BEFORE THE ENVIRONMENT COURT

Decision No. [2014] NZEnvC 93

IN THE MATTER of the Resource Management Act 1991 (the Act) and of appeals under Clause 14 of the First Schedule of the Act

BETWEEN

QUEENSTOWN AIRPORT CORPORATION LIMITED

(ENV-2009-CHC-210)

TROJAN HOLDINGS LIMITED

(ENV-2009-CHC-211)

MANAPOURI BEECH INVESTMENTS LIMITED

(ENV-2009-CHC-212)

FOODSTUFFS (SOUTH ISLAND) LIMITED

(ENV-2009-CHC-214)

QUEENSTOWN CENTRAL LIMITED

(ENV-2009-CHC-215)

THE STATION AT WAITIRI LTD

(ENV-2009-CHC-216)

AIR NEW ZEALAND LIMITED

(ENV-2009-CHC-221)

REMARKABLES PARK LIMITED AND SHOTOVER PARK LIMITED

(ENV-2009-CHC-222)

QUEENSTOWN LAKES COMMUNITY HOUSING TRUST

(ENV-2009-CHC-223)

Appellants

AND QUEENSTOWN LAKES DISTRICT COUNCIL

Respondent

Hearing: at Queenstown on 24, 25, 26 and 27 February 2014

Court: Environment Judge J E Borthwick
Environment Commissioner R M Dunlop
Environment Commissioner D J Bunting

Appearances: J M Crawford for Foodstuffs (South Island) Ltd
I M Gordon for Queenstown Central Ltd
J D Young for Remarkables Park Ltd and Shotover Park Ltd
J E Macdonald for Queenstown Lakes District Council
R Bartlett as Amicus Curiae

Date of Decision: 28 April 2014

Date of Issue: 28 April 2014

THIRD INTERIM DECISION OF THE ENVIRONMENT COURT

A: The Environment Court finds residential activities (above ground) within AA-E2 was not fairly and reasonably raised in submissions/further submissions lodged by SPL and RPL on the plan change.

B: Shotover Park Limited's appeal to amend the activity status of convenience retail from non-complying to controlled, is dismissed.

C: Subject to the direction given at paragraph [70] in relation to policy 9.6(b) the AA-E2 objectives and policies are approved. These provisions are contained in Annexure A attached to and forming part of this decision.

D: The Structure Plan is approved. The Structure Plan is set out in Annexure B attached to and forming part of this decision.

E: The Environment Court holds that it does not have jurisdiction under the Foodstuffs (South Island) Ltd appeal to amend the plan change by introducing a new type of activity in Table 1, clause 12.20.3.7 – namely large format retail activities in excess of 1000m^2 gross floor area, as a discretionary activity.

F: The Environment Court holds that it is *functus officio* on its decision limiting the size of retail units within AA-E2 to development between 500m^2 and 1000m^2 gross floor area.

G: The AA-A objective and policies in the form set out in the planners' second Joint Witness Statement are approved. These provisions are contained in Annexure A attached to and forming part of this decision.

H: The Environment Court finds the rules for permitted, controlled, limited discretionary and discretionary activities (rule 12.19.3.1 and rules 12.20.3.2-4) are *ultra vires* the Act. The decision on the objectives and policies pertaining to outline development plans is reserved, and leave is reserved for the parties to comment on the wording of the objectives and policies proposed by the planners in the second Joint Witness Statement.

I: Leave is reserved for any party to apply to the court to correct any minor editorial errors or omissions, including the use of consistent terminology.

REASONS

Introduction

[1] This decision addresses the balance of the objectives and policies including, to the extent that they were raised, certain rules and methods in plan change 19.

[2] The decision addresses the following topics which were the subject of a hearing conducted over 24-27 February 2014:

(a) residential activities (above ground) in Activity Area-E2 (AA-E2);

(b) convenience retail activities in Activity Area-E2;

(c) the objectives and policies for Activity Area-E2;

(d) the Structure Plan;

(e) the Environment Court's jurisdiction to approve of relief pursued by Foodstuffs (South Island) Ltd under its notice of appeal or under Shotover Park Ltd/Remarkables Park Ltd's notice of appeal;

(f) the determination of the objectives and policies pertaining to Activity Area-A; and

(g) the objectives and policies concerning outline development plans, and the vires of rules which would implement the same.

[3] The court's findings on each of these topics now follow.

TOPIC: Residential and Convenience Retail Activities

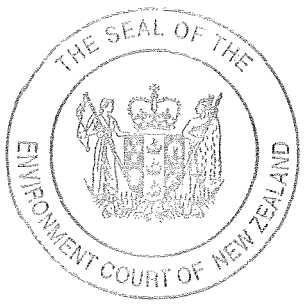
[4] Under its notice of appeal SPL sought to either refine existing objectives, policies and rules for AA-E1 and E2 or introduce a new sub-zone – AA-E3. This new sub-zone would enable business, large format retailing and residential activities on SPL land. Alternatively, SPL would include a separate suite of objectives, policies and rules for the same purpose. The appeal set out general and specific relief to give effect to the grounds for the appeal.

[5] In the Interim Decision[1] the court found residential, convenience retail and retail activities in the range of $500m^2$-$1000m^2$ to be appropriate activities within AA-E2.[2] We come back to SPL's appeal later in this decision, but for now we record that the Interim Decision rejected a suite of objectives, policies and rules for the proposed AA-E3.

[6] The following section addresses residential and convenience retail activities in Activity Area E2 (**AA-E2**).

Residential activities within AA-E2

[7] Although not referred to by counsel the challenge to the Interim Decision is essentially by way of rehearing pursuant to s 294 of the Act.



[1] [2013] NZEnvC 14.
[2] Residential activity means residential activity east of the EAR.

[8] In the Interim Decision the court found residential activities (above ground) to be an appropriate activity within AA-E2. Any decision approving residential activities was subject to jurisdiction. Jurisdiction, if it existed, could only arise under SPL's appeal and the court expressed its uncertainty as to whether there was scope to approve the activity under this appeal.[3] Following argument on an entirely different basis, the court held in the second Procedural Decision that it had jurisdiction to consider the relief under SPL's appeal. Subsequently, at the court's prompting QLDC submits, and SPL agrees, the relief seeking enablement of residential activities under SPL's notice of appeal went beyond the scope of its submissions/further submissions on the plan change and as a consequence the court does not have jurisdiction to approve this activity east of the EAR.[4]

Outcome

[9] Having reviewed the submissions/further submissions the court finds residential activities (above ground) in AA-E2 was not fairly and reasonably raised in submissions/further submissions lodged by SPL and RPL on the plan change. It follows that the court does not have jurisdiction to approve residential activities east of the EAR in AA-E2 as supported by QLDC/QCL in the 2012 hearing.

Convenience retailing

[10] In the Interim Decision the court also found convenience retail to be an appropriate activity within AA-E2.[5] Convenience retail is defined in PC19(DV) as meaning "... a dairy, grocery store or newsagent and lunch bars, cafes [sic] and restaurants".

[11] The main limitation on this activity is its maximum size - it is not to exceed $200m^2$.[6] PC19(DV) classified convenience retail within AA-E2 a non-complying activity. On appeal and by way of specific relief, SPL sought to amend this classification to a controlled activity and to broaden its definition by introducing grocery stores less than $150m^2$.[7]

[3] Interim Decision at [461]-[470], and see SPL notice of appeal dated 18 November 2009 [7.5(g) and (h)].
[4] SPL memorandum dated 5 November 2013, QLDC memorandum dated 22 October 2013.
[5] At [508].
[6] Table 1, clause 12.20.3.7.
[7] Notice of appeal, at 8.2.5(v) and 8.2.13(iii).

[12] At the resumed hearing in February 2014 Ms Hutton, a planner engaged by QLDC, advised that in the absence of residential and visitor accommodation in AA-E2, she no longer considered appropriate all of the activities defined as convenience retail, in particular dairy, groceries and newsagents.[8] If a less restrictive activity status were approved, she was concerned convenience retail would proliferate along the EAR.[9] That said, there remains a need for the food and beverage components of convenience retail and so she proposed a new activity called "Prepared Food and Beverage Activity" for inclusion as a discretionary activity in Table 1, together with a supporting policy and definition. The proposed definition, which does not refer to the $200m^2$ restriction on floor space, talks about smaller scale retail operations meeting day-to-day convenience needs, particularly those of prepared food and beverage.

[13] Mr Mead, also a planner for the QLDC, mused that food and beverage outlets may be up to $500m^2$ or $1000m^2$ gross floor area.[10]

[14] SPL's planning witness, Mr Brown, was of the view that unconstrained convenience retail would overwhelm the activity area and should be discouraged (through a non-complying or discretionary activity status) or minimised.[11] He strongly opposed food and beverage activities exceeding $200m^2$.[12] Finally, Mr Edmonds for QCL, was concerned that retail chains would impose predetermined site layouts upon this activity area undermining the strategic outcomes in the plan change.[13]

Discussion and findings

[15] We understand the QLDC to say that elements of convenience retail may no longer be appropriate within AA-E2. Those elements that are appropriate are set out in a new activity called "Prepared Food and Beverage". Ms Macdonald submitted prepared food and beverage is a sub-set of convenience retail whereas Ms Hutton says "Prepared Food and Beverage" is a sub-set of "Other Retail".[14] This difference in approach was not explained.

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[8] Hutton EiC dated 14 February 2014 at [19].
[9] Hutton EiC dated 14 February 2014 at [15]-[16].
[10] Transcript at 385, 420-421, 423-424.
[11] Brown EiC dated 14 February 2014 at [35].
[12] Brown EiC dated 11 March 2014.
[13] Edmonds EiC 18 February 2014 at [6.5]-[6.9].
[14] QLDC submissions dated 20 February 2014 at [45]-[46], Ms Hutton EiC dated 14 February 2014 at [17].

[16] While we understand Ms Hutton's reasons for not supporting elements of convenience retailing within AA-E2, without direction from the QLDC as to our jurisdiction to approve the introduction of a new policy, definition and amended rule we decline to approve the amendments recommended by its planners. In the absence of residential activities we dismiss SPL's appeal insofar as it seeks to amend the status of "convenience retail". The status of convenience retail is confirmed as a non-complying activity.

[17] If elements of convenience retail, in particular prepared food and beverage, are appropriate it remains open for the QLDC to make provision for this activity when it undertakes the review of the District Plan.

Outcome

[18] SPL's appeal insofar as it seeks to amend the status of convenience retail is dismissed.

Topic: AA-E2 Objective and Policies

[19] The court received no less than three joint witness statements (**JWS**) addressing the higher order provisions for AA-E2; namely the first JWS dated 25 November 2013, the second JWS dated 23 January 2013 and a revised JWS received during the course of the resumed hearing and dated 25 February 2014. Finally, at the court's direction Messrs Mead[15] and Edmonds[16] filed updated sets of AA-E2 provisions recording changes they had proposed during the course of the hearing.

[20] As Mr Gordon correctly states, it is counsels' responsibility to ensure that the provisions placed before the court for approval are within jurisdiction. We record that the parties undertook to instruct their planning witnesses on those activities within jurisdiction, for the purpose of framing policies for AA-E2.[17] The activities were eventually finalised in the revised JWS tabled during the hearing where health,

[15] Filed 25 February 2014.
[16] Filed 11 March 2014.
[17] Joint memorandum dated 23 December 2013at [5], and Minute dated 18 December 2013 at [13]-[14].

recreational, residential and visitor accommodation activities were deleted from policy 9.1.[18]

[21] As it is relevant to the framing of some objectives/policies for the Activity Area we record that in response to directions from the court[19] the Council, SPL/RPL, QCL and Foodstuffs (South Island) Ltd advised they consider the following activities to be within jurisdiction in AA-E2:[20]

Retail (including mid-sized retail and smaller scale convenience)	Commercial
Offices	Light Industry
Community	Education

[22] We were materially assisted during the hearing by the witnesses and in particular Mr Mead, a consultant planner retained by the council, explaining differences between wordings for the objectives/policies in the second planners' JWS, the evidence and the revised JWS. As not all of the provisions were contested and this is a convenient juncture to confirm the following policies in the revised planners' JWS which were not in dispute between the parties or questioned by the court:

9.4	9.7
9.8	9.9
9.10	9.11

AA-E2 Objectives

[23] The revised Planners' JWS proposed two AA-E2 objectives as follows:

> **Objective 9 - Activity Area E2** (Commercial Corridor)
>
> A. A predominantly commercially-orientated corridor for activities that benefit from exposure to passing traffic and which provides a transition between the adjoining residential and industrial areas, while complementing the role of Activity Area C1/FFSZ(A).
>
> B. A high quality urban form that complements the corridor functions of the Eastern Access Road, including its role as an important viewshaft.

[18] Tabled by Mr Mead 25 February 2014 (Transcript 378).
[19] Court Minute 18 December 2013 [22].
[20] Joint memorandum of the parties, 23 December 2013 [4].

[24] Mr Mead gave the planners' reasons for the changes from their second JWS and answered related questions in cross-examination and questions from the court. Through this process, and listening subsequently to the examination of other witnesses, Mr Mead progressively refined his preferred expression of the objectives (and related policies which we come to below). Mr Mead's finally preferred wording for objective 9 was as follows:[21]

> **Objective 9 - Activity Area E2** (Mixed Business Corridor)
>
> A. A business-orientated corridor for a range of activities that benefit from exposure to passing traffic, provides a transition between the adjoining residential and industrial areas while maintaining the role of Activity Area C1/FFSZ(A) as a town centre.
>
> B. A high quality urban form that complements the corridor functions of the Eastern Access Road, including its role as an important viewshaft.

