Before the Hearings Panel
For the Queenstown Lakes Proposed District Plan

Under	The Resource Management Act 1991 ('**RMA**')
In the matter of	The Open Space and Recreation / District Wide Hearing Stream 15

Casebook for Airbnb – (submitter 2390 and further submission 2768)

Dated 21 September 2018

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ORIGINAL

Decision No: C 1A /96

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of two references under clause 14 of the First Schedule to the Act

BETWEEN **PETER AND KAYE MARGARET HODGE**

Appeal : RMA 399/95

AND **CANTERBURY AGRICULTURAL AND PASTORAL ASSOCIATION**

Appeal : RMA 890/95

Referrers

AND **CHRISTCHURCH CITY COUNCIL**

Respondent

BEFORE THE PLANNING TRIBUNAL

His Honour Judge Skelton - (presiding)
Mrs N.J. Johnson
Ms J. Rowan

HEARING at CHRISTCHURCH on the 4th, 5th, 6th, 7th and 8th days of December 1995

COUNSEL

Mr C.B. Atkinson QC for Peter and Kaye Margaret Hodge
Mr N.R.W. Davidson with Ms A. Dewar for Canterbury Agricultural and Pastoral Association and Canterbury Saleyards Limited
Mr A. Hearn QC for the respondent and Bayer (New Zealand) Ltd

INTERIM DECISION

Introduction

These two references arise out of a decision delivered by the respondent on 24 May 1995 in respect of submissions and further submissions on Change 24 to the Paparua and City sections of the Christchurch City Transitional District Plan.

In this case the respondent's decision took the form of adopting certain recommendations made by Mr J R Milligan a Christchurch barrister, who had been appointed as a Commissioner to hear the submissions and further submissions. We have had the benefit of reading the Commissioner's report and recommendations and although, in the reference made by Peter and Kaye Margaret Hodge, there is some criticism of his conduct of that hearing, that criticism was expressly abandoned at the hearing before us. Some other matters in this reference were also abandoned after the hearing had commenced and the reasons for this will be referred to shortly.

Change 24 was preceded by Change 16 which, after it had been adopted by the respondent, was found to be defective in that it did not provide for some necessary changes to the City section of the transitional Plan, which we will now call the operative Plan. This meant that Change 16 had to be withdrawn and Change 24 was promulgated to replace it. There were no other material changes in the second instrument.

The Changes were promoted by the respondent to provide for the development of an agribusiness centre and the relocation of the Canterbury Agricultural and Pastoral Association's showgrounds and the Canterbury Saleyards operation to a new site in Curletts Road. This site, which is more particularly described as containing approximately 120 hectares being part lot 1 DP9212, part lot 1 DP9987 and all the land in Certificate of Title volume 18K folio 1028 (Canterbury Registry) and Section 1 SO 14287 and all the land in Certificate of Title volume 30F folio 851 (Canterbury Registry) is bounded by Curletts Road to the east, Wigram Road to the north-west, farmland to the south-west and the Heathcote River to the south. Adjoining the Heathcote River is the residential suburb of Hillmorton.

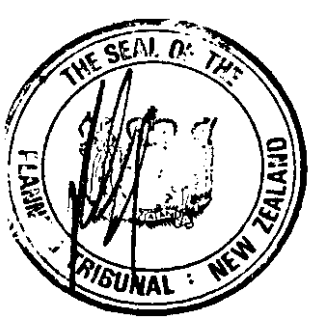
The site, hereinafter referred to as the "appeal site", is presently owned by the respondent. It is to be sold to the Canterbury Agricultural and Pastoral Association who will develop and maintain it in accordance with a concept plan that requires the preservation of quite a large area as a flood retention basin and extensive landscaping.

More will be said about the merits of Change 24 later. In the meantime we return to the reasons for the abandonment of some of the matters in the reference by Peter and Kaye Margaret Hodge.

Before doing this, we record that for convenience, we will now refer to both references as appeals - see Clause 15 of the First Schedule to the Act. We will also refer to Peter and Kaye Margaret Hodge as "the Hodges," to the Canterbury Agricultural and Pastoral Association as "the Association", to Canterbury Saleyards Limited as "the Saleyards" and to the respondent as "the Council".

In their appeal as filed originally the Hodges sought to have Change 24 cancelled for the following reasons.

> *"5.1 The applicant opposes the proposed plan change no. 24 for the following reasons:-*
>
> *5.2 The Council by adopting the recommendations of its Commissioner and the environmental committee:*
>
> *5.3 Failed to take any or adequate account of the proposed change on the integrity of the Transitional District Plan and the authorisation of uses of land in the Rural 1 and 2 zones already adequately allowed and planned for elsewhere in the area covered by such plan.*
>
> *5.4 Failed to take any or adequate account of extent to which the proposed change conflicted with achievement of the purposes of its Act.*
>
> *5.5 Failed to take any or adequate account of the extent to which the proposed change did not comply with or conflicted with a*



requirement[s] of Section 32 of Resource Management Act 1991.

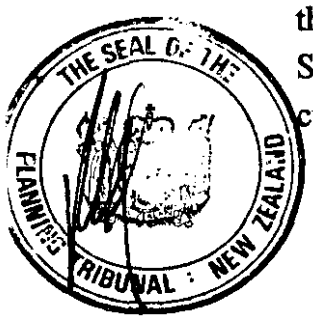
5.6 Reasons relating to the hearing before the Commissioner - no longer relevant."

In its appeal, the Association sought provision for subdivision - this having been refused by the Commissioner.

We began hearing these appeals on 4 November 1995 and for the next two and a half days, the hearing was devoted largely to matters of merit although jurisdictional issues were also referred to.

One of the matters of merit that had been receiving considerable attention concerned an addition to a schedule of protected uses in the Paparua section of the operative Plan. This addition specified the activities that would be permitted in the agribusiness centre. The Hodges, who own industrially zoned land at Halswell Junction Road and at Main South Road in a subdivision known locally as the "Produce Park", were particularly concerned about two of these constituent activities namely; *(h) "Administration and professional offices associated with the provision of services to the agricultural and horticultural industries", and (i) "Businesses involved in the sale of goods and services related to the agricultural and horticultural industries".* Most of the other constituent activities and indeed in one form or another probably all of them, take place on the present Saleyards site at the corner of Deans Avenue and Blenheim Road or on the Association's showgrounds site at Lincoln Road. The Hodges considered that the activities specified in (h) and (i) should not be permitted on the Curletts Road site because they own suitably zoned land on which these activities could be established.

On 24 June 1995, after the Hodge's appeal had been filed, the Council publicly notified a review of its operative Plan. In this review provision is made for the proposed agribusiness centre on the appeal site but for reasons that need not trouble us now, the constituent activities have been specified in a materially different way from the way they were specified in Change 24. Without going into the details the review would limit the constituent activities more specifically to those associated with the activities and services of the Association and the Saleyards or other organisations carrying out the same or similar functions as those currently undertaken by the Association and the Saleyards.



It was plain from the evidence we had already received, particularly that of Mr M F Vernon, the Association's Chief Executive, that its development intentions were different from those provided for by the review and as we have already said, the differences were material.

The Council had lodged submissions on the review seeking to remedy the inconsistencies between the two instruments. We were not clear whether the Association or the Saleyards had also lodged submissions but we understood the Hodges had lodged a submission in opposition to the relevant provisions and would probably lodge a further submission in opposition to the Council's submissions. Consequently, one of the principal merit issues that we were being asked to determine in these proceedings would arise again under the review.

In these circumstances we questioned whether we should continue with this hearing.

After an adjournment to consider the position, Counsel for all parties filed a memorandum the material parts of which are contained in paragraphs 2, 3 and 4 which are set out below:

> 2. *In those circumstances counsel are agreed and inform the Tribunal:*
>
> a. *The Council, the Saleyards, the Showgrounds and Bayer (New Zealand) Limited do not seek approval of the change in the Transitional District Plan known as Change Number 24 (the Change) and the subject of this reference in terms different from those in the Review Plan other than and except the 150 metre Buffer Zone incorporated in the Change adopted by the Council for the protection of Bayer (New Zealand) Limited.*
>
> b. *Hodge withdraws and abandons their reference except in so far as it seeks relief based upon:*
>
> i *The adequacy of public notification by the Council of the Change.*

ii *The adequacy of compliance by the Council with the obligations imposed upon it by Section 32 of the Resource Management Act before or upon notifying the Change.*

For the avoidance of doubt Hodge does not rely on the merits or lack of merits or adequacy of any analysis or report which is held otherwise to comply with the requirements of section 32 of the Resource Management Act 1991 or the general merits or adequacy for the purposes of the Resource Management Act 1991 of the report of the Commissioner of 12 May 1995 or the decision of the Council adopting it.

3. *The Council, the Showgrounds and the Saleyards record that they will contend (inter alia) that, if necessary to their argument, the Tribunal can and should exercise its powers to carry out an assessment for the purposes of section 32 of the Resource Management Act 1991 and for this purpose it is agreed that the evidence given and the balance of the evidence before the Tribunal may be brought to account and the further evidence may be taken as read.*

4. *All parties shall have the right to take such action as they may be advised under the Resource Management Act 1991 or otherwise except that Hodge shall take no action to prevent or delay the implementation of such rights of the Showgrounds or the Saleyards or both as they may have as a result of this Reference or any appeals therefrom and in particular will consent to any subdivision or give such other consent as may be necessary to enable the Saleyards to relocate to the site in Curlett's Road the subject of the Change in accordance with such provisions of the Change (if any) as they exist after determination of the Reference and any appeals therefrom.*

Referring to paragraph 2(b)(i) we also record that the Hodges' appeal did not raise the adequacy of public notification of the Change nor did they raise this matter in their original submission. It was raised for the first time at the hearing of this appeal but since it is a jurisdictional threshold issue we felt it necessary to allow them to continue with it. It is one of the matters we will consider later in this decision. In accordance with paragraph 3 of the memorandum, we received the balance of the evidence supporting Change 24 and we will also refer to this evidence later.

We now turn to deal with the two jurisdictional issues referred to in paragraph 2(b) of the memorandum. We will deal with the section 32 matter first.

The Section 32 Assessment

One of the grounds in the Hodges' appeal is that Change 24 *"Failed to take any or adequate account of the extent to which the proposed change did not comply with or conflicted with a requirement(s) of Section 32 of the Resource Management Act 1991."* We were never quite sure what was meant by this allegation but in the end Mr Atkinson made it reasonably clear that the Hodges' case was that, in effect, no section 32 assessment was ever lawfully carried out.

Section 32 (3) of the Act provides that a challenge to any objective, policy, rule or other method on the ground that subsection (1) has not been complied with, may be made only in a submission made, relevantly for present purposes, under the First Schedule. Originally, this sub-section referred to a submission made under Clause 6 of the First Schedule, but it was amended in 1993. The effect of this amendment will be considered shortly.

In this case, the Hodges did not make such a challenge in their submission on Change 16 or later, on Change 24. In their submission they referred to matters of merit only and there was no mention at all of the section 32 assessment.

However, in a document dated 10 February 1995 and headed "Submission of Peter and Kaye Margaret Hodge" which was presented to the Commissioner at the

hearing of submissions, there are references to other evidence about alternative sites and then this statement appears,

> *"We submit that this particular comparison of the Islington site is inadequate in terms of addressing the requirements of Section 32 of the RM Act. We believe that it is necessary to properly quantify the comparison and reach a conclusion based on the relative merits of the sites."*

It will be seen that even at this stage the Hodges were not contending, as their Counsel did before us, that no Section 32 assessment had been lawfully carried out.

Whether the Hodges are now precluded from making such a challenge became an issue before us because both Mr Hearn and Mr Davidson submitted that section 32 (3) prevents them from doing so at this late stage. In reliance on the document of 10 February 1995, Mr Atkinson submitted that the Hodges had challenged the section 32 assessment at an appropriate time and could therefore continue to do so now.

To support this part of his argument, Mr Atkinson sought to persuade us that for the purposes of section 32 (3) a submission is not confined to a formal submission made pursuant to Clause 6 of the First Schedule to the Act. He pointed out that in 1993 Parliament removed the reference to Clause 6 in this subsection and he suggested that this supported his principal argument based on the definition of the word "submission" in section 2 (1) of the Act which reads as follows:

> *"...means a written submission and, in relation to the preparation or change of a policy statement or plan, includes any submission made under Clause 8 of the First Schedule in support of or in opposition to an original submission".*

As originally enacted this definition read as follows:

> *"...means a written submission and, in relation to the preparation or change of a policy statement or plan, includes any submission made under Clause 6 of the First Schedule in support of or in opposition to an original submission".*

The amended definition was included in the 1993 Amendment Act that amended section 32 (3) and also amended the First Schedule in several ways including separating submissions originally made, which are now provided for in Clause 6, from further submissions in support of or in opposition to those submissions, which are now provided for in Clause 8.

Mr Hearn and Mr Davidson submitted that far from supporting Mr Atkinson's principal submission these amendments run counter to it. Mr Hearn, in particular, submitted that the 1993 amendment to section 32(3) was necessary only because reference to a submission under Clause 6 would be inadequate if, for example, a person wanted to file a further submission in support of or in opposition to an original submission which contained a challenge to section 32(1) procedures. This, so he submitted, is why section 32(3) now refers only to a submission under the First Schedule.

Mr Atkinson also submitted that the definition of the word "submission" in section 2(1) of the Act does not preclude the use of one of the common meanings of that word, namely a proposition put in legal proceedings. Thus, so the argument went, the Hodges' 'submission' to the Commissioner was a submission for the purposes of section 32(3). However, even if that is right as we said earlier, that so-called submission did not challenge the section 32(1) procedures in the way they were challenged at the hearing of these appeals. In any event we do not need to rely on that to rule that the Hodges are now precluded from making their challenge.

We accept the submissions made by Mr Hearn and Mr Davidson that, for the purposes of section 32(3) of the Act, a challenge to section 32 (1) procedures can only be made in a formal submission under the First Schedule. We agree with them about the effect of the 1993 amendments. We also agree that the document of 10 February 1995 was not a submission for the purposes of section 32 (3). In fact it contains a mixture of evidence and assertions made largely in opposition to other evidence anticipated to be given before the Commissioner.

In this regard we point out too, that although Clause 8B of the First Schedule requires a local authority to hold a hearing "into" submissions and to give every person who made a submission or further submission and who requested to be heard, notice of that hearing, the procedure for conducting such a hearing is contained in sections 39 to 42 of the Act. Section 40 expressly provides that every person who made a submission and stated a wish to be heard may *"...speak (either*

personally or through a representative) and call evidence." These provisions indicate to us that when used in section 32 (3) the word "submission" was intended by Parliament to refer to the formal submission in the prescribed forms under Clauses 6 and 8 of the First Schedule.

