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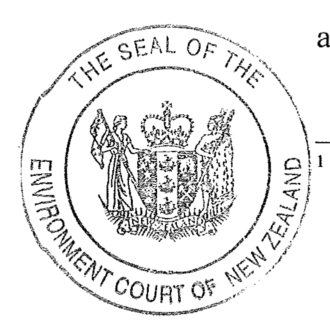
0. Introduction

0.1 The issue: another marine farm in Beatrix Bay?

[1] On 24 December 2014 the R J Davidson Family Trust applied (Marlborough District Council Application No U130797) for consent to establish and operate a 8.982 hectare marine farm in Beatrix Bay, Central Pelorus Sounds, to enable the cultivation of green shell mussels[1] and other crops. The application also seeks consent to disturb the seabed with anchoring devices, to take and discharge coastal seawater, to harvest the produce from the marine farm and to discharge biodegradable and organic waste during harvest.

[2] The ultimate issue for the court is whether the proposal achieves the objectives and policies of the combined district and regional plan and of the New Zealand Coastal Policy Statement. The first important subordinate issue is to obtain an accurate description of the environment — there is disagreement between the parties over the accurate description of the current and reasonably foreseeable future environment. A further important issue for the court is whether, assessed under the relevant objectives and policies, the clear financial and social benefits of the proposal outweigh the direct and accumulative environmental costs. Finally, there is disagreement about the scale,



[1] *Perna canaliculus.*

character and intensity (inter alia) of the accumulative adverse effects of the proposal on:

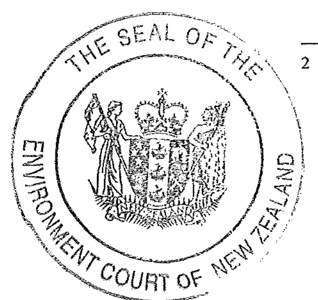
- the natural character of Beatrix Bay;
- the landscape values of a promontory at the northern end of the Bay;
- amenities for visitors to and (the few) residents of Beatrix Bay;
- safety through reducing navigational options;
- the marine ecology of Beatrix Bay; and
- the habitat of New Zealand King Shag.

[3] More specific issues are identified as we identify and analyse the matters to be considered.

0.2 The application, the appeal, the other parties and the service of evidence

[4] The applicant for the proposed marine farm is a family trust. The beneficiaries of which are the children of Mr R J Davidson. Mr Davidson is part-owner of a number of other consented marine farm areas in the Marlborough Sounds and is a well-known marine scientist.

[5] The application is for a site adjacent to and surrounding the southern end of an un-named promontory ("the northern promontory") which juts out into the northern end of Beatrix Bay. The amended proposal is to split the farm into two separate blocks (a south-east section of 5.166 hectares and a south-west section of 2.206 hectares) either side of the point of the promontory, with a reduced total area of 7.372 hectares. The farm is otherwise of standard design: it is to consist of a number of lines with an anchor at each end and a single warp rising to the surface. At the surface is a backbone with dropper lines extending to approximately 12m depth (not to the sea floor). Each structure set is spaced 12 to 20 m apart. Despite the array of potential crops[2], we will call the proposed farm a "mussel farm" to distinguish it from other types of marine farm like salmon farms which usually have much greater adverse environmental impacts.



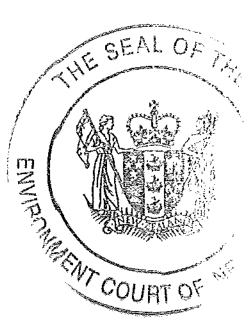
[2] In addition to green shell mussels, the application seeks to cultivate scallops (*Pecten novaezelandiae*), blue shell mussels (*Mytilus galloprovincialis*), dredge oysters (*Tiostrea chilensis*), pacific oysters (*Crassostrea gigas*) and algae (*Macrocystis pyrifera, Gracilaria sp., Pterocladia lucida, Undaria pinnatifida*).

[6] The application was heard by an independent commissioner Mrs S E Kenderdine[3] on 21 May 2014 and a decision to decline was issued by the Marlborough District Council on 2 July 2014. The decision was appealed by the Appellant, which has put forward to the court an amended proposal to reduce impacts on the environment.

[7] Two incorporated societies, Kenepuru and Central Sounds Resident's Association Inc and Friends of Nelson Haven and Tasman Bay Inc, (together "the Societies"), which had lodged submissions on the Davidson Family Trust's application, then joined the appeal as section 274 RMA parties in support of the Council's decision.

[8] The service of evidence in this proceeding was rather drawn out for two reasons. First, after the initial service of evidence which largely replicated the evidence given to the hearing Commissioner, the Council decided it wished to put forward evidence on ecological matters. That was challenged, and after submissions, (a procedural[4] decision) allowed a further exchange of evidence.

[9] The Council then lodged evidence by Dr B G Stewart — an ecologist, and Dr P R Fisher — an avian ecologist. The Appellant responded with evidence from its various experts and with a statement from Mr Davidson which was nearly[5] as long as his evidence-in-chief. The Council challenged the admissibility of that evidence on the grounds it was new evidence, rather than rebuttal. Subsequently the Council lodged "supplementary" evidence from Mr R Schuckard, Dr Fisher, and Dr T Cook (an ornithologist) in response to Mr Davidson's long rebuttal statement. The Appellant objected to the admissibility of this evidence on the grounds that the Council had no right to lodge it. Finally, the Appellant applied for consent to call rebuttal evidence on methodology from Dr D M Clement a marine ecologist. The admissibility of this was in turn challenged by the Council.



3 A retired Environment Judge with very extensive experience in and knowledge of the Marlborough Sounds.

4 Procedural Decision [2014] NZEnvC 257.

5 26 pp evidence-in-chief [Environment Court document 6]; 22 pp further evidence [Environment Court document 6A].

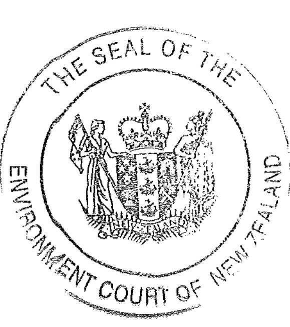
[10] The questions of admissibility raised subsequent to the procedural decision were adjourned to be resolved at the hearing. We considered it appropriate to receive all[6] the information lodged for these reasons. First, the evidence received is relevant which is the main test. Second, Mr Davidson is, in effect, the Appellant and so if he wishes to raise matters he should be allowed to so that he can be reasonably satisfied the Trust has been given a full and fair hearing. Third, to the considerable extent that Mr Davidson raised new matters in his rebuttal, the Council and the Societies should, in fairness, be allowed to reply.

0.3 The mussel farm site[7]

[11] The site is an area of shallow coastal water — between 22m and 42m deep — adjacent to the northern promontory. Dr D I Taylor, an ecologist called by the Appellant, described the benthic environment below the farm's two blocks as primarily soft mud sediments with a small area of mud/shell hash and coarser sand/shell hash sediments at the inshore margin. A bedrock/boulder reef habitat extends to the southwest of the promontory to around 35m from the closest proposed mussel lines. It was to avoid interfering with this reef that the Appellant divided its proposed farm into the two blocks described.

[12] On the site current speeds are generally below 4cm per second which is considered to be in the low to moderate range. Higher flushing events of up to 10cm per second occur periodically throughout the water column and strong currents up to 20cm per second have been recorded in the lower section of the water column. Flow direction is generally balanced east/west around the end of the promontory.

[13] The northern promontory adjacent to the site extends around 700m into the bay, dividing the northern coastline of Beatrix Bay into two relatively sheltered embayments. The western slopes of the promontory are dominated by rough pasture mixed with tauhinu scrub[8], gorse, pig fern, and occasional wilding pines. Further regeneration is inhibited by dry conditions combined with grazing stock (e.g. cattle), feral pig rooting



6 Except the evidence of Dr T Cook who was unable to attend at hearing to confirm his evidence and be cross-examined.

7 See the Assessment Matters in rule 35.4.2.9 of the Sounds Plan [p 35-21].

8 *Olearia leptophyllus*.

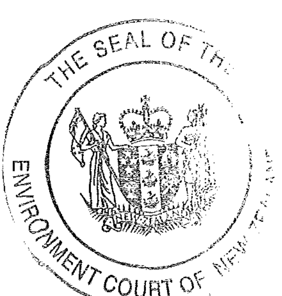
and goat and hare grazing. Vegetation cover on the eastern side of the promontory is more advanced but is also inhibited by feral animals and stock.

0.4 The landscape and seascape setting

[14] Beatrix Bay, containing approximately 2,000 ha, is one of the largest bays in Pelorus Sound (total 38,477 ha). It is roughly circular with a coastline of about 22 km. Some sense of the scale of the Bay can be gleaned from the fact that the northern promontory, where the site is, cannot be identified when entering from the south, but looms quite large from close to. The western side of Beatrix Bay is a long near-island running from Kaitira, the East Entry point to Pelorus Sound (from Cook Strait), to Whakamawahi Point. It is connected by a low isthmus along the northern side of Beatrix Bay to the Mount Stoke massif. The slopes of that hill form the higher (1,000 m above sea level) east and south-east margin of the bay. The southern end of the bay descends to Te Puaraka Point. The wide south-western end of Beatrix Bay opens to the rest of Pelorus Sound: south to Clova and Crail Bays, south-west to inner Pelorus Sound and west to Tawhitinui Reach.

[15] The relatively sheltered water of the "Mid Pelorus Marine Character Area"[9] is described in the plan as "... turbid and warm and the seafloor as mostly mud with conspicuous sparse marine life fringed by narrow cobble reef"[10]. Most of Beatrix Bay is 30 to 36 m deep with a seabed of soft sediment[11] (the most common type of habitat in the Marlborough Sounds).

[16] Much of the land surrounding the northern end of Beatrix Bay is in the single ownership of Mr W Scholefield. It has been farmed for many years, but is in varying stages of regeneration (i.e. pasture to kanuka/broad-leaf scrubland). Some of the upper hillsides are administered by the Department of Conservation and support mature forest. Three small reserves reach the coast (two on the western coast of the Bay and one on the eastern coast). None of the reserves are close to the application site.



9 Map 106 Sounds Plan Vol. 3.

10 Appendix Two of Sounds Plan [p Appendix Two – 67].

11 B G Stewart evidence-in-chief para 3.1[Environment Court document 26].

[17] There are[12] 37 existing marine farms (approximately 304.4 ha in total[13]) located around the edge of Beatrix Bay. Backbones (surface structures) on the 37 marine farms span approximately 8.5 km (33%) of total shoreline length[14] at sea level (but more under water). Approximately 85% of the surface area (2,000 ha) of Beatrix Bay is not occupied[15] by mussel farms.

0.5 <u>The matters to be considered when making the decision</u>

[18] The site is located within Coastal Marine Zone 2 ("CMZ2") in the Marlborough Sounds Resource Management Plan (the "Sounds Plan"). That is a zone in which "appropriate"[16] marine farms are provided for, at least close to the shore, as discretionary activities[17]. In fact, because the proposed farm extends beyond 200 m from the shore, the status of the activity under Rule 35.5 of the Sounds Plan is non-complying. One of the gateways of section 104D RMA must therefore be passed before we can grant consent. Those gateways require either:

- that the adverse effects will be minor; or
- that the activity is not contrary to the objectives and policies of the Sounds Plan.

[19] If one of these tests is met, section 104(1) identifies the matters we are to have regard to in coming to a decision. In this case the relevant matters include:

- the actual and potential effects of the activity on the environment (section 104(1)(a));
- the provisions of the New Zealand Coastal Policy Statement ("the NZCPS"), the Marlborough Regional Policy Statement ("the RPS") and the Sounds Plan (section 104(1)(b));

12 R J Davidson evidence-in-chief Table 1 [Environment Court document 6].
13 R J Davidson evidence-in-chief Table 1 [Environment Court document 6].
14 R J Davidson rebuttal evidence-in-chief para 8.1 [Environment Court document 6A].
15 R J Davidson evidence-in-chief Table 1 [Environment Court document 6].
16 Explanation to Issue 9.2 [Sounds Plan p 9-4]; Objective (9.2.1) 1 and Policy (9.2.1) 1.14 [Sounds Plan p 9-6].
17 Rule 35.4.2.9 of the Sounds Plan where "close" means between 50m and 200m of the shore within CMZ2.

- any other relevant matters, if that is reasonably necessary (section 104(1)(c)).

Consideration of matters under section 104(1)(a)-(c) is "subject to Part 2 of the RMA". We must also have regard to[18] the Commissioner's Decision.

[20] The "environment" in section 104(1)(a) is not only the current description of its components (as identified in the section 2 RMA definition) but also the past environment as described in the relevant district plan and the reasonably foreseeable environment. Thus the environment includes the accumulated and reasonably foreseeable accumulative effects of all stressors (other than the application) on the past and current environment.

[21] The future component of the "environment" is well established. In *Queenstown Lakes District Council v Hawthorn Estate Limited*[19] ("*Hawthorn*") the Court of Appeal identified the central question in section 104 (rather than section 104D) of the Act as[20]:

> ... whether the consent authority ought to take into account the receiving environment as it might be in the future and, in particular, if existing resource consents that had been granted but not yet implemented, were implemented in the future ...

The court examined numerous provisions in the Act in which the "environment" was referred to, then analysed[21] the scheme and purpose of the RMA and concluded:

> In summary, all of the provisions of the Act to which we have referred lead to the conclusion that when considering the actual and potential effects on the environment of allowing an activity, it is permissible, and will often be desirable or even necessary, for the consent authority to consider the future state of the environment, on which such effects will occur.

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18 Section 290A RMA.

19 *Queenstown Lakes District Council v Hawthorn Estate Limited* [2006] NZRMA 424; (2006) 12 ELRNZ 299 (CA) at [57].

20 *Hawthorn* at [11].

21 *Hawthorn* at [57].

[22] More recently, in *Far North District Council v Te Runanga-A-Iwi O Ngati Kahu*[22], the Court of Appeal confirmed that:

> In its plain meaning and in its context, we are satisfied that "the environment" necessarily imports a degree of futurity. [Emphasis added].

0.6 The obligation to supply adequate information (section 104(6) RMA)

Introduction

[23] There is one other, procedural, aspect of section 104 which we need to consider in the light of the evidence given to us. It is the question how to apply section 104(6) of the RMA (as added[23] in 2009). That states:

> (6) A consent authority may decline an application for a resource consent on the grounds that it has inadequate information to determine the application.

[24] For the Council Mr Maassen relied on this as the basis for his submission[24]:

> ... that even though a submitter or the Council does not call evidence on a particular effect, it is open for the consent authority to determine that the information is inadequate and decline the application accordingly. The only way, for example, one can faithfully fulfil the Parliamentary direction to "recognise and provide for" [the] matters of national importance [is] to have adequate information. This supports the evidential onus that the applicant bears.

Mr Maassen carefully did not call this burden an onus of proof. For the Appellant, Mr Gardner-Hopkins did not respond directly to Mr Maassen's submission about section 104(6).

The obligation to supply adequate information

[25] Section 104(6) appears to place an onus on the Appellant for a resource consent to supply enough relevant information to the consent authority to enable it to determine

22 *Far North District Council v Te Runanga-A-Iwi O Ngati Kahu* [2013] NZCA 221 at [80].
23 By section 83(6) Resource Management (Simplifying and Streamlining) Amendment Act 2009.
24 Submissions for Marlborough District Council dated 29 June 2015 at [113].

the application. In particular, the decision-maker must be able to reasonably assess a credible region[25] of probabilities of the relevant adverse effect even if only qualitatively.

[26] However, in some situations there may be inadequate information to even assess the likelihood of the effects of a stressor, and it is then that section 104(6) RMA may come into play. Clearly the power to decline on the basis of inadequate information should be exercised reasonably and proportionately in all the circumstances of the case. The power is also discretionary — that is shown by the use of the word "may" — so the consent authority may grant consent even if it lacks sufficient information. An example may be if there is a proposal for adaptive management to respond to uncertainties.

[27] Some assistance as to the purpose of section 104(6) RMA may be gained from Part 2 of the Act. The purpose of Part 2 is, as described in *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd*[26] ("*King Salmon*"), principally to guide local authorities, for example when considering a resource consent. However, as Mr Maassen observed, it is difficult for a consent authority to provide for the matters of national importance in section 6 unless it recognises them first. This suggests an applicant should put forward adequate information for the consent authority to be able to identify the relevant stressors and their effects.

[28] Another particular provision of Part 2 of the RMA that may assist application of section 104(6) is section 7(b) of the RMA, which requires decision makers to have particular regard to the efficient use and development of the relevant resources. While section 7(b) is only ever one, of many, matters to be considered (and it is silent about the protection of resources) it does imply that in many cases it is the more[27] valuable use and development of the resources which should be preferred. How often could a consent authority deliberately and rationally choose a wasteful use of resources? It appears to us that section 7(b) reinforces or creates a burden on an appellant to show that its proposed consent would use the resources better than the status quo or some other possible use if that is put forward in the evidence.

25 I.e. between 34% and 66%.

26 *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd* [2014] NZSC 38; [2014] 1 NZLR 593; [2014] NZRMA 195 at [24] and [25] per Arnold J.

27 Or most valuable if there are three or more options.

[29] Several aspects of the scheme of part 6 (Resource Consents) of the RMA are relevant as to how section 104(6) should be applied. First, section 88 prescribes[28] that an application for resource consent must include an Assessment of Environmental Effects ("AEE") as required by Schedule 4 of the Act. The information required by the Schedule (principally as to the effects of the proposal) "... must be specified in sufficient detail to satisfy the purpose for which it is required[29]". One purpose[30] is — as stated in the previous paragraph — found in the particularised objectives and policies of the relevant plan. This appears to impose an obligation to supply information of adequate quality (as well as sufficient detail) to enable grant of consent if no other information is put forward.

[30] An application may now[31] be determined to be incomplete if it does not include the information required by Schedule 4, and returned[32] to the Appellant. Then the Council has the power to request[33] that the Appellant provide further information or to commission a report[34] (in addition[35] to any standard report under section 42A RMA) before the hearing, although the Appellant has the right to refuse[36] to provide the information or even to ignore[37] the request. A similar provision[38] applies in respect of refusing to agree to the commissioning of a report.

[31] So the procedural scheme of Part 6 of the RMA emphasises the provision of information to the consent authority even before the hearing. That is to ensure the consent authority is adequately informed before making a decision. Because the appellant may refuse or ignore the request, section 104(6) still confers a power enabling the consent authority to decline if it has inadequate information.

28 Section 88(2)(b) RMA.
29 Clause 1, Schedule 4 RMA.
30 Another purpose is to fully and fairly inform the public of the potential effects.
31 Since the Resource Management Amendment Act 2013.
32 Section 88(3A) RMA (added by section 92(2) Resource Management Amendment Act 2013).
33 Section 92(1) RMA.
34 Section 92(2) RMA.
35 Section 92(4) RMA.
36 Section 92A(1)(c) RMA.
37 Section 92A(3) RMA.
38 Section 92B RMA.

[32] The Environment Court has the same[39] powers, duties and discretions as the consent authority in relation to section 104(6) under this appeal, so it appears the court may also decline the application if it has inadequate information to satisfy it that the purpose of the Act will be achieved. Further, when making an assessment under section 104(6) on the adequacy of the information, the consent authority (or, on appeal, the Environment Court) must have regard to[40] whether any request for further information or reports resulted in further information being available. Presumably if further information (or a report) has not been requested that is a factor against declining the application on the grounds of inadequate information.

[33] In *Saddle Views Estate Limited v Dunedin City Council*[41] Whata J, a Judge of the High Court with extensive experience of the RMA, stated:

> Burden of proof is a complex issue in RMA proceedings. Very often RMA proceedings involve proof of existing fact, assessment of future effects and an evaluative judgment in light of prescribed statutory thresholds. Allocation of evidential and persuasive burden is problematic and sometimes inapposite in this context, as several leading cases demonstrate[42].

We respectfully agree subject to two minor qualifications: first we consider it may be more accurate to move (or repeat) the phrase "in light of prescribed statutory thresholds"[43] to follow the words "assessment of future effects"; second, the statement needs to be read in the light of section 104(6) RMA.

[34] In one of the cases referred to by Whata J, *Shirley Primary School v Telecom Mobile Communications Ltd*[44], the Environment Court held that "in a basic way there is always a persuasive burden" on an Appellant for resource consent reflecting the principle that "the person who desires the Court to take action must prove the case".

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39 Section 290(1) RMA.
40 Section 104(7) RMA.
41 *Saddle Views Estate Limited v Dunedin City Council* (2014) 18 ELRNZ 97 (HC) at [90].
42 Referring to *McIntyre v Christchurch City Council* (1996) 2 ELRNZ 84 (PT); *Shirley Primary School v Christchurch City Council* [1999] NZRMA 66 (EnvC); *Ngati Maru Iwi Authority v Auckland City Council* HC Auckland AP 18/02 June 2002; *Director-General of Conservation v Marlborough District Council* [2004] 3 NZLR 127 (2005) 11 ELRNZ 15 (HC); *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council* [2006] NZRMA 193 (HC).
43 "Thresholds" is rather idealistic: few plans are so forthright, and the Sounds Plan is a classic plan that always qualifies its objective and policies.
44 *Shirley Primary School v Telecom Mobile Communications Ltd* [1999] NZRMA 66 at [121]-[122].

That approach was endorsed (obiter) by the majority of the Court of Appeal in *Ngati Rangi Trust v Genesis Power Ltd*[45].

[35] We conclude that since 2009 section 104(6) now imposes a type of legal burden on an Appellant to supply adequate information, although it may in certain circumstances be able to sidestep that if it can satisfy a consent authority that an adaptive management or similar condition is appropriate (i.e. the *Sustain Our Sounds v New Zealand King Salmon Company Ltd*[46] criteria are met — we discuss these later).

[36] The method of applying section 104(6) discussed above seems generally consistent with Principle 15 of the *Rio Declaration*[47]. That includes the statement that "[W]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation". However, we give that no weight since we did not receive full submissions on the principle. In any event, a precautionary approach is (as we shall see) included in the New Zealand Coastal Policy Statement which we will consider later.

[37] Does that mean that an Appellant must either in its AEE[48] or in its evidence "... pre-empt all possible arguments made by opponents, in order to disprove alleged effects"?[49] The answer is "no" for two reasons. First, the relevant effects should usually have been identified in the relevant plan, as should what the plan expects to be done about them. That is why the particularisation in subordinate policy statements or plans of the purpose and principles of Part 2 of the Act, as identified in the majority decision in *King Salmon*[50], is so important. Second, it is impossible to prove (or disprove) a future event, simply because it has not happened yet. The most that can be established is a probability or likelihood that an effect may (or may not) occur. Third, on the facts of this case it is quite clear that the Appellant knew from the beginning that lost feeding habitat for King Shags is an issue because its AEE records that[51].

45 *Ngati Rangi Trust v Genesis Power Ltd* [2009] NZRMA 312 (CA) at [23].

46 *Sustain Our Sounds v New Zealand King Salmon Company Ltd* [2014] NZSC 40; [2014] 1 NZLR 673; (2014) 17 ELRNZ 520 at [124] and [125].

47 *The Rio Declaration on Environment and Development* UNESCO, 1992.

48 Required under section 88(2)(b) and Schedule 4 of the RMA.

49 Making a question of a proposition by Mr G Severinsen in his recent paper *Bearing the Weight of the World: Precaution and the Burden of Proof* (2014) 26 NZULR 375 at 384.

50 *King Salmon* above n 26.

51 Assessment of Environmental Effects para 5.7 (Seabirds) [Exhibit 6.5].

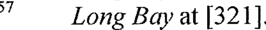
0.7 The standard of proof and prediction under the RMA

[38] As to the standard of proof, Mr Gardiner-Hopkins submitted[52] that the High Court in *"Buller Coal"*[53] stated that the appropriate standard of proof to be applied is "... the balance of probabilities". He made no distinction between the standard of proof of facts and any assessment of likelihood for predictions. We consider the differences are important.

[39] We accept that we must decide all questions of fact on the preponderance of the evidence. Of course not all disputes about the environmental setting of a proposal are factual. To the extent that the "environment"[54] includes the reasonably foreseeable future, questions about what that may look like are also predictive. However, a standard of proof for predictions that is "on the balance of probabilities" is problematic for several reasons.

[40] First the concept of a "probability of a probability" is at least awkward if not inchoate. Second, the definition of "effects" in section 3 of the Act includes "... effects of low probability but high potential impact". As the court has stated before, it is difficult to understand what is meant by determining an effect of low probability on the "balance" of probabilities.

[41] Third, in *Clifford Bay Marine Farms Ltd v Director General of Conservation*[55], the Environment Court suggested that applying "the balance of probability test to predictions of risk or any other prediction of future effects on every occasion is unhelpful". The court subsequently considered the issue further in *Long Bay-Okura Great Park Society Incorporated v North Shore City Council*[56] ("*Long Bay*") and considered it was bound[57] by the advice of the Privy Council in *Fernandez v*



52 Closing submissions dated 13 July 2013 at para 2.3(a).

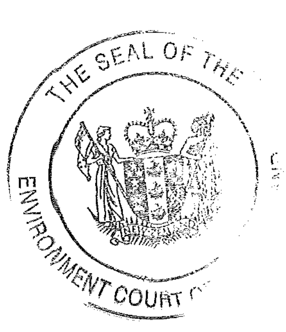
53 Citing *"Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council* [2005] NZRMA 193 (HC) at [73]". The correct reference is [2006] NZRMA 193 (HC).

54 As defined in section 2 RMA.

55 *Clifford Bay Marine Farms Ltd v Director General of Conservation* Decision C131/03 at [63].

56 *Long Bay-Okura Great Park Society Incorporated v North Shore City Council* Decision A78/2008.

57 *Long Bay* at [321].



Government of Singapore[58] where Lord Diplock referred to "the balance of probabilities" as[59]:

> ... a convenient and trite phrase to indicate the degree of certitude which the evidence must have induced in the mind of the court as to the existence of facts, so as to entitle the court to treat them as data capable of giving rise to legal consequences.

He continued:

> But the phrase ['the balance of probabilities'] is inappropriate when applied not to ascertaining what has already happened but to prophesying what, if it happens at all, can only happen in the future. There is no general rule of English law that when a Court is required, either by statute or at common law, to take account of what may happen in the future and to base legal consequences on the likelihood of its happening, it must ignore any possibility of something happening merely because the odds on its happening are fractionally less than evens.

As the court said in *Long Bay* that is a clear statement of the law, equally applicable in New Zealand. Predictions of the likelihood of an effect are decided upon the preponderance of the evidence.

[42] The Likelihood Scale[60] set out by the International Panel on Climate Change is useful in this context. It suggests the following "calibrated language for describing quantified uncertainty"[61] about the future:

Table 1. Likelihood Scale	
Term	**Likelihood of the Outcome**
Virtually certain	*99-100% probability*
Very Likely	*99-100% probability*
Likely	*66-100% probability*
About as likely as not	*33 to 66% probability*
Unlikely	*0-33% probability*

[58] *Fernandez v Government of Singapore* [1971] 2 All ER 691 (PC).
[59] *Fernandez v Government of Singapore* [1971] 2 All ER 691 (PC) at 696.
[60] Table 1 Likelihood Scale in *Guidance Note for Lead Authors of the IPCC Fifth Assessment Report on Consistent Treatment of Uncertainties* MD Mastrandrea et al (2010).
[61] *Guidance Note for Lead Authors of the IPCC Fifth Assessment Report on Consistent Treatment of Uncertainties* MD Mastrandrea et al (2010).

Very unlikely	*0-10% probability*
Exceptionally unlikely	*0-1% probability*

We will endeavour to be consistent with that Table in our assessment of probabilities of future events.

[43] The court also invited[62] the parties to make submissions before the hearing on the application of the probabilistic principle known as Bayes Rule to evidence (and hypotheses about future effects) but neither counsel nor the witnesses took up the opportunity. The court raised this point because most expert evidence that attempts to quantify the effects of stressors on the environment does so in a frequentist manner with 95% confidence limits. Since much data does not justify frequentist conclusions (disproving — or not — a null hypothesis, when that hypothesis is usually the opposite of what a consent authority wants to know), that information is then discarded as useless. However, such information can still be useful to assess the probabilities of potential events. As the Minute suggests, the principal method known to the court enabling consideration of more uncertain probabilities is Bayes Rule, so we regret the opportunity was not taken. That is especially so since Dr Clement, called for the Appellant, after making standard (and largely justified) frequentist criticisms of the Council's evidence, then admitted to the court that "Bayesian frameworks come in"[63] when assessing probabilities in conditions of uncertainty.

1. The marine environment of Beatrix Bay

1.1 Overview of the environmental setting

[44] The marine environment of Beatrix Bay, like the rest of the Marlborough Sounds, has been the focus of considerable historic human activity. It has been modified by physical disturbance (e.g. dredging and trawling), by runoff after land clearance, and by contaminants from residential and farming use of the land. Little data exists describing the ecological attributes of the Sounds prior to these activities. Some early publications reported on resources such as commercially viable intertidal mussel beds and subtidal scallop and horse mussel beds in the Pelorus Sound although most of these

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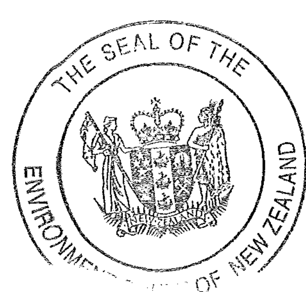
62 Minute dated 14 April 2015.
63 Transcript p 369.

have been lost as a result of dredging and/or smothering sedimentation from land use practices.

[45] Dredging still occurs in the area, however, the actual number of dredge and trawl tows is not publicly available. The consensus of the experts seemed to be that dredging only occurred once or twice a year, whereas in the past it had been more frequent. In any event the experts seemed to agree that repeated and ongoing trawling for flatfish in Beatrix Bay has resulted in significant changes to the seafloor with fine sediments remaining on the surface. This could potentially result in a turbid layer across the whole Bay, but whether that is so is unclear. Much of the soft bottom marine environment in central Pelorus Sound remains in a modified state with small remnant sites supporting biologically significant communities[64]. Close to the shore there is often domestic rubbish[65] on the seabed.

[46] The intertidal zone of Pelorus Sound is dominated by cobble and boulder substrata interspersed by areas of bedrock. Isolated areas with low gradient soft shores exist at the heads of bays where shellfish such as cockles and pipis exist. In many parts of the Sounds the intertidal biological communities have been modified by historical recreational and commercial fishing activities. For example, from 1960 to 1980, hand harvesting as well as subtidal dredging of natural green-lipped mussel beds was widespread in the Sounds.

[47] The inshore shallow subtidal edges of Pelorus Sound are dominated by relatively steeply sloping shores. These areas have not been dredged and the impact of sediment runoff is minimised due to wave action and water currents that keep these shores relatively free from the effects of sediment smothering. Inshore shallow subtidal habitats in Pelorus Sound and the wider Marlborough Sounds are therefore in a relatively natural[66] state. Where currents are strongest, a variety of filter feeding organisms such as hydroids, sponges, ascidians and tubeworms become abundant. These current-swept shallow subtidal areas have often been recognised as significant sites.



64 Davidson R, Duffy C, Gaze P, Baxter A, DuFresne S, Coutney S and Hamill P. (2011). Ecologically significant marine sites in Marlborough New Zealand (Davidson Environmental Limited) [Exhibit 6.3].

65 R J Davidson rebuttal evidence para 7.5 [Environment Court document 6A].

66 R J Davidson evidence-in-chief para 24 [Environment Court document 6].

[48] At the foot of the shore slope, the topography of the sea floor becomes relatively flat. Deep offshore flat areas are usually dominated by silt and clay (mud). Mud is the most common and widespread marine habitat in the Sounds and supports a characteristic invertebrate community in addition to benthic fish species such as flat fish. In general, the diversity of surface dwelling species in these offshore mud areas is considerably lower than on the sloping bay edges. Surface dwelling species in particular are often relatively uncommon on deep mud. These offshore areas have been dredged in the past and that still continues[67]. Dredged sites support a community dominated by opportunistic species able to cope with regular disturbance. In many instances the original community types found on these offshore soft bottoms do not recover (or recover very slowly) from activities such as dredging.

[49] In addition to dredging and trawling the stressors on coastal marine environments such as Beatrix Bay include anthropogenic effects such as accelerated climate change, sedimentation from run-off from land-based activities[68], fishing[69] and marine farming. We received minimal evidence as to how the effects of climate change might affect the habitats of Beatrix Bay or the species that live in them.

[50] Dr Taylor also observed that[70]:

> Confounding the issue of determining any cumulative ecological effects on sub-tidal and intertidal communities will be the Sound-wide impacts of stochastic (largely random but can be predicted on a probabilistic basis) environmental events. This includes a rapid succession of floods from the Pelorus River (catchment 880 km^2) and the Kaituna River (catchment 155 km^2), which discharge on average 43.0 m^3s^{-1} and 5.4 m^3s^{-1} respectively (Sutton & Hadfield 1997), and decadal oscillations in weather patterns like El Nino/La Nina[71]. Both of these drivers can cause

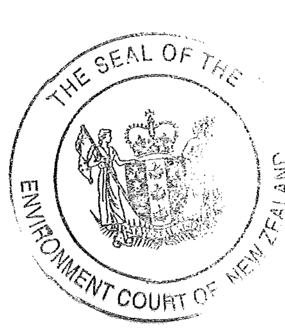
67 R J Davidson rebuttal evidence para 8.11 and Figures 5 and 6 [Environment Court document 6A].

68 D I Taylor evidence-in-chief para 36 [Environment Court document 8] referring to "deforestation, pastoral farming, clear-felling of exotic forestry".

69 D I Taylor evidence-in-chief para 36 [Environment Court document 8].

70 D I Taylor evidence-in-chief para 39 [Environment Court document 8].

71 Citing Zeldis JR, Hadfield MG, Booker DJ 2013. "Influence of climate on Pelorus Sound mussel aquaculture yields: predictive models and underlying mechanisms". *Aquaculture Environment Interactions* at 4:1-15.



large shifts in the abundance of intertidal and sub-tidal species[72], and are known to affect the distribution of species within the Marlborough Sounds[73].

1.2 The effects of the existing mussel farms

[51] We have referred to the 37 marine farms around the bay. Many of the earlier mussel farms in Beatrix Bay were — in accordance with the Sounds Plan — located close in to the shore and over rocky or reef substrates. As awareness of the ecological importance of those areas has risen, and as demand for farming space has increased, farms have extended seawards. That has had the effect of extending farms over the soft (flatter) substrate that characterises the seabed of most of Beatrix Bay.

[52] Cultured shellfish such as mussels feed on microscopic suspended particulate matter both living and non-living (collectively referred to as seston) by filtering it from the water column. Mussel diets are primarily composed of phytoplankton, but also include some zooplankton and other living and non-living material. Following digestion of food, the faeces produced by mussels are generally light and tend to break up and dissolve readily. That process releases dissolved nutrients, particularly nitrogen, into the water column. Mr B R Knight, another ecologist called for the Appellant, wrote that nitrogen is considered to be a limiting factor to the growth of phytoplankton in Beatrix Bay, so the effect of grazing by mussels — which reduces phytoplankton stocks — may be somewhat balanced by the recycling of nutrients that encourage replenishment of phytoplankton stocks[74]. However, that is somewhat academic because Mr Knight also described the current trophic status of Beatrix Bay as low-mesotrophic. Indeed basic nitrogen budgets developed for the Pelorus Sound indicate there is an excess of nitrogen inputs occurring.

72 Citing Schiel DR (2004). "The structure and replenishment of rocky shore intertidal communities and biogeographic comparisons". *Journal of Experimental Marine Biology and Ecology* at 300:309-342.

73 Citing Davidson R.J.; Duffy C.A.J.; Gaze P.; Baxter A.; DuFresne S.; Courtney S.; Hamill P. 2011. "Ecologically significant marine sites in Marlborough, New Zealand". Coordinated by Davidson Environmental Limited for Marlborough District Council and Department of Conservation.

74 B R Knight, evidence-in-chief para 19 [Environment Court document 9].

[53] Mr Knight relied on papers[75] which he said found no change in the base food web as a result of mussel production in Pelorus Sound. There was no indication from these studies that mussel production at a bay or Sounds-wide scale was nearing ecological carrying capacity or that mussel farming associated change in water column properties was occurring[76].

Water column effects

[54] More authoritative information on water column effects is contained in a report by Dr N Broekhuizen and others called "A biophysical model for the Marlborough Sounds Part 2: Pelorus Sound"[77]. A draft was produced by Dr Broekhuizen, under a witness summons, and the final version ("*the Broekhuizen Report*") was referred[78] to by Mr Maassen in his memorandum of June 2015 and produced to the court and parties in February 2016.

[55] *The Broekhuizen Report* presents the results from large scale biophysical modelling of Pelorus Sound designed to describe the effects of existing (at 2012) and proposed (consented since 2012) mussel and finfish farms on water quality[79]. Various marine farming and geochemical scenarios were modelled. A finding of particular relevance in this case was that bay scale effects of increased ammonium concentrations and decreased seston concentrations are predicted by the model as a result of mussel farming.

[56] Counsel submitted that *the Broekhuizen Report* shows that the Existing Mussel farms in Pelorus Sound as at January 2012 have changed the environment compared with a "No Mussel farms" scenario. The report states, as Mr Maassen for the Council quoted[80], that:

75 Zeldis JR, Howard-Williams C, Carter CM, Schiel DR 2008. *ENSO and riverine control of nutrient loading, phytoplankton biomass and mussel aquaculture in Pelorus Sound, New Zealand.* Marine Ecology Progress Series 371; 131-142; Zeldis JR, Hadfield M, Booker D 2013. *Influence of climate on Pelorus Sound mussel aquaculture yield; predictive models and underlying mechanisms.* Aquaculture Environment Interactions 3(4); 1-15.

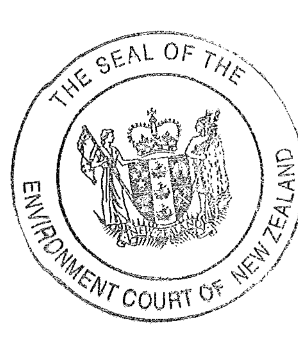
76 B R Knight, rebuttal evidence at 4.9-4.10 [Environment Court document 9A].

77 Broekhuizen, N; Hadfield M; Plew D "A biophysical model for the Marlborough Sounds Part 2: Pelorus Sound" (2015) NIWA Report CHC 2014-130.

78 Environment Court document 10A.

79 Broekhuizen N, Hadfield M and Plew D 2015 *A biophysical model for the Marlborough Sounds. Part 2: Pelorus Sound.* NIWA Client Report CH2014-130.

80 Memorandum from Marlborough District Council dated 22 July 2015.



Relative to the nominated baseline scenario (EM-EF-WD[81]), a no mussel, existing fish with denitrification simulation (NM-EF-WD[82]) yields:

Winter-time: lower concentrations of ammonium and nitrate but higher concentrations of particulate organic detritus (dead plankton etc.,) phytoplankton and zooplankton. The largest changes in relative concentration are seen in Kenepuru Sound and the largest relative concentration changes are within the zooplankton. There, time-averaged near-surface winter-time seston3 concentrations in the NM-EF-WD simulation are more than double those of the EM-EF-WD scenario (for zooplankton in Kenepuru, substantially more than double). The Beatrix/Crail/Clova system also exhibits similar (but smaller) changes.

Summertime: lower concentrations of ammonium, nitrate, higher concentrations of detritus and zooplankton, but phytoplankton concentrations which are similar to (or lower than) those of the EM-EF-WD scenario. During summer, mussels convert particulate organic nitrogen (not directly exploitable by phytoplankton) to ammonium (directly exploitable by phytoplankton). Phytoplankton growth is normally nutrient limited during this time, but in the immediate vicinity of the mussel farms, phytoplankton (which survive passage through the farms) find a plentiful ammonium supply. This enables them to grow quickly – more than offsetting the losses that the population suffered to mussel grazing (the 'excess' accrued phytoplankton biomass being fuelled out of the detritus that was consumed). …

[57] In summary the *Broekhuizen Report* suggests that there have been "material" changes in water column properties as a result of the development of mussel farms. However, the report does not assist with determining any threshold regarding the ecological carrying capacity of Pelorus Sound for mussel farms. Nor does it substantiate a trajectory of insidious decline (in Mr Maassen's phrase) in relation to the water column.

The benthic zone: physical effects

[58] Shell, mussels, faeces and pseudofaeces are released from mussel farms. The latter comprise inorganic and organic material filtered from the water column, but not digested. The rejected particles are aggregated into a mucus-bound mass and

81 The abbreviation stands for "existing mussel-farms, existing fish-farms, with benthic dentrificantion": (EM-EF-WD). This "corresponds to present-day conditions in Pelorus Sound" Broekhuizen et al para 4.9.

82 The abbreviation stands for "no mussel-farms, existing fish-farms, with benthic dentrification": (NM-EF-WD).

periodically ejected back into the water column. Pseudofaeces are heavier than faeces and settle out rapidly to the seafloor as sediment.

[59] Between 250 and 400 tonnes of shell, mussels and sediment is released under each hectare of farm each year[83]. For the 304 hectares (approximately) of current farms in Beatrix Bay, that is a minimum of 76,000 tonnes of sediment. The nutrients and fine particulate matter which are part of that sediment are dispersed at a rate which is a function of the current flow at the individual sites and the flushing characteristics of the bay as a whole. The shell hash and live mussels settle on the sea floor.

[60] The obvious visual effect of a mussel farm on the sea floor is the accumulation of live and dead mussels, increased sediment, and the increase in invertebrate predators such as the 11-armed sea star. Chapter 3 (Benthic Effects) of the *Literature Review of Ecological Effects of Aquaculture*[84] ("the *Literature Review*") published by the Ministry of Primary Industries states generally:[85]

> Visual observations suggest that shell deposition within a farm can be patchy, ranging from rows of clumps of live mussels and shell litter directly beneath long lines to widespread coverage across the farm site[86].

Further "Mussel clumps and shell litter beneath a mussel farm have been observed as acting as a substrate for the formation of reef-type communities"[87].

[61] Specifically in the Marlborough Sounds a more recent study we were referred to shows that at two sheltered farm sites[88]:

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83 B G Stewart evidence-in-chief para 6.4 [Environment Court document 26] referring to Hartstein, N.D. and Rowden, A.A. (2004). "Effect of biodeposits from mussel culture on macroinvertebrate assemblages at sites of different hydrodynamic regime". *Marine Environmental Research* 57:339-357 and Hartstein, N.D. and Stevens C.L. (2005). "Deposition beneath long-line mussel farms". *Aquaculture Engineering* 33:192-213.

84 *Literature Review of Ecological Effects of Aquaculture* (2013) Ministry of Primary Industries ("MPI") at section 2.2.2 (Exhibit 11.2). This publication does not contain a consensus view but is a series of individual chapters by different experts on the subject of their expertise.

85 *Literature Review* at p 3-20.

86 *Literature Review* citations omitted.

87 *Literature Review* citations omitted.

88 N D Hartstein "Acoustical and Sedimentological Characterization of Substrates in and Around Sheltered and Open-Ocean Mussel Aquaculture Sites and Its Bearing on the Dispersal of Mussel Debris" (2005) *IEE Journal of Oceanic Engineering* Volume 30 No 1 p 85 at 85.

> Photography and sediment samples reveal farms are underlain by mounds of shells with biodeposits infilling intershell voids and forming a veneer over entire mounds. In contrast, the surrounding seabed is naturally sedimented soft mud. Sediment from beneath the farms had total organic contents of 8%-19% decreasing sharply to natural levels of 4%-7%, 30 m from the farm's boundaries.