[25] Mr Mead explained his preferred version with particular reference to the following considerations:

- the final clause of objective 9A reinforces the primacy of the C1/FFSZ(A) town centre in a positive fashion while recognising AA-E2 is to perform a complementary retail role to the centre. Ultimately, however, he preferred the use of "maintaining" to avoid any inference of a synergistic complementary relationship between Activity Areas C1 and E2. Mr Mead also considered that the term "corridor" better explains how E2 is to function as a "movement corridor" as opposed to a town centre node;[22]
- the reference in the Objective heading to a mixed use zone in earlier iterations was inappropriate with residential activities, in particular, removed from policy 9.1 for jurisdiction reasons. Mr Mead accepted, however, that AA-E2 in the form he supported still allowed for a mix of uses and that residential and other potentially suitable activities might be enabled by a future Plan change.[23] We note he finally settled on the term "Mixed", which we find appropriate in the heading;

[21] Mead, final revisions filed 11 March 2014.
[22] Transcript 379, 416 and 419-420.
[23] Transcript 380.

- the term "business" is preferable to "commercial" in both the Objective heading and sub-paragraph "A" because the latter is defined in the Plan in a way that may foreclose activities the council envisages populating the zone. Mr Mead intended that "business" be given its normal meaning as a "wide ranging term". Mr Mead also noted correctly that in the Decisions Version Commercial activities are non-complying.[24]

[26] Mr G Dewe and Mr J Edmonds, planning consultants retained by Foodstuffs and QCL respectively, supported Mr Mead's deletion of "complementary" and insertion of "maintaining" in objective 9A to better describe the relationship between E2 and C1/FFSZ(A).[25]

[27] When asked by the court whether "business" or "commercial" better fits the outcome sought by objective A, Mr Edmonds indicated he was mindful of the court's reservations about the use of the undefined term "business"[26] but anticipated difficulties if "commercial" were adopted because the activities enabled by its Plan definition go (well) beyond those enabled by policy 9.1.[27] We understood Mr Edmonds to finally prefer "business" notwithstanding its lack of definition, if used consistently to mean the activities covered by policy 9.1. Having consulted the operative Plan, we are less comfortable with his opinion that "the E2 area would be most closely aligned to the current Business zone" and on this basis have a synergy with the term.[28] Having reviewed the hearing transcript and considered the revised objectives/policies of Messrs Mead and Edmonds, Mr J Brown supported the use of "business" with the qualification that it may be helpful to define the term as part of the lower order hearing.[29]

[28] Mr Edmonds supported use of the term "mixed use" in the Objective 9 heading in the revised planners' JWS and presumably also in policy 9.3 on the basis that it lacks a single, correct definition and although amended policy 9.1 enables a reduced number of activities, they still comprise a reasonable mix.[30] For similar reasons we expect he would not demur from Mr Mead's finally preferred terms "mixed Business corridor"

[24] Transcript 381.
[25] Transcript 460 and 471.
[26] Expressed in the Interim Decision.
[27] Transcript 495.
[28] Transcript 498.
[29] Brown, planning consultant for SPL/RPL, brief of evidence 11 March 2014 [9].
[30] Transcript 499.

and "mixed Business environment" in the subject provisions. Mr J Brown also supported the continued use of "mixed use".[31]

Discussion and Finding

[29] By the end of the hearing there were few if any wording differences between the parties and their witnesses on the objectives. *"Business"* if given its common meaning as Mr Mead envisaged, addresses the court's concerns expressed in the Interim Decision.[32] We are satisfied that the objectives in their above form are the most appropriate way to achieve the purpose of the Act,[33] and are consistent with both the court's Interim Decision and other confirmed parts of PC19. The AA-E2 objectives are accordingly confirmed in the form finally proposed by Mr Mead, with the qualification that mixed-use is used.

AA-E2 Policies

[30] A number of policies required determination as a result of either unresolved differences between the parties or questions by the court arising out of the witnesses' joint statements and/or evidence. We have found it most efficient to commence by setting out the wording of the disputed policies supported finally by Mr Mead.[34] Only where necessary do we refer to earlier iterations, which in some instances were numerous.

Policy 9.1

[31] Policy 9.1 enables a mix of urban activities within AA-E2 as follows:

> **Policy 9.1**
>
> To provide for a mix of offices, light industry, community, educational activities, mid-sized retail and smaller sized prepared food and beverage outlets.

[32] Amended to exclude activities lacking jurisdiction, the policy proved relatively uncontentious except for "smaller sized prepared food and beverage outlets" which the planners supported substituting for "smaller scale convenience retail" contained in the

[31] Brown, brief of evidence 11 March 2014 [10].
[32] [2013] NZEnvC 14 [519].
[33] Section 32(3)(a) pre-2009 RMA.
[34] Attached to Ms Macdonald's email for QLDC to the court 11 March 2014.

planners' second JWS.[35] For reasons given above, we have declined to approve the amendments in respect of "smaller sized prepared food and beverage outlets".

Discussion and findings

[33] Policy 9.1 is approved without inclusion of "smaller sized prepared food and beverage outlets".

Policy 9.2

[34] Policy 9.2 follows:

> **Policy 9.2**
> To exclude:
> (a) Activities that are incompatible with a high quality business environment due to the presence of harmful air discharges, excessive noise, use of hazardous substances or other noxious effects; or
>
> (b) Activities that would undermine Activity Area C1 as being the primary location for smaller scale retail.
>
> (c) Large footprint structures that are incompatible with the intended urban form outcome for the Activity Area.

[35] Mr Mead's evidence was that this policy is fundamentally concerned with the urban form along the EAR. This policy, together with 9.3, discourages certain activities and other undesirable influences on urban form at this location.[36]

[36] Policy 9.2 in the revised planners' JWS contained two significant additions that are not in the planners' second JWS, namely sub-paragraphs (b) and (c).

[37] Addressing first policy 9.2(a), this policy was amended to align with the "business corridor" terminology in objective 9A, and proved uncontentious. The wording of policy 9.2(a) would better align with the objective heading if "mixed" were inserted before "business environment" and this would also provide enhanced guidance

[35] Hutton, Fifth Statement 14 February 2014 [17]; Mead, Fourth Supplementary Statement 14 February 2014 [88] and revised planners' JWS 25 February 2014; Edmonds, Third Supplementary Statement 18 February 2014 [6.9] and Transcript 471; and Brown, Statement of Evidence 11 March 2014 [4]ff limited to 200m^2 GFA.
[36] Mead Transcript at 390-393.

for the formulation of related lower order provisions. Mr Edmonds supported the latter amendment.

[38] Mr Mead indicated that policy 9.2(b) reflects the intention of limiting retail activities to $500m^2$-$1000m^2$ units in lower order provisions except for the prepared food and beverage element which he supported. And that policy 9.2(c) addresses large buildings and their congruence with the urban design outcomes sought by the objective. Mr Mead explained that the caucusing planners were concerned with the potential adverse effects of large footprint buildings irrespective of whether they were used for retail or other activities. He indicated there was no issue with a multi level building with a $1000m^2$ footprint having, say, $3000m^2$ of floor space as opposed to the same area being achieved horizontally by a single storey building that would take up "quite a chunk" of the EAR frontage; depart from the mixed use outcome sought; and militate against a finer grain built form. Mr Mead considered that a "large footprint structures" definition was not required[37] but anticipated that the activity status and site and zone standards that attach to retail activities exceeding $1000m^2$, and buildings exceeding 1000 m^2 irrespective of activities conducted within them, would be different.[38] He emphasised that policy 9.2(c) is concerned with large footprint buildings per se whereas policy 9.3 deals with the extent of retail along the corridor (not to predominate) and the size of individual retail units. After careful reflection, Mr Mead confirmed his opinion that "urban form" was preferable to "built form" in policy 9.3(c) as it encompasses the latter, and as we note, is consistent with the language of objective 9B.[39] He also agreed that the word "or" should be deleted at the end of policy 9.2(a) being a "hangover" from an earlier iteration.[40]

[39] Mr Edmonds agreed with Mr Mead that "... incompatible with the intended urban form outcome for the Activity Area" was more appropriate than the planners' previously preferred wording " ... incompatible with the intended outcome for the Activity Area".[41]

[37] Transcript 397.
[38] Transcript 390-391 and 395.
[39] Transcript 399.
[40] Transcript 393ff.
[41] Transcript 472.

[40] We find no record of Mr Dewe or Mr Brown disagreeing with the revised planners' JWS wording of policy 9.2 including sub-paragraph (c).

Discussion and findings

[41] Policy 9.2 is approved in the form set out above subject to "mixed" being inserted before "business environment" in sub-paragraph (a) and "or" deleted at the end of the same provision.

Policy 9.3

[42] Policy 9.3 follows:

> **Policy 9.3**
> To ensure that a mixed business environment establishes along the EAR where retail uses do not predominate by:
>
> (a) Controlling the size of individual retail units.
>
> (b) Requiring development that fronts the EAR to provide two or more levels of development with above ground floor areas that are suitable for activities other than retail, or otherwise provide for a mix of uses along the road frontage of the site.
>
> (c) Limiting smaller sized retail operations to prepared food and beverage outlets and ensuring that cumulatively prepared food and beverage outlets do not have a strong visual presence along the corridor.
>
> (d) Enabling flexible occupation of floor space by:
>
> (i) having a standardised car parking rate for non-retail activities;
>
> (ii) floor to ceiling heights that enable a range of activities to occur within buildings.

[43] Acknowledging the threefold function of the EAR within the structure plan area Mr Mead advised policy 9.3 is to ensure that a mix of activities establishes along the EAR. This policy is supported by policy 9.6 which is concerned with the built form along the EAR.[42]

[44] To summarise, policy 9.3(b) is concerned to achieve a mix of uses by different means from the retail cap that he supported previously.[43] The genesis of policy 9.3(d)(i)

[42] Transcript at 411, 446-447.
[43] Transcript 401.

is the planners' revised JWS policy 9.3(c) but with its effect limited to non-retail activities for the reasons given by Mr Mead in his written brief.[44] The genesis of policy 9.3(d)(ii) is less clear but it appears to have arisen out of questions by the court of Mr Mead about the adaptive reuse of buildings for different purposes over their lifetime; that is providing for flexible occupation.[45]

[45] Mr Edmonds acknowledged that development may potentially be hindered by policy 9.3(b) if it were to require two or more levels. Nevertheless he considered the "references to two level buildings adjoining the EAR [to be] quite important matters that need to be addressed through policies".[46] He found support for this view in the Interim Decision and also in objective 9B's high quality urban form and finally the policy for a mix of activities. He considered the provisions noted preferable to pursuing a mixed use environment through "the only other option" of managing the ground floor use of land and effectively prescribing a retail cap, which he considered analogous to a licensing regime.[47] Mr Edmonds acknowledged that building scale could be achieved by setting façade and/or stud height minima but did not consider that either of these methods by themselves would necessarily achieve the mixed use outcome sought by the policies. In his opinion there was a relatively low risk of a policy for two or more levels causing an inefficient use of resources because of the length of the AA-E2 area, its other dimensions, and the land needs requirements described (we assume in 2012) by various experts.[48]

[46] Consistent with these views, Mr Edmonds preferred Mr Mead's wording of policy 9.3(b) to Mr J Brown's alternative of "Encouraging multiple level development" because it was "a bit more extensive and gave … a clearer steer to the outcome" that multiple-level development should be occurring along the EAR in a mixed use environment.[49]

[47] In reply to questions from the court on the last clause in policy 9.3(b), Mr Edmonds stated his preference was to achieve a mixed business environment by vertical

[44] Mead, EiC 14 February2014 [80]ff.
[45] Transcript 452.
[46] Transcript 479.
[47] Transcript 479.
[48] Transcript 480.
[49] J Brown, EiC 14 February 2014 [42] and Transcript 487.

mixing. He considered there was a low probability of achieving predominantly single storey buildings with a diverse horizontal mix because of the (high) land values involved. Although his answers were not supported by either land valuation or economics expertise, Mr Edmonds expected that retail would dominate at ground level interspersed with the occasional activity like a gymnasium with offices and commercial activities predominantly above.[50]

[48] On a related aspect, after assistance from the court on its interpretation, Mr Edmonds accepted that the second clause of policy 9.3(b) as worded by Mr Mead would be met by "... a single level building [on a site] enabling a mix of uses [along the road frontage]".[51] Mr Edmonds explained that he understood policy 9.3(b) to be concerned with ensuring more than just retail activities occurred at ground level in some places. In support of this position, he pointed to the policy's introduction which is concerned with ensuring that a mixed business environment results where retail "uses" do not predominate. To this extent he favoured policies that provide for a vertical mix of activities by requiring multiple storeys[52] and providing for a mix of uses on a site at ground floor level (in policy 9.3(b)). He envisaged that restricted discretionary activity consent would be required for anything less than "about two storeys".[53] He advised that if the policies are not written in a way to achieve these outcomes they should be amended.[54]

[49] In response to questions put in cross-examination, Mr Dewe indicated he was concerned that policy 9.3(b) "could well" hinder otherwise legitimate development. He gave as an example a person wanting to establish an educational activity needing to construct a second storey that was not required for the primary use which could not easily be leased for another activity or resulted in a bigger building than was otherwise required. He considered the policy may result in an inefficient use of resources and/or prevent legitimate activities from occurring. Mr Dewe supported the concept of achieving a mix of activities along the EAR corridor and thought this might be achieved through policies for the size of individual retail units and/or the ODP provisions. While

[50] Transcript 488 and 495
[51] Transcript 493.
[52] To be included in policy 9.6(b) in similar fashion to revised planners' JWS policy 9.6(c) "... building design should ... visibly express a two or more storey format".
[53] Transcript 490.
[54] Transcript 494.

he considered that a demand for uses could not be created where none existed, he acknowledged that requiring two storeys could encourage a mix of uses.[55]

[50] Mr J Brown helpfully distilled the strategic E2 issues down to two matters. Firstly, the identification of an appropriate mix of activities within jurisdiction and, secondly, securing the built form/amenity outcomes sought.[56] Although he considered the size of buildings to be important he did not expressly include multiple storeys amongst a list of significant built form measures.[57] He had this to say:

> ... I do not consider it necessary to compel developers to a minimum number of storeys particularly if the showroom retail activity may require a very high stud height in the part of the building fronting the EAR (for example a motor vehicle showroom which may have a void at the frontage and a mezzanine floor set back from the frontage). The requirement for multiple storeys should therefore be a site standard, so that if a one storey development is proposed at the EAR frontage, it would be assessed as a restricted discretionary activity.[58]

[51] In Mr Brown's opinion policy 9.3 in the planners' second JWS would be better re-framed by retaining sub-paragraph (a), deleting (b) and re-wording (c) to simply read "Encouraging multiple level development".[59] However, in a Supplementary Statement, he indicated that he was comfortable with either of the "slight differences" in policy 9.3 as finally preferred by Mr Mead and Mr Edmonds.[60]

Discussion and findings

[52] Policy 9.3 is concerned with achieving a mixed business environment along the EAR where retail uses do not predominate. We fully apprehend Mr Edmonds concern that the mixed use outcome that multiple storey development would facilitate, should not be foregone by policy 9.3(b) being met predominantly by single storey development with a horizontal mix of uses (the policy's second clause). Policy 9.3(b) is but one of a number of policies which are to give effect to objective 9. With the suite of policies in mind (including including policies on built form (policy 9.6)), we find that Mr Mead and Mr Edmonds were correct in identifying that policy 9.3(b) will deliver the mixed use environment sought be it vertically over two or more levels or horizontally at ground

[55] Transcript 460-463.
[56] Brown, EiC 14 February 2014 [25]-[26].
[57] Brown, EiC 14 February 2014 [27]-[28].
[58] Brown, EiC 14 February 2014 [37].
[59] Brown, EiC 14 February 2014 [42].
[60] Brown, Supplementary Statement 13 March 2014 [5] and [7].

level. It is significant that the latter requires a mix be achieved both on the site and at the road frontage. We understand Mr Brown to have also accepted policy 9.3(b) as finally drafted by Mr Mead. We find it highly probable that the EAR frontages will be attractive for mid-sized retail and if retail is not to predominate it is necessary there be positive provision for multi-storey development to enable and encourage other activities to establish. As Mr Edmonds and Mr Brown indicated, it may well be appropriate for multiple and single storey buildings to have a different activity status, and that is a matter for the lower order hearing.

