Gock v Auckland Council

[2019] NZHC 276

High Court, Auckland (2018-404-866; 923) 7-9, 19, 26 November, 3 December 2018;
Muir J 27 February 2019

Appeals — High Court — Scope of s 148 of the Local Government (Auckland Transitional Provisions) Act 2010 — Elite and prime soils — Outstanding natural features — Structure plan guidelines — Special Purpose (Quarry zoned lands) — Mana whenua issues — Local Government (Auckland Transitional Provisions) Act 2010, ss 115(1), 148.

Resource management — Plans and schemes — District — Change or variation — Heritage — Natural environment and natural resources — Environmental policy — Local Government (Auckland Transitional Provisions) Act 2010, ss 115(1), 148.

The appellants, Joe and Fay Gock (the Gocks); John and Adriana Self and Roger Clark (trustees of the Self Family Trust) (the Selfs) appealed against an Environment Court decision of 18 April 2018 (the Environment Court decision). The matter concerned the location of the Rural Urban Boundary (the RUB) at Puhinui in the *Auckland Unitary Plan* (the AUP), and covered two separate but related areas of land east of Auckland International Airport: Crater Hill, most of which was owned by the Selfs, and Pukaki Peninsula, owned in part by the Gocks.

The Independent Hearings Panel appointed under the Local Government (Auckland Transitional Provisions) Act 2010 (the Act) recommended that the two areas should be included on the urban side of the RUB in the AUP. However, Auckland Council (the Council) declined to accept the Independent Hearings Panel's recommendation, concluding that the two areas should be on the rural side of the RUB. The appeal to the Environment Court by the Selfs was dismissed.

Reviewing the background and procedural history, the Court noted that the relevant provisions of the Resource Management Act 1991 were those prior to the Resource Legislation Amendment Act 2017. When considering the contents of a district plan, the pertinent factors were found in ss 31, 32 and 72-77D. The Court stated that district plan provisions must give effect to a national policy statement or the *New Zealand Coastal Policy Statement* (the NZCPS) and the regional policy statement (the RPS).

Referring to *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* (cited below), the Court stated that to the extent that the area subject to the appeal was within the coastal environment, pt 2 of the Act should not be referred to because the NZCPS applied, and none of the exceptions in *King Salmon* were relevant.

The issues could be grouped into five points of appeal: (i) s 148 of the Act – scope; elite and prime soils; (ii) outstanding natural features; (iii) structure plan guidelines; (iv) the special purpose quarry zoned lands; and (v) mana whenua issues.

Addressing the first point of appeal, the appellants argued that the Environment Court had erred by holding that s 148(1) of the Act did not require that a reversion to

the Proposed Auckland Unitary Plan (PAUP) be requested in submissions. They argued that such a reversion was beyond scope.

Held, (1) the original PAUP was already in the public domain and that "scope" in the present case encompassed the notified PAUP. There was no error of law in the Environment Court's finding that the Council's alternative solution (namely to revert to the notified PAUP) was within scope of the submissions for the purposes of s 148(1)(b)(ii) of the Act. (paras 41, 42, 47)

(2) Regarding the interpretation of the relevant provisions in Chapter B2.2.2(2)(j) of the RPS concerning the significance of elite and prime soils in the location or relocation of the RUB, the Environment Court considered that the phrase "significant for their ability to sustain food production" was a qualifier only to the reference in the RPS to "prime" soils and that, on the other hand, the location of the RUB was required, without qualification, to avoid "elite" soils, without reference to their significance in sustaining food production. The Court rejected the Environment Court's construction of the provision, as this interpretation would preserve rural islands which were unsuitable for such food production. Having considered the expert witnesses' evidence, the Court found that the Environment Court had considered an irrelevant factor. The Environment Court, in assessing whether the relevant areas of premium soils were significant for their ability to sustain food production, had erred by failing to take into account the insignificant area of such soils involved in the present case (100 ha) in the context of the total area of such soils in the Auckland region (63,000 ha). It had also erred by wrongly taking into account the principle of incremental loss in the context of the RUB involving lands already surrounded by urban development. The remaining points of appeal failed. (paras 69, 72, 77(e), 87, 91, 93, 202)

Cases referred to

Albany North Landowners v Auckland Council [2017] NZHC 138

Application by Vivid Holdings Ltd, Re (1999) 5 ELRNZ 264 (EnvC)

Blencraft Manufacturing Co Ltd v Fletcher Development Co Ltd [1974] 1 NZLR 295 (SC)

BP Oil New Zealand Ltd v Waitakere City Council [1996] NZRMA 67 (HC)

Canterbury Regional Council v Apple Fields Ltd (2003) 9 ELRNZ 311 (HC)

Church of Jesus Christ of Latter Day Saints Trust Board v Hamilton City Council [2015] NZEnvC 166

Clark Fortune McDonald & Associates v Queenstown Lakes District Council (No 2) EnvC Christchurch C89/02, 24 July 2003

Contact Energy Ltd v Waikato Regional Council (2007) 14 ELRNZ 128 (HC)

Countdown Properties (Northland) Ltd v Dunedin City Council (1994) 1B ELRNZ 150 (HC)

Environmental Defence Society Inc v New Zealand King Salmon Co Ltd [2014] NZSC 38, [2014] 1 NZLR 593, (2014) 17 ELRNZ 442

Federated Farmers of New Zealand Inc v MacKenzie District Council [2014] NZHC 2616, (2014) 18 ELRNZ 712

Gavin H Wallace Ltd v Auckland Council [2012] NZEnvC 120

General Distributors Ltd v Waipa District Council (2008) 15 ELRNZ 59 (HC)

Minhinnick v Minister of Corrections EnvC Auckland A043/2004, 6 April 2004

Moriarty v North Shore City Council [1994] NZRMA 433 (HC)

Murphy v Takapuna City Council HC Auckland M456/88, 7 August 1989

Ngati Maru Iwi Authority v Auckland City Council HC Auckland AP18/02 7 June 2002

Oyekan v Adele [1957] 1 WLR 876, [1957] 2 All ER 785 (PC West Africa)

Pittalis v Grant [1989] QB 605 (EWCA)

Royal Forest & Bird Protection Society Inc v Southland District Council [1997] NZRMA 408 (HC)

Royal Forest & Bird Protection Society Inc v WA Habgood Ltd (1987) 12 NZTPA 76 (HC)

Royal Forest & Bird Protection Society of New Zealand Inc v New Plymouth District Council [2015] NZEnvC 219, (2015) 19 ELRNZ 122

Shaw v Selwyn District Council [2001] 2 NZLR 277 (HC)

Smith v Takapuna City Council (1988) 13 NZTPA 156 (HC)

Takamore v Clarke [2012] NZSC 116, [2013] 2 NZLR 733

Watercare Services Ltd v Minhinnick [1998] 1 NZLR 294, (1997) 3 ELRNZ 511 (CA)

Westfield (NZ) Ltd v Hamilton City Council (2004) 10 ELRNZ 254 (HC)

Wymondley Against the Motorway Action Group Inc v Transit New Zealand [2004] NZRMA 162 (HC)

Appeal

This was a partially successful appeal against an Environment Court decision which upheld Auckland Council's decision to reject an Independent Hearings Panel recommendation that the rural urban boundary follow the coastal margin, whereby both Crater Hill and the Pukaki Peninsula would be on the urban side of the rural urban boundary and therefore be identified as suitable for urbanisation.

A Webb for appellants
H J Ash and *T R Fischer* for respondent
R Enright for Auckland Volcanic Cones Society Inc (Interested Party)

Cur adv vult

MUIR J

Introduction

[1] These are appeals against a decision of the Environment Court.[1]

[2] The substantive dispute relates to the location of the Rural Urban Boundary (the RUB) at Puhinui, west of State Highway 20 on the edge of the Pūkaki-Waokauri Creek. The decision covers two separate but related areas: Crater Hill, most of which is owned by the Self Family Trust (the SFT); and Pūkaki Peninsula, which is owned, in part, by Mr Joe and Ms Fay Gock (the Gocks). The land is surrounded by housing/State Highway 1 on one side, and bordered by the Manukau Harbour on the other.

[3] The Independent Hearings Panel (the Panel) recommended that the RUB follow the coastal margin, with the result that both Crater Hill and the Pūkaki Peninsula would be on the urban side of the RUB and therefore be identified as suitable for urbanisation. The Auckland Council (the Council) did not accept the Panel's recommendation, and in its decision dated 22 July 2016 excluded both areas.

1 *Self Family Trust v Auckland Council* [2018] NZEnvC 49, [2018] NZRMA 323.

[4] The SFT appealed to the Environment Court, which upheld the Council's decision. The appellants now appeal to this Court on questions of law.[2]

Background and procedural history

General background

[5] Crater Hill and Pūkaki Peninsula are relatively close together, but are not contiguous: they are separated by two arms of Waokauri Creek and by strips of large residential lots and open space between those arms. Crater Hill is the eastern of the two sites, and covers approximately 100 hectares. Pūkaki Peninsula is of similar size. Both sites are treated in the Council's Auckland Unitary Plan (the AUP) as a sub-precinct of a special precinct called the Puhinui Peninsula.

[6] The AUP is the principle planning document for Auckland. It is now operative in part. It describes how the Auckland region's natural and physical resources will be managed while enabling growth and development to meet the needs of Auckland's expanding population. It is a complex document, and includes a regional policy statement (RPS) comprising multiple chapters, a regional plan and a district plan for Auckland.[3]

[7] The RPS includes the objective that urban growth ought to occur in a quality, compact urban form.[4] A "compact urban form" is described in the plan as one having clear boundaries, within which residential and commercial areas are relatively close together.[5] The concept is central to the RPS.

[8] The RUB is a "district plan use rule".[6] In plain English, as explained by the Environment Court, it is simply "a line on a map".[7] It is intended to provide a clear delineation between urban and rural areas, and define the maximum extent of urban development in Auckland until 2040. It is a method of achieving the goal of a compact urban form.

Development of the Auckland Unitary Plan

[9] The process for the development of the AUP is described in s 115 of the Local Government (Auckland Transitional Provisions) Act 2010 (the LGATPA):

> **115 Overview of this Part**
>
> (1) This Part sets out the following process for the preparation of the first Auckland combined plan:
>
> (a) the Auckland Council prepares a proposed plan for Auckland that meets the requirements of a regional policy statement, a regional plan, including a regional coastal plan, and a district plan:
>
> (b) the plan is prepared in accordance with this Part and, to the extent provided for by this Part, the RMA:
>
> (c) the plan is not required to include district plan provisions in relation to the Hauraki Gulf Islands (the district plan provisions of the former Auckland City Council in relation to those islands will become operative as part of an existing separate process):

2 As they are entitled to under ss 156(4) of the Local Government (Auckland Transitional Provisions) Act 2010 and s 299 of the Resource Management Act 1991.

3 Local Government (Auckland Transitional Provisions) Act 2010, s 122.

4 Auckland Unitary Plan, objective B2.2.1(1).

5 Auckland Unitary Plan, Chapter B2.9.

6 A phrase characteristic of the unfortunately opaque language which appears to have infected many of the planning documents I have been required to consider.

7 *Self Family Trust v Auckland Council* [2018] NZEnvC 49, [2018] NZRMA 323 at [17].

(d) the Council prepares its reports on the proposed plan under sections 32 and 165H(1A) of the RMA and makes them available for public inspection, and provides the reports to the Ministry for the Environment for audit:

(e) the Council notifies the proposed plan and calls for submissions:

(f) the Council notifies a summary of submissions and calls for further submissions:

(g) the Council then forwards all relevant information obtained up to this point to a specialist Hearings Panel appointed by the Minister for the Environment and the Minister of Conservation:

(h) the Hearings Panel holds a Hearing into submissions on the proposed plan by means of hearing sessions conducted in accordance with the procedural and other requirements of this Part:

(i) the Council must attend the hearing sessions and otherwise assist the Hearings Panel with the task of the Hearing:

(j) no later than 50 working days before the expiry of 3 years from the date the Council notifies the proposed plan, the Hearings Panel must make recommendations to the Council on the proposed plan (unless that period is extended by the Minister for the Environment by up to 1 year):

(ja) the Hearings Panel may make recommendations to the Council in respect of a particular topic once it has finished hearing submissions on that topic

…

[10] Once the Panel makes its recommendations to the Council, the Council must decide whether to accept or reject each such recommendation. Then, for each rejected recommendation, it must decide an alternative solution, which may or may not include elements of both the proposed plan as notified and the Panel's recommendation in respect of that part of the proposed plan, but must be within the scope of the submissions.[8]

[11] Following the Council's decision and assuming the Panel's recommendation is rejected, a person who made a submission on the proposed plan may appeal to the Environment Court. The appeal must be in respect of a provision or matter relating to the proposed plan that the person addressed in their submission, and in relation to which the Council rejected a recommendation of the Panel and decided an alternative solution.[9] A decision of the Environment Court on such an appeal may be further appealed on questions of law to the High Court.[10]

How the case came before this Court

[12] The AUP started life as the Proposed Auckland Unitary Plan (the PAUP), which identified the subject areas as remaining outside the RUB. The SFT was the only landowner to make a submission in that respect. It sought an amendment to the RUB, relocating it around the coastline and bringing Crater Hill within it.

[13] The Panel recommended to the Council that Pūkaki Peninsula and Crater Hill be included within the RUB and rezoned accordingly.

[14] The Council rejected this recommendation in favour of retaining the boundary in its original location together with existing Rural Production zoning.

[15] The SFT appealed the Council's decision to the Environment Court. It sought to set it aside and reinstate the Panel's recommendations. But the terms of its appeal

8 Local Government (Auckland Transitional Provisions) Act 2010, s 148(1). I note the interpretation of this particular requirement is disputed in this appeal.