The author adds[89] "Given that [the farms] have low current flows and little potential wave energy … there is likely little lateral transportation and redistribution of the shell and organic material, thus causing it to deposit directly beneath the culture site." That might suggest the mussel shells and mussels only fall directly underneath the lines so that there is soft substrate between them. However, that possible interpretation is belied by the description of the "surficial sediments" in Hartstein's Figure 8. That shows the whole footprint of both low-energy farms was "silt and clay with mussel shells" or (smaller areas of) "predominately mussel shells"[90].

[62] We find on the balance of probabilities that the whole area underneath an average mussel farm in Pelorus Sound has a changed substrate. It is no longer reef or soft mud but is usually a patchy mix of clumps of mussels and shells, and larger areas of mud and mussel shells. It is unlikely there is consistent soft mud and an absence of shells. We also find that on average the penumbra of sediment extends no further than 30 metres from the farms, and shell hash extends far less, depending on wind drifting long lines.

[63] Dr Stewart calculated[91] the total amount of soft substrate habitat available within Beatrix Bay as approximately 1960 ha. He then compared that with "… the amount of habitat likely changed due to the presence of mussel farms (approximately 365 ha), based on 320 ha of consented farm space and 15-20% extra for movement of longlines and impacts beyond farm boundaries". He concluded that "…approximately 19% of the soft substrate habitat is potentially affected" by existing mussel farms. He considered that insufficient information was available to determine the effects of mussel farms on

89 N D Hartstein, above n 88, at p 92.
90 N D Hartstein above n 88, at p 91.
91 B G Stewart evidence-in-chief para 7.4 [Environment Court document 26].

benthic communities away from the immediate farm footprint[92] or on the accumulated effects[93] from the scale of farming in Beatrix Bay on these communities.

[64] We are uneasy about Dr Stewart's calculations. The Appellant was generally critical of them, but did not attempt to put up on alternative figure. It seems to us (for example from Figure 1 attached to Dr Fisher's evidence[94]) that about 60% of the existing farms in Beatrix Bay are over water that is at least 20m deep and is thus likely to be both over soft mud seafloor and within King Shag foraging depths (which start at about 10m). Of the 320 hectares of consented space perhaps only 200 hectares is over soft substrate. In addition there is a 30 metre wide strip along the outside edge of all the total farm's length (8.5km) which adds a further 25 hectares of substrate substantially affected, albeit more by sediment than by shell hash and live mussels. Thus the total 225 hectares of affected benthic environment is very approximately 11% of the total area of Beatrix Bay (but more than 11% of the total soft substrate).

The benthic zone: biochemical and infaunal effects

[65] Dr Taylor wrote that[95]:

> … mild enrichment effects are common under mussel farms in the Marlborough Sounds, and are relatively minor and are a natural feature of mussel beds on the seabed. These effects are often result in enriched infauna (animals living in the sediments) and epifauna (animals living on the sediments) communities with greater taxa diversity and abundances[96].
>
> …
>
> In general, mussel farm-related seabed effects reduce to no near undetectable levels within 20 m–30m of farm boundaries[97].

[66] In relation to the deposition of finer sediments, Dr Taylor described how in his opinion deposition in the form of faeces and pseudofaeces from the mussel farm will

92 B G Stewart evidence-in-chief para 4.2 [Environment Court document 26].
93 B G Stewart evidence-in-chief paras 5.13 and 6.40 [Environment Court document 26].
94 P R Fisher evidence-in-chief p 7 [Environment Court document 28].
95 D I Taylor evidence-in-chief paras 32 and 33 [Environment Court document 8].
96 Citing Kaspar, H.F., Gillespie, P.A., Boyer, I.C. and MacKenzie, A.L. (1985). "Effects of mussel aquaculture on the nitrogen cycle and benthic communities in Kenepuru Sound, Marlborough Sounds, New Zealand". *Marine Biology* at 85: 127–136.
97 Citing Keeley, N., B. Forrest, G. Hopkins, P. Gillespie, D. Clement, S. Webb, B. Knight and J. Gardner (2009). "Review of the Ecological Effects of Farming Shellfish and Other Non-finfish Species in New Zealand". Prepared for the Ministry of Fisheries: *Cawthron Report No. 1476*. Nelson, New Zealand, Cawthron Institute: at p 144.

result in "mild" enrichment of the soft sediment directly below and immediately adjacent to the farm. This enrichment reduces to near undetectable levels within 20-30m of the farm boundary in low to moderate water flow sites.

[67] Dr Mead asserted that based on his own observations and modelling evidence on currents, he expected anoxic conditions (highly enriched) to be widespread under the majority of the mussel farms in Beatrix Bay[98]. He extrapolated from research by Christensen and others[99] in Pelorus Sound.

[68] Responding to Dr Mead's assertion[100] that enrichment of the benthic environment under existing mussel farms had not been investigated, Dr Taylor referred us to two qualitative assessment studies he had been involved with in Pelorus Sound, one of these in Beatrix Bay. Mr Ironside, in a lengthy cross-examination, took Dr Taylor through a detailed examination of all of the elements contributing to benthic changes under mussel farms reported in Christensen[101]. Dr Taylor responded that all have been taken into account in this case.

[69] In response to cross-examination by Mr Ironside on the Christensen research[102] on the "cumulative" effects of suppression of the natural denitrification process under mussel farms, Dr Taylor suggested that it was difficult to extrapolate to a bay-wide scale or even a farm-wide scale the results from three 5cm cores as reported by Christensen. He maintained his position that a gradient of effects under and moving out from mussel farms resulted in largely benign effects at a Beatrix Bay scale. In his opinion, "cumulative" effects were not distinct, marked or adverse[103]. When asked by the court

98 Transcript, p 412, line 20.

99 Christensen P B, Glud R N, Dalsgaard T and Gillespie P 2003. "Impacts of longline mussel farming on oxygen and nitrogen dynamics and biological communities of coastal sediments". *Aquaculture* 218, 567-588 [Exhibit 8.4].

100 S T Mead evidence-in-chief at para 41 [Environment Court document 20].

101 Christensen P B, Glud R N, Dalsgaard T and Gillespie P 2003. "Impacts of longline mussel farming on oxygen and nitrogen dynamics and biological communities of coastal sediments". *Aquaculture* 218, 567-588 [Exhibit 8.4].

102 Christensen P B, Glud R N, Dalsgaard T and Gillespie P 2003. "Impacts of longline mussel farming on oxygen and nitrogen dynamics and biological communities of coastal sediments". *Aquaculture* 218, 567-588 [Exhibit 8.4].

103 Transcript, p 186, line 17.

if the sediment sampling reported in the Christensen study was adequate to establish bay-wide conclusions, Dr Mead agreed that "this wouldn't be a normal process"[104].

[70] Dr Stewart presented findings from his own dive surveys of "inshore habitats" at the proposed site, under and adjacent to an existing mussel farm, and at a control site in Miro Bay. These surveys revealed a range of differences in epifaunal community structure (diversity) and abundance between sites. Hard substrate communities showed larger differences than those on soft substrate. Dr Stewart observed[105] that without more comprehensive survey work, linking differences in diversity to any specific cause would be difficult. He did however go on to make such a linkage[106] to the presence or close proximity or absence of mussel farms. He concluded that as the benthic community "will almost certainly differ" following development of a mussel farm, the effect on that community was likely to be significant within 100m of the farm.

[71] Dr Taylor and Dr Grange were critical of the design of Dr Stewart's study in that it examined a single site beneath the mussel farm and one control site some 14 km further into Pelorus Sound from Beatrix Bay in an area influenced by freshwater and sediment-laden plumes from the Pelorus River. Dr Taylor considered[107] the lack of site replication meant that analysis of the results had a very high risk of making a type 1 error (a false positive) suggesting there is an effect when none is actually present. In Dr Taylor's opinion the limitations of the study ruled out any conclusions on mussel farm effects on inshore communities as any differences can equally be explained by natural site to site variability as evidenced by the Davidson/Grange study referred to earlier.

[72] Of particular concern in this case are the effects of the mussel farms on specialist (rather than generalist[108]) taxa and particularly on (the habitat of) the specialist King Shag. It is apparent that the 37 mussel farms in Beatrix Bay each have some effect in altering the benthic environment below and adjacent to (within 30 metres of) the direct footprint of the farm. The evidence does not, however, support the claim that bay-wide effects on benthic communities are generally significant. The same conclusion was

[104] Transcript, p 416, line 14.
[105] B G Stewart evidence-in-chief at 4.19 [Environment Court document 26].
[106] B G Stewart evidence-in-chief at 4.24 [Environment Court document 26].
[107] D I Taylor, rebuttal evidence-in-chief [Environment Court document 8A].
[108] A simple everyday example is to compare nearly ubiquitous house sparrows (relatively generalist) with rock wren (mountain specialists).

earlier reached by the author of Chapter 12 of the *Literary Overview*[109] with the statement:

> While benthic effects are one of the most commonly expected changes as a result of shellfish farming, they are typically of minor ecological consequence **beyond** the boundary of the farm. (Emphasis added).

The implication is that benthic effects are of more than minor ecological significance underneath mussel farms. That is consistent with the evidence of Dr Stewart.

The photic zone

[73] Dr Stewart carried out an analysis[110] in respect of the photic zone — the sunlit zone within which photosynthesizing algae play a significant role in primary production. Using a "conservative" figure of 30 metres to define the depth of the zone in Beatrix Bay, he calculated the percentage of the photic zone likely altered by mussel farms is about 85-90%.

[74] Upon first reading, this appears to be a significant change resulting from mussel farming. However Dr Taylor wrote that[111]:

> … the level of productivity of the microphyto-benthos (the micro algal mats that grow on muddy substrata throughout the Marlborough Sounds) is known to fluctuate greatly depending on the time of year and the time elapsed since significant flood events in the Pelorus River. This is because the river plume reduces water clarity and contributes significantly to sedimentation in the Pelorus Sound[112].

He continued:

> Not only is the productivity of the microphyto-benthos highly variable in space and time, but it is also capable of remaining highly productive beneath mussel farms.

109 *Literature Review* above n 84: Chapter 12 (C Cornelisen) at section 2.3.2.

110 B G Stewart evidence-in-chief para 7.6 [Environment Court document 26].

111 D I Taylor rebuttal evidence para 4.1 [Environment Court document 8A].

112 Citing Handley S 2015. "The history of benthic change in Pelorus Sound (Te Hoiere), Marlborough". *NIWA Client Report No: NEL2015-001*. Prepared for Marlborough District Council.

[75] We have inadequate information to determine whether the effects of mussel farms have been adverse or beneficial generally on the photic zone of Beatrix Bay. However, since we were not given evidence of any direct link between this and any alleged adverse effect of relevance under the Sounds Plan or NZCPS we consider it no further.

Summary

[76] We find on the balance of probabilities that the <u>effects</u> of the existing mussel farms on:

(a) the water column is that they deplete seston supplies from the water column in winter and add to it in summer;

(b) the reef zone around the promontory are negligible;

(c) the photic zone are uncertain;

(d) the benthic zone are confined to changing the substrate to patches of shell, live mussels and sediments within an incomplete ring no wider than 30 metres from the farm boundaries;

(e) the soft seafloor of Beatrix Bay is that about 11% has been changed quite substantially.

[77] All those accumulated and accumulating effects are a key part of the environmental setting of the proposal.

1.3 <u>Have mussel farms changed fish distribution?</u>

[78] The soft mud floor of Beatrix Bay provides habitat for flatfish including Witch Flounder, other (right-eyed) flounder species and Lemon Sole. While fish species typically spend[113] some of their time feeding, "the remainder of the time [is spent] in other activities such as predator avoidance, where their location may be driven by benthic habitat". When not breeding or feeding, flatfish spend much of their time hidden in the soft substrate of the seafloor according to Dr Fisher. Beatrix Bay also provides habitat "for adult spawning and nursery areas for juvenile flat fish"[114].

113 P R Fisher evidence-in-chief para 4.26 [Environment Court document 28].
114 P R Fisher evidence-in-chief para 4.42 [Environment Court document 28].

[79] The *Literature Review* states[115] "Direct effects from the development of shellfish farms include alteration of essential fish habitats through the deposition of shell litter and biodeposition of particulate matter." It goes on to add "These effects can be avoided or minimised through proper site selection and effects assessments prior to development". Dr Fisher's evidence was consistent with that. In his view[116] the habitat under mussel farms is no longer soft muddy floor.

[80] The *Literature Review* continues[117]:

> The initial attraction of wild fish species to aquaculture structures (e.g., habitat creation) can lead to a variety of related effects including:
>
> - Changes in the distribution and productivity of wild fish populations due to the addition of artificial structures that create new habitats used by wild fish.
> - Changes in recreational fishing patterns and pressure, which in turn could affect wild fish populations differently than in the absence of the structures.
> - Larval fish depletion by shellfish and/or potential trophic interactions (e.g., alteration of plankton composition and food availability).

[81] Dr Stewart was also of the opinion that the "formation of reef-like communities immediately below mussel farms [both] create predator oases"[118] and cause "habitat loss and/or modification"[119] as well as "increased competition for bottom feeders ..."[120]

[82] In Mr Shuckard's experience[121] "[f]ish abundance around mussel lines is small[122] and dominated by small, demersal species characteristic of rocky reefs in the area, notably triplefins (*Forsterygion lapillum* and *Grahamina gymnota*) and Spotty (*Notolabrus celidotus*)." He has also observed[123] common species of fish around mussel

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115 *Literature Review* above n 84, at p 5-6.
116 B G Stewart evidence-in-chief para 3.15 [Environment Court document 26] (see P R Fisher evidence-in-chief para 6.2).
117 *Literature Review* above n 84, at p 5-6.
118 B G Stewart evidence-in-chief para 6.15 [Environment Court document 26].
119 B G Stewart evidence-in-chief para 6.17 [Environment Court document 26].
120 B G Stewart evidence-in-chief para 6.17 [Environment Court document 26].
121 R Schuckard evidence-in-chief para 59 [Environment Court document 25].
122 Citing Morrisey, D.J., Cole, R.G., Davey, N.K., Handley, S.J., Bradley, A., Brown, S.N. and Madarasz, A.L. (2006). "Abundance and diversity of fish on mussel farms in New Zealand". *Aquaculture* 252:277-288.
123 R Schuckard evidence-in-chief para 59 [Environment Court document 25].

farms such as Smooth Leatherjacket (*Parika scaber*) and Yellow-eyed Mullet (*Aldrichetta forsteri*).

[83] Mr Davidson wrote[124]:

> ... Dr Fisher suggests[125] the "smothering of benthos" under mussel farms excludes "naturally occurring benthic species" ... There are no published data on the abundance or distribution of witch flounder (or, for that matter, flat fish) under mussel farms compared to adjacent areas. His statement is therefore unsupported speculation. As mussel farms exclude trawling it is entirely possible that flatfish abundance may be higher under and between farms. Apart from studies investigating fish species inhabiting farm structures, I am not aware of comprehensive data investigating benthic species. (Underlining added).

This is one of the points where the burden on the Appellant (as applicant) of putting forward adequate information becomes critical.

[84] We accept that it is possible that some flatfish may be found underneath mussel farms: some of the prey (e.g. polychaetes) of Witch Flounder may increase in abundance. However, we find that the overall assemblage of fish and other fauna changes quite markedly underneath and in the proximity of most mussel farms. In relation to benthic fish species, Mr Schuckard[126] referred to overseas research which shows that:

> Declining environmental conditions under and in the vicinity of farms as a result of faeces and pseudo-faeces deposition in small discrete areas in and around the farms, have a generally negative impact on oxygen-related processes for the different life stages of fish; settlement probability of juveniles; habitat utilisation of spawning fish; age structure of successful spawners; and food consumption rates of adult fish.

124 R J Davidson rebuttal evidence para 8.16 [Environment Court document 6A].

125 P R Fisher evidence-in-chief para 6.6 [Environment Court document 28].

126 R Schuckard evidence-in-chief para 57 [Environment Court document 25] citing Folke, C., Kautsky, N., Berg, H., Jansson, A., Troell, M.. (1998). "The ecological footprint concept for sustainable seafood production: A review". *Ecological Applications*, 8(1) Supplement, pp S63-S71; Hinrichsen, H.H., Huwer, B., Makarchouck, A., Petereit, C., Schaber, M. And Voss, R. (2011) "Climate-driven long term trends in Baltic Sea oxygen concentrations and the potential consequences for eastern Baltic cod (*Gadus morhua*)". *ICES Journal of Marine Science*, 68: 2019-2028; Diaz, R., Rabalais, N.N. and Brietburg, D.L "Agriculture's Impact on Aquaculture: Hypoxia and Eutrofication in Marine Waters". *OECD Publishing* (2012)..

That supports the third bullet point in the *Literature Review* quoted above. Further, there appears to be effects on the substrate which may decrease the quality of habitat even for feeding flatfish: increased predator numbers and potentially a poorer hiding environment.

[85] We find that the habitats of flatfish and other benthic fish species have been reduced by the introduction of mussel farms in that:

(a) it is likely that the changes in substrate underneath mussel farms are physically (a change from soft mud to mud and shell, or shell and mussels), chemically (increases in organic matter) and ecologically (a change of in-fauna and increases in predators) different from the original seafloor;
(b) it is very likely that the fish assemblages have changed;
(c) flatfish in all stages of their life-cycle and in most of their activities are largely excluded from underneath most mussel farms;
(d) it is likely that flatfish have been at least partly displaced within about 30 metres of the outside boundary of mussel farms in the Sounds.

[86] The reduction in that habitat within Beatrix Bay is an accumulated effect or stressor which is part of the environment. However, we have found it quite difficult to assess the extent of change to that part of the benthic environment which is soft mud, because by no means all of the existing mussel farms are anchored over that type of seafloor exclusively.

[87] The Appellant (through Dr Taylor) did not address the question whether the nutrients under mussel farms — whether in or on the benthos (seafloor) or in the photic zone — change the food web in a way that assists species higher up the chain, for example by providing them with more prey, or inhibits them. We now turn to that and related issues in respect of one particular species — the New Zealand King Shag.

2. New Zealand King Shags and their habitat

2.1 Description, population and conservation status

[88] One aspect of the environment in which the site is located is of particular importance in this case. It stems from the fact that Beatrix Bay is within the extent of

occurrence ("EOO")[127] of the endemic New Zealand King Shag[128]. The New Zealand King Shag[129] ("King Shag") is one of 16 taxa[130] of blue-eyed shags. Like almost all *Leucocarbo* shags, it is dimorphic: males are larger and heavier than females and they tend to feed in deeper water[131].

[89] The King Shag is a large black and white bird with pink feet and white bars on its black wings. It has yellowish-orange patches of bare skin at the base of the bill. It is smaller than the Black Shag[132] and larger than the Pied Shag[133] (with which it can be confused).

[90] We received evidence about King Shags from three witnesses. Mr R Schuckard who holds a MSc in Biology gave evidence for the Societies. Since 1991 he has conducted long term[134] studies and monitoring of New Zealand King Shag. He is a committee member of the Friends of Nelson Haven and Tasman Bay Inc[135] and is thus not completely disinterested in the outcome of this proceeding. We treat his evidence with caution as we do that of Mr Davidson for the Appellant. In fact Mr Davidson expressly renounced[136] being an expert witness in these proceedings. On the whole those two witnesses both attempted to be as objective as possible and our caution is more about subconscious biases than obvious partisanship by these two witnesses. The largest exceptions are parts of Mr Davidson's rebuttal evidence where he alternates between critical statements on the evidence of other parties' witnesses and rather broad or simplistic assertions of his own. The Council called Dr P R Fisher, a completely independent avian ecologist who has studied the King Shag.

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127 "Extent of occurrence is defined as the area contained within the shortest continuous imaginary boundary which can be drawn to encompass all the known, inferred or projected sites of present occurrence of a taxon, excluding cases of vagrancy ... This measure may exclude discontinuities or disjunctions within the overall distributions of taxa (e.g. large areas of obviously unsuitable habitat) ... Extent of occurrence can often be measured by a minimum convex polygon (the smallest polygon in which no internal angle exceeds 180 degrees and which contains all the sites of occurrence)". IUCN (2012) *IUCN Red List Categories and Criteria*: [*Version 3.1, Second Edition*] Gland, Switzerland and Cambridge, UK: IUCN. iv + 34 pp11-12.

128 *Leucocarbo carunculatus.*

129 Te Kawau-a-Toru *Leucocarbo carunculatus.*

130 Seven blue-eyed species occur in New Zealand (including the Sub-Antarctic species).

131 P R Fisher evidence-in-chief para 4.5 [Environment Court document 28].

132 Better called Great Cormorant *Phalacrocorax carbo.*

133 *Phalacrocarax varius.*

134 R Schuckard evidence-in-chief para 3 [Environment Court document 25].

135 R Schuckard evidence-in-chief para 7 [Environment Court document 25].

136 R J Davidson evidence-in-chief para 10 [Environment Court document 6].

Population

[91] Mr Schuckard estimated the average population between 1992 and 2002 as 645 birds[137] with breeding colonies restricted to four areas: Duffers Reef, Trio Islands, Sentinel Rock and White Rocks[138]. Relying on his earlier research Mr Schuckard informed[139] us that "... the numbers of shags appear to have been stable for at least the past 50 years — and possibly over 100 years[140]". Mr Davidson saw this as providing "some comfort"[141] that marine farms have not effected the population of King Shags. In Dr Fisher's opinion[142] the methodology used by Mr Schuckard was "... appropriate for the task ..." and provided accurate counts.

[92] Dr Fisher initially wrote that[143] "the most recent *estimate* for the total King Shag population was of 687 birds". That is based on a survey of the marine avifauna of the Marlborough Sounds undertaken between September and December 2006. He sounded a precautionary note that the estimate is based on "... counts at colonies when significant numbers of birds were absent feeding"[144], and that caution was justified by subsequent events.

[93] New, more thorough (and expensive) techniques for surveying the King Shag population have recently (2015) been set up. On 11 February 2015 an aerial survey by Mr Schuckard and two other experts counted more (839)[145] King Shags than ever before. The increase in numbers of birds compared to the results of his earlier surveys is attributed by Mr Schuckard[146] to a better accuracy in the count than before, to the count being done in one morning rather than over tens of days and to more colonies being counted.

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137 R Schuckard "Population Status of the New Zealand King Shag ..." *Notornis* (2006) 53(3): 297-307.

138 All are protected as wildlife sanctuaries under the Reserves Act.

139 R Schuckard evidence-in-chief para 23 [Environment Court document 25].

140 Citing W L Buller "Notes and Observations on New Zealand Birds" (1891) *Trans. NZ Inst.* 24: 65-91.

141 R J Davidson rebuttal evidence para 8.10 [Environment Court document 6A].

142 P R Fisher evidence-in-reply para 3.4 [Environment Court document 28A].

143 P R Fisher evidence-in-chief para 3.2 [Environment Court document 28] citing M Bell "Numbers and distribution of New Zealand King Shag ... colonies in the Marlborough Sounds, September-December 2006" (2010) *Notornis* 57:33-36.

144 P R Fisher evidence-in-chief para 3.2 [Environment Court document 28].

145 R Schuckard Supplementary evidence para 30 [Environment Court document 25A].

146 R Schuckard Supplementary evidence para 30 [Environment Court document 25A].

[94] The highest number of birds counted by Schuckard at the four main colonies during his 1991-2002 surveys was 626 in 1994. The count for these four sites by the 2015 aerial survey was[147] 637. This suggests, given Dr Fisher's comment on the accuracy of Schuckard's 1991-2002 counts, that the numbers of birds at the four colonies has not changed significantly and thus the increase in the total number of birds is likely to be a result of a more wide ranging count.

[95] Mr Gardner-Hopkins in his closing submissions said:

> In 1992, the closest colony to Beatrix Bay, Duffers Reef, posted 168 (of 524) King Shag individuals. In contrast, the latest population count (early in 2015) has nearly 300 King Shags at Duffers Reef (out of 839 overall).[148]

It was unclear what inference he intended us to draw from that. One thing we cannot do is assume[149] there has been an increase in the total population[150].

[96] We conclude that King Shag numbers in the four main colonies have been approximately the same since 1991 and there is no declining trend in total numbers, but that finding is subject to the qualifications stated by Dr Fisher[151] who elaborated on this in his rebuttal evidence[152]: "the colony counts cannot be used to determine the long term '*stability*' of the population because the count[s] do … not reflect the number of breeding pairs, successful breeding attempts or age and sex ratio of birds, the latter determining the number of potential breeding pairs".

Status

[97] The King Shag is a Nationally Endangered[153] species in the *New Zealand Threat Classification System* published by the Department of Conservation. As at 2012 the criteria for King Shag's inclusion as a "Nationally Endangered Species" were that it had

147 R Schuckard evidence-in-chief para 30 [Environment Court document 25].
148 As summarised in the Council's submissions at para 277.
149 Transcript, p 525, line 17.
150 R Schuckard supplementary evidence para 30 [Environment Court document 25A].
151 P R Fisher evidence-in-chief para 3.4 [Environment Court document 28].
152 P R Fisher rebuttal evidence para 6.6 [Environment Court document 28A].
153 "Nationally endangered" is the second in three categories of "Threatened Species": Nationally Critical, Nationally Endangered, and Nationally Vulnerable in the Department of Conservation's Threat Classification System.

a small (250-1,000 mature individuals), stable population[154]. It was also described as "Range Restricted"[155].

[98] The *IUCN Red List Categories and Criteria* ("the *Red List*") categorises taxa by assessing them under five sets of criteria[156]:

- A: Reduction in population;
- B: Geographic range (EOO or AOO — see next paragraph — or both);
- C: Small population size and declining population;
- D: Very small or restricted population size;
- E: Quantitative analysis showing the probability of extinction in the wild meets a threshold[157].

[99] Obviously the "AOO" needs explanation. The *Red List* states[158]:

> Area of occupancy is defined as the area within its 'extent of occurrence' which is occupied by a taxon, excluding cases of vagrancy. The measure reflects the fact that a taxon will not usually occur throughout the area of its extent of occurrence, which may contain unsuitable or unoccupied habitats. In some cases (e.g. irreplaceable colonial nesting sites, crucial feeding sites for migratory taxa) the area of occupancy is the smallest area essential at any stage to the survival of existing populations of a taxon. The size of the area of occupancy will be a function of the scale at which it is measured, and should be at a scale appropriate to relevant biological aspects of the taxon, the nature of threats and the available data ...

[100] King Shag is identified as *vulnerable* by the International Union for the Conservation of Nature and Natural Resources ("IUCN") in the *Red List*. *Vulnerable* is one of the three 'threatened' species in the *Red List*. Dr Fisher explained that the King Shag is so categorised because[159]:

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154 H A Robertson, J E Dowding, G P Elliot et al p 10 Conservation Status of New Zealand Birds (2012) Department of Conservation.

155 H A Robertson, J E Dowding, G P Elliott et al Conservation Status of New Zealand Birds (2012) Department of Conservation p 10.

156 IUCN (2012) *IUCN Red List Categories and Criteria*: [*Version 3.1, Second Edition*] Gland, Switzerland and Cambridge, UK: IUCN. IV + 34.

157 50% probability means taxon is critically endangered, 20% endangered, 10% vulnerable.

158 The *Red List* above n 156, at p 12. The definition of "EOO" is given above n 127.

159 P R Fisher evidence-in-chief para 3.5 [Environment Court document 28].

> ... this **species is facing a high risk of extinction in the wild in the medium-term future** based on the criterion (D1) **population less than 1000 individuals,** *and* is restricted to four core breeding colonies (criterion D2: **five or less locations***),* rendering the species susceptible to stochastic effects (e.g. infrequent, significant events) and human impacts.

The criteria he was referring to are contained in the *Red List*. Either of the two criteria referred to (D1 and D2) are sufficient[160] to place King Shag in the *vulnerable* category.

2.2 What is the geographic range of the King Shag?

[101] Neither the extent of occurrence nor the area of occupancy of King Shags is known with much accuracy. In answer to the Appellant's sustained attack on the accuracy of the Sounds Plan's inclusion of King Shag habitat as an area of ecological value (we discuss this later), Dr Fisher suggested that the extent of occupancy is the entire area of the Marlborough Sounds because individuals have occasionally been seen in remote corners. The species is known to breed at less than 10 locations.

Proximity of King Shag colonies to the site

[102] Relatively small numbers of birds breed[161] in any year across the four main colonies (Duffers Reef, Trio Islands, Sentinel Rock and White Rocks) ranging from a minimum of 70 to a maximum of 166 pairs based on census counts between the years 1992-2002.

[103] The closest main colony to Beatrix Bay is the Duffers Reef colony, with approximately[162] 240 birds. That may represent about 30-40% of the world population. There is also a small colony of up to 20 King Shags located 2 kilometres due west of the Beatrix Bay entrance at Tawhitinui Bay point[163].

160 The *Red List* above n 156, at p 15.

161 P R Fisher evidence-in-chief para 3.7 [Environment Court document 28] citing Schuckard, R "New Zealand King Shag (*Leucocarbo carunculatus*) on Duffer's Reef, Marlborough Sounds." (1994) *Notornis 41*: 93–108 and Schuckard, R. "Population status of the New Zealand King Shag (*Leucocarbo carunculatus*)" (2006) *Notornis* 53: 297-307.

162 P R Fisher evidence-in-chief para 3.8 citing Ornithological Society of New Zealand 2013 [Environment Court document 28].

163 P R Fisher evidence-in-chief para 3.8 [Environment Court document 28].

Foraging areas

[104] Research from the Trios and (Northern) Stewart Island[164] in Admiralty Bay shows that King Shags forage mostly within 10 kilometres of the colonies. That was an approximation from Mr Schuckard's research which found that the mean distance of foraging birds from the Duffers Reef colony was 8.2km for a total count of 219 birds[165]. The maximum distance recorded was 24 kilometres although Dr Fisher acknowledged there had been no systematic studies at greater distances.

[105] In Mr Schuckard's opinion King Shags "... feed predominately southwest from the colonies in the outer Marlborough Sounds where their distribution in the feeding areas appear[s] to be constrained by distance and direction from the colony, and water-depth"[166]. To illustrate that he referred to his Figure 3 identified as "Figure 3 Distribution of feeding King Shags in the Marlborough Sounds". Certainly to our eyes that appears to illustrate his point about distance and direction. However, it was criticised by a witness for the Appellant, Dr D Clement who when asked in cross-examination whether it was an attempt to show area of occupancy agreed but qualified that by answering "... it is an attempt but not necessarily correct"[167]. We understand Dr Clement to be implying that there may be other squares beyond that distance which are within the area of occupancy, and we accept that. However, we also accept Dr Fisher's evidence that[168]:

> The potential marine foraging areas available to King Shags are constrained by energetic and food delivery requirements during the chick rearing period and body-morphometric related physiological constraints on maximal flight distances from the colony and water depth.

[106] Mr Schuckard's first surveys of the Duffers Reef breeding colony and feeding King Shags from this colony were 12 trips in 1990-1991. The foraging surveys were repeated along the same route, but in Beatrix Bay and Forsyth Bay only, in 1997 and 2014. Fewer trips (5) were made for these than for the 1990/91 survey. Finally, a single survey was undertaken by Mr Schuckard in 2015. He considered that he has established

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164 Davidson et al (Ex 6.3) at p 25.

165 P R Fisher evidence-in-chief para 4.8 [Environment Court document 8] citing R Schuckard "New Zealand King Shag ... on Duffer's Reef Marlborough Sounds" (1994) *Notornis* 41: 93-108.

166 R Schuckard evidence-in-chief para 7 [Environment Court document 25].

167 Transcript, p 361, line 33 dated 7 May 2015 1418.

168 P R Fisher evidence-in-chief para 4.4 [Environment Court document 28].

that the majority of feeding occurs within 15 km of the colony (although individual birds were observed beyond that distance).

[107] Usually, King Shags fly low to the sea and do not fly overland on foraging trips. There is one interesting and relevant exception. Beatrix Bay is unique in terms of foraging habitat for King Shags because they access[169] it from Forsyth Bay by flying over the narrow Piripaua Neck. In a nearly direct line the application site in Beatrix Bay is between 8 and 9 km from the Duffers Reef colony. We note that Mr Schuckard also recorded[170]:

> Some differences in foraging range between colonies does occur; about 34% of the feeding birds from the White Rock population fly between 20km and 26km from the colony into the Queen Charlotte Sound whereas most King Shags from Duffers Reef, Trio Island and Sentinel Rock feed up to 16km from their colonies.

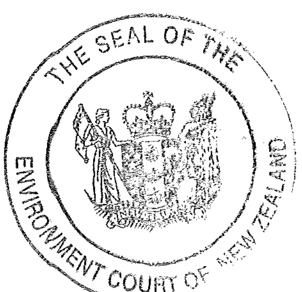
[108] We find that Beatrix Bay is part of the area of occupancy of King Shag and that the area outside the ring of mussel farms is used for foraging and feeding.

2.3 King Shag prey and the shag's foraging depths

King Shag prey

[109] Dr Fisher stated that the "small colony sizes and solitary foraging strategy"[171] of King Shags indicate a "patchy" prey resource which is confirmed by their diet of flatfish and other benthic[172] (seafloor) species, including:

> Witch [Flounder] (*Arnoglossus scapha*), Lemon Sole (*Pelotretis flavilatus*), New Zealand or Common Sole (*Peltorhampus novaezeelandiae*), Sole (*Peltorhamphus* sp.), Flounder (*Rhombosolea* sp.), Opalfish (*Hemerocoetes* sp.), Sea Perch (*Helicolenus percoides*), Triplefins Tripterigydea, Leatherjacket (*Parika scaber*), Blue Cod (*Parapercis colias*), Red Cod (*Pseudophycis bachus*), Red Scorpionfish (*Scorpaena papillosus*), Spotty (*Notolabrus celidotus*) and Octopus (*Octipodidae* sp).



[169] P R Fisher evidence-in-chief para 3.9 [Environment Court document 28].
[170] R Schuckard evidence-in-chief para 16 [Environment Court document 25].
[171] P R Fisher evidence-in-chief para 4.2 [Environment Court document 28].
[172] P R Fisher evidence-in-chief para 4.27 [Environment Court document 28].

Not all those prey species are equally important: flatfish are the most frequently taken[173] prey, and spotties are a very small part of King Shags' diet. Lemon Sole (which are known[174] to breed in Beatrix Bay) are an unusually large component of the diet of King Shag from Duffers Reef. That is consistent with the evidence[175] of Mr Schuckard which was uncontested on this issue.

[110] Because, like many predators, King Shags have to search for their prey, the distribution and density of flatfish and other benthic species is important. Dr Fisher wrote[176] "… the foraging efficiency of shags is … strongly influenced by the availability of prey. Even a small reduction in prey density will prevent birds meeting their energy requirements".

Foraging depth

[111] Reports by Mr Schuckard on some limited observations of foraging King Shags suggests that within Beatrix Bay they "predominantly" feed between 30 and 40 metres depth[177]. However the same survey gave 25% of foraging in Forsyth Bay[178] was in water from 10-30 metres deep. Those figures should not be regarded as conclusive because of the low sample size and differences in survey effort[179] (amongst other reasons[180]).

[112] Because female King Shags are smaller than males it is likely they forage in shallower water[181].

[113] Counsel for the Appellant summarised the evidence in respect of King Shags' use of Beatrix Bay as:

173 R Schuckard evidence-in-chief paras 51 et ff [Environment Court document 25].
174 B G Stewart evidence-in-chief para 3.3 [Environment Court document 26].
175 R Schuckard evidence-in-chief para 59 [Environment Court document 25].
176 P R Fisher evidence-in-chief para 4.35 [Environment Court document 28] citing D Grémillet and R P Wilson "A life in the fast lane: energetics and foraging strategies of the Great Cormorant" (1999) *Behavioural Ecology* 10: 516-524.
177 P R Fisher evidence-in-chief para 4.11 [Environment Court document 28].
178 P R Fisher evidence-in-chief para 4.12 [Environment Court document 28].
179 P R Fisher evidence-in-chief para 4.14 [Environment Court document 28].
180 P R Fisher evidence-in-chief para 4.14 [Environment Court document 28].
181 P R Fisher evidence-in-chief para 4.21 [Environment Court document 28].

(a) In 1991 and 1992, when Mr Schuckard undertook his survey (upon which the 1/11 notations are based), there were approximately 33 marine farms in Beatrix Bay. However, these were smaller, not having been extended by subsequent applications[182] ...

(b) Across all 12 of Mr Schuckard's surveys in 1991 and 1992, he only recorded 24 sightings of King Shags in Beatrix Bay.

Mr Gardner-Hopkins continued that later surveys showed:[183]

(i) Between 1997 and 2003, 13 King Shags were observed feeding in Beatrix Bay during "two to five" survey events (compared to 12 in 1992).[184] During that period a further eight farms and 23 extensions to existing farms were consented.

(ii) Between 2010 and 2015, nine King Shags were observed feeding in Beatrix Bay during "two to five" survey events (compared to 12 in 1992). [185] During that period it appears as if a further two farms and four extensions were consented.[186]

...

[114] Mr Gardner-Hopkins then submitted:

> ... it was Mr Schuckard's evidence that King Shags in Beatrix Bay tend to feed at depths between 20-40m[187]. In fact, in Mr Schuckard's studies from 1991 to present day, very few King Shags (2) were recorded feeding between 20-30m, and 94% of all King Shags were recorded feeding at depths of greater than 30m.[188]

He put a map called "Special Map: King Shag Foraging/Water Depth/Beatrix Bay" to Dr Fisher. It showed that only one King Shag was recorded in Beatrix Bay as foraging in water less than 20 metres deep, and two between 20 to 30m (where total n = 46). We consider that the evidence does not bear out Mr Gardner-Hopkins' contention that those figures are "significant because most of the mussel farms in Beatrix Bay are situated over seabed that is shallower than 30m deep."

182 Referring to Exhibit 33.1.
183 Referring to Exhibit 28.1.
184 Citing Schuckard Transcript at 502, lines 25-28.
185 Citing Schuckard Transcript at 503.
186 For accounting purposes, some of the new consented farms have now been counted alongside others to reach the 39 farms currently consented within Beatrix Bay.
187 Schuckard evidence-in-rebuttal at para 11.
188 See Exhibit 28.1 and P R Fisher, transcript at 576-577.

[115] Our reason for that finding is based on Mr Schuckard's description[189] of his survey method. This involved travelling on a reasonably consistent track at around 46 kph for approximately five hours, observing for King Shags 250m either side of the boat. A total of 115 km^2 out of an estimated 240 km^2 area was covered. Survey coverage did not include much of the close inshore areas, or the centre of Beatrix Bay, as shown on the survey track[190]. Indeed his "stylistic depiction" of his survey trips shows that for most of his trips he would have been beyond range to identify any inshore or shallow (20 to 30m) water foraging. We conclude that a more plausible explanation of the data is that fewer shags were observed in the shallower (less than 30m deep) water because there was less survey effort there. To that extent Mr Schuckard's results are biased (in the scientific sense).

[116] Indeed the Appellant called some evidence directed solely to that issue. Dr D Clement challenged the statistical validity of Mr Shuckard's survey methodology in supporting the conclusions reached. In her opinion, the study was not designed to allow for relative and statistical comparisons of King Shag use between areas. Dr Clement's evidence concluded with her opinion that[191]

> In summary, the 1994 Schuckard paper ... was not designed to systematically survey the stated study area for observations of feeding king shags from Duffers Reef. Based on the opportunistic distribution and feeding observations collected, this study cannot statistically presume that any survey sector may be more important as a feeding area relative to any other sector nor assess where feeding may or may not be occurring. Additionally, the stated mean foraging distance appears to represent a minimum range due to sampling design biases. As a result, it would not be appropriate to use the 1994 findings to statistically assess any potential changes in king shag distribution within the Sounds or through time.

[117] She continued[192]:

> Some readers may over- or misinterpret the study's findings based on wording and the lack of discussion around the limits of the study's methods. I attribute some of this confusion to the author's use of the collected data to drive the research questions (rather than the reverse), and the general lack of written detail in the paper. Additionally, the lack of any recent, more systematic

189 R Schuckard evidence-in-chief para 10 [Environment Court document 25].
190 Exhibit 25.5.
191 D Clement evidence-in-chief para 3.26 [Environment Court document 12].
192 D Clement evidence-in-chief para 3.28 [Environment Court document 12].

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studies focused on the distribution and / or foraging ranges of the Duffers Reef colony (unlike Admiralty Bay colonies; Fisher & Boren 2012) also precipitates the data from Schuckard (1994) being applied beyond what is considered statistically defensible.

[118] Dr Clement also states[193] with regard to the identification of King Shag feeding areas:

> ... it does not appear that the 1994 study has considered or corrected for any ... biases. As a result, the presence of foraging King Shags in the sector most relevant to Beatrix Bay (south) will be an under- or over-estimation in relation to the other sectors due to uncorrected biases. ... Given these factors, the study's original Figure 8 map and its caption, *"Main feeding area of king shags from Duffers Reef"* is simply a conclusion that cannot be drawn based on the data collected. It would be more appropriate to say that the map simply represents *observed* feeding locations of king shags from Duffers Reef.

We accept Dr Clement's criticisms.

[119] The Appellant also relied on a report by Mr Davidson and others called *Ecologically Significant Marine Sites in Marlborough, New Zealand*[194] ("the *Davidson 2011 Report*"). This includes a statement[195] that:

> King Shags regularly feed in the middle of the main channel and side arms in the outer Pelorus, particularly Beatrix Bay.

Mr Schuckard considered that is wrong. In his opinion[196]:

> Beatrix Bay has a rather flat bottom without any channels and feeding King Shags are widespread throughout Beatrix Bay at depths ranging predominantly from 20-40m.

We prefer the latter evidence which is consistent with that of Dr Fisher.

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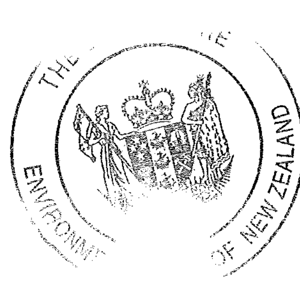
193 D Clement evidence-in-chief para 3.24 [Environment Court document 12].

194 R J Davidson et al *Ecologically Significant Marine Sites in Marlborough, New Zealand* Marlborough District Council and Department of Conservation 2011 [Exhibit 6.3].

195 The *Davidson 2011 Report*, above n 194, at p 83 [Exhibit 6.3].

196 R Schuckard evidence-in-chief para 19 [Environment Court document 25].



2.4 Use by King Shags of habitat within mussel farms

[120] Mussel farms provide one obvious advantageous change to King Shag's habitat: they supply buoys on which shags roost/rest/preen/loaf between flights or foraging. But do they forage within them?

[121] Dr Fisher wrote[197] that the existing and proposed mussel farms in Beatrix Bay "... exclude King Shag foraging from ... much of the soft substrate habitat ..." that is, or was, underneath them. Dr Fisher relied on the evidence of Dr Stewart to establish that about 19% of Beatrix Bay was affected. We have found that figure is an over-estimate, but we do not consider that invalidates Dr Fisher's evidence.

[122] A figure in Dr Fisher's evidence[198] appears to show that a high proportion of King Shags have been observed feeding in offshore areas both with and without mussel farms. Mr Davidson wrote[199] about this:

> Assuming these observations are representative, there are two possible reasons for this:
>
> (a) King Shags avoid mussel farms; or
>
> (b) they prefer to feed in deeper offshore areas of Bays and Reaches.

He continued[200]

> In order to determine which is the case, it is necessary to investigate shag preference in bays without mussel farms. These data have not been produced by Dr Fisher, however, in a paper by Schuckard (1994) the author delineated areas in Pelorus Sound where birds were observed feeding (Figure 4). Most feeding areas are in bays with mussel farms, however, in areas north and west of Maud Island free of mussel farms most feeding areas were located on offshore areas of these reaches. This suggests that birds select these deep offshore areas rather than avoiding mussel farms.