Before leaving this issue, we should also say in case further reliance is placed on it in the future, that the conclusion we have just reached is consistent with the Tribunal's decision in Leith v Auckland City Council [1995] NZRMA 400. It was submitted at our hearing that in that case the Tribunal had allowed a referrer to raise matters concerning a section 32 assessment for the first time in his reference. At page 412, after referring to the 1993 and 1994 Amendment Acts, the Tribunal said this:

> *"However the effect of all versions of s.32 (3) is that a challenge to a proposed district plan on the ground of failure to comply with the duties imposed by s.32 (1) may be made only by a submission under the First Schedule.*
>
> *Evidently Mr Leith misremembered his submission when he answered in cross-examination. Among the numerous allegations contained in his submission which forms the basis of his reference identified as Appeal RMA 229/94 is the bald claim "neither has s.32 of the RMA been complied with." Although no particulars were given, and although the reasons for appeal cited in the reference do not refer to that point, we accept that his challenge to the proposed district plan in these proceedings on that ground is within the limited scope allowed for that challenge by s.32 (3)".*

In this passage we take the Tribunal to be saying, that because Mr Leith challenged the section 32(1) procedures in his original submission under the First Schedule, it was open to him to continue that challenge at the hearing of his reference.

For the foregoing reasons it is our judgment that it is not open to the Hodges to challenge Change 24 on the ground that section 32 (1) was not complied with.

However, even if we are wrong about that, we are satisfied the Council did comply with its obligations under that sub-section. Evidence on this matter was given by Miss Clare Wooding, a planner employed by the Council, and by Mr Peter Hodge,

one of the appellants. Miss Wooding produced as Exhibit "3" a bundle of documents taken from the Council's files. These show that on 17 March 1994 the Council's Environmental Committee considered the then proposed Change 16 at a meeting at which a representative of local residents had been invited to speak.

At this time, the Committee had before it an incomplete section 32 assessment. This had been prepared by a consultant planner. The parts requiring completion related to benefit and cost assessments of alternative sites for the proposed development and of an alternative way of providing for the Association's activities and the Saleyards activities separately. The document the Environmental Committee had before it also indicated that in these two respects details would be pre-circulated before a full Council meeting or tabled at a full Council meeting.

The Environmental Committee's report to the Council made the following recommendation:

> *"That pursuant to Clause 5 of the First Schedule of the Resource Management Act 1991, the Council resolve to publicly notify proposed Change No. 16 to the Transitional District Plan, Paparua Section."*

In the body of the report it is stated that following spoken and written submissions from the representative of the local residents particularly on the question of potential smell nuisance, the Chairman of the Committee commented on the possibility of providing an air extraction system in the livestock buildings. The report then stated:

> *"It was noted that this aspect would be included in the Section 32 assessment to accompany the proposed change. Section 32 imposes a duty upon the Council to consider alternatives and assess the benefits and costs of any proposed objective, policy or rule adopted to achieve the purposes of the Resource Management Act 1991."*

Later the report stated:

> *"Several members expressed the view that the Council via the officers should provide a response to the residents' concerns as a lead up to any hearing held. In this regard it was noted that appropriate assistance would be given*

by staff to residents and further that the Section 32 assessment would need to specifically address the matters of concern raised by the residents.

Immediately before the recommendation, the report stated:

"In response to a request, officers undertook to provide details of the Section 32 assessment to the Spreydon/Heathcote and Riccarton/Wigram Community Boards."

The explantation section in the draft of proposed Change 16 that had been considered by the Environmental Committee contained this paragraph:

"The Council has also prepared an outline of the Resource Management issues that may arise through implementation of the Change. This outline is available from the City Council. It is anticipated these issues will be expanded and clarified following the hearing of submissions and will provide information to be incorporated in a Section 32 Assessment. (Duty to consider alternatives, assess benefits and costs.)"

On 7 March 1994 a Full Court of the High Court delivered its judgment in Countdown Properties (Northlands) Limited v Dunedin City Council [1994] NZRMA 145. In this judgment the Court held that the word "adopting" in section 32 (1) of the Act involves a local authority making an objective, policy or rule its own and that the assessment required by that sub-section had to be made before this took place. It was held to be otherwise in the case of a privately requested plan change.

Before this judgment there had been some doubt about when the section 32 (1) obligations had to be fulfilled and we think it is fair to say, on the basis of the evidence discussed so far, that on 17 March 1994 these doubts still existed so far as the Environmental Committee was concerned. Some committee members obviously thought, as did those who had drafted proposed Change 16 that the section 32 assessment could be completed at a later time. On the other hand there are indications in the documents of an expectation that the assessment would be completed before the full Council meeting which was scheduled for 28 March 1994 when it was intended that the Council would adopt the Change for public notification. We should add that in addition to the uncompleted section 32

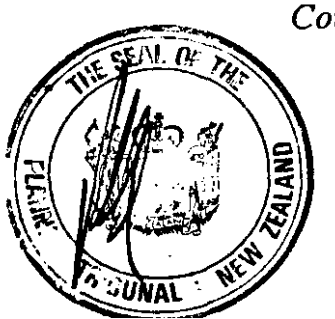
assessment there was also a completed traffic impact assessment that had also been carried out by consultants.

On 24 March 1994, a little over two weeks after the judgment in the Countdown case had been delivered, the Council's Manager Administration issued an internal memorandum to all councillors, the Environment Administration Manager and the Environmental Policy and Planning Manager. The material part of this memorandum reads this way:

> *"COUNCIL MEETING 28 MARCH 1994*
>
> *7TH ORDER OF THE DAY*
>
> *REPORT OF THE ENVIRONMENTAL COMMITTEE*
>
> *CLAUSE 2 PROPOSED PLAN CHANGE NO. 16, AGRIBUSINESS CENTRE - CURLETTS ROAD.*
>
> *Further to the indication given in the Section 32 Assessment (pp9 & 12) being the attachment to the above clause, that further details would be pre-circulated for inclusion before the meeting, the relevant information is now attached."*

The relevant information included the pages needed to complete the section 32 assessment. Miss Wooding said that she was able to conclude that this material was before the councillors because she found the memorandum in the order paper for the Council meeting on 28 March 1994. A perusal of the relevant documents shows that the section 32 assessment was then complete.

Another document produced by Miss Wooding as Exhibit '4' was a copy of Change 16 as notified. On the second page of the explanation, there is a material change from the document that was before the Environmental Committee. The paragraph commencing *"The Council has also prepared an outline..."* has been replaced by a new paragraph that reads *"The Council has also prepared a Section 32 Asessment (Duty to consider alternatives, benefits and costs) which is available from the City Council."*



Initially in his evidence in chief, Mr Hodge said that he could not recall whether the copy of Change 16 that he obtained from the Council after he had seen the public notification of that change referred to a section 32 assessment, but he went on to say that even if it had it is doubtful it would have meant anything to him at that time. In cross-examination Exhibit '4' was put to Mr Hodge and after comparing it with the copy of Change 16 that he had obtained he confirmed that they were the same and that the explanation contained advice to the reader and therefore to him, that the section 32 assessment was then available from the Council.

On this aspect of the matter it was Mr Atkinson's principal submission that there was no evidence that the Council had actually made the section 32 assessment its own. Even if it could be said that it was complete before the Council meeting on 28 March 1994, in the absence of such evidence he submitted that we should hold that the obligations imposed by section 32(1) of the Act were never complied with. We should add that it was agreed that if those obligations were met then the fact that they were not carried out again before adopting Change 24 is of no moment.

It is true that we do not have direct evidence about what took place at the full Council meeting on 28 March 1994. However on the balance of probabilities we think it is safe to conclude that because the completed section 32 assessment was in the hands of the councillors at the time of and for the purpose of that meeting it was part of the material upon which they decided to accept the Environmental Committee's recommendation to publicly notify and thereby adopt Change 16. If, by then, it was still the view of some councillors and those advising them that it was unnecessary to complete the section 32 assessment before that meeting there would have been no point in the administration manager going to the trouble of pre-circulating the balance of the assessment which comprised several pages and contained detailed information. It is simply not credible that this would have been done if it had still been thought that it was unnecessary. In the absence of clear evidence to the contrary and there is none, we conclude that before it formally adopted Change 16, the Council complied with its obligations under Section 32 (1) of the Act.

Finally, on this aspect of the matter we should say that in our own evaluation of the merits of Change 24, we have had the benefit of reading the section 32 assessment. This has enabled us to satisfy ourselves, on an uncontested basis,

about all the matters in section 32 (1) of the Act. We will have more to say about this later.

For all the foregoing reasons we have reached the conclusion that the Hodges' challenge to the section 32 (1) procedures must fail.

Public Notification

The other procedural issue raised belatedly by the Hodges concerned the public notification of Change 16 and later of Change 24. We say belatedly because as we recorded earlier, the Hodges did not take this point in their original submission under the First Schedule or in their presentation before the Commissioner or in their reference to this Tribunal. In view of the fact that it was their counsel's submission before us that the public notification was so defective that we should require the Council to begin again, it is surprising that they waited until this hearing to raise the matter.

Clause 5 (1) of the First Schedule requires a local authority who has prepared a proposed policy statement or plan to publicly notify it. Clause 5 (2) states

> *"Public notice under subclause (1) shall state -*
> *(a) Where the proposed policy statement or plan may be inspected; and*
> *(b) That any person may make a submission on the proposed policy statement or plan; and*
> *(c) The process for public participation in the consideration of the proposed policy statement or plan; and*
> *(d) The closing date for submissions; and*
> *(e) The address for service of the local authority."*

Section 2 of the Act provides that public notice means, relevantly:

> *"...a notice published in -*

(i) *One or more daily newspapers in the... district of the local authority" or*

(ii) *One or more...newspapers that have at least an equivalent circulation in that...district to the daily newspapers circulating in that...district, -*

together with such other public notice (if any) as the...local authority...thinks desirable in the circumstances..."

"Publicly notify" and "public notification" have corresponding meanings.

In this case nothing turns on the definition and it is common ground that the public notification of Change 16 and of Change 24 complied with all the requirements of Clause 5 (2) of the First Schedule.

In the case of Change 16 which was publicly notified in the Press on 16 April 1994, the relevant part of the notification reads as follows:

"The Christchurch City Council has prepared Change No. 16 to the Christchurch City Transitional District Plan. The nature of the change is as follows:

The Change provides for the development of an agribusiness centre and related activities. It would effectively provide for the relocation of the Canterbury Agricultural and Pastoral Association Showgrounds and the Canterbury Saleyards to a new site in Curletts Road."

In the case of Change 24 which was publicly notified in the Press on 2 July 1994, the relevant part of the notification reads as follows:

"This Change amends both the Paparua and City sections of the Plan in order to provide for the Agribusiness Centre. It replaces Change No. 16 which was publicly notified in the Press on April 16 1994, but was subsequently withdrawn."

For present purposes it is agreed that we can read both public notifications together to decide whether there has been adequate notification. It is also accepted by Mr Atkinson that now that Change 24 is to be limited in its scope in the ways earlier

discussed adequacy of the notifications is to be judged accordingly. Earlier, it would have been part of his submissions that the notifications were not adequate because they did not refer to any new or additional commercial or industrial activities as contemplated by the schedule of constituent activities referred to earlier in this decision. However these are no longer relevant.

Nevertheless, it was Mr Atkinson's submission that the use of the words "agribusiness centre" did not sufficiently describe the proposal even for present purposes because those words are not commonly understood in New Zealand language. Then too the references to the activities of the Association and the Saleyards did not themselves limit these to the activities currently engaged in by those organisations and both, or more particularly the Association could decide to conduct additional commercial or industrial activities in the future.

Mr Atkinson reminded us that one of the dictionary meanings of "notice" is

> *"an intimation or warning, esp. a formal one to allow preparations to be made". (See the Concise Oxford Dictionary).*

It is interesting to observe too however that the primary meaning of the word notice in the same dictionary is *"attention, observation"*. The secondary meaning is *"a displayed sheet etc. bearing an announcement or other information.*

The word "notify" is given the meaning

> *"inform or give notice to or make known, announce or report".*

Mr Atkinson also referred to several cases about notification under the Town and Country Planning Acts of 1953 and 1977. In particular he relied on Cheyne Developments Limited v Sandstad 11 NZTPA 321 in which Chilwell J discussed the relevance provisions of the Town and Country Planning Act 1977 which required a change to be publicly notified and also required public notification of an explanation of the change. In this judgment the learned judge also referred to a decision of the Tribunal in Re Mt Wellington Borough Council, Decision A 4/79. In that case the Tribunal confirmed that Section 52 (2) of the 1977 Act required public notification of two things, namely the change and an explanation of it.

Both cases were concerned specifically with the question whether the explanations were adequate. In the case before the Tribunal it was held that the explanation

was not adequate because it was meaningless. In the Cheyne Developments Limited case the explanation was held to be adequate because persons likely to be affected were given sufficient information to encourage them to look at the change.

Mr Hearn submitted that the cases under the former legislation are no longer of assistance because Clause 5 of the First Schedule to the Resource Management Act 1991 does not require public notification of an explanation of a change. Both he and Mr Davidson drew attention to the marked differences in the present legislation between the requirements for notifying a plan or a change and for notifying an application for resource consent. In the case of the latter, Section 93 (2) requires a prescribed form to be used. Where it is to be served it has to contain sufficient information to enable a recipient, without reference to other information, to understand the general nature of the application and whether it will affect him or her. Where it is publicly notified it is also to include the location, as it is commonly known, of the proposed activity.

Having regard to these provisions the Tribunal has held in more than one case that the public notification of an application for resource consent has been inadequate, see for example, Pro Jet Adventures and Others v Queenstown Lakes District Council 2 NZRMA 353, and more recently J Barrie and Others v Central Otago District Council and Otago Regional Council Decision No: C70/95. Earlier cases under the previous legislation have been relied on by the Tribunal in arriving at these decisions.

Concerning plans and plan changes there appears to have been a change in Parliament's intentions. This is not altogether surprising in a piece of reforming legislation. As Mr Hearn pointed out, considerable difficulties can arise when an attempt is made to adequately explain a major review of a plan or a major plan change both of which could have widespread ramifications. He adhered firmly to the submission that if there was no description of a change other than its numerical description this would suffice, provided all the requirements of Clause 5 (2) were fulfilled. On the other hand Mr Atkinson submitted that if this were so no reader of the public notification of any change would be able to decide whether it was necessary to look at the instrument so notified and this could hardly have been Parliament's intention.