9 Section 156(1).

10 Section 156(4), and Resource Management Act 1991, s 299.

were wide enough to cover the Pūkaki Peninsula, so the Gocks and a Mr Edwards joined the appeal as s 274 parties.[11] Both own land on the Peninsula. Mr Edwards is no longer a party.

[16] The Environment Court concluded that the Council was correct to reject the Panel's recommendations. It said:[12]

> Standing back and looking at all relevant considerations, properly weighted, we consider the Auckland Council drew the RUB in the correct place so as to exclude the Pūkaki Peninsula and Crater Hill. Its decision should be confirmed as creating an appropriate strong defensible boundary in this area.

[17] Under s 156(4) of the LGATPA, the Environment Court was required to treat the appeal as if it were a hearing under cl 15 of sch 1 to the Resource Management Act 1991 (the RMA). As a result, s 299 of the RMA applies, which allows a party to a proceeding before the Environment Court to appeal to this Court against any decision, report or recommendation on a question of law.

Legal framework

Statutory provisions

[18] The matters in dispute before the Environment Court—the location of the RUB, zonings and precinct provisions for the subject land — are all "district plan methods". The statutory tests for a district plan therefore apply.

[19] The appeal is governed by the RMA (incorporating the Resource Management Amendment Act 2013). The Resource Legislation Amendment Act 2017 (the RLAA) received the royal assent on 18 April 2017. However, the transitional provisions in cl 13, sch 2 of that Act provide that where, prior to the commencement date a proposed plan has been publicly notified but has not proceeded to the stage at which no further appeal is possible, the proposed plan must be determined as if the RLAA had not been enacted.

[20] For the purposes of this appeal the relevant statutory considerations when considering the contents of a district plan are therefore those set out in the un-amended versions of ss 31, 32 and 72-77D of the (un-amended) RMA.

[21] To summarise, the relevant factors include whether district plan provisions:

(a) Are designed to accord with and assist the Council to carry out its functions, so as to achieve the purpose of the Act;[13]

(b) Are in accordance with any regulations (including national environmental standards);[14]

(c) Give effect to any national policy statement or the New Zealand Coastal Policy Statement;[15]

(d) Give effect to the RPS;[16]

(e) Are "not inconsistent" with an operative regional plan for any matter specified in section 30(1),[17] and have regard to any proposed regional plan on any matter of regional significance;[18] and

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11 Resource Management Act 1991, s 274.

12 *Self Family Trust v Auckland Council* [2018] NZEnvC 49, [2018] NZRMA 323 at [538].

13 Resource Management Act 1991, ss 31 and 74(1)(a).

14 Section 74(1)(f).

15 Section 75(3).

16 Section 75(3)(c).

17 Section 75(4).

18 Section 74(2)(a)(ii).

> (f) Have regard to any relevant management plans and strategies under other Acts and to any relevant entry in the New Zealand Heritage Lists to the extent their content has a bearing on the resource management issues of the region.[19]

[22] Under s 32 of the RMA, an "evaluation report", which for present purposes includes a decision of the Environment Court,[20] must examine whether the objectives of the proposal being evaluated are the most appropriate way to achieve the purpose of the Act. It must also examine whether the provisions in the proposal are the most appropriate way to achieve the objectives having regard to other reasonably practicable options for doing so and in light of their efficiency and effectiveness in achieving that purpose.[21]

Part 2 of the Resource Management Act 1991 and King Salmon

[23] Part 2 of the RMA contains the purposes and principles of the Act. In *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* the Supreme Court considered the relationship between the New Zealand Coastal Policy Statement (the NZCPS) and pt 2 of the RMA.[22]

[24] It held that the NZCPS gives substance to the provisions of pt 2 in relation to the coastal environment. In principle, by giving effect to the NZCPS, a regional council is necessarily acting in accordance with pt 2 and there is no need to refer back to the Part when determining a plan change.[23] But the Supreme Court identified three exceptions where reference could be made to pt 2: invalidity of the NZCPS, or any part of it; instances where the NZCPS does not "cover a field"; or where there is uncertainty as to the meaning of particular policies within the NZCPS.[24]

[25] Under the principles established in *King Salmon*, therefore, to the extent the area subject to the appeal is within the coastal environment, pt 2 of the RMA should not be referred to because the NZCPS applies and none of the three exceptions are relevant.

The requirement to give effect to the Regional Policy Statement

[26] Section 75(3) of the RMA requires the Environment Court to give effect to the NZCPS, any national policy statement, and any RPS. The Supreme Court in *King Salmon* held that "give effect to" means simply to implement.[25] The Supreme Court further commented:

> [91] We acknowledge that the scheme of the RMA does give subordinate decision-makers considerable flexibility and scope for choice. This is reflected in the NZCPS, which is formulated in a way that allows regional councils flexibility in implementing its objectives and policies in their regional coastal policy statements and plans. Many of the policies are framed in terms that provide flexibility and, apart from that, the specific methods and rules to implement the objectives and policies of the NZCPS in particular regions must be determined by regional councils. But the fact that the RMA and the NZCPS allow regional and district councils scope for choice does not mean, of course,

19 Section 74(2)(b).

20 Section 290(1).

21 Section 32(1)(b).

22 *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593, (2014) 17 ELRNZ 442.

23 At [85].

24 At [88].

25 At [77].

that the scope is infinite. The requirement to "give effect to" the NZCPS is intended to constrain decision-makers.

[27] The Supreme Court also held that the requirement to give effect to a policy that is framed in a specific and unqualified way may be more prescriptive than a requirement to give effect to a policy that is worded at a higher level of abstraction.[26] Where, therefore, policies are expressed in clearly directive terms (e.g. "to protect" or "to avoid"), a decision-maker may have no option but to implement them.[27]

Appeals to this Court

[28] Appeals to this Court from the Environment Court are governed by s 156(4) of the LGATPA and s 299 of the RMA. Such appeals are confined to questions of law.[28] The onus of establishing any errors of law rests on the appellant.[29]

[29] This Court will only interfere with a decision of the Environment Court if it can be established that the Environment Court did one of the following:[30]

(a) Applied the wrong test;

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

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

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

[30] The weight to be afforded to relevant considerations is a question solely for the Environment Court, and is not open to challenge on appeal.[31] This Court will not, therefore, re-examine the merits of a case under the pretext of considering questions of law.[32] And where the Environment Court has made a qualifying error, this Court will not grant relief unless the error is one which has materially affected the result.[33]

Grounds of appeal

[31] The SFT and the Gocks say the Environment Court erred in the following ways:

(a) In its interpretation of s 148 of the LGATPA;

(b) In requiring structure planning in the context of a RUB location/relocation exercise;

(c) In its interpretation and application of policy B2.2.2(j) in relation to the protection of elite and prime soils;

(d) In its interpretation and application of RPS Chapters B4, B7, B8 and D 10 in relation to outstanding natural features and the coastal environment;

(e) In determining issues relating to Mana Whenua against the weight of evidence;

(f) By failing to discharge its obligations properly under s 32 of the RMA; and

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26 At [80].

27 At [80] and [129]-[130].

28 Resource Management Act 1991, s 299(1).

29 *Smith v Takapuna City Council* (1988) 13 NZTPA 156 (HC).

30 *Countdown Properties (Northland) Ltd v Dunedin City Council* (1994) 1B ELRNZ 150 (HC) at 157.

31 *Moriarty v North Shore City Council* [1994] NZRMA 433 (HC).

32 *Blencraft Manufacturing Co Ltd v Fletcher Development Co Ltd* [1974] 1 NZLR 295 (SC); and *Murphy v Takapuna City Council* HC Auckland M456/88, 7 August 1989.

33 *Royal Forest & Bird Protection Society Inc v WA Habgood Ltd* (1987) 12 NZTPA 76 (HC) at 81-82; and *BP Oil New Zealand Ltd v Waitakere City Council* [1996] NZRMA 67 (HC).

(g) As a consequence of the above, in determining that the most appropriate, efficient and effective way of achieving the purpose of the RMA was to keep Pūkaki Peninsula and Crater Hill outside the RUB.

[32] The appellants further submit that the Court made findings that were not supported by evidence about the effects of development on the Gocks and the SFT's land.

[33] As they were in submissions and argument, I group the appeal points under the following headings:

(a) Section 148 of the LGATPA — Scope.
(b) Elite and prime soils.
(c) Outstanding natural features.
(d) Structure Plan Guidelines.
(e) The Special Purpose Quarry Zoned lands.
(f) Manu Whenua issues.

Section 148 of the LGATPA — Scope

[34] The appellants allege that the Council (and likewise the Environment Court) did not have jurisdiction to reinstate the RUB promulgated in the PAUP. It says that the Environment Court erred in:

(a) Holding that the relevant statutory provision did not require that reversion to the PAUP be requested in submissions; and
(b) In its alternative finding that such request was nevertheless made.

[35] The relevant statutory provision is s 148(1) of the LGATPA which provides that, on receipt of the recommendations of the Panel, the Council must:

(a) Decide whether to accept or reject each recommendation of the Hearings Panel; and
(b) For each rejected recommendation, decide an alternative solution, which—
    (i) May or may not include elements of both the proposed plan as notified and the Panel's recommendation in respect of that part of the proposed plan; but
    (ii) Must be within the scope of the submissions.

[36] The Environment Court interpreted s 148 as follows:

> [25] There are two components to section 148(1)(b): subparagraph (i) provides that an alternative solution may or may not include elements of both the proposed plan and the Hearings Panel's recommendation. In this case the Council's alternative solution for the location of the RUB and consequential zoning was to revert to the notified version of the plan. Thus the alternative solution clearly satisfies subparagraph 148(1)(b)(i) of the LGATPA.
>
> [26] Subparagraph (ii) requires that the alternative must be within the scope of submissions. The second subparagraph is introduced by "but" for emphasis, although its logical meaning is "and". We accept Ms Ash's submission that the word "but" when used at the end of subsection (1)(b)(i) is conjunctive. It is incorrect to read the requirement for alternative solutions to be "within the scope of the submissions" as requiring the alternative solutions be "requested in submissions". We hold that the Council's alternative solution, to revert generally to the notified PAUP, therefore also comes within subparagraph 148(1)(b)(ii). (Footnotes omitted)

[37] It went on to hold:[34]

34 At [27].

> In any event there are a number of submissions which effectively seek the "alternative solution" decided by the Council when it rejected the [Panel's] recommendations.

[38] The appellants submit that the Environment Court was incorrect to read the word "but" as "and". However, little in my view turns on that point. The provisions of s 148(1)(b)(ii) are mandatory and cumulative on those in (i). Whether the "but" is appropriately considered an "and" seems to me to be a reasonably arid inquiry.

[39] More substantively, the appellants argue that the requirement in s 148(1)(b)(ii) — for the alternative solutions to be "within the scope of the submissions" should be interpreted as meaning "requested in submissions" — the result being that both the Council and the Environment Court only had jurisdiction to decide on an "alternative solution" that a submitter had requested in a submission on the PAUP. They say that "the orthodox position as to scope of submission" is whether the relief was "reasonably and fairly raised" via submission and that none of the submissions before the Panel contemplated reinstatement of the original RUB.

Discussion

[40] At the outset, I accept as appropriate Ms Ash's concession that, in the context of any notification and submission process, it is the written submission lodged in respect of the relevant proposal that is key and not the oral submissions that were subsequently presented, in this case, to the Panel.[35] That is for essentially natural justice reasons given that, otherwise, as Wylie J noted in *General Distributors Ltd v Waipa District Council*:[36]

> … the plan could end up in a form which could not reasonably have been anticipated resulting in potential unfairness.

[41] However, it will be readily apparent that if this is the underlying rationale it would not preclude reversion to (in this case) the original PAUP as that was already a proposal in the public domain.

[42] Consistent with that position, the Council argues that the word "scope" suggests that there must be a starting reference point, in this case the notified PAUP. It says that on receipt of the recommendations from the Panel, the Council had a range of options open to it, from the notified PAUP to the relief requested in submissions, or somewhere in between. It says that this is consistent with the ordinary requirements in relation to scope that apply when a Council notifies a plan change or review under the first schedule to the RMA. And, it says, the only additional limitation which applied to the Council's decision making in respect of the PAUP (other than the 20-working day time limitation) was the requirement under s 148(2)(b) of the LGATPA that the Council not consider any submission, or other evidence, unless it had been made available to the Panel prior to the issue of its recommendations.

[43] The Council defines these "ordinary requirements", in terms which I accept, as follows:

(a) The paramount test is whether any amendment made to the plan as notified goes beyond what is reasonably and fairly raised in submissions on the plan.[37]

(b) That assessment should be approached in a realistic workable fashion.[38]

(c) A submission must first raise a relevant resource management issue, and then any decision requested must fairly and reasonably fall within the

35 Including by the Council in support of the RUB in the PAUP.

36 *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59 (HC) at [55].

37 *Countdown Properties (Northlands) Ltd v Dunedin City Council* (1994) 1B ELRNZ 150 (HC) at 171.

38 *Royal Forest & Bird Protection Society Inc v Southland District Council* [1997] NZRMA 408 (HC) at 413.

general scope of the original submission, or the proposed plan as notified, or somewhere in between.[39]

(d) The approach requires that the whole relief package detailed in submissions be considered.[40]

(e) Consequential changes that logically arise from the grant of relief requested and submissions lodged are permissible, provided they are reasonably foreseeable.[41]

(f) Such changes can extend to consequential rule changes following agreed relief regarding policy changes, provided the changes are reasonably foreseeable.[42]

(g) There is an implied jurisdiction to make consequential amendments to rules following changes to objectives and policies on the principle that regional and district plans have an internal hierarchical structure.[43]

(h) In the case of a combined plan being developed contemporaneously, submissions on higher order provisions inevitably bear on the direction of lower order objectives. Objectives, policies, methods and rules should be promulgated with regard to all topically relevant submissions.[44]

[44] I accept as one of the key principles emerging from the various decisions footnoted above that any amendment must be fairly and reasonably within a range of options between what was originally notified and the relief requested in individual submissions.