197 P R Fisher evidence-in-chief at para 6.2 [Environment Court document 28].

198 P R Fisher evidence-in-chief Figure 1 [Environment Court document 28] based on unpublished data from Mr Schuckard.

199 R J Davidson rebuttal evidence-in-chief para 8.4 [Environment Court document 6A].

200 R J Davidson rebuttal evidence-in-chief para 8.5 [Environment Court document 6A].

[123] Dr Fisher has conducted and published[201] research directly on this point within inner Admiralty Bay and Current Basin (also in the outer sounds, near French Pass). The most pertinent parts of the paper state[202]:

> Whilst mussel farms are sited away from breeding colonies and appear to have no appreciable direct impact, cumulative effects from habitat modification, alteration of habitat suitability for fish below the farm and wider area, and potential changes in marine species assemblages need to be considered.
>
> ...
>
> King Shags were recorded on 36% of the farms (n = 44) from 13 surveys within inner Admiralty Bay. No individuals were recorded foraging between farm lines from any of the survey methods. The low number of sightings within mussel farms suggests that farms are not important foraging areas for king shags, at least in Admiralty Bay. However, this may vary by site, prey availability and distance from colony/roost. Sightings of king shags foraging within mussel farms [reported in evidence in other proceedings before the Environment Court] show that mussel farms do not preclude king shags However, the low number of reported sightings and lack of published data would suggest that king shags do not exclusively use the areas occupied by mussel farms.

[124] After Mr Davidson relied on that passage to support the Appellant's position, Dr Fisher responded[203]:

> Less than 1% of all foraging King Shag records have been recorded within farms; of these most sightings are of birds diving between lines or on the edge of farms. Whether these individuals successfully captured fish associated with the farm structure, shell debris on the seabed or open water between the mussel lines remains to be substantiated.
>
> The comprehensive coastal strip surveys through all the mussel farms within inner Admiralty Bay between November 2006 to March 2007 (Fisher & Boren 2012) confirmed that King Shags do not feed (rarely; based on observations from Lalas and Brown) within mussel farms and have low attendance rates resting on buoys. ...

[125] Dr Fisher then hypothesised why King Shags do not use mussel farms[204]:

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201 P R Fisher and L J Boren (2012) "New Zealand King Shag (Leucocarbo caruneulatus) foraging distribution and use of mussel farms in Admiralty Bay, Marlborough Sounds". *Notornis*, 59:105-115.

202 P R Fisher and Boren (2012) cited by R J Davidson rebuttal evidence-in-chief at paras 8.6 to 8.8 [Environment Court document 6A].

203 P R Fisher rebuttal evidence-in-chief paras 5.9 and 5.10 [Environment Court document 28A].

204 P R Fisher evidence-in-chief para 5.7 [Environment Court document 28].

> King Shags are typically not pelagic feeders or opportunistic taking prey near the surface … Whether mussel farms exclude King Shags through the physical structure of the submerged lines reducing the open marine space and ability of birds to access the sea bed and benthic prey, or through unsuitable modification to the benthos habitat where benthic fish prey hide, and changes in benthic assemblages has yet to be determined.

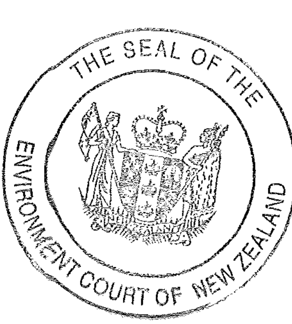
[126] Mr Davidson, while he did not agree that mussel farms exclude King Shag, agreed that there is inadequate information on this. He disputed[205] the first theory on the basis that the water is so opaque near the seafloor anyway that the obstacles in a mussel farm would cause King Shags no difficulties. We have insufficient information to determine this issue.

[127] In any event, Dr Fisher's answer was[206]:

> The modification of the seabed under mussel farms is well documented; whilst it is recognised that the changes in seabed infauna and epifauna are dominated by mussel shell debris that forms artificial reefs and is habitat for a range of marine invertebrates and assemblage of fish. The modified seabed environment is less than suitable for flatfish to hide from predators such as the King Shag. The adverse effects to the King Shag foraging habitat within the footprint of the farm are more than minor.

[128] Mr Schuckard added a further reason why King Shags may not forage on the seafloor under and around mussel farms is their prey may be largely absent because of the increased organic matter underneath them.

[129] There was some suggestion by the Council's witnesses[207] that there is a wider zone of influence outside the boundaries of mussel farms. Dr Fisher referred to a 50 metre exclusion zone around a mussel farm based on the *Literature Review*. This habitat exclusion describes an alleged effect of the physical presence of farm structures in reducing the habitat available for "surface feeding seabirds"[208]. This last point seems to have been overlooked by Mr Gardner-Hopkins when he cross-examined Dr Fisher[209]. King Shags are benthic feeders not surface or even mid-column feeders.



205 R J Davidson rebuttal evidence para 8.12 to 8.15 [Environment Court document 6A].
206 P R Fisher rebuttal evidence-in-chief para 7.3 [Environment Court document 28A].
207 We have summarised the relevant parts of Dr Stewart's evidence above in part 1 of this decision.
208 Table 6.10 *Literature Review* above n 84, at p 6-9.
209 Transcript, p 587.

[130] The more relevant table in the *Literature Review* is Table 6.11 which describes[210] the effect of reduced habitat available for "benthic feeding seabirds, such as shags and penguins … because of changed benthic fauna due to the settlement of shell and debris from ropes used to grow filter feeders". This effect is described as taking place immediately underneath and within 200 metres of a farm. We are inclined to consider the shadow effect is largely confined to within about 30 metres of the seaward boundary of most mussel farms in Beatrix Bay, and is much narrower around the other three boundaries.

[131] The "Summary" in Chapter 6 (Seabird Interactions) of the *Literature Review* commences[211]:

> The potential effects of smothering of the seabed by debris from ropes leading to changes in the fauna are considered to be insignificant given the small area occupied by filter feeder aquaculture in New Zealand in relation to the large total area of suitable habitat available for foraging seabirds.

Mr Gardner-Hopkins said to Dr Fisher[212] "… again, you haven't given consideration to how the area of mussel farms compares with the foraging area that you define for King Shags?" and the answer was "That's correct". We have two problems with this whole cross-examination. First it appears to suggest that it was Dr Fisher's problem that he had not compared the foraging areas with the area of the mussel farms, when it is, we have held, the Applicant who has the obligation to supply adequate information for us to determine the application.

[132] Second, Dr Fisher's answer might, by itself and if the apparently superfluous word "again" is ignored, convey the wrong impression to a reader of the transcript. To obtain Dr Fisher's fuller answer one needs to read the previous page of the Notes of Evidence. There, Mr Gardner-Hopkins had asked essentially the same question in

210 Table 6.11 *Literature Review* above n 84, at p 6-9.
211 Table 6.11: *Literature Review* above n 84, at p 6-9.
212 Transcript, p 588.

respect of (the barely relevant) Table 6-10 in the *Literature Review*. That contains a summary with a similar first sentence. In answer to the same question Dr Fisher said[213]:

> No. if I can just add to that, I did comment on this, this report and prior reports in my evidence and I noted that they didn't include the DOC survey that I was involved with, which was the most comprehensive survey looking at effects of King Shags on mussel farms …

[133] Mr Gardner-Hopkins submitted that:

> Of the 9 King Shags recorded to be feeding between 2010 and 2015, over half (5) were recorded feeding within the 50m and 200m zones relied upon by Dr Fisher as "excluding" King Shags.[214] The empirical data proves there is no exclusion around the marine farms.

That submission overstates both what Dr Fisher said and any (tentative) conclusion which can be drawn from the information, which is that King Shag may still forage "close" to the outside edge of marine farms. Whether that is with the same success rate, or higher — or lower — than in the absence of marine farms is not known. Changing environmental conditions such as the introduction of mussel farms may lead to an adaptive response that maintains or even increases the productive nature of the benthic ecosystem below the farm. That may even benefit King Shags. For example, it may be that there is an 'edge' effect in which King Shags are drawn to the outer edge of the 30m shadow (of sediment and some shell) because their prey such as Witch Flounder are finding more food e.g. polychaetes in the richer sediments there. That is however, our speculation and we have no evidence for it.

[134] We find on the basis of Dr Fisher's and Mr Schuckard's evidence that King Shags forage <u>within mussel farms</u> only very infrequently and that likely contributors to that is the reduced presence of flatfish on or in the changed seafloor underneath the farms. King Shags' use of mussel farms is likely to be largely confined to resting on them.

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213 Transcript, pp 587-588.

214 Exhibit 28.2 and P R Fisher, transcript at 579-580.

[135] While Dr Fisher considered that the whole of the Marlborough Sounds was a "significant habitat" for King Shags[215] — in reliance we suspect on the IUCN Red List and on a policy in the NZCPS[216] — he was also of the opinion[217] that Pelorus Sound (or at least the parts shown on the 1991/1992 map by Mr Schuckard) are the core feeding areas for the birds from the Duffers Reef colony.

3. The statutory instruments

3.1 The relevance of the statutory instruments

[136] The statutory instruments are of course relevant because the consent authority must have regard to[218] them. However, they are of even more importance now than previously in the light of *King Salmon*[219] because the effects on the environment to be considered are not (except in unusual circumstances) necessarily or usually the relevant effects inferred from Part 2 or alleged by opponents of an application but the potential effects particularised in the statutory instruments.

3.2 The Marlborough Sounds Resource Management Plan

[137] The Sounds Plan, made operative on 28 February 2008, is a combined[220] district, regional and regional coastal plan. It is contained in three volumes — Volume 1 sets out the objectives and policies and methods, Volume 2, the rules and Volume 3 the maps. In Volume 1 five (of 23) chapters are particularly relevant. We summarise the relevant provisions below.

Natural Character (Chapter 2.0)

[138] Chapter 2 (Natural Character) of the Sounds Plan attempts to integrate[221] the values and interests identified in other chapters which promote activities while avoiding, remedying and mitigating adverse effects on the identified values.

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215 P R Fisher evidence-in-chief para 7.4 [Environment Court document 28].
216 Policy 11(a)(iv) [NZCPS p 16].
217 P R Fisher rebuttal evidence-in-chief para 3.29 [Environment Court document 28A].
218 Section 104(1)(b) RMA.
219 *King Salmon* above n 26.
220 Sounds Plan para 1.0 [page 1-1].
221 Chapter 2.0 para 2.1 [Sounds Plan p 2-1]. This is repeated in the explanation to policy (2) 1.4 [Sounds Plan p 2.2].

[139] The single objective simply repeats section 6(a) of the RMA. The implementing policies are[222] first to avoid the adverse effects of use or development within those areas of the coastal environment which are predominantly in their natural state and have natural character which has not been compromised[223]; to encourage appropriate use and development in areas where the natural character of the coastal environment has already been compromised, and where the adverse effects of such activities can be avoided, remedied or mitigated[224]; and to consider the effects on those qualities, elements and features which contribute to natural character[225], including (relevantly):

(a) coastal and freshwater landforms;
(b) indigenous flora and fauna, and their habitats;
(c) water and water quality;
(d) scenic or landscape values;
...

[140] Other non-repetitive[226] policies require regard to be had to the ability to restore or rehabilitate natural character in the areas subject to the proposal when considering "appropriateness"[227]; adopt a precautionary approach in making decisions where the effects on the natural character of the coastal environment are unknown[228]; recognise that preservation of the intactness of the individual land and marine natural character management areas and the overall natural character of the freshwater, marine and terrestrial environments identified in Appendix Two is necessary to preserve the natural character of the Marlborough Sounds as a whole[229].

[141] Since this chapter attempts to integrate all the others in the Sounds Plan we will state the questions it raises at the end of this subpart, after ascertaining the other questions those chapters raise.

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222 Chapter 2.0, para 2.2 [Sounds Plan pp 2-3 and 2-4].
223 Policy (2) 1.1 [Sounds Plan p 2-3].
224 Policy (2) 1.2 [Sounds Plan p 2-3].
225 Policy (2) 1.3 [Sounds Plan p 2-4].
226 Policy (2) 1.5 largely repeats policy (2) 1.1 and the start of the chapter.
227 Policy 1.6.
228 Policy 1.7.
229 Policy 1.8.

Indigenous Vegetation and Habitats of Indigenous Fauna (Chapter 4.0)

[142] Objective (4.3) 1 and its two relevant supporting implementation policies[230]are important. The objective provides for "The protection of significant ... fauna ... and their habitats from the adverse effects of use and development". The first two policies are relevant:

> Policy 1.1 Identify areas of significant ecological value which incorporate areas of indigenous vegetation and habitats of indigenous fauna.
>
> Policy 1.2 Avoid, remedy or mitigate the adverse effects of land and water use on areas of significant ecological value.

[143] Those policies are important because feeding habitat of King Shag is identified in Volume 2 of the Sounds Plan (Appendix B, notation 1/11) of the Sounds Plan as an "Area of Ecological Value" ("AOEV"[231]) with national significance. The relevant ecological overlay for King Shag habitat is shown in Map 69 of the Sounds Plan. The site is within an area subject to that notation. Ironically, since this classification was based on recommendations in a report by Mr Davidson and others[232] (and that in turn drew on the foraging range information reported in Schuckard 1994[233]), the Appellant challenged the science behind this notation and asked us to place less weight on it as a result. We will consider that issue later.

[144] Modification of values associated with the ecological overlay for King Shag habitat are to be assessed as discretionary activities[234] with the anticipated environmental result[235] of maintaining population numbers and distribution of the species. The questions that arise under policies (4.3)1.2 are therefore:

- What are the likely adverse effects on the feeding habitat?
- What is the probability of adverse effects occurring?

230 Policy (4.3) 1.1 and 1.2 [Sounds Plan p 4-2].

231 Not to be confused with an "AOLV" or "Area of Outstanding Landscape Value" which is the term used in the Sounds Plan for outstanding natural features or parts of outstanding natural landscapes.

232 The *Davidson 2011 Report*, above n 194.

233 Schuckard R, 1994 "New Zealand Shag (Leucocarbo Carunculatus) on Duffers Reef, Marlborough Sounds". *Notornis* 41, Collin 93 to 108.

234 Section 4.4 Methods of Implementation [Sounds Plan p 4-4].

235 Section 4.5 Anticipated Environmental Results [Sounds Plan p 4-5].

- What is the probability of adverse effects being avoided, remedied or mitigated?
- What is the probability of a decrease in the number of King Shags? (Noting this last question derives from the methods not the policies).

Landscape (Chapter 5.0)

[145] Chapter 5 (Landscape) of the Sounds Plan recognises that the Marlborough Sounds as a whole has "outstanding visual values"[236]. Areas of "outstanding landscape value" are shown on the Landscape Maps in Volume 3. The promontory in Beatrix Bay, which the site is at the tip of, is not identified as an "Area of Outstanding Landscape Value".

[146] There are no relevant policies. However, Chapter 5 recognises as a relevant issue[237] that when deciding whether development is appropriate or not:

> ... the siting, bulk and design of structures ... on the surface of water can interrupt the consistency of seascape values and detract from the natural seascape character of a bay or wider area.

That is an evaluation matter raised directly in Appendix 1 of the Sounds Plan which we will refer to in due course.

Public access (Chapter 8)

[147] There is a single objective to maintain and enhance public access[238]. The relevant implementing policy expressly states[239] that adverse effects of marine farms on public access should as far as practicable be avoided and otherwise mitigated or remedied. The questions under this policy are first whether there would be any adverse effects on access? Second, can they practically be avoided, or at least mitigated or remedied?

236 Para 5.1.1 [Sounds Plan p 5-1].
237 Para 5.2.2, Landscape [Sounds Plan p 5-3].
238 Objective 8.3.1 [Sounds Plan p 8-2].
239 Policy 8.3.1/1.2 [Sounds Plan p 8-2].

The Coastal Marine Area (Chapter 9)

[148] The first objective (of three) for Chapter 9 is[240] to accommodate appropriate activities in the coastal marine area while avoiding, remedying or mitigating the adverse effects of those activities. The relevant implementing policy (9.2.1) 1.1 identifies as values to be maintained[241]: conservation and ecological values, cultural and iwi values, heritage and amenity values, landscape, seascape and aesthetic values, marine habitats and sustainability, natural character of the coastal environment, navigational safety, public access to and along the coast, public health and safety, recreation values, and water quality. Most of these are at issue to some extent in these proceedings. The policy also requires any adverse effects to be avoided, remedied or mitigated. Policy (9.2.1) 1.2 is at first sight rather repetitive but actually requires adverse effects of development to be avoided as far as practicable and otherwise mitigated or remedied.

[149] The other relevant policy is (9.2.1) 1.14 which is to enable a range of activities in appropriate places in the Sounds. Marine farming is expressly included and is zoned in the Coastal Marine Zone 2 in which marine farms are controlled or discretionary in the inshore area and non-complying beyond 200 metres from the shore. The Sounds Plan explains[242] that "the extent of occupation and development needs to be controlled to enable all users to obtain benefit from the coast and its waters".

[150] The second coastal marine area objective[243] is to manage water quality at a level that enables shellfish gathering and cultivation for human consumption. Implementing policies seek to avoid the discharge of contaminants that adversely affect significant ecological value, cultural areas, outstanding landscapes and seafood consumption. The only possibly relevant policy is that which seeks to avoid discharges affecting "significant ecological value" which seems to echo the policies relating to "areas of ecological value" already referred to, and we will consider the effects under that heading.

240 Objective 9.2.1 [Sounds Plan p 9-4].
241 Policy (9.2.1)1.1 [Sounds Plan pp 9-4 and 9-5].
242 Explanation of objective 9.2.1/1 [Sounds Plan p 9-6].
243 Objective 9.3.2 [Sounds Plan p 9-10].

[151] The third coastal marine objective[244] relates to alteration of the foreshore and seabed. It seeks to protect the coastal environment by avoiding, remedying or mitigating any adverse effects of activities that alter the foreshore or seabed. Policy (9.4.1) 1.1 identifies the same list of values as did policy (9.2.1) 1.1 already listed and so does not raise independent predictive questions. Policy (9.4.1) 1.9 suggests that certain adverse effects can only be addressed when the relevant rules say so, which emphasizes the wording of the rules.

Summary: stating the questions about the natural character of the area

[152] Returning to the policies in Chapter 2 of the Sounds Plan, the summarising questions these raise are:

(1) is the natural character of the area around the site compromised? And if so, to what extent?

(2) can any adverse effects of the mussel farm on coastal landforms, flatfish, King Shag and their habitats, water quality and scenic/landscape values be appropriately avoided, remedied or mitigated?

The rules

[153] Volume 2 of the Sounds Plan contains the rules implementing the objectives and policies. Chapter 35 covers Coastal Marine Zones One, Two and Three. General Assessment Criteria for discretionary activities are set out in Rule 35.4.1 and the specific criteria for marine farms are detailed in Rule 35.4.2.9. The former rule requires consideration of the "likely" effects of the proposal on the locality and wider community, the amenities values of the area, any significant environmental features including the habitat of indigenous species, and generally on the natural and physical resources of the area. The latter rule[245] requires specific assessments for marine farms of (relevantly):

- an assessment of the present nature of the site, both physical and biological including the nature of the sea floor and species found in the area;

...

244 Objective 9.4.1 [Sounds Plan p 9-16].
245 Rule 35.4.2.9 [Sounds Plan p 35-24].

- consideration of navigational matters …
- consideration of aesthetic and cultural matters;

…

- other matters including
  - (a) likely effect on areas used for commercial and recreational fishing;
  - (b) the visual effect of the farm and its operation;
  - (c) likely effects on water quality and ecology;
  - (d) the alienation of public space.

  …

The Council only requires assessment of "likely" effects on some resources. "Likely" may mean "as likely as not" or "fractionally above the balance of probabilities" or it may, following international conventions[246], mean effects with a 66% or higher probability of occurring. Either way, we doubt whether these policies and rules can be said to fully implement part 2 of the RMA in conjunction with that part of the definition of "effects" in section 3 RMA which includes[247] "any potential effect of low probability which has a high potential impact". The Sounds Plan is incomplete on those issues especially on the risk of extinction of King Shag: that may be an event of low probability but high potential impact.

3.3 The Marlborough Regional Policy Statement

[154] We are obliged to have regard to[248] the Marlborough Regional Policy Statement ("MRPS"). However, because it became operative (1995) over a decade before the Sounds Plan (2008) its provisions are deemed to be given effect to and particularised in the Sounds Plan (unless the latter is incomplete, unclear or *ultra vires*) — see *King Salmon*[249]. On the whole it is so broad it gives us little assistance, except that there is an objective[250] to ensure that "… natural species diversity and integrity of marine habitats be maintained and enhanced".

246 See the IPCC's *Guidance Note* (2010) quoted in part 0.7 of this Decision
247 Section 3(f) RMA.
248 Section 104(1)(b)(v) RMA.
249 *King Salmon* above n 26.
250 Objective 5.3.10 [MRPS p 44].

3.4 The New Zealand Coastal Policy Statement

[155] The New Zealand Coastal Policy Statement 2010 ("the NZCPS")[251] was described in *King Salmon*[252] by the Supreme Court as "an instrument at the top of the hierarchy". We respectfully adopt the Supreme Court's description of the objectives in that document. The NZCPS is important in this case because it has not yet been implemented in the Sounds Plan. One procedural policy of potential importance in this case is Policy 3 which requires us to adopt a precautionary approach. We will consider the implications of that later.

[156] The NZCPS identifies the following issues[253] relevant to this proceeding:

- the ability to manage activities in the coastal environment is hindered by a lack of understanding about some coastal processes and the effects of activities on them;
- loss of natural character, landscape values … along extensive areas of the coast …;
- continuing decline in … habitats and ecosystems in the coastal environment under pressures from subdivision and use, vegetation clearance, … plant and animal pests, poor water quality, and sedimentation in estuaries and the coastal marine area;
- demand for coastal sites … for aquaculture …;

…

These issues recognise that in their current state some areas in the coastal environment are not necessarily being managed sustainably.

[157] The NZCPS provides for integrated management of the resources of the coastal environment by requiring particular consideration of situations where "significant adverse cumulative[254] effects are occurring"[255]. A later policy[256] requires plans to set thresholds (including zones …) where practicable "… to assist in determining when activities causing adverse cumulative effects are to be avoided". The areas of ecological value in the Sounds Plan can be seen as an anticipation of this approach.

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251 This came into force on 3 December 2010.

252 *King Salmon* above n 26, at [152].

253 NZCPS 2010 p 5.

254 The word "cumulative" in these policies is being used in the normal (accumulative) sense not in the narrow *Dye* sense discussed below, in part 4.1 of this Decision.

255 Policy 4(c)(v) [NZCPS p 13].

256 Policy 7(2) [NZCPS p 15].

[158] We now turn to the substantive implementing policies.

Aquaculture

[159] Policy 6(2) of the NZCPS 2010 is important[257] because, in relation to the coastal marine area, it requires recognition of:

> a. ... potential contributions to the social, economic and cultural wellbeing of people and communities from use and development of the coastal marine area; ...
>
> b. ... the need to maintain and enhance the public open space and recreation qualities and values of the coastal marine area;
>
> c. ... a functional need [for some activities] to be located in the coastal marine area, and [to] provide for those activities in appropriate places;
>
> ...

[160] Those more general policies are then elaborated on with a specific Policy 8 (b) for aquaculture which is obviously relevant in this case. It is to[258] recognise the significant potential contribution of aquaculture to the well-being of people and communities by[259]:

> ...
>
> b. taking account of the social and economic benefits of aquaculture, including any available assessments of national and regional economic benefits; and
>
> c. ensuring that development in the coastal environment does not make water quality unfit for aquaculture activities in areas approved for that purpose.

These policies are clearly applicable. What is less clear is whether these are intended to refer to the net benefits of aquaculture. We assume that they are to be consistent with section 7(b) RMA, otherwise the NZCPS would be incomplete. In any event there was no disagreement over the brief evidence called for the Appellant on the social and financial benefits of the proposal.

Indigenous biodiversity

[161] Policy 11 is (relevantly):

257 Policy 6(2) relates to the coastal environment generally and is much less relevant to these proceedings.

258 Policy 8: Aquaculture [NZCPS 2010 p 15].

259 Policy 8 (a) is not relevant, because we are not here concerned with the approval of a regional policy statement or plan [NZCPS 2010 p 15].

Policy 11: Indigenous biological diversity (biodiversity)

To protect indigenous biological diversity in the coastal environment:

(a) avoid adverse effects of activities on:

(i) indigenous taxa that are listed as threatened or at risk in the New Zealand Threat Classification System lists;

(ii) taxa that are listed by the International Union for Conservation of Nature and Natural Resources as threatened;

(iii) ...

(iv) habitats of indigenous species where the species are at the limit of their natural range, or are naturally rare[260];

(b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on:

...

(iii) indigenous ecosystems and habitats that are only found in the coastal environment and are particularly vulnerable to modification including estuaries, lagoons, coastal wetlands, dunelands, intertidal zones, **rocky reef systems**, eelgrass and saltmarsh;

... [emphasis added].

[162] The first important aspect of policy 11 is that certain adverse effects are simply to be avoided: the effects on certain threatened categories of animals and birds and on certain classes of habitat of indigenous fauna. We note that categories in (a)(i) and (ii) are not mutually exclusive. Adverse effects of activities on a taxon obviously include injury to or death of individuals and reduction in population, but they may also include reductions in EOO or AOO, and reduction in habitat area or quality. This results from the reasons (e.g. very small populations) why they have been classified as threatened or at risk in the first place.

[163] Policy 11(a)(i) and (ii) refer to the adverse effects of activities on taxa, whereas 11(a)(iv) refers to habitats of indigenous species. Subparagraph (i) and (ii) thus simply implement section 5(2) whereas subparagraph (iv) also implements section 6(c) RMA (significant habitats). We mention that because there is some potential for confusion about subparagraph (i) and (ii). They do not refer to 'habitats' or 'significant habitats' and thus do not implement section 6(c). However, to particularise and implement section 5(2)'s direction for the "... protection of natural ... resources" the NZCPS adopts the

260 "Naturally rare" is defined in the Glossary as meaning "Originally rare: rare before the arrival of humans in New Zealand" [NZCPS 2010 p 27].

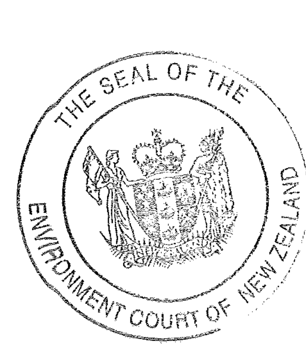
lists in the New Zealand Threat Classification System and in the IUCN Red List. These largely refer to population criteria. However, some of the criteria for small populations do refer to habitat (and they happen to be the relevant ones in this case). But that does not turn the criteria into section 6(c) RMA implementations.

[164] As recorded above, New Zealand King Shag is an indigenous taxon which is listed as threatened in both the New Zealand Threat Classification and in the IUCN Red List, so NZCPS policy 11(a)(i) and (ii) both apply. That means that the issue emphasised so strongly by the Appellant — whether the site's classification as a "significant habitat" for New Zealand King Shag is correct — is not really relevant at least to policies 11(a)(i) and (ii) of the NZCPS.

[165] Policy 11(a)(iv) recognises that habitats are particularly important at the edges of a species' range. This policy recognises that reduction in the quality or quantity of habitat may itself have consequences for a qualifying species, even if the consequences for individuals and/or populations are not yet known, and treats such reductions as effects to be automatically avoided.

[166] The King Shag is at the limit of its natural range primarily because its apparent area of occupation is so small. Anywhere within the AOO is close to its edges in the sense that birds from the principal Pelorus colonies are always within foraging range of the edges. The evidence is that the King Shag has a foraging range of about 25 km. Given the very small number of colonies we do not understand NZCPS policy 11(a)(iv) to apply in a way so that only the outermost ring (with an inner radius of say 20 km) is protected habitat. That would be an absurd consequence whereby potentially less important habitat is protected under the policy while more important habitat is not. Consequently we consider policy 11(a)(iv) applies in this proceeding.

[167] The court's knowledge of New Zealand King Shag suggests that neither its taxonomic status nor its (former) extent of occurrence are necessarily as black-and-white as Mr Schuckard portrayed them. It is possible, for example, that King Shag should be lumped as a northern outlier of a superspecies of "New Zealand Blue-eyed Shags" within the *Leucocarbo* genus. That would put King Shags at the limit of the (super-) species range so NZCPS policy 11(a)(iv) would still apply (i.e. a lumping of the species



with, for example, Stewart Island Shag, would make no difference to the analysis). The other matter is that the fossil record of King Shags apparently shows[261] a wider extent of occurrence (EOO) in the past. However, no evidence was given about these matters so we simply record them as potential complications in any future cases.

[168] The site is also close to the reef system wrapped around the promontory so policy 11(b)(iii) is relevant.

[169] The questions raised by these policies are: will the proposed mussel farm cause adverse effects on:

(a) the King Shag species?
(b) the habitat of King Shags?
(c) effects which are significant on the reef system around the promontory?

Natural character and natural landscapes in the coastal environment

[170] Policy 13 is (relevantly):

> **Policy 13: Preservation of natural character**
>
> 1. To preserve the natural character of the coastal environment and to protect it from inappropriate use, and development:
>   a. avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character; and
>   b. avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on natural character in all other areas of the coastal environment; including by:
>
>   ...

The meaning of "natural character" in section 6(a) of the RMA — as it applies to the coastal environment — now needs to be read in the light of the particularisation of that phrase in policy 13(1) of the NZCPS.

[171] Policy 15 is (relevantly):

[261] P Schofield and B Stephenson Birds of New Zealand (2013) Auckland University Press p 229.

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Policy 15: Natural features and natural landscapes

To protect the natural features and natural landscapes (including seascapes) of the coastal environment from inappropriate subdivision, use, and development:

a. Avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment;

b. Avoid significant adverse effects and avoid, remedy, or mitigate other adverse effects on other natural features and natural landscapes in the coastal environment;

...

[172] The important questions raised by these two policies are:

(1) Will the proposed mussel farm cause adverse effects:
    (i) to the natural character of Beatrix Bay?
    (ii) to the natural features in, or landscape of, Beatrix Bay?

(2) If the answer to question (1) is "yes" will any of those effects be significant?

(3) Will the proposed mussel farm, together with other mussel farms, cause cumulative adverse effects on the natural character/natural features/landscape of Beatrix Bay?

4. What are the predicted effects of the mussel farm?

4.1 Introduction: identifying the relevant effects

[173] Under section 104(1)(a) RMA the consent authority must have regard to the "actual and potential effects on the environment of allowing the activity".

[174] At first sight that requires a comprehensive inquiry because the word "effect" is defined very widely in section 3 of the Act as including:

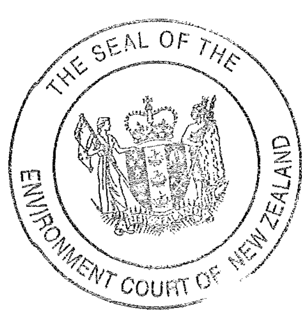
3 Meaning of effect

In this Act, unless the context otherwise requires, the term **effect** includes—

(a) any positive or adverse effect; and

(b) any temporary or permanent effect; and

(c) any past, present, or future effect; and



(d) any cumulative effect which arises over time or in combination with other effects— regardless of the scale, intensity, duration, or frequency of the effect, and also includes—

(e) any potential effect of high probability; and

(f) any potential effect of low probability which has a high potential impact.

The wording suggests that any cumulative effects of any stressor appear to be included. For example, the ecologist Dr Stewart referred to Chapter 12 of the *Literary Overview* which describes "cumulative" effects in relation to marine aquaculture as[262]:

> ... *Ecological effects in the marine environment that result from the incremental, accumulating and interacting effects of an aquaculture development when added to other stressors from anthropogenic activities affecting the marine environment (past, present and future activities) and foreseeable changes in ocean conditions (i.e. in response to climate change).*

That description appears to fit within section 3(d) RMA.

[175] However, in 1999 the Court of Appeal issued a decision in *Dye v Auckland Regional Council*[263] ("*Dye*") which held that a "cumulative effect" is not a wide concept in the context of a resource consent application. Tipping J, giving the decision of the Court, wrote[264]:

> The definition of effect includes "any cumulative effect which arises over time or in combination with other effects". The first thing which should be noted is that a cumulative effect is not the same as a potential effect. This is self evident from the inclusion of potential effects separately within the definition. A cumulative effect is concerned with things that will occur rather than with something which may occur, that being the connotation of a potential effect. This meaning is reinforced by the use of the qualifying words "which arises over time or in combination with other effects". The concept of cumulative effect arising over time is one of a gradual build up of consequences. The concept of combination with other effects is one of effect A combining with effects B and C to create an overall composite effect D. All of these are effects which are going to happen as a result of the activity which is under consideration. [Underlining added].

The converse appears to be that effects of other stressors (which are not the activity under consideration) are not cumulative effects as a matter of law. That is problematic in

262 *Literature Review* above n 84, at p 12-13.
263 *Dye v Auckland Regional Council* [2002] 1 NZLR 337; [2001] NZRMA 513 (CA).
264 *Dye* at paras [38] and [39].

relation to the (extensive) parts of the environment which are[265] "ecosystems and their constituent parts" because they are all affected accumulatively by all effects from all stressors. Further, *Dye* does not recognise that 'cumulative' effects of multiple stressors are the main consideration in preparations of district plans and other statutory instruments.

[176] *Dye* was explained by Cooper J in *Rodney District Council v Gould*[266] as follows:

> ... I consider that all that was said in *Dye* was that an effect that may never happen, and which, if it does, will be the result of some activity other than the activity for which consent is sought, cannot be regarded as a "cumulative effect".

[177] We record that other decisions show some disquiet over that restrictive application of the term "cumulative effects". First, *Dye* does not use the ordinary meaning of "cumulative" as pointed out by the Environment Court in *The Outstanding Landscape Protection Society Inc v Hastings District Council*[267]. Second, the learned Chief Justice, in her minority judgment in *West Coast ENT Inc v Buller Coal Ltd*[268], wrote:

> I ... would have thought that contribution to the greenhouse effect is precisely the sort of cumulative effect that the definition in s 3 permits to be taken into account under s 104(1)(a) in requiring the consent authority to "have regard to any actual and potential effects on the environment of allowing the activity".

Third, *Harris v Central Otago District Council*[269] has recently pointed out that strictly *Dye* is only authority for the proposition that a potential effect on the environment which might be caused by some other activity which requires a resource consent under the relevant plan is not a cumulative effect of allowing the activity for which consent is sought. It seems that the restrictions of *Dye* are not necessary: the potential effects of

265 Section 2 RMA.

266 *Rodney District Council v Gould* [2006] NZRMA 217 (HC) at [122].

267 *The Outstanding Landscape Protection Society Inc v Hastings District Council* [2008] NZRMA 8 at [50].

268 *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87; [2014] 1 NZLR 32; [2014] NZRMA 133; (2013) 17 ELRNZ 688 (SC) at [91].

269 *Harris v Central Otago District Council* [2016] NZEnvC52 at [48].

another independent application for resource consent would not usually be part of either the existing or the reasonably foreseeable future environment and so are irrelevant anyway.

[178] We observe that the complexity of *Dye*'s discussion of 'actual and potential effects' in section 104(1)(a) RMA are also unnecessary. There is a simple reason why Parliament used that phrase rather than the defined word "effects". Obviously if a resource consent is applied for in the proper order — in advance of carrying out an activity — all its effects are potential, i.e. they have not occurred yet. However, the legislature anticipated the reality that in a small but significant percentage of cases, particularly after an abatement notice has been issued by a local authority, a resource consent is applied for retrospectively. In such a case most of the effects are "actual".

[179] To those points we can add:

(1) *Dye* does not take into account — because it did not need to — the reality that all stressors, regardless of who or what causes them, cause "cumulative" effects on ecosystems; and

(2) the *Dye* view of the world is rather static — in reality this second's effects are the next second's environment. The past effects of stressors — the accumulated[270] effects — have become and are continually becoming, part of the environment which is the setting of any proposal.

[180] It is important to realise that *Dye* does not mean that "cumulative" effects in a wider sense are irrelevant. If the potential effects of stressors, other than the activity for which consent is sought, are relevant then they may be taken into account under section 104(1)(c) RMA. Accordingly we will analyse such potential effects — which we will call "accumulative effects" — separately so as not to confuse the analysis imposed by *Dye*. The different treatment of such effects under *Dye* may have been intended to have this consequence: whereas cumulative (in the *Dye* sense) effects <u>must</u> be had regard to under section 104(1)(a), the consent authority has a discretion under section 104(1)(c) as to whether it takes accumulative effects into account at all. However that is probably an

270 We will use "accumulated" for the past effects of any stressors; "accumulative" for future effects of all stressors (other than the application).

over legalistic approach, because the potential (future) effects of other stressors are also part of the reasonably foreseeable future environment (under section 104(1)(a)) and that must be established in any event. In other words, there is no bright line distinguishing accumulative effects of other stressors from the future dimensions of the 'environment': to the contrary, they are the same thing.

4.2 Effects on the water column[271]

[181] As described earlier, the operation of the mussel farm will cause discharge of seawater and contaminants (mussel shells, mussel faeces and pseudofaeces) to the seawater of Beatrix Bay. The question under the Sounds Plan is whether discharges affecting significant ecological value are avoided.

[182] Mr Knight also assessed the effects of the proposed farm structures on currents, waves, shading and water column stratification, concluding that these effects would be small and localised[272]. In Mr Knight's opinion, an additional mussel farm is unlikely to contribute to oligotrophication (lowering of nutrient levels) of the region. He described his application of the *Aquaculture Stewardship Guidelines*[273] to estimate the effects of the proposed farm on phytoplankton depletion. He reported as follows[274]:

> Results of the carrying capacity analysis ... show that the estimated stocking density of the farm would filter the estimated area of influence of the farm every 13.5 days (the clearance time CT) and that the area of influence would be flushed approximately every 4.5 days (the retention time RT). Consequently, the analysis shows that the water currents at the site are sufficient to support the proposed culture at the site and that the proposal will meet with the ASC (2012) criteria, that the ratio of the clearance to retention time would be greater than one. (Footnote omitted).

This analysis of local scale effects of the proposed farm on phytoplankton productivity diversity and succession was not challenged by other expert evidence or in cross-examination. In fact, the conclusion appears to be supported by Dr S T Mead[275], ecologist for the Societies, because he stated that the farm in isolation is unlikely to exceed its localised carrying capacity or influence nutrient properties in the wider bay.

271 See the Assessment Matters in rule 35.4.2.9 [Sounds Plan p 35-21].
272 B R Knight, evidence-in-chief at para 82 [Environment Court document 9].
273 Aquaculture Stewardship Council 2012: *ASGBivalve Standard Version 1* (January 2012).
274 B R Knight, evidence-in-chief para 56 [Environment Court document 9].
275 S T Mead, evidence-in-chief, paras 25 and 34 [Environment Court document 20].

[183] Dr Mead extrapolated the farm scale calculations by Mr Knight to show how quickly or slowly the seawater in the bay is replaced. He calculated a bay-wide CT/RT[276] score of 0.0675. In his opinion the capacity indicators[277] for clearance efficiency and regulation ratio indicated that cultured mussels control the ecosystem of Beatrix Bay (i.e. exceed carrying capacity)[278]. Based on his calculations, Dr Mead asserted that the accumulated ecological effects of mussel farms were already significant in Beatrix Bay and that no more farms should be added. Mr Knight responded to those calculations[279], noting that while they were useful tools "they do not account for the spatial complexity of an area and so will become increasingly less useful at larger scales." An equally cogent criticism of Dr Mead's opinion was that of Dr Stewart. He did not see the relevance in extrapolating the theoretical calculations because empirical observations at a base scale showed that carrying capacity was not being exceeded most of the time.

[184] We consider that the proposal is unlikely to add any adverse cumulative effects to the water column in Beatrix Bay that are more than minimal in the context of larger "natural"[280] variations. However, whether the regularity of winter/summer fluctuations changes the food web in a way that affects King Shag is unknown.

4.3 Effects on the seabed[281]

[185] Dr Taylor and Dr K Grange provided expert ecological evidence for the Appellant on the benthic effects of the proposal. Mr Davidson also gave us his expert opinions (although not claiming to be independent). Dr Stewart and Dr Mead provided expert evidence for the Council and the Societies respectively. A site-specific assessment[282] of the proposal was prepared by Mr R Forest for the original (now

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276 CT=clearance time; RT=retention time.

277 Using methodology described in Gibbs M T 2007. "Sustainability performance indicators for suspended bivalve aquaculture activities". *Ecological indicators*, 7(1), 94-107.

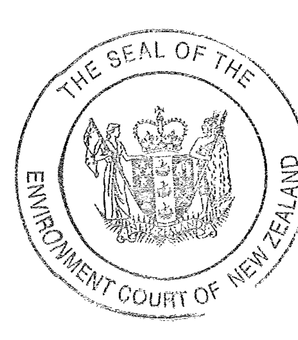
278 S T Mead, evidence-in-chief, at para 28 [Environment Court document 20].

279 B R Knight, rebuttal evidence at para 4.11 [Environment Court document 9A].

280 "Natural" is in inverted commas to recognise the possibility that el Niño/ la Niña events may be influenced by anthropogenic global warming.

281 See the Assessment Matters in rule 35.4.2.9 [Sounds Plan p 35-21].

282 Forest R 2013, *Proposed Marine Farm Site Assessment for a new application located in Northern Beatrix Bay, Pelorus Sound,* (Cawthron Report No 2406) [Exhibit 6.5].



modified) application. While Mr Forest was not called by the Appellant, that report was relied on by Dr Taylor and others.

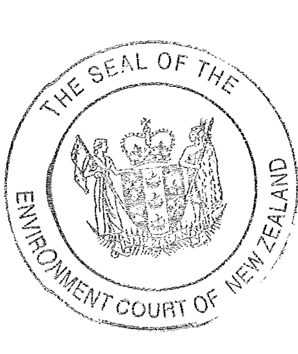
Will there be adverse effects on the rocky reef system at the promontory?

[186] We must assess the probability and degree of adverse effects on the rocky reef[283], which it will be recalled, is at least 35 metres from any part of the marine farm. There was no suggestion that there would be any shell drop on the reef. The only issue was whether finer suspended sediments would be moved on to and smother the reef.

[187] For the Appellant, Dr Taylor's evidence[284] was that the water flow regime at the site (typically less than 4cm per second), combined with the 35 metre buffer, would make farm-related deposition difficult to distinguish from background levels at the adjacent inshore reef area. Further, episodic high current flows recorded at the site (up to 20cm per second) would have the effect of re-suspending any fine organic material that might reach the reef. Dr Taylor also pointed out[285] research evidence establishing the inherent variability of rocky reef communities supporting his opinion that any "cumulative" effects from mussel farming on these communities are likely to be very difficult to detect when compared to large scale environmental processes. Finally Dr Taylor suggested that any residual concerns around potential effects on the reef habitat could be met by requiring an adaptive management approach based on benthic monitoring linked to a review of the farm's layout if significant issues were identified. Proposed conditions to this effect have been provided by Mr J C Kyle, planning witness for the Appellant[286].

[188] Dr Mead, after recalculating his figures related to flow rate and the deposition footprint, accepted that a deposition footprint limited to up to 35m from the farm was likely[287]. He also accepted[288] that the high currents experienced from time-to-time at the site may re-suspend any fine sediment that may travel further than the main footprint. Despite accepting these propositions, Dr Mead continued to assert that fine material

283 NZCPS policy 11(b)(iii).
284 D I Taylor evidence-in-chief paras 33 and 34 [Environment Court document 8].
285 D Taylor evidence-in-chief paras 38 to 43 [Environment Court document 8].
286 J C Kyle, evidence-in-reply, Appendix A [Environment Court document 32].
287 Transcript, p 394, line 28.
288 Transcript, p 396, lines 10-15.



reaching the reef area from the proposed adjacent mussel farm would have a major effect on the ecological community at the reef.[289]

[189] We see a low probability of such an effect — it is unlikely to occur on the preponderance of the evidence given to us.

