BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA

Decision No. [2019] NZEnvC 112

IN THE MATTER	of the Resource Management Act 1991
AND	of an appeal under Clause 14 of Schedule 1 to the Act
BETWEEN	GOLF (2012) LIMITED (ENV-2016-AKL-079) Appellant
AND	THAMES-COROMANDEL DISTRICT COUNCIL Respondent
AND	HOLES 1 AND 2 GROUP MATARANGI RATEPAYERS ASSOCIATION INCORPORATED NEW ZEALAND TRANSPORT AGENCY BURFOOT LIMITED Section 274 Parties

Court:	Environment Judge D A Kirkpatrick Environment Commissioner D J Bunting Environment Commissioner E H von Dadelszen
Hearing:	at Thames on 27 - 28 June 2018
Appearances:	W S Loutit for appellant A M B Green for respondent R E Bartlett QC for Holes 1 and 2 Group and Matarangi Ratepayers Assn Inc
Date of Decision:	24 June 2019
Date of Issue:	24 JUN 2019

DECISION OF THE ENVIRONMENT COURT

A: The appeal is dismissed. The provisions of the proposed District Plan as decided on by the respondent are confirmed.

B: Applications for costs are not encouraged. Timetable directions are made if any party wishes to apply.

REASONS

Introduction

[1] This appeal is about the appropriateness of zoning privately owned land as open space. It concerns the land at Matarangi presently occupied by a golf course (**the Site**) and the provisions applicable to it in the Thames-Coromandel District Council's proposed District Plan (**the proposed Plan**), particularly the zoning of the Site and the controls in Section 27.3 – Matarangi Structure Plan (**the structure plan**) of the proposed Plan.

[2] The focus of the appeal is on the proposed Open Space zoning to be applied to the golf course which is owned by Golf (2012) Ltd (**the appellant**). The appellant seeks that this zoning be replaced by Residential zoning and that all references to the Matarangi golf course be deleted from the structure plan. This is opposed by the Council (**the respondent**) and by residents of Matarangi in two groups: the Matarangi Ratepayers Association Inc and the Holes 1 and 2 Group (**the residents**) who are parties to the appeal under s 274 of the Resource Management Act 1991 (**RMA**).

[3] In an agreed statement of issues dated 21 May 2018, the parties stated that this appeal is concerned with the following issues:

(a) Whether private land can be zoned for open space purposes where the landowner does not agree?

(b) Given the encumbrances requiring the appeal land to be used as a golf course expire within the life of the Proposed Plan (2022 - 2024), what is the appropriate zoning be applied to the land now?

(c) Whether the Council's Proposed Provisions or the Appellant's Proposed Provisions are the most appropriate way to achieve the purpose of the RMA, including:

(i) Whether the proposed provisions give effect to the Waikato Regional Policy Statement;

(ii) Whether the proposed open space zoning provides an appropriate level of open space in the context of Matarangi; and

(iii) Whether the proposed rules have regard to the actual or potential effects including visual, landscape, urban design, traffic and planning.

[4] These issues and the cases presented by the parties raise the following statutory considerations:

(a) The application of s 85 RMA and whether the proposed Plan provisions render the Site incapable of reasonable use and place an unfair and unreasonable burden on the appellant;

(b) The maintenance and enhancement of amenity values, a matter to which particular regard must be had under s 7(c) RMA;

(c) The relative appropriateness of the zoning alternatives in terms of s 32 RMA, and in particular:

(i) The demand for residential land in this area of the Coromandel Peninsula; and

(ii) The consequences should the land no longer be used as a golf course.

[5] The proposed Plan was notified on 13 December 2013. The applicable version of the provisions of the RMA is therefore the version as amended by the Resource Management Amendment Act 2013, which received Royal assent on 3 September 2013 and commenced in accordance with s 2 of that Act. In particular, the amendments made by the Resource Legislation Amendment Act 2017 do not apply.[1]

[6] In broad terms, the appellant's position is that the proposed Plan provisions restrict uses of its land other than as a golf course and so render its interest in the land incapable of reasonable use and place an unfair and unreasonable burden on it, in terms of s 85 RMA.

[1] Clause 13, Schedule 12 to the RMA.

[7] The respondent Council and the residents say that the Open Space zoning is appropriate in all the circumstances, including for the maintenance and enhancement of amenity values and the quality of the environment, and given the planning history of Matarangi.

The site at Matarangi

[8] The Site is located on the western end of the Matarangi peninsula (also called the Omara[2] (or Omaro[3]) Spit) and comprises four properties:

(a) 5.3685 ha being Lot 36 DPS 72837 on which Holes 1 and 2 are situated, between Matarangi Drive at its intersection with Harbour Drive and the ocean beach;

(b) 13.8718 ha being Lot 1 DP 467530 on which Holes 3 – 7 and two lakes are situated, to the south of Matarangi Drive and east of Harbour Drive;

(c) 1.50525 ha being Lot 1 DPS 83350 on which the clubhouse, a putting green, carparking and an equipment storage shed are situated, at the intersection of Matarangi and Harbour Drives; and

(d) 27.5468 ha being Lot 19 DP 331131 on which Holes 8 – 18 are situated, west of the clubhouse and on the spit end beyond the 3300m mark of the peninsula.[4]

[9] The Site has a total area of 47.84 ha. This is slightly over a third of the area of the land which is subject to the Matarangi Structure Plan, which covers an area of 142.7 ha.

[10] The total area of Matarangi zoned Residential, Open Space, Recreation Passive and Road is 304 ha. This excludes land zoned Commercial, Light Industrial, Rural and Conservation (which is generally in the south-eastern quadrant of the peninsula). The total area of land zoned Residential at Matarangi is 162.1 ha. We were told that the total area of "open space" (as that term is used in the structure plan, including not only land zoned Open Space but also roads, walkways, lakes and land which is accessible through a consent notice) is about 140 ha.

2 As recorded in the New Zealand Gazetteer by the New Zealand Geographic Board Ngā Pou Taunaha o Aotearoa.

3 As identified in some of the evidence before us.

4 To assist in understanding the references to the holes of the golf course, a map of the golf course, as presently laid out, is **attached** as Annexure E.

The planning history of Matarangi

[11] The earlier planning history of the land, prior to the notification of the proposed Plan, was traversed before us and its relevance to our decision was put in issue. Counsel for the appellant submitted that the provisions of statutory planning documents prior to the proposed Plan are irrelevant to the assessment of the proposed Plan, while counsel for the respondent and for the residents submitted that the prior planning documents and the processes by which they came into effect were relevant.

[12] For reasons we set out later in this decision, we consider that the planning history of Matarangi is relevant to the issues in this appeal. We accordingly set out a summary of the evidence.

[13] In 1968, prior to any district scheme for the area, the Coromandel County Council approved a subdivision of 115 residential lots along the beach at the eastern end of the Matarangi peninsula.

[14] In 1972 that Council notified a proposed district scheme which zoned those 115 lots and a further 5.5 ha of land further east as residential land. The balance of the peninsula was zoned rural, in which the subdivision of land was provided for as what was at that time termed a conditional use and would now be called a discretionary activity.

[15] By a variation (Variation No. 4) to the proposed district scheme notified in January 1975, a Future Urban Development Zone was proposed at Matarangi in respect of 900 acres of land in three sequences. This variation identified a sequence of development and the provision of open space and included a requirement for a structure plan to be approved prior to development occurring. The variation included the following notation:

> The figures for the development at Matarangi are misleading in that the actual area to be developed for urban uses is very much less than the figures indicated. The preliminary structure plan prepared for this area indicates substantial areas of open space occupying some 60% of this total area.

[16] A further variation that same year (Variation No. 7) proposed a further development structure plan, including public open space at the western end and along the ocean coast of the peninsula with areas for "residential cottage cluster" as well as zones for tourist facilities, service commercial and a sewage treatment site.

[17] The Coromandel County Council was amalgamated with the Thames Borough Council to become the present respondent on 1 October 1975.

[18] The Council's decision on Variation No. 7 was the subject of an appeal to the Number One Town and Country Planning Appeal Board (**TCPAB**) by The Physical Environment Association of Coromandel Inc. The grounds of that Association's appeal rested partly on the preservation of the natural character of the coastal environment and its protection from unnecessary subdivision and development and partly on inadequate provision for infrastructure. The TCPAB's decision[5] was to allow the appeal and direct the Council not to proceed further with Variation No. 7, while recognizing that the Council could in due course notify a further variation of change to authorise a first stage of development.

[19] In the course of its decision, the TCPAB noted that the 900 acres zoned for future development would not necessarily be developed as Variation 4 had recorded that a high proportion of it was to remain as open space, commenting that if it were otherwise then development would tend to destroy some of the essential attributes that made the locality attractive for holiday and recreational purposes.[6]

[20] The TCPAB further commented that the concepts proposed for the form of overall development at Matarangi should preserve a substantial measure of the existing natural character of that locality.[7] In this regard the TCPAB held:

(a) that subdivision and building should be prohibited in the strip 100m wide inland from the seaward toe of the outer foredune or the seaward limit of vegetation along the ocean beach from the bluff on the east to the 3300m mark on the west;

(b) that subdivision and building should be prohibited on the spit-head, being the whole of the area west of the 3300m mark; and

(c) that on the harbour side, subdivision and building should be prohibited within 40m of MHWM from the eastern end to the 3300m mark.[8]

[21] The TCPAB went on to say that the public interest and orderly development of

---

5 *The Physical Environment Assn of Coromandel Inc v Thames-Coromandel DC* Decision A4744, 16 September 1977. As well as its relevance to this appeal, the decision is also notable for the fact that all three counsel appearing before the Board (chaired by A R Turner SM) became judges: L J Newhook for the appellant, P M Salmon for the respondent and D F G Sheppard for the main landowner.

6 *Ibid.* p 9 - 10.

7 *Ibid.* p 10, 3rd para.

8 *Ibid.* p 13, 2nd para.

Matarangi would require, before rezoning any land for development, identifying and defining those parts that will be essential as public open space in order to maintain the character of a holiday and recreation resort. It also noted the need for a logical pattern of development from east to west.[9] It recorded its doubt about rezoning a large area of land in the coastal environment as residential when that would be likely to lead to amorphous development of a suburban kind and said that it was most important that the layout and form of subdivision be appropriate to the environment and to the character intended for the holiday and recreation settlement.[10]

[22] The golf course was established between 1986, when Bob Charles was commissioned to design it, through 1988 when 9 holes on the western end beyond the 3300m mark were opened to the public, and onto 1994 - 1997 when a further 9 holes were designed and constructed.

[23] The Council notified the next proposed District Scheme in April 1986. This proposed Scheme contained similar provisions for Matarangi as those in the first Scheme. Notable elements included:

(i) The identification of the golf course on the planning maps as a "Use of Value to the Community";

(ii) Designations for proposed reserves and wastewater infrastructure.

[24] This Scheme became operative on 15 September 1990 and, on the commencement of the RMA on 1 October 1991, became the transitional District Plan.

[25] The Council notified the next proposed District Plan on 22 March 1997. In this Plan the golf course was zoned Conservation as well as retaining an identifier as a "Use of Value to the Community." The part of the golf course to the west of the 3300m mark was shown on the planning maps as land designated for reserve, even though it was privately owned and was not included in the Schedule of Designations as a proposed reserve. In making decisions on submissions, the Council included a structure plan for Matarangi. There were three references to the Plan which concerned this structure plan which were ultimately settled in 2001 by consent, resulting in a revised version of the structure plan. Among other things, this 2001 structure plan provided:

(a) For areas of residential development;

9 *Ibid.* p 14, 2nd para.

10 *Ibid.* p 15, 1st para.

(b) For the part of the golf course containing Holes 3 – 8, part of 9 and 17 – 18 as Housing Zone (Recreation Policy Area);

(c) Viewshafts zoned Housing Zone (Open Space Policy Area).

[26] This 2001 structure plan did not include:

(a) the land on the spit-end, west of the 3300m mark, which was zoned Coastal Zone (Open Space Policy Area); or

(b) Holes 1 and 2, which area was zoned mostly Coastal Zone (Recreation Policy Area) and, within 100m of the beachfront, Coastal Zone (Open Space Policy Area.

[27] In addition to these revisions to the 2001 Structure Plan, the settlement of the references also included removal of the designation of the privately owned land on the spit-end west of the 3300m mark as reserve and agreement between the then-owner and the Council for an encumbrance which would require the transfer of the land to the Council at no cost if it ceased to be used as a golf course. As it happened, there was a lengthy delay in registering that encumbrance and the property was transferred to a new owner before it was registered, rendering it ineffective.

[28] We were told by counsel for the appellant that there are currently encumbrances on the titles to the land which essentially require the land on which the 18 holes are located to be used as a public golf course until 1 January 2022 (in respect of Holes 1 – 2 and 8 – 18 and the clubhouse site) or 3 June 2024 (in respect of Holes 3 – 7). The text of the encumbrances was not given in evidence before us.

[29] In December 2004 the Council notified Variation 3 to its Plan, introducing stand-alone provisions, including development controls, for recreation and open space areas in the District rather than these being policy areas within a zone. The spit end of Matarangi beyond the 3300m mark was zoned Open Space, while the rest of the golf course was zoned Recreation (Passive). This Plan became operative on 30 April 2010.

[30] We were told that the appellant acquired the Site in April 2012.