[53] Mr Dewe was correct that demand for space cannot be conjured where none exists. However, he possibly overlooked that the E2 Activity Area emerged from first instance and court hearings and is based on the land needs assessment accepted by the court in the Interim Decision. The latter may well be an imprecise subject but the evidence is that Queenstown has strong growth prospects and will require space for activities of the type enabled by policy 9.1 in addition to retail. Also Mr Dewe's concession, fairly made, that providing for two storeys is likely to encourage a mix of uses is significant and counts in favour of policy 9.3(b) in the form preferred by other witnesses. It is possible that activities with an operational requirement for only one storey may emerge but we find they are likely to be outside the generality of cases and amenable to management through the resource consent process. We do not find Mr Dewe's concerns a sufficient reason to forego the benefits that policy 9.3(b) has for implementing objective 9A in particular.

[54] For the foregoing reasons policy 9.3 is confirmed in the form finally presented by Mr Mead except for sub-paragraph (c) which is deleted for the reasons given in the Convenience Retail Activities section above.

Policy 9.5

[55] Policy 9.5 follows:

> **Policy 9.5**
>
> To ensure buildings and site development results in a high level of visual interest when viewed from the EAR through a combination of generous areas of glazing at ground floor, building

modulation and detailing, positioning of main building entrances visible from the street, integration of signage with building design and appropriate landscape treatment.

[56] Policy 9.5 occupied a small amount of hearing time.[61] Ms A Hutton explained that the conferencing planners agreed unrestrained signage may impact adversely on AA-E2 amenity values; that QLDC typically imposes a consent condition on new buildings requiring signage platforms to prevent signs being "tacked on" and consequently a rule expressly allowing assessment of signage would be appropriate; and that policy support for such is required. To this end she recommended that policy 9.5 in the planners' second JWS be amended by inserting the words underlined above.

[57] Mr J Brown supported rules to achieve the design outcomes promoted by policy 9.5 including restrictions on signage and did not oppose Ms Hutton's recommended amendment.[62] Mr J Edmonds expressly agreed with it.[63]

Discussion and findings

[58] The amendment will better give effect to that part of objective 9B concerned with achieving "A high quality urban form" by enhancing policy direction on a specific matter and providing a "parent" for related rule(s). It is approved for inclusion.

Policy 9.6

[59] As noted, policy 9.6 is particularly concerned with built form along the EAR. The policy follows:

Policy 9.6

To ensure roadside interfaces become attractive spaces, by requiring:

(a) Buildings be developed close to road boundaries so activities within the ground floor of buildings are clearly visible to passing pedestrians and motorists;

(b) Buildings to provide an appropriate sense of scale to the streetscape through façade and roof design. Single level buildings should emphasise building heights at the street frontage through incorporation of vertical modulation into the design. Multi-level

[61] Although it was not included amongst Mr Mead's final 11 March 2014 list of amended policies.
[62] Brown, EiC 14 February 2014 [39(c)].
[63] Edmonds, EiC 18 February 2014 [7.7].

buildings should visibly distinguish upper floors from ground floors through articulating facades and the use of glazing, materials and finishes.

(c) Buildings to occupy at least half the road frontage of sites with car parking and loading areas located at the side or rear of each site so that they do not visually dominate road frontages. Storage of goods and refuse is to occur to the rear and be appropriately screened from view.

(d) Controlling the design and layout of drive through facilities.

[60] Mr Mead's proposed sub-paragraph (b) emerged during the course of the hearing as a re-worded/re-numbered version of the revised planners' JWS policy 9.6(c), which read:

(c) Building design to provide an appropriate sense of scale in the streetscape and visibly express a two or more storey format through the use of façade and roof modulations, material and finishes and variations in solid to void (windows, openings) ratios.

[61] Notable differences are deletion of the provision for two or more storeys and, by the inclusion of separate single and multi-level provisions, an expectation that single storey buildings are to be accommodated.

[62] Mr Mead explained that policy 9.6(b) above provides for a single storey building to have "... a similar sense of presence and scale as if it was a two level building ...".[64] He deposed that an acceptable outcome would be to have a single storey mix of activities along both sides of the EAR subject to "some sort of presence at the street frontage which while not being two storeys [would create] a sense of scale".[65] By way of illustrating what he meant by sense of scale he cited a retail showroom with a void or atrium behind a glass façade 6-8 metres high but with only one level of building. A building would not necessarily have to be up to 8 metres or two levels because 6-7 metres may suffice.[66] While cognisant of the danger of a "series of low, single ... three metre high buildings ... which [do] not create [a] quality environment",[67] Mr Mead was troubled by the words "express a two or more storey format" in the revised planners'

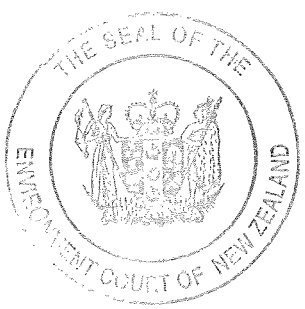
[64] Transcript 432.
[65] Transcript 436.
[66] Transcript 437.
[67] Transcript 438.

JWS policy 9.6(c). He searched for an alternative way to express his preceding evidence culminating in the policy 9.6(b) wording above.

[63] Responding to questions put in cross examination Mr Dewe indicated that he would be comfortable amending policy 9.6(c) in the revised planners' JWS by deleting the words "... visibly express a two or more storey format ...".[68]

[64] Mr Edmonds accepted substitution of "roof design" for "roof modulation" in the revised planners' JWS.[69] More significantly he did not accept that the words in 9.6(b) "to provide an appropriate sense of scale to the streetscape" were by themselves an appropriate substitute for the words "physically express a two or more storey format" in the revised planners' JWS.[70] In support of this opinion Mr Edmonds noted that the court's Interim Decision discusses creating an high quality urban space or streetscape along the EAR (at paragraph 509); ensuring both sides of the corridor "talk to each other"; and that there should be [a suitable] scale and proportion of buildings relative to the width of the EAR as emerged from earlier urban design conferencing. In reply to questions from the court,[71] he identified the importance of "putting scale along the EAR" and achieving a building scale of two storeys (be it in a conventional built form or an atrium of similar height possibly with a mezzanine floor). As previously noted, he considered that a resource consent should be required for buildings of reduced scale. Consistent with these opinions, he did not support the deletion of the words ".....and visibly express a two or more storey format ..." from the revised planners' JWS policy.[72]

[65] Finally, neither Mr Brown nor Mr Dewe supported Mr Mead's policy 9.6(d) as it suggests "drive through" facilities are anticipated in AA-E2.[73] Mr Brown was particularly concerned that the policy may facilitate "a boulevard of burger joints" (and other forms of fast food outlet). Following receipt of Mr Mead's final draft of policies on 11 March 2014, Foodstuffs filed a memorandum alerting the court to the possibility that particularly policy 9.6(d), together with policy 9.13(a)(ii), was not the subject of



[68] Transcript 461, noting policy 9.6(c) is re-numbered as policy 9.6(b) above.
[69] Transcript 473.
[70] Transcript 473.
[71] Transcript 490.
[72] Transcript 491. Ordered and labelled policy 9.6(c) in the 25 February 2014 version.
[73] Brown, Supplementary Statement 13 March 2014 [6].

evidence and formally not agreeing with or supporting their inclusion. Evidently before filing its memorandum Foodstuffs had first made inquiry with QLDC as to whether the wording for this policy was proposed during the course of the hearing, but it did not receive any assistance.

Discussion and findings

[66] Policy 9.6 is concerned in broad terms with achieving an attractive interface between built development and the EAR that implements objective 9B for a high quality urban form, and in particular its built form. We have determined that the policy and objective will generally be achieved better by multi-level development or similar than single storey as both Mr Mead and Edmonds recognised. That is not to say that all development must be two storeys or greater. As Mr Mead deposed, some enabled activities may be amendable to accommodation in buildings that demonstrate an appropriate sense of scale without literally being two storeys. Although it is a different matter, two storeys will also support the mixed use outcome sought by policy 9.3(b). As with some other subjects, we find it would be better if policy 9.6(b) were to also describe clearly the built form outcome to be avoided, which, Mr Mead acknowledged would be consistent with the scheme of the plan change.[74]

[67] For the preceding reasons we have determined that 9.6(b) needs to signal the desired policy direction in more explicit ways and find it should be amended to read:

> (b) Buildings to provide an appropriate sense of scale to the streetscape through façade and roof design. Unless the requirements of an activity otherwise entail this will be achieved by multi-level buildings which visibly distinguish upper floors from ground floors through articulating facades and the use of glazing, materials and finishes. Any single level buildings should emphasise building heights at the street frontage through incorporation of vertical modulation into the design such that there is an impression of two levels. Series of low, single level buildings are to be avoided.

[68] Leave is granted the parties to submit an amended wording that respects and gives effects to the court's wording should they wish. Any such amendment is to be done in consultation led by the QLDC and submitted as a joint memorandum.

[74] Transcript 438-439.

[69] Returning to Mr Mead's policy 9.6(d) we would have anticipated that QLDC having received Foodstuffs' memorandum would write to reassure the court and the parties that the policies supported by Mr Mead were the subject of evidence. It did not do so. We cannot find reference to these amendments in the transcript and without direction from QLDC as to our jurisdiction to approve policy 9.6(d) we decline to approve the amendments recommended by Mr Mead. We do so even though the policy may have merit when applied to drive through activities other than those associated with prepared food and beverage.

[70] We summarise the decision on policy 9.6 as follows:

(a) policy 9.6(a) and (c) are approved;
(b) leave is granted to the parties to comment by **11 May 2014**, suggesting amendments, on the court's wording of policy 9.6(b) on the basis indicated;
(c) policy 9.6(d) is not approved.

Policy 9.12

[71] Policy 9.12 is concerned with managing the effects of development and activities at the interface of Activity Areas C2 and E2, with the QLDC finally supporting the following wording:[75]

> 9.12 At the interface of Activity Areas C2 and E2.
>
> (a) require subdivision and development to provide a laneway between the Activity Areas to enable physical separation of development while providing shared access;
>
> (b) locate loading areas, ventilation ducts, outdoor storage areas and other activities generating noise and/or odour where effects from these are minimised in relation to residential activities in AA-C2;
>
> (c) require building and roof designs to minimise visual effects including glare when viewed from within AA-C2. Exhaust and intake ducts and other mechanical and electrical equipment should be integrated into the overall roofscape and building designs.

[75] Mead via QLDC counsel email dated 11 March 2014.

[72] It was common ground between the planners that AA-E2's interface with AA-E1 is less problematic (than that with C2) as activities in the former will typically be of a lower amenity and therefore less likely to be adversely affected by E2 activities.[76] Both Mr Mead and Ms Hutton were concerned with the need for effective management at the interface of Activity Areas E2 and C2, with particular reference to the potential for activities in E2 to adversely affect residential amenity in C2. They noted, in particular, weekend and evening noise, the operation of air discharge vents and ventilation systems, the outdoor storage of goods and refuse, building design and roofscape views from neighbouring residences.[77] Mr Mead deposed, and we accept, that the policy in the planners' second JWS which requires a laneway between the two activity areas will help manage some but not all of the potential effects identified in the evidence.[78] In response to questions from the court, Ms Hutton did not consider shading relevant but acknowledged that glare may potentially be so and we note its inclusion in QLDC's finally preferred wording.[79] Mr Edmonds agreed with the revisions to policy 9.12 proposed by Mr Mead and Ms Hutton.[80] Mr J Brown did likewise, noting that they would operate in conjunction with AA-C2 policy 8.9(b) in the planners' second JWS[81] also concerned with the management of AA-E2/C2 interface effects.[82]

Discussion and findings

[73] The amendments to policy 9.12 proposed by Mr Mead and Ms Hutton would add limbs (b) and (c) to the corresponding planners' second JWS policy, which provided solely for a laneway between the two activity areas. We find the additional policy provisions, including the incorporation of glare, to be consistent with the purpose of the Act (s 5), ss 7(c) and (f) and a number of higher order PC19 provisions (objectives 1(b), 3(a), 5 and 8) which the policy will help implement. The amendments were not contentious and are endorsed for the reasons given.