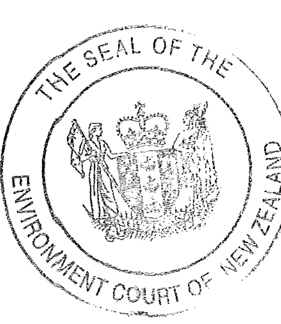
Will there be adverse effects on the intertidal zone?

[190] We are also required[290] to examine whether there will be adverse effects on another indigenous ecosystem found only in the coastal environment — the intertidal zone. Prompted by concerns expressed at the Council hearing on the possible impact of mussel farms on the wider biological community at Beatrix Bay, Mr Davidson undertook a sampling project on intertidal habitats[291] adjacent to and distant from mussel farms within Beatrix Bay in collaboration with Dr Grange. Mr Davidson selected the survey sites and collected the relevant data, which was analysed by Dr Grange. While acknowledging the snapshot nature of the survey, Dr Grange concluded from his analysis that there are differences in the biological communities between sites, but these differences are not consistent with the proximity to mussel farms. In his opinion, the differences can be explained by habitat differences and inherent patchiness in the shore communities (temporal and spatial variability)[292].

[191] Dr Grange's analysis was not disputed by Dr Stewart and he agreed[293] that it provided useful data. However, he went on to suggest that effects from mussel farms on intertidal communities are less easily determined than effects on subtidal communities. This was due to the influence of factors such as time submerged, wave action, aspect, substrate type, adjacent land use and exposure to the sun. These influences are moderated in the subtidal zone by the overlying water column.

[192] For his part Dr Mead dismissed[294] the analysis and conclusions of Dr Grange as providing no evidence one way or the other of the effects of mussel farms on intertidal communities. He asserted that the effects of mussel farms on intertidal habitats have not

289 Transcript, p 397, line 2.
290 Under policy 11(b)(iii) of the NZCPS.
291 K Grange evidence-in-chief Appendix 1 [Environment Court document 11].
292 K Grange evidence-in-chief at para 8.1 [Environment Court document 11].
293 B G Stewart evidence-in-chief at para 8.23 [Environment Court document 26].
294 S T Mead evidence-in-chief 15 [Environment Court document 20].



been extensively researched. Responding to questions in cross-examination, Dr Grange disputed this, noting extensive research had been reported and that no effects had been observed.[295] On this issue we prefer the evidence for the Appellant and predict that it is likely there will be only very minor (if any) independent or cumulative effects on the intertidal zone.

What will be the effects of the marine farm on the seafloor and its macrofauna?

[193] There is no policy in the NZCPS which directly requires consideration of this ecosystem in itself. However, the Sounds Plan requires identification of likely effects on the sea floor and marine ecosystems generally. As it happens, the Appellant's experts all acknowledged that sedimentation and shell drop from mussel farms does alter infaunal and epifaunal biological communities (these include flat fish) within the direct footprint of the farm. Species diversity may diminish in some circumstances and the abundance of some species may increase. This can vary from site to site depending on current velocities and farm management practices.

[194] We have already described the shell drop from other mussel farms. No one disputed that the same will occur under the Appellant's farm. The proposal will change the 7.372 hectares of soft mud seafloor to a reef-like system of shells, live mussels and sediment to a distance of 30 metres from the seaward edge of each part of the farm.

[195] When questioned by the court on the relative impact of mussel farming alongside other anthropogenic influences and stochastic events, Dr Mead asserted that mussel farms were having by far the greatest impact[296], but without giving any detail to support this assertion other than to dismiss the impact of dredging and trawling as pulse events from which recovery was rapid. This was in contrast to the evidence of Dr Stewart, who considered the risk or threat from aquaculture to be lower than that from other influences. In his opinion, the probability of adverse effects occurring remained high, but the consequence of these effects would be orders of magnitude less than other stressors. Dr Stewart qualified this to some extent by saying that changes in dredging/trawling effort, reductions in exotic forest harvesting and native tree and shrub regeneration may mean that the gap between relative importances of major influences

295 Transcript, p 284, line 11.
296 Transcript, p 418, line 20.

may be diminishing. Mr Davidson considered anthropogenic effects from land generated sedimentation and trawling/dredging are the "biggies"[297] in driving benthic effects.

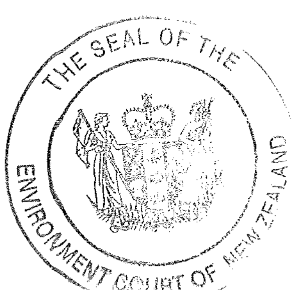
4.4 Effects on King Shag habitat and population

[196] The Council alleged that the Appellant's case was defective because its evidence-in-chief omitted to supply any information on the question whether the proposal would affect King Shags and their habitat. Mr Gardner-Hopkins, counsel for the Appellant, explained that it had not produced expert primary evidence on this issue as it was not significant in the Commissioner's decision and had not come to the fore until receipt of primary evidence from the respondent and section 274 parties. Counsel submitted that the Appellant was entitled to rely on aspects of evidence produced by other parties and to present rebuttal evidence on this. We agree with this submission and have considered all of the expert evidence, regardless of its source. However, that does not change the legal obligation on the Appellant to supply adequate information (from whatever source) to enable us to grant consent. We have already observed that some of the cross-examination by Mr Gardner-Hopkins seemed to proceed on the opposite basis.

[197] In Part 2 of this decision we found that the habitat of King Shags has been degraded (mainly by land use causing run-off of sediment and pollution, and by dredging) and reduced by installation of mussel farms. The impact of a further mussel farm will by itself generally have less than minor impacts on that habitat. On the other hand the accumulated and accumulating impacts of existing (and past) operations are adverse and more than minor, and the Trust's application can only add to those adverse effects on habitat.

[198] For convenience we summarise our findings[298] on the preponderance of evidence from parts 2 and 3 of this decision as follows:

(1) King Shags forage, feed and rest in Beatrix Bay.



297 Transcript p 85, line 20.
298 See the Assessment Matters in rule 35.4.2.9 [Sounds Plan p 35-21].

(2) Foraging occurs principally on or above the soft substrate of the Bay's floor at depths below 10m and mainly between 20m and 40m with female shags preferring shallower water in that range.

(3) The principal prey are flat fish including Witch Flounder and Lemon Sole.

(4) King Shags rarely forage within marine farms. There is anecdotal evidence of such foraging, but Dr Fisher's study showed none.

(5) Beatrix Bay is likely to be a better habitat for the Duffer's Reef colony than similar areas further away because King Shags require less energy to travel to (and return from) this area.

(6) A mussel farm over soft substrate modifies the habitat substantially by covering the area under it and an incomplete ring of variable width[299] (but up to 30m wide) around it under shell debris, mussel faeces and pseudofaeces.

(7) Mussel farms over soft substrate are potentially stressors of King Shag because they may reduce the presence King Shag's preferred prey or the ability of King Shag to catch them.

[199] We conclude that there are already adverse effects on King Shag in the current and reasonably foreseeable environment of the site.

[200] We have already found that the presence of mussel farms is having an adverse effect on the habitat of King Shags by excluding their benthic footprints from being foraged by King Shags. The telling figure is that less that 1% of the observations of swimming King Shags in the Marlborough Sounds have been of birds within mussel farms, and even then there is no evidence that they have been foraging, let alone successful. Further, there is a 30 metre wide (maximum) bulge outside each mussel farm in which the habitat is also likely to be modified adversely.

[201] The footprint of the 37 farms is 304.4 hectares and a 30 metre strip along the outside[300] of the farms would add (8.5 km x 0.03 km =) 25 hectares, which makes a total of 329.9 hectares subtracted from the potential optimum foraging area. That is (329.9 /

[299] The "ring" is likely to be incomplete because there is unlikely to be shell drop and sediment inside the farm, and it will be asymmetric too: stretching in the direction of the predominant current.

[300] We assume the inside edge of most farms is on or inside the boulder/reef zones.

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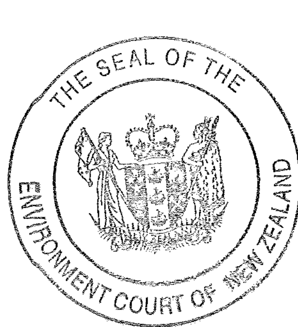
2,000 =) 16% of the area of Beatrix Bay which is a more than minor reduction in foraging area[301] within the Bay. There is already an adverse accumulated effect, and the addition of the proposed farm will only exacerbate that.

[202] There is one other aspect of the application which may have a more than minor effect. It results from the fact that the site is nearly the last empty but potentially available mussel farm site around the circumference of Beatrix Bay. The site may be important as a control site for recording foraging by King Shags. If a mussel farm is installed and operated on the site, that opportunity is lost.

[203] Mr Maassen submitted[302] that a threshold of "cumulative effects" would be passed. However, we have no evidence of a threshold of effects on the habitat of King Shags. There are a number of reasons why reduction in habitat might affect the King Shag e.g. directly by killing displaced individuals by removing food (or decreasing hunting efficiency) and indirectly by fragmenting populations, increasing vulnerability to extinction from stochastic events (disease, el Niño and climate change effects and genetic problems). We have no information that any of those are causing problems at present or not.

[204] The Appellant argued that because there was no, or insufficient, evidence that any "tipping point" has been reached in respect of the cumulative (or accumulative) effects which are relevant under the Sounds Plan and the NZCPS, we can disregard these matters. We do not consider that is correct: the concept of a 'tipping point' is not found in the RMA. It is a tempting but misleading metaphor: it adds a connotation of a valued resource being at the top of a cliff, and one more push (in the form of the activity being applied for) will see the resource in pieces at the bottom. In reality it is often impossible to say where tipping points are in relation to habitats. Ecosystems and their components react to the myriad of stressors they are exposed to in a multitude of ways, very few of them known with accuracy. While dose-response relationships are often (but not necessarily) sigmoidal[303], identifying a "tipping point" on such a curve can be difficult. The point is that nobody has any idea whether a sigmoidal curve is correct, or



301 We note this is less than Dr Stewart's figure (19%) but consider our figure is more conservative.
302 Mr Maassen's submissions dated 29 July 2015, paras 216-218.
303 An elongated 'S' shape rather than the 'U' shaped or parabolic curve shown by Mr J Z Butler, the planner for the Marlborough District Council, at his para 9.4 [Environment Court document 33].

if Mr Butler's curve[304] or some other is correct. Further, nobody knows where on any of the curves the current population is, and what the effects of other stressors are.

[205] What the RMA actually requires is protection of significant habitats. Local authorities have worked at stating methods for evaluating areas of vegetation and habitats, see for example the criteria stated in *Minister of Conservation v Western Bay of Plenty District Council*[305]. In the statutory documents relevant to this proceeding (the Sounds Plan and the NZCPS) two other methods of responding to section 6(c) RMA have been used. Neither refers to tipping points. The NZCPS refers to the IUCN criteria which does use some thresholds, for example population decreases[306] or changes in extent of occurrence or area of occupancy[307] but they are tightly defined and are given as alternatives. Nobody attempted to apply them in this case. For the King Shag the IUCN small population criterion D[308] applies instead. As recorded earlier there are no applicable thresholds for criterion D in the IUCN Red List.

[206] In summary, we have adequate information to find/predict that:

(1) King Shag habitat will be changed by shell drop and sedimentation;
(2) the effects of the farm accumulate and are likely to be adverse; and
(3) it is as likely as not there will be adverse effects on the populations of New Zealand King Shags and their prey;
(4) there is a low probability (it is very unlikely but possible) that the King Shag will become extinct as a result of this application.

[207] On the other hand we have insufficient information to assess the effects in the previous paragraph (the combined effects of the Davidson Family Trust mussel farm together with the other mussel farms in the bay) against the effects of other major environmental stressors, both anthropogenic and stochastic. Pastoral farming, exotic forestry, deforestation, dredging and trawling fall into the first category, while flooding

304 J Z Butler evidence-in-chief para 9.4 [Environment Court document 33].
305 *Minister of Conservation v Western Bay of Plenty District Council* Decision EnvC A71/01 at [20].
306 See the *Red List* Vulnerable Criteria A above n 156.
307 See the *Red List* Vulnerable Criteria B above n 156.
308 The *Red List* Vulnerable Criteria D above n 156, at p 22.

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in the Pelorus and Kaituna Rivers and oscillations in weather patterns fall into the latter (or both).

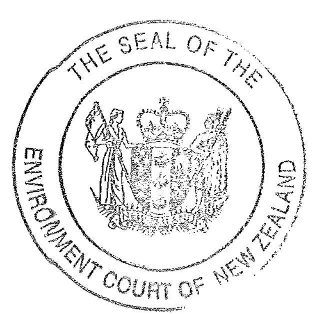
[208] The most direct likely effect on King Shag habitat is that an area of over 10 hectares (the 8.982 ha farm plus a 20 to 30 metre wide strip along its outside edge) is very likely to be covered in detritus from the farm at the rate of 250 tonnes/hectare (or more) each year. The studies of fish around mussel farms suggest that the new benthic habitats they form underneath them may not encourage flat fish. We hold that change is likely to be an adverse effect on King Shag habitat.

[209] In Dr Fisher's opinion benthic changes resulting from the scale of mussel farming reduce the availability of significant feeding habitat. Cross-examined by Mr Gardner-Hopkins he confirmed his view that the change in substrate under the farm meant that the "... benthic fish prey that the King Shags forage for are unable to use that habitat"[309]. This exchange occurred[310]:

> Q: The question that I think I asked was, on the basis of your paragraph 9.5 [of Dr Fisher's evidence-in-chief] and your earlier paragraph 7.4 you would consider any mussel farm in the Marlborough Sounds as having a more than minor effect because it removes foraging habitat for King Shags.
>
> A: That's correct. Yes I'd say that, yes.

Dr Fisher's approach is consistent with the approach in the NZCPS which is to avoid any adverse effect on threatened species and in particular to avoid adverse effects on the habitats of indigenous species (at the limit of their natural range).

[210] Given the scale of the proposal these will be minor (but not minimal) effects by themselves, but they are, with the accumulated and accumulative effects of existing farms, adverse to King Shag habitat (NZCPS Policy 11(a)(iv)) <u>and</u> to King Shags (NZCPS Policy 11(a)(i) and (ii)).



309 Transcript, p 585.
310 Transcript, p 585, lines 24 to 29.

4.5 Cultural effects[311]

[211] The local Iwi, Ngati Koata, supported the application as they apparently consider it complies with the Ngati Koata Iwi Management Plan. We have evaluated the evidence relating to effects on King Shag habitat and population above. We consider the application does not meet the protection focus for indigenous fauna and their habitats in the Iwi Management Plan. So we give the Ngati Koata support minimal weight.

4.6 The effects on the amenity and other values of the promontory

[212] On these and wider landscape/natural character issues the court read the evidence lodged by the following witnesses (and heard cross-examination on that evidence):

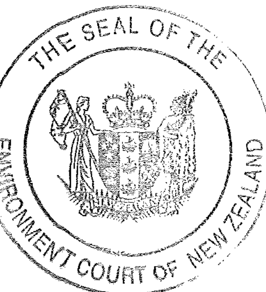
Landscape architects

- Mr C R Glasson for the Appellant;
- Mr A Bentley for the Marlborough District Council; and
- Dr M Steven for the section 274 parties.

Planners

- Mr Kyle for the Appellant;
- Mr J Z Butler for the Council; and
- Ms S J Allan for the section 274 parties.

[213] All of Beatrix Bay is considered by the landscape experts and planners and has been accepted by the court (in *Knight Somerville Partnership v Marlborough District Council*[312] and elsewhere) as having a high level of natural character even though 16% of its surface area is adversely affected by mussel farms. The promontory does not stand out from the rest of the bay in this regard in anyone's assessment except Dr Steven who considered that the southern third of the promontory is outstanding. While we do not accept Dr Steven's opinion, we do acknowledge the promontory's high values and sensitivity and we now consider the effects of the proposal on that.



311 See the Assessment Matters in rules 35.4.1 and 35.4.2.9 [Sounds Plan p 35-14 and 35-21 respectively].

312 *Knight Somerville Partnership v Marlborough District Council* [2014] NZEnvC 128.

How visible will the mussel farm be?

[214] For the Council Mr Bentley produced a table[313] as to the visibility of mussel farms at various distances. He explained that the table has been developed with his colleagues at the firm Boffa Miskell and contains an overall consensus from the Environment Court on different mussel farm appeals over the last 20 years. Mr Glasson, for the Appellant, produced his own table[314] of 'Visibility of Mussel Farms at Sea Level' (we think he means at about 1.5m above sea level). We have compiled this table:

Distance from farm	Mr Glasson	Mr Bentley
0-500m	Highly visible	Dominant
500-700m	Very visible	Prominent
700-1000m	Visible	Prominent
1000m-1.5km	Low visibleness	Prominent
1.5km-3km	Low visibleness	Visible as part of view
More than 3km	Low visibleness	Difficult to see

We find problems with both assessments. First, Mr Bentley's table seems to include two sets of value judgments — as to degree of visibility and as to its impact on the seascape — where the first might suffice. The use of the words "dominant" and "prominent" seems to make an aesthetic assessment which is arguably premature. In that regard Mr Glasson's vocabulary is preferable since it only attempts to assess the degree of visibility (albeit still in a subjective way).

[215] The difficulty with Mr Glasson's table is that it divides the units of distance so finely that we have doubts about its utility. A reasonable person on the water would struggle to identify whether they were 500 or 700 metres from a mussel farm in any conditions less than flat calm (and without other information).

[216] Mr Bentley's table describes the degree of visibility from 500 metres to 1.5km (from a farm) as *prominent*. We can accept this may be accurate (although we prefer

313 Visibility from water/Visibility from land (usually elevated) – J A Bentley evidence-in-chief, para 5.59 [Environment Court document 30].

314 Table 3.0, Visibility of Mussel Farms at Sea Level. Glasson evidence-in-chief, para 10.16 [Environment Court document 7].

"very visible") when viewing conditions are extremely favourable — flat sea with sun directly onto the farm. In other circumstances the table may not be correct, depending on both conditions and the eyesight of the observer.

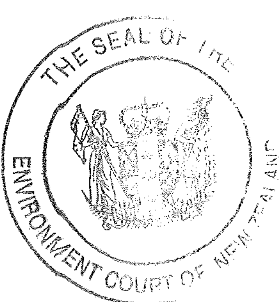
[217] In summary, on this site we predict that at a range of less than 400 metres (particularly where existing farms are not part of the foreground view) the farm would be highly visible in good conditions. In good but not millpond conditions from a range of 400m to 750m the farm may be visible depending on conditions and angle of approach. From about 750 metres to 1.5 kilometres the farm would, in many conditions, be visible. Beyond that it may be difficult to see even in good conditions.

[218] No ONL or ONF is identified for the site — it is not an Area of Outstanding Landscape Value ("AOLV") under the Sounds Plan. Thus the avoidance directives of Policy 15 NZCPS are not triggered. Given that finding, Policy 15(b) is applicable, even to an un-named promontory. That policy requires decision-makers to:

> Avoid significant adverse effects and avoid, remedy, or mitigate other adverse effects of activities on other natural features and natural landscapes in the coastal environment;

Any significant adverse effects need to be avoided and other adverse effects need to be remedied or mitigated.

[219] In Mr Glasson's opinion[315] the proposal in its modified form will still maintain the quality of the coastline and the landscape feature of the promontory. Now that the two mussel farm blocks are separated by an expanse of water *the integrity of the promontory can remain intact*. He also concluded that the proposal has avoided significant adverse effects on natural landscape, and the natural landscape values have been protected from other adverse effects due to the fact that the proposed mussel farm is integrated with a similar scale of existing farms in the area and is appropriately sited. Therefore he does not see the proposal, as amended, being contrary to Policy 15 of the NZCPS. Mr Glasson's overall conclusion was that[316]:



315 C R Glasson evidence-in-chief, para 7.28 [Environment Court document 7].
316 C R Glasson evidence-in-chief, para 11.8 [Environment Court document 7].

> The proposal is of a small scale, consistent with existing marine farm activity in Beatrix Bay, and would not compromise the landscape, natural character and visual amenity of the Bay. The presence of mussel farms in Beatrix Bay has already partly compromised the natural character at the head of the Bay, along with failed pastoral farming. One further mussel farm of this size will not affect the Bay's landscape, natural character and visual quality any further, or reach a threshold beyond which the effects are unacceptable.

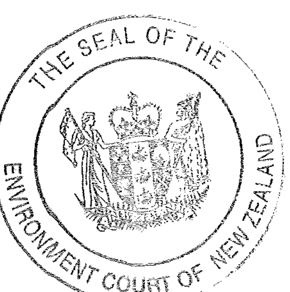
[220] Mr Bentley noted that due to the location of the proposed farm, it will appear from some locations to be not *wholly visually anchored to the landform* as is the case for the majority of farms around the Bay — this could in some conditions amplify the visual presence towards the unmodified waters offshore[317]. He concluded that the proposal will occupy an area of the coastal edge that is currently free from aquaculture development and the only remaining part of the promontory's naturalness that is unencumbered by mussel farms will be lost; therefore natural character will not be preserved.[318]

[221] We accept Mr Bentley's[319] answer when he described the headland which is the background landform of the proposal as:

> ... it's sort of quite different in that regard from other landscape areas within the Bay ... the fact that it's at the tip of that landform that in my view amplifies its prominence from a number of viewpoints and potential viewpoints, and leads to greater effects visually in that regard.

[222] We also agree with Mr Bentley when he describes some views of the proposed farm (and some existing farms) where there is a lack of (terrestrial) backdrop[320]. He cites the example of viewing the proposed mussel farms looking at the promontory and beyond towards the mouth of Beatrix Bay. In that situation:

> ... existing mussel farm development from that viewpoint is not anchored towards a local backdrop, so that it appears that it's visually a part of the open water... and what I am saying about this proposal is due to its location at the tip of the promontory, and there are more locations where that would be the case.



317 J A Bentley evidence-in-chief, para 8.51 [Environment Court document 30].
318 J A Bentley evidence-in-chief, para 8.51 [Environment Court document 30].
319 Transcript, page 652.
320 Transcript, page 653.

His point is illustrated from the aerial photograph on the cover of the Council's Graphics[321] (Exhibit 30.1) with the proposed farms overlaid in red — there is a considerable area at the head of the bay where a viewer from a boat cruising inside, through or outside the existing mussel farms would observe the farm with only a sea backdrop. That experience would not align with the Appellant's slightly conflicting contentions that the proposed farm continues an existing pattern of development, and/or that the proposal will not interrupt[322] the natural sequence because the two parts of the farm are on either side of the head of the promontory.

[223] In terms of NZCPS 15(b) requiring the avoidance of significant adverse effects and the avoidance remedying or mitigation of other adverse effects, Mr Bentley's conclusion was:

> That close-up these structures would detract from the valued natural qualities of this part of the coast and reduce aesthetic coherence of the promontory.[323]

In Mr Bentley's opinion the proposal clearly failed the NZCPS 15(b) requirement. That is consistent with the evidence of Dr Steven[324]. In the latter's opinion[325]:

> The presence of the marine farm will detract from the wild state that currently exists, and that is largely responsible for the erosional forces that have shaped the southern end of the promontory. The marine farms ... add a degree of industrialisation to an otherwise wild natural section of the coastal environment.

[224] As we have already noted, marine farms are traditionally located away from the most exposed parts of the headlands and promontories. While none of the witnesses could be definitive as to why this was the case it appears from their responses that adverse effects on navigation are likely to be one reason and another was the potential for adverse effects on landscape and natural character. Headlands/promontories by their very name suggest prominence and therefore potential sensitivity. NZCPS Policy 6(1)(h) requires us to:

321 Exhibit 30.1.
322 Transcript, pp 113 to 114.
323 J A Bentley evidence-in-chief, para 8.80 [Environment Court document 30].
324 M L Steven evidence-in-chief, para 117 [Environment Court document 23].
325 M L Steven evidence-in-chief, para 119 [Environment Court document 23].

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> (h) Consider how adverse visual impacts of development can be avoided in areas sensitive to such effects, such as headlands and prominent ridgelines, and as far as practicable and reasonable apply controls or conditions to avoid those effects.

Dr Steven[326] noted that visual impact on the promontory can arise from structures on the surrounding sea because of the way in which the sea/land interface is experienced. That aligns with Mr Bentley's evidence described above.

[225] We are unable to accept Mr Glasson's proposition[327] that the amended proposal (with the gap between the two farm blocks) will allow the integrity of the promontory to remain intact. We can accept from some view points (particularly from the south) that the promontory may appear unencumbered by marine farm structures. However, there are many views of the promontory that will have the proposed farm in the foreground. In such circumstances and at any distance less than 500 metres, the integrity of the promontory will, in our opinion, from a visual/aesthetic/natural character perspective be compromised. In our view that amounts to a significant adverse effect (which is clearly not avoided).

4.7 <u>The effects on the natural character of Beatrix Bay</u>

[226] The Sounds Plan through its CMZ2 zoning provides for the establishment of marine farms, particularly in inshore areas, as appropriate use of the coastal marine area, subject to individual farm assessment. One aspect of that is to determine the "natural character" of the relevant coastal marine area.

[227] Policy 13 in the NZCPS and the Sounds Plan together require us to answer these questions:

- Does the proposed mussel farm cause adverse effects on the natural character of Beatrix Bay?
- If so, are they significant adverse effects?
- Can any adverse effects be avoided, remedied or mitigated?

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[326] M L Steven evidence-in-chief, para 109 [Environment Court document 23].
[327] C R Glasson evidence-in-chief, para 7.28 [Environment Court document 7].

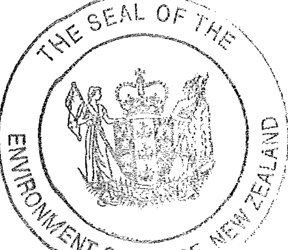
Preservation of Natural Character (Policy 13)

[228] Dr Steven described how[328]:

> When viewed from the water, the farm will be viewed against a sensitive land/sea interface. … The perception of the land/sea interface contributes significantly to the natural character and aesthetic appreciation of that part of Beatrix Bay.

[229] In Mr Glasson's opinion, as a result of its already compromised natural character, the proposed mussel farm will not adversely impact further on the natural character of the headland. He considered[329] that the proposal is not contrary to Policy 13(1)(b) of the NZCPS as it avoids significant adverse effects, and will avoid, remedy or mitigate other adverse effects on natural character in all other areas of the coastal environment by co-locating in an already modified environment. In his opinion the farm site is only a small area adjacent to the promontory, access to the coastline is available and the farm is *but a small addition to the already existing development in the Bay*[330].

[230] Mr Maassen referred[331] us to the Commissioner's decision[332] on the scale of direct visual effects. Notwithstanding the care taken by the Commissioner in her assessment, backed by decades of experience assessing the effects of marine farms in the Marlborough Sounds, we were not greatly assisted by this part of her decision because the amended application which is before us is quite different to the proposal considered by the Commissioner. In the paragraphs identified by Counsel, the Commissioner mentioned on three occasions how the farm *wrapped around the headlands* or words to that effect. This was her response to the staple-shaped farm in the original application which did indeed completely wrap around the headland without any separating gap. It gave rise to a completely different set of effects all of which were more adverse than those associated with the proposal before us.



328 M L Steven evidence-in-chief, para109 [Environment Court document 23].
329 C R Glasson evidence-in-chief, para 7.17 [Environment Court document 7].
330 C R Glasson evidence-in-chief, para 7.18 [Environment Court document 7].
331 Mr Maassen's submissions dated 29 July 2015, para 13.
332 In particular paras [139] through to [151].

[231] Mr Glasson's evidence was criticised by Mr Ironside who submitted[333] that Mr Glasson's overall approach is that existing development justifies further development. This is certainly not what NZCPS Policy 13(1)(b) intends even if it is the Sounds Plan's policy. Further, Mr Ironside observed[334] that there is no pattern of developing marine farms off headlands as Mr Glasson seeks to suggest. There has been a recent exception — the mussel farm allowed by the Environment Court in the *Knight Somerville*[335] case. The Appellant may have been fortunate in that case: the evidence against the proposal was very limited especially on King Shags; a good part of the justification for the location in that case was to avoid a reef further in; and finally, the promontory in this case is a much more dominant feature than the headland in *Knight Somerville*.

[232] In Dr Steven's opinion marine farming within Beatrix Bay has reached a point of unacceptable "cumulative" adverse effects with respect to the natural character of the coastal environment, and to the appreciation of amenity and the aesthetic quality of the landscape[336]. He went on to say that:

> cumulative effects must be understood in terms of the total changes evident in the landscape, and not simply the cumulative effects arising from an additional marine farm. In this regard, the cumulative effects of marine farming generally must be considered, together with other modifications to the landscape.

He concluded with respect to NZCPS Policy 13:

> The effects will be significantly adverse, and as such should be avoided. If the effects would have been considered less than significantly adverse, I am of the opinion that the effects can neither be remedied nor mitigated, and as such should also be avoided.[337]

[233] Our overall finding is that the adverse visual effects of the Appellant's proposal on natural character might be minor by themselves if the other farms were not in the bay. It is their cumulative effect on top of the accumulated effects of the other mussel farms which makes us pause. We assess that the proposed farm does not satisfy Policy

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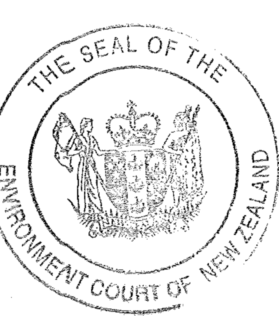
[333] Mr Ironside's submissions dated 6 July 2015, para 19.
[334] Mr Ironside's submissions dated 6 July 2015, para 19.
[335] *Knight Somerville Partnership v Marlborough District Council* [2014] NZEnvC128.
[336] M L Steven evidence-in-chief, para 104 [Environment Court document 23].
[337] M L Steven evidence-in-chief, para 111 [Environment Court document 23].



13(b) because its cumulative effect — added to the accumulated and accumulative effect of all the existing farms — will be significant and thus should be avoided.

4.8 Effects on Navigation[338]

[234] The proposed site at the head of Beatrix Bay is primarily used by commercial boats servicing mussel farms in the area and by low numbers of recreational fishers and divers. Direct access from the open water of Beatrix Bay to the reef area at the southern end of the promontory is retained by the 190m separation of the eastern and western sections of the proposed farm.

[235] Access to inshore waters and the shoreline is maintained by the siting of the nearest mussel lines 100m from the shore. Mr Brian Tear, navigation witness for the Appellant, considered navigation by recreational boats in and around mussel farms either in transit or for fishing as commonplace in the Marlborough Sounds. In his opinion, the effects of the proposed new farm are minor. While some small inconvenience may occur, this would only be to mariners transiting between the embayments on either side of the point. This was likely to affect mussel service boats only, as very few recreational boats were likely to use this route. This view was supported by Mr C Godsiff, a long-term mussel farmer and tourism operator with extensive boating experience in Pelorus Sound.

[236] Mr L Grogan, Deputy Harbour Master for the Council, considered that as the proposal breached the Maritime New Zealand *Guidelines for Aquaculture Management Areas and Marine Farms* 2005 ("the Guidelines") there was an increased risk of vessels using the area to become entangled in farm structures. Of particular concern to Mr Grogan was the placement of the farm within 200m of the promontory (a headland) and 500m of a recognised navigational route.

[237] Mr Tear responded that the Guidelines in this regard should not be applied in a blanket manner based on geography as there are many differences between headlands that determine navigational safety. Also, in his opinion, the proposed site was not on a navigational route between popular destinations since it is at the end of the promontory

338 See Assessment Matter 35.4.2.9 [Sounds Plan p 35-21].

in an isolated bay with comparatively low recreational boating use. We consider this latter point is of some importance.

[238] The Guidelines are non-regulatory and as such applications for marine farms do not need to be compliant. They do, however, identify navigational safety matters to be taken into account when assessing marine farm applications. We prefer the evidence of Mr Tear that any concern over navigational safety has been appropriately mitigated in this application.

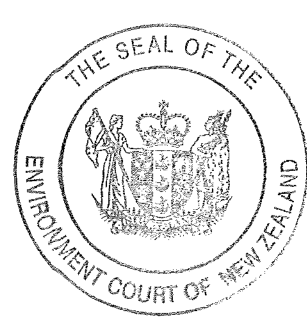
[239] On navigational safety, the court in *Knight Somerville Partnership v Marlborough District Council*[339] said:

> Any marine farm will present some risk to navigational safety simply by its shared common space in the sea. The Sounds, and Beatrix Bay in particular, have a long history of marine farming with its associated structures and hazards and mariners in the area are familiar with these. … Prudent seamanship is required in the vicinity of all farms and the lack of serious accidents associated with marine farms in the Sounds is a clear indicator that this is generally being exercised.

We agree and predict that there will likely be no more than minor adverse effects on navigational safety from the proposal.

4.9 Effects on fishing amenity and access

[240] Most effects on amenity have effectively been considered in parts 4.6 and 4.7 of this decision. However, one particular recreation — fishing — still needs to be considered. The reef area at the southern end of the promontory is used by locals and visitors for recreational fishing and diving[340]. Access to the reef area as a recreational destination is generally by boat, travelling directly across Beatrix Bay from the south. Although the area is relatively lightly used compared to less remote reef sites in Pelorus Sound, it is nevertheless highly valued by those who regularly use it, mostly in summer months.



339 *Knight Somerville Partnership v Marlborough District Council* [2014] NZEnvC 128 at para [67].
340 Transcript, p 601.

[241] We heard competing evidence from recreational witnesses on the likely accessibility of the reef after installation of the proposed farm. These ranged from perceiving it as a complete sealing off of access to the entire southeast embayment shoreline, to having no effect at all. Observations from our site visit tend to confirm the latter. Access to the reef and adjacent shore will remain unimpeded. Indeed, it was apparent that access to inshore areas between and through mussel farms is not significantly affected in good weather conditions when most fishing takes place. We accept that a little more care may be needed, but this is not a significant limitation to a moderately competent boat user in most conditions when recreational boat users would be out on the water. In this regard we do not accept the Societies' submission that recreational use of near shore areas in Beatrix Bay is severely limited by the presence of mussel farms, making this proposed currently unoccupied site even more important. However, we do accept the evidence[341] of Mr Offen for the Societies that drift fishing around the reef at the promontory's tip for blue cod will be difficult and that trolling across the reef for kingfish may be impossible.

[242] Mr Glasson stated that while water space has been infilled, the actual effects on the amenity values will be no more than minor because there will be so few boating recreationalists passing by the proposed farm or even accessing the northern beaches. He considers that Beatrix Bay is not an attraction for recreation due to the existing number of marine farms around the coastline. He came to this conclusion because Beatrix Bay is one that boaties, recreationalists and fishermen must make a special effort to enter — rather than a place where people pass-by. As there is no road access, all public access is by boat. The nearest (and only) dwelling in the Bay is 1.37 km from the proposed farm and the distance from the seaward end of the wharf (associated with the house) to the proposed farm is 1200m.

[243] We find that the layout of the proposed farm, which provides sufficient buffer distance between the mussel farm lines and the reef, is likely to reduce substantially any adverse effects on the recreational amenity provided by the reef and its adjacent shore or on access to it. We predict (with some reservations about the effects on trolling) that the adverse effects on fishing and access are as likely as not to be minor.

[341] T Offen evidence-in-chief paras 13 and 15 [Environment Court document 19].

4.10 Economic effects

[244] Despite the court's attempt to explain how to analyse these in *Port Gore Marine Farms v Marlborough District Council*[342] we received minimal evidence on this issue. We accept that there will be a producer surplus and consumer surplus which would give benefits to society. We also take into account the social benefits of employment identified by Mr M G Holland[343] even though strictly speaking that may be double counting benefits.

[245] Beyond that we are not able to make any quantitative comparison of the net benefits of the proposed marine farm with the net benefits of the status quo (i.e. no farm).

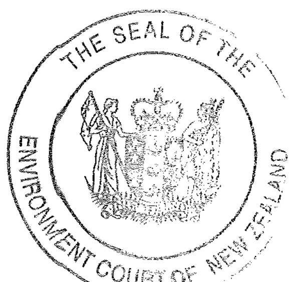
5. Evaluation

5.1 Preliminary issues: the gateway tests and the Commissioner's Decision

The gateway tests

[246] As noted earlier, this is an application for a non-complying marine farm under the Sounds Plan. As such we must be satisfied that it passes one of the gateways in section 104(D) RMA before consideration can be given to granting consent.

[247] We have found that some of the adverse effects are likely to be more than minor, so the first gateway is not passed. As for the second, Mr Maassen submitted that the test is a blunt one: "If a proposal is contrary to any material objective or policy, it fails the second gateway test". He relied on the judgment of Fogarty J in *Queenstown Central Limited v Queenstown Lakes District Council* where Fogarty described it as an error of law to "finess… out qualifiers of one objective by looking at another objective, to reach some overall conclusion that viewed as a whole the objectives allowed … the activity"[344].



342 *Port Gore Marine Farms v Marlborough District Council* [2012] NZEnvC 72 at [200] and [201].
343 M G Holland evidence-in-chief para 23 [Environment Court document 5].
344 See *Queenstown Central Limited v Queenstown Lakes District Council* [2013] NZHC 817 [2013] NZRMA 239 at [39].

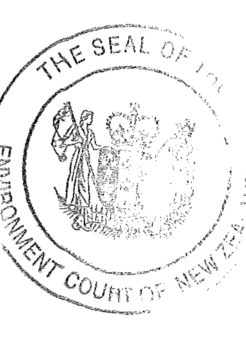
[248] Strictly Forgarty J's statement may have been obiter because "errors of law" found by Fogarty were (he said) sufficient to dispose of the appeals[345]. In any event we respectfully prefer to follow the Court of Appeal in *Dye* where Tipping J wrote that the correct question was whether the application was consistent "on a fair appraisal of the objectives and policies as a whole"[346]. Otherwise we prefer not to lengthen this decision and simply refer to other decisions of the court: *Cookson Road Character Preservation Society Inc v Rotorua District Council*[347], *Calveley & Anor v Kaipara District Council*[348] and *Saddle Views Estate Ltd v Dunedin City Council*[349].

[249] As it happens, because the Sounds Plan tries to be "all things to all people", as another division of the Environment Court recorded a planner's view[350], it is difficult for an application to be contrary to the objectives and policies of the plan: "... nominally non-complying activities are effectively discretionary". We consider the second threshold test is met because the application cannot be said to be contrary to the objectives and policies of the Sounds Plan as a whole, although this is quite a close-run judgment in this case.

The Council's decision (section 290A)

[250] The court is required to have regard to the Council decision which refused the consents sought. In this case the decision of the Council's Commissioner cannot guide us because the application considered by Commissioner Kenderdine is markedly different from that put to us. In bringing the appeal the Appellant has radically altered the layout of the proposed marine farm so that we are being asked to determine a different and smaller proposal than that presented to the Commissioner. This is particularly important in relation to the key findings of the Commissioner on access, natural character, landscape and amenity on which the decision to decline the application was based.

345 *Queenstown Central Limited v Queenstown Lakes District Council* [2013] NZHC 817 [2013] NZRMA 239 at [3] to [6].
346 *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA) at [25].
347 *Cookson Road Character Preservation Society Inc v Rotorua District Council* [2013] NZEnvC [194] at [46]-[51].
348 *Calveley & Anor v Kaipara District Council* [2014] NZEnvC 182 at [142].
349 *Saddle Views Estate Ltd v Dunedin City Council* [2014] NZEnvC 243, [2015] NZRMA 1 at [82].
350 *Kuku Mara Partnership (Admiralty Bay West) v Marlborough District Council* (2005) 11 ELRNZ 466 (EnvtC) at [86]. We understand the court was quoting Ms S Dawson the planner then advising the Council.



[251] On the effect of the proposal on King Shag, Commissioner Kenderdine wrote[351]:

> The protection of the King Shag habitat is a role not only for future decision makers, but for the applicant if this proposal goes ahead through monitoring and conditions. A large scale monitoring programme will assist in this regard. Meanwhile the King Shag population has been stable for 50 years and it appears to have adaptively managed its (new) aquaculture environment (s6(c)).

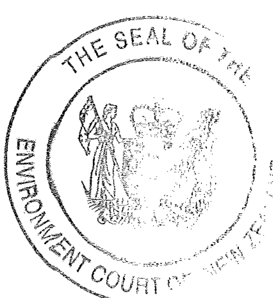
We note from the Commissioner's decision that the Council officers' section 42A report did not appear overly concerned with effects on King Shags or their habitat, and recommended that consent be granted. Mr Gardner-Hopkins submitted that the Council had (belatedly) taken a significantly different approach to this appeal than to previous applications where consents were supported. Mr Maassen's response was that this was the first application for some time that impinged on the King Shag habitat ecological overlay, which had resulted in the Council "taking a hard look" at this application to ensure the integrity of this component of the Sounds Plan. This was not a determinative factor for the Commissioner, but is for us.

[252] We now turn to consider the merits of the application as a whole under section 104 RMA, but before we do, there is a preliminary issue as to the relationship between the matters we must have regard to under section 104(1) RMA and Part 2 of the RMA.

5.2 "Subject to Part 2" in the light of the effect of *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd*

The correct application of 'subject to Part 2'

[253] As for the application of section 104 Mr Maassen submitted that in *KPF Investments v Marlborough District Council*[352] ("*KPF*") where the Environment Court concluded that the overall broad judgment under Part 2 whether a proposal would promote the sustainable management of natural and physical resources still applies.



351 Council Decision at para 279.
352 *KPF Investments Ltd v Marlborough District Council* [2014] NZEnvC 152 at [202].

[254] We now doubt whether that is quite accurate as a result of more recent decisions. In *Thumb Point Station Ltd v Auckland City Council*[353] ("*Thumb Point*") the implications of the majority decision in *King Salmon*[354] for the application of section 104 RMA were summarised by the High Court as being that:

> In most cases, the Environment Court is entitled to rely on a settled plan as giving effect to the purposes and principles of the Act. There is one exception, however, where there is a deficiency in the plan. In that event, the Environment Court must have regard to the purposes and principles of the Act and may only give effect to the plan to the degree that it is consistent with the Act.
> [Footnote omitted]

[255] In *Appealing Wanaka Inc v Queenstown Lakes District Council*[355] the Environment Court agreed with the *Thumb Point* summary, and explained[356] that the reference to any "deficiency" in *Thumb Point* was a reference to the "caveats" identified by Arnold J in *King Salmon* in the following passage[357]:

> ... it is difficult to see that resort to Part 2 is either necessary or helpful in order to interpret the policies, or the NZCPS more generally, **absent any allegation of invalidity, incomplete coverage or uncertainty of meaning**. The notion that decision-makers are entitled to decline to implement aspects of the NZCPS if they consider that appropriate in the circumstances does not fit readily into the hierarchical scheme of the RMA.
> [Emphasis added]

[256] We note that a similar issue about the phrase 'subject to Part 2 ...' came before the High Court in *New Zealand Transport Authority v Architectural Centre Inc & Ors* [358] ("*NZTA*"). While *NZTA* was concerned with section 171 RMA, the identical wording — "subject to Part 2 of the Act" — also occurs. The reasoning behind Brown J's decision is not completely obvious.

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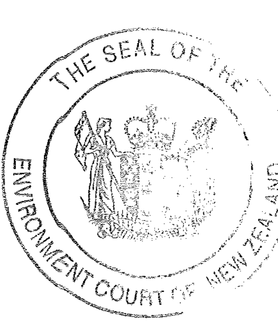
353 *Thumb Point Station Ltd v Auckland City Council* [2015] NZHC 1035 at [31].
354 *King Salmon* above n 26.
355 *Appealing Wanaka Inc v Queenstown Lakes District Council* [2015] NZEnvC 139.
356 *Appealing Wanaka Inc v Queenstown Lakes District Council* at [44]-[45].
357 *King Salmon* above n 26, at [90].
358 *New Zealand Transport Authority v Architectural Centre Inc & Ors* [2015] NZRMA 375 (HC) at [108].