[31] The Council published a draft District Plan for consultation in October 2012. In maps forming part of this draft, part of the Matarangi golf course (the areas occupied by Holes 1 - 2, 3 -7, 8, part of 9 and 17 – 18) was shown as unzoned land. The western tip

of the peninsula, where the rest of Hole 9 and Holes 10 – 16 are located, was shown as Open Space. In the text of this draft, the Matarangi Structure Plan contained objectives, policies, and rules for subdivision and for land use activities. The Open Space land at the western end did not form part of the structure plan area. Comments on this draft led to various changes in the notified proposed Plan.

The proposed Plan and the decision under appeal

[32] The proposed Plan was notified on 13 December 2013, with submissions closing on 14 March 2014. As notified, the proposed Plan extended the area of the structure plan to include the western end of the peninsula, zoned the whole golf course Open Space and included areas of land zoned Residential for future development. Permitted activities in the Open Space zone include commercial recreation facility/event facility recreation, community facilities and informal recreation. The definitions of those terms extend to include private function centres and outdoor adventure activities. There are stringent development controls, particularly on the size of buildings: an activity that does not meet those requires consent as a restricted discretionary activity. As well, the structure plan includes a rule requiring a site in the Open Space zone to remain publicly accessible.

[33] The structure plan map and text attracted 30 submissions, mostly in support. The appellant lodged a submission in opposition to the structure plan and the Open Space zoning and sought amendments to the Residential Zone provisions to make the golf course a permitted activity in that zone. The appellant also lodged further submissions in opposition to those in support of the structure plan and, conversely, a number of further submissions were lodged in opposition to the appellant's submission.

[34] The Respondent's decisions on submissions essentially accepted the submissions in support of the proposed provisions and rejected those in opposition. The reasons for its decisions, as set out in two relevant sections of its decision reports, are:

a) In relation to Holes 1 and 2 of the Matarangi Golf Course, the decision was as follows:

> ***Screening process***
>
> 5.2 In making decisions on the relief sought in submissions, the factors that influenced the Panel's decision included:
> - The documented history of the development of Matarangi;
> - Personal accounts;
> - Town and Country Planning Appeal Board Decision - The Physical Environment Association of Coromandel Inc. v Thames-Coromandel District

Council; dated 16 September 1977;
- Environment Court Consent Order - Matarangi Beach Estates Ltd, Matarangi Ratepayers Trust, David Hughes and Thames-Coromandel District Council; dated 13 August 2001.
- Draft papers for the formal purchase/vesting of the now Lot 19 DP 331131 (including the 'spit' at the western end of the beach) as public open space that was never completed by the Council.

Summary of evidence

5.3 After a considered review of all of the material put before the Panel, which is long and extensive, it is evident that both the Council and the community hold the viewpoint that there was 'intent' and an 'expectation' that Lot 36 DP 72837 (which comprises Holes 1 and 2) would remain as open space. Mr Loutit, legal counsel for Golf (2012) Ltd, as much as accepted that this was the case although his legal analysis was that as the 'door had not closed' to the intent/expectation argument due to Council inaction, the land's use could and should be reconsidered with the appropriate residential zoning, as outlined in Mr Norwell's evidence, being placed over the entire site.

5.4 The Panel was told by a submitter's consultant Planner (Mr Lawrence) that the land was retained in private ownership due to a lack of action or will by the Council to address the matter. Mr Lawrence suggested that the delay in acquisition suited the Council as it did not have to meet maintenance costs of the land while a private landowner was willing to provide public amenity for free. No counter-position was presented by any party to suggest that Mr Lawrence had misinterpreted past events.

5.5 Golf (2012) Ltd used RMA S.85 to argue its case noting that the section prohibits compensation claims arising from planning restrictions but provides that a person having an interest in land can challenge the provision of a proposed plan in a submission on the grounds that those provisions would render that interest in the land incapable of reasonable use. The test to be inferred from S.85 is not whether the proposed zoning is unreasonable to the owner but whether it serves the statutory purpose of promoting sustainable management of natural and physical resources. Golf (2012) Ltd stated that the proposed zoning renders the site incapable of reasonable use. The Panel holds the viewpoint that Golf (2012) Ltd must have been aware at the time of purchase that Lot 36 DP 72837 was considered open space; there was a long history of acceptance that the area was open space; the open space was an integral part of the justification for development and further development at Matarangi; and that the Council would be unlikely to change the zoning from open space.

5.6 Golf (2012) Ltd also used a statement in the Council's Section 32 evaluation to support its case:

"The Council will continue its practice of only zoning Council and DOC owned land as recreational zones".

5.7 The Panel finds that the Council's Section 32 evaluation is subject to specific statutory requirements, namely being to document the consideration of alternatives, costs and benefits supporting the Proposed Plan. It is not a vehicle to establish policy or make determinations as to what the District Plan will or will not do. As such the Panel disagrees that the Section 32 evaluation should have included such a statement, secondly the Panel is not in any way bound by it, and thirdly it disagrees that it can be used in the manner sought by Golf (2012) Ltd. The zoning of land in the District will result from the statutory and public First Schedule RMA process, based on what is in each circumstance the most appropriate outcome identified through submissions and evidence.

5.8 In respect of Holes 1 and 2, the Panel finds that the argument in favour of the land

being retained as open space, as a necessary part of a coordinated and planned development that has occurred at Matarangi, is very compelling. Such an outcome appeals to the Panel because it is consistent with the requirement for integrated management contemplated by S.31 RMA. The Panel is concerned that the land's use for residential activity along the lines proposed by Mr Norwell, with any residual open space negotiated as part of its future subdivision, is an unsatisfactory and uncertain outcome that is not reliable, effective or efficient. The Panel also records that Mr Norwell's analysis of options was narrow. Even if the Panel were persuaded that an open space zone outcome was inappropriate; there are a range of other enablement options less than a full 'urban' zone that would need to be considered. They include rural, rural lifestyle, or a variety of site development plan scenarios that could also offer utility to the landowner and a workable and certain contribution to the Matarangi Structure Plan's principles for the Peninsula. The lack of such analysis was fatal to Mr Norwell's recommendations.

5.9 While the Panel is supportive of the principle set out by Mr Loutit, effectively that private land should not be seen as "free" public land or reserves by "stealth." In this peculiar instance Golf (2012) Ltd knowingly bought land that had been identified as and was zoned for open space use on the basis of a long history of comprehensive planning for a very high amenity part of the District.

5.10 The Panel records however that from the 1977 Town and Country Planning Board decision onwards, it is clear that the land was identified as necessary "public" open space. Through the District Plan making process the Panel is limited in its ability to deliver on the "public" part of that outcome in terms of land acquisition. While it has identified that the most appropriate land use activity on the land is as open space, the Panel separately recommends that the Council work as a priority to formally acquire this land, possibly in conjunction with the Matarangi community. This amounts to the promotion of a non-statutory method.

6.0 PANEL'S RECOMMENDED DECISION

6.1 It is the Panel's recommended decision to adopt the Reporting Officers discussion and recommendations in the Section 42A Report/32AA Further Evaluation Report as it relates to Holes 1 and 2 of the Matarangi Golf Course along with any consequential changes necessary to give effect to this decision.

Non-statutory recommendation

a) The Council, in conjunction with the Matarangi community, should work as a priority to formally acquire land containing Holes 1 and 2 of the Matarangi Golf Course.

b) In relation to the Matarangi Structure Plan generally, the decision was as follows:

Matarangi Structure Plan

5.36 This structure plan was subject to a substantial number of submissions and further submissions. The Panel has addressed Holes 1 and 2 of the Matarangi Golf Course separately in Decision Report 24. In terms of the Matarangi Structure Plan, this is a refinement and roll-over of the existing structure plan in the ODP. It has a long history which was explained to the Panel in detail through the hearings. Many submitters proposed detailed amendments to specific provisions and the issue of open space was of particular importance. The Panel finds that the Matarangi area has had a clear history of being comprehensively managed through a guiding structure plan. Into the future, retaining that comprehensiveness is an essential resource management outcome. To that end, the Panel finds that the S.42A provisions are the most comprehensive, integrated and appropriate for Matarangi. Ad hoc changes to the suite of provisions, with good intention, could lead to a

number of unintended consequences and the evidence given in support of those changes was not sufficiently convincing in this regard.

5.37 Burfoot Ltd, an owner of land on the southern side of Matarangi Drive, proposed a number of changes to provisions in the structure plan. The Reporting Officer supports these in part by including "residential" to describe neighbourhoods, this being consistent with the underlying zone. Other changes use the words "generally" or "in general accordance" as the structure plan diagrams include concepts that will be implemented through the subdivision process. Some of the changes sought were not sufficiently supported in evidence, such as development on low lying land adjacent to a wastewater facility. The Panel finds that a resource consent path is the most appropriate means of testing such proposals.

...

6.0 PANEL'S RECOMMENDED DECISIONS

6.1 It is the Panel's recommended decision to adopt the Reporting Officer's discussion and recommendations in the Section 42A Report/Section 32AA Further Evaluation Reports on ... Section 27 Structure Plans with: ...

(f) amendments to the Matarangi Structure Plan as shown in Attachment 6; and
(g) any consequential changes necessary to give effect to this decision.

[35] A copy of the Matarangi Structure Plan map, as decided on by the respondent and the subject of this appeal, is **attached** as Annexure A. Copies of the relevant district planning maps, Maps 12B and 12C, are **attached** as Annexure B.

The case for the appellant

[36] As set out in its notice of appeal, the appellant sought:

(a) that the Site be zoned Residential and not Open Space;
(b) that the Residential Zone provisions (Section 54 of the proposed Plan) be amended to allow the continued operation of the golf course as a permitted activity;
(c) that the provisions of Section 27.3 of the proposed Plan (Matarangi Structure Plan) and Section 50 (Open Space Zone) be amended by deleting references to the Matarangi Golf Course; and
(d) that the Planning Maps be amended to show the site as Residential and any necessary amendments be made to the Residential Zone provisions in Section 54.

[37] As presented to us, the case for the appellant now seeks the following amendments to the proposed Plan provisions:

(a) Zone 10.88 ha of the Site Residential (shown as Areas A, B and C on the plans **attached** as Annexures C and D), enabling approximately 71 additional dwellings to be built on this land;

(b) Retain the Open Space Zone on the rest of the Site (being approximately 36.9 ha) together with the subdivision controls that are proposed to apply under the Matarangi Structure Plan;

(c) Apply the Beach Amenity and Beachfront Yard control to the northern boundaries of Areas A and B;

(d) Amend the Structure Plan to identify indicative roads in Areas A and C and Indicative Reserves in Areas A, B and C; and

(e) Amend the Structure Plan provisions by:

i. amending the objectives and policies to reflect the proposed new development areas;

ii. removing references to the Golf Course from the Plan;

iii. providing for a minimum allotment size in Area A of 2000 m^2 and for minimum setbacks on identified boundaries;

iv. providing addition assessment criteria for landscaping in Area A; and

v. as agreed with other parties (and satisfying the concerns of the New Zealand Transport Agency) requiring an integrated Traffic Assessment to be undertaken when subdivision first occurs in Area A, B or C.

[38] The particular provisions of the proposed Plan that concern the appellant are:

(a) The extension of the Structure Plan from covering holes 3 – 9 to cover the entire golf course;

(b) The rezoning of the holes previously zoned Recreation Passive (where subdivision is a discretionary activity) to Open Space, with consequent restrictions on subdivision including:

i. a positive obligation in terms of Objective 2 of the Structure Plan that: *The current Matarangi golf course remains a publicly accessible open space area for recreation, views, residential amenity and stormwater management*;

ii. reinforcement of this by Policy 2a and by the requirement of Policy 1F that the proportion of open space to residential land be at least 40% to 60%;

iii. by Rule 1.1, making any activity on Open Space land that would remove public access a non-complying activity;

iv. by Rule 3.1, making subdivision in the Open Space zone a non-complying activity unless the new lots either are vested in the Council as reserves or are subject to registered consent notices preserving public access and open space character in perpetuity; and

v. restricting development to buildings no larger than 25m^2, with site coverage no greater than 1%, not permitting farming or forestry and requiring the Site to remain publicly accessible.

[39] The expert planning witnesses all accepted that this was an accurate summary of the restrictions that the proposed Plan would impose on the Site.

[40] The principal foundation for the appellant's case, as submitted by counsel, is that the Council's proposed provisions are unlawful as they would impose an open space zoning on private land without the agreement of the landowner. Further support is submitted to come from consideration of the appropriate level of open space at the western end of Matarangi and the effects of residential development of the land on the environment. The appellant also submitted that the proposed provisions make any "non-open space" use of the land effectively impossible and therefore that the threshold of rendering the appellant's interest in the land incapable of reasonable use, in terms of s 85 RMA, is crossed.

[41] These arguments are addressed in detail below, together with the submissions in response of the respondent and the residents.

[42] In respect of the encumbrances presently registered against the titles to the land comprising the Site, the appellant's submission is that as they will expire during the expected operative life of the proposed Plan, they should be ignored. The expert witnesses in respect of planning matters were agreed that the encumbrances are irrelevant to determining the appropriate zoning. On that basis, the appellant says that it should have the ability to make reasonable use of the land when the encumbrances expire.

[43] Counsel for the appellant called expert evidence from a transportation engineer, an infrastructure engineer, an urban designer and landscape architect and a planning consultant.