We think there is force in Mr Atkinson's submission and we are not prepared to hold that when publicly notifying a change a council can fulfil its obligations solely in the way suggested by Mr Hearn. We think fairness, in an administrative

law sense, requires something more - see the judgment of the Court of Appeal in Ronaki Limited v No.1 Town and Country Planning Appeal Board and Others [1977] 2 NZLR 174 and in particular at pages 181 to 183 where the Court discussed the circumstances in which it might be thought, in the interests of fairness, that compliance with the statutory procedures may not suffice.

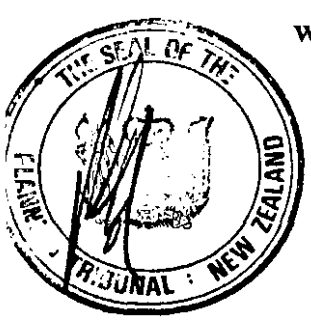
Although an explanation is no longer required we think some description beyond simply a numerical one is necessary. We think too, as Mr Atkinson also submitted, that such a description must be fair and accurate and certainly not misleading. However it does not have to be detailed. Nor do we think it has to fulfil the requirements of the former legislation. This indeed, may be the reason for the reform. What amounted to a sufficient explanation was sometimes a matter of considerable controversy, as the cases earlier referred to show.

In this case reading the two public notifications together and bearing in mind the now modified nature of Change 24, we are entirely satisfied that they would have adequately conveyed to the ordinary reasonable reader a sufficient description of the nature of the Change. It is not necessary to rely solely on the use of the words "agribusiness centre" even though the word "agribusiness" is referred to in most dictionaries we have consulted including the New Zealand edition of the Collins Dictionary as far back as 1982. The public notification of Change 16 also referred to the activities of the Association and the Saleyards and their relocation. It also stated the general location of the proposed site. If people having an interest in those matters wanted to know more about what was proposed we think the descriptions provided were sufficient to alert them to the fact that they should go to the appropriate place and examine the Change for themselves.

We conclude that there is no substance in the notification point taken by the Hodges.

The Merits of Change 24

Because these are now substantially uncontested except, in part, for one matter to which we will refer to later, we can cover these matters relatively briefly.

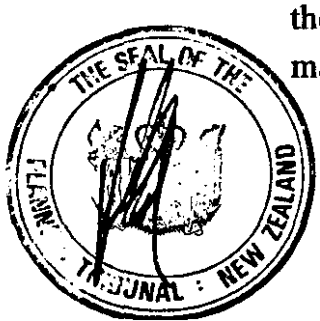


Details of the proposals are contained primarily in the evidence of Mr Vernon to whom we have already referred, and the evidence of Mr S D Martin, a director of the Saleyards. To the extent that the evidence of these two witnesses referred to relocation of both organisations it is of course still relevant. To the extent that their evidence referred to proposals to establish other activities such as those of particular concern to the Hodges we have put that evidence to one side. The merits or otherwise of those proposals will be for another day. In making our evaluation we want to make it perfectly clear that those future intentions have not carried any weight with us at all.

On the evidence we heard we are in no doubt at all that the now modified Change 24 should proceed because it will fulfil the purpose of the Act. The Association's present site is no longer appropriate for its activities, nor is the Saleyards site. The latter, in particular, is quite inappropriate from the point of view of adverse affects on amenities. Both have problems with traffic access as Mr P T McCombs, a traffic engineer called in support of the Change, was able to demonstrate. On the other hand the site at Curletts Road is well situated for traffic access even though part of it is subject to a designation for a future motorway extension. The evidence is that this designation, for which Transit New Zealand is responsible, will not affect the area of proposed development even if it is moved from its present position, and even if there is a need to make provision for crossing the motorway extension in the future.

The evidence of both Mr Vernon and Mr Martin also demonstrates sound reasons for co-locating the activities of both the Association and the Saleyards. There are features of each that are common to both particularly in regard to the services provided to the farming community.

Mrs Susan Robson, a consultant planner, was called by the Council to give evidence in support of Change 24. Her evidence was given before the agreement was reached to modify the Change, but it still provides a useful assessment of the Change against the requirements of Section 5 of the Act and some of the principles contained in Section 7. It was Mrs Robson's opinion that none of the principles contained in Section 6 are relevant in this case and we agree. The principles in Section 7 to which Mrs Robson referred were those contained in paragraphs (b), the efficient use and development of natural and physical resources; (c) the maintenance and enhancement of amenity values; (f) maintenance and



enhancement of the quality of the environment and (g) finite characteristics of natural and physical resources.

Mrs Robson also referred to the inadequacies of the present Association and Saleyards sites, although in respect of the latter she was not entirely correct when she said that this site could be redeveloped in ways that would give rise to benefits for the city generally. This was because, as she acknowledged at the hearing, the future use of this site is the subject of proceedings before this Tribunal in respect of Change 14. Be that as it may, the planning is complete so far as the Association's site is concerned. Change 32 is operative and will enable the land vacated by the Association to be developed mainly as residential for the general benefit of the city. The existing rugby league ground will remain as will the camping ground. There could also be a new business park.

On environmental effects, Mrs Robson addressed liquid effluent disposal which can be satisfactorily achieved through the city sewer system; noise, which is not likely to be a problem given the proximity to major arterial routes; separation of activities from the Hillmorton residential area; odour, which will also be adequately catered for by the requirements of the Change; traffic to which Mr McCombs had already referred; and visual impact which will be mitigated by extensive landscaping requirements.

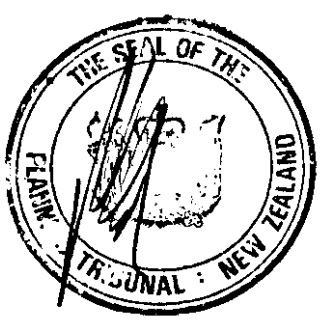
It was also Mrs Robson's opinion that Change 24 accords with the relevant provisions of the proposed regional policy statement. This has reached the stage of appeals to this Tribunal but we were not told of any that might be relevant here. The Change recognises the importance of the soils of the region as the policy statement requires, by ensuring that the physical development occurs on areas of lower quality soils and the better soils are used for demonstration cropping and activities of that kind, if and when they are permitted. The chapter on water quality in the proposed regional policy statement is also recognised by the Change and this is a feature of the site when compared with other alternative sites that were considered in the course of the section 32 assessment.

So far as that assessment is concerned Mrs Robson expressed reservations about the need to assess alternative sites, as did Mr M J G Garland, a planning consultant called by the Association and the Saleyards. Reference was made to the Tribunal's decision in GUS Properties Limited v Marlborough District Council Decision No: W75/94. In that case the Tribunal considered that alternative sites were not

matters to which regard need be had in terms of section 32 (1). Nevertheless both in that case and in this case several alternative sites were considered and the section 32 assessment makes it clear that apart from one at Islington, the site of a now disused freezing works, none measured up to the appeal site when benefits and costs were assessed. So far as the Islington site is concerned, while from a traffic point of view it was as good as the appeal site, it contains some substantial but now disused buildings that would need to be demolished and it does not present nearly such an attractive location as the appeal site.

On the matter of alternative sites we are inclined to think that the reservations expressed by both the witnesses just referred to and by the Tribunal in the earlier case have substance. Because it is unnecessary to do so we decline to determine the matter finally but we are attracted to Mr Garland's reasoning contained in his evidence at page 9 where he said this:

> *"... Section 32 is there primarily to ensure that any restrictions on the complete freedom to develop are justified rather than the converse. To put it more succinctly it is the 'noes' in the plan which must be justified, not the 'Ayes'.*
>
> *Those with a converse view would have it that this plan change is in effect a project to establish an agribusiness complex and that its very establishment will affect other people's abilities to provide for their social economic and cultural wellbeing. They would have it that provision for such a project needs to be justified in terms of alternative sites, benefits and costs. To have such a view, I believe, shows a lack of recognition of the essential difference between a resource consent and the plan change. While in a sense the plan change could be said to provide for a project, essentially it does this only as a consequence of providing a set of constraints on the effects of activities in order to achieve the purpose of the Act: it provides for a project by not putting in place controls which would prevent it. If development occurs then its effects will be so contained that the purpose of the Act is achieved.*
>
> *It is interesting to compare the requirements of Section 32 with those of Section 171 which deals with "Requirements" for public works. These are, of course specific projects as are applications for resource consent. When considering such a "Requirement" a territorial*



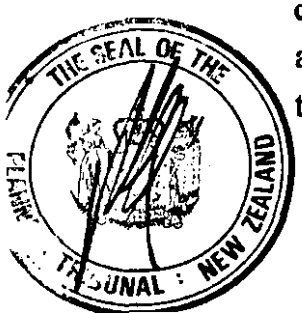
authority must consider "whether adequate consideration has been given to alternative sites, routes or methods of achieving the public work or project work". I believe this has to be quite different from the duties under Section 32 which requires consideration of alternative methods of achieving the purpose of the Act and an assessment of the benefits and costs of these.

It is interesting, also, to compare the requirements of Section 32 with those in the Fourth Schedule to the Act, which outlines the matters to be included in an assessment of effects on the environment which must accompany every application for resource consent. Where it is likely there will be a significant adverse effect on the environment a description is required of any possible alternative locations or methods for undertaking the activity.

These comparisons, I believe, make it all the more obvious that alternative sites for a plan change are not intended to be part of any Section 32 analysis".

In answer to questions from the Tribunal Mr Garland agreed that the second paragraph quoted above could also include the proposition that a change in particular could be seen as removing controls which might prevent a development.

As we said before, alternative sites were considered in the section 32 assessment in this case but we are inclined to the view that this was unnecessary. It was also unnecessary to consider the concerns of the residents in that process - a matter that was mentioned in the Environmental Committee's report - because, at least initially, section 32 does not contemplate a process in which the public is entitled to participate. It provides, as Mr Hearn submitted, for a kind of auditing to which all objectives, policies and rules are to be subjected before they are adopted. It is only after adoption that the public process begins and it is then that potentially affected residents have a full opportunity to test the merits of a change and the section 32 assessment through the submission process. But we also agree with the Tribunal in the Leith case that a bald assertion that there has been a failure to comply with section 32 is not enough. We agree too that if the real point of challenge is the correct weight to be given to certain values, the practical way to advance this is to show that the relevant provisions should be replaced by others that would more effectively serve the statutory purpose.



Apart from alternative sites the section 32 assessment in this case also considered other forms of alternatives such as providing for the activities of the Association and the Saleyards separately, and the "do nothing option". That is to say the option of having no objective for creating a site for an agribusiness centre. These were assessed and rejected in favour of the Change.

So far as we can find there is nothing in the section 32 assessment to show that the Council had regard to the alternative means of a resource consent application but in her evidence, Mrs Robson said that in her opinion the scale of the proposal and its time-frame were such that the resource consent procedure would be totally inappropriate. Also, in the case of new tenants, consent to establish on the site would be required. Because this matter of new tenants is no longer part of our consideration, except of course for the Saleyards as a principal tenant, it is not necessary for us to consider this alternative method in any detail although it still has some validity so far as the Saleyards is concerned. We doubt there is much force in the time factor argument Resource consent applications do not necessarily take any longer than plan changes and it has been held in other cases - see NZ Rail v Marlborough District Council [1994] NZRMA 70 for example, that the Act does not exhibit a preference for one over the other. However, strategically a resource consent would probably not be a satisfactory method in this case because it is quite plain that relocation of both the Association's activities and the Saleyards activities have consequences for other areas of the city and should be seen in the light of Changes proposed for those areas as well, even if some of them are still the subject of controversy. Then too, the total area of the appeal site which is approximately 120 hectares still has to accommodate activities other than those specifically provided for in Change 24 and it would be difficult to do this in the context of an application for resource consent for part or parts of the total area.

Overall, we are satisfied that the modified proposal should be provided for by way of objectives, policies and rules, through a plan change.

Another witness called by the Association and the Saleyards was Mr M R Cummings who is a registered valuer. His evidence is not strictly relevant now but it was interesting to note, and we wish to record, that he was of the opinion after having done quite a detailed analysis that the rate of uptake of industrially zoned land in the Hornby, Islington, Sockburn, Middleton and Wigram areas, would not be significantly affected even if the original proposals in Change 24 were to

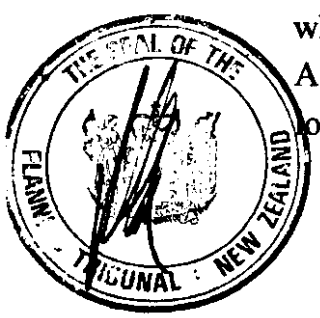
proceed. His conclusion was that the present rate of "absorption", as he called it, is 48.7 hectares over a four year period. Therefore over a period of 16.65 years the remaining land bank in those localities would be fully absorbed and by adding a further 10 hectares - which was the area of the proposed commercial/industrial activities - to that land bank, absorption would be complete in 17.4 years, that is less than one additional year. This, Mr Cummings concluded, illustrated a nil effect of the agribusiness centre on industrial land values and the land bank.

Of course, Mr Cummings was not cross-examined and nor was any evidence called to refute his conclusions, but if he is right this would be powerful evidence favouring a conclusion that the establishment of a full agribusiness centre on the appeal site would not have the kind of adverse effects that the Hodges are concerned about. Again, however, for the purposes of making our determination in these proceedings we have put this opinion to one side.

Having regard to the evidence discussed earlier we are satisfied that Change 24 as modified accords with the principles in section 7 (b), (c), (f) and (g). For this reason and also because it will enable people and the community to provide for their social, economic and cultural wellbeing while avoiding, remedying or mitigating adverse effects and allow for the reasonably foreseeable needs of future generations, the Change also accords with the purpose of the Act.

As Mrs Robson reminded us and indeed as the two witnesses for the Association and the Saleyards also pointed out, the activities of these two bodies have community-wide significance. They provide important social, economic and cultural services to the city and beyond and in our judgment relocating them together on the appeal site will promote the sustainable management of the physical resources of that site and, so far as the Association's present site is concerned, that site as well. We prefer to say nothing more about the Saleyards site although, at least the adverse effects caused by its present activities will be avoided if Change 24 proceeds.

