# Standard on Biodiversity Offsets






BBOP
Business and Biodiversity Offsets Programme



Forest Trends and the Wildlife Conservation Society provided the Secretariat for BBOP during the second phase of BBOP (2009-2012)

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# Standard on Biodiversity Offsets: A tool to assess adherence to the BBOP Principles on Biodiversity Offset Design and Implementation

This Standard on Biodiversity Offsets ('the Standard') and the accompanying supporting materials have been prepared by the Business and Biodiversity Offsets Programme (BBOP) to help auditors, developers, conservation groups, communities, governments and financial institutions that wish to assess biodiversity offsets against the BBOP Principles, Criteria and Indicators. They were developed by members of the BBOP Secretariat and Advisory Group during the second phase of the programme's work (2009 – 2012), and have benefited from contributions and suggestions from the many people and organisations who registered on the BBOP consultation website or have joined us for discussions in meetings.

The Advisory Group members listed here[1] support the Standard and commend the other documents to readers as a source of guidance on which to draw when considering, designing and implementing biodiversity offsets, in the context of the mitigation hierarchy. Best practice in biodiversity offsets is evolving, and the Standard and supporting documents presented here will be further refined based on more practical experience, feedback and discussion.

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[1] The BBOP Advisory Group members who support the Standard as of 1 February 2013 are: Ambatovy Project ● Arup ● Biodiversity Works ● Biotope ● BirdLife International ● CDC Biodiversité ● Centre for Research-Information-Action for Development in Africa ● Citi ● Conservation International ● Daemeter Consulting ● Department for Environment and Rural Affairs – Defra (UK) ● Department of Conservation, New Zealand ● Earthwatch Institute ● Ecoagriculture Partners ● EcoDecisión ● Environ Corporation ● Environmental Banc & Exchange ● Environmental Resources Management ● ERAMET - PT WEDABAY Nickel Project ● European Bank for Reconstruction and Development ● Fauna & Flora International ● Forest Trends ● Wildlife Division, Forestry Commission, Government of Ghana ● Global Environment Fund ● Golder Associates ● Grupo Ecológico Sierra Gorda, I.A.P., México ● Hardner & Gullison Associates ● Inmet Mining ● Inter-American Development Bank ● International Conservation Services CC ● International Institute for Environment and Development ● International Union for Conservation of Nature (IUCN) ● KfW Bankengruppe ● Leibniz Institute of Ecological and Regional Development (IOER) ● Markit Environmental Registry ● Ministry of Ecology, Energy, Sustainable Development, and Spatial Planning, France ● Ministry of Infrastructure and the Environment, The Netherlands ● Ministry of Mines and Energy, Namibia ● Ministry of Nature, Environment and Tourism, Mongolia ● Mizuho Corporate Bank ● National Environment Management Authority, Uganda ● National Institute of Ecology, Mexico ● Nature Conservation Resource Center, Ghana ● New Britain Palm Oil Ltd. ● New Forests ● Newcrest Mining Limited ● Nollen Group ● Proforest ● Rainforest Alliance ● Response Ability, Inc. ● Royal Botanic Gardens, Kew ● Scientific Certification Systems ● SLR Consulting ● Solid Energy Coals of New Zealand ● South African National Biodiversity Institute ● Sveaskog ● Tahi Estate ● The Biodiversity Consultancy ● The Brazilian Biodiversity Fund (Funbio) ● The Environment Bank ● The Nature Conservancy ● Tonkin and Taylor ● Treweek Environmental Consultants ● Tulalip Tribes, US ● United Nations Development Programme (Environment and Energy Group) ● United Nations Environment Programme – World Conservation Monitoring Centre (UNEP-WCMC) ● Wildlands Inc. ● Wildlife Conservation Society ● Winstone Aggregates ● WWF ● Zoological Society of London; and the following individuals: Steve Botts ● Susie Brownlie ● Marc Christensen ● Michael Crowe ● Toby Gardner ● Martin Hollands ● Louise Johnson ● Daniela Lerda ● Paul Mitchell ● Dave Richards ● Shelagh Rosenthal [NB: Other Advisory Group members may add their names to this list. Updated versions of this document will be posted to the web site noted on the preceding page.]

During Phase 2 of BBOP, the BBOP Secretariat was provided by Forest Trends and the Wildlife Conservation Society.

All those involved in the development of this Standard are grateful to the companies who volunteered pilot projects in BBOP's first and second phases of our work and for the support of the donors listed overleaf, who have enabled the Secretariat and Advisory Group to prepare these documents.

BBOP is embarking on the next phase of its work, during which we hope to collaborate with more individuals and organisations around the world, continually to refine the Standard based on experience and practice, and to learn from a wide range of experiences with biodiversity offsets in a variety of industry sectors and geographical areas. BBOP has already benefited from drawing on the experience and approaches of a the wide range of organizations, members and non-members alike, who are developing tools and mechanisms to apply the mitigation hierarchy, including delivery of biodiversity offsets. We hope their approaches and experiences will continue to inform and ultimately comply with the Standard as it is revised over time. BBOP is a collaborative programme, and we welcome your participation and feedback. To learn more about the programme and how to get involved please:

**See:** **http://bbop.forest-trends.org**

**Contact**: **bbop@forest-trends.org**

In addition to our fee paying membership, we thank those organisations that have provided financial support for BBOP's work[2] in its second phase:

[2] Endorsement of some or all of the BBOP documents is not implied by financial support for BBOP's work.

# Table of Contents

# Part 1: Introduction

## About the Principles, Criteria and Indicators

This document presents a standard on biodiversity offsets, intended to help determine whether an offset has been designed and subsequently implemented in accordance with the BBOP Principles. BBOP agreed its ten Principles in 2009, and this standard is presented as a hierarchy of Principles, Criteria and Indicators (PCI): an architecture similar to that used in a number of other standards, such as the Forest Stewardship Council, the Marine Stewardship Council, the Roundtable for Sustainable Palm Oil, Round Table on Responsible Soy, and others.

'Principles' are interpreted as the fundamental statements about a desired outcome. 'Criteria' are the conditions that need to be met in order to comply with a Principle. 'Indicators' are the measurable states which allow the assessment of whether or not a particular Criterion has been met.

In order for the PCI structure to be as streamlined and efficient as possible, a 'necessary and sufficient' test was applied to each Criterion and Indicator during the drafting process. In other words, the Criteria need to be both 'necessary' (i.e. no redundancies) and 'sufficient' (i.e. together, the Criteria are enough to demonstrate the Principles have been met and the Indicators enough to demonstrate the Criteria have been achieved). Consequently, each Criterion and Indicator is an essential part of the whole, and all need to be met for a biodiversity offset to meet the Standard. The issue of conformance with the PCI (what is needed to 'meet the Standard') will be refined based on experience of using the standard and is discussed briefly below.

Although the PCI focus on the ecological aspect (i.e. intrinsic values) of biodiversity, the principles also embrace its socioeconomic and cultural values, since these must be taken into consideration in following the mitigation hierarchy[3] and demonstrating no net loss or a net gain of biodiversity. Taking care of these values is also essential to ensure the long-term success and sustainability of biodiversity offsets.

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[3] The mitigation hierarchy is defined as:

a. Avoidance: measures taken to avoid creating impacts from the outset, such as careful spatial or temporal placement of elements of infrastructure, in order to completely avoid impacts on certain components of biodiversity.

b. Minimisation: measures taken to reduce the duration, intensity and / or extent of impacts (including direct, indirect and cumulative impacts, as appropriate) that cannot be completely avoided, as far as is practically feasible.

c. Rehabilitation/restoration: measures taken to rehabilitate degraded ecosystems or restore cleared ecosystems following exposure to impacts that cannot be completely avoided and/ or minimised.

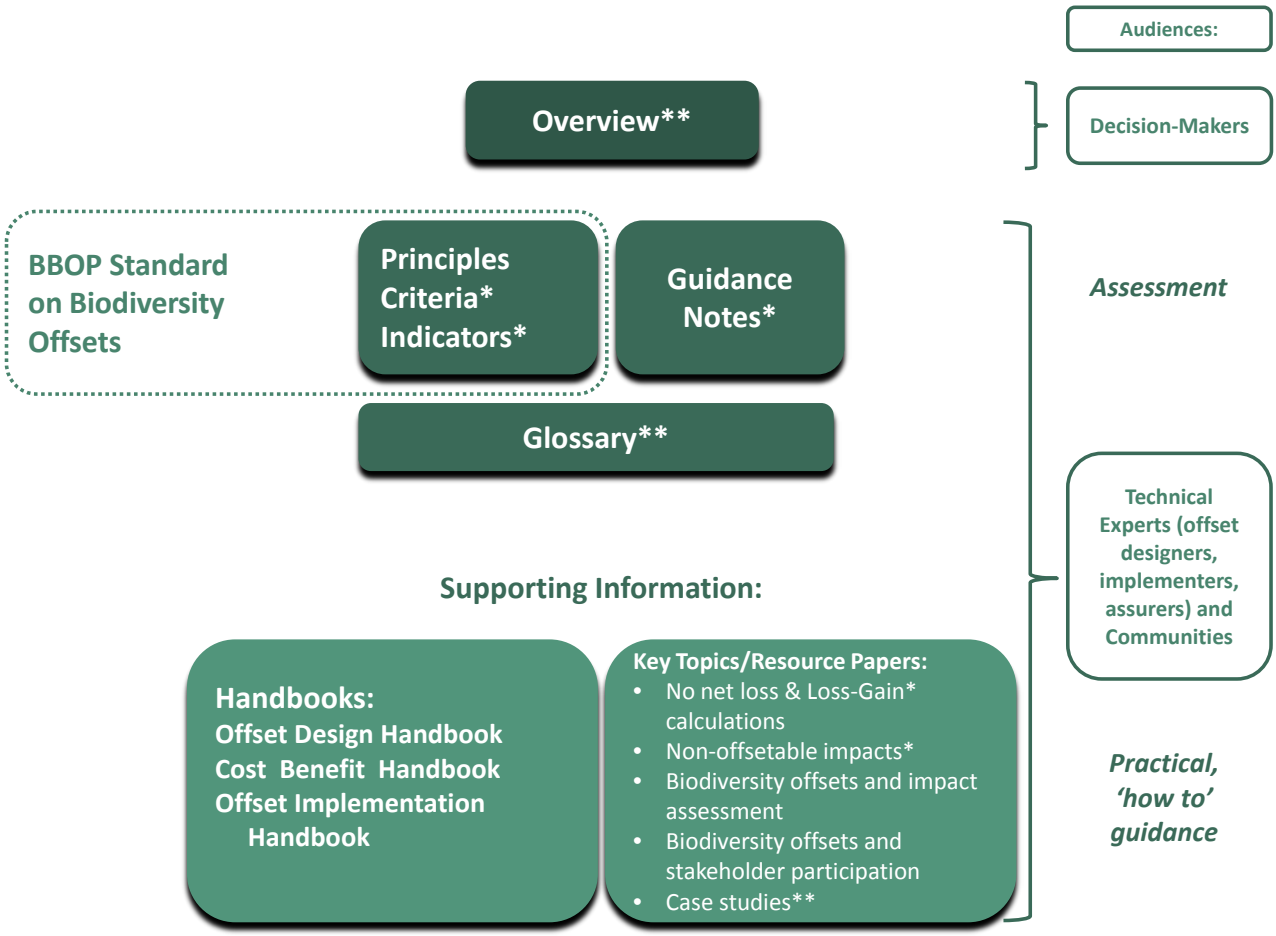
d. Offset: measures taken to compensate for any residual significant, adverse impacts that cannot be avoided, minimised and / or rehabilitated or restored, in order to achieve no net loss or a net gain of biodiversity. Offsets can take the form of positive management interventions such as restoration of degraded habitat, arrested degradation or averted risk, protecting areas where there is imminent or projected loss of biodiversity.

# Related Documents, Including Guidance Notes and Glossary, Audience and Users

The BBOP Principles, and now the Criteria, Indicators and accompanying Guidance Notes, constitute the core of BBOP's work to develop best practice for biodiversity offsets. Since BBOP was established at the end of 2004, it has also produced a number of other tools and products. The relationship between these is illustrated simply in **Figure 1**:

**Figure 1: BBOP Standard on Biodiversity Offsets and Associated Material**

*Note: Documents published in 2009, unless marked as follows: * First prepared in 2012; ** Updated 2012*




All the documents listed in the diagram above (from 2009 and from 2012) will be available on **http://bbop.forest-trends.org/guidelines/.**

The Standard is intended for two principal categories of users:

- **Assessors and Auditors:** The PCI have been prepared to enable auditors and assessors to determine whether an offset has been designed and subsequently implemented in accordance with the BBOP Principles. Assessment could be undertaken by a variety of people. An assessor could be an employee of a company designing a biodiversity offset (first party assessment), a member of an NGO that is a company's

partner or some other organisation associated with the company (second party assessment), or a third party auditor. Consequently, the principal users of the Standard and accompanying Guidance Notes will be individuals assessing biodiversity offsets against the Standard. Assessment takes place once a biodiversity offset has been designed and continues through the implementation stage. (See chronology diagram on page 8, and more information on assessing conformance on page 11)

- **Offset designers and implementers:** Since biodiversity offsets are likely to be assessed against the Standard, it will be useful for individuals to refer to the PCI as they design and implement the biodiversity offset, so the offset will meet the Standard. The PCI could thus provide guidance for offset design and implementation, when used with other 'How to' tools for offset design and implementation such as BBOP's Handbooks.

In addition, there are other potential audiences for the Standard:

- **Policy-makers:** Those involved in developing and administering policy on the mitigation hierarchy and biodiversity offsets (whether they work for governments, individual companies or industry associations), may also find the Standard and Guidance Notes useful, as they capture international best practice on identifying impacts on biodiversity and applying the mitigation hierarchy (avoid, minimise, rehabilitate/restore, offset).

- **Civil society:** Similarly, representatives from local communities, indigenous peoples and civil society organisations such as NGOs may find the Standard and Guidance Notes helpful if they are affected by or interested in a project or biodiversity offset. The documents could help inform their dialogue with developers.

Among the documents mentioned in the diagram on the preceding page, two that accompany the Standard are particularly relevant to people using the Standard to assess biodiversity offsets. They are:

- **Guidance Notes for Assessors:** The document presents notes to assist with the assessment of whether an offset has been designed and subsequently implemented in conformance with the BBOP Principles, Criteria and Indicators. It offers an interpretation of each Indicator; key questions for assessment; factors to consider in assessing conformance (conformance requirements and situations that are likely to represent causes of non-conformance); as well as related activities from other Indicators. This will be available at: **http://bbop.forest-trends.org/guidelines/Standard_Guidance_Notes**

- **Glossary**: A glossary of the terms found in the Standard and also common in methodologies and guidelines related to biodiversity offset design and implementation. This will be available at: **http://bbop.forest-trends.org/guidelines/Updated_Glossary**

The Standard set out in this document has been designed to enable assessors to determine whether a particular project (for example, the expansion of a palm oil plantation, the building of a road, the construction of a mine, an oil and gas field and pipeline, a dam, a wind farm, a housing estate, or a tourism venture) has met the BBOP Principles. However, biodiversity offsets can also be used to address the broader effects of programmes, plans, policies and schemes that have larger-scale, on-the-ground impacts on biodiversity. It is possible to plan for no net loss at a level broader than single projects, for instance, when developing:

- A **regional** development plan or strategic environmental assessment
- A **national** scheme or system for biodiversity offsets
- **Conservation banks** to provide offsets for multiple projects

For the present purposes, the term 'development project' should be understood throughout this document to embrace broader programmes, plans, systems and policies, where no net loss is planned for those. In the future, BBOP may develop standards that are tailored more closely to broader application for national systems or conservation banks, for instance.

A significant development in the application of the mitigation hierarchy (avoid, minimise, rehabilitate/restore, offset) to biodiversity has been the release in August 2011 of the International Finance Corporation's revised Performance Standard 6 (PS6), which will take effect from 1 January 2012. This is a requirement of clients seeking project finance from the IFC, and from 2012[4] is also a condition of project finance from over seventy banks that have adopted the Equator Principles, and thus apply the IFC's Performance Standards. The key provisions of PS6 and relationship with the BBOP Standard on Biodiversity Offsets are explained in **Box 1**.

| **Box 1: Introduction to IFC Performance Standard 6 and Relationship with BBOP Standard on Biodiversity Offsets** | |
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| **What is PS6?** | The Performance Standards set out requirements for corporate clients of the IFC (and of banks that have adopted the Equator Principles) seeking project finance. There are 8 Performance Standards, and PS6 is titled 'Biodiversity Conservation and Sustainable Management of Living Natural Resources'. The amended version described below will come into effect on 1 January 2012. |
| **What is its objective?** | • Protect and conserve biodiversity<br>• Maintain the benefits from ecosystem services<br>• Promote the sustainable management of living natural resources<br>**PS6 covers projects:**<br>• Located in modified, natural or critical habitats<br>• Which potentially impact on or are dependent on ecosystem services over which the client has direct management control or significant influence<br>• Including production of living natural resources (e.g. agriculture, husbandry, fisheries, forests) |
| **What are requirements of clients for impacts on 'modified habitat'?** | **Modified habitat** comprises: 'Areas that may contain a large proportion of non-native plant and/or animal species, and/or where human activity have substantially modified the area's primary ecological functions and species composition.' It may include areas managed for agriculture, forest plantations, reclaimed coastal zones and reclaimed wetlands.<br>• PS applies to areas of modified habitat including **significant biodiversity value**, as determined by the risk and impact identification process in Performance Standard 1.<br>• The client should minimise impacts on such biodiversity and implement mitigation measures as appropriate. |

[4] The Equator Principles Association Steering Committee has agreed that the newly revised IFC Performance Standards will take effect for EP Association Members on 1 January 2012, just as they do for the IFC. Accordingly Exhibit III of the Equator Principles (which refers to the 2006 IFC Performance Standards) will be updated on 1 January 2012 to reflect their implementation by EP Association members under the current EP framework. The existing EPs (specifically Exhibit III) will refer to the revised IFC Performance Standards from 1 January 2012. The revised IFC Performance Standards should be applied by EP Association Members (as per the EPs) to all new and current project finance transactions when the borrower has commissioned an Environmental and Social Impact Assessment (ESIA) on or after 1 January 2012. The 2006 IFC Performance Standards can be applied to current project finance transactions when the borrower has commissioned an ESIA before 1 January 2012 on the proviso that it is completed by 30 June 2012. All new transactions after 30 June 2012 should apply the revised IFC Performance Standards. See: http://www.equator-principles.com/index.php/all-ep-association-news/ep-association-news-by-year/83-ep-association-news-2011/254-revised-ps

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| **What are requirements of clients for impacts on 'natural habitat'?** | **Natural habitat** comprises: 'Areas composed of viable assemblages of plant and/or animal species of largely native origin, and/or where human activity has not essentially modified an area's primary ecological functions and species composition.'<br><br>The client will not significantly convert or degrade natural habitats, unless all of the following have been demonstrated:<br>• **No other viable alternatives** within the region exist for development of the project on modified habitat;<br>• **Consultation** has established the views of stakeholders, including Affected Communities, with respect to the extent of conversion and degradation; and<br>• Any conversion or degradation mitigated according to the **mitigation hierarchy**.<br>• **In areas of natural habitat, mitigation measures will be designed to achieve no net loss of biodiversity where feasible.** Appropriate mitigation measures include:<br>  ◦ Avoiding impacts on biodiversity through the identification and protection of set-asides;<br>  ◦ Implementing measures to minimise habitat fragmentation, such as biological corridors;<br>  ◦ Restoring habitats during operations and/or after operations; and<br>  ◦ Implementing biodiversity offsets. |
| **What are requirements of clients for impacts on 'critical habitat'?** | **Critical habitat** comprises: 'Areas with high biodiversity value, including:<br>(i) Habitat of significant importance to Critically Endangered and/or Endangered species;<br>(ii) Habitat of significant importance to endemic and/or restricted-range species;<br>(iii) Habitat supporting globally significant concentrations of migratory species and/or congregatory species;<br>(iv) Highly threatened and/or unique ecosystems; and/or<br>(v) Areas associated with key evolutionary processes.'<br><br>In areas of critical habitat, the client will not implement any project activities unless all of the following are demonstrated:<br>• **No other viable alternatives** within the region exist for development of the project on modified or natural habitats that are not critical;<br>• Project **doesn't lead to measurable adverse impacts** on biodiversity values for which critical habitat designated and on ecological processes supporting them;<br>• Project **doesn't lead to net reduction in the global and/or national/regional population** of any Critically Endangered or Endangered species over a reasonable period of time; and<br>• Robust, appropriately designed, and long-term biodiversity **monitoring and evaluation** is integrated into the client's management program.<br>• In cases where a client can meet these requirements, the project's mitigation strategy will be described in a **Biodiversity Action Plan** and will be designed to achieve **net gains** of those biodiversity values for which critical habitat was designated.<br>• Where biodiversity **offsets** are proposed, client must demonstrate through an **assessment** that the project's significant residual impacts on biodiversity will be mitigated to meet the above requirements. |

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| **What are requirements of clients with projects within protected areas?** | Where a proposed project is located within a **legally protected area or an internationally recognised area** (UNESCO Natural World Heritage Sites, UNESCO Man and the Biosphere Reserves, Key Biodiversity Areas, and wetlands designated under the (Ramsar) Convention on Wetlands of International Importance), the client will meet the requirements for natural or critical habitat, as applicable and, in addition, will:<br>• Demonstrate that the proposed development in such areas is legally **permitted**;<br>• Act in a manner **consistent with** any government recognised **management plans** for such areas;<br>• **Consult** protected area sponsors and managers, affected communities, indigenous peoples and other stakeholders on the proposed project, as appropriate; and<br>• Implement **additional programs**, as appropriate, to promote and enhance the conservation aims and effective management of the area. |
| **What are requirements of clients concerning 'ecosystem services'?** | Client will undertake a systematic review to identify priority ecosystem services, namely:<br>• Ecosystem services which the project is likely to impact, resulting in adverse impacts to affected communities: Client will **avoid adverse impacts on such priority services**. Where such impacts are unavoidable, the client will minimise them and implement mitigation measures that aim to **maintain the value and functionality of priority services**. Affected communities will participate in determination of these priority ecosystem services. And/or:<br>• Ecosystem services on which the project is directly **dependent** for operations: Client shall minimise impacts on these priority ecosystem services and implement measures that **increase resource efficiency** of their operations. |
| **What is the relationship with the BBOP Standard?** | • The definition of biodiversity offsets in PS6 is in alignment with the core elements of BBOP's definition, and the requirements mentioned in PS6 (e.g. 'like for like') are contained within the BBOP Standard. The two documents are complementary of one another.<br>• PS6 defines a set of circumstances in which companies will need to mitigate residual impacts on biodiversity using biodiversity offsets in order to obtain project finance.[5] The BBOP standard offers companies a way to demonstrate that they comply with PS6. Guidance Note 6 also references the BBOP Principles as an internationally recognized standard in biodiversity offset design.<br>• In addition, there are many circumstances other than those covered by PS6 in which companies will need to, or benefit from, undertaking biodiversity offsets (for example, regulatory compliance or where there is a business case for demonstrating no net loss, even if project finance is not needed from the IFC or an Equator Bank). Conforming to the BBOP standard will offer companies the assurance that they have met and demonstrated international best practice. |

[5] While PS6 concerns project finance, financial institutions and other organizations are already starting to regard PS6 as a benchmark of best practice generally, and to draw on it to guide lending and investment decisions for projects that do not involve project finance.

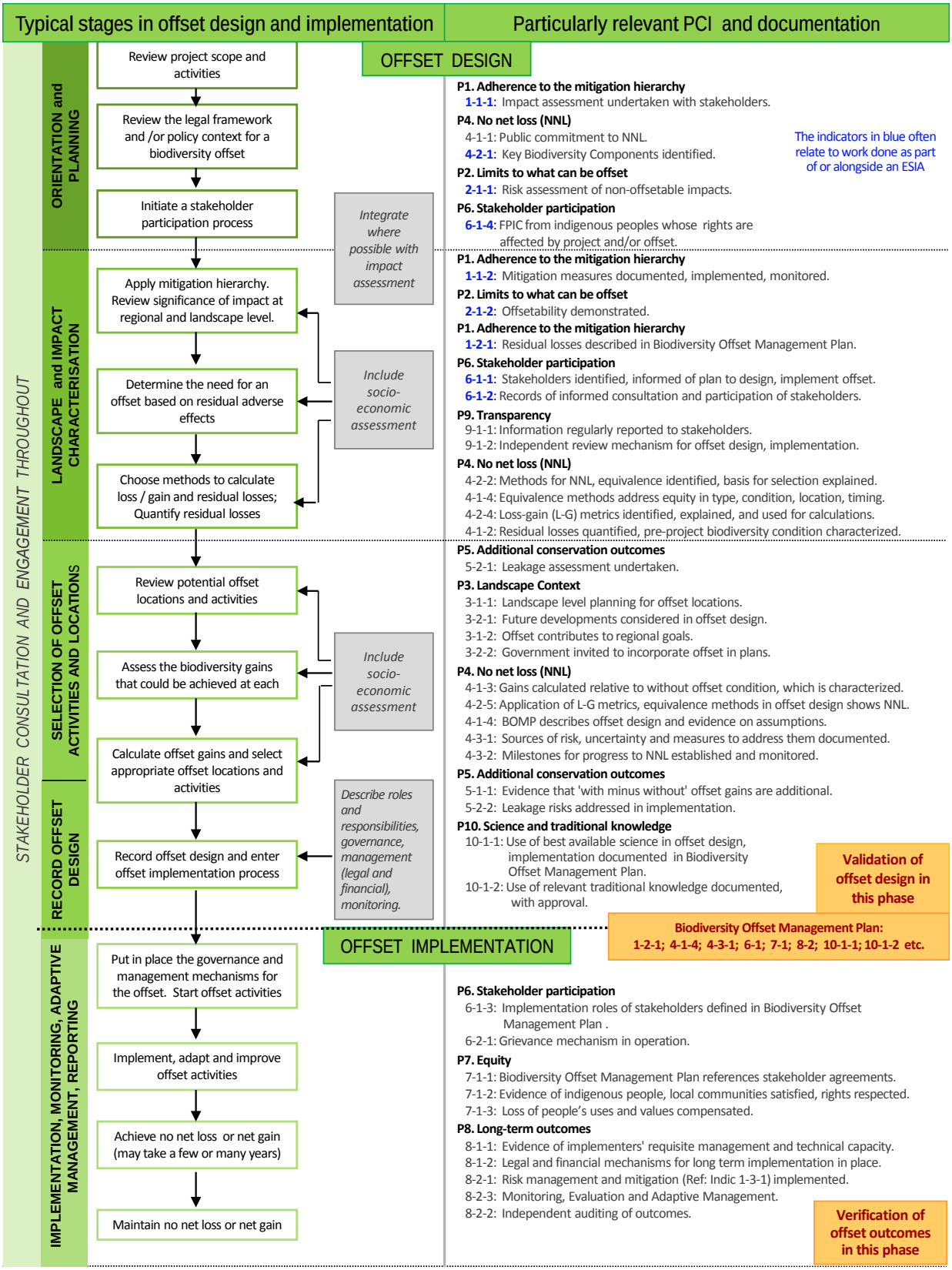
## The assessment process and sequence of addressing the Principles, Criteria and Indicators

The Principles, Criteria and Indicators are presented in this document according to the order of the BBOP Principles (e.g. from Principle 1, Criterion 1, Indicator 1 through to Principle 10, Criterion 1, Indicator 2). However, to see them presented in a possible chronological order, typical of the stages involved in biodiversity offset design and implementation, please see the flow diagram on the next page.

The sequence of the Principles, Criteria and Indicators in the Standard has been the subject of extensive debate among BBOP members. On the one hand, it would naturally be very helpful to present the Principles, Criteria and Indicators in an order likely to reflect the steps followed by an offset designer or assessor. On the other hand, the chronology of offset design and implementation varies enormously according to whether the offset is prospective (planned prior to impacts taking place) or retrospective (planned once some impacts have already started), and according to the scale of the project and even the geographical location and industry sector concerned. There was a concern among some members that readers might feel that presenting a chronology would suggest there is a single, prescriptive approach to the offset design process, whereas the process might vary considerably in different settings. In addition, offset design is more an iterative than a simply linear process. Finally, presentation of the Principles, Criteria and Indicators in different running orders may be useful in different contexts for particular decision-makers, audiences and communicators. Consequently, **Figure 2** is purely illustrative and offers just one possible approach to the process.

## Figure 2: Principles, Criteria and Indicators: Illustrative Chronology

*Note: This diagram illustrates a general approach. Offset planning is usually more iterative than linear; so the order of events may vary depending on the circumstances.*



## Key documents

Naturally, there are many documents (including corporate environmental policies, site management plans, Environmental and Social Impact Assessments, records of meetings with various stakeholders, and others) which are relevant to the design and implementation of biodiversity offsets. However, a number of key documents are referred to throughout the Standard and are likely to offer especially useful evidence to assessors that particular PCIs have been satisfied. These include:

- **Environmental Impact Assessment (EIA) or Environmental and Social Impact Assessment (ESIA):** Many projects require a formalised process, including public consultation, in which all relevant environmental and social consequences of the project are identified and assessed before authorisation is given. The application to biodiversity of the mitigation hierarchy (avoidance, minimisation, rehabilitation/ restoration and offsets), can be integrated into ESIAs. ESIAs are thus mentioned in several of the BBOP Principles, Criteria and Indicators. The blue text in Figure 2 groups the Indicators particularly relevant to ESIAs within the chronology.

- **The Biodiversity Offset Management Plan (BOMP) and other management plans:** Developers typically adopt some form of management plan (often called a Biodiversity Action Plan) to address the mitigation measures set out in the ESIA and then developed as part of the environmental management plan to ensure their implementation. Biodiversity may be integrated throughout the environmental management plan, or may form a discrete component. Such documents may also incorporate biodiversity offsets, but they are generally more focussed on project sites (and managing impacts on-site) rather than on offset areas and activities. Offset activities may be physically separate from companies' on-site biodiversity management, broader in scope and involve more detailed and longer-term roles, responsibilities and legal, institutional and financial arrangements. The BBOP Standard is flexible as to what form and name such plans take, but requires one or more plans that address the full set of issues involved in design and implementation of mitigation measures, including the biodiversity offset. **Box 2** illustrates a possible table of contents for the BOMP, highlighting the PCIs that refer to it.

**Box 2: The Biodiversity Offset Management Plan (BOMP)**

For convenience, the document which describes the measures planned for avoidance, minimisation, rehabilitation/restoration of impacts, and the detailed design and implementation of an offset for the residual impacts is referred to throughout the Standard as the 'Biodiversity Offset Management Plan'. According to Indicator 4-1-4,'the Biodiversity Offset Management Plan (BOMP) describes the offset design and its intended conservation outcomes, and includes the evidence and assumptions used to predict that these outcomes will result from the offset activities described'. In fact, this document may have another name, and the issues may be covered in more than one document (including the Environmental Impact Assessment, Environmental Action Plan, Biodiversity Action Plan, and Offset Plan). Whatever approach is most suitable for the given project, one or more plans are needed that satisfy the assessor that all the requirements the Standard describes for the 'BOMP' have been met. Where there is more than one plan, they should be clearly cross-referenced and made available to the assessor together. As the layout of plans may vary, the following table offers an indicative outline only of the contents of the BOMP, and the specific criteria and indicators that refer to it.

| INDICATIVE POSSIBLE OUTLINE OF THE BOMP | RELATED INDICATORS |
|---|---|
| **TABLE OF CONTENTS** | ---- |
| **EXECUTIVE SUMMARY (two pages)** | ---- |
| **INTRODUCTION:**<br>• One or two-page summary about the project (location, sector, nature of activities, operator).<br>• Developer's commitment to no net loss*, and rationale for this commitment (explanation of business case) | 4-1-4: documentation of the offset design and how offset will achieve no net loss<br>1-1-1: assessment of project's predicted residual impacts<br>1-1-2: application of mitigation hierarchy documented<br>4-1-1: publicly stated commitment to no net loss;<br>2-1-1: assessment of whether impacts can be offset |

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| • Intended conservation outcomes.<br>• (* provided the project's impacts are capable of being offset) | |
| **DESCRIPTION OF PROJECT IMPACTS:**<br>• Describe the key biodiversity components affected.<br>• Describe the project's impacts on biodiversity (including direct, indirect, and cumulative impacts, as appropriate) including on the key biodiversity components identified. Include consideration of the intrinsic, socioeconomic and cultural values of biodiversity. | 4-1-2: pre-project baseline characterised<br>4-2-1: key biodiversity components identified<br>1-1-1: the predicted residual impacts from the project on all affected biodiversity, including key biodiversity components, assessed and documented |
| **DESCRIPTION OF MEASURES FOR AVOIDANCE, MINIMISATION, REHABILITATION/RESTORATION:**<br>• Describe the measures for avoidance of impacts, including those taken to avoid impacts and risks to highly irreplaceable and/or vulnerable biodiversity<br>• Describe the measures for minimisation of impacts<br>• Describe the measures for rehabilitation/restoration | 1-1-2: application of mitigation hierarchy documents avoidance, minimisation, and rehabilitation / restoration measures<br>2-1-1: assessment of risk that impacts cannot be offset (highly irreplaceable or vulnerable biodiversity) |
| **DESCRIPTION OF RESIDUAL IMPACTS:**<br>• Describe the residual impacts on biodiversity, after avoidance, minimisation, rehabilitation/restoration.<br>• Describe the level of risk that any of these residual impacts are not capable of being offset. | 1-1-1: assessment of project's predicted residual impacts<br>4-1-2: quantification of residual losses relative to pre-project baseline<br>2-1-1: assessment of risk that impacts cannot be offset<br>2-1-2: the risk assessment demonstrates how the impacts can be offset, accounting for uncertainties |
| **DESCRIPTION OF OFFSET DESIGN:**<br>• Describe how stakeholders were identified and involved in offset design, and the results of their involvement<br>• Describe the metrics selected and the rationale for doing so<br>• Describe the offset site(s) selected and the rationale for doing so<br>• Describe the offset activities selected and the rationale for doing so | 6-1-1: relevant stakeholders identified and informed<br>6-1-2: stakeholder consultation and participation in design and implementation<br>6-1-3: roles of stakeholders defined<br>7-1-1: agreements established with relevant stakeholders<br>2-2-2: selection of methods and appropriate metrics documented, and rationale explained;<br>4-1-4: describe and document offset design (including location) and provide rationale for design<br>3-1-1: identification of offset sites in context of landscape level analysis<br>4-1-3: offset gains quantified relative to biodiversity baseline at offset site(s)<br>4-1-4: offset design described and rationale provided<br>4-2-5: loss-gain used in design and demonstrates no net loss<br>5-1-1: offset gains are additional<br>2-1-2: risk assessment demonstrates how residual impacts can and will be offset<br>9-1-2: implement a mechanism for independent review of offset design and implementation |

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| **DESCRIPTION OF OFFSET IMPLEMENTATION:**<br>• Describe the roles and responsibilities of the different stakeholders involved in the implementation of the offset<br>• Describe the institutional and legal arrangements for the implementation of the offset<br>• Describe the financial arrangements for the implementation of the offset<br>• Describe the milestones for implementation<br>• Describe the measures for monitoring, evaluation and adaptive management of offset implementation<br>• Describe the grievance procedure | 6-1-3: roles of stakeholders in implementing offset<br>8-1-1: evidence for management and technical capacity of those implementing the offset<br>8-1-2: legal mechanisms in place<br>8-1-2: financial mechanisms in place<br>4-3-1: sources of uncertainty and risk, and measures to manage risk are identified<br>4-3-2: milestones for delivery of offset gains established and monitored<br>8-2-1: risk management measures are implemented, monitored, and risk is adaptively managed<br>8-2-2: outcomes are independently audited<br>8-2-3: a system for monitoring, evaluating, and reporting on success<br>6-2-1: system for handling grievances implemented |
| **REPORTING:**<br>• Describe the provisions for reporting on the implementation of the measures defined in this plan | 4-1-1: public commitment to no net loss<br>4-1-4-: documentation of offset design and implementation<br>4-3-2: development of implementation milestones and tracking progress<br>8-2-2: outcomes independently audited<br>8-2-3: a system for monitoring and reporting on success<br>9-1-1: communication on baseline findings<br>9-1-2: mechanism for independent review and reporting |

## Assessing conformance

The Guidance Notes are intended primarily to help auditors assess conformance with the BBOP Standard. For more stepwise guidance on designing and implementing a biodiversity offset, the Guidance Notes can be read in conjunction with other technical documents related to the practical design and implementation of biodiversity offsets (such as the BBOP Handbooks on Offset Design, Cost Benefit Assessment and Offset Implementation; Resource Papers on Offsets and Impact Assessment, Offsets and Stakeholder Engagement, on No Net Loss (including Loss-Gain calculations) and on Impacts that are Difficult to Offset. These are available at: **http://bbop.forest-trends.org/guidelines/**. A wide range of other organisations, many of them BBOP members, are working on mitigation issues and offsets. These include companies with no net loss or net positive impact commitments, such as Ambatovy Minerals S.A, de Beers, BC Hydro, Rio Tinto and Solid Energy New Zealand; financial institutions such as the IFC, whose Performance Standard 6 is outlined in Box 1; government initiatives such as the Netherlands No Net Loss-initiative (NNLi); the New Zealand Department of Conservation's Biodiversity Offset Programme, and regional groups such as the European Commission with its No Net Loss Initiative; intergovernmental organisations, for instance the Convention on Biological Diversity and the International Union for Conservation of Nature (IUCN); and a variety of non-governmental organisations collaborating directly with the private sector in the field, including, for example, Birdlife International, Fauna and Flora International, and The Nature Conservancy, with its Development by Design approach. Their experiences, tools and approaches can also help developers design and implement offsets that conform to the BBOP Standard.

To help assessors and auditors determine compliance with the PCIs, Guidance Notes will be available in a separate document (see **http://bbop.forest-trends.org/guidelines/Standard_Guidance_Notes**). The Guidance Notes are organised in the following fashion: First, each Indicator (with associated Principle and Criterion) is set out in a text

box. The Guidance Notes for that indicator follow, with an explanation or interpretation that defines terms used in the Indicator and provides some examples or descriptions to illustrate characteristics of the Indicator. The interpretation also offers guidance on the kinds of evidence or factors to be considered in evaluating the Indicator and what constitutes good practice in a particular area (for instance, suitable metrics, or what to look for in plans). Following the interpretation of each indicator, key questions are listed that will need to be answered for assessors to be satisfied that the Indicator has been met, with related conformance requirements for each question. As a corollary, footnotes to the conformance requirements offer examples of the circumstances that would likely constitute non-conformance. A table at the back of the document shows the connections between the Indicators.

The Guidance Notes are not intended to provide a prescriptive or complete set of targets to be met in order for a given offset to satisfy the PCI, but rather to offer indicative information for assessors and auditors reviewing and evaluating evidence for conformance. As is frequently stressed throughout the Guidance Notes, there is no single best approach to the design and implementation of biodiversity offsets. The philosophy of BBOP members has always been to take a principles-based and flexible approach. Despite the detail in the Criteria, Indicators and 'conformance requirements' in the Guidance Notes, assessment of a biodiversity offset against the Standard will inevitably involve value judgements on the part of the assessor as to whether the offset complies with the PCI, for instance on the selection of appropriate experts and methods. Given the numerous different approaches and methods offset planners may take, Principle 9, concerning transparency, is particularly important. The assessor needs to be satisfied that the developer has explained the choices made concerning offset design and implementation, and offered a rationale for these choices. The conformance requirements for many Indicators thus require the developer to explain the rationale for the approach taken on a particular issue. Given the variety of possible situations to which this Standard may be applied, and the fact that some Indicators may not be relevant in a particular context, assessors may also find it helpful to consider a 'comply or explain' philosophy to the more detailed conformance requirements in the Guidance Notes, so that if a particular suggestion is inapplicable, the developer can explain why this is the case and offer an alternative approach to satisfying the Principle concerned.

The current view of BBOP members is that, to meet the Standard, a biodiversity offset needs to conform to the Indicators. Assessors and auditors should not insist on perfection in satisfying the Principles, Criteria and Indicators, but major failures in any individual Principle or Criterion would disqualify a biodiversity offset from meeting the Standard. The issue of the level of conformance with the PCI needed for a particular biodiversity offset to meet the Standard, and how this conformance should be measured and determined, will remain under development for the immediate future, while the Standard is trialled and improved.

One feature of biodiversity offsets is that their implementation, and even their design, can be a long-term undertaking. As is the case with a number of other standards, assessors may find it helpful to consider two stages of assessment: 'validation' of biodiversity offset design, when a Biodiversity Offset Management Plan has been prepared that describes a biodiversity offset which, if satisfactorily implemented, should satisfy the PCI; and 'verification' of biodiversity offset implementation, with periodic assessments as to whether the Biodiversity Offset Management Plan is being properly implemented.

Some assessors may not have specific expertise in the emerging and quite detailed scientific and technical aspects of biodiversity offset design and implementation.[6] And they may well not have the time to undertake detailed

[6] Who is the 'assessor' or 'auditor' mentioned in this document? How is it possible to know whether they are competent and have done a good job? A developer wishing to show that a biodiversity offset has been independently audited against the Standard will need to select an individual or organisation with appropriate skills. Organisations experienced in auditing against other environmental standards involving biodiversity assessments (e.g. FSC, RSPO, etc) should be able to adapt to the more quantified approach involved in assessments against the BBOP Standard. A system of accreditation for auditors (certifiers) would help spread

research to establish whether the selection by the developer of a particular approach or methodology is appropriate. Consideration of peer review (for instance, the establishment by the developer of a panel of experts or steering committee) may help assessments. By way of illustration, two examples of issues on which such expert opinion may be valuable are in the ranking of biodiversity components according to conservation priority (Indicator 4-2-1) and in the determination of adequate provision for risk and uncertainty (Indicator 4-3-1). With such situations in mind, Indicator 9-1-2 also makes provision for an independent review panel, steering committee or other mechanism for peer review.

## Offset or compensation? What if my project does not satisfy all the PCIs?

BBOP defines a biodiversity offset as a no net loss (or net gain) conservation outcome (see the **Box 3**, to the right). Consequently, to meet the Standard, all the Principles and Criteria need to be satisfied, as evidenced by conformance with all the Indicators, unless the developer can justify that a given Indicator is inapplicable in its particular setting.

**Box 3: Definition of Biodiversity Offsets**

Biodiversity offsets are measurable conservation outcomes resulting from actions designed to compensate for significant residual adverse biodiversity impacts arising from project development* after appropriate prevention and mitigation measures have been taken.

The goal of biodiversity offsets is to achieve no net loss and preferably a net gain of biodiversity on the ground with respect to species composition, habitat structure, ecosystem function and people's use and cultural values associated with biodiversity.

* While biodiversity offsets are defined here in terms of specific development projects (such as a road or a mine), they could also be used to compensate for the broader effects of programmes and plans.

However, we recognise that the Standard represents new and emerging best practice, and many conservation projects are either not designed to meet all the PCI, or for a variety of reasons, are simply unable to do so.

Typical reasons why it may not be possible for a project to conform to all the PCIs include the following:

- The conservation actions were not planned to achieve no net loss.
- The residual losses of biodiversity caused by the project and gains achievable by the offset are not quantified.
- No mechanism for long term implementation has been established.
- It is impossible to offset the impacts (for instance, because they are too severe or pre-impact data are lacking, so it is impossible to know what was lost as a result of the project).
- The compensation is through payment for training, capacity building, research or other outcomes that will not result in measurable conservation outcomes on the ground.

**Figure 3** illustrates the continuum from a very basic form of compensation, through compensation which is close to an offset, to the type of compensation which is a full offset that can realistically expect to achieve a net gain.[7]

**Figure 4** shows a flow diagram that can be used to consider whether the outcome in a given setting is a biodiversity offset, or a different form of compensation.

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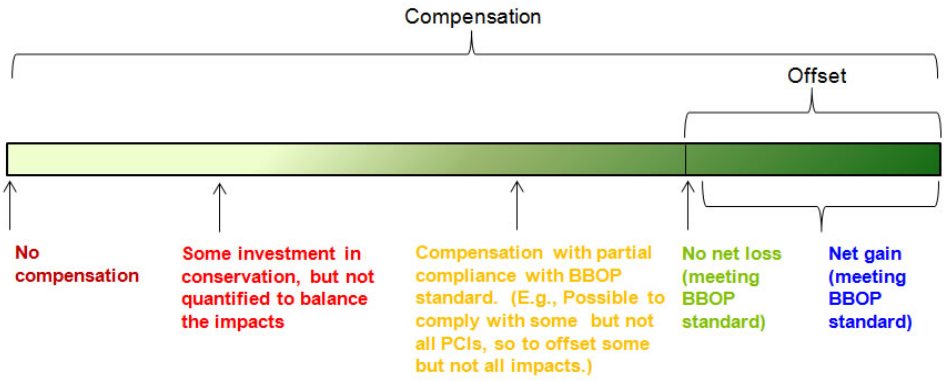
consistent, best practice in assessing offsets against the BBOP Standard. Such an accreditation system, with associated training, is foreseen for the future.

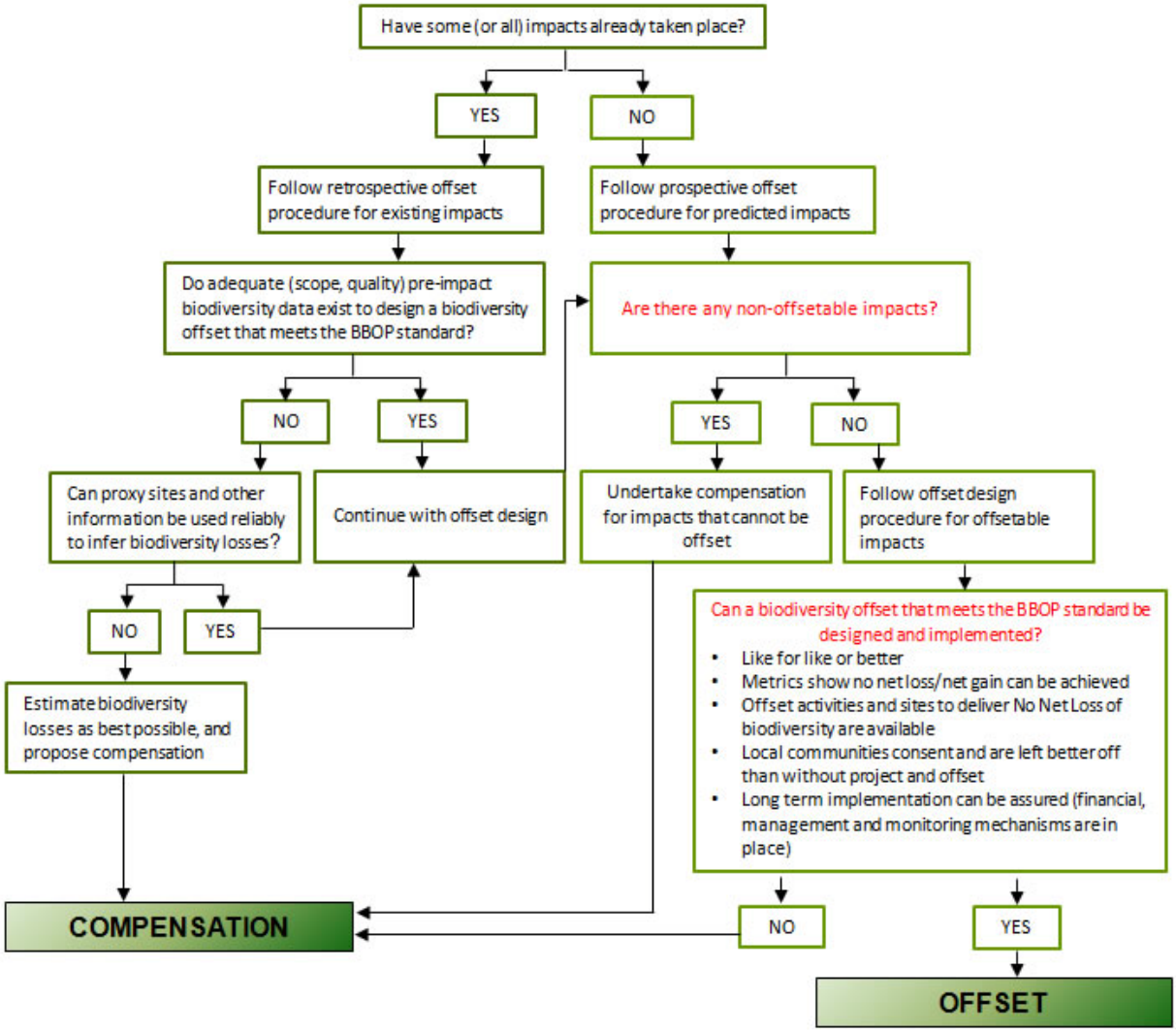
[7] BBOP members have spent most time working on biodiversity offsets, and have yet to discuss other forms of compensation in much detail. In the future, BBOP may be able to offer ideas on different kinds and qualities of compensation.

## Figure 3: The Compensation-Offset Spectrum




## Figure 4: Distinguishing a Biodiversity Offset from Compensation

*This decision tree implies a binary 'yes/no' answer at various steps, although in reality there can often be a continuum of responses. For instance, for a single project the answer may be 'yes' for some impacts, and 'no' for others. However, even in situations where compensation rather than an offset is undertaken, developers are encouraged to get as close as possible to a no net loss outcome, so as best to manage their biodiversity risks.*



## Relationship with ecosystem services

Biodiversity supplies the ecosystem services upon which human life depends. Ecosystem services are the benefits people obtain from functioning ecosystems. They are commonly classified as being either 'provisioning' (food, fibre, water, fuel, genetic resources, etc), 'regulating' (air quality, climate regulation, pest and disease control, etc), 'cultural' (spiritual, aesthetic, educational, etc), or 'supporting' (soil formation, nutrient cycling, etc). Biodiversity both supplies ecosystem services and depends upon them for its persistence. Human survival and well-being depend on ecosystem services, and thus also on the healthy functioning of the ecosystems and biodiversity on which they are based.

As biodiversity underpins ecosystem services, the focus of the Standard is on ensuring no net loss of biodiversity, but there are important links to ecosystem function and services:

- A good offset design process will take into consideration the loss and gain of biodiversity at all levels of organisation, and also how changes in the composition, structure and functioning of biodiversity might influence the provision of ecosystem services to different stakeholders. There are numerous ways of doing this, as outlined in the BBOP Handbooks.
- Key biodiversity components can include biodiversity components selected because they provide important ecosystem services, helping ensure the offset design delivers a 'like for like or better' outcome in terms of ecosystem services.
- Loss-gain metrics can be selected to include methods for calculating impacts on particular ecosystem services and gains (through the offset) in those ecosystem services.
- An important component of successful biodiversity offsets can be the development of a package of benefits to indigenous peoples and local communities to compensate them for the residual impact of the development project and the offset on their use and enjoyment of biodiversity, and to secure their support and involvement in the implementation of the offset. These benefits could range from provision of biodiversity components (e.g. medicinal plants, fuel wood) to financial compensation.
- Most methods used internationally in biodiversity offsets for calculating loss and gain use a combination of biodiversity components as proxies, rather than economic valuation. However, some methods of economic valuation are used, and the BBOP Cost Benefit Handbook suggests a range of tools that can help ensure that people are left at least as well off as a result of the project and offset, and preferably better off.
- One potential mechanism for securing the conservation outcomes needed for a biodiversity offset is payments for ecosystem services (PES). A range of people and organisations, from indigenous peoples and local communities, to farmers, NGOs, local authorities and protected area management boards, can be paid to deliver the specific conservation outcomes needed for the biodiversity offset to achieve no net loss (or a net gain).

The Economics of Ecosystems and Biodiversity (TEEB) study draws attention to the global economic benefits of biodiversity, highlighting the growing costs of biodiversity loss and ecosystem degradation through a range of publications. These mention biodiversity offsets and conservation banking in volumes aimed at companies, policy-makers, local authorities and for the public. For instance, 'TEEB for business' recommends that companies: 'Take action to avoid, minimise and mitigate BES risks, including in-kind compensation ('offsets') where appropriate'. (See **http://www.teebweb.org/**)

## History, trialling and next steps

The BBOP Principles were developed by members of the BBOP Advisory Group between 2006 and 2009, and agreed by all Advisory Group members in February 2009. The Criteria and Indicators set out below as well as the accompanying Guidance Notes were developed in the following manner:

- Principles, Criteria and Indicators architecture discussed and agreed at the BBOP's seventh meeting in September 2009;
- Development of PCIs during discussions at the Assurance Working Group (AWG) teleconference in Jan 2010; in the combined Assurance and Guidelines Working Group meeting in Cambridge from 15–18 March 2010; during the AWG teleconference in July 2010; at BBOP's eighth meeting in Paris in September 2010; and in a meeting of BBOP's Assurance and Guidelines Working Groups in London on 31 March and 1 April 2011. First draft of Guidance Notes prepared.
- Internal consultation among BBOP Advisory Group members and redraft of the PCI and Guidance Notes in April-May 2011
- External consultation (involving non-members) in June-July 2011 and redraft of the PCI and Guidance Notes in August 2011.
- Final discussions of the draft Standard (PCI) and Guidance Notes at BBOP's ninth meeting in October 2011.
- Final (minor) changes to the draft Standard and Guidance Notes in November and December 2011.
- Launch of the Standard in January 2012.

Experience gained from applying the Standard in 2012-2013 will be used by BBOP members to develop a revised standard in 2014.

The BBOP Secretariat would be interested to hear from any organisation that has used the Standard or would be prepared to try it out at a project site. Please contact **bbop@forest-trends.org**.

# Part 2: Principles with Criteria and Indicators

Biodiversity offsets are measurable conservation outcomes resulting from actions designed to compensate for significant residual adverse biodiversity impacts arising from project development[8] after appropriate prevention and mitigation measures have been taken. The goal of biodiversity offsets is to achieve no net loss and preferably a net gain of biodiversity on the ground with respect to species composition, habitat structure, ecosystem function and people's use and cultural values associated with biodiversity.

These principles establish a framework for designing and implementing biodiversity offsets and verifying their success. Biodiversity offsets should be designed to comply with all relevant national and international law, and planned and implemented in accordance with the Convention on Biological Diversity and its ecosystem approach, as articulated in National Biodiversity Strategies and Action Plans.

| Hierarchy component | Requirement |
|---|---|
| ***PRINCIPLE 1***[9] | ***Adherence to the mitigation hierarchy: A biodiversity offset is a commitment to compensate for significant residual adverse impacts on biodiversity identified after appropriate avoidance, minimisation and on-site rehabilitation measures have been taken according to the mitigation hierarchy.*** |
| **CRITERION 1-1** | **The developer shall identify, implement and document appropriate measures to avoid and minimise the direct, indirect and cumulative negative impacts of the development project and to undertake on-site rehabilitation/restoration.** |
| INDICATOR 1-1-1 | An assessment of the development project's impacts on biodiversity (including direct, indirect and cumulative impacts, as appropriate) is conducted with stakeholder participation. |
| INDICATOR 1-1-2 | Measures to avoid and minimise biodiversity loss and to rehabilitate/restore biodiversity affected by the project are defined and documented, and these measures implemented, monitored and managed for the duration of the project's impacts. |
| **CRITERION 1-2** | **The biodiversity offset shall only address the residual impacts of the development project, namely those impacts left after all the appropriate avoidance, minimisation and rehabilitation/restoration actions have been identified.** |
| INDICATOR 1-2-1 | Any residual losses of biodiversity that may exist following avoidance, minimisation and rehabilitation/restoration are identified and described in the Biodiversity Offset Management Plan. |

[8] While biodiversity offsets are defined here in terms of specific development projects (such as a road or a mine), they could also be used to compensate for the broader effects of programmes and plans.

[9] The Principles are identical in content to those agreed in 2009, but their sequence has been changed. The Principles that appear here as numbers 1, 2, 3, 4 and 5 were formerly numbered 3, 4, 5, 1 and 2.

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| ***PRINCIPLE 2*** | ***Limits to what can be offset: There are situations where residual impacts cannot be fully compensated for by a biodiversity offset because of the irreplaceability or vulnerability of the biodiversity affected.*** |
| **CRITERION 2-1** | **The risk that the project's residual impacts on biodiversity may not be capable of being offset ('non-offsetable') shall be assessed and measures taken to minimise this risk.** |
| INDICATOR 2-1-1 | A risk assessment is undertaken to predict the level of risk that the project's residual impacts on biodiversity will be not be capable of being offset, with special attention afforded to any highly irreplaceable and vulnerable biodiversity components. |
| INDICATOR 2-1-2 | The risk assessment demonstrates how the project's residual impacts can and will be offset through specific measures and commitments, taking into account the level of risk and uncertainties regarding the delivery of the offset. |
| ***PRINCIPLE 3*** | ***Landscape context: A biodiversity offset should be designed and implemented in a landscape context to achieve the expected measurable conservation outcomes taking into account available information on the full range of biological, social and cultural values of biodiversity and supporting an ecosystem approach.*** |
| **CRITERION 3-1** | **The biodiversity offset shall be designed and implemented to complement and contribute to biodiversity conservation priorities identified at the landscape, eco-regional and national levels.** |
| INDICATOR 3-1-1 | The identification of potential offset locations is undertaken in the context of a landscape level analysis, and the ecosystem approach is used to plan the offset. |
| INDICATOR 3-1-2 | Evidence is provided that the offset gains and conservation outcomes contribute to regional and national conservation goals, where these exist. |
| **CRITERION 3-2** | **The biodiversity offset shall be designed and implemented for the long term, taking into consideration other likely developments (e.g. competing land use pressures) within the landscape.** |
| INDICATOR 3-2-1 | Evidence is provided that any reasonably foreseeable future developments that might affect the offset, including developments by third parties, have been considered in the offset design. |
| INDICATOR 3-2-2 | Evidence is provided that the offset planner has proposed to the relevant government authorities that the biodiversity offset should be incorporated, where possible, within local, regional and national government land use or other similar plans. |
| ***PRINCIPLE 4*** | ***No net loss: A biodiversity offset should be designed and implemented to achieve in situ, measurable conservation outcomes that can reasonably be expected to result in no net loss and preferably a net gain of biodiversity.*** |
| **CRITERION 4-1** | **The no net loss or net gain goal for the development project shall be explicitly stated, and the offset design and conservation outcomes required to achieve this goal clearly described.** |
| INDICATOR 4-1-1 | The commitment to a goal of no net loss or a net gain of all biodiversity components affected by the project is stated by the project developer in a publicly available document. |

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| INDICATOR 4-1-2 | All residual biodiversity losses due to the project are quantified relative to the 'pre-project' condition of affected biodiversity, which is identified, characterised, and documented. |
| INDICATOR 4-1-3 | The biodiversity gains anticipated from the offset are quantified relative to the 'without-offset' condition of biodiversity in the area of the offset site(s). The 'without offset' biodiversity condition is identified, characterised and documented. |
| INDICATOR 4-1-4 | The Biodiversity Offset Management Plan (BOMP) describes the offset design and its intended conservation outcomes, and includes the evidence and assumptions used to predict that these outcomes will result from the offset activities described. |
| **CRITERION 4-2** | **An explicit calculation of loss and gain shall be undertaken as the basis for the offset design, and shall demonstrate the manner in which no net loss or a net gain of biodiversity can be achieved by the offset.** |
| INDICATOR 4-2-1 | A set of key biodiversity components at species, habitats and ecosystem levels, including landscape features and components related to use and cultural values, is identified. The rationale for selecting these key biodiversity components to represent all the biodiversity affected by the project is explained and documented. |
| INDICATOR 4-2-2 | Methods for (1) determining the equivalence of residual biodiversity losses and gains (assessing like for like or better) in the offset design, and (2) calculating the net balance of biodiversity losses due to the development project and gains due to the offset activities, including identification of suitable metrics, are identified and the rationale for their selection explained and documented |
| INDICATOR 4-2-3 | The methods used for determining equivalence of biodiversity losses and gains address equity[10] in the type and condition, the location, and if possible, the timing of biodiversity losses and gains, and explicitly consider the key biodiversity components. |
| INDICATOR 4-2-4 | The metrics selected for quantifying the net balance of biodiversity losses and gains capture the type, amount and condition of affected biodiversity, including the key biodiversity components, and are used to calculate losses and gains in the offset design. |
| INDICATOR 4-2-5 | The methods to determine net balance and equivalence of losses and gains (Indicator 4-2-2) are applied as the basis for the offset design, and demonstrate no net loss or a net gain of biodiversity. |
| **CRITERION 4-3** | **The offset design and implementation shall include provisions for addressing sources of uncertainty and risk of failure in delivering the offset.** |
| INDICATOR 4-3-1 | Sources of risk and uncertainty in the design and implementation of the offset (including in the loss/gain calculations), together with the measures taken to manage them, are documented in the Biodiversity Offset Management Plan. |
| INDICATOR 4-3-2 | A series of milestones for implementing the offset, tracking progress towards achieving no net loss or net gain and verifying that the offset delivers the intended conservation outcomes, is established and monitored. |

[10] The word 'equity' is used here in the sense of 'comparability', rather than 'fairness'.

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| ***PRINCIPLE 5*** | ***Additional conservation outcomes: A biodiversity offset should achieve conservation outcomes above and beyond results that would have occurred if the offset had not taken place. Offset design and implementation should avoid displacing activities harmful to biodiversity to other locations.*** |
| **CRITERION 5-1** | **The conservation outcomes of the biodiversity offset shall be 'additional' in that they are due to the offset activities and would not have occurred without them.** |
| INDICATOR 5-1-1 | Evidence is provided that the conservation gains at the offset site(s), calculated as the difference between the conservation outcomes with and without the proposed offset activities, were caused by the offset activities. The gains are predicted for a specified, long-term period, and monitored and verified during offset implementation. |
| **CRITERION 5-2** | **The offset shall be designed and implemented to avoid 'leakage': the displacement by the offset of activities that harm biodiversity from one location to another.** |
| INDICATOR 5-2-1 | An assessment is undertaken to identify potential leakage resulting from the offset activities. |
| INDICATOR 5-2-2 | The offset design includes provisions for addressing the risk of leakage and these are put into effect during implementation. |
| ***PRINCIPLE 6*** | ***Stakeholder participation: In areas affected by the development project and by the biodiversity offset, the effective participation of stakeholders should be ensured in decision-making about biodiversity offsets, including their evaluation, selection, design, implementation, and monitoring.*** |
| **CRITERION 6-1** | **Consultation and participation of relevant stakeholders shall be integrated into the decision-making process for offset design and implementation, and documented in the Biodiversity Offset Management Plan.** |
| INDICATOR 6-1-1 | Relevant stakeholders are identified and informed of the plan to design and implement a biodiversity offset for the project. |
| INDICATOR 6-1-2 | Records are maintained that document the results of informed consultation and participation of relevant stakeholders related to the design and implementation of the biodiversity offset. |
| INDICATOR 6-1-3 | The roles of relevant stakeholders in the implementation of the biodiversity offset, including its evaluation and monitoring, are established and clearly defined in the Biodiversity Offset Management Plan. |
| INDICATOR 6-1-4 | For projects and/or offsets with adverse impacts on indigenous peoples, their free, prior and informed consent (FPIC) will be obtained and documented.[11] |

[11] The process of obtaining FPIC and the outcome (i.e. evidence of agreement between parties) for the purposes of this Indicator are those set out in IFC Performance Standard 7 on Indigenous Peoples. As described in IFC Performance Standard 7, adverse impacts on indigenous peoples are impacts to lands and natural resources subject to traditional ownership or under customary use, relocation of indigenous peoples from communally held lands and natural resources subject to traditional ownership or under customary use, and significant impacts to critical cultural heritage.

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| **CRITERION 6-2** | **A mutually agreed and documented system for handling grievances exists and is accepted and implemented by all relevant parties.** |
| INDICATOR 6-2-1 | A documented system, open to relevant affected parties, which handles and resolves grievances in an effective, timely and appropriate manner and records outcomes, is in operation. |
| ***PRINCIPLE 7*** | ***Equity: A biodiversity offset should be designed and implemented in an equitable manner, which means the sharing among stakeholders of the rights and responsibilities, risks and rewards associated with a development project and offset in a fair and balanced way, respecting legal and customary arrangements. Special consideration should be given to respecting both internationally and nationally recognised rights of indigenous peoples and local communities.*** |
| **CRITERION 7-1** | **Rights, responsibilities, risks and rewards shall be clearly identified and mechanisms to share these fairly amongst relevant stakeholders shall be included in the Biodiversity Offset Management Plan.** |
| INDICATOR 7-1-1 | The Biodiversity Offset Management Plan references all agreements with relevant stakeholders pertaining to sharing of rights, responsibilities, risk and rewards related to the design and implementation of the project and offset. |
| INDICATOR 7-1-2 | Documented evidence exists that agreements concerning the project and the design and implementation of the biodiversity offset were entered into willingly by all parties and comply with existing regulations, recognise customary arrangements and, as appropriate, respect the internationally and nationally recognised rights of indigenous peoples. |
| INDICATOR 7-1-3 | Agreements with relevant stakeholders demonstrate that the impacts on peoples' biodiversity uses and values resulting from the development project and offset have been taken into account and appropriately compensated. |
| **PRINCIPLE 8** | **Long-term outcomes: The design and implementation of a biodiversity offset should be based on an adaptive management approach, incorporating monitoring and evaluation, with the objective of securing outcomes that last at least as long as the development project's impacts and preferably in perpetuity.** |
| **CRITERION 8-1** | **Mechanisms shall be in place to ensure that the measurable conservation outcomes from the offset will outlive the duration of the development project's impact.** |
| INDICATOR 8-1-1 | Evidence is provided that those responsible for implementing the offset (see indicator 6-1-3) have the requisite management and technical capacity. |
| INDICATOR 8-1-2 | Legal and financial mechanisms are in place to guarantee the financial and institutional viability of the offset for at least the duration of the project's impacts, including under conditions of a sale, or transfer of project ownership or management. |
| **CRITERION 8-2** | **Adaptive monitoring and evaluation approaches shall be integrated into the Biodiversity Offset Management Plan to ensure regular feedback and allow management to adapt to changing conditions, and achieve conservation outcomes on the ground.** |
| INDICATOR 8-2-1 | Evidence is provided that the measures to manage and mitigate identified risks (see Indicator 4-3-1) are implemented, the results are monitored, and that risk assessment and management are adapted as necessary throughout offset implementation. |

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| INDICATOR 8-2-2 | Offset conservation outcomes and milestones are independently audited and project responds to audit recommendations in a timely manner. |
| INDICATOR 8-2-3 | A system exists for monitoring and evaluating the success of offset implementation, including the monitoring of risks, and this provides regular feedback which is used to document, correct and learn from problems and achievements. |
| ***PRINCIPLE 9*** | ***Transparency: The design and implementation of a biodiversity offset, and communication of its results to the public, should be undertaken in a transparent and timely manner.*** |
| **CRITERION 9-1** | **The developer responsible for designing and implementing the biodiversity offset shall ensure that clear, up to date, and easily accessible information is provided to stakeholders and the public on the offset design and implementation, including outcomes to date.** |
| INDICATOR 9-1-1 | Information on baseline findings, impact assessment as well as offset design and implementation is reported to stakeholders and the public in appropriate media during offset design and implementation. |
| INDICATOR 9-1-2 | An independent mechanism (such as a steering committee, review panel, or system for peer review) is established to oversee the offset design and implementation process and report regularly to the public on their assessment of progress. |
| ***PRINCIPLE 10*** | ***Science and traditional knowledge: The design and implementation of a biodiversity offset shall be a documented process informed by sound science, including an appropriate consideration of traditional knowledge.*** |
| **CRITERION 10-1** | **Scientific information, and, where applicable, traditional knowledge, shall be utilised when designing and implementing the offset.** |
| INDICATOR 10-1-1 | The Biodiversity Offset Management Plan describes how the best available scientific knowledge and methods have been used in offset design and implementation, providing evidence of consultation with scientific experts. |
| INDICATOR 10-1-2 | The Biodiversity Offset Management Plan describes whether and how relevant traditional knowledge has been used in offset design and implementation, with, as appropriate, the involvement and prior approval of local communities and indigenous peoples, and of relevant experts. |

http://bbop.forest-trends.org

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

AP 214/93

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of Appeals pursuant to that Act from Decision No W53/93, and Decision ENF 210/92 of the Planning Tribunal

BETWEEN COUNTDOWN PROPERTIES (NORTHLANDS) LIMITED and COUNTDOWN FOODMARKETS NEW ZEALAND LIMITED

Appellant

AND THE DUNEDIN CITY COUNCIL

Respondent

AND M L INVESTMENT COMPANY LIMITED and WOOLWORTHS (NZ) LIMITED

Second Respondent

AP 215/93

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of An Appeal thereunder from Decision No W53/93 of the Planning Tribunal

BETWEEN FOODSTUFFS (OTAGO/SOUTHLAND) PROPERTIES LIMITED

Appellant

AND THE DUNEDIN CITY COUNCIL

Respondent

AND M L INVESTMENT COMPANY LIMITED and WOOLWORTHS (NZ) LIMITED

Second Respondent

AP 216/93

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of An Appeals pursuant to that Act from Decision No W53/93 and Decision ENF 210/92 of the Planning Tribunal

BETWEEN TRANSIT NEW ZEALAND

Appellant

AND THE DUNEDIN CITY COUNCIL

Respondent

AND M L INVESTMENT COMPANY LIMITED and WOOLWORTHS (NZ) LIMITED

Second Respondent

**Coram:** Barker J (presiding)
Williamson J
Fraser J

**Hearing:** 1,2,3,4,7,8 February 1994 (in Christchurch)

**Counsel:** R J Somerville and R J M Sim for Foodstuffs
T C Gould and D G Bigio for Woolworths
E D Wylie for Countdown
A J P More for Transit New Zealand
N S Marquet for Dunedin City Council

Date of Judgment: 7 March 1994

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**JUDGMENT OF THE COURT**

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**Introduction:**

These appeals from a decision of the Planning Tribunal ('the Tribunal') given on 4 August 1993 have significance beyond their particular facts. They involve the first consideration by this Court of various provisions of the Resource Management Act 1991 ('the RMA') - a statute which made material alterations to the way in which land use and natural resources are managed. A number of statutes, notably the Town & Country Planning Act 1977 ('the TCPA') were repealed by the RMA and the regimes which they imposed were altered significantly, both in form and in substance. Although the RMA was amended extensively last year, counsel assured the Court that its decision is likely nevertheless to offer long-term guidance to local authorities and to professionals concerned with planning. Counsel were agreed that transitional provisions in the 1993 amendment required these appeals to be determined under the provisions of the 1991 Act without reference to the 1993 amendment.

All three appeals were heard together by a Court of three Judges which was assembled because of the importance of the issues raised and the need for guidance in the early

stages of the RMA's regime. At the commencement of the hearing, the Court was advised by counsel for the appellant, Transit NZ Limited ('Transit') that his client had reached a settlement with the first respondent, the Dunedin City Council ('the Council') and the second respondents, M L Investment Company Limited and Woolworths (NZ) Ltd, (called collectively 'Woolworths'). This settlement was on the basis that, if the other two appeals were substantially to fail, agreement had been reached on the appropriate rules for parking, access and traffic control which should be incorporated in the relevant section of the Council's District Plan.

Counsel for Transit was given leave to be absent for the bulk of the hearing but appeared for the hearing of submissions by the other appellants who claimed that the proposed settlement was incapable of implementation. Those other appellants were -

(a) Countdown Properties (Northlands) Limited and Countdown Foodmarkets New Zealand Limited (collectively called 'Countdown'); and

(b) Foodstuffs (Otago/Southland) Limited ('Foodstuffs').

Like most local bodies in New Zealand, the Dunedin City Council underwent major territorial changes in 1991 as a result of local body re-organisation. Instead of being just one of several territorial authorities in the

greater Dunedin region, the Council now exercises jurisdiction over a greatly enlarged area which includes all the former Dunedin municipalities plus areas of rural land formerly located in several counties. Allowing a certain straining of the imagination in the interests of municipal efficiency, the 'city', as now defined, penetrates into Central Otago, past Hyde, and up the northern coast, including within its boundaries a number of seaside townships such as Waikouaiti.

In consequence, the Council inherited a pot-pourri of District Schemes under the 1977 Act, some urban, some rural. These schemes became the Council's transitional district plan under the RMA. The task imposed by the RMA on the Council of preparing a comprehensive plan for this new and varied territorial district is a daunting one, particularly in view of the wide consultation required by the RMA. It was estimated at the hearing before the Tribunal that the section of the new district plan covering urban Dunedin will not be published until late 1994 at the earliest.

We note that the RMA has introduced a whole new vocabulary which has supplanted the well-known terms used by the TCPA. For example, "scheme" becomes "plan"; "ordinance" becomes "rule". Presumably, the drafters of the RMA wanted to emphasise that Act's new approach; it was not to be seen as a mere refurbishment of the TCPA.

One of the many ways in which the RMA differs from the TCPA, lies in the ability of persons other than public bodies, to request a Council to initiate changes to a district plan. The cost is met by the person proposing the plan change. Under the TCPA, only public authorities of various sorts could request a scheme change. The process by which this kind of request is made and implemented is an important feature of these appeals and will be discussed in some detail later.

Essentially, these appeals are concerned with a request by Woolworths to the Council, seeking a plan change to rezone a central city block from an existing Industrial B zone to a new Commercial F zone. On about 40% of the area of this block (which is bounded by Cumberland, Hanover, Castle and St Andrew Streets and has a total land area of some 2 hectares), stands a large building, formerly used as a printing works. Woolworths wishes to develop a "Big Fresh" supermarket within this building; all parking as well as the retail outlet would be under the one roof. Had Woolworths sought an ad hoc resource management consent under the RMA to use the land in this way (cf the 'specified departure' procedure under the TCPA) Countdown and Foodstuffs would not have been able to object. When a plan change is advertised, however, there is no limit to those who may object.

Both appellants operate supermarkets within the same general area in or near the Dunedin central business

district. They lodged submissions in opposition to the plan change with the Council and appeared at a hearing of submissions before a Committee of the Council. Dissatisfied with the Council's decision in favour of the plan change, they initiated references to the Tribunal under clause 14 of the First Schedule to the RMA ('the First Schedule'). The concept of a 'reference' of a proposed plan change to the Tribunal instead of an appeal to the Tribunal is part of the new approach found in the RMA. The appellants subsequently appealed to this Court alleging errors of law in the Tribunal's decision. Appeal rights to this Court are governed by S.299 of the RMA but are similar in scope to those conferred by the TCPA.

Amongst numerous parties, other than Countdown and Foodstuffs, making submissions to the Council were two who subsequently sought references of the proposed plan change to the Tribunal; i.e. Transit and the NZ Fire Service. Transit's concern was with the efficiency of the State Highway network and with parking and access;, two of the streets bounding the proposed new Commercial F zone constitute the north and southbound lanes respectively of State Highway 1. The Fire Service was concerned with the effect of the traffic generated by various vehicle-orientated retail outlets on the efficient egress of fire appliances from the nearby central fire station. NZ Fire Service did not appeal to this Court.

In addition to the references, there was a related application to the Tribunal by Countdown seeking the following declarations under S.311 of the RMA -

(a) whether the Council could change its transitional district plan; and

(b) whether the Council could lawfully complete the evaluation and assessments required by S.32 of the RMA subsequent to the public hearing of submissions on the plan change.

The first question was considered by Planning Judge Skelton sitting alone; on 1 February 1993, he determined that it was permissible for Woolworths to request the Council to change its transitional district plan at the request of Woolworths and to promote the change in the manner set out in the First Schedule. There was no appeal against that decision. The second question was subsumed with other matters raised in the references, and was left for argument in the course of the substantive hearing before the Tribunal.

That hearing before the Tribunal chaired by Principal Planning Judge Sheppard, lasted 16 sitting days; its reserved decision occupies some 130 pages. The decision is notable for its clarity and comprehensiveness; we have been greatly assisted in our consideration of the complex issues by the way in which the Tribunal has both

expressed its findings and discussed the statutory provisions which are at times difficult to interpret.

Because the decision of the Tribunal contains all the necessary detail, we do not need to repeat many matters of fact and history adequately summarised in that decision. Nor do we feel obliged to refer to all the Tribunal's reasons particularly where we agree with them. Aspects of the essential chronology need to be mentioned.

Chronology:

Woolworths' request, made pursuant to S.73(2) of the RMA, was received by the Council on 19 December 1991. In addition to asking for the change of zoning of the relevant land from Industrial to Commercial, Woolworths provided the Council with an environmental analysis of the request and some suggested rules for a new zone. On 20 January 1992, the Planning and Environmental Services Committee of the Council, acting under delegated authority, resolved to "agree to the request" in terms of Clause 24(a) of the First Schedule of the Act ('the First Schedule'). This resolution was made within 20 working days of receiving the request as required by Clause 24. The Council also resolved to delegate to the District Planner authority to prepare the plan change, undertake all necessary consultations and to request and commission all additional information as required by the RMA. There was consultation by the Council with Woolworths as

envisaged by the legislation, which requires private individuals seeking plan changes to underwrite the Council's expenses in undertaking the exercise.

Early in February 1992, the Council informed the owners of land in the block and some statutory authorities of the proposal. Public notice of the proposed plan change was given on 21 March 1992. It advised the purpose of the proposed change as "to provide for vehicle-orientated large scale commercial activity on the selected area of land on the fringe of the Central Business District." The proposed changes to policy statements and rules in the District Plan were opened to public inspection and submission.

Some 15 submissions on the plan change were received by the Council and a summary prepared. A further 66 notices of opposition or support were then generated; a public hearing was convened at which submissions were made by the parties involved in this present appeal plus many others who had either made submissions or who had supported or opposed the submissions of others. After the public hearing, a draft report purporting to address matters contained in S.32 of the RMA, was presented to the Council Planning Hearings Committee by a Mr K. Hovell, a consultant engaged by the Council to advise it on the proposed change. It was found by the Tribunal as fact, that the analysis required by S.32 (to be discussed in some detail later) was not prepared by the Council

until after the hearing of submissions. Obviously therefore, no draft S.32 report was available for comment at the public hearing of the submissions.

After the hearing of submissions, amendments were made by the Committee to a draft S.32 analysis prepared by Mr Hovell; a final version was prepared by him at the Committee's direction on 31 July 1992. The Tribunal found that Mr Hovell acted as a secretary and did not advise the Committee at this stage of its deliberations. On 11 August 1992, the Committee acting under delegated powers, decided that the change be approved. It had amended both the policy statements and the rules from those which had originally been advertised. The extent to which these amendments could or should have been made will be discussed later. All those who had made submissions were supplied with the Council's decision, a legal opinion from the Council's solicitors and a revised report from Mr Hovell headed "Section 32 Summary".

The extensive hearing before the Tribunal ensued as a result of the references made by the present appellants and NZ Fire Service. In broad terms, the effect of the Tribunal's decision was to direct the Council to modify the proposed plan change in a number of respects; however, it approved the change of zoning of the block in question from Industrial to Commercial.

Foodstuffs, Countdown and Transit exercised their limited right of appeal to this Court. A number of conferences with counsel and one defended hearing in Wellington refined the issues of law. Counsel co-operated so as to avoid unnecessary duplication of submissions. We record our gratitude to all counsel for their careful and full arguments.

Approach to Appeal:

We now deal with the various issues raised before us. Before doing so, we note that this Court will interfere with decisions of the Tribunal only if it considers that the Tribunal -

(a) Applied a wrong legal test; or
(b) Came to a conclusion without evidence or one to which on evidence, it could not reasonably have come; or
(c) Took into account matters which it should not have taken into account; or
(d) Failed to take into account matters which it should have taken into account.

See Manukau City v Trustees of Mangere Lawn Cemetery (1991), 15 NZTPA 58, 60.

Moreover, the Tribunal should be given some latitude in reaching findings of fact within its areas of expertise.

See **Environmental Defence Society v Mangonui County Council** (1988), 12 NZTPA 349, 353.

Any error of law must materially affect the result of the Tribunal's decision before this Court should grant relief. **Royal Forest & Bird Protection Society Inc v W.A. Habgood Ltd** (1987), 12 NZTPA 76, 81-2.

In dealing with reformist new legislation such as the RMA, we adopt the approach of Cooke, P in **Northern Milk Vendors' Association Inc v Northern Milk Ltd** [1988] 1 NZLR 530, 537. The responsibility of the Courts, where problems have not been provided for especially in the Act, is to work out a practical interpretation appearing to accord best with the intention of Parliament.

In dealing with the individual grounds of appeal, we adhere to counsel's numbering. Some of the grounds became otiose when Transit withdrew from the hearing and one ground was dismissed at a preliminary hearing.

**Grounds 1, 2 and 3:**

1. **The Tribunal misconstrued the provisions of S.32(1) when it held that the first respondent adopted the objectives, policies, and rules contained in Plan Change No 6 at the time when it made its decision that the plan change be approved in its revised form;**

2. **The Tribunal applied the wrong legal tests and misconstrued the Act when it concluded that the first respondent performed the various legal duties imposed on it by S.32;**

3. **The Tribunal misconstrued S.32 and S.39(10(a) of the Act and failed to apply the principles of natural justice by holding that the report of the first respondent's S.32 analysis did not need to be publicly disclosed before the first respondent held a hearing on proposed plan change 6.**

These grounds are concerned with the Council's duty under S.32 of the RMA and can be dealt with together by a consideration of the following topics -

(a) Was the Council correct in not fulfilling its duties under S.32(1) of the RMA before it publicly notified the plan change and called for submissions? Put in another way, was the Council right to carry out the S.32 analysis after the public hearing of submissions but before it published its decision?

(b) Should the Council have made a S.32 report available to persons making submissions on the plan change?

(c) Was the Council's actual S.32 report an adequate response to its statutory responsibility?

(d) If the Council was in error in its timing of the S.32 report or in the adequacy of the report as eventually submitted, was the error cured by the extensive hearing before the Tribunal an independent judicial body before which all relevant matters were canvassed?