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[76] For example, Edmonds' Third Supplementary Statement, 14 February 2014 [5.1] and Hutton Fifth Statement, 14 February 2014 [20].
[77] Mead Fourth Supplementary Statement, 14 February 2014 [92]ff and Hutton Fifth Statement, 14 February 2014 [20]ff.
[78] Mead op cit [100].
[79] Transcript 468.
[80] Edmonds Third Supplementary Statement, 14 February 2014 [5.3].
[81] J Brown EiC 14 February 2014 [41].
[82] J Brown EiC14 February 2014 [41].

Policy 9.13

[74] Policy 9.13 concerns outline development plan requirements for AA-E2. For reasons given below, we reserve our decision on the objectives and policies pertaining to outline development plans.

TOPIC: Structure Plan

[75] By consent, the contents of the Structure Plan is approved, a copy of which is attached to this decision at Annexure B.

TOPIC: Foodstuffs (South Island) Ltd's standing to pursue relief for large format retail activities under its own appeal or SPL's appeal

Introduction

[76] Following the August 2013 procedural hearing the court, having reviewed generally the submissions and further submissions filed on the plan change, became concerned that it did not appear to have a record of Foodstuffs' submission seeking to enable large format retail activities.

[77] At the court's direction, QLDC filed a memorandum[83] in which it argued that Foodstuffs' submission and further submission on the plan change did not seek to enable (or extend) retail activities – specifically large format retail within the plan change area. Counsel advised her client did not contest the court's jurisdiction to determine Foodstuffs' appeal because Foodstuffs is a party to SPL's appeal which does (validly) put into issue retailing activities on its land (including land in which Foodstuffs has an interest).

[78] In Foodstuffs' view it does have standing to pursue the relief it is seeking under its notice of appeal.[84] SPL agreed with Foodstuffs' position.[85]

[79] The parties subsequently filed a joint memorandum submitting the court has jurisdiction to consider large format retailing as this activity falls within the category of

[83] Dated 7 November 2013.
[84] Foodstuffs' submissions dated 22 October 2013.
[85] SPL memorandum dated 5 November 2013.

"other retail", which is a discretionary activity in AA-E2.[86] On that basis the parties sought the jurisdictional hearing be vacated. Foodstuffs did not withdraw or abandon the relief under its notice of appeal and the court declined to vacate the hearing.[87]

[80] Foodstuffs' standing to pursue relief enabling large format retail activities on land over which it has an interest has three planks, summarised as follows:

(a) it has standing to pursue relief under its own appeal;
(b) it has standing to pursue relief as a party to SPL's appeal (pursuant to s 274); or
(c) the relief pursued falls within the category of "other retail" in PC19(DV).

(A) Foodstuffs' standing to pursue relief under its own appeal

[81] Foodstuffs argued that it has standing to pursue its relief under its notice of appeal. Referring to the High Court decisions of *Palmerston North City Council v Motor Machinists Ltd*,[88] *Clearwater Resort Ltd v Christchurch City Council*,[89] *Horticulture New Zealand v Manawatu-Wanganui Regional Council*[90] and *Option 5 Inc v Marlborough District Council*,[91] Foodstuffs submits the test for jurisdiction (which we generally accept) requires:

(a) the appellant to have made a submission that is on the plan change;
(b) the appeal must relate to one of the four matters referred to in clause 14(1) of the First Schedule; and
(c) the appellant must have referred to one of the clause 14(1) matters in their submission.

[82] Foodstuffs referred to two other High Court decisions as authority for its proposition that a broad approach should be adopted when considering matters addressed in the submissions/further submissions on the plan change. In particular:

[86] Joint memorandum dated 6 December 2013.
[87] Minute dated 10 December 2013.
[88] [2013] NZHC 1290.
[89] Christchurch AP 34/02 dated 14 March 2003.
[90] [2013] NZHC 2492.
[91] CIV-2009-406-144 dated 28 September 2009.

(a) *Re an application by Vivid Holdings Ltd* at [19] "in order to start to establish jurisdiction a submitter must raise a relevant resource management issue in its submission in a general way";

(b) *Option 5 Inc v Marlborough District Council* at [15] "as long as it is clear the submitter has broadly referred to the provision or matter in issue this should be sufficient to give the Court jurisdiction to consider the appeal".

[83] Addressing the notice of appeal, and referring to the High Court decision of *Power v Whakatane District Council and Others*[92] Foodstuffs urged care be taken not to subvert the legislature's objective in limiting appeal rights to those fairly raised by an appeal by taking an unduly narrow approach [we presume] in relation to its submission and further submissions on the plan change.

Foodstuffs' submission/further submission/notice of appeal

[84] Foodstuffs' submission on the plan change (dated 3 August 2007) explains that it had recently submitted a resource consent application for a supermarket. The location of the supermarket is outside PC19 and in an area that was the subject of a privately initiated plan change request. This second plan change was lodged by RPL and it sought to enable large format retail activities within the Remarkables Park Development Area (paragraph 1.6). Foodstuffs was concerned PC19 had the potential to inhibit large format retail within the Remarkables Park Development Area (paragraph 1.3). It asked that PC19 be assessed in conjunction with RPL's plan change, and to ensure that PC19 did not promote further retailing over and above the "social and economic needs of the community, and over and above the proposed large format retailing anticipated for Remarkables Park" (paragraphs 1.7 and 3.1).

[85] Foodstuffs lodged further submissions responding to submissions made by RPL, SPL and Five Mile Holdings Ltd.[93] Foodstuffs opposed Five Mile Holdings Ltd's submissions giving the following reasons:

- it will adversely affect the vibrancy and amenity of Remarkables Park;
- it would result in the dispersal of retailing activity, which is inefficient and contrary to the sustainable management purpose of the Act;

[92] High Court, CIV-2008-470-456, 30 October 2009 at [30].
[93] Further submissions are all dated 31 October 2007.

- it is not an appropriate response to the retailing demands of Queenstown and the wider Wakatipu Basin; and
- there is no provision for large format retail. In any case, large format retail is best located at Remarkables Park near the established commercial centre.

[86] Foodstuffs supported in full the outcome sought by RPL and SPL. In particular, SPL's submission on PC19 concerns land in which Foodstuffs has an interest. SPL opposed the plan change, seeking it be withdrawn. Alternatively, SPL sought the plan change be revised with provision to be made for business or business and/or industrial rear lot development on its land consistent with a realigned EAR.[94]

[87] SPL's relief is supported by a thoughtful, albeit a highly critical analysis of the notified plan change. This analysis addresses, amongst other matters, the proposed town centre within PC19 concluding that the Remarkables Park Zone could accommodate future shortfall in land for town centre activities; it makes a prediction of a significant oversupply of retail land and finally, it expresses a concern that given the proximity of PC19 to Remarkables Park it is unlikely that the latter's existing large retail centre will function efficiently in the medium to long term.[95] Addressing specifically large format retail activities SPL records its surprise that there is no provision for this in PC19, given a 2004 s 293 application for LFR principally on SPL's land.[96] Alternatively, SPL submits a superior location for large format retail would be the Remarkables Park Zone.[97] It states this matter will be further addressed in the submission. While the balance of the submission does not expressly refer to large format retail, the relief does seek that the plan change is revised with provision made (as previously stated) for business and industrial rear lot development consistent with a realigned EAR.[98]

[88] In its notice of appeal, Foodstuffs seeks the following relief:

(a) That the structure plan is amended to:

[94] SPL submission dated 3 August 2007 at paragraphs 2, 4.1 and 4.2.
[95] SPL submission dated 3 August 2007 at paragraph 3.3.1.
[96] The submission does not identify the Environment Court proceedings where this application arises and from the bar we were told that the proceedings are those involving Gardez Investments Ltd and Queenstown Lakes District Council.
[97] SPL submission dated 3 August 2007 at paragraph 3.3.2.
[98] SPL submission dated 3 August 2007 at paragraphs 2, 4.1 and 4.2.

i. include the Subject Site wholly within an activity area that enables large format retail; and

ii. locate the EAR alignment further to the west at the location shown in Appendix 7 of the Notices of Requirement.

(b) That the plan change provisions are amended to enable large format retail within the Subject Site, specifically that:

i. Objective 10, and related policies are amended to recognise the appropriateness of large format retail in providing higher value use of the Subject Site;

ii. Rule 12.20.3.7 Table 1 - is amended so that "other retail" with a gross floor area more than 500m² per retail outlet is a controlled or limited discretionary activity within the Subject Site;

iii. the Subject Site is exempt from the control over continuous building length - Rule 12.20.5.2(iii);

iv. the Subject Site is exempt from the control over nature and scale of activities Rule 12.20.5.2(viii)(c); and

v. Section 14.2, Rule 14.2.4.1 - delete Clarification of Table 1 B. The carparking standards for the use intended should be a minimum requirement not a maximum requirement.

(c) Delete the requirement for an outline development plan process for Activity Area E.

(d) Any such alternative or consequential relief to the Plan Change provisions considered necessary or appropriate to address the issues and concerns raised in this appeal.

[89] During the course of the February 2014 hearing, Foodstuffs advised that it no longer pursued separate policy recognition for large format retail as a distinct category of retail, nor would it pursue a policy of encouraging large format retail activity in excess of $1000m^2$.[99] Instead Foodstuffs would seek approval for large format retail activity in excess of $1000m^2$ as a discretionary activity.[100]

Discussion and findings

[90] Clause 6 of the First Schedule provides that any person may, in the prescribed form, make a submission to the relevant local authority on a proposed policy statement or plan that is publicly notified under clause 5. PC19 (the notified version) alters the

[99] When referring to "large format retail" Foodstuffs means a store with a gross floor area in excess of $1000m^2$.
[100] Transcript at 551-552.

status quo by rezoning Rural General land to enable urban development within the structure plan area. The plan change rezoned Rural General land owned by SPL (and others) to Activity Area C (AA-C). The objective for AA-C is to create a village centre (objective 8). AA-C is enabling of commercial activities of all scale, including small to medium format retail. The notified plan change contains a policy encouraging the development of a mainstreet village environment and [we interpolate] encouraging the design of any large format retail to achieve this (policy 8.5). The design facade of large format retail is required to mitigate its visual effects (policy 8.8). In apparent tension with the objective and policies for AA-C, the rules classify commercial activities in AA-C with a gross floor area greater than 500m^2 per retail outlet as non-complying activities (clause 12.19.3.6 Table 1).

[91] Following the approach in *Clearwater Resort Ltd v Christchurch City Council,* and paying particular regard to the extent that the plan change alters the status quo, we have no hesitation in finding Foodstuffs' submission was on the plan change. More troubling is whether the relief sought by Foodstuffs in its submission/further submissions was enabling of large format retail within PC19.

[92] While noting Foodstuffs' own submission to be equivocal,[101] nevertheless Ms Crawford submits that:

(a) by no longer seeking to reject PC19 in its entirety; and
(b) seeking to rezone rural land by providing for retail, including large format retail; and
(c) by no longer seeking retailing in the Remarkables Park Zone

- Foodstuffs' notice of appeal is consistent with its original submission that "further retailing over and above the social and economic needs of the community not be allowed".[102]

[93] We do not accept Ms Crawford's submission. When comparing the notice of appeal with the submission, we find Foodstuffs' relief on appeal to be inconsistent with

[101] Transcript at 531, 544 and 600.
[102] Foodstuffs' submissions dated 22 October 2013 at [5(h)].

the substance of its submission. Distinguishing between retail and large format retail activities in its submission, Foodstuffs urged the Council to ensure PC19 "did not promote further retailing over and above the social and economic needs of the community, and [our emphasis] over and above the proposed large format retailing anticipated for Remarkables Park" (paragraphs 1.7 and 3.1). Foodstuffs' submission on large format retailing concerned the extent and specifically the location of this activity; Foodstuffs opposed large format retail activities within PC19.

[94] As a consequence of this finding we have looked to SPL and RPL to see whether a submission made by them would establish Foodstuffs' standing to pursue relief on appeal.

[95] As noted above, in its further submission Foodstuffs supported in full submissions lodged by SPL and RPL. SPL/RPL submissions distinguish between town centre activities and large format retail activities. The submitters assert PC19(DV) makes no provision for large format retail. This is not entirely correct as the policies anticipate this activity in AA-C – including on SPL's land, albeit the rules inconsistently classify retail exceeding 500m^2 a non-complying activity. (We note the activity status is different again under the s 32 Report where it is a controlled activity).

[96] Paragraph 3.3.2 of the submissions filed by SPL and RPL respectively, is generally supportive of large format retail within PC19 or alternatively within the Remarkables Park Zone. However, when the whole of the submission is considered, we find that it is a limited form of large format retail that is proposed for PC19. The relief in the submission substance was to enable business and industrial activities on its land. "Business" is not defined under the operative District Plan or the plan change. In their submissions, SPL and RPL had recourse to the s 32 Report which describes the purpose of business land which includes a limited form of retail activity, namely retailing of larger and bulky goods. We accept Mr Young's argument that the relief seeking "business" activities includes the retailing of larger and bulky goods.[103] This form of retail activity was specifically proposed for SPL's land, and is complementary to its proposed industrial rear lot development. Further to this we find the relief seeking "business" activities qualifies its general submission on "large format retail". In arriving

[103] Transcript at 567.

at this decision we have been particularly mindful of the caution given by Allan J in *Power v Whakatane District Council and Others* not to take an unduly narrow approach when considering the submissions.

[97] We find the subject matter of Foodstuffs' appeal and the subject matter of SPL's submission are different. Foodstuffs' appeal extends the purpose of the business land in the SPL submission to include the general enablement of large format retail over SPL land in which it has an interest and in furtherance of this Foostuffs seeks to include an objective, policies, rules and methods.

Outcome

[98] We conclude the relief sought on appeal was not reasonably or fairly raised in the submissions of Foodstuffs, SPL or RPL. It follows, Foodstuffs does not have standing to pursue the relief set out at paragraph [8(a)(i) and 8(b)] of its appeal pertaining to large format retail activities.