We come finally to the Association's appeal. As we said earlier the relief sought is to provide for subdivision but now, only for the kind of subdivision recognised by section 218 (1)(a)(iii) of the Act. That is to say for subdivision by way of a lease which, including renewals, could be for 20 years or longer. Originally the Association's appeal sought subdivision for freehold purposes as well but it no longer seeks this and in response to a request from the Canterbury Regional

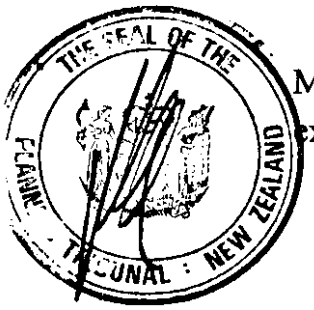


Council it has also agreed to exclude from the subdivision provisions the area covered by the Wigram Flood Retention Basin.

The Association also seeks a rule that would exclude leasehold subdivisions from the operation of Section 407 of the Act. This section authorises the application of several sections in the Local Government Act 1974 in the absence of any provision in a district Plan of the kind contemplated by section 108 (1)(a) or section 220 (1)(a) which authorise the imposition of conditions requiring financial contributions provided they are for the purposes stated in the Plan. This means that until there are such provisions, and there are none at present in the operative Plan, the Council is entitled to require amongst other things, financial contributions on subdivisions in accordance with the relevant provisions of the Local Government Act 1974. The Association claims that the subdivisions it proposes should not be subject to these requirements because of the large amount of land in the appeal site that will, in effect, be set aside and excluded from development.

The Commissioner thought there was merit in this argument but he was not prepared to include a provision in Change 24 excluding section 407 because he did not think it had been fairly raised by the original submissions to the Change. Citing Floyd v Takapuna City Council Decision A87/81 and Manners- Wood v Lakes-Queenstown Wakatipu Combined Planning Committee Decision A62/82, the Commissioner held that a further submission pursuant to Clause 8 of the First Schedule could not introduce additional and novel elements that were not referred to in the submissions first filed. Then, because at that time, it was not proposed to limit subdivision to leases, the Commissioner thought that permanent alienation should not be encouraged and consequently subdivision should not be permitted. He did record however, that because the relevant rules of the Plan relating to subdivision were to be carried forward or rather, the Change did not alter them, some measure of subdivision would probably be permitted.

In its appeal which the Association decided to file only after it was confirmed that the Hodges intended to proceed with their appeal, it did not seek an exclusion from the provisions of Section 407 of Act. This was raised for the first time at this hearing.



Mr Hearn said that the Council would not oppose either the subdivision or the exclusion provisions on the merits, particularly now that subdivision is to be

limited to leases but as to whether the Tribunal had jurisdiction to provide all the relief sought and in particular the exclusion from section 407 he had no submissions to make.
In his evidence, and this was supported by submissions made by Mr Davidson, Mr Garland supported the Association's case for exclusion from financial contributions, by suggesting that when properly considered in the light of the present Act such a provision could be seen as a de facto part of the relief sought by the first submission which contained a request for provisions for subdivision.

At page 14 of his evidence-in-chief he said this:

> *"That really leaves the point as to whether the elements sought relating to financial contributions are in truth outside the ambit of the (primary) submission. In terms of town and country planning, I believe they would have been. Under the former Act a land owner was entitled to do only what was specified with his or her land. In that circumstance, any issues raised in a cross submission which would enlarge the ambit of a provision first sought and which should therefore have been scrutinised under cross submission, would not have been admissible. The Resource Management Act, however, is based on the opposite notion that a person is allowed to do what he or she wishes except where a rule in a plan prevents it. In this case rules may be seen as "restrictive" rather than "enabling". The submitters have sought the introduction of rules relating to subdivision and if that is to be achieved as sought those measures requiring contributions would automatically apply and they are "de facto" a part of the solution sought by the (primary) submission. The further submission seeking exemption from such contributions can therefore be seen as a diminution of the provision originally sought rather than the introduction of new material. A lesser test would be required in terms of Section 32 for the diminished rule because it is closer to what may now be described as the "default" position of complete freedom to develop."*

When questioned by the Tribunal on this passage, Mr Garland acknowledged that section 11 of the present Act restricts subdivision and this is to be contrasted with section 9 which does not restrict land use in the same way. Consequently, the premise upon which Mr Garland based this opinion is untenable. It needs to be remembered that section 11 provides that no person may subdivide land unless the

subdivision is expressly allowed by a rule in the district Plan or proposed district Plan or by a resource consent. Nor do we accept that requesting rules allowing for subdivision automatically means that a person will be required to pay a financial contribution. Whether a financial contribution will be required has to be decided on a case-by-case basis unless, of course, the district Plan provides otherwise which is not the case here. Even then we would be surprised if some measure of discretion was not left in the hands of a consent authority. In any event, that is certainly the position at present so far as this Plan is concerned because the relevant sections in the Local Government Act 1974 are discretionary.

As we understood Mr Davidson's submissions he was suggesting that because the Association and the Saleyards both lodged further submissions on this aspect, partly in opposition to the earlier submissions of each of them seeking to have the exclusion from financial contributions included as part of the rules governing subdivision, this was a satisfactory way of raising this issue in a submission.

We do not accept this argument. We think exclusion from the provisions of Section 407 which, we repeat, are discretionary, is a matter that should have been raised in the first submissions. It is a matter that others and particularly other developers might well consider affects them. If the Association were to be relieved of even the prospect of financial contributions (and we bear in mind that these could be quite significant) others may be called upon through other developments to make up any perceived shortfall. Of course, this is to some extent speculative, but it demonstrates the point that where a potential subdivider is seeking to be relieved of a potential liability for financial contributions by a rule in a Plan this should be made known to the public so that, if it is thought necessary or desirable, further submissions opposing it can be lodged. It cannot be said that the Association and the Saleyards were at arms length over this matter and we do not give any weight to the fact that both of them lodged further submissions in the way described, in an attempt to raise it for the first time. We agree with the Commissioner that it should be dealt with either by way of a variation or on the merits when an application for subdivision consent is made.

However, we are prepared to grant the rest of the relief sought by the Association particularly now that it is confined to subdivision for leases. This is, of course, a lesser relief than was sought originally in the Association's first submission.

Conclusion

For all the foregoing reasons we have decided that Change 24 should be modified in the way agreed to in the Memorandum of Counsel dated 6 December 1995 but with the addition of rules to provide for subdivision by way of lease for permitted activities as a controlled activity. The Change will now require amendments both to the objectives and policies and to the rules. Some of these amendments were discussed at the hearing and a draft of some of them was put before us. However we do not think we should try to redraft the Change in its entirety. We think the parties should do that and put it before us for approval. Because they are no longer interested in the merits we do not expect the Hodges to participate in this if they do not wish to do so. However they should be asked to consent to the draft before it is lodged with the Registrar.

We will not fix a time for this to be done recognising that so far as the Association, the Saleyards, and the Council are concerned, all will be anxious to complete the matter as soon as possible. We await the redrafted Change 24 accordingly.

All questions of costs in respect of both appeals are reserved. When we issue a final decision we will give some further directions about those matters.

DATED at **CHRISTCHURCH** this 11th day of January 1996.

P R Skelton
Planning Judge

BEFORE THE ENVIRONMENT COURT

Decision No. [2017] NZEnvC051

	IN THE MATTER	of the Resource Management Act 1991
	AND	of an appeal under clause 14 of Schedule 1 to the Act
	BETWEEN	ROYAL FOREST & BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED
		(ENV-2016-AKL-000014)
		Appellant
	AND	WHAKATĀNE DISTRICT COUNCIL
		Respondent

Court:	Environment Judge DA Kirkpatrick Environment Commissioner RM Dunlop Environment Commissioner WR Howie
Hearing:	At Whakatāne on 9 March 2017 Respondent's submissions in reply filed on 24 March 2017
Appearances:	S Gepp for Royal Forest & Bird Protection Society Inc D Riley for Whakatāne District Council
Date of Decision:	6 April 2017
Date of Issue:	6 April 2017

DECISION OF THE ENVIRONMENT COURT

A: The appeal is refused.

B: The provisions of the proposed Whakatāne District Plan are amended in the terms set out in **Attachments A and B** to this decision.

C: There is no order as to costs.

REASONS

Introduction

[1] The review of the Whakatāne District Plan, notified on 28 June 2013, has now progressed to the point where the only remaining issue to be resolved is the status or classification of the activity of harvesting of mānuka and kānuka in Significant Indigenous Biodiversity Sites (**SIBS**) listed in the schedules to Chapter 15 – Indigenous Biodiversity.

[2] The relevant decisions of the Whakatāne District Council (**the Council**) on submissions were that such harvesting should be a restricted discretionary activity in SIBS listed in Rule 15.7.1 Schedule A (Coastal and Wetland Sites) and a permitted activity in SIBS listed in Rule 15.7.3 Schedule C (Te Urewera-Whirinaki Sites).

[3] The appellant, Royal Forest & Bird Protection Society Inc (**the Society**) seeks in its appeal that such harvesting be a non-complying activity in SIBS in Schedule A and a restricted discretionary activity in SIBS in Schedule C.

[4] The parties agree that such harvesting should be a restricted discretionary activity in SIBS listed in Rule 15.7.2 Schedule B (Foothills).

Background

[5] As notified, the proposed Whakatāne District Plan included Rule 15.2.1.1(9) stating the activity status for the following activity:

	Activity Status	**Schedule A**	**Schedule B**	**Schedule C**
9.	Harvesting of mānuka and kānuka, excluding any kānuka in the Rural Coastal Zone, for commercial use provided that; a. an area equal to that harvested annually is replanted in the same year in the same or similar indigenous species or allowed to naturally regenerate; b. that no more that 10% of the **Significant Indigenous Biodiversity Site** is harvested in any one year; and c. that a sustainable management plan verifying the above is submitted to **Council**.	RD	C	P

[6] The Society, in its submissions on the proposed District Plan in relation to this

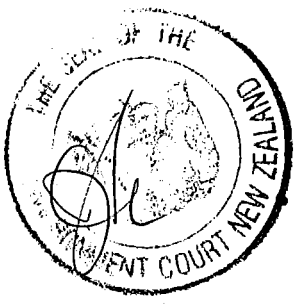
activity, submitted that there should be no permitted or controlled harvesting of mānuka and kānuka within scheduled SIBS, that the replanting conditions were not enforceable and that the ten per cent per year threshold was unsustainable. It sought to change the activity status or classifications in this part of the activity table to non-complying for SIBS in Schedule A and to discretionary for SIBS in Schedules B and C.

[7] The Council's decisions on submissions and further submissions on the plan in relation to Chapter 15 – Indigenous Biodiversity said this at paragraph 13.2.9 in relation to activity 9 in Rule 15.2.1:

> The committee heard evidence from several submitters including Mr Brosnahan about the status and threshold level for sustainable harvesting of mānuka and kānuka. Forest & Bird and P Fergusson asked for a more restrictive status for commercial harvesting of kānuka and mānuka within SIBS, while DoC requested clarification that the reference to ten per cent in the Rule applied to mānuka and kānuka rather than all indigenous vegetation. Federated Farmers and John Fairbrother for Nikau Farms sought provisions that allow the harvesting in a sustainable way as either a permitted or controlled activity in all SIBS.
>
> The committee notes that the rule is intended to provide for sustainable harvesting of mānuka and kānuka, recognising that in some SIB regenerating mānuka and kānuka can be managed sustainably to enable the economic benefits to be gained from the activity. However, the committee takes particular note that the rule does not apply to vulnerable coastal mānuka and kānuka in the Rural Coastal zone.
>
> The committee notes that commercial extraction of mānuka and kānuka have been managed sustainably for many years as mānuka and kānuka grows relatively fast and can be sustainably harvested while retaining significant values.
>
> The committee agrees with the submission by DoC that clearance of ten per cent of the total area of a SIB could amount to a large amount of clearance in any one year, particularly in the SIB extended over multiple titles and included other vegetation types. To address this issue the amended wording is accepted to clarify that the clearance relates to ten per cent of the total area of mānuka and kānuka as follows:
>
> > *"Harvesting of mānuka and kānuka excluding any kānuka in the rural coastal zone, for commercial use provided that:*
> >
> > *(a) an area equal to that harvested annually is replanted in the same year in the same or similar indigenous species or allowed to naturally regenerate;*
> >
> > *(b) that no more than ten per cent of the total area of kānuka and mānuka in a scheduled feature* ~~***Significant Indigenous Biodiversity Site***~~ *on any site is harvested in any one year; and*
> >
> > *(c) that a sustainable management plan verifying the above is submitted to* ***Council.***"

[8] The decision made no change to the activity status in any of the Schedules.

[9] The Society's appeal against this decision is on the grounds that allowing commercial harvesting of mānuka and kānuka on a concessionary basis does not protect the habitat values of this vegetation type which may contain threatened species, and does not recognise the successional aspect of forest ecology, and that the



conditions are unenforceable. The relief sought in the appeal on this matter was the same as the submission, namely that the activity should be non-complying in Schedule A sites and discretionary in Schedules B and C sites.

[10] The Council and the Society, with other interested parties, participated in mediation of this and many other matters in the Indigenous Biodiversity chapter. The relevant outcomes for the purposes of this appeal were that the description of Activity 9 in (now) Rule 15.2.1.2 (including its requirements, conditions, and permissions) was reworded but the activity status for areas listed in Schedules A and C was not agreed, as follows:

	Activity Status	**Schedule A** <u>**Coastal and Wetlands**</u>	**Schedule B** <u>**Foothills**</u>	**Schedule C** <u>**Te Urewera - Whirinaki**</u>
9.	Harvesting of mānuka and kānuka, excluding any kānuka in the Rural Coastal zone, for commercial use provided that: a. an area equal to that harvested annually is replanted in the same year in the same or similar indigenous species or allowed to naturally regenerate; <u>b. the replanted or regenerating area is not subject to any further harvesting operation until at least twenty years has elapsed from the commencement of replanting or regeneration</u>; and ~~b~~<u>c.</u> no more than 10% of the total area of kānuka and mānuka in a scheduled feature on any **site** is harvested in any one year; ~~and~~ <u>d. kānuka and mānuka is harvested only from identified areas where kānuka and mānuka represent at least 80% of the vegetation canopy cover; and</u> ~~c. a sustainable management plan verifying the above is submitted to **Council.**~~	~~RD~~ D <u>**or**</u> NC	~~C~~ RD	P <u>**or**</u> RD

[11] The deletion of condition (c) (as notified) was addressed through mediation by the insertion of a new rule 15.2.6 – *Harvesting of kānuka and mānuka (Rule 15.2.1.2(9))*, which provides:

> *An initial plan prepared by a suitably qualified professional identifying that the areas to be harvested meet the requirements (in (c) and (d) of 15.2.1.2(9) is submitted to Council prior to the activity being carried out, and two further plans verifying that replanting and/or regeneration is occurring in accordance with (a) and (b) of 15.2.1.2(9) are submitted to Council at five and 15 year intervals after the clearance has occurred.*

[12] Also agreed through this mediation process was that the activity status for classification of such harvesting in SIBS listed in Schedule B should be restricted

discretionary.