S.32 of the Act at material times read as follows

> "32 **Duties to consider alternatives, assess benefits and costs, etc** - (1) In achieving the purpose of this Act, before adopting any objective, policy, rule or other method in relation to any function described in

subsection (2), any person described in that subsection shall -

(a) Have regard to -
  (i) the extent (if any) to which any such objective policy, rule, or other method is necessary in achieving the purpose of this Act; and
  (ii) other means in addition to or in place of such objective, policy rule, or other method which, under this Act or any other enactment, may be used in achieving the purpose of this Act, including the provision of information, services, or incentives, and the levying of charges (including rates); and
  (iii) the reasons for and against adopting the proposed objective, policy, rule, or other method and the principal alternative means available, or of taking no action where this Act does not require otherwise, and

(b) Carry out an evaluation, which that person is satisfied is appropriate to the circumstances, of the likely benefits and costs of the principal alternative means including, in the case of any rule or other method, the extent to which it is likely to be effective in achieving the objective or policy and the likely implementation and compliance costs; and

(c) Be satisfied that any such objective, policy, rule, or other method (or any combination thereof) -
  (i) is necessary in achieving the purpose of this Act; and
  (ii) is the most appropriate means of exercising the function, having regard to its efficiency and effectiveness relative to other means.

(2) Subsection (1) applies to -

(a) The Minister, in relation to -
  (i) the recommendation of the issue, change, or revocation of any national policy statement under sections 52 and 53;
  (ii) the recommendation of the making of any regulations under section 43.

(b) The Minister of Conservation, in relation to -
  (i) the preparation and recommendation of New Zealand coastal policy statements under section 57'

(ii) the approval of regional coastal plans in accordance with the First Schedule.

(c) Every local authority, in relation to the setting of objectives, policies, and rules under Part V.

(3) No person shall challenge any objective, policy, or rule in any plan or proposed plan on the grounds that subsection (1) has not been complied with, except -

(a) in a submission made under clause 6 of the First Schedule in respect of a proposed plan or change to a plan; or

(b) In an application or request to change a plan made under section 64(4) or section 65(4) or section 73(2) or clause 23 of the First Schedule."

Consideration must first be given to the method ordained by the RMA for implementing a plan change initiated by persons other than public bodies. S.73(2) provides -

"Any person may request a local authority to change its district plan and the plan may be changed in the manner set out in the First Schedule."

Clause 2 of the First Schedule requires -

"A written request to the local authority defining the proposed change with sufficient clarity for it to be readily understood and to describe the environmental results anticipated from the implementation of the change".

An applicant is not required to provide any other assessments or evaluations, although Woolworths did so.

Under clause 24 of the First Schedule, the local authority is required to consider the request for a plan change. Within 20 working days it must either "agree to the request" or "refuse to consider" it. The words

"agree to the request" are unfortunate; on one reading, the local authority might be seen as being required to assent to the plan change (i.e. agree to the request for a plan change) within 20 working days. We accept counsel's submissions that the only sensible meaning to be given to the phrase "agree to the request" is "agree to process or consider the request". This interpretation is consistent with the remainder of the First Schedule. The local authority may refuse to consider the request on one of the narrow grounds specified in clause 24(b) or defer preparation or notification on the grounds stated in clause 25. The Council's decision to refuse or defer a request for a plan change may be the subject of an appeal (not a 'reference') to the Tribunal (clause 26).

Clause 28 requires the local authority to prepare the change in consultation with the applicant and to notify the change publicly within 3 months of the decision to agree to the request; (copies of the request must be served on persons considered to be affected). 'Any person' is entitled to make submissions in writing; clause 6 details the matters which submissions should cover. In particular, a submitter must specify what it is he, she or it wants the Council to do. There is no statutory restriction on who can make a submission.

It is doubtful whether the local authority can make a submission to itself under the RMA in its original form.

The Court of Appeal in **Wellington City Council v Cowie** [1971] NZLR 1089 held that a local authority could not object to its own proposed scheme. The TCPA was changed to permit this. A similar provision was not found in the RMA; we were told by counsel that the 1993 amendment now permits the practice. In this case, the Council's development planner lodged a submission which the Tribunal found was lodged in his personal capacity.

The local authority must prepare a summary of all submissions and then advertise the summary seeking further submissions in support or opposition. The applicant for the plan change is entitled to receive a copy of all submissions and has a right to appear at the hearing as if the applicant had made a submission and had requested to be heard. The local authority must fix a hearing date, notifying all persons who made a submission and hold a public hearing; the procedure at the hearing is outlined in S.39 of the RMA; notably, no cross-examination is allowed.

After hearing all submissions, the local authority must give its decision "regarding the submissions" and state its reasons for accepting or rejecting the submissions. Any person who made a submission, dissatisfied with the decision of the local authority, has the right to seek a reference to the Tribunal.

As noted earlier, the words "refer" or "reference", refer to the way in which the jurisdiction of the Tribunal is invoked on plan changes by those unhappy with the Council's decision on the submissions. We shall discuss the Tribunal's powers on a reference later in this judgment. The Tribunal, after holding a hearing, can confirm the plan change or direct the local authority to modify, delete or insert any provision or direct that no further action be taken on the proposed change (clause 27 of the First Schedule). The Council may make amendments, of a minor updating and/or 'slip' variety before resolving to approve the plan change (as amended as a result of the hearing of submissions or any reference to the Tribunal).

The Act does not define the phrase used in S.32(1) "before adopting". The word "adopting" is not used in the First Schedule, which in reference to plan changes uses the words "proposed" (clause 21), "prepared" (clause 28), "publicly notified" (clause 5), "considered" (clauses 10 and 15), "amended" (clause 16), and "approved" (clauses 17 and 20). Section 32 also uses "to set" which implies a sense of finality.

Accepted dictionary meanings of the word "adopt" are "to take up from another and use as one's own" or "to make one's own (an idea, belief, custom etc) that belongs to or comes from someone else". The Tribunal held that the meaning of the word adopting is "the act of the

functionary accepting that the instrument being considered is worthy of the action that is appropriate to its nature".

The Tribunal's findings on the local authority's S.32 duties can be summarised thus.

(a) Read in the context of S.32(2) the word "adopting" as used in S.32(1) refers to the action of a local authority which, having heard and considered the submissions received in support of or in opposition to proposed objectives policies and rules, decides to change the measure from a proposal to an effective planning instrument.

(b) The duties imposed by S.32 are to be performed before adopting", that is, before the change is made into an effective planning instrument.

(c) All that the RMA requires is that the duties be performed at some time before the act of adoption.

(d) If Parliament had intended that in every case S.32 duties were to be performed before public notification of a proposed measure, and that people would have been entitled to make submissions about the performance of them, then there would have been words to express that intention directly.

(e) A separate document of the local authority's conclusions on the various matters raised in S.32(1) is not required to be prepared, let alone published for representations or comments, before the decision is made.

(f) In relation to change 6, the Council adopted the objectives, policies and rules of the change at the time when, having heard and deliberated on the submissions received, it made its decision than the planned change be approved in the revised form.

The essential argument for Foodstuffs and Countdown is that the Tribunal was wrong in law and that S.32 requires the Council to prepare the report before advertising the plan change or at the latest before the hearing of submissions regarding a plan change; it cannot fulfil its obligations under S.32 after that point.

Interpreting the provisions of S.32 of the RMA must commence with an examination of the words used in the section having regard not only to their context, but also to the purposes of the Act. S.32(2) describes the persons to whom the duties it imposes shall apply. They are the Minister for the Environment, the Minister of Conservation and every local authority.

So far as the Ministers are concerned, the description relates only to "recommendations" or the "preparation and recommendation" of policy statements or approvals. A

local authority is limited to "the setting" of objectives, policies and rules under Part V which applies to regional policy statements, regional plans and district plans. A distinction has thus been made in the section between Ministers and local authorities. In relation to Ministers, the section expressly refers to recommendation or preparation and recommendation whereas with local authorities, the section refers to the **setting** of objectives, policies and rules.

Under S.32(1) the local authority involved in the setting of objectives, policies and rules must complete certain duties before adopting such objectives, policies or rules. We see no reason to read the phrase "before adopting" other than in its plain and ordinary meaning. Adopting involves the local authority making an objective, policy or rule its own. The Appellants submitted that the phrase requires the duties to be carried out prior to public notification of change. They argued that the local authority adopts a privately requested change prior to public notification because it had, by then, set or settled the substance of the requested change.

We do not accept this submission because the procedure in Clauses 21 to 28 (inclusive) of the First Schedule does not envisage the local authority making the changes its own until after public notification, submissions, and decisions on submissions. It is inconsistent with that

procedure to conclude that the local authority adopted (or made its own) the proposed change prior to the decision on submissions.

A local authority's obligation under Clause 28 of the First Schedule is to prepare a requested change of plan in consultation with an applicant. The process relates to the form rather than the merits of the change. Even after public notification, the local authority has a discretion, on the application of an applicant, to convert the application to one for a resource consent rather than for a change to a plan (Clause 28(5)(a)). To decide that a local authority is adopting a requested change to an objective, policy or rule prior to its decision on submissions requires a conclusion which limits the meaning of "adopting" to encompassing prescribed procedural steps. No decision or positive act of will by the local authority would be required.

Lord Esher, MR in **Kirkham v Attenborough**, [1897] 1 QB 201, 203 held that, with a contract for sale of goods, there must be some act which showed that a transaction was adopted, an act which was consistent only with the person being a purchaser. In this case, there is no act of the Council which shows anything other than an initial acknowledgment that: (a) the proposed change has more than a little planning merit; and (b) a performance of prescribed duties to invest the proposed plan change with a form whereby its merits can be assessed by the public

submission process. There can be no act or decision, inconsistent with the performance of the obligations of the local authority until it has reached its decision upon the submissions.

During argument, two obstacles to this view were signposted. They concerned, first, S.32(3) and, second, S.19. It was submitted that S.32(3) clearly indicated that "before adopting" must mean "prior to public notification"; otherwise, the public would not have the right to challenge an objective policy or rule on the grounds of non-compliance with S.32. This conclusion followed, it was argued, from the necessity for the challenge to be in a submission under Clause 6 in respect to a proposed plan or change to a plan.

The Tribunal accepted that S.32(3) was capable of giving that indication but concluded that, if Parliament had intended the S.32 duties to be performed before public notification, then there would have been express words to that effect.

The first point to consider is whether S.32(3) applies to a privately requested plan change. In the definition section of the RMA, "proposed plan" means "a proposed plan or change to a plan that has been notified under clause 5 of the First Schedule but has not become operative in terms of clause 20 of the First Schedule; but does not include a proposed plan or change originally

requested by a person other than the local authority or a Minister of the Crown".

The Tribunal held: (a) there was no exlusion of privately requested changes in the words "change to a plan" in S.32(3)(a); (b) the use of the term "proposed plan" in the first phrase of S.32(3) does not preclude a challenge to the Council's performance of its S.32 duties in a submission under clause 16 of the First Schedule.

With respect we do not agree. There is no reason to read down the second part of the definition of "proposed plan" which clearly indicates that the definition of proposed plan does not apply to privately requested plan changes; accordingly, there can be no restriction as to the time when persons making submissions on a privately requested plan change may raise non-compliance with S.32 by the Council. They do not have to do so in their submission.

This approach to S.32(3) supports our view on the timing of the "adopting" of the plan change by the local authority. The Tribunal held, in this case, that the plan was not 'adopted' for the purposes of S.32 until it had heard and considered the submissions on the plan change. It was enough for it to provide the S.32 report at the time when it gave its decision on the submissions which it had heard and considered.

We agree with the Tribunal's decision in the result, although differing on the interpretation of S.32(3). We hold that the "adopting" by the local authority under S.32(1) takes place at a different time with a privately requested plan change than it does when the plan change is initiated by the local authority itself or at the request of another local authority or a Minister. This view follows from our interpretation of S.32(3). A person making a submission on a plan change instituted by a Minister or local authority can challenge the sufficiency of the S.32 report only in his or her submission on the plan change. We give this interpretation in the hope this important Act will prove workable for those who must administer it but at the same time, preserve the rights of persons affected by a plan change.

When a private individual requests a scheme change, the local authority's options are fairly limited. It can only reject the application out of hand if a plan change is 3 months away or if the request is frivolous,vexatious or shows little or no planning merit or is unclear or inconsistent or affects a policy statement or plan which has been operative for less than two years. At the stage of the initial request, the local authority could not possibly have carried out a potentially onerous S.32 investigation. It may not have time to do so even within the 3 months required under clause 28 of the First Schedule before notifying publicly the plan change.

Whilst a privately-inspired plan change may pass the threshold test, as the investigative process unrolls, the local authority may come to the view that the requested change is not a good idea; it may wish to await the hearing and consideration of the submissions before deciding whether to 'adopt' it. It will have to consider the wider implications of a proposed plan change during a period limited by clause 28 to 3 months. These considerations would often be canvassed at the hearing of submissions, as they were in this case, without a S.32 report being prepared. A local authority might not be therefore in a position to 'adopt' the plan change until it had the S.32 report; it could need the public hearing and consideration of submissions to flesh out that report to its own satisfaction.

In response to the argument that those making submissions should have access to a S.32 report because the Act in S.32(3) clearly envisages their having the right to comment on a S.32 report, the answer lies in the interpretation we have given to S.32(3). There is no restriction on the time in which a S.32 report can be challenged on a privately requested plan change; therefore, persons wishing to refer the Council's decisions or submissions to the Tribunal can criticise the S.32 report by means of a reference to the Tribunal.

However, the situation is different for those plan changes to which S.32(3) applies; i.e. plan changes

initiated by the local authority itself or requested by a regional authority or another territorial authority or by a Minister. In those situations, the S.32 report would have to be available at the time the plan change is advertised because of the limitation contained in S.32(3) on the right to comment on the adequacy or otherwise of a S.32 report. For scheme changes requested by a Minister or a local authority, such comment may only be made in a submission on the plan change.

It is no answer to say that a person making a submission in advance of knowing the contents of a S.32 report should include as a precaution a statement that the S.32 report was inadequate; this was suggested in argument by counsel for the Council. Such a course would make a mockery of the process and would imply little cause for confidence in the competence of the local authority.

In this scenario, the difference between 'adopt' and 'approval' is quite wide. The approval, which is the act of making a formal resolution about and affixing the seal to the text of the change may never happen; the result of the submissions to the Council or of a Tribunal direction on a reference may cause the local authority to find that its 'adopting' of the change was erroneous. However, with the plan change initiated privately, adopting comes at the time when the Council decides after hearing all the submissions that it should adopt the

change. Formal approval may follow later, depending on whether there are references to the Tribunal.

When the local authority itself initiates the plan change, the situation is simple; it should not do so unless it is then in a position to 'adopt' a plan change.

In the case of a plan change requested by another authority or by the Minister to which S.32(3) applies, a Council receiving the request will have to 'adopt' the change prior to advertising the change and therefore complete its S.32 report by that stage. Again, the Council may not ultimately 'approve' the change because it may come to a different view on the wisdom of doing so after hearing the submissions or after a Tribunal direction.

As to the argument that time is needed for a S.32 report, one imagines that other local authorities or a Minister in requesting the change should be in a position to supply the territorial authority with most of the information needed for its S.32 evaluation of the proposal. If there were not time available within the 3 months, then there is power for the local authority under S.38(2) to increase the time to a maximum of double. One would not envisage, however, a regional council or a Minister requesting a change without providing sufficient prima facie information justifying the request which would make the adopting process simple.

The time for 'adopting' the plan change therefore in terms of S.32, is a 'moveable feast' depending on whether or not the plan change is initiated by a private individual.

S. 19 of the RMA is as follows -

> "19. **Change to plans which will allow activities - Where -**
>
> (a) A new rule, or a change to a rule, has been publicly notified and will allow an activity that would otherwise not be allowed unless a resource consent was obtained; and
>
> (b) The time for making or lodging submissions or appeals against the new rule or change was expired and -
>
> (i) No such submissions or appeal have been made or lodged; or
> (ii) All such submissions have been withdrawn and all such appeals have been withdrawn or dismissed -
>
> then, notwithstanding any other provision of this Act, the activity may be undertaken in accordance with the new rule or change as if the new rule or change had become operative and the previous rule were inoperative."

This section allows activities to be undertaken in accordance with a new rule as if it had become operative, provided that the new rule has been publicly notified and the time for making submissions or appeals against the new rule has expired and no submissions or appeals have been made. The appellants argued that this section implies that consideration under S.32 must take place before the time for making or lodging submissions or

appeals against the new rule have expired; otherwise, activity could be undertaken which was contrary to S.32.

The Tribunal did not place any weight on the argument under S.19. We have carefully considered the submissions and conclude that, while S.19 may appear to produce the possibility of an anomalous situation, it does not affect the powers of a local authority in setting objectives, policies or rules. In particular, it does not reflect upon the time at which the local authority adopts such an objective, policy or rule. Section 19 is concerned with activities which may be undertaken. It is not concerned, as S.32 is, with the rule-making process. Even if a person takes the risk of commencing activity before approval of a change, that activity does not affect the policy, objective or rule itself. Whatever the position about such activity, a local authority is still required to be satisfied of the matters arising under S.32(1)(a), (b) and (c). Certainly there are no words within S.19 which purport to affect the duty under S.32.

Our general approach is supported, we think, by the difference between officially promoted and privately requested changes in their interim effect. S.9(1) of the RMA provides as follows-

> "No person may use any land in a manner that contravenes a rule in a district plan or proposed district plan unless the activity is -

(a) Expressly allowed by a resource consent granted by the territorial authority responsible for the plan; or
(b) An existing use allowed by S.10 (certain existing uses protected).
..."

As noted, 'proposed district plan' includes a proposed change initiated by a local authority or Minister but not a privately requested change. Consequently an officially promoted plan has general planning effect from the date of public notification, whereas a privately requested plan has no general planning effect until approval. S.19 bears to some extent on the question of effect before approval but it is limited to activities allowed by the new rule where there is no opposition to it; in our opinion, as previously discussed, it does not support the appellants' case.

In the result, we believe that the Tribunal came to the correct decision about the timing of the S.32 report; in the circumstances of this case, the report was properly 'adopted' at the time when the Council gave its decision on the submissions.

In Ground 3 of the appeal it was argued that the principles of natural justice required persons making submissions to a local authority to have a S.32 report available to them prior to the hearing of submissions. Reference was made to S.39(1)(a) of the RMA requiring an appropriate and fair procedure at a hearing.

We did not consider that there is any merit in this submission. S.39 requires a public hearing with appropriate and fair procedures. Such a hearing took place on this occasion. There was no report or analysis under S.32 available since the local authority had been under no duty to carry it out prior to that time. The applicant and those making submissions were able to call evidence. When the report did come into existence, it was circulated to the parties. Later, during the reference to the Tribunal, there was ample opportunity to criticise the content of the report and to make submissions and call evidence concerning all aspects of it. We reject Ground 3.

The adequacy of the report prepared by the First Respondent is challenged in Ground 2. It was claimed that the Council (a) had taken into account irrelevant considerations, namely, Sections 6, 7 and 8 of the RMA; (b) had failed to take into account the matters; and had (c) applied the wrong test.

These same criticisms were considered by the Tribunal which concluded that, while the Council's S.32 analysis report did not scrupulously follow the language of S.32(1), it was not substantially deficient in any respect. After weighing the appellant's detailed criticisms, we are of the view that the Tribunal was correct in the robust and practical view that it took. It was suggested in submissions that the Tribunal

incorrectly permitted an inadequate compliance by the Council with its S.32 duties upon the basis that local authorities were still learning the extent of their responsibilities under the Act. We do not share that view. We note that the Tribunal stated -

> "In our opinion failures to perform the S.32 duties in substance which are material to the outcome should not be excused. However deficiencies of form that are not material to the outcome, may properly be tolerated, at least in the introductory period when functionaries are still learning the extent of their responsibilities under the Act."

Earlier it stated -

> "Although functionaries are not to be encouraged in expecting that failure to comply with duties imposed by S.32 can be condoned compliance needs to be considered in terms of a reasonable comparison of the material substance of what is done with what is required if any deficiency that may be discovered from a punctilious scrutiny of a S.32 assessment results in a requirement to return to the starting point as in some board games, the Act will not provide a practical process of resource management addressing substance not form."

We agree with those views.

Since our conclusions are that the Tribunal was not in error in relation to either the timing of the S.32 exercise or the adequacy of the First Respondent's S.32 analysis, there is no need to consider in depth the matter raised in the fourth question under this heading.

It is sufficient to note that the references to the Tribunal took place by way of a complete re-hearing. Any defect of substance in the Council's decision and

S.32 analysis was capable of exploration and resolution by the Tribunal. Even if there had been an error, we believe that it would have been corrected by the detailed, careful and extensive hearing by the Tribunal over a period of 16 days when detailed evidence was given by 19 witnesses and thorough submissions made by experienced Counsel. We are conscious of the approach described in Calvin v Carr, (1980) AC 574, A J Burr Limited v Blenheim Borough, [1982] NZLR 1 and Love v Porirua City Council, [1984] 2 NZLR 308.

We consider that this was one of those instances where any defects at the Council stage of hearing were cured by the thorough and professional hearing accorded to all parties by the Tribunal. Accordingly, grounds of appeal 1, 2 and 3 are dismissed.

Ground 4. **"That the Tribunal applied the wrong legal tests and misconstrued the Act when it held that the first respondent did not exceed its lawful authority in making the amendments to the proposed plan change that were incorporated in the revised version of the change appended to its decision."**

A revised and expanded version of the plan change as advertised emerged when the Council's decision was issued after hearing submissions. The appellants submitted that because many of the changes had not been specifically sought in the submissions lodged with and notified by the Council, that the Council's action in making many of the changes was ultra vires. Mr Wylie for Countdown presented detailed submissions comparing

relevant segments of the change as advertised with the counterparts in the Council's finished product.

Mr Marquet for the Council helpfully provided a compilation which, in each case, demonstrated: (a) the provision as advertised; (b) the provision in the form settled by the Council after the hearing of submissions; (c) the appellants' criticism of the alteration or addition; (d) (where applicable) the submission on which the alteration or addition was said by the Tribunal to have been based; (e) the Tribunal's decision in respect of each alteration or addition; and (f) other relevant references. We have found this compilation extremely helpful; we do not think it necessary to embark on the same detailed analysis of Counsel's submissions which occupied some 20 pages of the Tribunal's judgment, because we agree generally with the Tribunal's approach and its decision in respect of each individual challenge.

The Tribunal categorised the challenged variants into five groups:(a) Those sought in written submissions; (b) Those that corresponded to grounds stated in submissions; (c) Those that addressed cases presented at the hearing of submissions; (d) Amendments to wording not altering meaning or fact; (e) Other amendments not in groups (a) to (d).

Clause 6 of the First Schedule refers to the making of submissions in writing on any proposed plan change. A

person making a submission is required by clause 6 to state whether he/she wishes to be heard in respect of the submissions and to state the decision which the person wishes the local authority to make. A prescribed form requires the statement of grounds for the submission.

A summary of the submissions is advertised by the Council under clause 7(a) and submissions for or against existing submissions are then called for by way of public advertisement. A summary of submissions can only be just that; persons interested in the content of submissions are entitled to inspect the text of the submissions at the Council offices so that an informed decision on whether to support or object can be made. In this case, criticism was made of the adequacy of the summary but we see no merit in such a contention.

Many of the submissions did not specify the detailed relief or result sought. Many (such as Countdown's) pointed up deficiencies or omissions in the proposed plan. These alleged deficiencies or omissions were found in the body of the submissions. Countdown sought no relief other than rejection of the plan change. The Council in its decision accepted many of the criticisms made by Countdown and others and reflected these criticisms in the amendments found in the decision.

Clause 10 of the First Schedule states that, after hearing the submissions "the local authority concerned

shall give its decision regarding the submissions and state its reasons for accepting or rejecting them". This is to be compared with Regulation 31 of the Town and Country Planning Regulations 1978 which stated that "the Council shall allow or disallow each objection either wholly or in part..." (Emphasis added)

Counsel for the appellants submitted that clause 10 was narrower in its scope than the TCP Regulations and did not permit the Council to do other than accept or reject a submission.

Like the Tribunal, we cannot accept this submission. We agree with the Tribunal that the word "regarding" conveys no restriction on the kind of decision that could be given. We accept the Tribunal's remark that "in our experience a great variety of possible submissions would make it impracticable to confine a Council to either accepting a submission in its entirety or rejecting it".

Councils customarily face multiple submissions, often conflicting, often prepared by persons without professional help. We agree with the Tribunal that Councils need scope to deal with the realities of the situation. To take a legalistic view that a Council can only accept or reject the relief sought in any given submission is unreal. As was the case here, many submissions traversed a wide variety of topics; many of

these topics were addressed at the hearing and all fell for consideration by the Council in its decision.

Counsel relied on **Meade v Wellington City Council** (1978), 6 NZTPA 400 and **Morrow v Tauranga City Council** (A.6/80 Planning Tribunal, 13 December 1979) which emphasised that a Council's role under a scheme change was to allow or disallow an objection.

The Tribunal held that a test formulated by Holland J in **Nelson Pine Forest Limited v Waimea County Council** (1988), 13 NZTPA 69, 73 applied. In that case the Tribunal on appeal had added conditions to ordinances which made certain uses "conditional uses". The Tribunal had dismissed the appellant's appeal from the Council scheme change whereby the logging of native forests on private land became a conditional rather than a predominant use. The Judge held that this extension of ordinances articulating conditions for the conditional use, was within the jurisdiction of the Council and accordingly of the Tribunal, although no objector had expressly sought it. He said -

> "...that an informed and reasonable owner of land on which there was native forest should have appreciated that, if NFAC's objection was allowed and the logging or clearing of any areas of native forest became a conditional use, then either conditions would need to be introduced into the ordinance relating to conditional use applications, or at some stage or other the Council would adopt a practice of requiring certain information to be supplied prior to considering such applications. Had the Council adopted the conditions to the ordinances that it presented to the Tribunal at the

> time of the hearing of the objection, I am quite satisfied that no one could reasonably have been heard to complain that they had been prejudiced by lack of notice. Such a decision would accordingly have been lawful."

The Tribunal noted and applied this test in **Noel Leeming Limited v North Shore City (No 2)**, (1993), 2 NZRMA 243, 249.

Counsel for Countdown submitted that Holland J's observations were obiter and made in the context of the TCPA rather than of clauses 10 and 16 of the First Schedule. Counsel contended that Holland J's decision meant no more than that the Judge would have been prepared to find that the amendments ultimately made would have been within the parameters of and (by implication envisaged by) the objection as lodged.

There is some force in this submission. Indeed, a close reading of the decision in the **Nelson Pine Forest v Waimea County** case, the Tribunal's decision in **Noel Leeming v North Shore City (No 2)** and the Tribunal's decision in this case confirms that the paramount test applied was whether or not the amendments are ones which are raised by and within the ambit of the submissions. Holland J's reference to what an informed and reasonable owner of land should have appreciated was included within the context of his previous statement (p.73) -

> "...it is important to observe that the whole scheme of the Act contemplates notice before changes are made by a local authority to the scheme statement nd ordinances in its plan. It follows that when an

> authority is considering objections to its plan or a review of its plan it should not amend the provisions of the plan or the review beyond what is specifically raised in the objections to the plan which have been previously advertised."

The same point was made by the Tribunal in **Noel Leeming v Northshore City (No 2)** at p.249 and the Tribunal in this case at p.59 of the decision.

Adopting the standpoint of the informed and reasonable owner is only one test of deciding whether the amendment lies fairly and reasonably within the submissions filed. In our view, it would neither be correct nor helpful to elevate the "reasonable appreciation" test to an independent or isolated test. The local authority or Tribunal must consider whether any amendment made to the plan change as notified goes beyond what is reasonably and fairly raised in submissions on the plan change. In effect, that is what the Tribunal did on this occasion. It will usually be a question of degree to be judged by the terms of the proposed change and of the content of the submissions.

The danger of substituting a test which relies solely upon the Court endeavouring to ascertain the mind or appreciation of a hypothetical person is illustrated by the argument recorded in a decision of the Tribunal in **Meadow Mushrooms Ltd v Selwyn District Council & Canterbury Regional Council** (C.A.71/93, 1 October 1993). The Tribunal was asked to decide whether it was either "plausible" or "certain" that a person would have

appreciated the ambit of submissions and consequently the need to lodge a submission in support or opposition. We believe such articulations are unhelpful and that the local authority or Tribunal must make a decision based upon its own view of the extent of the submissions and whether the amendments come fairly and reasonably within them.

The view propounded by the appellants is unreal in practical terms. Persons making submissions in many instances are unlikely to fill in the forms exactly as required by the First Schedule and the Regulations, even when the forms are provided to them by the local authority. The Act encourages public participation in the resource management process; the ways whereby citizens participate in that process should not be bound by formality.

In the present case, we find it difficult to see how anyone was prejudiced by the alterations in the Council's finished version. The appellants did not (nor could they) assert that they had not received a fair hearing from either the Council or the Tribunal. They expressed a touching concern that a wider public had been disadvantaged by the unheralded additions to the plan. We find it difficult to see exactly who could have been affected significantly other than those 81 who made submissions to the Council. More importantly, it is hard to envisage that any person who had not participated

in the Council hearing and the Tribunal hearing could have offered any fresh insight into the wisdom of the proposed plan change. We make this observation considering the exhaustive scrutiny given to the proposal by a range of professionals.

We have considered the detailed arguments addressed to us concerning each of the changes in the policy statement and rules. On the whole we agree with the classifications of the Tribunal into the categories which it created itself. Mr Marquet pointed out a few instances where the Tribunal may have wrongly categorised a particular variation. Even if he were correct, that does not alter our overall view. We broadly agree with the Tribunal's assessment of each variation, many of which were cosmetic.

There is only one variation which requires specific mention. That is the change to Rule 4. After the hearing of objections, the Council added a Rule to the effect that "any activity not specified in the preceding rules or permitted by the Act is not permitted within the zone unless consent is obtained by way of resource consent".

We find that there was no submission which could have justified that insertion. Nor is the fact that the omission may have been mentioned in evidence appropriate;

because the jurisdiction to amend must have some foundation in the submissions.

We do not see this omission as fatal. The Tribunal held, correctly, that there there is power to excise offending variations without imperilling the scheme change as a whole. If Rule 4 can be excised, then S.373(3) of the RMA would apply; that subsection provides as follows -

> "Where a plan is deemed to be constituted under subsection (1), or where a proposed plan or change is deemed to be constituted under subsection (2), the plan shall be deemed to include a rule to the effect that every activity not specifically referred to in the plan is a non-complying activity."

We say generally that no-one seems to have been disadvantaged by the amendments. Even where the relationship to the submissions was somewhat tenuous, it seems quite clear that at the extensive hearing before the Council, most of the matters were discussed. If they were not discussed before the Council, they were certainly discussed before the Tribunal at great length.

In fact the whole of the appellant's case can hardly be based on any lack of due process. Their objections to the plan were considered at great length and fairness by the Tribunal. Any complaints now (such as those under this ground) are of the most technical nature. We see nothing in this ground of appeal which is also rejected.

Ground 5. **"The Tribunal erred in law when it determined the status of the written submission on plan change No. 6 made by an employee of the first respondent Mr J. Chandra, and its decision thereon was so unreasonable that no reasonable Tribunal properly directing itself in law and considering the evidence could have reached such a decision."**

This ground was struck out by Barker ACJ at a preliminary hearing.

Ground 6. **"The Tribunal applied the wrong legal test and misconstrued the Act when it declined to defer a decision on the merits of proposed plan change No 6 pending review by the first respondent of its transitional district plan.**

Ground 7. **The Tribunal misdirected itself when it determined that the Act restricts the authority of a territorial authority to decline to approve a plan change where it raises issues that have implications beyond the area encompassed by the plan change and which, in the instant case, should more appropriately be dealt with at a review of the transitional district plan.**

Although these two grounds relate to discrete findings by the Tribunal, they cover similar ground and will be considered together. The appellants claimed that significant resource management issues involving the whole Dunedin City area arise when a Council is addressing a plan change involving only part of the district; consequently, any change to the district plan must have implications for other parts of the district. The appellants asserted that the Tribunal should have referred the proposed plan change back to the Council with the direction that it should be cancelled because the forthcoming review of the whole district plan was a more appropriate way of managing the resource management issues involved.

The Tribunal heard evidence from witnesses giving reasons why it was preferable to pursue integrated management for all parts of the district and that the best time to do that was at the time of the review. The Tribunal rejected this evidence. Its decision is succinctly stated thus -

> "Although we accept that issues raised by plan change 6 would have implications for a wider area than the subject block, these proceedings are not inappropriate for addressing those issues. The proposed plan change was publicly notified; a number of submissions were received, and they were publicly notified; further submissions were received; the respondent's committee held a public hearing at which evidence was given; it made a full decision which was given to the parties; five parties exercised their rights to refer the change to the Tribunal; the Tribunal conducted a three week hearing in public at which public and private interests were represented, evidence was given by 19 witnesses, and full submissions were made. No one could be prejudiced by the Tribunal making decisions on matters in issue in the proceedings on the merits. On the contrary, the applicants would be prejudiced, and would be deprived of what they were entitled to expect, if the Tribunal were to withhold decisions on the merits on questions properly at issue before it. If we have a discretion in the matter, we decline to exercise it for those reasons."

The Tribunal went on to point out that clause 25 of the First Schedule provides that a local authority may defer preparation or notification of a privately requested change only where a plan review is due within 3 months; the review was due to be publicly notified at the end of 1994 at the earliest; it was not likely to be operative before 1997. The Tribunal further held that this was not the unusual case where a change should be deferred

and that the express provision for deferment in the First Schedule shows an intent by the Legislature that deferment is not intended for reviews that are more remote.

We entirely agree with the approach of the Tribunal. Clearly, the legislature was indicating that plan changes which had more than minimal planning worth should be considered on their merits, even although sponsored by private individuals, unless they were sought within a limited period before a review. We see no reason to differ from the view of the experienced Tribunal. This ground of appeal is also rejected.

**Ground 8. "The Tribunal wrongly construed the ambit of the first respondent's lawful functions under Part V of the Act and in particular, misconstrued Ss.5(2), 9, 31(a), 31(b) and 76 by allowing the first respondent to direct and control the use and development of natural and physical resources within the subject block.**

Under this ground, the appellants mounted a challenge to the way in which the Council used zoning in the proposed plan change. The appellants acknowledged that zoning was an appropriate resource management technique under the RMA. They did not accept that the RMA provides for zoning to restrict activities according to type or category unless it can be shown that the effects associated with a particular category breach "effects-based" standards. According to this argument, if any use is able to meet the environmental standards relating

to that zone, it is not lawful for rules under a plan to prevent any such use on the basis of type or description.

Counsel submitted that the plan change should have created a framework intended to enable people in communities to provide for their own social, economic and cultural wellbeing (the words of S.5 of the RMA). Much was made of the difference between the RMA and the TCPA. S.5 was said to be either or both 'anthropocentric' and 'ecocentric'.

Consideration of S.76 is required -

> "S.76.
>
> (1) A territorial authority may, for the purpose of -
>
> (a) Carrying out its functions under this Act; and
> (b) Achieving the objectives and policies of the plan,- include in its district plan rules which prohibit, regulate, or allow activities.
>
> (2) Every such rule shall have the force and effect of a regulation in force under this Act but, to the extent that any such rule is inconsistent with any such regulation, the regulation shall prevail.
>
> (3) In making a rule, the territorial authority shall have regard to the actual or potential effect on the environment of activities including, in particular, any adverse effect; and rules may accordingly specify permitted activities, controlled activities, discretionary activities, non-complying activities, and prohibited activities.
>
> (4) A rule may -
>
> (a) Apply throughout a district or a part of a district;
> (b) Make different provision for -
> (i) Different parts of the district; or
> (ii) Different classes of effects arising from an activity:

(c) Apply all the time or for stated periods or seasons;
(d) Be specific or general in its application;
(e) Require a resource consent to be obtained for any activity not specifically referred to in the plan."

The Tribunal considered that the plan change represented a reasonable and practical accommodation of the new plan with the old scheme which was acceptable for the remainder of the life of the transitional plan. It rejected the various contentions that the change was inconsistent with the transitional district plan and saw no legal obstacle to approval of the change. It characterised the Council's method of managing possible effects by requiring resource consent as a "rather unsophisticated response" to the new philosophies of the RMA but it held the response was only a temporary expedient, capable of being responsive in the circumstances.

We think that the Tribunal's approach was entirely correct. S.76(3) enables a local authority to provide for permitted activities, controlled activies, discretionary activities, non-complying activities and prohibited activities. The scheme change has done exactly this.

Similar submissions about S.5, the new philosophies of the RMA and the need to abandon the mindset of TCPA procedures were given to the Full Court in **Batchelor v Tauranga District Council (No 2)** [1992] 2 NZLR 84; that

was an appeal against a refusal by the Tribunal to grant consent to a non-complying activity. The Court said at 89 -

> "Our conclusion on the competing submissions about the application of S.5 to this case is that the section does not in general disclose a preference for or against zoning as such; or a preference for or against councils making provision for people; or a preference for or against allowing people to make provision for theselves. Depending on the circumstances, any measures of those kinds may be capable of serving the purpose of promoting sustainable management of natural and physical resources."

As in **Batchelor's** case, reference was made in the appellants' submissions to the speech in Hansard of the Minister in charge introducing the RMA as a bill. We find no occasion here to resort to our rather limited ability to use statements in parliamentary debates in aid of statutory interpretation. **Wellington International Airport Ltd v Air New Zealand Ltd**, [1993] 1 NZLR 671, 675 sets limits for resort to such debates.

To similar effect to **Batchelor's** case is a decision of Thorp J in **K.B. Furniture Ltd v Tauranga District Council** [1993] 3 NZLR 197. He too noted that the aims and objects of the RMA represent a major change in policy in that the RMA moved away from the concept of protection and control of development towards a more permissive system of management of resource focused on control and the adverse effects of activities on the environment.

We find the **Batchelor** and **K.B. Furniture** cases of great relevance when considering this ground of appeal; they looked at the underlying philosophy between the two Acts and, in particular, the application of S.5 of the RMA. In **Batchelor's** case, the Tribunal had taken a similar pragmatic view to that taken by the Tribunal in this case. The Full Court held that there was no general error in an approach which recognised the difficulty of operating with a transitional plan, conceived as a scheme under the TCPA, yet deemed to be a plan under the RMA. Zoning is a method of resource management, albeit a rather blunt instrument in an RMA context; under a transitional plan, activities may still be regulated by that means.

In the **K.B. Furniture** case, Thorp J characterised **Batchelor's** case as pointing to -

> "...the need to construe transitional plans in a pragmatic way during the transitional period, and in that consideration to have regard to the "integrity" of such plans, must have at least persuasive authority in this Court; and with respect must be right. It would be an extraordinary position if a clear statement of legislative policy as to the regulation of land use by territorial local authorities were to have no significance in the interpretation of "transitional plans". At the same time, it would in my view be equally difficult to support the contention that such plans must now be re-interpreted in such a fashion as to ensure that they accord fully with, and promote only, the new and very different purposes of the 1991 Act. That endeavour would be a recipe for discontinuity and chaos in the planning process".

We agree with this statement entirely. This ground of appeal is also dismissed.

Ground 9. **"That the Tribunal applied the wrong legal tests and misconstrued the Act when it concluded that the incorporation of Rule 4 in plan change No 6 is intra vires the Act, and in particular by concluding that Rule 4 is within the bounds of S.76 of the Act and by determining that Rule 4 is necessary with reference to the transitional plan rather than the provisions and purposes of the Act."**

This ground is rather similar to Ground 4.

Rule 4 of plan change 6 provides: "Any activity not specified in rules 1-3 above or permitted by the Act is not permitted within the zone unless consent is obtained by way of a resource consent". The contention of the appellants is that this rule purports to require persons undertaking a number of activities expressly referred to in the district plan to acquire a resource consent before they can proceed. It was submitted that this rule was ultra vires the rule-making power of S.76 (cited above).

Counsel for the appellants drew on the well-known principles that a Court is reluctant to interpret a statute as restricting the rights of landowners to utilise their property unless that interpretation is necessary to give effect to the express words of the RMA Act; in a planning context, this principle is demonstrated by such authorities as **Ashburton Borough v Clifford** [1969] NZLR 921, 943. Counsel submitted that S.9 introduced a permissive regime and that the ability of the local authority to reverse that presumption is prescribed by S.74(4)(e); that normal principles of

statutory interpretation should properly have applied to the construction of S.76.

The Tribunal held that there must be one coherent planning instrument in the context of a hybrid transitional district plan and for the purposes of marrying provisions prepared under one Act which are to change a plan prepared under another Act. "We infer that the need in such circumstances for a rule requiring resource consent to be obtained for activities in one zone that are specifically referred to elsewhere in the plan has on balance more probably been overlooked from the list in S.76(4) than deliberately excluded. The rule is clearly within the general scope of S.76(1) and we do not consider that it was ultra vires respondent's powers".

The Tribunal did not find helpful (and neither do we) various maxims of statutory interpretation advanced by the appellants. The Tribunal could not believe that the Legislature intended, by providing expressly for such rules in the circumstances referred to in S.76(4)(e), to preclude similar rules in other cases where they are needed. We think the Tribunal's reasoning sound and find no reason to depart from it.

Mr Marquet referred to a decision of the Tribunal in **Auckland City Council v Auckland Heritage Trust** (1993), 1 NZRMA 69 where Judge Sheppard held that a reference

anywhere in a plan to a particular activity was sufficient to preclude the application of S.373 to a zone which did not permit that activity. We agree with the criticisms of Mr Marquet of this decision in that no reference was made in it to the ability of a Council to make different provisions for different parts of a district.

In that case, there had been a provision protecting buildings specified in the schedule from alteration or destruction. As alteration or destruction was referred to in the plan, the Judge held that other buildings were not constrained by the rule that demolition and construction can only take place with a resource consent because that requirement was limited only to the scheduled buildings. Such a view could have the effect of taking away control formerly had under the district scheme. However, we are not concerned with the correctness of the **Auckland Heritage Trust** decision.

Even if the Tribunal were wrong in that decision, then our view, already discussed under Ground 4, is that S.373(3) applies; a transitional district plan must be deemed to include a rule to the effect that every activity not specifically referred to in the plan is a non-complying activity.

We reject this ground of appeal.

*Ground 10.* **"The Tribunal incorrectly applied the law relating to uncertainty and vagueness, and came to a decision which was so unreasonable in the circumstances, that no reasonable tribunal could reach the same, by holding that certain phrases in the rules in change No 6 are valid and have the requisite measure of certainty."**

At the hearing before the Tribunal it was argued by the appellants that the rules contained a number of phrases which were vague and uncertain. The Tribunal listed a number of expressions so attacked, discussed relevant authorities and ruled on the matters listed. In some cases, it upheld the submission and either severed and deleted the phrase objected to or held the whole provision invalid. In other cases it rejected the submission made and upheld the validity of the phrase concerned.

In its decision, the Tribunal dealt with this aspect of the case as part of a wider group of matters under the heading "Whether rules 4 and 6 are ultra vires".

Countdown's notice of appeal para 7, under the same heading, specified a number of respects (including the present point) in which the Tribunal is alleged to be in error in that section of the decision.

As a result of pre-trial conferences and argument before Barker ACJ, the grounds of appeal were re-stated by the appellants jointly in 24 propositions or grounds and these were the bases on which (with some excisions and amalgamations) the appeal came before us.

In submissions for the appellant, Mr Wylie covered a number of matters raised in para 7 of the notice of appeal which are outside the ambit of ground 10. We confine ourselves to the specific issue raised by the ground as framed; i.e. whether in respect of the phrases upheld as valid by the Tribunal, it incorrectly applied the law and came to a decision which was so unreasonable in the circumstances that no reasonable tribunal could reach it.

As to the law, the Tribunal cited and quoted passages from the judgments of Davison CJ in **Bitumix Ltd v Mt Wellington Borough**, [1979] 2 NZLR 57, and McGechan J in **McLeod Holdings v Countdown Properties** (1990), 14 NZTPA 362. The Tribunal then said (p.81) -

> "With those judgments to guide us and bearing in mind that unlike the former legislation the Resource Management Act does not stipulate that conditions for permitted use be 'specified', we return to consider the phrases challenged ..."

My Wylie questioned the validity of the distinction that the RMA, unlike the former legislation, does not stipulate that conditions for permitted uses be "specified". No submissions were made by other counsel in this respect and we are unclear about this step in the Tribunal's reasoning. We consider, however, that the correct approach was as indicated by the judgments cited; in our opinion the Tribunal would have reached the same result even if it had applied them alone and had not

borne in mind the further factor derived from the absence of the word "specified".

The Tribunal held, for example, that the phrase "appropriate design" and the limitation of signs to those "of a size related to the scale of the building..." were too vague and could not stand. On the other hand it determined that whether an existing sign is "of historic or architectural merit" and whether an odour is "objectionable", although matters on which opinions may differ, are questions of fact and degree which are capable of judgment and were upheld.

We do not consider that the Tribunal incorrectly applied the law or came to a decision that was so unreasonable that it could no stand. This ground of appeal is also dismissed.

Ground 11. **That the Tribunal's conclusion that the land in the block the subject of Plan Change No 6 is in general an appropriate location for large scale vehicle orientated retailing is a conclusion which on the evidence it could not reasonably come to."**

This ground was withdrawn at the hearing and is therefore dismissed.

Ground 12.. **"That the Tribunal's decision accepting the evidence adduced by the second respondent about the economic effects of proposed change No 6 were so unreasonable, that no reasonable Tribunal, properly considering the evidence, and directing itself in law, could have made such a decision."**

This ground relates to the evidence of a statistical retail consultant, Mr M.G. Tansley, who generally supported the plan change. No witness was called to contradict his evidence. The appellants made detailed and sustained criticisms of his evidence before the Tribunal and claimed that Mr Tansley did not have the relevant expertise to predict economic effects of the proposed change. The Tribunal held that an economist's analysis would not have assisted it any more than did Mr Tansley's.

In a close analysis of Mr Tansley's evidence, counsel for Countdown examined the witness's qualifications and his approach to a cost and benefit consideration of the proposed plan change; they alleged deficiencies in his predictions about the economic effects of the change. These matters were before the Tribunal when they made their assessment of the evidence. Its decision (p.34) records the Tribunal's appreciation of such criticisms.

The Court is dealing with the decision of an specialist Tribunal, well used to assessing evidence of the sort given by Mr Tansley, who was accepted by the Tribunal as an expert. We see no reason for holding that the Tribunal should not have accepted his evidence. Although it is possible for this Court to hold in an appropriate case that there was no evidence to justify a finding of fact, it should be very loath to do so after the Tribunal's exhaustive hearing. The Tribunal is not

bound by the strict rules of evidence. Even if it were, the acceptance or rejection of Mr Tansley's evidence is a question of fact. We see this ground of appeal as an attempt to mount an appeal to this Court against a finding of fact by the Tribunal - which is not permitted by the RMA. We therefore reject this ground of appeal.

Ground 24. **"The Tribunal erred in law and acted unreasonably by failing to consider either in whole or in part the evidence of the appellants and by reaching a decision regarding the merits of the plan change that no reasonable Tribunal considering that evidence before it and directing itself properly in law could reasonably have reached. In particular the Tribunal failed to consider the evidence of the following -**

> **Anderson, Page, Nieper, Cosgrove, Hawthorne, Bryce, Chandrakumaran, Constantine, Edmonds,**

This ground is similar to ground 12, so we consider it next. The appellants complaint here is that the Tribunal took considerable time to analyse the Council's and Woolworths' witnesses' views on the appropriateness of the location for the commercial zone and on the economic and social effects of allowing the proposed change. They claim, in contrast, that the witnesses called by the appellants on the same topics were not considered at all or not given the same degree of attention. The Tribunal heard full submissions by the appellants as to reliability of opposing witnesses, but, the appellants submitted before us, it failed to place any weight at all on the evidence given by the appellants' witnesses. The Tribunal was said to have been unfairly selective and that, therefore, its decision was against the weight of

evidence and one which no reasonable Tribunal could have reached.

Again, this submission must be considered in the light of the Tribunal's expertise. Even a cursory consideration of the extensive record shows that the hearing was extremely thorough; every facet and implication of the proposed scheme change appears to have been debated at length. The Tribunal conducted a site visit and a tour of suburban shopping centres. An analysis presented by Mr Gould shows that the witnesses whom the appellants claim were ignored in the decision were questioned by the presiding Judge. In the course of its decision (p.86), the Tribunal expressly confirmed that it was reaching a conclusion after "hearing the witnesses for the respondent and applicant cross-examined and hearing the witnesses for Foodstuffs and Countdown..." The Tribunal was not required in its judgment to refer to the evidence of each witness.

Once again, we are totally unable to hold that the Tribunal erred in law just because its thorough decision omitted to mention these witnesses by name. It is impossible for us to say that their evidence was not considered. Again, this ground comes close to be an appeal on fact masquerading as an appeal on a point of law. There is nothing to this ground of appeal which is accordingly dismissed.

Ground 13. **"That the Tribunal applied the wrong legal tests and misconstrued the Act when it held that Change No 6 assisted the first respondent in carrying out its functions in order to achieve the statutory purpose contained in Part II of promoting sustainable management of natural and physical resources and that the change is in accordance with the function of S.31."**

Ground 14. **"The Tribunal misdirected itself in law by concluding that the content and provisions of Plan Change 6 promulgated under Part V of the Act are subject to the framework and legal premises of the first respondent's transitional district plan created under the Town and Country Planning Act 1977."**

These grounds were included in the arguments on Grounds 8 and 9 and do not need to be considered separately.

Grounds 15, 16, 17 and 18:

15. **"That the Tribunal erred in law by holding that S.290 of the Act did not apply to the references in Plan Change No 6."**

16. **"That the Tribunal misconstrued the statute when it held that it did not have the same duty as the first respondent to carry out the duties listed in S.32(1)."**

17. **"That the Tribunal misconstrued the Act when it held that it has the powers conferred by S.293, when considering a reference pursuant to clause 14."**

18. **"That the Tribunal misdirected itself by failing to apply the correct legal test when it purported to confirm Plan Change 6, namely by deciding that it was satisfied on balance that implementing the proposal would more fully serve the statutory purpose than would cancelling it."**

The first step in the appellant's argument to the Tribunal on this part of the hearing was that S.290 of the RMA applied to the proceedings. That section reads -

> **"Powers of Tribunal in regard to appeals and inquiries -**

> (1) The Planning Tribunal has the same power, duty, and disecretion in respect of a decision appealed against, or to which an inquiry relates, as the person against whose decision the appeal or inquiry is brought.
>
> (2) The Planning Tribunal may confirm, amend, or cancel a decision to which an appeal relates.
>
> (3) The Planning Tribunal may recommend the confirmation, amendment or cancellation of a decision to which an inquiry relates.
>
> (4) Nothing in this section affects any specific power or duty the Planning Tribunal has under this Act or under any other Act or regulation."

The second step in the argument was that pursuant to S.290(1) the Tribunal had a duty to carry out a S.32(1) analysis in the same way as the Council had.

The Tribunal held that S.290 did not apply because the proceedings were not an appeal against the Council's decision as such and that the Tribunal was not under the same duty as the Council to carry out the duties listed in S.32(1). It went on to say -

> "However the Tribunal's function is to decide whether the plan change should be confirmed, modified, amended, or deleted. To perform that function, the matters listed in S.32(1) are relevant. We therefore address those matters as a useful method to assist us to perform the Tribunal's functions on these references."

The Tribunal then considered those matters in detail.

The appellant's submission to this Court is that the Tribunal was wrong as a matter of law in holding that S.290 did not apply and in determining that it was not itself required to discharge the S.32 duties.

The Tribunal also held that S.293 of the RMA, unlike S.290, was applicable and that it had the powers conferred thereby. S.293 (in part) is as follows -

> "Tribunal may order change to policy statements and plans
>
> (1) On the hearing of any appeal against, or inquiry into, the provisions of any policy statement or plan, the Planning Tribunal may direct that changes be made to the policy statement or plan.
>
> (2) If on the hearing of any such appeal or inquiry, the Tribunal considers that a reasonable case has been presented for changing or revoking any provision of a policy statement or plan, and that some opportunity should be given to interested parties to consider the proposed change or revocation, it may adjourn the hearing until such time as interested parties can be heard."

Although S.293 refers to "plan" which (by the relevant definition) means the operative district plan and changes thereto, the Tribunal considered that, because there is no mechanism by which there could be an appeal to the Tribunal against the provisions of an operative plan, for S.293 to have any application to plans, therefore, it must apply to appeals against provisions of proposed plans and proposed changes to plans. It accordingly held that the context requires that the defined meanings do not apply and that it has the powers conferred by S.293 in respect of a proposed change as well as those conferred by clause 15(2) of the First Schedule. That clause is as follows -

> "(2) Where the Tribunal holds a hearing into any provision of a proposed policy statement or plan (other than a regional coastal plan) that reference

> is an appeal, and the Tribunal may confirm, or direct the local authority to modify, delete, or insert, any provision which is referred to it."

The appellants submit that the Tribunal was wrong as a matter of law in holding that it had the powers conferred by S.293 in the present case.

Mr Marquet accepted (as he had before the Tribunal) that Ss.290 and 293 both applied and that the Tribunal had the powers set out in those provisions but contended, for reasons amplified in his submissions, that there had been no error of law.

Mr Gould supported the Tribunal's findings. He argued, however, that on a careful reading of the decision the Tribunal did not rely upon the powers contained in S.293 but instead on its jurisdiction under clause 15(2) of the First Schedule. It had correctly defined its function, he contended, and in the performance of that function, had reviewed all the elements of S.32. He submitted that even if the Tribunal had the duties under S.32 of the Council (but in a manner relevant to an appeal process), the steps it would have taken in its deliberation and judgment would have been no different. No material effect would arise, he submitted, if the Tribunal were found to be technically in error in its views as to Ss. 290 and 293.

We consider that, for the reasons given by the Planning Tribunal, it correctly determined that it had the powers

conferred by S.293 although we accept Mr Gould's submission that, in the end, the Tribunal did not exercise those powers and acted only pursuant to clause 15(2) of the First Schedule.

We differ from the Tribunal's conclusion as to S.290. In our view, the nature of the process before the Tribunal, although called a reference, is also, in effect an appeal, from the decision of the Council. In addition, the provisions in clause 15(2) that a reference of the sort involved here is an 'appeal' and a reference into a regional coastal plan pursuant to clause 15(3) is an 'inquiry' link, by the terminology used, clause 15 in the First Schedule with S.290.

The general approach that the Tribunal has the same duties, powers and discretions as the Council is not novel. S.150(1) and (2) of the TCPA conferred upon the Tribunal substantially the same powers as S.290(1) and (2) of the RMA; in particular, S.150(1) provided that the Tribunal has the same "powers duties functions and discretions" as the body at first instance. Under that legislation, the Tribunal's approach to plan changes was that the Tribunal is an appellate authority and not involved in the planning process as such. This principle was discussed in this Court in **Waimea Residents Association Incorporated v Chelsea Investments Limited** (Davison CJ, Wellington, M.616/81, 16 December 1981).

There was no provision in the TCPA corresponding to S.32 of the RMA but the judgment of Davison CJ is relevant as confirming the judicial and appellate elements of the Tribunal's function even although it had the same powers and duties as the Council.

We accept Mr Gould's submission that even if the Tribunal had decided that S.290 applied and it had the same duties as the Council (in a manner relevant to its appellate jurisdiction) the steps it would have taken in its deliberation and judgment would have been no different from those set out in detail in pages 121 to 125 of the decision.

The appellants argue next, in respect of ground 18, that the test required is not simply to decide whether on balance the provisions achieve the purpose of the RMA but whether they are in fact necessary. Alternatively, it is submitted that its construction of the word 'necessary' was not stringent enough in the context.

We deal with the alternative point first. The Tribunal in its decision discussed the submissions made by counsel and the judgments of the Court of Appeal in **Environmental Defence Society Inc and Tai Tokerau District Maori Council v Mangonui County Council** [1989] 13 NZTPA 197 and of Greig J in **Wainuiomata District Council v Local Government Commission** (Wellington, 20 September 1989, C.P.546/89).

The Tribunal considered that in S.32(1), 'necessary' requires to be considered in relation to achieving the purpose of the Act and the range of functions of Ministers and local authorities listed in S.32(2). In this context, it held that the word has a meaning similar to expedient or desirable rather than essential.

We agree with that view and do not consider that the Tribunal was in error in law.

We return now to the appellants' primary submission.

It is true that the Tribunal said (at p.128) -

> "On balance we are satisfied that implementing the proposal would more fully serve the statutory purpose than would cancelling it, and that the respondent should be free to approve the plan change."

But we do not think it is correct that the Tribunal adopted this test in place of the more rigorous requirement that it be satisfied that the provisions are necessary. S.32 is part only of the statutory framework; by S.74, a territorial authority is to prepare and change its district plan in accordance with its functions under S.31, the provisions of Part II, its duty under S.32 and any regulations. This was fully apprehended by and dealt with appropriately by the Tribunal. It said at p.127 -

> "We have found that the content of proposed Plan Change 6 would, if implemented, serve the statutory

> purpose of promoting sustainable management of natural and physical resources in several respects; and that the proposal would reasonably serve that purpose; and would serve the aims of efficient use and development of natural and physical resources, the maintenance and enhancement of amenity values, the recognition and protection of the heritage values of building and ares; and the maintenance and enhancement of the quality of the environment.
>
> We have also found that the measure is capable of assisting the respondent to carry out its functions in order to achiege that purpose, and is in accordance with those functions under S.31; that its objectives, policies and rules are necessary, in the sense of expedient, for achieving the purpose of the Act; that the proposed rules are as likely to be effective as such rules are able to be; and that the objectives, policies and rules of the plan change are in general the most appropriate means of exercising the respondent's function."

The Tribunal went on to deal with possible alternative locations, the road system, pedestrian safety, the obstruction of fire appliances leaving the fire station, non-customers' use of carparking, and adverse economic and social effects. It then concluded with the passage which, the appellants contend, shows that the Tribunal adopted the wrong test by saying that on balance it was satisfied that implementing the proposal would more fully serve the statutory purpose than cancelling it.

In our view, the Tribunal applied the correct test when considering the relevant part of S.32; it asked itself whether it was satisfied that the change was necessary and held, after a full examination, that it was. On the basis of that and numerous other findings, it then proceeded to the broader and ultimate issue of whether it should confirm the change or direct the Council to modify, delete or insert any provision which had been

referred to it. It determined that, on balance, implementing the proposal would more fully serve the statutory purpose than would cancelling it and that the Council should accordingly be free to approve the plan change. Reading the relevant part of the Tribunal's decision as a whole we consider that its approach was correct and that it did not err in law as the appellants contend. This ground of appeal is dismissed.

Ground 19. **"That the Tribunal misdirected itself when it determined that the onus of proof rested with the appellant Transit to establish a case that approving Plan Change No 6 would rresult in adverse effects on the traffic environment."**

Ground 20. **"In considering Plan Change No 6 in terms of S.5 of the Act the Tribunal erred in failing to consider the effects of the Plan Change on the sustainable management of the State Highway, on the reasonably foreseeable transportation needs of future generations, and on the needs of the people of the district, pedestrians, and road users, as to their health and safety, and on the need to avoid, remedy or mitigate adverse effects of the plan change on the transportation environment of the Dunedin district."**

Ground 21. **"The Tribunal erred in determining that the Plan Change would create no adverse effects on the State Highway and on persons using and crossing the State Highway."**

Ground 22. **"In considering the effectiveness of the rules contained in the plan change the Tribunal erred in failing to take account of the fact that in respect of permitted and controlled activities allowed by the plan change the general ordinances of the transitional district plan as to vehicle access are ultra vires and of no effect."**

Ground 23. **"The Tribunal erred in considering the effectiveness of the rules contained in the Plan Change, and in particular wrongly determined that the issue of what are appropriate rules for vehicle access should be resolved by the appellant and the first respondent through the process of proposed draft plan change 7 or some informal process."**

These grounds were not argued because of the settlement reached by Transit with the Council and Woolworths. However, because all the other appellants' grounds of appeal have been dismissed, we have now to consider submissions from those appellants as to why the settlement should not be implemented in the manner suggested.

The settlement arrived at amongst Transit, the Council and Woolworths provided for certain rules as to access to the site to be incorporated in the plan change. Details of these rules were annexed to the parties' agreement and submitted to the Court. Counsel for Transit sought an order that the now agreed rules be referred back to the Tribunal where the parties would seek appropriate orders by consent incorporating the new rules. Such a procedure was only to be necessary if the appeals by Countdown and Foodstuffs alleging the invalidity of the planning change were unsuccessful. We have ruled that they are. We therefore consider the viability of implementing the Transit settlement.

Counsel for Countdown who submitted that the new rules contained within the settlement agreement required public notification before the local authority or Tribunal could proceed to include them in the plan change. Further, it was contended that the Tribunal had refused such proposed amendments sought by Transit upon the basis that Transit's submission to the Council had not specifically

stated the amendments sought and that that was final because it had not been appealed. Reference was made to S.295 of the RMA viz -

> "that a decision of the Planning Tribunal ... is final unless it is re-heard under S.294 or appealed under S.299."

It was further agreed that Transit's grounds of appeal did not embrace the new rules but rather dealt with the procedure adopted by the Tribunal in advising both Transit and the Council actively to consider the issues raised by Transit's proposed amendments.

All parties accepted that the Tribunal had power under clause 15(2) of the First Schedule to confirm or to direct the local authority to modify, delete or insert any provision which had been referred to it; as well, it had powers to direct changes under S.293 of the RMA. The latter power includes a specific power to adjourn a hearing if it considers that some opportunity should be given to interested parties to be notified of and to consider the proposed change. The detailed procedure is contained in S.293(3).

On the penultimate page of its decision the Tribunal stated -

> "The other two amendments sought by Transit would replace general provisions about the design of vehicle accesses to car parking and service and loading areas with detailed rules containing specific standards. However, although Transit's submission to the respondent on the plan change

> referred to pedestrians crossing Cumberland Street mid-block, and to the design and location of accesses and exits, it did not state that the submitter wished the respondent specifically to make the amendments that were sought in Transit's reference to the Tribunal. Further, those amendments were not put to the respondent's traffic engineering witness, Mr N.S. Read, in cross-examination by Transit's counsel.
>
> The applicants' traffic engineering witness, Mr Tuohey, proposed a different rule about design and location of vehicle accesses, and that is also a topic currently being considered within the Council administration, focusing on a draft Plan Change 7. In all those circumstances, we do not feel confident that the specific provisions sought by Transit would necessarily be the most appropriate means of addressing the concern raised by it. We are content to know that both Transit and the respondent are actively considering the issues which the amendments sought by Transit are intended to address."

We do not read those paragraphs, in the context of the Tribunal's decision as a whole, as a concluded finding upon Transit's reference to the Tribunal. We accept that these amendments, now settled upon, may be within the Tribunal's jurisdiction under S.293 or clause 15(2) of the First Schedule.

In Port Otago Limited v Dunedin City Council (Dunedin, A.P.112/93, 15 November 1993, Tipping J expressed the view that it would be a rare case in an appeal on a point of law where this Court could substitute its own conclusions on the factual matters underlying the point of law for that of the Tribunal. He considered, and we agree, that unless the correctly legal approach could lead to only one substitute result, the proper course is to remit the matter to the Tribunal as R.718A(2) of the High Court Rules empowers.

Accordingly, we allow Transit's appeal by consent and remit to the Tribunal for its further consideration and determination the possible exercise of its powers under S.293 or Clause 15(2) of the First Schedule in relation to the rules forming part of the settlement.

Since this judgment may have interest beyond the facts of this case and because we have mentioned R.718A of the High Court Rules, we make some comments about the scheme of the Act relating to appeals to this Court.

Section 300-307 of the RMA provide detailed procedure for the institution of appeals to this Court under S.299 and for the procedure up to the date of hearing. In our view, it is unfortunate that such detailed matters of procedure are fixed by statute. Our reasons are: (a) statutes are far more difficult to alter than Rules of Court should some procedural amendment be considered desirable; (b) most statutes are content to leave procedural aspects to the Rules once the statute has conferred the right of appeal; (c) the High Court Rules in Part X aim for a uniform procedure for all appeals to this Court other than appeals from the District Court. There is much to be said for having the same rules for similar kinds of appeals.

Although the RMA goes into considerable detail on procedure, it is silent on the powers of the Court upon hearing an appeal from the Tribunal. One might have

thought that the power of the Court on hearing an appeal might have been a better candidate for legislative precision than detailed provisions which are similar to but not identical to well-understood and commonly used rules of Court. We hope that, at the next revision of the Act, consideration be given to reducing the procedural detail in Ss.300-307 and that the same measure of confidence be reposed in the Rules of Court as can be found in other legislation granting appeal rights from various tribunals or administrative bodies.

**Result:**

The appeals of Countdown and Foodtown are dismissed. The appeal of Transit is allowed by consent in the manner indicated. Woolworths and the Council are both entitled to costs. We shall receive memoranda from counsel if agreement cannot be reached.

R D. Barker J.

Fraser J.

Solicitors: Gallaway Haggitt Sinclair, Dunedin, for Foodstuffs
Duncan Cotterill, Christchurch, for Countdown
Timpany Walton, Timaru, for Transit
Chapman Tripp Sheffield Young, Auckland, for Woolworths
Ross Dowling Marquet & Griffin, Dunedin, for Dunedin City Council

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

AP 198/96 (INV)

| | |
|---|---|
| UNDER THE | Resource Management Act 1991 |
| IN THE MATTER | of an Appeal pursuant to Section 299 Resource Management Act 1991 |
| BETWEEN | THE ROYAL FOREST AND BIRD PROTECTION SOCIETY INC. |
| | Appellant |
| A N D | SOUTHLAND DISTRICT COUNCIL |
| | Respondent |

**Hearing:** 12 June 1997

**Counsel:** P J Milne for Appellant
B J Slowly for Respondent
B I J Cowper for Rayonier NZ Limited

**Judgment:** 15 JUL 1997

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## JUDGMENT OF PANCKHURST J

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**Introduction:**

In a decision delivered on 1 July 1996 the then Planning Tribunal ("the Tribunal") held that a rule included in the Southland District Council's District Plan, by way of amendment to the proposed Plan, was ultra vires the Southland District Council ("the Council"). Such decision reflected an application of the principle recognised in ***Countdown Properties (Northlands)***

***Limited v Dunedin City Council*** (1994) NZRMA 145, and other cases, that an amendment to a Plan should not go beyond what was reasonably and fairly raised in submissions lodged in relation to that Plan This requirement flows from a value which underscores the Resource Management Act 1991 : that there should be public participation in the resource management process.

Unusually in the present case the Council itself made a concession before the Tribunal that it considered it had acted ultra vires. That view was shared by a number of parties who had lodged references to the Tribunal pursuant to clause 14 of the First Schedule to the Resource Management Act 1991 ("the Act"). However, the Royal Forest and Bird Protection Society Incorporated ("RF & B") contended that the amendment was validly made, in that it was fairly raised in a submission RF & B lodged in relation to the Plan.

In this Court three parties were represented. RF & B as the appellant again contended that the relevant amendment was properly made, while the Council supported the Tribunal's ultra vires ruling. Rayonier New Zealand Limited ("Rayonier") likewise supported the Tribunal's decision. Rayonier owns approximately 100,000 hectares of forest throughout New Zealand. An area approaching 30,000 hectares is in Southland and therefore directly affected by the provisions of this District Plan. Although Rayonier's forests are all exotic, a significant understorey of native vegetation develops within maturing forests. Accordingly Rayonier's concern in the present instance was with any provision controlling the clearance of native vegetation, as such provisions may impact upon the company's ability to harvest its crop.

**Background:**

The Southland proposed District Plan was publicly notified by the Council on 1 August 1994. *Clause 5 of the First Schedule to the Act prescribes* the steps to be followed to ensure all potentially interested parties have notice of the proposed plan and the opportunity to make submissions concerning its content. Those steps were followed.

The Plan was divided into sections, and then into subsections. Section 4 was entitled "**Resource Areas**", and section 4.6 "**Coastal Resource Area**". This section of the plan applied essentially to the coastal margin of the Southland District, which runs from Fiordland in the west, to the Catlands in the east. Within section 4.6 was a proposed Rule COA.4 as follows:

> *"Rule COA.4 Native flora and fauna*
> *Any activity that has the effect of destroying, modifying, removing or in any way adversely affecting any :*
> - *native vegetation, or*
> - *habitat of any native fauna*
>
> *shall require a Discretionary Resource Consent."*

The Rule then prescribed criteria to be applied by the Council in relation to applications for consent.

Section 3 of the Plan was entitled "**General Objectives Policies Methods and Rules**". This section was further divided into thirteen subsections of diverse content, ranging from "**Manawhenua Issues**" to "**Public Works and Network Utilities**" Section 3.4 was entitled "**Heritage**" and was devoted to three heritage types namely : natural, built, and cultural. Importantly

for present purposes section 3.4 is of district-wide application. By proposed Rule HER.5 it was provided.

> *"Any activity or work that would or is likely to have an effect on, or destroy, remove or damage any of those natural heritage sites or items in Schedule 6.13 and 6.12, shall require a Discretionary Resource Consent."*

The Rule then set out matters which the Council must consider in determining applications for Resource Consents. Schedule 6.13 described some "**123 Significant Geological Sites of Land Forms**", while Schedule 6.12 described various "**Significant Tree and Bush Stands**".

Both the proposed Rules COA.4 and HER.5 excited submissions and cross submissions from a range of interested parties. RF & B made submissions in relation to both Rules. In relation to the **Heritage** section generally it described the Plan as *"deficient and inadequate overall"*. Of Rule HER.5, RF & B argued:

> *"this rule is currently far too limited in its scope as it is dependent on the schedules, which only scratch the surface of significant areas."*

For present purposes it is not necessary to consider the submission in greater detail, other than to note the concern that there were in RF & B's view no controls on indigenous vegetation clearance, save for the quite circumscribed controls contained in proposed Rules HER.5 and COA.4. In argument counsel for RF & B summarised what RF & B sought in these terms:

> *"In essence the relief sought by RF & B was a new heritage rule or an amendment to existing Rule HER.5, to provide for clearance of all indigenous vegetation to be a discretionary activity and to require the Council in assessing application for*

*Resource Consents to identify and protect areas of significant indigenous vegetation and significant habitats of indigenous fauna."*

In relation to Rule COA.4 RF & B made a very short submission in which it noted its support for the Rule which it considered would *"allow the Council to implement the purpose and principles of the Act in the coastal area".*

By contrast Rayonier lodged a submission in which it sought the deletion of proposed Rule HER.5. Alternatively it contended the operation of the Rule should be restricted or other methods of control recognised. Following the submission lodged by RF & B, that the clearance of all indigenous vegetation should be a discretionary activity, Rayonier lodged a cross submission in opposition. It contended that RF & B's approach would effectively elevate all native vegetation to the status of significant vegetation and would unjustifiably catch understorey in forest plantations. Rayonier did not make submissions in relation to proposed Rule COA.4 since the coastal strip which comprised the Coastal Resource Area was outside the company's area of operation. I have focused upon the submissions of RF & B and Rayonier to the exclusion of those from other parties. Of course there were submissions on Rules HER.5 and COA.4 from a range of people. In my view a focus upon RF & B and Rayonier's positions is sufficient for present purposes. Their markedly different positions sufficiently expose the issues which arise in the present vires context.

Before the Planning Tribunal Mr D G Halligan, Resource Manager for the Southland District Council, gave evidence by way of a prepared statement which was not challenged by any of the parties then represented. As the Tribunal noted his evidence was largely a recital of relevant portions of : the District Plan as publicly notified, the submissions and cross submissions, the resultant decisions of the Council, and the District Plan as amended consequent upon those decisions.

Mr Halligan's evidence also included a description of a revised Rule COA.4 which was drafted by Council staff and tabled before the District Plan Committee. The revised version of the rule provided as had the first draft that any activity which had the effect of destroying, modifying, removing or adversely affecting native vegetation or the habitat of native fauna should be a discretionary activity. However qualifications were added, namely such activity on land subject to the South Island Landless Natives Act 1906 would be a controlled activity. Further, if an approved sustainable yield management plan existed, then activity which would otherwise have a discretionary status would become a controlled activity and activity which would otherwise have a controlled status would become a permitted activity.

Contrary to the expectation of the Council's planning staff the Committee in a decision concerning proposed Rule COA.4 and after review of submissions on that Rule, resolved to amend the Heritage section of the Plan by introducing a new Rule HER.3

The new Rule read:

> ***"Rule HER.3 - Indigenous Flora and Fauna***
> *(i) Any activity which has the effect of destroying, modifying, removing or in any way adversely affecting any:*
> *(a) significant indigenous vegetation or*
> *(b) significant habitats of indigenous fauna*
> *shall, except to the extent set out in this Rule, be considered to be a discretionary activity."*

Defined exceptions in paragraphs (ii) and (iii) provided for the taking of timber from an area to which the Forests Amendment Act 1993 did not apply, and for the carrying out of proper agricultural practices on agricultural land, to be controlled activities. Further certain activities in accordance with a sustainable forest management plan and certain silvicultural, horticultural, and agricultural practices were defined as permitted activities. At the same time the Committee resolved to amend Rule COA.4 by restricting its application to *"significant"* indigenous vegetation or fauna, and by incorporation of a reference back to the new Rule HER.3.

In the most general of terms therefore the final result was to introduce into the District Plan an area-wide provision whereby works which would adversely affect significant indigenous vegetation or fauna became a discretionary activity. The thrust of Rule COA.4 was largely unchanged, subject to some refinement. The decision of the Council to introduce area wide control of significant indigenous vegetation and fauna by a new Rule in the Heritage section, but to do so in reliance upon submissions relevant to the

Coastal Resource Area section, fuelled the ultra vires argument before the Planning Tribunal.

**RF and B's Contentions:**

In the present appeal pursuant to s299 of the Act, RF & B alleges that the Tribunal erred in law in three respects:

(a) in finding that Rule HER 3 was not reasonably and fairly raised in RF & B's submission on the proposed Plan,

(b) in taking into account irrelevant considerations, namely the reasoning by which the Council justified the inclusion of Rule HER 3 and the circumstance that the general Heritage submission of RF & B seeking greater control of activities affecting indigenous vegetation or fauna was in the Tribunal's view *"disallowed by the Council"*, and

(c) in failing to take into account its own finding that RF & B's Heritage submission was publicly notified in a way that would have made it perfectly clear it was seeking in the Heritage section of the Plan a new Rule to control the clearance, logging or other use of land that would adversely affect indigenous vegetation, by making such activities discretionary.

It was argued by counsel for RF & B that such errors of law, either singly or in combination, required this Court to intervene and set aside the ultra vires ruling. I regard the three points raised as so interrelated, that the convenient course is to consider them together.

**Was HER.3 Fairly Raised?:**

The First Schedule to the Act lays down a clear process by which there must be public notification of both the proposed Plan and of a summary of the submissions received thereon. Thereafter the parties have the opportunity to make further submissions and ordinarily the Council must hold a hearing in relation to the rival submissions. This staged process is designed to ensure that before a Plan is amended the opportunity of informed public participation in the establishment of the Plan has been extended.

All counsel accepted the test laid down in ***Countdown Properties (Northlands) Limited v Dunedin City Council*** as appropriate in the present context. In that case a full Court, after review of earlier High Court decisions including in particular ***Nelson Pine Forest Limited v Waimea County Council*** (1988) 13 NZTPA 69, concluded that in deciding whether a plan amendment was properly made:

> *"The local authority or tribunal must consider whether any amendment made to the plan change as notified goes beyond what is reasonably and fairly raised in submissions of the plan change. .... It will usually be a question of degree to be judged by the terms of the proposed change and the content of the submissions."*

The Court then made some general observations concerning the extent to which the Act encouraged public participation in the resource management process. In this context it noted that persons making submissions were unlikely to fill in the forms exactly as required by the First Schedule, but opined that the

process should not be one *"bound by formality"*. I agree with, and adopt, the approach embraced in the ***Countdown Properties*** judgment.

The process of public notification, submissions, and hearing before the Council is quite involved. Issues commonly emerge as a result of the participation of diverse interests and the thinking in relation to such issues frequently evolves in the light of competing arguments. Thereafter the Council must determine whether changes to the Plan are appropriate in response to the public's contribution. Against this background it is important that the assessment of whether any amendment was reasonably and fairly raised in the course of submissions, should be approached in a realistic workable fashion rather than from the perspective of legal nicety

In the present case submissions made in relation to s3.4, the **Heritage** section, clearly raised the theme of greater control upon activities likely to adversely affect indigenous vegetation. The Tribunal accepted as much at p 6 of its decision when it held:

> *"This part of RF & B's submissions was publicy notified in a way that would have made it perfectly clear that it was seeking, in this section of the Plan, a new rule to control the clearance, logging or other use of land that would directly and adversely affect indigenous vegetation, by making this a discretionary activity."*

Rayonier, for example, readily appreciated the significance of RF & B's submission and moved to counter it. Had the Council, in the context of a decision concerning the **Heritage** section, and in response to submissions

thereon, decided to introduce Rule HER.3, a vires argument could hardly even have been raised.

The problem is one borne of the particular approach the Council adopted. In its **Decisions on Submissions** issued on 1 August 1995 the Council in Decision 3.4.2.201 first summarised the extensive submissions made in relation to Rule HER.5. It then continued:

> *"**Decision:** There was a general misconception in the submissions received that this section related to the removal of indigenous vegetation on private property.*
>
> *If detailed consideration is given to Schedule 6.12 it can be seen that the items of significant tree and bush stands identified are either situated on public property (ie. reserves), or in the alternative where they exist on private property, are a schedule of those lands already protected under QEII covenants in one form or another.*
>
> *It was not the intention of Council under Rule HER.5 to impose restrictions as it relates to indigenous plantations on indigenous vegetation on private property. This matter is more strictly addressed under Method HER.8."*

The decision of the Council relevant to Rule COA.4 was Decision 4.6.2.191. Again the approach of summarising the thrust of the submissions from various parties was adopted.

There then followed a lengthy decision of more than four pages. The decision included:

> *"The Committee has carefully read and listened to all of the submissions that have been made in respect of this Rule. As a result of that consideration the Committee has decided that the Rule should have the following amendments and that it*

> *should apply to the whole of the District and as a consequence be included in the* ***Heritage*** *section:"*

There then followed a description of what was to become Rule HER.3 and a description of the exceptions to it. The Council then continued:

> *"With those general amendments the Council believes that the Rule can be sensibly applied throughout the whole District through its inclusion as Rule HER.3."*

A little later the full text of Rule HER.3, and of the consequential amendments to Rule COA.4, were set out. These provisions are sufficiently quoted, or summarised, earlier in this judgment.

Against that background the Tribunal concluded Rule HER.3 was ultra vires for three reasons First, it found that the Rule was *"clearly founded on, and only on, the submissions and cross submissions made on Rule COA.4".* Moreover the Tribunal considered that *"none of the submissions or cross submissions on that Rule sought the resultant Rule HER.3".* Second, the Tribunal found that *"although there are similarities between Rule HER.3 and (what) was sought by RF & B, there are important differences".* In this regard the Tribunal noticed the specific exceptions in respect of forest management plans and the link between Rule HER.3 and Method HER.9 whereby determinations about whether indigenous vegetation was *"significant"* were to be made. Accordingly Rule HER.3 was described as *"a different rule"* from what was sought by RF & B. Third, the Tribunal found that the **Heritage** submission made and relied upon by RF & B to support Rule HER.3 was

disallowed by the Council. Decision 3.4.2.201, read as a whole, led the Tribunal to this conclusion.

It then noted however that the introduction of Rule HER.3 seemed at first sight to conflict with a rejection of RF & B's submission. However, the Tribunal referred again to the *"material differences"* between what RF & B sought and Rule HER.3. Finally, it added in a passage which seems to me to capture a principal concern of the Tribunal members that:

> *"It is plain from the Council's reasoning that in introducing Rule HER.3 it did not think it was controlling all activities relating to indigenous vegetation throughout the district which would have been the effect of the rule sought by RF & B. Nevertheless of course, the Council did introduce a District Rule containing a measure of control in respect of indigenous vegetation and the habitats of indigenous fauna, based on submissions that did not seek this relief."*

Then followed the ultra vires ruling.

Mr Slowley, in submissions on behalf of the Council, argued that the above findings, in particular the conclusion that Rule HER.3 was founded only on submissions made on Rule COA.4, were findings of fact which this Court should not disturb. The observations of Chilwell J in ***Environmental Defence Society v Mangonui County Council*** (1987) 12 NZTPA 349 at 353 are apposite:

> *"An expert tribunal, such as the Planning Tribunal, ought to be given some latitude to reach findings of fact which fall within the area of its own expertise even in the absence of evidence to support such findings; and some latitude in reaching findings of fact made in reliance upon its own expertise in the evaluation of conflicting evidence; and some latitude in reaching conclusions based on its expertise, without relating them or being able to relate them to specific*

> *findings of fact; but care should be taken to ensure that expertise is not used as a substitute for evidence such that the burden of proof is unfairly shifted."*

I accept these observations have some application in the present context. The Tribunal undoubtedly possesses expertise in relation to the evaluation of the process for public participation prescribed in the First Schedule. It must see and consider many examples of that process in the course of its work. On the other hand, the present are not findings of fact in the conventional sense. The Tribunal did not hear contested evidence and therefore enjoy an opportunity not possessed by this Court. The subject findings are rather conclusions drawn in the main from the Council's **Decisions on Submissions** issued on 1 August 1995. I accept it is appropriate to afford those findings special recognition as emanating from an expert Tribunal, but I do not accept counsel's submissions that the findings are decisive of the present problem.

Mr Milne for RF & B squarely confronted each of the reasons advanced by the Tribunal for its ruling As to the point that Rule HER.3 was founded only on submissions made in relation to Rule COA.4, he argued that the Tribunal's focus upon the reasons given by the Council was wrong in law; as the sole issue was whether the new Rule went beyond what was reasonably and fairly raised in RF & B's **Heritage** submission. Put another way, the ultimate issue was whether the public had received a fair crack of the whip; had enjoyed the opportunity to be heard in answer to RF & B's **Heritage** submission before Rule HER.3 was included in the Plan. Likewise, counsel disputed the finding that there were important differences between Rule HER.3

and what RF & B sought in its **Heritage** submission. He accepted there were differences, but argued such were as to matters of emphasis. The new Rule was fairly to be seen as a watered down version of what RF & B sought in the first place, counsel contended. Moreover, he submitted the proper test was not whether Rule HER.3 was *"materially different"* from, but whether its substance was *"reasonably within"* the scope of, the submission made by RF & B.

As to the finding that the Council rejected RF & B's **Heritage** submission, counsel argued that rejection was far from clear upon a reading of the Council's decision as a whole. In particular, the decision did not expressly state whether it accepted or rejected the submission, although Clause 10 of the First Schedule required that to be done.