[257] Brown J quoted, and seemed to accept a passage in *Auckland City Council v The John Woolley Trust*[359] ("*Woolley*") which was an appeal about a resource consent under the RMA. Randerson J wrote:

> [47] ... Given the primacy of Part 2 in setting out the purpose and principles of the RMA, I do not accept the general proposition mentioned at para [94] of the decision in *Auckland City Council v Auckland Regional Council*[360], that the words "subject to Part 2" in s 104 mean that Part 2 matters only become engaged when there is a conflict between any of the matters in Part 2 and the matters in s 104. Part 2 is the engine room of the RMA and is intended to infuse the approach to its interpretation and implementation throughout, except where Part 2 is clearly excluded or limited in application by other specific provisions of the Act.

While we doubt if anything turns on the metaphor, we respectfully question its accuracy: Part 2 of the RMA appears to us — if a nautical image is to be used — to be more akin to the bridge or, nowadays the operations room, on a flagship.

[258] In contrast, in *King Salmon* Arnold J simply described section 5 as "... a guiding principle which is intended to be applied by those performing functions under the RMA rather than a specifically worded purpose intended more as an aid to interpretation;" [361]. Alternatively it is "... a carefully formulated statement of principle intended to guide those who make decisions under the RMA[362]". Later Arnold J also observed (presumably obiter) that the provisions in Part 2 are not operative provisions in the sense of being sections under which particular planning decisions are made[363], rather they "comprise a guide for the performance of the specific legislative functions". These passages suggest *Woolley* may need to be applied carefully in future.

[259] Brown J's other approach to the application of the phrase 'subject to Part 2 ...' was simply to adopt[364] what the Board wrote[365]:

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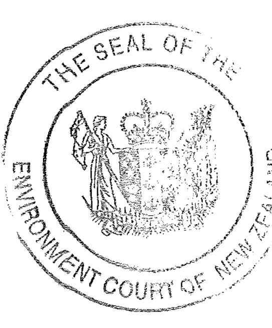
359 *Auckland City Council v The John Woolley Trust* [2008] NZRMA 260 (HC) at [47].
360 *Auckland City Council v Auckland Regional Council* [1999] NZRMA 145.
361 *King Salmon* above n 26, at [24(a)].
362 *King Salmon* above n 26, at [25].
363 *King Salmon* above n 26, at [151].
364 *New Zealand Transport Authority v Architectural Centre Inc & Ors* [2015] NZRMA 375 (HC) at [118].
365 Decision of the Board of Inquiry into the Basin Bridge (29 August 2014) para [183].

> [183] Further and perhaps more importantly, as we have already noted, Section 171(1) and the considerations it prescribes are expressed as being *subject to Part 2*. We accordingly have a *specific statutory direction* to appropriately consider and apply that part of the Act in making our determination. The closest corresponding requirement with respect to statutory planning documents is that those must be prepared and changed *in accordance with ... the provisions of Part 2*.

The difficulty is that the phrase 'subject to Part 2' does not give a specific direction to apply Part 2 in all cases, but only in certain circumstances. As Cooke P explained for the Court of Appeal in *Environmental Defence Society Inc v Mangonui County Council*[366] (a case under the Town and Country Planning Act 1977): "The qualification "subject to" is a standard drafting method of making clear that the other provisions referred to are to prevail in the event of a conflict". We now know, in the light of *King Salmon*, that it is not merely a "conflict" which causes the need to apply Part 2. The Supreme Court has made it clear that, absent invalidity, incomplete coverage or uncertainty of meaning in the intervening statutory documents, there is no need to look at Part 2 of the RMA even in section 104 RMA.

[260] We accept that in this proceeding we are not obliged to give effect to the NZCPS, merely to "have regard to" it, and even that regard is "subject to Part 2" of the RMA. However, logically the *King Salmon* approach should apply when applying for resource consent under a district plan: absent invalidity, incomplete coverage or uncertainty of meaning in that plan or in any later statutory documents which have not been given effect to, there should be usually no need to look at most of Part 2 of the RMA. We note that the majority of the Supreme Court in *King Salmon* was clearly of the view that its reasoning would apply to applications for resource consents.[367]

[261] We consider that *Thumb Point* is, with respect, more accurate than *NZTA* on how to apply *King Salmon* in the context of section 104. Further, *Woolley* may now need to be applied with caution. None of those cases were cited to us by counsel but since no party relied strongly on Part 2 of the Act as over-riding considerations under section 104(1)(a) to (c), we consider it is unnecessary to seek further submissions. Rather this



366 *Environmental Defence Society Inc v Mangonui County Council* [1989] 3 NZLR 257; (1989) 13 NZTPA 197 (CA) at 202.

367 *King Salmon* above n 26, at [137]-[138].

exercise is simply the court trying to articulate the correct way of applying *King Salmon* in a section 104 context in the face of conflicting High Court decisions and the court's own erroneous decision in *KPF*[368].

Summary

[262] In summary we hold that the correct way of applying section 104(1)(b) RMA in the context of section 104 as a whole is to ask:

(1) "Does the proposed activity, after: assessing the relevant potential effects of the proposal in the light of the objectives, policies and rules of the relevant district plans[369];

(2) having regard to any other relevant statutory instruments[370] but placing different weight on their objectives and policies depending on whether:

  (a) the relevant instrument is dated earlier than the district (or regional) plan in which case there is a presumption that the district (or regional) plan particularises or has been made consistent with the superior instruments' objectives and policies;

  (b) the other, usually superior, instrument is later, in which case more weight should be given to it and it may over-ride the district plan even if it does not need to be given effect to; and/or

  (c) there is any illegality, uncertainty or incompleteness in the district (or regional) plan, noting that assessing such a problem may in itself require reference to Part 2 of the Act, can be remedied by the intermediate document rather than by recourse to Part 2;

(3) applying the remainder of Part 2 of the RMA if there is still some other relevant deficiency in any of the relevant instruments; and

(4) weighing these conclusions with any other relevant considerations[371]

— achieve the purpose of the Act as particularised in the objectives and policies of the district/regional plan?"

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368 *KPF* above n 352.

369 I.e. the operative district plan and any proposed plan (including a plan change).

370 Under section 104(1)(b) RMA.

371 E.g. under section 104(1)(c) and 290A RMA.

[263] Whether that process can still be called an "overall broad judgement" is open to some doubt. The breadth of the judgment depends on the following matters in the district or regional plan:

- the status of the activity for which consent is applied;
- the particularity (or lack of it) in the relevant objectives and policies about the effects of the activity; and
- the existence of any uncertainty, incompleteness or illegality (in those plans or in any higher order instruments).

Consequently we consider that in *KPF*[372] the court may have overstated the width of the judgment under section 104 at least if the *KPF* approach is applied to other district plans which are more particular than the rather generalised Sounds Plan.

Incomplete tests for efficiency

[264] There is one other matter: it appears all district or regional plans are incomplete in the sense that they are not Stalinist Five-year Plans: they do not attempt to resolve the most efficient use of all resources: see *Meridian Energy Ltd v Central Otago District Council*[373]. While plans give guidance and/or directions (particularised implementations of Part 2 RMA) in policies, which are deemed to be appropriate (which includes efficient) — *King Salmon*[374] — some activities are stated by rules to be discretionary or non-complying so that more efficient uses can be ascertained on a case-by-case basis.

[265] That means that one aspect of Part 2 of the RMA may often need to be looked at as a result of *King Salmon*. That is section 7(b) which states:

> **7 Other matters**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—
>
> ...
>
> (b) the efficient use and development of natural and physical resources:

372 *KPF* above n 352, at [200].
373 *Meridian Energy Ltd v Central Otago District Council* [2010] NZRMA 477 (HC) at 118.
374 *King Salmon* above n 26, at [24] (d).

…

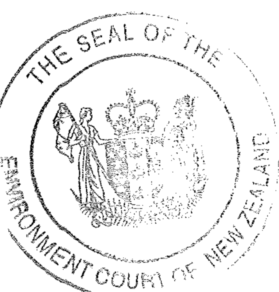
[266] Efficiency is, in our view, one of the least well understood concepts in the RMA. First it is important to understand that efficiency is a neutral concept: the efficient use of a resource cannot be ascertained until there are policies by which it can be assessed. Second, the standalone efficiency of a use of a resource can be ascertained by comparing the probability of environmental gains with the risk of adverse effects, or in 'economic' terms ascertaining whether the benefits exceed the costs. However, since those are rarely quantified, that assessment of efficiency (e.g. that refusing consent to a wind farm will "waste" the wind resource) adds little to the overall assessment. The third and potentially most useful point is that efficiency can be assessed in a practical and relative way. Efficiency asks "does the proposed use of the resource implement the relevant policies and achieve the objectives better[375] than the current (or permitted) use of the resource?" Consequently we consider there may be an extra step in the ultimate evaluation as follows:

> Having particular regard to section 7(b) RMA by assessing (at least) is the proposal more efficient in implementing the policies and achieving the objectives of the relevant plan than the status quo (or the permitted activities in the plan)?

[267] We have not needed to ask for further submissions on this issue because section 7(b) is largely irrelevant in this case. That is because the subsection is only concerned with two of the elements of sustainable management of resources — their use and development — not their third: protection. This case is essentially about the protection of the resources in the environment around the site and so we take this issue no further here.

5.3 Having regard to the potential effects of the mussel farm

[268] When considering the effects of the proposal and their consequences the consent authority should consider those effects as avoided, remedied or mitigated by any conditions of consent. We have done so in this case. However, there is one exception,



375 It is possible, especially in the absence of section 6 matters, to quantify and compare net benefits of a proposal with those of the status quo — see *Port Gore Marine Farms v Marlborough District Council* [2012] NZEnvC 72.

which is the proposed "adaptive management conditions". Since these neither avoid, remedy or mitigate effects but rather provide a recipe for future possible avoidance, remediation or mitigation of effects, we will consider adaptive management later.

[269] It will be recalled that in part 3 of this decision we asked a series of questions about the potential effects of concern under the Sounds Plan's objectives and policies. The answers to these questions were given in part 4. Pulling together and summarising the more important predicted non-neutral effects of the Davidson Family Trust application with the accumulative effects of the other identified stressors which we should consider under the Sounds Plan and the NZCPS, they are:

(1) likely net social (financial and employment) benefits;
(2) a likely significant adverse effect on the natural feature which is the promontory;
(3) likely significant cumulative adverse effects on the natural character of the margins of Beatrix Bay;
(4) likely adverse cumulative effects on the amenity of users of the Bay;
(5) very likely minor adverse impact on King Shag habitat by covering the muddy seafloor under shell and organic sediment, an effect which cannot be avoided (or remedied or mitigated);
(6) very likely a reduction in feeding habitat of New Zealand King Shags;
(7) very likely more than minor (11% plus this proposal) accumulated and accumulative reduction in King Shag habitat within Beatrix Bay and an unknown accumulative effect on the habitat of the Duffer's Reef colony generally; and
(8) as likely as not, no change in the population of King Shags, but with a small probability of extinction.

5.4 <u>Consideration under the Sounds Plan</u>

[270] The Sounds Plan in itself requires a fairly broad judgment. In the bigger picture, the proposal is generally consistent with Chapter 2 (natural character) and Chapter 5 (landscape) provisions of the Sounds Plan. The direct visual effects on the natural character and landscape of the promontory and associated inshore area are more than minor by themselves i.e. in the notional absence of existing marine farms on either side

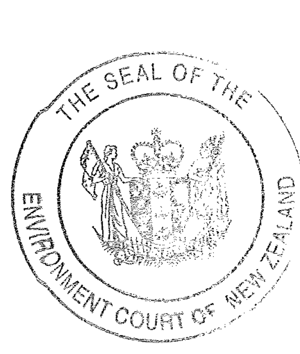
of the promontory. Importantly, the proposal applies the natural character policy[376] to place development in areas "where the natural character of the coastal environment has already been compromised". We have wrestled with this and find the problem nearly intractable: in the absence of this policy we would find inappropriate the cumulative effects of the proposal on the amenity of the inshore area of Beatrix Bay and the feature which is the promontory. However, this policy seems to render cumulative effects on natural character irrelevant.

[271] Focussing on Chapter 9 (The Coastal Marine Area) the first objective is[377] to accommodate appropriate activities in the coastal marine area while avoiding, remedying or mitigating the adverse effects of those activities. The proposal achieves policies (9.2.1) 1.1 and 1.12 by (relevantly) enabling marine farming while maintaining, mitigating or remedying adverse effects on[378] cultural and iwi values, cultural and iwi amenity values, public health and safety, recreation values, and water quality. The question is whether it adequately mitigates effects on the remaining values in the policy (9.2.1)1.12 list, specifically conservation and ecological values, seascape and aesthetic values, the natural character of the coastal environment, navigational safety and public access to and along the coast — to make the site appropriate[379] in the landscape.

[272] The third coastal marine objective[380] seeks to protect the coastal environment by avoiding, remedying or mitigating any adverse effects of activities that alter the seabed. That raised the key question[381] whether the effects on the "value" of the marine habitat are sufficiently mitigated or remedied.

[273] It will be recalled that a key policy[382] in the Sounds Plan is to avoid, remedy or mitigate the adverse effects of (in this case) water use on areas of significant ecological value ("AOEV"). We have also recorded that the Appellant challenged the basis of the notation in the Sounds Plan describing the area around the site as an AOEV. We note that the challenge was not to the fact that the AOEV is habitat of King Shag. That is

376 Policy (2.2)1.2 [Sounds Plan].
377 Objective 9.2.1 [Sounds Plan at 9-4].
378 Policy (9.2.1)1.1 [Sounds Plan at 9-4 and 9-5].
379 Policy (9.2.1) 1.14 [Sounds Plan].
380 Objective 9.4.1 [Sounds Plan at 9-16].
381 Policy (9.4.1)1.1 [Sounds Plan at 9-16].
382 Policy (4.3) 1.2 [Sounds Plan p 4-2].



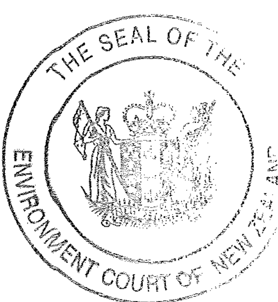
incontestable. The challenge by the Appellant was to whether the AOEV represented 'significant' habitat of King Shag. The Marlborough District Council was obliged to recognise and then to provide for the significant habitat of King Shag under section 6(c) RMA, and the AOEV was a response. It is far too late — more than a decade after the Sounds Plan came into force — to challenge the basis on which the Council made its decision to identify the area around the site as an AOEV. The proper approach on this issue would have been for the Appellant to call evidence showing that the site was not part of the habitat of King Shag, since it is likely that the whole AOO is significant for the species given its very small population. Consequently we consider policy (4.3)1.2 should be given full weight along with all the other relevant policies.

[274] Consequently, we consider that if we were to decide simply on the Sounds Plan itself and without yet considering the NZCPS we would on balance refuse resource consent on the basis that the proposal inappropriately reduces the habitat of King Shag.

5.5 Consideration under the NZCPS

[275] We recognise that mussel farms such as the application can only be located[383] in the coastal marine area. We also take into account the (social and) economic benefits[384] of the proposed farm. However, we consider the site is not an appropriate area for the reasons identified by the Council and the Societies: the change in benthic conditions within the direct footprint of the farm and nearby, particularly alterations to seabed morphology from shell drop, faeces and pseudofaeces represented an adverse effect on the foraging and feeding habitat of King Shag. Those adverse effects on King Shag habitat cannot be avoided as directed by the policy 11 of the NZCPS.

[276] We recognise that there are considerable uncertainties about the inter-relationships between stressors. The accumulative effect of marine farms on King Shag habitat may be less of an immediate threat than sediment run-off from land-based activities and bottom dredging. That does not mean it is not a threat. Further, potential effects of climate change (such as increase in water temperature) loom in the next few decades.

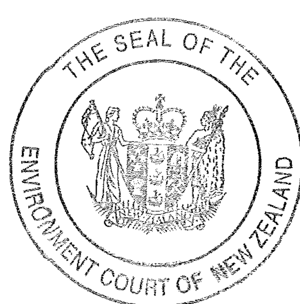


383 Policy 6(2)(c) [NZCPS p 14].
384 Policy 8(b) [NZCPS p 15].

[277] The point of policy 11(1) NZCPS is that if a species is at the limit of its range then it is automatically susceptible to stressors and any adverse effects on its habitat should be avoided. Applying that policy we consider that this is a strong factor against granting consent. More information and analysis is required beyond what we have been presented with here to address accumulative effects in a comprehensive manner. In the Appellant's view this is properly the province of a review of the Sounds Plan. We do not accept that an applicant can avoid the issue in this way when faced with the strong direction given in Policy 11 of the NZCPS. The applicant needs to put forward information that will satisfy the decision-maker that the risk of accumulative effects is acceptable. The onus is on the applicant because under section 104(6) RMA we may, as discussed, decline the application on the grounds that we have inadequate information.

[278] The cases for the Council and the Societies suggested the court take a precautionary approach in declining the application on the basis of uncertainty around the current knowledge of the effects of mussel farms on the environment. This was particularly the case in respect of adverse accumulative ecological effects and accumulative effects on King Shag where these effects are poorly understood. Policy 3 of the NZCPS[385] requires us to:

> Policy 3 Precautionary approach
>
> (1) Adopt a precautionary approach towards proposed activities whose effects on the coastal environment are uncertain, unknown, or little understood, but potentially significantly adverse.
>
> (2) In particular, adopt a precautionary approach to use and management of coastal resources potentially vulnerable to effects from climate change, so that:
>
> (a) avoidable social and economic loss and harm to communities does not occur;
>
> (b) natural adjustments for coastal processes, natural defences, ecosystems, habitat and species are allowed to occur; and
>
> (c) the natural character, public access, amenity and other values of the coastal environment meet the needs of future generations.



[385] Policy 3 [NZCPS p 12].

[279] Policy 3 NZCPS applies where environmental effects are both "uncertain, unknown, or little understood" and "potentially significantly adverse". The Appellant submitted[386] that neither criterion is met.

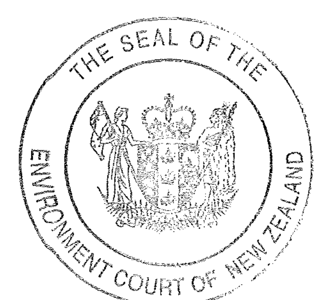
[280] We have predicted that the adverse effect of the change to King Shag habitat under the site will be minor given the extent of potential habitat in the Sounds. On the other hand we have also predicted that the accumulative adverse effects could be serious. Counsel for the Appellant warned us[387] against the "real risk of loading a (new) potential effect upon multiple (existing) potential effects to arrive at an unrealistic potential cumulative effect scenario". Some *Dye*-induced confusion in that submission aside, we have heeded the warning. However, the prediction remains: potentially the King Shag could be driven to extinction by the accumulated and accumulative effects of mussel farms which are part of the environment in Beatrix Bay. That is a low probability event, but extinction is indubitably a significantly adverse effect which would be exacerbated, to a small extent, by the Davidson proposal.

[281] The precautionary approach suggests both that we should exercise our discretion under section 104(1)(c) to take accumulative effects into account, and — to the extent we have inadequate information about those — to consider declining the application under section 104(6) RMA (after taking into account in the Appellant's favour that the Council did not, it appears, ask for further information about this before the Commissioner's hearing).

5.6 Overall weighing under the Sounds Plan and the NZCPS

[282] Weighing the proposal under the Sounds Plan and the NZCPS, we judge that the undoubted benefits of the proposal are outweighed by the costs it imposes on the environment. In particular the proposal does not avoid or (where mitigation is possible) sufficiently mitigate:

(1) the direct minor effect of changing a small volume of the habitat of King Shag;



386 Opening submissions para 6.25.
387 Closing submissions for the Appellant dated 13 July 2015 at para 2.7(c).

(2) the accumulative effect — with other existing mussel farms in Beatrix Bay — of an approximate 11% reduction in the surface area of that soft bottom habitat on King Shag, even acknowledging that there are other suitable foraging areas within Pelorus Sounds which have not been quantified;

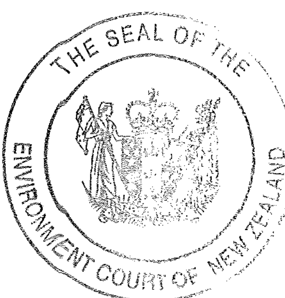
(3) the more than minor adverse effects on the landscape feature of the northern promontory; and

(4) the addition to the already significant adverse accumulated and accumulative effects on the natural character of Beatrix Bay.

[283] We have spent considerable time considering the implications of the apparently stable population of King Shag. If the population is stable despite all the existing mussel farms, how can one more have an adverse effect on the taxon?

[284] The first answer is that our finding that the current population of King Shag is apparently stable needs to be qualified by the lack of information about almost all other aspects of its population dynamics. The information given to us was completely inadequate to allow us to detect any trend in the population. At present data on the number of breeding pairs, breeding success rates, or even of the age and sex ratio of birds is almost completely lacking. In particular there is no data on the survival rates and population trends of mature female King Shags. These last are particularly important because it is the likely preferred foraging grounds of females which mussel farms have been extended into over the last 10 to 15 years.

[285] A second additive answer is that it is generally recognised that the precise effects of combinations of stressors on bird populations are not known. Thus the *Red List* works usually on the basis that if there is a percentage reduction in population of a taxon over time then that puts the species at risk. There are elaborate criteria depending on initial population; size of population reduction, declines in EOO or AOO or habitat quality, and so on[388]. However, when a taxon is reduced to less than 1,000 individuals on the planet, because of the risk of stochastic events, waiting for a reduction in population is no longer regarded as an appropriate trigger for protecting the taxon.



388 "V The Criteria for Critically Endangered, Endangered and Vulnerable" The *Red List* above n 156, at p 16 et ff.

[286] The NZCPS has also recognised[389] that continuing decline in habitats is a key issue in the coastal marine area. That is one of the reasons that policy 11(a)(iv) expressly avoids adverse effects (not only significant adverse effects) on habitats of indigenous species where the species is at the limit of its natural range.

[287] No party argued that the NZCPS was uncertain or incomplete so there is no need to apply the 'subject to Part 2' qualification in section 104 RMA.

5.7 Would the difficulties be met by adaptive management?

[288] The Appellant has proposed that any uncertainty over the effect of the proposed mussel farm on the environment can be met by adaptive management conditions. In *Sustain our Sounds Inc v Marlborough District Council* ("*SOSI*") the Supreme Court stated that there are two questions[390] to be answered:

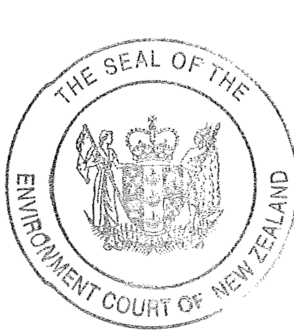
> … [First] what must be present before an adaptive management approach can even be considered and what an adaptive management regime must contain in any particular case before it is legitimate to use such an approach rather than prohibiting the development until further information becomes available.

The second question is whether any adaptive management regime is considered consistent with a precautionary approach[391] or whether consent should be refused.

[289] Giving the judgment of the Supreme Court, Glazebrook J elaborated[392]:

> As to the threshold question of whether an adaptive management regime can even be considered, there must be an adequate evidential foundation to have reasonable assurance that the adaptive management approach will achieve its goals of sufficiently reducing uncertainty and adequately managing any remaining risk. The threshold question is an important step and must always be considered. As Preston CJ said in *Newcastle*, adaptive management is not a "suck it and see"

389 Issues [NZCPS p 5].
390 *Sustain our Sounds Inc v Marlborough District Council* [2014] NZSC 40; (2015) 17 ELRNZ 520 at [124].
391 *SOSI* at [129].
392 *SOSI* at [125].



approach[393]. The Board did not explicitly consider this question but rather seemed to assume that an adaptive management approach was appropriate. This may be, however, because there was clearly an adequate foundation in this case.

[290] The proposed regime is claimed[394] by the Appellant to meet the requirements for adaptive management in respect of "proximate benthic effects" by[395]:

(a) establish[ing] effective baseline monitoring to accurately assess the existing environment at the Application site and at least two control sites (in addition to the already existing data);

(b) introduce[ing] clear and strong monitoring, reporting, and checking mechanisms; and

(c) enable[ing] the removal or reduction in farming or other mitigation if monitoring results warrant such action.

[291] However that was qualified as counsel for the Davidson Family Trust explained in their opening submissions[396]:

> This adaptive management regime is offered by the Trust to assist in confirming the relationship between mussel farms and nearby reef habitats, and is offered notwithstanding the lack of any evidence that reef and rocky habitats inshore of mussel farms have been substantially altered by mussel farming.
>
> No other adaptive management conditions are required (or offered).

Thus the adaptive management regime is not proposed for the habitat (soft substrate) actually occupied by the farm.

[292] Given the apparent stability of the King Shag population, we have considered whether, despite the Appellant's disavowal of any other kind of adaptive management, we should impose an adaptive management condition involving research into (at least):

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393 Referring to *SOSI* at [121] and adding: "See also the comments of Tremblay-Lamer J quoted at [123] above; the explicit consideration of the two options in *Clifford Bay Marine Farms Ltd v Marlborough District Council*, above n 199, at [113]; and the threshold question discussed in *Crest Energy Kaipara Ltd v Northland Regional Council*, ..., at [229]."

394 J C Kyle rebuttal evidence Appendix A [Environment Court document 32A].

395 See proposed conditions of consent in Appendix A to J C Kyle evidence-in-rebuttal [Environment Court document 32].

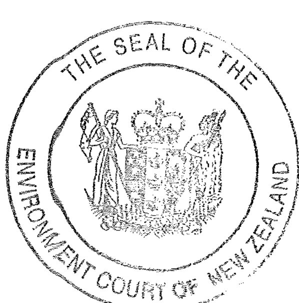
396 Opening submissions paras 6.31 and 6.32.

- Use of the areas covered by mussel farms and their shell shadow by preferred prey (flatfish) of King Shags.
- Whether there are seasonal or other periodic changes to use of Beatrix Bay by flatfish?
- Use of different substrates and depths by male King Shags and (separately) by females.
- Survival rates of male versus female King Shags.
- The other matters raised by Dr Fisher.

[293] If the Davidson Family Trust's proposal was for one of the first mussel farms in Beatrix Bay, that sort of condition might work. Unfortunately, its site is one of the few still available on the soft substrate immediately outside the rocky inshore substrate. If research is carried out, as it urgently needs to be, into the various questions posed in the previous paragraph, then this site will likely be needed as an unmodified or control site.

[294] A further, more important, difficulty in this case is that there is still considerable uncertainty over the probabilities as to whether marine farms are stressors of King Shags. Clearly what is needed are before and after controlled studies, but none have been conducted in Beatrix Bay or indeed elsewhere in the Sounds. Consequently we have little confidence that amendments of the proposed[397] adaptive management conditions would reduce uncertainty and manage any remaining risk.

[295] Finally, relying on an adaptive management condition triggered by a change in King Shag population is in our view precisely what the IUCN Red List criteria suggest is inappropriate for very small populations. The geographic range criteria B and the very small population criteria D are <u>independent</u> of the "change in population" criteria[398]. A population change condition is inappropriate because by the time a population change (at whatever relatively arbitrary level of change — 5%, 10% or 20% — is chosen) has been established to the appropriate degree of certainty, the species may be doomed to extinction.



397 J C Kyle rebuttal evidence Appendix A [Environment Court document 32A].
398 The *Red List* above n 156, at pp 21 and 22.

[296] We find that the adaptive management threshold test of *SOSI* is not met and therefore it would be inappropriate to rely on adaptive management of adverse effects in relation to these applications.

6. Result

[297] After considering all the matters raised by the parties and after weighing all the relevant factors we judge that the objectives and policies of the Sounds Plan, reinforced by the more directive policies of the NZCPS, require that we should refuse the consents sought.

[298] We have attempted to assist the Appellant by assessing the information and making predictions where we can. For example we have attempted to assess the probable area of mud seafloor covered by mussel farms in Beatrix Bay. However, if that or any of our other assessments are too inaccurate, then the alternative outcome is clear: we were simply given inadequate information by the Appellant (and other parties) to determine that the application should be granted. Accordingly we would exercise our discretion under section 104(6) RMA to decline to grant consents.

Afterword

[299] We have also briefly considered the implications of refusing consent in this case for other applications in the area of occupancy of King Shags. In the short term this decision may cause difficulties. For the Appellant, Mr Gardner-Hopkins gained admissions[399] from a number of witnesses that the impetus for gathering information "should" occur at an industry level or higher (referring to local or even central government). The answer is that the Aquaculture Industry and the Council[400] may need to commission rather more sophisticated and detailed research into King Shags than appears to be carried out at present. In particular all the matters covered by the IUCN Red List criteria would be a minimum requirement of any research programme.

[300] The survival of a very rare species of bird is at risk here. With a population of less than 1,000 individuals it is at high risk of extinction. Much more robust research needs to be carried out both on New Zealand King Shag population structures and on the

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[399] For example — Transcript, p 485, line 24.
[400] See the Methods of Implementation in the Sounds Plan at 9.3.3.

interrelationship between stressors on this species before the industry can expand (or even perhaps continue at the same level) in outer Pelorus Sound.

Reasons of Environment Commissioner Buchanan

Preliminary comment

[301] The application to establish a marine farm at the head of an unnamed promontory in Beatrix Bay by the RJ Davidson Family Trust was declined by the Marlborough District Council following a hearing before an independent Commissioner in July 2014. The decision to decline the application was based on the adverse effects of the proposal on navigation, natural character values, landscape values and recreational amenity being more than minor. As noted in the majority decision, the Court was presented with a modified marine farm layout at the site that sought to avoid many of the adverse effects noted in the Commissioner's decision.

[302] The majority conclude that there is an adverse effect on the habitat of King Shag and significant adverse effects on visual perceptions of natural character of the promontory and of Beatrix Bay. For this reason, the majority is of the view that the application should be refused. I disagree with the weight given to the effects on King Shag habitat and the evaluation of adverse visual effects of the proposed marine farm in an environment already containing 37 similar marine farms. The application should be granted.

King Shag

[303] I agree with the description of King Shag biology, population and status set out in Part 2 of the majority decision, including the findings:

(a) That King Shag numbers have remained constant since 1991 and that there is no declining trend in numbers.
(b) Beatrix Bay is part of the area of occupancy of King Shag.
(c) That King Shag forage very infrequently within mussel farms, likely due to reduced flatfish numbers under the farms.

[304] In relation to (a) Schuckard (2006)[401] established that the population of King Shag has on average been not less than around 650 birds over the past 50 years. Daytime counts reported from the four main colonies prior to 1992, taken when part of the population was away feeding, were adjusted by Mr Schuckard using a correction factor described in his 2006 paper. This correction factor was adopted by Bell (2010)[402] as an acceptable multiplier to estimate population and size from daytime counts at the colonies. Mr Schuckard was of the opinion that the population numbers of King Shag had remained stable for at least 50 years. The uncontested evidence he produced supports this. I therefore extend the finding of the majority decision to include the period from 1951 when full colony counts were first recorded.

Statutory instruments

[305] The questions that arise from Policy 4.3(1.2) of the Sounds Plan regarding the likely adverse effects on King Shag habitat relate only to those areas of the Sounds mapped as an area of ecological significance in Appendix B notation 1/11 of the Plan. Activities within the area of ecological value are to be assessed as discretionary and the anticipated environmental result is the maintenance of population numbers and distribution of the species, in this case King Shag.

[306] The New Zealand Coastal Policy Statement Policies 11(a)(i) and (ii) refer to threatened taxa. Taxa is a generic term used to refer to a taxonomic category at any level, such as phylum, order, family, genus or species. In this case we are dealing with a threatened seabird of the genus Leucocarbo and species carunculatus. The threatened taxon for the purpose of Policies 11(a)(i) and (ii) is the species *Leucocarbo carunculatus.* These policies direct the avoidance of adverse effects of the activity on a threatened species (King Shag).

[307] Policy 11(a)(iv) refers to the habitats of indigenous species where the species is at the limit of its natural range. Species range limits are the spatial boundaries beyond which individuals of the species do not occur. The natural range of King Shag is the Marlborough Sounds. Populations of species occupying habitats at the outer limits or

401 Schuckard, R. (2006). Population status of New Zealand King Shag (Leucocarbo carunculatus). Notornis, 53: 297-307.

402 Bell M. (2010). Numbers and distribution of New Zealand King Shag (Leucocarbo carunculatus) colonies in the Marlborough Sounds, September-December 2006. Notornis 57: 33-36.

periphery of the species' natural range are significant to ecology, evolution and conservation in that they provide opportunities to understand the conditions under which populations expand or contract or evolve new forms. Adverse effects of activities at these margin habitats may not affect the wider population of the species, so the maintenance of biological diversity in these areas of the marine environment is dependent on the avoidance of adverse effects on their habitats. This is the purpose of Policy 11(a)(iv).

[308] We are dealing here with a species that has a very limited range. The subject site is recognised as within the central feeding range of the population of King Shag centred on the Duffers Reef colony, which in turn is the largest colony of this species found within the natural range of the species.

[309] The majority decision finds that *Leucocarbo carunculatus* is at the limit of its natural range because its extent of occupancy (natural range) is small. Policy 11(a)(iv) NZCPS is not qualified by any size constraints large or small. The natural range is just that, the natural range, irrespective of its size. The majority decision also introduces the finding that *Leucocarbo carunculatus* is an outlier of a superspecies (collection of related species of largely sub-antarctic blue-eyed shags (genus Leucocarbo). This misinterprets Policy 11(a)(iv) which refers to indigenous species, not superspecies. The species *Leucocarbo carunculatus* is not found outside the Marlborough Sounds. The limit of its range is determined by the geography of the Sounds and physiology of the birds themselves that limit the foraging flight range to about 25 kilometres. King Shag are therefore not a qualifying species under Policy 11(a)(iv) NZCPS where any reduction in habitat at the limit of its range is to be avoided. King Shag cannot be considered as "naturally rare" under the NZCPS definition of that term for the purpose of the second qualifying requirement of Policy 11(a)(iv) as we have little knowledge of the status of the species in pre-human times.

Effects on King Shag

[310] The majority decision examines at length the likelihood and scale of adverse effects on the habitat of King Shag, both directly as a result of this proposal and cumulatively from all mussel farms in Beatrix Bay. The conclusion from this examination is that the altered environment under the proposed farm is likely to cause an

adverse effect on King Shag habitat. Given the scale of the proposal these effects will be minor (but not minimal) by themselves, but taken together with all the other existing farms will be adverse to King Shag habitat.

[311] The majority decision summarises that there was adequate information to find/predict that:

(1) King Shag habitat is changed by shell drop and sedimentation;
(2) The effects of each farm will accumulate and are likely to be adverse;
(3) That it is as likely as not there will be adverse effects on the population of King Shag and their prey;
(4) There is a low probability (it is very unlikely but possible) that the King Shag will become extinct as a result of this application.

[312] I did not dispute that (1) and (2) above are supported by the evidence and that regard should be given to these effects under section 104(1)(a) RMA. I disagree that there is adequate information to support (3) or (4). The accepted population information establishes that King Shag numbers are not declining and have not done so for the past 50 years at least. This cannot be dismissed. The likelihood of this farm resulting in the extinction of the species is so remote that it cannot be considered as a credible threat in the context of the definition of effect under Section 3 RMA.

[313] The majority decision states that completely inadequate information was available to detect any trend in the population, as data on breeding pairs, breeding success rates, and age and sex ratios was almost completely lacking. This does not recognise the reality that it is these and many other aspects of a species' population dynamics that contribute to the balance of recruitment and mortality that results in a static or stable population over time. Adverse effects from environmental stressors having a substantial impact on critical aspects of King Shag population dynamics would be reflected in the population counts available since 1951. King Shag are adapted to a specialist niche habitat, provided only in the Marlborough Sounds. This niche habitat has been subject to a range of anthropogenic and stochastic stressors over the past 50 years with no observed effect on the population of King Shag. A complete understanding of the population dynamics of the species will not alter this fact.

[314] I find there is adequate information to support the alternative finding that it is extremely unlikely that there will be adverse effects on the population of King Shag from the proposal.

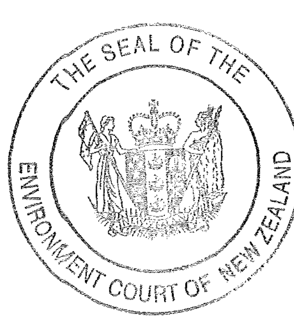
Evaluation

[315] The subject site is within the ecological overlay (Map 69) described in Appendix B, Notation 1/11 of the Sounds Plan defining the significant foraging habitat of King Shag. A very small proportion of mussel farms occupy space within this Area of Ecological Value as it primarily covers areas seemingly favoured by foraging King Shag at depths below 30 metres. The adverse effect of a reduction of 10 hectares available to King Shag for foraging in the context of the extent of the ecological overlay is minimal and extremely unlikely to result in a decrease in the number of King Shag. The significant habitat identified within Beatrix Bay remains viable. Policy 4.3(1.2) of the Sounds Plan is satisfied.

[316] There is no question that Policies 11(a)(i) and (ii) NZCPS apply. Adverse effects on King Shag may include reduction in the area occupied by King Shag and reduction in habitat quality. While the existing mussel farms may have displaced King Shag from feeding in that area of the species' habitat occupied by mussel farms in Beatrix Bay, this has resulted in no harm to the population. The numbers of King Shag foraging in Beatrix Bay has not diminished over the 25 years since snapshot foraging bird surveys were first carried out in 1991 and the population of King Shag has not shown any downward trends since mussel farms were first established in the Sounds.

[317] Policies 11(a)(i) and (ii) are satisfied by this finding. Indigenous biodiversity in Beatrix Bay is not compromised by adverse effects on the habitat of King Shag. That habitat remains viable and the population of King Shag as far as it exploits this part of its natural range is not adversely affected by mussel farms.

[318] Policy 11(b)(iii) NZCPS refers to avoiding significant adverse effects on rocky reef systems. Adverse effects of the proposal on the rocky reef area at the head of the promontory have been evaluated in the majority decision which found there to be a low probability of there being a more than minor effect on the ecology of the reef. The



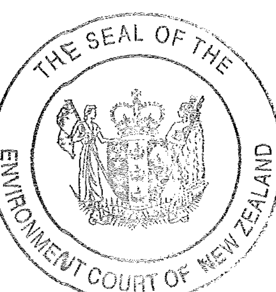
majority decision also evaluates the adverse effects on the indigenous eco-system within the intertidal range as required by Policy 11(b)(iii) finding that it is likely there will be only minor (if any) independent or cumulative effects on the intertidal zone. Policy 11(b)(iii) it is therefore satisfied by these findings.

Comment

[319] Concern for the effects of new salmon farms being introduced into the area of occupancy of King Shag was raised at the Board of Inquiry (BOI) into the New Zealand King Salmon proposal. The BOI found that there were potential adverse effects of low probability but high consequence that needed to be considered. The Board adopted a precautionary approach to these effects in granting consents within King Shag habitat by including in consent conditions the requirement for an adaptive management approach under a King Shag Management Plan (KSMP). This approach was confirmed as part of the wider consideration of adaptive management conditions by the Supreme Court[403].

[320] The KSMP is required to include a baseline survey of King Shag numbers followed by repeat surveys at least every three years. The BOI identified a statistically significant decline in King Shag numbers of 5 percent as a threshold for investigation of whether the marine farm was contributing to the decline and possible remediation measures if such a contribution was identified. The baseline counts for the KSMP were those included in the evidence of Mr Schuckard and Dr Fisher and recorded in the majority decision. If, as the majority decision suggests, a residual low risk remains that the reduction in King Shag habitat from this proposed farm either directly or cumulatively with all other mussel farms may adversely affect the King Shag population, then a similar adaptive management approach would seem to be appropriate.

[321] The scale of this proposal in comparison to the King Salmon application does not justify a specific adaptive management approach for King Shag as applied by the BOI decision. It is very important, however that the mussel industry within the Sounds generally becomes linked in some manner to the KSMP. A way needs to be found to involve the mussel industry in monitoring the KSMP results as they are published on the



[403] *Sustain our Sounds Inc v Marlborough District Council* [2014] NZSC 40; (2015) 17 ELRNZ 520 at [140] and [158].

New Zealand King Salmon website and contribute to any subsequent investigation if the threshold 5 percent decline in King Shag population is exceeded in order to establish whether mussel farming is contributing to that decline and response measures that could be adopted. This would be a sensible and pragmatic marine farming approach to a potential effect of low probability but high consequence, but is not one we can impose on a single consent holder in this case.

[322] The alternative approach is to decline all future applications for marine farms in the natural range of King Shag until such time as sufficient information is available to determine with certainty the risk posed by marine farms on the King Shag population. This seems to be the approach taken in the majority decision.

Conclusion on King Shag

[323] The majority decision largely turns on the interpretation of Policy 11(1)(iv) NZCPS and the directive within that policy to avoid adverse effects on habitats of an indigenous species and the risk this poses as a potential contributor to the decline (or indeed demise) of King Shag. This, in my view, is not a correct application of the policy.

[324] The real issue (under Policies 11(a)(i) and (ii)) is the effect of the small adverse reduction in habitat on the population of King Shag. The primary indicator of the population status of King Shag is the reliable data set on the trend in the population over time. This indicates to me that marine farming in the Sounds has not had a negative influence on that population.

[325] The very low residual risk of the adverse effects of mussel farming in the Sounds on King Shag habitat having an adverse effect on King Shag population warrants an industry wide adaptive management approach that piggybacks on the KSMP now in place for New Zealand King Salmon.

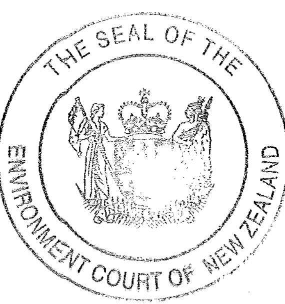
Effects on the Promontory

[326] Competing evidence on the effects of the proposal on the promontory was provided by three independent experts as summarised in the majority decision. All of Beatrix Bay is considered by the experts and accepted by the Court (in *Knight*

Somerville Partnership[404] and elsewhere) as having a high level of natural character. The promontory does not stand out from the rest of the Bay in this regard. The Sounds Plan through its CMZ2 zoning provides for the establishment of marine farms, particularly in the inshore area of Beatrix Bay, as appropriate use of the coastal marine area subject to individual farm assessment. The proposed farm is not exceptional in this environment. The small (2 percent) extension of occupied space at the southeast and southwest ends of the promontory does not differ in effects on natural character from any other farm in the Bay, including the recently consented (by the Court) farm adjacent to the headland between Tuhitarata and Laverique Bays (*Knight Somerville Partnership*).

[327] Mr Glasson's opinion and conclusion set out in paragraph [217] of the majority decision provides an evaluation of the proposal in the context of the land/water interface of the promontory and the presence of existing mussel farms. I accept Mr Glasson's proposition that the proposal will allow the integrity of the promontory to remain intact. When viewed from the south, the most common approach by sea, the end of the promontory and its background are unencumbered by marine farm structures even with this proposal in place. From all other viewpoints, the visual effects of the proposal on the natural character of the promontory cannot be viewed in isolation from existing farms that stretch to the outer margin of the feature. The visual perspective in this regard is already compromised with the seaward extension resulting from the proposal having only a minor additional effect.