[45] It was almost precisely in these terms that the position was put in *Re Application by Vivid Holdings Ltd*:[45]

> … any decision of the Council, or requested of the Environment Court in a reference [that is on appeal], must be:
>
> (a) Fairly and reasonably within the general scope of:
>
> (i) an original submission; or
>
> (ii) the proposed plan as notified; or
>
> (iii) somewhere in between.
>
> provided that
>
> (b) the summary of the relevant submissions was fair and accurate and not misleading.

[46] In *Albany North Landowners v Auckland Council* the High Court recognised that pt 4 of the LGATPA (in which s 148 appears) did not envisage a departure from this body of case law.[46]

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39 *Re Application by Vivid Holdings Ltd* (1999) 5 ELRNZ 264 (EnvC) at [19]. See also *Church of Jesus Christ of Latter Day Saints Trust Board v Hamilton City Council* [2015] NZEnvC 166 at [19].

40 *Shaw v Selwyn District Council* [2001] 2 NZLR 277 (HC) at [31].

41 *Westfield (NZ) Ltd v Hamilton City Council* (2004) 10 ELRNZ 254 (HC) at [73]-[77].

42 *Church of Jesus Christ of Latter Day Saints Trust Board v Hamilton City Council* [2015] NZEnvC 166 at [47].

43 *Clark Fortune McDonald & Associates v Queenstown Lakes District Council (No 2)* EnvC Christchurch C89/02, 24 July 2003 at [17].

44 *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [114].

45 *Re Application by Vivid Holdings Ltd* (1999) 5 ELRNZ 264 (EnvC) at 271 (footnotes omitted).

46 *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [1148].

[47] In my view the Environment Court's finding that the Council's alternative solution (namely to revert generally to the notified PAUP) was within the scope of submissions for the purposes of s 148(1)(b)(ii) is consistent with such principles and fulfils the underlying natural justice imperative. I cannot therefore accept the appellant's argument that the s 148(1)(b)(ii) reference necessitates a specific submission proposing reversion to the notified PAUP.

[48] In any event, the Environment Court went on to hold that there were "a number of submissions which effectively seek the 'alternative solution' decided by the Council when it rejected the Panel's recommendations".[47]

[49] In support of this finding the Council refers to the submissions of each of Te Ākitai Waihoua (Te Ākitai), The Board of Airline Representatives of New Zealand (Inc) (BARNZ), Auckland International Airport Ltd (AIA) and New Zealand Transport Agency (NZTA).

[50] In its original submission (No 6386) Te Ākitai stated (para 3.2 (11)) that it generally supported:

> The location of the Rural Urban Boundary (RUB) in respect of Puhinui and Mangere and the zoning of this land as rural production.

[51] The schedule to its submission included the following:

TOPIC	PAUP PROVISIONS/REASONS	RELIEF SOUGHT
Rural Urban Boundary	• Support for the location of the Rural Urban Boundary (RUB) as it applies to the Puhinui/Mangere area. This location reflects the key agreements reached as part of the Puhinui master planning process undertaken in 2013 and the Eastern Access Agreement and ensures that urban development of this land will not proceed until such a time that sufficient planning work is undertaken to advise otherwise.	• Support and retain the location of the RUB on the Maps (RUB overlay) as it applies to the Puhinui/ Mangere area.

[52] Te Ākitai also lodged a further submission (FS No 3321) in respect of the original submission by Self Family Trust. In that submission it identified its position as "oppos[ing] amendment to the RUB at Puhinui to follow the coast line and rezoning for a range or urban purposes".[48] The relief sought in that submission was:

> To not accept the relief sought by Self Trust unless a collaborative and comprehensive structure planning process identifies that urban development can occur without having significant cumulative adverse effects on Te Ākitai's cultural values in the Puhinui Peninsula.

47 *Self Family Trust v Auckland Council* [2018] NZEnvC 49, [2018] NZRMA 323 at [27].

48 At 19.

[53] BARNZ's operative submission was in the following terms:

Sub No.	**Submitter name and address for service**	**Submitter's relief**	**Support / Oppose**	**Decision sought by BARNZ**	**Reasons**
3866-1	Self Trust	Amend the extent of the RUB to include all land along the coastline in Puhinui area within RUB.	Oppose	Disallow the whole of the submission.	BARNZ considers that amending the RUB as proposed may not be appropriate for a range of reasons, including in relation to potential reverse sensitivity, traffic, and air discharge effect. In addition, it is considered that a full structure planning exercise should be undertaken prior to amending the RUB. A structure plan is required to assess transportation and infrastructure constraints, aircraft and potential future airport maintenance base noise constraints, and environmental and cultural constraints. Comprehensive analysis on these constraints has not been undertaken or made available to date.

[54] AIA in turn relevantly submitted:

Item	Sub # Point	Submitter	Decision sought by submitter	Support / Oppose	Reasons	Decision sought
297	3866-1	Self Trust	Amend the extent of the RUB to include all land along the coastline in Puhinui area within RUB.	Oppose	Auckland Airport considers that amending the RUB as proposed may not be appropriate for a range of reasons, including in relation to potential reverse sensitivity, traffic, and air discharge effect. In addition, it is considered that a full structure planning exercise should be undertaken prior to amending the RUB. A structure plan is required to assess transportation and infrastructure constraints, aircraft and potential future airport maintenance base noise constraints, and environmental and cultural constraints. Comprehensive analysis on these constraints has not be[en] undertaken or made available to date.	Auckland Airport seeks that these submissions be disallowed.

[55] And NZTA's submission was in terms:

Submitter name, address and Council submission number	**Position**	**Relevant UP Provision**	**Particular Parts of the Submission**	**Reason for support / opposition**	**Relief**
Self Trust	Oppose	Rural Urban Boundary (RUB)	Amend Rural Urban Boundary at Puhinui area should be brought into the Rural Urban Boundary) and be rezoned for a range of urban purposes.	The Agency supports the use of the RUB (in conjunction with structure plans) as a means of effectively and efficiently delivering future growth (including aligning the provision of infrastructure necessary to support the growth). The Agency was involved in the development of the proposed RUB, as the State highway network is critical to providing transport services to the future urban area and the Agency is a co-investor in the transport system. While it is acknowledged that transport was just one of the criteria used by the Council to identify the RUB, the Agency would be very concerned if the extent of the RUB areas, or Future Urban Zones, were increased significantly without the opportunity to consider the potential impact on the national State highway network and wider transport system, and whether the extension would increase (or bring forward) the need for transport investment from the National Land Transport Fund.	The Agency seeks that the whole of the submission be disallowed.

[56] In respect of Te Ākitai's original submission, in which it sought to "retain the location of the RUB on the Maps", it is common ground that the Map referred to is the PAUP Rural Urban Boundary Map, identifying both the Puhinui Peninsula and Crater Hill as being outside the RUB.

[57] Mr Webb relies, however on the observation in the reasons section of the submission that:

> This location reflects the key agreements reached as part of the Puhinui master planning process undertaken in 2013.

[58] He says that this process, which resulted in a report by the Council's Auckland Development Committee dated 16 October 2014, but which was subsequently overtaken by the PAUP, produced a recommendation that Crater Hill in fact be included within RUB. He refers to [32] of the Development Committee's Report:

> While it is acknowledged that area B [Crater Hill] is special given the cultural, geological and archaeological values present within this area, it is recommended that this area be included within the RUB on the basis that the precinct provisions to be applied to this area will ensure that these important values are not compromised. Any partial movements of the RUB in this location will not ensure the defensibility of the RUB line, which is only able to be secured by moving the line to the coast.

[59] Mr Webb submitted therefore that Te Ākitai's position was not one of adamant support for the RUB as detailed in the PAUP, and could not therefore be considered a basis for reversion to that proposal.

[60] In response, the Council says that there is no evidence of Te Ākitai having, in 2013, agreed that Crater Hill should be within the RUB. To the contrary, the same report of the Auckland Development Committee records its "strong objection" to "alternatives to the holistic protection of the site".

[61] In my view Mr Webb's submission therefore lacks an adequate evidential foundation. More significantly, however, the relief sought in the Te Ākitai submission is to retain the location of the RUB in the PAUP. Its subsequent submission does not negate that but rather serves only to qualify it. I accept the submission of the Council that the relief sought in a submission is the best determinant of scope and that Te Ākitai's support of the original RUB location means that the Council's ultimate decision to reject the recommendation of the Panel was within the "scope of submissions" for the purposes of s 148(b)(ii).

[62] The position is even clearer in relation to the BARNZ, AIA and NZTA submissions. They each seek decisions in terms that the submission to amend the RUB be "disallowed". A necessary implication of disallowing the submission is that the notified RUB (and associated zoning) would be retained.

[63] The appellants also argue that the Environment Court was in error by not expressly benchmarking its assessment of the submissions against the legal test of whether reversion to the PAUP was "fairly and reasonably raised" in them.

[64] I am unable to accept that submission. Although the Environment Court may not have referred to the test in these terms, it nevertheless substantively adopted it. I accept in that respect Ms Ash's argument that reversion to the notified PAUP was so plainly raised in submission (either directly or by necessary implication from relief which sought that the SFT's original submission be rejected) that it was unnecessary for the Court to go further and make express findings in terms of the test. As Woodhouse J said in *Contact Energy Ltd v Waikato Regional Council*:[49]

> [64] Appeals purportedly on points of law not infrequently turn into a contention that the Tribunal did not refer in its decision to a matter of fact or of law in issue in the hearing. That, of itself, is not an error of law …

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49 *Contact Energy Ltd v Waikato Regional Council* (2007) 14 ELRNZ 128 (HC) at [64]-[65].

> [65] … There is also no obligation on a Tribunal to record every part of its reasoning process on the facts or on the law, and notwithstanding the fact that the conclusions reached may involve unarticulated rejections of contentions of witnesses or submissions of parties on the law.

[65] For these reasons I do not consider any error of law arises in relation to the Environment Court's decision as to scope.

Elite and prime soils

Background

[66] The evidence before the Environment Court was that approximately 68 per cent of Pūkaki Peninsula and 44 per cent of Crater Hill (the latter assuming de-stoning) comprised either "land containing elite soil" or "land containing prime soil" as relevantly defined.[50]

[67] In relation to the Pūkaki Peninsula, 37 per cent of the available land was identified as elite and 31 per cent prime. In relation to Crater Hill, the area of elite soils was described by Council's expert, Mr Ford, as "relatively small".

[68] Land containing elite soils is the most highly versatile and productive land in Auckland. It is well-drained, friable, has well-structured soils, is flat or gently undulating and capable of continuous cultivation. Land containing prime soils is land with only moderate limitations for arable use.[51]

[69] The appellants submit that the Environment Court erred in construction of the relevant provision in the RPS relating to the significance of elite and prime soils in the location or relocation of the RUB. Such provision is contained in Chapter B2.2.2(2)(j) and is in the following terms:

> Ensure the location or any relocation of the Rural Urban Boundary identifies land suitable for urbanisation in locations that;
>
> … while …
>
> (j) avoiding elite soils and avoiding where practicable prime soils which are significant for their ability to sustain food production.

[70] In its recommendations the Panel noted the requirement to "avoid elite soils", but said that:[52]

> … this is not an absolute but is in the overall context of the soil's significance for its ability to sustain food production across the values for which elite soils are protected.

[71] It held that:[53]

> … with the wider and surrounding urbanisation of Puhinui this area is effectively a rural island whose soils are not significant in terms of their ability to sustain food production across the versatile range that is associated with elite soils.

[72] Despite the fact that the relevant provision in the RPS was itself the product of the Panel's processes, the Environment Court adopted a different interpretation. It considered that the phrase "significant for their ability to sustain food production" qualified only the reference to prime soils with the result that, subject to a de minimis exception, the location of the RUB was required to avoid elite soils without reference to their significance in sustaining food production.[54]

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50 At [4014] of its decision the Environment Court describes "almost all" of the Pūkaki Peninsula as including elite or prime soils. This significantly overstates the positon.

51 Auckland Unitary Plan, Chapter J1.4 definitions: "land containing elite soil" and "land containing prime soil".

52 Report to Auckland Council Hearing Topics 016,017. Changes to the Rural Urban Boundary: 080,081, Rezoning and precincts, Annexure 3 Precincts South at [3.4].

53 At [3.4].

54 *Self Family Trust v Auckland Council* [2018] NZEnvC 49, [2018] NZRMA 323 at [144].

[73] Although conceding the protection may not in fact be "absolute",[55] the Environment Court nevertheless held that the policy of avoidance required that "other activities which do not utilise the elite soils not be allowed, which is a strong bottom line".[56]

[74] In coming to that conclusion the Environment Court relied on the fact that:[57]

(a) The wording of RPS policy B2.2.2(2)(j) repeats the word "avoiding", thereby setting up a disconnection between the first three words and the balance of the provision;

(b) Such disconnection was reinforced by the additional subordinate phrase "where practicable"; and

(c) Support for that construction was provided by RPS objectives B9.3.1(i) and (ii) which, in the context of the "rural environment" respectively seek protection of land containing elite soils and management of land containing prime soils.