[44] The two engineers concluded that further residential development of the order of

70 lots as sought to be enabled by the appellant could be accommodated subject to detailed design and through standard consenting procedures. No issue was taken with these opinions and we have no other reason to doubt them. We accordingly proceed to consider the contested issues in this appeal on the basis that that there would be no physical impediment to development of the site for residential purposes at that scale.

[45] Counsel for the appellant called Ms R Skidmore, an experienced urban designer and landscape architect, to give expert evidence in support of the appeal. Ms Skidmore had conferred with her peers (Mr S Brown, called by counsel for the respondent and Ms R de Lambert called by counsel for the residents) in the context of the parties' joint statement of issues dated 21 May 2018 and reached agreement on some matters and identified the issues among them in a joint expert witness statement. In particular, these expert witnesses agreed that:

(a) the spit lies within the coastal environment and the beach and Whangapoua Harbour contribute strongly to the character and identity of Matarangi;

(b) there is an identified 'High Natural Character Area' on the coastline adjacent to the open space at the end of the spit;

(c) there is an identified 'Significant Natural Area' along the seaward costal edge of the spit'; and

(d) Matarangi has evolved through a series of predetermined stages of development and has an informal character which benefits from the generous open and well-connected open space that is part of the purposeful fabric of the coastal settlement.

[46] Ms Skidmore disagreed with her peers on several issues:

(a) She considered that the values of the open space network would be maintained with the residential development of areas A, B and C, while her peers considered they would be compromised;

(b) She considered that the beach is a key feature of the open space network and that it would not be affected by such development, but her peers, while agreeing with her as to the importance of the beach, considered that the inland open space was also important to the amenity of residents and visitors;

(c) She considered that the reduction in amenity for immediately adjoining residential properties to areas A, B and C would not be significant given the suite of development controls proposed by the appellant, while her peers considered it would be significant;

(d) She deferred consideration of a 'best alternative to a broader planning judgment but noted that better accessibility and amenity might be provided by protection as a reserve rather than in private ownership, while her peers considered the proposed provisions to be better aligned with long-established open space amenity objectives for Matarangi.

[47] In answer to questions, Ms Skidmore maintained her view that while the Open Space zoning contributed to the character of the area and building houses would not enhance that, the landscape values of the area could be maintained.

[48] Counsel for the appellant also called Mr M Norwell, an experienced planning consultant, to give expert evidence in support of the appeal. Mr Norwell had also conferred with his peers (Mr B Baker called by counsel for the respondent and Mr J Brown called by counsel for the residents[11]) in the context of the parties' joint statement of issues dated 21 May 2018 and reached agreement on some matters and identified the issues in contention among them in a joint expert witness statement. In particular, these expert witnesses agreed that:

(a) Whether private land can be zoned for open space where the landowner does not agree is primarily a legal issue;

(b) The existence of the encumbrances is irrelevant to the determination of the appropriate zoning;

(c) The open space attributes associated with the golf course are important and not the fact that it is a golf course;

(d) The relevant provisions of the WRPS are Policies 6.1, 6.2, 6.10, 12.3, 12.3.1, 12.3.2, 12.3.3 and Section 6A Development principles;

[49] Mr Norwell disagreed with his peers on several issues:

(a) Mr Norwell considered the proposed Open Space zoning of areas A, B and C is inappropriate while Mr Baker and Mr Brown considered that those areas had been set aside with other areas as open space in exchange for development rights to the areas that have been developed;

(b) Mr Baker and Mr Brown considered that the proposed Plan provisions give effect to the RPS while the appellant's proposed version does not and that they are are the most appropriate provisions for achieving the objectives of the proposed Plan, while Mr Norwell's opinion was that the appellant's

11 Also present was Mr M Chrisp, engaged by the New Zealand Transport Agency, whose involvement was limited to that party's concerns about the effect of traffic generation on the state highway network.

version is consistent with the WRPS because less than 25% 10.88 ha out of 47.8 ha) is to be rezoned with the remaining 36.9 ha to be vested as public open space and is more appropriate than the proposed Plan provisions;

(c) Mr Baker and Mr Brown considered it relevant that the Site has been established as open space as a result of successive subdivisions over previous decades;

(d) Mr Norwell said that the appellant's proposed development controls (including minimum lot sizes of 2,000m^2 in Area A and 25m buffers in all three areas, a beach front yard of 7.5m and a height limit of 7m) will maintain appropriate amenity, while Mr Baker and Mr Brown disagreed, although Mr Baker supported the controls if the areas are rezoned.

[50] In answer to questions, Mr Norwell expressed the opinion that the proposed Plan adds a layer of complexity to the operative provisions, amounting to a significantly higher hurdle for redevelopment of the Site.

The case for the respondent

[51] The respondent submitted that the proposed zoning in the decisions version of the Plan is appropriate based on:

a) The existence of the Site as a substantial part of the western end of the Matarangi peninsula, which is the dominant landform in the area;

b) The existing level of open space available on the peninsula;

c) The importance of maintaining the character of the existing environment and preserving recreational values;

d) Giving effect to relevant objectives of the proposed Plan and relevant provisions of the Waikato Regional Policy Statement (**WRPS**) in relation to the built environment and landscape, natural character and amenity, and the New Zealand Coastal Policy Statement (**NZCPS**) in relation to the preservation of the natural character of the coastal environment.

[52] The respondent submitted that these provisions are not unlawful and that the appellant's provisions would reduce the amenity values of this area for other properties and compromise the open space values of the locality. Counsel further submitted that providing opportunities for housing is not the respondent's priority at Matarangi. He

pointed to the purpose of the Matarangi structure plan:

> The purpose of the Matarangi Structure Plan is to set the context for development, provide for pedestrian and road connectivity, ensure appropriate infrastructure is established, and to create a coastal community that complements the existing settlement of Matarangi.
>
> New development will be based around the Whangapoua Harbour with distinct residential neighbourhoods defined by areas of open space enabling pedestrian connections to be formed to esplanade reserves and between residential neighbourhoods. There will be strong pedestrian connections to existing development, other residential neighbourhoods, recreational opportunities, protection of the Coromandel Ranges visual backdrop, and enhancement of the natural character of the Whangapoua Harbour.

[53] That purpose is reflected in the objectives and policies of the structure plan, including by several references in those provisions to the network of open space areas.

[54] Counsel for the respondent noted the discussion in the decision of the TCPAB in relation to setbacks for natural hazards.[12] He submitted that the same issues arise today in light of:

i) Policy 25 of the NZCPS in relation to subdivision, use and development in areas of coastal hazard risk;

ii) Policy 6.2 of the WRPS in relation to planning for development in the coastal environment and in particular item (f) which requires allowing for the potential effects of sea level rise; and

iii) Policy 6.1.1 of the WRPS in relation to general development principles as set out in section 6A of the WRPS and in particular items:

   (e) connect well with existing and planned development ...

   (j) maintain or enhance landscape values ...

   (l) maintain and enhance public access to and along the coastal marine area

[55] Counsel noted that the proposed Plan provisions relating to the Current Coastal Erosion Line and the Future Coastal Process Line have been included to manage the risk from coastal erosion in coastal settlements to give effect to those higher order policies. These lines have only been assessed from beach profile data as far west as the Holes 1 and 2 area, so that a precautionary approach should be taken to any proposal to enable development to the west of that area, which includes the spit end.

[56] Counsel presented a comparison of the relevant aspects of the Open Space zone

12 *The Physical Environment Assn of Coromandel Inc v Thames-Coromandel DC*, fn 5, p 10, 1st para.

and the Residential zone in the proposed Plan and submitted that the Open Space provisions better accord with the Objectives and Policies of the Matarangi Structure Plan. In particular, he noted that the minimum lot size for subdivision in the Residential zone is 500m^2 while the appellant proposes a minimum lot size of 2,000m^2 in Area A. He also noted that the provisions of the Residential zone do not address the risks from natural hazards while any application for consent in the Open Space zone would need to assess these risks.

[57] The respondent submitted that there is a finite area of open space available at Matarangi and that this part of the peninsula has been identified for its open space qualities since at least the decision of the TCAPAB in 1977 and has been provided for in the District Plan since 1990. Further, the proposed provisions are comparable to other privately-owned golf courses such as the Gulf Harbour course at Whangaparaoa and the Howick course at Musick Point.

[58] Notwithstanding those submissions, counsel advised that the respondent would be open to considering some amendments to the proposed provisions in order to better reflect the particular circumstances of the Site as being a privately-owned golf course rather than a publicly owned reserve.

[59] Counsel for the respondent called two witnesses to give expert evidence: Mr S Brown, an experienced landscape architect, and Mr B Baker, an experienced senior planning officer employed by the respondent. We have already set out summaries of the joint witness statements that each of them engaged in with their peers.

[60] It was put to Mr Brown that he had focussed on the past, and he responded that he had focussed on the landscape and amenity effects of what is now proposed, for which the pattern of development found at Matarangi is an integral part of the assessment. Mr Brown stated that he had not treated the ownership of the land as a factor in his assessment of such effects. In answer to questions from the Court, Mr Brown stated that he had considered Areas A, B and C both separately and together, and also in conjunction with existing accessways, in terms of both the effects on adjoining lots and in terms of the broader issue of the character and identity of the whole of Matarangi, as he considered that the western end offers a destination for everyone.

[61] Mr Baker's evidence helpfully set out the relevant provisions of the several planning documents relevant to the appeal. He noted that the spit end, including Area A,

would need to be specifically assessed in terms of the potential effects of coastal hazards. He advised that the Council's policy of development contributions did not identify land to be acquired. He considered that reserves had been adequately provided for on the northern side of Matarangi Drive, with the exception of the original 1968 subdivision area in the northeast. He said that there had been concerns raised about the provision of reserves to the south of Matarangi Drive at the western end of the peninsula. He advised that there was no guidance in the Plan for the provision of reserves, although there is Policy 1f in the structure plan which provides:

> To maintain the existing character within the structure plan area, the proportion of open space to residential land shall be at least 40% open space to 60% residential land.

The case for the residents

[62] The two groups of residents retained the same counsel and presented a single case supporting the position of the respondent.

[63] Their opposition to the appeal relied on the guidance in the 1977 decision of the TCPAB,[13] which they submitted was the basis on which the sensitive coastal environment at Matarangi could be developed. Counsel characterised the existing development as dominated by single-lot low-rise high-quality residential forms abutting and responsive to very generous areas of open space (based on the 40:60 proportions of open space to residential areas) with three key elements:

a) A coastal strip 100 m wide;

b) A harbourside strip 40 m wide; and

c) A cut-off point for built development 3,300 m west of the base of the peninsula.

[64] Counsel offered the observation that as a form of development approved under the Town and Country Planning Act 1953, 24 years prior to the passage of the RMA and prior to the NZCPS, the WRPS and the District Plan, it was hard to say that the original decision-makers had got it wrong.

[65] In response to the appellant's submission that historical context should be disregarded when considering future zoning, counsel submitted that the quality of residential amenity values was related to the design and layout of dwellings abutting the golf course, especially those adjacent to Areas A, B and C, which have been designed

13 *The Physical Environment Assn of Coromandel Inc v Thames-Coromandel DC*, fn 5.

to address the views and coastal aspect. In his submission, these arrangements reflect a planning context for the existing environment on which reliance has been placed.

[66] Also part of these arrangements, counsel submitted, was the development of a golf course on the open space land and the retention of that land in the hands of the earlier developers rather than being vested in the Council, as is normally the case with reserve contributions. In that sense, counsel submitted that the appellant, as a subsequent owner, was seeking to alter the basis for the original development.

[67] Counsel also submitted that a proposal to increase the provision of residential zoning in an area should be based on evidence of demand rather than the preference of the owner, especially where such provision would be at the expense of the green spaces that give the area its character and amenity values.

[68] Addressing the reasonable use issue, counsel for the residents submitted that in any modern structure plan it is inevitable that certain parts will be given over to creating areas for infrastructure which may not necessarily vest in the local authority and which may have little if any commercial value. In this case, he submitted that additional open space had been offered to get the development of the area "over the line" and should not now be treated as available for development.

[69] Counsel for the residents called evidence from several of them: Mr Rod Cameron, Ms Bridget Gilbert, Ms Julia Maskill and Mr Alastair MacCormick. These witnesses principally addressed the character and amenity values of Matarangi and their views as to the effects on those things if the Site were rezoned for residential activities. Mr MacCormick also presented evidence of the history of development, including the history of the golf course. There were no challenges to that evidence through cross-examination.

[70] Counsel also called expert evidence from Ms R de Lambert, an experienced landscape architect and Mr J Brown, an experienced planning consultant. We have already set out summaries of the joint witness statements that each of them engaged in with their peers.

[71] Ms de Lambert noted the differences between areas in Matarangi, largely shaped by stages of development. She was of the view that development had become more difficult over time as environmental considerations had become greater. She opined that the existing level of development would not be achievable under current controls.

[72] Mr Brown offered the view that the Open Space zone might be amended to allow other useful and beneficial outdoor recreation activities beyond golf such as confidence courses. He did not accept that it would be hard to imagine more restrictive controls than those of the Open Space zoning of the site, pointing to other golf courses and where land was subject to identification as an outstanding natural landscape or feature or a high natural character area in the coastal environment, but he did accept that the controls on the Site are at the tougher end of the spectrum.

Principal Issues

Unlawful restrictions on the use of land

[73] The appellant challenges the proposed Plan provisions on the basis that they are onerous and unreasonable restrictions on the subdivision and use of privately owned land to the degree of being unlawful. Counsel submitted that it is a long-established general legal principle that private land should not be zoned for reserve purposes unless the landowner agrees, or the land is unsuitable for development.