[328] The majority decision accepts that cumulative effects on the natural character of Beatrix Bay reported by Dr Steven are significantly adverse. This conclusion does not appear to recognise the collective advice of the landscape experts that the natural character of the Bay remains high. This is inclusive of the presence of 37 marine farms. It was not suggested by anyone that the assigned high status would be revised to some lower assessment category as the result of adding this additional farm. As such, the very small change on a Bay-wide scale of an additional 7.34 ha of mussel buoy lines cannot be considered as significant. To do so would require the acceptance that some concept of threshold for the area covered by marine farms existed, beyond which additional



[404] *Knight Somerville Partnership v Marlborough District Council* [2014] NZEnvC 128.

marine farms had significant cumulative effects and were therefore inappropriate despite the CMZ2 zoning. No case for this was made other than Dr Steven's assertion that it was a *reasonable and defenceable proposition* that such a threshold had been reached.

[329] For the above reasons, I give greater weight to the evidence of Mr Glasson than to that of Mr Bentley and Dr Steven in concluding that the adverse effects on the visual/natural character perceptions of the promontory in particular, and Beatrix Bay in general, are likely to be no more than minor.

[330] In considering the Sounds Plan, I agree with the evaluation in the majority decision that Policy 2.2(1.2) seems to render cumulative effects on natural character irrelevant in that it encourages development in already compromised areas of the coastal environment.

[331] In considering the NZCPS, my finding on the absence of significant adverse effects on natural character and landscape means the "avoidance" directives of Policy 13(1)(b) and Policy 15(b) respectively are not triggered. In having regard to the policy alternative to avoid, remedy or mitigate any adverse effects on natural character and landscapes, I consider that it is not possible to achieve any of these in operating a marine farm that requires visible suspension infrastructure, although the ability to remove this infrastructure can be seen as a mechanism to remedy any unacceptable adverse effects of the mussel farm over time. The adverse visual effects of this proposal in the context of existing marine farms in the visual catchment are of a scale that is not determinative on its own.

<u>Summary</u>

[332] In summary:

(a) An adverse effect on King Shag habitat is likely that is more than minor but less than significant at a cumulative Bay-wide scale.

(b) There is no evidence that the adverse effect on King Shag habitat is having any adverse effect on the population of King Shag generally and the Duffers Reef Colony in particular.

(c) There is a low risk that mussel farms in the outer Pelorus Sounds may have adverse effects on the Duffers Reef Colony of King Shag.

(d) The proposal is unlikely to have significant adverse visual effects on the natural character and landscape of the promontory or cumulatively on the natural character and landscape of Beatrix Bay.

(e) The proposal is likely to have no more than minor adverse effects on non-visual aspects of natural character including benthic and water column effects, recreational amenity, navigation and King Shag.

Result

[333] The application should be granted with standard mussel farm conditions to be advised by the Council.

[334] The majority decision to refuse the application is a disproportionate response to the extremely unlikely risk that an additional marine farm in Beatrix Bay may contribute to a decline in the King Shag population in the Marlborough Sounds. In my view, the proposal represents an appropriate development in the coastal marine area.

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J R Jackson	**J R Mills**	**I Buchanan**
Environment Judge	**Environment Commissioner**	**Environment Commissioner**

ORIGINAL

Decision No. A96/98

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of two appeals under clause 14 of the First Schedule to the Act
BETWEEN	WINSTONE AGGREGATES LIMITED
	(RMA 162/95)
AND	AUCKLAND REGIONAL COUNCIL
	(RMA 174/95)
	Appellants
AND	PAPAKURA DISTRICT COUNCIL
	Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge R G Whiting (presiding)

Environment Commissioner J R Dart

Environment Commissioner R F Gapes

HEARING at AUCKLAND on 1, 2, 3, 4 & 5 December 1997 and 18,19 & 20 February 1998

APPEARANCES

Mr F G Herbert for the Papakura District Council
Mr J M Savage for the Auckland Regional Council
Mr M R G Christensen and K J Catran for Winstone Aggregates Limited
Mr J Kingston for the K L Richardson Estate

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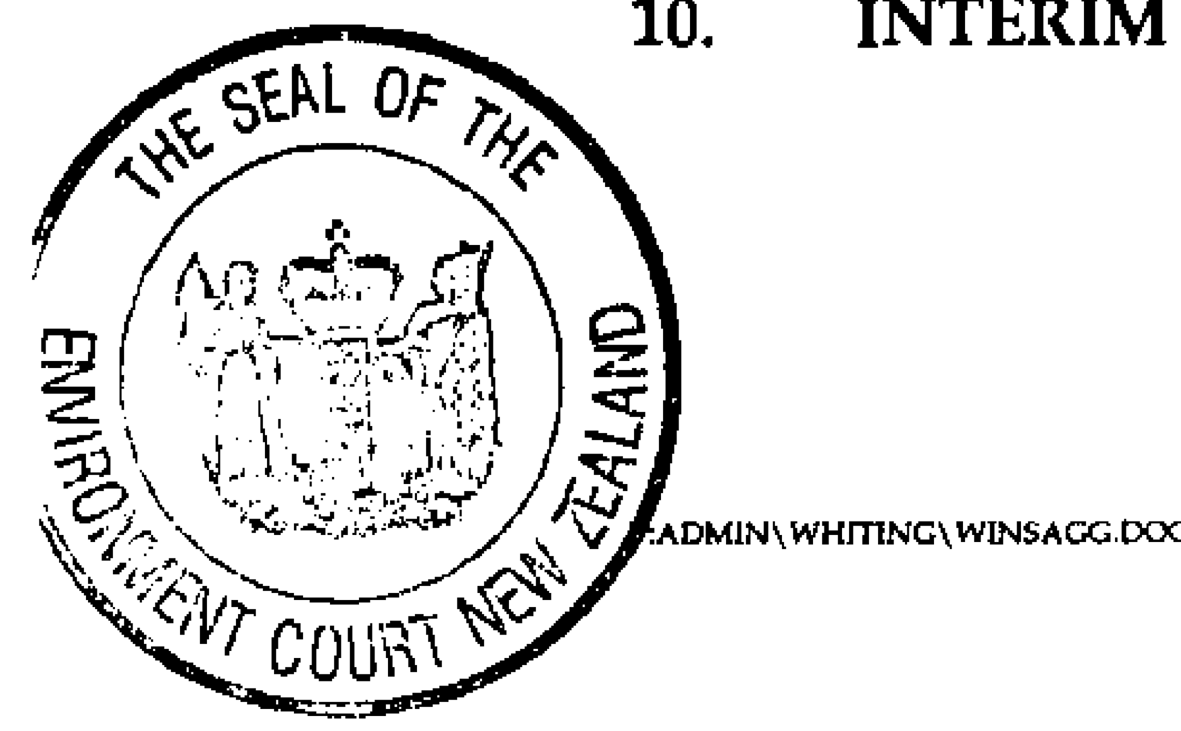

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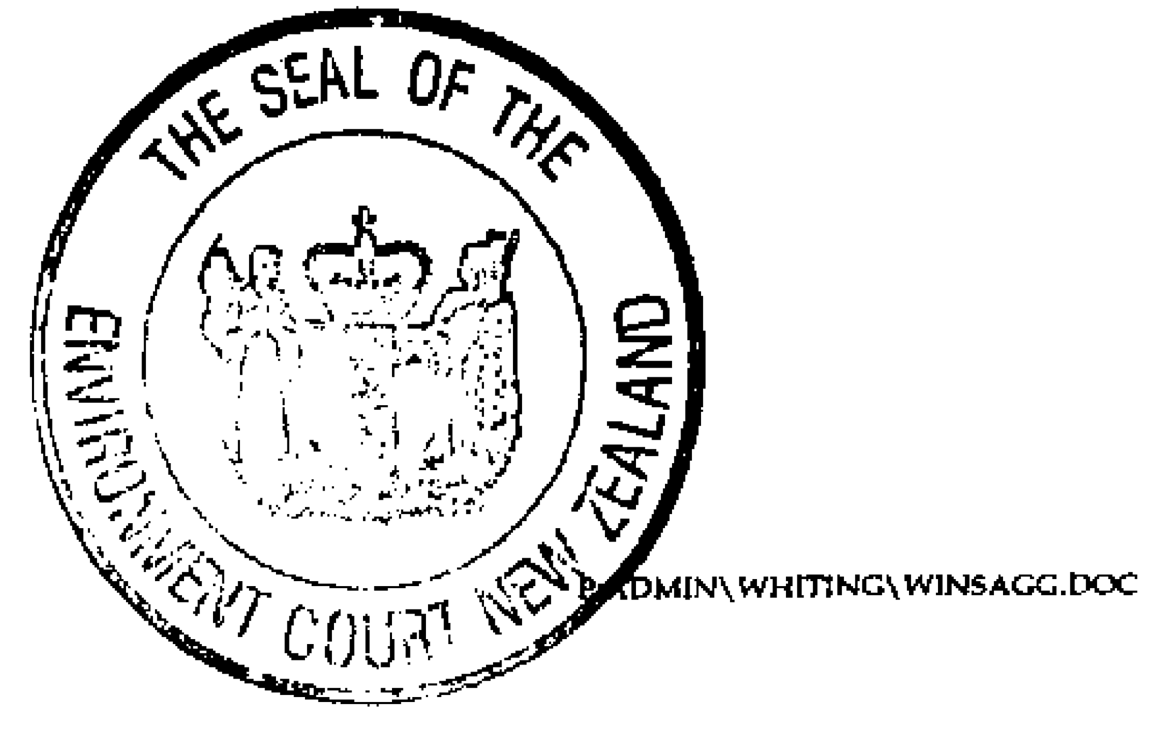
DECISION

1. Introduction

[1] These appeals concern the appropriate objectives, policies, methods and rules in the Papakura District Council's ("the Council") proposed plan to address the effects arising from the extraction of aggregate. Winstone Aggregates Limited ("Winstone") owns a relatively large portion of land at Hunua. According to present-day planning, this contains two areas wherein the extraction of aggregate is expected to be economically viable. They are the "Hunua Excavation" and "Symonds Hill Excavation" areas. The Hunua excavation is an existing quarry, whilst the Symonds Hill excavation area has potential for future quarrying operations. The evidence established that other nearby areas may be investigated in the future for their aggregate potential and be found economically extractable. The evidence established that the aggregate reserves at Hunua and Symonds Hill constitute a resource of some significance.

[2] It was clear from the evidence that quarries, by their very nature, commonly have adverse effects on the surrounding land and that activities such as residential, educational and community activities are particularly sensitive activities in proximity to them.

[3] The potential conflict between quarrying activities and other land use activities that are sensitive to their effect, creates important resource management issues associated with quarrying. The first is, to what extent should the environment be protected from the adverse effects of quarrying. The second is, to what extent should aggregate and its extraction sites, as natural and physical resources, be protected from the adverse effects of incompatible activities.



[4] These two management issues reflect, on the one hand, the extent to which a quarry operator should be required to internalise the adverse effects of quarrying and, on the other hand, the extent to which adjacent landowners should have the use of their land constrained.

[5] The two management issues, of their very nature, lead to conflicting interests between quarry operators and adjacent landowners. But the heart of this case is a consideration of the two issues from a resource management perspective, to ensure that the appropriate objectives, policies and rules reflect the purpose and intent of the Resource Management Act 1991 ("the Act").

2. Appeals

[6] These are references to the Environment Court under clause 14 of the First Schedule to the Resource Management Act 1991. The Auckland Regional Council ("the ARC") has referred the matter to the Court on the grounds that the objectives, policies and rules of the proposed plan of the Council do not cater adequately for the protection of mineral resources. The ARC also requested an Aggregate Resource Protection Area (a buffer area surrounding the quarry), hereinafter referred to as the "ARPA", in which to treat as discretionary activities all those subdivision and other uses, such as residential, educational and community activities, which would be sensitive to the effects of the quarry.

[7] Winstone has appealed, on the grounds that the objectives and policies provided for in the proposed district plan fail to provide for the sustainable management of minerals and, specifically, fail to facilitate the identification of mineral resources and their protection from encroachment by other potentially conflicting land uses. Their reference also requests a change to the rules, and to provide for an ARPA around the company's existing Hunua Quarry zone, similar to that requested by the Auckland Regional Council. They maintain that there should be some restriction on activities

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which locate near the company's quarry, because of the potential conflict between the quarry and such other activities which may be sensitive to the effects of quarrying. They also request exclusion of the proposed Nature Conservation zone from land owned by Winstone within the quarry zone, as the inclusion of such land within the Nature Conservation zone could compromise the long term productive use of the mineral resource.

3. Background

(a) Aggregate Resources

[8] There are two major quarries in the Papakura District. The first is operated by the referrer, Winstone, and is located in Hunua Gorge; and the other by W Stevenson & Sons Limited, situated in Drury. Both are well established activities, which have long been given planning recognition through specific quarry zoning in previous planning schemes. To the north of the existing quarry, is a further area of potential resource, known as the Ardmore Quarry Road Rock Resource, presently designated for defence purposes. Winstone is presently discussing the future of that rock reserve with the Ministry of Defence.

(b) Transitional plan

[9] Both of the major quarries have been zoned Rural 6 in the transitional plan. A copy of the Rural 6 zone is attached as "Attachment A". The purpose of the Rural 6 zone is to cover areas where quarrying is undertaken on a large scale in the district. It provides also for uses associated with quarrying, and industries using quarried material. The zone contains a limited number of rules (or ordinances as they were then known) limiting the quarrying activities. These include a rule containing the effect of explosive blasting outside the quarry zone (a ground vibration standard), and a rule providing that all excavation and stockpile areas are to be kept at least 30 metres from any boundary of the zone. The rules of the zone do not contain any special

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requirements about noise. Quarrying is a permitted activity, subject only to the restrictions of the yard and vibration standards.

[10] The land surrounding the Rural 6 zone at Hunua is in the Rural 1 zone of the transitional plan. This is the general rural zone applying to most rural land in Franklin County. As previously mentioned, land to the north of the quarry is designated for defence purposes. A Rural 4 zone provided for rural-residential development near Ponga Road and Coal Mine Road to the south-west of the quarry. Additional land in this area was zoned Rural 4 by Change No. 17, which became operative in 1988.

(c) Proposed Plan

[11] The respondent decided to prepare its proposed plan in sections of which there were two in the plan as publicly notified – **Section 1, Rural Papakura and Section 2, Urban Papakura**. Later, as a consequence of the hearing of submissions, the Council decided to reformat the proposed plan so that there are now 3 sections: **Section 1, General; Section 2, Rural Papakura; and Section 3, Urban Papakura**. The Council decided the two existing quarries in the district (Winstone's Hunua Quarry and Stevenson's Drury Quarry), would be included in the urban part of the proposed plan, and would be given a zoning of "Quarry". Quarrying in the quarry zone is subject to a range of controls. For completeness we attach as "Attachment B", a copy of the rules for the quarry zone, following the decisions of the respondent on submissions. Quarrying is subject to considerably more controls than was the case under the transitional plan.

[12] Quarry operations are to be constrained by the need to comply with noise, vibration and air blast standards, which relate to nearby dwellings. The quarry zone rules use the notional boundary technique, which controls noise and vibration only near dwellings. The rules also provide that when a quarry activity moves over to Symonds Hill, a quarry management plan will be required to be submitted "to the Council for its retention".

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[13] The quarry zone at Hunua is an isolated island of "Urban" zoning, surrounded by land zoned in the rural section of the proposed plan. In the proposed plan as notified, all land surrounding Hunua Quarry continued to be in a general rural zone, the Rural Papakura zone. The designations for defence purposes in the transitional plan were carried on into the proposed plan. With regard to the issue of protecting aggregate resources, the planning implication of the designated land in close proximity to the quarry is, that there is practically no threat of the designated land being used for activities which are sensitive to the effects of quarrying, because such activities are incompatible with the purpose for which the land is designated. Designated land near the quarry is therefore a natural buffer or protection area for the quarry.

[14] Likewise, but for different reasons, the General Rural zoned land surrounding the Hunua quarry also acts as a natural buffer or protection area for the quarry because of the limited potential for the carrying on of activities (particularly residential activities) which are sensitive to quarrying.

[15] Following the public notification of the proposed plan, ARC made a number of submissions. The ground for one of those submissions was: that insufficient provision had been made for the identification of mineral resource areas and the protection of mineral resources through objectives, policies and rules. The ARC also requested that a nature conservation zone be applied over areas of indigenous bush in the district.

[16] Winstone was also a submitter. Its submission was, essentially, that provision should be made for a 500 metre buffer around a quarry zone, and around significant resources (particularly on the north side of Hunua Gorge Road) and that subdivision and certain uses within the buffer area which could be adversely affected by quarry operations, should not be permitted.

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The company suggested that those activities adversely affected by quarry operations should have discretionary activity status within the buffer zone.

[17] Judge K L Richardson (now deceased) was also a submitter. Judge Richardson's submission sought that the zoning of Ponga Road be reviewed and that the same zoning should be applied to both sides of the road, or as much of it as the Council deemed appropriate. That submission also opposed the appropriateness of using the Richardson land as a buffer for the quarry. A submission similar to that of K L Richardson was lodged by Mr N B Richardson, the son of the judge, who was then living next door.

[18] The land is now owned by the estate of the late judge; we will refer to it as "the Richardson land". The Richardson land is next to the Winstone quarry zone, and is separated from it in part by the Symonds Stream. It lies to the south and west of the quarry zone. Symonds Hill, in the quarry zone, is elevated above the Richardson land.

[19] Winstone did not oppose the two Richardson submissions by way of further submission. However, the Auckland Regional Council did lodge further submissions opposing the Richardson submissions, and stated that "the reasons for opposition included adverse effects of rural-residential development on quarry operations and potential mineral resources".

[20] In its decisions on submissions, the respondent changed the proposed zoning on the Richardson property to rural-residential, and imposed also, a nature conservation zone on areas of indigenous bush along Symonds Stream and to the north of Hunua Gorge Road. On behalf of the respondent, Mr Herbert submitted that, except for the proposed quarrying of Symonds Hill, the Richardson land is suitable for the proposed rural-residential zoning. To that extent, the respondent does not contest the Richardson estate zoning.

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[21] The respondent rejected the submissions of the ARC and of Winstone, essentially, on the grounds that it was unrealistic for the Council to provide for an unidentified potential mineral area, and that the objectives and policies of the plan adequately recognise mineral resources in the district. The respondent considered that it was inappropriate for the Council to restrict activities on land which is not held by the quarry industry. So far as the latter reason is concerned, the Council said:

> *"The effects of present and future quarry operations should be restricted to the site of those operations. That is, the responsibility for mitigating the effects of quarries rests with the quarry operator".*

[22] The Council, by its decision, recognised the first management issue (internalisation of effects), but rejected the second management issue,(constraints on adjacent land).

[23] Following the release of the decisions of the respondent, references were lodged by Winstone and the ARC on the grounds that the respondent had not granted the relief sought by the appellants..

(d) Zoning of lands surrounding Hunua Quarry

[24] The details relating to the zoning of land surrounding Hunua Quarry are unchallenged. Those details were provided for us in the evidence of Ms C Crampton, a consultant planner, who gave evidence on behalf of Winstone. She told us that the zoning pattern of land around Hunua Quarry which arises from the decisions on submissions, is more complicated than the single Rural Papakura zone of the proposed plan as it was notified. As a result of the Council's decisions, the land surrounding the quarry zone is now in 3 zones: Rural Papakura, Rural-Residential and Nature Conservation. Nearly all the land in the Rural-Residential zone which is in the proposed ARPA, is south-west of the quarry zone and separated from it by Symonds Stream. Also, there is a strip of Nature Conservation zoned bush along the Symonds Stream. The land in the Rural-Residential zone

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which is also in the proposed ARPA, is almost entirely on the Richardson land.

[25] The decision by the respondent to change the Richardson land from Rural Papakura zone to Rural-Residential zone has not been referred to this Court by either of the appellants. However, it was urged upon us, both by Winstone and by the ARC, that the decision to change the zoning gives additional development potential to and near Hunua Quarry. This could jeopardise the Symonds Hill Quarry, which has been planned for quarrying and specifically zoned as such in the district plan for many years. Both appellants were opposed to the rural-residential zoning because of the effect it may have on the quarry operation and on mineral resources in the area, and because it is contrary to the regional perspective expressed in the proposed regional policy statement.

[26] It was submitted to us, both by Mr Christensen, counsel for Winstone, and by Mr Savage, counsel for the ARC, that we should recognise the inappropriateness of the rural-residential zoning on the Richardson estate land, and direct a change to the proposed plan, requiring it to be zoned Rural Papakura under section 293 of the Resource Management Act 1991.

(e) Section 274 parties

[27] There are two Section 274 parties. The K H Richardson Estate, and W Stevenson & Sons Limited. The respondent has agreed with W Stevenson & Sons Limited to undertake a study of the effects that sensitive activities would have upon its quarry, following the outcome of the decision in this case. W Stevenson & Sons Limited did not pursue their right to take part in this hearing.

[28] The Richardson estate is opposed to the ARPA and, through its counsel, Mr Kingston, mounted a determined attack on the appellants' case It was also contended by Mr Kingston, that the rules of the quarry zone as proposed

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provided neither sufficient control, nor for a quarry management plan which in turn would make adequate provision for the control of adverse effects. He submitted that we should direct a change to the proposed plan, requiring noise and vibration limits to be applied at the quarry boundary instead of at the notional boundary.

(f) The draft consent order

[29] Following the filing of the appeals the respondent, Winstone and the ARC met with the object of reaching a consensus on changes which could be made to the proposed district plan. This was finally achieved, and the amended provisions consented to are annexed as "Attachment C". The effect of the consent order, if incorporated in the proposed plan, would be to amend the objectives, policies and rules, in a way which would make it clear that the extraction of minerals and the operation of existing quarries was not to be unduly compromised. This includes provision for prospecting, where the effects would not be more significant than are permitted for normal farming activity.

[30] The draft consent order also proposes that rules in three of the zones in the proposed district plan -- the Rural Papakura zone, the Rural-Residential zone, and the Nature Conservation zone - are to be amended. The new rules provide that an ARPA (or buffer area) extending 500 metres from the boundary of the present and future operations of the Hunua Quarry is to be imposed. Within this "buffer area", subdivision, residential, educational and community activities are to be regarded as sensitive activities. Whereas they would otherwise be permitted or controlled activities elsewhere in the zone, they would be discretionary activities within the ARPA.

[31] The effect of the draft consent order is to incorporate into the objectives, policies and rules of the proposed plan, the second management issue constraining the use of land owned next to the quarry. This negates the Council's view expressed in its decisions, that it is the responsibility of the

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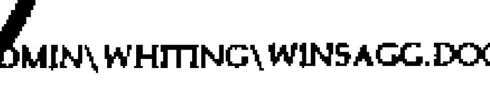

quarry operator to mitigate effects and restrict them to the site of quarry operations. It also negates the Council's view that it is inappropriate to restrict activities on land not held by the quarry industry.

(g) Proposed Auckland Regional Policy Statement

[32] Section 74 of the Act provides that a territorial authority shall have regard to any proposed regional policy statement when preparing and changing its district plan in accordance with its functions under section 31, the provisions of Part II, its duty under section 32 and any regulations.

[33] We therefore consider the present position regarding the proposed Auckland regional policy statement (PARPS). The PARPS is subject to references to the Environment Court.

[34] Mr H D Jarvis, the Senior Planning Co-ordinator with the Auckland Regional Council, gave evidence on behalf of that body. He told us that, so far as the present appeals are concerned, the relevant provisions of the proposed statement are contained in Chapters 2 and 13. Chapter 2 provides an overview of the major resource management issues facing the region, and provides a strategic framework to achieve integrated management. References relating to the strategic direction and the urban provision have been settled by the various parties and are recorded in an interim decision of the Court A94/96.

[35] Chapter 13 of the PARPS relates to minerals. It is one of ten chapters which set out the objectives, policies and methods to achieve sustainable and integrated management of major natural and physical resources, and of the regionally significant activities in the region. Chapter 13 is also subject to references to this Court. Parties which have appealed are Winstone, the NZ Mineral Industry Association and I H Wedding & Sons Limited. These appeals are concerned mainly with Policy 13.4(1) which relates to the avoidance of mineral prospecting exploration, extraction and processing in

locations where those activities would have an adverse effect on such matters as natural heritage values, cultural heritage values, the natural character of the coastal environment, the natural character of rivers, lakes and wetlands, elite land and locally significant heritage resources. These appeals have now been settled by consent of all parties. The main effect of the settlement is to add the word "significant" to references to effects and values.

[36] Mr Jarvis in his evidence pointed out the relevant parts of Chapter 2 and Chapter 13 (decisions version) so far as these appeals are concerned. As his evidence on this matter was essentially unchallenged, we set out in full those parts which are relevant. As to Chapter 2, Mr Jarvis said:

> *3.4 Chapter 2 identifies issues of strategic significance to the Auckland region. Issue 2.3.5 states:*
>
> ***"2.3.5 Some of Auckland's rural land is being adversely affected by inappropriate subdivision, use and development and this is compromising rural productivity, amenity values, rural character, soils and land resources". (Pages 2-8)***
>
> *3.5 The adverse effects of dispersing countryside living throughout rural areas are discussed:*
>
> ***"The dispersion of residential activities throughout the rural area can inhibit the efficient operation of rural activities and lead to a conflict between incompatible activities and expectations about the level of amenities in the rural areas". (Pages 2-9)***
>
> *3.6 The PARPS recognises that countryside living has the potential to undermine the policies of urban containment and intensification and the rural resource management policies. Accordingly, the countryside living policies of the PARPS reinforce the strategic direction:*
>
> ***"2.6.1 Policy: Urban containment and consolidation***
>
> *...*
>
> ***3. Countryside living (see Appendix D) may only be provided for in defined locations in rural areas in ways that are consistent with the Strategic Direction, and so that: ...***
>
> ***(xiv) the extraction of regionally significant mineral resources will not be compromised;***
>
> ***(xv) conflicts do not arise between incompatible land uses". (Pages 2-16, 17)***
>
> *Countryside living is defined in Appendix D as:*
>
> ***"low density residential development on rural land. It includes the concepts of rural-residential development, scattered rural-residential lots, farmlets, residential bush lots, retirement lots, large-lot residential development and the***

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like. It is similar to low density residential development where it occurs within urban areas".

3.7 *The subsequent methods state:*

"2.6.2 Methods

1. Provision shall be made in district plans for the urban development and countryside living of the Auckland Region to be contained within:

(ii) rural and coastal settlements and countryside living areas as defined by either: (b) ... in accordance with a change, variation or review to a district plan prepared on the basis of a district development strategy which is not inconsistent with the resource protection policies of the RPS ...

(v) takes into account the availability of countryside living areas and other low density residential areas in the district and the district of adjoining TAs

... "(Pages 2-17).

3.8 *Reasons 2.6.3 list effects of countryside living and includes the following explanation:*

"In order to limit these effects, areas for countryside living should be defined in strategic plans and district plans as provided for in Method 2.6.2-1 and through a structure planning process as provided for in Method 2.6.2.-3. This means that only limited and selected parts of the rural region, that can best function as suitable areas for countryside living, should be identified in district plans". (Pages 2-22)

[37] As to Chapter 13, Mr Jarvis said:

4.2 *Minerals, primarily aggregates, are essential for the development of the Auckland region. The PARPS states there are two issues:*

"13.2.1. Mineral extraction can have a range of adverse effects on the environment.

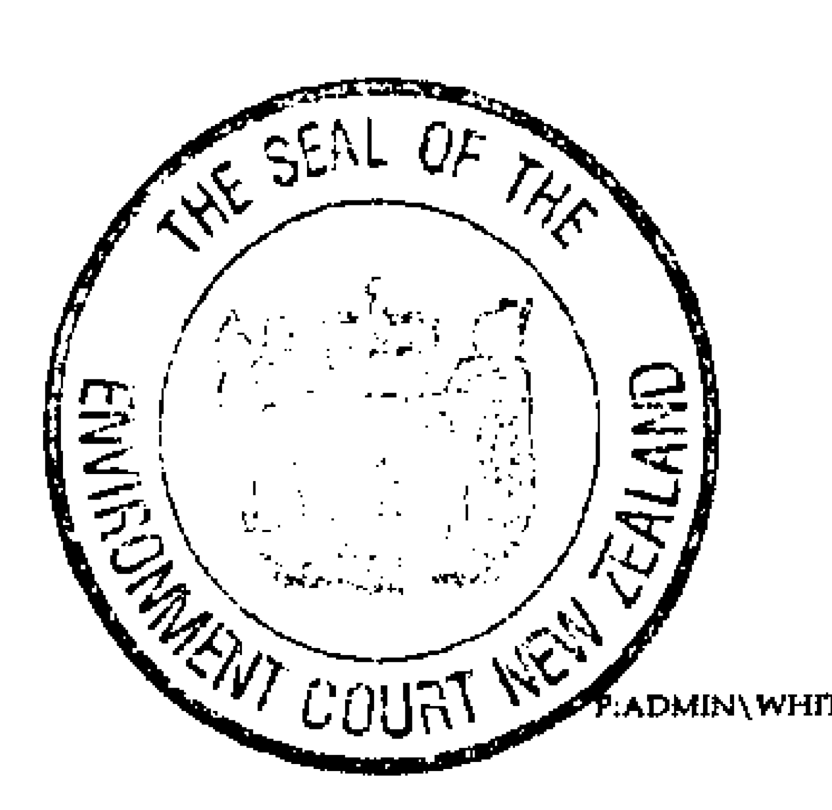
13.2.2 Competing activities and values can impose increased environmental and monetary costs on the community for minerals which are needed for development in the region. This also gives rise to inter-regional issues, as the Auckland region becomes increasingly dependent on the minerals of adjacent regions". (Pages 13-1,2)

The first issue recognises that the extraction of minerals involves processes which create effects such as sediment discharge, noise and vibration. The second issue recognises that extractive activities can be curtailed because of nearby urban development and rising community expectations regarding environmental quality. In my experience most value conflicts concerning mineral development can either be conventional urban development as near the Mt. Wellington Quarry or rural residential, otherwise known as countryside living, near quarries in rural zones.

4.3 *In my opinion the key policy in Chapter 13 in relation to these references is 13.4.1.2 which reads:*

"The development and use of land in the region will be managed so as to:

(i) Protect existing mineral extraction sites from activities which would unduly limit their operations, to the detriment of the regional environment, including its economy.



(ii) ***Protect areas of minerals which have the potential to provide most effectively for the region's future needs from activities which may compromise the ability to extract, or provide access to, those deposits***

..." (Pages 13-3)

Method 13.4.2 states:

(4) ***District plans and any relevant regional plans will make provision for the management of mineral prospecting, exploration, extraction, processing and the transportation of minerals.***

(5) ***District plans and any relevant regional plans will contain provisions requiring mineral extractors to provide for the use of the site after extraction processes cease, so as to minimise present and future adverse effects on the environment. The fulfilment of such rehabilitation and aftercare responsibilities shall be secured by means of bonds or like measures.***

(6) ***District plans and any relevant regional plans will include appropriate measures to protect existing or known potential mineral extraction sites, from the establishment of activities in adjacent areas, where they are likely to be sensitive to the adverse effects of extraction and processing***

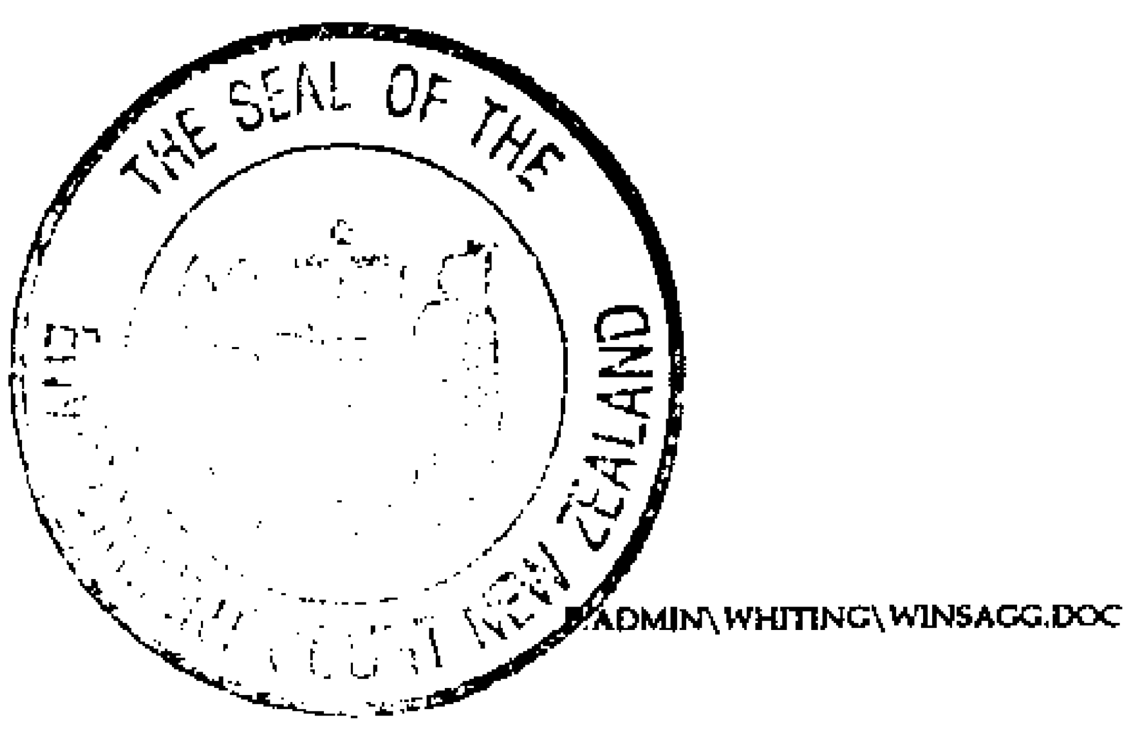
..." (Pages 13-3,4)

[38] We were urged by Mr Savage, counsel for the ARC, to ensure that the district plan is not inconsistent with the proposed regional policy statement. He submitted that :

"In implementing those functions, the district council is obliged to ensure that a district plan is not inconsistent with any regional policy statement (section 75(2)(c). While it is accepted that the references to the regional policy statement in section 75 is to an operative document, the relevant provisions referred to by Mr Jarvis are beyond challenge and as indicated earlier the changes resulting from outstanding references do not detract from the specific provisions in the PARPS directed at protecting existing mineral resources from the establishment of activities likely to be sensitive to quarrying." (Paragraph 22).

[39] While the Act requires that particular level of coherence between a regional policy statement and a district plan, the requirements are not the same for a proposed regional policy statement. By section 74(2)(a), a *"territorial authority"* shall have regard to —

(a) *Any proposed regional policy statement or regional plan on a matter of regional significance in respect of its district; ...*



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[40] Given the perceptivity of the plain words of section 74 [1], it would be incorrect to read the section in the manner suggested by counsel.

[41] The meaning of ("have regard to") has been considered in a number of decisions, notably in the context of section 104(1) of the Act. "To have regard to" a matter means that it is of material consideration, but that does not mean such rules or policies necessarily must be followed; ***R V Westminster City*** [2]. As was found in R V C D [3], these words are not synonymous with "shall take into account". The decision-maker does not have to strictly apply the policies or rules; they are required only to "have regard to". In "having regard to" the PARPS, we consider that the sections relevant to this reference are more or less settled, and that we can therefore expect the PARPS (once operational) to promote the protection of the aggregate resource. However, the Act does not require that a proposed district plan be consistent with a proposed regional policy statement. Should a district plan be found to be lacking in consistency at some future time, mechanisms exist within the Act for initiating changes, where appropriate. Having regard to the PARPS, we are mindful of the desirability of striking a balance between obligations and functions now and in the future.

4. THE REGIONAL SIGNIFICANCE OF AGGREGATE AS A REGIONAL RESOURCE

[42] The introduction to the Minerals Chapter of the PARPS (Chapter 13) states:

> *"Minerals are essential for the development of the region. Minerals of economic value which occur in the Auckland region are primarily aggregates which are used by the construction industry".*

[43] And:

> *"Most mineral deposits are fixed in location, unevenly distributed, and generally a non-renewable resource. The transportation of minerals involves high monetary costs and a*

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[1] We note (for completeness) that this section that was amended by the 1997 Amendment Act, and that the amendment retains the same requirements.
[2] 1991 QB 87.
[3] 1976 1 NZLR 436, 437 Summers J.

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significant environmental impact. Adverse environmental effects may also result from the extraction of minerals, and some of these effects may be significant. Consumption of aggregates and other mineral product is correlated with population growth, and the form and rate of urban development. Even during periods of low growth, the maintenance of infrastructure and buildings ensures a continuing demand for mineral products. Average consumption of 5.7 tonnes per person per annum occurred in the 1986 to 1991 period. With the Region's population already in excess of 1 million by 1995 and expected to grow, a sustained demand for aggregates is expected.

There are some 60 quarries in the region, producing rock, sand and shingle. Most of these are small, with the great majority of production coming from a few large quarries. Construction for housing, industrial development and infrastructure, to support continued growth of the Region's population, gives rise to steady demand for aggregates within the region.

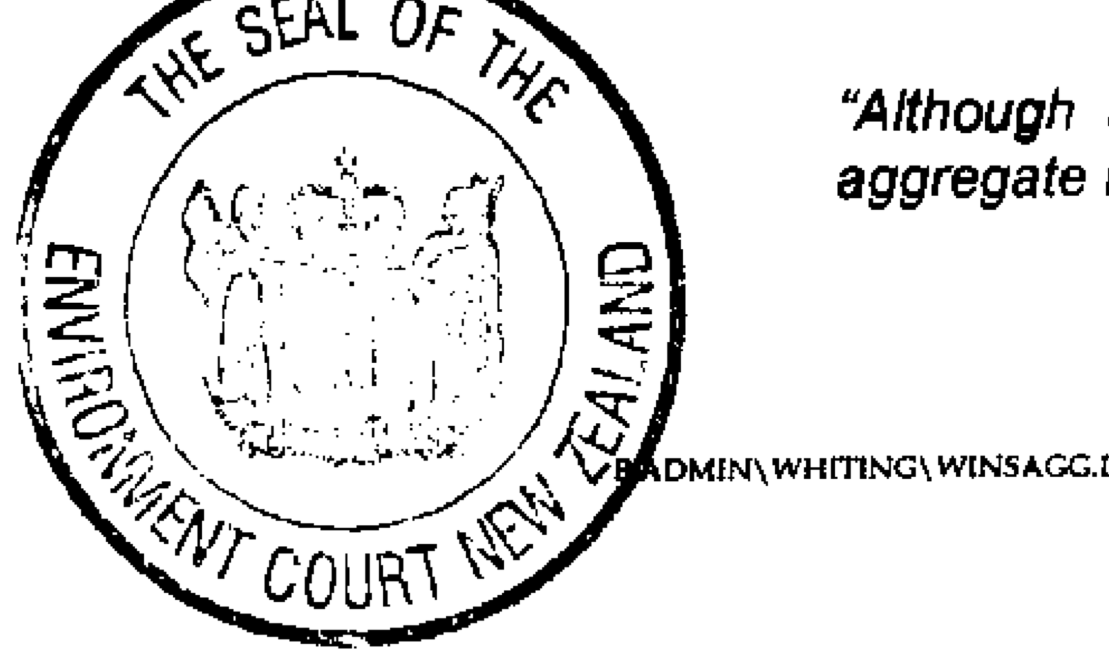
[44] These words reflect to a large extent the evidence of Mr Compton and Mr Happy, both of whom gave evidence on behalf of Winstone. Mr Compton is the Resource Development Director with the company and has been employed in the civil engineering and construction industry for 28 years, the last five with Winstone. Mr Happy has the position of Resource Scientist and Environmental Co-ordinator with Winstone; his professional qualifications include a Master of Science Degree with Honours in Geology, and he is a Fellow of the Institute of Quarrying and a Member of the Australasian Institute of Mining and Metallurgy. He has been employed by Winstone companies for 22 years. Both witnesses gave extensive evidence, including, inter alia, evidence relating to:

- A description of Winstone Aggregates and relevant company policies,
- A description of the Hunua Quarry zone site and current operation,
- The importance of the aggregate resources at Hunua,
- An outline of the distribution and availability of potential aggregate resources in the Auckland and the northern Waikato regions,
- Evidence relating to the constraints which are likely to severely limit or prevent the development of most potential quarry sites in the area,
- A description of quarrying operations and their effects,
- The costs of extracting, processing and delivering aggregate.

[45] Although both witnesses were cross-examined at considerable length by Mr Kingston, their comprehensive evidence left us in no doubt as to the significance of aggregate as an important regional resource.

[46] Mr Compton had this to say:

"Although aggregate is a commodity upon which everyone depends, the importance of aggregate resources to district and regional economies is generally not fully appreciated.



> *The aggregates industry provides a number of economic, social and environmental benefits to the community. They range from the immediate local benefits to those of regional importance:*
>
> - *There are economic benefits for and created by Hunua Quarry's 17 employees, as well as for and by contractors and consultants involved directly with aspects of quarrying.*
> - *The quarry's products provida downstream employment for a great number of people in roading and construction, as well as being extensively used in manufacturing.*
> - *Manufactured products include ready mixed and asphaltic concrete, precast concrete beams and panels, blocks, pavers, pipes, wallboards, and the like.*
> - *To construct a significant road or building without the use of aggregates would be totally impracticable.*
>
> *Aggregates literally form the foundations on which our community is built".*

[47] He told us that, currently, about 7-8 million tonnes of aggregates are being consumed annually in greater Auckland. That is over 7 tonnes per person per year. It is predicted that this may increase to 8½ tonnes by the year 2001. We were told that the Hunua Quarry aggregate resource contains approximately 30 years' supply of aggregates, if taken at a production rate of 1 million tons per annum. The Symonds Hill resource is expected to include a further 25 years' supply, at 1 million tons per annum.

[48] It is clear from the evidence, that the Hunua Quarry is already a vital aggregate resource for the Auckland region. Production and sales last year exceeded 400,000 tonnes. Output is planned to increase to over 1 million tonnes per annum, or about 12.5% of the Auckland region's consumption, within the next six years.

[49] We were told also of the limitations to the supply of aggregate from within the Auckland region, having regard to the anticipated demand and the potential high costs of sourcing aggregate from outside the Auckland region.

[50] We are satisfied on the evidence, that aggregate is a resource of primary significance to our society in general and in particular to the Auckland region. It is required in very large quantities for roading and construction. Demand is expected to increase over the next decade. It is a finite resource,

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and some current major quarries in the Auckland region are already close to being worked out.