(B) Section 274 party to SPL's appeal

[99] In the alternative Foodstuffs argues that the court has jurisdiction to consider the relief it is pursuing by way of SPL's appeal, to which it is a party.

[100] When responding to Five Mile Holdings Ltd's submission (now QCL), SPL lodged a further submission opposing the liberalisation of commercial activities within Frankton Flats Special Zone (B). SPL submitted if the QLDC formed the view that some commercial/retail activity is needed within the plan change area then these activities are most appropriately located on SPL's land or on land immediately to its south.[104]

[101] SPL further submission also supported Foodstuffs' agreeing with it that the dispersal of retailing was undesirable and inefficient, and that large format retail should be enabled at the Remarkables Park Zone.

[102] We find SPL's further submissions responding to Five Mile Holdings and Foodstuffs to be inconsistent.

[104] Further submission dated 31 October 2007, 6 and 13.

[103] That aside, insofar as SPL's notice of appeal does address matters that were raised in its submission and further submission, Foodstuffs submits the court has jurisdiction to approve the relief it now pursues.

[104] Under its notice of appeal SPL, amongst many other matters, opposed activity areas E1 and E2 and sought a specific activity area, AA-E3, on its land. The proposed AA-E3 was to enable business and large format retail activities (paragraph 7.5(a)).[105] SPL sought a more flexible and permissive approach for business activities, particularly large format retailing (paragraph 7.5(e)). If AA-E3 was not approved, then SPL sought AA-E1 and E2 be amended to enable a range of business, large format retail and residential activities including the general and specific relief proposed for AA-E3 (paragraph 7.5(h)). SPL also desired a planning framework that separately provided for AA-D; expressly enabled business, large format retail and residential activities in the proposed AA-E3 and encouraged diversity of industrial uses in AA-E1 and E2 (paragraph 7.6(c)).

[105] SPL's general relief included the following:

> **Paragraph 8.1(v)**
> Refine the existing objectives, policies and rules for proposed Activity Areas E1 and E2 to introduce proposed Activity Area E3 which enables business, large format retailing and residential activities (referred to at 7.5 and 7.6 above) OR include a separate suite of objectives, policies and rules for proposed Activity Area E3 which enable business, large format retailing and residential activities.

Discussion and findings

[106] Foodstuffs is a s 274 party to SPL's appeal and, as such, it is not entitled to enlarge the scope of SPL's appeal.

[107] We find SPL's submission/further submission to be on the plan change. The submission (to the extent discussed) and further submission sought to include greater provision for retail activity, including large format retail, on SPL's land. SPL's appeal concerns the provisioning of large format retail activity.

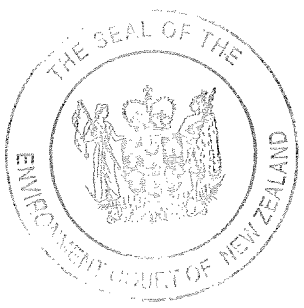
[105] The notice of appeal also proposed residential activities, but for reasons we set out it did so without having sought this in submissions and further submissions on the plan change.

[108] In the Interim Decision the court, giving reasons, concluded that the proposed AA-E3 sub-zone was not the most appropriate way to achieve the purpose of the Act (commencing paragraph [528]). The court confirmed the AA-E2 sub-zone and listed activities it found to be appropriate for this sub-zone (at paragraph [508]). The list includes residential, convenience retail and "mid-sized retail suitably defined in the range 500-1000m^2". The court does not specifically address in the Interim Decision the status of activities that it considered to be appropriate. The list at [508] of the Interim Decision is not exhaustive. The court made findings on the evidence presented and if an activity, for example educational facilities, were not in dispute it has not commented upon the same.

[109] In addition to listing appropriate activities for AA-E2, at paragraph [509] the court approved a limitation of retail to activities between 500m^2 and 1000m^2 gross floor area, finding larger retail units are unlikely to give rise to the high quality streetscape as envisaged by the Hearing Commissioners, where built form is an important contributor.

[110] Referring to the evidence of Mr Mead and Mr Heath, Mr Young (on behalf of SPL) submitted that it is generally accepted that LFR is any retail activity that covers an area with a gross floor area of 500m^2 or more.[106] The Interim Decision enabled LFR in the form of showroom retail and "mid-sized retail" ranging between 500m^2-1000m^2 gfa. Mr Young submitted the decision enabling LFR within AA-E2, including "mid-sized retail" is final and therefore the court is *functus officio.*[107] We agree.

[111] Foodstuffs did not engage either with SPL's appeal or the Interim Decision when arguing jurisdiction remains for the court to approve Large Format Retail in excess of 1000m^2 as a discretionary activity. Its failure to do so may reflect the common position taken by the parties that the status of LFR either as a discretionary or non-complying activity is a matter for the lower order hearing as it comes within PC19(DV's) "other retail" category.[108]



[106] SPL submissions dated 14 November 2013 at [44].
[107] SPL submissions dated 14 November 2013 at [42]-[48] and Transcript at 561-562.
[108] Joint memorandum of counsel dated 6 December 2013.

[112] While the Interim Decision does not address the status of activities within AA-E2, it does make findings relevant to the plan change rules, methods and standards. In particular, the Environment Court found that mid-size retail suitably defined in the range between 500m^2-1000m^2 gfa is an appropriate activity in AA-E2[109] and [we emphasise] the court separately approved the limitation of retail to activities between 500m^2 and 1000m^2 gfa.[110] The court did so having considered a substantial body of evidence concerning large format retail activities, giving reasons for its decision.

Outcome

[113] In the Interim Decision the court approved residential, mid-sized retail (limiting the size of large format retail) and convenience retail activities within AA-E2. SPL's notice of appeal sought relief for these activities. The court has subsequently determined that relief for residential activities is beyond the court's jurisdiction, in the absence of residential activities the court has determined the SPL appeal on convenience retail should be declined.

[114] Subject to an appeal to a higher court reviving jurisdiction, the Environment Court is *functus officio* on its decision at paragraph [508] to approve mid-sized retail activities and at paragraph [509] limiting the size of retail activities to 500m^2 and 1000m^2 gfa within AA-E2.

(C) Other retail

[115] Foodstuffs' appeal aside, counsel do not point to any appeal seeking to amend PC19(DV's) "other retail" activity so as to provide for large format retail exceeding 1000m^2 and as a consequence the court makes no finding as to its jurisdiction under the balance of the appeals. If the parties wish to pursue this matter, they will need to address the findings of the court in the Interim Decision.

TOPIC: AA-A and the open space provisions

[116] In its first Interim Decision the court found that it was important to clarify whether AA-A was to remain in private ownership as it had no evidence on what the implications might be for the provision of open space in other parts of the structure plan

[109] Interim Decision at [508].
[110] Interim Decision at [509].

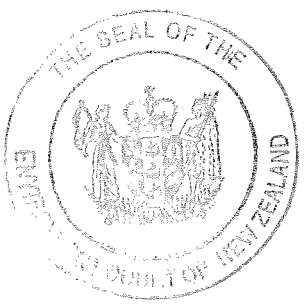
area if AA-A were to vest as reserve.[111] In its second procedural decision the court reserved its decision on whether there is jurisdiction under PC19(DV) and the notices of appeal to amend (now) objective 6 by inserting "private" before open space or to achieve the same outcome through s 293.[112]

[117] At the resumed hearing in February 2014 Mr Gordon for QCL submitted that whether AA-A remains in private ownership or vests in the District Council will have no bearing on its inevitable contribution to the overall amenity of the FF(B) zone. In his submission there is sufficient policy support to ensure that through the ODP approval process a satisfactory open space outcome is achieved across the zone, with any extant gaps now closed by amendments proposed by the planners through caucusing.[113]

[118] The planners' JWS records that the tenure of AA-A is ultimately a matter to be negotiated through the resource consent process provided for by (now) policy 6.4, with one possible outcome being that AA-A vests in the QLDC as reserve but at a value that reflects its limited recreational role. Alternatively, the land may remain in private ownership with the walkway/cycleway component recognised as a credit for reserve purposes under Council's Local Government Act development contributions policy. In this regard we note the planners' advice that "the principal purpose of AA-A is to mitigate the landscape and visual effects of development in the PC19 area, not to provide recreational space".[114]

[119] The latter is consistent with AA-A objective 6 and policy 6.1 as proposed to be amended by the planners in their second JWS, namely:

> **Objective 6**
>
> An open landscaped area adjacent to the State Highway that helps to maintain views of the surrounding outstanding natural landscapes and provides for public access and physical separation of buildings from the State Highway.



[111] [2013] NZEnvC 14 at [324].
[112] [2013] NZEnvC 224 at [116].
[113] Gordon, opening submissions [4]-[15].
[114] Second Planners' JWS 23 January 2014, 38.

Policies

6.1 To mitigate the adverse landscape and visual amenity effects of development by providing an attractive, comprehensively designed open landscaped area between State Highway 6 and Activity Areas C1, C2 and E2 that is free of buildings.

[120] We find that the objective and policy in conjunction with others identified by Mr Edmonds[115] provides sufficient context for both determining the ultimate tenure of AA-A and guiding the implementation of related aspects of QLDC's development contributions regime.

[121] We come now to the second aspect of this subject that has troubled the court through these proceedings and which underpinned the concern expressed in the first Interim Decision. Namely, if AA-A were to vest as reserve, might it constitute such a large part of the land owner's reserve contribution liability that insufficient reserves would be provided in other parts of the zone? The court was mindful in this respect of the size of AA-A (2.31 ha) and the QLDC's evidence that its development contributions policy is likely to yield reserves in the order of 4.9 ha, or some equivalent mix of land and money.[116] Finally, we were assisted on this matter by Mr Edmonds who, after initially expressing some uncertainty,[117] assured the court that Council's development contributions policy operates independently of the PC19(DV) zone standard[118] that requires:

vi **Minimum permeable surface**

The minimum area of landscaped permeable surface shall be:

a) 10% of the net site area in Activity areas C1, C2, D and E1 and E2 to be provided in a manner which enables the communal shared use of the space by those working in and visiting various sites in the proximity ....[119]

[122] Mr Edmonds' evidence was that this important zone standard works together with the rules for building coverage and outdoor living space for residential units in order to implement the open space objective and policies in PC19. The court heard evidence that this zone standard has a wider reach than open space policies, and the

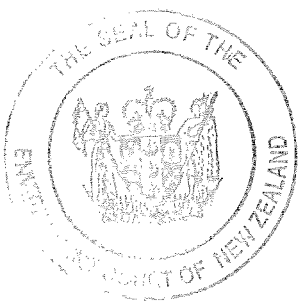
[115] Edmonds Fourth Supplementary Statement 21 February 2014, Appendix 2.
[116] Wilson, EiC at [5.2] and Appendix C.
[117] Transcript at 326.
[118] Transcript at 327-328.
[119] PC19(DV) rule 12.20.5.2(vi).

same standard gives effect to the stormwater policies. Secondly, the rules and policies operate independently from the QLDC's reserves contribution policy developed under the Local Government Act.[120] Finally, this plan change requires resource consent for a group of activities [an ODP consent] to be granted before any activity occurs in activity areas C1, C2 and E2 (see rule 12.20.3.6 for Prohibited Activities). While the court has reserved again its decision on the objectives and policies pertaining to the use of the outline development plan, it is of the view that the provision of open space (whether public or private communal open space or outdoor living space associated with residential units) is an activity about which rules may be made, including the requirement to obtain resource consent.

[123] With Mr Edmonds' assurance in mind, the court is now satisfied that the development contributions and PC19 policies identified by Mr Edmonds, the ODP consent process and the minimum permeable surface zone standard as expressed in the Decisions Version[121] are collectively capable of delivering a satisfactory open space outcome of the type illustrated in a comparable development by Mr Barratt-Boyes.[122] The court is assisted materially by the words in the zone standard "... which enables the communal shared use of space". They indicate, firstly, that the 10% area is to be collocated and, secondly, that, in addition to serving by implication a stormwater management purpose (permeable surface), the land is to be used communally as open space.

[124] We heard no submissions or evidence on behalf of the QLDC or any other party which detracted from QCL's case on these matters, and which would cause us to reach different conclusions.

[125] For the reasons set out above the court endorses the AA-A objective and policies in the form set out in the planners' second JWS.



[120] Transcript at 326-336.
[121] If pursued the merits of the amended version of the minimum permeable surface zone standard contained in the Hutton/Ferguson version of PC19 and the jurisdiction for such are matters for the hearing of lower order provisions.
[122] Barratt-Boyes Third Supplementary Statement dated 18 February 2014 at [1.8ff].

TOPIC: Outline Development Plan Provisions

Introduction

[126] This part concerns an issue raised by the court as to whether a land use consent may be granted for an Outline Development Plan prepared in accordance with PC19.

[127] The issue was argued by the parties at the hearing in Queenstown on 24-27 February 2014, with Mr R Bartlett appearing as Amicus Curiae.

The provisions for outline development plans in PC19(DV)

[128] The operative Queenstown Lakes District Plan defines "Outline Development Plan" as meaning:

> ... a plan within a zone or over an area of land or a site which delineates the performance standards and/or activities in the identified areas of the zone, or on the site or area of land.

[129] PC19(DV) contains an objective, policy and rules concerning the use of Outline Development Plans within Activity Areas C1, C2 and E2.[123] While the parties propose amendments to the higher order provisions of PC19(DV), to provide a necessary level of context we set out the relevant provisions from P19(DV) next.

[130] Objective 2 is:

> To enable the creation of a sustainable zone utilising a Structure Plan and an Outline Development Plan process to ensure high quality and comprehensive development.

[131] As policy 2.1 provides, development in Activity Areas C1, C2 and E2 is to be undertaken in accordance with an Outline Development Plan (**ODP**):

> **Policy 2.1**
> To ensure that development is undertaken in accordance with a Structure Plan and Outline Development Plans in Activity Areas C1, C2, and E2, so that a wide range of urban activities can be accommodated within the Zone while ensuring that incompatible uses are located so that they can function without causing reverse sensitivity issues.

[123] All references are to PC19's decision version.