[74] In support of this submission, counsel for the appellant relied on the decisions of the Court in *Capital Coast Health Ltd v Wellington City Council.*[14] In that case, the Council proposed rezoning 4.3 ha of residentially zoned land as open space. Situated on the land were a number of healthcare buildings. The neighbouring land was zoned mostly for open space (being part of Wellington's Town Belt), with one area being designated as a secondary school. There was argument as to the status of the land, given its complicated history and its ownership previously by the Crown and then by a Crown entity. Ultimately the Court concluded that the land was not subject to any statutory restriction or trust and that the company had relied on the operative residential zoning when it negotiated the terms of its acquisition of the land from the Crown.[15]

[75] The Court then considered matters of landscape, heritage values and other reasonably practicable options for achieving the objectives of the Plan in the context of s 32 RMA. The Council's planning witness testified that the Council had not looked at the issue of whether privately owned land should be zoned as open space as its analysis had been "effects-based." The Court expressed surprise at this evidence, saying:[16]

> ... without proper identification of how the land was held, the council was in no position to analyse some of the threshold tests under its s.32 evaluation and consequently in no

14 *Capital Coast Health Ltd v Wellington City Council* Decisions W101/98 (interim decision) and W4/2000 (final decision).
15 *Ibid.*, interim decision at [87].
16 *Ibid.*, interim decision at [162] – [163].

position to establish the effects of its Open Space proposal on the landowner.

[76] The Court found that a private landowner would not be able to make reasonable use of land zoned for open space and therefore that an open space zoning was inappropriate for private land which was capable of other uses, agreeing with the appellant's planning witness that it is not the role of private landowners to provide for general open space and the recreational needs of the community.[17] The Court said there was a considerable body of case law to support that view, but did not cite any authority. The Court concluded that aspects of the Council's s 32 RMA analysis had been inadequate, including of the imposition of inhibiting development controls on private land which required particular consideration of the site-specific factors involved.[18] Overall the Court concluded that the appropriate method of establishing public open space of the land was through designation or acquisition and the proposed open space zoning was not confirmed.[19]

[77] The parties in that case were directed to confer on appropriate residential provisions to be applied to the land. As well as submitting agreed provisions, the parties also submitted a memorandum raising an issue as to the legal position as set out in paragraphs [183] – [185] of the interim decision, as summarised in the preceding paragraph of this decision. The memorandum, as set out in the final decision, stated:

> Open Space zoning
> As a general principle private land should not be zoned for reserve purposes (however described and either expressly or effectively) unless:
>
> - it is already reserved for such purposes; or
> - the landowner agrees; or
> - it is incapable of being used for other purposes
>
> If the council wishes to protect land for reserve purposes, than that purpose should be achieved by designation or acquisition.
>
> However, this general principle is always subject to the provisions in Part II of the Act. Where particular land has such significance in terms of any of the factors listed in s.6 and s.7 of the Resource Management Act 1991 that its use or development ought to be substantially limited or precluded, then land use controls which may have that effect may be appropriate regardless of the ownership of that land (but subject to s.32 and s.85).
>
> Section 32
>
> The duties under s.32 relate generally to generic plan provisions - ie those mentioned in subsection (1). The obligation of the council is to carry out this duty in relation to the district as a whole, and in relation to the constituent or distinct parts of the district identified in the plan. It is not a duty which generally extends to every separate property in the district. Generally, the consideration and assessment required by s.32 need only be carried out

---

17 *Ibid.*, interim decision at [164].
18 *Ibid.*, interim decision at [183].
19 *Ibid.*, interim decision at [185].

> in respect of an individual property where the appropriateness of controls relating to that particular property are raised on a submission under the First Schedule.
>
> There may however be instances where the controls are specific to particular land (eg 'spot zoning') or where they effectively involve the reservation of particular private land for public purposes (eg open space, reserve, conservation or protection zoning). In some of these instances (eg where the control represents a significant change from the status quo), the council will be required, prior to adopting the method, to carry out a more site specific assessment of the costs and benefits etc of the proposed controls and to consider whether the method is necessary in achieving the purposes of the Act, and is the most appropriate means of exercising its functions.

[78] In relation to this, the Court then stated:

> We have no difficulty at all with the conclusions of counsel (above) in relation to these statements. The expression of the principle that in general private land should not be zoned for reserve purposes except under specific circumstances and that this should be achieved by designation or acquisition more or less encapsulates our conclusions in Paragraphs 183 and 185 of the interim decision.
>
> We also agree on the s.32 issues raised and that the appropriateness of Open Space controls relating to a particular property requires raising in a submission under the First Schedule. This is of course the correct legal position. Such a submission would doubtless prompt the council to be on enquiry as to how the land is held.

[79] Counsel for the appellant submitted that this statement is important because in the *Capital Coast Health* case the Court did not regard the matters of landscape and heritage or the history of the site justified a departure from the basic proposition that it is not the role of private landowners to provide open space for the community. Counsel also submitted that in no subsequent case has there been any consideration of private land being zoned for open space purposes.

[80] Counsel for the respondent submitted that other cases dealing with challenges to the reasonableness of proposed plan provisions offer a wider range of considerations. Linking this challenge of unlawfulness to the appellant's similar challenge under s 85 RMA, counsel submitted that s 85 does not establish a test of invalidity: rather, it establishes a basis on which a proposed provision can be challenged. Counsel also noted that in this context the assessment is not simply of the challenged provision by itself but requires a comparison with an alternative proposed provision.

[81] Counsel for the respondent submitted that the starting point for the consideration of proposed rules is as set out in the well-known passage in *Nugent Consultants Ltd v Auckland City Council*:[20]

> In summary, a rule in a proposed district plan has to be necessary in achieving the purpose of the Act, being the sustainable management of natural and physical resources (as those terms are defined); it has to assist the territorial authority to carry out its function

[20] *Nugent Consultants Ltd v Auckland City Council* [1996] NZRMA 481 at 484.

> of control of actual or potential effects of the use, development or protection of land in order to achieve the purpose of the Act; it has to be the most appropriate means of exercising that function; and it has to have a purpose of achieving the objectives and policies of the plan.

[82] Counsel for the respondent referred to *Hastings v Auckland City Council*,[21] a decision concerning private land proposed to be zoned Open Space which the appellant sought to be zoned Business (heavy industrial). As well, the Council had given notice of its requirement to designate the land as a nature reserve and there was evidence of attempts by it to purchase the land and of disagreement over the basis of its value. Ultimately the Court found that the Open Space zoning would render the land incapable of reasonable use and place an unfair burden on the owner and that some protection would remain under the Business zoning.[22]

[83] The Court in *Hastings* started its review of the legal position of zoning precluding reasonable use[23] by referring to the decision of the Court of Appeal in *Auckland Acclimatisation Society v Sutton Holdings*[24] which related to a proposal to drain private land in the Whangamarino wetland and quoting the following passage:

> In his approach to the case Barker J *[in the decision under appeal]* was much influenced by the concept that it would require very clear words to justify freezing land in private ownership without rights of compensation for the owners. He invoked the principle that a statute should not be held to take away private rights without compensation. Counsel for the appellants strongly disputed the relevance of that principle.
>
> While the High Court Judge was of course quite right about the existence of the principle, its scope in planning law is limited and we have to say that it cannot be imported into the present field. From 1 April 1968 the 1967 Water Act, s 21, *[Water and Soil Conservation Act 1967]* vested certain rights regarding water in the Crown - including the sole right to dam any river or stream, to divert or take natural water, to use natural water. There are various exceptions and provisos, including some protection for lawful existing uses, but none is material here. The farmers have the ordinary rights of landowners to use their land in its natural state, but the effect of the 1967 Act is that they have no right to divert the natural water that is on the land. Ownership of the land does not of itself carry the right to alter the natural conditions in that way. The scheme of the Act means that to refuse the water rights applied for would not be to deprive the landowners of anything. Rather, it would be to deny them privileges. There can be no moral claim to or expectation of compensation in the event of refusal.[25]

[84] The Court in *Hastings* then set out s 85 RMA and observed:

> [92] From the Whangamarino case we take it that legislation regulating use of natural resources may modify the general principle that a landowner's right to use land in its natural state should not be taken away without compensation. From section 85 we take it that in enacting the Resource Management Act 1991, Parliament deliberately ruled out rights to compensation for planning controls, and provided two other remedies instead.

---

21 *Hastings v Auckland City Council* Decision A68/01.
22 *Ibid.* at [166] - [172].
23 *Ibid.* at [86] - [100].
24 *Auckland Acclimatisation Society v Sutton Holdings* [1985] 2 NZLR 94.
25 *Ibid.* at page 98, line 50 to page 99, line 14.

> First, a person having an interest in land affected by a plan provision that would render the interest in land incapable of reasonable use (without significant effects on the environment) can challenge the provision in a submission on the plan when it is proposed. Secondly, such a person is able to apply for a change to the plan, if it renders the interest in land incapable of reasonable use (without significant effects on the environment), and places an unfair burden on any person having such an interest.

[85] The Court then referred to the decisions in *Cornwall Park Trust Board*[26] and *Capital Coast Health*,[27] describing them as examples where the Court considered challenges to restrictive zonings on the merits of the particular case by applying the same tests as it would to other zoning challenges. The Court in *Hastings* then concluded on this point:

> [96] We hold that even where the owner of an interest in land considers that proposed zoning would render that interest in land incapable of reasonable use, the remedies intended by Parliament are those described in section 85; and that on a challenge to such zoning the tests derived from the Act are to be applied to the merits of the case. We do not accept that it is necessarily unreasonable for a territorial authority to persist with such a zoning of private land in the face of the owner's objection, particularly where the territorial authority asserts that other use of the land would have significant effects on the environment.
>
> [97] Counsel for the City Council submitted that a demonstrated commitment by the Council to designate and/or acquire the land or to compensate the owner may make reasonable an otherwise unreasonable zoning, where this furthers the purpose and principles of the Act. It may do, in some circumstances. However when zoning is challenged by a reference to the Court, the main task is to apply the tests that are to be inferred from the Act (including where appropriate the test that can be inferred from section 85) and determine the appropriate zoning.
>
> [98] Section 85 contemplates an owner of an interest in land challenging a plan provision on the ground that it renders an interest in land incapable of reasonable use. On a reference derived from such a submission, the test to be inferred from section 85 is not whether the proposed zoning is unreasonable to the owner (a question of the owner's private rights), but whether it serves the statutory purpose of promoting sustainable management of natural and physical resources (a question of public interest). The implication is that a provision that renders an interest in land incapable of reasonable use may not serve that purpose. But the focus is on the public interest, not the private property rights.

[86] Counsel for the respondent also referred to the decisions in:

i) *West Coast Regional Council v Royal Forest and Bird Protection Society of New Zealand*[28] which may be noted for its trenchant dismissal of a submission based on the dictum in *Wellington City v Cowie*[29] relating to the serious interference of town planning legislation with common law rights, pointing out:

> [73] Thirty-five years have elapsed since *Cowie*. The RMA is not regarded by this Court as a drastic erosion of the rights of property owners, and so to be

---

26 *Cornwall Park Trust Board v Auckland City Council* Decision A58/97.
27 *Capital Coast Health v Wellington CC* fn 14.
28 *West Coast Regional Council v Royal Forest and Bird Protection Society of New Zealand* [2007] NZRMA 32.
29 *Wellington City v Cowie* [1971] NZLR 1089; 4 NZTPA 177 (CA).

> construed restrictively to protect their rights. That judicial perspective has gone. The RMA operates to minimise adverse effects. It can be seen as a reform, by extension, of the common law. The common law had various tort remedies preventing or remedying adverse externality effects on neighbouring properties. Thereby the common law for centuries has restricted and still restricts use of private property. See the common law against: all manner of nuisance, for example, from dust; escape of dangerous things; preventing loss of support of land; and diversion and pollution of water.

ii) *Guyco Holdings Ltd v Far North District Council*[30] which concerned the proposed imposition of heritage controls on private property at Paihia containing heritage items relating to the mission of Rev Henry Williams almost 200 years ago. Counsel for the landowner made submissions about restrictive zonings of private land, citing the *Capital Coast Health* case in support. The Court found more relevant assistance in the decision in *Cornwall Park Trust Board*,[31] where the Court had observed that most zoning and land use rules, by their very nature, are restrictive in some way and if the only way to promote the sustainable management of natural and physical resources is by restrictive zoning, then that mechanism should be employed.

iii) *Creswick Valley Residents' Association Inc v Wellington City Council*[32] where the Court said it was not influenced by the argument that privately owned land should not be zoned as any kind of Open Space. While acknowledging that in some circumstances, such as in the *Capital Coast Health* case, ownership of the land may be a relevant consideration, the Court noted as a relevant factor in the case before it that the appellant had acquired the land with knowledge of an existing restriction. The Court then said that the question was simply whether the proposed zoning would be more appropriate than the existing zonings.[33]

iv) *Royal Forest and Bird Protection Society of New Zealand v New Plymouth District Council*[34] and the general observation by the Court there that sustainable management of resources requires that the exercise of private property rights will on occasion be subject to controls.