[75] The Council submits that the Environment Court's interpretation reflects the plain and ordinary grammatical construction of the provision and that the appellant's interpretation could not be sustained without the addition of commas after each of the references to elite soils and prime soils, viz:

> Avoiding elite soils, and avoiding where practical prime soils, which are significant for their ability to sustain food production.

[76] It also adopts the Environment Court position that repetition of the word "avoiding" reinforces the disconnection between "avoiding elite soils" and the remainder of the sentence. Likewise, it says that the Environment Court was correct to interpret the provision in light of the RPS objectives B9.3.1(i) and (ii).

Discussion

[77] I am unable to accept the Environment Court's construction of this provision. My reasons are as follows:

(a) The approach too readily dismisses the Panel's interpretation of a provision for which it was itself responsible and in respect of which there was, unusually therefore, direct evidence of the drafter's intention.

(b) I consider it reads too much into repetition of the word "avoiding" when, in other respects, the RPS is not a model of spare drafting (reflecting, realistically, the considerable pressure under which it was prepared).

(c) There is in my view limited support which can appropriately be drawn from Chapter B9.3.1(1) and (2). These provisions relate to land that is outside the RUB. To then use them to support the logically antecedent inquiry about where the RUB should be located appears to me inappropriate. In any event, on the interpretation advanced by the Panel and by the appellants there remains a significant distinction between the level of protection afforded to elite and prime soils. That is because prime soils must only be avoided "where practicable", whereas areas containing elite soils must simply be avoided. In that sense the protection/management dichotomy in B9.3.1(1) and (2) has a parallel within B2.2.2(2)(j), even on the appellant's construction.

(d) Importantly, the purpose of avoiding elite soils in RUB location or relocation cannot simply be in the service of pedology. The very basis for

55 At [402].

56 At [402].

57 At [144].

their protection (where they are "significant") is to sustain food production. That is confirmed by the definition of "land containing elite soil" which emphasises that it is "the most highly versatile and productive land" and is "capable of continuous cultivation". And if that is the case, then the qualification at the conclusion of 2.2.2(2)(j) is as logically relevant to elite as it is to prime soils.

(e) The Environment Court's near absolute protection is capable of producing perverse consequences, for example by preserving rural "islands" fully surrounded by urban development, or precluding land containing elite soils from inclusion within the RUB even though, for example, a reverse sensitivity analysis[58] made it unsuitable for food production.

(f) Although the punctuation suggested as necessary by the Council would eliminate any ambiguity from the provision, it is not in my view necessary to be able to maintain the appellants' interpretation which, overall, better accords with the purposive approach which the RPS requires.

[78] It is also significant that only 37 per cent of the Pūkaki Peninsula comprises elite soil. The Environment Court's decision to exclude the whole of the Peninsula appears substantially based on the near absolute protection it affords to this approximately one third area.

[79] However, although I consider the Environment Court's construction of B2.2.2(2)(j) to have been in error, such conclusion is not decisive in the appellants' favour. The Court apparently accepted that both Pūkaki Peninsula and Crater Hill nevertheless contained elite and prime soils significant for their ability to sustain food production. Paragraph [268] of the judgment records, for example:

> [268] The evidence of Dr Hicks (and Mr SJ Ford) is that half (approximately) of the land on Crater Hill and almost all of the land on Pūkaki Peninsula is "significant for their ability to sustain food production". We accept Ms Ash's submissions that the Council's evidence shows that Crater Hill is capable of meeting the relevant RPS objectives and policies by contributing to the wider economic productivity of and food supply for Auckland New Zealand (Objective B9.2.1). The Crater Hill land has productive potential and should be retained for productive purposes in order to give effect to the RPS, irrespective of any possible comparisons with other soils elsewhere in South Auckland.

[80] In the context of an appeal to this Court on a point of law the question is therefore whether such conclusion was one to which the Environment Court could reasonably have come on the evidence, or involved consideration of irrelevant factors, or a failure to consider the corollary.

[81] I observe at the outset that the portion of the sentence appearing between inverted commas in [268] line 3 of the judgment — that the lands were "significant for their ability to sustain food production" — is not a reflection of what was actually said by either of the Council's expert witnesses Messrs Hicks or Ford. Rather it represents the Court's overall assessment of the evidence benchmarked against the B2.2.2(2)(j) test.

[82] Looking then at the evidence of these witnesses, Mr Webb is, in my view, correct when he says that Mr Hicks' evidence (with which the appellants took no significant issue) was focused on identifying the areas of elite and prime soils on both the Peninsula and at Crater Hill and their suitability for horticulture. It did not discuss significance in any sense other than to confirm that the soils were suitable for a range of horticultural crops. By comparison, Mr Ford, who is an agricultural and resource

58 The possibility of spray drift over adjoining residential areas may for example render the land unsuitable for cropping.

economist addressed what he called "contribution to the wider economic productivity of and for supply for Auckland and New Zealand". He did so separately under Pūkaki Peninsula and Crater Hill Farm headings.

[83] In respect of Pūkaki Peninsula he said:

> 5.26 The vegetable production sector provides an essential service to the country by supplying vegetables to our predominantly urban population throughout the year at an affordable cost. Their ability to provide this service throughout the year is predominantly driven by the availability of the correct soil types in the required climate zones which are situated in the Auckland and Waikato regions.
>
> 5.27 If there was sufficient loss of land which was both elite and frost free this would mean that the demand for this produce would not be able to be met. The alternative source of these vegetables would involve either the produce simply not being available or significantly higher production costs for them to be produced on much lower productive potential land, or produced indoors at much higher cost or produced internationally, which would result in the price required to be paid for them to be too high for the majority consumers.
>
> 5.28 Therefore the failure to protect land containing elite and prime soils will ultimately lead to the loss of production of some of the staple vegetables that are currently available in the Auckland market place. That is why the retention of such soils is not only essential for the horticultural sector which currently uses it but also for the greater Auckland and national consumers who are able to source their food at reasonable prices.
>
> 5.29 Access to fresh vegetables at certain times of year would become affordable only by the elite in terms of wealth because the cost of them would be prohibitive for the average wage earner.
>
> 5.30 At point 6 of the joint statement (relating to scarcity of elite soils in the Auckland region) I state that my opinion is reliant on Dr Fiona Curran-Cournane when she made the points in her evidence on Topic 011 that elite land is less than 1% of the land area or approximately 4,397 ha and that this area is of national importance for their high versatility. Dr Singleton and Dr Hicks both in separate statements point out that there are more elite soils in the Auckland Region when the soil mapping is carried out at a lower scale. However, I believe that we reached consensus on this issue when we refer to Dr Singleton's statement that "they are still rare and important".

[84] In respect of Crater Hill he said:

> It is my opinion that although there is a relatively small amount of elite soils identified, with destoning of the soils identified as elite and prime which encompass 44% of the total area or approximately 50 ha, there is a significant amount of area on the land at Crater Hill which would be able to be utilised for vegetable production. The relatively frost-free nature of this soil would mean that it would make a significant contribution to this relatively rare class of land within the Auckland region.

[85] The evidence in relation to Pūkaki Peninsula is in my view generic to all elite and prime soils. Mr Ford identifies the value of such soils in production of fresh vegetables and posits that if sufficient of them are lost then there will be inevitable consequences in terms of supply and therefore (at certain times of the year at least) cost. But nowhere in his statement does he address whether on any reasonable metric the loss of these particular lands would lead to any significant overall drop in supply.

[86] Similarly, his observation that Crater Hill would, with destoning, release approximately 50 ha of land suitable for vegetable production, contains no assessment of significance within an overall supply context.

[87] By comparison, the appellant's expert planner, Mr Putt, endeavoured to place the subject lands within the wider perspective of the total areas of land containing elite or prime soils within the Auckland region. His evidence (unchallenged in this respect)

was that 63,000 ha of land in the Auckland region comprise elite and prime soils. Of this amount, on the latest figures available, a little over 20 per cent was being used for cropping and horticulture (including market gardening) and 35 per cent was occupied by lifestyle blocks. He concluded:

> 13.8 Accordingly, it is clear that when considering whether the removal from food production of the 100 ha. of elite and prime soil on Pūkaki Peninsula is an issue in terms of resource protection, the 63,000 ha. of those soils across the Auckland regions is the backdrop to that decision. It is statistically an extremely small part of the elite and prime soil portfolio in the region.

[88] To put that statistic in perspective, the areas of elite and prime soil on the Peninsula comprise, using Mr Putt's figures, 0.0016 of such lands in the Auckland area and 0.0024 if lifestyle blocks are excluded.[59] Nowhere does Mr Ford depose to how the loss of such a comparatively small area of land to urban development would materially change the economics of vegetable supply in Auckland or New Zealand. And, significantly, the Environment Court does not engage with Mr Putt's essential thesis at all.

[89] Rather it appears to have substantially relied on rebuttal evidence from the Council's witnesses Ms Trenouth and Mr Hicks. This emphasised the cumulative erosion of Auckland's elite and prime soils to urbanisation over time (particularly during the post-war expansion of suburbs beyond the Tāmaki Isthmus) and the substantial cumulative effect of re-zoning on the availability of elite and prime soils for food production. During oral argument this approach came to be identified as "death by a thousand cuts".

[90] So, at [401] the Environment Court observed:

> Continual erosion of even incremental quantities of such [elite] soils has an effect on potential sustainable food production for Auckland region and New Zealand as a whole. It was also stated that once urbanisation occurs land is not able to be returned to food production.

[91] The question on appeal is whether this involved consideration of an irrelevant factor. In my view it did. Although incremental loss will undoubtedly be relevant at an individual resource consent or scheme change/variation level, what the Environment Court was concerned with on the appeal was whether, at the policy level associated with location of the RUB, this had occurred in a coherent and lawful way. If, as urban Auckland expands, the areas of elite and prime soil were, on the premise of incremental loss, invariably excluded from the RUB, then the integrity and coherence of that boundary would inevitably be compromised, and spot zoning result. As the Panel noted, the Peninsula and Crater Hill areas already comprise a "rural island". They do so as a result of cumulative individual decisions that have expanded the RUB to points significantly south, in turn cumulatively eroding arable lands. The essential question in terms of B2.2.2(2)(j) was whether *this* land now fully surrounded by urban development, with the exception of its coastline, is significant in terms of its ability to sustain food production. That was not an inquiry in my view adequately answered by reference to incremental loss. Such would too significantly threaten the policy requirement for coherent RUB location.

[92] An alternative route to the same conclusion is to say that unless the threshold in terms of significance in B2.2.2(2)(j) is met, then there is no relevant reduction or "cutting" for the purposes of the incremental loss argument. That is the approach

59 Note Mr Putt assumes 100 ha of elite and prime soils on the Peninsula under the actual area was 71.5. To that is potentially added 50 ha on Crater Hill. I have adopted his 100 ha benchmark for the purposes of these calculations, although recognising small adjustments would be requied to reflect the actual combined position of the two areas.

submitted by Mr Webb. I accept that submission because the "death by a thousand cuts" proposition presupposes that any land potentially lost is significant — a logically antecedent inquiry.

[93] Accordingly, I find:

(a) The Environment Court erred in the proper construction of B2.2.2(2)(j); and

(b) Its assessment of whether the relevant areas of premium soils were significant for their ability to sustain food production (to the extent undertaken) proceeded in error of law by:

(i) Failing to take into account the insignificant area concerned in the context of the total area of elite and prime soils in the Auckland region; and

(ii) Taking into account the principle of incremental loss in the context of RUB location or relocation involving lands already surrounded by urban development.

[94] I also accept the appellant's submission that the error(s) were material. As the Council's witness Ms Trenouth acknowledged, apart from the position that the Council adopted (and the Environment Court accepted) in respect of Policy B2.2.2(2)(j) at least the majority of other issues relevant to Pūkaki Peninsula could be addressed by a Future Urban Zoning (FUZ) and appropriate structure planning. This (in my view appropriate) concession is reflected in [533] of the Environment Court's decision where it said that in respect of the Peninsula it was "one characteristic" — the elite soils — which "outweighed the positive characteristics of the counterfactual" (inclusion within the RUB on the basis of a FUZ).

[95] As to what specific relief flows from this, including as to whether the Peninsula and Crater Hill might potentially fall on opposite sides of the RUB and whether the correct response is to remit the matter to the Environment Court, I intend to invite further submissions after the parties have had an opportunity to consider this judgment.

Outstanding natural features

Background

[96] The appellants say that the Environment Court erred in interpreting relevant RPS Policies in respect of "outstanding natural features".

[97] Policy B2.2.2(2)(g) provides:

> Ensure the location or any relocation of the Rural Urban Boundary identifies land suitable for urbanisation in locations that:
>
> … while …
>
> (g) protecting natural and physical resources that have been scheduled in the Unitary Plan in relation to natural heritage, Manu Whenua, natural resources, coastal environment, historic heritage and special character.

[98] Both the Pūkaki Lagoon Volcano (situated on the Gocks' land) and Crater Hill (on the SFT's land) are included in Chapter L of the AUP, Schedule 6; Outstanding Natural Features (ONF) Overlay Schedule.[60]

[99] The appellants submit that the Environment Court erroneously interpreted and applied B2.2.2(2)(g). They say that, relying on a misinterpretation of the B4.2.2(7), the Court assumed an absolute level of protection for both ONFs which was incorrect.

60 The appeal does not raise any material issue in respect of the Pūkaki Lagoon Volcano. It is already subject to Open Space/Conservation Zoning which Mr Webb concedes would remain even if the area were to come within the RUB.

[100] Chapter B4 relates to "Natural Heritage". It records as objectives B4.2.1(1) and (3):

> (1) Outstanding natural features and landscapes are identified and protected from inappropriate subdivision, use and development.
>
> (3) The visual and physical integrity and the historic, archaeological and cultural values of Auckland's volcanic features that are of local, regional, national and/or international significance are protected and, where practicable, enhanced.