[13] The remaining issues for the Society and the focus of the hearing of this appeal are the appropriate activity statuses or classifications for such harvesting as described in Activity 9 in SIBS listed in Schedules A and C.

Relevant planning provisions

[14] It was common ground between the Society and the Council that the following provisions of the operative Bay of Plenty Regional Policy Statement (**RPS**) concerning matters of national importance are relevant to this appeal:

> **Policy MN 1B: Recognise and provide for matters of national importance**
>
> *(a) Identify which natural and physical resources warrant recognition and provision for as matters of national importance under section 6 of the Act using criteria consistent with those contained in Appendix F of this Statement;*
>
> *...*
>
> *(c) Recognise and provide for the protection of areas of significant indigenous vegetation and habitats of indigenous fauna identified in accordance with (a); ...*
>
> **Policy MN 2B: Giving particular consideration to protecting significant indigenous habitats and ecosystems**
>
> *Based on the identification of significant indigenous habitats and ecosystems in accordance with Policy MN 1B:*
>
> *(a) Recognise and promote awareness of the life-supporting capacity and the intrinsic values of ecosystems and the importance of protecting significant indigenous biodiversity;*
>
> *(b) Ensure that intrinsic values of ecosystems are given particular regards to in resource management decisions and operations;*
>
> *(c) Protect the diversity of the region's significant indigenous ecosystems, habitats and species including both representative and unique elements;*
>
> *(d) Manage resources in a manner that will ensure recognition of, and provision for, significant indigenous habitats and ecosystems; and*
>
> *(e) Recognise indigenous marine, lowland forest, freshwater, wetland and geothermal habitats and ecosystems, in particular, as being underrepresented in the reserves network of the Bay of Plenty.*
>
> **Policy MN 3B: Using criteria to assess values and relationships in regard to section 6 of the Act**
>
> *Include in any assessment required under Policy MN 1B, an assessment of: ...*
>
> *(c) Whether areas of indigenous vegetation and habitats of indigenous fauna are significant, in relation to section 6(c) of the Act, on the extent to which criteria consistent with those in Appendix F set 3: Indigenous vegetation and habitats of indigenous fauna are met;*
>
> **Policy MN 7B: Using criteria to assist in assessing inappropriate development**
>
> *Assess, whether subdivision, use and development is inappropriate using criteria consistent with those in Appendix G, for areas considered to warrant protection under section 6 of the Act due to:*
>
> *(a) Natural character;*

(b) Outstanding natural features and landscapes;

(c) Significant indigenous vegetation and habitats of indigenous fauna;

(d) Public access;

(e) Māori culture and traditions; and

(f) Historic heritage.

Appendix G – Criteria applicable to Policy MN 7B

Policy MN 7B

Methods 1, 2, 3 and 11

1 Character and degree of modification, damage, loss or destruction;

2 Duration and frequency of effect (for example long-term or recurring effects);

3 Magnitude or scale of effect (for example number of sites affected, spatial distribution, landscape context);

4 Irreversibility of effect (for example loss of unique or rare features, limited opportunity for remediation, the costs and technical feasibility of remediation or mitigation);

5 Resilience of heritage value or place to change (for example ability of feature to assimilate change, vulnerability of feature to external effects);

6 Opportunities to remedy or mitigate pre-existing or potential adverse effects (for example restoration, enhancement), where avoidance is not practicable;

7 Probability of effect (for example likelihood of unforeseen effects, ability to take precautionary approach);

8 Cumulative effects (for example loss of multiple locally significant features).

Policy MN 8B: Managing effects of subdivision, use and development

Avoid and, where avoidance is not practicable, remedy or mitigate any adverse effects of subdivision, use and development on matters of national importance assessed in accordance with Policy MN 1B as warranting protection under section 6 of the Act.

[15] The proposed District Plan, as amended by decisions on submissions, is now past the point where any of its provisions (other than those which are the subject of this appeal) can be changed. We therefore treat the proposed provisions as having greater weight than any provisions in the operative District Plan.

[16] The following strategic provisions of the proposed District Plan were agreed to be relevant:

Strategic objective 7 (Our special places – Māori and iwi):

Subdivision, use and development are managed so that tāngata whenua, including kaitiaki maintain and enhance their culture, traditions, economy and society.

Strategic objective 8 (Our special places):

The natural, cultural and heritage resources that contribute to the character of the district are identified, retained and protected from inappropriate subdivision, use and development.

Policy 2 *To recognise the contribution that natural character, landscapes, biodiversity and heritage resources make to the social, cultural and economic wellbeing of people; and to provide for the* ***maintenance***

and enhancement of those resources in resource management decisions.

[17] The following objectives and policies of chapter 15 of the proposed District Plan on Indigenous Biodiversity[1] were agreed to be relevant:

Objective IB1: *Maintenance of the full range of the district's indigenous habitats and ecosystems, including through restoration and enhancement.*

Policy 2 *To recognise sustainable land management practices and cooperative industry arrangements that reflect the principles of stewardship and kaitiākitanga, and to take into account the range of alternative methods in the maintenance and protection of indigenous biodiversity, including Tasman Forest Accord, NZFOA Forest Accord, Iwi Management Plans, Bay of Plenty Regional Council biodiversity management plans and protective covenants with the QEII Trust and Nga Whenua Rāhui.*

Objective IB2: *Areas of indigenous vegetation and habitats of indigenous fauna identified as significant in Schedules 15.7.1, 15.7.2 and 15.7.3 are protected.*

Policy 1(b): *To ensure that subdivision, use and development, is undertaken in a manner that protects scheduled* ***significant indigenous biodiversity sites*** *by: …*

(b) outside the coastal environment, avoiding and where avoidance is not practicable, remedying or mitigating adverse effects including the loss, fragmentation or degradation of those sites and the cumulative effects on ecosystems.

Policy 5: *To provide for the sustainable use of indigenous vegetation including scheduled significant indigenous biodiversity sites where the adverse effects of this use are minor.*

[18] Section 15.4 of the proposed District Plan sets out the assessment criteria for restricted discretionary activities and Rule 15.4.4 provides:

15.4.4 ***Harvesting of kānuka and mānuka where restricted discretionary activity status is due to grazing during regeneration in Schedule C sites (Rule 15.2.1.2(9))***

15.4.4.1 *Council shall restrict its discretion to:*

a. *Timing to enhance the regeneration or establishment of mānuka and kānuka;*
b. *Stock type;*
c. *Grazing intensity;*
d. *Stock containment methods; and*
e. *Potential adverse effects on water bodies within the property.*

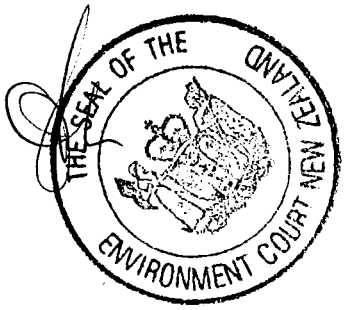
[19] In relation to activities which are classified as discretionary or non-complying, the relevant assessment criteria are set out in section 3.7 in Chapter 3 of the proposed District Plan. The introductory paragraph of this section states that the criteria are a guide to the matters that the Council can have regard to when assessing an application, but that they do not restrict the Council's discretionary powers under s 104(1)(a) of the Act to consider any actual or potential effects on the environment of allowing the

[1] As amended by a consent order dated 5 October 2016 in this proceeding and other related appeals.

activity.

[20] Section 3.7.13 sets out the criteria in respect of indigenous biodiversity effects as follows:

> *3.7.13.1* ***Council*** *shall have regard to;*
>
> *a.* *any adverse effect on* ***ecosystems*** *including;*
>
> *i.* *coastal* ***ecosystems****;*
>
> *ii.* *estuarine margins;*
>
> *iii.* *rivers and streams, wetlands and their margins;*
>
> *iv.* *habitats of* ***indigenous fauna*** *or flora;*
>
> *v.* *the cumulative effects of the activity on habitat of* ***indigenous vegetation*** *and fauna;*
>
> *vi.* *the degree to which the activity will result in the fragmentation of indigenous habitat and adversely impact on the sustainability of remaining vegetation;*
>
> *vii.* *the impact on ecological linkages and connectivity between significant natural areas;*
>
> *viii.* *the degree to which the effects are reversible and the resilience of the feature to change;*
>
> *ix.* *the long-term sustainability of an affected coastal* ***ecosystem****, waterway, estuarine margin, wetlands and their margins, indigenous vegetation or habitat;*
>
> *x.* *the indigenous vegetation to be retained and the degree to which the proposal will protect, restore or enhance indigenous vegetation and the net ecological gain as a consequence of the activity; and*
>
> *xi.* *the means to protect fish habitats by maintaining riparian vegetation;*
>
> *b.* *the effect on Significant Biodiversity areas identified in Appendix 15.7.1, 15.7.2 and 15.7.3, or other sites considered significant according to criteria in the Bay of Plenty Regional Policy Statement;*
>
> *c.* *the location of* ***buildings****, structures and services (such as* ***accessways****) in relation to how that may adversely affect ecological features;*
>
> *d.* *specifically, the management of existing kānuka stands in the Rural Coastal Zone, and means of restoring or rehabilitating this regionally significant feature;*
>
> *e.* *whether there is a reasonable alternative siting for the proposed activity or any alternative subdivision layout that will avoid, remedy or mitigate a significant adverse effect on the environment;*
>
> *f.* *location of the activity relative to any indigenous area and its vulnerability to the pest species; method of containing the pest plant or animal; other barriers to the spread of the plant or animal pest; method of identifying animals (for example, branding); method of dealing with escapes;*
>
> *g.* *plant and animal pest management;*
>
> *h.* *the means to manage the adverse effects of pets, for example, cats, dogs, ferrets and rabbits on wildlife and vegetation;*
>
> *i.* *whether there will be adverse effects on* ***ecosystems****, including effects that;*



i. may deplete the abundance, diversity or distribution of native species; or

ii. disrupt natural successional processes; or

iii. disrupt the long term ecological sustainability of Significant Biodiversity sites, including through increased fragmentation and vulnerability to pests; or

iv. obstruct the recovery of native species and the reversal of extinction trends, or the restoration of representative native biodiversity within an ecological district, ecological region, or nationally, or

v. reduce representative biological values within an ecological district, ecological region, or nationally, or

vi. reduce the area, or degrade the habitat value of an area set aside by statute or covenant for the protection and preservation of native species and their habitat, or

vii. degrade landscape values provided by native vegetation, or

viii. degrade soil or water values protected by native vegetation, or

ix. degrade a freshwater fishery, or

x. degrade aquatic ***ecosystems****.*

j. the degree of clearance in relation to the area retained or protected property.

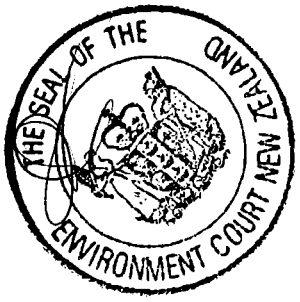
The evidence

[21] Mr Shaw, an expert ecologist called by the Council, has extensive knowledge of the natural environment in the district. He gave essentially unchallenged evidence of primary facts about the circumstances in which mānuka and kānuka are present in the district as follows:

(a) The three types of scheduled SIBS in Chapter 15 of the proposed Plan and the table in Rule 15.2.1.2 have been identified based on Land Environment New Zealand Classifications.

(b) There are six sites listed in Schedule A containing kānuka forest (that is, where more than 80 per cent of the cover consists of kānuka) and one further site of mixed kānuka-kamahi forest that could potentially contain more than 80 per cent cover in kānuka. They are located in the Te Teko, Taneātua and Ōtānewainuku Ecological Districts. They are smaller in size than the sites in Schedules B and C and are located in much modified environments.

(c) The sites listed in Schedule C are much larger and fall largely within the Whirinaki, Ikawhenua and Waimana Ecological Districts with some also present in the Taneātua and Waioeka Ecological Districts. Large



proportions of these districts, other than Taneātua, have a cover of indigenous vegetation: from Waimana at 98 per cent to Whirinaki at 78 per cent. Most of these districts also have very high levels of formal protection as reserves under the Reserves Act or by way of covenants, of the order of 76-89 per cent.

(d) Commercial harvesting of kānuka for firewood is a longstanding (over many decades) activity in various parts of Whakatāne district. Typically, trees are harvested and the areas are left to regenerate naturally, often in the presence of grazing. Currently, most of this activity occurs on sites listed in Schedule B, with little or none presently occurring on sites listed in Schedules A and C.

(e) The areas in Schedule C with significant extensive kānuka dominant forest which are unprotected either as reserves or by way of covenants are all physically inaccessible and therefore are not subject to harvesting.

(f) The value of mānuka as firewood appears to be diminishing, with much higher values being placed on it for the harvesting of foliage for use in skin and hair care products and as a resource for bee keeping and honey production.

[22] Against this factual background, Mr Shaw expressed the following principal opinions:

(a) The small size and limited number of the sites listed in Schedule A means that assessment of the effects of harvesting in these areas can be done effectively.

(b) An activity status of discretionary is sufficient in the Schedule A areas, given the clear requirements in the objectives, policies and assessment criteria for promoting sustainable management in terms of the conditions on the activity for regeneration and the scope of the general discretion to decline consent.

(c) While the sites listed in Schedule C are substantially larger, other methods of protection and limited accessibility means that including rules in the plan to require resource consents to be obtained for harvesting in these areas would be of little benefit.

[23] The Council also called Mr McGhie, its principal planner, to outline the Council's planning approach. Mr McGhie relied on the evidence of Mr Shaw as the basis for his planning assessment. Mr McGhie also outlined the views that had been expressed to the Council by Māori, who own much of the land in the areas where the Schedule C sites are located, during consultation and the submission process.