[87] The residents generally supported the respondent. Counsel for the residents submitted that it may also be relevant to consider that *Capital Coast Health* is a case of

---

30 *Guyco Holdings Ltd v Far North District Council* [2014] NZEnvC 129.
31 *Cornwall Park Trust Board v Auckland City Council* fn 26.
32 *Creswick Valley Residents' Association Inc v Wellington City Council* [2015] NZEnvC 149.
33 *Ibid.* at [3-67].
34 *Royal Forest and Bird Protection Society of New Zealand v New Plymouth District Council* [2015] NZEnvC 219 at [95].

a proposed down-zoning by imposing greater restrictions than under the previous plan, which may alter the balance being assessed, whereas this case is seeking greater development opportunities in respective of proposed provisions which are essentially a carry-over from previous plans. In his submission this is not a case about establishing open space where none previously existed or otherwise changing long-established development opportunities with restrictive plan provisions.

[88] Counsel for the residents submitted that there is no presumption that open space zoning for private land is unlawful and that no authority had been provided for that proposition. In counsel's submission, the issue is whether the Court may be satisfied that the test in s 85(3) RMA is met.

Section 85 RMA – reasonable use of land and the burden on an owner

[89] Section 85 RMA (as in force in 2013 at the time the proposed Plan was notified) relevantly provides:

> **85 Compensation not payable in respect of controls on land**
>
> (1) An interest in land shall be deemed not to be taken or injuriously affected by reason of any provision in a plan unless otherwise provided for in this Act.
>
> (2) Notwithstanding subsection (1), any person having an interest in land to which any provision or proposed provision of a plan or proposed plan applies, and who considers that the provision or proposed provision would render that interest in land incapable of reasonable use, may challenge that provision or proposed provision on those grounds—
>
> (a) in a submission made under Part 1 of Schedule 1 in respect of a proposed plan or change to a plan; or
>
> (b) in an application to change a plan made under clause 21 of Schedule 1.
>
> (3) Where, having regard to Part 3 (including the effect of section 9(3)) and the effect of subsection (1), the Environment Court determines that a provision or proposed provision of a plan or a proposed plan renders any land incapable of reasonable use, and places an unfair and unreasonable burden on any person having an interest in the land, the court, on application by any such person to change a plan made under clause 21 of Schedule 1, may—
>
> (a) in the case of a plan or proposed plan (other than a regional coastal plan), direct the local authority to modify, delete, or replace the provision; and
>
> (b) in the case of a regional coastal plan, report its findings to the applicant, the regional council concerned, and the Minister of Conservation, which report may include a direction to the regional council to modify, delete, or replace the provision.
>
> (4) Any direction given or report made under subsection (3) shall have effect under this Act as if it were made or given under clause 15 of Schedule 1.
>
> ...
>
> (6) In subsections (2) and (3), the term **reasonable use**, in relation to any land, includes the use or potential use of the land for any activity whose actual or potential effects on any aspect of the environment or on any person other than

the applicant would not be significant.

(7) Nothing in subsection (3) limits the powers of the Environment Court under clause 15 of Schedule 1 on an appeal under clause 14.

[90] The appellant submitted that the test to be inferred from s 85 RMA is not whether the proposed zoning is unreasonable to the owner (which is a question of the owner's property rights) but whether it serves the RMA's purpose of promoting the sustainable management of natural and physical resources (which is a question of public interest), relying on the reasoning in the Court's decision in *Hasting v Auckland CC*.[35]

[91] Other propositions based on case law and relied on by the appellant are:

a) It is important to keep the burden on a private landowner in proportion to the public benefit of the restriction in the Plan, so that the restriction does not preclude reasonable economic use of the land, and the failure of the expert planning witnesses called by other parties to address s 85 RMA means that their assessment is incomplete and so their opinion evidence should be given little weight;

b) The assessment is independent of the identity or characteristics of the landowner and must examine the relevant land as a whole: a provision that imposes an "all or nothing" binary choice of options is likely to render an owner's interest incapable of reasonable use;[36]

c) The possibility of applying for and obtaining a resource consent as a non-complying activity is not sufficient to amount to provision for reasonable use;[37]

d) There should be recognition of any controls that the alternative plan provisions may impose to achieve some or all of the matters in the public interest that the Council seeks.[38]

[92] Counsel for the appellant submitted that the proposed Plan provisions in this case go further than those in the cases cited, amounting to a disproportionate restriction of private rights compared to the public benefit and imposing an "all or nothing" choice on the owner. He pointed to the remaining provision for open space in the provisions now sought by the appellant.

---

35 *Hastings v Auckland CC* fn 21 at [98].
36 *Steven v Christchurch CC* [1998] NZEnvC 91; [1998] NZRMA 289 at [35] - [39].
37 *Seabreeze Investments Ltd v Christchurch CC* Decision C081/02 at [97].
38 *Hastings v Auckland CC*, fn 21 at [168] - [171].

[93] Counsel for the respondent submitted that an assessment under s 85 RMA must be in the context of an alternative zoning or rule and that where the alternative would have adverse effects on the environment, then the proposed zoning would not necessarily be unreasonable. Counsel pointed to examples of other golf courses in other districts where some form of open space zoning has been applied.

[94] We have already referred to the respondent's submissions about the case law in the preceding section of this decision relating to the parties' submissions on the lawfulness of a restrictive zoning. We have also referred to the submission of counsel for the respondents and for the residents that the cases relied on by the appellant may be distinguished on the basis that in those cases the challenged provisions had been proposed after the owner had obtained an interest in the land, so that an existing opportunity was being removed by the proposed provisions. We note the submission that, in contrast, the present case is one where development of the land has always been restricted and the challenge is really one of failing to create an opportunity.

[95] Counsel for the residents made submissions based on the evidence of Mr MacCormick about past dealings with the land but acknowledged the limits of any argument based on that, given the absence of financial or economic evidence from the appellant. Counsel also submitted that there was a lack of evidence of any unmet demand for housing at Matarangi which might otherwise provide a foundation for an argument of unreasonable restrictions on development.

[96] Addressing the principles relied on by the appellant, counsel for the residents characterised its case as pursuing a higher and better use. He submitted that this argument did not take account of the fact that in any modern structure plan it is inevitable that parts will be given over to infrastructure which may not, of itself, have commercial value.

Appropriateness of plan provisions

[97] Counsel for the appellant referred to the statutory framework for preparing plans in ss 31 – 32 and 72 – 76 RMA, referring to the distillation of those provisions down to an evaluation of which provisions are the most appropriate,[39] and to the planning issues listed at [3](c) above.

---

39 Referring to *Royal Forest and Bird Protection Society of NZ v Whakatane DC* [2017] NZEnvC 051 by way of example.

[98] In the overall context of the RMA, the appellant submitted that the legislation, in terms of its purpose, is forward looking, citing *Shirley Primary School v Christchurch CC*.[40] On that basis counsel submitted that the history of the site, both in terms of its development and successive planning provisions for it, are not as important to determining the most appropriate Plan provisions as a current assessment of the environment and the effects of activities on it.

[99] Counsel for the respondent, while denying that the provisions of the proposed Plan are inappropriate, indicated that the respondent is open to expanding the range of recreation activities that might be permitted on the Site while still maintaining its open space character and its amenity values. No specific amendments were presented to us, so we cannot assess them as an alternative outcome in this proceeding, but the respondent's indication may be helpful in future discussions about resource management at Matarangi.

[100] We received evidence from the three expert planning witnesses about the terms and conditions of the rules governing development in the Open Space zone as compared to the Residential zone. While that evidence was certainly relevant and helpful to our understanding of the issues between the parties, it mainly demonstrated that there is a substantial difference between the nature and extent of the development controls in each zone. We have concluded that the principal issue between the parties is really between the zones as a whole in terms of the reasonableness of imposing one or the other on this particular Site where it is private land.

[101] We also received submissions about giving effect to relevant provisions in the New Zealand Coastal Policy Statement (and in particular Policy 13) and the Waikato Regional Policy Statement (and in particular section 6, relating to the built environment, and section 12, relating to landscape, natural character and amenity). Neither of those policy statements contains any directive provision applicable to the present circumstances which would have determinative effect.

Evaluation

Are the proposed provisions unlawful?

[102] We start our evaluation by considering whether the proposed plan provisions for the Site are unlawful. This is based on the submission that there is a general legal

40 *Shirley Primary School v Christchurch CC* [1998] NZEnvC 394; [1999] NZRMA 66 at [114].

principle that private land should not be zoned for reserve purposes except in very limited circumstances, which submission is in turn based on the final decision in *Capital Coast Health*.[41]

[103] Having reviewed the relevant case law, we respectfully conclude that the principle, as stated, may demonstrate a misapprehension about the status of the land. Strictly speaking, a reserve is land which is reserved from sale in terms of either the Reserves Act 1977 or some particular legislation to that effect. If land is reserved from sale, then that status under such legislation will generally present a much more significant restriction on its use and development than the provisions of the district plan.

[104] We therefore use the term "open space" rather than "reserve" in our evaluation, because that term does not import (at least in our usage) any presumption as to the status of the land. Recasting the submission in those terms, and reviewing the relevant case law, we conclude that there is no general legal principle that private land should not be zoned for open space purposes unless the landowner agrees or the land is unsuitable for development. There is nothing in the RMA to that effect. The case law provides examples where the Court has directed plan provisions, including zonings, to be changed, but those decisions have not been based on the illegality of such provisions. The statements in *Capital Coast Health* that might be read to the contrary are explained, in our view, by the analysis in *Hastings*[42] and the conclusion in that decision that the fundamental question is not answered by resort to such a principle of illegality at the threshold but rather by an evaluation in terms of s 32 RMA of whether the proposed plan provisions promote the purpose of the RMA and are the most appropriate provisions taking into account all relevant considerations.

[105] Importantly, the lawful scope under the RMA of plan provisions which restrict uses and activities and the extent to which such restrictions may give rise to a right to compensation is confirmed at the highest level. In *Hastings*[43] the Tribunal referred to the decision of the Court of Appeal in the Whangamarino case,[44] as quoted above. Counsel for the respondent also referred us to the decision of the High Court in *West Coast Regional Council v Royal Forest and Bird Protection Society*,[45] also quoted above, which

---

41 *Capital Coast Health v Wellington CC*, fn 14.
42 *Hastings v Auckland CC*, fn 21.
43 *Ibid.*
44 *Auckland Acclimatisation Society v Sutton Holdings*, fn 24.
45 *West Coast Regional Council v Royal Forest and Bird Protection Society*, fn 25.

did not give any weight to a submission based on *Wellington City Council v Cowie*[46] that the effect of town planning legislation on common law rights amounted to serious interference.

[106] In *Waitakere City Council v Estate Homes Ltd*[47] the Supreme Court addressed a case where the Council had required, as a condition of subdivision consent, that the developer design, form and construct a section of an arterial road over the subdivided land along the path of a longstanding designation. The same condition was being imposed on neighbouring developers along that path. The Council accepted that it should compensate the developer to the extent that the condition required more work and more land than would otherwise have been required simply for the subdivision. The parties could not agree on the basis on which such compensation should be assessed and paid.

[107] It is important to note that this case arose in quite a different context to the present appeal. The litigation involving *Estate Homes Ltd* concerned conditions of resource consent under the RMA, rather than the preparation of a plan under the RMA. This difference requires consideration of whether the principles identified and expressed by the Supreme Court in that case are applicable in this one.

[108] For present purposes, the principal issue addressed by the Supreme Court was whether the land for the road had been taken as an expropriation of property, or whether it was an ingredient of a condition imposed on the granting of the subdivision consent as a form of regulation.[48] The distinction is important because of the relevance of two conflicting principles:

1. Subject to inconsistent legislation and compliance with the general law it is the right of every person to use their assets as they please and to be compensated if such assets are expropriated for public purposes.
2. Land development requires principled, systematic and sensitive controls without any expectation of or right to compensation.

[109] The Supreme Court observed that the first principle is one of statutory interpretation rather than substantive law, there being no protection in New Zealand equivalent to the Fifth Amendment of the Bill of Rights to the United States Constitution. As such, the first principle only applies if there is actually a taking. In general, a refusal

---

46 *Wellington City Council v Cowie*, fn 26.
47 *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112; [2007] 2 NZLR 149; [2007] NZRMA 137; see the discussion at [43] – [54].
48 *Waitakere City Council v Estate Homes Ltd*, fn 47: see the discussion at [43] – [54].

of permission to develop land, even where that results in reducing the value of the land, has been treated by the courts as a form of regulation rather than a taking of property and not a basis for compensation.[49] The Supreme Court held that if a lawful condition to a subdivision consent requires the giving up of land in exchange for the right to subdivide, then no expropriation will be involved and so no presumption of compensation will apply. If the condition is unlawful, then the remedy is to seek invalidation of the condition rather than compensation. The distinguishing characteristic of expropriation is a forced acquisition allowing the owner no choice: such absence of choice must be present before the first principle can be invoked.

[110] Whether there is truly a choice available may depend on one's point of view. The Supreme Court recognised that a developer may consider a condition imposed by a consent authority to be excessive and that the delay of exercising the right of appeal against it may result in unfair pressure because of economic imperatives to act promptly on the grant of consent. It nonetheless held that such circumstances provide no sound basis for reading statutory powers of a consent authority as involving expropriation of property for which compensation should be available.

[111] Notwithstanding the difference in context between an application for resource consent and an appeal against proposed plan provisions, the reasoning of the Supreme Court is based on fundamental principles which we respectfully consider are applicable to the present circumstances. In particular, we consider that the imposition of controls by rules in a district plan (including rules imported by the application of zoning to land) are reasonably comparable to the imposition of controls by conditions of resource consents.