**Conclusion:**

With some hesitation I am driven to the conclusion that the appeal must be allowed. The fundamental issue must be whether Rule HER.3 was *"reasonably and fairly raised"* in submissions relevant to the Southland Plan. There can only be one answer to that inquiry, namely that the substance of the rule was properly raised. Not only does a reading of the RF & B submission demonstrate this to be so, but the Tribunal found as much in the passage quoted earlier from page 6 of its decision.

As to the three matters relied upon by the Tribunal in support of its ultra vires ruling I do not see them, either singly or in combination, as supportive of the essential ruling. Unquestionably the Council's process of

reasoning was curious, in that it made the decision to include Rule HER.3 in the **Heritage** section, in the context of its consideration of the **"Coastal Resource Area"** section. But such a curious process of reasoning does not detract from the fact that the content of Rule HER.3 was squarely raised in RF & B's **Heritage** submission. In real terms no-one could be heard to argue that during the public consultative process they were denied the opportunity to oppose a change sought by RF & B. Put another way, the subsequent faulty reasoning of the Council does not impinge upon the effective process of consultation which preceded it.

Further the Tribunal's view that there were important differences between Rule HER.3 and what RF & B sought in its **Heritage** submission, is not helpful. I accept counsel's argument that the new rule was nothing more than a watered down version of what RF & B sought. Moreover the required approach was to ask whether Rule HER 3 was within the scope of RF & B's *submission, rather than whether there were material differences.* Likewise, I am not at all confident that a sensible reading of the Council's decision leads to the conclusion that it rejected RF & B's **Heritage** submission. In the absence of an express acceptance or rejection of this submission I am of the view that the proper conclusion to be drawn is that the Council accepted the thrust of RF & B's **Heritage** *submission, by including Rule HER.3 in the* **Heritage** *section;* albeit that the process of reasoning adopted was curious. Lastly, I reject the concern averted to by the Tribunal that the Council did not appreciate in introducing Rule HER.3 that *"it was controlling all activities relating to*

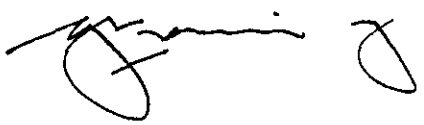
*indigenous vegetation throughout the District ...".* Such conclusion is not tenable when one has regard to the terms of Decision 4.6.2.191 where, albeit in the **"Coastal Resource Area"** section, the Council expressed its belief that an amendment could *"be sensibly applied throughout the whole District through its inclusion as Rule HER.3".*

To summarise, in my view the essential inquiry was whether the amendment effected through Rule HER.3 was reasonably and fairly raised in submissions Once it is decided that it was, the answer to a vires argument was plain. Instead the Tribunal focused upon the three reasons it advanced in support of its ultra vires conclusion. Aside from the fact that such reasons were dubious anyway, it was in my view wrong in law to elevate those issues above the test recognised in ***Countdown Properties***.

The formal determination of the Court is that the Tribunal erred in law in determining that Rule HER.3 was ultra vires the Council. Accordingly such ruling is set aside. Counsel for Rayonier submitted that should the appeal be allowed, the case should be remitted to the Environment Court for consideration on its merits. I agree In that regard it is appropriate to make two observations. First, the present vires decision may not preclude parties before the Environment Court from challenging the merits of Rule HER.3 by reference to the terms of the Council decision which produced it. Second, Rayonier in support of the Tribunal's vires ruling, argued that because the Council introduced rule HER.3 in the context of its decision in the **"Coastal Resource Area"** section, Rayonier could not challenge the merits of the new rule before

the Environment Court. This because it had not made submissions or sought to be heard in relation to the **"Coastal Resource Area"** of the Plan. I doubt that this can be so. The decision of this Court that Rule HER.3 is not ultra vires, because it was reasonably and fairly raised in RF & B's **Heritage** submission, must carry the consequence that Rayonier has standing to challenge the new Rule. It made a cross submission in direct response to RF & B's **Heritage** submission. Just as the curious process of reasoning whereby the Council introduced Rule HER.3 does not make the Rule ultra vires, nor can that same process of reasoning deny Rayonier standing which it would otherwise undoubtedly possess.

The question of costs is reserved. If RF & B seeks an award it should promptly file a memorandum. The Council and Rayonier, following filing and service of such memorandum, shall have fourteen days in which to respond.



Solicitors:
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Bell Gully, Auckland, for Rayonier NZ Limited

ORIGINAL

Decision No. C010/2005

**IN THE MATTER** of the Resource Management Act 1991

**AND**

**IN THE MATTER** of two references under clause 15 of the First Schedule to the Act

**BETWEEN** **INFINITY GROUP**

(RMA337/03)

**DENNIS NORMAN THORN**

(RMA352/03)

Appellants

**AND** **QUEENSTOWN-LAKES DISTRICT COUNCIL**

Respondent

**BEFORE THE ENVIRONMENT COURT**

Alternate Environment Judge D F G Sheppard (presiding)
Environment Commissioner P A Catchpole
Environment Commissioner M P Oliver

**HEARING** at Wanaka on 21, 22, 23, 24 and 25 June, and 20, 21, 22, 23 and 24 September, 2004.

**APPEARANCES:**

W P Goldsmith and J M Crawford for Infinity Group
P J Page and A Durling for D N Thorn
G M Todd and (from 20 September 2004) K Rusher for the Queenstown-Lakes District Council
J R Haworth for the Upper Clutha Environmental Society Incorporated.

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

**INTERIM DECISION**

**Table of Contents**

## Introduction

[1] Lake Wanaka and its setting are renowned for their outstanding natural beauty. The main issue in these proceedings was whether a proposed extension of Wanaka town on a peninsula to the north-east should be disallowed or restricted because of adverse effects on landscape and visual amenity values.

[2] The Queenstown-Lakes District Council, at the request of the developer, proposed a special zone for the 75-hectare site that would enable a mixed-density residential development with up to 240 residential units, and open space areas. After hearing submissions, the Council increased the number of residential units from 240 to 400.

[3] Two reference appeals were lodged with the Court. One, brought by the developer, sought amendments to the special plan provisions. The other, brought by an opponent, sought that the previous Rural General zoning of the site remain.

[4] The two references were heard together. The parties were the developer (Infinity Group), which generally supported the special zoning for residential development; the Council, which also generally supported the special zoning; the other referrer, Mr D N Thorn, who opposed the special zoning for development; and the Upper Clutha Environmental Society, which opposed provision for development at the lake end of the site.

[5] The references having been lodged in May 2003, prior to the commencement of the Resource Management Amendment Act 2003, there was no dispute that the proceedings have to be decided as if that amendment Act had not been enacted.[1]

## The site and its environment

[6] The site is roughly rectangular in shape, and has an area of 75.484 hectares. It is located on the Beacon Point Peninsula, immediately north of a residential area served by Rata Street and Hunter Crescent; and east of another residential area known as Penrith Park. To the north, the site abuts a recreation reserve, which in

[1] Resource Management Amendment Act 2003, s 112(2).

turn abuts Lake Wanaka. The adjoining land to the east is exotic forest, and to the south-east, pasture.

[7] The southern boundary of the site is about 2.3 kilometres from the Wanaka Town Centre. The western boundary of the site is about 700 to 800 metres from Lake Wanaka, and the northern boundary is about 120 metres from the lake edge.

[8] The site is generally rolling, with shallow gullies, rounded ridges and a predominantly westerly aspect. The northern boundary is near the top of a steep scarp which drops to the lake. The eastern boundary is about 130 to 300 metres from a ridge.

[9] The average level of the lake is about 279 metres above sea level. The highest point on the site is about 360 metres above sea level, and the lowest point about 305 metres above sea level.

[10] Most of the site has a slope pattern that ranges from 1 in 7 to flatter than 1 in 20, but there are areas near the eastern boundary, the south-western end and the north-eastern end that slope between 1 in 7 to 1 in 3. The escarpment down to the lake beyond the northern end of the site is generally steeper than 1 in 3.

[11] In pre-historic times, the site was overrun by glacial advances which left morainic deposits, more recently about 23,000[2] and 18,000[3] years ago. The younger (Hawea) moraine generally lies between the 300- and 360-metre contour lines on the site.

[12] The vegetation of the site is mainly exotic pasture grasses, and there are scattered stands kanuka and matagouri mainly at the northern end of the site and along parts of the eastern boundary. There are also pockets of kanuka in gullies and patches elsewhere on the site.

[13] The site is visible to varying degrees from parts of Lake Wanaka, and from parts of West Wanaka, including the Millennium Walkway along the western shore, and residential areas to the west and south of the site. More particularly, the northern part of the site is visible from the lake, and the elevated slopes near the

[2] The Mt Iron Advance.
[3] The Hawea Advance.

eastern boundary are visible from the west and south, as well as from parts of the lake.

[14] Some people cross the south-eastern corner of the site to gain access to walking and cycle tracks in the adjacent plantation, and others use cycles on tracks through the kanuka at the northern end. The owner has acquiesced in that, but the site is private property and there is no public right of access over it. There is a popular walking path through the lakeside reserve to the north of the site.

## Relevant planning instruments

[15] There are three planning instruments applicable to the site: the Otago Regional Policy Statement; the transitional district plan; and the partly operative Queenstown-Lakes District Plan.

### Otago Regional Policy Statement

[16] The Otago Regional Policy Statement became operative on 1 October 1998. Among other matters, there are objectives and policies of protecting natural features and landscapes from inappropriate subdivision, use and development;[4] ensuring public access opportunities to and along margins of lakes are maintained;[5] protecting areas of natural character, outstanding natural features and landscapes of lakes;[6] consolidation of urban development to make efficient use of infrastructure;[7] avoiding, remedying, or mitigating adverse effects of subdivision, land-use and development on landscape values;[8] and maintaining the natural character of areas with significant indigenous vegetation.[9]

### The transitional district plan

[17] The transitional district plan had been prepared under the former Town and Country Planning Act 1977, and is deemed to be the operative district plan under the

[4] Objective 5.4.3, Policy 5.5.6, and Objective 6.4.8.
[5] Objective 6.4.7 and Policy 6.5.10.
[6] Objectives 6.4.8 and 9.4.1(c).
[7] Policy 9.5.2(a).
[8] Policies 9.5.4 and 9.5.5(c).
[9] Policy 5.5.7(i); Objective 10.4.3 and Policy 10.5.2.

Resource Management Act 1991[10] until replaced by a district plan prepared under the 1991 Act.

[18] By the transitional plan, the northern part of the site (Mr J C Kyle estimated about one-quarter to one-fifth) is zoned Rural L (Landscape Protection), and the rest is zoned Rural B.

[19] There is a policy of ensuring that areas of high visual amenity are protected by zoning.[11] The zone statement for the Rural L Zone records that the shores of Lake Wanaka in the vicinity of Wanaka town are worthy of protection; and states an objective of providing for greater development of the town in depth, complemented by the Rural L zone restricting development around the lake margin.[12]

[20] The Rural B zone is a general rural zone applying to land suitable for pastoral use, although other uses compatible with scenic values and land stability are also permitted.[13]

**The Queenstown-Lakes District Plan**

[21] The proposed Queenstown-Lakes District Plan was prepared under the Resource Management Act, and was publicly notified on 10 October 1995. The site was in the Rural Downlands Zone, but by decision on submissions, it was included in the Rural General Zone, a zone which primarily encourages retention of land for farming carried out in such a way that protects and enhances nature conservation and landscape values.[14] The plan provides objectives, policies and methods applicable to managing the effects of subdivision and buildings that address landscape and visual amenity values.

[22] The proposed district plan was made partly operative from 11 October 2003, but many provisions of Sections 4 and 5 (District-wide Issues and Rural Areas), among others, are not yet operative.

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[10] S 373(1).
[11] Policy 3.5.02.
[12] Section 3.5.01.
[13] Sections 3.3.01 and 3.3.02.
[14] Section 5.3.1.1.

[23] The plan states a vision of community aspirations for a sustainable district. this contains a statement that undeveloped ridgelines and visually prominent landscape elements that contribute to the District's well-being (among other features) are protected from activities that damage them.[15]

[24] In Chapter 4 on district-wide issues, there are (among others) objectives of preserving the remaining natural character of lakes and their margins, protecting natural features.[16] There are (among others) policies of long-term protection of geological features;[17] of sites having indigenous plants of significant value;[18] and of avoiding adverse effects on the environment.[19]

[25] The district-wide provisions relating to landscape and visual amenity, provide for classification of rural landscapes into three classes: Outstanding Natural Landscape, Visual Amenity Landscape and Other Rural Landscape.[20] Specific policies and assessment matters apply to rural landscapes in each of those classes. However the Plan does not identify urban landscapes, nor does it provide specific policies and assessment criteria in respect of them.

[26] Even so, there are policies on future development that are not specific to particular classes of rural landscape. They include a policy of avoiding, remedying or mitigating adverse effects of development where the landscape and visual amenity values are vulnerable to degradation;[21] and of encouraging development in areas with greater potential to absorb change without detraction from landscape and visual values.[22] There is a policy of avoiding sprawling subdivision and development along roads in visual amenity landscapes.[23] There is also a policy of ensuring that the density of subdivision and development does not increase so the benefits of further planting and building are outweighed by adverse effects on landscape values of over-domestication of the landscape.[24] The environmental results anticipated from

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[15] Section 3.6, 2nd paragraph.
[16] Objective 4.1.4.1.
[17] Policy 4.1.4.1.1, 4.1.4.1.4, and 4.1.4.1.12.
[18] Policies 4.1.4.1.4 and 4.1.4.1.11.
[19] Policy 4.1.4.1.7.
[20] Section 4.2.4.
[21] Policy 4.2.5.1(a).
[22] Policy 4.2.5.1(b).
[23] Policy 4.2.5.6(d).
[24] Policy 4.2.5.8(a).

implementing the policies and methods relating to landscape and visual amenity include protection of the visual and landscape resources and values of lakes.[25]

[27] For an objective of efficient use of energy, there is a policy of promoting compact urban forms which reduce the length of and need for vehicle trips.[26]

[28] In a part of the plan about urban growth, the Council identified an issue of protecting landscape values and visual amenity.[27] In that context there is an objective of growth and development consistent with the maintenance of the quality of the natural environment and landscape values.[28] There is a related policy of protecting the visual amenity, and avoiding detracting from the values of lake margins.[29] Associated with another residential growth objective are policies of enabling urban consolidation where appropriate and encouraging new urban development in higher density living environments.[30] The environmental results anticipated from implementing the policies and methods relating to urban growth include avoidance of development in locations where it will adversely affect the landscape values of the district.

[29] Similarly, in a part of the plan about residential areas (district-wide), there is a policy of enabling residential growth having primary regard to protection of the landscape amenity.[31] In respect of Wanaka in particular, there is an objective that residential development is sympathetic to the surrounding visual amenities of the rural areas and lakeshores.[32]

[30] A resource management consultant, Ms N M Van Hoppe, gave the opinion that the Rural General zone is an inappropriate zoning for the site, on the grounds that it is not efficient or commercially viable to farm it due to its small area, being adjoined on two boundaries by residential activities, and only being accessible through residential areas. The witness also considered the Rural General zoning of the site inappropriate because it does not allow for the residential development that the site is capable of absorbing.

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[25] Para 4.2.6(vi).
[26] Para 4.5.3.1.1.
[27] Para 4.9.2.
[28] Section 4.9.3, Objective 1.
[29] Ibid, Policy 1.1.
[30] Ibid, Policies 3.1 and 3.2 for Objective 3.
[31] Section 7.1.2, Policy 1.4.
[32] Section 7.3.3.

[31] The zoning of a piece of land in a proposed plan can be changed by the Court on an appropriate appeal. To that extent evidence about the appropriateness of the existing zoning of the land might be relevant on appeals arising from such a variation. However, the issue on appeals arising from a variation is focused on the appropriateness of the zoning and other provisions proposed by the variation. If those provisions are not upheld, and the variation is cancelled, the existing zoning remains.

## Variation 15

[32] The Council proposed the special zoning for Infinity Group's site by publishing a variation (identified as Variation 15) to its proposed district plan. We will summarise the contents of the variation, and the sequence of events in respect of it. We will then address the question whether the variation has merged with the proposed district plan, and describe further amendments to the special zone agreed on by Infinity Group and the Council, and presented by them to the Court.

### Contents

[33] Variation 15 creates a special Peninsula Bay Zone and proposes that the site be rezoned accordingly. The zone includes a layout and design plan for development of the site, which identifies separate activity areas (or subzones) in the site.

[34] The Variation also provides statements of issues, objectives and policies, and implementation methods for the Peninsula Bay Zone. The implementation methods including rules containing site and zone standards governing (among other things) the development of sites, including lot sizes, the extent of earthworks, the heights, locations, density and appearance of buildings, and the heights and appearance of plantings. The rules also govern the classes of activities in the zones.

[35] In terms of Variation 15 as notified, the zone would limit development to a total of 240 residential units. There were to be four activity areas:

- Area 1 would be a low-density residential area (minimum lot size 1000 square metres) in the centre of the site, covering about half the area of the zone, in which complying buildings would be permitted activities:

- Area 2, about 20 % of the area of the zone, was to be a rural-residential area along the northern and eastern edges of the zone, in which buildings would be discretionary activities.

- Area 3 was to be a higher-density residential area in the middle of the site, about 5% of the zone area, in which complying buildings would be permitted activities:

- Area 4 was to be for open space and recreation, applying to about 20% of the site area around the residential areas, in which buildings would be non-complying activities.

**The sequence of events**

[36] The Council publicly notified Variation 15 on 13 October 2001, the time for lodging submissions closing on 23 November 2001, by when 19 submissions in opposition had been lodged.

[37] On 15 March 2002, before it had notified a summary of submissions for further submissions to be lodged, the Council purported to put the variation on hold. The purpose was to await a community consultation process under the style Wanaka 2020, for which a workshop was to be held in May.

[38] On 19 July 2002, a Council committee discussed the views expressed at the workshop, and decided to proceed with Variation 15. The Council then asked the developer, Infinity Group, for amended layout and zone provisions to allow for 400 dwellings.

[39] On the next day the Council published its summary of the submissions on the variation. The time for lodging further submissions closed on 26 August, by when 35 further submissions from 5 people had been lodged (including 12 by Mr Thorn).

[40] On 29 October 2002 Infinity Group provided the Council with an amended plan increasing the maximum number of dwellings in the zone from 240 to 400, increasing the extent of Area 3 (higher-density residential), and reducing the minimum lot size from 1000 square metres to 700 square metres (Area 1).

[41] In February 2003 the Council heard the submitters following which, on 17 April 2003, it reached its decision on the submissions, altering the special zone provisions in these respects in particular:

(a) Creating new Areas 5a and 5b at the northern end of the site, and making provision for protection of native vegetation in Area 5b;

(b) Increasing to 400 the maximum number of residential units in the zone;

(c) Reducing the minimum lot size in Area 1 to 700 square metres;

(d) Identifying 24 additional sites in Area 1; and

(e) Providing for multi-unit development in Area 3.

[42] On 2 May 2003 the Council gave notice of its decisions on the submissions; and on 26 May Infinity Group and Mr Thorn lodged with the Environment Court reference appeals arising from the variation.

[43] By their appeal, Infinity Group sought deletion of Rule 12.19.3.5 prohibiting removal of native vegetation, disturbance of earth, structures and residential and visitor accommodation activities in Area 5b; and consequential amendments to other rules and to the layout and design plan.

[44] By his appeal, Mr Thorn sought that the site be zoned Rural General. In effect he sought that Variation 15 be cancelled.

[45] The Council contended that the Variation should be confirmed, albeit with some amendments to the provisions for the Peninsula Bay Zone:

(a) Prohibiting removal of kanuka outside nominated residential building platforms in Areas 2 and 5b;

(b) Specifying maximum building heights by reference to datum levels for residential building platforms in Areas 2 and 5b;

(c) Deleting the exemption for earthworks within residential building platforms in Areas 2 and 5b, so that assessment criteria encouraged carrying them out in the period between 1 May and 31 October.

[46] The Upper Clutha Environmental Society contended that the zoning should be amended to prohibit development of the part of the site at the northern end, effectively Area 5.

**The effect of the merger of Variation 15**

[47] A question arose about the significance of Variation 15 having, by clause 16B of the First Schedule to the Act, merged in the proposed district plan, both being at the same procedural stage.

[48] Mr Todd, for the Council, submitted that the Court should start with the existing Rural General zoning, consider the zoning proposed by the variation, and that it is open for it to come to a determination allowing for something within that spectrum.

[49] Counsel for Infinity Group, Mr Goldsmith, addressed this question in his closing submissions. He observed that in considering a resource-consent application in respect of the site, the consent authority would have regard to the district plan as amended by Variation 15; and the former Rural General Zone would not form part of the evaluation of the application.[33] Otherwise it would be faced with the complex and unwieldly task of assessing an application by reference to three (or possibly more) planning instruments.

[50] Counsel then addressed the question whether that approach should apply to consideration of a variation. He remarked that there is an inherent conflict between the two subclauses of clause 16B, and that this case is further complicated by the proposed plan being partly operative. Mr Goldsmith also submitted that there is no presumption in favour of any particular zoning of the site, the proceedings being more in the nature of an inquiry,[34] from which the Court has to determine the most appropriate zoning for the land.

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[33] *Awly Developments v Christchurch City Council* Environment Court Decision C103/2002, para 53; *Peat v Waitakere City Council* Environment Court Decision A82/04, para 66.

[34] *Hibbit v Auckland City Council* [1996] NZRMA 529, 533.

[51] Clause 16B(1) prescribes that a variation shall be merged in and become part of the proposed instrument as soon as the variation and the proposed instrument are both at the same procedural stage.

[52] Variation 15 reached the stage of being subject to determination of reference appeals to the Environment Court on 26 May 2003, when these appeals were lodged. The proposed district plan was also at that stage then. It did not become partly operative until 11 October 2003. So we find that by Clause 16B(1), the variation merged in and became part of the proposed district plan on 26 May 2003.

[53] That does not mean that the Rural General zoning of the site provided by the proposed plan as amended by decisions on submissions is irrelevant. At the least, if the variation is cancelled, so the special Peninsula Bay Zone no longer applies to the site, the application to it of the Rural General zoning would be revived.

[54] Even so, we accept Mr Goldsmith's submissions that there is no presumption in favour of any particular zoning of the site, the Court being required to determine the most appropriate zoning for the land (with the limit, submitted by Mr Todd, that it falls within the range between the status quo and that proposed by the variation).

[55] We doubt whether clause 16B(2) affects that. We infer that subclause (2) is intended to apply to resource-consent applications and enforcement action, not to reference appeals.

**Amendments to Variation 15**

[56] The Council amended Variation 15 by its decisions on submissions. By its appeal Infinity Group sought further amendments. By the time of the appeal hearing, Infinity Group and the Council had reached agreement on numerous further amendments to the provisions of the special Peninsula Bay Zone. Without detailing them all, the more important are these:

[57] Altering the layout plan so that 6 lots in Area 5 are returned to Area 1, and identifying 11 sites with building platforms in Area 5a, instead of 6 larger sites with no identified platforms:

(a) Inserting objectives, policies, implementation methods, explanation and reasons specific to Area 5:

(b) Making buildings in Area 5a controlled activities on identified building platforms, otherwise discretionary activities:

(c) Reclassifying removal of native vegetation, earthworks, structures, residential and visitor accommodation activities in Area 5b from prohibited to non-complying;

(d) Amending the control on buildings in Area 5a that break a ridgeline as viewed from any public place so that it applies only to views from up to 700 metres from the shoreline;

(e) Reducing building height limits for Area 5a from 5 metres to 4.5 metres, and providing for a limit of 11 units in that area.

[58] Subsequent to the agreement between Infinity Group and the Council on those amendments, Infinity Group proposed further amendments to the special Peninsula Bay Zone provisions, both prior to, and during the appeal hearing. Infinity Group proposed the further amendments on the basis that the hearing was an iterative process intended to achieve the best zoning outcome for the land, including the most appropriate zone provisions.

[59] We accept that the Variation contains elaborate zoning provisions for comprehensive development of a considerable area of land in ways that are intended to avoid, remedy and mitigate adverse effects on the environment. But the successive amendments, however well intentioned, certainly presented the opposing parties and the Court with a proposal that continued to be altered up to the end of the appeal hearing. So we doubt that the proposal presented by Infinity Group to the Council in 2001 had been prepared with sufficient care having regard to the importance of the site and the scale of the development.

**Authority for increased density**

[60] In the variation as notified in 2001, the special Peninsula Bay Zone provided for a maximum of 240 residential units, and a minimum site area of 1000 square metres. By its decision on the submissions, the Council increased the maximum number to 400, reduced the minimum size to 700 square metres, and made consequential changes to the layout plan. Mr Thorn challenged the Council's

authority to make those amendments in that way, contending that no submission on the variation had sought them.

**Arguments and evidence**

[61] Mr Thorn's planning witness, Mr W D Whitney, gave the opinion that people who had not lodged submissions on the variation might have done so, if it had provided for 400 residential units, with the consequential increase in traffic effects. He observed that anyone wishing to debate the merits or otherwise of the amendments had been deprived of the opportunity to do so, as the amendments had not been provided for in a submission notified for further submissions.

[62] In cross-examination, Mr Whitney accepted that in hearing the submissions, the Council had had before it a traffic engineer's report which, at the Council's request, had considered the effects arising from a 400-unit development. The witness also accepted that a person who had read the original notification of the variation but had not checked the notification of submissions could find that the outcome is different from what was originally notified, but he observed that people do have opportunity to respond to what is in submissions.

[63] The Council relied on a primary submission on the variation by Ian and Sally Gazzard, in which they had stated that they had no objections to high density housing in suitable areas as they believed there is also a need for small sites. That submission had been notified in summary form for further submissions.

[64] Its planning witness, Ms N M van Hoppe, stated that the Council had obtained specialist reports during its decision-making process which had concluded that increased traffic volumes due to increase in density and volume within the zone would result in no more than minor effects that could be absorbed by current and proposed services.

[65] Infinity Group submitted that the assessment of whether the increase in residential density was reasonable and fairly raised by submissions should be approached in a realistic workable fashion, rather than from the perspective of legal nicety.[35] Mr Goldsmith also relied on *Haslam v Selwyn District Council*.[36]

[35] *Royal Forest & Bird Society v Southland District Council* [1997] NZRMA 408 pg 10.
[36] Environment Court Decision C71/93, p 10.

[66] Infinity Group relied on the Gazzards' primary submission, and on a further submission by the Wanaka Residents' Association supporting the Gazzards' statement about high-density housing and need for smaller sites. Infinity Group also relied on the report of the Wanaka 2020 workshop that community discussion had indicated that the Peninsula Bay development could be beneficial with greater density.

[67] Mr Page (counsel for Mr Thorn) contended that the Gazzards' submission had not raised an increase in density, as it did not state any relief sought by them; and that it can only be understood as support for the high density residential area (Area 3) of the zone as notified. On the Wanaka Residents' Association's further submission, counsel argued that a further submission cannot extend the scope of a primary submission.

[68] Mr Whitney gave the opinion that what the Gazzards had sought by their submission was that adequate infrastructure be planned and installed before further development takes place. They had not sought a decision increasing the number of residential units or reducing the lot sizes. The witness also gave the opinion that the Wanaka Residents' Association, by its further submission, had supported the Gazzards' submission on high density housing "provided adequate surrounding infrastructure can be provided".

[69] Mr Whitney observed that the Wanaka 2020 workshop report was an informal document that did not have status as a management plan or strategy document prepared under another Act to which regard is to be had in terms of Section 74(2)(b)(i) of the Act. The report summarised general conclusions from workshop discussions, and responses to those conclusions developed by facilitators and the technical support team. Mr Whitney gave his reasons for suggesting that an increase in density in response to that report might be promoted closer to Wanaka town centre than increased density at Peninsula Bay.

[70] Mr Whitney did not agree with Ms Van Hoppe's opinion that the Wanaka 2020 workshop should be considered as part of the consultation for the variation, because once a variation is notified, consideration is limited to its contents and to the submissions and further submissions lodged in response to it.

## Consideration

[71] In considering this question we state our understanding of the law; state our findings about the contents of the relevant submissions; address the significance for this purpose of the Wanaka 2020 workshop report; reach our conclusion; and then consider the consequences of it for the case.

### *The law*

[72] It has been part of New Zealand planning law for decades that despite arguments about the realities of the situation, and appeals to common sense, a planning authority cannot alter a variation except to the extent that the alteration is sought by a submission lodged in accordance with the prescribed procedure.[37] The application of this principle to the Resource Management Act regime was confirmed by the High Court in *Countdown Properties v Dunedin City Council* [38] and in *Royal Forest & Bird v Southland District Council*[39] cited by Mr Goldsmith. A planning authority cannot alter a variation beyond what is reasonably and fairly raised in a submission. For example, a submission seeking co-ordinated development does not provide a basis for deleting a zone.[40] However the process of deciding whether an alteration is beyond that limit is not to be bound by formality, but approached in a realistic workable fashion, rather than from a viewpoint of legal nicety.[41]

[73] A further submission is confined to either supporting or opposing a submission.[42] It cannot introduce additional matters.[43]

[74] The decision in *Haslam* is not quite in point. It related to amendments to a proposal the subject of a resource consent application, not to a planning authority's decision on submissions.

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[37] See *Wellington City v Cowie* [1971] NZLR 1089 (CA); *Whitford Residents' Association v Manukau City Corporation* [1974] 2 NZLR 340 (SC); *Nelson Pine Forest v Waimea County Council* (1988) 13 NZTPA69 (HC).
[38] [1994] NZRMA 245 (HC).
[39] [1997] NZRMA 408 (HC).
[40] *Weatherwell-Johnson v Tasman District Council* Environment Court Decision W181/96.
[41] *Royal Forest & Bird Society*, supra.
[42] First Schedule, clause 8.
[43] *Hilder v Otago Regional Council* Environment Court Decision C122/97.

***The contents of the relevant submissions***

[75] The Gazzard's submission on the variation was produced in evidence.[44] It is a completion of a standard form issued by the Council. In the part where submitters are to state the specific provisions of the variation that the submission relates to, the Gazzards had entered : "A suitable infrastructure to supply adequate services, i.e. roads, water, electricity and sewage." In the section for stating the decision sought from the Council, the Gazzards had entered: "That adequate infrastructure is planned and installed before further development takes place. Roads widened, or do you restrict parking to only one side of roads?[45]

[76] In the section for stating the nature of the submission, the Gazzards set out their concerns about infrastructure being provided. They also set out their submission about the design of the development, referring to colours, materials, and tree plantings. That is the context in which this passage appears:

> We would like to see more open spaces between older existing established areas and understand 'Infinity' are addressing that issue with those concerned.
> We have no objections to High Density housing in suitable areas as we believe there is also a need for small sites.
> The narrowness of existing entry roads to the proposed area virtually precludes two way traffic when cars are parked on both sides of the road.

[77] The Council and Infinity Group did not rely on any other submission. We have examined the other submissions produced in evidence, and have found nothing in them that would support their argument that the Council was entitled to make the changes in question to the variation as notified.

[78] The further submission by the Wanaka Residents Association states support for the Gazzards'submission in this way:

> We support the part of the submission 15/8/1 – "Have no objection to high density housing in suitable areas, as believe there is a need for smaller sites."

[79] The Association's further submission gave this statement of its reasons:

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[44] Exhibit 2.
[45] Underlining in the original.

> The Wanaka 2020 Workshop identified this area as one suitable for some increased density. We support this provided adequate surrounding infrastructure can be provided.

***The significance of Wanaka 2020***

[80] We now consider whether the Wanaka 2020 Workshop referred to by the Wanaka Residents Association in its further submission is significant in deciding whether the Council was entitled to make the changes in question to the variation as notified.

[81] Mr Thorn contended that Wanaka 2020 was a non-RMA process, was not required to be consistent with Part II of the Act, or with the provisions of the partly operative district plan, and does not provide a lawful basis for the alterations to the variation in question.

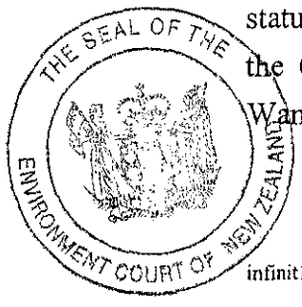
[82] Mr Whitney did not criticise the Wanaka 2020 programme, but gave the opinion that the report of the workshop is an informal document, and observed that it is described as:

> ... a summary of general conclusions from workshop discussions, and responses to those conclusions developed by the facilitators and the technical support team.
> It is a first step only ...

[83] Mr Whitney considered that the report does not have status as a management plan or strategy document prepared under another Act to which regard is to be had in terms of section 74(2)(b)(i) of the Act.

[84] The Council acknowledged that the findings of the Wanaka 2020 report have no statutory basis, but contended that they confirmed the position the Council took in its decision. Ms Van Hoppe stated that in the Wanaka 2020 workshop the community had indicated that the proposed zone could absorb greater density.

[85] Infinity Group maintained that the Council's decision is supported by the findings of the community planning exercise recorded in the Wanaka 2020 report. A planning consultant, Mr Kyle, stated that although the Wanaka 2020 plan has no statutory basis in terms of the Local Government Act, it is intended to form part of the Council overall community plan required by it, and is reflective of how the Wanaka community wishes to deal with urban growth issues.



[86] Whatever value the Wanaka 2020 programme may have, it is not a substitute for the well-established process under the Resource Management Act by which the public are entitled to notice of proposals to alter planning instruments, and have legal rights to take part in formal hearings about them. There is no evidence that the public were given notice that the Wanaka 2020 workshop might lead to increasing the density under the Peninsula Bay Zone the subject of Variation 15 from 250 to 400 residential units. The evidence indicates that expressions of views on that topic were the subject of development by facilitators and a technical support team, but we are unable to form an opinion on whether that was an objective process. Further, people interested in the content of Variation 15 were entitled to confine their attention to steps in the procedure prescribed by the Resource Management Act, and should not be prejudiced by not having taken part in the Wanaka 2020 exercise, however valuable that might have been for other purposes.

[87] In short, we find that conclusions of the Wanaka 2020 workshop, or any report of it, cannot be relied on to justify the Council's decisions to make the alterations in question to Variation 15.

***Decision***

[88] We now consider whether the alterations to the number of units and minimum site area made by the Council were reasonably and fairly raised by the Gazzards' submission, approaching the Council's task in a realistic, workable way, rather than being bound by formality or legal nicety.

[89] Reading their submission as a whole, we do not accept that it indicated any wish by the Gazzards for any increase in the number of residential units provided for by the variation. Variation 15 as notified contained provision for a higher-density residential area (Area 3). The Gazzards' submission on the variation was about adequate and timely provision of infrastructure in a development that included that provision for a higher-density residential area. There is nothing in the submission capable of being understood as a wish for more extensive higher-density development.

[90] Rather, the Gazzards' statement that they had no objection to high-density housing, can only be understood in its context as stating no more than this: they had no objection to high-density housing on suitable areas, as they believed there was a need for smaller sites, but they wanted the infrastructure services provided first.

[91] This is not to form an opinion bound by formality, or legal nicety. We place no great weight on the absence of anything about density in the section of the submission form for stating the decision sought from the Council. We have considered the document as a whole. We find that its contents do not support a finding that the Gazzards wanted more high-density development, nor that they wanted an increase in the number of residential units.

[92] We have also read the Gazzards' submission as a whole to consider whether it indicated any wish by them for a reduction in the minimum lot size provided for by the variation. The only reference to lot size is in the same sentence in which they stated that they had no objection to high-density housing. In that sentence the Gazzards were stating that they had no objection to high-density housing as they believed there is a need for smaller sites. In context, they were not asserting that site sizes should be smaller than the variation provided for. Rather, they were expressing their support for its provision for smaller sites (ie 1000 square metres), but urging that adequate infrastructure should be installed before development takes place.

[93] Again, we do not place reliance on points of form or of legal nicety. It is a matter of reading the sentence in its context. We find that reading it in that way does not support a finding that the Gazzards were wanting the variation to provide for site sizes that would be smaller than those provided for. To the contrary, they had no objection to what the variation provided in that respect, and they wanted the Council to provide that the infrastructure for the development must be provided first.

[94] The Residents Association's submission supported the Gazzards' submission in that respect. Even if the Residents Association had wanted even higher density, or even smaller sites, the Association would not have been able to give effect to that merely by lodging a further submission supporting the Gazzards' primary submission, because a further submission cannot go further than the primary submission to which it relates. In the absence of a primary submission seeking more residential units or smaller sites than the notified variation provided for, the Council could only have given effect to such a wish by promoting a further variation.

[95] To conclude, we uphold Mr Thorn's challenge in this respect, and find that the Council did not, in the circumstances, have power to amend Variation 15 as it purported to do:

(a) by increasing from 240 to 400 the maximum number of residential units; nor

(b) by reducing the minimum lot size from 1000 square metres to 700 square metres.

Consequently the variation has to be treated as if it had not been amended in those respects; and as if the amendments made to the layout and design to give effect to those amendments had not been made.

***The consequences of the finding***

[96] Infinity Group contended that if the Court were to come to that conclusion, it should issue an interim decision allowing them opportunity to propose an amended layout and design plan providing for a maximum of 240 residential units; and observed that Infinity Group would be free to pursue an additional 160 units by further application. The alternative would be to revert to the layout and design plan the subject of the notification of the variation.

[97] As the latter no longer represents what any party wants, it would be preferable (depending on the outcome of other issues in these proceedings) to accede to Infinity's proposal. If Infinity Group should later apply for consent to increase the maximum number of residential units, natural justice would require that the application should be notified.

**The draft stakeholders' deed**

[98] Infinity Group maintained that a significant positive environmental outcome that would result from confirmation of Variation 15 is the Area 4 park and central facility that would be provided for the general public. The developer would have an obligation under a stakeholders deed to be entered into between Infinity Group and the Council to construct them, to maintain them for 5 years, leaving the Council with a choice that they vest in the Council as a recreation reserve, or continue as a privately-owned facility accessible by the public at large.

[99] *Counsel accepted that the proposed stakeholders' deed would represent a* private contract, the parties to which would be free to vary or cancel it at any time; and that no-one else would be entitled to enforce compliance with it.

[100] The Council accepted that even if the Council were to enter into such a deed, it could have little significance for the Court's decision in these proceedings; that if the park and facility were vested in the Council, their value could be taken into account in assessing the amount of any financial contribution levied on the developer; but that the Council could not bind or fetter its judgment in that regard in advance.

[101] The Court invited further submissions from Infinity Group on the significance of the proposed deed. Infinity Group stated that it was content to leave the central facility (and the possibility of it containing a swimming pool) to be settled with the Council in future, and did not rely on its provision as a positive outcome that would necessarily result from confirmation of the variation. In respect of the proposed park and proposed re-vegetation of it by the developer, Infinity Group offered amendments to zone provisions to ensure that the park and re-vegetation would be implemented.

[102] Infinity Group submitted that the proposed stakeholders' deed would have lesser significance to the proceedings and may have none. It did rely on the intention that the Council, which has responsibility under the Act, would be a party to the deed, and that the public could reasonably expect that it would enforce agreements that it has entered into, while acknowledging that the public would not be able to resort to enforcement proceedings if the Council failed to do so. Counsel also contended that there would be a positive advantage in that a future owner of land in the zone would not be able change the outcomes provided by the deed through a consent or variation process.

[103] In our judgement the Court should not place weight on the proposed stakeholders' deed in deciding these appeals for these reasons:

(a) Infinity Group and the Council have not entered into such a deed; and although Infinity Group may genuinely intend to do so if the Council is willing, there is no basis for assurance that the deed will be entered into.

(b) Even if such a deed was entered into, the processes under the Act for variation and enforcement of plan provisions would not apply in respect of it. As a private contract, the parties could agree –for purposes that might have nothing to do with the purpose of the Act– to vary or cancel it; and the public would in practice have no recourse in law.

[104] Where a private promoter of a variation or plan change wishes that intended public facilities be taken into account as positive environmental outcomes, the better practice is for the obligation to provide them be imposed by rules or other implementation methods in the plan.

**Compliance with Section 32**

[105] Mr Thorn contended that the Council had failed to comply with its duties under section 32 of the Act in respect of the objectives, policies, rules and other methods in Variation 15 in these respects:

(a) The Council had not itself independently performed those duties, but had simply adopted documentation in that respect that had been prepared by or on behalf of Infinity Group. Counsel argued that the obligation fell on the Council, and that it could not pass the responsibility to a developer and merely adopt its documentation.

(b) The variation does not achieve Part II of the Act as expressed in district-wide objectives and policies of the plan that are no longer in contention by reference appeal, and is not consistent with those objectives and policies–

i. In that they discourage development in landscapes that are vulnerable to change and contribute significantly to amenity values; and

ii. In not making a comparison with likely benefits and costs of development on alternative sites.

[106] The Council contended that it had fulfilled its duties under section 32 in respect of the variation in that, although the preparatory work had been done for Infinity Group, the Council had ensured that the work had been done properly in accordance with the requirements of the Act.

[107] Infinity Group observed that although a submission on the variation had arguably raised compliance with section 32, this issue had not been raised by Mr Thorn in his reference, and contended that the issue is not before the Court. Infinity Group also contended that on the evidence the variation did comply with section 32, in that:

(a) Variation 15 is the most appropriate means of exercising the Council's functions;

(b) Variation 15 would not be contrary to the district-wide objectives and policies of the district plan on landscape values, particularly as the issue is whether the site is appropriate for further development in relation to all the objectives and policies:

(c) There is no obligation under the section to make a comparison with development of alternative sites.

[108] As the Court has to decide these appeals as if the 2003 Amendment Act had not been enacted, we refer to the version of that section as originally enacted, and incorporating the amendments to it made by section 2(1) of the Resource Management Amendment Act (No 2) 1994. Subsection (1) directed that before adopting an objective, policy, rule or other method in relation to a function described in subsection (2), the person concerned was to have regard to certain matters described in paragraph (a), carry out an evaluation described in paragraph (b), and be satisfied of matters described in paragraph (c). Subsection (2) provided that those duties applied (among others) to a local authority in relation to the public notification under clause 5 of Schedule 1, of a variation, and in relation to a decision made by a local authority under clause 10 of Schedule 1, on any variation.

[109] Subsection (3)[46] provided:

> A challenge to any objective, policy, rule or other method, on the ground that subsection (1) of this section has not been complied with, may be made only in a submission made under–
>
> ...
>
> (b) Schedule 1.

[110] However the Environment Court can take into account any inadequacy of a section 32 analysis to determine the appropriateness of any part of the plan on its merits; but does not have jurisdiction to declare the instrument invalid on that account.[47]

[46] As substituted by the 1994 amendment.

[47] *Kirkland v Dunedin City Council* (2001) 7 ELRNZ 44 (HC); upheld on appeal [2001] NZRMA 529; 7 ELRNZ 227 (CA).

[111] Consideration of a challenge to the adequacy of compliance with the section is restricted to cases in which that issue was raised in the submission giving rise to the reference.[48] However that does not preclude the Court from taking into account matters referred to in section 32 in deciding the appropriateness of contents of a variation on their merits.

[112] Because he was absent from the district at the time, Mr Thorn did not lodge a primary submission on Variation 15. He did lodge further submissions in support of primary submissions that had been lodged by Jadwich Fryckowska, R and P McGeorge, D J Cassells & others, G and H Crombie, Heather Hughes, Martin White, Lindsay Williams, and N Brown; and in opposition to a primary submission by Infinity Group. None of the primary submissions in respect of which Mr Thorn lodged further submissions in support contained a challenge based on failure to comply with section 32, nor did Mr Thorn's further submissions in support of them.

[113] The primary submission by Infinity Group, in respect of which Mr Thorn lodged a further submission in opposition, did contain this assertion:

> The section 32 Report was adequate and appropriately addresses the proposal. In particular it identified relevant issues, assessed objectives and policies, assessed rules and methods, and outlined consultation. The Variation will not detract from the landscape values of the District.

[114] Although that primary submission expressly asserted that the section 32 report had been adequate and appropriately addressed the proposal, Mr Thorn's further submission in opposition to that primary submission did not raise a challenge on the basis that section 32 had not been complied with.

[115] Mr Thorn's reference to this Court of Variation 15 did not contain an allegation to the effect that the Council had failed to comply with the duties imposed on it by section 32 in respect of the variation.

[116] So we find that,–

(a) having not lodged a primary submission challenging the variation on the ground that section 32(1) had not been complied with,

[48] Ibid, paras 15 and 20 of the Judgment of the HC; and para 17 of the Judgment of the CA.

(b) having not lodged a further submission supporting someone else's primary submission containing such a challenge,

(c) having not lodged a further submission opposing Infinity Group's assertions in that respect, and

(d) having not alleged non-compliance with the section in his reference,[49]

– Mr Thorn was not entitled to contend, in these proceedings, that the Council had failed to comply with those duties. Therefore we reject Mr Thorn's contention to that effect.

[117] To the extent that Mr Thorn's contentions and evidence relate to the appropriateness of contents of the variation in respects that may be influential to the outcome of his appeal, we consider them on the merits in other sections of this decision.

**The basis for decision**

[118] Infinity Group submitted that there is no presumption in favour of any particular zoning of the site, and that the basis for deciding these appeals is that the variation has to–

(a) be necessary in achieving the purpose of the Act;

(b) assist the Council to carry out its functions of the control of actual and potential effects of the use, development and protection of land in order to achieve the Act's purpose;

(c) be the most appropriate means of exercising that function; and

(d) have a purpose of achieving the objectives and policies of the Plan.

[119] Those submissions were founded on earlier decisions[50] and derived from provisions of the Act. They were not contested.

[49] An allegation to that effect in the reference would not have sufficed without having arisen from a submission containing a challenge that s 32 had not been complied with.
[50] Eg *Hibbit v Auckland City Council* [1996] NZRMA 529, 533.

[120] Mr Thorn contended that in considering whether the proposed zoning of the site is necessary to achieve the purpose of the Act, that purpose should be determined by looking at the settled objectives and policies of the plan, as was done in *Suburban Estates v Christchurch City Council.*[51] Infinity Group disputed that and contended that a number of objectives and policies remain subject to challenge, a presumption that the purpose of the Act is fully represented by the objectives and policies of the plan would not be justified, citing *Dickson v North Shore City Council.*[52] Mr Thorn contested that any material objectives and policies were still subject to challenge; and urged that the Court's analysis should begin with the question whether the variation would achieve Part 2 as expressed through the district-wide objectives and policies of the plan.

[121] A variation is a method by which a local authority can propose an alteration to a proposed planning instrument.[53] This is done by a process of publication, opportunities for submissions and further submissions, hearing and reasoned decision by the local authority, and opportunity for appeal to the Environment Court.[54]

[122] The scope of a variation is not restricted by objectives and policies of the proposed plan. Indeed it is permissible for a variation to alter general objectives and policies. The process is comparable with that for adopting the proposed plan itself.

[123] The *Suburban Estates* and *Dickson* cases were appeals about the contents of proposed district plans, not about variations to them.

[124] Because the scope of a variation is not restricted by objectives and policies of the proposed instrument that is being altered, we do not accept Mr Thorn's submission that it has to be necessary to achieve the purpose of the Act as incorporated even in settled objectives and policies of the instrument. Rather, we hold that in this respect a dispute about a variation should be tested–

(a) by whether it achieves the purpose of the Act stated in section 5; and

(b) by whether it has a purpose of achieving the settled objectives and policies of the instrument that are not being altered by the variation.

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[51] Environment Court Decision C217/2001.
[52] (2002) 8 ELRNZ 172.
[53] See definition in s2(1).
[54] First Schedule, cl 16.

[125] In accordance with section 32(1), the criterion in item (a) gives effect to the overarching importance of the purpose of the Act; and the criterion in item (b) should ensure that if the variation is upheld, the instrument as altered retains its coherence.

**Landscape and visual amenity effects**

[126] We now address the main issue in the decision of these proceedings: Whether and to what extent the development provided for by the variation would have adverse effects on the landscape and amenity values of the locality. There was no question in respect of the development of most of the site. The issue was limited to development of two discrete areas of the site: Areas 2 and 5.

[127] It was Mr Thorn's case that parts of those areas are vulnerable to change and are not capable of absorbing the development on them that the variation provides for; and that the controls proposed by the variation would not be sufficient to protect the landscape and the natural amenity values of Lake Wanaka. Area 2 slopes up to the pine forested ridge which runs along the east of and above the site. Mr Thorn urged that the integrity of that ridge as a rural backdrop to Wanaka should be maintained. Area 5 is at the northern end of the site, farthest from existing development and closest to Lake Wanaka. Mr Thorn (supported by the Environmental Society) contended that the part of this area where development could be visible from the lake and lakeshore should be left undeveloped.

**Classification of landscape**

[128] An important question in considering the effects on landscape and visual amenity values is whether the site is in an outstanding natural landscape (ONL), or a visual amenity landscape (VAL); or whether it is not part of a rural landscape at all, but part of an urban landscape. The classification identifies which objectives and policies are applicable.

[129] Infinity Group's primary position was that the landscape of which the site forms part is not a VAL, but instead is part of the Wanaka urban landscape. If that is so, the policies applicable to VAL landscapes are not directly relevant. But if the Court finds that the site **is** part of a VAL, then Infinity Group contended that confirmation of Variation 15 would be consistent with those policies.

[130] The Council contended simply that the site is entirely in a VAL; but Mr Thorn contended that the part of the site (being in Area 5) between the lake shore and the ridge above it is correctly classified as being part of the ONL that includes the lake itself; and that the rest of the site is in a VAL. He contended that it is not open in law to classify it as being in an urban landscape.

[131] Three witnesses who were qualified in landscape and visual amenity matters gave evidence: Mr D J Miskell, Mr B Espie, and Ms D J Lucas.

[132] Mr Miskell gave the opinion that the site is not part of an ONL, a VAL, or an ORL; but being adjacent to existing residential areas in the south and west, is a natural extension of Wanaka town.

[133] Mr Espie gave the opinion that two landscapes meet in the vicinity of the site: a rolling agricultural landscape to the south-east, and a more remote and dramatic landscape to the north-west. Each contains pockets that share characteristics of the other, and a line between them would be arbitrary. He classified the former as a VAL, and the latter as an ONL; and as the site does not contain any outstanding natural feature, he classified it as part of a VAL.

[134] Ms Lucas gave the opinion that the VAL extends across the site to the lakeside ridge; and that from the ridge to the lakeshore is included within the ONL of the lake.

[135] The site is adjacent to the urban area to the west and south, is adjacent to a rural area to the east, and to the lake to the north. The site itself contains no urban development, but has a rural appearance. We are not persuaded by Mr Miskell's reasons for treating it as part of the urban landscape.

[136] Setting aside for separate consideration the northern part of the site beyond the ridge above the lake, we accept the opinions of Ms Lucas and Mr Espie that it is in a VAL.

[137] Mr Espie extended that classification to the northern part of the site beyond the ridge above the lake because it does not contain any outstanding natural feature. He acknowledged that the VAL meets an ONL in the vicinity of the site, and that the boundary between them would be arbitrary. Ms Lucas included the part beyond the

ridge in the ONL because in landscape and visual terms it is part of the landscape of the lake.

[138] We find Ms Lucas's approach more persuasive. The fact that the site is one land holding should not influence its landscape classification. The topography of the site lends itself to separate classification of the part beyond the northern ridge, visible from the lake and locations from which the lake can be viewed.

[139] In summary, we find that the northern part of the site beyond the ridge above the lake is correctly classified ONL; and the rest of the site is correctly classified VAL.

**Assessment of landscape and visual amenity effects**

[140] Next we have to consider the landscape and visual amenity effects of the development that would be provided for by the variation.

***The parties' attitudes***

[141] Mr Thorn contended that the higher parts of the site adjacent to the eastern boundary (Area 2) and Area 5 are vulnerable to change and not capable of absorbing the development that the variation would provide for; and that the variation would not sufficiently protect the natural and landscape values associated with the lake. He contended that this area should be left largely undeveloped, and in that he was supported by the Environmental Society.

[142] Infinity Group accepted that the backdrop ridge is important and acknowledged that stricter controls are required for Area 2 (than elsewhere in the zone) to ensure an appropriate interface between the lower land and the higher pine-clad ridge behind. It contended that the level of development proposed for Area 2 is appropriate, and would not have effects on landscape and visual amenities sufficient to warrant the land being given some form of non-residential zoning.

[143] All parties agreed that the most sensitive area of the site in landscape and visual amenity terms is Area 5 at the northern end. Infinity Group urged that the development provided for in that area had been very carefully assessed. This had included computer-aided inter-visibility analysis, and preparation of a video-simulation based on computer-modelled dwellings built to maximum permitted

heights and within the identified building platforms, taking into account controls on external colours and the requirement to retain existing kanuka vegetation. It contended that the development provided for in Area 5 would not have adverse effects on landscape and visual amenity values which would warrant that area of land being zoned in a way which would exclude development.

***The evidence***

[144] Ms Lucas gave the opinions that the development provided for by the variation would have significant adverse effects on the important landscape and natural amenity values of the lake and its enclosing landform; and on the eastern ridge which provides a natural backdrop and context for the town. She expressed concern that even with strict location and height controls for residences along the lakeside ridge, the landscape protection would be dependent on the kanuka vegetation being adequately retained. That witness gave the opinion that with premium prices for such sections, expansive views would be sought from inside and outside each house; protection of the kanuka screening could not be assured; and that any buildings visible on that ridge would reduce the naturalness of the lake experience.

[145] Mr Espie gave the opinion that the Peninsula Bay zone would have the effect of extending the area of Wanaka townscape up the slope that forms the middle-ground of views that are available from the west. This extension would take the form of a horizontal strip behind existing development but, because the existing ridgeline would not be broken, the appreciation of landscape that is had by observers to the west of Peninsula Bay would not fundamentally change. His opinion depended on ensuring the retention of existing kanuka, and controlling building heights and colours.

[146] Mr Miskell considered that sensitive design controls would protect and enhance the amenity values which are the most vulnerable to change. He acknowledged that residential buildings would inevitably alter the appearance of the site from some viewpoints in the surrounding landscape, but considered that the site has the ability to absorb the changes because an effective rural setting will remain.

[147] Mr Miskell considered that the natural character of Lake Wanaka would be altered only to a minor degree because the site is only a minor part of the surrounding landscape. Views from the lake to the north of the site would

effectively be unchanged, and views from the west would be seen in the context of existing development. He gave his opinion that overall amenity values would be enhanced by the creation of a pleasant living environment, recreational attributes would be enhanced, and much of the remnant kanuka will be retained.

***Our findings***

[148] We accept that the development provided for elsewhere on the site than in Areas 2 and 5 would not have significant adverse landscape and visual amenity effects. However we do not accept that the potential effects of development in Areas 2 and 5 would or could be adequately or appropriately avoided, remedied or mitigated by the controls on the height, bulk, location or appearance of buildings, nor by requirements to retain vegetation.

[149] While it remains alive in suitable locations and height, vegetation can hide, or at least soften the view of development. But hiding development, or softening its appearance, does not excuse providing for development that should not be provided for in an ONL, or in a VAL where it would not have potential to absorb change without detraction from landscape and visual values.

[150] Further we do not have confidence that district plan requirements for retaining vegetation will necessarily be effective in the long term. As well as being vulnerable to fire, disease, and natural mortality, the continued life of vegetation may depend on the extent to which it is perceived to obstruct valued views.

[151] If there is to be development in sensitive areas, there should certainly be controls on earthworks, and on the height, bulk, location and appearance of buildings and on sealed surfaces, so that their appearance recedes into the background. However the question in these proceedings is whether development should be provided for in those areas at all.

[152] We bear in mind that Area 5 is largely in an ONL, in which development would be visible from public places, and detract from views of otherwise natural landscape. Area 2 is in a part of the VAL, and development would be visible from public places and affect the naturalness of the landscape. We find that both areas are vulnerable to change, and neither is capable of absorbing the development the variation would provide for.

[153] In respect of the development of Area 2, we have not been persuaded by Mr Espie's opinion that the appreciation of the landscape from the west would not fundamentally change. From there the present landscape is rural, and possesses visual amenity. However much the sight of it is hidden or softened by vegetation, however much its prominence is mitigated by compliance with controls on earthworks and the height, bulk, location or appearance of buildings, that part of the landscape would no longer be rural. It would be changed to rural-residential.

[154] Counsel for Infinity Group submitted that, by comparison with Mr Miskell, Ms Lucas had made only an extremely cursory assessment of the potential effects of buildings in Area 5, limited to brief comments in two paragraphs of her rebuttal evidence. We do not criticise Mr Miskell, but we found Ms Lucas's reasons for her opinions realistic and persuasive.

[155] We accept Ms Lucas's opinions, and find that the development provided for by the variation in Areas 2 and 5 would have significant adverse effects on landscape and visual amenity values.

**Application of criteria**

[156] Having come to our findings on that critical issue, we now consider the variation by reference to the four criteria already identified, to assist our decision whether it should be upheld or cancelled.

**Is Variation 15 necessary to achieve the purpose of the Act?**

[157] The first criterion is whether the variation is necessary to achieve the purpose of the Act.

[158] Infinity Group submitted that in applying this test, the word 'necessary' should be understood in the sense of being desirable or expedient in achieving the purpose.[55] It contended that the purpose of the Act would be better achieved if provision is made in the district plan for a special zoning to enable a mixed-density community development on the site, rather than it retaining a rural zoning, in that:

[55] Citing *Countdown Properties (Northlands) v Dunedin City Council* [1994] NZRMA 145, 152 (FC).

(a) The proposed Peninsula Bay Zone represents a logical extension of the residential part of east Wanaka:

(b) It supports the Council's strategy of managing growth in and around urbanised areas:

(c) It is consistent with the findings of the Wanaka 2020 community planning report:

(d) Overall amenity values would be enhanced through creation of a pleasant living environment with improved recreational opportunities and retention of much of the remnant kanuka, enhancing the certainty that these environmental outcomes would be achieved.

[159] Three qualified planners gave evidence on this topic: Mr Kyle, Ms Van Hoppe, and Mr Whitney.

[160] Mr Kyle gave the opinion that the variation is necessary to achieve the purpose of the Act on four main grounds:

(a) There is not enough land zoned residential at Wanaka to accommodate continuing growth:

(b) The proposed Peninsula Bay zone serves the Council strategy of urban consolidation and development of compact urban forms centred on existing settlements in accommodating urban growth:

(c) It gives effect to the recommendations of the Wanaka 2020 report favouring increasing density to avoid sprawl:

(d) The site is suitable and the development would not give rise to adverse environmental effects or impinge on significant landscape values.

[161] Ms Van Hoppe gave the opinion that Variation 15 would be effective in achieving the purpose of the Act in that sustainable management of natural and physical resources would be achieved in these respects:

(a) The high and low density residential use would be an efficient use of the site:

(b) The Peninsula Bay zone would provide a practical and logical boundary for Wanaka avoiding sprawling subdivision:

(c) The rate of residential development would be consistent with proposed capacity of service infrastructure:

(d) The character of the Wanaka residential zone would be retained:

(e) Natural resources in the site having significant value, such as native vegetation, and ecological values, would be protected.

[162] Mr Whitney questioned whether the variation is necessary in achieving the purpose of the Act. He referred to research by a Council official, Ms V Jones, that had been reported to the Council's Strategy Committee, showing that the existing zoning provided capacity for 2843 additional dwellings at Wanaka; for 679 more in Rural-Residential and Rural-Lifestyle zones; together with further capacity in nearby townships. From that Mr Whitney concluded that there is no urgency for providing additional residential-zoned land at Wanaka.

[163] Mr Whitney also gave the opinion that development to the south-east of the town would provide for growth of the town in areas accessible to the town centre, business and industrial zones, and other services available in central Wanaka.

[164] Ms Van Hoppe concurred with Mr Whitney that, based on Ms Jones's research, there is no immediate urgency in providing for residential growth at Wanaka; but she observed that –

(a) Ms Jones's research had assumed that all consents for residential subdivision and development would be exercised, and owners of land zoned residential with capacity for further subdivision or development would do so prior to the Council providing for further growth;

(b) As market forces would dictate the pace of residential development within the Peninsula Bay zone, it might be some time before its full capacity would be realised.

[165] Mr Kyle responded that Ms Jones's model does not respond to the preferences and aspirations of individual landowners, so the rate of release of land for infill development cannot be predicted reliably.

[166] We accept Infinity Group's submission that in applying this test, the word 'necessary' has to be understood as desirable or expedient. But the variation has to be desirable or expedient for achieving the purpose of the Act, being the sustainable management of the natural and physical resources concerned. The explanation in section 5(2) of sustainable management refers to two main elements: the enabling of people and communities to provide for their social, economic, and cultural well-being, health and safety; and the constraints referred to in paragraphs (a), (b) and (c), which include safeguarding the capacity of ecosystems, and avoiding, remedying and mitigating adverse environmental effects.

[167] The first consideration then is whether provision for a further 240 dwellings at Wanaka is desirable or expedient. There are indications both ways.

[168] In support, it may reasonably be inferred that upholding the variation would enable Infinity Group, and ultimate occupiers of dwellings provided in accordance with the Peninsula Bay Zone, to provide for their social and economic well-being.

[169] Without implying any criticism of Ms Jones's valuable work, we understand the limitations of the results that were mentioned by Ms Van Hoppe and Mr Kyle. We also accept that it would take some years before the full capacity of the Peninsula Bay zone would be realised. Even so, the considerable extent of the unused capacity for further dwellings in the current provisions of the plan leaves ample scope for the market to respond to the preferences and aspirations of landowners and would-be residents without the site being developed at all.

[170] The Council's wishes to consolidate residential growth at Wanaka so as to avoid sprawl, and to provide a variety of densities, could be achieved without providing for the site to be zoned as proposed. If those wishes were achieved without the proposed rezoning of the site, the significant native vegetation on the site would not be placed at risk; nor would the landscape and visual amenity values, to which the northern and eastern edges of the site could continue to contribute if undeveloped.

[171] In short, the zoning may be favourable for those taking part in the development, whether as developer, or as purchasers of residential lots or dwellings, or as users of the recreational facilities to be provided. However we have not been persuaded that residential development of the site is needed now to accommodate the growth of Wanaka, or to enable the community to provide for its social or economic well-being.

[172] In our judgement, Variation 15 is not necessary to achieve the purpose of the Act, even giving the word 'necessary' the meaning of desirable or expedient. The environmental and ecological outcomes would not be improved by upholding the variation rather than by cancelling it.

**Would Variation 15 assist the Council to control effects?**

[173] We now apply the second criterion: Whether the variation would assist the Council to carry out its functions of the control of actual and potential effects of the use, development and protection of land in order to achieve the Act's purpose.

[174] Infinity Group contended that the variation would assist the Council to do so by managing Wanaka's growth, planning for the future of the site in an integrated manner designed to enhance overall amenity values without detracting from the landscape values and natural character of Lake Wanaka.

[175] Mr Kyle supported that contention, referring to the variation enabling mixed density development, recognising the landscape sensitivity of parts of the site, providing for protection of natural values, and minimising effects of development beyond the site. He gave the opinion that the resulting development would be in harmony with the landscape and visual amenity values of the area, and would not be incongruous with the residential development surrounding the site.

[176] Mr Whitney gave the opinion that integrated management of effects of the use, development or protection of the land resource is fundamental. He observed that the variation would provide for development at the northern extreme of Wanaka, rather than providing for a compact urban form.

[177] We accept Mr Whitney's point in that respect. We find that the Council's function of controlling effects of the use and development of the site would be assisted by the provisions of the variation identified by Mr Kyle, as far as they go. But they do not go far enough to assist it to control development so that it avoids adverse effects on the landscape and visual amenity values of the environment of development at the northern and eastern edges of the site.

**Would Variation 15 be the most appropriate means?**

[178] The third criterion is whether the variation is the most appropriate means of exercising the Council's function of controlling actual and potential effects of the use, development and protection of land in order to achieve the Act's purpose.

[179] Infinity Group contended that the variation is the most appropriate means of doing so, in that the Peninsula Bay Zone would ensure that amenity values, and the quality of the environment, is maintained and enhanced, while retaining and protecting large areas of vegetation. It also relied on the benefit to the general public of the proposed park and central facility proposed for Area 4. It urged that those outcomes would not be achieved if the variation is cancelled so that the rural zoning of the site would be reinstated.

[180] In his evidence in this respect, Mr Kyle listed aspects of the variation that he considered are beneficial, including the provision for mixed-density residential development, recognising the landscape sensitivity of parts of the site, providing for protection of natural values, and minimising effects of development beyond the site. The witness concluded that those provisions are efficient, appropriate and effective in assisting the Council to manage Wanaka's urban growth.

[181] Mr Whitney observed that the report to the Council on the analysis and evaluation of the variation in terms of section 32 had advised that the Council had to consider thorough investigations of alternative sites and directions for growth (advice with which the witness agreed). Mr Whitney stated that he had found no evidence of a thorough investigation of alternative sites and directions for growth at Wanaka having been undertaken. As already mentioned, this witness identified other means of providing for growth of Wanaka, and gave the opinion that investigation of alternative sites and directions for growth should occur.

[182] The criterion is whether the variation is the most appropriate means of exercising the Council's function. The use of the word 'most' gives effect to section 32(1)(c)(ii), which directs that a person adopting a method in a planning instrument is to be satisfied that it is–

> ...the most appropriate means of exercising the function, having regard to its efficiency and effectiveness relative to other means.

[183] On its face, that direction calls for a comparison between the means proposed and other possible means of exercising the Council's function, in order to achieve the Act's purpose.

[184] In his evidence on this topic, Mr Kyle identified provisions of the variation that he considered beneficial. He acknowledged that there are a number of sites around Wanaka that are suitable for accommodating growth. He addressed other means than variation of authorising development of the subject site (resource consent, district plan review, privately promoted plan change). But he did not address the question whether the variation, containing those provisions for development of the subject site, is the *most* appropriate means of exercising the function.

[185] Infinity Group contended that in these proceedings consideration of other possible sites for accommodating growth would not be correct or appropriate, and consideration should not be given to whether the variation providing for development of the subject site is the *most* appropriate means of exercising the Council's function in comparison with development of other sites. Counsel argued that on a variation there is no obligation to do so, relying on the High Court Judgment in *Brown v Dunedin City Council.*[56]

[186] In that Judgment the High Court held that section 32(1) does not contemplate that determination of a site-specific proposed plan change will involve a comparison with alternative sites. The learned Judge affirmed that the assessment should be confined to the subject site, and observed it would be unrealistic and unfair to expect those supporting a site-specific plan change to undertake the task of eliminating all other potential sites within the district.

[56] [2003] NZRMA 420, Chisholm J.

[187] *Brown's* case related to a plan change rather than a variation. But having considered the learned Judge's reasoning, we see no basis for not applying it to a site-specific variation, such as that the subject of these proceedings. Accordingly we accept Infinity Group's contention, and hold that this criterion does not require consideration of whether the variation providing for development of the subject site is the *most* appropriate means of exercising the Council's function in comparison with development of other sites.

[188] Even so, no planning witness gave the opinion that the provisions of the Peninsula Bay Zone would be the *most* appropriate means of exercising the Council's function of controlling actual and potential effects of the use, development and protection of land in order to achieve the Act's purpose.

[189] Mr Kyle identified a number of beneficial aspects of it. So did Ms Van Hoppe, but she identified respects in which, even with amendments agreed on by Infinity Group and the Council, there may result in too little control over development in Area 5 at the northern end of the site (which is sensitive for landscape and visual amenity values). In cross-examination by counsel for Infinity Group, Ms Van Hoppe resiled on the status of removal of native vegetation not in public view; and accepted that later amendments proposed had addressed another point about building heights.

[190] Mr Whitney gave the opinion that the provisions for development of elevated parts of the site (especially at the northern end) would not preclude adverse effects on visual amenity from the lake surface and elsewhere, nor make adequate provision for public access there.

[191] Reviewing the evidence as a whole, we do not find in it an adequate foundation for finding that the revised provisions of the Peninsula Bay Zone (as proposed at the Court hearing) would be the *most* appropriate means of exercising the Council's function of controlling actual and potential effects of the use, development and protection of land in order to achieve the Act's purpose.

**Does Variation 15 have a purpose of achieving the objectives and policies?**

[192] We now consider the variation by the fourth criterion, whether it has a purpose of achieving the settled objectives and policies of the Plan. Logically this

criterion only applies in respect of methods that do not implement objectives and policies specific to the variation.

[193] We have summarised the relevant objectives and policies. They include protection of natural resources including the natural character of lakes, outstanding rural landscapes, and visual amenity values. They also promote urban consolidation and compact urban forms by higher density living environments.

[194] Infinity Group maintained that the variation is generally consistent with the objectives and policies of the plan; that it achieves those addressing the peripheral expansion of urban areas; and respects those relating to landscape and visual amenity.

[195] Mr Thorn contended that the variation would not achieve Objective 4.2.5.1 and associated Policies 1(a) to (c), relating to identification of parts of the district with greater potential to absorb change in preference to those vulnerable to degradation. His counsel argued that once the parts of the district most capable of change have been identified, an assessment is required to ensure that development harmonises with local topography and ecological systems and other nature conservation values as far as possible. He contended that as the process has not been carried out, the proposed zoning does not have a purpose of achieving that objective and associated policies.

[196] Counsel for Infinity Group responded that in considering Variation 15 as a whole, Objective 4.2.5.1 should be applied on a 'macro' basis rather than a 'micro' basis. He contended that the issue is whether in relation to that objective the site is appropriate for further development. He urged that although landscape and visual amenity issues are important, it is equally important to provide for the growth being experienced and to provide for open space and for recreation.

[197] We quote Objective 4.2.5.1, and the associated policies in question:

> Objective:
> Subdivision, use and development being undertaken in the District in a manner which avoids, remedies or mitigates adverse effects on landscape and visual amenity values.
> Policies:
> 1 Future Development
> (a) To avoid, remedy or mitigate the adverse effects of development and/or subdivision in those areas of the District where the landscape and visual amenity values are vulnerable to degradation.

(b) To encourage development and/or subdivision to occur in those areas of the District with greater potential to absorb change without detraction from landscape and visual amenity values.
(c) To ensure subdivision and/or development harmonises with local topography and ecological systems and other nature conservation values as far as possible.

[198] Mr Thorn may be right in suggesting that Policies 1(a) and (b) involve identifying parts of the district with greater potential to absorb change and those vulnerable to degradation. But that has not yet been done, no doubt because the plan is not yet fully operative. By definition variations are proposed at the stage when the plan is not fully operative. So we do not accept the fact that Variation 15 is proposed prior to the Council giving effect to its policy of identifying parts of the district should influence our decision on whether the variation should be cancelled.

[199] Rather we consider that the appropriate question is whether the development that the variation would authorise–

(a) would avoid, remedy or mitigate adverse effects on landscape and visual amenity values;

(b) would do so in an area where they are vulnerable to degradation, rather than having potential to absorb change without detracting from those values; and

(c) would harmonise with local topography and ecological systems and other nature conservation values as far as possible.

[200] From the findings we have already stated, we do not accept that the development that the variation would authorise would, in respect of the northern end and the eastern edge, achieve the objective or Policy 1(a), corresponding to items (a) and (b) in the previous paragraph. To that extent we find that Variation 15 does not have a purpose of achieving the objectives and policies of the plan.

[201] So far we have focused on the particular objective and policies relied on by Mr Thorn. We now expand our focus to include all the objectives and policies of protecting natural resources, including the natural character of lakes, outstanding rural landscapes, and visual amenity values. In our judgement, development of the northern and eastern edges of the site, that would be visible from the surface of the lake and elsewhere, would not serve those policies either. Nor would development of the site, even where the development itself is higher density, achieve the

objectives and policies of promoting urban consolidation and compact urban forms. On the contrary, it would extend the town further.

[202] In short, we judge that the variation would not achieve the settled objectives and policies of the plan about protecting natural resources, nor the thrust of settled objectives and policies about promoting urban consolidation and compact urban form.

**Summary of findings on criteria**

[203] We have considered the variation by reference to each of the four criteria already identified.

[204] The variation would assist the Council in its function of controlling the effects of residential development of the site if it is to be developed for that purpose.

[205] However the variation is not necessary (in the sense of desirable or expedient) in achieving the purpose of the Act; it would not be the most appropriate means of controlling the actual and potential effects of the use, development and protection of land in order to achieve the Act's purpose; and it would not achieve the settled objectives and policies of the plan about protecting natural resources, nor the thrust of settled objectives and policies about promoting urban consolidation and compact urban form.

**Specific provisions of Variation 15 in issue**

[206] There were issues raised concerning several specific provisions of the variation on which we have to give our rulings.

**Link Road**

[207] A question was raised about the possibility of a road on the site being available for access to and from future development of land to the east of the site.

[208] Infinity Group recognised that provision for such a link road could have value. It did not itself propose it, but was willing to facilitate any option that achieved the objectives of all parties.

[209] Whether the district plan should be altered to provide for urban development of the land to the east of the site is not in issue in these proceedings. Nothing in this decision should be taken as endorsement of it. On that basis, we see no point in making provision for access to and from it through the site.

**Public open space**

[210] The next question concerned whether the Court has authority to reduce the public open space Area 4 of the proposed development by removing Area 4b as proposed at the hearing.

[211] Infinity Group responded that the variation had never provided that Area 4 would be public open space at all; but it volunteered to dedicate all of Area 4 except Area 4b as public open space.

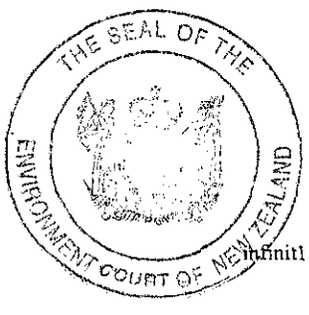
[212] We apprehend that this supposed issue arose from misunderstanding. We have found no evidence that raises an issue requiring the Court's ruling.

**Residential flats**

[213] Then there was a question about whether the effect of upholding the variation would be that there could be 400 residential units and also 400 additional residential flats on the site. Evidently this arose because of a general provision in the district plan which is understood to have effect that an owner of a residential unit is also entitled to have a residential flat on the same site.

[214] Infinity Group responded to the point by stating that if the Court had any concern over this, it would have no objection to an amendment providing that in the Peninsula Bay Zone, a residential unit does not include an entitlement to a residential flat on the same site.

[215] Because an issue had been made about the total number of dwellings provided for by the variation, we continue our consideration of the variation on the basis that if it is upheld, it would be amended accordingly.



[216] Development of such a large area would be likely to take place over a considerable period, and might be undertaken by more than one developer. We question the practicability of administering a limit on the total number of residential units in those circumstances.

**Status of removal of kanuka**

[217] There were also differences about the status of the activity of removing kanuka vegetation in certain areas of the site: whether it should be a discretionary activity, a non-complying activity, or a prohibited activity.

[218] The Council submitted that removal of kanuka outside nominated building platforms in Areas 2 and 5 should be a prohibited activity.

[219] The importance of protecting the kanuka is two-fold. First, it is valued for its inherent worth as native vegetation. Secondly, while it survives it could to some extent screen development in those areas from view from the lake surface and elsewhere.

[220] However retaining the kanuka would not necessarily be perceived by successive owners of lots in those areas as being in their own interests, particularly in commanding the widest views of the superlative lake and mountain-scape.

[221] The high value of retaining the kanuka could be shown by prohibiting its removal. However in our judgement, owners are more likely to moderate their desires to maximise views if there is provision for applying for consent, and conditions and criteria published for consideration of proposals.

[222] Accordingly we will continue to consider the variation on the basis that removal of kanuka from those areas would be a non-complying activity, with conditions and criteria designed to ensure that consent would only be granted if the removal would not reduce the extent that landscape and visual amenity values are maintained.

**Building height limits**

[223] Some differences of opinion about the basis for determining the maximum height of buildings led to Infinity Group and the Council preferring use of height limits above a datum, rather than above supposed ground levels, in Areas 2 and 5. The Council urged inserting an additional criterion for deciding earthworks, to encourage carrying them out in the period between May and October.

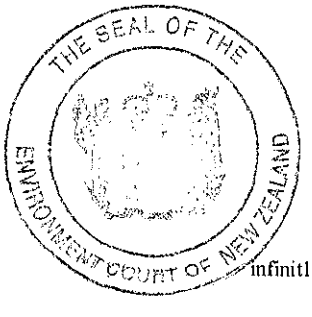
[224] We accept that this method might encourage additional excavation, but Infinity Group accepted that earthworks for residential buildings should then be part of the controlled activity consent process for buildings. The criterion encouraging earthworks between May and October was not opposed.

[225] We accept that setting maximum building heights by reference to datums provides certainty and enforceability, and is preferable to the general district plan mechanism which has difficulties in both respects. So we will continue to consider the variation on the basis that the building height limits in Areas 2 and 5 would be set by reference to appropriate datums; that earthworks for residential buildings should then be part of the controlled activity consent process for buildings; and that there be a criterion encouraging earthworks between May and October.

**Building appearance**

[226] Another issue of detail related to the extent to which the Council would have control over the external appearance of buildings in Areas 2 and 5a. Infinity Group proposed that this be done by stating that the external appearance of buildings, including design, cladding, colour and reflectivity, and consistency of design and appearance of garaging and outbuildings with the principal dwelling be matters in respect of which the Council would have control when considering, as controlled activities, the addition, alteration or construction of all buildings in those areas.

[227] In our judgement that appears to be appropriate, and we will continue to consider the variation on the basis that it is amended accordingly.



**Future driveways and walkways**

[228] There was also some reference to the routes of future driveways and walkways. Infinity Group accepted that they are shown conceptually on the plans, and the routes had not been fixed by survey or by reference to topography.

[229] We continue our consideration of the variation on that basis.

**Exercise of power under section 293**

[230] Infinity Group proposed that, if the Court held (as it has) that the maximum number of residential units is limited to 240, the Court should act under section 293 to raise the limit to 400 residential units. Consequential changes would involve increasing the extent of Area 3 and reducing the minimum lot area in Area 1 from 1,000 square metres to 700 square metres.

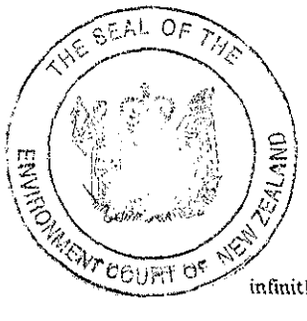
[231] Infinity Group argued that because the possibility of there being 400 residential units is already before the public from the Council decision on submissions, public notification of the proposed amendment should not be required. However the Council submitted that if the Court found that a reasonable case had been made for the amendment, it should direct public notification.

[232] Mr Thorn opposed this proposal, contending that the Council should be given an opportunity to reconsider its position, it having clearly signalled that it did not favour a 240-dwelling development, but preferred a higher density. He urged that this could only be done by cancelling the variation.

[233] In reply, counsel for Infinity Group submitted that the Council's preference for a higher density supports rather than counts against the proposition; and that there is no need to give it further opportunity for reconsideration.

[234] We quote the relevant parts of section 293:

> **293. Environment Court may order change to policy statements and plans–** (1) On the hearing of any appeal against, or inquiry into, the provisions of any policy statement or plan, the Environment Court may direct that changes be made to the policy statement or plan.
> (2) If on the hearing of any such appeal or inquiry, the Environment Court considers that a reasonable case has been presented for changing or revoking any provision of a policy statement or plan, and that some opportunity should be given to interested parties to consider the proposed



change or revocation, it may adjourn the hearing until such time as interested parties can be heard.

(3) As soon as reasonably practicable after adjourning a hearing under subsection (2), the Environment Court shall—

(a) Indicate the general nature of the change or revocation proposed and specify the persons who may make submissions; and

(b) Indicate the manner in which those who wish to make submissions should do so; and

(c) Require the local authority concerned to give public notice of any change or revocation proposed and of the opportunities being given to make submissions and be heard.

...

[235] In considering those provisions, we apply the law explained by the High Court. The power is to be exercised cautiously and sparingly.[57] Before the Court has jurisdiction to invoke the section it must consider, first, that a reasonable case (strong enough to have a reasonable chance of success) has been presented and, secondly, that some opportunity should be given to interested parties to consider the proposed change. The requirement for further public notification and submissions is an integral component of the package. Even if the Court considers that a reasonable case has been presented, it will be exceedingly rare where the Court would exercise the power even within the scope of the reference, because interested parties will have had their opportunity to consider the proposed change.[58] There must be a nexus between the reference and the changed relief sought.[59]

[236] We now consider whether the conditions in which the power may be exercised exist in this case; and if they do, we can then form our judgement whether in the circumstances it should be exercised.

**Has a reasonable case been presented?**

[237] The first condition of the Court's power is that on the hearing of the appeal, the Court considers that a reasonable case has been presented for the change in question, understanding a reasonable case as one strong enough to have a reasonable chance of success.

[238] Infinity Group and the Council maintained that there is a reasonable case for increasing the density of the zone from 240 to 400 residential units on the ground that the report of the Wanaka 2020 workshop supported development of Beacon

[57] *Gisborne Refrigerating Co v Gisborne District Council* (1990) 14 NZTPA 336 (Greig J).

[58] *Canterbury Regional Council v Apple Fields* [2003] NZRMA 508; 9 ELRNZ 311 (Chisholm J) paras 41, 45, 47, 50.

[59] *Hamilton City Council v NZ Historic Places Trust* (HC, Hamilton; 11/08/04, Harrison J, para 25).

Point (which includes the site) should be more intensely developed to avoid continuing sprawl and scattered development.

[239] Mr Kyle stated that the findings of the Wanaka 2020 process are highly reflective of how the Wanaka community wishes to deal with the urban growth issues affecting the town. He also gave the opinion that the increase in the density is consistent with the objectives and policies on urban growth, with its primary focus on urban consolidation and avoidance of development where it would adversely affect landscape values or involve costly extensions to, or duplication of, urban infrastructure.

[240] Ms Van Hoppe observed that the changes would not affect the overall configuration of the Peninsula Bay Zone, but would make more efficient use of the land in Areas 1 and 3.

[241] Mr Whitney considered that the proposed development of the site can be regarded as urban sprawl rather than consolidation, and observed that it is some distance from existing schools, shopping and employment areas of Wanaka.

[242] It is not for us to make a final judgement in these proceedings on those issues. Our duty is to decide whether the case for the changes to the variation is strong enough to have a reasonable chance of success.

[243] In that respect we are not influenced by the outcome of the Wanaka 2020 workshop. That process was managed by facilitators and a technical support team who prepared the report, and we have no information about whether they had a particular agenda. It was not a process under the Resource Management Act that people with an interest in Variation 15 would necessarily take part in; nor would they expect that the recommendations might be relied on for making important changes to the variation. At best the report represented the views of the people who chose to take part in the workshop.