[24] Mr McGhie characterized the issue before the Court as one of balancing the protection of indigenous biodiversity with management responses that would be appropriate to each type of SIBS. In that regard, he observed that the Council had originally proposed only two types of SIBS, but had created Schedule C for two main reasons:

(i) Māori had objected to large tracts of land being controlled in ways that would unnecessarily restrict their development opportunities; and

(ii) the list in Schedule B would otherwise have consisted of sites varying significantly in size.

[25] Mr McGhie set out in his statement of evidence numerous amendments that had been made to Rule 15.2.1.2(9) and in other plan provisions through the process of mediation as summarised above. As well as the Rules referred to earlier in this decision, he also explained that a new definition of "naturally regenerate" had been inserted in chapter 21 of the proposed Plan and that the definition of "indigenous vegetation" had been amended to ensure that regenerated kānuka or mānuka was not covered by the exclusion for vegetation established for commercial purposes. These amendments were not in issue before us.

[26] Mr McGhie also set out his analysis of the activity rule in terms of s 32 of the Act and in the context of the relevant objectives and policies of the Regional Policy Statement and the proposed District Plan. In his opinion, a non-complying activity status for harvesting in Schedule A sites would be out of proportion with those objectives and policies given the degree of protection that the rule has been drafted to provide and the extent to which the process of considering an application for resource consent should include an assessment of sustainable practice to address the relevant assessment criteria in section 3.7.13 of the proposed District Plan. Given those considerations, he opined that a discretionary status was more appropriate.

[27] In relation to a permitted activity status for the Schedule C sites, he also expressed the opinion that this would be consistent with the relevant objectives and

policies and would better address landowner concerns, subject to a restricted discretionary activity status applying where grazing is proposed during the natural regeneration phase.

[28] The Society called Ms Myers as an expert ecologist. In her evidence, Ms Myers set out the ecological context for the harvesting of mānuka and kānuka. She noted the extent of ongoing loss of indigenous biodiversity nationally and emphasised the ecological values of kānuka and mānuka forest in Whakatāne District and, especially, the national importance of Te Urewera for its range of ecological diversity. She stressed the successional role of kānuka and mānuka and the benefits that these species provide in the form of buffers for other forest species and corridor functions between stands of bush and forest. She noted that there was a lack of specific survey information to enable the extent of harvesting and regeneration to be quantified.

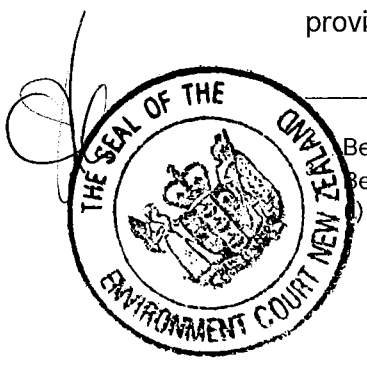
[29] In her opinion, rules for vegetation clearance should be based on the ecological values of that vegetation, as the degree of threat to an ecosystem may be unknown or can change over time. On that basis, she expressed the opinion that harvesting in areas listed in Schedule A should be non-complying because those areas are small and vulnerable and that resource consent as a restricted discretionary activity should be required for harvesting in sites in Schedule C in order to provide a basis for understanding the extent of that activity and its effects.

[30] Ms Myers agreed with the changes to these plan provisions that had been achieved through mediation.

Relevant considerations for a district plan

[31] Under s 290 of the Act, the Court has the same power, duty, and discretion in respect of a decision appealed against as the person against whose decision the appeal is brought. We must accordingly proceed to consider the issues on appeal on the same statutory basis as they were considered by the Council.

[32] The Council was required to prepare its the proposed District Plan in accordance with ss 74 and 75 of the Act,[2] and the Court must now consider the provisions still in issue in this appeal under those sections.[3] Those sections now



[2] Being s 74 in the form it was when the proposed District Plan was notified on 28 June 2013.
[3] Being s 74 in the form inserted by s 78 Resource Management Amendment Act 2013, given:
(a) the commencement of those sections under s 2(2)(b) of the Amendment Act on 3 December 2013; and

relevantly provide:

> ***74 Matters to be considered by territorial authority***
>
> *(1) A territorial authority must prepare and change its district plan in accordance with—*
>
> *(a) its functions under section 31; and*
>
> *(b) the provisions of Part 2; and ...*
>
> *(d) its obligation (if any) to prepare an evaluation report in accordance with section 32; and*
>
> *(e) its obligation to have particular regard to an evaluation report prepared in accordance with section 32; ...*
>
> *(2) In addition to the requirements of section 75(3) and (4), when preparing or changing a district plan, a territorial authority shall have regard to— ...*
>
> *(b) any—*
>
> *(i) management plans and strategies prepared under other Acts; ...*
>
> *(2A)A territorial authority, when preparing or changing a district plan, must take into account any relevant planning document recognised by an iwi authority and lodged with the territorial authority, to the extent that its content has a bearing on the resource management issues of the district. ...*
>
> ***75 Contents of district plans***
>
> *(3) A district plan must give effect to— ...*
>
> *(c) any regional policy statement.*

[33] The Council plainly has a function of the control of any actual or potential effects of the use, development, or protection of land, including for the purpose of the maintenance of indigenous biological diversity under s 31(1)(b)(iii).

[34] In relation to the consideration of Part 2 of the Act, counsel for the Council referred us to the Court's decision in *Appealing Wanaka Inc v Queenstown-Lakes District Council*[4] and submitted that because the relevant objectives and policies of the proposed Plan for indigenous biodiversity are beyond challenge, there is no need to look past them to Part 2 of the Act.

[35] That decision is based on the reasoning of the Supreme Court in *Environmental Defence Society v NZ King Salmon*.[5] The Supreme Court held that there is a hierarchy of statutory planning instruments under the Act in order to achieve the purpose of the Act. The purpose of these instruments is to give substance to the principles in Part 2 of the Act. Where an instrument has been prepared to give effect to a higher instrument,

(ii) there appears to be no transitional provision in the Amendment Act which would require the application of s 74 of the Act as it stood when the proposed District Plan was notified.

4 *Appealing Wanaka Inc v Queenstown Lakes District Council* [2015] NZEnvC 139.

5 *Environmental Defence Society v NZ King Salmon* [2014] NZSC 38; [2014] 1 NZLR 593; [2014] NZRMA 195; (2014) 17 ELRNZ 442.

there is no need to refer back to that higher instrument, or to Part 2 of the Act, to interpret and apply the lower instrument unless there was a challenge based on invalidity, incompleteness or uncertainty in relation to the lower instrument.[6]

[36] In the present case, there is no issue before us of invalidity, incompleteness or uncertainty in the relevant objectives and policies of the proposed District Plan. Accordingly, our consideration of the most appropriate activity status for the harvesting or mānuka and kānuka in SIBS listed in Schedules A and C to the District Plan should be in terms of those relevant objectives and policies.

[37] We address matters concerning the obligation to prepare and have particular regard to an evaluation report in accordance with s 32 of the Act under a separate heading below.

[38] In relation to management plans and strategies prepared under other Acts, Counsel for the Council referred us to Te Urewera Act 2014. The purpose of that Act is:[7]

> *... to establish and preserve in perpetuity a legal identity and protected status for Te Urewera for its intrinsic worth, its distinctive natural and cultural values, the integrity of those values, and for its national importance, and in particular to—*
>
> *(a) strengthen and maintain the connection between Tūhoe and Te Urewera; and*
>
> *(b) preserve as far as possible the natural features and beauty of Te Urewera, the integrity of its indigenous ecological systems and biodiversity, and its historical and cultural heritage; and*
>
> *(c) provide for Te Urewera as a place for public use and enjoyment, for recreation, learning, and spiritual reflection, and as an inspiration for all.*

[39] The principles for achieving that purpose are:[8]

> *(1) In achieving the purpose of this Act, all persons performing functions and exercising powers under this Act must act so that, as far as possible,—*
>
> *(a) Te Urewera is preserved in its natural state:*
>
> *(b) the indigenous ecological systems and biodiversity of Te Urewera are preserved, and introduced plants and animals are exterminated:*
>
> *(c) Tūhoetanga, which gives expression to Te Urewera, is valued and respected:*
>
> *(d) the relationship of other iwi and hapū with parts of Te Urewera is recognised, valued, and respected:*
>
> *(e) the historical and cultural heritage of Te Urewera is preserved:*
>
> *(f) the value of Te Urewera for soil, water, and forest conservation is*

6 Ibid at [85] and [88].
7 Te Urewera Act 2014, s 4.
8 Te Urewera Act 2014, s 5.

maintained:

(g) the contribution that Te Urewera can make to conservation nationally is recognised.

(2) In achieving the purpose of this Act, all persons performing functions and exercising powers under this Act must act so that the public has freedom of entry and access to Te Urewera, subject to any conditions and restrictions that may be necessary to achieve the purpose of this Act or for public safety.

[40] This Act declares Te Urewera to be a legal entity and establishes a board for its governance and management. That board is under an obligation to prepare a management plan to identify how the purpose of the Act is to be achieved and to set objectives and policies for Te Urewera, but we understand that such a plan has not yet been prepared.

[41] We were also referred to an integrated planning protocol between Tuhoe Te Uru Taumatua, the Council and other local authorities in which Te Urewera is situated, but that is not a statutory document and did not appear to contain any objectives or policies.

[42] We have set out above the policies of the RPS of most relevance to this appeal.

Evaluation under section 32 of the Act

[43] The necessary evaluation of a proposed rule under s 32 of the Act[9] involves an examination, to a level of detail that corresponds to the scale and significance of any anticipated effects, of whether the rule is the most appropriate way to achieve the objectives of the Plan by:

(a) identifying other reasonably practicable options for achieving those objectives;

(b) assessing the efficiency and effectiveness of the rule in achieving those objectives, including:

i) identifying, assessing and, if practicable, quantifying the benefits and

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[9] Being s 32 in the form inserted by s 70 Resource Management Amendment Act 2013, given:
(i) the commencement of those sections under s 2(2)(b) of the Amendment Act on 3 December 2013;
(ii) the transitional provision in cl 2 of Schedule 2 to the Amendment Act (inserting a new Schedule 12 in the principal Act) which requires the further evaluation under s 32 to be undertaken as if s 70 of the Amendment Act had not come into force only if it came into force on or after the last day for making further submissions on the proposed District Plan; and
(iii) the last day for making further submissions on the proposed District Plan being 19 December 2013.

costs of all the effects that are anticipated to be provided or reduced from the implementation of the rule; and

ii) assessing the risk of acting or not acting if there is uncertain or insufficient information; and

(c) summarising the reasons for deciding on that rule.

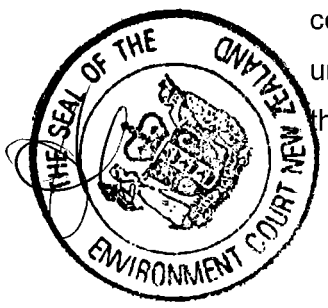
[44] Section 32 of the Act has been through several amendments since the Act first came into force. It is not necessary to rehearse the whole evolution of the section for the purposes of this case, but in light of the focus of this appeal and the wording of the relevant objectives and policies of the proposed District Plan it is appropriate to address one particular aspect of s 32 which has recently been inserted.

[45] The requirement to identify other means or options for achieving the purpose of the Act and the objectives of the plan which is being evaluated has been a central element of s 32 of the Act in all its versions. The current version appears to be the first time that the options have been qualified by the words *reasonably practicable*. The potential importance of this qualification is emphasised in this case given the centrality of Policy MN 8B in the RPS and Policy IB2(1)(b) in the proposed District Plan in argument before us and their wording which calls for consideration of whether avoiding adverse effects on significant indigenous vegetation and SIBS is or is not "practicable."

[46] Neither the word "practicable" nor the phrase "reasonably practicable" is defined in the Act. There is a definition of "best practicable option" in s 2 where it is defined to mean, unless the context otherwise requires:

> *in relation to a discharge of a contaminant or an emission of noise, means the best method for preventing or minimising the adverse effects on the environment having regard, among other things, to—*
>
> *(a) the nature of the discharge or emission and the sensitivity of the receiving environment to adverse effects; and*
>
> *(b) the financial implications, and the effects on the environment, of that option when compared with other options; and*
>
> *(c) the current state of technical knowledge and the likelihood that the option can be successfully applied.*

[47] While acknowledging that this case is not concerned with the discharge of a contaminant or the emission of noise, we consider that this definition is helpful in understanding what the word "practicable" may mean in the context of the Act and how the practicability of an option should be analysed.



[48] The word "reasonably" is often used to qualify other words both in legislation and in case law. It has been held in relation to the predecessor provision to s 6(a) of the Act that it may be an implied qualification of the word "necessary."[10] Similarly in relation to s 341(2)(a) of the Act, the same qualification has been implied on the basis that it is unlikely that the legislature envisaged the unreasonable.[11] In the context of an earlier version of s 171(1)(c) of the Act, it has been held to allow some tolerance to the meaning of "necessary" as falling between expedient or desirable on the one hand and essential on the other.[12] There does not appear to be any reason why it should be interpreted differently when used (whether expressly or by implication) in the phrase "reasonably practicable."

[49] Examining other legislation which may be of assistance in this context, we also note that there is a definition of "reasonably practicable" in the Health and Safety at Work Act 2015, as follows:

> *In this Act, unless the context otherwise requires,* reasonably practicable, *in relation to a duty of a PCBU set out in subpart 2 of Part 2, means that which is, or was, at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters, including—*
>
> *(a) the likelihood of the hazard or the risk concerned occurring; and*
>
> *(b) the degree of harm that might result from the hazard or risk; and*
>
> *(c) what the person concerned knows, or ought reasonably to know, about—*
>
> *(i) the hazard or risk; and*
>
> *(ii) ways of eliminating or minimising the risk; and*
>
> *(d) the availability and suitability of ways to eliminate or minimise the risk; and*
>
> *(e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.*

[50] Similar definitions are to be found in other legislation concerned with matters of health and safety and the protection of property, including in s 2 Electricity Act 1992, s 2 Gas Act 1992, s 69H Health Act 1956 and s 5 Railways Act 2005. The phrase is also used in many statutes without definition.

[51] These legislative examples are, perhaps unsurprisingly, consistent with well-established case law interpreting the meaning of "reasonably practicable." It has been

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[10] *Environmental Defence Society Inc v Mangonui County Council* [1989] 3 NZLR 257 at 260; (1989) 13 NZTPA 197 at 203 (CA) per Cooke P in relation to s 3(c) of the Town and Country Planning Act 1977, citing *Carlton & United Breweries Ltd v Minister of Customs* [1986] 1 NZLR 423, 430; and *Commissioner of Stamp Duties v International Packers Ltd and Delsintco Ltd* [1954] NZLR 25, 54.