[132] The purpose of the ODP is expanded upon in a section titled the Explanation and Reasons for Adoption, which states that when considering ODPs it is important care is taken to ensure adjacent activities can co-exist while avoiding reverse sensitivity effects.

[133] A series of rules give effect to the objective and policy. Commencing with the rule for prohibited activities, rule 12.20.3.6 provides that where an ODP is required it shall be prohibited to undertake any activity until such time as an ODP has been approved. An ODP is approved by way of resource consent (rule 12.20.3.3(iii)). Rule 12.20.3.3(iii) states that an ODP is a requirement for activity areas C1, C2 and E2. While this rule does not identify any activities that would be expressly allowed if resource consent was granted, it does list extensive matters over which the District Council's discretion would be limited. This rule contains an advice note that any approval of an ODP shall not constitute an approval for any controlled, limited discretionary, discretionary or non-complying activity or building which shall require separate resource consent under the relevant rule(s) of this zone.[124]

[134] The following zone standard stipulates, amongst other matters:

> **12.20.5.2 Zone Standard (xvi)**
>
> (a) no resource consent shall be approved or development undertaken in the absence of an approved Outline Development Plan;
>
> (b) no development shall be undertaken in the absence of an Outline Development Plan; and
>
> (c) all development must be in accordance with an approved Outline Development Plan.

[135] Other rules classify activities as being permitted, controlled, limited discretionary or discretionary (rules 12.19.1.1 and 12.20.3.2-4). Each of these rules refer to the requirement for the activity to be in accordance with the plan's site and zone standards and Structure Plan and with any approved ODP for activity areas C1, C2 and E2.

[124] Queenstown Lakes District Plan at J-17.

[136] While the ODP provisions were challenged at the substantive hearing, in the Interim Decision the court found the method to have merit and provided guidance on the wording of the relevant objectives and policies. Responding to these directions, the planners conferenced and proposed amendments to the objectives and policies in their Joint Witness Statements dated 28 November 2013 and 23 January 2014.

Court's directions on vires

[137] Having reviewed the amended provisions in the first JWS (dated November 2013) the court sought advice from the parties whether an ODP that provides for the matters listed in a new policy 3.2 is a land use consent. When responding the parties were directed to consider the rules, methods and assessment matters relevant to ODPs.

[138] The expert witnesses in their second JWS discussed the purpose of the ODP provisions in the context of PC19. We come back to their evidence later.

[139] Having considered the planners' advice and prior to the hearing reconvening on 4 February 2014, the court issued a minute[125] identifying an issue with the vires of the ODP provisions and seeking legal submissions. When the hearing reconvened on 4 February 2014, and notwithstanding their clients' instructions to support the ODP provisions, counsel had yet to formulate their submissions on the provisions' vires.[126] The court adjourned the topic until 24 February 2014 and appointed Mr R Bartlett, Amicus Curiae.

[140] In subsequent minutes the court reiterated to the parties that the vires of the ODP provisions is a matter of statutory interpretation, and interpretation of the District Plan and PC19.[127] The merits of the ODP process were not in issue.[128]

Planners' Second Joint Witness Statement

[141] In their second JWS,[129] the planners advised that "ODPs are a land use consent".[130] ODPs are the main tool by which "mid-level urban structuring elements

[125] Dated 29 January 2014.
[126] Reconvened hearing 4-5 February 2014, Minute dated 11 February 2014.
[127] Minutes dated 30 January and 11 February 2014.
[128] Minutes dated 30 January and 14 February 2014.
[129] Dated 23 January 2014.
[130] Second JWS at 20.

within the relevant activity areas will be put in place".[131] These structuring elements include the minor/secondary road network (being roads not included in the Structure Plan), reserves and open spaces, walkway connections and building platforms. These activities are capable of being consented.[132] ODPs are also to include urban design assessment matters, which "technically" the planners did not regard as being an activity (the term "activity" appears to be defined by the planners as a "physical development that uses resources").[133]

[142] The following general principles are said to apply to ODPs:

(a) ODPs should not set out activity classifications within activity areas;
(b) ODPs should not change the main performance standards for an activity (e.g. height); and
(c) any criteria or assessment matters set out in the ODP must align with and develop the policies and associated outcomes within the plan change itself.

[143] The planners conceived of an approved ODP as a "guiding plan, rather than a fixed blueprint".[134] They noted ODPs can be amended via a variation to the original land use consent, or by way of a new land use consent. In their view persons wanting to develop land are not bound by the ODP criteria as the ODP sits outside the District Plan but "such consents could draw upon the criteria as a guide as to what is appropriate".[135] At some point in time the need for a comprehensive ODP will likely fall away after all the roads, accessways and reserves have been established.[136]

[144] We set out next the sections of the Act relevant to our consideration of the vires of the relevant rules and methods.[137]

Relevant RMA Provisions

[145] As PC19 was publicly notified in July 2007 the applicable statute is the Resource Management Amendment Act 2005. Counsel did not address this statute but instead

[131] Second JWS at 19.
[132] Second JWS at 19-20.
[133] Second JWS at 20.
[134] Second JWS at 21.
[135] Second JWS at 22-23.
[136] Second JWS at 21-22.
[137] The version of the Act that applies, is the version immediately before the enactment of the Resource Management (Simplifying and Streamlining) Amendment Act 2009.

directed their submissions to the Act's most recent amendments. At the court's direction the parties filed a memorandum post-hearing in which they accepted that PC19 is subject to the law as it was prior to the 2009 amendments, but submitted the post 2009 amendments were not material to the submissions given.[138] We have applied (as best we can) their arguments to the correct statutory provisions. In doing so, we note s 87A, which was referred to extensively in submissions, prior to 2009 was numbered s 77B.[139] All other amendments to the RMA subsequent to the notification of the plan change have kept the same section number.

[146] The purpose of district plans is to assist territorial authorities to carry out their functions in order to achieve the purpose of the Act. The contents of District Plans are described in s 75(1). A District Plan must state the objectives for the district; the policies to implement the objectives; and the rules (if any) to implement the policies. A District Plan may also state, amongst other matters, the methods, other than rules, for implementing the policies for the district (s 75(2)(b)).

[147] Sections 76 and 77A address the making of rules in District Plans. Section 76 contains a general provision about rule making:

> (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 rules in a district plan.
>
> (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.
>
> (4) A rule may—
> (a) Apply throughout a district or a part of a district:

[138] Joint memorandum of counsel and Amicus Curiae, dated 20 March 2014 at [2] and [4].
[139] This section applied between 10 August 2005 to 30 September 2009, until substituted as from 1 October 2009, by s 60 Resource Management (Simplifying and Streamlining) Amendment Act 2009.

(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 an activity causing, or likely to cause, adverse effects not covered by the plan.

[148] Pursuant to s 77A, rules may apply to the types of activities identified in s 77B:

77A Power to include rules in plans

(1) A local authority may make rules describing an activity as an activity in section 77B.

(2) When an activity in a plan or proposed plan is described as an activity in section 77B, the requirements, restrictions, permissions, and prohibitions specified for that type of activity apply to that activity in that plan or proposed plan.

(3) The power to specify conditions in a plan or proposed plan is limited to conditions for the matters in section 108 or section 220.

[149] Six types of activities are identified in s 77B being permitted, controlled, restricted discretionary, discretionary, non-complying and prohibited activities. Three types of activity are particularly relevant to the issues at hand and in respect of those activities s 77B states:

Permitted Activities

(1) If an activity is described in this Act, regulations, or a plan or proposed plan as a permitted activity, a resource consent is not required for the activity if it complies with the standards, terms, or conditions, if any, specified in the plan or proposed plan.

Restricted Discretionary Activities

(3) If an activity is described in this Act, regulations, or a plan or proposed plan as a restricted discretionary activity, -

(a) a resource consent is required for the activity; and

(b) the consent authority must specify in the plan or proposed plan matters to which it has restricted its discretion; and

(c) the consent authority's powers to decline a resource consent and to impose conditions are restricted to matters that have been specified under paragraph (b); and

(d) the activity must comply with the standards, terms, or conditions, if any, specified in the plan or proposed plan.

Non-complying Activities

(5) If an activity is described in this Act, regulations, or a plan or proposed plan as a non-complying activity, -

(a) a resource consent is required for the activity; and

(b) the consent authority may grant the resource consent with or without conditions or decline the resource consent.

[150] Resource consent has the meaning set out in s 87, and includes all conditions to which the consent is subject.[140] Section 87 describes five types of resource consent, although only two are applicable. These are:

Section 87

In this Act, the term **resource consent** means any of the following:

(a) a consent to do something that otherwise would contravene section 9 or section 13 (in this Act called a **land use consent**):

(b) a consent to do something that otherwise would contravene section 11 (in this Act called a **subdivision consent**):

...

[151] Finally, s 9(1)(a) states (relevantly) no person may use land in a manner that contravenes a rule in a District Plan or Proposed District Plan unless the activity is expressly allowed by a resource consent. While the term "activities" features in the sections noted above, s 9 talks about the "use of land". Section 9(4) defines "use" in the following way:

In this section, the word **use** in relation to any land means—

(a) Any use, erection, reconstruction, placement, alteration, extension, removal, or demolition of any structure or part of any structure in, on, under, or over the land; or

(b) Any excavation, drilling, tunnelling, or other disturbance of the land; or

(c) Any destruction of, damage to, or disturbance of, the habitats of plants or animals in, on, or under the land; or

(d) Any deposit of any substance in, on, or under the land; or

(da) Any entry on to, or passing across, the surface of water in any lake or river; or

(e) Any other use of land -

and **may use** has a corresponding meaning.

[140] Section 2.

Vires of the provisions

Submissions in support by QLDC and QCL

[152] QLDC says it is artificial to treat an ODP as a mere "plan" which does not authorise any activity. A consent approving an ODP would allow the use of land for a range of activities, including the use of land for activities that are identified in Table 1 as being permitted activities[141] and the infrastructural elements of a development, some of which counsel notes.[142] QLDC's subtle argument turned on whether a consent for an outline development plan may be granted, with counsel arguing that it may provided that the consent authorises permitted activities.[143] The ODP may also include conditions unrelated to permitted activities.[144]

[153] QLDC argues the plan change rules have two features: the obtaining of consent for an ODP is a "requirement" of a permitted activity within the meaning of s 87A(1) and secondly, a permitted activity is to comply with an approved ODP.[145] The "requirement" is specified in the zone standards (clause 12.20.5.2 (xvi)). (NB: this submission was made as if s 87A applies, which it does not. The correct provision is s 77B.)

[154] While we were not told, we assume from QLDC's citation of *Re Application by Christchurch City Council* that it equates the term "requirement" which appears in s 87A, with the term "standard" in s 77B. We make no findings on whether the term "requirement" and "standard" are the same, but have considered QLDC submission on this basis. Thus we understand QLDC to say that for permitted activities the obtaining of an ODP consent is a standard specified in PC19. All activity types are subject to the same standard.[146]

[155] QLDC submitted a rule requiring consent to be obtained as a pre-condition to development is not novel. Such a rule is an example of the cascade or sieve approach

[141] QLDC opening submissions dated 27 February 2014 at [8].
[142] QLDC opening submissions at [14].
[143] Transcript at 621-622.
[144] Transcript at 626.
[145] QLDC opening submissions at [30]-[32].
[146] QLDC reply submissions at [21].

approved of in the Planning Tribunal decision of *Re Application by Christchurch City Council* [1995] NZLR 129.[147]

[156] QCL also submits that the effect of rule 12.19.1.1 (for permitted activities) and Table 1 is that certain specified uses of land will be permitted provided that they comply with an ODP. Until ODP activities are consented no use of land is permitted.[148] QCL argues:

(a) a consent for an ODP acts as a consent to use the land for permitted activities;[149]

(b) subject to a consent granted for an ODP, an activity may be permitted (either because it is listed in Table 1 as a permitted activity or it does not otherwise contravene a rule in the plan change – such as those activities that are not located in buildings);[150]

(c) without an approved ODP the use of land would contravene a rule in a Plan and therefore s 9(3) of the Act;

(d) provided that a consent is granted to allow one activity to take place that would otherwise contravene rule 12.20.3,[151] in particular allowing a permitted activity, it is a consent to do something that otherwise would contravene a rule in a District Plan;[152] and

(e) accordingly, the ODP is a resource consent within the meaning of s 87(a) of the Act.

Submissions of the amicus curiae

[157] Mr Bartlett was directed to present legal argument for and against the proposition that a land use consent may be granted for an ODP prepared in accordance with PC19. He had the advantage of seeing draft submissions of QLDC and QCL and was able to reply to these and we summarise next his key points.

[147] QLDC reply submissions at [13]-[14].
[148] QCL submissions dated 20 February 2014 at [15].
[149] QCL submissions dated 20 February 2014 at [16]-[17].
[150] QCL submissions dated 20 February 2014 at [18]-[27].
[151] The rule for permitted activities is rule 12.19.11 and in the context of the submissions we understand Mr Gordon to be referring to this class.
[152] QCL submissions dated 20 February 2014 at [28].

[158] Mr Bartlett says that the status of an activity derives from the Act and from its subsidiary planning instruments, not from a resource consent.

[159] Under the RMA the resource consent provisions predicate a connection to activities and to the implementation of rules. Resource consents:[153]

- entitle use of land in a manner that contravenes a district rule (s 9(3));
- are not real property but run with the land (s 122);
- if unimplemented, lapse on the date specified in the consent or if no date is specified, within five years (s 125(1));
- may have the lapse period extended subject to meeting criteria (s 125(1A));
- are permissive;
- may subsist with any other number of unimplemented and inconsistent consents on the same property;
- may be subject to an application for a change or cancellation of conditions by the consent holder (s 127);
- may be subject to cancellation by the consent authority (s 126(1));
- may be subject to review of condition by the consent authority (s 128/129);
- may be subject to an application for surrender (s 138).