[244] We do not accept that simply because there could result 400 residential units instead of 240 on a 75-hectare site, that amounts to a case for the changes strong enough to have a reasonable chance of success

[245] On the difference between Mr Kyle and Mr Whitney on whether the increased density would appropriately serve the policies of consolidation and compact urban form, we find more plausible and prefer Mr Whitney's opinion that increasing the density of development on the site so far from the town centre represents sprawl rather than consolidation.

[246] In summary, we do not consider that a reasonable case, one strong enough to have a reasonable chance of success, has been presented for the changes in question. This condition of the Court's power under section 293 does not exist.

**Should opportunity be given to interested parties to consider the amendment?**

[247] The first condition of the Court's power under section 293 to direct the changes to the variation is that the Court considers that some opportunity should be given to interested parties to consider them.

[248] Contrary to what might seem to be its own interest, counsel for Infinity Group submitted that public notification is not necessarily required. However we have no doubt at all that, if a reasonable case had been presented for the changes in question, opportunity should be given to interested parties to consider them, and if they wish, make submissions and present evidence on them.

**Should the power be exercised?**

[249] If we had found that a reasonable case had been presented for the changes, we would then have to make a judgement whether in the circumstances the power should be exercised.

[250] Infinity Group proposed that the changes should be assessed by the factors identified in the *Apple Fields* case,[60] and contended that those criteria are fulfilled.

[251] Because we have found that the first condition of the Court's power has not been fulfilled, there is no need for us to make a point-by-point consideration of the proposed changes to Variation 15 be reference to those criteria. It is sufficient for us to refer to item (3), which we quote:

[60] [2003] NZRMA 508; 9 ELRNZ 311 paras 13, 55-62.

> That the discretion must be exercised cautiously and sparingly for these reasons:
> (a) It deprives potential parties of interested persons of their right to be heard by the local authority;
> (b) The Court has to discourage careless submissions and references;
> (c) The Court has to be careful not to step into the arena – the risk of appearing partisan is the great disadvantage of inquisitorial methods.

[252] On item (a), in this case exercise of the power would continue to deprive people of the opportunity to be heard by their elected local authority on the changes.

[253] On item (b), the cause of the proposal in this case is not careless submissions or references, but the Council's unsound assumption of authority to make the changes. The Court should, and does, discourage, rather than encourage, that.

[254] On item (c), although in this case the changes are proposed by a party, not on the Court's own initiative, the Court should still be careful not to step into the arena, as it might have to make a final judgement, later, on a dispute over the appropriate density of future development of the site.

[255] For those reasons, even if both conditions of the Court's power to act under section 293 were fulfilled, we would not exercise the power.

## Part II of the Act

[256] In coming to a judgement on the variation overall, we have duties under Part II of the Act, which states its purpose and principles. Part II contains sections 5 to 8. Section 5 states the purpose and explains what is meant by sustainable management. As the remaining sections are supportive of and more particular than section 5, we consider them first.

[257] Section 6 imposes a duty on functionaries to recognise and provide for a number of matters of national importance. Some of them are raised by this case and we will address them.

[258] Section 7 imposes a duty on functionaries to have particular regard to certain other matters. Some of them were relied on in this case, so we address them too.

[259] The parties were agreed, and we accept, that the variation does not raise any issue in respect of the duty imposed by section 8 to take into account the principles of the Treaty of Waitangi.

**Matters of national importance**

[260] We quote section 6:

> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
> (a) The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:
> (b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:
> (c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:
> (d) The maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers:
> (e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.

[261] Mr Kyle gave the opinion that the variation would preserve the natural character of Lake Wanaka and its margins, would protect significant areas of kanuka, would enhance public access to the margin of the lake, and would not impact on Maori ancestral lands, water, sites, lakes or rivers.

[262] Ms Van Hoppe gave the opinion that the northern area of the proposed zone would not impact on the natural character of Lake Wanaka's margin; and that any potential effect of visibility of development could be mitigated or avoided by the proposed zone provisions. This witness stated her belief that the proposed public walkways and open space would enhance public access to and along the lake, and that the development would have no more than minor effects on the existing walkway.

[263] Mr Whitney gave the opinion that subdivision and development of the northern end and elevated eastern edge of the site would be inappropriate because it would be visible from the margin of the lake, and from the surface of the lake (itself an outstanding natural landscape) to the north, and from the north-east, and generally from west. This witness also stated that residential development at the northern end

of the site would be likely to present a private atmosphere that would not enhance public access at the lakeshore.

[264] Earlier in this decision we stated our findings that the variation would provide for development in Area 5 that would have significant adverse effects on landscape and visual amenity of Lake Wanaka and its shores. Based on those findings, we hold that the variation would not recognise and provide for the preservation of the natural character of the lake and its margin. In our judgement, development of parts of the site that would be visible from the surface or the margin of the lake, even if existing kanuka or other vegetation did not exist, would not be appropriate; and the variation would not sufficiently protect the natural character from it, nor protect the outstanding natural feature and landscape of the lake from it. It would not fulfil the Council's duty under section 6(a) and (b).

[265] The variation contains measures designed to protect some of the areas of significant indigenous kanuka vegetation on the site, though not all of them. To the extent that it does not, the variation would not fulfil the Council's duty under section 6(c).

[266] The variation recognises and contains some provisions for maintenance and enhancement of public access to and along the lake. Although the presence of private development might mean that some people's enjoyment of that access is less, in our judgement that does not deserve categorising as a failure on a matter of national importance.

**Matters for particular regard**

[267] We quote the relevant parts of section 7:

> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—
>
> ...
>
> (aa) The ethic of stewardship:
>
> (b) The efficient use and development of natural and physical resources:
>
> (c) The maintenance and enhancement of amenity values:
>
> (d) Intrinsic values of ecosystems:
>
> (e) [Repealed.]
>
> (f) Maintenance and enhancement of the quality of the environment:
>
> (g) Any finite characteristics of natural and physical resources:
>
> (h) ...

[268] Mr Kyle gave the opinion that the variation would achieve the relevant matters set out in section 7. He stated that the development would make efficient use of existing service infrastructure and roading (paragraph (b)); that amenity values would be maintained (paragraph (c)); that ecosystem values at the site would be preserved and enhanced (paragraph (d)); the development would enhance the quality of the environment by provision of reserve areas and formalised access to the margin of the lake, and by facilities to be located on reserve areas, and would not exhaust future resources.

[269] Mr Whitney gave the opinion that development of the part of the site that overlooks the lake would not be consistent with the ethic of stewardship (paragraph (aa)), exemplified by the Lake Wanaka Preservation Act 1973 and subsequent community protection of the lake. He questioned whether the development authorised by the variation could be found to be an efficient use of resources (paragraph (b)) without a thorough investigation of alternative sites and directions for growth.

[270] On the maintenance and enhancement of amenity values (paragraph (c)) and of the quality of the environment (paragraph (f)), Mr Whitney gave the opinion that the amenity values of the site are enjoyed by those who view the land as a backdrop to the town, including from the surface and margins of the lake. He considered that the need for the land to be used to accommodate urban growth should be demonstrated before those amenity values, and that quality, is sacrificed. Similarly the witness observed that the finite characteristic of the land resource should be considered before a decision is made to allocate it for residential subdivision and development.

[271] Although the variation would allow development that may be visible from the lake, it contains provisions designed to minimise the effect on the natural character of the lake and its visual amenities. In those circumstances we judge it disproportionate to find that the Council failed to have particular regard to the ethic of stewardship in that respect.

[272] On paragraphs (b) and (g), the Council does not appear to have examined options for growth of Wanaka adequately. Nor did it explain the limit on the number of residential units, be it 240 or 400. We would have expected a comprehensive assessment of the development capability of a site of this size. However we consider that it would be disproportionate to find that the Council had failed to have particular

regard to the efficient use of land and of existing service infrastructure, or of the finite characteristics of the land resource, in that regard.

[273] On paragraphs (c) and (f), the variation does contain provisions designed to maintain and enhance amenity values and the quality of the environment. We do not find that the Council failed to have particular regard to those important matters.

[274] In summary, we do not find that the Council failed in its duty to have particular regard to the applicable matters listed in section 7.

**The purpose of the Act**

[275] The purpose of the Act is stated in section 5, which we quote:

> **5 Purpose**– (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
> (2) In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while—
> (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
> (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
> (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[276] The Act has a single purpose, and it is our duty to consider the aspects of the variation that might serve it, and those that would not, in coming to a judgement whether it should be upheld or cancelled.

[277] The main resources concerned are the land of the site, the lake and its margins, the landscape and visual amenity values, and the significant native kanuka vegetation. The physical resources, particularly roads and other service infrastructure, are in this case less important.

**Judgement**

[278] Earlier in this decision, we reviewed the evidence and gave our reasons for finding that Variation 15 :

(a) Is not necessary to achieve the purpose of the Act;

(b) Has not been shown to be the most appropriate means of exercising the Council's functions to achieve the Act's purpose;

(c) Would not achieve the settled objectives and policies of the partly operative district plan about protecting natural resources; and

(d) Would not sufficiently protect the natural character of the lake (an outstanding natural feature and landscape) from inappropriate development.

[279] On those bases, it is our judgement that the variation would not serve the purpose of the Act of promoting sustainable management (as described) of natural and physical resources.

**Determinations**

[280] For those reasons, the Court determines:

(a) That Appeal RMA352/03 is allowed:

(b) That Variation 15 is cancelled:

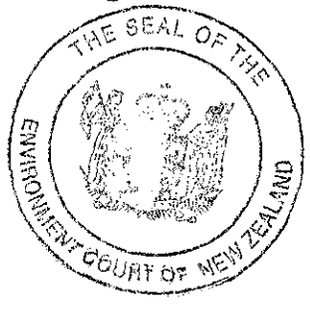
(c) That Appeal RMA337/03 is consequentially disallowed.

**Costs**

[281] The question of costs is reserved. Any application for costs may be lodged and served within 15 working days of the date of this decision. Any response may be lodged and served within 15 days of receipt of the application.

**DATED** at Auckland this 26th day of January 2005.

For the Court:




D F G Sheppard
Alternate Environment Judge

Issued: 28 JAN 2005

**BEFORE THE ENVIRONMENT COURT**

Decision No. [2011] NZEnvC 384

| | |
|---|---|
| **IN THE MATTER** | of the Resource Management Act 1991 (**the Act**) and of an appeal pursuant to section 120 of the Act |
| **BETWEEN** | MAINPOWER NZ LIMITED |
| | (ENV-2009-CHC-100) |
| | Appellant |
| **AND** | HURUNUI DISTRICT COUNCIL |
| | Respondent |
| **AND** | |
| **IN THE MATTER** | of a direct referral under section 87 of the Act |
| **BY** | MAINPOWER NZ LIMITED |
| | (ENV-2010-CHC-200) |
| | Applicant |

| | |
|---|---|
| Hearing: | at Christchurch on 20 – 23 June, 27 – 30 June, 1 – 3 August, 8 – 10 August 2011 |
| Court: | Environment Judge J E Borthwick<br>Environment Commissioner D H Menzies<br>Environment Commissioner H M Beaumont<br>Environment Commissioner D J Bunting |
| Appearances: | See Attachment 1 |
| Date of Decision: | 9 December 2011 |
| Date of Issue: | 12 December 2011 |

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

## DECISION OF THE ENVIRONMENT COURT

A: The appeal is allowed and the application for resource consent referred directly to the court is granted.

B: By **16 December 2011** the Hurunui District Council and MainPower New Zealand Ltd are to file and serve a joint memorandum confirming the amendments to the conditions (**attached**). Reasons are to be given if changes are proposed.

C: By **21January 2012** all other parties proposing amendments to the Conditions (or a revised set of conditions if changes are proposed by Hurunui District Council and MainPower New Zealand Ltd) are to file and serve their memoranda setting out the reasons for the changes sought.

D: By **28 January 2012** the Hurunui District Council and MainPower New Zealand Ltd may file a memorandum in response.

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## REASONS

### Introduction

[1] MainPower New Zealand Ltd proposes to establish and operate a wind farm at Mt Cass, Waipara.

[2] These proceedings are unusual in that the Court is considering both an appeal against a decision by the Hurunui District Council to decline consent for the wind farm and an application for resource consent referred directly to the Court in relation to the same proposal. This second application is the result of extensive mediation culminating in the modification of the proposed wind farm.

[3] While these modifications addressed the concerns of some of the parties on appeal, it attracted submissions from other persons who now considered themselves affected.

[4] It is the proposal as modified by the application for resource consent directly referred to the Environment Court which is the subject of this decision. MainPower is not seeking consent for its original application for resource consent heard by the District Council.[1]

### The location of the wind farm

[5] Mt Cass is located 3 km from the Omihi junction, 5 km to the south-east of Waipara and 10 km north-east of Amberley. These settlements are located in the Waipara Basin and Mt Cass is one of a series of ranges framing the south-eastern part of the Basin. The wind farm would extend 7.5 km along the ridgeline of Mt Cass at an elevation of between 400 m and 569 m and would be visible from the settlements.[2]

[6] Mt Cass is one of three peaks (Totara and Oldham Peak are further to the north-east) on a cuesta landform; an asymmetric ridge of sedimentary rocks – in this case principally limestone.[3] Typical of this type of landform Mt Cass has a steep north-west facing front slope (called a scarp or escarpment) and a gentle south-eastwards dipping backslope.



[1] MainPower Memorandum of Counsel dated 22 November 2010.
[2] Hurley, EiC, at [2.1] – [2.2].
[3] Weka Pass limestone overlies Amuri Limestone.

[7] Just below the scarp slope and parallel to the ridge line is a wide flat area identified in the evidence as the 'northern terrace'. It is on this lithological feature that the main access road is to be sited. The northern foothills are rounded gentle features within the landscape. By comparison the land beyond the south-east dip slope and lying towards the coast is rugged hill country which terminates abruptly at the cliff face of an uplifted marine terrace.

[8] Located along both sides of the ridgeline are boulder fields and scree slopes. These are more prominent on the scarp which also has areas of cliff face. On the upper slopes of Mt Cass native forest and shrubland is found interspersed with patches of pasture. Pasture and silviculture (forestry plantations) predominate on the lower slopes.

[9] The site's five landowners farm the land (sheep and cattle)[4] and intend to continue farming if consent is granted. MainPower has in place agreements and easements enabling the development of the wind farm.[5]

[10] In the wider Waipara Basin, and some parts of the north facing foothills, viticulture is well established.

**The proposal**

[11] In the following section we provide an overview of the proposal (greater detail is found in our assessment of effects). The proposal is to build and operate a wind farm which will include the following activities:

- turbines and turbine platforms;
- roading (including connection to individual platforms);
- electrical plant (including a sub-station, operation buildings and switching yard);
- concrete batching plant and aggregate storage area;

[4] The landowners are MainPower New Zealand Ltd, Dovedale Farm Ltd, Hamilton Glens Ltd, Organic Farm Ltd and Tiromoana Station Ltd.
[5] Hurley EiC at [2.5]-[2.6].

- undergrounding of cables between the turbine sites and the substation;
- erection of overhead transmissions lines;
- excavation and deposition of excavated material not used for fill or roading (at 'soil disposal sites');
- stockpile areas for road aggregates and topsoil;[6]
- temporary storage of plant and equipment (at 'lay down' areas); and
- the extension of the existing Mt Cass walkway.[7]

**Application directly referred to the Court**

[12] Referred to as the *mediation layout* the principal amendments to the original proposal are as follows:[8]

- relocating some turbines from the area between Mt Cass and Totara Peak to other locations on the Mt Cass ridge;[9]
- relocating a primary access road from the top of the dip slope to the northern terrace;
- construction of three new ramp roads across the escarpment and other new roading to provide access to the new turbine locations;
- relocating the substation, switch and control buildings from the main ridgeline to the northern terrace;
- realigning the above ground transmission line along the northern terrace;
- relocated laydown areas.

[13] Consent sought is to authorise one of three different turbine layouts; the dimensions of which are shown. [10]

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[6] Morrison EiC at [6.1].
[7] Morrison EiC at [6.1].
[8] The extent of the new works is shown on plans SK102-SK103 (reference Dr Steven, Appendix E, and J Whyte both in application for direct referral).
[9] The total number of turbines will remain the same under the mediated layout – refer to application for direct referral at 5.
[10] Hurley EiC at [2.14].

| Layout | Maximum height from ground level(m) | Maximum number of turbines | Maximum installed capacity (MW) |
|---|---|---|---|
| R33 | 55 | 67 | 34 |
| R60 | 95 | 40 | 40 |
| R90 | 130 | 26 | 78 |

[14] The three turbine layouts have different energy outputs. Adopting the titles given to the different layouts in the evidence the R33 layout will produce 67 GWh,[11] R60 will produce 103 GWh and R90 212 GWh.[12] These are all for the mediation layout. As the final turbine layout design is dependent upon the model of turbine chosen flexibility is sought in relation to the layout.[13]

[15] A 2 km 'Access Road' is to be constructed from the site of the former Mt Cass homestead to a point on the ridge line below Mt Cass Peak near the western end of the wind farm site. From about this point four spur roads, (two to the west, one to the north and one to north east), service turbines in these locations. 'North Terrace Road' drops down from Mt Cass Peak onto the northern terrace and then along the terrace on the line of an existing farm track to a point about 500m east of Totara Peak. From here the road climbs back up onto the ridge line before following the ridge line east to a point just north of Oldham Peak ('Ridge Road C'). Short spur roads extend north and east to service turbines in these locations.[14] In addition, access to a number of turbine sites is provided by three ramp roads,[15] each extending up the scarp face at intervals along North Terrace Road.

[16] The overhead transmission lines are to be routed along the Northern Terrace Road, and then down the southern slopes to meet the existing network at Tiromoana Homestead, near Mt Cass Rd. The transmission lines then follow, more or less, the existing power lines to Waipara Junction. From there the transmission lines run alongside state highway 7 terminating at the Waipara substation. If consented, the

[11] GWh is 1 million kWh and 1 MWh is 1,000 kWh.
[12] Sise EiC at [3.10].
[13] Hurley EiC at [10.5].
[14] Hurley EiC at [2.2] – [2.28].
[15] Referred to as Ramp Roads 1, 2,and 3.

existing power lines on Mt Cass Rd are to be removed or incorporated into the new transmission lines.[16]

[17] The height of the turbine determines the area of the platform required for the foundations and working space for plant and equipment. The largest platform is required for the R90 turbines and measures 51m x 22m. Platforms of 44m x 18m and 20m x 15m are required for the R60 and R33 turbines respectively.[17] After construction a proportion of the platform area will be planted or allowed to naturally regenerate with an area 15m x 15m being retained as a maintenance platform.[18] We understood that largest foundations are those required for the R90 turbines at approximately 16m square (or octagonal) and 3m depth.[19] Each of these foundations, which will be constructed of reinforced concrete, will occupy a relatively small proportion of the turbine platform.

[18] The location of the proposed wind farm is shown on the maps attached to this decision (Figure 1).

**Additional consents required**

[19] A number of additional resource consents may be required to authorise the proposal, but are not sought at this stage. If required until those consents are granted, the wind farm cannot be established. As these applications are not before us, nothing we say should be taken as an assessment of the merits.

[20] The additional consents are described in Appendix H of the Application for Direct Referral. It is recorded there that "[s]uch applications will <u>not</u> assist in the better understanding of the nature of this application" (our emphasis). The application for direct referral refers to applications for discharge permits and other land use consent applications that "may" be required subject to engineering design and the scale of the activity.[20] Other activities may yet be permitted or controlled under the Regional Plan.[21]

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[16] Hurley EiC at [2.29]-[2.32].
[17] Morrison EiC at [4.2].
[18] Morrison EiC at [4.10].
[19] Morrison EiC at [4.5].
[20] These concern discharge permits and land-use consents in relation to activities on private access roads, laydown and disposal areas and the substation.
[21] This includes consents for the storage of hazardous substances and overhead electricity reticulation in the bed of a river.

[21] The District Council did not take issue with this and we have no basis to determine now whether additional consents are required. It is on the basis that additional consents may not be required that we proceed to determine this application.

**The parties**

[22] We have recorded the parties to the appeal and the direct referral proceedings in Attachment 1 to this decision.

[23] The application directly referred to the Court attracted a large number of submitters some of whom are also parties to the original appeal. Of the 72 persons who made a submission on the direct referral, 24 gave notice of their intention to be heard. At the hearing eight parties either gave evidence and/or made representations (submissions).

[24] We have considered the submissions made on the applications for direct referral whether or not the submitter subsequently participated in the Court's hearing. We record now our indebtedness to those persons who appeared without legal representation. We appreciate court proceedings are time consuming and for some a daunting prospect. We found valuable their measured thoughtful evidence and informed perceptive questioning of witnesses.

[25] Of those who appeared, we summarise the parties concerns in the following paragraphs.

***The Energy Efficiency and Conservation Authority (EECA)***

[26] EECA presented legal submissions and evidence from Mr Thomas Torrens in support of the wind farm proposal. EECA highlighted the proposals many positive benefits (which were largely uncontested) and drew attention to the key provisions within the National Policy Statement for Renewable Electricity Generation (**NPS REG**) which took effect from May 2011. While the NPS REG does not set a national target for electricity generation from renewable resources the preamble refers to central government's strategic target of 90% generation.

[27] EECA also referred to a number of other draft national policy statements. We have considered these in the context of the matters for which they were raised, but have not placed any weight on them as they may yet change.

***New Zealand Wind Energy Association***

[28] The New Zealand Wind Energy Association appeared in support of the proposal. The Association's functions are to promote, encourage and enable the update of wind energy. Mr Fraser Clark highlighted the benefits of the proposal and how it fits with government policy.

***Dr Glen Metcalf***

[29] Dr Glen Metcalf made a submission opposing the wind farm. Dr Metcalf has a range of concerns including the effects of the proposal on the limestone ecosystems, the permanent loss or fragmentation of habitats, the effect on threatened, at risk and regionally uncommon plants, the loss of ecotones and sequences, the reduction of intrinsic ecosystem values and the increase in fire risk.

[30] Dr Metcalf was critical of the approach taken by MainPower in seeking consent for three different turbine layouts. As a consequence she is concerned that there is inadequate information by which to assess the proposal.

[31] Finally, Dr Metcalf expresses dissatisfaction with what she says describes as "provisos" in the conditions of consent.

***Mr Jim Young***

[32] While Mr Jim Young has a particular interest in the Canterbury gecko his submission also addressed wider issues. He agrees that this is the best site available to MainPower but doubts the economic analysis put forward in support of the application. He speculates that a series of small wind farms may be as productive. He is particularly concerned with the proposal to translocate Canterbury gecko from the construction site to other locations on Mt Cass. Like Dr Metcalf he expressed concerns about a condition wherein MainPower may not follow its experts' advice on the routings of roads and turbines.

[33] Mr Young is not opposed to wind farms per se, rather his objective in participating at this hearing is to ensure there is careful development of the wind resource at this site.

***Mr and Mrs Hamish and Katrina McLachlan (the McLachlans)***

[34] We received individual submissions from Mr and Mrs Hamish and Katrina McLachlan and Mrs McLachlan also gave evidence. The McLachlans farm a property west of Mt Cass. They estimate that the wind farm (or at least the north-eastern end) would be visible from 75% of their property, albeit not their house. The closest turbine would be 1 km from their boundary.

[35] The McLachlans are opposed to the wind farm. Their principal area of concern is for the health and wellbeing of one of their four children. This child is a person on the autism spectrum. They have concerns as to the potential effects of the wind farm and its impact on their child and, as a consequence, upon the family-at-large. These effects arise in relation to the level and characteristics of noise. We respond to their concerns in some detail in the noise section of our decision.

***Mr Christopher Herbert***

[36] Mr Herbert presented a submission opposing the wind farm proposal. He expressed concerns about a number of matters including the health of the McLachlans' child, that the presence of the wind farm could reduce the value of his farm and that the benefits of the proposal to the community are likely to be overstated particularly if MainPower was to transfer the consent to another party. He held strong reservations about the noise evidence particularly given the experiences with wind farm noise elsewhere and also held concerns about the management of the fire risk and bird-strike.

***Mr Barry Rich and Ms Lynette Atkinson***

[37] Mr Barry Rich and Ms Lynette Atkinson own a small landholding on the western foothills of Mt Cass. They oppose the wind farm. Before she retired Ms Atkinson was the principal of a primary school. She expressed concern about the visibility of the turbines from the Omihi and Waipara Schools (she estimated their location to be 3 km west of the site). These concerns arise also in relation to children with autism or Asperger's syndrome.

[38] Both are concerned about the loss of their visual amenity, the adverse effect on the landscape and noise effects. Mr Rich, in particular, has had a long association with this area and raised concerns about the stability of the site and the ecological effects of the wind farm.

***Mr Gary Thomas and Ms Phoebe Vincent***

[39] Mr Gary Thomas is a producer of fine wines with a vineyard situated on the western foothills of Mt Cass.

[40] Mr Thomas is concerned about the effects of the wind farm on tourism associated with Waipara's fledgling fine wine industry. This industry is located in Waipara because of its limestone soil types and mesoclimate. The industry derives significant earnings through wine tastings, vineyard sales and other related hospitality activities. The Waipara landscape is important as the setting for these activities and he is concerned the landscape will be adversely affected and that this will impact on sales.

[41] We heard separately from Mr Thomas' partner, Ms Phoebe Vincent. She shared many of her husband's concerns and responding to MainPower's witnesses emphasised the importance of the landscape as the context in which fine wine tourism has developed. She is concerned that the proposal jeopardises this, recreational opportunities, and generally the quality of life they presently enjoy. Mr Thomas and Ms Vincent doubted the benefits of/justifications for the proposal, including the need to generate power within the District.

***Mr Don Vincent***

[42] In common with other residents who gave evidence or made representations to the Court Mr Vincent sought that the application be declined. He spoke of the importance of the Mt Cass landscape, and its "iconic ridge". He too is concerned about the effects of noise, weed infestation and the like.

***Mr Michael Eaton***

[43] Mr Michael Eaton is a well known painter, successful winegrower and long time resident of Glenmark. He is concerned that the wind farm will be an "ecological

disaster" and that it will result in weed infestation of this ecologically significant area. The wind farm will give rise to "visual pollution" and consequently will have a deleterious effects on local tourism into which there has been considerable investment.

***Mt Cass Ridge Protection Society (the Society)***

[44] The Society was represented at the hearing by Mr Malcolm Wallace. The Society opposes the application; its concerns are wide ranging and include the adverse effects on the site's geology, ecology and landscape and the effects on the coastal environment. The Society says the recreational amenity of the existing Mt Cass walkway will be diminished. If consented, however, the Society supports the extension to the walkway but says the walkway should be unformed.

[45] The Society also submits that the offset/environmental compensation package is inappropriate and/or unnecessary. It says that the proposed conditions will be ineffective for their purpose. It has clear views on the lapsing of the consent and about site restoration.

***The Hurunui District Council***

[46] The District Council takes a neutral position in relation to the modified proposal. Counsel for the District Council, Mr David Caldwell, submits that subject to the appropriate conditions the modified proposal is "consentable ... that is, there is nothing which would, or indeed could, amount to a veto on the granting of consent".[22]

[47] The wind farm has been significantly modified from that considered by the District Council's commissioners in 2009. The District Council accepts the proposal's positive effects and recognises the importance of renewable energy.[23] Nevertheless the District Council's witnesses held a number of concerns about the effects of the proposal on a ridge feature (which it says is an outstanding natural feature), the effects on the landscape and visual amenity and also upon the site's ecological values and would have considerably more restrictive conditions imposed if consent was granted.


[22] D Caldwell Opening submissions at [7].
[23] D Caldwell Opening submissions at [15].

**The law**

[48] The site is zoned Rural in the Hurunui District Plan and land use consent is required for a number of activities which are described in the planning evidence of Ms Jane Whyte and Ms Helga Rigg. Under the District Plan the proposal is a discretionary activity and therefore must be considered under section 104B and 104(1) of the Act.[24] In particular section 104(1) requires that, subject to Part II, we must have regard to the following matters:

- the actual and potential effects of the proposal on the environment;
- the provisions of the relevant statutory documents, being:
  - the National Policy Statement for Renewable Electricity Generation 2011;
  - the New Zealand Coastal Policy Statement;
  - the Hurunui District Plan;
  - the Regional Policy Statement; and
- any other relevant matter.

[49] In terms of those other relevant matters we have had regard to the draft National Policy Statement on Indigenous Biodiversity although little weight can be given to this as it is a draft and may change. We have also had regard to the New Zealand Biodiversity Strategy 2000.

***The purpose and principles of the Act***

[50] The Act has a single purpose which we set out as follows:

> Section 5: Purpose
>
> (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
>
> (2) In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people

[24] We note that different provisions apply to the appeal than the direct referral. That is because the direct referral was lodged after the 2009 Resource Management (Simplifying and Streamlining) Amendment Act came into force. We have applied the Act as amended by 2009 Amendment Act but do not consider anything arises that would materially alter our assessment and exercise of discretion under the different provisions.

and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while—

(a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

(b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and

(c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[51] Sections 6 – 8 of Act are important as these inform and assist the purpose of Act.[25] Section 6 lists matters of national importance that are to be recognised and provided for in this decision. They include (relevantly):

(a) The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:

(b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:

(c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:

...

(e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.

And section 7 (again relevantly):

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—

(aa) the ethic of stewardship

(b) the efficient use and development of natural and physical resources:

...

(c) the maintenance and enhancement of amenity values:

[25] *Beda Family Trust v Transit New Zealand* Judge Whiting A139/2004 at [24].

(d) intrinsic values of ecosystems:

...

(f) maintenance and enhancement of the quality of the environment:

(g) any finite characteristics of natural and physical resources:

...

[(j) the benefits to be derived from the use and development of renewable energy.

Finally, section 8:

> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

[52] On large infrastructure proposals such as this one it is not unusual to find tension between the values referred to in Part 2. As the Board of Inquiry into the New Zealand Policy Statement Renewable Electricity Generation 2011 (**NPS REG**) observed (and we agree):[26]

> ... the values referred to in Part 2 can be incommensurable because there may be no common factor or metric that can be used for balancing or weighing them when making a value judgement. A value choice is often required where one value is chosen and another is rejected.

[53] Under Part 2 we are required to make an overall broad judgment whether the proposal promotes the sustainable management of natural and physical resources. That recognises that the Act has a single purpose. Such a judgment allows for comparison of conflicting considerations, the scale and degree of them and their relative significance in the final outcome - *North Shore City Council v Auckland Regional Council*.[27] This means where, on some issues, a proposal is found to promote one or more of the aspects of sustainable management, but on others it is found not to attain, or to attain fully, one or more of the aspects described in subsections 5(a), (b) or (c) it would be wrong to conclude that the latter overrides the former with no judgment of scale or proportion.[28]


[26] NPS REG at [49].
[27] 97 NZRMA 59 at [93].
[28] *Genesis Power Ltd v anor v Franklin District Council* A148/2005 at [51].

[54] As there are competing Part 2 values we have regard to the Act's statutory hierarchy as between sections 6, 7 and 8 as part of the balancing exercise.[29] In doing so we keep in mind the requirement that the matters of national importance stated in section 6(a) and (b) are to be protected from inappropriate development; but that section 6(c) is not qualified in this way. However, these sections are subordinate to the Act's primary purpose being sustainable management of natural and physical resources and are not an end or an objective in their own right. Nor are their provisions to be achieved at all costs. Rather:

> The achievement which is to be promoted is sustainable management and questions of national importance, national value and benefit, and national needs, must all play their part in the overall consideration and decision.[30]

[55] MainPower submits that the effect of the NPS REG is that a wind farm is appropriate "unless there are strong and compelling reasons to override this national interest".[31] We do not accept this submission.

[56] The provisions of the National Policy Statements together with the other statutory documents guide decision-makers when making value choices. The preamble to the NPS REG states that in some instances the benefits of renewable electricity generation can compete with matters of national importance as set out in section 6 of the Act, and with matters to which decision-makers are required to have particular regard under section 7. The objectives and policies are intended to guide applicants and decision-makers on an application for resource consent.[32] However, there is nothing in its language or provision that creates a presumption that the matters of national significance in the NPS REG are to be given greater weight than those in section 6 or to prevail over the statutory purpose.

[57] We agree with and adopt what was said by the Board of Inquiry in the *Upper North Island Grid Upgrade Project* (cited with approval by the Board of Inquiry – *Renewable Electricity Generation* at paragraph 52) that:


[29] Ibid at [55].
[30] *NZ Rail Ltd v Marlborough District Council* 94 NZRMA 70 at [86].
[31] Opening Submissions, MainPower, at [5.31].
[32] NPS REG 2011 Explanatory Note at page 8.

> Subject to Part 2, the NPS is to be applied by decision-makers under the Act, but not as a substitute for, or to prevail over, the RMA's statutory purpose or the statutory tests. It is a relevant consideration to be weighed along with other considerations in achieving the sustainable management purpose of the Act. The objectives and policies of the national policy statement are intended to guide decision-makers in considering requirements for designations for transmission activities and in making decisions on resource consents.[33]

**Issues for consideration and determination**

[58] As all parties have accepted that Mt Cass has areas of significant indigenous vegetation and habitat of indigenous fauna, the key issues for consideration and determination for the proposed wind farm are:

*The wind resource*

- the quality of the wind energy resource at Mt Cass;
- the benefits of the proposal in the context of New Zealand's electricity market; and
- the potential benefits and costs of the wind farm on the regional and local economies.

*Geomorphology, geology and hydrogeology*

- the effects on the geomorphology, geology and hydrogeology of the site from the construction and operation of the wind farm.

*Fire*

- whether the wind farm creates a risk of fire and if so, can the risk be managed?

*Ecology*

- the effects on indigenous biodiversity and ecosystem function; and
- whether these effects are able to be avoided, remedied or mitigated by the proposed biodiversity offset.

[33] Final Report (September 2009) at [221].

*Landscape*

- whether there is an outstanding natural feature in the area of the proposed wind farm;
- whether Mt Cass is within the coastal environment; and
- will the wind farm result in an adverse effect on the landscape (including any natural features) and the values derived from or supported by the landscape?

*Noise*

- are the levels of sound and the characteristics of sound produced by the wind farm adverse and if so then to whom?

*Statutory documents*

- to what extent is the proposal consistent with the provisions of the statutory documents?

[59] We consider these issues in turn setting out our findings and our evaluation in the context of the district and regional plans.

**The wind resource**

[60] We commence our evaluation by considering the wind resource at Mt Cass, which after all, is the subject matter of the resource consent application.

***What is the quality of the wind energy resource at Mt Cass?***

[61] Evidence on the wind resource at Mt Cass was provided on behalf of MainPower by Mr Philip Wong Too a senior engineer with specialist international wind energy consultancy, Garrad Hassan. Mr Wong Too has over 13 years of experience in wind monitoring and energy assessments as well as in the design, construction and operation of wind farms.

[62] We draw on Mr Wong Too's evidence (which was largely uncontested) to provide a general overview of the site's wind energy. We also address a related issue and that concerns the degree to which the project's economic viability might be affected by uncertainties in the assessment of the wind resource.

[63] Mr Wong Too's evidence was that following several years of monitoring, Mt Cass has been assessed as having a Class 1/Class II[34] wind resource, acceptable turbulence levels and an expected output of between 75% and 90% of the time.[35] It is his assessment that Mt Cass has the best wind resource for a wind farm in North Canterbury.[36]

[64] While existing or consented New Zealand wind farms are located primarily in areas with Class I wind speeds, most of these Class I sites have been used up with the result that sites on the borderline between Class I/Class II such as Mt Cass are now becoming economically viable to develop.[37]

[65] From his analysis of the wind resources at sites throughout New Zealand, Mr Wong Too is of the opinion that a wind farm at Mt Cass will positively add to the geographical diversity of the country's wind energy generation.[38]

[66] Mr Wong also notes that the capital cost of wind turbines can be as high as 70% of the total cost of a wind farm. As such, developers normally seek to identify a range of suitable turbine options in their wind farm proposals in order to be able to optimize price competition when it comes to turbine supply. Hence MainPower's decision to include the three turbine options (R33, R60 and R90) at Mt Cass. Mr Wong Too considers each of these to be a viable alternative.[39]

[67] Mr Young questioned Mr Wong Too about his wind energy assessments and the potential for uncertainty in these assessments to affect the project's economics. Mr

[34] Based on International Electrotechnical Commission Classifications which vary from the highest, Class I (wind speeds 8.5m/sec to 10.0 m/sec) to Class III (wind speeds less than 7.5m/s.).
[35] Wong Too EiC at [5.10] and [7.7].
[36] Wong Too Transcript at 228.
[37] Wong Too EiC at [5.12].
[38] Wong Too EiC at [7.4].
[39] Wong Too Transcript at 231.

Wong Too advised that his company has its own specialised uncertainty analysis software although he could not recall whether this had been used for Mt Cass.

[68] His opinion on the potential effects of uncertainty in the wind energy assessment is best summarised in this exchange with Mr Young:[40]

Mr Young:

> But in order to judge whether your wind farm will be economic, isn't this important to know, you know, the degree of uncertainty you are facing here?

Mr Wong Too:

> Yes, but ... at this stage of the game where there are a large number of uncertainties around turbine sizes, turbine types, things like that, say a 10 to 20% error uncertainty in the energy calculations will pale into insignificance in the (context) of a 20% exchange rate fluctuation over two years, or a 20% change in turbine prices over two years or, I mean 100% fluctuations in wholesale electricity prices on a year to year basis. I mean, the energy uncertainty is only one relatively small part of the overall uncertainties facing the project.

[69] We find that Mr Wong Too has undertaken a competent assessment of Mt Cass's wind energy.

***The benefits of the proposal in the context of New Zealand's electricity market***

[70] The evidence of Mr Greg Sise on the benefits of a wind farm at Mt Cass in the context of New Zealand's electricity market was taken as read and not contested. For completeness we include here a brief summary of the key benefits identified by Mr Sise:[41]

- a depression in electricity spot prices with these being passed on to consumers most probably through delays in future price increases;
- enhanced security of national electricity supply particularly in dry years when hydro outputs are reduced;
- a reduction in losses in the transmission grid; and
- reduced $CO_2$ emissions from the displacement of thermal generation.

[40] Wong Too Transcript at 222.
[41] Sise EiC at [8.1].

***The potential benefits and costs of the wind farm on the regional and local economies***

[71] Evidence on the economic benefits and costs of developing a wind farm at Mt Cass was provided by Mr Michael Copeland. This was also taken as read.

[72] Mr Copeland identified the same national energy benefits as Mr Sise. In addition he concludes that there would be improved economic wellbeing for the Canterbury region from:

- enhanced employment opportunities, income and expenditures particularly during the construction of the wind farm and to a lesser extent during its operation;
- opportunities for local businesses to supply goods and services; and
- an increase in economic efficiency from the better utilization of existing local infrastructure.

[73] Mr Copeland also discusses a number of economic costs which could arise from the construction of the wind farm. The economic costs and Mr Copeland's assessment of each are as follows:[42]

- a potential loss of agricultural production - Mr Copeland's opinion is that the cost of any lost production will be offset through land rental payments from MainPower, and that there will be no external costs from the wind farm which will need to be borne by the local community;
- a potential loss of tourism expenditure - based on the advice of Mr Greenaway and Dr Stevens that an enhanced walkway along Mt Cass Ridge should attract more visitors, Mr Copeland concludes that there should not be any reduction in local tourism expenditure as a result of the development of the wind farm. (More specific detail on the effects of the proposed wind farm on local tourism is set out elsewhere in the decision);



[42] Copeland EiC at [7.]1-[7.9].

- the timing of wind farm development - while Mr Copeland acknowledges that there has been a slowdown in New Zealand's current economic activity and a corresponding reduction in demand for more electricity, this slowdown is expected to last for only 1 or 2 years with increasing demand restored after that;
- whether there would be negative impacts on property values - Mr Copeland notes that some submitters have expressed concern that potential noise effects from the wind farm could have an impact on the value of their properties. As he is not qualified in property valuation and his comments are restricted to more generic economic matters. In fact we heard no expert evidence on the specific issue of the potential effects of the wind farm on property values; and finally
- the loss of biodiversity, landscape and recreational values - Mr Copeland's opinion is that it is better not to attempt to estimate monetary values for these effects but to leave them to be part of the overall judgement under section 5 of the Act. We agree with him and have considered both the costs and benefits to the local and regional economies in our overall evaluation of the proposal under Part 2 of the Act, where we consider also the benefits of the proposal in the context of renewable electricity generation.

**Geomorphology, geology and hydrogeology**

[74] We turn next to our consideration of the effects on the geomorphology, geology and hydrogeology of the site from the construction and operation of the wind farm, focusing in particular on the following sub-issues:

- the importance of Mt Cass's geomorphology;
- the protection of subterranean features from the effects of the wind farm and vice versa;
- the protection of the limestone pavement at road crossings;
- the design storm;

- the design and implementation of a monitoring programme for detecting and controlling potential contamination of underground water;
- the site's seismicity;
- the stability of boulders on the northern escarpment; and
- findings, including the conditions of consent for geomorphology, geology and hydrogeology.

[75] Evidence on these matters was presented for MainPower by Professor Paul Williams, an internationally recognised expert in the geomorphology and hydrology of limestone and karst formations; and for the District Council by Dr Jack McConchie, a principal water scientist from Opus International Consultants, also an expert in geomorphology, hydrology and regional planning.

[76] Professor Williams[43] (supported by Dr McConchie)[44] provided helpful explanations of a number of terms used throughout the hearing to describe the geomorphology and hydrology of the Mt Cass site. These are paraphrased here:

- *geomorphology* is the study of landforms with a focus on the form of the ground surface and the processes which mould it;
- *hydrology* is the study of water in the environment, in the atmosphere, on the surface and below ground;
- *hydrogeology* is a branch of hydrology which is concerned mainly with underground water (or groundwater);
- *karst* is the germanicised form of the word *Kras,* with karst landscapes being limestone topography characterised by sinking streams, underground rivers, caves, dry valleys and springs;
- *dolines* (often referred to as "sinkholes") are enclosed depressions in karst formed by the dissolution of bedrock ("solution dolines"), by the collapse of a roof of a cave ("collapse dolines") or by the movement of superficial deposits such as soil or alluvium down widened joints into underground cavities leaving a dimpled surface (typical of the Mt Cass dolines);

[43] Williams EiC at [3.1-3.10].
[44] McConchie EiC at [15].

- a *cuesta* is an asymmetric ridge built of sedimentary rocks elongated along the strike of the strata, with a steep front slope (called a scarp or escarpment) and a gentle back slope more or less parallel to the dip. At Mt Cass the scarp runs more or less along the north side of the ridge and the dip more or less along the south side;
- a *karrenfield* is an assemblage of limestone pavements.

[77] Professor Williams and Dr McConchie met in November 2009 to discuss the geomorphology and hydrogeology of the wind farm site. A document signed by both experts on 18 January 2010 titled *Final Agreement on Geomorphology Following Caucusing on 23 November 2009* records what they refer to as their agreement in principle on all matters surrounding the geomorphology (and hydrogeology) of the site (we refer to this as the **joint statement**).

[78] We heard also from Matthew Naylor, who is a senior engineering geologist from MWH Ltd with specialist geological and geotechnical expertise in the investigation, design and construction of roads and embankments and cuttings in karstic features. Mr Naylor was engaged by MainPower to develop a site-specific methodology for mapping the Mt Cass landforms and to carry out a preliminary geological and geotechnical review of the proposed wind farm roads and turbine foundations.

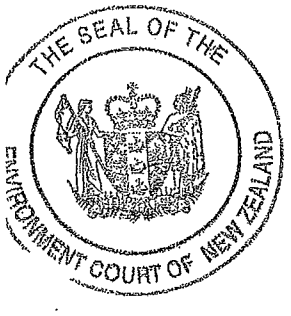
[79] The mapping undertaken by Mr Naylor was entered into a GIS database which was then used by a number of experts to evaluate the effects of the proposed development on the different types of landform. Table CG172.2, 27 May 2011 attached to Mr Hurley's rebuttal evidence sets out, for each type of limestone landform, the total area within the Mt Cass ecosystem, the disturbance required for each of the three turbine options, and the area of the disturbance as a proportion of the total area. For all intents and purposes the areas for the three turbine options are the substantially the same.

[80] Mr Naylor's definitions of the different types of limestone landform, the disturbances required and their proportion of the total area are as follows:

- *pavement* – a continuous relatively flat or moderately inclined surface with an organised system of open near-vertical joints which fully penetrate the surface limestone bedding. Disturbance required including areas which are to be buried, 1.21 ha or 0.87% of total area (R60 option);
- *boulder field* – areas to the *south* of the ridge crest with 30% to 50% of the natural ground surface covered with boulders supporting vegetation other than just pasture grass *or* over 50% of the natural ground surface covered with boulders and supporting any form of vegetation. Disturbance required, 0.48 ha or 0.50% of total area (all options);
- *scarp face boulder field* – boulder fields to the *north* of the ridge crest. Disturbance required, 0.67 ha or 1.49% of total area (R90 option);
- *cliff* – steeply inclined areas of exposed in-situ rock forming parts of the slope *north* of the ridge crest. Disturbance required, 0.02 ha or 0.49% of total area;
- *scree* – sloping areas *north* of the ridge crest with over 50% of the ground surface predominantly free of topsoil and vegetation, with a surface cover of gravel sized limestone fragments. Disturbance required, nil.

[81] We note in particular the major reduction in pavement disturbance from that required for the original layout to that required for the mediation layout. For example, for the R60 option, the disturbance reduced from 4.29 ha to 1.21 ha.

[82] Dr Lloyd for the District Council sought an amendment to Mr Naylor's definition of boulder field.[45] We accept Mr Naylor's response that from a geomorphological perspective, he considered that his definition was little different from that proposed by Dr Lloyd and that it should not be changed. Further, as the definition, mapping and areas of disturbance specified in the proposed conditions are linked and interdependent, any change in one definition would necessitate remapping and revision of the overall clearance figures.[46]




[45] Lloyd EiC at [227].
[46] Williams EiC at [3.1]-[3.10].

[83] In response to a concern raised by Mr Davis as to the accuracy of the limestone mapping, Mr Naylor advised that a contingency of 20% had been added to his assessments so as not to underestimate the extent of each of the disturbance areas.[47]

***The importance of Mt Cass's geomorphology***

[84] In the joint statement, Professor Williams and Dr McConchie agreed that the Mt Cass ridge is a fine example of a cuesta and is a geomorphic feature of regional significance. They also agreed that the listing of Mt Cass in the Geopreservation Index of the Geological Society of New Zealand is justified, although they note that the index is compiled from relatively unscreened material, is not peer reviewed and has no legal standing in its own right.

[85] In his evidence-in-chief Professor Williams concludes that while Mt Cass ridge is a fine example of a cuesta of regional significance, in proportion to its total area the impact of the wind farm would be small and that even though the potential impact on the karrenfield would be greater, in his view it would not be a major effect.

[86] For his part Dr McConchie concludes that the karst of the Mt Cass cuesta has significance at a regional and district level and "its diverse and distinctive and impressive range of karst features" are unlikely to be replicated elsewhere.[48] It is his opinion that the revised layout will avoid what he describes as the "best" landscape elements, and that the uncertainties of the proposal and its potential effects can best be accommodated through independent project reviews and comprehensive monitoring.

***The protection of subterranean features from the effects of the wind farm and vice versa***

[87] In their joint statement the two experts recorded their agreement that little is known about the site's subterranean karst features such as drainage paths and caves and that it was difficult to evaluate the degree of risk these features might pose for the development of the wind farm – and, conversely, the potential for the development to damage the karst and its biota. They went on to say that to protect these subterranean features, drainage works should be designed to diffuse run-off through vegetated areas

[47] Naylor Rebuttal at [2.1]-[2.2].
[48] McConchie EiC at [26].

rather than through discharge into the sinkholes. The filling of sinkholes should also be avoided to preclude the risk of natural re-excavation from below by upward stoping (or mining) and subsequent collapse.

[88] The joint statement also included the experts' recommendations for roads and structures to avoid areas with sinkholes, and for measures such as ground penetrating radar and proof drilling to be used to confirm sub-surface conditions at the proposed locations of the turbines.

[89] Mr Naylor did not see any foundation difficulties for constructing turbines at Mt Cass provided suitable measures are followed. The measures he identified included locating the turbines at least 20 metres away from the scarp face to avoid areas of potential instability; avoiding sites with large open joints and sinkholes; where joints or small sinkholes were present, adopting remedial measures such as using piles or grouting open joints to improve bearing capacity; and developing protective measures for preventing sediment discharge into the joints or sinkholes.[49]

[90] Mr Naylor also agreed with Professor Williams and Dr McConchie that a range of engineering investigations should be undertaken as inputs to the detailed design of the wind farm and the determination of its final layout. He listed ground penetrating radar to identify depths to rock and potential voids, foundation borehole drilling, test pits, geotechnical hazard mapping, and laboratory testing to determine the properties of landslide materials.[50]

[91] Likewise, he identified a range of measures for ensuring that the turbine access roads can be constructed safely and to minimise their impact on the overall geomorphology of the site. These include stabilisation strategies for roads cut through limestone and, as for the turbine foundations, developing protective methods for preventing sediment discharge into the joints or sinkholes.[51]



[49] Naylor EiC at [4.2].
[50] Naylor EiC at [4.6].
[51] Naylor EiC at [4.3].

*The protection of limestone pavement at road crossings*

[92] In their joint statement, Professor Williams and Dr McConchie agreed that where access roads cross limestone pavement at a low gradient, covering the surface with limestone rubble will armour the surface and minimise destruction. This approach is supported by Mr Naylor.

[93] Referring to the two experts' joint statement for protecting limestone pavement at road crossings through burying, Mr Hurley notes that the adoption of this approach at three locations on the ridge between Mt Cass and Totara Peak will mean that no areas of limestone pavement will be permanently removed by road construction. While this may be so, in the ecology section of this decision, we address Dr Lloyd's concerns over the loss of limestone 'habitat' through the proposed burying.

*The design storm*

[94] In response to questions from the Court as to the appropriate design storm to be used for the design of detention features for run-off and sediment control, Professor Williams and Dr McConchie eventually agreed a 5% AEP (Annual Exceedance Probability) storm for the construction period and a 2% AEP storm for the permanent roads.[52] Dr McConchie pointed out that a 5% AEP design storm meant that there was a 5% chance of this design storm occurring every year. It was also preferable to use this terminology as opposed to that of a 1 in 20 year storm which could imply that such a storm would occur only once every 20 years.

[95] The agreement of the two experts on the design storm is reflected in Condition 39 which requires a design storm of 5% AEP of the appropriate design duration for the construction period and a design storm of 2% AEP for permanent roads.

***The design and implementation of a monitoring programme for detecting and controlling potential contamination of underground water***

[96] In answer to a question from the Court about the potential for contamination of underground springs from wind farm construction activity, Professor Williams advised that although Mt Cass is underlain by about a hundred metres of limestone, it is only the top Weka Pass layer which is well karstified. He had accompanied the biologist who

[52] Transcript at 902-906.

had undertaken the water sampling and saw that most of the springs are at the junction of Weka Pass and the underlying Amuri limestone layers. Surface drainage would pass quickly through the wide open joints of the Weka Pass layer, reach the top of the Amuri layer and then flow under gravity down the dip slope over a maximum of one or two days to the nearest spring.

[97] In their joint statement, Professor Williams and Dr McConchie had agreed that water quality monitoring should be undertaken at the main springs draining the site prior to, during and after construction, with this monitoring to include both aquatic indicator species as well as suspended and dissolved contaminant or pollutants including hydrocarbon indicators.

[98] They stressed that the monitoring programme should include records of bio-data such as stoneflies, mayflies and snails. These would give a clear indication of the presence of pollutants as evidenced through deaths or reductions in abundance of the bio-data.[53] If the monitoring detected pollutants at a particular spring, it should be possible to quickly find the source of this pollution by following the dip directly up the slope from the spring, identify the closest construction work site (the most likely pollution source), and then institute remedial measures to stop the contamination.

[99] Dr McConchie proposed a geomorphological consent condition which had the objective of the "prevention of any sediment and other contaminants from entering the subterranean karst and drainage lines".[54] In response to a question from the Court, he acknowledged that the conditions as drafted by MainPower used the word "minimise" which, even though much less certain than "prevent", he would somewhat reluctantly accept.[55] Professor Williams said that he would be happy with "minimise" provided the clear intent of the water and soil erosion management focussed on prevention. This opinion in our view balances the desirability of absolute prevention with practical reality.

[100] In addition to the proposed water quality monitoring sites at the springs on the south facing dip slope, in answer to a question from the Court the two experts agreed

[53] Transcript at 885.
[54] McConchie EiC at [74].
[55] Transcript at 887.

that monitoring should also be undertaken in the stream(s) on the northern side of the wind farm as these provide farm stock water.[56] As a result, Condition 41 has been amended to include an additional site at Smothering Gully Stream below the northern terrace.

***The site's seismicity***

[101] Mr Naylor notes that the site is in a zone of relatively high seismic activity although in his opinion no more than in other parts of New Zealand. It is also his opinion that the turbines and their foundations can be designed to withstand the level of seismic shaking anticipated for the site, with the design level to be confirmed through a site specific hazard assessment.[57] None of this was disputed.

***The stability of boulders on the northern escarpment***

[102] During its site visit, the Court observed a number of large limestone boulders located below the scarp face and above the realigned terrace road and the site of the proposed sub-station. During an earthquake, some of these boulders appeared to us to have a high potential for dislodgement, thereby posing a risk to the safety of personnel involved in the construction and operation of the wind farm.

[103] At our request Mr Naylor provided us with supplementary evidence on the stability of these boulders. In doing so, he advised that during a further site visit he had identified that most of the boulders were between 0.5 m and 1.5 m in diameter although some were up to 10 m. Included was a small number of very large boulders (less than 10) which had been significantly undercut and had only marginal stability with the potential to cause damage unless they are stabilised. Mr Naylor identified a number of boulder stabilisation techniques including removal, anchoring or propping as well as the construction of safety fences. He also noted that a seismic risk assessment will be undertaken at the design stage of the project and that this will be used in the design of individual stabilisation measures.

***Findings, including the conditions of consent on geomorphology and geology***

[104] Based on his assessments to date, the proposed risk and foundation design stage assessments and the mitigation measures proposed including the condition in the

[56] Transcript at 891-892.
[57] Naylor EiC at [4.5].

Construction Management Plan requiring minimisation of the visual impact of these measures, Mr Naylor considers that Mt Cass's geomorphology and geology is suitable for the safe construction and operation of the proposed wind farm.

[105] Dr McConchie is of the view that the proposed conditions of consent should ensure that the effects of the development of the wind farm on the site's geomorphology and water quality should be minimised in the first instance and mitigated whenever some effects are inevitable.[58]

[106] Professor Williams is satisfied that while the hydrogeology of the karst drainage system has not been fully explored, large caves are unlikely to be present, local catchment areas are small and aquifer volumes will be modest especially as these are freely drained by gravity. Overall he is of the view that if the wind farm is constructed and operated in accordance with the proposed conditions of consent including the proposed water quality monitoring regime, the potential effects on the site's hydrogeology and water quality will be minimised.[59]

[107] We find no reason to dispute the conclusions of these three experts and find also that the proposed conditions of consent relating to geomorphology, geology and hydrogeology should:

- adequately protect sub-surface drainage pathways;
- adequately protect existing cave features;
- result in an acceptable level of disturbance for the different types of limestone and in particular the pavement where this is crossed by access roads;
- following the stabilisation of the boulders on the northern escarpment, provide a safe working environment for personnel involved in the construction and operation of the wind farm; and
- with the proposed construction management plan and monitoring programme, minimise the potential for contamination of underground water sources.

[58] McConchie EiC at [89].
[59] Williams EiC at [8.1]-[8.5].

**Fire risk**

[108] In this section we examine the probability and consequences of a turbine catching fire. Evidence on this was provided by Mr Philip Wong Too. In addition, a submitter, Mr C Herbert raised concerns about the adequacy of MainPower's Draft Fire Management Plan.

[109] Mr Wong Too advised that the most likely source of a fire was from a malfunction in a turbine transformer. Transformers located in the nacelles of older turbines were not necessarily designed to be robust enough to accommodate the constant vibration of the turbine and this sometimes caused damage to the electrical wiring which could result in a fire. Conversely, modern transformers are designed with better protection and many were now being located in a cabinet on the ground adjacent to the tower base.[60]

[110] Mr Wong Too went on to say that other more recent safeguards for fire prevention included improved generator wiring, changes to the pitch valves and improvements to the bearings in the turbine gear boxes.[61] Operator competence and experience are also very important factors for minimising the risk of fire.

[111] Mr Wong Too pointed out that, even with the best safeguards, fires do occur from time to time.[62] For example, there is always the potential for human error and he quoted one instance where following the failure of a protection system, the turbine operator failed to complete adequate checks before reactivating the turbine and a fire resulted.

[112] There was little that could be done to extinguish a fire in a nacelle some 60 or 70m above the ground other than waiting until it had burnt out and there was the possibility that ground cover below the turbines could be set alight by falling debris. If a fire did occur, the wind farm turbine supervisory control and data acquisition system (**SCADA**) should enable rapid detection of the fire and trigger the earliest possible

[60] Wong Too Transcript at 232.
[61] Wong Too Transcript at 233.
[62] Wong Too Transcript at 232.

mobilisation of firefighters with the wind farm turbine roads providing speedy access for firefighting.[63]

[113] Mr Herbert was critical of MainPower's Draft Fire Management Plan claiming, for example, that the nearby Waipara Fire Brigade had not been identified in the plan.[64]

[114] MainPower's proposed Conditions 119 to 121 set out the requirements for the preparation of a Fire Management Plan (**FMP**). Condition 121 makes specific reference to the FMP including relevant contact details from Appendix G of the Ashley Rural District Fire District Plan 2009-201. We have not sighted a copy of this plan to establish whether or not the Waipara Fire Brigade is included in Appendix G but we would presume that it would be. In any case, we would not expect the conditions for the wind farm to include this level of detail.

[115] While we did not hear evidence on this, it would seem that the incremental risk of a fire from a wind turbine over the status quo for the Mt Cass site should be minimal. During the construction and operation of the wind farm, MainPower will have in place greatly improved access and a detailed FMP which currently do not exist for the site.

[116] We conclude that while the risk of fire cannot be eliminated, the design and operation of the turbines proposed for Mt Cass should result in an acceptable level of risk and that if there is a fire, MainPower's FMP will provide a sound approach for responding to this.

[117] Finally, Condition 120 has been amended to delete reference to "all parties", which at the time of drafting the condition was a reference to the parties to the proceeding.

***District Plan - assessment of natural hazards including the risk of fire***

[118] A wind farm at Mt Cass will be vulnerable to seismic events and geomorphologic processes. Objective 14 of the District Plan (the Plan) requires that the effects of natural hazards on the environment are to be avoided or mitigated, with



[63] Wong Too EiC at [9.3, 9.4].
[64] Transcript at 714.

priority given to community protection. Policy 14.3 requires that development is to take into account risks from natural hazards.

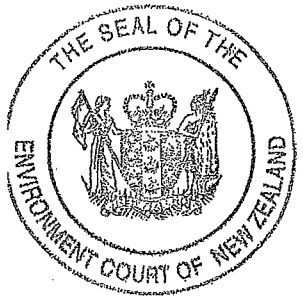
[119] Objective 10 and Policy 10.4 of the Plan require the provision of safe environments with the latter being "[t]o encourage development which fosters a healthy and safe built environment".[65]

[120] Objective 15 and Policies 15.4 and 15.5 include provisions for minimising the risk of damage from hazardous activities and the use of hazardous substances. The wind farm will require the use and storage of hazardous substances such as oil and fuel, particularly during the construction period. Having had regard to the assessment matters for natural hazards and hazardous substances set out in Section A9, we are satisfied that these are able to be controlled through careful design and site management and through the conditions of consent.

[121] Other requirements of Section A9 include an assessment of the extent to which the proposed development meets the objective, functional requirement and performance provisions of the New Zealand Building Code. We heard no evidence on the consents MainPower might require under the Building Code for the design and construction of the wind farm – nor did we expect to. Suffice to say that what we did hear was based on technologies and construction techniques well proven on other wind farms already built in New Zealand.

[122] We are satisfied that the FMP, once in place, will provide acceptable procedures for the management of the risk of fire and suppression if a fire should occur.

[123] Finally we consider the requirement of Section A9 for an assessment of the anticipated natural hazard damage and costs and the estimated benefits to the community of the proposed development. (Costs and benefits to take into account both monetary and non-monetary costs and benefits).[66]




[65] Similar provisions are contained in the RPS at Chapter 16 in objective 1 and policy 1.
[66] Section C1: Resource Consent Procedures, Assessment Criteria C.1.2.4 (h).

[124] Starting with the estimated monetary and non-monetary benefits to the community, we address these in our overall Part 2 evaluation of the wind farm proposal and do not repeat them here.

[125] The only obvious natural hazard we have been able to identify which could have the potential to affect the community (adjoining farmers) would be if there was a breakdown of the proposed water quality control procedures with stock water becoming contaminated and the health of farm stock being threatened.

[126] This is directly related to Objective 4 and Policy 4.1 of the Plan which are concerned with the protection and enhancement of the quality and quantity of the District's freshwater resources. Some parties did raise concerns about the contamination of water resources used in farming. These are important resources and their values are to be recognised. In this regard Condition 41 has been amended to include water quality monitoring at the main springs (which are listed) on the south facing dip slope and at the Smothering Gully Stream on the north slope.

[127] We accept the advice of the geomorphology and hydrogeology experts that if MainPower's proposed wind farm at Mt Cass is constructed and operated in accordance with the conditions of consent including the proposed water monitoring regime, then these will satisfy the freshwater provisions of the Plan. On this basis, we find that the natural hazard risk of the wind farm contaminating farm stock water is at an acceptably low level.

*Other matters – unrelated to geomorphology or natural hazards including fire*

[128] Having had regard to the evidence presented on behalf of MainPower (which was uncontested) and the assessment matters set out in the Plan we are satisfied that the proposal also achieves those policies concerning the maintenance of air quality (Policy 10.10),[67] efficient production and use of energy (Objective 11, Policy 11.1), and the safe and efficient use of the transportation network (Policy 12.10).

[129] In the next section we consider the area's ecological values.

[67] Conditions 32, 35 and 63.

**Ecology – the effects on biodiversity and ecosystem function at Mt Cass**

[130] The Mt Cass range supports a delightful mosaic of native bush interspersed with grasslands largely comprising silver tussock and exotic pasture. The bush remnants are most evident on the south facing dip slope of the cuesta being concentrated on areas of limestone pavement and outcrops or in deep gullies. While grazed by cattle and sheep, and hosting various animal pests, the range is also home to native animals, with lizards and birds being of particular interest in this case.

[131] The combination of the limestone features, regenerating bush along the ridge and relict forest communities on the dip slope provides a series of distinctive habitats and a diverse range of ecotones between limestone pavement, boulder field, forest, shrubland and grassland communities. There is high species abundance, richness and diversity. It has been described as one of the best examples of a limestone ecosystem in the eastern South Island. Accordingly, there is agreement that the range qualifies as an area of significant indigenous vegetation and provides significant habitats for indigenous fauna in terms of section 6 of the Act.

[132] The ridge is currently farmed with grazing by sheep and cattle. Organic Farm Holdings Ltd owns the land to the west of Mt Cass. MainPower owns 168 ha of land extending along the ridge between Mt Cass and Totara Peak. Dovedale Farm Ltd owns the next 3 km to the east, including Totara and Oldham peaks, and Hamilton Glens owns the forked eastern end of the ridge.[68] There will be no change to farm management as a result of the proposed wind farm, on the properties not owned by MainPower.

[133] At the initial caucusing on the original proposal for the Mt Cass wind farm the ecologists were agreed that Mt Cass is an outstanding indigenous limestone ecosystem with the most significant values being concentrated along the ridge crest between Mt Cass and Totara Peak (some 3 km). They were also agreed that the potential adverse effects of the proposed wind farm could be summarised in ten categories:[69]


[68] Hurley EiC at [2.5].
[69] Ecologists' joint statement dated 13 January 2010 (thirteen experts).

- loss of limestone ecosystems, indigenous limestone vegetation and habitats;
- loss of a portion of threatened, at risk and regionally uncommon plant and animal populations;
- fragmentation of habitat, resulting in edge effects and isolation of populations;
- loss of part of ridge ecotones/sequences;
- disturbance/opportunities for weed/pest encroachment;
- reduced naturalness;
- interruption of ecological processes;
- increased risk of fire; and
- increased risk of contaminant/sediment discharge.

There was disagreement as to severity of these effects on the ecosystem and its constituent species and some experts considered proposed mitigation measures to also have adverse effects.

[134] As noted, following mediation the road network and turbine locations were revised and the 'mediation layout' proposed. The footprint of the wind farm and associated clearance of vegetation was set out in detail for each of the turbine sizes (and associated layout) proposed. The total area of each vegetation type within the Mt Cass ecosystem and the maximum vegetation clearances[70] (those for R60 turbine layout) are summarised below: [71]

| Vegetation | Mt Cass | Original clearance | | Mediation layout[72] | |
|---|---|---|---|---|---|
| | (hectares) | (hectares) | % | (hectares) | % |
| Pasture | 960 | 14 | 1.5 | 20 | 2.1 |
| Tussock | 58.4 | 2.0 | 1.2 | 3.0 | 5.2 |
| Shrubland | 200 | 2.9 | 1.5 | 0.71 | 0.36 |
| Forest | 185 | 2.3 | 1.2 | 0.09 | 0.05 |
| Other | 68 | 0 | | 0 | |
| **Total** | 1471 | 21.2 | 1.4 | 23.8 | 1.6 |

[70] Does not include temporary construction activities and fill areas in grasslands where any disturbance must be restored. Does include a 1 metre buffer and a 20% contingency in the calculation of the areas to be cleared.
[71] Figures have been drawn from Hurley rebuttal Appendix B and rounded.
[72] As further amended to avoid an area of forest on limestone as described in Hurley rebuttal at [47].

[135] It is clear from the table the mediation layout increases the clearance of pasture and tussock grassland while reducing the clearance of indigenous forest and shrubland. The biggest change is shifting the access road from the top of the ridge on the dip slope to the terrace below the scarp on the northern side. All ecologists were agreed that the mediation layout is an improvement and reduces adverse effects on the ecosystem. In a second round of caucusing, the ecological experts focused on four themes:[73]

- ecological values – agreed to be as described in the January 2010 statement;
- ecosystem resilience – given the current use of the site for grazing;
- effects of development – focusing on the limestone ecosystem, uncertainty associated with the possible presence of rare and cryptic species, and fragmentation effects; and
- biodiversity offset – limits of what can be offset and the adequacy of the model to demonstrate appropriateness.

[136] We heard evidence from ten ecological experts:

- Dr Sarah Flynn (called by MainPower) on the existing vegetation, proposed clearance and disturbance, changes to the grazing regime, and the biodiversity offset;
- Dr Raphael Didham (MainPower) on habitat fragmentation;
- Dr David Norton (MainPower) on rare plants and the metrics of the biodiversity offset;
- Dr Graham Ussher (MainPower) on the proposed biodiversity offset;
- Dr Kelvin Lloyd (District Council) on the importance of the ecosystem and the direct and indirect effects of proposal;
- Mr Mark Davis (Mt Cass Ridge Protection Society) on the adequacy of information, importance of ecosystem and effects of proposal;
- Dr Colin Burrows (Mt Cass Ridge Protection Society) on a holistic consideration of effects along the Mt Cass ridge;

[73] Ecologists' joint statement 9 April 2011 (Sarah Flynn, Kelvin Lloyd, David Norton and Graham Ussher) and Response to this joint statement (Colin Burrows and Mark Davis).

- Dr Richard Seaton (MainPower) on potential effects on avifauna;
- Ms Astrid van Meeuwen-Dijgraaf (District Council) on potential effects on avifauna; and
- Mr Trent Bell (MainPower) on potential effects on lizard fauna.

[137] Mediation, expert conferencing, and the subsequent exchange of evidence between the various ecological witnesses for the different parties have resulted in refinements to the rehabilitation and offset proposals, and amendments to the conditions of consent. The mitigation now proposed is to covenant[74] and protect 127 ha of land owned by MainPower. The land management, described and modelled as a 'biodiversity offset', involves:[75]

- exclusion of cattle;
- managed sheep grazing;
- trapping and removal of pest animals;
- natural regeneration of indigenous species;
- restoration planting of 1 ha trial plot with provision for a further 6 ha if required;
- weed control;
- monitoring of threatened plant species; and
- monitoring of biodiversity condition.

[138] While many issues and concerns have been settled or very much reduced, Dr Lloyd, Mr Davis and Dr Burrows remain of the opinion that the revised proposal will have significant adverse effects on the Mt Cass ecosystem.[76] Doctors Flynn, Norton and Ussher consider that the proposed biodiversity offset package would more than compensate for any adverse effects on the ecosystem giving a net gain in biodiversity values.[77]

[139] Given that we are dealing with an ecosystem here we cannot confine our assessment of effects to simply the immediate and direct effects on the wind farm

[74] MainPower's preference is a QEII covenant Memorandum dated 1 August 2011.
[75] Hurley EiC at [8.1]-[8.2].
[76] Lloyd EiC at [31]; Davis EiC at [90]; Burrows EiC at [44] to [46].
[77] Flynn ; Norton EiC at [6.5]; Ussher rebuttal at [4.5].

footprint. We must also consider the consequential effects over the longer term, the wider changes on the project site as well as interactions with the surrounding environment. This wider temporal and spatial context is critical to a full assessment of effects on the ecosystem. This raises issues of complexity and scientific uncertainty in the assessment of both the existing environment and the prediction of effects.

[140] After considering the position of the parties and the ecologists' joint statements explaining the areas of disagreement we identify five issues to be addressed:

(i) do we have sufficient information about the ecosystem?
(ii) what is the state and trajectory of the ecosystem under the current farming regime?
(iii) what is the significance of the proposed disturbance to vegetation and habitat?
(iv) does the proposed biodiversity offset make up for the loss and disturbance of vegetation and habitat?
(v) are the conditions of consent appropriate, certain and enforceable?

[141] Following cross-examination the experts giving evidence on ecosystems were empanelled as a group to answer questions of the Court (we refer to this as "hot-tubbing").

***Do we have sufficient information about the ecosystem?***

[142] The Mt Cass ecosystem area is long and narrow running about 9 km along the ridge and extending about 500 m down the scarp slope to the northwest and 800 to 1200 m down the more gentle dip slope to the southeast.[78] It sits within the Motunau Ecological District.[79] Exotic pasture extends up the northern face of the escarpment interspersed with tussock, mingimingi shrubland and forest remnants. The exposed ridgeline is a mosaic of mingimingi shrubland across pasture, mixed pasture and silver tussock grasslands, and broadleaf scrub on knolls and rock pavement. A variety of herbs occurs in cracks and cups on exposed limestone pavement. A series of forested ridges lie across the south facing dip-slope with shallow valleys in between covered in

[78] Flynn EiC Figure 1.
[79] New Zealand is divided into 268 ecological districts with characteristic landscapes and biological communities.

pasture and tussock grasslands. The low broadleaf dominated bush and scrub of the ridge crest grades into moderately high woodland (6-10 m) on the mid-slopes, and to tall podocarp/broadleaf forest further down the slope.[80] The forests on the upper slopes are mostly younger, regenerating since 1950, while those on the lower slopes are mature with emergent podocarps that may have persisted for some hundreds of years.[81]

*Vegetation communities*

[143] Dr Flynn (and others) had surveyed, described and mapped the vegetation communities of the Mt Cass ecosystem:[82]

| Community | Description of vegetation[83] |
|---|---|
| 1 | Pasture |
| 1(a) | Tussock grassland (>10% *Poa cita*) |
| 2 | Mingimingi – pasture grass shrubland |
| 3 | Broadleaf – (mingimingi) – (five finger) – (kohuhu) scrub |
| 4 | Kowhai – (broadleaf)/ongaonga forest |
| 5 | Mahoe – (houhere)/Raukaua – ongaonga – climbing fuchsia forest |
| 6 | Broadleaf – five finger – (mahoe)/(ongaonga) forest |
| 7 | (Matai)/mahoe – broadleaf – (lemonwood) forest |
| 8 | (Ribbonwood)/mahoe – kaikamako/ongaonga forest |
| 9 | Totara/five finger – mahoe/(pasture) forest |
| 10 | Totara – (matai)/kowhai – mahoe/kawakawa forest |

[144] Areas of matagouri shrubland, exotic pine forest, kanuka forest and scrub, and exotic willow forest were also mapped. While noting that the mapping of the vegetation communities was a combination of field surveys and extrapolation from aerial photographs, Dr Flynn was confident that it was an accurate and adequate description.[84]

[145] Mr Davis compared the mapping of pasture and tussock grassland communities at a number of locations on the eastern end of the Mt Cass ridge with his own observations in the field. While acknowledging the varying density of tussock in relation to the average 10% density cut-off he considered the mapping of tussock

[80] Flynn EiC at [2.7]-[2.9] and Burrows EiC at [28].
[81] Lloyd and Norton Transcript at 1121-1122.
[82] Flynn EiC at [2.4] and Figure 1 (as updated July 2011).
[83] The vegetation communities are named for the dominant species.
[84] Flynn EiC at [2.6] and rebuttal at [4.2].

grassland and the extent of clearance to be considerably under-estimated. He observed substantial tussock grasslands east of Totara Peak with cover from <5 to 50%.[85] Similarly Mr Davis considered the mapping of the woody vegetation and limestone features to have excluded a number of smaller patches and underestimated both the total area of such vegetation and the clearances.[86] Mr Davis noted that the vegetation on site was "very much a mosaic" and did not fit into the "neat categories" mapped.[87]

[146] Dr Flynn agreed that the tussock grasslands are patchy and vary widely in density. However, she considered the cut-off of 10% average cover to be conservative and the mapping to represent areas of reasonably consistent cover above 10%.[88] Her tussock survey used randomly selected sampling points and five one-metre quadrants along a 10 m transect. She considered this to be more objective and rigorous than Mr Davis' assessments and to result in accurate mapping of tussock grassland from the western extension through to Oldham Peak. She acknowledged that the sampling points were all along the proposed development footprint and did not extend down the dip-slope. The omission of tussock grassland areas on the lower slopes may have led to an underestimate of the extent of tussock within the Mt Cass ecosystem.[89]

[147] Dr Flynn also agreed with Mr Davis about the mosaic nature of vegetation and acknowledged the limits to the precision of the mapping given the inherent variability of all ecosystems. However she considered the mapping to be sufficiently accurate to enable an assessment of the scale and severity of effects in the context of the wider ecosystem.[90]

[148] The vegetation communities mapped provide a simplified representation of the complex mosaic of vegetation actually present on the site. While we accept that some individual plants, and groups of plants, have been missed in the mapping it is evident that some of the areas mapped as forest, shrubland and tussock also contain patches of exotic pasture. Similarly the different vegetation community types will grade from one to another and the boundaries drawn can only ever be an approximation of that

[85] Davis EiC at [18]-[24], [42].
[86] Davis EiC at [25].
[87] Transcript at 1147.
[88] Transcript at 1149.
[89] Flynn rebuttal at [4.12]-[4.15].
[90] Transcript 1148 and Flynn rebuttal at [4.17].

transition. Overall we are satisfied that the survey methodology and sampling carried out have adequately characterised and mapped the vegetation communities.

*Rare plants*

[149] Limestone ecosystems in different localities are known to support different assemblages of rare plant species.[91] Mt Cass hosts two nationally Threatened species, eight At Risk species and approximately 20 locally uncommon species.[92]

| **Risk category** | **Scientific name** | **Common name** |
|---|---|---|
| Threatened | *Australopyrum calcis* subsp *optatum* | Limestone wheatgrass |
| Threatened | *Heliohebe maccaskillii* | |
| At risk | *Aciphylla subflabellata* | Spaniard |
| At risk | *Carmichaelia kirkii* | Kirk's broom |
| At risk | *Raoulia monroi* | Fan leaved mat daisy |
| At risk | *Tupeia antartica* | White mistletoe |
| At risk | *Colobanthus brevisepalus* | Pin cushion |
| At risk | *Einadia allanii* | |
| At risk | *Pseudopanax ferox* | Fierce lancewood |
| At risk | *Senecio glaucophyllus* subsp *basinudus* | |
| Data deficient | *Senecio* sp aff *dunedinensis* | |

[150] Occurrences of the Threatened species, limestone wheatgrass and *Heliohebe*, have been identified and mapped across the site. Dr Lloyd considered the limestone wheatgrass to be "one of the most important values of the site".[93] In addition, the "conspicuous" At Risk species (including the Spaniard, Kirk's broom, fierce lancewood and white mistletoe) have been mapped. Mapping of less conspicuous At Risk taxa is not as comprehensive and has focused on the wind farm footprint. Dr Norton noted that many of the Threatened and At Risk species were plants of open sites and would have expanded their range given the deforestation of the site.[94] Dr Norton agreed with Dr Lloyd that not all instances of Threatened and At Risk species had been picked up in the



[91] Lloyd EiC at [37].
[92] Lloyd EiC at [38] and Norton EiC at [2.3]-[2.5] and Appendix B.
[93] Transcript at 1073.
[94] Norton EiC at [2.4]-[2.5].

survey work and "every time we go there we find something we haven't seen before".[95] None of the locally uncommon plant species have been mapped.[96]

[151] Dr Burrows noted the presence of a large number of plants of "exceptional interest" given the limestone substrate and local climate conditions. He commented on the lack of a comprehensive inventory of non-vascular plants. Dr Burrows considered the site to host species or subspecies that "appear to be confined to the location".[97] Dr Norton agreed that a range of species were present on the site although was not aware of any that were endemic to Mt Cass.[98]

[152] The mapping of Threatened and At Risk plant species gives an indication of the numbers and distribution across the site. While not comprehensive there is sufficient information to underline the importance and distinctiveness of the flora and to assess the potential adverse effects along the footprint of the wind farm.

*Invertebrates*

[153] While the ecologists considered the site to support an intact and regionally distinctive indigenous invertebrate fauna they were agreed that there had not been sufficient sampling in spring or summer to obtain an adequate understanding of its significance. Accordingly they could not agree as to the significance of potential adverse effects including loss of habitat along the ridge, reduced habitat connectivity, changes in habitat quality and alterations of species interactions and food web structures.[99]

[154] Dr Lloyd, Mr Davis and Dr Burrows considered the available data to be "inadequate to discount the possibility that the development footprint may intersect populations of fauna with poor dispersal capabilities and restricted distribution".[100] Dr Didham acknowledged that intensive sampling could better characterise the terrestrial invertebrates but there was little ecological information available to interpret such data. He considered such sampling to be unnecessary and simply assumed that highly diverse


[95] Transcript at 1152-1153.
[96] Lloyd EiC at [98].
[97] Burrows EiC at [33]-[36], [57].
[98] Norton rebuttal at [2.2].
[99] Ecologists' joint statement 13 January 2010.
[100] Ecologists' joint statement 9 April 2011.

and ecologically significant invertebrate fauna would be present.[101] Dr Didham had considered the possibility of impacts on species with low dispersal powers and was satisfied that this was a negligible concern given the mediation layout and proposed treatment of the two largest road crossings.[102] We further discuss these places where the road crosses the limestone ribs later in this decision.

[155] Doctors Flynn and Norton acknowledged the limitations in biological information on invertebrates. However, they maintained that high quality habitat would provide for conservation of the invertebrates.[103] Dr Burrows similarly observed "if the woodland at Mt Cass is thriving in a self sustaining way, so will be the fauna".[104]

[156] We accept that there is limited information on the invertebrate biodiversity at the site. We concur with Drs Flynn, Norton and Burrows that outcomes for invertebrates will depend on the quality of the habitat provided.

*Avifauna*

[157] Doctors Seaton and van Meeuwen-Dijgraaf were agreed[105] that the Mt Cass range provides a healthy and functioning ecosystem with respect to habitat for birds although noted that introduced predators and browsers could be limiting populations through predation and competition for food. The habitat is well connected within the site and has moderate connections to other indigenous forest and shrub, exotic forest and riparian vegetation. The bird population includes permanent residents and seasonal visitors, comprising 16 native and 15 introduced species. Most native birds are found in the dip-slope forests rather than on the scrub dominated ridgeline. Bellbird, silvereye and kereru are found in greater numbers during autumn and winter with falcon having only been recorded in June.[106]

[158] Four forest bird species are rare in the Motunau Ecological District – kereru, tui, rifleman and tomtit. Kereru have been recorded at the site, tomtits have been recorded in the past but were not seen in the latest surveys, and tui and rifleman are not known at

[101] Didham EiC at [9.22]-[9.23].
[102] Didham EiC at [10.9].
[103] Flynn rebuttal at [4.8]-[4.9] and Transcript at 980.
[104] Burrows EiC at [38].
[105] Avifauna caucus summary dated 15 January 2010.
[106] Seaton EiC at [3.6]-[3.8].

Mt Cass. In addition to tui and rifleman, other "missing"[107] species are kakariki and kaka.[108]

[159] The New Zealand falcon (Threatened) and the New Zealand pipit (At Risk) have been recorded at the site. Pipits are more likely to be found in areas of pasture or tussock grassland although have not been recorded in recent surveys.[109] Falcons have not been known to breed on the site and may be hunting or just passing through.[110]

[160] Dr van Meeuwen-Dijgraaf was concerned that the bird count methodology may fail to detect rare species or those that visit sporadically although accepted that the data indicated the range of species present.[111] Dr Seaton was confident that the bird count methodology would ensure the detection of even "more difficult to observe species".[112] In any event the ornithologists were agreed on the proposed monitoring programme (including two years' pre-construction baseline monitoring) should consent be granted.[113]

[161] Dr Seaton considered there to be a "very, very small chance" of migrant shorebirds passing through the site and Dr van Meeuwen-Dijgraaf agreed it was a "slim possibility" with the birds being more likely to follow the coast.[114] The pre-construction monitoring includes migrant shorebirds that may cross the site.[115]

[162] We are satisfied that there is sufficient information on avifauna to enable an assessment of potential adverse effects. We consider the adequacy of the conditions with respect to monitoring and mitigation of potential effects on avifauna later in this decision.