5. ISSUES

[51] The proposed district plan recognises aggregate as a significant natural resource. The introduction to Part 6.6 of section 2 says:

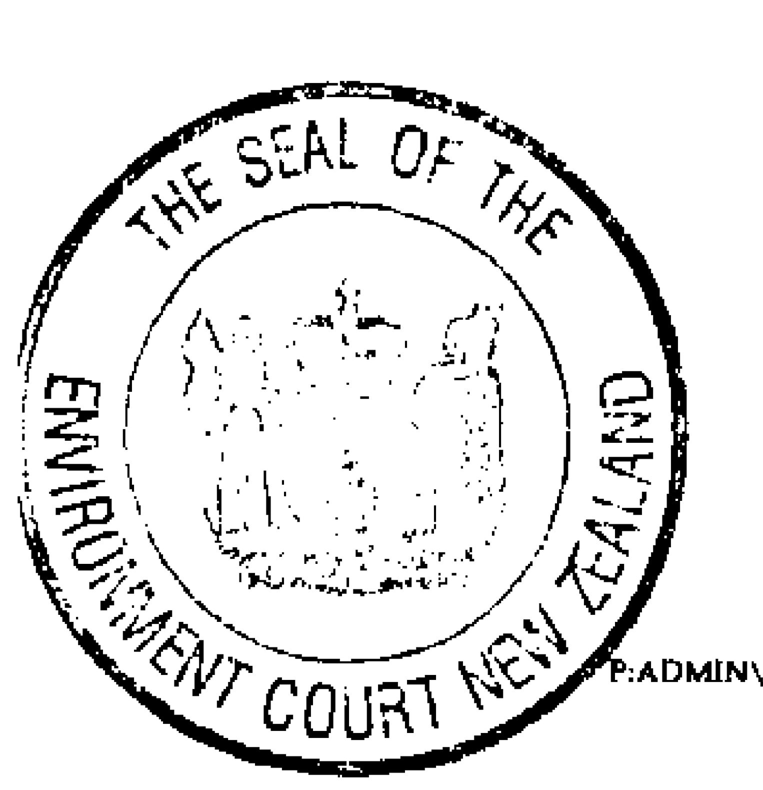
> *"The Hunua range constitutes a valuable natural and physical resource in the district and the Auckland region. Among other attributes it constitutes a major source of aggregate for the region. As quarries nearer the centre of the metropolitan area are worked out the potential for the Hunuas to supply the demand for aggregate will assume even greater significance".*

[52] Objective 6.6.1 in the proposed district plan (as notified and after amendments from submissions) for quarrying and mineral extraction, recognises the significance of the aggregate resource. It states:

> *"6.6.1 To promote the development of the mineral resources of the Hunua area in an environmentally and culturally acceptable manner".*

[53] The appellants' case, particularly Winstone's, was succinctly put by Ms Crampton in her evidence, when she said:–

> *"While the significance of the district's aggregate resources is recognised at the issue and objective level, the policies and subsequent provisions of the proposed plan are concerned with the adverse effects of quarrying. I consider that they deal with only one arm of the two arms of the management of mineral resources which, in my opinion, is required by the RMA. The protection of the environment including people from adverse effects of mineral extraction is dealt with in the proposed plan's policies and rules. The other arm of the management of minerals, the protection of minerals and extraction sites as natural and physical resources from being adversely affected by other activities, is missing from the plan. It is my opinion that the proposed plan is neglecting the Council's function under section 31(b) RMA with respect to the control of the effects of the use and development of land in close proximity to valuable aggregate resources.*
>
> *It is my opinion that by considering only one side of mineral resource issues, the proposed plan is not managing the resources of the district in an integrated manner. It takes no account of the issue of costs imposed on the community for minerals which are needed for development in Auckland. This is identified as a regional and inter-regional issue in issue 13.2.2 of the Minerals Chapter of the PARPS. Transporting heavy bulky aggregates imposes high environmental and monetary costs. Unless conflict between aggregate extraction and activities which are sensitive to it is managed by district plan provisions, the Auckland community will have to pay increased transport charges, road maintenance costs and energy consumption costs of transporting aggregate from sources at a greater distance from Auckland. Loss of existing investment in the physical resources of quarry development is another cost.*
>
> *The expansion of countryside living on the periphery of Auckland means, in my opinion, that the encroachment of residential activity into the rural area in the vicinity of a long-established*



quarry has become a more significant resource management issue and a special rule to restrict countryside living is now justified".

[54] Overall, the submissions raised by counsel centre on two main issues:

1. Whether providing for an ARPA zone (reverse sensitivity buffer zone) is within the jurisdiction of this Court; and

2. Whether (if it could be imposed) it is appropriate, in the circumstances of this case, to provide such a zone.

[55] The first is solely a legal issue.

[56] The second is one of mixed law and fact. It requires a consideration of the two management issues, i.e., on the one hand, the extent to which adverse effects should be internalised and, on the other, the extent to which those effects should be controlled externally.

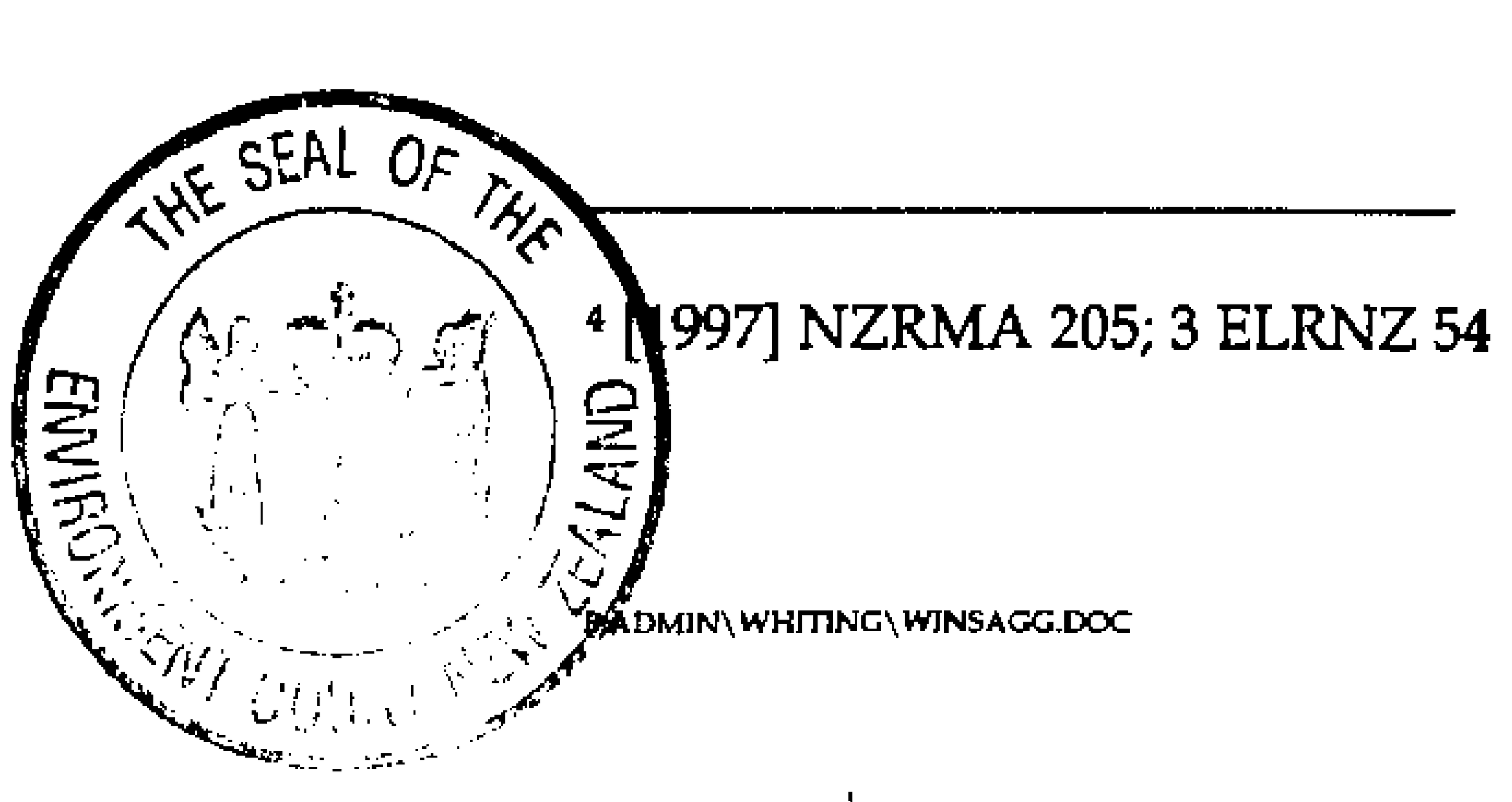
[57] We consider each of those issues in turn.

6. REVERSE SENSITIVITY JURISDICTION

[58] Before considering whether the buffer zone requested by the appellants is appropriate, it must be determined whether the Court has the jurisdiction to provide for such a zone, given that it is based on the principle of reverse sensitivity. This jurisdiction is based on the ability of the Council to deal with the matter.

[59] The term 'reverse sensitivity' was defined in the recent decision *Auckland Regional Council v Auckland City Council* [4] (10/97) in this way:

"The term "reverse sensitivity" is used to refer to the effects of the existence of sensitive activities on other activities in their vicinity, particularly by leading to restraints in the carrying on of those activities".



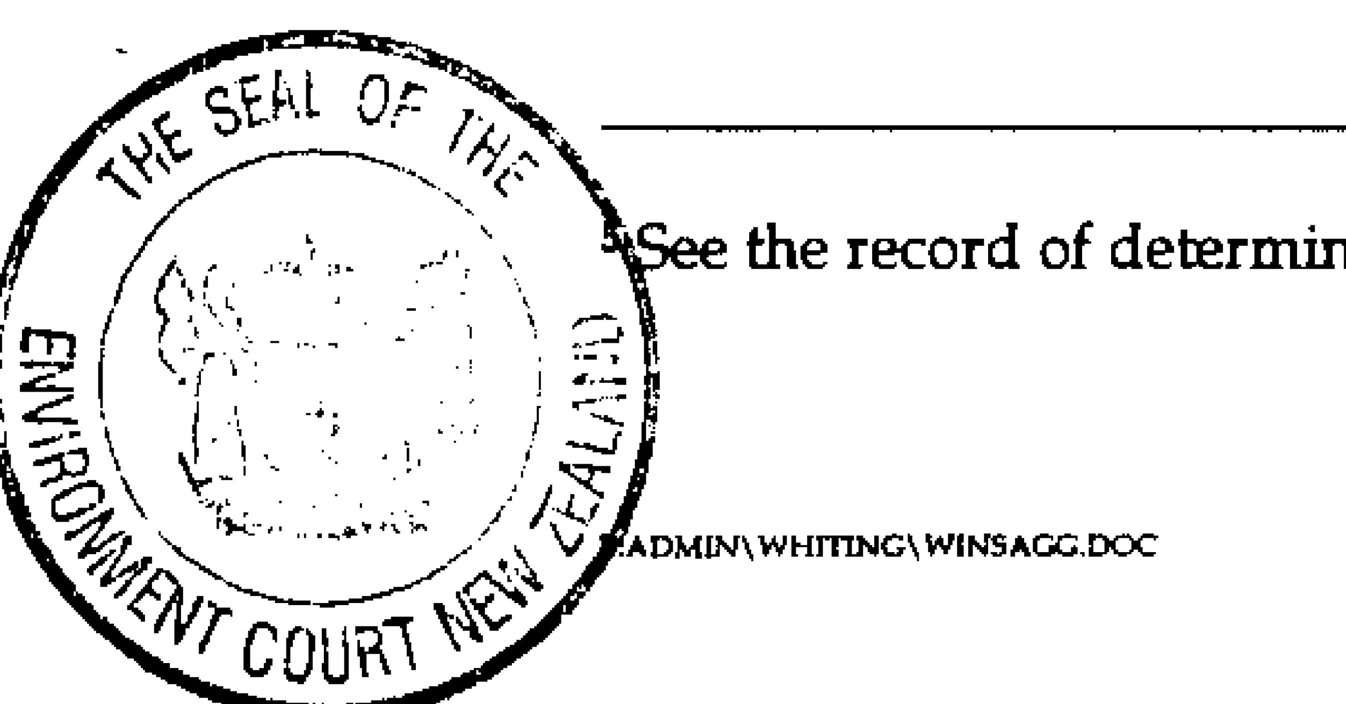
[4] [1997] NZRMA 205; 3 ELRNZ 54

[60] We respectfully adopt this definition. We also note the useful points raised by counsel for the Wellington District Council, noted by Environment Judge Kenderdine in the ***Wellington Airport*** decision (at 44):

> *"The council's response to this issue was to argue that the use of the term "reverse sensitivity" should not obscure either of two things. First, it is not a term which is used in the Act or given any particular status. Second, it is no more than a description of a class of effect - the sensitivity of a person quite lawfully creating adverse effects to pressure from people who may be potentially affected by those effects. But like any other "effect", reverse sensitivity needs to be considered in the context of all effects.*
>
> *As Mr Mitchell pointed out all of the cases referred to by Mr Nolan involve one significant difference to the present. They all concern the possible entry of potentially sensitive people into an area where they may be affected by existing adverse effects which are not only lawfully created within the area, but for which the area is indeed designed. That is not the case here. It would be if we were looking at residential activity within the Airport Precinct, or within land zoned by WIAL. But we are not. We are assessing an activity which is generally considered acceptable within a zone (as it is elsewhere in the city), but for the activities in a neighbouring zone. We agree with Mr Mitchell none of the authorities referred to by Mr Nolan advance the proposition that far."*

[61] There have been a very small number of decisions concerning the topic of reverse sensitivity. None of the decisions have considered the sort of situation which is raised here (and described more fully earlier in this decision): a quarry zone ringed by a number of differently zoned properties (including some designations for public works or defence), where the appellants seek to impose what is effectively a 'buffer zone' around the quarry, measured outwards from the quarry boundary.

[62] The closest factual situation is that which arose in the ***Wellington Airport***[5] matter, where Wellington International Airport sought to constrain (by "tacit prohibition") acceptable activities in one zone, because of activities in another. Apart from the suburban centres issue, the matter was settled by consent order. The consent order noted the agreement that all new dwellings in residential areas within the air noise boundary are to achieve noise attenuation, and multi-unit residential activity in this area was changed in status from discretionary (restricted) to discretionary (unrestricted). Importantly, a more stringent package of noise controls consisting of an air noise boundary, a ban on non-noise-certified and



5 See the record of determination at 5.

chapter 2 aircraft, a curfew, ground noise controls, and land use controls, was also instituted.

[63] As previously stated, the appellants propose that activities located in the ARPA which would be sensitive to the operation of the quarry, should become discretionary activities, to be assessed against the list of proposed criteria for consent. The purpose of the proposed buffer overlay is to protect the quarry activity from possible complaint and constraint flowing from the establishment of any sensitive activity. Targeted 'sensitive' activities include residential dwellings, educational and community institutions. Ms Crampton noted in her evidence that: *"It is probable that granting consent for subdivision and consequential housing would be inappropriate on much of the proposed Protection Area on the Richardson land, in the opinion of those giving technical evidence for Winstone"*. (at 18.2.1).

[64] Consequential amendments to the objectives and policies are also proposed, to reflect the proposed reverse sensitivity provisions. The proposed amendments to the objectives and policies are designed to constrain the encroachment of those sensitive activities which might compromise the extraction and processing of minerals.

[65] As noted above, the proposed ARPA provides that hitherto permitted activities should be assigned a different status (discretionary), if they are within the so-called 'buffer zone'. The Act provides for the status of activities by section 76. These rules are one of the 'methods' contemplated by the functions in section 31(a) to achieve integrated management.

[66] The import of these functions was discussed by Chief Environment Judge Sheppard in the ***Auckland Regional Council v Auckland Regional City Council*** (supra) decision. It had been suggested that the Council did not have the ability to provide for reverse sensitivity in a district plan. The facts of the case concerned the status of "sensitive" activities within the business 5 and 6 zones (heavy industry). Judge Sheppard said: (emphasis in original)

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"We acknowledge, as Mr Kirkpatrick submitted, that the Resource Manegement Act contains references to effects ON the environment. Sections 5(2)(c) and 104(1)(a) are notable examples. However the references to effects in the description of the functions of territorial authorities are not so qualified. Section 76(3) provides:

"In making a rule, the territorial authority shall have regard to the actual or potential effects on the environment of activities including, in particular, any adverse effect; and rules may accordingly provide for permitted activities, controlled activities, discretionary activities, non-complying activities, and prohibited activities".

The direction in that subsection is that a territorial authority, in having regard to the actual or potential effects on the environment of activities, may provide for discretionary activities (among other classes of activity). The authority to provide for controlled and discretionary activities (and other classes) is not limited to the classes of activity that give rise to the actual or potential effect. It is consistent with our understanding of a territorial authority's functions (already stated) that in having regard to actual or potential effects on the environment of activities, district rules might provide for other activities to be any of the classes of activities listed in the subsection, as the performance of the authority's functions may indicete is appropriate in achieving the purpose of the Act.

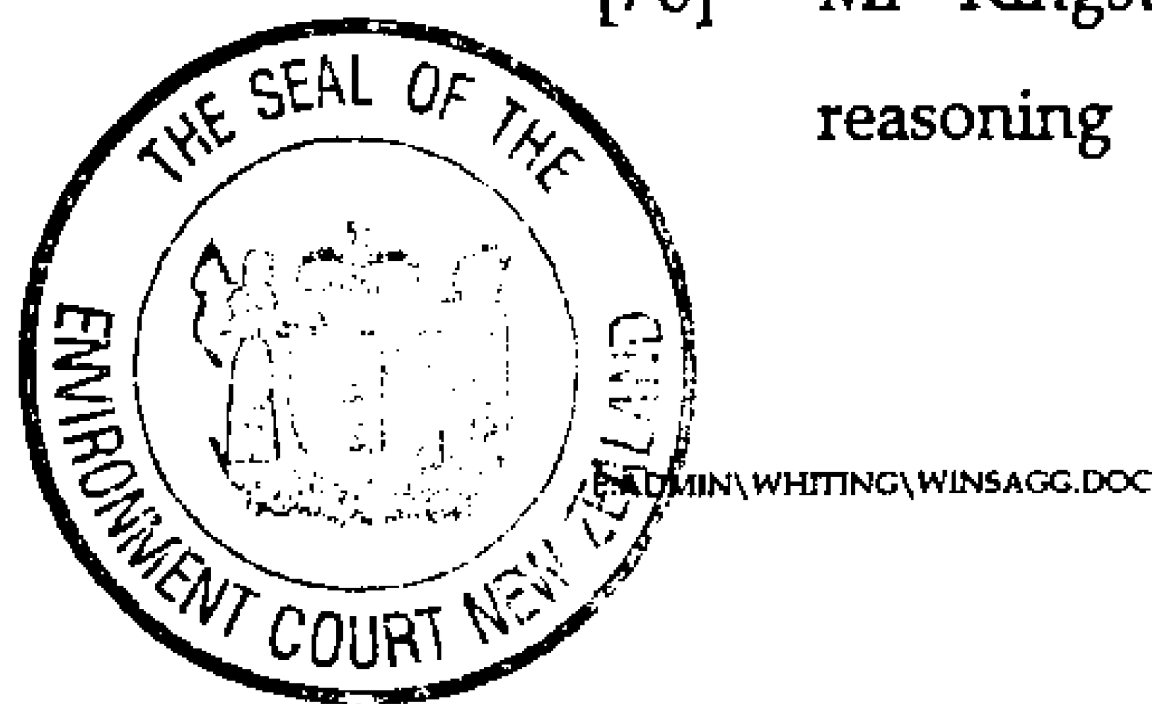
In summary, we do not accept that the provisions proposed by the regional council should be rejected on the ground that they provide for reverse sensitivity".

[67] The last paragraph explains the jurisdiction of a territorial authority to provide for an activity as a particular status, taking into account adverse effects which may be generated by another activity. As noted above, the authority to provide for a discretionary (or other) activity *is not limited to the classes of activity which create the actual or potential effect.*

[68] In that case the appellant ARC succeeded, and permitted activities within the business 5 and 6 zones which were likely to be adversely affected by air discharges from other activities within those zones were accordingly reclassified as discretionary activities, with criteria as prescribed in the decision.

[69] We have been urged by the appellants to adopt the outcome in the ***Auckland Regional Council*** decision above, and accordingly to provide that sensitive permitted activities in the proposed ARPA be reclassified as discretionary, with criteria that reflect the possibility of undesirable conflict with neighbouring activity in the 'quarry' zone.

[70] Mr Kingston, counsel for the Richardson Estate, submitted that the reasoning used in the ***Auckland Regional Council*** case is specific to a



situation within a zone (intra-zone). We accept this submission, as one of the reasons given by the Court for their decision was that *"such amendments would implement more fully the objectives and policies stated in the plan for the business 5 and 6 zones..."*. However, we consider that the interpretation of the functions of the territorial authority, and in particular section 76(3), does not exclude inter-zonal applications of reverse sensitivity where this is consistent with the overall functions and obligations of the territorial authority.

[71] Therefore the Council, and hence the Court, does have the jurisdiction to provide for a zone in order to cater for reverse sensitivity.

7. IS AN ARPA ZONE (REVERSE SENSITIVITY BUFFER ZONE) APPROPRIATE

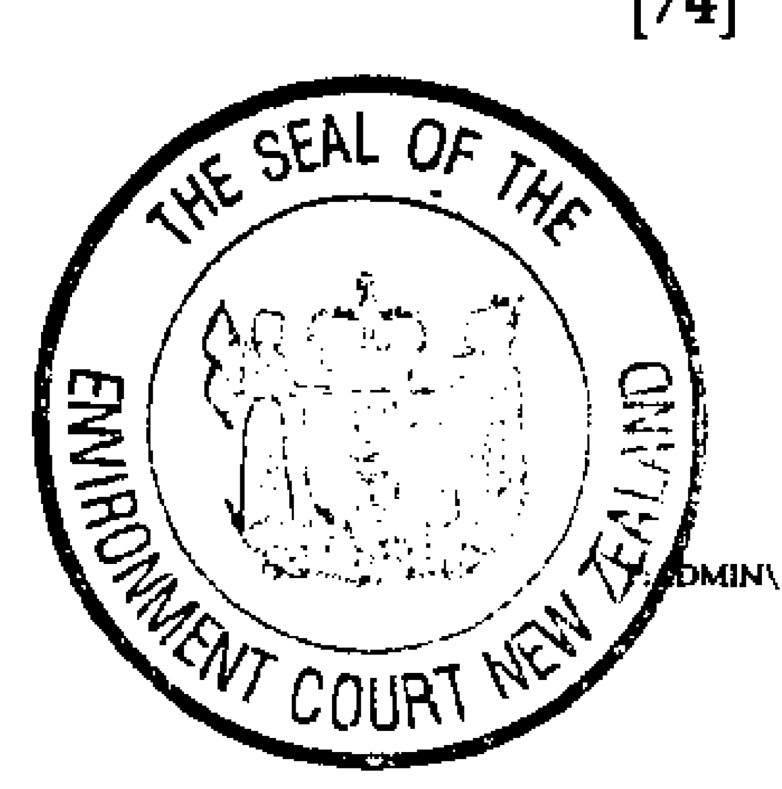
(a) Adverse effects of quarries

[72] Both Mr Compton and Mr Happy gave evidence relating to the constraints in quarrying operation. The nature of quarrying operation is such that they have significant potential effects which include:

- Ground vibrations from blasting;
- Air blasts,
- Noise from quarry operations and vehicles,
- Dust,
- Heavy vehicle traffic flows,
- Visual impacts,
- Release of sediment to water from earthquakes,
- Potential risks from storage and use of hazardous substances particularly for blasting.

[73] These effects can be annoying to other nearby activities which are sensitive to them, in particular residential and community facility-type activities.

[74] Ms Crampton described a quarry as a "NIMBY" (not in my back yard) activity because of its effects, particularly noise, vibration, visual impact and heavy traffic. She pointed out that unlike activities which are provided for

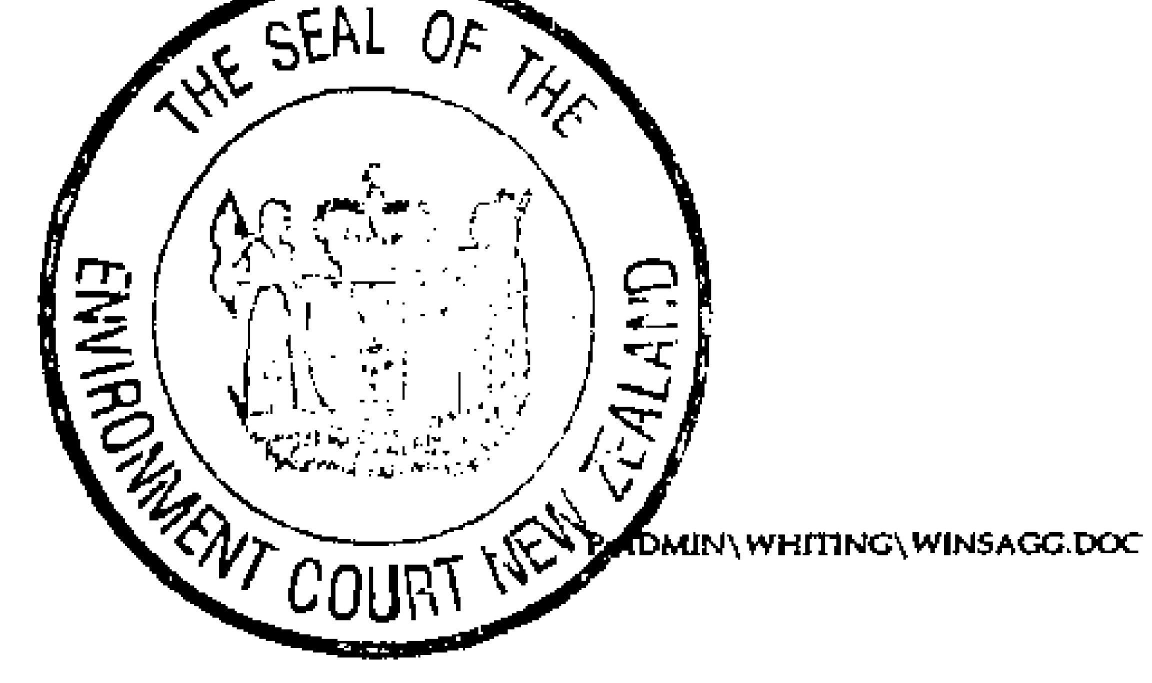


in the Public Works Act, there are no provisions aimed specifically at providing for quarries, nor are they provided for in the designation procedure. As noted by Ms Crampton, consequences flow from this. One is, that there is no compulsory process for acquiring land which may be required as a buffer, nor one for paying compensation. Another is, that quarries are subject to the same sorts of controls over their effects as any other activity. We must assume that the exclusion of quarries is deliberate. WE should not seek to create replicas of the designation process or the Public Works Act, but deal with the issues in the manner provided for in the Act, in order to achieve the purpose of the Act.

[75] In addition to Mr Compton , Mr Happy and Ms Crampton, six further witnesses gave evidence for Winstone Aggregates Limited, to address the potential conflict between the quarry operations and sensitive uses which may establish in close proximity to it. Their evidence was predicated on the foundation that aggregate is a significant regional resource and that it is appropriate to provide controls in the district plan to avoid the conflict which may result in the "sterilisation" of much of the resource. The Richardson Estate also called a number of witnesses to address the same issues, but from the perspective of adjacent landowners.

[76] We are satisfied on the evidence, that quarrying has the potential to produce adverse effects. We are satisfied that it is important that sensible planning be put in place, not only to ensure the availability of the extraction of the resource, but also to avoid unnecessary conflict between quarry operators and persons living nearby; and to protect the environment.

[77] The appropriate and fair balancing of the competing interests of the quarry operators, the community at large and adjacent landowners, in a way which gives effect to the interest and purpose of the Act, is the central focus of this appeal.



[78] A considerable amount of evidence was adduced to address the adverse effects and the difficulty of confining those effects within the quarry boundary. Many of the effects can be mitigated or confined on site, albeit at some cost. For example, measures can be taken to prevent dust annoyance. Measures can also be taken to prevent sediment entering waterways.

[79] It is clear from the evidence that the most difficult and costly effects to mitigate are noise and the effects of blasting. For this reason we heard extensive and detailed expert evidence relating to both noise and vibration.

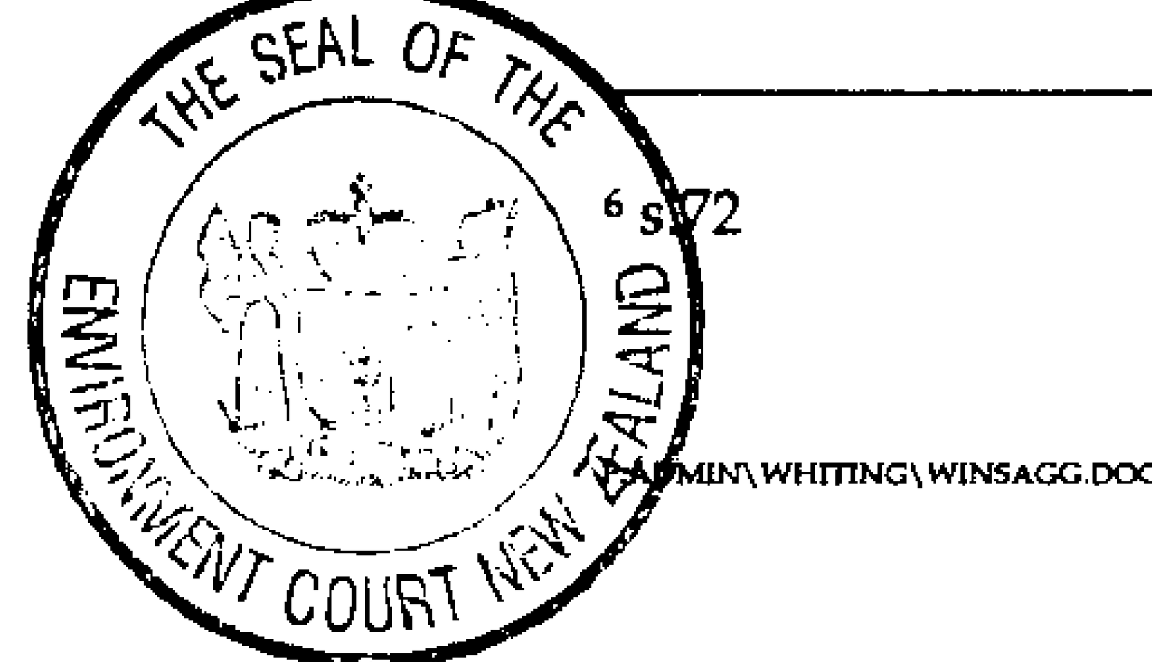
[80] Noise and vibration can be mitigated or, it was suggested, noise can be internalised. The issue is, to what extent is it reasonable to expect a quarry operator to internalise those effects? This involves a careful consideration of the evidence, including an assessment of the practicable mitigation measures available with present technology, and the economics of implementing those measures.

[81] Before looking at the evidence relating to noise and to vibration we first consider the resource management issues that arise in this appeal.

(b) Resource Management Issues

(i) General

[82] The plans may make provision for such of the matters set out in the Second Schedule to the Act. The purpose of the plan is stated to be, to assist the Council to carry out its functions in order to achieve the purpose of the Act[6] Section 5 sets out the purpose of the Act, which is, to promote the sustainable management of natural and physical resources. Sustainable management is defined. The definition contains matters of relevance as it seeks to manage the use, development and protection of natural and physical resources in a way, or at a rate, which enables people and



[6] s72

communities to provide for their social, economic and cultural well-being, while, inter alia, avoiding, remedying or mitigating any adverse effects of activities on the environment. [7] In achieving the purpose of the Act, we must also recognise and provide for the matters of national importance in section 6, have particular regard to the matters in section 7 (of particular relevance are subsection (b), (c), (f) & (g)).

[83] Included in section 7 are the efficient use and actual development of resources. [8] This could lead to the necessity for an activity to be able to emit a reasonable level of adverse effects (such as noise and vibration). But section 7 also includes the maintenance and enhancement of amenity values [9] and the quality of the environment [10]. These matters would support the incorporation of suitable restrictive controls to achieve those ends.

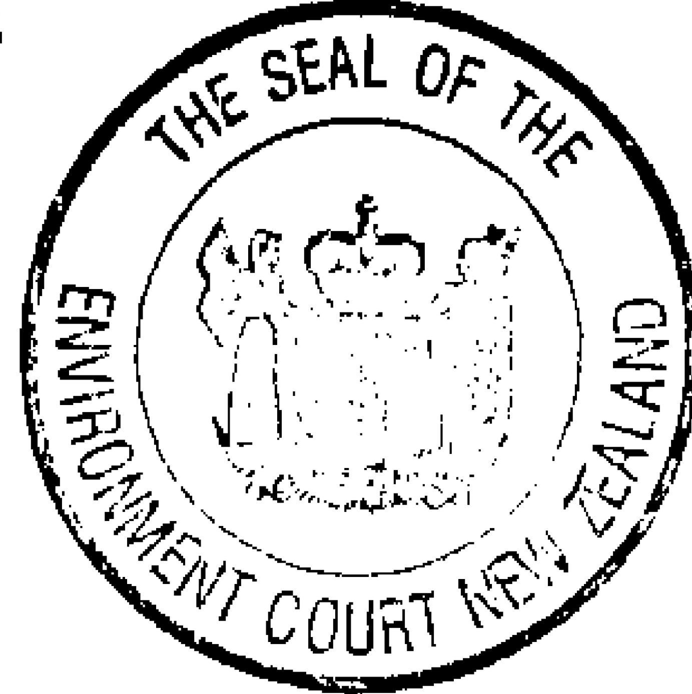
(ii) Integrated management

[84] One of the functions of the territorial authority is to achieve integrated management of the effects of the use, development, or protection of land and associated physical resources of the district through the establishment, implementation and review of objectives, policies and methods in order to give effect to the Act, as set out under Section 31(a).

[85] Judge Kenderdine discussed the issue of integrated management in Wellington International Airport (supra), and usefully summarised it (at 48 of the record of determination):

> *"In our view integrated management envisages that the council must bring together all separate but similar parts of the plan to form a consistent whole to ensure the sustaineble management of its resources".*

[7] see definition of effects in section 3
[8] section 7(b)
[9] section 7(c)
[10] section 7(f)



[86] Integrated management requires that the constituent parts of a district should be considered in a fair and balanced way, consistent with the purpose of the Act.

[87] The status of activities within each zone must implement the objectives and policies of that specific zone, as well as enable integrated management across zones, be necessary in achieving the purpose of the Act; be the most appropriate means of exercising the function of controlling actual or potential effects of use, development or protection of land; be in accordance with the other functions of section 31, the provisions of Part II, section 32, any regulations, and any appropriate heed to the requirements of section 74, section 75, and (with regard to rules) section 76.

[88] Counsel for the ARC submitted that there was clearly conflict between quarrying activities and rural/residential activities on surrounding land, including the Richardson land. We agree with this as a matter of fact. However, we do not consider that it follows necessarily, that the territorial authority "ought to include in the district plan measures to protect the mineral resources from that potential conflict" Nor do we accept that this is "the only way in which the district council can give effect to its functions under section 31 in order to achieve the purpose of the Act." As we have explained above, the equation is somewhat more complex. The protection of mineral resources is important, but it cannot be the only matter which must be considered when making rules in a district plan. This is particularly so when the matters averred to are matters solely within the provisions of a proposed regional policy statement.

[89] The expressed functions of district councils are clearly relevant in the context of this case. We have already referred to the adverse effects generated by the extraction and the processing of aggregate, and that many of those adverse effects can be contained on site, albeit at some cost. It is the appellants' contention that the adverse effects of noise, vibration and visual impact cannot reasonably and economically be contained on the site. As a

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consequence, sensible planning dictates that it is appropriate to make provision for avoiding unnecessary potential conflict between those effects that cannot reasonably be contained on the site, and those uses of the land by sensitive activities within the perimeter of those effects.

[90] We have already held that the Council and this Court have jurisdiction to make provision for rules to control effects in the way submitted. We are of the view that in appropriate cases, such provision amounts to sensible planning, in that it gives effect to the sustainable management of our natural and physical resources. We have also said that this is not the only way in which the district council can give effect to its functions under section 31 in order to achieve the purpose of the Act. We must consider whether the proposed restrictions are the most appropriate means of exercising the territorial authority's functions.

[91] One of the guiding approaches of the RMA is internalisation of effects, as a way of avoiding, remedying or mitigating effects of an activity. This approach is not absolute[11]. We note that this is in keeping with the *Environment 2010 Strategy*[12], which sets out the 11 principles for integrated management, one of which is internalisation of external costs. The principle as defined in the *Strategy* reads[13]:

> *"Resource management should ensure that the unpriced environmental effects (or external costs) associated with the production, distribution, and consumption of goods and services are 'internalised', that is, they are assessed and consistently charged to users and consumers who benefit from them."*

[92] The principle was adopted by the High Court in *Machinery Movers v ARC* [1994] 1 NZLR 492, where it was expressed (in relation to pollution costs) in this manner (p.502):

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[11] We agree with the approach contended by Mr Kirkpatrick in *ARC v ACC* :..."that the Act follows a "polluter pays" approach, requiring creators of adverse effects to internalise those effects rather than force the rest of society to bear the burden of dealing with them. However he agreed that the approach described is not absolute."

[12] *Environment 2010 Strategy: A statement of the Government's Strategy on the Environment* (September 1995).

[13] Ibid, at 15.

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"As to the economic aspect, the economic reason why our society may not in the absence of regulation strike a balance between economic output and environmental quality is that the costs of pollution are not borne by polluters but by somebody else. As a result, these "external" costs will not, in general be taken into account by those who cause pollution. Insofar as pollution costs are not borne by thosa who cause pollution, or by the purchasers of their products, some part of the total benefits resulting from economic activity in the community is wrongly redistributed away from the victims of pollution to other groups in society. In order to correct this market failure, the government must intervene to impose financial costs or penalties which bring the external costs back to the polluter. These concepts were discussed in the First report of the United Kingdom Royal Commission on Environmental Pollution, Cmnd. No. 4585 at 4-6 (1971) and are now encapsulated in Principle 16 of the Rio Declaration on Environment and Development adopted at the United Nations Conference on Environment and Development adopted at the United Nations Conference on Environment and Development, Rio de Janeiro 3-14 June 1992, [1992] International Legal Materials 876,879. New Zealand has signed the Declaration.

Principle 16 states:

"National authorities should endeavour to promote the internalisation of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment."

The RMA explicitly recognises the importance of having environmental laws which are economically efficient. Thus s7 provides in part:

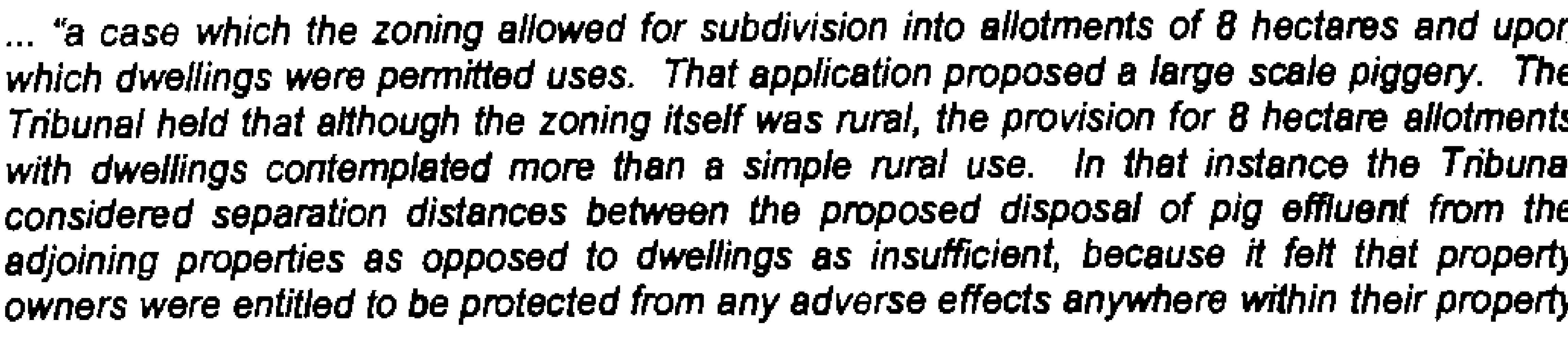
"7. Other matters - In achieving the purpose of this Act, all persons exercising functions and powers under it in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to - ...

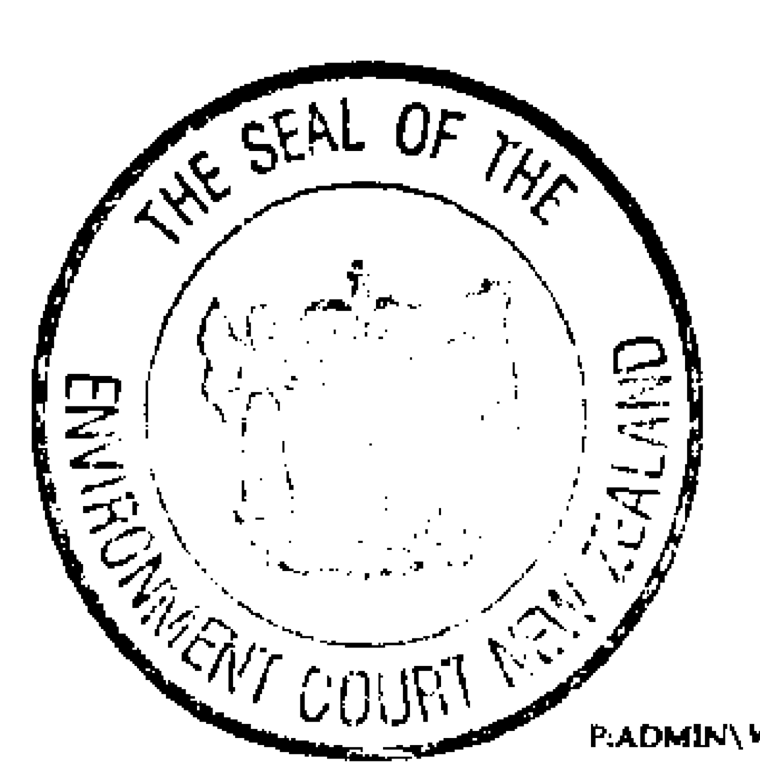
(b) The efficient use and development of natural and physical resources."

Section 32(1)(b) also requires the use of cost-benefit analysis in achieving the purpose of this Act".

[93] As we have said, the principle is not absolute, but there is a clear analogy between the approach favouring the internalisation of pollution costs and the approach to other adverse effects of an activity.

[94] In *Boddy v Grey District Council* (W88/94) (a mining application) the (then) Tribunal noted the decision *Tonks, Colville & Brand v Ashburton District Council,* and *Keating & Tonks v Christchurch Regional Council* (Decision C29/91 and C60/92) in these words:


... "a case which the zoning allowed for subdivision into allotments of 8 hectares and upon which dwellings were permitted uses. That application proposed a large scale piggery. The Tribunal held that although the zoning itself was rural, the provision for 8 hectare allotments with dwellings contemplated more than a simple rural use. In that instance the Tribunal considered separation distances between the proposed disposal of pig effluent from the adjoining properties as opposed to dwellings as insufficient, because it felt that property owners were entitled to be protected from any adverse effects anywhere within their property



boundaries. Thus the external effects of the applicant's proposal should as far as possible be confined to the site where those activities giving rise to the effects are carried out. The district council in this case, considered the same should occur on these applications but it was not effectively possible to achieve it because of the nature of the operation."

[95] And later (at 25):

"Elsewhere in the decision (Tonks) and referring to the need to create greater separation distances, the Tribunal held that adjoining property owners are entitled to be protected from any adverse effects anywhere within their property boundaries. Put another way, the external effects of the applicants' use should, as far as possible, be confined to the site where the activities which give rise to those effects are carried out. If this cannot be done then regardless of whether the use was a conditional use or a specified departure, consent should be refused."

[96] After due consideration, the Tribunal held that consent for the mining could take place alongside the rural/residential sites, but subject to conditions regarding noise and visual amenity, and with an internal buffer zone between sites "so that no mining is to take place within 100 metres of the Ross boundary".

[97] We remind ourselves that we are currently considering a reference, rather than an appeal for resource consent. The statute requires different things of a territorial authority in the formulating of a district plan. Nevertheless, we are of the view that in promoting the sustainable management of natural and physical resources, particularly having regard to s.32(1)(c), the adverse effects of quarrying should, as far as possible, be confined to the site within which those activities causing the effects are carried out. We consider that this is in accord with the purpose of the Act. When Part II of the Act is taken as a whole, there is a clear mandate for controls to be included in plans which will prevent undue adverse effects and reduction in amenity values.

[98] We consider that in controlling undesirable effects, territorial authorities should impose restrictions to internalise adverse effects as much as reasonably possible. It is only where those effects cannot be reasonably controlled by restrictions and controls aimed at internalisation, that the sort of restrictions on other sites (as sought by the appellants) might be

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appropriate. Those are relatively rare circumstances, and will vary from site to site.