[160] With reference to the above attributes of a resource consent, Mr Bartlett submits that it cannot have been Parliament's intention that a consent would prescribe the rules that are to apply to a consent granted for another activity.[154]

[161] In his view it is not possible to discern in PC19 whether a proposed activity is permitted or not because of the pre-condition that consent for an ODP be obtained first.[155] He summarises QCL's argument as "permitted activities only become permitted activities to those who have first obtained an outline development plan", and submits this is inconsistent with the definition of a permitted activity. A permitted activity is something that does not require a resource consent.[156] Finally, Mr Bartlett submits under QLDC's and QCL's approach activities that are not listed in the plan change and

[153] Bartlett submissions dated 27 February 2014 at [33].
[154] Bartlett submissions dated 27 February 2014 at [34].
[155] Bartlett submissions dated 27 February 2014 at [57].
[156] Bartlett submissions at [47].

which do not contravene a rule in the plan change, would need to be identified in an ODP to meet the requirements of s 9 that they are expressly allowed by a resource consent.

Consideration of vires

Purpose of the ODP provisions

[162] First, we acknowledge the premise in PC19(DV) that it is prohibited to undertake any activity within C1, C2 and E2 until such time as a resource consent is granted for an ODP (rule 12.20.3.6). Remarkably this rule was not referred to by QLDC and QCL.

[163] Secondly, we found it helpful to set out the scheme of the ODP provisions in this plan change. The scheme has four features:

(a) there is a requirement for a single application for resource consent for a group of activities [we refer to this as the consent for ODP activities];
(b) the timeframe for processing an application for ODP activities is set in the plan;
(c) until such time as there is consent for ODP activities the use of land is prohibited in three activity areas; and
(d) any use of land that does not comply with a consent for ODP activities is a non-complying activity.

[164] We turn next to the issue identified by the court.

Issue: Is a land use consent granting an outline development plan a "consent" within the meaning of ss 9 and 87 of the Act?

Rule 12.20.3.3(iii) – the rule for limited discretionary activities

[165] An application for a consent for ODP activities is to be made pursuant to rule 12.20.3.3(iii).

[166] Counsel did not directly address rule 12.20.3.3(iii) and yet its subject matter is at the heart of the legal argument. The rule simply states "Outline Development Plan requirement for development within Activity Areas C1 C2, and E2" and then follows matters in respect of which the District Council's discretion is limited.

[167] While at times counsel and the planners spoke of outline development plans as if they were an activity (i.e. the plan is an *activity*), we understand in this plan change the term "outline development plan" means a consent granted for a bundle of activities. In the latter context, the QLDC and the planners also spoke about "outline development plans" as being a consent granted for the structural or structuring activities within the three activity areas. Assuming this is correct, rule 12.20.3.3(iii) does not actually identify the activities for which resource consent is required. Rather, the reader is left to deduce from the matters to which discretion is limited under this rule and also from the relevant policies, the activities that are the subject of an application for resource consent.

[168] In the absence of a rule specifying activities that are expressly allowed subject to a grant of consent, rule 12.20.3.3(iii) is ultra vires s 77A(1) & 77B(3). To come within s 77B (3), and to be consistent with the operative District Plan's definition of "outline development plan", rule 12.20.3.3(iii) is to list activities that are limited discretionary activities.

[169] If the court found difficulties with the plan change rules Ms Macdonald suggested introducing a new rule(s) requiring an application to be made for a series of ODP activities (not exhaustively listed). These activities would be classified as discretionary activities, as opposed to limited discretionary activities in the plan change.[157] Subject to what we say below Ms Macdonald's rule is a step in the right direction. However, with the classification of ODP activities having potentially changed from a limited discretionary activity under rule 12.20.3.3(iii) and the content of the rule not finalised, we make no final finding on the same.

Vires of the activity rules (rules 12.19.1.1 and 12.20.3.2-4)

[170] The amendment of the rule 12.20.3.3(iii)) or insertion of a new rule(s), would not address the matters raised by all counsel concerning the vires of the permitted activity rule and, more generally, all of the activity rules. The consideration of vires arises under two heads, as follows:

[157] QLDC opening submissions at [34].

(a) can the status of a permitted activity or indeed any activity be determined by a prior grant of consent?

(b) can a rule prohibit permitted activities in specified circumstances?

Issue: Can the status of a permitted activity, or indeed any activity be determined by a prior grant of consent?

[171] In accordance with s 77A the QLDC has categorised activities as belonging to one of six types of activities and has made rules for each type accordingly.

[172] QLDC says there is nothing in the Act which prevents a rule requiring as a pre-condition to any development, the approval of a resource consent. The obtaining of an ODP is a "requirement" within the meaning of s 87A(1) [we interpolate – a "standard" under s 77A]. Ms Macdonald submits all activities are subject to the same *requirement* as part of the rules' sieve process.[158] This argument had some initial attraction, until the standard was considered in the context of other rules and the plan change policies.

[173] We asked if a resource consent is required for the bundle of activities covered by an ODP what rule would be contravened if land were used without consent being granted? In her reply Ms Macdonald for QLDC submits that for the purpose of s 9,[159] the rule in the plan which is contravened is the zone standard (12.20.5.2 Zone Standards (xvi)). She advised this zone standard is a "requirement" within the meaning of s 87A(1).[160] We do not agree with this submission for the following reasons.

[174] Section 87(a) of the Act defines resource consent as meaning, amongst other things, a consent to do something that would otherwise contravene s 9. Section 9(1)(a) provides no person may use land in a manner that contravenes a rule in a District Plan unless the use is expressly authorised by a resource consent. In the absence of an ODP consent, all activities within AA-C1, C2 and E2 are prohibited (rule 12.20.3.6). Thus the rule in the plan that is contravened if land is used in the absence of a consent for ODP activities, is the prohibited activity rule (rule 12.20.3.6). If land is proposed to be

[158] QLDC reply submissions at [13-14, 21].

[159] QLDC, in common with other counsel, referred to s 9(3). The correct section is s 9(1). The amendments made to s 9 under the Resource Management (Simplifying and Streamlining) Amendment Act 2009 do not apply.

[160] QLDC reply submissions at [21].

developed, but not in accordance with any consent granted for ODP activities, then the rule in the plan that is contravened is the rule for non-complying activities (12.20.3.5 non-complying activities (ii)).

[175] We return to the rule for permitted activities which was the particular focus of QLDC and QCL submissions. Rule 12.19.1.1 identifies a garden centre and its ancillary activities,[161] and the activities in Table 1 as belonging to the class of permitted activities subject to compliance with:

- the site and zone standards;
- Structure Plan; and
- any approved outline development plan for activity areas C1, C2 and E2.

[176] The rule also provides that an activity is permitted if it is not listed as a controlled, discretionary, non-complying or prohibited activity.[162] Likewise the rules for controlled, limited discretionary and discretionary activities require compliance with any approved outline development plan.

[177] If the words "... compliance with ... any approved Outline Development Plan" in the permitted activity rule are given their natural and ordinary meaning, the rule requires compliance with a grant of resource consent for ODP activities; including all the conditions of a consent.[163] When these words are considered within the wider policy context, the purpose of the rule is to require all activities within C1, C2 and E2 to comply with a prior grant of resource consent. Arising out of the exercise of a discretionary power, a consent (including all of its conditions) is not a standard that is specified in the plan change.

[178] A second related difficulty with the permitted activity rule is that the classification of the activity proceeds from the exercise of the consent authority's

[161] Rule 12.20.1.1(b).
[162] We note the rule refers to Table 1 in rule 12.20.3.7 and also to Table 12.20.3.6. If the relevant rule is Table 1 in rule 12.20.3.7 there appears to be an error in its drafting.
[163] See s 2 definition of "resource consent".

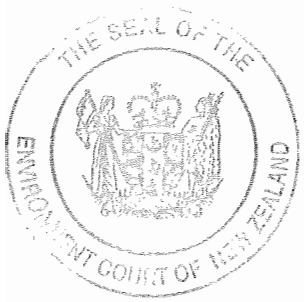
discretion whether to grant a limited discretionary application for ODP activities. Thus the plan change does not convey in clear and unambiguous terms the use to which the land may be put.

[179] Given this, we find the rules requiring compliance with "any approved Outline Development Plan" to be ultra vires s 77B(1) of the Act.

[180] We address briefly the Planning Tribunal decision of *An Application by Christchurch City Council*[164] referred to us by QLDC in support of the rules. The Christchurch City Council was in the process of reviewing its Transitional District Plan, when it applied for declarations as to the validity of rules classifying activities subject to their compliance with certain standards. Those standards were likened to a sieve test, and QLDC says this description fits the rules in PC19(DV). The Planning Tribunal noted s 9 was the only section in the Act constraining land use activities and if there is no rule in a District Plan then a particular activity is not constrained by that section.[165] That said the Planning Tribunal declared:

> (i) That it is lawful for a district plan to contain a rule in respect of permitted activities having the following form:
>
> "Any activity which complies with the standards specified for the zone where the standards specified go to the effects which activities have on the environment rather than to their purpose."
>
> (ii) That under the provisions of the Resource Management Act 1991 a district plan may prescribe and categorise the consequence of non-compliance with specified standards and may restrict the exercise of the consent authority's discretion to particular standards specified in the plan.

[181] We have no evidence that the Christchurch District Plan either then, or now, has a rule classifying permitted activities subject to either a prior grant of consent for another activity or subject to compliance with the grant of consent for another activity. It follows we are not satisfied that the Planning Tribunal's declaration supports the approach taken in PC19(DV).



[164] [1995] NZRMA 129.
[165] *An Application by Christchurch City Council* at 16.

[182] We struggle to understand how the classification of permitted activities can proceed from a grant of a resource consent. In this regard we were not assisted by QLDC simply passing off the rule as being not excluded under the Act. The importance of this issue is captured by Justice Allen in *Power v Whakatane District Council*[166] where he observed (without deciding the particular matter):

> It is settled law that a Council may not reserve, by express subjective formulation, the right to decide whether or not a use comes within the category of permitted use: *McLeod Holdings Ltd v Countdown Properties Ltd* [1990] 14 NZTPA 362 at 372. It is arguable also that a rule which provides that an activity is a controlled activity only if it has been the subject of an approved outline plan is similarly invalid. That was the view expressed by Judge Sheppard in *Fletcher Development and Construction Ltd v Auckland City Council* [1990] 14 NZTPA 193. As Mr Ryan submits, a member of the public would have no way of ascertaining at any given point of time whether a particular development on the subject site would be a controlled activity or a discretionary one. That would have to await the settlement (or not as the case may be) of a development plan in consultation with the stipulated parties.

Outcome

[183] We agree with Mr Bartlett that under s 87A (or correctly s 77B) the status of an activity derives from the Act and its subsidiary planning instruments and not from a resource consent. In summary we find rules 12.19.1.1 and 12.20.3.2-4 are ultra vires s 77B of the Act insofar as the rules require compliance with a resource consent which is not a standard, term or condition that is specified in the plan change.

Issue: Can a rule prohibit permitted activities in specified circumstances?

[184] As noted above, counsel did not address the rule for prohibited activities. It appears the prohibited activity rule is a method to secure a procedure under the plan change, namely the obtaining of a consent for ODP activities prior to any development of activity areas C1, C2 and E2.

[185] Section 77B(7) addresses prohibited activity status in this way:

> If an activity is described in this Act, regulations, or a plan as a prohibited activity, no application may be made for that activity and a resource consent must not be granted for it.

[166] CIV-2008-470-456 at [45].

[186] There is at least one appeal seeking the deletion of this rule.[167]

[187] The Court of Appeal in *Coromandel Watchdog of Hauraki Inc v Chief Executive of the Ministry of Economic Development*[168] considered definition of prohibited activity needs no elaboration. "It simply means an activity for which a resource consent is not available". PC19(DV) arguably extends the definition of prohibited activity, by including permitted activities. Having heard no submission on the rule we do not decide whether the rule has this effect.

Potential amendments

[188] Subject to jurisdiction we posit that what is intended by the rule prohibiting all activities is to create a deferred zoning over activity areas C1, C2 and E2 where land may not be used in accordance with the plan change until a specified event occurs. The event that would cause the lifting of the deferment is the obtaining of consent for a bundle of ODP activities. If this is correct, with the appropriate policy support a resource consent application for ODP activities and other land use and subdivision consents could be filed together and be processed sequentially.

[189] The purpose of rules 12.19.1.1 and 12.20.3.2 - 4 is to make a proposed land use activity non-complying, if the land use contravenes a consent granted for ODP activities within the relevant activity area.[169] We suggest that this purpose *may* be maintained and policies given effect to, if the rules are amended to delete reference in the rules to "...compliance with ... any approved Outline Development Plan"; delete or amend zone standard 12.20.5.2(xvi) which duplicates matters already provided under the rules classifying non-complying and prohibited activities; amend the rule for non-complying activities to add that "the use or development of land within activity areas C1, C2 and E2 in the absence of a consent granted for ODP activities is a non-complying activity" and to include an assessment matter ascertaining compliance with any applicable consent for ODP activities.

[167] Notice of appeal filed by Five Mile Holdings Ltd (in receivership).
[168] [2007] NZCA 473 at [41].
[169] See 12.20.3.5 non-complying activities (ii) which provides that any activity which is not listed as a prohibited activity and which does not comply with one or more of the relevant Zone Standards, shall be a non-complying activity.

[190] In contrast with the other types of resource consent, s 77B(5) does not stipulate that the activity must comply with any standards (terms or conditions) stipulated in a plan or proposed plan. Instead s 77B(6) states that the particular restrictions for non-complying activities are those specified in s 104D. Pursuant to s 104D(1)(b) the use of land not in accordance with a consent for ODP activities would be contrary to the objectives and policies for the plan change, which expressly provides for the use of Outline Development Plans as the central means to give effect to the objectives and policies.

[191] If the rule for non-complying activities were to be amended in the way suggested, this does not appear to offend s 77B(5). Such a rule may be described as a *procedural rule*. Mr Bartlett queried the vires of procedural rules without venturing an opinion on the matter.[170] However, we can see no impediment under the sections of the Act referred to above. The sustainable management purpose of requiring the consent of ODP activities prior to development is described fully in the objectives and policies, although there may need to be some refinement of these subject to confirming the bundle of activities comprising the ODP consent. Such a rule would more closely follow the scheme of the Act than those currently in PC19(DV).