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[107] Birds that have not been recorded but could be expected at the site.
[108] Avifauna caucus summary dated 15 January 2010.
[109] Seaton EiC at [3.11].
[110] Seaton EiC at [3.22]-[3.24].
[111] van Meeuwen-Dijgraaf EiC at [14].
[112] Seaton rebuttal at [2.6].
[113] van Meeuwen-Dijgraaf EiC at [31] and Transcript at 566.
[114] Transcript at 581-582.
[115] Exhibit C Draft Mt Cass Wind farm Avifauna Management Plan.

*Herpetofauna*

[163] The herpetologists were agreed that there was suitable habitat for a number of lizard species although only three have been found on the site – Canterbury geckos, the common skink and McCann's skink. The Canterbury gecko population was high in abundance and conservation value although much less than it would have been in the absence of predatory mammals. Skink densities were considered to be low. There was an abundance of suitable habitat for Green geckos which are of high conservation significance.[116] While the early survey work had been "limited" Mr Bell has since carried out further surveys and is "reasonably confident" that the Green geckos (Jewelled and Rough gecko) and any large skink species have not persisted at Mt Cass.[117]

[164] The Canterbury gecko population was concentrated on the scarp face with the abundance being approximately twice that within the proposed wind farm development corridor. Mr Bell explained that geckos select deep narrow crevices with high levels of solar radiation.[118]

[165] We are satisfied that there is sufficient information as to the abundance and distribution of lizards on the site.

***What is the state and trajectory of the ecosystem under the current farming regime?***

[166] While the ecologists are agreed as to the values and significance of the site they do not agree on the state and likely future trajectory of the indigenous vegetation and associated habitat for fauna.

*The state of the site today*

[167] The ecologists were agreed:[119]

[116] Herpetofauna joint statement dated 10 January 2010 (Trent Bell and Marieke Lettink).
[117] Bell EiC at [2.6].
[118] Bell EiC at [2.10], [2.14].
[119] Ecologists' joint statement 13 April 2010 Appendix 3.

> The site contains one of the best examples of a limestone ecosystem, and the greatest extent of indigenous woody vegetation on limestone, in the eastern South Island, and the best dry, eastern podocarp-broadleaved limestone ecosystem remaining in New Zealand.
>
> The large size and relative compactness of the Mt Cass ecosystem is conducive to it being/becoming ecologically self-sustaining. Habitat patches are well connected internally.
>
> The site is less modified by human activity than other forest systems in the ecological district. The woody communities are in excellent condition despite the site being modified by historic Polynesian burning and subsequent European farming practices ... along with the incursion of exotic mammalian predators.
>
> The presence of regenerating forest and shrublands on limestone pavement as evidenced by comparison of 1950 and 2006 aerial photographs of the site, and high species diversity including endemic limestone taxa, demonstrates a high overall level of resilience within the ecosystem, but with variation across the site; significant risk of local population extinction for some species ...
>
> The potential for restoration and/or maintenance of significant ecological values (allowing for management input) is excellent.

[168] Dr Burrows described woodland vegetation as "tenacious and resilient at this site, despite inroads by stock".[120] In contrast Dr Didham considered the vegetation to be "obviously and unequivocally fragmented" and the remnants "heavily degraded by a range of disturbance processes".[121] Dr Flynn considered the condition of the vegetation to be variable across the site with "grazing impacts beneath forest and scrub ranging from moderate to severe, depending on accessibility to stock and feral deer".[122] Mr Davis accepted that there were severe localised effects from grazing but did not consider that to hold true for the site as a whole.[123]

[169] Dr Lloyd observed:[124]

> I believe this apparent contradiction reflects different scales of reference. Compared to the pre-human landscape, the indigenous forests of Mt Cass are certainly fragmented and degraded, as Dr Didham points out. However, compared to other areas of indigenous vegetation in the current

[120] Burrows EiC at [16].
[121] Didham EiC at [7.6]-[7.7].
[122] Flynn EiC at [6.12].
[123] Transcript at 1117-1118.
[124] Lloyd EiC at [59].

landscape, the indigenous vegetation at Mt Cass is remarkably intact and considerably less fragmented than other indigenous forest fragments in the Motanau ED, or on other eastern New Zealand karst systems.

[170] We concur with Dr Lloyd and accept that while there is obvious degradation, including fragmentation, the site has extraordinary value for its indigenous biodiversity and the vegetation has demonstrated a remarkable resilience to the ongoing stresses of both farming and pests.

*The impacts of grazing and the future under farming*

[171] The ecologists were agreed that grazing animals are affecting different elements of the ecosystem differently – to the benefit of some and the detriment of others. Reduction in grazing would enhance the condition of the forest vegetation while the limestone wheatgrass populations may face competition from exotic grasses and herbs.[125] The ecologists were not agreed as to the extent or seriousness of the effects of grazing and the implications for the future of the ecosystem.

[172] Dr Lloyd considered ecological processes of succession and regeneration to be occurring on the site. While noting that the forest vegetation had been affected by grazing animals he thought the inaccessible areas were substantial, dispersed across the site and sufficient to ensure regeneration of canopy tree species.[126] Dr Burrows and Mr Davis considered the aerial photographs taken between 1950 and 2004 to demonstrate widespread regeneration across the site.[127] Dr Burrows suspected a lack of water to be restricting the spread of vegetation across pasture.[128] Dr Didham considered natural regeneration would eventually link the scarp face and boulder field habitats to the north with the podocarp forest remnants to the south. He noted the limitation of natural regeneration by livestock browsing except in crevices of limestone pavement.[129]

[173] Doctors Flynn, Norton and Ussher considered grazing to be suppressing regeneration and succession of woody vegetation to the extent that the biodiversity values and viability would be compromised in the long term. They based their opinion

[125] Ecologists' joint statement 9 April 2011.
[126] Lloyd EiC at [46]-[61].
[127] Joint statement 9 April 2011.
[128] Transcript at 1101.
[129] Didham EiC at [7.9]-[7.10].

on observations of browse within forest remnants and analysis of the aerial photographs indicating no succession of woody vegetation since 1995.[130] Stock density and accessibility has affected the composition of any vegetation that did establish.[131]

[174] There was discussion of this issue in the 'hot tub'. In response to questions from the Court Dr Lloyd maintained that the forest continued to recover in "extent and stature" despite the adverse effect from grazing by both sheep and cattle. Dr Norton considered there to be substantial differences in the under-storey vegetation of forest, particularly on the lower slopes, where there was ready access to domestic stock and other browsing animals such as deer.[132]

[175] Dr Flynn described the variation in stock accessibility and regeneration across the site – she considered the elevated limestone pavement features, with dense scrub vegetation, along the ridge crest to be inaccessible to stock while the taller more open forest was readily accessible and, consequently, the under-storey vegetation suffered.[133] While acknowledging continued regeneration within the browsed forest areas she observed that the diversity of the forest had suffered with the more palatable species heavily suppressed.[134] She also agreed with Dr Burrows that regeneration within pasture was likely to be limited by both a water deficit and stock grazing.[135]

[176] The regeneration and succession processes at the site are complex and affected by grazing from sheep and cattle as well as browse by a range of pest species (including deer, goats and hares). Competition from exotic pasture grasses and a lack of water are other factors. We accept that regeneration is continuing and the forest canopy is slowly advancing. This is likely to reduce fragmentation and enhance ecological processes across the site. However, we find that the diversity and quality of this forest cover is being adversely affected by both domestic and feral browsing animals.

[177] In considering the future of the site as a working farm we concur with Dr Flynn's opinion that management decisions by landowners are "a key determinant in the

[130] Ecologists joint statement 9 April 2011 and Flynn EiC Appendix I.
[131] Flynn rebuttal at [3.9].
[132] Transcript at 1112, 1119.
[133] Transcript at 1114-1115.
[134] Transcript at 1127-1128.
[135] Transcript at 1116.

composition and distribution of indigenous and pastoral ecosystem components".[136] While the historical pattern has been an advance of woody vegetation across exotic pasture there are no guarantees that this pattern will continue.

*Outlook for lizards*

[178] Mr Bell did not consider Mt Cass to be in an optimal state for lizards due to habitat destruction and fragmentation (as a result of farming), and introduced mammalian pests (including rats, mice, mustelids, cats, hedgehogs, rabbits and hares). He considered the prospects for maintaining a healthy lizard population under the current management regime to be uncertain and likely to be negative.[137]

***What is the extent and significance of the proposed disturbance to vegetation and habitat?***

[179] Dr Flynn identified the adverse effects of the mediation layout as the loss of indigenous vegetation and habitat from the development footprint and the resulting fragmentation and edge effects.[138]

*Loss of indigenous vegetation and habitat from the development of the footprint*

[180] Dr Flynn regarded the loss of forest and scrub to be of greater consequence than loss of shrubland, pasture or exposed limestone pavement. She predicted that tussock grassland and shrubland communities would increase in the medium term although ultimately revert to forest. Similarly she considered the herb field communities of open pavement would gradually reduce in their extent although light grazing would prevent them from being overwhelmed by exotic pasture grasses.[139] The condition of the forested areas would improve as a result of the controlled grazing.[140]

[181] In evaluating the significance of the adverse effects Dr Flynn noted that a simple measure of percentage of ecosystem affected is not determinative of the effect, but it is a very good indication of the likely effects when considered at both the detailed level and



[136] Flynn rebuttal at [3.3], [3.9].
[137] Bell EiC at [2.17]-[2.22].
[138] Flynn EiC at [7.2].
[139] Flynn EiC at [5.30]-[5.34].
[140] Flynn rebuttal at [6.6].

at the general level.[141] She concluded that the effect on the Mt Cass ecosystem would be negligible given the extent and condition of the habitat that would remain.[142]

[182] Dr Lloyd considered the wind farm to "constitute a major and novel disturbance to the site". Direct effects included loss of limestone habitat, indigenous vegetation and individuals of Threatened, At Risk and locally uncommon plant species. Indirect effects included loss of indigenous ground cover species as a result of competition from exotic grasses and herbs. Dr Lloyd was also concerned that it was not possible to predict all of the potential effects.[143]

[183] During cross-examination Dr Lloyd accepted that the percentage of an ecosystem affected is "an important indicator but not the only one". He agreed that the total amount of indigenous vegetation to be removed would be a small proportion. With respect to the clearance of indigenous forest he explained that national importance of the limestone ecosystem at Mt Cass provided the context for his assessment. He also noted the removal of forest, albeit small areas, from the most important part of the ridge where there were few ecological connections across it. He accepted that the mediation layout avoided the greater part of the ridge.[144]

[184] Dr Lloyd explained that he considered the loss of limestone pavement habitat to be significant, despite the very small area, due to a number of factors: [145]

- the loss was permanent and irreversible;
- limestone provides open or partially shaded habitat in the long-term;
- limestone pavement is a key factor in terms of the resilience of the indigenous vegetation on the site; and
- the importance of ecological function and connections across the ridge with respect to the three main areas[146] of limestone pavement to be disrupted.

[141] Flynn EiC at [5.21].
[142] Flynn rebuttal at [6.5].
[143] Lloyd EiC at [253]-[254].
[144] Transcript at 1058-1060, 1064.
[145] Transcript at 1129-1130.
[146] Those in the *Golf Course* and marked on Golder Associates Plan CG161.3 and CG163.3 attached to the Draft Conditions.

He maintained that effects on the limestone ecosystem should be completely avoided between Mt Cass and Totara Peak.[147] Dr Norton agreed with Dr Lloyd as to the importance of the Mt Cass ecosystem and agreed that any effect on a significant ecosystem is significant.[148]

[185] When asked if any loss of pavement would be acceptable Dr Lloyd considered that the loss of the smallest of the three areas, in the "golf course", would be of less concern if the other two, maintaining the connectivity across the ridge, were left intact.[149] We note that Conditions [45] and [46] require the two larger road crossings in the "golf course" to be covered with crushed material, to avoid cuts in the limestone pavement. When full access is not required for construction or maintenance the section of the road crossing the pavement must be partially rehabilitated (with soil and native vegetation) so that the width of the running surface is reduced from 6 m to 3.5 m.

[186] From the 'hot tub' Dr Flynn pointed out that some of the limestone pavement is proposed to be buried and there would be an opportunity to unearth those areas in the future. With respect to ecological function Dr Norton said he had modelled approximately 12 ha of karst limestone, presently under pasture, to naturally regenerate under the proposed management of the site. Dr Lloyd discounted the value of this 12 ha as he considered the regeneration to be ongoing in the absence of protection from stock and other browsing animals although he accepted that there may be areas where this was not occurring.[150]

*Fragmentation and edge effects*

[187] Dr Didham considered the increase in fragmentation of habitat, caused by the roads and turbine platforms bisecting vegetation patches, to be extremely small compared to the existing fragmentation of the site. He did not consider the type and scale of the increase in fragmentation to be a strong new disturbance regime given the burning of vegetation and farming activities of the past. As a consequence of even the small increase in fragmentation, there would be adverse effects on the spatial pattern of



[147] Transcript at 1165-1167.
[148] Transcript at 1170.
[149] Transcript at 1130-1131.
[150] Transcript at 1130-1133.

remaining habitat, a small loss of native vegetation, a decrease in fragment connectivity and an increase in edge habitat.

[188] While Dr Didham considered the short-term effects to be significant he concluded that the proposed habitat enhancement and pest control work would mitigate these impacts and even reverse the high degree of fragmentation at the site. In particular he considered the loss of ecological values from the destruction of limestone pavement areas could be offset by managing re-vegetation of areas of limestone pavement with limited or no native cover. In Dr Didham's opinion there would be a benefit to biodiversity in the long-term as the site would achieve a level of vegetation cover and connectivity that could not be achieved under the current land management regime.[151] Dr Didham's evidence having been admitted by consent was unchallenged.

[189] The question of the significance of the adverse effects of vegetation disturbance and loss of habitat is difficult to answer. While we accept that the importance of the ecosystem is a key factor in the evaluation we do not consider that to automatically confer significance on any adverse effect. The magnitude and scale of the effects must also be considered. We agree with Dr Flynn that the very small areas of loss and disturbance, and corresponding small proportion of habitat, within the Mt Cass ecosystem, are important factors. While the project site as a whole is large, the actual footprint of the wind farm is small and considerable efforts have been made to minimise the disturbance of indigenous vegetation by placing the roads and turbine platforms within pasture areas where possible.

[190] We agree with Drs Lloyd and Didham that fragmentation and associated edge effects and loss of connectivity exacerbate any adverse effects associated with the direct loss of habitat. We are persuaded by Dr Didham's analysis of historical fragmentation, as well as projected improvements, that increased fragmentation will be a minor and temporary effect. The relocation of the main access road has substantially avoided the extensive fragmentation and disruption of ecotones associated with the original proposal. We do not accept that the proposed wind farm would result in a major or novel disturbance of the ecosystem.



[151] Didham EiC at [4.3], [8.7]-[8.10], [9.9], [12.3]-[12.4], [12.8].

[191] While burial of some areas of limestone pavement is proposed we are not persuaded that we should regard this as a temporary effect. The removal of roads may or may not be a practical or sensible option as part of decommissioning. In addition the decommissioning may be some decades into the future. While it is possible to restore the pavement and reverse this loss, we do not consider it to be likely. We consider the burial of pavement to remove this substrate and potential habitat. However, we accept the evidence of Drs Didham and Norton that there are relatively large areas of pavement elsewhere on the site currently devoid of any significant native vegetation. These areas are expected to regenerate given the proposed change to the grazing regime and, over time, will more than compensate for the loss of pavement habitat.

*Threatened, At Risk and locally uncommon plant species*

[192] Dr Lloyd and Dr Norton are agreed that the *Heliohebe* predominantly occupies scarp habitats that will not be affected by the wind farm construction. Three clumps of limestone wheatgrass have been identified within the construction footprint, for the R33 layout only. Dr Norton noted that more than 700 clumps have been recorded at over 100 sites on the Mt Cass ridge.[152] During cross-examination Dr Lloyd accepted that destruction of the three occurrences of limestone wheatgrass might not be significant if the other occurrences were maintained in a healthy state.[153]

[193] A number of individual plants of the At Risk species have also been found within the construction footprint. Dr Norton did not consider any of the plant species would suffer local, regional or national extinction as a result of the wind farm. He considered that any impact would be compensated for in the long term by the enhanced habitat and viability of the site.[154] The Construction Management Plan requires the identification and relocation of Threatened and, where practicable, At Risk plant species within the construction zone.[155]

[194] Dr Lloyd was particularly concerned about the indirect effects of the proposed change in the grazing regime at the site. While he acknowledged that the proposed removal of cattle and management of sheep grazing would enhance forest health he was

[152] Lloyd EiC at [51] and Norton EiC at [2.6], Appendix B.
[153] Transcript at 1061.
[154] Norton EiC at [2.7], [2.14]-[2.15].
[155] Conditions [31j] and [32n].

uncertain as to outcomes for a range of Threatened, At Risk and locally uncommon species. He considered the consequential increase in exotic herb and grass species would have an adverse effect on indigenous groundcover species, including limestone wheatgrass.[156] During cross-examination Dr Lloyd explained that removal of feral animals and domestic stock "would remove one inhibiting factor" for the regeneration of native vegetation but promote another, being competition with exotic grass. He considered a managed grazing regime to be essential and suggested fencing to spatially separate areas of pasture (with and without limestone wheatgrass) for different management. Dr Lloyd also accepted that returning Mt Cass to pre-European or original land cover "would be a worthy goal".[157]

[195] Dr Norton noted this "dilemma" in managing plants adapted to open sites given the natural succession processes leading towards closed-canopy woody vegetation. While open-habitat species may decline he considered the areas of limestone escarpment and outcrops would retain populations of these species under appropriate management.[158] He noted the substantial populations of limestone wheatgrass on the adjacent Dovedale and Organic Farm Holdings properties.[159]

[196] Dr Flynn observed that exotic grasses increased in stature but not necessarily in extent following the exclusion of stock. Similarly, indigenous herbs increased in stature and did not necessarily decrease in extent. A comparison of ungrazed areas (Mt Cass Scenic Reserve), those grazed only by sheep (DoC covenant on adjacent farm), and areas grazed by sheep and cattle (on the "golf course") showed no difference in the numbers of species of "conservation interest" while a number of other native species appeared more abundant at ungrazed sites. Rank grass overwhelmed crevices and overhangs around limestone boulders on ungrazed sites. Dr Flynn concluded that both excluding cattle and managing the intensity of sheep grazing would be important to improving forest, shrubland and limestone pavement condition.[160]

[197] We have already noted that the footprint of the wind farm is relatively small and the direct effects on vegetation and habitat are small in scale. Given the survey work

[156] Lloyd EiC at [92]-[108].
[157] Transcript at 1048, 1062-1063.
[158] Norton EiC at [2.16]-[2.17].
[159] Norton rebuttal at [2.4].
[160] Flynn rebuttal at [5.20]-[5.22].

that has been undertaken to identify Threatened plant species and their distribution across the site we are confident that the direct effects on these species would be minimal. The potential for indirect effects is of more concern.

[198] We are satisfied that exclusion plots and observations of adjacent areas under differing grazing regimes demonstrate an improvement in overall outcomes for indigenous vegetation following a reduction in grazing pressure. However, we agree with Dr Lloyd that the outcome for the open habitat specialists is uncertain within the proposed covenant area. We consider the monitoring requirements for At Risk, Threatened and locally important plant species later in this decision.

*Effects on avifauna*

[199] The ornithologists were agreed that the potential adverse effects on avifauna were moderate overall and included the short term reduction in food sources, temporary disturbance during construction, and collision impacts. It was considered possible to offset the reduction in food sources by re-vegetation and rehabilitation over the medium to long-term. Given the lack of information on collision risk for native birds, particularly in a forested environment, a mortality monitoring programme was proposed.[161] Predator control would be required over the whole site, particularly leading up to and during the breeding season (June to August). Any additional mitigation effort would be determined after considering whether or not there is an adverse effect at the local population level.[162]

*Effects on herpetofauna*

[200] The direct effects on lizards were agreed to be mortality during construction and loss of habitat along the wind farm footprint.[163] Mr Bell considered that direct mortality during construction would be unlikely to affect the populations of any lizard species except in the very short term. Permanent loss of limestone pavement and boulder is estimated at 2.31 ha or around 1.36% of available limestone habitat for Canterbury gecko. Approximately 23 ha of grasslands, providing relatively poor skink habitat, will also be removed.[164] During cross-examination Mr Bell estimated that only 30 to 150

[161] Avifauna caucus statement dated 15 January 2010.
[162] Avifauna caucus statement dated 10 October 2010.
[163] Herpetofauna joint statement dated 10 January 2010.
[164] Bell EiC at [3.4].

Canterbury geckos would be disturbed during construction out of a population of potentially thousands at Mt Cass. He considered that a high proportion of these geckos could be retrieved.[165]

[201] The indirect adverse effects include habitat fragmentation, edge effects, road kill and altered predator behaviour. Mr Bell considered these effects to be low for the Canterbury gecko and moderate for the skinks. He considered the effects of the mediation layout to be substantially less than the original layout, largely due to avoiding fragmentation of the limestone habitat across the Mt Cass ridge.[166]

[202] Mr Bell outlined the proposed measures to remedy and mitigate effects on lizards:[167]

- avoiding sites of high impact through micro-siting;
- relocating and releasing affected lizards;
- habitat restoration and managed grazing;
- pest control within the covenant area.

[203] Mr Bell concluded that the lizard fauna would benefit from the improved habitat and predator control.[168]

*Overall findings on significance of effects on vegetation and habitat*

[204] While the direct effects of construction are significant in the short term they are temporary and small in scale. Given the extent and proposed management of the covenant area we find that the adverse effects on the vegetation and habitat for indigenous fauna are minor in the medium term and may well be reversed in the longer term. However, we are aware of the uncertainties inherent in predicting effects within any ecosystem and of the possibility for markedly different outcomes for some species. Given the importance of the Mt Cass ecosystem we consider that any such effects should be remedied and mitigated as far as is reasonably practical.



[165] Transcript at 538-541 and Bell Transcript at 1-2.
[166] Bell EiC at [5.2]-[5.4].
[167] Bell EiC at [7.2].
[168] Bell EiC at [7.6]-[7.9].

***Does the proposed offset make up for the loss of vegetation and habitat?***

[205] The ecologists were agreed that the purpose of the biodiversity offset model is to determine the 'quanta' (type and amount) of mitigation actions/initiatives required to offset adverse effects on biodiversity values. However, they were not agreed that the "habitat hectares" model developed for the site is sufficient to assess the proposed biodiversity offset. Dr Lloyd and Mr Davis challenged the choice of attributes, assumptions of net gain, and the adequacy of information for invertebrates, lower plants and ecological relationships. They also considered the rarity of the ecosystem and the importance of the biodiversity on site to preclude an offset approach to adverse effects.[169]

[206] Dr Norton considered the biodiversity offset model to be robust and to demonstrate that the significant biodiversity values of Mt Cass would be in better condition in the medium to long term than would be the case under the current farm management. He considered the removal of cattle, control of pests, restoration plantings, and active management of threatened species would result in considerable improvements in biodiversity that would not occur without the wind farm.[170] Dr Ussher had reviewed the model and concluded that it provided a robust and transparent measure of the biodiversity. He was confident that the net gain predicted by the model was real and achievable.[171]

[207] Dr Norton had assessed the project against the 10 principles supported by the international Business and Biodiversity Offsets Programme[172] (**BBOP**) and the seven principles in Schedule 2 of the Proposed National Policy Statement on Indigenous Biodiversity[173] (**BioD NPS**). He considered the BioD NPS principles to be equivalent to those contained in the BBOP guidance material and his own earlier work on biodiversity offsets. Dr Lloyd considered the proposed BioD NPS to provide the most recent and explicit guidance for offsetting although noted that there may be changes.[174] Dr Norton

[169] Ecologists' joint statement dated 9 Aril 2011.
[170] Norton EiC at [4.46], [6.5]-[6.6].
[171] Ussher EiC at [3.1].
[172] Norton EiC Appendix C.
[173] Exhibit D Proposed National Policy Statement on Indigenous Biodiversity.
[174] Lloyd EiC at [149].

agreed that the principles of the proposed BioD NPS provided a useful framework.[175] The principles in the BioD NPS are in brief:

1. no net loss;
2. additional conservation outcomes;
3. adherence to the mitigation hierarchy;
4. limits to what can be offset;
5. landscape context;
6. long term outcomes; and
7. transparency.

*Modelling the biodiversity offset*

[208] Dr Norton described the "biodiversity offset calculator", outlined the major steps and assumptions, and summarised the outcomes. He noted that such methodology is still being developed and ecologists would not all have the same view as to the appropriate parameters.[176]

[209] In essence the methodology sets benchmark ecosystem types for the site (scrub and forest), maps the present day vegetation (pasture, tussock grasslands, shrublands, scrub and forest), determines the project impact (for both the construction footprint and an edge zone), and then predicts the future type and condition of the ecosystem.[177] The model is based on a set of attributes for the structure and composition of the vegetation and key species considered to be representative of the major groups present. The attributes chosen for this site were:[178]

- forest/scrub canopy cover;
- forest/scrub under-storey cover;
- forest/scrub ground cover;
- silver tussock grassland;
- falcon;
- kereru and bellbird;

[175] Norton rebuttal at [5.2].
[176] Norton EiC at [4.13]-[4.17].
[177] Norton EiC at [4.17]-[4.22].
[178] Norton EiC at [4.23]-[4.24], [40.69]-[4.70].

- small birds (fantail, grey warbler and brown creeper);
- Canterbury gecko; and
- limestone wheatgrass.

[210] The losses and gains in biodiversity were predicted for the restoration planting (1 ha), predator control, and natural regeneration under the managed grazing regime.[179] Assumptions were made as to the time taken to reach the benchmark ecosystem condition : 5 years for silver tussock, 50 years for scrub and 100 years for forest in restored ecosystems, 50 years for both scrub and forest with predator control, and 80 years for scrub and 130 years for forest for facilitated natural regeneration.[180]

[211] The Habitat Hectares approach was used to account for the biodiversity losses and gains for each of attributes chosen. The habitat score indicates the quality relative to the benchmark conditions and when multiplied by the area on the site it produces a measure of quality and quantity in habitat hectares (**HH**).[181]

[212] A discount rate of 3% was chosen to determine the present value of the gain in biodiversity – a gain of 10 HH after 50 years is discounted to a value of 2.3 HH today.[182] The uncertainty was set at zero for the restoration plantings and natural regeneration, and at 20% for predator control.[183]

[213] The calculated biodiversity losses (caused by the construction of the wind farm) and predicted gains (as a result of restoration, predator control and regeneration) for each attribute after 50 years are presented below:[184]

[179] Norton EiC at [4.56].
[180] Norton EiC at [4.47], Appendix F.
[181] Norton EiC at [4.34]-[4.36].
[182] Norton EiC at [4.44].
[183] Norton EiC at [4.45], [4.49].
[184] Drawn from Norton rebuttal at [6.10].

| Attribute | HH loss | HH gain | HH difference |
|---|---|---|---|
| Forest/scrub canopy | 0.11 | 0.77 | 0.66 |
| Forest/scrub under-storey | 0.05 | 2.29 | 2.24 |
| Forest/scrub ground cover | 0.02 | 1.31 | 1.28 |
| Silver tussock grassland | 0.65 | 0.28 | -0.37 |
| Canterbury gecko | 0.53 | 2.42 | 1.89 |
| Falcon | 0.26 | 0.83 | 0.57 |
| Kererеu and bellbird | 0.09 | 2.16 | 2.06 |
| Small birds | 0.29 | 2.15 | 1.86 |
| Limestone wheatgrass | 0.13 | 0.93 | 0.81 |
| **Total** | **2.14** | **13.14** | **11.00** |

[214] Net gains are predicted for all attributes except silver tussock. The conditions require the restoration of the same area of silver tussock as has been destroyed.[185] During cross-examination Dr Norton explained that the modelled loss of silver tussock was due to the time discounting in the calculation of the offset.[186]

*Choice of attributes and the model*

[215] Dr Lloyd was concerned that key biodiversity components were missing from the model – different forest types, vegetation composition, other measures of vegetation structure, At Risk and locally important plant species, and *Wainuis edwardi* (a potentially affected snail). He thought the choice of attributes fell well short of a fair representation of the biodiversity at Mt Cass and recommended additional species and measures of forest structure to enable objective assessment of milestones. Dr Lloyd considered a species-by-species condition-area model (Condition-Hectares) to be considerably more transparent and appropriate. He regarded the Habitat Hectares model as being well suited to ecosystems services provided by woody vegetation but not to the wider range of biodiversity values at Mt Cass.[187]

[216] Dr Norton maintained that a mix of surrogate and species attributes was more appropriate than a species only approach.[188] During cross-examination Dr Norton explained that the species selected in the model focussed on species affected by the wind

[185] Norton EiC at [4.81].
[186] Transcript at 997.
[187] Lloyd EiC at [154]-[166], [205]-[210].
[188] Norton rebuttal at [6.8].

farm, particularly Threatened species, and therefore did not include other species such as the *Heliohebe*, scrambling broom or holy grass. Invertebrates were not included as they are difficult to study and little is known about the population abundance or the way they use habitat. In his opinion a high quality habitat would provide for the conservation of groups such as invertebrates, microorganism and fungi.[189]

[217] Dr Ussher added that one of the constraints in modelling was the ability to obtain information and track attributes over time. Thus the Canterbury gecko, which is easier to monitor than the skinks, is to some degree used as a surrogate for other lizards on site.[190] He agreed that more attributes could be added to the model but he did not think it would be necessary and nor would it give a clearer answer.[191] Dr Ussher said that both the Habitat Hectares and the Condition-Hectares models were being tested for use in New Zealand and he did not know which approach was best. He considered the Habitat Hectares model, as used for Mt Cass, to both reasonable and appropriate and to provide a robust outcome.[192]

[218] The inclusion of a greater number of species and additional parameters in the attributes to be modelled would increase the level of detail and provide more information on the response of the ecosystem and it component parts. However, having more information is not necessarily going to lead to better outcomes for biodiversity at the site. We are satisfied that the model and the attributes chosen are adequate to assess the overall trends in biodiversity at the site. We return to the issue of monitoring of At Risk, Threatened and locally uncommon species when we consider the conditions of consent.

*Predictions of net gain and uncertainty*

[219] Dr Ussher considered the magnitude of the net gain in biodiversity to provide "a high level of reassurance" as to actual biodiversity gains on the ground. He noted gains overall as well as for all species of conservation interest while acknowledging the loss of silver tussock.[193]


[189] Transcript at 979-980.
[190] Transcript at 1014.
[191] Transcript at 1016.
[192] Ussher rebuttal at [3.3]-[3.7].
[193] Ussher EiC at [8.11]-[8.12].

[220] Where silver tussock is disturbed for geotechnical investigation or construction purposes, Condition 92 requires rehabilitation to the pre-construction condition. Where tussock grassland of median density greater than 10% is permanently removed "an equivalent quantity must be established and maintained". Dr Ussher explained that the model assumed 17% cover in restored areas of silver tussock grassland rather than the 40 to 50% actually observed in the field. He considered the model to be "very, very conservative" for tussock. Modelling at 50% cover would result in a net gain of 0.2 HH for silver tussock.[194]

[221] Dr Lloyd concluded that gains in silver tussock would be readily achievable as it was easy to propagate and transplant and would benefit from the proposed changes to the grazing regime. He considered that a lower weight should be given to silver tussock than to the nationally threatened species and nationally reduced ecosystems at the site.[195]

[222] Dr Norton performed a sensitivity analysis of the calculated offset and concluded that it was fairly insensitive to the relative weights given to the different attributes. The model was sensitive to the discount rate yielding negative outcomes for discount rates of 11% and over.[196] He considered the model to provide confidence that the biodiversity gain would be substantially greater than the initial loss due to the development of the wind farm.[197]

[223] During cross-examination Dr Norton acknowledged that the model did not provide a precise or exact measure of the biodiversity offset but indicated the magnitude of the likely outcome. He agreed that the quality of the information was important.[198] Dr Ussher described the model as providing "an indicative ball park guideline" rather than a high degree of precision.[199]

[224] All of the ecologists are agreed that the remnant vegetation is in relatively good condition and would benefit from the removal of cattle, controlled grazing by sheep and pest control. There is little doubt that the indigenous vegetation and habitat for fauna

[194] Transcript at 1008.
[195] Lloyd EiC at [221].
[196] Norton EiC at [4.82]-[4.85].
[197] Norton rebuttal at [7.2].
[198] Transcript 980-982.
[199] Transcript at 1011.

will improve across the covenant area under the proposed management regime. The uncertainty is in the quantification of this net gain. Restoration and regeneration may not be as successful as anticipated and predicted by ecologists.

[225] We note that a discount rate effectively discriminates against benefits accrued in the future. This is an important factor for this project where the ecologists are generally agreed that slower natural regeneration processes (facilitated by active pest and weed control) are preferred to restoration planting. While we accept that discounting is appropriate we should not be blinded by the model and lose sight of the potential for very large benefits for the ecosystem at Mt Cass in the long term.

[226] Given the magnitude of the net gain predicted by the model, the sensitivity analysis and the time preference discount we are satisfied that the model does provide confidence as to the likelihood of substantial gains for biodiversity at the site in the medium to long term.

*Limits to offsetting*

[227] Dr Lloyd considered the offset to be inappropriate as it was inconsistent with the proposed NPS guidance[200], BBOP principles[201] and Dr Norton's own principles[202] with respect to limits to off-setting. Dr Lloyd noted the rarity of the karst limestone ecosystem (being less than 5% of the original extent) and the vulnerability of limestone wheatgrass (and other At Risk and locally uncommon plant species) to changes in grazing intensity.[203] Mr Davis considered the offset to be inappropriate and referenced Dr Norton's biodiversity offset paper where "he was suggesting a threshold of perhaps less than 10% if that was all that remained of a particular habitat type, it may not be suitable for a biodiversity offset".[204]

[228] During cross-examination Dr Ussher agreed that limestone ecosystems were naturally rare in New Zealand and the extent of indigenous vegetation associated with limestone had become rare. Dr Ussher considered that both the rarity of the ecosystem

[200] Exhibit D Proposed NPS on indigenous biodiversity.
[201] Norton EiC Appendix C.
[202] Norton DA (2009) *Biodiversity offsets – two New Zealand case studies and an assessment framework.* Environmental Management 43:698-706.
[203] Lloyd EiC at [189]-[194].
[204] Transcript at 1085.

and the effects should be taken into account when deciding if an off-set would be appropriate.[205]

[229] Principle 4 from the proposed BioD NPS reads:

> **Limits to what can be offset:** There are situations when residual effects cannot be fully compensated for by a biodiversity offset because the biodiversity affected is vulnerable or irreplaceable.
>
> These situations will be demonstrated:
>
> (a) when a comprehensive assessment has been undertaken to determine whether, and if so which, highly vulnerable and irreplaceable biodiversity components are present and are affected by the activity. In determining when offsetting is not appropriate local authorities should have regard to whether the vegetation or habitat:
>
> i. represents a non-negligible proportion of what remains of its type
>
> ii. is now so rare or reduced that there are few options or opportunities for delivering the offset
>
> iii. is securely protected and in good condition so there is little opportunity to offset the biodiversity components in a reciprocal manner
>
> iv. is threatened by factors that cannot be addressed by the available expertise.
>
> If there are residual effects on biodiversity that are not, or seem likely not, to be capable of being offset, any measures taken to address them, by way of environmental compensation or otherwise, should not be considered to be a biodiversity offset for the purposes of Policy 3.

[230] There is no doubt that the ecosystem at Mt Cass is rare and components of it are vulnerable. We agree with Mr Davis and Dr Lloyd that it meets some of the criteria to be considered with respect to limits to offsetting and considerable care needs to be taken at such a site. However, we agree with Dr Ussher that the extent and nature of the disturbance must also be taken into account when considering whether or not an offset is appropriate.

[231] All the ecologists acknowledged that it is the karst limestone and associated indigenous vegetation that is particularly valued. The clearance of this element is very much reduced given the revised mediation layout. In addition any direct disturbance of Threatened and At Risk plant species must be addressed by relocation where

[205] Transcript at 1024-1026.

practicable.[206] Nor are there any sizeable effects on the scarp face that hosts a number of Threatened and At Risk species. Looking at the spatial context of the ecosystem, the disruption of ecotones is now minor with only a small increase in fragmentation. The conditions require the indirect effects of the change in grazing management to be monitored by assessing under-storey vegetation, limestone wheatgrass abundance, abundance of shrubs and ground layer species typical of limestone pavements, and natural regeneration processes in open habitats.[207] We have already noted that Dr Norton has identified some 12 ha of limestone pavement, currently under pasture, that would be available for regeneration of vegetation. This provides ample opportunity for delivering a "like-for-like" offset.

[232] Given the small scale of the disturbance of the karst ecosystem, the limited disruption to ecotones across the ridge and minimal effects on the scarp face we do not consider that "highly vulnerable and irreplaceable components of biodiversity" are affected to such an extent the offsetting is out of the question. We note that the site is not at present securely protected and while the vegetation is in relatively good condition there are continuing pressures from domestic stock, pests and weeds. Given the nature and scale of the effects and the availability of limestone pavement for delivering the offset we find that biodiversity offsetting is both viable and appropriate on this site.

***Are the ecology conditions appropriate, certain and enforceable?***

[233] The proposed conditions of consent have been modified as a result of mediation and further revisions have been agreed between the parties during the course of evidence exchange and the hearing. The latest iteration, as proposed by MainPower, is dated 9 August 2011. The District Council and appellants sought further changes in their closing submissions, should consent be granted.

*Micrositing and certainty as to the extent of disturbance*

[234] The proposed turbine locations are shown in plans and Condition [8] provides for "micrositing" which allows the turbines to move by up to 140 m (for the R90 layout) or 100 m (for R60 and R33). This allowance raised concerns that the extent and nature of the vegetation clearance and disturbance of limestone features could change.

[206] Condition 32(n).
[207] Condition 89(a).

However, the proposed conditions constrain the extent and location of any potential clearance and disturbance.

[235] Condition [6] designates an "exclusion zone" to protect identified areas across the site and Condition [13] limits the total area of clearance or disturbance of indigenous vegetation and limestone substrates. Dr Flynn considered these conditions to provide a high level of control over the construction process and to minimise effects.[208] In addition, Condition [10] requires an ecologist and an expert in karst landscapes to advise on the final placement of turbines – a process that might further reduce effects. Condition [12] provides for the marking of any indigenous vegetation and limestone features which are able to be avoided as a result of micrositing.

[236] We find Conditions [6] and [13] to be adequate to control the potential effects of construction activities on indigenous vegetation and the limestone features. While we agree that the micrositing process will assist in minimising the potential effects at a very small scale, Conditions [6] and [13] provide sufficient constraints across the site as a whole.

[237] An additional clause was proposed for Condition [6] during the course of the hearing that essentially extended the exclusion zone following micrositing. We do not consider this to be necessary or practical. If there is any disturbance or clearance of the areas identified during micrositing those areas would have to be counted and included within the limits specified in Condition [13].

[238] As originally drafted Condition [6] precluded any activities authorised by the consents within the exclusion zone except the walking track and particular fences. As written this condition would prevent boulder stabilisation work that may disturb vegetation and even monitoring that could require fencing or installation of equipment. The intent of the condition is clearly to restrict the extent and location of disturbance to vegetation and limestone features during construction. During the operational phase the site will be protected by the terms of the covenant and other conditions of consent.



[208] Flynn EiC at [3.10]-[3.22].

[239] Accordingly we have made some changes to the drafting of this condition to improve both the clarity and practicality. Condition [6] is amended to read:

> No construction activities authorised by this consent shall occur within the exclusion zones identified in the Golder Associates plans referred to in conditions [3], [4], and [5] except for fencing, the walking track referred to in condition [143], and any stabilisation of rocks.

[240] Condition [13] specifies the maximum area of vegetation clearance and disturbance of limestone pavement and boulder field for each turbine layout. Various amendments were made during the course of the hearing. We amend and edit to clarify exactly what is and what is not included in the limits on clearance and disturbance of indigenous vegetation and limestone features. Condition [13] is to read:

> The total area of indigenous shrubland and forest clearance and limestone pavement and boulder field disturbance due to pre-construction geotechnical investigations and construction activities shall be minimised, but in any event must not exceed the following:
>
> **Vegetation clearance (hectares)**

| | **R33** | **R60** | **R90** |
|---|---|---|---|
| Indigenous shrubland | 0.71 | 0.71 | 0.71 |
| Indigenous forest | 0.09 | 0.09 | 0.08 |

> **Exposed limestone disturbance (hectares)**

| | **R33** | **R60** | **R90** |
|---|---|---|---|
| Pavement and boulder field | 1.99 | 2.29 | 2.04 |
| Pavement | 0.93 | 1.21 | 0.89 |

> For the avoidance of doubt, these limits do not include the impact from fencing and the construction of the walking track [conditions 14 and 143].

*Threatened, At Risk and locally uncommon species*

[241] The vision of the Environmental Management Plan[209] (**EMP**) is for the covenant area to be restored to a diverse mix of vegetation appropriate to the location – dense podocarp forest, mixed podocarp-broadleaf forest, broadleaf forest, shrublands and open escarpment communities after 300 years. The draft EMP outlines the first five-year cycle of a 50 year programme of conservation and restoration within the 127 ha

[209] Flynn EiC Appendix F.

covenant area. Four outcomes are sought over the next 50 years : vigorous regeneration of forest and scrub; animal populations increasing in abundance and distribution; restoration plantings facilitating succession in pasture; existing populations of threatened plant and animal species are secure.

[242] As acknowledged by the ecologists the issue of varying outcomes for different species under a changed land management regime does present something of a dilemma. Dr Norton explained:[210]

> One of the key results of the restoration management work proposed as part of the biodiversity offset is that the area of woody vegetation will expand (because of animal pest control and removal of cattle grazing) and there will inevitably be a reduction in the abundance of some indigenous ground layer species, especially those that require high light environments.

[243] Dr Lloyd was concerned about open habitat plants and ground layer species, particularly limestone wheatgrass, given the proposed grazing regime. He recommended hand weeding although acknowledged this was difficult across a large site.[211] Dr Flynn acknowledged that the distribution and abundance of these species would change within the Mt Cass covenant area. She considered hand weeding to be feasible although noted that two thirds of the known population of limestone wheatgrass colonies occurred outside of the covenant area.[212]

[244] While expressing some concerns Dr Lloyd acknowledged that the future biodiversity values of site could benefit from a change in management. When asked what he saw as the ideal outcome for the site Dr Lloyd replied:[213]

> I think all the experts agreed it would be an ideal site for conservation management, restoration of indigenous vegetation over as much of the site as possible, control of pest animals. You know, many of the things that are elements in the proposed mitigation.

[245] Conditions [31j] and [32n] require the identification and relocation of Threatened plants and At Risk plants (where practicable) within the construction zone. Condition [89] requires monitoring of effects of the reduced grazing regime on ground

[210] Norton rebuttal at [6.17].
[211] Lloyd EiC at [112], [175].
[212] Flynn rebuttal at [5.31], [6.6].
[213] Transcript at 1072.

layer species generally and on limestone wheatgrass. Condition [90] requires the EMP to include measures for Threatened plant species management including monitoring of *Heliohebe maccaskillii* and management of limestone wheatgrass. The District Council have suggested a number of additions to these conditions extending the objectives of the EMP, and the monitoring and management of flora to include populations of At Risk plant species. Dr Lloyd supported these conditions and an extension to include locally uncommon species.

[246] We acknowledge the dilemma identified by the ecologists in attempting to restore the ecosystem while securing the future of important species at the site. It is clear that the proposed management of the covenant area would result in a novel ecosystem – the species abundance, distribution, diversity and interactions will change. While the overall quality of the ecosystem would be improved it is not possible to restore the historical state of the site. Ongoing management will be essential particularly with respect to the control of animal pests.

[247] Given the likely evolution of the ecosystem under the proposed management of the covenant area we consider it would be unrealistic to manage individual species beyond the Threatened species and other key species already identified. We also note that the management of the adjacent farm properties, also hosting populations of open habitat plants, will not change as a result of the wind farm. We find that the overall gains for biodiversity outweigh any potential adverse effects on the abundance and distribution of individual plant species at the site. Accordingly we do not accept that At Risk or locally uncommon plant species should be subject to specific management or monitoring conditions.

*Level of detail in the conditions and the EMP*

[248] In response to questions from the Court Dr Lloyd stated that there needed to be a lot more detail in the conditions of consent to specify actions to be taken (such as hand weeding of limestone wheatgrass), performance indicators to measure outcomes for biodiversity and further trials of the proposed grazing regimes prior to wind farm construction.[214]

[214] Transcript at 1073-1074.

[249] Discussing the conditions of consent Dr Norton observed:[215]

> I think there's a real balancing act between how prescriptive you become in conditions versus what's in a management plan and to me the conditions should focus on the desired outcomes without necessarily being incredibly prescriptive and I think I'd prefer to leave the prescriptive detail to the management plan

[250] We accept the approach of having the detailed implementation plans contained with the EMP given that the general content and objectives are specified in the conditions of consent. We appreciate that the detailed monitoring required to support an adaptive management approach is also best left for the EMP. However, we agree with Dr Lloyd that there must be certainty with respect to outcomes for biodiversity. In ensuring this certainty of outcomes we are cognisant of the need to only impose conditions that relate to the effects of the wind farm development. The conditions of consent are not imposed to ensure conservation outcomes on the site beyond the objectives of the biodiversity offset programme.

[251] Conditions [89] to [91] set out the monitoring requirements and performance indicators for the Habitat Enhancement and Pest Control section of the EMP. We direct amendments to [89] and [91] to fill gaps, delete unnecessary repetition and remove some prescriptive detail on monitoring of vegetation that more properly belongs in the EMP. We have also deleted the requirement for measurable time bound performance targets for invertebrates. While some monitoring of invertebrates may well be considered useful as part of the EMP we do not consider performance targets are necessary in the conditions. Outcomes for invertebrates will be linked to the quality of the habitat provided and there are sufficient measures in place to determine the quality of that habitat.

[252] Condition [89a] is deleted and Condition [89] is amended to read (additions are underlined and deletions noted by footnotes):



[215] Transcript at 1202.

The Habitat Enhancement and Pest Control section of the Environmental Management Plan shall include a research and monitoring programme, developed in consultation with the Department of Conservation, that assesses whether the Habitat Enhancement and Pest Control Programme is successful in meeting the objectives and purposes outlined in condition **[85]**. The monitoring programme shall include appropriate measurable and time bound performance targets in relation to:

a) A pest animal control programme including deer, goats, pigs, rabbits, hares, possums, mustelids, rats, hedgehogs, cats and mice.[216]

b) The effect of reduced levels of domestic stock grazing on both forest regeneration and the potential increase in competition from exotic grasses and weeds. The programme shall include provision for annual monitoring of the effect of different sheep grazing intensities on:

   i. forest understory vegetation composition

   ii. limestone wheatgrass distribution and abundance, and

   iii. the abundance of indigenous shrubs and ground layer species typical of open limestone pavement sites; and

   iv. natural regeneration processes in shrubland and open limestone habitats.

c) Vegetation condition measured by monitoring permanent vegetation plots established in forest and scrub vegetation. The cover abundance of all vascular plants will be measured within each plot with tree diameter and seedling number and height recorded. The plots will be measured every three years and compared to the performance indicators set out in condition [91].[217]

d) Herpetofauna population abundance, as required by condition [79.f].

e) Avifauna abundance, including kereru, falcon and pipit, as required by conditions [69], [72] and [73].

f) Weed monitoring and control, as required by condition [80].

g) Threatened plant species, as required by condition [90].

[253] The performance measures for the habitat enhancement programme are listed in Condition [91]. A number of these are process measures – that is they require the establishment of fencing and various operational programmes. The key outcome measures are those related to eight of the nine attributes modelled for the biodiversity offset calculation – Conditions [91i] and [91j]. The ninth attribute, tussock, has been deleted as it is subject to different and very specific Conditions (Conditions 92] and

[216] The form of the pest control and the targets for each species, previously listed in Conditions [89a], are to be set in the management plan.

[217] The number and size of the monitoring plots and frequency of measurement have been deleted and are to be specified in the management plan.

[93]) requiring the planting out of an equivalent area whenever grasslands with more than 10% tussock are removed. The requirement for no woody weeds within the restoration plantings is removed given the overall controls on weeds (Condition [91d]) and requirement for post-planting maintenance and monitoring of the planted areas (Condition [91f]).

[254] Condition [91] is amended to read:

> The Habitat Enhancement and Pest Control section of the Environmental Management Plan shall also include the following performance indicators, which are to be used to establish whether the Habitat Enhancement and Pest Control programme is successful in meeting the objective and purposes of the programme outlined in condition **[85].**
>
> a) All fencing around and within the Mt Cass Conservation Management Area has been constructed or maintained to a standard that enables effective control of domestic and feral animals within the area including:
>
> i. The boundary of the Mt Cass Conservation Management Area has been securely fenced ~~to the minimum standard of a sheep and cattle proof standard seven wire fence with a barbed wire along the top~~ in accordance with condition **[86]**.
>
> ii. Internal fences are maintained to a standard that permits effective control of sheep within the area as required for management purposes.
>
> iii. Cattle have been removed from the entire Mt Cass Conservation Management Area, and if they do enter the area, they have been quickly and efficiently removed and the reasons for their ingress (e.g. damaged fence) has been remedied.
>
> b) The research and monitoring programme required by conditions [89] and [90] has been developed by MainPower, in consultation with the Department of Conservation, and has been implemented.
>
> c) The plant pest control programme required by condition [80], with regular surveillance surveys for new records, has been implemented.
>
> d) No plants of wilding conifers, European broom, hawthorn, barberry, wild rose, elderberry, cherry plum and old-man's beard (or any other species deemed to threaten biodiversity values such as wild thyme) are known to be alive within the Mt Cass Conservation Management Area, with any plants found eliminated within 3 months of their first record.
>
> e) A nassella tussock control programme is undertaken each year through the Mt Cass Conservation Management Area.
>
> f) The vegetation restoration programme required by condition [86c] has been established including propagation, site preparation, planting, appropriate post-planting maintenance and with appropriate outcome monitoring.
>
> g) A minimum of 1 ha has been planted within 3 years of commissioning of the wind farm with more areas planted depending on rates of natural regeneration of vegetation.

h) Plant survival of planted areas is >75% after 2 years, with replanting being undertaken where survival is <75% after 2 years.

i) The condition of the ~~nine~~ eight biodiversity attributes[218] used in the biodiversity offset model have not deteriorated at the end of 5 years from the commencement of activities authorised by this consent within the Mt Cass Conservation Management Area relative to the condition of these attributes at comparable sites that are not subject to the management actions being implemented through the plan.

j) The condition of the ~~nine~~ eight biodiversity attributes used in the biodiversity model are meeting the targets set out in the Environmental Management Plan in accordance with condition [89], measured at the end of 10 years from the commencement of activities authorised by this consent, and at 5 yearly intervals thereafter.

k) The establishment of a liaison protocol with the Department of Conservation in accordance with condition [156] whereby the Department of Conservation meets with MainPower at least once each year to review and comment on the conservation management achievements and proposed work as per its terms of reference.

l) Monitoring results are reported to the Department of Conservation in accordance with the liaison protocol in time for them to review and provide comment to the independent peer reviewer and the Hurunui District Council each year.

m) To enable annual reporting to the Department of Conservation and the peer reviewer, a GIS with associated databases has been established with appropriate documentation, and is updated on a regular basis where required.

n) The composition of planted vegetation contains only those species that are found naturally within the limestone ecosystem at Mt Cass.

~~o) No woody weeds are present in the planted vegetation.~~

*Extent of restoration planting*

[255] The extent of the restoration planting had been reduced from 23 ha to 7 ha to 1 ha in response to concerns expressed by the Director-General of Conservation. Dr Norton reported strong opposition to the extensive restoration plantings originally proposed so the focus was put into natural regeneration.[219]

[256] While acknowledging the value of passive regeneration of vegetation compared to "manufactured" plantings, Drs Flynn and Norton considered restoration planting to be appropriate, particularly where exotic pasture and weeds are inhibiting natural

[218] Composed of: Vegetation structure and composition (canopy cover; understory cover; ground cover) and species abundance (falcon; kereru and bellbird; small birds (fantail, grey warbler, brown creeper); Canterbury gecko; limestone wheatgrass).
[219] Hurley rebuttal at [33], Norton EiC at [4.9] and Transcript at 1210.

regeneration.[220] Dr Burrows agreed that "nature needs a helping hand" and recommended restoration planting in long thin areas of pasture between the forested ribs.[221] Dr Lloyd commented that restoration planting would be appropriate if it did not "offend the naturalness principle" and did not cause problems for other important species such as limestone wheatgrass.[222]

[257] In the draft EMP restoration planting is planned to reintroduce locally uncommon species such as *Carmichaelia kirkii*, fierce lancewood, *Aciphylla subfabellata*, kahikatea, totara, matai and titoki; and to re-establish escarpment communities where they have been lost using *Hebe, Coprosma, Raukaua, Brachyglottis* and *Olearia.*

[258] Given the extensive discussions that have taken place as a result of mediation and conferencing of experts we accept the position that has been presented and the conditions relating to restoration planting. One hectare of restoration planting is required as a trial and up to 7 ha may be planted depending on the outcomes of the facilitated natural regeneration envisaged for the site. The conditions of consent adequately manage the process and monitor the outcomes of the restoration planting.

*Conditions relating to avifauna*

[259] The ornithologists had agreed on the conditions of consent relating to avifauna. They were satisfied that more detailed monitoring provisions could be dealt with in the EMP.[223]

[260] In response to questions from the Court on the objectives for avifauna management Drs Seaton and van Meeuwen-Dijgraaf agreed there should be no net loss of indigenous birds overall with specific provisions for species such as the falcon, pipit and kereru.[224] During the course of the hearing there was considerable discussion of predictions for a net gain in biodiversity compared to the original objectives of the EMP to achieve no net loss. MainPower agreed that the overall objective was to achieve a net

[220] Flynn EiC at [7.4] and Norton EiC at [4.9].
[221] Transcript at 1208-1209.
[222] Transcript at 1209-1210.
[223] Avifauna caucus statement dated 10 October 2010 and Transcript 562-566.
[224] Transcript at 575-577.

gain in biodiversity values within the covenant area. Similarly, an overall net gain would be expected for avifauna.

[261] Dr van Meeuwen-Dijgraaf noted that the predator control is expected to result in an increase in bird numbers with the potential for an increase in bird strike.[225] When asked about what level of mortality would result in mitigation measures Dr van Meeuwen-Dijgraaf replied that further investigation would need to take place to determine if a net loss was occurring and to understand the species involved. She considered that the conditions of consent should provide for expert review and appropriate mitigation options to be implemented.[226]

[262] Dr Flynn commented on the potential for the biodiversity offset to become "a victim of its own success" using the example of increased bird strike as a result of increased populations of existing bird species on the site and, potentially, new arrivals. Dr Lloyd warned a scenario where birds (such as falcon) may be attracted into the covenant area and suffer from high mortality due to bird strike, resulting in a decrease in the local population. Doctors Flynn and Lloyd agreed that the monitoring results should be reviewed by an ecologist to determine the net effect on the local population and options for mitigation if required.[227]

[263] As with the indigenous vegetation the biodiversity offset programme is expected to result in a net benefit to avifauna although the relative abundance and distribution of individual species may change. We agree that the objective should be a net gain in the relative abundance of indigenous species without specifying a net gain for individual species. However, we find that specific provisions relating to the monitoring and management of the kereru, falcon and pipit should remain.

[264] We consider that the conditions relating to bird strike should be amended to clarify that bird strike is not to be regarded as an adverse effect unless there is an adverse effect on the local population. It would be perverse to require the wind farm to undertake additional mitigation if the monitoring shows a net gain in the population of a particular species, or the arrival of a new species, despite the loss of individual birds

[225] Transcript at 567.
[226] Transcript at 583-585.
[227] Transcript 1183-1186.

through bird strike. We agree with Drs Flynn and Lloyd that an appropriately qualified expert should be engaged to review the mortality and population monitoring information to determine whether or not there is an overall adverse effect. This review may require further monitoring to determine if the wind farm is acting as a sink for the population of any particular species within the Motunau Ecological District.

[265] Condition [68] is amended to read:

> The consent holder shall undertake a programme of avifauna monitoring and management the objectives of which are:
>
> a) to monitor for potential adverse effects of the wind farm on avifauna and manage those effects if necessary; and
>
> b) to achieve a net gain in the relative abundance of indigenous species present at Mt Cass.

[266] Condition [72] is amended to read:

> If evidence is found of injury and/or mortality of kereru, New Zealand falcon or New Zealand pipit through interaction with wind farm infrastructure the Consent Holder shall, as soon as practicable, provide a report to the Hurunui District Council detailing a suitable monitoring and management regime to be implemented to address any net negative impact at the local population level.

[267] Condition [74] is amended to read:

> The monitoring programmes required by conditions **[69] to [73]** shall be designed in consultation with the Department of Conservation, and the results of all monitoring shall be provided to the Hurunui District Council and the Department of Conservation annually. Whether any additional mitigation is required will be determined in consultation with the Department of Conservation and shall consider whether the effect will result in a net negative impact at the local population level of any indigenous species.

[268] Condition [76b] is amended to read:

> A protocol that outlines steps to be taken if a Threatened or At Risk species is found to be using the site (including injured or dead) that has not been previously recorded. Additional mitigation is only required if there is an net negative impact, due to the wind farm, on the population within the Motunau Ecological District.

*The environmental management plan and independent peer review*

[269] The conditions provide for an independent peer review of the EMP and the annual report detailing monitoring results and progress towards the objectives. The EMP itself must be reviewed and updated at regular intervals. We amend these to provide for recommendations to be made by the peer reviewer and considered in any subsequent review of the EMP.

[270] Condition [161] is amended to add:

> (c) may make recommendations.

[271] Condition [27] is amended to read:

> The Environmental Management Plan shall be reviewed by the Consent Holder at least once every three years for the first nine years, and thereafter at least once every five years and shall be amended taking into account any required actions identified as a result of monitoring under this consent, the annual report prepared under condition **[67]** and any recommendations from the peer review required by condition **[161]**.

***Overall findings on ecology***

[272] The Mt Cass site has considerable value as a limestone ecosystem with high species abundance, richness and diversity. However, we are not dealing with an untouched, pristine natural environment – fire and farming have depleted and degraded the vegetation and habitat for fauna. Left as it is we have no doubt that ongoing farming, weeds and animal pests would continue to impact on the ecosystem. While the remnant vegetation may persist and the canopy cover could expand the quality of the habitat would continue to be compromised.

[273] The wind farm has a limited footprint of 24 ha and is largely located within exotic pasture. The layout has been modified to reduce fragmentation and disruption of particularly important ecotones. In return for the removal of 3 ha of tussock grassland and less than 1 ha of woody vegetation, conservation management, characterised as a biodiversity offset, is proposed to extend across 127 ha at the site. We acknowledge that this is not simply a question of scale and there are important considerations relating to edge effects, the indirect effects of altering the grazing regime and the outcomes for

open habitat species. All of these have been evaluated and appropriate conditions of consent imposed.

[274] In the end we consider the proposed offset programme and modelling to have demonstrated that the management actions both remedy and mitigate many of the adverse effects on biodiversity such that there will be net gain in the medium to long term. While Dr Ussher[228] and Dr Norton[229] regarded the rehabilitation of batters and temporary construction areas as a 'remedy' and the offset (including restoration plantings and pest control work) as 'mitigation' Dr Flynn[230] regarded the offset actions as having aspects of both. We agree with Dr Flynn.

[275] The overall effect on biodiversity is positive notwithstanding some changes in the abundance and distribution of individual species. We note that the management changes are being imposed on a dynamic and evolving ecosystem and there are uncertainties for some species under either farming or the proposed managed grazing regime. We consider that the conditions provide sufficient certainty as to the overall outcomes for biodiversity at the site and adequate safeguards for the particular species of concern.

***Planning provisions on ecology***

[276] All parties were in agreement that the site contains areas of significant indigenous vegetation and significant habitats of indigenous fauna and these are to be protected in terms of section 6(c) of the Act and also the Regional Policy Statement and Hurunui District Plan.

[277] The District Plan contains the following provisions, and as these are central to this proposal we set them out in full.

> Objective 2
>
> Protection and enhancement of the life supporting capacity and the ecological intrinsic, conservation and cultural values of the District's natural resources.



[228] Transcript at 1155, 1159.
[229] Transcript at 1168.
[230] Transcript at 1163.

Policy 2.2

To avoid, remedy or mitigate adverse effects on the ecological integrity, functioning, habitat values, natural character or amenity of resources of significant natural and cultural value.

Policy 2.3:

To promote the rehabilitation or enhancement of significant natural resources which have been adversely modified, where that enhancement will achieve a long-term improvement to the values of the resource and improve the biodiversity and life supporting capacity of indigenous ecosystems for areas with important ecological values.

[278] We are satisfied that the proposal will achieve objective 2 and Policies 2.2 and 2.3 of the District Plan. The biodiversity offset will both remedy and mitigate adverse effects from the construction and operation of the wind farm and provide benefits for biodiversity across a wider area. As will be apparent from the decision we have taken into consideration the assessment matters for significant natural areas assuming that these matters are not restricted to those areas identified in the planning maps. The planning maps do identify a significant natural area partially located on this site, but this is unaffected by the construction activities.

[279] The District Plan encourages land use practices which avoid or reduce animal plant pests (policy 1.12) and the proposal responds to this through its comprehensive weed control and pest management programs.[231]

[280] The physical and biological characteristics of the soils will be maintained (Section: Use of non-renewable resources, objective 1). This objective does not preclude land-based activities and will be provided for while avoiding a range of adverse effects on soils including soil erosion and contamination (polices 1.1, 1.2 and 16).

[281] We have had regard to the matters of regional significance noted in chapter 20.4 and objective 3 and policy 4 of Chapter 8 of the RPS and conclude that these provisions addressed through the proposal and its biodiversity offset programme.



[231] Conditions [31], [32], [82] – [84].

***The Commissioners' decision on ecological matters***

[282] The Commissioners concluded that there were very significant adverse effects on the indigenous vegetation and habitat for fauna. In particular they noted the fragmentation of the ecosystem and disruption of ecotones across the ridge caused by the ridge crest road creating "a linear swathe that would bisect the entire length of the significant natural area". They did not accept that the biodiversity offset (the earlier proposal comprising restoration planting of some 26 ha of degraded habitat plus pest and weed control) was appropriate as it was not "like for like and could not replicate the high habitat complexity and distinctiveness of the limestone pavement ecosystem". Nor were they convinced that the restoration planting and translocation of threatened plant species would be successful.[232]

[283] We note that the revised proposal considerably reduces the loss of vegetation associated with limestone pavement and places the main access road on the northern terrace avoiding the complete disruption of ecotones across the ridge. Rather than a "linear swathe" there remain only three relatively small road crossings which are to be partially rehabilitated to reduce the road width. The planting trials have demonstrated that restoration is feasible and observations of different grazing regimes have illustrated the potential for managed grazing to facilitate regeneration of indigenous vegetation. Given the changes in both the scale and nature of the disturbance to indigenous vegetation and habitat and the revisions to the biodiversity offset programme, our findings of a minor adverse effect in the short term and an overall benefit in the longer term are not inconsistent with the Commissioners' conclusions. The project proposal has evolved considerably since the District Council hearing.

[284] Against this context, including the landform and its flora and fauna, we next set out evaluation of the area's landscape and the amenity derived from the same.

**The coastal environment, landscape and amenity**

[285] The effects of a development on a community's attachment to a place are frequently to the fore when changes to rural areas are proposed. That is because communities and individuals may have a very strong and deeply held attachment to the place in which they live and work. When a wind farm is proposed, involving large

[232] Commissioners' decision at [741]-[743], [748] & [894]-[896].

structures in prominent positions, the effects on landscape, natural character and visual matters are generally raised as concerns and it was so in this case.

[286] The Hurunui District Plan has at its basis landscape typing, derived in turn from aggregation of land typing. The Plan takes a careful approach to landscape and while noting that many natural features and landscapes in Hurunui have been modified, it states that "both the community and visitors strongly identify with natural features and with landscapes of the Hurunui District."[233] The Plan acknowledges the difficulty in protecting landscapes as "they are hard to define and the values held for different types of landscapes" can vary considerably.

[287] Decisions made by the Hearing Commissioners for the District Council issued on 2 April 2009 included the finding that Mt Cass forms part of the coastal environment,[234] and that part of the site between Mt Cass and Totara Peak, incorporating the limestone platforms, the native woody vegetation and the limestone escarpment constitutes an outstanding natural feature in terms of section 6(b).[235] Since their decision, as an outcome of mediation, an amended layout and development plan is now proposed. However, the basis for parts of their decision, particularly with respect to the coastal environment and the finding of the outstanding natural feature identification remain.

[288] On these issues, as well as amenity derived from the landscape, we heard evidence from landscape architects Dr Michael Steven, Ms Di Lucas, Ms Elizabeth Briggs and Ms Nicki Smetham (the latter on some aspects of the mediated proposal). In addition the following planners presented evidence on natural character and relevant planning matters: Ms Jane Whyte and Ms Helena Rigg. Submitters also presented evidence and submissions on amenity issues, all of which we have taken into account, although not all have been referred to individually.

[289] Before we discuss the evidence we set out our understanding of landscape.



[233] Issue 7 Management Strategy, Hurunui District Plan at 038.
[234] Hurunui Commissioners' decision at [648] and [878].
[235] Hurunui Commissioners' decision at [679] and [879]-[880].

***What is landscape?***

[290] The term 'landscape' is not defined in the Act and when employed by different disciplines and fields of expertise its meaning and usage is not the same. Even amongst landscape architects there appears no commonality of understanding.

[291] Landscape, as a concept used by landscape architects and related disciplines, is a cultural construct as are 'justice', 'arts', 'language' and 'nature'. The understanding of landscape therefore may vary according to the culture, and over time as cultural influences change.[236] Further, what is meant by 'landscape' may be understood in different ways by different fields of endeavour. What landscape architects mean by landscape may not be the same as say a geomorphologist or ecologist notwithstanding the same term is used.

[292] As a cultural construct we come to know the landscape through the values and perceptions held by people, be they expert landscape architects, people who have an attachment to a place, or those who have knowledge and experience of a region, area or site and its natural and physical resources - seen in that way "landscape is a conduit and a symbol for a wide range of attitudes and concerns".[237]

[293] Landscape attributes are often described in proceedings before the Environment Court with reference to the "modified Pigeon Bay factors".[238] A series of factors were formulated in the *Pigeon Bay* case relevant to the identification of landscapes (although not necessarily an assessment of their significance). These were subsequently reviewed in *Wakatipu Environmental Society v Queenstown Lakes District Council*,[239] and have been widely adopted for landscape assessment in the court for the last ten years. The factors were developed to provide a more systematic framework for identifying and assessing landscapes than was previously undertaken, bringing into account matters beyond visual or physical attributes in order that social relationships with place may be considered.


[236] By way of example the majority of evidence presented in these proceedings is based on a European derived understanding of landscape, see Dr Steven Transcript at 419.
[237] Steven EiC at [8.9].
[238] *Pigeon Bay Aquaculture Ltd v Canterbury Regional Council* [1999] NZRMA 209.
[239] *Wakatipu Environmental Society v Queenstown Lakes District Council* at [97].

[294] Recent divisions of the court have encouraged landscape architects to move beyond description when giving evidence in relation to the modified Pigeon Bay factors. The difficulty is that no robust methodology has been developed for their application. Mere repetition of these factors without further methodological development is a barrier to better understanding the complex construct that is landscape. In addition landscape assessments, as in this case, have largely failed to engage with community views and values, although some have taken account of those views expressed through the Plan. Development of methodology for analysis to address the three groups of aspects we outline below may produce more useful outcomes for decision-making.

[295] In attempting to develop a working definition of landscape (particularly to describe and identify landscape significance), the Court in *Maniototo Environmental Society Inc and Anor v Central Otago District and Anor* (the 'Lammermoor' decision)[240] described the landscape as follows:

> ... In our view a landscape is four-dimensioned in space and time within the given environment — often focussed on a smaller relevant space such as an application site — which is the sum of the following:
>
> (1) a reasonably comprehensive (but proportionate to the issues) description of the characteristics of the space such as:
>
> - the geological, topographical, ecological and dynamic components of the wider space (the natural science factors);
> - the number, location, size and quality of buildings and structures;
> - the history of the area;
> - the past, present and likely future (permitted or consented) activities in the relevant parts of the environment; and
>
> (2) a description of the *values* of the candidate landscape including:
>
> - an initial assessment of the naturalness of the space (to the extent this is more than the sum of the elements described under (1) above);
> - its legibility — how obviously the landscape demonstrates the formative processes described under (1);
> - its transient values;
> - people and communities' shared and recognised values including the memories and associations it raises;
> - its memorability;

[240] *Maniototo Environmental Society Inc and others v Central Otago District Council and Otago Regional Council, Decision* C103/2009, at [202]-[204].

- its values to tangata whenua;
- any other aesthetic values; and
- any further values expressed in a relevant plan under the RMA; and

(3) a reasonably representative selection of *perceptions* — direct or indirect, remembered or even imagined — of the space, usually the sub-sets of:

(a) the more expansive views of the proposed landscape; and

(b) the views, experiences and associations of persons who may be affected by the landscape.

[296] The Court continued: "To describe and delimit a landscape a consent authority needs at least to consider the matters in set (1) and, to the extent necessary and proportionate to the case, those in sets (2) and (3) also".[241]

[297] This description was referred to in the *Upper Clutha Tracks Trust v Queenstown Lakes District Council* (the 'Parkins Bay' decision).[242] The Court commented that the description

> ...seems to correspond generally with contemporary landscape practice in describing the landscape as having three sets of components:
>
> - biogeographical elements, patterns and processes;
> - the associative or relationship contributions; and
> - the perceptual aspects.

[298] The natural and physical attributes of a landscape can be both objectively and subjectively analysed. The natural environment including the land, water, air, flora and fauna can be described and assessed both quantitatively and qualitatively. Likewise, change to the natural environment which results from human endeavor through, for example, the presence of physical structures, buildings and roads or modification to landform or vegetation can be described and assessed.

[299] It is important to keep in mind that when considering what are loosely termed landscape or natural 'values', we take into account people's values, rather than assessing the landscape values as aspects apart from people.



[241] Ibid.
[242] [2010] NZ EnvC 432, at [22].

*Conclusion on landscape definition and description*

[300] In attempting to respond in a way that may assist our decision-making, having discussed the matter with witnesses, we offer the following definition:

> Landscape means the natural and physical attributes of land together with air and water which change over time and which is made known by people's evolving perceptions and associations.

[301] In keeping with the Act such a definition enables the development of landscape assessment which takes account of:

- natural and physical environment; and
- perceptual; and
- associative aspects (beliefs, uses, values and relationships)

which may change over time.

[302] The definition responds, through reference to associative aspects, to our sense of, or attachment to, place. Thus we commence our evaluation of the landscape evidence with a working definition of landscape. In this case our assessment was informed by experts who understand the effects of change on the natural and physical landscape (and also consider people's response to this), visitors to the area and local people who have an attachment to the place.

***Simulations***

[303] Expert landscape evidence was provided on the effects of the project including road formation and the three turbine design and layout options. In addition visual simulations were provided of views from the State Highway and identified locations surrounding Mt Cass. We accept that the visual simulations are an accurate representation of the proposals for the purposes of understanding visual effects but were not intended to substitute for the human eye or experience.


[304] The landscape architects held a joint conference and reached agreement on the appropriate landscape scales of consideration and agreed that there were four relevant

scales. Although each had used different terminology they agreed that relevant landscape assessment scales were the Canterbury region, the Hurunui district, the Mt Cass range (that is the site and its environs), and Mt Cass ridge.[243]

***Findings on the physical attributes of the area***

[305] The Mt Cass range is a limestone cuesta. The steep scarp of the formation faces to Waipara Valley and the dip or backslope of the cuesta faces the coastline. The ridgeline of the cuesta aligns parallel to the coast, from north-east to southwest. The cuesta has been farmed for over 100 years resulting in modification of the earlier land cover. Prior to farming the forest cover had been removed by earlier inhabitants. The limestone rock including boulders and exposed pavement remain very evident on the range, providing shelter and habitat for remaining indigenous vegetation. On the seaward side a series of dry valleys extend in a splayed or fluted formation, from the eroding scarp face down to the base of the dip slope forming a distinctive pattern in the rural landscape.

[306] The mountain range is located within the Waipara Valley which is a well-defined broad plain surrounded by hills and ridges, one of which is the prominent feature of Mt Cass and is accessed by recently formed and older farm tracks, some cutting into the limestone rock, leaving the light-coloured limestone exposed, and others having a grass cover.

[307] The range is surrounded by farming, forestry and vineyards. Pastoral farming is undertaken along the range which is held and managed in different farm ownerships. On the eastern side, farmland predominates but there are pockets of native bush. This is a working landscape and present are the usual farm trappings including extensive fencing, water troughs and tanks.

[308] In various places along the summit of the ridge are a number of masts including facilities for telecommunications and wind recording and also a poled walking track. The surrounding farm land has differing land cover and appearance varying with ownership and pastoral management. The pastoral management at the summit has

[243] Caucus statement of Briggs Steven and Lucas 13 June 2011.

resulted in woody vegetation among limestone pavement, boulders and less accessible areas, and open elongated grassed areas, extending in various directions, which were likened to golf course fairways. We address later whether this ridge is a feature for the purposes of section 6(c).

[309] Apart from the effects of the proposal on amenity, there were two particular disputes in the landscape evidence presented. The first concerned the coastal environment.

***Is Mt Cass within the coastal environment?***

[310] Hurunui Commissioners concluded that Mt Cass ridgeline is within the coastal environment. Ms Rigg, the planner appearing for the District Council, Ms Briggs and Ms Lucas held the same view which was based, among other reasons, on the Hurunui District Plan, the Regional Policy Statement and the New Zealand Coastal Policy Statement 2010. The latter was not in force when the Commissioners made their decision.

[311] In Ms Lucas' opinion the site and its context lies within the coastal environment and should be considered under the relevant provisions of statutory documents.[244] We focus on Ms Lucas' evidence as she supported her opinion by giving detailed reasons.

[312] Ms Lucas found assistance in policies 13 and 15 of the New Zealand Coastal Policy Statement (**NZCPS**) when assessing what is 'natural character', 'natural features' and 'landscape' and 'amenity'. While Mt Cass ridge is some 500 m high and 4 km "back from the coastal edge" Ms Lucas took the approach that when dealing with a project which was of a large scale, then the coastal environment should in turn be appropriately considered at a broad scale.[245] On this basis much of the project would be located in the coastal environment.[246]

[313] To support this proposition Ms Lucas produced a map from a 1995 study documenting landscape types in the District depicting Mt Cass as being in an area of

[244] Lucas EiC at [113].
[245] Lucas Transcript at 389-390.
[246] Lucas EiC at [117].

'coastal hills'.[247] While the accuracy of this statement and the map was disputed, this is not a matter we need to determine as we did not find landscape typing notation informative of whether Mt Cass was within the coastal environment.

[314] Other reasons given to support her opinion included that Mt Cass is the dominant or defining ridge to the coast, streams drain from Mt Cass to the coastline, coastal processes influence the ridge, Mt Cass and its environs are uplifted – that is to say they had once been under the sea.[248]

*Discussion and findings*

[315] Defining landscape and coastal environment boundaries is not a straight forward task.

[316] The coastal environment is one of the environments of special concern in the District. The District Plan records that the coast is one of the District's most significant natural resources and that "coastal environment" can generally be regarded as the areas in which the coast is a significant part or element.[249] The Plan defines coastal environment based on the predominant character of a particular location and also factors including recent coastal processes and the presence of vegetation or habitats influenced by their coastal location. The Plan locates coastal environment in "coastal environment management areas" which are recorded in the planning maps with a distinctive blue 'zipper' line.[250] On Map 4a, which includes Mt Cass, the coastal environment is shown extending from close to the top of the coastal cliffs, to over half a kilometre inland. While Ms Lucas opined that the coastal environment management area line was "hazard driven", the presence of hazards is shown by a separate line generally seaward of the management area.[251] Our understanding therefore is that the District Plan has clearly defined the coastal environment and Mt Cass is not within it.

[317] We have considered what NZCPS has to say about the extent and characteristics of the coastal environment (in particular Policy 1 and the other policies referred to by Ms Lucas). In recognising that this varies from region to region and locality to locality,

[247] Ms Lucas was a co-author of the study.
[248] Lucas Transcript at 367 onwards.
[249] Issue 17, at 015-024 HDP.
[250] Chapter 11 Issue 17.
[251] Policy 17.8 explanation, Hurunui District Plan at 022.

policies 1(2)(c) and (f) contain two descriptors that might support a broader understanding of coastal environment. Policy 1(2)(c) restricts consideration to areas where coastal processes are significant. We did not understand witnesses to suggest this was the case for Mt Cass ridge. Policy 1(2)(f) refers to elements and features that contribute to the natural character, landscape, visual qualities or amenities. While this is more generally expressed, it does not appear to necessarily encompass land that is some kilometres distant from the coast. We could find no other support in the NZCPS for the relevance of a dominant ridge, and where that might be.

[318] The District Council planner Ms Rigg, who had administered resource consents in the area for a number of years, agreed in response to a question from the Court, that she had never applied the provisions of the NZCPS (including the previous Policy Statement) when assessing resource consent applications in the coastal hills area.[252] We therefore understand that she had not previously considered that Mt Cass ridge, and the coastal hills more generally, were within the coastal environment.

[319] In general there was a paucity of evidence concerning coastal vegetation which we would have thought a central consideration if the contention was to be made out. Concerning coastal vegetation evidence was led by counsel from Dr Norton and Mr Davies during the course of the hearing. In that regard we prefer the evidence of Dr Norton who, while acknowledging a small coastal influence in terms of the saline inputs of the wind and the presence of some coastal vegetation, said that he would "not regard the bulk of Mt Cass ridge as being coastal in terms of the vegetation composition (in terms of Policy 1, 2 (e)) NZCPS".[253] This opinion accords with what we viewed during our site visit. Further, we noted that significant or potentially significant natural areas on the Plan are identified in Schedule A7.1[254] including at Mt Cass. Unlike other entries, the presence of coastal vegetation is not noted.

[320] The Hurunui Commissioners, referring to case law, were persuaded that the coastal environment boundary should be at the dominant landward ridge, which they identified as Mt Cass. We accept that Mt Cass is a dominant ridge and that glimpses of it can be seen from some parts of the Hurunui coastline. In other cases before the

[252] Rigg Transcript at 847-848.
[253] Norton Transcript at 968.
[254] HDP Natural environment section at 099.

Environment Court a landward ridge has been adopted as a boundary to a coastal environment. However, where a dominant ridge may be a useful means to identify a coastal environment boundary, such a boundary should be relevant to the coastline and coastal environment. There is no necessity to identify a dominant ridge in each case, particularly one that may be kilometres away from the coast. In any event we are satisfied that the effects on natural character and landscape would not extend to that area which could properly be considered to be coastal environment of Hurunui.

[321] We find that Mt Cass ridge and the dip slope landward of the ridge is not within the coastal environment and neither is any part of the wind farm. By contending that the coastal environment has an extreme reach, we are concerned that attention could be drawn from the importance of the coastline and derogate from the focus of section 6(a). While it is not necessary for the purposes of our decision to identify an alternative boundary, we had insufficient evidence to make a finding that the boundary was not correctly located by the Hurunui community in their Plan.

***Is the Mt Cass ridge an outstanding natural feature?***

[322] No witness considered that the Mt Cass range was an outstanding natural landscape and neither did the Hurunui Commissioners, although there was general agreement on its significance to the Waipara landscape. Mt Cass is not identified as an outstanding natural landscape in the Hurunui Plan and having no evidence to the contrary, we accept that Mt Cass is not an outstanding natural landscape. However, there was considerable and detailed evidence on the question of whether Mt Cass ridge is an outstanding natural feature.

[323] The Hurunui Commissioners concluded that Mt Cass ridge (that part of the site between Mt Cass and Totara Peak incorporating the limestone platforms, the native woody vegetation and the limestone escarpment) is an outstanding natural feature for the purposes of section 6(b) of the Act.[255] Ms Lucas and Ms Briggs agree that there is an outstanding natural feature at Mt Cass, and that the escarpment is an integral part of the limestone landscape feature, as do the two geomorphologists. Ms Lucas goes further to



[255] Hurunui Commissioners' decision at [679].

include the northern most extent of the ridge terminating at Oldham Peak,[256] thus indicating a larger feature than had the Commissioners.[257]

[324] Dr Steven alone says that there is no outstanding natural feature at Mt Cass.

[325] The Hurunui Plan has a section on important landscapes, but notes in its explanatory provisions that a large proportion of the Hurunui District is a working landscape and that its management must be sufficiently flexible to enable activities to occur where adverse effects can be avoided, remedied or mitigated. Many natural features have been modified and that opportunities exist to restore and enhance those features and through policy this is promoted.[258] There is also policy to identify and monitor the significance of natural features but no specific criteria or clear methods for doing so. As outstanding natural features (as distinguished from landscapes) are generally referred to in the Hurunui Plan, we understand from this that they are thought to exist but have yet to be identified.

[326] The lack of identification in the Plan is not determinative of whether Mt Cass ridge is an outstanding feature, not least because there are no such features identified in the Plan and the regional landscape assessment, used to prepare the District Plan, was at a broad scale. We accept, as was held in *Unison*, that the evaluation of the quality of a particular landscape should be considered for district plans on a district-wide, as opposed to a regional or national basis.[259]

[327] We received very detailed evidence from a number of witnesses regarding the putative feature and thank them for their carefully developed opinions. The Court was assisted through the fresh thought and by the witnesses robust exchange of views, particularly those of Dr Steven although we did not always agree with him.

[328] We commence our discussion with the evidence of the geomorphologists who described the landform. They both agreed that the Mt Cass ridge is a fine example of a cuesta and is a geomorphological feature is of regional significance.[260] Professor Paul


[256] Lucas EiC attachment 14.
[257] Dr McConchie also identified a ridge extending to Oldham Peak.
[258] Policy 7.4.
[259] *Unison Networks Ltd v Hastings District Council* Decision W11/2009, at [81].
[260] Caucusing statement of McConchie and Williams 23 November 2009.