[101] The policies in B4.2.2 in turn set out mechanisms for identifying, evaluating, protecting and managing outstanding natural landscape and ONFs.

[102] In respect of ONFs, the following protections are specified in B4.2.2:

> (6) Protect the physical and visual integrity of Auckland's outstanding natural features from inappropriate subdivision, use and development.
>
> (7) Protect the historic, archaeological and cultural integrity of regionally significant volcanic features and their surrounds.

[103] Both outstanding natural landscapes and ONFs are in turn to be managed "in an integrated manner to protect and, where applicable and appropriate, enhance their values".[61]

[104] In respect of these provisions, the Environment Court held:

> [260] The more detailed policies in the RPS for setting the level of protection for a volcano in Auckland which has been scheduled as an ONF are policies B4.2.2(6), (7) and (8). We discuss the inter-relationship of these policies in more detail later. Since at present we are merely trying to assess the effectiveness with which they are being achieved we simply note that, while policy (6) provides for protection of ONFs generally from inappropriate subdivision, use and development, policy (7) directs that regionally significant volcanoes — and regional significance (or national significance) is what makes a natural feature outstanding — are to be protected completely from subdivision, use and development. Questions of inappropriateness do not arise because all subdivision, use and development is inappropriate.
>
> …
>
> [449] Those two policies must be read with policy (7). Policy (7) specifically relates to volcanic features — thus appearing to be intended to implement objective B4.2.1(3) —
>
> (a) refers only to "regionally significant volcanic features and their surrounds", and
>
> (b) only protects their "historic, archaeological and cultural integrity".
>
> The effect of policy (7) is that if a volcanic feature and its surrounds are "regionally significant" its historic, archaeological and cultural integrity should be protected. Development of regionally significant volcanoes is implicitly inappropriate in all circumstances, otherwise the formula " … protect from inappropriate subdivision, use and development" would have been used. To imply those words would make policy (7) redundant: the policy would add nothing to policy (6).
>
> [450] These policies are uncertain because while objective B4.2.1(3) requires:
>
> (a) complete protection of all Auckland's remaining volcanic features; and
>
> (b) in particular protection of their "visual and physical integrity" (in addition to other values).
>
> — the policies read together do not cover either field completely in that:
>
> • locally important features are not referred to (that is not important in this case because Pūkaki Hill is a scheduled ONF);

61 Auckland Unitary Plan, B4.2.2(8).

- the requirement to protect the visual and physical integrity has been qualified by the phrase "from inappropriate subdivision, use and development";
- questions arise as to whether development and use can appropriately affect "visual and physical integrity" without affecting archaeological, historic and cultural integrity at all.

[451] These policies are difficult to apply because an ONF's historic, archaeological and cultural integrity is protected from adverse effects, full stop. In contrast its physical and visual integrity are protected only from inappropriate subdivision, use and development. It is difficult to see how the policies by themselves or in context can be said to consistently implement the objectives. However, these policies need to be read with those in sub-chapter B8 as we shall see. (Footnotes omitted)

[105] The appellants argue that three errors of law emerge from this discussion:

(a) Policy B4.2.2(7) does not relate to the *entire* volcano, but only to regionally significant volcanic *features* (for example, the tuff ring, the crater and the slopes).

(b) It was, in the words of the appellants' written submissions, "wrong for the Court to interpret (7) as imposing a blanket ban on any use on development of a scheduled volcano".

(c) The Court erroneously interpreted and applied Chapter B8 Coastal Environment to support its position.

Discussion

(1) *Entire volcano or volcanic features*

[106] I am unable to accept the appellants' argument in this respect. The wording of Policy B4.2.2(7) recognises that the intended protection is not only of the regionally significant volcanic features but also of their "surrounds". This suggests a holistic rather than deconstructed approach to the features. That is, in turn, reinforced by both B4.1 Issues and B4.6 Explanation, both of which refer to the "maunga"[62] of the Auckland volcanic field as a "significant part of Auckland's natural identity and character". Again, it is the overall feature rather than individual components of it that is recognised. And it would be unusual, even in the absence of the words "and their surrounds" for volcanic features to be defined in some more limited way than other "outstanding natural features" — the latter clearly encompassing all components of a feature within a defined area.

[107] In any event, the appellants recognise as regionally significant volcanic features each of the tuff ring, crater and slopes. Collectively these components define the entire feature. So although the Environment Court might be technically faulted for describing the B4.2.2(7) protection as being for "regionally significant volcanoes" as opposed to "volcanic features and their surrounds", nothing substantively turns on that point.

(2) *A blanket ban?*

[108] I accept that [260] and [449] of the Environment Court's decision in their terms recognise what is fairly described as a "blanket ban" on development (including subdivision) of regionally significant volcanic features.[63] The issue is whether that is an appropriate construction of B4.2.2(7).

62 That is, "mountains".

63 Paragraph [449] uses the phrases "regionally significant volcanoes" which is not strictly correct. But nothing turns on this for the reasons previously indicated.

[109] In their initial written submissions the appellants argued that if the Environment Court's construction was correct then "there would be no need for Policy (6) or any of the other objectives or policies referring to protection from inappropriate subdivision". And, they say, that the Court's approach went against the "theme" of the RPS which is to protect against *inappropriate* subdivision, use and development.

[110] Understandably this was interpreted by the Council and the Auckland Volcanic Cones Society (AVCS) as an attempt to graft onto the "protection" afforded by B4.2.2(8) a qualification limiting it to protection from "inappropriate subdivision, use and development". I agree with Ms Ash and Mr Enright that no such qualification is appropriately read into the section. Subsections (6) and (7) can be read together without it, simply by recognising that the reasonably significant volcanic features referred to in (7) represent a subset of the outstanding natural features referred to in (6), and one subject to an additional level of protection.[64]

[111] But, as the appellants submitted in oral argument, such conclusion does not of itself justify the Environment Court's conclusion that (7) makes any development (or use or subdivision) per se or even "implicitly" inappropriate.

[112] Although (6) and (7) overlap for the reasons indicated, the subsections in fact have different focuses — (6) on protection of "physical and visual integrity", and (7) on "historic, archaeological and cultural integrity". They reconcile in an unqualified protection (or what the appellants call "blanket ban") for regionally significant volcanic features against any subdivision, use or development that fails to protect[65] their historic, archaeological or cultural integrity, but a regime that would nevertheless allow such activities where this level of protection occurred and where it was also not "inappropriate" in terms of effects on "physical and visual integrity".

[113] Although the Environment Court in fact recognises this same dichotomy at [451], it earlier casts the proscription on subdivision use or development of "volcanoes" in absolute terms[66] leaving this Court uncertain as to whether the correct legal test has been applied.

(3) *Did the Environment Court erroneously invoke Policy B8?*

[114] The Environment Court then attempts to resolve the conflict engendered by its earlier unqualified prohibition on subdivision use and development by reference to Chapter B8 — Coastal Environment. In that context it embarks on a very lengthy analysis of whether B8 reflects the mandatory provisions of Policy 15(a) of the NZCPS[67] — concluding that it does at least "partly" do so.[68]

[115] I have two principle problems with this. First, I consider the conflict to be of the Environment Court's own making. B4.2.2(6) and (7) are adequately reconcilable in their terms; provided (7) is not elevated to a blanket ban on subdivision use and development. Paragraph [451] of the judgment itself recognises the route to that reconciliation. Secondly, I accept the appellants' submission that although the Coastal

64 I accept the submission of both the Council and Auckland Volcanic Cones Society Inc that this was a legitimate policy approach. A similar point is made in *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593, (2014) 17 ELRNZ 442 at [101].

65 That is "to keep safe from harm, injury or damage". See *Royal Forest & Bird Protection Society of New Zealand Inc v New Plymouth District Council* [2015] NZEnvC 219, (2015) 19 ELRNZ 122 at [63].

66 *Self Family Trust v Auckland Council* [2018] NZEnvC 49, [2018] NZRMA 323 at [260] and [449].

67 Mandatorily reflected in any Regional Policy Statement by virtue of s 62(3) of the Resource Management Act 1991.

68 *Self Family Trust v Auckland Council* [2018] NZEnvC 49, [2018] NZRMA 323 at [463].

Environment provisions of the RPS appropriately attempt to capture the NZCPS requirement that outstanding natural features in the coastal environment be protected from "adverse effects of activities",[69] they are an unlikely source of assistance in the interpretation of provisions relating to volcanic features, for the simple reason that not all volcanic features are in the coastal environment.

[116] Nevertheless, the policy provisions of Policy B8 were necessarily given effect to. And B8.3.2(2)(b) requires urban activities to be avoided in parts of the coastal environment scheduled in the AUP in relation to natural heritage.

[117] It was common ground before the Environment Court that the extent of the coastal environment in the area was as depicted in a map annexed to witness Mr Brown's evidence and reproduced as Annexure D to the Court's decision. This depicts the Pūkaki Lagoon as within the coastal environment, as are what appear to be most if not all the outer slopes of Crater Hill on the northern, western and southern sides.[70] However all the eastern slopes, together with the crater itself and the lake are not.[71]

[118] Mr Webb argues that the B8.3.2(2)(b) requirement to "avoid" urban activities should not be interpreted to prevent all subdivision and development, only that which is inappropriate. He calls in aid various objectives in Policy B8, including B8.2.1(1), B8.2.1(2), B8.3.1(1) and B8.3.1(2). These are in terms:

> **B8.2.1 Objectives**
>
> (1) Areas of coast environment with outstanding and high natural character are preserved and protected from inappropriate subdivision, use and development.
>
> (2) Subdivision, use and development in the coastal environment are designed, located and managed to preserve the characteristics and qualities that contribute to the natural character of the coastal environment.
>
> **B8.3.1 Objectives**
>
> (1) Subdivision, use and development in the coastal environment are located in appropriate places and are of an appropriate form and within appropriate limits, taking into account the range of uses and values of the coastal environment.
>
> (2) The adverse effects of subdivision, use and development on the values of the coastal environment are avoided, remedied or mitigated.

[119] However, as Ms Ash submits, the starting point must be the plain meaning of RPS Chapter B8.3.2(2)(b) itself. It is clear in its requirement to avoid urban activities[72] in scheduled areas occurring within the coastal environment.

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69 Refer NZCPS Policy 15(a) in terms "avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment" and RPS Policy B8.3.2 in terms:

> (2) Avoid or mitigate sprawling or sporadic patterns of subdivision, use and development in the coastal environment by all of the following:
>
> …
>
> (b) avoiding urban activities in areas with natural and physical resources that have been scheduled in the Unitary Plan in relation to natural heritage, Mana Whenua, natural resources, coastal, historic heritage and special character; … .

70 The Environment Court clearly regarded all the outer slopes on those sides as in the coastal environment (at [441]). Mr Webb submits the "upper outer slopes" were not. I am unable to resolve that issue from Annexure D. Clearly however if some parts of the upper slopes are outside the coastal environment they are very limited. Nothing turns on the issue in my view.

71 Indeed, significant portions of the eastern slopes are not part of the ONF. They comprise (part rehabilitated) quarry subject to Special Purpose Zoning.

72 This is not defined but I agree with the Environment Court [at 463] it must include housing. As to the word "avoid" it is simply to be given its usual or ordinary meaning of "keep away or refrain from"; *Shorter Oxford English Dictionary* (7th ed, Oxford University Press, Oxford, 2007) at 161.

[120] I agree with her also that B8.3.2(2)(b) can be readily reconciled with the objectives referred to by the appellants on the basis that some parts of the coastal environment may be appropriate for urban development, but those scheduled in the AUP in relation to natural heritage, such as ONFs are not. B8.3.1(1) says as much.

[121] So, a proposal to develop housing on parts of Crater Hill, which were both within the coastal environment and part of the ONF, was always going to face the significant obstacle of B8.3.2(2)(b).

[122] This brings me then to the question of materiality. Although I have said that it is unclear whether the Environment Court correctly interpreted B8.4.2.2(7) when it concluded that its effect was to render inappropriate all subdivision uses and development of "regionally significant volcanoes", nevertheless:

(i) It went on to address the appropriateness of the SFT's subdivision and development proposals in terms of Chapter B4.2.2(b); and

(ii) The constraints proposed by RPS Chapter B8.3.2(2)(b) were always necessarily adhered to.

[123] As to appropriateness in terms of B4.2.2(6), it said:

> [452] Mr Bartlett submits that both policies B4.2.2(6) and (7) applied separately would be achieved if the RUB were moved to [the Panel's] lines. On the evidence we have found, in section B, that the effects of the Self family proposed on Crater Hill are likely to be inappropriate. We prefer the evidence of Mr Brown on the adverse effects of the proposal on visual integrity to the less coherent evidence of Mr Scott (who, as his counsel reiterated) evaluated the proposals largely in the framework of the original ONF assessment criteria, rather than having regard to the conceptually difficult and wider list(s) provided in the AUP. We accept the evidence of Dr Hayward on the effects on its geophysical integrity. We find that the proposed Self family development would isolate the crater and fragment the important outside slopes.

[124] That was clearly a conclusion to which the Environment Court was reasonably entitled to come on the evidence and is therefore immune to challenge in this Court. No error of law can therefore arise in that respect. And on the basis of that conclusion, any error of law in respect of the interpretation of B4.2.2(7) was clearly immaterial to the result.

[125] Since it has long been recognised that any error of law by the Environment Court must have been material to the decision before the High Court will grant relief,[73] that therefore effectively resolves this aspect of the appeal.