[112] On the issue of whether the owner in this case has a choice, or whether the controls of the proposed plan amount to any kind of forced acquisition of some interest in the land, we consider the planning history of the Site to be relevant. In particular, it is apparent from the evidence that the appellant acquired the Site at a time when controls were in place restricting its use according to the Open Space and Recreation zonings applicable to it under the operative Plan. These zonings are reasonably comparable to the proposed zonings under the proposed Plan and accordingly there has been no diminution of development rights or "down-zoning" under the proposed Plan. We accept the submission of counsel for the residents that the *Capital Coast Health* case may be distinguished on that basis. We conclude that the proposed Plan provisions for the Site

[49] Section 85(1) RMA.

are not unlawful.

[113] Having reached that conclusion, we acknowledge that the legality of the proposed Plan provisions does not create any presumption as to their appropriateness, either under s 32 RMA or under s 85 RMA where, as here, a person with an interest in land challenges any such provision in a submission made under Schedule 1.

Do the provisions render the Site incapable of reasonable use and place an unfair and unreasonable burden on the appellant?

[114] Dealing with the challenge under s 85 RMA, we start by recording that there was no procedural objection to the appellant's reliance on that provision in this appeal. The case law identifies some unusual aspects to the way in which a person may raise a challenge under s 85 RMA through an appeal against a decision on a submission on a proposed plan and suggests that the proper course is to proceed by way of an application under clause 21 of Schedule 1 to the RMA.[50] We are content to proceed on the basis that the appellant's challenge is clearly raised in its submission on the proposed Plan as required by s 85(2)(a) and, notwithstanding the procedural provisions in s 85(3), the Court's powers under clause 15 of Schedule 1 to the RMA are not limited by that provision. We will therefore proceed to consider the substance of the appellant's challenge as being properly raised in its appeal.

[115] The basis on which the Court may modify, delete or replace any proposed provision of a proposed plan under s 85 RMA is a determination that such provision renders any land incapable of reasonable use, and places an unfair and unreasonable burden on any person having an interest in the land. In making that determination, the Court must have regard to Part 3 RMA (including the effect of s 9(3)) and the effect of s 85(1) RMA. As well, "reasonable use" is defined in s 85(6) for the purposes of S 85(2) and (3) to mean:

> in relation to any land, includes the use or potential use of the land for any activity whose actual or potential effects on any aspect of the environment or on any person other than the applicant would not be significant.

[116] In *Steven v Christchurch City Council*[51] the Court set out the following list of other matters to be referred to:

(1) the natural and physical resources in the case;

---

50 See the procedural decisions in *Steven v Christchurch CC* Decision C 125/97; *Mullins v Auckland CC* Decision A 35/96; and *Fore World Developments Ltd v Napier CC* Decision W 12/2005.

51 *Steven v Christchurch City Council* fn 36 at [34].

(2) that no reasonable use can be made of the land (that is whether the first test in section 85(3) is satisfied);
(3) Part 2 of the Act (the purpose and principles) because these underpin everything else in the Act;
(4) Part 3 of the Act and the inference from section 9 that real property rights prima facie meet the purpose and principles of the Act - Part 3 and section 9 are expressly referred to in section 85(3) so there can be no doubt of their relevance;
(5) the relevant provisions of the proposed plan (in this case the heritage section and discretionary rules) because the listing of the property has to be looked at in the context of that plan;
(6) the rebuttable presumption that the proposed plan is effective and efficient - otherwise the work on the (proposed) plan is wasted;
(7) the personal circumstances of the applicant, looked at objectively - because in assessing a burden one has to look at who is carrying it.

(Footnotes omitted)

[117] This list is certainly helpful in identifying some particular matters that are likely to be relevant to the assessment required under s 85(3), noting that some of them are axiomatic to any decision made under the RMA.

[118] The Court in *Steven* expressly excluded consideration of Part 4 RMA and s 32 in particular on the basis of direct reference in s 85(3) to Part 3 but not Part 4, the summary nature of the process and the fact that the Court has no executive planning function for carrying out an analysis under s 32.[52] With respect, those reasons, while perhaps determinative in the context of an originating application under s 85(3) or cl 21 of Schedule 1, do not appear so in the context of an appeal under cl 14 of Schedule 1. In our view we should proceed to make a decision on this appeal, addressing the issue raised by the appellant under s 85, just as we would in any other plan appeal by including an assessment of the most appropriate plan provisions in terms of s 32 RMA.

[119] In *Steven v Christchurch City Council*[53] the subject land was a 1,029m^2 residential property with an old and nearly derelict house in the middle of it. The house was included in Group 3 of the list of protected buildings, places and objects in the proposed plan. Valuation evidence indicated that renovation of the house would be inefficient (it would cost more than it would return on a sale), but demolition of the protected building would require consent as a discretionary activity. On that basis the Court found that the listing of the building would render the land incapable of reasonable use. It considered that this finding was itself a factor suggesting that an unfair and unreasonable burden had been placed on the owner, as well as disenabling the owner from promoting her economic and social wellbeing. It also considered that the option of seeking a discretionary consent was

52 *Steven v Christchurch City Council* fn 36 at [24].
53 *Steven v Christchurch City Council* fn 36.

insufficient to relieve the burden. While noting that the owner had been aware of the listing of the property at the time she acquired it, ultimately the Court considered that the only fair and reasonable outcome of any application would be to grant consent to demolish and directed the Council to remove the property from the protected list.

[120] In *Fore World Developments Ltd v Napier City Council*[54] the appellant sought to develop its land as medium density residential subdivisions and challenged certain plan provisions relating to the effects of coastal erosion, particularly the application of a Coastal Hazard Zone to the appellant's land. The decision addressed the competing evidence, including what it described as exhaustive analysis of possible alternative methods and the costs and benefits of the various permutations of controls and assessed those in the context of s 32 RMA. It noted that the evidence of the consultant planner for the appellant was that there was no credible use of the land under the proposed provisions. The Court concluded that residential use was not prevented, but not at the level sought by the appellant, saying:

> [122] ... The choice of an appropriate zoning is driven by a matrix of factors in which such things as location, servicing ability and the nature of the surrounding area may be as influential as the quality of the land itself. Nor does the landowner's wish to use the land in a way that maximises its value make that use alone reasonable, and others unreasonable.
> [123] Put another way, although this land might not be capable of economically viable farming use, that does not mean that medium density residential becomes a reasonable use, still less the only reasonable use. ...

[121] At [125] the Court emphasised the point, saying:

> Reasonable use is not synonymous with optimum financial return ....

[122] In *Gordon v Auckland Council*[55] the subject land included a headland on the southern coast of Waiheke Island. As well as its landscape and natural character values, the headland was the site of a pa which was scheduled as a category A item of historic heritage. The landowners sought to be able to build a house on the headland and argued that restricting the use of land to grazing of light animals and incidental maintenance rendered it incapable of reasonable use. The Court noted that the actual use of the land had been limited to light grazing and that such farming activity was not financially viable even to the level of being self-sustaining. Even so, the Court also noted that unrestricted development of the headland could potentially cause significant effects on the archaeological values of the immediate environment. The Court held that the restriction on the use of the headland did not render the whole landholding incapable of reasonable

54 *Fore World Developments Ltd v Napier City Council* Decision W 029/2006.
55 *Gordon v Auckland Council* [2012] NZEnvC 7.

use, given certain concessionary possibilities for the development of the balance of the land.

[123] These cases, and the others (*Guyco Holdings*[56] *and Creswick Valley Residents' Assn*[57]) referred to us by counsel for the respondent, demonstrate that there is no additional test beyond that set out in s 85(3): that the Court must determine whether a proposed provision of a proposed plan renders any land incapable of reasonable use and places an unfair and unreasonable burden on any person having an interest in the land. Further, they tend to indicate that the Court's evaluation of a case against this test must be based on all the evidence and assessed on the merits with a focus on the public interest, as clarified in *Hastings*.[58]

[124] Addressing the Site in those terms, we note that the existing golf course use, including as it does commercial activities associated with or incidental to golfing activities, is provided for in the proposed provisions as a permitted activity, while the use of the Site for residential activities is not provided for and would require consent as a non-complying activity. In comparison, neighbouring land is zoned Residential and able to be used (and is used) for residential activities. If all other things were equal, this disparate treatment of otherwise similar land would, on its face, be a restriction of reasonable use of the Site and might amount to an unfair and unreasonable burden on the appellant. But the cases presented for the respondent and the residents require us to consider whether the context of the appeal imports considerations which would mean that all other things are not equal.

Should past plan provisions be disregarded?

[125] In relation to the submission that the RMA is forward looking, the authority relied on by counsel for the appellant is *Shirley Primary School v Christchurch City Council*.[59] The relevant passage in that decision is at [114]:

> Going back to basic principles of statutory interpretation we consider that the purpose and scheme of the Act have implications for the burden and standard of proof and for the assessment of evidence generally. The purpose of the Act - sustainable management (Section 5: generally and in particular the reference to "... the foreseeable needs of future generations") and Part II generally entail that the Act is forward-looking. It is preventative, precautionary and proactive. Various other provisions in the Act suggest how those probabilistic (because looking into the future) criteria should be considered and decided. These include pre-eminently:
> - section 3 - the definition of "effect"
> - Part V - the provisions for policy statements and plans

---

56 *Guyco Holdings Ltd v Far North District Council*, fn 27.
57 *Creswick Valley Residents' Association Inc v Wellington City Council*, fn 29.
58 *Hastings v Auckland CC*, fn 21.
59 *Shirley Primary School v Christchurch CC*, fn 40.

- Section 105(2)(b)
- Section 276

[126] It is important to consider the context of that passage. The decision in *Shirley* concerned an appeal under s 120 RMA against a decision to grant a resource consent to establish a cellular telecommunications facility close to a school. A primary issue before the Court was the assessment of the risk posed to children by that activity. The discussion of the forward-looking nature of the RMA was in the context of the evidential burdens that may be on any party to an appeal, particularly in relation to the evaluation of risk and the application of the inclusive definition of *effect in* s 3 RMA, particularly paragraph (f): any potential effect of low probability which has a high potential impact. In that context, the forward-looking aspects of the RMA were plainly central to the issues to be decided, but this passage is not part of the reasons for the decision.

[127] A fuller discussion of the consideration of the future under the RMA was undertaken by the Court of Appeal in *Queenstown-Lakes District Council v Hawthorn Estate Ltd & anor*.[60] That discussion, describing as artificial an approach that would limit enquiries to a fixed point in time, refers to other provisions in the RMA which entail considerations of what has occurred in the past. Notably, the term *environment* is found throughout the RMA. The definition of that term in s 2 RMA includes a range of things that do not just exist in the present but have come into existence over time, such as ecosystems and communities, natural and physical resources (as further defined, notably to include structures), amenity values (also further defined to mean the qualities and characteristics of an area that contribute to people's appreciation of its various attributes) and the broad range of human conditions which affect or are affected by those aspects of the environment. This broad sense of the environment plainly requires an appreciation of how the environment has come to be in the form it is.

[128] The passage in *Shirley* picks out the prospective elements of risk analysis in the definition of *effect* in s 3(e) and (f). Also integral to any analysis of effects are any past effect in s 3(c) and any cumulative effect which arises over time or in combination with other effects in s 3(d). These aspects of effect necessarily require consideration of what has happened in the past so far as it is relevant to planning for the future.

[129] Even for the particular purpose of comprehending what the future environment

60 *Queenstown-Lakes District Council v Hawthorn Estate Ltd & anor* [2005] NZCA 114 at [39]-[57].

may be like and making plans to promote sustainable management of resources going forward, an understanding of the past is at least desirable, otherwise *those who cannot remember the past are condemned to repeat it.*[61]

[130] It is true that there is no presumption in favour of the proposed plan as notified or as amended by the Council's decisions on submissions. As the Planning Tribunal held in *Leith v Auckland City Council*,[62] quoting with approval from Palmer's *Local Government Law in New Zealand*:[63]

> As a matter of principle an appeal to the Planning Tribunal is a true hearing de novo, with a complete rehearing of all evidence afresh. ... Accordingly, in appeals relating to content of a regional or district plan ... no onus rests on the appellant to prove that the decision of the body at first instance is incorrect. The appeal is more in the nature of an inquiry into the merits, in accordance with the statutory objectives and existing provisions of policy statements and planning. There is no presumption that the council decision is correct. Where an appeal relates to a rule, which brings into question a policy statement or other plan provision, there is no presumption that the related policy, plan, or rule is necessarily appropriate or correct.

This statement has been confirmed by the Court many times since and remains correct.

[131] The Planning Tribunal in *Leith* also held that previous plan provisions do not affect the assessment of appropriate provisions in a proposed plan, so that the evaluation of a proposed plan under s 32 RMA is not based on the operative plan. Although it is possible that the provisions of an earlier plan may have some value in the consideration of alternatives (in terms now of s 32(1)(b)(i) and the identification of other reasonably practicable options for achieving the objectives of the proposed plan), that is not assured. In preparing a district plan, a council is required to start with a clean sheet and focus on the purpose of the RMA.[64] While that conclusion in *Leith* was in the context of a proposed plan notified shortly after the RMA came in to force and highlighted the differences between that Act and the Town and Country Planning Act 1977, the principles remain the same now.