Williams, who gave evidence for MainPower, described the features of karst landscapes – all of which are present here – including sinking streams, underground rivers, caves, dry valleys, enclosed depressions, fluted rock outcrops, and springs; and also provided their various landforms such as the dolines, karren, grikes and clints.[261]

[329] In the opinion of Dr Jack McConchie, for the District Council, despite being an apparently unspectacular landscape when viewed from a distance, the Mt Cass-Oldham ridgeline and backslope exhibit a distinctive, potentially unique (within Canterbury) range of landforms and landscape elements.[262] While the landforms may not be dramatic on a global scale, he described them as "stunning" in the context of Mt Cass, the Hurunui district, and the Canterbury region.[263]

[330] The landscape architects agreed that a feature is a distinctive part of a landscape. And for the purposes of determining significance a feature can be considered separately from the wider landscape of which it is a part.

[331] In Dr Steven's opinion the Mt Cass ridge is part of the landscape (or even two landscapes, one either side of the Mt Cass ridge), and is not a distinctive landscape feature. The limestone escarpment, rock pavements and associated vegetation communities are loosely defined. The limestone elements, extending over a distance of 6.5 km, are simply typical of the underlying geomorphic processes. We understood that Dr Steven considered these as a series of small scale landscape elements and importantly, on his approach, they cannot be appreciated other than from within the site itself nor can they be viewed in their entirety from any single viewpoint.[264]

[332] That said, Dr Steven was able to distinguish Mt Cass ridge as a discrete entity when considering its naturalness concluding that the "[s]ummit ridge and plateau between Mt Cass and Totara Peak" was high. When considering naturalness he concluded that the entity was a significant natural feature.[265]


[261] We have drawn on the evidence of Professor Paul Williams and Mr Matthew Naylor to provide descriptions of each of these landforms in the geomorphological section of this decision.
[262] McConchie EiC at [22].
[263] McConchie EiC at [36].
[264] Steven EiC at [3.10] and [3.11].
[265] Steven EiC at [3.15], [4.15] table 16, [4.18].

*Discussion and findings*

[333] We agree with Ms Lucas that site context must be relevant in a consideration of an outstanding natural feature, and that such an assessment is based on people's perceptions and relationship with place. Moreover it is natural features which are outstanding, not outstandingly natural features that are relevant.[266]

[334] Further, we understand that Dr Steven is striving for a 'test' to determine outstandingness. However we regard this is a matter of judgment, informed by both community values and expert opinion. There are no invariable criteria for outstandingness — it depends on the specific characteristics of the natural landscape [or in this case natural feature] being considered.[267]

[335] Opinions on a feature's boundaries may reasonably differ where there are no clear land form changes or geographic boundaries such as a river or coastal edge. Landscapes frequently blend from an area with a certain group of predominant characteristics, to an area with other characteristics. Land use and management may blur perceptions and features which are elements within them. We reject Dr Steven's view that since the feature may only be seen "within the site itself", the area could not be regarded as a feature.

[336] We reiterate naturalness is part of a continuum of meaning and that the construct extends from pristine landscape which is understood as having no human impact, to landscape which might be an intensively developed inner city landscape. "It is a cultural construct rather than scientific term": *Upper Clutha Tracks Trust v Queenstown Lakes District Council* at [62].

[337] Naturalness can be objectively assessed such as by quantifying buildings, roads and other infrastructure and modifications in the built environment and also variances within the natural environment. This assessment should then be related to the context



[266] The same observation was made in *Upper Clutha Tracks Trust and others v Queenstown Lakes District Council* at [65].
[267] *Maniototo Environmental Society Inc v Central Otago District Council* at [206].

and people's perception of naturalness. Community views and values are relevant and we return to these later in the decision.

[338] It follows we do not accept that the only truly natural is a pristine landscape – that is to set the bar too high.[268]

[339] We found Dr Steven's approach when describing and assessing Outstanding Natural Features (ONF's) difficult to grasp because, we suspect, different 'yardsticks' based on landform elements, changes to topography or visibility from viewing points were used when assessing 'naturalness' and separately the presence of a 'feature'. Thus at first blush his conclusions about naturalness and the presence (or absence) of a feature appear inconsistent.

[340] While different scales such as for the word 'natural' may assist understanding of that term, a reductionist approach applied at the level of a landform element, topography or visual catchment – as we understood to be Dr Steven's approach – gives the impression that the construct can be accurately measured and such scaling can be undertaken without consideration of context and people's values. We do not accept that this can, or should, be done.

[341] We have considered Dr Steven's opinion that the ridge and plateau represents no more than a series of small landscape elements. We note that Dr Steven also describes the plateau area as a stimuli-rich, micro-scale landscape.[269] That, we regard, as the distinctive quality of the site, although we do not accept that the area is small overall. The escarpment, pavement areas and boulder fields on the summit are significant elements of this feature.

[342] Recent farm management has created a distinctive separation of the forested limestone pavement areas from the pasture dominated dry valleys, and enabled accessibility of the site and the plateau. This presents as an integrated and interlinking landscape experience valued by sectors of the wider Hurunui and Canterbury community. We find the distinctive and characteristic qualities of the ridge extend

[268] Steven EiC at [4.6].
[269] Steven EiC at [5.62].

beyond consideration of the area as an amenity, which is about pleasantness rather than distinctiveness and significance.

[343] Returning again to the consideration of community values the landscape experts did not undertake any specific public consultation. However, the Court had the benefit of submissions to the amended proposal. We also heard evidence from local residents and other groups and found their evidence compelling, particularly concerning the values held about the Mt Cass ridge. We accept that there is a diversity of interest from the local community and beyond which values the Mt Cass ridge.

[344] We are satisfied that the ridge feature between Mt Cass and Totara Peak is distinctive within the wider landscape. We accept that as a geomorphological entity, the evidence was that the cuesta extends to Oldham Peak. However, the most characteristic and valued elements were located in the area between Mt Cass and Totara Peak.

[345] Having concluded this, there seemed to be no real dispute that this entity is an outstanding natural feature. The evidence presented to support the Mt Cass ridge (including the escarpment and upper dip slope) between Mt Cass and Totara Peak as being an outstanding natural feature includes the uncontested significant Maori cultural values attached to the Mt Cass ridge,[270] the evidence of the geomorphologists that the limestone pavement and boulders on the ridge have regional geomorphological significance, and the contribution that the vegetation makes to the distinctive feature. While some expert opinion was that the outstanding natural feature extends to Oldham Peak we were not satisfied that this should be included as not all of these elements are present. It follows that we agree with the Hurunui Commissioners' finding that the ridge from Mt Cass to Totara Peak is an outstanding natural feature.

[346] We reject MainPower's submission that to consider the contribution made by the significant indigenous vegetation to the feature is to 'double count' this attribute under section 6(b) and (c) because it is valued differently under these sub-sections.


[270] Briggs EiC quoting the Cultural Impact Assessment prepared by Joseph Hullen at [69].

***Findings in relation to whether development of the ONF is inappropriate?***

[347] That being our finding we are required to consider whether the proposed development is inappropriate in the context (section 6 (b)). Here we are considering those attributes which led to our decision that the ridge was an Outstanding Natural Feature. We address the visual (including amenity effects) separately.

[348] Dr Steven's opinion was that the short and long term effects of the development on the biophysical landscape would be acceptable. He based this opinion on his understanding that that no part of the ridge was an outstanding natural feature while we have found it to be such. In contrast, Ms Lucas' view was the effects would be significant and not acceptable. Ms Lucas had formed her view on the understanding that Mt Cass ridge was within the coastal environment, we have found that it is not.[271]

[349] Detailed evidence was presented on the landscape protection agreed in the course of expert mediation, leading to the amended proposal. While turbines continue to be located along the ridge we accept that following removal of some turbines, the new route of the central access road and relocation of aspects the substation, there is now a greatly reduced effect on the ridge feature. There is a sizeable section of the ridge, nearly a kilometre, from which turbines have been excluded and areas where no works are to take place have been identified as an exclusion zone. The exclusion zone protects much of the section of the ridge where characteristic aspects are most distinctive. This exclusion zone extends to the dip slope and to the north and south of the ridge. Minimization of effects in this location is in our view necessary and appropriate.

[350] Of the identified limestone pavement and boulder areas within the project area, only a small proportion now remains affected; similarly the effects on the clusters of forest vegetation are very much reduced. We also note that both geomorphologists have agreed conditions which in their view address effects on the limestone pavements and boulder fields, and that Te Runanga o Ngai Tahu, Te Ngai Tuahuriri Rununga and Waitaha ki Waitaha have agreed conditions which address their concerns relevant to the cultural aspects of Mt Cass ridge.



[271] Lucas EiC [112]-[113]; Transcript at 366.

[351] We accept that particular care will need to be taken (and is provided for in conditions) to minimize impact on the natural character of the ridge. The biodiversity offset proposed as mitigation will effectively remedy some impacts. Changes will take place on the ridge as a result of grazing reduction and weed and pest management. This is expected to reduce the open space on the 'golf course' as regeneration of native vegetation advances. However, the proposal provides for a walkway which will enable continued access into the ridge area. Despite this, we accept that there would remain a likely perception of detrimental effects on the natural character of the feature, mainly deriving from the size and number of the wind farm turbines, the scale of some proposed works and the construction activities themselves.

[352] Addressing solely the effects on the outstanding natural feature we find that a wind farm (and the works that it would now entail, and conditions which would be imposed, including a proposed covenant in perpetuity over land identified as Mt Cass Conservation Management Area) on this farmland is not inappropriate. We do so taking into account that much of the most characteristic and distinctive section of the feature is excluded from development, that the area is to be protected for the future, that the vegetation and pavement will be managed for protection (including pest and weed management which we are confident will enhance natural aspects), and that cultural aspects have been protected.

[353] That an outstanding natural feature can be protected and become accessible though this development we find a beneficial aspect of the proposal. Through the development the public are to have controlled access and so be able to see, appreciate and understand this previously private site.

***What are the effects on amenity?***

[354] We must have particular regard to the maintenance and enhancement of amenity values, which mean those physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes. We received very little evidence on cultural matters, and understand that conditions have been agreed to address identified issues. So first we consider landscape amenity and then recreation and tourism aspects.

***What are the effects on landscape amenity?***

[355] In this section we address effects on the landscape and then the perception of those effects from beyond the site, particularly of the visual effects of the proposed turbines.

[356] The infrastructure and development proposed which may change people's appreciation of the site include the turbines with foundations and platforms, the access roads to the site and to turbines (and particularly the visible cut faces of the roads), temporary construction works, the substation, buildings and parking, the lay-down and fill disposal areas, the effects of underground cabling linking turbines and the substation, the pylon line between the substation and the Waipara exchange, and the proposed walkway, planting and landscape protection.

[357] The adverse effect on people's perception of the landscape and visual amenity derives (in this case) from the turbines. In all other respects we are satisfied that the negative effect on the ridge is short term. Many of the effects would be remedied following construction.

[358] Each turbine design and configuration would be evident on the hilltop: the smallest design would be 55 metres in height and the largest 130 metres. While a maximum of only 26 are proposed of the tallest, the shorter turbines would be more numerous. They are of a contrasting scale to structures elsewhere in the area.

[359] Thus there are likely to be two groups whose experiences of the wind farm will differ markedly. For the public at large most views (but not all) of Mt Cass are from of distances of 5km or greater. These views are generally eastward of state highway 1 which runs parallel to the ridgeline. From these viewpoints the effect of the proposal on the landscape and the visual amenity derived from the same will be minor.

[360] This includes the views from two schools, which we visited. The schools are located either side of State Highway 1. Both schools had dense screen and shelter planting and the class rooms were not oriented towards Mt Cass. We conclude that the turbines are unlikely to be a visual distraction from the schools.

[361] The second group comprises those whose viewing points are mostly east of State Highway 1 (largely from privately owned land) and closer to Mt Cass. For people within this group the proposal will not maintain the existing landscape character; the rural character of the area will change as a consequence.

[362] The evidence from the landscape architects was that while the turbines would be evident and noticeable they would not cause an adverse visual effect such that the proposal should be turned down. We heard from persons directly affected (predominately farmers). They were not so much concerned with views from dwellings, rather the change in landscape and visual amenity presently enjoyed as their workplace is outside. Some likened this – quite sincerely, to the "industrialisation" of the landscape.

[363] A wind farm must be located in an exposed area. The Mt Cass turbines would be clearly visible over a wide area and there will inevitably be mixed perceptions of their effect on visual amenity. While these views are not in the main from private dwelling houses, for many persons, particularly those living and working in the lee of the mountain, the change to the landscape will be adverse and very likely negatively impact on their appreciation of the landscape. These effects are not determinative but rather matters to be taken into consideration under Part 2 of the Act.

***What are the effects on recreation amenity?***

[364] Recreation is included in amenity values to which we are to have particular regard. Recreation generally increases wellbeing and may include simple pleasures such as walking and driving in the countryside, or more skilled activities such as golf or team sports. We heard from Mr Rob Greenaway, an expert in recreation, who presented evidence for MainPower, and also from Dr Mike Floate on behalf of the Mt Cass Protection Society. In addition Mr Gary Thomas, a section 274 party, presented submissions and evidence on an aspect of tourism, wine tourism.

[365] The question we are asked to decide is whether the visual and audible effects of the proposed turbines would have a negative effect on recreation and tourism. We address recreation first.

[366] There are two walkways which are open to the public in the vicinity of Mt Cass. Both were developed and are managed by Transwaste Ltd, and formed part of the mitigation proposals for the Kate Valley landfill. The poled routes have some rudimentary facilities such as signage, stiles and a portable lavatory and follow formed farm tracks with turf surfaces. Both walkways cover rolling farm land providing an easy recreation experience for families and individual walkers within less than two hours driving access of Christchurch. The walkways may be closed to the public from time to time such as for farm management reasons, fire risk and public safety. Views from the walking tracks are of the Pegasus Bay, farm land and the Waipara Valley, as well as closer more internal views of vegetation, limestone pavement, screes and boulder fields, and sheep and cattle. Both walkways have views of Mt Cass and walkers would have clear appreciation of the turbines, in close proximity in some places.

[367] MainPower proposes an extension to the Mt Cass track to provide further loops which would enable recreation access to the summit and plateau, north of the current track. There was dispute about how this might be developed and whether public access could damage the ecological communities in the plateau. We understand that as the result of mediation and the joint witness caucus, the combination of a poled route and formed track could be designed and formed with minimal threat to local ecology and limestone pavements.

[368] We find that the walkways already formed and the extension proposed will continue to provide recreation amenity and do not agree that the turbines will negate recreation enjoyment, although they may attract different people.

[369] Access to the sites of special ecological interest on Mt Cass has been available through the goodwill of the landowner previously. From evidence presented we recognise that there is benefit in providing public access to the area, and Mr Greenaway was confident that there would be more visitors to Mt Cass ridge than there are presently.[272] Those who perceive turbines as unattractive elements may be deterred from use of the area, but this would be balanced by the general improvement in access and would allow a broader range of people to enjoy the amenity provided by the site. This would include those who regard wind farms favourably because of their association

[272] Greenaway Transcript at 485.

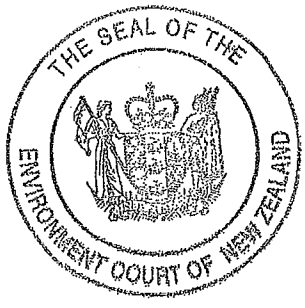
with clean renewable energy. We find overall minimal negative recreational impact from the proposal.

[370] We found the suggestion by the Mt Cass Protection Society that the unformed legal road may be used as an alternative public access unconvincing and agree the wisdom of controlled public access.

***What are the effects on tourism amenity?***

[371] Tourism was addressed as a subset of recreation, (although it might also be considered as an economic activity). Mr Greenaway assessed how Waipara works as a tourist destination,[273] and concluded that the landscape as an attraction was secondary to the wineries destination in its own right.[274] He differentiated between passing visitors and wine tours where people set out to visit wineries. While he acknowledged that the landscape was a factor in a visit to a winery (it may enhance the enjoyment of a winery), he stated that the Waipara landscape had not led tourism development in the area,[275] and did not accept that there was a correlation between landscape and fine wine. He thought that tourism in Waipara was likely to increase as the result of the wind farm.[276]

[372] We heard from winegrowers, Mr Thomas, Ms Vincent, and Mr Eaton. They were concerned with the negative impact on landscape and the development of a wine industry including fine wines and wine tourism. Mr Thomas, who was developing a vineyard from which he hoped to produce fine wines in the future, gave evidence that there could be a correlation between uncluttered landscape and fine wines. He gave examples of areas around the world which produce fine wines and which have attractive landscapes. Mr Thomas presented detailed analyses and a heartfelt argument for the retention of the Waipara landscape in its present state. He outlined factors which he believed influenced fine wine production including limestone and limestone soils, particular landforms, mesoclimatic influences including low rainfall at the appropriate time of year, and the landscape setting.[277]




[273] Greenaway Transcript at 468.
[274] Greenaway Transcript at 488.
[275] Greenaway Transcript at 491.
[276] Greenaway Transcript at 499.
[277] Thomas Transcript at 860.

[373] We were not convinced that a wind farm would derogate from the perception of fine wine. While examples were presented of fine wine areas which do not currently have turbines or visually unattractive infrastructure, we would expect much more detailed evidence to justify a finding that there would be a negative impact on the perception of a fine wine, or on wine tourism. We accept Mr Greenaway's evidence that the Waipara wineries are a destination choice in their own right.

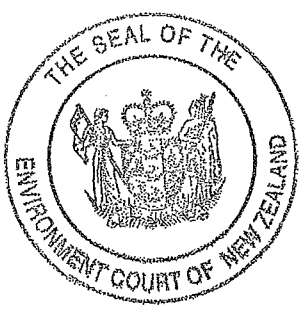
[374] In conclusion we find that the proposed wind farm would not have an appreciable negative effect on the recreation or tourism amenity in Waipara, but that a wind farm may increase tourism. We see no reason to accept that there would be a negative perception and therefore a business impact, on Waipara's wines from the proposed wind farm.

***Planning provisions on landscape***

[375] A central issue for determination is whether this proposal achieves the objective that natural features and landscapes valued by the community are protected and enhanced (objective 7).[278]

[376] Policy 7.2 encourages the use and development to be undertaken in such a way that all natural features and landscapes which contribute to the amenities of the District are protected and enhanced. Policy 7.3 has two parts. First, activities are to be controlled where these would have an adverse effect (relevantly) on an outstanding natural feature. Secondly, to avoid adverse effects on areas which have a high degree of naturalness, visibility, aesthetic value or expressiveness. The explanation to the policy refers to areas which have been identified as outstanding and which therefore may be particularly vulnerable to the adverse effects arising from change.. It states "[w]hile it is recognised that human activities and structures still need to exist and be provided for important landscapes and natural features should be protected".

[377] The Plan promotes the restoration and enhancement of important natural features and landscapes (policy 7.4) and this is to be done, amongst other means, through the resource consent process (methods) including the conditions of consent.[279]




[278] Section 7: Protection of resources with significant value, objective 1.
[279] Explanation to the policy.

[378] The relocation of the wind farm road and removal of some turbines off the ridge and escarpment between Cass and Totara Peaks was, in our view, essential if the feature was to be protected and adverse effects on natural character (at least) avoided. There will, however, always be tension between policies seeking to avoid areas with a high degree of visibility and a wind farm development.

[379] Related to this concern are the provisions for the protection and enhancement of environmental quality; these are:

> Objective 10
> A healthy and safe environment within the District and maintenance and/or enhancement of amenity values which the community wishes to protect.
>
> Policy 10.3
> To maintain and enhance environmental amenity by ensuring that the development and distribution of facilities and services avoids, remedies or mitigates adverse effects.
>
> Policy 10.5
> To avoid, remedy or mitigate the adverse effects of activities on amenity values.
>
> Policy 10.5a
> To avoid, remedy or mitigate the adverse visual effects of buildings and structures sited on prominent ridges or immediately adjacent to strategic arterial, district arterial and collector roads or to Lake Sumner Road.

[380] While the Plan does not identify the amenity values that attach to Mt Cass, that does not mean these cannot be ascertained – they can be through the public's participation in these proceedings and secondly, from expert evidence given at the hearing. The wind farm will be visible from various dwellings located east of the state highway and also from viewing distances of several kilometres. Placement of the turbines on a prominent ridgeline will therefore have some considerable effect on amenity, particularly for persons who work outdoors. To this extent the proposal is in tension with objective 10.

[381] We have considered chapter 8 of the Regional Policy Statement (RPS) which contains detailed provisions concerning the protection and enhancement of natural features and landscapes. For the reasons above there is tension also between this proposal and objective 2 of the RPS which provides for the: [280]

[280] Related to this is policy 3 which we have also considered.

> Protection or enhancement of the natural features and landscapes that contribute to Canterbury's distinctive character and sense of identity, including their associated ecological, cultural, recreational and amenity values.

[382] And policy 3, which states that those natural features and landscapes that meet (as this site does) the criteria in sub-chapter 20.4(1) "should be protected from adverse effects of the use, development, or protection of natural and physical resources, and their enhancement should be promoted."

[383] The proposal endeavours to address the thorny issue highlighted in section 9 of the Plan of meeting the demand for public access to resources of significant value to the community without conflicting with both the need to protect the environmental values of those resources and also recognising landowners' rights. MainPower does so by proposing to form a track extending the Mt Cass walkway and into areas containing indigenous vegetation and distinctive limestone features. We are satisfied that the proposed formed track meets the intent of objective 9 and policies 9.2 – 9.6.

[384] Finally, Maori resource management values are accorded proper recognition in the District Plan as being a matter of national importance under the Act (section 6(e)). MainPower, as a result of consultation with Te Runanga o Ngai Tahu, Te Ngai Tuahuriri Runanga and Waitaha ki Waitaha have proposed comprehensive conditions controlling what is to occur in the event that a site of importance to them is discovered.[281] The proposed mitigation is of importance to the resources and areas valued by Maori and include fencing off cattle, weed control and pest management and restoration of the natural environment. Given this we are satisfied that the provisions of the Plan are achieved (objective 5 and policy 5.1, 5.4, objective 6 and policy 6.2).

**Noise**

[385] In this section of our decision, we examine the effects of noise from the construction and operation of the wind farm. We heard from two noise experts, Mr Malcolm Hunt for MainPower and Mr Stuart Camp for the District Council, as well as from Dr David Black, a medical expert who was called by MainPower to address the potential for adverse health effects arising from the operation of the wind farm.

[281] Conditions [123]-[128].

[386] Prior to the hearing, the noise experts had reached a common understanding on most issues including the proposed conditions of consent. Issues for which we consider clarifications are required are:

- effects of construction noise - the control of noise from the concrete batching plant and, if used, hydraulic rock breakers;
- effects of non-turbine operational noise;
- wind turbine noise limits - the adoption of NZS6808:2010 for assessing wind turbine noise;
- monitoring sites - the substitution of the recently demolished Mt Cass Homestead with the Tiromoana Homestead as a noise monitoring site;
- predicted noise levels compared with background levels at Hamilton Glens;
- post-installation testing for noise with special audible characteristics (SACs);
- effects of wind farm noise on the health of a resident on the autism spectrum;
- cumulative noise effects from Mt Cass and possible future wind farms;
- noise effects for recreational users of the Mt Cass walkway;
- effects of low frequency noise and infrasound;
- effects on pupils at a nearby school; and
- effects on fauna.

[387] We address these in turn.

***Effects of construction noise***

[388] During construction, noise will be generated by on-site construction equipment and by vehicles transporting labour, equipment and materials to the wind farm site.

[389] Condition 130 of the proposed Mt Cass Conditions dated 9 August 2011 requires that all construction, earthworks, site remediation and decommissioning be designed and carried out in accordance with NZS6803:1999 Acoustics – Construction Noise, with the noise limits being within those set out in Table 2 of this standard (for works of 'long

term' duration). This is the standard which is specified in the District Plan for construction noise.

[390] In his evidence Mr Hunt makes particular reference to the two noisiest types of on-site construction activity, the concrete batching plant and, if used, hydraulic rock breakers. He notes that careful siting will be required for the batching plant to minimize off site noise and that temporary screens or earth mounds could be used as barriers to mask the noise if rock breaking operations are undertaken.

[391] In his assessment, noise from on-site construction activities will barely be noticeable at any residential property, the closest being over 900 m from the wind farm.[282] In this context, it is his view that noise from all forms of construction activity received at dwellings should be below 55 $dBA_{L10}$ the maximum allowable daytime limit for permitted activities in the District Plan.[283]

[392] As none of this evidence was disputed, we accept that the proposed conditions for construction noise should apply.

***Effects of non-turbine operational noise***

[393] The District Plan at A1.2.9 requires that all activities be designed and conducted so as to ensure that the following noise limits are not exceeded at or outside the boundary of the site:

- 55dBA $L_{10}$ 7am to 7pm daily
- 45 dBA $L_{10}$ 7pm to 7am daily
- 75 dBA $L_{max}$ all days between 10pm and 7am.

[394] The Plan goes on to say that in the case of residential dwellings and/or zones, noise is to be measured at any point within the notional boundary of any residential zone, or the notional boundary of any habitable residential building in any other zone. The notional boundary is defined as a line 20 m from the facade of any rural building or the legal boundary where this is closer to the dwelling.

[282] Hunt EiC at [8.11].
[283] Camp EiC at [15].

[395] Condition 131 requires that the following limits should not be exceeded within the notional boundary of any dwelling:[284]

- 50 dB $L_{Aeq\ (15min)}$ 7am to 7pm
- 40 dB $L_{Aeq\ (15min)}$ 7pm to 7am
- 70 dB $L_{max}$ 7pm to 7am.

[396] The unit ($L_{Aeq(15min)}$) differs from that used in the Plan ($L_{10}$). Mr Hunt told us that the $L_{Aeq(15min)}$ unit is now being used in modern standards instead of $L_{10}$ and that for all intents and purposes at Mt Cass there will be little difference between the units.[285]

[397] There will be practical achievement of the Plan non-turbine operational noise standard with Condition 131 having noise limits up to 5 dB more stringent.

***Wind turbine noise limits***

[398] Mr Hunt contends that noise limits such as those specified in the District Plan are not suitable for assessing wind turbine noise and that instead turbine noise should be assessed against *NZS6808:2101, Acoustics-Wind farm noise.*[286] As this was not raised or disputed by any of the other parties, we accept that the New Zealand standard should apply for assessing wind turbine noise.

***Monitoring sites***

[399] Mr Hunt notes that the original modelling and monitoring of sound had been undertaken at the Mt Cass homestead. This homestead has since been demolished and can no longer be considered as a viable monitoring location although his evidence continues to refer to Mt Cass as a noise sensitive site because it is the closest site to the wind farm.[287]

[400] Mr Camp considers that, because the Mt Cass homestead site is one of the two closest monitoring sites to the wind farm, even with no residence, it should be retained

[284] Condition 131 of the 8 August 2011 Mt Cass Conditions.
[285] Hunt Transcript at 657.
[286] Hunt EiC at [7.6].
[287] Hunt EiC at [3.17].

as a monitoring site. As an alternative, he proposes that the nearby Tiromoana homestead could substitute for Mt Cass as the predicted sound levels at both sites are the same. This would require detailed monitoring to be undertaken at Tiromoana prior to construction.[288]

[401] Condition 132 confirms that the dwellings at Dovedale, Hamilton Glens and Tiromoana are the selected monitoring points for measuring and assessing sound from the wind farm. Condition 132 limits the wind farm sound level at these selected monitoring points to a maximum of 5 dB above background sound levels or 40 dB $L_{A90}$(10 min), whichever is the greater. This noise limit is in accordance with Clause 5.2 of NZS 6808:2010.

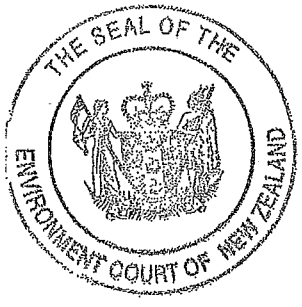
***Wind farm sound levels at Hamilton Glens and the McLachlan residence***

[402] The Hamilton Glens farm residence is located in a relatively sheltered area north of the wind farm and further north again, about 2.3 km from the wind farm, is the McLachlan residence.

[403] Mr and Mrs McLachlan, who are both parties to these proceedings, have a young child who has autism spectrum disorder. Mrs McLachlan questioned Mr Hunt about the difference at Hamilton Glens between the maximum predicted wind farm sound level of 36 dBA and the measured background sound level of 18 dBA. She was concerned that if there was a similar sound level difference at her residence, this could be very noticeable and potentially affect her child.[289]

[404] For Hamilton Glens, Mr Camp referred to the Marshall Day (Stuart Camp) report of 24 September 2010 titled *Mount Cass Wind farm-Additional Noise Analysis* attached as Appendix 3 to his evidence. This states that following a review of measured background noise:

> Wind conditions during noise monitoring at Hamilton Glens are not particularly representative of the overall wind statistics for the locality. Correcting for this gives more than 61% of night time noise levels less than 25 dBA.[290]




[288] Camp EiC at [20,21].
[289] Hunt Transcript at 639.
[290] Camp EiC at Appendix 3 at [2].

[405] Even with these extended periods of low background sound levels, with some as low as 18 dBA, he is of the view that "... a 35 dBA night time noise level is appropriate for properties such as Hamilton Glens which are clearly sheltered from some wind directions".[291] In this context NZS6808:2010 at 5.3.3 includes a recommendation that wind farm sound limits be set no lower than 35 dBA at any time.

[406] Compared with Hamilton Glens, the predicted maximum wind farm sound level at the McLachlans' dwelling is only 25 dBA.

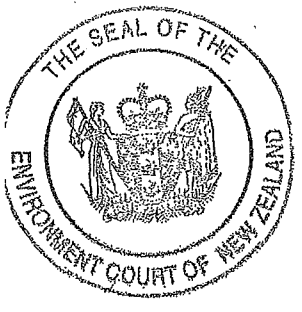
***Post-installation monitoring for noise with special audible characteristics***

[407] Having considered the predicted maximum level of sound at the McLachlans, we now consider special audible characteristics as these have been shown to be of considerable concern for communities living near wind farms.

[408] All wind farms produce sound at source.[292] The received sound level is influenced by a number of effects and conditions including the distance from wind turbine generator, air turbulence, air and ground adsorption, screening effects of vegetation and wind effects.

[409] Nearly all sound produces special audible characteristics including the lower frequency sounds of tonality, impulsiveness and amplitude modulation.[293] C5.5.2 of NZS6808:2010 notes that as sound propagates from a wind farm, the higher frequency components attenuate more quickly than the lower frequency components. At a distance, it is the lower frequency sounds that are audible, albeit at a low sound level.

[410] Many parties expressed concerns about the emission of noise and the effects arising from SACs. However, Mr Hunt was very confident that MainPower could install R60 or R90 turbines that would produce "zero" SACs at the monitoring sites. Some manufacturers of R60 and R90 turbines certify these turbines do not produce SACs.[294] However, Mr Hunt had some doubt about R33 turbines. He said that he had not sighted




[291] Camp EiC at Appendix 3 at [2].
[292] Hunt EiC at [6.4] - sound at source is known as the *sound power level.*
[293] Camp EiC at [30].
[294] Hunt Transcript at 650-652.

any manufacturer's certificate and he referred to equivocal results in noise monitoring at Te Rere Hau wind farm where these are installed.

[411] Condition 133(a) of the 8 August 2011 version of the Mt Cass Conditions provides for an Acoustics Emissions Report to be submitted to the District Council confirming that the selected turbines "are not expected" to have special audible characteristics[295] (our emphasis). In response to a question from the Court, counsel for MainPower advised that in this condition MainPower now proposed to substitute the words "shall not have" for the words "are not expected to have".[296]

[412] Our understanding is that the Acoustics Emissions Report relates to the status of the turbines as tested by the manufacturer before delivery to the site. MainPower's proposed revised wording could be interpreted as applying to the turbines both before and after their installation when this is not the intent of this condition. We consider that the words "do not have" should substitute for "are not expected to have" as these more accurately capture the intent of the condition.

[413] The unexpected presence of SACs from the turbines following their installation at *Project West Wind* at Makara has heightened community sensitivity to wind farm noise in other locations where wind farms are proposed. For the Mill Creek wind farm,[297] which is close to *Project West Wind*, even with a requirement for a manufacturer's warranty for SAC free turbines, to protect the local community, all of the noise experts agreed that there should be a condition for post installation testing to be undertaken to ensure that the turbines are SAC free prior to the operational commissioning of the wind farm.

[414] The Court asked the noise experts for their opinions as to whether a similar condition should apply for Mt Cass. Mr Camp provided this response:

> ...well firstly, it's in MainPower's best interests to make sure that that problem doesn't exist because as we saw at Makara, residents get highly annoyed by it and you never quite catch up. You solve the problem but people are still then sensitised to the noise whatever that's like. So, I think it would be sensible to have a condition that required assessment of special audible


[295] Hunt Transcript at 1434.
[296] Counsel for MainPower Transcript at 1434.
[297] *Meridian Energy Ltd and Ors v Wellington City Council and Ors* [2011] NZEnvC 232.

> characteristics on say, two turbines before commissioning the rest of them. And as Mr Hunt noted yesterday, assessing special audible characteristics is relatively simple because you don't do that out at a residential property. It's not about measuring the overall noise level, it's about measuring the character of that noise. So you would do that at the reference position that he referred to in the standard when you measure the sound power level of the turbine.... which is very quick and easy, it's a one hour measurement perhaps... I think that could be done on one or two turbines prior to running the remainder at night.[298]

[415] Despite this, the 8 August 2011 draft conditions do not provide for post installation testing for SACs. When asked why this was so, counsel for MainPower said:

> I've had discussions with Wind and Energy Association and...it's a matter I suppose of principle around the need for such a condition in all cases.[299]

[416] We consider MainPower's stance in this regard to be somewhat unreasonable. On other wind farms, even where turbines have been certified by manufacturers to be "SAC free", SACs have been detected and local residents, the McLachlans in particular, have considerable concerns over wind farm noise – which we discuss in some detail below.

[417] With Mr Camp's advice that such testing is straightforward and not costly, we have decided that SAC field testing should be undertaken on two turbines installed as part of the commissioning of the wind farm and that at the very least, a number of turbines closest to the McLachlan's residence should not be operated until it has been established that there are no SACs present. We have identified these turbines and the SAC testing requirements in a proposed new Condition 134(b) as follows:

> The sound from at least two wind turbines shall be measured prior to commissioning the wind farm. These measurements shall be conducted at a location within 1000m from the turbines. A compliance assessment report for the turbines shall be submitted to the Environmental Services Group Manager in accordance with Section 8.4.1 of NZS6808:2010. Turbines 61/75 to 69/75 in the R33 layout, 36/42 to 39/42 in the R60 layout, or 24/26 to 25/26 in the R90 layout shall not be operated until a report on this test has been submitted and it shows that no special audible characteristics are present, when assessed in accordance with NZS6808/2010. The reference test method for tonality shall be that prescribed as Annex C to ISO 1996 – 2:2007.


[298] Hunt Transcript at 675.
[299] Counsel for MainPower at Transcript 1433.

Note: the intention is that testing is carried out prior to operating the turbines closest to the McLachlan property.

[418] The proposed wording of this condition has been adapted from a similar condition agreed among the noise experts on the Mill Creek wind farm[300] (footnote with decision reference). The parties are invited to comment on the suitability of this proposed wording and particularly on the location as to where the SAC measurements should be made.

[419] In the context of the rest of the wind farm, the noise level at the closest dwelling (Tiromoana) is predicted to be just under the allowable 40 dBA. If unexpected SACs were detected, it would be necessary to impose the 5 dBA penalty provided for in Condition 136, which in turn would require turbine de-rating or shut down until the cause(s) of the SACs had been identified and remedial actions put in place.

[420] Accordingly, it must be in MainPower's best interests to use the results of the post installation testing to ensure that none of the Mt Cass turbines exhibit SACs prior to commissioning of the wind farm.

***Effects of wind farm noise on the health of the McLachlans' child***[301]

[421] Dr Black was questioned extensively by Mrs McLachlan about the potential effect of the wind farm on the health of her child. We found this questioning to be most helpful and draw heavily on it to describe the concerns for the McLachlans if a wind farm is built close to their farm and home. Dr Black's area of expertise is in medicine and bio-physics. He does not regard himself as an expert in autism with his opinions on autism being obtained primarily from literature research.[302]

[422] At the suggestion of the McLachlans, Dr Black had contacted Dr Angela Arnold-Satiepe an Auckland based psychologist who is a specialist in the treatment and management of children with autistic spectrum disorders. This was to discuss the potential effects wind farm noise might have on this child. The discussion had taken place after Dr Black had prepared and submitted his rebuttal evidence.


[300] See *Meridian Energy Ltd and Ors v Wellington City Council and Ors* [2011] NZEnvC 232.
[301] In order to protect the privacy of the child we have not included personal details in the quoted text of the decision, transcript or conditions of consent.
[302] Black Transcript at 601.

[423] Mrs McLachlan disputed Dr Black's recollection of his discussions with Dr Satiepe saying they did not match those of Dr Satiepe.[303] We could not confirm this one way or the other as we did not hear from Dr Satiepe but in any case we do not consider that this had any material effect on Dr Black's responses to Mrs McLachlan's questions or our understanding of these.

[424] In response to a question from counsel for MainPower as to whether he had any additional comment to make following his discussion with Dr Satiepe, Dr Black replied, inter alia:

> I think the important points that I found helpful from my discussion were that as I had already interpreted from the literature, the possibility of children with autism spectrum disorder being – behaving or reacting in an idiosyncratic way to either sound or to the arrival of something new in their environment is unpredictable and is something which is virtually – very difficult to mitigate, particularly with regard to noise. We discussed at some length the way in which such children can find particular tones or sounds for no understandable reason, even in retrospect, distressing at times.[304]

[425] This statement encapsulates for us the McLachlans' concern of the unknown with respect to the health of their child if a wind farm is built at Mt Cass.

[426] In response to a question on the protection afforded to the community by health standards and the effects on the health for those with autism, Dr Black had this to say (inter alia):[305]

> I hope I made it clear in my evidence that when a project like this is being undertaken it is incumbent on the designers to ensure that it complies with ... public health standards which are designed to protect a normal population, and the normal population does not, by definition, include any hypersensitive population that might exist. Trying to protect a hypersensitive population with a standard designed for a normal population is both impossible and is also fraught with difficulties and failures.



[303] Black Transcript at 629.
[304] Black Transcript at 592.
[305] Black Transcript at 601, 602.

[427] In confirming to Mrs McLachlan that autistic people are not catered for by health standards in the general, well and normal population:[306]

> ...people with autistic spectrum disorder are not necessarily catered for by public health standards. They are not, in fact, catered for by quite a lot of facilities in the environment such as I've just mentioned, the normal procedures for education assessment and employment, and these are people who do require special care

and:[307]

> ....the New Zealand Standard for wind farm noise does provide protection for that contiguous general population, including the most sensitive people in it ... the standard, like most public health standards, does not purport to provide protection for a separate non-contiguous, hypersensitive group.

[428] Mrs McLachlan then went on to ask if Dr Black agreed with the following statement:[308]

> A precautionary approach should generally be regarded as justified in cases where there is a possibility of an event with very serious consequences even though the possibility of occurrence is low. By adopting a precautionary approach the likelihood of an adverse outcome can be reduced, even if not eliminated.

to which Dr Black responded (inter alia):[309]

> ...there are areas where there is incomplete information, in other words where the science is incomplete and so a precautionary principle is invoked if it is thought that there is a serious risk of something that we don't know about. In this case, I think you are arguing that, well not necessarily arguing, but suggesting that here is a possibility that there might be an effect to a hypersensitive group, that is not established that it will happen ... but can't be excluded and that should result in a pre-cautionary approach being applied across the board to stop that happening. That is just not workable ... to do that you'd have to apply that uniformly and it would defeat the whole point of having well formed standards based on population responses. Again I repeat and I know it sounds harsh, but the reality is that the only way to protect hypersensitive sub-groups is

[306] Black Transcript at 602.
[307] Black Transcript at 605.
[308] Black Transcript at 613.
[309] Black Transcript at 613-615.

to either treat or individually protect them. You can't protect them as part of a wider population protection mechanism.

[429] He then went on to say that:

> But I must add to this because it all sounds a bit bleak ... in my view having looked at the literature and also yes, in my discussions with Dr Angela, the possibility of an effect on Autistic Spectrum Disorder people from noise hasn't necessarily got anything to do with the level of the noise or sound, it's more likely to have something to do with the character of it. (our emphasis).

Mrs McLachlan:[310]

> There is no escape we cannot, we cannot get, or [the child] cannot get away from it like a noise in the community?

Dr Black:[311]

> Mrs McLachlan, if it turned out that some aspect of a wind turbine did prove to be distressing for your [child] that would be most unfortunate and would require some individual management and... I don't know what that would be, but that management would have to surround looking after her rather than trying to modify the environment.

Mrs McLachlan:[312]

> Well would you not agree that [your child] already lives in an environment where [the child]... is more than settled and as far as I know there are not many of those triggers. Would you not agree that would be MainPower introducing something that [the child] could not find acceptable?

Dr Black:[313]

> ...what you say is correct if that happened, but it is impossible to run the world on then having an idea like that flow on to regulatory controls and standards.



[310] Black Transcript at 615.
[311] Black Transcript at 615.
[312] Black Transcript at 615.
[313] Black Transcript at 615.

[430] In response to a question from Mrs McLachlan as to how her child might be affected by the predicted maximum 42 dB noise level at the boundary of the McLachlan's farm, Dr Black responded that he would be very surprised if the child was adversely affected through exposure to what he described as 42 dB of broad spectrum noise.[314] He amplified this further when he said:[315]

> It's not a matter of level of noise and it's far from certain that the nature of the noise would be of a type that would upset [the child]. In fact with modern wind turbines, the tonal component to the noise is largely eliminated. In some earlier turbines there could, at times, be quite a tonal component. The broad spectrum white noise which is typical of turbines once you get more than a few hundred metres away from them, is a noise of natural character and one which is generally readily accommodated by people because it becomes undistinguishable from natural noises which people are accustomed. I've had quite a lot of people in communities who were concerned about turbines say to me that after a while they really can't discriminate between the sound to the extent that they do hear it and the wind and if they want to really establish whether it is the wind or the turbine, they really have to face it with both ears facing it and really listen and think about it. (our emphasis)

[431] Following Mrs McLachlan's questioning, the Court sought confirmation from Dr Black that the issue with noise for those with autism may not necessarily be the level of the sound but rather the character of the sound. Dr Black said:[316]

> That's what my research has led me to believe, that there is – there are no characteristics of autism which result in people having hyperacusis, in other words excessively sensitive hearing, and it is not that they are more sensitive to sounds at a lower sound pressure level than normal people. It is that there are characteristics of sound which could – which they could find quite distressing. In fact, in my discussions with Dr Angela which I have referred to, she really quite emphasised that point to me.

[432] Having heard his submission, the Court asked Mr McLachlan whether he had a perception of what the effect might be at his home from an increase in noise level from the lowest reported background sound level of 18 dB to the predicted 25 dB, or indeed how loud 25 dB actually sounds. This led on to a question from the Court, as to whether MainPower had offered to arrange for the McLachlans to visit an existing wind farm so

[314] Black Transcript at 622.
[315] Black Transcript at 626.
[316] Black Transcript at 631.

that they could hear for themselves sound levels from turbines similar to those proposed at Mt Cass. Mr McLachlan responded that no invitation had been received.

[433] Following her closing submission and in response to a question from the Court, Mrs McLachlan advised that Mr Hurley from MainPower had been in contact and agreed that background noise monitoring would be undertaken at their dwelling.[317] We note also that Condition 133 confirms that the McLachlans will be considered a high amenity area for the purposes of NZS6808:2010 for as long as, but no longer, the child lives in the dwelling at this address.

[434] In his closing submission counsel for MainPower advised that MainPower and Meridian (who are in the planning stages for a separate wind farm north of Mt Cass) had offered jointly to assist with noise attenuation measures for the McLachlans' house but this offer had been declined.[318] He advised that MainPower had also offered assistance with a psychologist but that the McLachlans had responded that, while grateful, "...this was not something [their child] could cater for in [his/her] life at the moment".[319] Counsel advised that MainPower would continue to liaise with the McLachlans to offer any assistance they could.

[435] Short of deciding not to build the wind farm, we consider that MainPower has been responsive with its offers to address the McLachlan's concerns, although in doing so, we accept that even if they were to accept all of the offers, some uncertainty would still remain. Importantly, MainPower did not indicate that these offers were conditional on any matter and we commend them for their continued offer of assistance.

[436] Earlier in this section of our decision we concluded that there should be a condition requiring post installation testing for SACs to ensure that at least the turbines closest to the McLachlans' property are SAC free prior to their operational commissioning. The desirability of this testing has been strongly reinforced for us following our consideration of the evidence of the potential effects of wind farm noise on the McLachlans' child's health. In particular we note Dr Black's statement that it is

[317] Mrs McLachlan Transcript at 1230.
[318] Counsel for MainPower Transcript at 1456.
[319] Counsel for MainPower Transcript at 1458.

more likely to be the character of the sound rather than its level which those with autism could find distressing and that this view was also emphasized by Dr Satiepe. If Dr Black (and Dr Satiepe) are correct, ensuring that the turbines do not exhibit SACs (special audible characteristics) before the wind farm is commissioned is an important way of reducing the possibility of the child being affected by turbine noise.

[437] On the basis that SACs are avoided, we move on to consider Dr Black's statement that with modern wind turbines, the tonal component to the noise is largely eliminated. The broad spectrum white noise which is typical of turbines once you get more than a few hundred metres away from them is a noise of natural character and one which is generally readily accommodated by people because it becomes indistinguishable from natural noises which people are accustomed.[320]

[438] Our understanding of Dr Black's statement is that as modern turbines should not have any tonal noise or other SAC components, the remaining broad spectrum noise should contain only the higher frequencies which he describes as being "noise of natural character".

[439] The predicted maximum wind farm sound level at the McLachlan's is 25 dBA within the notional boundary of the property. With no SACs, the remaining turbine noise should then be perceived primarily as "a noise of natural character". The noise level is also very low, in many rural locations being typical of the background sound level. Short of having no wind farm noise at all, this low noise level should be barely discernible.

[440] There is also Condition 133 which requires the McLachlans' dwelling to be considered as a high amenity area in terms of NSZ6808:2010 while the McLachlans' child resides permanently at the dwelling. We have amended the condition by removing the name of the child.

[441] In addition, Condition 134 requires post-installation testing to be undertaken at the McLachlans' dwelling for the purposes of ensuring compliance with the sound level limits of Conditions 132 and 133.



[320] Black Transcript at 626.

[442] We acknowledge that even with assurances of no SACs, the very low 25 dBA predicted sound level at their residence, the high amenity area classification and the post installation testing to be undertaken at their dwelling, the McLachlan's concerns of an adverse effect from the wind farm may still remain. While it may not be the outcome the McLachlans are seeking, we accept Dr Black's advice that these concerns should be addressed through individual management rather than through us declining consent for the wind farm.

*Cumulative effects*

[443] One of the remaining issues we identified at the start of this section was submitter concerns over cumulative noise effects if another wind farm was to be built north of Mt Cass. Since the hearing closed applications for resource consent have been directly referred to the Environment Court in relation to a second wind farm in this area. The cumulative effects of the second wind farm are not something that we are able to consider as part of this Mt Cass consent decision.

*Effects of noise on recreational users*

[444] On the issue of wind farm noise for recreational users of the walkway, Mr Hunt advises that when wind farm noise levels on the walkway are high, then background noise levels from wind will also be high. We agree with his contention that the combined noise from the wind farm and general background noise should not detract from the experience for those who elect to use the walkway in windy conditions. Inevitably there will be users whose primary objective for using the walkway will be to see and hear the turbines at close range which for them will be a very positive experience.

*Effects of low frequency noise and infrasound*

[445] In his evidence, Mr Hunt notes that there is no evidence that low frequency noise or infrasound will have any adverse effects on health especially at the distances involved for Mt Cass.[321] This opinion is supported by Dr Black.[322] None of this was disputed.


[321] Hunt EiC at [9.10].
[322] Black EiC at [7.16]-[7.26].

*Effects on Omihi School*

[446] A number of submitters expressed concern that the noise from the wind farm could adversely affect children at the Omihi School. The predicted noise level at the McLachlan's dwelling which is 2.3 km from the wind farm is only 25 dBA. As the school is around 4 km from the wind farm, it is Dr Black's opinion that wind farm noise there will be barely audible and that it will have no effect on the pupils.[323] Dr Black's opinion was not disputed.

*Effects on fauna*

[447] Dr Black notes that one submitter (McKrone) is concerned that wind farm noise could drive away worms and that two others, Mr Francis and Ms Dineen are concerned about the effects on farm animals such as egg-laying chickens. Dr Black responds that the levels of vibration transferred to the ground are barely detectable and that these will not affect animals, chickens or earthworms.[324]

*Planning provisions concerning noise*

[448] Objective 10 (which we have referred to earlier) is also relevant in the context of noise, being:

> A healthy and safe environment within the District and maintenance and/or enhancement of amenity values which the community wishes to protect.

Policy 10.5 is:

> To avoid, remedy or mitigate the adverse effects of activities on amenity values.

And Policy 10.9 is:

> To control noise at levels acceptable to the community and, where they exceed those levels, generally maintain a separation distance between those noise- emitting activities and sensitive activities.

[449] Relevant also are the assessment criteria for resource consents. These provide in relation to noise:


[323] Black EiC at [7.28].
[324] Black EiC at [7.29]-[7.30].

- that the proposed noise levels are not to create a nuisance to any person;
- that the frequency and duration of the proposed noise above the level in the District Plan is insufficient to cause a significant adverse effect on the amenities of the surrounding sites;
- the necessity for the frequency, duration and level of noise, having regard to the best practicable options, the nature of productive rural activities in the rural areas, and other land use activities within the locality;
- that the proposed noise levels will not adversely affect the health and safety of any person; and
- any recommendations from a suitably qualified person(s).[325]

[450] The proposal will practically comply with the noise standards in the District Plan. Secondly, as a minimum, noise levels at all rural residential sites are to comply with the guideline limits set out in NZS6808:2010 Acoustics – Assessment & Measurement of Sound from Wind Turbine Generators. The construction of the proposal is to comply with the noise limits set out in NZS6808:1999 Acoustics – Construction Noise.

[451] MainPower has offered a Condition (133a) that the turbines are not expected to have SACs. We have imposed a further condition requiring post installation testing to confirm the absence of SACs before the turbines closest to the McLachlans' residence are operated. If SACs are detected in the test turbines, MainPower must then identify the cause(s) of the SACs and eliminate these for at least for the 'McLachlan' turbines. In addition, for the reasons we have already set out, it must be in MainPower's best interests to use the results of the post installation testing to ensure that none of the Mt Cass turbines exhibit SACs prior to commissioning of the wind farm.

[452] Finally, there is also the provision in Condition 136 that if SACs should be detected at any time, a 5dB penalty will apply which would require MainPower to de-rate or shut down turbines until compliance is achieved.

[453] With these safeguards, we are satisfied that the proposal will achieve objective 10 of the District Plan.



[325] Section C1: Resource Consent Procedures, Assessment Criteria C.1.2.4(a)(v).

**Part 2 matters**

[454] Opposition to MainPower's application to build a wind farm at Mt Cass centred on a number of key concerns. In summary these were:

- the effects of constructing a wind farm on a geomorphic ridge of regional significance containing significant indigenous vegetation and significant habitats of indigenous fauna;
- the loss of the amenity of the existing rural landscape and the values it supports (including tourism, recreation and viticulture industry); and
- the noise from the wind farm and its potential effects, including on the health and wellbeing of the McLachlans' child.

**Section 6**

[455] In our consideration as to whether we should grant consent for the wind farm (or not), we are required to recognise and provide for the matters of national importance listed under s6 of the Act.

[456] For Mt Cass, of the six matters listed in section 6, there are three that are relevant:

> (b) The protection of outstanding natural features and landscapes from inappropriate ... use and development;
>
> (c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna; and
>
> (e) The relationship of Maori and their culture and traditions with their ancestral lands ...

[457] While we have found the ridge and escarpment between Mt Cass Peak and Totara Peak to be an outstanding natural feature, we have also found that the siting of the proposed wind farm on this outstanding natural feature would not be inappropriate. We have reached this finding having taking into account that there is little disturbance of the most characteristic and distinctive sections of the feature. This area is to be protected for the future and the vegetation associated with the limestone pavement will be protected and enhanced.

***The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna***

[458] The effects of a wind farm on Mt Cass's ecology were at the forefront of concerns raised in both evidence and submissions. The Commissioners in the first instance hearing declined consent for the wind farm primarily on the basis that its effects on the site's ecology were unacceptable. The layout we considered *(the mediation layout*) included substantial revisions to reduce these effects. For this layout, we have found that:

- while the direct effects of construction will be significant in the *short term* these will be temporary and small in scale;
- with the development of the proposed Mt Cass Conservation Management Area, the adverse effects on the vegetation and habitat for indigenous fauna will be minor in the *medium term;* and
- in the *longer term,* these may well be reversed.

[459] MainPower proposes to address some of the adverse effects through "biodiversity offsets". What is meant by "offset" and how it fits within the framework of the Act was the subject of considerable discussion. This is a reflection of recent work (models and methodologies) aimed at ensuring conservation outcomes are measurable. In this regard we were referred to the international publication *Business and Biodiversity Offsets Programme,* the proposed National Policy Statement on Biodiversity, the National Policy Statement on Renewable Electricity Generation (2011) and to various judgments of the Environment Court.

[460] At times we found that the terminology associated with offsets was loosely employed and confusing. This may have occurred because the Business and Biodiversity Offsets Programme is concerned with "significant residual adverse biodiversity impacts after appropriate prevention and mitigation measures" thus begging the question.[326]



[326] NPS REG, policy C2 takes a similar approach - *residual environmental effects ...that cannot be avoided, remedied or mitigated.*

[461] For the purposes of this decision we have adopted the approach taken to offsets in the decision of the Board of Inquiry into the New Zealand Transport Agency Transmission Gully Plan Change Request (October 2011):[327]

> What ultimately emerged from the evidence, representations and submissions of the parties was an acknowledgement that the term offsetting encompasses a range of measures which might be proposed to counter balance adverse effects of any activity, but generally fell into two broad categories. Offsetting which related directly to the values affected by an activity was in fact a form of remedy or mitigation of adverse effects and should be regarded as such. Offsetting which did not directly relate to the values affected by an activity could more properly be described as environmental compensation.

[462] This, as MainPower's witness stated, necessarily includes any residual effects. These are:

> ... bundled together because you have to consider the management actions and whether those management actions are comprehensive enough to address the residual effects.[328]

[463] The offsetting for Mt Cass clearly relates to the values being affected, and secondly, it is being undertaken on the same site. Therefore we consider it to be a "form of remedy or mitigation of adverse effects" rather than environmental compensation.

[464] We acknowledge the uncertainties inherent in predicting effects within any ecosystem and the possibility for markedly different outcomes for some species. In this context, we have found that MainPower's biodiversity offset model including its sensitivity analysis and time preference discount provides us with confidence that there should be substantial gains for the biodiversity at the Mt Cass site in the medium to longer term.

[465] The conditions of consent, incorporating our changes, should provide sufficient certainty as to the overall outcomes for biodiversity at the site and adequate safeguards for the particular species of concern.


[327] At [210].
[328] Transcript at 1155.

***The relationship of Maori and their culture and traditions with their ancestral lands***

[466] The Court heard no evidence or submissions on Maori issues. Conditions 122 to 128 set down the requirements under which the Consent Holder has agreed to enter into accidental discovery protocols with Te Rununga Ngai Tahu, Te Ngai Tuahuriri Rununga and Waitaha ki Waitaha. We accept that these protocols will satisfy section 6(e) by protecting the relationship of Maori and their culture and traditions with their ancestral lands at Mt Cass.

**Section 7**

[467] Section 7 which requires us to have particular regard to a number of matters. Of the eleven matters listed under section 7 there are seven that are relevant to Mt Cass:

| | |
|---|---|
| (aa) | The ethic of stewardship |
| (b) | The efficient use and development of natural and physical resources |
| (c) | The maintenance and enhancement of amenity values |
| (d) | Intrinsic values of ecosystems |
| (f) | Maintenance and enhancement of the quality of the environment |
| (g) | Any finite characteristics of natural and physical resources |
| (j) | The benefits to be derived from the use and development of renewable energy. |

***The ethic of stewardship***

[468] In the *Project West Wind* decision[329] the Court discussed the concept of stewardship, firstly in the context of preserving the landscape unaltered, and secondly, allowing some compromise of amenity to take advantage of non-polluting and renewable sources of energy. For Mt Cass we would extend the context of preservation to include the site's ecology. The Court in *Project West Wind* favoured some compromise of amenity as long as this did "... not impose unreasonable burdens on communities, individuals or the receiving environment."[330] We adopt this same approach of compromise for Mt Cass. We consider the Mt Cass Conservation Management Area to provide much better stewardship of the ecological values than would be possible under a working farm.



[329] *Meridian Energy Ltd and ors v Wellington City Council and Wellington Regional Council*, W031/2007.
[330] at [369].

***The efficient use and development of natural and physical resources***

[469] The wind resource is well suited for renewable energy generation. A wind farm will result in considerable added value for the Mt Cass land as the wind farm can operate in parallel with the existing farming operations even if these are to be more controlled within the Mt Cass Conservation Management Area. The proposed extension to the walkway will provide visitors with expanded opportunities to experience close up the Mt Cass landscape, its landforms and ecology as well more distant views including those of Pegasus Bay. All of this will result in an efficient use of the natural and physical resources of the wind farm site.

***The maintenance and enhancement of amenity values***

[470] The development of a wind farm at Mt Cass will result in varying degrees of change to the amenity values experienced by both local residents and visitors for the landscape, ecology, recreation and tourism. The turbines will be clearly visible over a wide area and there will be mixed perceptions of their effect on visual amenity. For many who live within view of the wind farm, accustomed to the existing rural landscape, the addition of turbines along the ridgeline will negatively impact of their enjoyment of this landscape. Conversely others, including many visitors to the area as well as passers-by on the highway, will view the turbines as adding interest to the landscape as well as being a positive reminder that the modified landscape is now providing a valuable source of renewable energy.

[471] The recreational amenity of Mt Cass is centred primarily on the walkway. While some existing walkway users are concerned that the wind turbines will diminish the enjoyment of their experience, this will be offset by the proposed ecological conservation measures as, and when, these start to bear fruit. The extended walkway will provide opportunities to observe, appreciate and understand the landscape and ecology of the previously private properties along the ridge line. We conclude that the presence of the wind farm should have positive outcomes overall for recreational amenity. Waipara's tourism is unlikely to be negatively affected by the wind farm.



[472] There will be some loss of amenity for the local community. In particular, while the predicted wind farm sound level at the McLachlans is very low and conditions have been imposed to provide assurances for them of no special audible characteristics, we

accept that there can be no guarantee of absolute protection for the health and wellbeing of their child. If concerns do arise for the McLachlans, we agree with Dr Black that these should be addressed through individual management. Overall, we are satisfied that, provided there is full compliance with the noise conditions, a healthy and safe noise environment should be maintained for the local community.

***Intrinsic values of ecosystems***

[473] In our consideration of section 6(c) matters we found that the conditions of consent (with our changes) should provide sufficient certainty for the enhancement of the biodiversity of the site as well as adequate safeguards for species of concern. In addition, the proposed conditions of consent relating to geomorphology, geology and hydrogeology should protect sub-surface drainage pathways and that the proposed water quality monitoring programme should minimise the potential for the contamination of underground water sources. These measures should in turn protect aquatic biota as well as the quality of the drinking water for farm livestock.

***The maintenance and enhancement of the quality of the environment***

[474] The main effects of the wind farm on the quality of the environment will be the visual impact on the landscape, some loss of amenity due to noise and changes to Mt Cass's ecology. We have addressed each of these in some detail in our consideration of other section 6 and section 7 matters and do not repeat them here.

***Any finite characteristics of natural and physical resources***

[475] Wind farms have been constructed at various locations throughout New Zealand and there are resource consents approved for many more which have yet to be built. The wind at each of these sites is a finite resource. The scale and scope of each of these wind farms has been constrained by its adverse effects on local amenity. These constraints have often required layouts to be reconfigured or turbines deleted before consent was granted. Each deleted turbine has reduced the amount of energy able to be generated from the available wind resource.


[476] Mt Cass too has a finite wind resource. Many submissions sought that there be no wind farm at all because of its perceived adverse effects on the site's ecology and the general amenity of the local community. In response to these concerns, MainPower

made major changes to the proposed layout of the wind farm (but not its scale) to limit adverse environmental effects. We heard very detailed evidence on these effects but little if any on whether the wind farm might be more acceptable to some if its scale was limited through reducing the number of turbines. It was very much all or nothing. We assume that MainPower has scaled the wind farm to capture the maximum amount of energy it can from the wind at Mt Cass within the constraints of the site.

***The benefits to be derived from the use and development of renewable energy***

[477] The Mt Cass wind farm will have the following benefits which we recognise in accordance with the National Policy Statement on Renewable Electricity Generation (2011):

- it will capture a currently unused renewable energy wind resource of good quality for the generation of electricity;
- with its proximity to the main transmission grid, there will be low transmission costs and an efficient use of the electricity;
- it will increase electricity generation capacity while avoiding, reducing or displacing greenhouse gas emissions thereby countering the effects of climate change;
- it will increase the security of supply at local, regional and national levels through diversifying the type and/or location of electricity generation;
- it will assist with avoiding the reliance on imported fuels for the purposes of generating electricity; and
- it will assist in meeting New Zealand's obligations under the Kyoto protocol and the 2025 target of the New Zealand Energy Efficiency and Conservation Strategy for 90% of generation to be from renewable sources.

**Section 8**

[478] Section 8 of the Act requires us to take into account the principles of the Treaty of Waitangi in the decision-making process. As we have already noted, all matters affecting iwi had been resolved prior to the hearing.

**The Commissioners' first instance decision**

[479] We are required by section 290A of the Act to have regard to the decision of the Commissioners appointed by the District Council to decide the original application for

resource consent.[331] We have noted that the mediation layout is quite different from the wind farm considered by the Commissioners and the impacts on ecology have been considerably reduced. While we agree that a part of the Mt Cass ridge is an outstanding natural feature, we do not regard the Mt Cass range as within the coastal environment. Ultimately the changes in the layout and location of key elements of the wind farm infrastucture have led us different conclusions as to the extent and significance of the adverse effects.

**Exercise of discretion**

[480] Towards the beginning of this decision we set down the purpose and principles of the Act which guide us in determining whether or not granting consent achieves the purpose of the Act, namely the promotion of the sustainable management of natural and physical resources. To repeat, sustainable management is defined in the Act in these terms:[332]

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

[481] Decisions on wind farms often come down to weighing up the (primarily) national level benefits and adverse effects at the local level. This particular wind farm proposal clearly demonstrates benefits at both levels. While there are undeniable adverse effects on the landscape, visual character and local amenity, when viewed overall the outcomes for the environment are positive; that is to say better outcomes for the local ecosystem in addition to the regional, national and global positives of renewable generation. The wind farm enables the creation and funding of the Mt Cass Conservation Management Area for the restoration of a significant limestone ecosystem.



[331] Released 2009.
[332] Section 5(2) RMA.

The walkway will make this important site more accessible for both recreation and education purposes.

[482] Taking all these matters into consideration we are satisfied that the purpose of the Act would be best served by granting consent.

**Lapsing period**

[483] MainPower has sought a lapsing period of eight years from the date of the commencement of its consent. While this is supported by the District Council many submitters requested a shorter period being dubious about whether the proposal would proceed and wishing to have certainty – as much as they are able to gain, as to their future environment.

[484] We are satisfied, for the reasons advanced by MainPower that an eight year lapse period is appropriate.

**Result**

[485] The appeal against the decision by Hurunui District Council is allowed and the application for land use consent referred directly to the Court is granted for one of the following options:

- 67- R33 turbines, as detailed on CG151.4 in two sheets dated 27 May, 2011,or
- 40 - R60 turbines, as detailed on CG152.4 in two sheets dated 27 May, 2011,or
- 26 - R90 turbines, as detailed on CG153.4 in two sheets dated 27 May, 2011

all in accordance with the Mt Cass Conditions as revised by the Court and attached to this decision.


[486] We direct that MainPower and the District Council confer about any changes which they consider might need to be made to the attached conditions to reflect this decision. If so, a revised set of conditions is to be lodged with the court and circulated

to all parties for comment by **16 December 2011**. These conditions should be accompanied by a memorandum explaining the reasons for any changes or additions to the Court's version of the conditions (**attached**).

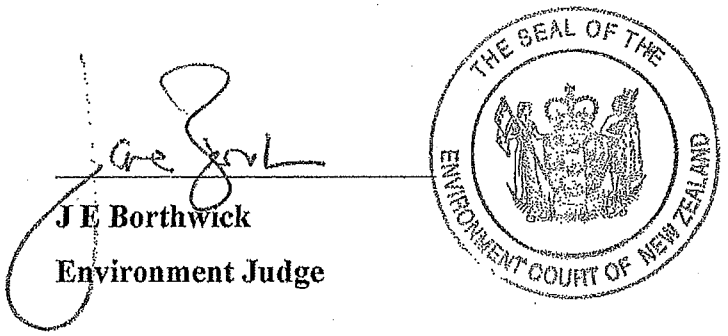
[487] By **21 January 2012** all other parties proposing amendments to the conditions (or a revised set of conditions if changes are proposed by Hurunui District Council and MainPower New Zealand Ltd) are to file and serve their memoranda setting out the reasons for the changes sought. By **28 January 2012** the Hurunui District Council and MainPower New Zealand Ltd may file a memorandum in response.

[488] We anticipate determining final conditions on papers. If any party seeks a hearing on conditions they should advise accordingly. The Court will release an untracked set of conditions at the parties' request.

**Costs**

[489] Costs are reserved. Parties are to note the presumption in section 285(5) of the Act that costs are not to be ordered against a person who is a party under section 274(1).

For the Court:




**J E Borthwick**
**Environment Judge**

Issued[333]:

[333] JEB\WF\DM\MtCass Wind Farm Decision Dec 2011.doc

**Attachment 1 - List of section 274 parties**

**ENV-2009-CHC-100**

1. MainPower New Zealand Ltd (appellant)
   Represented by Mr M Christensen and Ms A Ritchie
2. Hurunui District Council (respondent)
   Represented by Mr D Caldwell and Ms J Laming
3. Canterbury Aoraki Conservation Board
   Represented by Mr J Wallace
4. Energy Efficiency and Conservation Authority
   Represented by Mr D Randal
5. Metcalf, Mary
6. Mt Cass Ridge Protection Society Inc
   Represented by Mr Wallace
7. New Zealand Wind Energy Association
   Represented by Mr M Christensen and Ms A Ritchie
8. Orion New Zealand Limited*
9. Simpson, Andrew
10. Waitaha Ki Wiataha*
11. Young, James

**ENV-2010-CHC-200**

1. MainPower New Zealand Ltd (applicant)
   Represented by Mr M Christensen and Ms A Ritchie
2. Hurunui District Council
   Represented by Mr D Caldwell and Ms J Laming
3. Atkinson, L
4. Carr, John*
5. Croft, Peter*
6. Eaton, Elizabeth*
7. Eaton, Michael
8. Energy Efficiency and Conservation Authority
   Represented by Mr D Randal

9. Herbert, Christopher

10. McLachlan, Hamish

11. McLachlan, Katrina

12. Metcalf, Mary

13. Mt Cass Ridge Protection Society Inc
Represented by Mr Wallace

14. New Zealand Wind Energy Association
Represented by Mr M Christensen and Ms A Ritchie

15. Orion New Zealand Limited*

16. Pharis, Richard
Represented by Mr Wallace

17. Pharis, Vivian
Represented by Mr Wallace

18. Rennie, Donald

19. Rennie, Pauline*

20. Rich, Barry

21. Savill, Camilla*

22. Savill, Henry*

23. Simpson, Andrew

24. Thomas, Gary

25. Vincent, Phoebe

* denotes the party did not attend to make a submission or give evidence

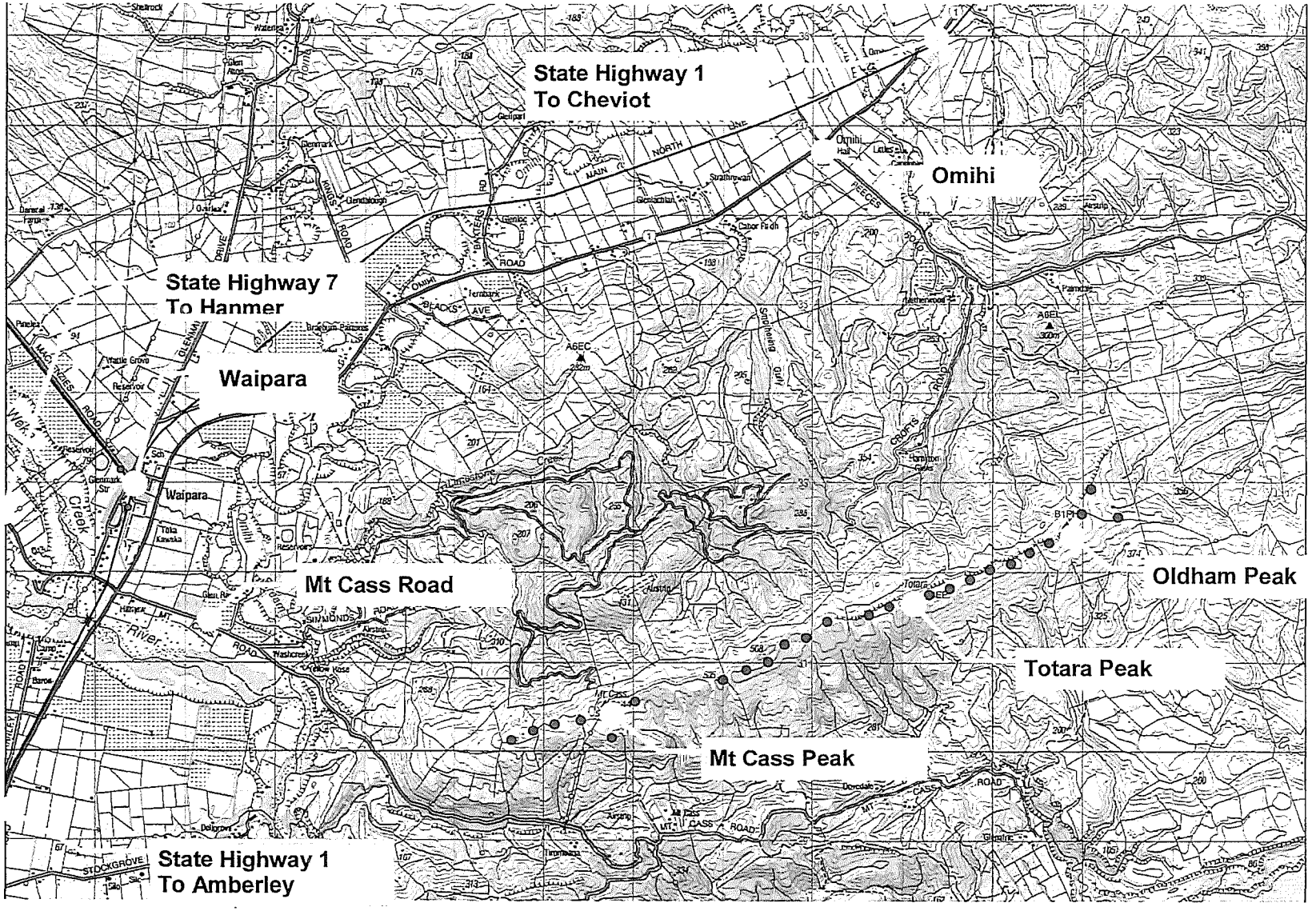



Figure 1 - Location Map

# Mt Cass Conditions

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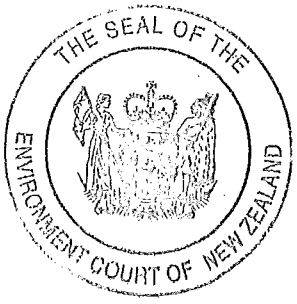


**Authorised Works and Lapse Date**

1. The Consent Holder is authorised to construct and operate a windfarm on Mt Cass which comprises one only of the following alternative turbine layouts:

| Layout | Maximum Height from ground level (m) | Maximum Number of Turbines |
|---|---|---|
| **R33** | 55 | 67 |
| **R60** | 95 | 40 |
| **R90** | 130 | 26 |

2. At least six months prior to the start of any construction activities the Consent Holder shall advise the Manager Environmental Services of Hurunui District Council of the choice of turbine to be constructed on the site.

3. If the R33 turbine layout is constructed, the following aspects of the layout, construction and operation of the wind farm shall, subject to conditions **[8] to [11] and [13]** be in accordance with the Golder Associates Plan CG151.4 dated 27 May 2011:
   a. Location of roads and carparking areas
   b. Location and extent of construction laydown areas other than those associated with turbine platforms
   c. Extent of areas disturbed by earthworks
   d. Location and extent of spoil disposal areas
   ~~d.~~e. Location of the exclusion zone.

4. If the R60 turbine layout is constructed, the following aspects of the layout, construction and operation of the windfarm shall, subject to conditions **[8] to [11] and [13]**, be in accordance with the Golder Associates plan CG152.4 dated 27 May 2011:
   a. Location of roads and carparking areas
   b. Location and extent of construction laydown areas other than those associated with turbine platforms
   c. Extent of areas disturbed by earthworks
   d. Location and extent of spoil disposal areas
   ~~d.~~e. Location of the exclusion zone.

5. If the R90 turbine layout is constructed, the following aspects of the layout, construction and operation of the windfarm shall, subject to conditions **[8 to 11 and 13],** be in accordance with the Golder Associates plan CG153.4 dated 27 May 2011:

   a. Location of roads and carparking areas

   b. Location and extent of construction laydown areas other than those associated with turbine platforms

   c. Extent of areas disturbed by earthworks

   d. Location and extent of spoil disposal areas

   d.e. Location of the exclusion zone.

6. ~~Except for the walking track referred to in condition [143] and the fence referred to in condition [86] n~~No construction activities authorised by this consent shall occur within the exclusion zones identified in the Golder Associates plans referred to in conditions **[3], [4]** and **[5],** ~~or in those areas marked in accordance with condition [12]~~except for fencing, the walking track referred to in condition **[143]** and any stabilisation of rocks**.**

7. Those parts of the boundaries of the exclusion zones identified on Golder Associates plans CG161.3-166.3 dated 20 December 2010 (being parts of those exclusion zones within 10 metres of proposed activities authorised by this consent) shall be physically identified and marked on the ground prior to any construction activities taking place within 50 metres of those areas.

8. The proposed turbine locations are shown on the Golder Associates plans referred to in conditions **[3], [4]** and **[5]**. The Consent Holder may change the final location of the turbines (a process known as micrositing) provided that:

   a. No turbine in the R90 layout shall be located more than 140 metres from the locations of the turbines shown on Golder Associates plan CG153.4 dated 27 May 2011;

   b. No turbine in the R33 or R60 layouts shall be located more than 100 metres from the locations of the turbines shown on Golder Associates plans CG151.4 and CG152.4 dated 127 May 2011;

   c. No turbine in the R60 or R90 layouts shall be located within the areas marked with a red hatch on CG161.3 and CG164.3; and

d. Subject to condition 13, the final placement of turbines shall avoid, but if unable to avoid, then shall minimise effects on indigenous shrubland and forest[1] and on exposed limestone pavement[2] and boulderfield[3] as provided for in condition **[10].**

9. The final position of the activities referred to in conditions **[3], [4]** and **[5]** may be the subject of minor adjustment (also known as micrositing) provided that any such adjustment shall not result in the maximum limits set out in condition **[13]** being exceeded.

10. In undertaking the micrositing process, the Consent Holder shall engage:
    a. A suitably qualified and experienced ecologist; and
    b. A suitably qualified and experienced expert in karst landscapes.

    (both to be approved by the Manager Environmental Services of the Hurunui District Council) to advise (in consultation with a representative of the Department of Conservation) on the final placement of turbines and the final location of those activities referred to in conditions **[3], [4]** and **[5]**.

11. In undertaking the micrositing process provided by condition **[10]** the Consent Holder shall have particular regard to any advice received from the ecologist and the expert on karst landscapes. In any instance where the Consent Holder is unable to follow the advice from the ecologist or the expert on karst landscapes due to other micrositing factors, the Consent Holder shall provide the reasons in writing in a report to the Hurunui District Council, 40 working days prior to construction commencing.

---

1 The following forest and shrubland communities have been recorded and will be impacted by the project at Mt Cass and are identified on the Golder Associates plan Figure 1: Mt Cass Vegetation Communities, dated July 2011 attached as Appendix 1. Community 2: Mingimingi – pasture grass shrubland; Community 3: Broadleaf – (mingimingi) – (five-finger) – (kohuhu) scrub; Community 4: Kowhai – (broadleaf)/(ongaonga) forest; Community 5: Mahoe – (houhere)/Raukaua – ongaonga – climbing fuchsia forest; Community 6: Broadleaf – five-finger – (mahoe)/(ongaonga) forest; Community 7: (Matai)/mahoe – broadleaf – (lemonwood) forest; and matagouri shrubland. For the avoidance of doubt the reference to "communities" includes all species present within those communities.

2 Exposed limestone pavement means those areas, in situ or otherwise, that consist of a continuous, relatively flat or moderately inclined surface with an organised system of open sub-vertical joints which fully penetrate the surface limestone bedding as identified on Golder Associates plans CG181.3, CG182.3, dated 27 May 2011 attached as Appendix 2.

3 Boulderfield means land in which the area of unconsolidated bare boulders (> 200 mm diam.) exceeds the area covered by any one class of plant growth-form. Boulderfields are named from the leading plant species when plant cover > 1%, as per ATKINSON, I. A. E. 1985: Derivation of vegetation mapping units for an ecological survey of Tongariro National Park, North Island, New Zealand. New Zealand Journal of Botany 23: 361-378. The extent of boulderfield is identified on Golder Associates plans CG181.3, CG182.3, dated 27 May 2011 attached as Appendix 2

12. Any indigenous vegetation or limestone features outside the exclusion zones which are able to be avoided as a result of the micrositing process provided for in condition **[8]** shall be physically identified prior to construction activities taking place in that location.

13. ~~Notwithstanding conditions [8] and [9], t~~The total area of indigenous shrubland and forest clearance and limestone pavement and boulderfield disturbance~~, (excluding any impact from the fence, referred to in condition [86] and the construction of the walking track required by condition [143])~~ due to pre-construction geotechnical investigations and construction activities shall be minimised, but in any event must not exceed the following:

**Vegetation Clearance (hectares)**

| | R33 | R60 | R90 |
|---|---|---|---|
| ~~Total i~~Indigenous shrubland[4] | 0.71 | 0.71 | 0.71 |
| ~~Total i~~Indigenous forest[5] | 0.09 | 0.09 | 0.08 |

~~For the avoidance of doubt, vegetation clearance includes areas cleared for pre-construction geotechnical investigation, and areas cleared for construction purposes.~~

**Exposed limestone** ~~pavement and limestone boulderfield~~, disturbance **(hectares)**

| | R33 | R60 | R90 |
|---|---|---|---|
| Pavement and boulderfield | 1.99 | 2.29 | 2.04 |
| Pavement | 0.93 | 1.21 | 0.89 |

| ~~R33~~ | ~~R60~~ | ~~R90~~ |
|---|---|---|
| ~~1.99~~ | ~~2.29~~ | ~~2.04~~ |

4 Shrubland impacted by the project comprises the following communities, identified on the Golder Associates plan Figure 1: Mt Cass Vegetation Communities dated July 2011, Community 2: Mingimingi – pasture grass shrubland; and matagouri shrubland.

5 Indigenous forest impacted by the project comprises the following communities, identified on the Golder Associates plan Figure 1: Mt Cass Vegetation Communities dated July 2011: Community 3: Broadleaf – (mingimingi) – (five-finger) – (kohuhu) scrub; Community 4: Kowhai – broadleaf) / (ongaonga) forest; Community 5: Mahoe – (houhere)/Raukaua – ongaonga – climbing fuchsia forest; Community 6: Broadleaf – five-finger – (mahoe)/(ongaonga) forest; Community 7: (Matai)/mahoe – broadleaf–(lemonwood) forest.

~~Provided that disturbance of exposed limestone pavement shall not exceed the following:~~

| ~~R33~~ | ~~R60~~ | ~~R90~~ |
|---|---|---|
| ~~0.93~~ | ~~1.21~~ | ~~0.89~~ |

For the avoidance of doubt the limits set out in the above table do not include ~~any disturbance for pre-construction geotechnical investigations~~the impact from fencing and the construction of the walking track referred to in condition **[143]**.

14. ~~As provided for in condition [6], in undertaking the establishment of the~~When constructing and maintaining ~~-~~fences within the exclusion zone ~~referred to in condition [86]~~ and ~~when marking or constructing~~ the walking track referred to in condition **[143]** the Consent Holder shall minimise effects on vegetation and limestone by adopting the following approaches:

    a. Finalising the detailed alignment of the walking track by providing an outline plan to be certified by the Manager Environmental Services of the Hurunui District Council at least one month prior to any construction activities occurring;
    b. Hand cutting of indigenous vegetation;
    c. Avoiding the use of wheeled mechanical equipment or tracked vehicles (such as tractors or excavators) on in situ limestone pavement; and
    d. Otherwise minimising disturbance to limestone surfaces.

    But in any event

    The maximum extent of vegetation ~~indigenous shrubland~~ clearance for the construction of the walking track referred to in condition **[143]** shall not exceed 0.25 ha of indigenous shrubland and ~~the maximum extent~~ 0.05 ha of indigenous forest ~~clearance shall not exceed 0.05 ha~~.

15. Any concrete batching on the wind farm site shall be located in the area identified on the Golder Associates plans referred to in conditions **[3]**, **[4]** and **[5]**.

16. The substation buildings shall be designed generally in accordance with the Noordanus Architects' plans RC02, RC05 and RC06 dated April 2010. The exterior cladding, guttering, downpipes and roof of the substation buildings

shall be painted in recessive colours drawn from the background colours of the landscape of the area. A copy of the plans and elevations including suggested colours shall be provided by the Consent Holder to the landscape experts panel, for its consideration, prior to application for building consent.

17. All turbines shall, in all external parts, including turbine towers, nacelles and turbine blades, be finished in the same neutral (off-white or light grey) and non-reflective colour scheme.

18. The Consent Holder shall maintain the turbines in good condition at all times and shall undertake appropriate regular servicing in accordance with industry practice.