[126] I comment briefly, however, on the alternative submission that the Environment Court "erroneously included all of Crater Hill in the coastal environment". That fails on the wording of the Court's decision, which at its highest describes "much" of Crater Hill as occurring in that environment. At [435] it specifically excludes the "inside of the crater", and at [441] it makes clear its understanding that the eastern outer slopes lay outside the area. As I have indicated,[74] nothing in my view turns on whether some small part of the upper slopes or the northern, western and southern sides fall inside or outside the coastal environment, as depicted in Annexure D to the Court's decision.

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73 *Royal Forest & Bird Protection Society Inc v WA Habgood Ltd* (1987) 12 NZTPA 76 (HC) at 81-82; *BP Oil New Zealand Ltd v Waitakere City Council* [1996] NZRMA 67 (HC).

74 The Environment Court clearly regarded all the outer slopes or those sides as in the coastal environment (refer Decision at [441]). Mr Webb submits the "upper outer slopes" were not. I am unable to resolve that issue from Annexure D. Clearly however if some parts of the upper slopes are outside the coastal environment they are very limited. Nothing turns on the issue in my view.

[127] That said, the conclusion to which I have come in no way derogates from the SFT's arguments in respect of that part of Crater Hill which is neither included in the ONF nor within the coastal environment. I will return to that issue in my discussion of the Quarry Zoned land below.

Structure plan guidelines

Background

[128] The appellants submit that the Environment Court erred in law when it stated:[75]

> We hold that the structure plan process needs to be followed whenever location or movement of the RUB is being considered. It is therefore relevant to this proceeding.

[129] Policy B2.2.2(2)(f) of the RPS provides:

> 2. Ensure the location or any relocation of the Rural Urban Boundary identifies land suitable for urbanisation in locations that:
>
> …
>
> (f) follow the structure plan guidelines as set out in Appendix 1.

[130] The introduction to Appendix 1 — Structure Plan Guidelines — in turn identifies that "[T]his appendix forms part of the regional policy statement". To that end the Environment Court was obliged to give effect to it under s 75(3) of the RMA.

[131] The Court recorded and adopted Ms Trenouth's description of structure planning as:[76]

> … the process undertaken to analyse an area to determine the appropriate urban form and structure, including land uses, location of infrastructure, and integration and management of effects on the environment. The structure planning guidelines ensure a collaborative process with multiple parties including landowners and key stakeholders such as Mana Whenua to identify a high level plan that guides future development including the preparation of a plan change to relocate the RUB.

[132] All planning experts had agreed on a joint statement which included an acknowledgement in respect of B2.2.2(2) that "(a) to (f) all important — all relevant criteria need to be met to meet this policy, no ranking … ". But the SFT's planning expert, Mr Putt and counsel for the Gocks are recorded in the decision as arguing that B2.2.2(2)(f) "only needs to be considered if [the Court] decide[s] the RUB should be moved".[77] That is essentially the argument repeated in this Court.

[133] The Environment Court rejected that approach. It said:

> [100] … However, that rather overlooks that rezoning of land within the RUB is the subject of policy B2.2.2(7) which also requires following the structure plan guidelines. Thus it is clear that those guidelines are relevant to location of the RUB. Ms Trenouth explained the rationale in cross-examination:
>
> > So when you are looking to relocate the RUB you need to think about what is the land use going to be, what sort of land use, how efficient is it going to be, does it protect the natural and physical resources, you have to do that analysis, that structure plan analysis before you relocate the RUB because you don't want to move the RUB if the answer's going to be we'll move the RUB but actually there's nothing that you can achieve in there, it's [not] going to meet those criteria. So in this example, in this situation, we've got, … an ONF and we've heard one of the key issues is the ONF and we've heard the evidence before me today about the impacts of residential development and urbanisation on that feature. So

75 At [99].

76 *Self Family Trust v Auckland Council* [2018] NZEnvC 49, [2018] NZRMA 323 at [99].

77 At [100].

> my question would be why would you move the RUB if you're going to have such significant impacts on the environment.
>
> [101] The relevance of that answer is increased by another consideration which is that without the inclusion of the structure plan matters the list of considerations in policy B2.2.2(2) would be incomplete in that it otherwise omits consideration of the Mana Whenua objectives and policies in sub-chapter B6 and most of the coastal environment considerations in sub-chapter B8 unless they have been "scheduled" so that policy B2.2.2(2)(g) applies.

[134] The Court then came to its conclusion set out at [128] above. Having done so, it went on to hold that significant failures on behalf of both the Gocks and the SFT to follow/apply the guidelines factored against their appeal.

[135] In relation to the SFT, which had sought an active zoning of its property,[78] the Environment Court held that:[79]

> … more information should have been supplied in relation to how to achieve:
>
> - a desirable urban form at a neighbourhood scale including pedestrian connectivity, diversity of lot sizes within blocks, provision of open spaces, integrated stormwater management approach.
> - …
> - feedback from consultation with landowners, infrastructure providers, council controlled organisations and communities, and
> - a range of specialist documents to support the structure plan and plan change: including infrastructure assessments for stormwater, transport, water and wastewater; assessments of impacts on natural and cultural values; assessment of environmental risk; and implementation plans. (Footnotes omitted)

[136] It suggested that on that basis, "a FUZ would be a preferable way for the Self Family to proceed *if* the RUB is to be moved",[80] but having concluded that the ONF on Crater Hill was the "one characteristic … which by itself outweighs the positive characteristics of the counterfactual [i.e. the SFT's proposal]" the Court considered that relocation of the RUB was inappropriate and therefore further investigation of the FUZ option was unnecessary.[81]

[137] By contrast, the Gocks had sought a FUZ and in that context had not actively engaged with the structure plan guidelines. They considered that to be an exercise for a later date when they came to seek an active zoning. This resulted in Environment Court criticism:

> While the question of how much structure planning detail needed is clearly a question of fact and degree each time the location of a RUB is raised before the Council or the Environment Court, the lack of detail given in relation to the Pūkaki Peninsula is worrying especially with respect to:
>
> - the location, type and form of the urban edge;
> - the protection of " … the coastal environment";
> - the integration of the "green network". (Footnotes omitted)

Discussion

[138] Mr Webb makes a number of arguments against the Environment Court's approach. He points to the policies in B2.2.2(3) and (7). These are in terms:

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78 A "Mixed Housing Suburban" zoning on the site of the quarry and the outer slopes adjacent to SH20 and a "single House" zone on the northern and southern sides.

79 At [206]-[209].

80 *Self Family Trust v Auckland Council* [2018] NZEnvC 49, [2018] NZRMA 323 at [209].

81 At [533] and [539].

(3) Enable rezoning of future urban zoned land for urbanisation following structure planning and plan change processes in accordance with Appendix 1 Structure plan guidelines.

(7) Enable rezoning of land within the Rural Urban Boundary or other land zoned future urban to accommodate urban growth in ways that do all of the following:

(a) support a quality compact urban form;

(b) provide for a range of housing types and employment choices for the area;

(c) integrate with the provision of infrastructure; and

(d) follow the structure plan guidelines as set out in Appendix 1.

[139] He submits that when the Environment Court said that his approach "rather overlooks that rezoning of land within the RUB is the subject of policy B2.2.2(7) which also requires following the structure plan guidelines"[82] it was invoking a provision irrelevant to the logically antecedent issue of RUB location. However, I accept Ms Ash's submission that although in its terms Policy B2.2.2(7) relates to rezoning land already within the RUB or other land zoned future urban,[83] rezoning will always be a necessary consequence of relocating the RUB (in this case requiring a change from Rural Production to urban or FUZ). To that extent I accept the Environment Court's position that Policy B2.2.2(7) supports application of the structure plan guidelines whenever location or relocation of the RUB is being considered. It is not, however, what I would describe as the Council's strongest point.

[140] Mr Webb's principal submission focuses on Policy B2.2.2(3). He says this confirms that where a FUZ is sought (or in the case of Crater Hill, potentially imposed) structure planning is to occur at the subsequent point active zoning is applied for. He says that to "require [it] now would make Policy B2.2.2(3) entirely redundant".

[141] I am unable to accept that submission. For a start it does not recognise the subtle but nevertheless important distinction between the requirement in B2.2.2(2)(f) (and B2.2.2(7)) to "follow the structure plan guidelines" and the B2.2.2(2)(3) policy of enabling rezoning of future urban zoned (FUZ) land "following structure planning". I consider Ms Ash correct when she says that although the "full blown" structure plan necessary to move from a FUZ to live zoning is not necessary in the context of a location or relocation argument, nevertheless if change is sought to the RUB, its proponent(s) will need to establish that the land is suitable for urbanisation "in locations that … follow the structure plan guidelines".

[142] The rationale for that is, I consider, adequately explained in Ms Trenouth's evidence as recorded in [133] above — before relocating the RUB the decision maker "needs to think about what the land use is going to be … you don't want to move the RUB if that answer is going to be … actually there's nothing you can achieve in there, it's [not] going to meet those criteria".

[143] So although the level of detail in terms of compliance with the guidelines may vary, depending, for example, on the size of the area to be brought within the RUB (and thus as a further example the impact on transport networks)[84] there is a threshold which must be crossed in terms of suitability for urbanisation having regard to the guidelines.

[144] Mr Webb says that such an approach will lead to arbitrariness in the assessment and will allow "specific concerns to be raised (potentially unreasonably) if

82 At [100].

83 An example of the latter is the area of land around Kingseat which although outside the RUB is zoned future urban.

84 Refer Auckland Unitary Plan, Appendix 1 Structure Plan Guidelines at [1.4.6].

certain details are not addressed, to disallow an application". He says that is what the Environment Court did here, referring to the various omissions in terms of guideline compliance which it identified. He submits you either "do a structure plan or you do not".

[145] I accept that the position is not entirely satisfactory. If it is the case that the guidelines have to be followed at the location/relocation stage then, for fear of omission and subsequent criticism, applicants will inevitably tend towards comprehensive assessment against the guidelines. That may, in real terms, look little different to a "structure planning" exercise in terms of B2.2.2(3). And if that is the case, then there would seem little point in the context of a location or relocation argument to seek a FUZ — the work will probably have been done to support a live zoning.

[146] However, these are difficulties which seem to me to be unavoidable having regard to the provisions of Policy B2.2.2(2)(f) and the s 75(3) of the RMA requirement that it be given effect to.

[147] Mr Webb says that there is no obligation to apply B2.2.2(2)(f) "just because it is there". He points to the fact that B2.2.2(2) also mandates:

> (h) Protecting the Waitakere Ranges Heritage area and its heritage features; and
>
> (k) Avoiding mineral resources that are commercially viable.

He says, self-evidently, these proscriptions will not apply to every location or relocation application, so why likewise should (f)?

[148] I cannot accept that submission. B2.2.2(2)(2)(a) to (f) cumulatively define the requirements for locations to be appropriately brought within the RUB. Subparagraphs (g) to (m), which are introduced by the word "while", in turn define what might broadly be defined as limitations, some of which may apply to individual applications but others not. It is not possible in my view to read out of the assessment one or more of the cumulative requirements simply because one or more of the limitations may on its face be inapplicable.

[149] I agree therefore with both Ms Ash and Mr Enright when they say that, both at the time of locating or relocating the RUB and at the time rezoning of land within the RUB is sought, there was a mandatory requirement to follow the structure plan guidelines. As Mr Enright put it, the appellant's argument relies on a binary fiction — the guidelines *cannot* be considered when relocating the RUB; they can *only* be considered when rezoning — which is not reflected in the plain words of Policy B2.2.2(2)(f) and B2.2.2(7)(d). I agree with him that the Environment Court would in fact have erred if it had not taken the guidelines into account in identifying where the RUB should be.

[150] As to the evidence before the Environment Court, the Gocks did not specifically address the guidelines, believing that to be premature in the context of their proposed FUZ. It was, in that context, clearly open to the Environment Court to express its concerns about the "worrying" lack of detail.

[151] In respect of the SFT land, Mr Webb says that although the Court considered not enough information had been provided to justify a live zoning, it nevertheless undertook its assessment of the effects from urbanisation anyway. He says it "can't have it both ways — either there was sufficient information to determine this issue or there was not". He went on to submit, however, that "[i]n any event, a masterplan was submitted for the SFT land [so] it is difficult to accept the Court's finding that insufficient material was provided".

[152] I do not see any contradiction in the Environment Court's approach. It was open to it to identify what it described as "the dearth of information" relating to guideline compliance in the specified areas and yet draw conclusions as to suitability for urbanisation based on the information it had. And Ms Ash and Mr Enright are also correct in saying that the evaluation of the evidence in terms of sufficiency was a matter for the Environment Court and that no error of law is therefore established.

[153] This ground of appeal therefore fails.

The Special Purpose — Quarry zoned lands

[154] In his submissions in respect of the SFT lands Mr Webb developed an alternative argument relating to the area on the south east of the volcanic feature. This area is neither part of the ONF nor within the coastal environment and is currently zoned Special Purpose — Quarry. He argued that absent an application to extend the ONF boundary into what is now this part-rehabilitated area or to change its zoning, the Environment Court was obliged to address RUB location having regard to the status quo (which includes an existing right to undertake a number of industrial type activities). And he further argued that having regard to B2.2.2(2)(m), the appropriate boundary for the RUB coincided with the boundary of the ONF. He submitted, therefore, that having rejected the SFT's submission that the whole of Crater Hill be brought within the RUB, the Environment Court was obliged, in terms of s 32(1)(b)(i) of the RMA, to examine the reasonable practicality of including the quarry zoned land within the RUB. And he said that any decision not to was (or would be) so unreasonable as to constitute an error of law. He submitted that it should have been brought inside the RUB with a FUZ.