[192] That said, the rule for non-complying activities will need to be developed in conjunction with the rule for ODP activities. In accordance with s 76(3) when formulating any rule regard shall be paid to the actual or potential effect on the environment of the activities that are the subject matter of a rule. This section is particularly important in order that the subject matter of the rules satisfy the lawful requirements of a resource consent. However, these are not matters which we need decide now; the merits and vires of these amendments will be the subject of further submissions from the parties.

Overall Conclusion on ODP provisions

[193] Under the rules for prohibited and non-complying activities, the District Council would retain a high level of control over future land development. The rules, if not circumscribed, have the potential to incur developers' significant costs both in time and

[170] Bartlett at paragraph [9].

resources. Vires aside, this potential must be relevant to a s 32(3) evaluation as to their appropriateness for achieving the plan change objectives.

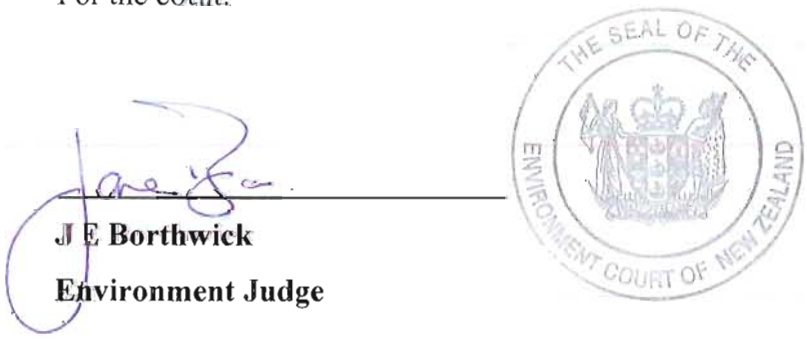
[194] The effect of these amorphous provisions is not well understood. While Ms Macdonald talked about the consent for ODP activities as a "detailed blueprint for future development",[171] the planners said it was a "guiding plan, rather than a fixed blueprint",[172] not binding on developers because it would fix criteria outside of the District Plan.[173] This difference of opinion alone gives us considerable cause for concern.

[195] We find that the rules for permitted, controlled, limited discretionary and discretionary activities (rule rule 12.19.3.1 and rules 12.20.3.2-4) are ultra vires the Act.

[196] Mr Bartlett was right to caution against making a finding on vires until the parties had settled the final wording of the rules, especially given the court's directions that counsel were to consider the policies, rules and methods at this hearing. We are heartened at Ms Macdonald's concluding remark that at most this is a technical issue and look forward to QLDC's response in due course.

[197] That said, we reserve our decision on the ODP objectives and policies pending a final determination of the rules. In doing so we take on board Mr Young's plea that there may be value in counsel reviewing the objectives and policies proposed by the planners. We agree and leave is granted for the parties to do the same and the provisions will be further considered at the same time as the lower order hearing.

For the court:



J E Borthwick
Environment Judge

[171] QLDC reply submissions at [18].
[172] At 21.
[173] At 22-23.

Objective 9 Activity Area E2 (Mixed-Use Business Corridor)

A. A mixed–use business-orientated corridor for activities that benefit from exposure to passing traffic and which provides a transition between the adjoining residential and industrial areas, while maintaining the role of Activity Area C1/FFSZ(A) as a town centre.

B. A high quality urban form that complements the corridor functions of the Eastern Access Road, including its role as an important viewshaft.

Policies:

9.1 To provide for a mix of offices, light industry, community, educational activities and mid-sized retail activities.

9.2 To exclude:

a. activities that are incompatible with a high quality mixed business environment due to the presence of harmful air discharges, excessive noise, use of hazardous substances or other noxious effects;

b. activities that would undermine Activity Area C1 as being the primary location for smaller scale retail.

c. large footprint structures that are incompatible with the intended urban form outcome for the Activity Area;

9.3 To ensure that a mixed use business environment establishes along the EAR where retail uses do not predominate by:

a. controlling the size of individual retail units;

b. requiring development that fronts the EAR to provide two or more levels of development with above ground floor areas that area suitable for activities other than retail, or otherwise provide for a mix of uses along the road frontage of the site

c. Enabling flexible occupation of floor space by:

(i) having a standardised car parking rate for non-retail activities;

(ii) floor to ceiling heights that enable a range of activities to occur within buildings.

9.4 To ensure that built form, site layout and landscape treatment of development establishes and maintains a high quality, attractive and visually cohesive interface along the EAR frontage

9.5 To ensure buildings and site development results in a high level of visual interest when viewed from the EAR through a combination of generous areas of glazing at ground floor, building modulation and detailing, positioning of main building entrances visible from the street, integration of signage with building design and appropriate landscape treatment.

9.6 To ensure roadside interfaces become attractive spaces, by requiring:

a. buildings be developed close to road boundaries so activities within the ground floor of buildings are clearly visible to passing pedestrians and motorists;

b. **Subject to directions:** *Buildings to provide an appropriate sense of scale to the streetscape through façade and roof design. Unless the requirements of an activity otherwise entail this will be achieved by multi-level buildings which visibly distinguish upper floors from ground floors through articulating facades and the use of glazing, materials and finishes. Any single level buildings should emphasise building heights at the street frontage through incorporation of vertical modulation into the design such that there is an impression of two levels. Series of low, single level buildings are to be avoided.*

Annexure A

c. *Buildings to occupy at least half the road frontage of sites with car parking and loading areas located at the side or rear of each site so that they do not visually dominate road frontages. Storage of goods and refuse is to occur to the rear and be appropriately screened from view.*

9.7 *To require any landscape treatment of frontages to complement and be integrated with building design and site layout. Landscape treatment should not be an alternative to high quality building design.*

9.8 *To achieve a high level of amenity on the northern edge of Activity Area E2 as viewed from State Highway 6 and Activity Area A.*

9.9 *To ensure that safe, convenient and attractive pedestrian footpaths and on-street parking are available within the road corridor, along both sides of the EAR as well as for pedestrian connections between activities within the Activity Area, and activities in Activity Areas C2 and E1.*

9.10 *To require adequate parking (staff and visitor), loading and turning of vehicles to occur within each site (or as part of a shared arrangement secured by an appropriate legal agreement), arranged so that all vehicles that exit onto the EAR can do so in a forwards direction.*

9.11 *To limit vehicle access to and from the EAR to either shared crossing points or accessways or alternative access locations, when subdivision or development occurs.*

9.12 *At the interface of Activity Areas C2 and E2:*

a. *require subdivision and development to provide a laneway between the Activity Areas to enable physical separation of development while providing shared access.*

b. *locate loading areas, ventilation ducts, outdoor storage areas and other activities generating outdoor noise and/or odour where effects from these are minimised in relation to residential activities in AA C2.*

c. *require building and roof designs to minimise visual effects including glare when viewed from within AA C2. Exhaust and intake ducts and other mechanical and electrical equipment should be integrated into the overall roofscape and building designs.*

9.13 **Not approved** *To require outline development plan(s) for development in the Activity Area to demonstrate, in addition to the matters set out in 3.2*

a. *how site layout (not uses), including vehicle access, building location and car parking, accessways and pedestrian and cycle connections are to be provided for in a manner that recognises multiple ownerships and achieves high quality urban form along, and the mixed-use business corridor function of, the EAR;*

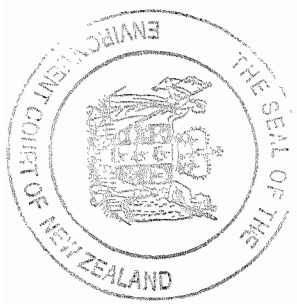
b. ~~*the location and size of retail activities.*~~ *Developments should enable a combination of different types of activities to occur within the sites covered by the ODP,* ~~*either arranged vertically (in multiple stories of buildings) or horizontally (adjacent to one another)*~~*: and*

c. *how car parking is to be managed so as to not to over provide car parking relative to the likely demand and to minimise the number of vehicle crossings onto the EAR.*

Explanation and Principal Reasons for Adoption

Activity Area E2 straddles the Eastern Access Road. The proximity of the highway and the Eastern Access Road provides a high level of visual exposure for this land, which in turn requires that there is a high quality

urban design and architectural response. This area is identified as a suitable location for a mix of high quality light industrial activities and mid-sized retail activities, which are not necessarily appropriate in a town centre environment, yet which benefit from visual exposure, as well as offices. Retail floor area restrictions, building and site design controls are in place to ensure that the area develops a mixed use character.



Objective 2 Area A (Open Space)

An open landscaped area adjacent to the State Highway that helps to maintain views of the surrounding Outstanding Natural Landscapes and provides for public access and physical separation of buildings from the State Highway.

Policies:

2.1 To mitigate the adverse landscape and visual amenity effects of development by providing an attractive, comprehensively designed open landscaped area between State Highway 6 and Activity Areas C1, C2 and E2 that is free of buildings.

2.2 To provide a public walkway and cycle path that is linked with the local network and that is compatible with the walkway/cycleway adjacent to the northern edge of the FFSZ(A).

2.3 To ensure that all of Activity Area A is comprehensively maintained and managed in a consistent manner and is not fenced or further developed in incompatible landscape styles.

2.4 To require that a resource consent be granted and implemented for development of Activity Area A prior to work proceeding in Activity Areas C1 and C2. The consent is to:

a. provide for the formation of a walkway and cycle path linked with the local network;

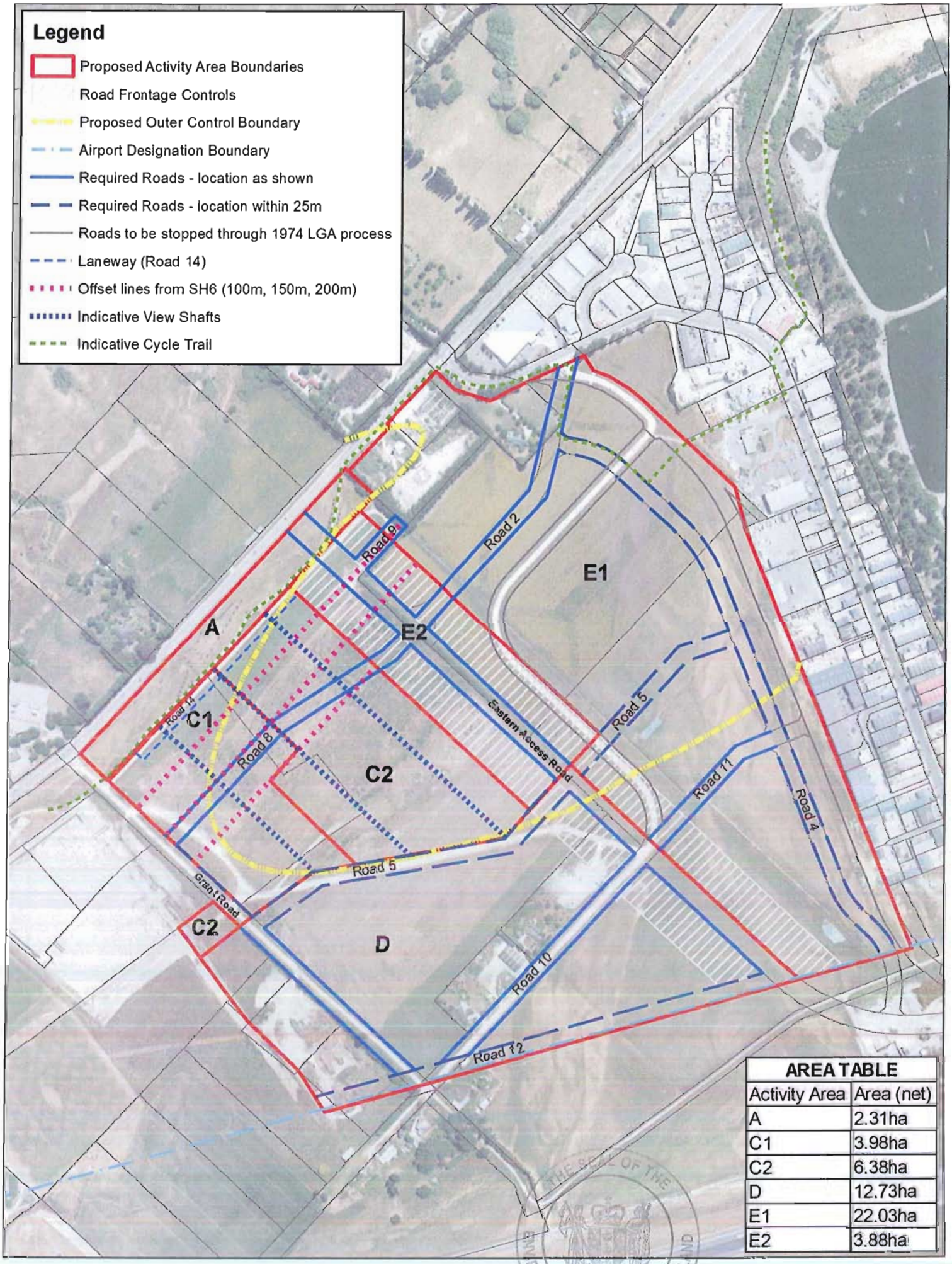
b. provide for consistent landscape treatment while not compromising the Area's open character, viewshafts to The Remarkables, and views to ONLs;

c. secure the Area's ongoing maintenance and management; and

d. secure permanent public use of the walkway and cycleway.

Explanation and Principal Reasons for Adoption

This Activity Area includes most of the land within 50m of State Highway 6 along the frontage of the zone. The area will remain free of buildings and will provide a landscaped open area between the State Highway and the built form in Activity Areas C1, C2 and E2. Public access through the activity area and its ongoing maintenance will be secured through the resource consent process.



AREA TABLE	
Activity Area	Area (net)
A	2.31ha
C1	3.98ha
C2	6.38ha
D	12.73ha
E1	22.03ha
E2	3.88ha

Frankton Flats B Zone Structure Plan

28 February 2014

0 50 100 Metres

N