***Reporting during construction***

19. Every two weeks during construction the Consent Holder shall provide written confirmation to the Hurunui District Council of the total extent of clearance of indigenous shrubland and forest and impacts on limestone pavement and boulderfield and confirmation that the limits set out in condition **[13]** have not been exceeded. If required the Consent Holder shall facilitate site inspections and provide access to relevant GIS information to assist the independent assessment of compliance with condition **[13]**.

***Post construction reporting***

20. Following the completion of the works authorised by this consent, the Consent Holder shall provide the Hurunui District Council with as-built plans showing the location of all constructed turbines, access roads, substations, buried cables, transmission lines and all other works. The Consent Holder shall also provide the Hurunui District Council with independently verified written confirmation that the maximum limits of shrubland and forest clearance and disturbance of limestone landforms set out in condition **[13]** have not been exceeded, and the areas identified in accordance with condition **[12]** have been avoided.

***Lapsing***

21. In accordance with section 125(1) of the Resource Management Act 1991, this consent shall lapse if not given effect to within eight years of the date of commencement of this consent.

***Advice Note: For the avoidance of doubt, commencement of consent shall have the meaning ascribed by section 116 of the Act.***

**Management Plans – General (Preparation and Review)**

22. Each management plan and review thereof shall be reviewed and certified by a suitably qualified, independent and experienced expert approved in writing by the Hurunui District Council to confirm that the activities undertaken in accordance with the management plan will achieve compliance with the relevant consent conditions. All such certification along with any reviews of the management plans shall be provided to the Hurunui District Council.

22[a] Within 6 months of the date of grant of consent, the Consent Holder shall provide to the Manager Environmental Services of the Hurunui District Council a draft Environmental Management Plan required by condition **[66].**

23. At least 3 months prior to undertaking any activities authorised by this consent, the Consent Holder shall provide to the Manager Environmental Services of the Hurunui District Council for review acting in a technical certification capacity the following management plans:
    a. Construction Management Plan
    b. Environmental Management Plan.

24. The outcome of this review shall be provided to the Consent Holder in writing within 30 working days of receipt of the Plans.

25. Subject to any other conditions of this consent, all activities shall be undertaken in accordance with the latest version of the management plans referred to in condition **[23].**

26. The Construction Management Plan shall be reviewed by the Consent Holder annually during the continuation of construction activities (including rehabilitation).

27. The Environmental Management Plan shall be reviewed by the Consent Holder at least once every three years for the first nine years, and thereafter at least once every five years and shall be amended taking into account any

required actions identified as a result of monitoring under this consent, ~~and~~ the annual report prepared under condition **[67]** and any recommendations from the peer review required by condition **[161]**.

28. The review by the Consent Holder shall assess whether management practices are resulting in compliance with the conditions of these consents, and whether the objectives of the management plans are being met through the actions and methods undertaken. The Consent Holder shall amend the plans where that is necessary to better achieve the objectives of the management plans and the conditions of this consent. The Consent Holder shall provide any amended plan to the Hurunui District Council for certification that it will achieve compliance with the relevant consent conditions. The management plans shall not be amended in any way that contravenes the objectives set out for the respective plans.

29. Copies of the management plans shall be lodged in the Hurunui Memorial Library in Amberley and the Christchurch Public Library so that there is public access to them. In addition, copies shall be publicly available on the Consent Holder's website.

**Construction**

***Construction Management Plan***

30. The Construction Management Plan shall apply to all works up to and including the completion of commissioning of the wind farm and the rehabilitation of construction activities.

31. The objective of the Construction Management Plan shall be to set out the practices and procedures to be adopted to ensure compliance with consent conditions and to meet the following objectives:

    a. To minimise the overall area of disturbance (by cuts, fills and placement of cover) of karst limestone features and indigenous vegetation, but in any event to ensure compliance with the maximum levels of indigenous shrubland and forest clearance and disturbance of limestone pavement and boulderfield set out in condition **[13]**;

    ~~a.~~b. Avoid disturbance of vegetation and limestone features within the exclusion zone as set out in condition **[6]**;

~~b.~~c. To minimise sediment generation and sediment laden runoff in accordance with condition **[37]**;

~~c.~~d. To maintain existing surface and subsurface drainage patterns and pathways;

~~d.~~e. To ensure that appropriate monitoring and reporting of all activities is undertaken in accordance with these conditions;

~~e.~~f. To ensure that the earthworks and spoil disposal areas are contoured so that, to the greatest extent practicable, the finished landform will blend with the surrounding landscape so as not to be visually dominant from any public viewing point (excluding unformed legal roads);

~~f.~~g. To ensure that, the earthworks are undertaken in a manner which provides for final surfaces which are suitable for rehabilitation and/or recolonisation by native vegetation;

~~g.~~h. To ensure that only those areas identified in the Golder Associates plans referred to in conditions **[3], [4] and [5]** are used as spoil disposal areas;

~~h.~~i. To ensure matters relating to the extent and timing of construction traffic, and the traffic management provisions to be put in place during this time, achieve a safe and efficient road network;

~~i.~~j. To ensure that conditions of this consent relating to visual effects mitigation can be met;

~~j.~~k. To identify threatened indigenous flora within the construction zone and provide for their relocation as required by condition **[32.n]**;

~~k.~~l. To identify Canterbury gecko and other lizard species within the construction zone and provide for their relocation as required by condition **[79];**

~~l.~~m. Minimise potential for disruption to any active New Zealand falcon nest identified within 200 m of any construction or earthwork area; and

~~m.~~n. To minimise the ~~effects and~~ introduction and spread of weeds.

32. The Construction Management Plan shall include, but not be limited to:

a. The methods and techniques to achieve the above objectives.

b. Assigning roles and responsibilities, including appointment of a representative to be the primary contact person in regard to construction matters relating to this consent.

c. Details of a training programme for machinery operators working on the site who will be involved in indigenous vegetation or limestone pavement or boulderfield disturbance. The training programme will include, but not be limited to, education on using least impact techniques when disturbing or clearing limestone or indigenous vegetation.

d. Limits of disturbance to indigenous vegetation and karst land forms in accordance with condition **[13]**.

e. Location of soil stockpiles and spoil disposal areas.

f. Construction staging and sequencing over the whole site.

g. A description of the sources of noise and the methods to be used to meet condition **[131]**.

h. Management of construction traffic as provided for in condition **[63]**.

i. Procedures for earthworks, erosion and sediment control, stabilisation of the site (including the removal or stabilisation of any unstable boulders) and revegetation of existing vegetation sites with locally eco-sourced indigenous species and non-invasive, low stature grasses such as perennial ryegrass (Lolium perenne) and annual poa (Poa annua) grass species only. Aggressive exotic grasses such as browntop (Agrostis caprillaris), cocksfoot (Dactylis glomerata) and brome (Bromus spp.) shall not be used.

j. Contouring of all spoil disposal sites to visually integrate into the natural landform.

k. Procedures for management, control and maintenance of runoff processes and patterns

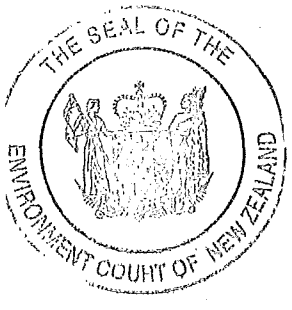
l. Procedures for the management of dust.

m. Procedures for the management of weeds.

n. Methods for the relocation of threatened indigenous flora (as defined by de Lange et al (2009))[6] identified within the construction zone, and where practicable, At Risk indigenous flora (defined be de Lange et al (2009)) identified within the construction zone.

o. Methods for location and relocation of lizards as required by condition **[79]**.

p. Procedures for management of fire risk and for fire suppression.




[6] de Lange PJ, Norton DA, Courtney SP, Heenan PB, Barkla JW, Cameron EK, Hitchmough R, Townsend AJ 2009 Threatened and uncommon plants of New Zealand (2008 revision). New Zealand Journal of Botany 47:61-96.

q. Adoption, if appropriate, of the principles identified in the Ministry for the Environment publication "A Cultural Health Index for Streams and Waterways, June 2003, Technical Paper 75".

r. Spill contingency measures and procedures for the management of hazardous substances.

s. Procedures for rehabilitation of the areas directly affected by the construction and roading activities and the ongoing maintenance of the rehabilitation work.

t. Monitoring, record-keeping and reporting requirements.

u. Procedures for minimising the visual effect of any removal or stabilisation of unstable boulders for safety reasons during construction and operation.

v. Procedures to ensure compliance with conditions **[45] and [46]** for the treatment of identified areas of limestone pavement.

***General - Pre Construction Plan Lodgement***

33. At least 20 working days prior to any construction works commencing the Consent Holder shall provide to the Manager Environmental Services of the Hurunui District Council:

a. A plan showing the final turbine locations, turbine choice, final turbine platform locations and final roading layout, together with confirmation that:

i. With the exception of ~~the stock~~ fencing, ~~e and~~ the walkway, and rock stabiliation, no construction activity authorised by this consent shall occur in the exclusion zones identified in condition **[6]**;

ii. Any areas identified in accordance with condition **[12]** are avoided;

iii. The maximum disturbance limits set out in condition **[13]** are not exceeded; and

iv. No turbine platform creates a notch in or "daylights" the Mt Cass ridge as viewed from SH1 between Waipara and Omihi.

b. Engineering design plans of the roads, including erosion and stormwater controls. These engineering design plans shall incorporate:

i. Final road layouts, having completed detailed assessments relating to geotechnical, engineering, wind energy, visual impact and any proposed mitigation and ecological matters;

ii. Details of locations and quantities of cuts and fills.

c. Results of prior drilling and ground penetrating radar traverses undertaken to ascertain occurrences of subsurface cavities.

d. The relationship of the construction works to known karst features and details on how construction activities have been planned to minimise potential adverse effects on karst features and to demonstrate compliance with conditions **[6]** and **[13]**.

34. The Consent Holder shall provide written notification to the Hurunui District Council at least five working days prior to works commencing.

***Implementation of mitigation measures – Construction Phase***

35. There shall be no objectionable or offensive dispersal or deposition of dust beyond the boundary of the site.

36. Any concrete batching plant on the wind farm site shall be removed within six months of completion of the wind farm construction.

***(a) Erosion and Sediment Control***

37. The Consent Holder shall undertake erosion and sediment control measures, the purpose of which is to:

a. Minimise disruption, and interruption to the natural drainage pattern;

b. Minimise the amount of sediment that is discharged as a result of construction works into subterranean karst features and the water courses, both surface and subsurface, that drain the site; and

c. Minimises the discharge of silt or sediment into the exclusion zones indicated on Golder Associates plans CG161.3-166.3 dated 20 December 2010.

38. All erosion and sediment control measures shall remain the responsibility of the Consent Holder, and be installed, operated and maintained in accordance with these conditions of consent.

39. The design storm for detention features for runoff and sediment control shall be 5% AEP of the appropriate design duration. The design storm for runoff and sediment control for permanent roads shall be 2% AEP.

40. The Consent Holder shall ensure that appropriate construction contract provisions are included within the contract documents to allow construction contractors to tender accurately for the scope of the proposed erosion and sediment control measures.

41. Prior to construction activities commencing the Consent Holder shall undertake water quality monitoring at the main springs (NZMG coordinates: 2497333E, 5791621N; 2497679E, 5791558N; and 2499314E, 5791997N), and at the Smothering Gully stream, draining the proposed development site, for a period sufficient to establish baseline conditions. This shall include at least two winter wet seasons unless more frequent occurrence of storms permits baseline data to be acquired, to the satisfaction of Hurunui District Council, more quickly. Samples taken over a range of spring flows generated by the four largest runoff events recorded shall be used to establish baseline water quality in terms of:

    a. Aquatic indicator species; and
    b. Suspended and dissolved water quality measures, including hydrocarbon indicators which detect the presence of fuel, hydraulic oils and lubricants.

42. Each year during construction activities and for a period of one year following completion of construction activities, the Consent Holder shall undertake similar water quality monitoring during large rainfall events at the sites identified in condition **[41]** and using the same parameters listed in that condition.

43. The results of the water quality monitoring required by conditions **[41 and 42]** shall be forwarded to the Hurunui District Council within 5 working days of the analytical results of sampling being received by the Consent Holder. Should sample results indicate adverse environmental impacts then an immediate review shall take place to better achieve the objectives of the Construction Management Plan or Oil Spill Contingency Plan as required under conditions **[25], [34] and 110].**

44. The Consent Holder shall engage an independent and appropriately qualified person in consultation with the Manager Environmental Services of the Hurunui District Council to audit the design of the erosion and sediment control measures against the Construction Management Plan required by condition **[23],** to audit the procedures for stabilisation as required by condition **[32.i],** and to audit bulk earthwork activities on an as-required basis to ensure that the sediment and erosion control measures are being constructed and maintained in accordance with the plan. The Consent Holder shall be responsible for the reasonable direct costs associated with this engagement.

***(b) Treatment of Identified Limestone Pavement Areas***

45. Limestone pavement within the areas marked on Golder Associates plan CG161.3 and CG163.3 shall be covered to a sufficient depth with crushed limestone or other appropriate material as necessary so as to avoid cuts to limestone pavement.

46. Limestone pavement in the areas identified in condition **[45]** shall be partially rehabilitated to a width for the running surface of the road of 3.5 metres in accordance with the Chris Glasson Plan, dated 15 November 2010, and the plan titled 'Indicative Cross Section of the Completed Road Formation and Mitigation Measures', dated 24 July 2011, attached as Appendix 3. The Consent Holder may at any time for maintenance or decommissioning reasons reinstate full access in these areas for so long as that access is required. Once full access is no longer required the Consent Holder is to partially rehabilitate the area to the standard required by the Chris Glasson Plan dated 15 November 2010.

47. ~~46[a]~~ If a road is constructed to access t6/75 at NZMG coordinates 2496126E, 5792235N or thereabouts, it shall be no wider than 3.5m for the running surface.

***(c) Roading***

47.48. The running surface of the access road shall, in the first instance, be provided using selected material excavated from the turbine sites, roads and incidental building and construction areas. Should this excavated material be insufficient

or unsuitable, then suitable road surface material, including seal if necessary, shall come from off site.

48.49. The Consent Holder shall provide designated parking areas on site for staff and contractors.

49.50. Structural fill required for forming roads shall, wherever practicable, be constructed of the soils and crushed rock excavated from the site.

~~50. All roads in cut shall have a stabilised drainage side channel sufficient to convey flow up to the 5% AEP storm along the road edge and into culverts without erosion.~~

51. As soon as reasonably practicable after final road levels are achieved, all roads shall be covered with selected basecourse to provide a running surface and avoid surface and scour erosion.

52. The discharge from any temporary diversion channels shall be controlled so as to prevent scour at the outlet of the channel.

### *(d) Turbine Platforms*

53. Turbine platforms shall be designed to provide for erosion and sediment control measures, as detailed in the Construction Management Plan.

### *(e) Spoil Disposal Sites*

54. All spoil disposal sites shall be located in accordance with the Golder Associates plans referred to in conditions **[3]**, **[4]** and **[5]** and subject to condition **[10]**, and be managed to ensure that:

a. Suitable locations for clean-water cut-off drains can be provided;

b. A sediment control measure appropriate to the size of the disposal area can be provided to treat all run-off from the disposal area.

55. All spoil disposal sites shall be designed, constructed and managed in accordance with the following:

a. The toe bund shall be a structural fill;

b. The amount of surface area within the spoil site that is exposed at any one time shall be minimised;

c. Exposed areas shall be stabilised to the greatest extent practicable at the end of each day, and temporarily covered if possible prior to any storm event that is likely to cause erosion or mobilise sediment;

d. All sediment ponds shall be constructed to provide for retrofitting of flocculation if needed;

e. Contouring of all spoil disposal sites to visually integrate into the natural landform.

56. A clean water diversion shall be constructed around each spoil site where there is a significant catchment above the spoil disposal site.

57. Each spoil site shall be stabilised and planted over including being grassed (non-invasive species) or re-vegetated with silver tussock to no less than 20% cover, as soon as practicable after it has been fully utilised, in order to prevent scour and avoid sediment being washed into adjacent watercourses. Stabilisation may be staged, and stabilised areas diverted to a clean water diversion, to maintain a suitably small working catchment area.

58. Any topsoil stockpile that is intended to remain in situ for more than 4 consecutive weeks shall be subject to erosion and sediment control in accordance with condition **[37]** and be hydroseeded if intended to remain for more than 4 months.

59. All topsoil stockpiles shall be bunded on the uphill side to divert clean water runoff away from the stockpile.

***(f) Rehabilitation of disturbed areas***

60. Prior to undertaking any construction activities, the Consent Holder shall engage a suitable qualified and experienced ecologist to undertake a survey of the vegetation in the areas which are to be disturbed for construction purposes as detailed in condition **[61].** The results of this survey shall be provided to the Hurunui District Council.

61. Site areas disturbed for pre-construction geotechnical investigations and construction purposes, but not necessary for the ongoing wind farm operation, being the concrete batching area, laydown areas, spoil disposal areas, road batters, and parts of turbine platforms, shall be rehabilitated

progressively, and in any event within 12 months of the completion of construction in accordance with the Construction Management Plan. The objective shall be to rehabilitate those areas to a similar condition to the condition identified in the pre-construction survey required by condition **[60]**, or as otherwise agreed with the Hurunui District Council.

62. Within 3 months of completion of the construction of the wind farm (including the rehabilitation required by condition **[61]**), the Consent Holder shall advise the Manager Environmental Services of the Hurunui District Council in writing that all relevant conditions of this consent relating to construction activities have been complied with.

***Construction Traffic***

63. The Construction Management Plan shall set out in detail matters relating to the extent and timing of construction traffic activity, and temporary traffic management provisions to be put in place during construction, and shall:

a. Be prepared after consulting with Transwaste Ltd, The Hurunui District Council and the New Zealand Transport Agency and shall implement the outcome of that consultation;

b. Set out the nature and timing of local physical improvement works, if necessary, to be undertaken on Mt Cass Road at the Consent Holder's expense or as otherwise agreed with the Hurunui District Council;

c. Set out in detail the sharing of maintenance costs for the section of Mt Cass Road between State Highway 1 and the entrance to the Kate Valley Landfill site during wind farm construction. This cost sharing arrangement will be negotiated by the Consent Holder and Transwaste Ltd and the outcome forwarded to Hurunui District Council;

d. Detail the intended traffic arrangements and provisions for the delivery of over-weight and over-dimensioned major components to the site, including any time restrictions for the movement of over-weight and over-dimensioned vehicles; and

e. Detail the management of construction traffic (other than component delivery by over-dimension and over-weight vehicles) during the construction phase. This shall include as a minimum:

i. Identifying all roads within the Hurunui District that are to be used by heavy construction traffic.

ii. The provision for dust suppression, if necessary, on the routes used for the transport of goods to the site so that safe stopping sight distance is maintained at all times.

iii. Ensure that all heavy construction traffic within the Hurunui District shall utilise those roads which have been identified to be used by heavy construction traffic in the certified Construction Management Plan.

iv. Identify the management practices to be adopted to avoid conflict with other users on the affected roads, including the safety of pedestrians and cyclists.

64. If any road vesting is required to implement the Construction Management Plan all the costs of road vesting shall be met by the Consent Holder and survey plans of the land to be vested are to be provided to the Hurunui District Council.

65. The Consent Holder shall take the best practicable option to avoid the deposit of debris on to public roads during the construction period. Any debris shall be removed as soon as possible, but at least 2 hours before dark on each occasion.

**Terrestrial Ecology**

***Advice Note: Activities involving protected wildlife consequent on the exercise of this consent will require prior approval under the Wildlife Act from the Department of Conservation.***

***Environmental Management Plan***

66. An Environmental Management Plan shall be prepared that sets out the practices and procedures to be adopted to ensure compliance with consent conditions relating to:

a. Avifauna management (conditions **[68] to [76]**);

b. Herpetofauna management (conditions **[77] to [79]**);

c. Weed control (conditions **[82] to [84]**);

d. Habitat Enhancement and Pest Control (conditions **[1] to [90]**);

e. Fire Management (conditions **[119] to [121]**).

67. The Consent Holder shall provide an annual report to the Hurunui District Council, by the date of the anniversary of the commencement of this consent, which:

a. Details all environmental monitoring and studies undertaken as part of the exercise of this consent;

b. Outlines any changes to the monitoring programme that may be required to allow compliance to be determined;

c. Reports on the extent to which activities are meeting the objectives of the Environmental Management Plan and are achieving or maintaining the performance indicators set out in condition **[91]**. Where the report identifies that the performance indicators have not been achieved or maintained, the Report shall include:

i. The reasons why the performance indicators have not yet been achieved and/or are not being appropriately maintained; and

ii. Advice as to specific measures the Consent Holder has either already implemented, or intends to implement to address the failure to achieve or appropriately maintain the performance indicators.

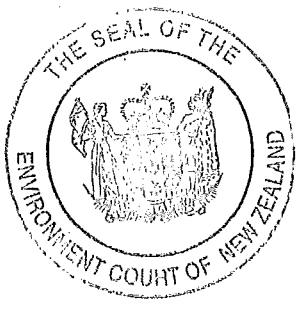
d. Reports on consistency of activities with the Management Plan procedures and methods, and whether there should be amendments made to those methods and procedures which would better assist the Consent Holder in meeting the objectives of the Plan.

***Avifauna Management***

68. The Consent Holder shall undertake a programme of avifauna monitoring and management, the ~~purpose~~objectives of which are:

a. To monitor for potential adverse effects of the wind farm on avifauna, and to manage those effects if necessary; and

b. To achieve ~~no~~a net ~~loss~~gain in~~of~~ the relative abundance of indigenous species present at Mt Cass~~, particularly NZ falcon, kereru and pipit~~.



*Pre- Construction Monitoring*

69. The Consent Holder shall engage a suitably qualified and experienced avian ecologist to undertake a pre-construction survey of avifauna populations and species abundance at the site[7] in order to assess potential avifauna displacement and future population trends. The monitoring shall include measures of species abundance across the wind farm site and within all habitat types present within the wind farm footprint. Monitoring methods shall be standardised between pre-construction and post-construction surveys.

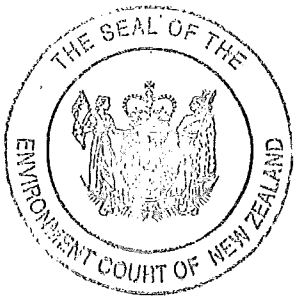
70. The monitoring shall:

    a. be carried out seasonally, during the months of October (as soon as possible after lambing), January, March and June;

    b. include visiting each bird count station five times each season to give a measure of variation around the data;

    c. include two years' data to account for annual variation and provide robust baseline data;

    d. include a survey of internally migrant shorebird species using observers with suitable identification skills positioned along the Mt Cass ridgeline during at least one period of summer migration (January-February) and at least one period of winter migration (July and August). If significant numbers of migratory shorebirds are recorded to cross the proposed wind farm then a further more in depth monitoring program will need to be established to identify the risks posed to internal and internationally migrant shorebirds and how best to avoid, remedy or mitigate these.




[7] For the purpose of this condition, "the site" means the length of ridgeline over which any construction activity occurs, extending down the dip-slope to include all major tracts of bush and down the scarp to the bottom of the scarp.

*Post Commissioning Monitoring*

71. Following commissioning of the wind farm, the Consent Holder shall:

a. Undertake an annual survey for a minimum of two years of avifauna populations, which includes measures of species abundance across the wind farm and within all habitat types present within the wind farm footprint, to assess potential avifauna displacement post commissioning.

b. Undertake a mortality monitoring programme at least once a season, during the same months that the avifauna population surveys are carried out (consent condition **[68]**) for a minimum of two years that includes:

i. Carcass searches

ii. Searcher efficiency trials

iii. Carcass decomposition and/or removal rates

iv. Extended searches of some turbines (especially on forest pasture margin)

v. Calculation of mortality rates adjusted by estimates of error from the above protocols.

c. The mortality monitoring programme outlined in condition 71(b) shall be repeated after a period of 5 years of operation of the wind farm.

72. If evidence is found of injury and/or mortality of Kereru, New Zealand Falcon or New Zealand Pipit through interaction with wind farm infrastructure then the Consent Holder shall, as soon as practicable, provide a report to the Hurunui District Council detailing a suitable monitoring and management regime ~~(including as appropriate those measures listed in condition [76.c]),~~ to be implemented~~; and the methods to be used~~ to address any net negative impact ~~adverse effects on~~ at the local population level.~~Kereru, New Zealand Falcon or New Zealand Pipit.~~

*Falcon monitoring*

73. The Consent Holder shall undertake falcon monitoring as follows:

a. Surveys for breeding falcons shall be carried out during the breeding season throughout the construction period and for two years post-commissioning. This shall include surveys of the Mt Cass ridgeline and all areas of suitable breeding habitat adjacent to the wind farm footprint.

b. If at any time pre, during or post construction there is evidence of falcon breeding on or neighbouring the wind farm footprint, or there is evidence of falcon being adversely impacted by the wind farm, then a more intensive monitoring programme for falcon needs to be initiated and continued for at least two years post commissioning. The monitoring programme shall include breeding success, measures of habitat use and the survival of fledglings and adult falcons (through radio-tracking).

c. If during construction, a falcon nest is identified on the site, the Consent Holder will ensure that, where practicable, a 200m setback of construction activity from the nest is maintained while it is still active.

74. The monitoring programmes required by conditions **[69]** to **[73]** shall be designed in consultation with the Department of Conservation, and the results of all monitoring shall be provided to the Hurunui District Council and the Department of Conservation annually. Whether any additional mitigation is required will be determined in consultation with the Department of Conservation and shall consider whether the effect will result in a net negative impact at the local population level of any threatened or non-threatened species.

*Management Plan*

75. The Consent Holder shall engage a suitably qualified and experienced avian ecologist to prepare an avifauna monitoring and management section of the Environmental Management Plan, in consultation with the Department of Conservation.

76. The avifauna section of the Environmental Management Plan shall include, but not be limited to:

a. The survey methodologies and reporting mechanisms for the surveys required by conditions **[69]** to **[73]**, and in particular the mechanisms in relation to:

i. Incidental avifauna behaviour observations

ii. Reporting incidental injury and mortality events (i.e. events that occur outside of the official survey)

iii. How to manage avifauna and whom to contact should injured avifauna be found

iv. Reporting of injury or mortality of threatened, at risk, regionally rare and/or banded avifauna. This shall also include details of the persons to whom any carcasses should be supplied, either for research or as taonga.

b. A protocol that outlines what steps to take if a Threatened or At Risk species is found to be using the site (including injured or dead) that has not been previously recorded. ~~(e.g. including but not limited to, developing a risk profile for that species and identifying potential mitigation options and actions)~~ Additional mitigation is only required if there is a net negative impact, due to the wind farm, on the population within the Motunau Ecological District.

c. Identification of additional mitigation options that may need to be implemented if adverse effects occur (e.g. including but not limited to avifauna corridor enhancement, off-site habitat protection or enhancement (for species that use the site but do not breed there), on or off site breeding programmes, nest protection, captive breeding, or changes in the operation of the wind farm to reduce impacts).

***Herpetofauna Management***

77. The Consent Holder shall undertake a programme of lizard management, the ~~purpose~~objectives of which isare to:

a. Identify methods to avoid or minimise any adverse effects on lizards arising from the construction and operation of the wind farm;

b. Maintain Canterbury gecko, common skink and McCann's skink populations at the same or greater abundances than those present at the wind farm site prior to development of the wind farm; and

c. Maintain habitats of Canterbury gecko, common skink, and McCann's skink populations at the wind farm site in the same or better condition than that present prior to the development of the wind farm.

*Management Plan*

78. The Consent Holder shall engage a suitably qualified and experienced ecologist to prepare a herpetofauna management section of the

Environmental Management Plan, in consultation with the Department of Conservation.

79. The herpetofauna management section of the Environmental Management Plan shall include, but not be limited to:

a. Methods for searching for Canterbury gecko by an appropriately qualified and experienced ecologist in areas to be directly impacted by construction activities.

b. Methods for the relocation prior to the commencement of construction of Canterbury gecko and other lizard species encountered during searches for Canterbury gecko from areas of the site directly impacted by construction activity to suitable alternative habitats on site. (Note – this is likely to require a period of at least 6 months prior to construction activities commencing which may affect lizard habitat).

c. Procedures to be followed in the event that other threatened herpetofauna species are found during construction. The procedures shall identify methods to avoid, remedy, and mitigate any adverse effects of the wind farm on the threatened herpetofauna species.

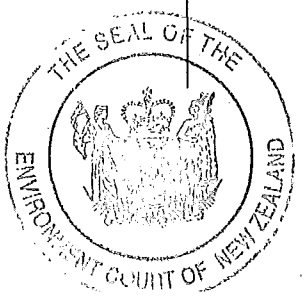
d. Pest control methods which target possums, feral deer, feral goats, rabbits, hares, cats, mustelids, hedgehogs and rats.

e. The utilisation of an 'adaptive management' approach, in which the herpetofauna management programme is modified in accordance with the latest results of the monitoring programme, with specific reference to the effectiveness of pest control (including, if necessary, the control of irruptions of mice) as measured against the responses of populations.

f. Procedures for ongoing monitoring by a suitably qualified and experienced ecologist to assess population abundance.

**The Mt Cass Conservation Management Area**

80. No later than 3 months after commissioning of the wind farm, the Consent Holder shall register a legally binding covenant in a form approved by the Manager Environmental Services of the Hurunui District Council, which provides legal protection in perpetuity of the area identified on Golder Associates plan CG221 as the Mt Cass Conservation Management Area.



81. The Mt Cass Conservation Management Area shall be managed in accordance with, and the Consent Holder shall comply with, the conditions of this consent.

***Weed Monitoring and Control***

~~80.~~82. The Consent Holder shall undertake a weed monitoring and control programme within the Mt Cass Conservation Management Area and other areas subject to physical disturbance by the wind farm, the ~~purpose~~objective of which is to reduce the invasion of exotic weeds and ensure that any which do invade are controlled to acceptable levels.

*Management Plan*

~~81.~~83. The Consent Holder shall engage a suitably qualified and experienced ecologist to prepare a weed monitoring and control plan as part of the Environmental Management Plan, in consultation with the Department of Conservation.

~~82.~~84. The weed monitoring and control section of the Environmental Management Plan shall include, but not limited to:

a. The details of a weed control strategy which shall include as a minimum:

   i. An inventory of the baseline of weed infestation at the Mt Cass wind farm site including assessment of exotic grasses and herbs that are adversely affecting indigenous ground layer plants;

   ii. Assessment of weeds of ecological importance at the Mt Cass site; and

   iii. Detail of methods to be used for weed removal and/or control; and contingency plans for high level infestations resulting from the construction operation.

b. The details of measures to minimise the effects and introduction of weeds that shall include, but not be limited to:

   i. Undertaking annual monitoring of site works to ensure new weed infestations are detected and removed before they have an opportunity to establish and spread;

ii. Ensuring construction vehicles are cleaned of adhering soil before first entering the project site, and that weed-free sources of aggregate are used;

iii. Ensuring that prior to weed control being undertaken, the control site is searched by a suitably qualified ecologist and any Threatened and At Risk plant species occurring within the site are identified; and

iv. Post-construction weed control (e.g. targeted herbicide spraying and, where appropriate, hand weeding). Spraying is not to occur within 10m of any Threatened and At Risk plant species which has been identified, unless part of a specific management initiative.

***Habitat Enhancement and Pest Control***

~~83. No later than 3 months after commissioning of the wind farm, the Consent Holder shall register a legally binding covenant in a form approved by the Manager Environmental Services of the Hurunui District Council, which provides legal protection in perpetuity of the area identified on Golder Associates plan CG221 as the Mt Cass Conservation Management Area.~~

~~84. The Mt Cass Conservation Management Area shall be managed in accordance with, and the Consent Holder shall comply with, the conditions of this consent.~~

85. The Consent Holder shall establish and implement a Habitat Enhancement and Pest Control programme, the overall objective of which is to achieve, a net gain in the biodiversity values within the Mt Cass Conservation Management Area. The specific purposes of the Habitat Enhancement and Pest Control programme are to:

a. Encourage and/or facilitate the natural recovery of and to increase the area of native woody vegetation present and to increase connectivity between remnant patches of woody vegetation within the Mt Cass Conservation Management Area;

b. Reduce predation pressure on avifauna, invertebrate and lizard populations;

c. Reduce browsing damage to existing and regenerating indigenous vegetation;

d. Manage pest levels in accordance with specific targets, as measured by residual trap catches, or other pest density indices;

e. Protect and enhance populations of threatened plant species.

86. Habitat enhancement and pest control within the Mt Cass Conservation Management Area, and seasonal pest control in the remainder of the wind farm site, shall endure for the operational duration of the wind farm, and must include as a minimum the following:

a. The erection (or maintenance or upgrading of existing farm fencing) of a continuous deer fence around the Mt Cass Conservation Management Area. No cattle shall be grazed within the fenced area. Sheep may only be grazed within the fenced area in accordance with a grazing regime provided for as part of the Environmental Management Plan.

b. Pest control for the Mt Cass Conservation Management Area ~~to the standards~~as outlined in condition **[89[a]]**, and in the rehabilitation areas described in condition **[61]**, and in the remainder of the wind farm as for possums, mustelids, rats, hedgehogs and cats ~~as outlined in condition [89.[a]] to be achieved seasonally by 1 November each year~~.

c. Restoration planting of at least 1 ha (and up to 7 ha depending on natural rates of regeneration) of land shown on the areas of land shown on Golder Associates Plan CG221.

d. All actions listed in conditions **[89]** – **[93]**.

*Management Plan*

87. The Consent Holder shall engage a suitably qualified and experienced restoration ecologist to prepare, in consultation with the Department of Conservation, a Habitat Enhancement and Pest Control section of the Environmental Management Plan in respect of the Mt Cass Conservation Management Area.

88. The Habitat Enhancement and Pest Control section of the Environmental Management Plan which is submitted for certification shall set out a detailed programme of activity to be carried out in the first five years from commencement of activities authorised by this consent.

89. The Habitat Enhancement and Pest Control section of the Environmental Management Plan shall include a research and monitoring programme, developed in consultation with the Department of Conservation, that assesses whether the Habitat Enhancement and Pest Control Programme is successful in meeting the objectives and purposes outlined in condition **[85]**. The monitoring programme shall include appropriate measurable and time bound performance targets in relation to:

a. A pest animal control programme including deer, goats, pigs, rabbits, hares, possums, mustelids, rats, hedgehogs, cats and mice.

a.b. The effect of reduced levels of domestic stock grazing on both forest regeneration and the potential increase in competition from exotic grasses and weeds. The programme shall include provision for annual monitoring of the effect of different sheep grazing intensities on:

i. Forest understory vegetation composition

ii. Limestone wheatgrass distribution and abundance, and

iii. The abundance of indigenous shrubs and ground layer species typical of open limestone pavement sites

iv. Natural regeneration processes in shrubland and open limestone habitats.

c. Vegetation condition measured by monitoring permanent vegetation plots established in forest and scrub vegetation. The cover abundance of all vascular plants will be measured within each plot with tree diameter, and seedling number and height recorded. The plots will be measured every three years and compared to the performance indicators set out in condition [91].

~~b. the use of permanent monitoring of vegetation plots as follows:~~

~~(i) Ten to fifteen permanent 20 x 20 m (in forest) or 10 x 10 m (in scrub) plots shall be established in woody vegetation on the MainPower property in proportion to the area of the main forest and scrub vegetation types present.~~

~~(ii) Within each plot, cover abundance of all vascular plants will be measured using the recce plot method (Hurst & Allen 2007), with tree (>5 cm dbh at 1.3 m) diameter and seedling number and height (in 2-4 permanently marked 2 x 2 m subplots).~~

(iii) All plots will be measured every three years, to assess progress in vegetation recovery as a result of herbivore control and to compare against the performance indicators set out in condition [91].

c.d. Herpetofauna population abundance, as required by condition **[79.f]**.

d. Invertebrate abundance.

e. Avifauna abundance, including kereru, falcon and pipit, as required by conditions **[69]**, [72] and [73].

f. Use of the site by NZ Falcon, as required by condition [73].

g.f. Weed monitoring and control, as required by condition **[820]**.

h.g. Threatened plant species, as required by condition **[90]**.

89[a] The Habitat Enhancement and Pest Control section of the Environmental Management Plan shall also include a pest animal control programme, with appropriate outcome monitoring, which:

a. Controls pests to the following levels, which are expressed as annual targets averaged over the period of pest control for that year:

| Species | Annual target |
|---|---|
| Deer, goats and pigs | Absent |
| Rabbits and hares | Absent |
| Possums | <1% RTC index |
| Mustelids | <5% tracking tunnel index |
| Rats | <5% tracking tunnel index |
| Hedgehogs & cats | To be confirmed |
| Mice | <15% tracking tunnel index[8] |

b. Sets out details about the duration, location, type and frequency of trapping, and other forms of control including the management regime proposed for periodic checking of traps and baits. Detail is also to be included of the pest control, location, type and frequency outside the Mt Cass Conservation Area but within the Mt Cass windfarm site to manage pest

[8] This is to be achieved primarily via a combination of the underlying rat control programme and managed grazing in accordance with the Habitat Enhancement and Pest Control Section of the Environmental Management Plan. Mice control need not be continually or regularly undertaken because it is expected that general rodent management programme, along with grazing management will be effective in suppressing mice populations.

~~numbers and reinvasion of the Mt Cass Conservation Management Area and to assist with fauna protection outside the Mt Cass Conservation Area.~~

~~c. Describes methods for, and frequency of, monitoring of the relative abundance of pests.~~

~~d. Contains details about the resources to be employed by the Consent Holder to successfully implement the required pest control.~~

90. The Habitat Enhancement and Pest Control section of the Environmental Management Plan shall also include measures for threatened plant species management including:

i. Monitoring programme for *Heliohebe Mmaccaskillii*

ii. Surveys, propagation of and habitat management for *Australopyrum calcis* subsp. *optatum* populations on site.

91. The Habitat Enhancement and Pest Control section of the Environmental Management Plan shall also include the following performance indicators, which are to be used to establish whether the Habitat Enhancement and Pest Control programme is successful in meeting the objective and purposes of the programme outlined in condition **[85].**

a. All fencing around and within the Mt Cass Conservation Management Area has been constructed or maintained to a standard that enables effective control of domestic and feral animals within the area including:

i. The boundary of the Mt Cass Conservation Management Area has been securely fenced ~~to the minimum standard of a sheep and cattle proof standard seven wire fence with a barbed wire along the top.~~in accordance with condition **[86]**.

ii. Internal fences are maintained to a standard that permits effective control of sheep within the area as required for management purposes.

iii. Cattle have been removed from the entire Mt Cass Conservation Management Area, and if they do enter the area, they have been quickly and efficiently removed and the reasons for their ingress (e.g. damaged fence) has been remedied.

b. The research and monitoring programme required by conditions **[89] and [~~89.[a]~~90]**, has been developed by MainPower, in consultation with the Department of Conservation, and has been implemented.

c. The plant pest control programme required by condition **[80]**, with regular surveillance surveys for new records, has been implemented.

d. No plants ~~of~~ wilding conifers, European broom, hawthorn, barberry, wild rose, elderberry, cherry plum and old-man's beard (or any other species deemed to threaten biodiversity values such as wild thyme) are known to be alive within the Mt Cass Conservation Management Area, with any plants found eliminated within 3 months of their first record.

e. A nassella tussock control programme is undertaken each year through the Mt Cass Conservation Management Area.

f. The vegetation restoration programme required by condition **[86.c]** has been established including propagation, site preparation, planting, appropriate post-planting maintenance and with appropriate outcome monitoring.

g. A minimum of 1 ha has been planted within 3 years of commissioning of the wind farm with more areas planted depending on rates of natural regeneration of vegetation.

h. Plant survival of planted areas is >75% after 2 years, with replanting being undertaken where survival is <75% after 2 years.

i. The condition of the ~~nine~~eight biodiversity attributes[9] used in the biodiversity offset model have not deteriorated at the end of 5 years from the commencement of activities authorised by this consent within the Mt Cass Conservation Management Area relative to the condition of these attributes at comparable sites that are not subject to the management actions being implemented through the plan.

j. The condition of the ~~nine~~eight biodiversity attributes used in the biodiversity model are meeting the targets set out in the Environmental Management Plan in accordance with condition **[89]**, measured at the end of 10 years from the commencement of activities authorised by this consent, and at 5 yearly intervals thereafter.



[9] Composed of: Vegetation structure and composition (canopy cover; understory cover; ground cover) and species abundance (falcon; kereru and bellbird; small birds (fantail, grey warbler, brown creeper); Canterbury gecko; limestone wheatgrass).

k. The establishment of a liaison protocol with the Department of Conservation in accordance with condition **[156]** whereby the Department of Conservation meets with MainPower at least once each year to review and comment on the conservation management achievements and proposed work as per its terms of reference.

l. Monitoring results are reported to the Department of Conservation in accordance with the liaison protocol in time for them to review and provide comment to the independent peer reviewer and the Hurunui District Council each year.

m. To enable annual reporting to the Department of Conservation and the peer reviewer, a GIS with associated databases has been established with appropriate documentation, and is updated on a regular basis where required.

n. The composition of planted vegetation contains only those species that are found naturally within the limestone ecosystem at Mt Cass.

~~o. No woody weeds are present in the planted vegetation.~~

***Tussock Grassland Management***

92. Where silver tussock is disturbed for pre-construction geotechnical investigations or construction purposes, but not necessary for the ongoing wind farm operation it shall be rehabilitated in accordance with condition **[61]**. Rehabilitation of the area shall be to the standard identified in the pre-construction survey.

93. Where areas of silver tussock of a median greater than 10% density as identified on Golders Associates Plan CG241 dated 17 November 2010 are permanently removed as a result of wind farm development, an equivalent quantity of silver tussock shall be established and maintained on the wind farm site using direct vegetation transfer, planting, or other appropriate method.

**Visual Effects Mitigation**

***Road construction mitigation and remediation***

94. All surplus limestone and other excavated material shall be disposed of in locations indicated on the Golder Associates plans referred to in conditions **[3]**, **[4]** and **[5]**.

95. Areas containing spoil disposal and surplus earthworks shall be finished in accordance with conditions **[31.f and 31.g]**.

96. Uphill edges of cut faces for roads built through Amuri limestone shall be finished in an irregular pattern.

97. Straight line interfaces between cut faces and original surfaces shall be avoided.

98. Cut faces in Amuri limestone shall be finished so as to emulate naturally occurring limestone faces. Techniques for this purpose shall reference naturally occurring patterns in local limestone faces and may include:

a. Cut faces shall be scarified to achieve a surface texture commensurate with naturally occurring surface textures in weathered Amuri limestone. Scarification shall be done with a tyned tool in the direction of the bedding plane or 'grain' in the limestone.

b. Continuous, sheer limestone cut faces shall be avoided through the creation of surface variations that emulate naturally occurring patterns. Shallow vertical and diagonal fissures, narrow rills and shallow pockets shall be cut into limestone faces in an irregular pattern at 3—5 m intervals.

c. In cuts over 2 m in height, shallow benches approximately 200-400mm deep shall be cut into the face at approximately 2 m (but irregular) intervals, parallel to the bedding plane or 'grain' of the rock. These benches will provide locations for the accumulation of sediments and the products of natural erosion, which will in turn form a substrate for the establishment of plants.

99. During the construction of Northern Terrace Road and associated ramp roads to the main ridgeline, cut material shall not be sidecast down-slope of the road, but shall be removed from the work areas and disposed of at disposal sites indicated on the Golder Associates Plans CG151.4-153.4.

100. Mitigation techniques on the outside edges of roads referred to in Condition **[99]** shall include, but not be limited to, the following:

a. Where these roads are cut through Amuri limestone, at irregular intervals along the outer edges of roads, top soil shall be removed from the edge of the road to expose patches of underlying limestone.

b. Indigenous tussock and grey scrub species shall be established sufficiently close to the outer edge of the road to grow above the level of the roads formation.

101. Limestone boulders within boulderfields derived from Weka limestone that will be displaced through the construction of the Northern Terrace Road and spur roads or displaced through stabilisation measures, shall be relocated locally in naturalistic patterns on the downhill side of the roads. To the extent practicable, boulders shall be located in ground to a similar depth and orientation as they were in their natural state.

102. The finish of cut limestone faces and fill surfaces, the establishment of replicated boulder fields, the design of spoil disposal areas and the establishment of plants for mitigation and remediation shall be guided by the preparation (by the Consent Holder in consultation with the Hurunui District Council) of a site 'landscape pattern book' of graphic examples drawn from the locality. The pattern book will provide a source book of examples that should be used to guide the visual appearance of landscape mitigation and remediation works.

***Landscape expert guidance and oversight***

103. During excavation associated with the construction of roads, the construction of the fence required by condition **[86[a]]** on the northern side of the escarpment, and the implementation of landscape mitigation and remediation works, including the disposal of surplus material to spoil disposal areas, a landscape experts panel shall be available as necessary to provide guidance on the implementation of the landscape conditions described in this section. The panel shall be comprised of two landscape architects; one nominated by Hurunui District Council, and one by the Consent Holder.



104. The landscape expert panel shall liaise with geomorphological, geotechnical and ecological experts as necessary.

***Rehabilitation of visually prominent cut limestone surfaces***

105. Within 3 months of the commencement of consent the Consent Holder shall commence a trial of methods for the remediation of freshly cut, un-weathered Amuri limestone surfaces to determine whether accelerated or simulated weathering can be achieved within a shorter time frame than that of natural biofilm establishment.

106. Methods for trialling shall be developed in consultation with the Hurunui District Council and the landscape panel referred to in condition **[103]**, and may include:

a. The application of organic materials to initiate natural biofilm colonisation; or

b. The application of organic or inorganic sprays for the purpose of temporary staining of freshly cut rock surfaces.

107. At the same time as providing the Hurunui District Council with the information required by condition **[33]**, the Consent Holder shall notify the Council of the method that shall be used to remediate Amuri limestone at the site both immediately after cutting and in the long term, providing that any such method will not jeopardise the natural process of biofilm colonisation. The Consent Holder shall implement the identified method as soon as is practicable but no later than six months after cutting.

***Planting for mitigation and remediation of cut and fill batters***

108. Other than on cut limestone faces, cut and fill surfaces shall be rehabilitated in accordance with condition **[61].**

109. Locations for the establishment of woody plants and silver tussock within the wind farm site for visual mitigation shall be determined through consultation between landscape and ecology experts nominated by Hurunui District Council and the Consent Holder. The location of mitigation planting shall take into account the effects arising as a consequence of visibility from important public viewpoints agreed upon by the landscape experts.

110. The pattern of plantings undertaken for visual mitigation and remediation shall reflect natural patterns of plant distribution and association, as illustrated in the site landscape pattern book (see condition **[102]**).

111. The use of plants for mitigation and remediation of visual and landscape effects associated with cut and fill excavations shall be subject to conditions specified for habitat enhancement, ecological restoration and weed management.

**Hazardous Substances Management**

112. The Consent Holder shall ensure that all contaminant storage shall be bunded or contained in such a manner so as to prevent the discharge of contaminants. All contaminant storage areas with the exception of turbines and transformers are to be located in accordance with MWH plan Z1357201-C103.

113. Site refuelling shall be controlled by the development of operating procedures to minimize the risk of spills. Those procedures shall be incorporated in a Site Oil Spill Contingency Plan for mobile refuelling which shall be submitted to the Hurunui District Council for certification. This plan shall address:

a. Purpose and Policy
b. Safety
c. Description of the wind farm site
d. Characteristics of oils and hydrocarbons used at the site
e. Potential spill sources and risks
f. Preventative measures
g. Training
h. Spill response organisation
i. Equipment and operators
j. Equipment available off site
k. Immediate response
l. Media releases
m. Debriefing
n. Points to consider
o. Document review
p. Appendix 1 : Telephone numbers
q. Appendix 2 : Pollution Report and Incident Forms
r. Appendix 3 : Material Safety Data Sheets



114. All machinery and plant shall be regularly maintained in such a manner so as to minimise the potential for leakage of contaminants.

115. Spill kits shall be available on site to deal with any accidental spillage beyond the bunded area.

116. All contaminants (e.g. fuel, hydraulic oils, lubricants etc) shall be removed at the end of the construction period except for those required for ongoing maintenance of the wind farm and operational activities.

117. All storage and use of hazardous substances shall be in accordance with the provisions of the Hazardous Substances and New Organisms Act 1996 (HSNO), including compliance with any required emergency management plan, site test location certificate, and stationary container test certificate.

118. Any transformer erected on site shall be accompanied by containment measures sufficient to ensure that no transformer oil will be released into the environment in the event of spillage.

**Management of Fire Risk**

119. The Consent Holder shall prepare a Fire Management Plan (FMP) that establishes procedures for the management of the risk of fire and for fire suppression. The FMP shall be part of the Environmental Management Plan. The FMP shall be in general accordance with the Forest and Rural Fire Act 1977 and any regulations thereunder.

120. The Consent Holder shall ensure that the FMP, including any amendments, are available for viewing by the Consent Authority on request in writing~~, or at such other time as is agreeable to all parties~~. The Department of Conservation, the Ashley Rural Fire Authority and the Principal Rural Fire Officer of the Hurunui District Council, or such authority as may replace any one of these authorities as parties responsible for the management of rural fires within and on land adjoining the footprint, shall be consulted during the development of the FMP.

121. The Fire Management Plan shall include, but not be limited to:

a. The names and contact details for the Ashley Rural Fire Authority;

b. Other relevant contact details (of the organisations set out in appendix G of the Ashley Rural Fire District Plan 2009 – 2011);

c. A description of the sources of water to be used in fire fighting;

d. A requirement for the provision on site of a water point of at least 30,000 litres of water;

e. Requirements for at least one vehicle with a minimum capacity of 200 litres onsite during periods of extreme fire risk;

f. Ensuring adequate protection is in place prior to undertaking any activities authorised by this consent, including any preliminary geotechnical investigations.

**Accidental Discovery Protocol**

122. In the event of the accidental discovery of any archaeological remains the following shall occur:

a. All activity affecting the immediate area will cease and the New Zealand Historic Places Trust be notified.

b. The site shall be secured to ensure the archaeological remains are not further disturbed.

c. Works affecting the archaeological remains shall not recommence until the necessary authorities under the Historic Places Act 1993 are obtained.

d. If human remains/koiwi tangata are located, in addition to the steps above the NZ Police shall be contacted.

e. Wahi Tapu, Wahi Taonga and Urupa Protocol shall be implemented if relevant.

123. The Consent Holder shall offer to enter into a Discovery Protocol for Wāhi Tapu, Wāhi Taonga and Urupā jointly with Te Runanga o Ngāi Tahu and Te Ngāi Tūāhuriri Runanga. The purpose of a "Discovery Protocol for Wāhi Tapu, Wāhi Taonga and Urupā shall be to:

a. Manage and protect the integrity of known and unknown archaeological sites from damage and loss;

b. Maximise the opportunity to retrieve physical and archaeological evidence from disturbed sites;

c. Obtain quality information on the lives of people , their activities, food, resource use, trails and habitation areas of Ngāi Tahu ancestors from archaeological sites; and

d. Ensure Te Ngāi Tūāhuriri Runanga is satisfied with the management of any koiwi tangata.

e. The Protocol shall include the following requirements:

i. An offer to engage a representative of Te Ngāi Tūāhuriri Runanga trained in the discovery and recognition of archaeological sites to advise, oversee and where necessary be present during site preparation, excavation and construction, to act as advisor to the Consent Holder on identification of Wāhi Tapu, Wāhi Taonga, Urupā or historic cultural sites.

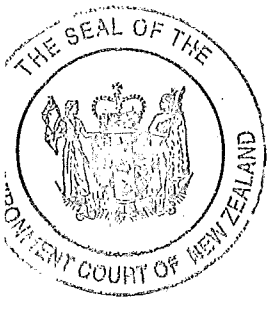
ii. The Consent Holder shall consult with Te Runanga o Ngāi Tahu and Te Ngāi Tūāhuriri Runanga to determine in accordance with tikanga Maori if there are any matters of protocol which tangata whenua wish to undertake in relation to the commencement of any development works, significant events or the commissioning of the completed works.

iii. The Consent Holder shall ensure that contractors involved with earthmoving activities have received appropriate training and are aware of the requirement to undertake and monitor earthmoving activities in a way that enables the identification of Wāhi Tapu, Wāhi Taonga, Urupā or historic cultural sites. Te Runanga o Ngāi Tahu and Te Ngāi Tūāhuriri Runanga shall be offered a contract to provide appropriate training to contractors.

iv. Immediately it becomes apparent that a Wāhi Tapu, Wāhi Taonga, Urupā or historic cultural site has been discovered, earthmoving activities shall stop in the location of the discovery. The contractor shall shut down all machinery or activity immediately, leave the location and advise the Consent Holder of the occurrence.

v. In cases other than where suspected Koiwi Tangata (human remains) are suspected:

1. The representative of Te Ngāi Tūāhuriri Runanga shall be consulted by the Consent Holder of the site to determine what further actions are required to safeguard the site or its contents, and to avoid, remedy or mitigate any damage to the site.
2. Work in the area of the discovery may only continue once all the necessary authorities under the Historic Places Act 1993 are obtained.



vi. Where Koiwi Tangata (human remains) are suspected:

1. The Consent Holder shall take steps immediately to secure the site of the Koiwi Tangata in a way that ensures the koiwi tangata are untouched.
2. The Consent Holder shall be responsible for notifying the Te Ngāi Tūāhuriri Runanga, the Police and the Historic Places Trust that suspected Koiwi Tangata have been uncovered.
3. The Consent Holder of the site shall make its staff available to meet and guide Kaumatua, the Police and Historic Places Trust staff to the site, assisting with any requests that they may make.
4. Earthmoving operations in the vicinity of the Koiwi Tangata shall remain halted until the Kaumatua; Police and Historic Places Trust staff have marked off the area around the affected area and given approval for earthmoving operations to begin.

vii. Work in the affected area may only continue once:

1. if the Koiwi Tangata are not of Maori origins, all the necessary legal authorisations are obtained.
2. if the Koiwi Tangata are of Maori origins, all the necessary legal authorisations are obtained and with the express agreement of the Kaumatua.

124. The Consent Holder shall comply with any Discovery Protocol for Wāhi Tapu, Wāhi Taonga and Urupā jointly entered into with Te Runanga o Ngāi Tahu and Te Ngāi Tūāhuriri Runanga, to the extent necessary to give effect to the mandatory requirements in the above condition.

125. The Consent Holder shall provide Te Runanga o Ngāi Tahu, Te Ngāi Tūāhuriri Runanga and the Historic Places Trust with the following information no less than 10 working days prior to any earthmoving activities:

a. A schedule of the dates of all significant earthmoving events, their sequence and duration.

b. The Consent Holder shall invite Te Runanga o Ngāi Tahu and Te Ngāi Tūāhuriri Runanga to attend any episode of significant earthmoving activity.

126. Prior to commencing construction, the Consent Holder shall consult with the three Hapu of Waitaha to ensure that up to six Kaumatua representatives are provided with sufficient opportunity to visit the site at a mutually agreed time to Inspect:

a. All areas of the site that have been identified for excavation; and

b. Any other locations of interest to Waitaha ki Waitaha within the wider outline area.

127. Following the visit to the site by the Kaumatua representatives under condition **[126]** the Consent Holder shall prepare a *Site Cultural Sensitivity Protocol (*SCSP*)* to be included in the Construction Management Plan. The SCSP shall:

a. Be prepared in consultation with Waitaha ki Waitaha;

b. Include protocols and process for dealing in a culturally safe manner with all sites identified under condition **[126]** as being of potential cultural concern or significance to Waitaha ki Waitaha;

c. Provide for a procedure whereby a nominated representative of Waitaha ki Waitaha is able to receive regular updates of the construction programme and the implementation of the SCSP;

d. Require the Consent Holder, in consultation with Waitaha ki Waitaha, to place Interpretative Panels (signs) on all sites or features of cultural significance to ensure that the cultural and historical significance of each site can be recognised and understood; and

e. Include an appropriate procedure whereby:

   i. The representative described in condition **[127.c]** and up to six Kaumatua are able to visit the site during the construction period to inspect all of the sites described in condition **[126]** as required by Waitaha Ki Waitaha; and

   ii. All of Waitaha Ki Waitaha and Its associates are, after construction, able to access the site to observe and celebrate significant cultural events and occurrences on an ongoing basis.

128. The Consent Holder shall prepare an Accidental Discovery Protocol (ADP) as part of the Construction Management Plan prior to construction of the wind farm. The ADP shall be prepared in consultation with Waitaha ki Waitaha and

the New Zealand Historic Places Trust, the ADP shall be put in place for any earthmoving or ground modification that occurs during the construction and operation of the wind farm:

a. The ADP shall set out the steps to take should any prehistoric (Māori) or historic archaeological site be found as a result of any earthmoving or ground modification that occurs during the construction and operation of the wind farm at any time.

b. In the event that koiwi tangata (human skeletal remains), taonga or artefact material are discovered during site construction, the Consent Holder shall, without delay:

   i. Cease all work within the immediate vicinity of the discovery;

   ii. Notify their nominated Archaeologist, the Consent Authority, Waitaha ki Waitaha and the New Zealand Historic Places Trust;

   iii. Enable a site inspection by, Waitaha ki Waitaha and their advisors, and the New Zealand Historic Places Trust who shall determine the nature of the discovery and the further action required, including whether an Archaeological Authority is required under the Historic Places Act 1993.

   iv. In the case of accidental discovery of an archaeological site a programme of archaeological site investigation shah be carried out by the Consent Holder Any such site shall be properly excavated, recorded, analysed and reported upon under the supervision of an appropriately qualified archaeologist. All archaeological work shall be carried out to the best professional standards.

   v. Any koiwi tangata or taonga shall be handled and removed by Waitaha ki Waitaha responsible for the tikanga (custom) appropriate to its removal and preservation.

c. Upon completion of tasks **[128.b.i]** to **[128.b.v]** above, and provided all statutory permissions have been obtained, the Consent Holder may recommence site construction following consultation with the Consent Authority, Waitaha ki Waitaha, and the New Zealand Historic Places Trust.

**Noise**

***Definitions***

129. The following definitions shall apply for the purposes of these conditions:

a. Where noise measurement or assessment is required, these shall be undertaken in accordance with NZS 6801:2008 "Acoustics—Measurement of Sound", and NZS 6802:2008 "Acoustics—Environmental Noise". Wind turbine sounds shall be measured and assessed in accordance with NZS 6808:2010 "Acoustics – Wind farm Noise".

b. Reference to "dwelling" shall mean any dwelling existing at the time of granting of this consent.

c. Notional boundary shall have the meaning set out in NZS 6802:2008.

d. "Noise Sensitive Activities" shall have the meaning set out as "Residential Activity" in paragraph 2.2 of NZS 6802:2008.

***Construction Activities***

130. All construction, earthworks, site remediation and decommissioning, shall be designed and carried out in accordance with the New Zealand Standard NZS 6803:1999 "Acoustics - Construction Noise" and shall comply with Table 2 of that standard for "long term duration".

## *Operational Noise (Non-Turbine)*

131. Noise from all other activities on the site (other than wind turbine generator operation and construction activities) shall not exceed the following limits at or within the notional boundary of any dwelling existing at the date of granting of consent (for the avoidance of doubt, this shall include dwellings on Mt Cass, Dovedale and Hamilton Glens):

a. 7.00am to 7.00pm 50dB $L_{Aeq(15\ minute)}$

b. 7.00pm to 7.00am 40dB $L_{Aeq(15\ minute)}$

c. 7.00pm to 7.00am 70dB $L_{Amax}$

***Operational noise (Turbines)***

132. At any wind speed wind farm sound levels ($L_{A90}$(10 min)) shall~~ould~~ not exceed the background sound level by more than 5 dB, or a level of 40 dB $L_{A90}$(10 min), whichever is the greater, at any point within the notional boundary of any dwelling or building housing noise sensitive activities existing at the date

of granting of consent, when measured and assessed in accordance with New Zealand Standard NZS6808:2010 "Acoustics – Wind farm Noise" (for the avoidance of doubt, this shall include dwellings on Dovedale and Hamilton Glens and at 666 Mt Cass Road (Tiromoana Homestead) whether or not those houses exist at the time of the grant of consent).

133. Notwithstanding condition **[132]**, the notional boundary of the dwelling located at NZMG coordinates 2500630E 5796970N shall be considered as a high amenity area for the purposes of NZS6808:2010 for as long as, but no longer, as a person on the autism spectrum permanently resides at that dwelling.

133[a] Prior to commissioning of any turbine, the Consent Holder shall provide the Hurunui District Council's Environmental Services Group Manager with an Acoustic Emissions Report which details the sound power level of the selected turbines, and confirms the selected turbines aredo not ~~expected to~~ have special audible characteristics.

***Post Installation Testing***

134. For the purposes of assessing compliance with conditions **[132] and [133]**, detailed testing shall be undertaken in accordance with section 7.5 of NZS6808:2010. Post installation testing shall be carried out at no fewer than 3 dwellings, and shall include the dwelling located at NZMG coordinates 2500630E 5796970N, Tiromoana Homestead and Hamilton Glens unless otherwise approved by Council. A report setting out the measurement details and results shall be provided to Hurunui District Council no later than 3 months after the Mt Cass Wind Farm commences operation, or if the Wind Farm is commissioned in stages, within 3 months of each stage commencing operation.



134[a] The sound from at least two wind turbines shall be measured prior to commissioning the wind farm. These measurements shall be conducted at a location within 1000m from the turbines. A compliance assessment report for the turbines shall be submitted to the Environmental Services Group Manager in accordance with Section 8.4.1 of NZS6808:2010. Turbines 61/75 to 69/75 in the R33 layout, 36/42 to 39/42 in the R60 layout, or 24/26 to 25/26 in the R90 layout shall not be operated until a report on this test has been submitted and it shows that no special audible

characteristics are present, when assessed in accordance with NZS6808/2010. The reference test method for tonality shall be that prescribed as Annex C to ISO 1996 – 2:2007.

*Note: the intention is that testing is carried out prior to operating the turbines closest to the McLachlan property.*

135. If post installation testing shows that the wind farm does not comply with the noise conditions of this consent, the Consent Holder shall as soon as practicable undertake remedial measures to achieve compliance at all dwellings. The remedial measures may include de-rating turbines, or shutting down turbines. If turbines are shut down, such turbines shall remain off (other than for testing) until such time as any necessary remedial work to achieve compliance is complete. On completion of any remedial work, an additional report shall be submitted to Council demonstrating compliance.

***Special Audible Characteristics***

136. For the avoidance of doubt, wind farm sounds containing a special audible characteristic such as impulsiveness, tonality and/or an amplitude modulation, shall be assessed in accordance with NZS6808: 2010. Where modulation of wind farm sound is detected, the application of the 5dB penalty for special audible characteristics is to apply to the measured sound level where the measured peak to trough level exceeds 6dBA on a regularly varying basis or if the spectral characteristics, one-third octave band levels, exhibit a peak to trough variation that exceeds 6dB on a regular basis in respect of the blade pass frequency.

***Additional Monitoring***

136 [a] Additional monitoring and reporting of the type required by condition 134 and 135 may be required of the Consent Holder by the Hurunui District Council where in the opinion of an enforcement officer appointed by the Council, wind farm sound received at any noise sensitive location as defined by NZ6808.2010 is considered to have become objectionable, or where the enforcement officer has reasonable grounds to believe that the noise limits in condition **[132]** are being exceeded.



**Radio Interference**

137. Cables linking the turbines and any substations shall be installed in accordance with industry standard practices and protocols in order to avoid Earth Potential Rise (EPR) interference with existing communication facilities.

138. Within 12 months of the Mt Cass Wind Farm becoming operational, if requested by a property owner or occupier, the Consent Holder shall remedy any television interference that is a direct result of the installation and operation of the wind turbines as soon as practicable. This remedy will be the restoration of reception for free to air channels at the Consent Holder's cost to a level of reception quality in existence at each point of interference prior to the wind farm construction. The Consent Holder's obligation under this condition is limited to a single remediation of a loss of reception.

139. Prior to the erection of wind turbines in close proximity to Mt Cass, if requested by an operator of fixed radio linking service located on Mt Cass, the Consent Holder shall ensure that any turbine is located outside of the 'first Fresnel Zone'. For the purposes of clarification, this may be achieved by either relocating the fixed radio linking service or through the siting of a wind turbine.

140. Within 12 months of the Mt Cass Wind Farm becoming operational, if requested by the provider of one of the fixed radio linking services set out in the table below, the Consent Holder shall investigate any reflection (or scattering) effect of the Wind Farm on that service, and if any loss of service is occurring, remedy this by offering to undertake any work necessary.

| Licence No. | Client | Freq (MHz) | Licence Type | TxLoc | TxE | TxN | RxLoc | RxE | RxN |
|---|---|---|---|---|---|---|---|---|---|
| 155126 | MAINPOWER NEW ZEALAND LTD | 454.925 | Fixed < 1GHz; BW >12.5kHz & <=50kHz (Bi-d | RANGIORA | 2476800 | 5767000 | MT CASS | 2495690 | 5792150 |
| 155127 | MAINPOWER NEW ZEALAND LTD | 459.962 | Fixed < 1GHz; BW >12.5kHz & <=50kHz (Bi-d | MT CASS | 2495690 | 5792150 | RANGIORA | 2476800 | 5767000 |
| 155128 | MAINPOWER NEW ZEALAND LTD | 459.087 | Fixed < 1GHz; BW >12.5kHz & <=50kHz (Bi-d | MT CASS | 2495690 | 5792150 | BELTANA | 2539200 | 5832200 |
| 155129 | MAINPOWER NEW ZEALAND LTD | 454.05 | Fixed < 1GHz; BW >12.5kHz & <=50kHz (Bi-d | BELTANA | 2539200 | 5832200 | MT CASS | 2495690 | 5792150 |
| 177635 | MAINPOWER NEW ZEALAND LTD | 453.8 | Fixed < 1GHz; BW >12.5kHz & <=50kHz (Bi-d | WALLACE PEAK | 2494100 | 5846000 | MT CASS | 2495690 | 5792150 |
| 177636 | MAINPOWER NEW ZEALAND LTD | 458.837 | Fixed Bi-directional Point-to-Multipoint | MT CASS | 2495690 | 5792150 | BELTANA | 2539200 | 5832200 |
| 177636 | MAINPOWER NEW ZEALAND LTD | 458.837 | Fixed Bi-directional Point-to-Multipoint | MT CASS | 2495690 | 5792150 | WALLACE PEAK | 2494100 | 5846000 |
| 177637 | MAINPOWER NEW ZEALAND LTD | 453.8 | Fixed < 1GHz; BW >12.5kHz & <=50kHz (Bi-d | BELTANA | 2539200 | 5832200 | MT CASS | 2495690 | 5792150 |
| 177638 | MAINPOWER NEW ZEALAND LTD | 454.275 | Fixed < 1GHz; BW >12.5kHz & <=50kHz (Bi-d | RANGIORA | 2476800 | 5767000 | MT CASS | 2495690 | 5792150 |
| 177639 | MAINPOWER NEW ZEALAND LTD | 459.313 | Fixed < 1GHz; BW >12.5kHz & <=50kHz (Bi-d | MT CASS | 2495690 | 5792150 | RANGIORA | 2476800 | 5767000 |
| 174826 | NEW ZEALAND RAILWAYS CORPORATION (ONTRACK) | 424.663 | Fixed < 1GHz; BW >12.5kHz & <=50kHz (Bi-d | CHRISTCHURCH | 2480900 | 5740700 | MT CASS | 2495690 | 5792150 |
| 174827 | NEW ZEALAND RAILWAYS CORPORATION (ONTRACK) | 429.675 | Fixed < 1GHz; BW >12.5kHz & <=50kHz (Bi-d | MT CASS | 2495690 | 5792150 | CHRISTCHURCH | 2480900 | 5740700 |
| 175167 | NEW ZEALAND RAILWAYS CORPORATION (ONTRACK) | 420.113 | Fixed < 1GHz; BW >12.5kHz & <=50kHz (Bi-d | MT CASS | 2495690 | 5792150 | BELTANA | 2539200 | 5832200 |
| 175171 | NEW ZEALAND RAILWAYS CORPORATION (ONTRACK) | 425.125 | Fixed < 1GHz; BW >12.5kHz & <=50kHz (Bi-d | BELTANA | 2539200 | 5832200 | MT CASS | 2495690 | 5792150 |

| Licence No. | Client | Freq (MHz) | Licence Type | TxLoc | TxE | TxN | RxLoc | RxE | RxN |
|---|---|---|---|---|---|---|---|---|---|
| 175219 | NEW ZEALAND RAILWAYS CORPORATION (ONTRACK) | 426.575 | Fixed < 1GHz; BW >12.5kHz & <=50kHz (Bi-d | ETHELTON | 2514100 | 5815000 | MT CASS | 2495690 | 5792150 |
| 175220 | NEW ZEALAND RAILWAYS CORPORATION (ONTRACK) | 421.563 | Fixed < 1GHz; BW >12.5kHz & <=50kHz (Bi-d | MT CASS | 2495690 | 5792150 | ETHELTON | 2514100 | 5815000 |
| 175506 | NEW ZEALAND RAILWAYS CORPORATION (ONTRACK) | 424.663 | Fixed < 1GHz; BW >12.5kHz & <=50kHz (Bi-d | MIDDLETON RAILYARDS | 2476200 | 5740800 | MT CASS | 2495690 | 5792150 |
| 175507 | NEW ZEALAND RAILWAYS CORPORATION (ONTRACK) | 429.675 | Fixed < 1GHz; BW >12.5kHz & <=50kHz (Bi-d | MT CASS | 2495690 | 5792150 | MIDDLETON RAILYARDS | 2476200 | 5740800 |
| 201031 | TAIT ELECTRONICS LTD | 1429.38 | Fixed >=1GHz & <14GHz (Bi-directional) | MT CASS | 2495690 | 5792150 | MARLEYS HILL (TAIT) | 2480430 | 5732990 |
| 201032 | TAIT ELECTRONICS LTD | 1523.88 | Fixed >=1GHz & <14GHz (Bi-directional) | MARLEYS HILL (TAIT) | 2480430 | 5732990 | MT CASS | 2495690 | 5792150 |

141. Within 12 months of the Mt Cass Wind Farm becoming operational, if requested by the provider of one of the wide area coverage services set out in the table below, the Consent Holder shall investigate any scattering interference effect of the Wind Farm on that service, and if any loss of service is occurring, remedy this by offering to undertake any work necessary.

| Licence No. | Licence Type | Client | Licence ID | Freq (MHz) | Loc Name | Easting | Northing |
|---|---|---|---|---|---|---|---|
| 176984 | Land Repeater >5W; BW <=12.5kHz | CANTERBURY WASTE SERVICES LTD | 81552 | 164.675 | MT CASS | 2495690 | 5792150 |
| 155118 | Land Repeater >5W; BW >12.5kHz | MAINPOWER NEW ZEALAND LTD | 491 | 461.925 | MT CASS | 2495690 | 5792150 |
| 177572 | Land Repeater >5W; BW <=12.5kHz | MAINPOWER NEW ZEALAND LTD | 82761 | 164.225 | MT CASS | 2495690 | 5792150 |
| 125595 | Land Repeater NZ Wide; BW >12.5kHz | NEW ZEALAND RAILWAYS CORPORATION (ONTRACK) | 2486 | 152.05 | MT CASS | 2495690 | 5792150 |
| 200998 | Land Repeater >5W; BW <=12.5kHz | TAIT ELECTRONICS LTD | 101365 | 418.012 | MT CASS | 2495690 | 5792150 |
| 207409 | Land Repeater >5W; BW <=12.5kHz | TAIT ELECTRONICS LTD | 111459 | 858.038 | MT CASS | 2495690 | 5792150 |

## Aviation

142. Any navigational lights to be located on the turbines or meteorological masts, as required by the Civil Aviation Authority (CAA), shall be installed and

operated in such a way to minimise their visibility when viewed from the ground, while meeting CAA requirements. The Consent Holder shall provide a copy of the written advice from the Civil Aviation Authority identifying the relevant turbines to Council within seven days of receiving such advice.

**Public Access**

143. The Consent Holder shall provide a walking track for public access over the site, generally in accordance with the indicative route identified on Golder Associates plan CG191.1 dated 17 December 2010. The Consent Holder shall finalise the route and standard of the walking track following consultation with ~~interested persons~~ the Department of Conservation.

144. Public access to the route shall be secured in perpetuity by means of an appropriate legal instrument to be registered on the relevant certificate of title within 60 working days of the completion of wind farm construction.

145. Access restrictions may occur under the following circumstances:
    a. For farm management (e.g. lambing)
    b. Maintenance of roads and tracks when machinery is operating on site or open excavations are present
    c. During major turbine maintenance when heavy machinery is operating on site
    d. During times of high fire risk
    e. At any time that the public safety is at risk due to either wind farm or farm operations (at the sole discretion of the Consent Holder).

146. The Consent Holder shall provide interpretative signage along the walking route, following consultation with the Department of Conservation~~, which includes information for visitors on possible instability during seismic events~~.

**Community Liaison Group**

147. The Consent Holder shall, prior to undertaking any activities authorised by this consent, publicly offer to establish (by way of community newsletter and public notice) a community liaison group for the Mt Cass Wind Farm project. ~~The Consent Holder shall do this by public notice.~~ As a minimum the following shall be invited to participate in this group:

a. A maximum of two representatives of property owners, comprising one from within each of the Amberley and Glenmark Wards;

b. One representative of Mt Cass Road residents;

c. One representative of the Consent Holder; and

d. A representative of the Hurunui District Council shall be invited to attend meetings in an observer capacity.

148. The Consent Holder shall offer the opportunity for regular meetings during the construction of the wind farm and at least annually during the operation of the wind farm.

149. The objective of the community liaison group is to facilitate information flow between the Consent Holder and the community and to be an ongoing point of contact between the Consent Holder and the community. The functions of the group may also include acting as a forum for relaying any community concerns about the construction and ongoing operation of the wind farm and reviewing the implementation of measures to resolve and manage community concerns. MainPower is to advise the Community Liaison Group of the final choice of turbine to be used, as soon as reasonable after it has made that decision.

150. In particular, the Consent Holder shall provide an opportunity for the Community Liaison Group to:

a. Provide input and feedback into the initial preparation and review of the management plans; and

b. Receive and discuss the results of all monitoring and reports as required by the conditions of these consents.



151. The Consent Holder shall be responsible for convening the meetings of the group and shall cover the direct costs associated with the establishment and

operation of the group. The Consent Holder shall be responsible for the keeping and distribution of the group's minutes to all participants of the group.

152. The Consent Holder shall not be in breach of the above conditions if any one or more of the above parties specified above do not wish to be members of the group or to attend any particular meeting.

**Contact Procedure**

153. The Consent Holder shall establish and publicise contact details for a liaison officer, so that members of the local community have a specified and known point of contact should they wish to raise any issues that may arise during construction and operation of the wind farm. A log book detailing all calls and any action taken shall be kept, and made available to Hurunui District Council on request.

**Complaint Register**

154. The Consent Holder shall maintain and keep a Complaints Register for any complaints about the construction activities and operation of the wind farm received by the Consent Holder including complaints in relation to traffic, noise, dust, shadow flicker or blade glint. The Register shall record, where this information is available:

a. The date, time and duration of the incident that has resulted in a complaint;

b. The location of the complainant when the incident was detected;

c. The possible cause of the incident;

d. Any corrective action undertaken by the Consent Holder in response to the complaint, including timing of that corrective action;

~~e. The Complaints Register shall also be available to the Council and the Community Liaison Group at all reasonable times upon request;~~

f.e. The date and details of the response given to each complainant.

The Complaints Register shall be available to the Council and the Community Liaison Group at all reasonable times upon request.

155. Within 5 days of receipt of any complaint in accordance with condition **[154]**, the Consent Holder shall advise the Hurunui District Council of the details of

any complaint received and, where appropriate, of any remedial or corrective action taken, including the response provided to the complainant.

**Statutory Liaison Protocol – Department Of Conservation**

156. Prior to undertaking any activities authorised by this consent, the Consent Holder shall offer to establish a Statutory Liaison Protocol with the Department of Conservation.

157. A representative of the Department of Conservation shall be offered the opportunity to visit the site at regular intervals during construction and to offer comment on the construction process, to attend an annual meeting, and the provision of any information to which the Hurunui District Council is entitled by virtue of these consents.

158. The purposes of the annual meeting are to:

a. Provide input and feedback on the preparation, implementation, review and adaption of the management plans required by condition **[23];**

b. Receive from the Consent Holder, and discuss with the Consent Holder and the Hurunui District Council, the results of all monitoring and reporting required by the conditions of this consent.

**Independent Peer Reviewer**

159. Prior to undertaking any activities authorised by this consent, the Consent Holder shall engage, at its cost, a Peer Reviewer who is independent of the Consent Holder, and who is approved in writing by the Hurunui District Council.

160. The Peer Reviewer shall be experienced in the field of terrestrial ecology and restoration ecology.

161. The Peer Reviewer shall provide an annual report to the Hurunui District Council which:

a. Addresses the adequacy of the actions and methods set out in the Environmental Management Plan required by condition **[23]** and the Decommissioning Management Plan required by condition **[180]** to achieve their purposes and objectives, and whether or not the actions and methods are in accordance with good practice;

b. Reviews the annual report prepared by the Consent Holder under condition **[67]** and assesses whether the purposes and objectives of the Environmental Management Plan are being achieved

b.c. May make recommendations for improvements.

162. Where the independent Peer Reviewer considers that he / she does not have the required expertise in any area of ecology in order to fulfil the functions set out in **[161]** above, he/she may, following consultation with the Consent Holder engage the services of an appropriate expert to report on the relevant matter to the Independent Peer Reviewer. Any report from such an expert shall form part of the annual report as required by these conditions.

**Review of Conditions**

163. In accordance with section 128 of the Resource Management Act 1991, the Council may at one year after the commencement of this consent and at yearly intervals thereafter, serve notice on the Consent Holder of its intention to review any of the conditions of this consent for any of the following purposes:

a. To deal with any unanticipated adverse effects on the environment which may arise from the exercise of the consent, which is appropriate to deal with at a later stage; or

b. To require the Consent Holder to adopt the best practicable option to mitigate any adverse effect upon the environment; or

c. Ensuring that the conditions are effective and appropriate in managing the effects of activities permitted by this consent.

d. To deal with any lack of achievement of the objectives of the Environmental Management Plan, and to require the Consent Holder to undertake further adaptive management measures to better implement the objectives of the Plan.

e. To address any unanticipated adverse effect that is identified through the peer review process under condition **[161],** and in the monitoring reports required by condition **[67].**

**Costs Associated with Monitoring and Review**

164. The Consent Holder shall pay to the Hurunui District Council the actual and reasonable costs associated with the monitoring of conditions, or review of consent conditions, or supervision of the resource consent as set in

accordance with section 36 of the Resource Management Act 1991. These costs may include site visits, correspondence and other activities, the actual costs of materials or services, including the costs of consultants or other reports or investigations which may have to be obtained.

**Performance Bond**

165. At all times, the Consent Holder shall provide and maintain in favour of the Hurunui District Council a financial assurance (Performance Bond) to:
    a. Secure compliance by the Consent Holder with the conditions of the consent and to enable any adverse effects on the environment caused by activities of the Consent Holder to be avoided, remedied or mitigated;
    b. Secure completion of the Habitat Enhancement and Pest Control Management Plan;
    c. Secure the completion of rehabilitation and decommissioning in accordance with the Decommissioning Management Plan; and
    d. Ensure that, where necessary, the Hurunui District Council has appropriate resources to remedy any failure (whether deliberate or otherwise) or inability on behalf of the Consent Holder to comply with the conditions of consent.

166. The amount (quantum) of the Performance Bond may vary from time to time but at any given time shall be sufficient to cover the estimated cost at that time (including any contingency) of compliance with all conditions as detailed in conditions **[167]** to **[173]**.

167. The Consent Holder shall not give effect to the consent until the Performance Bond is executed by the Consent Holder and guarantor and deposited with the Hurunui District Council.

168. The performance of the conditions of the Performance Bond shall be guaranteed by a guarantor acceptable to the Hurunui District Council. The guarantor shall bind itself to pay for all works associated with the carrying out and completion of all conditions of consent and avoiding, remedying or mitigating any adverse effects on the environment caused by the activities of the Consent Holder and carrying out and completion of the Habitat

Enhancement and Pest Control Management Plan in the event of any default of the Consent Holder.

169. If the Consent Holder is unable at any time to arrange a guarantor for the quantum as set out in condition **[168]** the Consent Holder will provide a cash bond.

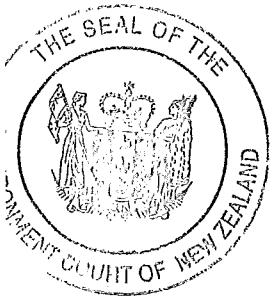
170. The Performance Bond shall be in a form acceptable to the Hurunui District Council and shall be consistent with conditions **[164]** to **[175]**.

171. The Performance Bond shall provide that the Consent Holder remains liable under the Resource Management Act 1991 for any breach of the conditions of the consent.

172. The Consent Holder shall provide the Hurunui District Council with a report which recommends the amount of the initial Performance Bond at least 6 months prior to the anticipated commencement of activities authorised by the consent.

173. The amount of the Performance Bond shall be reviewed and fixed by the Hurunui District Council, within 30 days of receipt of the report required by condition **[172].** Notification of the amount of the Performance Bond under this condition shall be advised by written notice (the "review date") by the Hurunui District Council to the Consent Holder, within the timeframes specified above.

174. Should the Consent Holder not agree with the amount of the Performance Bond fixed by the Hurunui District Council under condition **[173]** then the matter may be referred to arbitration in accordance with the provisions of the Arbitration Act 1996. Arbitration shall be commenced by written notice ("notice of arbitration") by the Consent Holder to the Council advising that the amount of the bond is disputed, such notice to be given within 14 days of the review date under condition **[173]**. If the parties cannot agree upon an arbitrator within 7 days of the notice of arbitration, then an arbitrator shall be appointed by the President of the Institute of Professional Engineers of New Zealand. Such arbitrator shall give an award in writing to the parties within 30 days after his or her appointment (the "date of arbitration decision"), unless the



parties agree that the date of arbitration decision shall be extended. The Consent Holder shall bear the full and reasonable costs of the parties in connection with this arbitration. In all other respects, the provisions of the Arbitration Act 1996 shall apply.