[155] This alternative submission elicited the predictable response from Ms Ash and Mr Enright that it went beyond the identified grounds in the Notice of Appeal dated 10 May 2018. The alleged "Seventh Error" in that document put in issue whether retention of "Pūkaki Peninsula and Crater Hill outside the RUB" was the "most appropriate, efficient and effective way of achieving the purpose of the RMA, pursuant to s 32 of the RMA", but nowhere was specific error of law alleged in relation to continued exclusion of the quarry zoned area.

[156] In response, Mr Webb initially sought an oral amendment to the Notice of Appeal to capture the point. Ms Ash and Mr Enright replied that they were unlikely to take a technical point in relation to late amendment but because the prospect of including the quarry lands within the RUB — while leaving the balance of Crater Hill outside it — had never been developed as an alternative before the Environment Court there could be no error of law in the Court not addressing this option. They submitted that if an amendment was allowed an opportunity should be given to make additional written submissions. I agreed with that suggestion.

[157] The amendment is in respect of the alleged "Seventh Error", which is now identified as following:[85]

> 9. As a consequence of the above, the Court erroneously determined that the most appropriate, efficient and effective way of achieving the purpose of the RMA pursuant to s 32 of the RMA, was to keep Pūkaki Peninsula and Crater Hill, *and in particular the Self Family Trust land currently in the Quarry Zone, which has been severely modified and which was neither part of the outstanding natural feature overlay on Crater Hill, nor within the coastal environment,* outside the RUB and such decision was so unreasonable that no reasonable Court could have made that decision.

85 The emphasis is my own and identifies the additional words added in the amended Notice of Appeal.

[158] By memorandum dated 3 December 2018 the Council and AVCS confirmed their absence of "any technical objection" to the amendment. I grant leave accordingly and proceed to consider whether the appeal should be allowed on this point. I do so against the agreed background that the Environment Court did not identify bringing what Mr Webb refers to as "just" the "quarry land", within the RUB and applying a FUZ as a reasonably practicable option under s 32(1)(b)(i) of the RMA.

[159] It is also common ground that, neither in evidence before the Environment Court nor in submissions made to it, was this alternative proposal advanced. However, the SFT argues that the Environment Court "cannot avoid its statutory duty under s 32 of the RMA on this basis". It also says that the Court's assessment of Crater Hill was as a "feature in the coastal environment" and that it applied this approach equally to the quarry lands. It says that in respect of such lands the Court therefore took into account irrelevant factors. It also says that the Environment Court failed to take into account a relevant factor, namely the activities (including on-site primary produce manufacture and processing and recycling mineral material, construction waste and demolition waste) permissible as of right in the quarry zone and whether in fact urbanisation might therefore give better effect to the RPS provisions.

[160] Both the Council and AVCS argue that this new argument cannot now be raised but that if there is any residual discretion to entertain it, such should not be exercised because there was no error of law on the part of the Environment Court.

[161] As to whether the argument can be taken at all, the Council refers to two High Court decisions — *Ngati Maru Iwi Authority v Auckland City Council* and *Wymondley Against the Motorway Action Group Inc v Transit New Zealand*.[86] AVCS in turn refers to further authority that, although directed to s 293 of the RMA and thus not specifically relevant to this appeal, nevertheless emphasises that the Environment Court is not entitled to shed itself of its appellate role and step into a planning role.[87]

[162] Both *Ngati Maru* and *Wymondley* refer to the following paragraph from the English Court of Appeal's decision in *Pittalis v Grant*:[88]

> The stance which an appellate court should take towards a point not raised at the trial is in general well settled … . It is perhaps best stated in *Ex p Firth, re Cowburn* (1882) 19 Ch D 419 at 429, [1881-5] All ER Rep 987 at 991 per Jessel MR:
>
> > … the rule is that, if a point was not taken before the tribunal which hears the evidence, and evidence could have been adduced which by any possibility would prevent the point from succeeding, it cannot be taken afterwards. You are bound to take the point in the first instance, so as to enable the other party to give evidence.
>
> Even if the point is a pure point of law, the appellate court retains a discretion to exclude it. But where we can be confident, first, that the other party has had opportunity enough to meet it, second, that he has not acted to his detriment on the faith of the earlier omission to raise it and, third, that he can be adequately protected in costs, our usual practice is to allow a pure point of law not raised below to be taken in this court. Otherwise, in the name of doing justice to the other party, we might, through visiting the sins of the adviser on the client, do an injustice to the party who seeks to raise it.

[163] In *Ngati Maru* the Court raised (obiter) the question of whether the discretion to entertain a new argument on a pure point of law applied only to general appeals,

86 *Ngati Maru Iwi Authority v Auckland City Council* HC Auckland AP18/02 7 June 2002 at [65], [66] and [69]; and *Wymondley Against the Motorway Action Group Inc v Transit New Zealand* [2004] NZRMA 162 (HC).

87 *Canterbury Regional Council v Apple Fields Ltd* (2003) 9 ELRNZ 311 (HC) at [45]; and *Federated Farmers of New Zealand Inc v MacKenzie District Council* [2014] NZHC 2616, (2014) 18 ELRNZ 712 at [156]-[157].

88 *Pittalis v Grant* [1989] QB 605 (EWCA) at 611.

unlike those from the Environment Court to the High Court, which are limited to error of law. Nevertheless (in the absence of argument) it proceeded on the basis that there was such a discretion.

[164] Ms Ash urges me to limit the principal to general appeals on the basis that in such context "the appellate Court may stand in the place of the Court of first instance and 'remake' findings of fact or law or both". She says, "[i]n short evidence may be revisited through general appeals but may not be revisited in appeals to points of law". But that in my view ignores what are in any event, the limits of the jurisdiction — to consider a pure point of law not earlier raised. If that defines the jurisdiction then it seems to me the general appeal/appeal on point of law distinction becomes irrelevant because the appellate court is never going to be invited to "re-make" findings of fact if the relevant point is allowed to be taken.

[165] Of course Ms Ash is correct that, were the Environment Court found to be in error of law by not going on to consider, in the context of s 32 of the RMA, an option which no party had advanced during the course of the hearing, then inevitably the matter would have to be referred back to the Environment Court for further factual findings. And she is also in my view correct that this appears contrary to one of the purposes of limiting appeals on points of law — to encourage finality. But that is not a reason to confine the principal in *Pittalis* to general appeals only.

[166] What it does bring into focus, however, is her next point; that the principle in *Pittalis* is limited to "pure points of law", whereas the question of whether the option of bringing "just" the quarry land within the RUB and applying a FUZ was a "reasonably practicable" one under s 32(1)(b)(i) of the RMA involves findings of fact.

[167] Such findings of fact are recorded at [197] in terms:

> The reasonably practicable options for achieving the relevant objectives and policies in relation to location of the RUB are:
>
> (i) the Council's decision ("the status quo"); and
>
> (ii) the relief sought by the appellant [the SFT] ("the counterfactual").

[168] In my view:

(i) Given that these were the only alternatives being advanced before the Environment Court (each in turn supported by expert evidence), the finding that these were the reasonably practicable options is not one to which the Environment Court could not reasonably have come or which was reached without any evidential foundation.

(ii) Nor can it realistically be suggested that the Environment Court's conclusions in respect of the identified reasonably practicable options were based on some erroneous belief that the quarry land was within either the ONF boundaries or coastal environment. The Court attached to its decision a plan showing the coastal environment that clearly excluded the quarry and specifically acknowledged that "the former quarry (adjacent to SH 20) is not within the ONF, nor is SH 20 itself".[89]

(iii) Likewise, the submission that the Environment Court failed to take into account a relevant consideration, namely that the Special Purpose — Quarry zone, permitted a number of industrial type activities as of right and that "urbanisation may have been more appropriate" is belied by the Court's discussion, at [164] to [168], about permitted activities within the zone and the acknowledgment at [439] of the "development potential of the rehabilitated quarry in its own zone".

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89 *Self Family Trust v Auckland Council* [2018] NZEnvC 49, [2018] NZRMA 323 at [180].

[169] Clearly therefore the appellants face significant challenges in terms of the substantive arguments raised in [9] of the Amended Notice of Appeal. That of itself is a relevant consideration in terms of any ultimate discretion which might survive *Pittalis*. So too are the considerations that animated Doogue J in *Ngati Maru*. Having observed that the argument being advanced had neither been raised in the Environment Court, nor in the notice of appeal, nor even in the written submissions exchanged in advance of the hearing before him (all of which equally apply in this case),[90] his Honour said:[91]

> This course is to be deprecated. The Environment Court is a specialist tribunal and this Court has not had the benefit of its concluded views on this important aspect of its jurisdiction. If I had found this ground of appeal made out, I would have refused the Iwi Authority relief as it could have involved fresh evidence before the Environment Court in respect of a point never previously raised. The original hearing took four weeks and there was adequate opportunity to raise the point then when, if it had been upheld, it might have been met by other evidence.

[170] Ultimately the underlying question for this Court is whether an appeal on a point of law is properly brought against a decision which identified as the "reasonably practicable options" those put to the decision-maker. I do not consider the Environment Court had an obligation to go outside that framework. Indeed, if it had done so it may have been open to the criticism that it had based its decision on findings untested by submission and quite possibly unsupported in the evidence. Its appellate as opposed to planning role reinforces this conclusion.

[171] I do not therefore consider this ground of appeal made out. It would be inappropriate, however, to go further and comment on the merits of any proposal to now include "just" the quarry lands within the RUB. That may well be the basis of a future application, the merits of which are not a matter for this Court.

Mana whenua issues

[172] The SFT argues[92] that the Environment Court erred in determining how to discharge its obligations under:

(a) Section 6(e) of the RMA to recognise and provide for the relationships of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga as a matter of national importance;

(b) Section 7 of the RMA to have particular regard to, inter alia, kaitiakitanga and the ethic of stewardship;

(c) Section 8 of the RMA to take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi); and

(d) RPS Chapter B6 Manu Whenua.

[173] It says that the Environment Court failed to consider how the proposals to include the lands within the RUB would have better served these requirements.

[174] The Gocks in turn say that the Environment Court failed to take into account relevant matters and in particular how the proposal to include land within the RUB would "provide a pathway through structure planning in consultation with Tangata Whenua for Tangata Whenua themselves to recognise and provide for the matters in ss 6(e), 7 and 8 of the Act".

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90 The argument that the Environment Court did not consider the option of bringing "just" the quarry land within the RUB was only fully developed by Mr Webb in reply at which point the requirement for an amended notice of appeal was identified.

91 *Ngati Maru Iwi Authority v Auckland City Council* HC Auckland AP18/02, 7 June 2002 at [65].

92 Amended Notice of Appeal dated 21 November 2018 at [4(a)].

[175] As developed in written submissions and during the course of oral argument, the submissions had two essential strands:

(a) That the Environment Court inappropriately regarded itself as having had "some limit on its jurisdiction (that it could only do what Mana Whenua wanted) in determining the most appropriate use of the land" (that is that it regarded Mana Whenua as having something akin to veto rights); and

(b) That it misinterpreted Mana Whenua evidence, conflating concepts of kaitiakitanga and mauri, reached conclusions in relation to mauri which were not supported in the evidence and concluded that Mana Whenua were inflexibly opposed to relocation of the RUB when the essence of kaitiakitanga was consultation and this could be best achieved through a FUZ and structure planning.

[176] The Environment Court's discussion of these issues occurs at [526] to [532] of its decision under the heading "Recognising and Protecting the Mana Whenua" and subheading "Chapter B5 (sic) of the AUP".[93] It identifies what it calls the "counterfactual" for transfer of 60 per cent of Crater Hill to the Council and/or Te Ākitai as legal owners[94] and for the creation of significant public open space and legal access strips on Pūkaki Peninsula. It refers to counsel for the SFT's submission that the Crater Hill proposal was a "generous one" and his further argument that a "moratorium on development of land of this status on the basis of Te Ākitai's preference would have far reaching and unfair consequences". In that respect the Court said:

> [531] We do not accept … that the Council's position is a moratorium — it limits residential (and some industrial) development but retains existing uses. The submission also misses a fundamental aspect of mana whenua which is that it is for the tangata whenua or a Mana Whenua Group (defined as discussed earlier) to decide how their kaitiakitanga should be exercised. If Te Ākitai decide they consider the mauri of the area requires maintenance of all the land on Te Kapua Kohuara and Pūkaki Peninsula in its current condition (subject to zoning and existing use privileges the land owners have) rather than 60% ownership of Crater Hill plus open space (and legal access strips) on Pūkaki Peninsula, it is not for the Auckland Council or this court to contradict them (at least in the circumstances similar to this proceeding). That position is consistent with the holistic character inherent in the Māori world view (and expressed in policy B6.3.2(4)(a) and B6.3.2(6)(a). Recognising Te Ākitai's position is also a matter which section 8 of the RMA requires us to take account of. That is a procedural matter which can rarely be particularised in a plan.
>
> [532] Crater Hill and Pūkaki Peninsula are part of a cultural dimension to the area which is very important. The importance lies not only in the individual sites (both identified and as yet unlocated) but in the area as a whole as identified as sub-precinct H in the Puhinui Structure Plan. This case is really the last gasp for Te Ākitai and their Mana Whenua: if they cannot retain the sub-precinct with the current land use zoning that is inherently far more sympathetic to the mauri of the land that would be the case with residential or light industrial development over significant portions,[95] they will lose the cultural dimensions of this area (i.e. their cultural landscape) as a whole. We conclude that maintaining the status quo RUB is essential for sustaining the existing quality of naturalness, and thereby the mauri of the small remaining undeveloped parts of Te Ākitai's rohe.