[11] *Hugle v Cowie* [1998] 1 NZLR 104 at 109-110; [1997] NZRMA 395 at 400-401; (1997) 3 ELRNZ 261 at 268 (HC).

[12] *Bungalo Holdings Ltd v North Shore City Council* A137/2002 at [94].

held that the phrase is a narrower term than "physically possible" and implies a computation of the quantum of risk against the measures involved in averting the risk (in money, time or trouble), so that if there is a gross disproportion between them, then extensive measures are not required to meet an insignificant risk.[13] Where lives may be at stake, a practicable precaution should not lightly be considered unreasonable, but if the risk is a very rare one and the trouble and expense involved in precautions against it would be considerable but would not afford anything like complete protection, then adoption of such precautions could have the disadvantage of giving a false sense of security.[14] "Practicable" has been held to mean "possible to be accomplished with known means or resources" and synonymous with "feasible," being more than merely a possibility and including consideration of the context of the proceeding, the costs involved and other matters of practical convenience.[15] Conversely, "not reasonably practicable" should not be equated with "virtually impossible" as the obligation to do something which is "reasonably practicable" is not absolute, but is an objective test which must be considered in relation to the purpose of the requirement and the problems involved in complying with it, such that a weighing exercise is involved with the weight of the considerations varying according to the circumstances; where human safety is involved, factors impinging on that must be given appropriate weight.[16]

[52] While acknowledging that this case is not governed by any of those other Acts referred to and that the case law summarised above was decided under other legislation, nonetheless we consider the approach consistently taken in other legislation and by other Courts to the assessment of the correct approach to or the boundaries of what is "practicable" in relation to a duty to ensure the health and safety of people and the protection of property could be analogous to the approach which may be taken to protecting, or otherwise dealing with adverse effects on, the environment under the Resource Management Act 1991.

[53] We consider that these statutory provisions and cases together illustrate a consistent approach to the meaning of "reasonably practicable" which we respectfully adopt in this case in considering the options before us. We accordingly proceed to consider RPS Policy MN 8B and District Plan Policy IB2(1)(b) and identify reasonably practicable options for achieving the objectives of the proposed District Plan by examining the options having regard to, among other things:

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13 *Edwards v National Coal Board* [1949] 1 KB 704; [1949] 1 All ER 743 (EWCA).
14 *Marshall v Gotham Co Ltd* [1954] AC 360; [1954] 1 All ER 937 (UKHL).
15 *Union Steam Ship Co of NZ Ltd v Wenlock* [1959] 1 NZLR 173 (CA).
16 *Auckland City Council v NZ Fire Service & anor* [1996] 1 NZLR 330 (HC).

i) The nature of the activity and its effects;

ii) The sensitivity of the environment to adverse effects generally and to the identified effects of the activity in particular;

iii) The likelihood of adverse effects occurring;

iv) The financial implications and other effects on the environment of the option compared to other options;

v) The current state of knowledge of the activity, its effects, the likelihood of adverse effects and the availability of suitable ways to avoid or mitigate those effects;

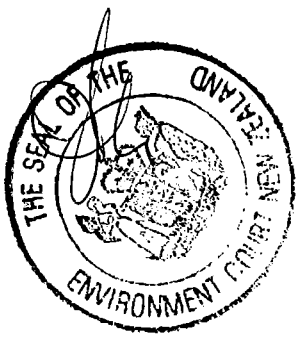
vi) The likelihood of success of the option; and

vii) An allowance of some tolerance in such considerations.

The extent to which adverse effects must be avoided

[54] A further consideration arising from the centrality of RPS Policy MN 8B and District Plan Policy IB2(1)(b) in the argument is the need expressed in those policies to avoid adverse effects on significant indigenous vegetation and scheduled SIBS or, where avoidance is not practicable, to remedy or mitigate adverse effects.

[55] The most obvious meaning of "avoid" in the context of the Act and in policy statements under it, as held by the Supreme Court in *Environmental Defence Society v NZ King Salmon*,[17] is "not allow" or "prevent the occurrence of." The Supreme Court then goes on to explore the contexts in which the word is used and, in particular, the importance of its meaning when used with the word "inappropriate" in relation to subdivision, use and development. That exploration is principally in the context of s 6(a) and (b) of the Act and against the framework of the New Zealand Coastal Policy Statement. It is clear, however, that the approach of the Supreme Court is equally applicable in other contexts where the extent of avoidance called for by a policy is to be considered.[18]



[17] *Environmental Defence Society v NZ King Salmon* [2014] NZSC 38; [2014] 1 NZLR 593; [2014] NZRMA 195; (2014) 17 ELRNZ 442 at [92]-[97].

[18] See for example *R J Davidson Family Trust v Marlborough DC* [2017] NZHC 52 at [61]-[93] where the Supreme Court's approach in relation to a proposed plan change was held to be a lawful consideration in relation to an application for resource consents.

[56] Certainly, in relation to this case which involves a plan review and proposed provisions intended to recognise and provide for the protection of areas of significant indigenous vegetation as required by s 6(c) of that Act, it was common ground that the approach of the Supreme Court was applicable.

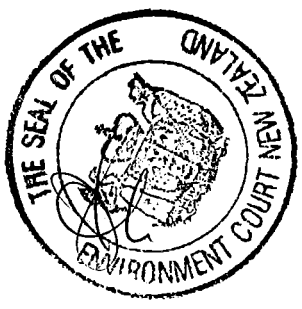
[57] The consideration of context is, as it usually is,[19] an essential part of the interpretation and application of policy provisions. It is generally insufficient to refer to the presence of the word "avoid" as a conclusion in itself: a policy to avoid adverse effects of activities on the environment, without any greater particularity, could be said to be a basis for not allowing any activity at all. As the Court of Appeal recently observed in *Man o'War Station Ltd v Auckland Council,*[20] much turns on what is sought to be protected.

[58] We bear this guidance respectfully in mind in considering not just whether the SIBS listed in Schedules A and C to Chapter 15 of the proposed District Plan should be protected, but the extent of such protection and the manner in which such protection is intended to be achieved.

[59] In considering what rule may be the *most appropriate* in the context of the evaluation under s 32 of the Act, we consider that notwithstanding the amendments that have been made to that section in the meantime, the presumptively correct approach remains as expressed in *Wakatipu Environmental Society Inc v Queenstown Lakes District Council*:[21] that where the purpose of the Act and the objectives of the Plan can be met by a less restrictive regime then that regime should be adopted. Such an approach reflects the requirement in s 32(1)(b)(ii) to examine the efficiency of the provision by identifying, assessing and, if practicable, quantifying all of the benefits and costs anticipated from its implementation. It also promotes the purpose of the Act by enabling people to provide for their well-being while addressing the effects of their activities.

Classes, categories or status of activities

[60] The power to categorise activities into one of six classes and to make rules and specify conditions for each class is conferred by s 77A of the Act. The six classes of



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19 *R (Daly) v Secretary of State for the Home Department* [2001] 2 WLR 1622 (UKHL), 1636 per Lord Steyn; referred to in *McGuire v Hastings DC* [2001] NZRMA 557 (PC) at [9] per Lord Cooke.

20 *Man o'War Station Ltd v Auckland Council* [2017] NZCA 24 at [65] as part of discussion in [59]-[66] and [70]-[73].

21 *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* Decision C153/2004 at [56].

activities are listed in s 77A(2) and described in s 87A. The class of an activity is often referred to as its "activity status."[22]

[61] The six classes may be seen as a spectrum of control from *permitted* through to *prohibited* in a progression of increasing levels of constraint:

(i) a permitted activity requires no resource consent and may be undertaken as of right if it complies with the requirements, conditions and permissions, if any, specified in the Act, regulations or relevant plan;

(ii) a controlled activity requires a resource consent but that consent must (with limited exceptions) be granted and may be subject to conditions within the scope of control specified in the relevant plan or national environmental standard;

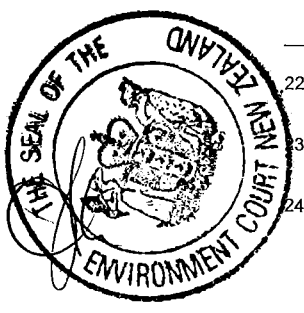
(iii) a restricted discretionary activity requires a resource consent but the consent authority's power to decline an application for such an activity or to grant consent and impose conditions is restricted to the matters specified for that purpose in the plan or national environmental standard;

(iv) a discretionary activity requires a resource consent and the consent authority's discretion to decline consent or to grant consent with or without conditions is, within the scope of the Act itself, unlimited;

(v) a non-complying activity must be assessed against the threshold tests in s 104D of the Act and may be granted only if it passes one of those threshold tests; and

(vi) a prohibited activity is one for which no application for resource consent may be made.

[62] Counsel for the Council referred us to well-known decisions in *New Zealand Mineral Industry Association v Thames-Coromandel District Council*[23] and *Mighty River Power Limited v Porirua District Council*[24] in support of her argument that the harvesting of trees from sites listed in Schedule A should be discretionary rather than non-



[22] The phrase "activity status" appears only in s 149G of the Act, inserted on 1 October 2009, but the usage among practitioners is considerably older than that.

[23] *New Zealand Mineral Industry Association v Thames-Coromandel District Council* (2005) 11 ELRNZ 105.

[24] *Mighty River Power Limited v Porirua District Council* [2012] NZEnvC 213.

complying. She did acknowledge, however, in response to a question from the Court that the statements in those decisions on which she relied were conditioned by the factual circumstances before the Court in those two cases. We consider that acknowledgement to be properly made and, with respect to those decisions and others of a similar nature,[25] we think that caution must be exercised in applying the reasoning in those decisions to other cases. Without doubting the correctness of the statements in the context of the cases in which they were made, the complexity of plan making means that the classification of activities in other circumstances is likely to require specific analysis of the effects of the activity against the particular objectives and policies which relate to the activity being assessed.

[63] It is important to note that the statutory framework for the classification of activities contains no provisions which address the application of these categories or classes to any particular activities or in terms of the nature of the effects of any activity. Instead, the scheme of the Act is that the categorization or classification of an activity is to be done by rules under s 77A. Such rules, like all others in a district plan, must be examined and assessed in accordance with the requirements of s 32 of the Act and consistent with the requirement under s 76(3) of the Act to have regard to the actual or potential effect on the environment of the activity under consideration including, in particular, any adverse effect.

Evaluating the most appropriate activity status

[64] In terms of achieving the objectives of the proposed District Plan, both parties pointed to Objective IB2 as being the most relevant:

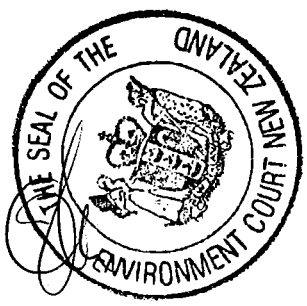
> ***Objective IB2:*** *Areas of indigenous vegetation and habitats of indigenous fauna identified as significant in Schedules 15.7.1, 15.7.2 and 15.7.3 are protected.*

The focus of the argument was then on the issue of the most relevant policy, with the focus of the case being on policies IB2(1)(b) and IB2(5).

[65] Counsel for the Council, in addressing the extent of protection that is appropriate in the circumstances, placed the most weight on Policy IB2(5):

> ***Policy 5:*** *To provide for the sustainable use of indigenous vegetation including scheduled significant indigenous biodiversity sites where the adverse effects of this use are minor.*

[66] She submitted, based on Mr Shaw's evidence, that classifying harvesting in



[25] In relation to permitted activities, see *Twisted World Limited v Wellington City Council* W024/2002 at [62]-[64]; in relation to restricted discretionary activities see *Auckland City Council v John Woolley Trust* (2007) 14 ELRNZ 106 at [49] (HC); and in relation to discretionary activities, see *Lakes District Rural Landowners Society Inc v Wakatipu Environmental Society Inc* C75/2001 at [43]-[44].

Schedule A sites as non-complying would go too far, given the extent to which the plan provided for the assessment of effects in terms of specific criteria and the status of discretionary left open the ability of the Council to decline an application.

[67] In relation to classifying harvesting in Schedule C sites as permitted, she submitted, on the basis of Mr Shaw's evidence that the effects would be no more than minor, that it was unnecessary to impose the costs of the consenting process on landowners except where grazing was proposed during the regeneration phase.

[68] It was common ground that grazing generally slows the regeneration of indigenous species, but that as kānuka and mānuka are relatively unpalatable to stock they are able to regenerate in the presence of managed grazing. On that basis, the parties were agreed that the activity status in Schedule C sites should be restricted discretionary where grazing is proposed during the regeneration phase, which amounts to a partial allowance of the Society's appeal.

[69] The Council proposed that, should the Court confirm the status of Activity 9 in Schedule C sites as otherwise permitted, this outcome could be provided for in the rules by inserting a footnote to that activity status stating that restricted discretionary status applies where grazing is proposed during the natural regeneration phase. The assessment of an application for consent for that activity would not be against the assessment criteria for clearance of indigenous vegetation and so the heading of Rule 15.4.1 would explicitly exclude Activity 9. Instead, such assessment was proposed to be dealt with by a new rule 15.4.4 setting out the restrictions on the Council's discretion, as follows:

> ***15.4.4*** ***Harvesting of kānuka and mānuka where restricted discretionary activity status is due to grazing during regeneration in Schedule C sites (Rule 15.2.1.2(9))***
>
> *15.4.4.1* *Council shall restrict its discretion to:*
>
> *a. Timing to enhance the regeneration or establishment of mānuka and kānuka;*
> *b. Stock type;*
> *c. Grazing intensity;*
> *d. Stock containment methods; and*
> *e. Potential adverse effects on water bodies within the property.*

[70] Counsel for the Council also addressed the relocation and expansion of condition (c) in Activity 15.2.1.2(9) (as notified) to become a new rule 15.2.6, in the following terms:

> ***15.2.6*** ***Harvesting of kānuka and mānuka in Schedule C sites (Rule 15.2.1.2(9))***
>
> *15.2.6.1* *An initial plan prepared by a suitably qualified professional identifying that the areas to be harvested meet the requirements in (c) and (d) of 15.2.1.2(9) is*

> *submitted to Council prior to the activity being carried out, and two further plans verifying that replanting and/or regeneration is occurring in accordance with (a) and (b) of 15.2.1.2(9) are submitted to Council at five and 15 year intervals after the clearance has occurred.*

[71] Counsel submitted that this rule would apply to Activity 15.2.1.2(9) regardless of its activity status because it forms part of the rules for indigenous biodiversity generally. We note the statement at the beginning of section 15.2 of the District Plan:

> The following standards and terms apply to Permitted, Controlled, and Restricted Discretionary activities and will be used as a guide for Discretionary and Non-Complying activities.