175. If the decision of the arbitration is not made available by the date of arbitration decision referred to in condition **[170]**, then the amount of the Performance Bond shall be the sum fixed by the Hurunui District Council under condition **[169]**, until such time as the arbitration does give an award in writing to the parties. At that time, the amount of the Performance Bond shall be adjusted in accordance with the arbitration decision.

176. The amount of the Performance Bond shall be reviewed within 30 days of each third anniversary of the date of commencement of construction activities authorised by the consent. Conditions **[173]** and **[174]** will apply with any necessary modifications. Pending the outcome of the review, but subject to condition **[175],** the existing bond shall continue in force. That sum shall be adjusted in accordance with the arbitration decision.

177. If the amount of the bond is to be increased as a result of a review by the Hurunui District Council under condition **[176]** or as a result of the decision of an arbitrator under condition **[174],** the Consent Holder must lodge a new bond or a variation of the bond with the District Council within 30 days. The existing Performance Bond shall continue in full force and effect until the new bond is lodged with the Hurunui District Council.

178. The Performance Bond may be varied, cancelled, or renewed at any time by agreement between the Consent Holder and the Hurunui District Council provided that cancellation will not be agreed to unless a further or new bond acceptable to the Hurunui District Council is available to replace immediately that which is to be cancelled.

179. The consent authority shall release the Performance Bond on the Completion of Closure of the Site. "Completion of Closure of the Site" means completion of the Decommissioning Plan under condition **[180].**

**Decommissioning**

180. If the wind farm or any group of 4 adjacent turbines ceases operation for a continuous period of 24 months, or for any other reason determined by the Consent Holder, the wind farm or block of turbines shall be decommissioned.

181. The Consent Holder shall provide written notice to the Hurunui District Council of the intent to decommission the site and shall prepare and submit a Decommissioning Management Plan to the Manager Environmental Services of the Hurunui District Council for endorsement (acting in a technical certification capacity) three months prior to any decommissioning work.

182. The plan is to include, but not be limited to, details of the following matters:

a. Procedures for dismantlement and removal of turbine structures (but not the removal of sub-surface components);

b. Methodology for earthwork site rehabilitation and revegetation, including rehabilitation of and reduction in the width of, roads; and where appropriate, re-creation of original landform contours;

c. Rehabilitation of the areas dealt with in conditions **[45] and [46]**;

d. Traffic management for any overweight and over-dimension vehicles;

e. Other matters relating to facilities and signage for public viewing and access.

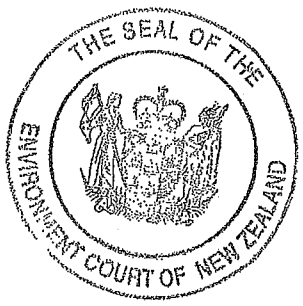
183. The Consent Holder shall provide written notice to the Manager Environmental Services of the Hurunui District Council within 3 months of completion that all decommissioning works has been completed.

184. At least one year prior to the closure of the wind farm, the Consent Holder shall provide and maintain in favour of the Hurunui District Council a bond, or such other financial instrument as approved by the Consent Authority, to cover the estimated costs in perpetuity of the ongoing management of the Mt Cass Conservation Area in accordance with the Mt Cass Conservation Management aArea section of the Environmental Management Plan required by condition **[89]**.

***Advice Note: Further resource consents associated with the development of a wind farm at Mt Cass may be required from the Canterbury Regional Council.***

# Appendix 1

Figure 1: Mt Cass Vegetation Communities dated July 2011



# Appendix 2

Golder and Associate Plan CG181.3, CG182.3 Geomorphological mapping

# Appendix 3

1. Chris Glasson Plan, 15 November 2010

2. Cross section of completed road formation with mitigation 24 July 2010

**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**

**CIV-2014-404-002064**
**[2015] NZHC 767**

| | |
|---|---|
| UNDER | the Resource Management Act 1991 |
| AND | |
| IN THE MATTER | of an appeal against a decision of the Environment Court under s 299 of the Resource Management Act 1991 |
| BETWEEN | MAN O'WAR STATION LIMITED<br>Appellant |
| AND | AUCKLAND COUNCIL<br>Respondent |

| | |
|---|---|
| Hearing: | 24 and 25 March 2015 |
| Appearances: | M E Casey QC and M J E Williams for Appellant<br>B O'Callahan and J Burns for Respondent<br>R B Enright and M C Wright for Environmental Defence Society Incorporated (s 301 party)<br>R Gardner for Federated Farmers of New Zealand (s 301 party) |
| Judgment: | 21 April 2015 |

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**(RESERVED) JUDGMENT OF ANDREWS J**

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*This judgment is delivered by me on 21 April 2015 at 2.30 pm pursuant to r 11.5 of the High Court Rules.*

.....
*Registrar / Deputy Registrar*

## Introduction

[1] The appellant, Man O'War Station Ltd ("MWS") owns a 2,364 hectare rural property at the eastern end of Waiheke Island and on Ponui Island in the Hauraki Gulf, known as Man O'War farm ("the farm property"). Proposed Change 8 to the Auckland Regional Policy Statement ("Change 8") introduced new policy provisions for Outstanding Natural Landscapes (ONLs) and the Auckland Council prepared a new set of ONL maps for the Auckland region. The new mapping resulted in approximately 1,925 hectares of the farm property (more than 75%) being mapped as ONLs, referred to as "ONL 78" (on Waiheke Island) and "ONL 85" (on Ponui Island).

[2] MWS appealed to the Environment Court against the Council's mapping. In its decision given on 29 July 2014, the Environment Court accepted that areas in Man O'War Bay and Hooks Bay, and the whole of Ponui Island (apart from the eastern coastal margin and sea scape), should be excluded from the ONL.[1] However, the Court rejected MWS's submission that only coastal areas and particular inland areas should be included in the ONL.

[3] MWS has appealed to this Court, pursuant to s 299 of the Resource Management Act 1991 ("the RMA"), on the grounds that the Environment Court made errors of law.

## Interim or final decision?

[4] The decision of the Environment Court is headed as an "Interim Decision". At [152] the Environment Court directed that the mapping of ONL 78 and ONL 85 in Change 8 was to be revised as set out in the decision, "subject to possible further consideration of mapping should wording in the [Auckland Regional Policy Statement] change after further agreement or input from parties".

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1 *Man O'War Station Ltd v Auckland Council* [2014] NZEnvC 167.

[5] An interim decision of the Environment Court decision cannot be appealed.[2] However, counsel for MWS accepted that in relation to the mapping of ONLs, the decision is final. There is, therefore, no issue as to MWS's ability to appeal.

**Relevant statutory provisions**

[6] The applicable law is set out in the provisions of the RMA as they were when Change 8 was publicly notified in September 2005. In Part 2 of the RMA "Purpose and principles", s 5(1) provides that the purpose of the Act is to promote the sustainable management of natural and physical resources. "Sustainable management" is defined in s 5(2) as including "avoiding, remedying, or mitigating any adverse effects on the environment". Section 6 is headed "matters of national importance" and provides that in achieving the purpose of the Act, persons exercising functions and powers under it "shall recognise and provide for the following matters of national importance", including at s 6(b): "the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development". Those sections have remained unchanged since 2005.

[7] Provisions relating to the sustainable management of the environment are set out in a three-tiered system, moving from the general to the specific: national, regional, and district.[3] Section 57(1) of the RMA (unchanged since 2005) provides that "there shall at all times be at least one New Zealand coastal policy statement prepared and recommended by the Minister of Conservation …" Section 60(1) provides that there must be a regional policy statement for each region, prepared by the regional council. Section 61(1) provides that the regional policy statement must be prepared and changed in accordance with (among other things) Part 2 of the Act, and the regional policy statement must, pursuant to s 62(3) give effect to a New Zealand coastal policy statement. Sections 60 to 62 are also unchanged since 2005.

[8] Policies 13 and 15 of the New Zealand Coastal Policy Statement 2010 (NZCPS 2010) are particularly relevant in the present case. Policy 13 "Preservation of natural character" is:

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2 See *Mawhinney v Auckland Council* HC Auckland CIV 2010-404-63, 26 October 2011 at [90]-[99] and *Motiti Avocados Ltd v Minister of Local Government* [2013] NZHC 1268.

3 See *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [9]-[16].

(1) To preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development:

(a) avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character; and

(b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on natural character in all other areas of the coastal environment; …

[9] Policy 15 relates to "Natural features and natural landscapes" and begins:

To protect the natural features and natural landscapes (including seascapes) of the coastal environment from inappropriate subdivision, use, and development;

(a) avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment; and

(b) avoid significant adverse effects and avoid, remedy, or mitigate other adverse effects on activities on other natural features and natural landscapes in the coastal environment;

Policy 15 then sets out means by which the policy is to be achieved, including:

(c) identifying and assessing the natural features and natural landscapes of the coastal coastal environment of the region and district, at minimum by land typing, soil characterisation and landscape characterisation …

(d) ensuring that regional policy statements, and plans, map or otherwise identify areas where the protection of natural features and natural landscapes requires objectives, policies, and rules; …

[10] The term "outstanding natural landscape" is not defined in the RMA. The Environment Court referred to the approach and factors set out in the Environment Court's decisions in *Wakatipu Environmental Society Inc v The Queenstown-Lakes District Council ("WESI")*,[4] and in *Maniototo Enviromental Society v Central Otago*

[4] *Wakatipu Environmental Society Inc v The Queenstown-Lakes District Council* [2000] NZRMA 59.

*District Council ("Maniototo")*,[5] in which the Court will first identify a "landscape", then consider whether the landscape is sufficiently "natural" to be classified as a natural landscape, then assess whether the natural landscape is "outstanding". That latter assessment is undertaken by reference to the factors set out in *WESI*. In essence, these require the landscape to remarkable, exceptional, or notable.

**The judgment of the Supreme Court in *Environmental Defence Society Inc v The New Zealand King Salmon Co Limited***

[11] In submissions to this Court, counsel made extensive reference to the judgment of the Supreme Court in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd ("King Salmon")* delivered on 17 April 2014 (after the hearing of MWS's appeal to the Environment Court).[6] The Environment Court received and considered submissions from counsel as to its impact on the proceeding, before issuing its decision.

[12] *King Salmon* concerned a proposed salmon farm in an area of the Marlborough Sounds (Papatua, in Port Gore) that was accepted as being "an area of outstanding natural character and an outstanding natural landscape". It was also accepted that the proposed salmon farm would have significant adverse effects on that natural character and landscape.[7] The appeal concerned whether a plan change, which would allow the salmon farm, but would not give effect to Policies 13 (1)(a) and 15(a) of the NZCPS 2010, should have been refused.

[13] The Supreme Court held by a majority that the Board of Enquiry considering the proposed plan change was required to give effect to the NZCPS policies,[8] that "avoid" (in the phrase "avoid adverse effects") means "not allow", or "prevent the occurrence of",[9] and that the Policies provided "something in the nature of a bottom line".[10] The NZCPS is "an instrument at the top of the hierarchy" of environmental instruments, and gives effect to the protective element of sustainable management.[11]

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5 *Maniototo Enviromental Society v Central Otago District Council* Decision C103/2009.
6 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*, above n 3.
7 *King Salmon*, at [5].
8 At [77].
9 At [96].
10 At [132].
11 At [153].

In reaching this conclusion, the majority rejected the "overall judgment" approach adopted by the Board of Enquiry, and the High Court on appeal.

[14] In his dissent, William Young J noted the possibility of overbroad consequences of the majority's decision: "severe restrictions being imposed on privately-owned land in areas of outstanding natural character", and the potential to be "entirely disproportionate" in its operation as any perceptible adverse effect would be controlling irrespective of whatever benefits, public or private, there might be if an activity were permitted."[12]

[15] Counsel for both MWS and the Council agreed that the Auckland Regional Policy Statement would need to be revised following the *King Salmon* judgment, and that the Policy Statement will inevitably be more restrictive as regards the coastal environment.

**Application to adduce new evidence on appeal**

[16] MWS applied to adduce further evidence on appeal, being a statement of Mr Andrew Christopher McPhee, principal planner in the Central and Islands area planning team at the Auckland Council. Mr McPhee's statement considers the planning implications of the Supreme Court's judgment in *King Salmon*, in particular, whether changes are required to be made to planning instruments as a result of the judgment.

[17] At the hearing in this Court, counsel for the Council, Mr O'Callahan, advised the Court that the Council acknowledges that there needs to be revisions to the Auckland Regional Policy Statement, and that the policy in respect of the coastal environment will inevitably be more restrictive. Mr O'Callahan submitted that there would be no purpose in allowing the evidence to be adduced.

[18] In the light of that acknowledgment, I agree that there is reason to adduce Mr McPhee's evidence.

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[12] At [201].

**Environment Court decision**

[19] The Environment Court noted that it was agreed by the parties that all of the areas that were in dispute as being ONLs were "landscapes", and had sufficient "natural" qualities for the purposes of s 6(b) of the RMA.[13]

[20] The Environment Court considered a submission for MWS that (in particular as a result of the *King Salmon* judgment, and the inevitability of more restrictive policies) a more conservative (higher) threshold should be adopted for determining what comprises an ONL, and that the assessment should be made at a national scale. However, the Court accepted a submission for the Council that the planning consequences would flow from the fact that the land is an ONL, and are not relevant the determining whether it is an ONL or not.[14]

[21] Further, the Court was not comfortable with MWS's submission that the assessment of "outstandingness" should be made on a national rather than a regional scale, for two reasons. First, the task would be enormously complex, if not impossible, and secondly, if pristine areas of New Zealand such as parts of Fiordland, the Southern Alps, and certain high country lakes were to be regarded as the benchmark, nothing else might qualify to be mapped as outstanding.[15]

[22] The Environment Court then considered in detail evidence given for MWS and the Council concerning ONL mapping. It is evident from the maps presented in the Environment Court that the principal witnesses for both parties agreed that the entire coastline and sea scape, and the prominent landscape in the higher parts of the property were properly assessed as ONLs, and that areas in Man O'War Bay and Hooks Bay were properly excluded.

[23] The debate focussed on intermediate areas between the coastal and interior landscapes. MWS's witness, Ms Gilbert, distinguished between the "coastal environment landscape area" and the "interior landscape character area". The

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13 Environment Court decision, above n 1 at [4].
14 At [37]-[39].
15 At [57]-[67].

Council's witness, Mr Brown, disagreed with this separation. The Environment Court said that during a site visit:[16]

> … it became obvious to us that [MWS's] property on Waiheke Island offered a mosaic of landscape features including the bush clad eastern slopes of the Puke range, an interspersed network of bush gullies, pastureland, vineyards and geological features, flanked by a series of coastal headlands, escarpments and ridges leading out to the waters of the Hauraki Gulf. These features interact in a manner that, viewed from either land or sea, makes it difficult to identify distinctly separate landscapes for assessment of significance in a regional context. … In particular, we consider that these "landscapes" have varying degrees of connectedness to the coast but ultimately read in the round for the viewer. With one exception … we do not find it appropriate the separate coastal and inland landscape …

[24] Accordingly, the Environment Court allowed only limited amendments to the ONL mapping.

## Approach on appeal

[25] It was common ground that the principles to be applied in approaching an appeal to the High Court under s 299 of the RMA are as summarised by French J in *Ayrburn Farm Estates Ltd v Queenstown Lakes District Council*:[17]

> [33] An appeal to this Court under s 299 is an appeal limited to questions of law.
>
> [34] Appellate intervention is therefore only justified if the Environment Court can be shown to have:
>
> i) applied a wrong legal test; or
>
> ii) come to a conclusion without evidence or one to which on the evidence it could not reasonably have come; or
>
> iii) taken into account matters which it should not have taken into account; or
>
> iv) failed to take into account matters which it should have taken into account.
>
> [35] The question of the weight to be given relevant considerations is for the Environment Court alone and is not for reconsideration by the High Court as a point of law.

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16 At [128]

17 *Ayrburn Farm Estates Ltd v Queenstown Lakes District Council* [2012] NZHC 735, [2013] NZRMA 126 at [33]-[36].

> [36] Further, not only must there have been an error of law, the error must have been a 'material' error, in the sense that it materially affected the result of the Environment Court's decision.
>
> (Footnotes omitted)

[26] Further, as Mander J observed in *Young v Queenstown Lakes District Council*:[18]

> The Court will not engage in a re-examination of the merits of the case under the guise of a question of law, nor will it delve into questions of planning and resource management policy. The weight to be attached to policy questions and evidence before it is for the tribunal to determine, and is not able to be reconsidered as a point of law.

[27] Finally, it is appropriate to note the observation of Wylie J in *Guardians of Paku Bay Association Inc v Waikato Regional Council*:[19]

> The High Court has been ready to acknowledge the expertise of the Environment Court. It has accepted that the Environment Court's decisions will often depend on planning, logic and experience, and not necessarily evidence. As a result this Court will be slow to determine what are really planning questions, involving the application of planning principles to the factual circumstances of the case. No question of law arises from the expression by the Environment Court of its view on a matter of opinion within its specialist expertise, and the weight to be attached to a particular planning policy will generally be for the Environment Court.

## Appeal issues

[28] On behalf of MWS, Mr Casey QC first submitted that the Environment Court had erred in its consideration of the effect of the Supreme Court's judgment in *King Salmon*. In particular, it was submitted, the Environment Court erred in:

a) failing to address the *WESI* factors when determining whether the landscapes in question were ONLs;

b) failing to undertake the assessment of whether areas of the farm property were ONLs by reference to landscapes in New Zealand as a whole, rather than by reference to landscapes in the Auckland region;

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[18] *Young v Queenstown Lakes District Council* [2014] NZHC 414, at [19].

[19] *Guardians of Paku Bay Association Inc v Waikato Regional Council* (2011) 16 ELRNZ 544 (HC) at [33].

c) failing to recognise that as a result of the level of protection required for ONL's in the coastal environment being clarified in *King Salmon*, the threshold for classification as an ONL was significantly elevated above that applied under Change 8; and

d) failing to recognise that given the implications of the judgment in *King Salmon*, it was required to determine which parts of the farm property fell within the coastal environment, and which did not.

*WESI factors*

*(a) Submissions*

[29] Mr Casey and Mr Williams submitted for MWS that while the Environment Court listed the factors set out in *WESI* and other decisions, it did not actually evaluate whether the landscape was "outstanding", by reference to the factors. Rather, the Court simply adopted the approach taken by the Council's expert witness. They further submitted that the Court failed to give adequate consideration to the "naturalness" of the disputed landscape: the MWS land is a working farm, and so heavily developed that it cannot properly be described as "natural".

[30] Mr Williams also submitted that the Environment Court was wrong to reject MWS's submission that it is necessary to separate coastal and non-coastal areas for the purposes of identifying ONL's. He submitted that there is a "fourth dimension" involved in assessing non-coastal land, which is not present in relation to the coastal environment. He described this as a "real world enquiry", which allows for the dynamic nature of farming, and the fact that a simple farming step (such as spraying weeds to reclaim pasture) may lead to a substantial change in a landscape. He submitted that the Environment Court had erred in law in failing to take this factor into account.

[31] It was submitted that, as a result of the above errors, the Environment Court had identified as ONLs landscapes which, while picturesque or handsome, were best

described as "fairly normal rural landscapes". Counsel referred to the comment in *High Country Rosehip*, that not all handsome landscapes are "outstanding".[20]

[32] Mr O'Callahan submitted for the Council that the Environment Court was not in error. He submitted that the Court was not required to consider whether the farm property was "landscape" and "natural", as that was agreed by the expert witnesses for MWS and the Council. Further, there was agreement that substantial parts of the farm property were ONLs. The debate was as to drawing the line between the ONLs and areas that were not ONLs. The Environment Court was dealing with areas around the fringes, so did not have to rank the "outstandingness" of particular areas.

[33] Mr O'Callahan submitted that in deciding whether a natural landscape is "outstanding", the Environment Court had to have regard to the appropriate factors and synonyms used to understand "outstandingness", as set out in cases such as *WESI*, *Maniototo*, and *High Country Rosehip*. Those factors and synonyms were derived in cases that did not involve the coastal environment. He submitted that, in any event, the assessment of "outstandingness" is essentially the same whether carried out in the coastal or non-coastal environment.

[34] Mr O'Callahan submitted that the Environment Court had appropriately set out and understood the relevant factors, and had set out and considered the competing evidence and submissions. Ultimately, he submitted, the Court's determination was a matter of the specialist court exercising its judgment on the expert evidence. It was not necessary for the Court to set out and analyse the individual factors. The Court's determination was a factual determination, which cannot be appealed.

[35] Mr Enright submitted for the Environmental Defence Society that the real issue on appeal was whether the Environment Court undertook the exercise of deciding whether the land at issue was "outstanding". In that assessment, divisions of the Environment Court have in other cases referred to synonyms, or qualifying adjectives, such as those set out in *WESI* and *High Country Rosehip.* In the present case, he submitted, in identifying disputed ONL areas, the Court had in mind the

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[20] *High Country Rosehip v MacKenzie District Council* [2011] NZEnvC 387 at [104].

relevant adjectives, or synonyms, used to assess whether the land was outstanding. Ultimately, whether land is outstanding is a factual determination.

*(b) Discussion*

[36] I am not persuaded that the Environment Court failed to undertake an appropriate assessment of the disputed ONL areas. I accept that the Court was not required to consider whether the disputed areas were "landscapes" and "natural landscapes", as those issues were agreed. The sole issue for the Court was whether they were "outstanding".

[37] The Court referred to the discussion of the concept of "outstandingness" as set out in *WESI*, and the qualifying adjectives and synonyms noted in the evidence of MWS's expert witness. There was no error in the Court's analysis of the evidence before it. Its conclusions as to which areas were ONLs were then factual determinations, and cannot be appealed.

[38] So, too, was the Environment Court's rejection of the MWS submission that there must be a separation of coastal and non-coastal land for the purposes of identifying ONLs. The "real world enquiry" is recognised in the factors set out in *WESI* and *Maniototo*, where human intervention was accepted as being part of the development of the natural landscape. In *Maniototo*, in particular, the element of human engagement and interaction with the landscape is recognised. Far from detracting from the "naturalness" of the landscape, the human engagement and interaction contributes to the intrinsic value of the landscape.

[39] I am not persuaded that the Environment Court has been shown in the present case to have failed to take that factor into account. The Court had the evidence of the expert witnesses for MWS and the Council before it, and referred to both in its decision. It is not an error of law to have accepted one over the other.

*Regional or national reference?*

[40] As noted earlier, the second aspect of MWS's appeal concerned the scale against which the assessment of "outstandingness" is carried out: whether it should be on a national, regional, or district-wide scale.

*(a) Submissions*

[41] Mr Williams submitted that the Environment Court was wrong to assess the "outstandingness" of the MWS farm property at a regional level; he submitted that the assessment should be at a national level. Mr Williams accepted that in *WESI* the Environment Court had referred to a regional basis for assessment, but submitted the in later decisions, for example *Maniototo*, the assessment was on a national basis. He submitted that this is appropriate, as an "outstanding" landscape must, by definition, "stand out against the rest". He submitted that it follows from the fact that protection of ONLs is a matter of national importance, that the assessment of them must be on a national, not regional or district basis.

[42] Mr O'Callahan submitted that the MWS submission on this point misinterpreted the provisions of the RMA. He submitted that the MWS submission would equate to saying that the RMA is to be read as "protecting nationally significant landscapes" and "nationally significant indigenous flora and fauna. However, that is not how the RMA is framed. The RMA provides that *protection* is of national importance; it is of national importance to protect ONLs and other matters that are of significance.

[43] Mr O'Callahan further submitted that if it had been intended that only "nationally outstanding landscapes" were to be protected, then the RMA would have provided accordingly, and would have provided the machinery for such protection at the national level. Further, various divisions of the Environment Court have developed the law concerning the identification of ONLs at the district or regional level; albeit on occasion (as in *Maniototo*) asking how the landscape in issue compared with other New Zealand landscapes.

[44] Mr Enright, for the Environmental Defence Society, submitted that there is no reason to interfere with the well-established factors for assessing "outstandingness" which were developed at the regional or district level and were agreed upon by all parties before the Environment Court.

*(b) Discussion*

[45] There is no basis on which I could accept that the assessment of "outstandingness" in this case should have been undertaken on a national, rather than regional or district basis. I accept the submissions for the Council and the Environmental Defence Society that the wording of the RMA does not support MWS's submission. Section 6 is clear in its terms, that it is protection of ONLs (and the other matters listed) that it is national importance. It does not say that it is only natural landscapes that are of national significance that are to be protected.

[46] There is force, too, in Mr O'Callahan's submission that if it had been intended that only nationally significant natural landscapes were to be protected, the RMA would have included an express provision to that effect. It is significant that the jurisprudence surrounding the identification of ONLs has developed through divisions of the Environment Court considering the issue on a regional or district basis.

[47] Further, I am not persuaded that it is necessary to incorporate a "national" comparator (or even a regional or district one) into the consideration of "outstandingness". The Courts in which the jurisprudence has been developed have not been asking "is this a nationally significant outstanding natural landscape?" They have been asking simply "is this an outstanding natural landscape". That is the issue that they are required to consider, under the RMA.

*Effect of King Salmon*

*(a) Submissions*

[48] On this point Mr Williams submitted that mapping of ONL's on the farm property for the purposes of Change 8 had been undertaking in the policy context

that prevailed before the Supreme Court judgment in *King Salmon*. That context included the adoption of the "overall judgment" approach to planning decisions. Mr Williams referred to *North Shore City Council v Auckland Regional Council*, in which the Environment Court said: [21]

> We have considered … the method to be used in applying s 5 to a case where on some issues a proposal is found to promote one or more of the aspects of sustainable management, and on others is found not to attain, or to attain fully, one or more of the aspects described in paras (a), (b) and (c). To conclude that the latter necessarily overrides the former, with no judgment of scale or proportion, would be to subject s 5(2) to the strict rules and principles of statutory construction, which are not applicable to the broad description of the statutory purpose. To do so would not allow room for the exercise of the kind of judgment by decision makers (including this Court – formerly the Planning Tribunal) …

[49] Mr Williams submitted that a different paradigm now applied, with the clear direction that higher order documents in the hierarchy of environmental management have primacy over lower order documents. He submitted that *King Salmon* would have a substantial and serious impact on its farming operation. It has a reasonable fear that the judgment will translate into a prohibition on all activities on the farm property, in order to comply with the directions in higher order documents. Working within a policy framework where farming activities could continue (on an overall judgment approach) is vastly different from a situation where those activities could be prohibited, under a requirement to "avoid adverse effects".

[50] Mr Williams further submitted that *King Salmon* has substantially changed the nature of environmental policies and objectives. The corollary must be, it was submitted, that there must be a change in mapping, as the nature of the protection to be provided (in the present case, for ONLs) must inform the process of mapping. ONL's are not mapped for their own sake, but for the purposes of protecting them from inappropriate subdivision, use, and development, and from adverse effects (if they fall within the coastal environment). In essence, Mr Williams argues that the definitions of ONLs was contextual and depended on the extent of protection that that status would grant.

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[21] *North Shore City Council v Auckland Regional Council* [1997] NZRMA 59

[51] He submitted that as a result of *King Salmon*, it necessarily follows that the manner in which ONL criteria are applied must change; the increased level of protection required for ONLs necessitates a higher threshold for identification of an ONL.

[52] Federated Farmers of New Zealand supported the submissions for MWS. Mr Gardner also expressed concern as to the consequences of the *King Salmon* judgment for the level of landscape protection required under the RMA. He submitted that the issue of the threshold for identification of an ONL is of crucial importance for any farm that is in the coastal environment and is "outstanding" in terms of s 6 of the RMA.

[53] Referring particularly to rural production activities, Mr Gardner submitted that, following *King Salmon*, it was implausible that the many and varied activities associated with rural production (such as construction of farm tracks, planting exotic shelter belts, or constructing some farm buildings) which would previously have been considered appropriate in an ONL in the coastal environment would now have to be avoided (prohibited) because of their adverse effect.

[54] Applying *King Salmon* would necessarily mean that the very activities Change 8 relies on as warranting classification as an ONL should no longer take place. Thus, it is "logically difficult" to identify working rural landscapes as ONLs, and the underpinning of the landscape identification and mapping under Change 8 is undermined.

[55] Regarding the impact of *King Salmon*, Mr O'Callahan submitted that MWS was wrong, at a conceptual level, to submit that if the level of protection for ONLs set out at the policy level increases, the threshold for identifying ONLs must be stricter. He submitted that policies do not drive identification as ONLs. Rather, the RMA clearly provides a delineation between identifying ONLs, and the policies for protecting them.

[56] Mr O'Callahan further noted that in *King Salmon*, it was accepted that the area where the proposed salmon farm was to be sited was an ONL. There was no

suggestion that, as a result of the Supreme Court's judgment, the local authority should reconsider the ONL identification. Rather, the policies for protecting the area identified as an ONL had to be reconsidered.

[57] Mr Enright submitted that the *King Salmon* judgment does not affect mapping of ONLs. It impacts upon the wording of objectives, policies and methods to protect ONLs. He submitted that *King Salmon* could not, by a side wind, change anything relating to identification of ONLs. More particularly, it could not have been in the Supreme Court's mind that the identification of ONLs should be more confined, and their numbers reduced as a consequence.

*(b) Discussion*

[58] I do not accept the submission for MWS that as a consequence of the *King Salmon* judgment, the identification of ONLs must necessarily be changed, and made more restrictive. There is no justification for such a submission in the *King Salmon* judgment, and it is not justified by reference to the RMA.

[59] It is clear from the fact that "the protection of outstanding natural features and landscapes" is made, by s 6(b), a "matter of national importance" that those outstanding natural landscapes and outstanding natural features must first be identified. The lower level documents in the hierarchy (regional and district policy statements) must then be formulated to protect them. Thus, the identification of ONLs drives the policies. It is not the case that policies drive the identification of ONLs, as MWS submits.

[60] As identified by the Council, the RMA clearly delineates the task of identifying ONLs and the task of protecting them. These tasks are conducted at different stages and by different bodies. As a result it cannot be said that the RMA expects the identification of ONLs to depend on the protections those areas will receive. Rather, Councils are expected to identify ONLs with respect to objective criteria of outstandingness and these landscapes will receive the protection directed by the Minister in the applicable policy statement.

**Decision**

[61] For the reasons set out above, MWS's appeal against the Environment Court decision must fail. The appeal is dismissed.

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Andrews

**BEFORE THE ENVIRONMENT COURT**

**Decision No. [2016] NZEnvC** 190

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|---|---|
| IN THE MATTER | of the Resource Management Act 1991 |
| AND | |
| IN THE MATTER | of an appeal pursuant to Clause 14 of Schedule 1 to the Act |
| BETWEEN | MOTITI ROHE MOANA TRUST |
| | (ENV-2015-AKL-000134) |
| | Appellant |
| AND | BAY OF PLENTY REGIONAL COUNCIL |
| | Respondent |

| | |
|---|---|
| Court: | Environment Judge JA Smith (chair)<br>Environment Judge DA Kirkpatrick |
| Hearing: | at Rotorua on 13 September 2016 |
| Appearances: | RB Enright for the Motiti Rohe Moana Trust<br>PH Cooney and RB Boyte for the Bay of Plenty Regional Council<br>JM Pou and AM Neems for Ngāti Makino Heritage Trust (s 274 party)<br>S Ryan for Lowndes (s 274 party)<br>VJ Hamm and AG Godinet for Motiti Avocados Limited (s 274 party) |
| Date of Decision: | 30 SEP 2016 |
| Date of Issue: | 30 SEP 2016 |

Opening Karakia by Mr Hoete

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**DECISION OF THE ENVIRONMENT COURT ON AN APPLICATION FOR STRIKEOUT UNDER SECTION 279(4) OF THE ACT**

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A: The Court refuses to strike out the appeal at this stage.

Some aspects of the appeal may be beyond jurisdiction, particularly potential incorporation of a prohibition of activities within the entire management area. However, any issues as to appropriate provisions can be addressed both in the evidence at the hearing and in any decision by the Court.

The Court is satisfied that the usual methods of control of the scope of hearing, through the hearing and decision process, are adequate in the circumstances and a strikeout is not appropriate.

B: Costs are reserved and may be pursued independently of the outcome of the hearing. The Court does not require any submissions on this issue until the substantive hearing is resolved.

## REASONS

### Introduction

[1] The Motiti Rohe Moana Trust ("**the Trust**") filed a wide-ranging appeal in respect of the Regional Coastal Environment Plan particularly relating to the rohe of the Trust and the Motiti natural environment.

[2] The area affected was described by a diagram in the Trust's original submission and is annexed hereto as **A** for clarity. It can be seen that it includes not only the immediate environs of Motiti Island but also the offshore Tokau Reefs and other features, including, importantly, the Astrolabe Reef/Otaiti.

[3] Subsequently the parties attended mediation and there were several discussions relating to the scope of the remedies sought by the Appellant.

[4] Given that the Application relates to the scope of the original submission and the appeal as filed, it is necessary to annex hereto both the original submission (marked **B**) and the second amended appeal (marked **C**). Although there was a first amended appeal, its production here is not critical for the purpose of determining the scope of the appeal.

**The application for strikeout**

[5] The Regional Council has taken the unusual step of applying to strikeout the entire appeal on the basis that:

> *...the relief the Trusts seek which is an integrated spatial planning management area around Motiti with specific provisions applying to it, was not within the foreseeable contemplation of those who are likely to be directly or potentially affected by those outcomes.*
>
> *That relief was not fairly and reasonably raised in the submission. The relief raised in the submission and that now raised in the appeal is also not on the Coastal Plan.*

[6] In closing, Mr Cooney confirmed that the Council's submission was that the Trust had never filed a valid submission; accordingly there could be no valid appeal and therefore the proceedings needed to be struck out as an abuse of process under s 279(4) of the Act. Mr Cooney readily admitted that the Council had received the submission, progressed it through the hearing stage, and issued a decision in respect of it. He also acknowledged that the submission seeking a marine spatial plan was one reflected in a number of other submissions, all of which were accepted and dealt with by the hearings process. Nevertheless, we accept that the question of whether a submission is valid or not is a question of law and the Council's acceptance of it and dealing with the matter as a submission does not make it lawful.

**The Court's approach**

[7] We consider that we first need to determine whether or not there was a valid submission. If there was a valid submission, the question then is whether this was reduced in any of the notice of appeal documents that have subsequently been filed. To the extent it has been so reduced those submission points and any relief based on them are no longer available to the appellants.

[8] For practical purposes we can regard the submissions and the original notice of appeal as having the same content. The notice of appeal itself simply refers to the original submission. It was acknowledged by all parties that there had been no reduction in the scope of the submission in the original notice of appeal (**Original Appeal**).

***Expansion of an appeal***

[9] Mr Enright for the Trust submitted that he had not attempted to extend the appeal in either the second or third notices of appeal, but rather to clarify the outcome sought in response to requests of the parties, particularly the Regional Council.

[10] No party argued before us that it was possible to extend a submission on appeal, or extend the scope of the remedies that might be sought.[1] This position was elaborated by the High Court in *General Distributors Ltd v Waipa District Council*:[2]

> *[54] ... To this end the Act requires that public notice be given by a local authority where it promulgates or makes any changes to its plan. There is the submission/further submission process to be worked through. A degree of specificity is required in a submission – cl 6 of the First Schedule and Form 5 of the Regulations. ... There is a right of appeal to the Environment Court, but only if the prospective appellant referred to the provision or the matter in the submission – cl 14(2) of the First Schedule.*
>
> *[55] One of the underlying purposes of the notification/submission/further submission process is to ensure that all are sufficiently informed about what is proposed. Otherwise the plan could end up in a form which could not reasonably have been anticipated, resulting in potential unfairness.*
>
> *[56] There is of course a practical difficulty. As was noted in* Countdown Properties *at 165, councils customarily face multiple submissions, often conflicting, and often prepared by persons without professional help. Both councils, and the Environment Court on appeal, need scope to deal with the realities of the situation. To take a legalistic review and hold that a Council, or the Environment Court on appeal, can only accept or reject the relief sought in any given submission would be unreal.*

[11] This is expounded further by the High Court in *Royal Forest and Bird v Southland District Council*:[3]

> *...It is important that the assessment of whether any amendment was reasonably and fairly raised in the course of submissions, should be*

1 *Countdown Properties Northland Limited v Dunedin City Council* [1994] 1ELRNZ 150 at 171, HC.
2 (2008) 15 ELRNZ 59 (HC).
3 [1997] NZRMA 408 (HC) at 413.

*approached in a realistic workable fashion rather than from the perspective of legal nicety.*

[12] Finally, the Court holds no particular powers to broaden the scope of an appeal (see s 278 of the Act and Rule 1.12 of the District Court Rules, 2014).[4]

[13] Accordingly, it is the argument of the applicant Council here, supported by Motiti Avocados Ltd (a s 274 party), that in the second amended notice of appeal the appellant has gone beyond the scope of any submission it made. It is thus submitted that the entire submission (and appeal) is therefore to be struck out as an abuse of process.

[14] There appears to be an inherent difficulty with this argument, which is that if the appellant has gone too far in the remedies it seeks, it is difficult to see the basis on which it precludes the remedies which are in scope. Given the very broad powers of the Court to decide outcomes between those stated in the plan and those sought by the appellant, such issues of scope are particularly difficult to determine at this stage. It is on this basis that Mr Cooney eventually reverted to an argument that the submission made was invalid and was never "on" the proposed plan.

***The Trust's submission***

[15] The Trust's submission to the Council started from the proposition that it supported parts of the proposed plan and sought amendments to others to reflect the principles of the Treaty of Waitangi and the status and role of the Trust as kaitiaki of the islands of Motiti and the surrounding waters, islands and reefs. It noted in particular its whakapapa to the island, and before this Court it was acknowledged that they represented a party with a proper interest in this matter.

[16] The format of the submission has adopted the approach of the plan rather sought to dictate its own approach. That is helpful in that it enables us to understand better the particular parts of the plan that are being addressed. It can be seen under general themes that there was concern about active protection of taonga and failure to give effect to Part 2 of the Act and NZCPS and the objectives and policies of the Regional Policy Statement.



[4] *Transit NZ v Pearson* [2002] NZRMA 318 (HC) at [48].

[17] Under "relief sought" the Trust seeks:

(a) to be proactive in respect of active protection and redress, the implementation of Treaty principles in settlement outcomes for Motiti:

(b) amendment of implementation methods to include cultural dimensions;

(c) memoranda of understanding;

(d) policies to partner with the Trust to maintain and enhance coastal values in this area;

(e) implementation methods to advocate for Mataiti and Taiapure reserves; and

(f) clarification of policies for greater certainty of sustaining kai moana and eco systems, avoiding degradation of natural character and biodiversity, measuring baselines and, in particular, provide an expanded network of restored island and marine protected areas where ecological health and indigenous biodiversity will be protected and enhanced.

[18] Under implementation it added:

(a) for cultural advisors to assist with applications;

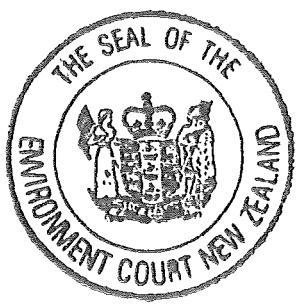
(b) to add content to objectives and policies, amending or refining as required to integrate matauranga Māori into the plan and to provide the Māori worldview of their existence; and

(c) management and decision-making to take into account various historic cultural and spiritual relationships.

[19] Under the second heading of Matauranga Māori they supported that process, but sought in particular:

(a) a marine spatial plan for Motiti rohe moana and whenua incorporating matauranga Māori in collaboration with the Trust; and

(b) the application of Māori attributes of mana, mauri and tapu to assist with natural character.



[20] Under the third heading of Integrated management they sought integrated management of fisheries resources and, in particular, to give effect to Objective 1 of the NZCPS.

[21] Under the fourth heading of Marae based aquaculture, they sought to expand Issue 35 to include Motiti rohe moana and to provide for non-commercial Marae-based aquaculture.

[22] In relation to Part C, under "Integrated Management" they sought an integrated methodology for the marine environment similar to the use of structure planning, spatial planning or integrated whole of catchment management. They sought that the fishery resources and marine management be integrated, in particular in collaboration with tangata whenua

[23] Under "Natural Heritage" they sought greater involvement and participation in decision-making. They identified that the restoration of biodiversity is an issue of significance to mana whenua.

[24] In respect of "Iwi Resource Management" they noted the need to reframe the issues and objectives and policies to provide for the protection of biodiversity and natural heritage.

[25] Under "Activities in the coastal marine area" they sought to add objectives and policies to provide for marine spatial planning over the Motiti Rohe Moana.

**Evaluation of submissions**

[26] We have cited these provisions at some length because it is clear to us that they do specifically include matters of marine spatial planning, integrated management including fisheries, flora and fauna, and the protection of at least various areas within the Rohe area as well as restoration of other areas.

[27] In simple parlance, Mr Cooney's proposition that spatial planning management around Motiti was not within contemplation is not borne out by reference to the submission. We have concluded that any reasonable person reading these provisions would immediately ascertain that the Trust had an interest in the waters, reefs, toka, and islands and other features around and including Motiti, and that it sought to

maintain various forms of control – particularly to protect the fisheries, flora and fauna of that area and cultural matters including Taonga. Exact places where various controls were sought is not set out, but it is intended to reflect a spatial planning regime.

***Is such a submission on the plan?***

[28] There was a great deal of submission made to this Court about the case law applying to whether various submissions or appeals were "on" variations or plan changes. The distinction between a plan change/variation and a full plan review has not been addressed in any of the cases which were put to this Court. We think it is important to analyse the distinction between a full plan review and a plan change or variation to understand how the issues discussed in the cases concerning a provision being "on" plan change and variation come to the fore.

*A full plan review*

[29] Schedule 1 provides essentially for the preparation, change and review of policy statements and plans (see clause 1 and 2). Clauses 1-15 deal with the preparation of proposed policy statements or plans. Clauses 16 and 16(a) deal with amendment to a policy statement or plan or a variation to the same. It is clear that the words of Clause 16 provide for amendments to a plan which can be made without utilising the process in the First schedule.

[30] Clause 1(4) specifically refers to a request for a plan change and Clause 16(a) deals with variation of a proposed policy statement or plan. We conclude it must be assumed that the word "proposed" applies to both the policy statement and the plan, as well as a change.

[31] The wording of Schedule 1 is such that the distinctions between a variation, a change and a review are not as clear as they might be. However, we conclude that the intention of these phrases is well-established both through practice and through case law. A review in relation to a regional plan consists of a new plan intended to replace the operative plan, and substitute provisions in full. In short, when the plan review becomes operative the existing plan ceases to operate.


[32] In respect of a change, this anticipates that there may be changes to an operative plan, which are less than replacing the whole plan. There appears to be no

particular limit to such a change, but in practice these have tended to replace *parts of* an operative plan only. We conclude that it would be inconsistent if a change could replace an entire plan, as this would be classified as a review.

[33] A variation consists of changes that can occur while the Schedule 1 process is under way. Although the word "proposed" precedes only the words "policy statements", it must by interpretation apply also to the word "plan", ie "proposed plan". Accordingly, it is intended that the variations provision allow alterations to occur during the Schedule 1 process of either a review or a change.

[34] The distinctions between these types of alteration to a plan represent significant differences in approach to the application of Schedule 1, particularly the submission process. For current purposes it is clear the proposed Regional Coastal Environment Plan is intended to replace the operative Coastal Environment Plan in due course. There is little doubt that it constitutes a review of the entire plan, and is intended to provide a comprehensive framework to meet the Council's obligations in respect of the coastal environment.

[35] There have been, from time to time, variations and/or changes to regional plans – including in the Bay of Plenty. These are clearly noted as such both in notification and during processing. The issue in respect of a change or variation is that it may deal with a substantially narrower range of issues and not meet all of the obligations of the authority under the Resource Management Act.

*The plan process*

[36] The obligations for a regional council are set out not only in section 30, but also in sections 67-70 of the RMA. The first issue is that the Regional Council has the power to provide more than one plan covering all of its obligations under s 30. In this case there is no dispute that the Regional Council has elected to deal with the regional coastal environment in a separate plan.

[37] This is not unusual, but it is clear that there is going to be a question of whether a particular issue is within the subject matter that the Regional Council may address in such a regional coastal plan. For example, the extent of land-based activities that might be controlled in such a plan, or discharges to air. In this particular case, however, there is no doubt that the proposed Regional Coastal Plan (reflecting

ss 67-70), and the Regional Policy Statement, are intended to address the coastal marine area including the waters of the Bay of Plenty within territorial limits.

[38] For current purposes there is no doubt that the Regional Policy Statement acknowledged and addressed Motiti Island, the toka, reefs and sea waters as having particular values. Those were the subject of disputes before and decisions of the Court.

[39] Section 66 requires the Regional Council to prepare regional plans in accordance with the provisions of ss 66 (1) and (2) and it is clear under subsection (2) that it must have regard to the Regional Policy Statement in preparing that plan.

[40] Section 66(2)(a) requires the Regional Council to take into account:

any relevant planning document recognised by an iwi authority; and

any planning document prepared by a Customary Marine Title Group under s 85 of the Marine and Coastal Area Takutai Moana Act 2011.

[41] In preparing the Plan, there are also requirements under s 67 to give effect to any national policy statement (including the NZ Coastal Policy Statement) and the regional policy document.

[42] In relation to a full plan, we have concluded that the parameters of the obligations of the Regional Council in preparing the plan also constitute generally the parameters of the submissions that may be made on the plan.

**Scope on a review**

[43] We accept that *Motor Machinists*[5] represents a clear statement of an analysis which must occur where there is a plan change or variation dealing with a narrower range of issues in respect of the Council's obligations. Nevertheless, where the Council is fulfilling its statutory functions under s 30 and ss 66 and 67 of the Act, it must be open to a party to argue that the Council has failed to meet any of those obligations, or that these could be better met by altering the provisions of the plan.


5 *Palmerston North City Council v Motor Machinists Limited* [2013] NZHC 1290, HC.

[44] It is well established that on appeals about proposed planning instruments there is no presumption in favour of the planning authority's policies or the planning details of the instrument challenged or the authority's decisions on submissions: each aspect stands or falls on its own merits when tested by submissions and the challenge of alternatives or modification.[6]

[45] In this particular case, we conclude that the submission made by the Trust was well within the framework of the Regional Coastal Plan dealing with issues raised in both the Regional Policy Statement and the NZ Coastal Policy Statement, as well as addressing matters under Part 2 of the Act. This is explicit within the submission, and forms the basis of the submission for a marine spatial plan. In short, the submission is clearly within the scope of the Plan review.

*Can a lack of precision defeat a submission "on" the plan review?*

[46] The significant submission of Mr Cooney was that there had been a failure to properly identify the changes that were sought to the proposed Regional Coastal Plan. The level of precision required during a plan review process is a matter of some complexity. Not unnaturally, parties are concerned that if they suggest outcomes with too much precision at an early stage they are not able to adapt that submission if Council decides to adopt an alternative approach. On the other hand, Councils are concerned to properly identify the range of outcomes that are sought so that the public notice provisions adequately inform the public of the issues that are raised. We note the discussion in *Motor Machinists*[7] as to amendments made to the Resource Management Act in relation to submissions and further submissions. Although in the context of a plan change a similar approach applies in respect of reviews.

[47] In respect of plan reviews, it must follow that there can be a wide range of potential submissions, and the notification only of a summary of those issues reflects a limited intent for public participation. Nevertheless, in this case we are advised, and accept, that a number of parties made submissions seeking marine spatial plans, and that several further submissions were made to the Trust's submission in relation to the marine spatial planning issue (among other things).



6 *Leith v Auckland City Council* [1995] NZRMA 400 at [408]-[409]
7 *Motor Machinists*, above fn 5 at [43].

[48] Given the clear reference to protection, management of fisheries and marine spatial planning, we are in no doubt that any party reading the submission as a whole (rather than just a summary provided by the Council) would be in no doubt of the potential ramifications of the provisions sought. Moreover, this needs to be understood in the context that the Trust had already raised similar issues in respect of the Regional Policy Statement and that other parties, including Ngāti Makino before this Court, had raised issues relating to co-management of waterways.

[49] We acknowledge that this submission is also in the context of the sensitivity of the population to issues surrounding Motiti Island and the wreck of the MV Rena that occurred in 2011 and its aftermath. This includes the processing of the application for resource consent and the comprehensive hearing of that application which was required by Commissioners. Given that the submission raised, specifically, issues under ss 30, 66 and 67 of the Act – particularly relating to Regional Policy Statement, the New Zealand Coastal Policy Statements and Part 2 of the Act – we conclude that there was clear notice of the concerns of the parties in relation to the coastal plan as it affected the Motiti rohe area.

[50] As to the degree of specificity, we are satisfied that it was sufficiently specific to identify that there could potentially be:

(a) aquaculture areas

areas of restriction for cultural and natural environment reasons;

areas of control including over spatial areas and fishery areas; and

issues of co-management and cultural constraints, including upon land-based coastal areas.

[51] However, there is nothing in the submission as filed that would suggest that the area of effect of the plan was to be wider than that notified. In other words, any landward areas not included within the regional plan were not raised as specific issues in the Trust's submission.

[52] Overall, we have concluded that not only was the submission dealing with issues required to be dealt with under the Act in the review of the Regional Coastal Plan, but was sufficiently specific to alert members of the public to the potential

outcomes sought – including potentially controlling coastal parts of Motiti Island and the area around it for protection, management and aquaculture activities. However there was nothing in the submission which sought to affect the area inland of the coastline of Motiti Island itself.

*Alternative analysis as to whether a submission is on the review*

[53] In case we are wrong in looking at this matter on a broader basis for a full Plan review, and accepting that the approach in *Motor Machinists* may also be appropriate for reviews, we ask ourselves the following key questions, based on the analysis in that case:

- Should the s 32 report have dealt with the issues raised in the submission?
- Are there third parties who would be affected, who did not have an opportunity to participate?

[54] As to the s 32 report, most of the matters raised by the Trust relating to the application of the Regional Policy Statement and Coastal Policy Statement as well as Part 2, are matters required to be assessed as part of any s 32 Report. It would seem unreal to suggest that the obligations under s 30 and ss 66-70 were not part of an evaluation of the most appropriate way to achieve the purpose of the Act.

[55] To that extent the NZ Coastal Policy Statement is referred to in the latter sections, as is the Regional Coastal Policy Statement. For our part, we cannot see how a s 32 report could not address issues of marine spatial management, even if these were eventually discounted; nor, for example, issues under s 66(2) and (2a).

[56] We acknowledge, as Mr Cooney says, that the Council may properly, after evaluation of all those matters, elect to adopt another management method. However, in our view, two issues arise:

(i) Clearly, the question of whether there should be marine spatial management is a matter which arises under various provisions of the Act and should be addressed in the s 32 report;

(ii) as discussed above, it is well established that it is open to a party to submit that another approach is more appropriate in the Plan.

[57] We note in this case that the Trust essentially has agreed with the Council's general approach save for the submission of including the marine spatial plan for this rohe. Mr Cooney's argument in this regard was that the Council had not provided one, and had dealt with most of the marine area by overall controls. He however then acknowledged that there were several areas where specific controls had been adopted and a more spatial approach had been utilised, such as the Port of Tauranga.

[58] In other words, we have not been advised of anything that would be entirely inconsistent with adopting a marine spatial plan for this area if the rest of the Regional Coastal Environment Plan was to be adopted. Given that this argument was at a high level, it may be that there are such provisions, and these could be properly considered at a full hearing.

***Has the submission been narrowed?***

[59] Ms Hamm's primary submission to this Court on behalf of Motiti Avocados Limited was that the appeal as filed had subsequently been changed by the two further notices to such an extent that there was no proper matter for consideration by the Court. In that regard she acknowledged that the notice of appeal essentially repeated the matters of submission (in fact attached the submission as its grounds) and, accordingly, that there was no narrowing of the appeal at that point.

*The first amended statement of claim*

[60] All parties agree that the first amended notice of appeal simply narrowed some of the specific grounds of appeal. In the first amended notice of appeal, the changes were relatively minor, but made certain deletions, one clarification, and also confirmed that the appeal did not seek any relief which opposes (directly or indirectly) the leaving of the Rena wreck, its equipment cargo and associated debris on Otaiti/Astrolabe reef. In particular no relief was sought in relation to maritime incidents in the proposed plan 3.3, or recognition of the wreck in ONFL 44 (see paragraph [32] of the first amended notice of appeal).

*The second amended notice of appeal*

[61] Ms Hamm submitted that the second amended appeal considerably expanded the remedies sought in the notice of appeal. Mr Cooney took the same view. Both

were of the opinion that the expansion sought was so significant that the appeal should be struck out as a whole. Two issues arise:

- Was there an expansion of the appeal in the second amended notice of appeal?
- If there was, does this vitiate the remedies sought encapsulated within the original appeal and first amended appeal?

*Was there an expansion of the appeal?*

[62] Mr Enright's primary position was that, with one exception and one clarification, the second amended appeal merely sought to respond to a mediation agreement to provide greater clarity, and was not intended to expand the appeal. He acknowledged that the landing point at Te Hurihuri was a matter beyond the scope of the original submissions or appeal, and therefore asked for that to be removed. We do so.

[63] The Trust also had reached agreement with Lowndes (a s 274 party) that the consent for the wreck of the MV Rena was independent of any changes sought to the proposed Regional Coastal Plan. The Court has issued a memorandum in respect of this issue that can be referred to for greater clarification.

***The changes in the second amended notice of appeal***

[64] As can be seen from attachment **C**, many of the provisions are essentially insertions of an explanatory nature, or expanding grounds for the marine spatial control sought. It is difficult to see that any of those would expand the original submission, particularly given the subsequent agreement which is included within the annexures (marked **D**), and particularly given the discussion in relation to the Rena and Issue 55 is removed, as is the discussion at 12.1.1(1)(a) in relation to Hurihuri Point landing.

[65] Even the objectives at 2.11, 50, 51 and 52 are clearly an attempt to put in clearer wording the original submissions made by the Trust in relation to the Motiti Natural Environment Area.

[66] Part 4 is clearly intended to create a new management area through new provisions to be inserted as Section 12. This, in our view, is consistent with the marine

spatial planning issue. It then goes on to deal with the content of that. Some wording, such as policy MNEMA1:

(a) discusses rahui conservation management area; and

(b) discusses preventing removal, damage or destruction of indigenous flora or fauna, including taonga species.

[67] Proposed section 12.2 discusses aquaculture as a controlled activity and MNEMA2, under that, discusses the rahui.

[68] Ms Hamm strongly makes the point that there was no discussion in the original submission of rahui, and Mr Enright concedes this. On the other hand, he says that the question of management and protection are both explicitly discussed, including management of fisheries and flora and fauna through marine spatial planning.

***Evaluation of second amended notice***

[69] The difficulty for this Court in assessing these type of provisions at this stage is that it has not heard the evidence supporting them. A form of restriction or rahui is a significant outcome, and generally there would have to be clear reasons and both objectives and policies to support it. It may or may not amount to a prohibition under the Act, depending on the context. Questions then arise as to the spatial extent of any such rahui, any periods for which it might apply, and any conditions that might then apply.

[70] In short, it is difficult for this Court to conclude that these outcomes are beyond the scope of the originally worded submission and appeal until it has heard evidence. Clearly, any form of blanket prohibition is beyond the appeal and submission, and unlikely to be supported by the proposed Regional Coastal Plan provisions that are not under appeal.

[71] In fact the Trust's own submission sought that "areas" might be subject to various controls. This indicates to us that the intent was that there would be a marine spatial plan with various provisions applying in different places. This appears entirely consistent with the discussion about high value areas and areas of particular cultural value.

[72] I acknowledge Mr Cooney's and Ms Hamm's concerns that the wording as currently sought goes too far. However, a court assessment would need to be made in the context of the evidence and with a close consideration as to the actual remedy sought in relation to each of the grounds of appeal and submission. Mr Enright himself accepts that the wording in the second amended appeal is the Trust's optimum outcome, and issues as to the scope of that wording (and refinement thereof) and the spatial extent of it are matters that will be subject to further refinement through the evidence and hearing process.

*Is strikeout an appropriate remedy for amendment that goes beyond the submission?*

[73] We have concluded that there are clearly remedies within the scope of the submissions that can be addressed in the appeal if a marine spatial plan is sought. This might impose some form of constraint or restriction, such as requiring resource consents for certain activities. It might include other methods, objectives or policies which are sought to implement a marine spatial plan or conditions sought in the submission and appeal. In practical terms, it is far too early in the case to say whether any of the remedies sought in the second amended statement of claim would be appropriate or better in the circumstances of this case.

[74] The parties will be aware that the general practice of the Court in such complex cases is to issue an interim decision and then give the parties an opportunity to consider the appropriate approach that should be adopted if it considers that there is some merit to the appeal.

[75] Inevitably in the course of a hearing parties refine the remedies sought and the Council and parties offer iterations of the plan which each considers might address the particular concerns of the appeal. This is why the Court refers to the hearing process as an iterative one, and it is one of constant refinement from the time of the original submission until the time when the matter is finally disposed of by the Court. Once evidence is circulated the parties will have further opportunities to refine remedies on the basis of the evidence available, and in consideration of the evidence for the remaining parties. Often this position is further elucidated through cross-examination, where alternatives are explored with witnesses. It is not uncommon for an appropriate approach or even a resolution to appear during the course of a hearing. This is in the nature of the public and participatory planning context in which this matter is being heard.

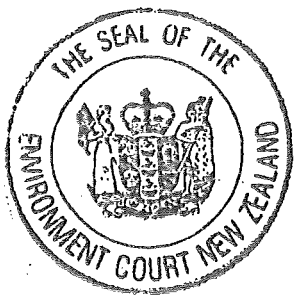
**Conclusion**

[76] For the reasons we have given in detail, we consider it is premature to conclude that the potential outcomes under the plan are an abuse of process. Clearly, any remedy sought must be within the scope of the submissions filed and must relate to matters which the proposed Regional Coastal Plan addresses under the Act, Coastal Policy Statement and New Zealand Coastal Policy Statement. Given that many of the objectives and policies of the plan are also not in dispute, it would need to be consistent with the settled elements of the plan. However it is not possible for the Court at this stage to say that the particular remedies sought may not be available to any degree at all.

[77] Some remedy between that currently contained within the plan and that sought by the appellant might be considered to be appropriate after a full hearing. In such an event there are a range of possibilities open to the Court, including the potential to require either a plan change or to direct notification of any new provisions. A more common approach adopted by the Court would require the parties to see if they can resolve the issues in light of the Court decision and agree on wording to be incorporated into the plan. Such an evaluation can only be undertaken after hearing full evidence.

[78] It is clear that under s 279(4) of the Act that there is a high threshold to establish an application to strike out.[8] The issues in this case are ones well known to the Regional Council (and other authorities) through the RPS process, the Rena consent and other matters (including resource consents and a district plan). The Court can see no basis to say that the Trust has no valid interest in the matters which are the subject of this plan or that they did not properly raise issues of concern to them within the scope of the plan review being undertaken. Certainly no wrongful actions or process are alleged. After all, the second amended notice of appeal is an attempt to clarify the issues for the parties. If it does not help then it is difficult to see why the appeal should be struck out. Evidence in relation to the concerns and the appropriate response to achieve the purposes of the Act are matters that can only take place on a full evaluation of the evidence and submissions.

[79] Accordingly the application for strikeout is declined.

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8 *Hurunui Water Project v Canterbury RC* [2016] NZRMA 71 at [84]-[86].

[80] Costs are reserved and may be pursued independently of the outcome of the hearing. The Court should not require any submissions on this issue until the substantive hearing is resolved.

For the court:

JA Smith
Environment Judge

'A' A,

# MOTITI ROHE MOANA TRUST

*Nga Hapu o Te Moutere o Motiti*

Rohemoana@gmail.com

MOTITI
ROHE MOANA

21 August 2014

The Chief Executive
Bay of Plenty Regional Council
PO Box 364
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**Tena koutou**

**MOTITI ROHE MOANA TRUST SUBMISSION TO THE PROPOSED BAY OF PLENTY COASTAL ENVIRONMENT PLAN**

## A INTRODUCTION

1. This is the submission of Motiti Rohe Moana Trust (the Trust) to the Proposed Bay of Plenty Coastal Environment Plan (the Plan). The submissions seeks retention of those parts of the Plan that support the Trust's aspirations and outcomes and seeks consultation in accordance with the principles of Te Tiriti o Waitangi and the status and role of the Trust as kaitiaki of the island of Motiti and surrounding waters, islands and reefs in respect to all matters relating to Motiti Rohe and seeks amendments or removals to other parts of the Plan to address our concerns with the Plan.

2. The submitter is the Motiti Rohe Moana Trust established in 2009. Trustees are kaumatua born and raised on Motiti Island. Among other things the Trust's purpose set out in the Trust deed is to act on behalf of Nga Hapu o Te Moutere o Motiti for the purposes of resource management, fisheries, aquaculture and other matters within the Motiti Rohe Moana. The rohe is shown in the map in attachment 1.

3. The Trust advocates for ahi ka Maori on Motiti Island and all who whakapapa to Motiti island and surrounding reefs, islets and waters.

4. Te Moutere o Motiti is a taonga. Te Tau o Taiti is a taonga and so too are Te Porotiti, Te Papa, Okarapu, Motuhaku , Motunau, Tokeroa and the coastal waters in which they are located.

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

5. This submission is in three parts. Part A is the introduction. Part B sets out the general themes of the submission; challenges the process by which the plan has been prepared and opposes the Plan in general terms as it has not been prepared in accordance with the principles of the Treaty, does not apply matauranga Maori, and has not engaged with Motiti ahi ka or those who whakapapa to Motiti and its waters. The general themes of the submission pick matters that were not addressed in the Proposed Regional Policy Statement or its Variation 1. Part C identifies more specific submissions and the relief sought.

6. The Trust signals at this stage its position set out in its original submissions to the proposal by the Council to prepare a variation to the proposed regional policy statement and a proposed regional coastal environment plan. It reiterates the need for the Regional council to engage in consultation with the Trust and encourages the use of collaborative approach to developing appropriate plan provisions for the coastal environment within the rohe of the Motiti Rohe Moana.

7. The Trust is mindful of the recent Supreme Court Decision

> "*Moreover, the obligation in s 8 to have regard to the principles of the Treaty of Waitangi will have procedural as well as substantive implications, which decision-makers must always have in mind, including in giving effect to the NZCPS.*"
> (SC 82/2013 [2014] NZSC 38 *EDS v King Salmon*, para [88]).

## B. SUBMISSIONS & RELIEF SOUGHT

### General themes issues & relief sought to the Plan as a Whole

1. Provide active protection of taonga within the costal environment of Motiti Island and coastal waters in partnership with the Trust.

   Issue:
   Failure to give effect to Part II Resource Management Act 1991 (RMA), New Zealand Coastal Policy statement (NZCPS) Objective 3 and Policy 2 in particular, and relevant provisions of the Proposed Bay of Plenty Regional Policy Statement provide for exercise of

   - tino rangitiratanga
   - kaitiakitanga
   - customary values
   - application of matauranga maori
   - tikanga
   - active protection of taonga

   in respect to Motiti Rohe Moana

   Relief sought:

a. Engage with the Trust to ensure Treaty of Waitangi are observed; to be proactive in respect of active protection and redress; and to recognise and to ensure RMA Part II & PRPS framework is implemented so that Treaty principles and settlement outcomes are delivered in the for Motiti Island and Motiti rohe moana
b. Amend to provide implementation methods directed at providing reports mandated by the Trust and including cultural dimensions applying matauranga Maori.
c. Enter into memoranda of understanding with the Trust.
d. Add policies for regional council to partner with the Trust to maintain and enhance coastal values of Motiti Rohe Moana and Whenua.
e. Provide implementation methods to advocate for Mataiti and Taiapure reserves in partnership with the Trust
f. Add, refine or clarify policies to Work with tangata whenua to establish ecological bottom line or agreed target for managing the natural (character and biodiversity)and cultural resources of Motiti Rohe Moana and Whenua which will:
    - provide greater certainty in sustaining *kai moana* and ecosystem services
    - avoid degradation of natural character and biodiversity
    - better measure success of protection and enhancement measures implemented
    - establish a baseline for monitoring changes
    - provide an expanded network of restored island and marine protected areas where ecological health and indigenous biodiversity will be protected and enhanced
    - Add Implementation Methods for Plans:

g. Add implementation Methods for all applications for resource consent policy or plan changes or variations are to be reported on by cultural adviser(s) mandated by tangata whenua of Motiti with costs to be borne by proponents.

h. Add content to Objectives and Polices amending or refining as required to integrate matauranga Maori into the Plan to provide the Maori world view of their existence and why they live their lives in the way they do including *Ngakau Maumaharatanga mo ake ake* as it applies to Motiti rohe moana and whenua.

i. Management and decision making to take into account historic, cultural and spiritual relationships of Tangata Whenua with the island and waters of Motiti and the ongoing capacity to sustain these relationships.

2. Matauranga Maori

Issue:

We strongly support the inclusion of matauranga Maori in integrated management process. However, we consider there needs to be specific provisions for its implementation

Relief sought

A4

a. Marine spatial plan for Motiti rohe moana and whenua incorporating matauranga Maori in collaboration with the Trust.
b. Apply Maori attributes of mana, mauri and tapu to assessment of natural character in particular to the island reefs and waters of Motiti rohe moana and whenua.

3. Integrated management – coastal marine area

Issue:

The purpose of the RMA and PRPS is to achieve integrated management. Methods need to be implemented to achieve integrated management for the marine environment. The integrated management of fisheries resources in terms of an ecological management approach has been developed in the international context and must be applied to the Motiti rohe moana to give effect to Objective 1 of the NZCPS.

Relief sought:

Integrated marine management implemented through integrated management of fisheries resources.

4. Marae based aquaculture

Issue: More specific provision is needed for non commercial marae based aquaculture. Objective 34 is supported as far as it goes.

Relief Sought:

a. Expand issue 36 to include Motiti rohe moana. Recognise that water quality is not an issue in this location and that Oceanic aquaculture carried out by Motiti marae within customary waters is worthy of investigation and implementation if proven feasible.
b. Expand Objective 35 to also provide for non commercial marae based aquaculture.

**PART C SUBMISSIONS & RELIEF SOUGHT**

**Specific**

1. Integrated management issue objectives and policies are supported as far as they go. There is a need to provide integrated methodologies for the marine environment similar to the use of structure planning, spatial planning or integrated whole of catchment management applied on land.

Relief sought:
Add Issues, Objectives Policies and Methods that implement Objectives 1 and 3 of NZCPS.
Add
Issue: Fisheries resources to be a management focus so that marine management can be integrated in a manner similar to integrated catchment management for land. Objective:

A5

Develop methodologies for management of fisheries resources in collaboration with tangata whenua and management agencies.
Policy: A methodology for integrated management of fisheries resources will be developed for the Motiti Rohe moana and whenua through collaboration with the Trust and stakeholder groups.
Policy: Methodologies developed will be implemented by plan change or variation

2. Natural Heritage issue objectives and policies do not go far enough in recognising issues of significant to Mana Whenua and Mana moana participation and decision making in regard to natural heritage and biodiversity or in identifying locations which require restoration and the linkage between natural and cultural heritage.

   Relief Sought:
   Add Issues Objectives Policies and Methods to give effect to Objective 2, 3 and 7 and Policies 2, 13 and 15.
   Reword issues and objectives to include recognition that natural heritage and restoration of biodiversity is an issue of significance to Mana Whenua and Mana Moana and their participation and decision making is provided for in regard to indigenous biodiversity and natural heritage.

3. **Iwi Resource Management** issues objectives and policies are supported as far as they go and need to be reworded and extended.

   Relief sought: Reword issues objectives and policies:
   a. to provide for Mana Whenua and Mana Moana rather than "iwi";
   b. to extend issue 20 for example to recognise and provide for Mana Whenua and Mana Moana to be able to develop ad utilise their land and waters,
   c. reframe the issues objectives and policies to provide for protection of biodiversity and natural heritage as a focus for achieving appropriate fisheries management.

4. **Activities in Coastal Marine Area** is supported in part and opposed to the extent it does not provide for matters of significance to Mana whenua and Mana moana.

   Relief sought:

   a. Add Objectives and policies to provide for marine spatial planning over the Motiti Rohe Moana

We wish to be heard in oral submission.

Umuhuri Matehaere
CHAIRMAN
MOTITI ROHE MOANA TRUST

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

A6

This is the annexure marked B referred to in the annexed affidavit of Graeme James Lawrence sworn at Tauranga this 20th day of May 2014 before me

Signature

A Solicitor of the High Court of New Zealand (Solicitor to sign in part on Exhibit)

Marge Dawson
Deputy Registrar
District Court
Tauranga

"B"

# MOTITI COASTAL PLAN

0 1.75 3.5 7 10.5 14 Kilometers

N

ROHE of MOTITI ROHE MOANA TRUST

MOTITI NATURAL ENVIRONMENT

Te Tau o Taiti (Astrolabe)

Te Porotiti

Te Papa

Okaropu

Motuhaku (Schooner rock)

Motunau

Tokerau

Plate 1e)

Graemelawrence for MRMT 23/05/14

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

B1

**BEFORE THE ENVIRONMENT COURT**
**AUCKLAND REGISTRY**

**UNDER** the Resource Management Act 1991

**BETWEEN** **UMUHURI MATEHAERE, GRAHAM HOETE AND KATARAINA KEEPA AS TRUSTEES OF THE MOTITI ROHE MOANA TRUST**, with its registered office at 20 Matapihi Station Road, RD5, Tauranga

**Appellant**

**AND** **BAY OF PLENTY REGIONAL COUNCIL** a consent authority under the Act with its principal offices at 5 Quay Street, Whakatane

**Respondent**

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**FIRST AMENDED NOTICE OF APPEAL BY THE TRUSTEES OF MOTITI ROHE MOANA TRUST IN RELATION TO THE PROPOSED BAY OF PLENTY REGIONAL COASTAL ENVIRONMENT PLAN**

**Dated this 23rd day of November 2015**

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THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

B,

**To** the Registrar
Environment Court
Auckland

1 The Trustees of the Motiti Rohe Moana Trust (**MRMT**) appeal against the decision of Bay of Plenty Regional Council on the following Plan Change:

- The Proposed Bay of Plenty Regional Coastal Environment Plan **(Proposed Plan)**

2 MRMT made a submission on the Proposed Plan. MRMT was a primary and further submitter. It was assigned primary submission number 083 and further submitter FS12.

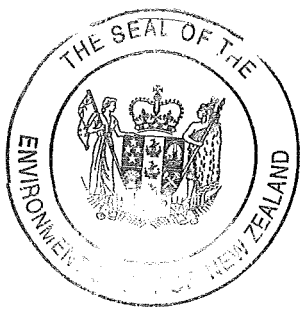
3 MRMT is not a trade competitor for the purposes of section 308D of the Resource Management Act 1991 (**RMA**).

4 MRMT was established in 2009. Trustees are kaumatua born and raised on Motiti Island. The Trust's purpose stated in the Trust Deed is to act on behalf of Nga Hapu o te Moutere o Motiti for environmental and other kaitiaki roles. This includes ahi ka Maori on Motiti Island and those who whakapapa to Motiti Island and surrounding reefs, islets and waters. MRMT is directly affected by an effect of the subject of the appeal that— (a) adversely affects the environment; and (b) does not relate to trade competition or the effects of trade competition.

5 MRMT received notice of the decision on or about 01 September 2015. The decision was made by Bay of Plenty Regional Council (**Council**). The decision that MRMT is appealing is described below.

6 Reasons for the decision are stated in the Commissioners Report; with Appendix B providing responses to submission points where Hearing Commissioners disagreed with Council Officer recommendations. Appendix D provides revised wording, adopted by Council as the Decisions Version of the Proposed Plan ("**Decision**"). At Appendix B, the Decision states:

> "**Appendix B: Recommendations on Submission Points**
>
> This Appendix sets out the Hearing Committee's recommendations on submission points where those recommendations differ from the officer's written recommendations that were contained in the following two section 42A reports:
>
> - Proposed Regional Coastal Environment Plan Staff Recommendations on Provisions with Submissions and Further Submissions, 6 March 2014 (otherwise referred to as the "**1193 page S42A Report**"); and
>
> - Proposed Regional Coastal Environment Plan 2014, Supplementary Report on Submissions to the Proposed Regional Coastal Environment Plan 2014, **Jo Noble, 11 May 2015**, File Reference 7.00399).
>
> **If a submission point is not listed in this Appendix then the Hearing Committee**



B3

**has adopted the officer's recommendations and reasons contained in the above section 42A reports without further change."** [Emphasis Added]

7 MRMT's primary and further submission points are not listed in Appendix B and not addressed in the Jo Noble Report dated 11 May 2015. Accordingly Council's decision on MRMT's submission points is as stated in the **1193 page S42A Report.**

8 The 1193 pages s42A Report has not listed submission points by submitter and these are not listed sequentially.[1] Subject to [11] below, this Appeal relates to the following decisions and recommendations made in relation to MRMT's primary submission (083) and further submission FS12:

Pages 2-3 of 1194
Pages 18-22 of 1194
Page 54 of 1194
Page 140 of 1194
Page 176 of 1194
Page 300 of 1194
Page 429 of 1194
Page 686 of 1194

9 This Appeal is limited to creation of a marine spatial planning framework for the Motiti Natural Environment Area. Scope of relief is identified by the following submission points made by MRMT in its primary submission:

**Submission Point 083-2:**

"a. Marine spatial plan for Motiti rohe moana and whenua incorporating matauranga Maori ~~in collaboration with the Trust.~~ [delete words in strikethrough]

b. Apply Maori attributes of mana, mauri and tapu to assessment of natural character in particular to the island reefs and waters of Motiti rohe moana and whenua."

**Submission Point 083-6:**

"1. Integrated management issue objectives and policies are supported as far as they go [*sic*]. There is a need to provide integrated methodologies for the marine environment similar to the use of structure planning, spatial planning or integrated whole of catchment management applied on land.

Relief Sought:

Add Issues, Objectives, Policies and Methods that implement Objectives 1 and 3 of NZCPS."

**Submission Point 083-10:**

"Add objectives and policies to provide for marine spatial planning over the Motiti Rohe

[1] MRMT notes that the 1194 page Officer Report is not user-friendly meaning that it is difficult to ensure that all relevant page numbers and cross-references are correctly recorded.

Moana."

10 This Appeal relies upon all submission points in 083 and further submission FS12 but only to the extent that these submission points support the relief for marine spatial planning for the Motiti Natural Environment Area as stated in [9] above.

11 This Appeal expressly excludes the matters arising from the submission and further submission of Lowndes (submitter # 113, and FS30) as it relates to management of maritime incidents including the wreck of the MV Rena (and its equipment and cargo and associated debris field) on Otaiti/Astrolabe Reef and any associated debris or discharge.

12 Council was wrong to reject or reject in part MRMT's submission 083 and further submission FS12 seeking introduction of marine spatial planning for Motiti Natural Environment area. To the extent that Council accepted some of MRMT's primary and further submission points, MRMT does not challenge "acceptance" but appeals against the wording adopted in the Proposed Plan [2] to convey "acceptance" of these submission and further submission points. The decisions identified at [8] are therefore appealed for the following reasons:

12.1 Relief sought by MRMT was within jurisdiction of the RMA and within scope ("remit") of the Proposed Plan. Part 2 RMA, and higher order policy instruments, such as the NZCPS and Regional Policy Statement, require or envisage use of marine spatial planning as a method to implement Objectives and Policies for nationally important outcomes. On *King Salmon* principles s8 RMA is relevant, even if the NZCPS otherwise covers the field, to coastal methods that address Te Tiriti and partnership obligations.

12.2 Marine spatial planning is required to implement a Customary and Biodiversity effects management area within the footprint of the Motiti Natural Environment Area. Cultural effects include s6(e), s6(f), s7(a) and s8 RMA values; mana whenua / mana moana considerations; matauranga Maori principles; and the interrelationship of the biophysical and metaphysical world. Relief sought by MRMT expressly sought marine spatial planning outcomes for Motiti Rohe Moana. It was wrong for Council to reject these outcomes on the basis that *"..a successful marine spatial planning exercise needs collaboration from a broad spectrum of parties, and would require political support and the allocation of resources."* (pp3 of 1194).

12.3 The Proposed Plan process is a fully notified public process involving input from a broad spectrum of stakeholders. It is irrelevant consideration to require a separate extra process on the basis that it requires "political support" and "allocation of resources". Council had regard to irrelevant matters and fell into error by its determination that marine spatial planning cannot be undertaken within the Proposed Plan itself. It is the correct process and Council should not defer consideration of an essential issue that involves nationally important values in relation to Motiti Rohe Moana.[3]

12.4 The decisions do not give effect to Part 2 RMA including s5 cultural and social wellbeing,

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[2] Whether by way of Issues, Objectives, Policies or Methods.

[3] The Decision at [90] identified that "..in response to other submitters we have amended the issues and objectives to refer to possible future maritime spatial planning.."

nationally important values in s6(a), s6(b), s6(d), s6(e), s6(f), matters for particular regard including s7(a), s7(c), s7(d), s7(f), s7(g) and Te Tiriti principles in s8 RMA.

12.5 The decisions do not give effect to relevant provisions in the NZ Coastal Policy Statement and Regional Policy Statement; do not address relevant statutory functions and tests in ss30, 32, 32A, 32AA, requirements for Regional Plans in ss63-70 and 1st Schedule RMA; and fails to adopt Objectives, Policies, Methods to introduce marine spatial planning and related relief sought by MRMT in its primary and further submissions within the Motiti Natural Environment Area (Motiti Rohe Moana).

12.6 The decisions do not give reasons for rejecting a number of MRMT's submission points. The decisions do not address the issues and reasons stated in MRMT's primary submission and further submission. Relief sought by MRMT falls within jurisdiction and is effects based.

13 I seek the following relief:

13.1 The relief stated in [9] above.

13.2 For clarity, this appeal does not seek any relief which opposes either directly or indirectly the leaving of the wreck of MV Rena (and its equipment and cargo and associated debris field) on Otaiti/Astrolabe Reef and any associated debris or discharge. In particular no relief is sought in relation to:

a. maritime incidents in the proposed plan (3.3), or

b. recognition of the wreck of MV Rena in ONFL 44.

14 The following documents were attached to the Notice of Appeal dated 13 October 2015:

a. MRMT Submission #083
b. MRMT Further submission #FS12
c. Final Decisions Committee Report September 2015

**Dated this 23rd day of November 2015**

**Umuhuri Matehaere**
**Trustee & Chairman, Motiti Rohe Moana Trust**

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

G

**ATTACHMENT ONE: AMENDED RELIEF TO APPEAL**

Part One Purpose, content, planning framework

Amend 5.Plan Mechanisms at 5.2 to provide for "Management Areas" as a plan mechanism by amending the heading and adding a new paragraph follows:

"5.2 Zoning, ~~and~~ Overlays and Management Areas

The Motiti Management Area adopts a spatial planning approach to the Motiti Natural Environment Management Area, identified in the Regional Policy Statement. The Management Area has multiple values and requires an integrated approach to protect and enhance these values.

Part Two Issues and objectives for the coastal environment

Add a new item 12 to the list of topic headings to provide for the Motiti Natural environment Management Area as follows:

12. Motiti Natural Environment Management Area (MNEMA)

Under 1. Issues

Add a new set of issues to address an additional discrete spatial area within the coastal environment, namely the Motiti Natural Environment Area, following on from 1.10 Harbour Zone and 1.11 Port Zone, by inserting a new 1.12 Motiti Natural Environment Management Area and issues as follows:

1.12 Motiti Natural Environment Management Area

Issue 53 Motiti Island is the only continuously occupied offshore island in the region. It is the most developed of all offshore islands. Tangata whenua have a lengthy history of traditional and continuing cultural relationships with the coastal environment of the Motiti Natural Environment Management Area where tangata whenua have lived and fished for generations. Motiti is physically and spiritually linked to Otaiti as well as toka, reefs and other features identified in the Motiti Natural Environment Management Area. Otaiti is both anchor (haika) and umbilical cord (pito) for Motiti Island (Topito o te Ao).

Issue 54 For tangata whenua of Motiti, Te Moutere o Motiti is a taonga. Te Tau o Taiti (Astrolabe reef) is a taonga, and so too are identified features and named toka (rocks) including Te Porotiti, Te Papa, Okarapu, Motukau, Motunau, Tokeroa and the coastal waters in which they are located.

Issue 55 *He Aitua*

The *MV Rena* grounding on Te Tau o Taiti (Otaiti) Astrolabe reef on 5 October 2011 was a significant maritime incident with profound impacts on the marine environment and customary fisheries of the Motiti Rohemoana.

*Rahui*

Tangata whenua of Motiti issued a rahui under customary authority, kaitiakitanga and tikanga to manage, maintain and protect Otaiti for the duration that the MV Rena wreck remains in situ. The rahui seeks to restore the mauri of Otaiti as a

taonga. For restoration to occur, an integrated approach is required to address tangible and intangible values including natural heritage, natural character, biodiversity, cultural and taonga species. The rahui expresses the matauranga Maori of Motiti tangata whenua for protection of Otaiti and management of the Motiti Natural Environment Management Area.

Under 2 Objectives

Add new objectives for the Motiti Natural Environment Management Area under a new Section 2.11 as follows:

2.11 Motiti Natural Environment Area (see Part Seven Map Series 43 and 44)

Objective 50 Protect, restore and rehabilitate the natural and cultural heritage characteristics that are of special value to the tangata whenua of Motiti including:

(a) Mauri o te wai; and

(b) Kaimoana resources; and

(c) Landforms and features; and

(d) Taonga including Otaiti.

Objective 51 Recognise the ongoing and enduring relationship of the tangata whenua of Motiti with the coastal environment of MNEMA. Recognise and implement the rahui for Otaiti in order to sustainably manage the multiple values that exist within the Rahui Conservation management area.

Objective 52 In taking into account the principles of the Treaty of Waitangi and kaitiakitanga, protect and enhance the Motiti Natural Environment Management Area as taonga.

Part Four Activity Based policies and rules

Add a new item 12 to the list of topic headings to provide for the Motiti Natural environment Management Area activities as follows:

12. Motiti Natural Environment Management Area activities (MNEMA)

Add a new Policies & Rules Section 12 as follows:

12. Motiti Natural Envrionment Management Area (MNEMA)

12.1. Policies

12.1.1 General Policies for the Motiti Natural Environment Management Area

1. Also refer to the following policies in other sections of this Plan where relevant to a proposed activity.

(a) All policies in Part 3 –Natural heritage

With the exception that the reference in NH5(a) (ii) to activities in Schedule 15 being appropriate in certain circumstances does not include activities and structures associated with boat launching,