93 It should read "Chapter B6".

94 Mr Webb says the precise figure is 62 per cent.

95 N H Denny evidence-in-chief at 9.2 [Environment Court document 9].

[177] Mr Webb takes particular issue with the Court's observation that, in relation to what Te Ākitai "decide they consider the mauri of the area requires … it is not for Auckland Council or this Court to contradict them (at least in the circumstances of this proceeding)". He refers to a settled line of authority including *Minhinnick v Minister of Corrections*,[96] *Watercare Services Ltd v Minhinnick*,[97] *Gavin H Wallace Ltd v Auckland Council*,[98] which establishes that the RMA does not confer on Tangata Whenua or Kaitiaki a power of veto over use or development of natural and physical resources in their area. That is for the stated reason that the Court acts as arbiter for the community as a whole so that although Māori views are important they will not in every case prevail.

[178] Neither Ms Ash nor Mr Enright take issue with that principal (which I consider demonstrably correct and appropriately reaffirmed). However, they say that neither in its terms nor context does [531] elevate Te Ākitai's views to veto status. They place particular emphasis on the fact that [531] recognises that Te Ākitai's position is one that the Environment Court says it is required to "take account of" and contrast that with any suggestion that its views were binding on the Court. And they refer to subsequent references at [533], [536] and [538] either again to "taking account" of competing considerations or to "standing back and looking at all relevant considerations" as reinforcing this submission.

[179] In my view they are correct in their assessment of how the Environment Court approached the issue. In terms of s 75(3) of the RMA the Court was, of course, obliged to give effect to all relevant provisions of the RPS. Mr Webb does not contend otherwise. And B6.2.2(1)(e) provided that opportunities be given to Mana Whenua to participate in the sustainable management of natural and physical resources in a way which:

> (e) recognises Mana Whenua as specialists in the tikanga of their hapū or iwi and as being best placed to convey their relationship with their ancestral lands, water, sites, waihi tapu and other taonga.

[180] Considered in its context that is all [531] says — Te Ākitai were themselves best placed to decide how their kaitiakitanga should be exercised and how best the mauri of the area is maintained — an uncontroversial proposition within the context not only of B6.2.2(1)(e) but the common law also, since it has long recognised that cultural norms are appropriately defined in terms of the indigenous persons affected.[99]

[181] Nor can the Environment Court be criticised for having had particular regard to the impact of moving the RUB on the "holistic nature of the Mana Whenua world view", "the exercise of kaitiakitanga" or the "mauri" of the area, when that is precisely what it was "require[ed]" to do under RPS Policy B6.3.2(6)(a), (b) and (c). However, none of that dictated a particular outcome. It was still open to the Environment Court (as it did in *Wallace*, where the metropolitan urban limit was likewise in issue), to arrive at a result which was inconsistent with the mana whenua position.[100] In this case it did not do so but that was a result reached after assessment of the evidence and in light of all relevant RMA and RPS provisions. I do not consider it the result of a misdirected belief in a Mana Whenua veto.

[182] Mr Webb says, however, that the Environment Court's assessment of "Te Ākitai values" was insufficiently nuanced, and that on close analysis Te Ākitai

96 *Minhinnick v Minister of Corrections* EnvC Auckland A043/2004, 6 April 2004 at [135].

97 *Watercare Services Ltd v Minhinnick* [1998] 1 NZLR 294 at 305, (1997) 3 ELRNZ 511 at 525 (CA).

98 *Gavin H Wallace Ltd v Auckland Council* [2012] NZEnvC 120.

99 See *Oyekan v Adele* [1957] 1 WLR 876 (PC West Africa) at 880; and *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733.

100 *Gavin H Wallace Ltd v Auckland Council* [2012] NZEnvC 120.

witnesses Mr Denny and Ms Wilson recognised that the mauri of the land had already been compromised and that the exercise of kaitiakitanga could be adequately protected through a structure planning process. Within the context of an appeal to this Court that must necessarily reduce to a question of whether the Environment Court's conclusions about whether relocation of the RUB aligned with Te Ākitai cultural values was one to which it could not reasonably have come[101] — a difficult threshold to cross.

[183] The starting point is Te Ākitai's evidence-in-chief. In that respect Mr Denny said at [4.4] that Te Ākitai "opposes the proposed extension of the Rural Urban Boundary … . as it diminishes the value and significance that Te Ākitai Waiohua place on the region". At [9.2] he said that developing the quarry into a mixed housing suburban zone did not "help restore the mauri of the quarry or form of the maunga" and at [10.1] he said that Te Ākitai "fully supports Auckland Council's decision to not extend the Rural Urban Boundary" and that this was "essential to respect the significant values the area has to Te Ākitai Waihua and to protect and preserve sites of particular significance and the broader cultural landscape".

[184] Ms Wilson in turn said that Te Ākitai sought "protection of its culturally significant sites" (at [3.2]), that Te Ākitai had "significant concerns about what is sought in the appeal" and that it "supported Council's decision".

[185] However, Mr Webb emphasises several other aspects of the evidence. Firstly, he says that in her brief of evidence Ms Wilson commented favourably on the Puhinui Structure Plan and, through its associated processes, recognition of Te Ākitai as kaitiaki of the Puhinui area. He then particularly emphasises her description of the ability to act as a contributor to policy and decision making as giving "life to the notion of kaitiakitanga". He submits that it is not a proper exercise of kaitiakitanga to dictate land use and relying on *Minhinnick v Minister of Corrections* says that the concept does not extend to ownership, authority, control or aboriginal title over an area.[102] He says the only proper exercise of kaitiakitanga is to ensure Mana Whenua involvement in decision making which is precisely what would occur in the context of structure planning.

[186] That in my view is too narrow an approach. The ability to contribute may "give life" to kaitiakitanga, but it does not define it. Indeed s 2 of the RMA defines the concept in much wider terms as meaning:

> … the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship.

[187] In my view there can be little real dispute that Te Ākitai's evidence contemplated that the exercise of guardianship and stewardship of both Pūkaki Peninsula and Crater Hill required maintenance of what the Environment Court called "the status quo". Mr Denny's evidence was that to do so was "essential" to respect and protect cultural values.

[188] Next Mr Webb emphasises the cross-examination of Mr Denny where he confirmed that Te Ākitai feedback in relation to the Puhinui masterplan process had been positive and his acknowledgment that "potentially" structure planning in relation to the Puhinuui Peninsula might deliver some benefits, for example the establishment of māra kai gardens. However, this and his further acknowledgment that the establishment of such gardens was "possible" represents an inadequate framework on

101 Or potentially failed to take into account relevant matters or took into account irrelevant matters.

102 *Minhinnick v Minister of Corrections* NZEnvC A043/2004, 6 April 2004 at [133].

which to now construct an argument that the Environment Court reached conclusions on Te Ākitai's evidence which were not reasonably open to it. The evidence is simply too slight.

[189] Of course Mr Webb is correct when he says that, where elsewhere in his evidence Mr Denny spoke about the importance of "preserving the life supporting soils of the region … . for growing māra kai gardens", he was expressing an idea which was more wishful thinking than reality given that the Peninsula is not (predominantly) in Māori ownership and that either purchase or lease would be necessary before his vision could be realised. And Mr Webb may be correct that such prospect is more likely advanced through relocation of the RUB and a structure planning process. But this was one facet only of Te Ākitai evidence which also recognised the importance of preserving life supporting soils generally for farming and where appropriate safeguarding urupā.

[190] Mr Webb further submits that the decision contains a "finding of fact against the weight of evidence (that the mauri of the land 'requires' maintenance of the land in its current condition) which is also an error of law". Although that pitches the test for error of law too low (assessments of the weight of evidence being matters for the Environment Court,) he goes on to submit that there was no evidence to support such finding.

[191] While not defined in the RMA, "mauri" is defined in the *Māori-English, English-Maori Dictionary Te Aka* as follows:

> (noun) life principle, life force, vital essence, special nature, a material symbol of a life principle, source of emotions — the essential quality and vitality of a being or entity. Also used for a physical object, individual, ecosystem or social group in which the essence is located.

[192] The concept is also defined in *Chapter N Glossary of Māori Terms* in the AUP as "life force", and in RPS Policy B6.5.2(2)(a) as "life force and life-supporting capacity", and it is referred to in Objective B6.3.1(2) and Polices B6.3.2(4)(c) and 6(c).

[193] The mauri of Crater Hill was addressed in Mr Denny's evidence-in-chief as follows:

> Te Ākitai Waiohua wish to preserve the mauri of Ngā Kapua Kohuora by protecting the remaining form of the crater, restoring the modified sections of the crater to its former natural form and safeguarding the crater lake, lava caves and, where identified, urupā. It also includes preserving the "life supporting" soils of the crater and protecting access to the former waka portage.

[194] In relation to Pūkaki Peninsula he said:

> The mauri of Pūkaki peninsula and the sites Waituarua and Ngatonatona have been affected mainly by modern farming and ploughing. Te Ākitai Waiohua hope to preserve the mauri of Pūkaki peninsula and the sites Waituarua and Ngatonatona by protecting the existing coastline to the Pūkaki and Waokauri Creeks, acknowledging and preserving the life supporting soils of the region for farming or growing māra kai gardens and, where appropriate, safeguarding urupā.

[195] Mr Webb seizes on the first sentence in this second statement and says that, because on Mr Denny's own admission the mauri of the peninsula has been affected by European farming practices (a comment which Mr Webb is critical of the Environment Court for not even referring to), the best prospect of it being rehabilitated is through a structure planning process, which may, for example, deliver māra kai gardens.

[196] Again I consider this inappropriately reads down Mr Denny's evidence, which includes the preservation of "life supporting soils" for farming as part of the maintenance of the mauri of the area. The Environment Court's conclusion that

the status quo is "inherently far more sympathetic to the mauri of the land that (sic) would be the case with residential or light industrial development" was one therefore for which there was evidential support.[103] It also borders on the self-evident that urbanisation of the Peninsula must further erode its "vital essence" or "special nature" to Te Ākitai.

[197] Mr Webb also submits that the Environment Court conflated the concepts of kaitiakitanga and mauri. However, I accept the Council's submission that in any discussion about how best "guardianship" or "stewardship" of the lands is recognised, concepts of mauri will inevitable feature. That much must follow from the Chapter B6.5.2(2) definition of mauri to include the "life-supporting capacity … of the place".

[198] Finally, the appellants submit that the Environment Court erred by failing to take into account the evidence of Council's planning witness, Ms Trenouth, which Mr Webb submitted "clearly stated that on Pūkaki Peninsula a FUZ with structure planning could have given effect to RPS provisions including cultural issues".

[199] That puts the position too highly. Ms Trenouth did acknowledge that a FUZ and subsequent structure planning could address the identification and protection of specific sites of cultural and historic heritage in accordance with the policies in Chapter B6.5.2(1) and (7). But her overall conclusion was that the likely outcome of future structure planning on the Peninsula would be a Light Industry zone,[104] and that this would have "significant impact on Mana Whenua values". This result was not one which she identified as capable of mitigation in the same way. And I agree with Ms Ash that, having regard to the principles established in *Contact Energy Ltd v Waikato Regional Council*, it was unnecessary for the Environment Court to record Ms Trenouth's position in relation to the specific cultural sites.[105]

[200] For these reasons I do not consider the Environment Court erred in law either in its assessment of Te Ākitai's position in relation to the appeal, the reasons for its position or the implications of its opposition in terms, inter alia, of B6.3.2(6).

[201] Significantly, however, when the Environment Court came to consider[106] its final result in relation to the Pūkaki Peninsula it was the identification of elite soils in that location (and the ONF on Crater Hill) which was regarded as the "one characteristic of each site which by itself outweighs the positive characteristics of the counterfactual". The need to recognise and protect Te Ākitai's values in respect of both sites was regarded as supporting that status quo position. It is possible therefore that, having found the Environment Court to have been in error in its construction of RPS Chapter B.2.2.2(2)(j), Mana Whenua objections are not decisive in terms of outcome and that relief (whether by reference back or otherwise) remains appropriate.

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103 At [532].

104 For the reason that the Airport Noise Overlay covered approximately half of the subject area restricting or prohibiting residential development and the balance (inevitably accessed through a business/industrial area) was subject to noise mitigation requirements which would affect the economies of residential development.

105 *Contact Energy Ltd v Waikato Regional Council* (2007) 14 ELRNZ 128 (HC) at [65]. Namely that there is no obligation on the part of the Environment Court to record every finding on every piece of evidence or to record every part of it.

106 *Self Family Trust v Auckland Council* [2018] NZEnvC 49, [2018] NZRMA 323 at [533].

Result

[202] To summarise, I have dealt with the appeal points in the following ways:

(a) Section 148 of the LGATPA — Scope. The Environment Court did not err in determining it had jurisdiction to reinstate the RUB as defined in the PAUP.

(b) Elite and prime soils. The Environment Court erred in the proper construction of B2.2.2(2)(j): and in its assessment of whether the relevant areas containing premium soils were significant for their ability to sustain food production. These errors were material.

(c) Outstanding natural features. The Environment Court erred in some respects, but not in a material way. This ground of appeal fails.

(d) Structure Plan Guidelines. This ground of appeal fails.

(e) The Special Purpose Quarry Zoned lands. This ground of appeal fails.

(f) Manu Whenua issues. This ground of appeal fails, but see my comments in [201] above.

[203] I allow the appeals in the respects indicated and dismiss them where likewise indicated.

[204] As to relief, I consider that appropriately the subject of further submission after the parties have had an opportunity to consider the implications of this judgment.

[205] I set the matter down for a telephone conference before me on 25 March 2019 at 9.00 am when the parties can advise how they consider the matter appropriately advanced and whether hearing time will be required.

Appeal partially successful

Reported by Barbara Rea