[72] Should any harvesting of kānuka and mānuka not meet the standards and terms[26] of Rule 15.2.1.2(9) or Rule 15.2.6, counsel noted that then it would be subject to Rule 15.2.1.2(14), the catch-all activity rule which makes activities involving indigenous vegetation clearance or modification or habitat disturbance not otherwise provided for in the activity table a non-complying activity in sites listed in Schedule A and a discretionary activity in sites listed in Schedules B and C.

[73] The Court expressed a doubt about the likelihood of compliance with Rule 15.2.6.1, particularly at years five and 15 and especially where the subject property may have been transferred. In reply, counsel for the Council submitted that much of the land listed in Schedule C is Māori land and unlikely to be transferred to third parties. She said that monitoring of sites that had been subject to harvesting would occur whether the activity was the subject of a consent or not and whether the costs of monitoring were the subject of an administrative charge under s 36(1)(c) or not.

[74] In response, counsel for the Society placed the most weight on Policy IB2(1)(b):

> ***Policy 1(b):*** *To ensure that subdivision, use and development, is undertaken in a manner that protects scheduled* ***significant indigenous biodiversity sites*** *by: …*
>
> *(b) outside the coastal environment, avoiding and where avoidance is not practicable, remedying or mitigating adverse effects including the loss, fragmentation or degradation of those sites and the cumulative effects on ecosystems.*

[75] Counsel for the Society approached the issue of the appropriate activity status for harvesting kānuka and mānuka by referring us to the decision in *Royal Forest and Bird Protection Society of NZ Inc v New Plymouth District Council*.[27] There the Court was concerned with the level of protection of significant natural areas required in terms

[26] Being the "requirements, conditions, and permissions" referred to in s 87A of the Act.
[27] *Royal Forest and Bird Protection Society of NZ Inc v New Plymouth District Council* [2015] NZEnvC 219.

of s 6(c) of the Act. By analogy with the consideration of the requirements of s 6(a) and (b) of the Act taken by the Supreme Court in *Environmental Defence Society v NZ King Salmon*,[28] the Environment Court held that there was a requirement to implement the protective element of sustainable management in those circumstances.

[76] While recognising that counsel for the Society referred to the *New Plymouth* case for its clarification of the meaning of the word "protection" which is not defined in the Act, we note that the case concerned an application for declarations and enforcement orders based on claims that the Council had not appropriately recognised and provided for protection of areas of significant indigenous vegetation, among other things. Those circumstances clearly come within the exception of incompleteness to the hierarchical approach as explained by the Supreme Court.

[77] In the present case there is a clear relationship between Policy IB2(1)(b) in the District Plan and Policy MN 8B in the RPS where the former gives effect to the latter, providing local and regional substance in terms of the principles in s 6(c) of the Act. On that basis, and consistent with the approach described in the *Appealing Wanaka* decision[29] discussed above, we should not go back to Part 2 of the Act in a more general assessment of what is appropriate.

[78] Counsel for the Society stressed the character of the adverse effects of the harvesting activity and relied on the evidence of Ms Myers in relation to the disruption of forest succession, loss of habitat, hedge effects and the particular threat to Schedule A sites given their small size. She also submitted that the evidence that little or no harvesting was presently occurring in the Schedule A and C sites meant that there was no economic incentive to undertake harvesting and therefore it would be unnecessary to provide for that activity so as to enable reasonable use of the land. With respect, we think that latter submission is not supported by the scheme of the Act or other authority. In our view, the Act is not drafted on the basis that activities are only allowed where they are justified: rather, the Act proceeds on the basis that land use activities are only restricted where that is necessary.

[79] Another point raised in the argument before us was the notion that the classification of an activity as non-complying tended to indicate that it ought not to occur, while the classification as discretionary usually means that the activity will be

[28] *Environmental Defence Society v NZ King Salmon* [2014] NZSC 38; [2014] 1 NZLR 593; [2014] NZRMA 195; (2014) 17 ELRNZ 442 at [24]-[28].

[29] *Appealing Wanaka Inc v Queenstown Lakes District Council* [2015] NZEnvC 139.

acceptable if it is made subject to appropriate conditions.

[80] With respect, cognisant of the degree to which some earlier decisions of the Court noted above[30] may give that impression, we consider it better to approach these two classifications in their statutory context. In particular, they share the same consenting provision in s 104B of the Act, which is expressed simply as a general discretion. While a non-complying activity must first pass one of the thresholds set out in s 104D, if it does so then in terms of s 104B it is to be considered on the same statutory basis as a discretionary activity. At that stage, both types of activities must be considered in terms of the matters set out in s 104 of the Act, including having regard to any effects on the environment of allowing that activity and any relevant provisions of any of the planning documents listed in s 104(1)(b). Typically, the most relevant provisions will be the objectives and policies which bear most directly on the activity or others of like nature and on the environmental context in which the activity is proposed to be established.

[81] In relation to the Schedule A sites, we conclude that a discretionary activity classification is the most appropriate for the activity of harvesting of mānuka and kānuka. We consider that this activity status responds to the policy framework in the District Plan by providing suitable protection of SIBS through an assessment and consenting process for sustainable use of the resource. The detailed assessment criteria for this activity should ensure a thorough analysis of all likely effects, including effects on wider ecosystems. Given those provisions in the District Plan, we do not see any reason to require a prior threshold assessment under s 104D of the Act: that would amount to a further restriction which would add little if anything to the assessment under s 104.

[82] In relation to the Schedule C sites, we conclude that a permitted activity classification is the most appropriate for the activity of harvesting of mānuka and kānuka where grazing will not occur during the regeneration phase. We consider that the requirements, conditions, and permissions for this activity appropriately delimit the extent to which it could occur without a resource consent being required and provide a reasonably clear boundary to the activity for the purposes of monitoring and enforcement. We also have regard to the fact that harvesting of mānuka and kānuka has been occurring in the district for a long time without evidence of more than minor adverse effects on the environment. We also note the fact that currently little or no such

[30] At fn 23 and fn 24.

harvesting activity is occurring in the Schedule C sites and see no evidence that a requirement to obtain resource consent should be imposed on any sort of pre-emptive basis. We acknowledge the relationship of the Māori owners with much of the land listed in Schedule C and take into account the principles of the Treaty of Waitangi / Te Tiriti o Waitangi and the purpose and principles of Te Urewera Act 2014 in reaching our conclusion.

[83] We are grateful to the parties for the constructive way in which they have worked together to improve the related provisions of the District Plan, including since mediation. In particular:

(a) We endorse the suggested amendment of the activity description to replace the words "in the same year" with "within one year." This amendment effectively addresses the potential problem of treating the activity as occurring within a calendar year when it is much more likely to be seasonal.

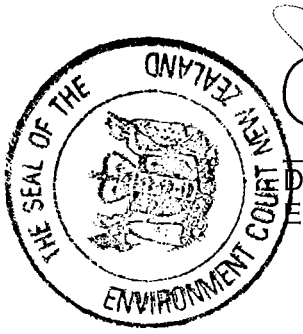
(b) We endorse the agreed position that if harvesting in the Schedule C sites is to be generally a permitted activity, nonetheless it should be a restricted discretionary activity if grazing is proposed in the harvested area during the regeneration phase, given the effect of grazing to delay such regeneration.

(c) As a consequence of that adjustment to the activity status in the Schedule C sites, we also confirm the appropriateness of the amendments to the headings of Rules 15.2.6, 15.4.1 and 15.4.4 to make that distinction clear.

[84] We attach to this decision as **Attachment A** the relevant provisions of the District Plan, amended in accordance with our decision. We attach as **Attachment B** the same provisions with those amendments shown with deletions struck through and additions underlined.

[85] In accordance with the Court's usual practice on appeals under clause 14 of Schedule 1 to the Act, there is no order as to costs.

For the Court:



D A Kirkpatrick
Environment Judge

Attachment A

Relevant provisions of the Whakatāne District Plan, amended in accordance with this decision

1. In Rule 15.2.1 Activity Status Table:

	Activity Status	Schedule A	Schedule B	Schedule C
9.	Harvesting of mānuka and kānuka, excluding any kānuka in the Rural Coastal zone, for commercial use provided that: a. an area equal to that harvested annually is replanted within one year in the same or similar indigenous species or allowed to naturally regenerate; b. the replanted or regenerating area is not subject to any further harvesting operation until at least twenty years has elapsed from the commencement of replanting or regeneration; c. no more than 10% of the total area of kānuka and mānuka in a scheduled feature on any **site** is harvested in any one year; and d. kānuka and mānuka is harvested only from identified areas where kānuka and mānuka represent at least 80% of the vegetation canopy cover.	D	RD	P[1]

[1] RD activity status applies where grazing is proposed during the natural regeneration phase

2. New rule 15.2.6.1

15.2.6 Harvesting of kānuka and mānuka in Schedule C sites (Rule 15.2.1.2(9))

15.2.6.1 An initial plan prepared by a suitably qualified professional identifying that the areas to be harvested meet the requirements in (c) and (d) of 15.2.1.2(9) is submitted to Council prior to the activity being carried out, and two further plans verifying that replanting and/or regeneration is occurring in accordance with (a) and (b) of 15.2.1.2(9) are submitted to Council at five and 15 year intervals after the clearance has occurred.

Amended heading of Rule 15.4.1

15.4.1 Clearance of Indigenous Vegetation (Activity Status 15.2.1), including placement or construction of a building (excluding 15.2.1.2(9) in Schedule C sites where restricted discretionary activity status is due to grazing during regeneration)

4. New Rule 15.4.4

15.4.4 Harvesting of kānuka and mānuka where restricted discretionary activity status is due to grazing during regeneration in Schedule C sites (Rule 15.2.1.2(9))

15.4.4.1 Council shall restrict its discretion to:

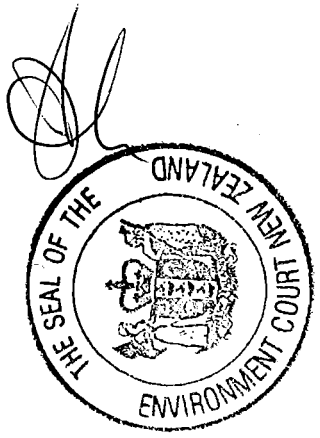
a. Timing to enhance the regeneration or establishment of mānuka and kānuka;
b. Stock type;
c. Grazing intensity;
d. Stock containment methods; and
e. Potential adverse effects on water bodies within the property.

5. New and Amended Definitions

Indigenous Vegetation means any native naturally occurring plant community containing a complement of habitats and native species normally associated with that vegetation type or having the potential to develop these characteristics. It includes vegetation with these characteristics that has regenerated following disturbance or has been restored or planted. It excludes plantations and vegetation that have been established for commercial purposes.

Where indigenous vegetation naturally regenerates or is replanted within a SIB in accordance with Rule 15.2.1.2(9), it is not a "plantation or vegetation established for commercial purposes" as described in the definition of indigenous vegetation.

Naturally regenerate means the harvested area is retired from other active land uses (including grazing) and indigenous vegetation is allowed to regenerate through natural processes. For kānuka and mānuka dominant stands this will typically take ten to twenty years.



Attachment B

Relevant provisions of the Whakatāne District Plan, amended in accordance with this decision

Amendments are shown with deletions ~~struck through~~ and additions underlined

1. In Rule 15.2.1 Activity Status Table:

	Activity Status	Schedule A	Schedule B	Schedule C
9.	Harvesting of mānuka and kānuka, excluding any kānuka in the Rural Coastal zone, for commercial use provided that: a. an area equal to that harvested annually is replanted ~~in the same~~ within one year in the same or similar indigenous species or allowed to naturally regenerate; b. the replanted or regenerating area is not subject to any further harvesting operation until at least twenty years has elapsed from the commencement of replanting or regeneration; ~~b~~c. no more than 10% of the total area of kānuka and mānuka in a scheduled feature on any **site** is harvested in any one year; and d. kānuka and mānuka is harvested only from identified areas where kānuka and mānuka represent at least 80% of the vegetation canopy cover. ~~c. a sustainable management plan verifying the above is submitted to Council.~~	~~RD~~ D	~~C~~ RD	P[1]

[1] RD activity status applies where grazing is proposed during the natural regeneration phase

2. New rule 15.2.6.1

15.2.6 Harvesting of kānuka and mānuka in Schedule C sites (Rule 15.2.1.2(9))

15.2.6.1 An initial plan prepared by a suitably qualified professional identifying that the areas to be harvested meet the requirements in (c) and (d) of 15.2.1.2(9)) is submitted to Council prior to the activity being carried out, and two further plans verifying that replanting and/or regeneration is occurring in accordance with (a) and (b) of 15.2.1.2(9) are submitted to Council at five and 15 year intervals after the clearance has occurred.

3. Amended heading of Rule 15.4.1

15.4.1 Clearance of Indigenous Vegetation (Activity Status 15.2.1), including placement or construction of a building (excluding 15.2.1.2(9) in Schedule C sites where restricted discretionary activity status is due to grazing during regeneration)

4. New Rule 15.4.4

15.4.4 Harvesting of kānuka and mānuka where restricted discretionary activity status is due to grazing during regeneration in Schedule C sites (Rule 15.2.1.2(9))

15.4.4.1 Council shall restrict its discretion to:

a. Timing to enhance the regeneration or establishment of mānuka and kānuka;
b. Stock type;
c. Grazing intensity;
d. Stock containment methods; and
e. Potential adverse effects on water bodies within the property.

5. New and Amended Definitions

Indigenous Vegetation means any native naturally occurring plant community containing a complement of habitats and native species normally associated with that vegetation type or having the potential to develop these characteristics. It includes vegetation with these characteristics that has regenerated following disturbance or has been restored or planted. It excludes plantations and vegetation that have been established for commercial purposes.

Where indigenous vegetation naturally regenerates or is replanted within a SIB in accordance with Rule 15.2.1.2(9), it is not a "plantation or vegetation established for commercial purposes" as described in the definition of indigenous vegetation.

Naturally regenerate means the harvested area is retired from other active land uses (including grazing) and indigenous vegetation is allowed to regenerate through natural processes. For kānuka and mānuka dominant stands this will typically take ten to twenty years.