[132] Notwithstanding the prospective view that needs to be taken both when preparing plans and when assessing applications for resource consent, one must also bear in mind that the environment in which plans and applications are considered exists as a result of what has happened in the past. The assessment of effects on the environment of allowing

---

61 George Santayana, *The Life of Reason* (1905), Vol. 1 *Reason in Common Sense*, Chap. XII *Flux and Constancy in Human Nature*, "Continuity necessary to progress."

62 *Leith v Auckland City Council* [1995] NZRMA 400 at 408-409.

63 K A Palmer, *Local Government Law in New Zealand*, 2nd ed. 1993 at p 646.

64 *Leith v Auckland CC*, fn 62 at 414.

an activity must be in terms of the existing environment.[65] Certainly, a plan must be forward-looking, but it must also be based on the existing environment. As a result, a planning or resource management assessment is never fully zero-based.

[133] In terms of those considerations, we find that the planning history of Matarangi is relevant to the extent that it explains how the peninsula came to be developed and how the Site relates to the rest of the environment. We do not consider that previous plan provisions should guide or be a baseline for the assessment of the proposed provisions or the appellant's alternative provisions, but they may identify another option, the reasonable practicability of which we now discuss, for achieving the objectives of the proposed Plan and giving effect to the relevant provisions of the WRPS.

The basis for the application of a restrictive zoning

[134] The primary issue between the parties, being the appropriateness of zoning the Site as Open Space versus the degree to which such zoning imposes restrictions on its use, is at the heart of the central issue for the making of the Plan, being to identify what the most appropriate zoning of the Site is.

[135] We have concluded that the existing environment of the Site is based on its planning history. From the planning history of the site, we identify two principles which are relevant to our consideration of that central issue:

a) That the development of residential areas at Matarangi should incorporate substantial areas of open space; and

b) That the provision of open space at the western end of the peninsula has occurred through private development.

[136] The establishment of the settlement at Matarangi occurred at an early stage of statutory land use planning in the district, but certain matters have been reasonably consistent since that time. In particular, as the decision of the TCPAB[66] makes clear, the preservation of the natural character of the coastal environment and the protection of it from unnecessary subdivision and development[67] has been an express matter of national importance for 45 years.

---

65 *Queenstown-Lakes District Council v Hawthorn Estate Ltd & anor*, fn 60.
66 *The Physical Environment Assn of Coromandel Inc v Thames-Coromandel DC*, fn 5.
67 Section 2B Town and Country Planning Act 1953, as inserted by s 2 Town and Country Planning Amendment Act 1973.

[137] The method of enabling appropriate development while protecting the natural character of the western end of the Matarangi peninsula was, on the evidence, the design and construction of the golf course as private open space. While one may have a doubt about the choice of that method, that doubt would be based mainly on hindsight and does little to assist in the present consideration of the most appropriate provisions in the proposed Plan.

[138] What we think can properly be taken from that choice of method is that the basis for the subdivision and residential development of Matarangi was linked to that open space. It was not argued before us, but we understand that the predecessors of the respondent would have been able to require any subdivider and developer to make contributions of land or money in respect of reserves as conditions of consent for such subdivision and development. We do not know what such contributions may have amounted to, but the real point is that the provision of open space has been a standard requirement of residential subdivision in New Zealand for many years.[68]

[139] In the present case, the more recent separation of the residential development from the open space appears to have been the choice of a previous owner, with some conveyancing arrangements put in place to address the need for such open space. Those matters are not subject to our jurisdiction and again, with hindsight, may not have been a complete method of protecting the open space, but we refer to them as background. More important to the issue before us is that these arrangements appear to have been voluntary, so that the owner at the time chose to enter into them. Consequently, subsequent owners can also be presumed to have acquired their interests on that basis.

[140] The appellant is of course correct in submitting that it is open to any owner to challenge a proposed zoning at the time it is proposed and to present its submission in accordance with s 85 RMA. But if the owner's primary argument is that private land should not be made open space for the benefit of the public, then it is relevant to ask who made the land open space? If it was the council who initially imposed that zoning, then that may be unreasonable without either the owner's agreement or the council's acquisition, but if it was the owner (or a predecessor in title) who did so, then that is the choice they have made. As the Court noted in *Creswick Valley Residents' Association*,[69] it is relevant that the owner acquired the land with knowledge of an existing restriction. In terms of the test

---

68 Even as far back as the Plans of Towns Regulation Act 1875.

69 *Creswick Valley Residents' Association*, fn 28.

for expropriation identified by the Supreme Court in *Estate Homes*,[70] that choice means that the zoning does not amount to expropriation.

[141] For those reasons we conclude in this case that the tests of s 85 RMA are not met solely on the basis of the proposed change in zoning. That is not the end of the issue: there remains the question whether the proposed zoning is the most appropriate way to achieve the objectives of the proposed Plan. In that assessment, the appellant's revised relief must be identified as a reasonably practicable option and assessed in terms of efficiency and effectiveness in achieving those objectives, as required under s 32(1)(b) RMA.

[142] Primarily, this is a comparative assessment of the appropriateness of the provision of open space. As noted above, the differences in the development controls between the Open Space zone and the Residential zone are so great that detailed analysis of them is not as important to our decision as the higher-level assessment whether the zoning of the whole of the Site is the right amount or whether it should be reduced. The third option would be the appellant's initial proposal as set out in its notice of appeal: to rezone the entire Site as Residential. It no longer seeks that relief and we think it was right to amend the relief sought. Rezoning the whole of the Site as Residential would clearly go too far by removing the open space needed to maintain the character and amenity values of the western end of the peninsula.

[143] The proposal now is to rezone approximately a quarter of the Site in three areas. We consider that merely referring to a percentage does not provide any proper foundation for assessment, given the range of relevant considerations and the extent to which at least some of the considerations require qualitative rather than quantitative analysis. Assuming that all of the land proposed by the appellant to be rezoned would be developed for residential activity, we assess the effects as follows.

[144] Area A is an interior block in the open space at the end of the peninsula beyond the 3300m mark. From the evidence and confirmed by our visit to the Site, rezoning the interior would largely avoid the fairways and greens of the golf course. It would also alter the nature of that area by effectively shifting the eastern boundary of the open portion of the spit end some 250 metres to the west. In our judgment it would substantially diminish the integrity of that area of open space by enabling residential development in the middle

70 *Waitakere City Council v Estate Homes Ltd*, fn 38.

of it.

[145] Area B is presently used as Holes 1 and 2 of the golf course. The proposed rezoning would remove those two holes of the golf course and effectively remove that area of open space. The area remaining is essentially the existing setback that applies to the residentially zoned land on either side of Area B. The residential development of Area B would substantially change the setting of the adjoining houses which we accept have been designed on the basis of that open space. Matarangi Drive is set a few metres below the level of Area B, but a view to the northeast towards the sea can be had from the pathway. Rezoning this area would effectively remove the open space connection between this part of Matarangi Drive and the sea.

[146] Area C is a portion of Hole 3 just south of Matarangi Drive to the east of The Fairway. It appears to us that the rezoning of this area would have the least effect of the three areas of proposed rezoning in terms of its impact on the open space. Connectivity with the rest of the eastern area of open space (the balance of Hole 3 and Holes 4 – 7) would remain given road frontages and access strips. We expect that rezoning this portion of Hole 3 would disrupt this portion of the golf course for golfers, but we accept that the retention of the golf course ought not to be a determining factor given that it is not a requirement under the other provisions of the proposed Plan. More important is the relative provision of open space in the context of the overall area of development of this end of the peninsula. The current proportion of 40% open space to 60% development is high by comparison with urban areas, but on the other hand it is substantially less than the proportion of open space, as high as 65%, identified by the TCPAB as being appropriate for Matarangi.[71]

[147] These considerations lead to the question of whether Area C should be rezoned because on its own that would have minimal effect or whether the whole area of the Site should be retained as open space in order to maintain the balance of open space and development that has occurred over the years. In our judgment, the principles which are relevant to those questions must include the protection of the character of the coastal environment, the maintenance of amenity values and the stewardship of this environment and the finite resource of land on the peninsula all support maintaining the open space and recreation zonings in order to protect the existing environment.

---

71 *The Physical Environment Assn of Coromandel Inc v Thames-Coromandel DC*, fn 5 at pp 5 and 9-10.

[148] We do not disregard economic well-being in that assessment. We note that the appellant's case was not founded on economic matters. Unlike the Court in *Steven*,[72] we did not receive any evidence about the price paid for or the value of the land, or the comparative values of development options. We note that the Court in *Hastings*[73] held that the test in s 85 is not a question of private rights but of public interest and that the Court in *Fore World Developments Ltd*[74] held that reasonable use is not synonymous with optimum financial return. There must always be at least a general regard to economic well-being as an element of the sustainable management of natural and physical resources. In this case, which we have found not to involve expropriation of property, it is not a determinative factor.

[149] We have also not received any evidence of an unreasonable burden on the appellant beyond the argument based on the principle that private land should not be zoned for public purposes without the owner's agreement. The case in *Steven* raised the issue of hardship and the Court there granted relief at least in part for that reason. We think it is consistent with ordinary notions of justice that a court should be concerned to address an issue of hardship in a case before it, but no evidence was presented to us of that here.

[150] More broadly, we must always have particular regard to the efficient use and development of natural and physical resources, as required under s 7(b) RMA. This is sometimes treated as importing the need for economic analysis. In the context of a proposed plan there is also the requirement in s 32(1)(b)(ii) of examining the appropriateness of provisions by assessing the efficiency and effectiveness of them provisions in achieving the objectives of the proposed plan. Given the case law referred to above and the lack of evidence of financial matters, we are cautious about attempting any economic analysis.

[151] In any event, we consider that efficiency in the context, and in light of the purpose, of the RMA is not simply a matter of maximizing the financial return on expenditure. In terms of its role in Part 2 and in s 32 RMA, efficiency is not an objective in itself, but a principle as to the way in which to do things. In a case such as this, it may perhaps be better understood in contradistinction to notions of wastefulness. In particular, given the other principles in Part 2, efficient use and development can include the protection of a

---

72 *Steven v Christchurch CC*, fn 36.
73 *Hastings v Auckland CC*, fn 21.
74 *Fore World Developments Ltd v Napier CC*, fn 51.

resource for its intrinsic values. This could be so where those values are unquantifiable and incommensurable with other values, if otherwise development of the valuable resource would be regarded as wasteful.

[152] In this case, the use or non-use of land as open space in the coastal environment of a holiday settlement is not necessarily wasteful. As already noted, the protection of the natural character of the coastal environment is a matter of national importance, it provides obvious amenity values and in the context of a peninsula which is already substantially developed it has finite characteristics.

[153] For those reasons we conclude that the provisions of the decisions version of the proposed Plan are appropriate and are more appropriate than the appellant's alternative. We therefore dismiss the appeal.

[154] Costs are not normally awarded on plan appeals[75] and we do not encourage any application in this case. If, notwithstanding that, any party seeks costs, then a memorandum setting out the claim must be filed and served with 15 working days and any response must be filed and served within 10 working days after that.

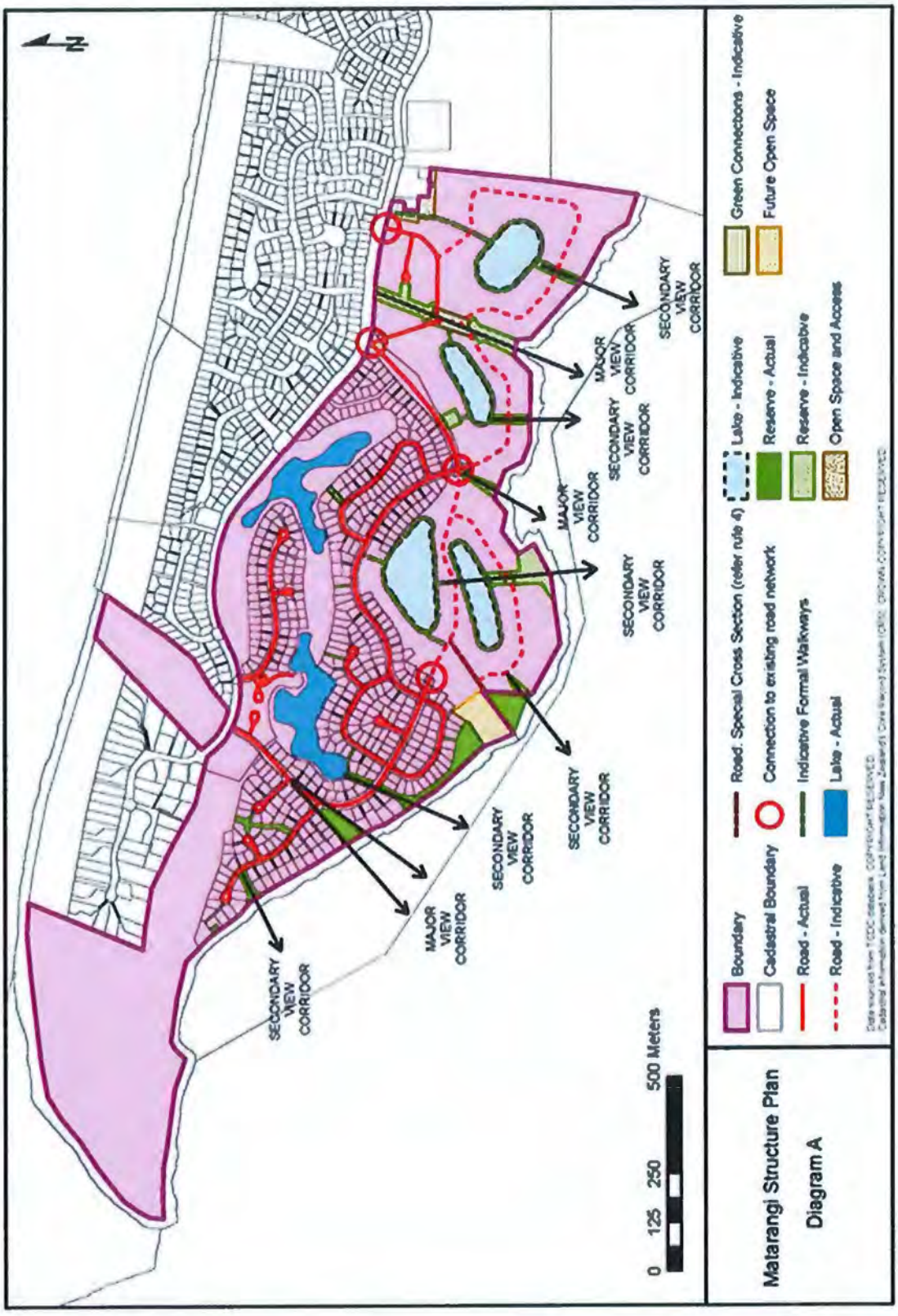
For the court:

D A Kirkpatrick
Environment Judge

75 Environment Court Practice Note 2014, cl 6.6(b).

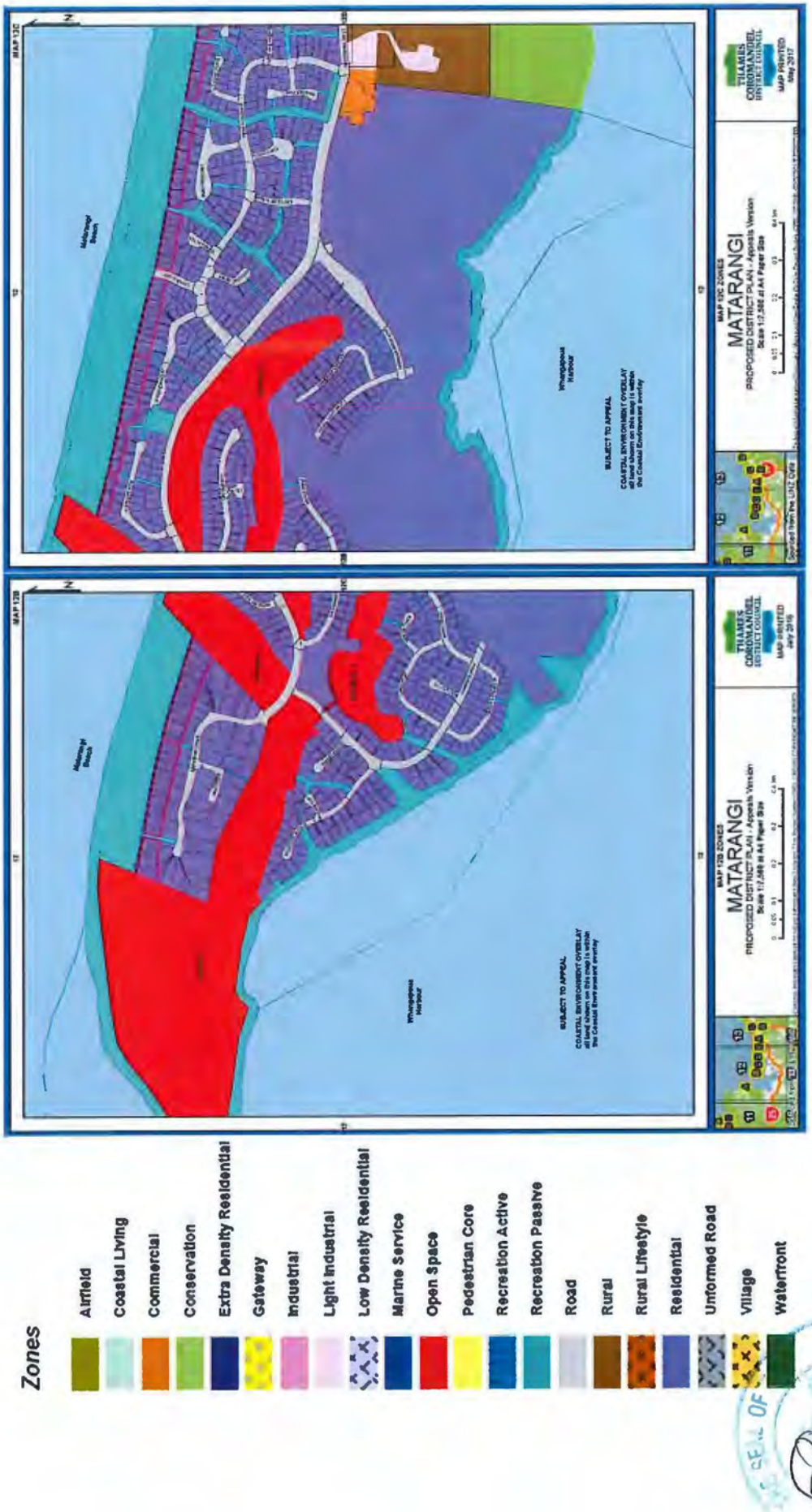
Annexure A

Matarangi Structure Plan Diagram A – Decisions version of proposed Plan



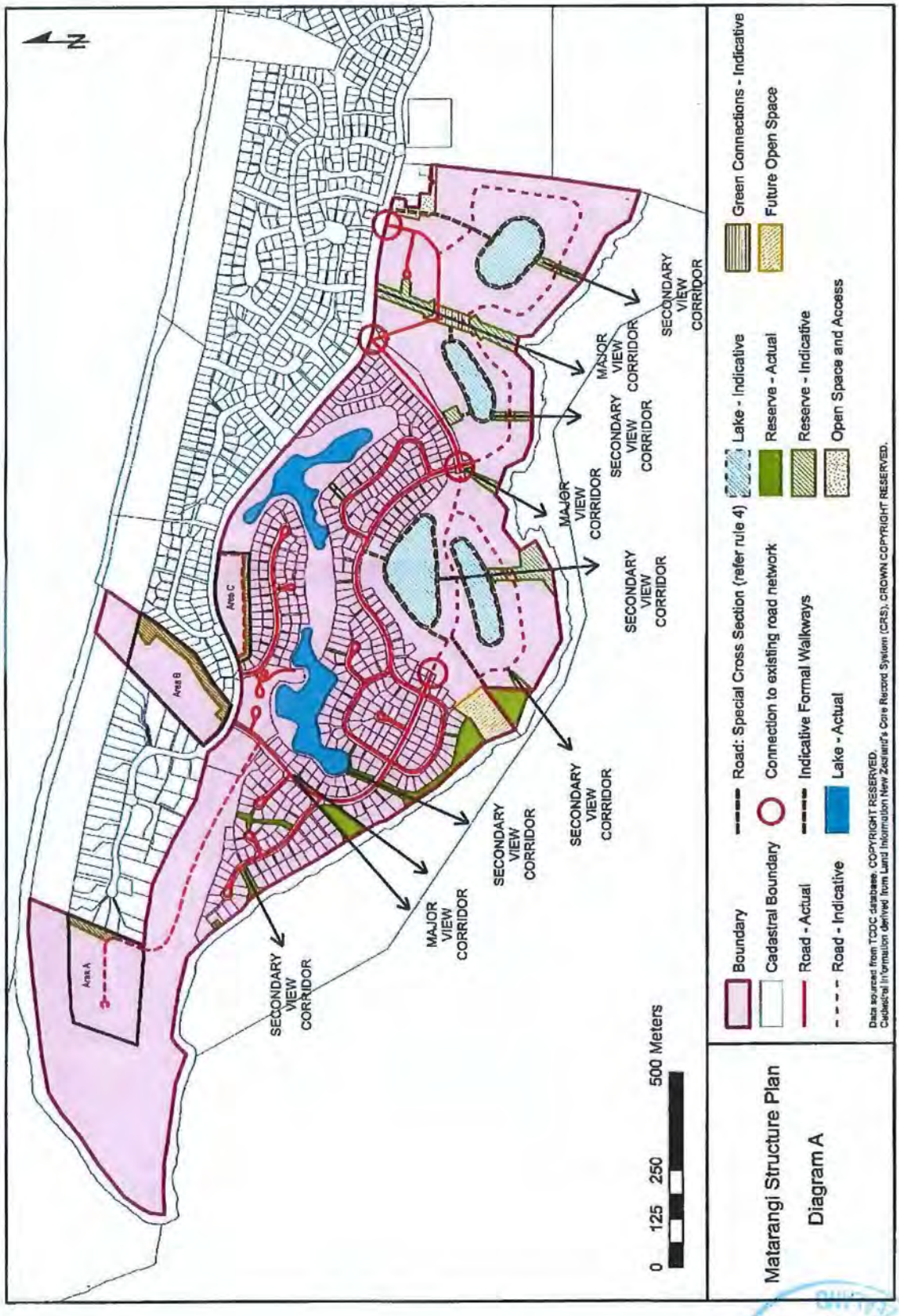
Annexure B

Planning Maps 12B and 12C for Matarangi – Decisions version of proposed Plan



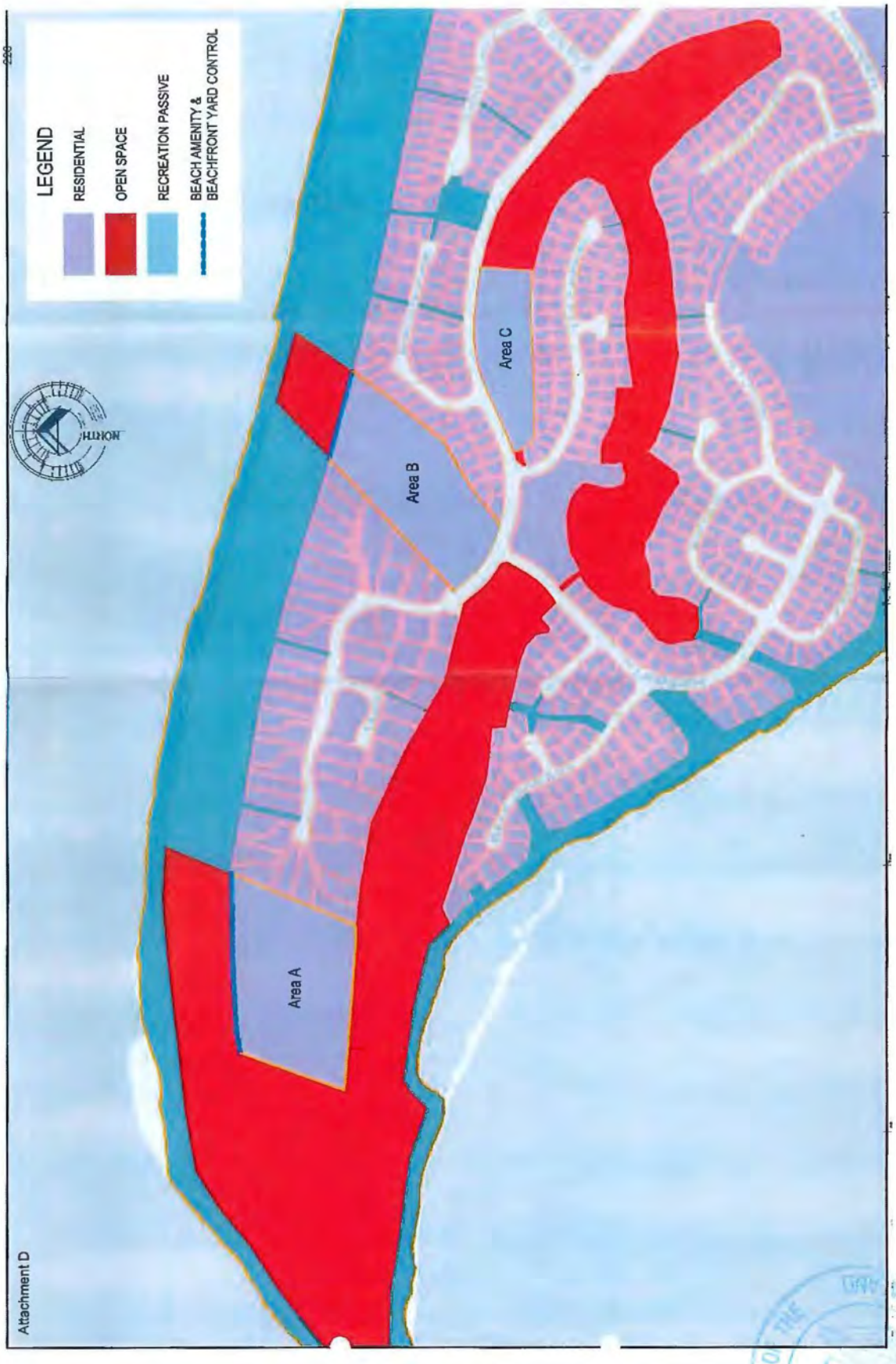
Annexure C

Matarangi Structure Plan Diagram A – Appellant's version



Annexure D

Planning Map for western end of Matarangi – Appellant's version



Annexure E

The Dunes Golf Course at Matarangi