(iii) Necessity test

[99] As was explained in *Nugent Consultants v Auckland City Council* 2 ELRNZ 254 (at 257), in reference to the functions of a territorial authority under the Act, relating to rules in a district plan (sections 5, 31, 32, 75, 76):–

> *"In summary, a rule in a proposed plan has to be necessary in achieving the purpose of the Act, being the sustainable management of natural and physical resources (as those terms are defined); it has to assist the territorial authority to carry out its function of control of actual or potential effects of the use, development or protection of land in order to achieve the purpose of the Act; it has to be the most appropriate means of exercising that function; and it has to have a purpose of achieving the objectives and policies of the plan."*

[100] "Necessary" has been defined, in *Green v McCahill* [1997] NZRMA 519 (HC), *Countdown v Dunedin City Council* [1994] NZRMA 145, IB ELRNZ 150 as being that which is "expedient or desirable" rather than 'essential'.

[101] That the district plan should contain objectives, policies and methods to control the effects of quarrying, is not in dispute. It is whether those objectives, policies and methods should be directed at internalising all of the adverse effects, or whether a combination of those restrictions should be combined with restrictions constraining the use of land owned by adjacent landowners. We have already held that we are of the view that adverse effects should be internalised where possible, but that such restrictions should be reasonable. In the event of adverse effects escaping from the site after the imposition of reasonable controls, then restrictions constraining adjacent landowners can and should be implemented. It is only when reasonable controls for the containing of effects at the boundary of the quarry site have been implemented can it be properly and adequately assessed that the perimeter of effects extends beyond the quarry zone thus making it necessary to impose restrictions on adjacent landowners.

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(iv) Economic considerations

[102] Section 7 requires that, among other factors, particular regard be had to the efficient use and development of natural and physical resources. This section was highlighted as a key issue by counsel for Winstone, who urged upon us that the Estate could not implore the Court not to consider the financial implications of the appellant adopting particular mitigation measures while, at the same time, claiming it was entitled to maximise the financial gain from subdividing its own land.

[103] It was submitted by counsel for the Estate that the only justification put forward by the appellant for putting the Richardson Estate's rights at risk, was the cost of mitigation. It was emphasised that there is no implication in the Act that section 5 requires the consideration of the financial viability of rock extraction, and section 7 cannot be seen to introduce such a goal, as it is limited to achieving the purpose of the Act.

[104] It was submitted by counsel for the appellants, that any additional constraint on the quarry's potential use and development by allowing sensitive uses to proceed as permitted activities, would jeopardise the efficient use of the resource. It was Ms Crampton's evidence that, "the proposed amendments will facilitate efficient production and transportation of aggregates and efficient allocation of land resources for the benefit of the community of Auckland".

[105] We have held that the aggregate from the quarry is a regionally significant resource, and it is of great public benefit to have the facility available. The Hunua resource was seen as particularly important, being one of only five existing major quarries which will be capable of continuing supply to the region when all other regional basalt quarries halt production in about the next five years.

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[106] The economic evidence presented to the Court, focused on the increased costs to the quarry if it was required to internalise to a reasonable degree, particularly about reducing explosive charge weights. However, this evidence was not definitive, and was based on extrapolation from hypotheticals rather than probative tests [14]. Clearly, an internalisation of costs will increase the cost of extracting the aggregate, but no conclusive evidence was put forward to quantify these costs. There was insufficient evidence for a determination that the proposed plan provisions would constitute an efficient use and development of resources.

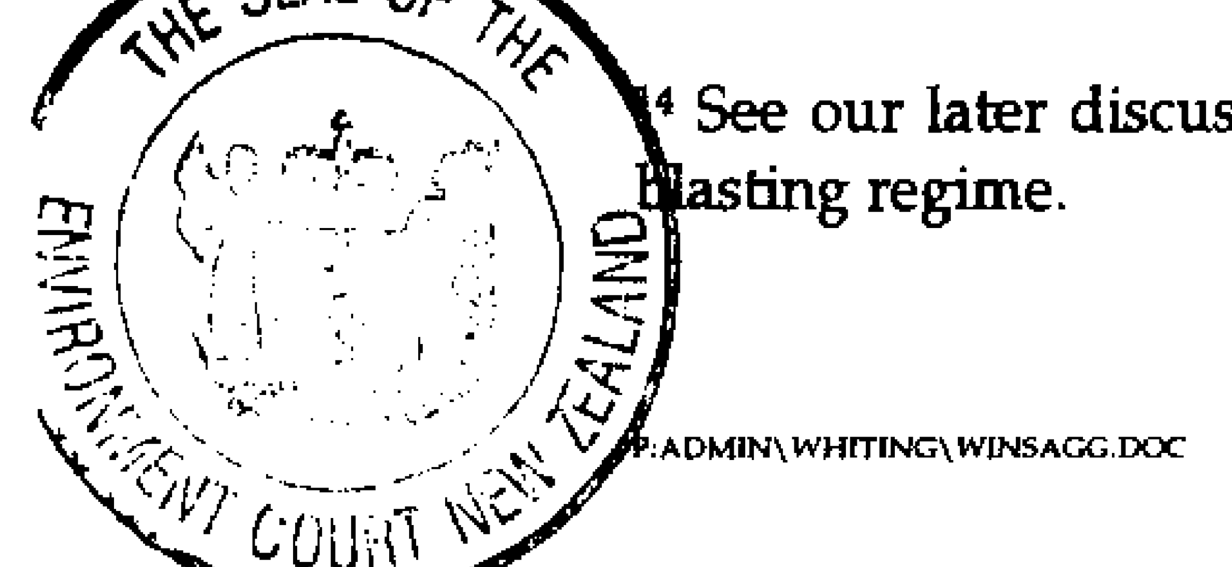
[107] Even if increased costs for the quarry had been established with sufficient specificity, it should be remembered that, as stated in *New Zealand Suncern Construction Limited v Auckland City Council* [1996] NZRMA 411, 424:

> *"... efficient use and development of natural and physical resources does not necessarily imply maximum financial yield for a developer. Judge Sheppard and Commissioner Catchpole accept Mr Cooper's submission that efficient use and development can be assessed more broadly".*

[108] The financial viability of a particular venture is not a relevant consideration for the Court even in considering a resource consent, let alone at district plan level. Relevant caselaw – *Warbrick v Whakatane District Council* [1995] NZRMA 303; *Burling v Horowhenua District Council* Decision No. W99/97.

[109] In *NZ Rail Limited v Marlborough District Council* [1994] NZRMA 70, 88, Greig J stated that economic considerations arise as a factor in the definition of sustainable management in s.5(2), and the efficient use and development of natural resources in s.7(b). However, he stated that:

> *"... in any of these considerations it is the broad aspects of economics rather than the narrower consideration of financial viability which involves the consideration of the profitability or otherwise of a venture and the means by which it is to be accomplished. Those are matters for the applicant developer and, as the Tribunal appropriately said, for the boardroom".*



[14] See our later discussion on the evidence relating to the costs arising from modifying the blasting regime.

[110] Justice Greig continued, stating that the Tribunal had had sufficient regard to the economic evidence put before it in terms of the costs, the economics, and the potential viability of the proposal for the reclamation and construction of all works and buildings required. He then stated that:

> *"The Tribunal took into account economic questions, as it was bound to do, in a broad sense and in a narrower sense upon the projected development itself. In the result they came to the conclusion that the evidence was not 'sufficiently persuasive to justify refusing consent on economic grounds".*

[111] In *Marlborough Ridge Limited v Marlborough District Council* 3 ELRNS 483 Environment Judge Jackson saw both the broader economic aspects and the narrower aspects (including viability of a project and/or the benefits to a developer) as being relevant when considering economic issues raised under section 5 and section 7(b). He determined that the economic effects on the environment of a proposal are to be considered only to the extent that they affect the community at large, and not the effects on the expectation of individual investors. However, no determination was made as to whether or not the benefits of a proposal for its promoter should be considered.

[112] In the current situation, it seems that the evidence is such that there can be no finding as to the viability of the quarry (similar to the finding of the Tribunal in *NZ Rail*). Accordingly, there is no opportunity to place the financial viability of one venture over the broader community concerns. Clearly, neither the quarry nor the Richardson Estate should be favoured on the grounds of financial maximisation of an individual venture.

[113] In terms of seeing efficiency in perspective, it was submitted by counsel for the Estate, that section 7(b) is only one of six factors to which particular regard should be paid. Equal regard is to be had for section 7(c) - being the maintenance and enhancement of amenity values; and section 7(f) - being the maintenance and enhancement of the quality of the environment. Further, it was submitted that all these factors are to be regarded in

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"achieving the purpose of the Act". It is settled law, that section 5 has primacy, and this should not be overlooked.

[114] We are clearly of the view that it is appropriate to take into account the cost to the quarry owner of implementing restrictions imposed to internalise effects, in the circumstances of this case. When we have regard to the importance of aggregate to the community, any unreasonable costs to the operation will be absorbed by the community at large. However, for reasons that will become clear in our discussion on the evidence, we hold that the evidence is inconclusive, and not sufficiently probative for us to make a determination on the economic issue.

(v) Measuring points

[115] The need to implement reasonable controls to internalise effects leads to a further issue, which arose in this case, being the physical location at which noise and vibration limits should be met. It was submitted by Mr Kingston on behalf of the Richardson Estate, that the appropriate measuring point for noise and vibration is, at the quarry boundary.

Noise

[116] With regard to noise, the submissions of Mr Kingston were reflected in a more refined and detailed manner in the evidence of Mr Hart, the acoustical engineer called to give evidence on behalf of the Richardson Estate. Mr Hart drew an analogy between the present case and the New Zealand Standard which has been introduced to provide guidance on how airport noise should be managed and land use planning carried out near airports. He was of the view that if the ARPA applied and the quarry is not required to comply with normal noise limits at the site boundary but at some more distant boundary, then it is still necessary to have some noise limits applying at or close to the site boundary, as long as the land is not owned by the quarry operator.

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[117] While the Estate challenged the notional boundary rules, it did not appeal the notional boundary rules contained in the proposed plan. Mr Kingston submitted that, pursuant to section 293 of the Act, we should direct a change to the proposed plan, requiring noise (and vibration) limits to be applied at the quarry boundary instead of the notional boundary.

[118] Mr Christensen, on behalf of Winstone, made submissions to the contrary. He submitted that in rural areas it has been a common practice to use "notional boundaries" as a measuring point. He submitted that the notional boundary approach is central to NZS6802:1991 and the reason for this approach is the perceived inappropriateness of protecting open fields and unoccupied areas from noise. He referred us to *Pilcher, Irvine and Ors v Timaru District Council and Ors* (C53/97) and *Westway Contractors Limited v Christchurch City Council* (C72/93) as two examples of cases where the notional boundary was used as the measuring point. He submitted that to depart from the notional boundary would be contrary to a number of decisions of this Court.

[119] We have reviewed a number of recent decisions [15] and it appears to us that the question of 'notional boundary versus site boundary' has no definite answer. The measurement sites are chosen as best suit the circumstances of a particular case and these include the plan provisions, the zoning, the type of activity on the land surrounding the activity, who was first there, and the economics of the issue.

[120] We also consider, for reasons already given, that as a whole the Act (and in particular Part II) gives a clear mandate for preventive controls to be included in plans to avoid undue adverse effects and reductions in amenity values. We are also conscious of the need not to unnecessarily constrain the

[15] McKenzie v Dunedin City Council (C42/95) and (C83/95); Cooks v Invercargil City Council (C81/97); Solid Energy v The Grey District Council (A8/98); Port Otago Limited v Dunedin City Council (C97/92); New Zealand Rail Limited v Marlborough District Council (C36/93); Bird v South Canterbury Car Club and Timaru District Council (C27/94)

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use of adjacent land, particularly when there are no measures whereby an adjacent owner can seek compensation.

[121] Taking all of these matters into account, we are of the view that a measurement should be imposed on the quarry zone boundary, defining the reasonable noise constraints imposed on the quarry operator. These levels will depend on the circumstances of each case. In other words, they are site specific, and will depend on such factors as technology, cost, geography and the geological structure of the site and its surrounds.

[122] When the control at the interface boundary is set, it can then be determined whether a buffer zone is necessary, and the extent of any such buffer zone.

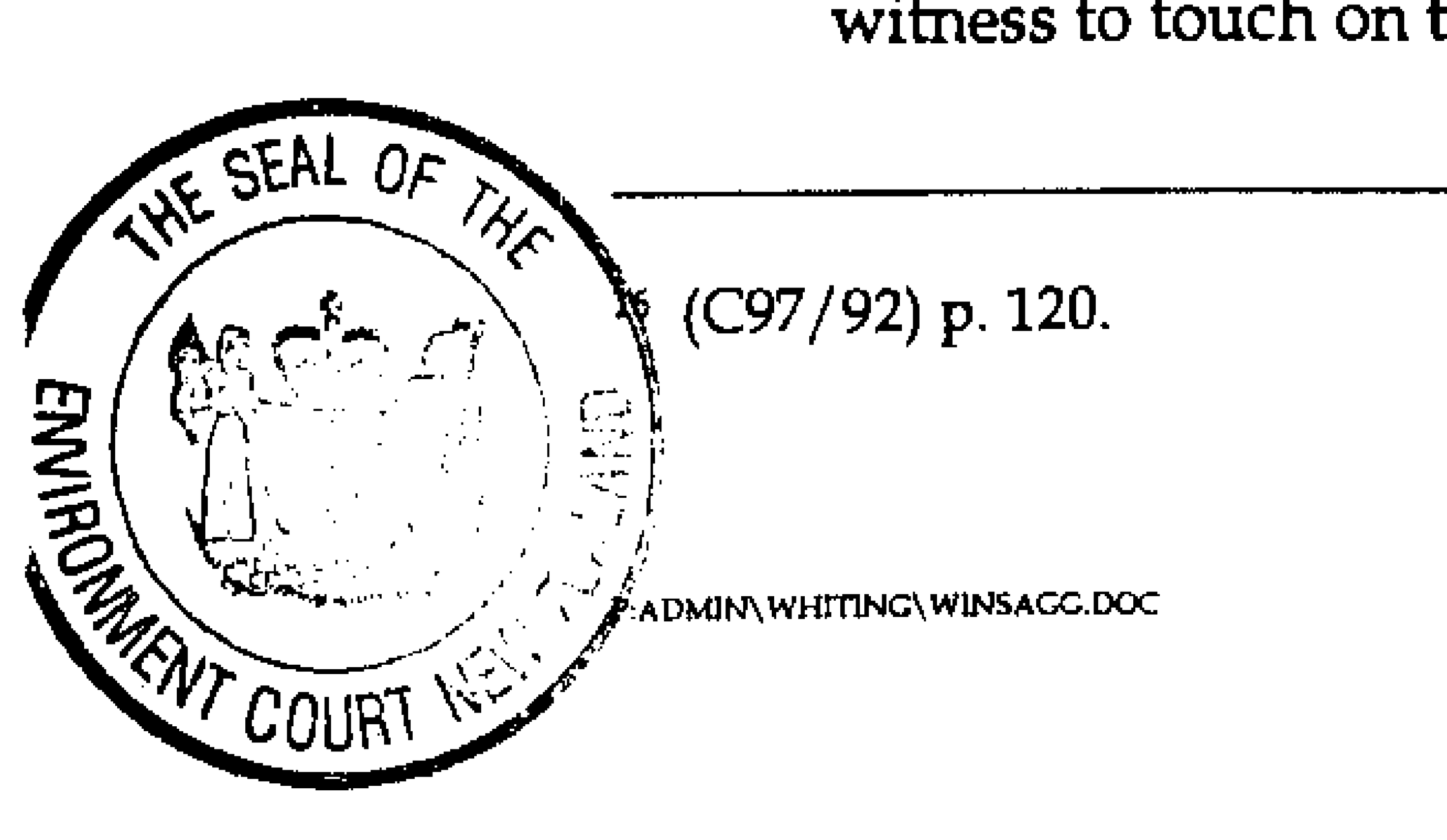
[123] In *Port Otago Limited v Dunedin City Council* the Planning Tribunal (as it was then) stated that rural and residential zone boundaries were appropriate places for measurement because:

> *"Those occupying properties in those zones are entitled to the enjoyment of the amenities provided for by those zones anywhere within their properties and not just within their dwellings".* [16]

[124] The primary responsibility on the owners and occupiers of a site is to internalise the effects of an activity as much as they can. Only where it is unreasonable (having regard to all the circumstances of each particular case) to internalise should other methods of controlling effects be considered.

Vibration

[125] So far as standards setting vibration controls are concerned there was little evidence in this regard. While Mr Kingston submitted that such controls should be applied at the site boundary, he called no evidence to support that contention. In fact he called evidence to the contrary. The only expert witness to touch on this issue was Dr St George who said:



16 (C97/92) p. 120.

"Most standards use a limiting peak particle velocity (PPV) which is either independent of frequency e.g. AS2187.2 1993 (PPV = 10 mm/s) or a frequency dependent scale eg. DIN 4150 (PPV = 5-20 mm/s: frequency 0-100 H_z). These levels usually apply at the property rether than the site boundary as wave transmission paths are almost impossible to predict, therefore compliance at the boundary might not ensure compliance at a greater distance, even along the same radial line from the source. To meet compliance levels the operators adjust the charge weights, shot geometry and timing".

[126] We are of the view that the adverse effects should be internalised as much as is reasonably practicable in the circumstances. Our tentative view is, that to adequately achieve this, there should be controls at the interface boundary. However, as this is an interim decision, in the event of the matter requiring our determination, we wish to hear further evidence on the matter.

8. THE EVIDENCE

[127] The principal effects which give rise for the need for controls are noise and vibration. To a lesser extent the visual effects of quarrying are also relevant. However the significance of aggregate as a resource is such that, where the circumstances warrant, visual effects (subject to reasonable mitigation measures) are an unfortunate but nevertheless permissible by-product.

[128] We heard a considerable amount of expert evidence directed at the effects of noise and vibration and the appropriate means of mitigating those effects. We have given careful consideration to all the evidence and the extensive cross-examination of counsel. Because the matter was part-heard and there was a two and a half month gap between hearings we have carefully re-read all the evidence and the notes of cross-examination. We have also taken account of the submissions of counsel.

(i) Noise

[129] On the topic of noise we heard from two experienced acoustical consultants, Mr P A Heinze for Winstone, and Mr M D Hart for the Richardson estate.

[130] It was generally common ground as between the two experts that the source of noise relating to the quarry operations can be grouped into two main categories:

- General Plant
- Blasting

[131] The general plant activities include:-

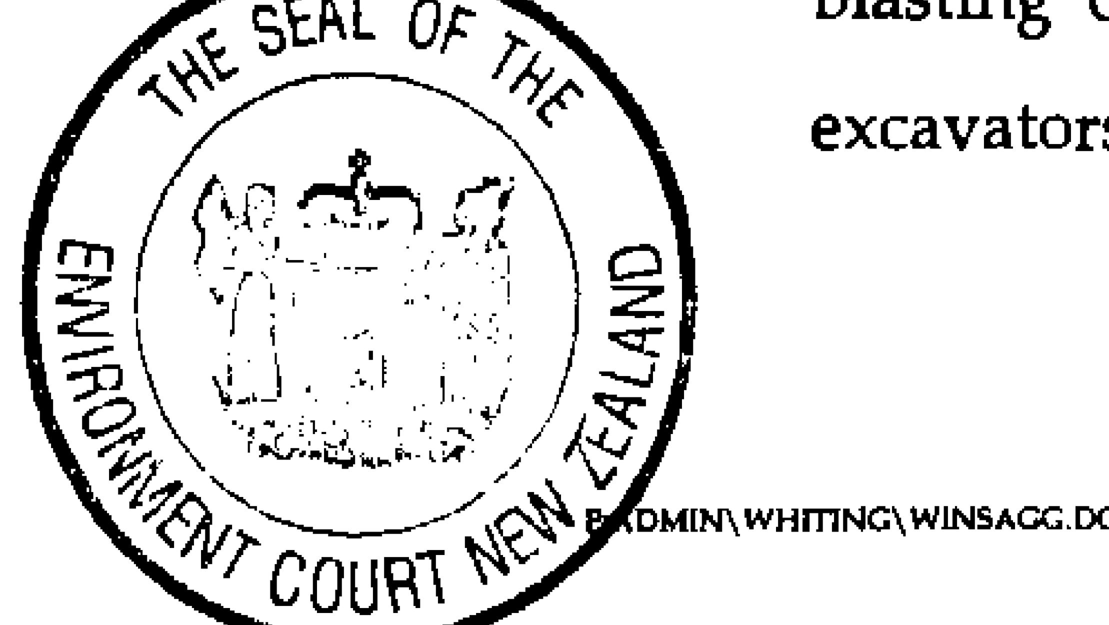
- Site clearing
- Over-burden stripping
- Product extraction
- Rehabilitation

[132] The site is first cleared of vegetation. Generally speaking over-burden is then removed from the site in progressive stages, and the product is extracted from the areas exposed. Over-burden removal and product extraction may occur contemporaneously at different locations on the site. At the completion of product extraction the site is then rehabilitated. The evidence established that site clearing and rehabilitation are relatively insignificant compared with the other two stages.

[133] The main noise sources are:

- Excavators and loaders
- Trucks
- Rock drills
- Product processing
- Blasting

[134] The first two sources are common to both over-burden removal and the product extraction, though the equipment used may vary. Drilling and blasting occur only during product extraction. The rock drills and the excavators and loaders normally remain close to the active work site.



Trucks move about the site transporting materials. Product processing generally involves crushing and screening and is generally performed using stationary plant.

[135] Measurement and assessment of noise produced by blasting is different than for noise produced by the other four sources. The difference was clearly set out in the evidence of Mr Hart where he said:-

"The first four sources are measured and assessed using New Zealand Standards NZS 6801:1991 Measurement of Sound and NZS 6802:1991 Assessment of Environmental Sound, and the sound descriptors used are L_{10} and L_{max}. The L_{max} is less of a potential problem than the L_{10} in terms of compliance with noise criteria, and has therefore not been addressed in depth.

Blasting noise is impulsive in character, and is outside the scope of NZS 6801:1991. Blasting requires special measurement and assessment techniques, and the sound descriptor normally applied is the peak level, L_{peak}. The L_{peak} is an entirely different descriptor to L_{max}. Both L_{max} and L_{10} are measured using "A" frequency-weighting (as per NZS 6802:1991) and denoted as "dBA". The L_{peak} is normally measured without frequency-weighting (also referred to as "unweighted" or "linear"), denoted as dB, or alternatively using "C" frequency-weighting, denoted as dBC (which for our purposes may be regarded as equivalent)".

[136] The proposed district plan sets maximum noise levels for a quarry zone (Part VI), where the limits measured at or within 30 metres from any dwelling are:-

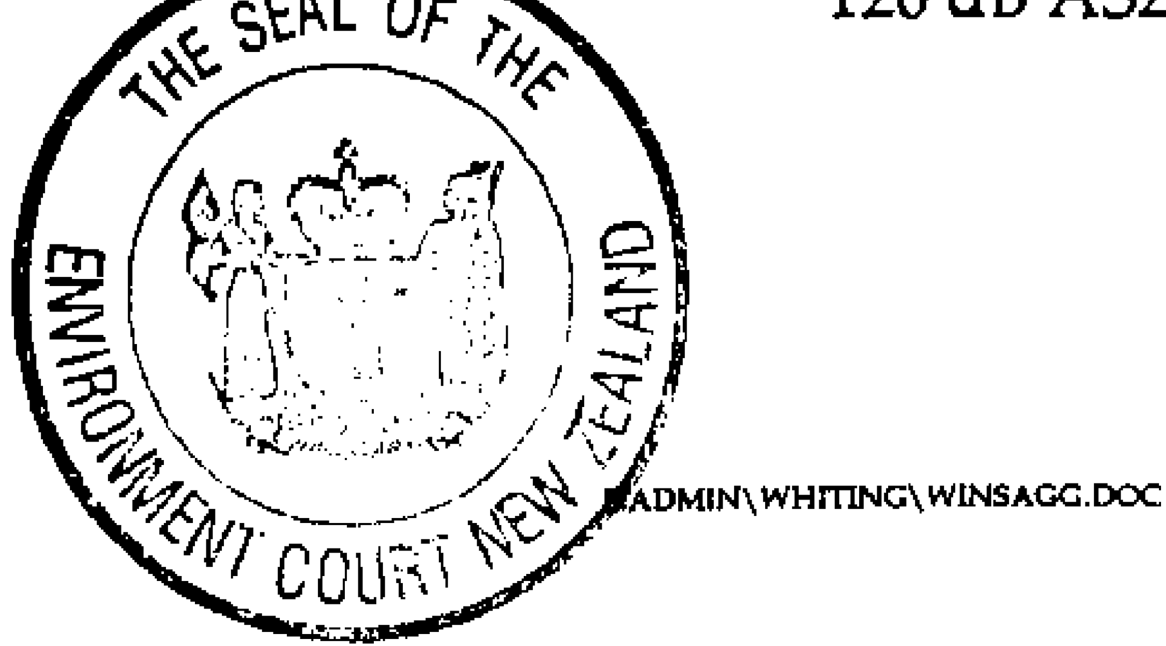
55 dBA L_{10}	**Monday to Friday**	**Between the hours of 0700 and 1800**
	Saturday	**Between the houses of 0700 and 1600**
45 dBA L_{10}	**At all other times including Sundays and Public Holidays**	

[137] With regard to noise produced by blasting the proposed plan provides:-

"F. Vibration and blasting

(i) The noise created by the use of explosives measured at a notional boundary of 20 metres from occupied dwellings shall either not exceed a peak overall sound pressure of 128 dB or alternatively a peak sound level of 122 dBC".

[138] Mr Heinze was of the view that the more stringent Australian Standard of 120 dB AS2187.2 (1993) is more appropriate than the district plan limits.



[139] Mr Heinze gave evidence of predicted levels of noise. He said this:-

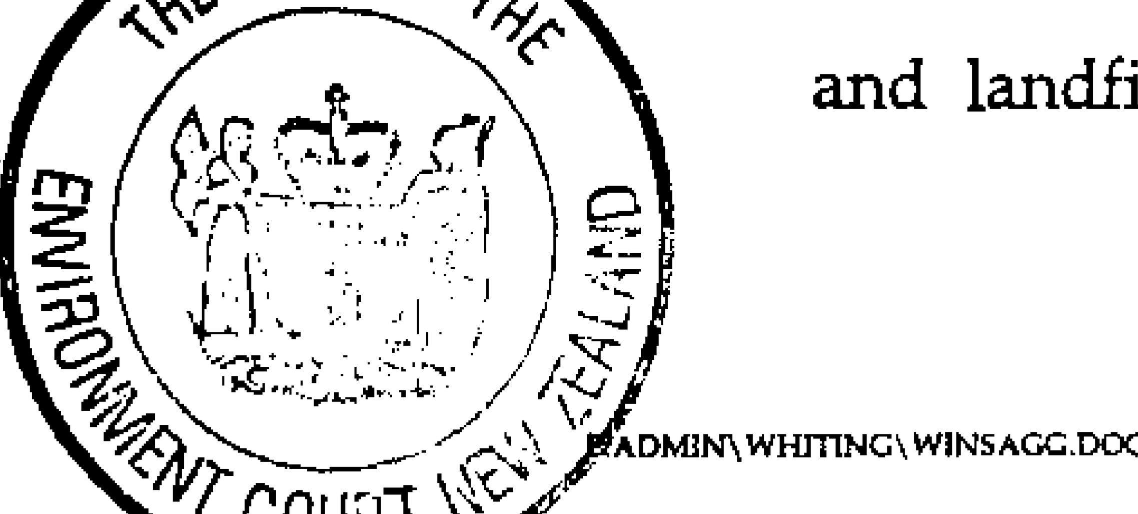
> ***"I have carried out noise level predictions at the proposed buffer zone boundary or ARPA which is 500m from the quarry zone. My analysis has shown that when quarry activity is located on the top of Symonds Hill, the noise level would be in the range of 50-55 dBA L_{10} at the ARPA outer boundary which is likely to just comply with the noise limit of 55 dBA. This is one of the reasons why a 500m buffer area has been selected. However, at distances closer to the quarry face (less than 500m) the levels would exceed the limit of 55 dBA by up to 10dB with the subsequent possibility of complaints and litigation. My calculations are based on noise measurements of individual items of plant at existing quarries.***
>
> ***With operations on the lower portions of the quarry, the noise level would be lower at around 45-50 dBA due to the greater screening effect of the quarry face. While there is unlikely to be a problem with noise from activity on the power portion of the quarry, it must be remembered that the material on the lower portion can only be removed once the material on the upper portion is removed (which produces noise at 50-55 dBA). Furthermore, I am instructed, it would take a long time to remove the material on the upper portion of the quarry - years rather than weeks or months.***
>
> ***Noise levels from quarry operations are predicted to exceed the measured background noise levels of 30 and 35 dBA by 20 dBA at 500m from the quarry zone and up to 35 dB inside the buffer zone".***

[140] Mr Hart made a number of criticisms of Mr Heinze's evidence, including Mr Heinze's failure to produce evidence as to the noise levels that could be expected at the site boundary.

[141] In this regard he said:-

> ***"I have not found any evidence as to the noise levels that could be expected at the site boundary. During our meetings I indicated to Mr Heinze and Mr Happy that this information would be useful, but due to the short time between these meetings and the preparation of this evidence, I have not received further information. Mr Heinze has supplied the raw data that he used for his predictions, and from some basic calculations (and from experience elsewhere) I believe that it would be reasonable to expect levels on the order of 85 dBA L_{10} and 150 dBA L_{peak} at the site boundary. These levels are without mitigation measures applied.***
>
> ***For non-operational activities i.e. site clearing, over-burden removal and rehabilitation it would be reasonable to consider whether the limits recommended by NZS 6803P: 1984 and NZS 6803P: 1984, the Measurement and Assessment of Noise from Construction, Maintenance and Demolition Work, should be applied."***

[142] With regard to non-operational activities he applied the various criteria set out in the code to NZS 6803P:1984. He referred us to previous cases he had been involved with concerning quarrying or related activities such as mines and landfills where it had been argued that operational limits may be



relaxed for non-operational activities that occur for a limited proportion of the project. However it became clear to us during cross-examination that Mr Hart's knowledge of the detailed workings of the quarry, the subject of these proceedings, was somewhat limited.

[143] He opined that there are further options that should be considered before it could be said that the proposed activities represent the best practicable option for the purposes of section 16 of the Act. These included using larger equipment, using more items of equipment, working in more than one location at a time, working during the hours contemplated in NZS 6803P:1984 rather than hours proposed in Papakura District Scheme. In this regard he concluded by saying:-

"Further investigation into the options available for equipment selection and screening could enable product extraction to be undertaken so that it complied with 55 dBA L_{10} at the site boundary, or at least at a distance considerably less than the 500 metres proposed by Mr Heinze. Until there has been a comprehensive consideration of the options available, I could not support the view that the proposed activities represented the best practicable option for the purposes of section 16 (I note that neither Mr Heinze nor Mr Happy discuss section 16 in their briefs of evidence).

[144] Mr Christensen, in his closing submissions, levelled a number of criticisms at Mr Hart's evidence. He pointed out also that some major points were not put to Winstone's witnesses. Some of Mr Christensen's criticism is valid. Mr Hart's evidence was essentially of a negative character being a critique of the evidence of Mr Heinze. Perhaps this is a consequence of Mr Hart being brought into the case at a late stage. Unfortunately, he was not able to provide answers, but nevertheless, some of the matters raised by him are of sufficient concern to us to cause us to defer making a final decision.

[145] After a careful evaluation of the evidence, we are satisfied that there has not been a full consideration of options for noise management, and that the best practicable option may not have been selected. We agree with Mr Hart that further work is required to establish what are the best practicable options. Before we reconsider justifying the imposition of restrictions on residents' rights to use their own land, we need to be satisfied that all reasonable and practicable steps have been taken to internalise effects.

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[146] Also, we have already decided that the concept of a "notional boundary" (as defined for noise measuring techniques) is not appropriate to the type of difficulty faced in this appeal. It is imprecise, given that there are presently no buildings in the potentially affected zone, and the "notional boundary" is a moving target. We find that it is necessary to consider the data at the actual property boundary. Consideration can then be given to the extent (if any) to which the generator of the adverse noise effects (in this case, the quarry) may be permitted to exceed standards at that actual boundary. This brings with it the possibility of some certainty in predicting the likely state of affairs, which in turn leads to a definable future, with ability both to monitor noise effects, to modify operations accordingly, and to deal with a proper evaluation of complaints or enforcement proceedings.

[147] The evidence adduced did not address this issue other than a query raised by Mr Hart in his evidence. It is therefore not possible for us on the evidence presently presented to make a determination as to the appropriate standards to be set at the quarry boundary.

(ii) Vibration Caused by Blasting

[148] We heard detailed expert evidence on the effects of vibration caused by blasting and the measures that can be implemented to mitigate the effects. For the appellant Winstone, Mr P J Millar, the geotechnical engineering manager of Tonkin and Taylor Limited, gave evidence. Mr J Russell, a blasting consultant and mining engineer, and Dr J D St J George, a senior lecturer in mining engineering at the University of Auckland, gave evidence on behalf of the Richardson estate.

[149] All three witnesses were extensively cross-examined. We again heard detailed submissions by counsel, particularly Mr Kingston, Mr Christensen and Mr Catran.

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[150] A brief and succinct account of the cause, effects and attenuation of vibration was given to us by Dr St George when he said in evidence:-

"Ground vibrations from blasting are caused when part of the explosive energy released during detonation, is transferred to the rock in the form of shock waves. Vibrations resulting from these waves passing through the ground are characterised by their amplitude, frequency and duration. All three are important when considering the effect of ground vibrations to structures. Damage to structures is related to the movement (strain) imparted by the motion of the ground waves. The maximum velocity of a particle (PPV) is widely accepted as correlating well with damage criteria and is used in determining compliance levels.

As the shock wave travels away from the source it attenuates and therefore the effects are reduced at locations further from the blast source. This attenuation is a complex process and is a function of geological structure, rock properties, ground water and surface topography. These are essentially all site specific variables and therefore beyond the control of the operator. It seems purely arbitrary to me, to select a 500m buffer without defining site characteristics. Quite often the attenuation is dependent on direction which would mean that some properties in close proximity to the site would be less sensitive to vibrations than others further away.

The main factors which influence ground vibrations for design are: type of explosive, charge weight par delay, charge distribution, hole diameter, burden, spacing, delay intervals and number of holes blasted. Of these the charge weight/delay has been found to be most influential parameter affecting blast vibrations. This is not surprising since it determines the amount of energy imparted to the rock. The charge weight is directly proportional to hole diameter and therefore can be adjusted to meet optimum production levels as well as vibration criteria".

[151] Part 6.5.5.1(f) of the proposed district plan contains standards which define limits for blast induced ground vibrations. These are:-

(i) *The noise created by the use of explosives measured at a notional boundary of 20m from occupied dwellings shall either not exceed a peak overall sound pressure of 128 dB or alternatively a peak sound level of 122 dBC.*

(ii) *All blasting shall be restricted to between 9am and 5pm Monday to Friday except where necessary because of safety reasons.*

(iii) *Blasting shall be confined to two occasions per day except where necessary for safety reasons.*

(iv) *Where because of the irregular or infrequent nature of blasting startling of the neighbouring tenants is likely then adequate public notification shall be given to those affected by this.*

(v) *When blasting the limit of particle velocity (peak particle velocity) measured on any foundation of an adjacent building not connected with the site, shall not exceed 20 mm/s for commercial buildings or 5 mm/s for dwellings and buildings of a similar design. Peak particle velocity means the maximum particle velocity in any of three*

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> ***mutually perpendicular directions. The units are millimetres per second (mm/s).***
>
> ***(vi) Every blast shall be recorded with particular attention to details of charge weight and delay practises. Monitoring using reliable and appropriate methods representative of all blasts, at varying distances and various sites of differing sensitivity shall be carried out to ensure the limits set out in rule (v) are not exceeded. Blast records and monitoring results shall be made available to the Council on request.***

[152] According to Mr Millar the controls particularly in clauses (v) and (vi) are tighter than the widely used German DIN 4150 Standard Part III (1986). The DIN 4150 permits and increases the levels of vibration measured in terms of peak particle velocity with increasing frequency whereas in clauses (v) and (vi) the limits are constant. Further the rule provides that vibration from quarry activities shall not exceed 5 mm/sec PPV for 100% of the time. All the experts agreed that 97.5% compliance at 5 mm/sec PPV is a generally accepted rule. We agree that the rule should be amended accordingly.

[153] The geology of the Hunua area and descriptions of blasting procedures adopted at the existing Hunua quarry were given in detail by Mr Peter Millar. He said that the usual hole diameter for the placement of charges was 102mm, with explosive charges usually between 80 and 160kg per hole, 160kg being the maximum used. He produced figures from 4 explosions at the Hunua greywacke quarry for which seismic acts were recorded and suggested that this information be used to derive figures upon which to base our decisions as to effects upon the quarry's neighbouring property.

[154] On the other hand, Mr J Russell drew attention to the absence of past vibration records from the Hunua quarry referred to in Mr Millar's evidence. Mr Russell took issue with the use of data based on readings at the Stevenson quarry (Drury) and the Winstone quarry (Lunn Avenue, Auckland). He felt the readings to be useless, being based upon differing rock type. He said:-

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"In order to obtain a reasonable accurate approximation of the vibration characteristics of this particular site at Symonds Hill, there should, in my view, be a proper vibration study undertaken. In my opinion, Mr Millar is, given the absence of relevant information, forced to make assumptions about assumptions, and apply statistical analysis to the result. I would consider this to be a thoroughly unsatisfactory method of predicting vibration characteristics as they would affect the Richardson estate property. I stress the desirability of a proper vibration study being undertaken before conclusions can be drawn in this respect.

In my opinion, the seismic information from the Lunn Avenue quarry and the estimation charts from Australian Standards (AS2187.2 - 1993) should likewise be ignored, as they simply add confusion to the results".

[155] He continued later, saying:-

"For reasons I have advanced above, I am of the opinion that it is totally unsatisfactory to seek to raise to conclusions based on 4 sample blasts only, because the actual vibrations experienced in the particular site, may in fact be considerably different and may invalidate either Mr Millar's conclusions or my conclusions, or produce a compromised result between either argument".

[156] Mr Christensen made a constructive analysis of the dichotomy between the evidence Mr Millar and Mr Russell. We do not intend to discuss this matter at great length. While many of the issues raised by Mr Christensen were thought provoking and exercised our minds we were left at the end of the day with some considerable disquiet. We find it unsatisfactory for us to consider reaching a conclusion when the empirical data on which Mr Millar's extrapolations are based have been so cogently criticised by Mr Russell, a criticism with which we have considerable empathy.

[157] We are unable to conclude the matter without having appropriate data and expert opinions based on it.

[158] It is clear from the evidence that vibration effects are significantly dependent upon the blasting regime. As Dr St George said in the passage quoted from his evidence the charge/weight delay has been found to be the most influential parameter affecting blast vibration. The use of smaller charge weights require the reduction in the height of benches. Mr Millar pointed out that this practice increased the costs of post-blast processing but he did not give us any figures. The costs of modifying the blasting regime were also touched upon by Mr R G Compton the resource development director with Winstone. He said:-

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"Mr Millar's evidence will discuss the relationship between the "charge weight" of explosive and the noise/vibration generated. The relationship between drilling and blasting means that the unit cost of production for blasted rock is lower when higher charge weights are used. At our Mt Wellington quarry, the encroachment over the years of residential and commercial development on the surrounding land has meant that a more intensively managed blasting programme involving more complex procedures using lower charge weights and "decked" patterns of explosives have had to be adopted. Apart from the increased direct costs associated with implementing this programme at Mt Wellington there are also significant additional indirect costs. These include the provision of extra resources to monitor effects and to deal with complaints about the perceived effects I have referred to.

Direct costs are also still increasing. The quarry manager has recently engaged overseas consulting expertise which has resulted in the introduction of laser profiling and bore hole logging. These tools survey the face profile and drill holes allowing accurate definition of critical blasting design parameters. This is intended to further reduce the effects of blast vibration even though the present practice results in compliance with the district plan. These initiatives introduce a cost that need not be associated with quarrying where an appropriate distance allows the attenuation of vibration effects.

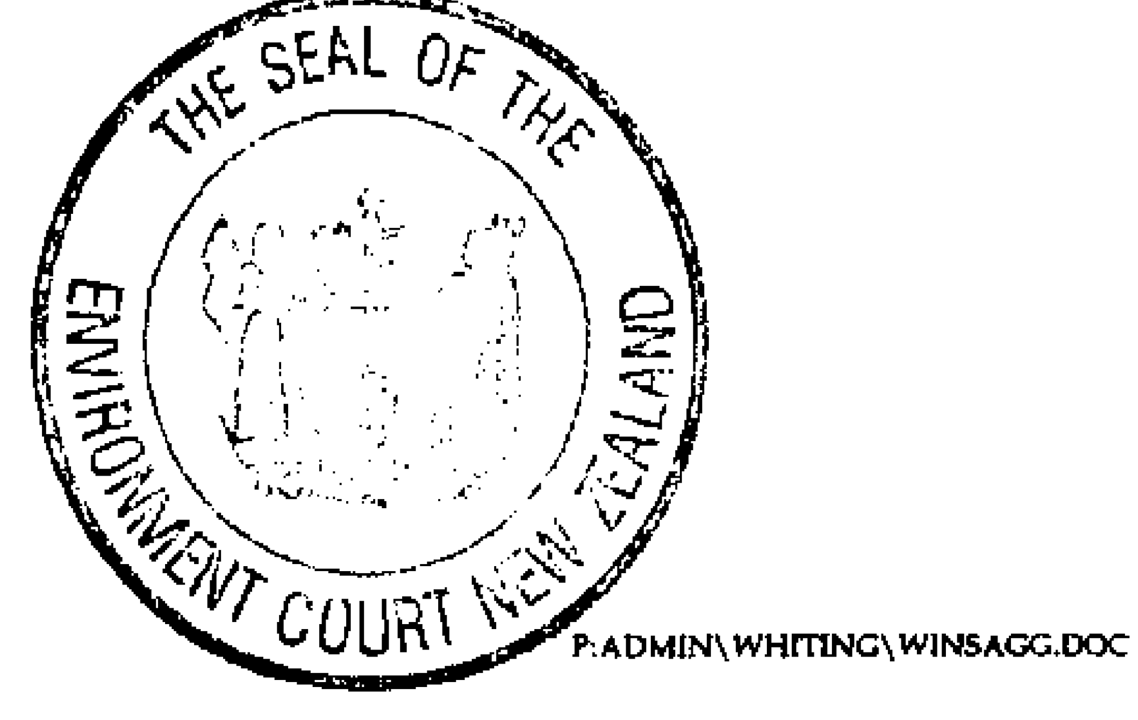
It is clear there is a significant difference in cost as the result of having to adopt "urban" blasting practice at Mt Wellington because of the proximity of neighbours. On the basis of direct costs alone I estimate that the unit cost of blasting at Mt Wellington in the June 1997 financial year was almost double that achieved at Hunua where usual quarry practice for the most efficient operation is still possible".

[159] Again from the evidence we have no definitive calculation.

[160] Mr Russell and Dr St George attempted to quantify the cost effect of modifying the blasting regime. But to be fair to Winstone the evidence is based to some extent on assumptions and as Mr Russell said the increase in drilling and blasting costs is directly related to the inadequacy of any proper vibration information in the way of a vibration study.

[161] There is insufficient evidence on which we can make an informed value judgment. We say value judgment because costs so far as they affect the community is only one factor that has to be taken into account.

[162] We regret to say that, on the evidence, we are unable to make determinations about the issue arising from the vibration effects of blasting. We will require further evidence in this regard.



9. OBJECTIVES AND POLICIES

[163] The objectives and policies have been amended to make provision for "reverse sensitivity" type rules to protect aggregate extraction from sensitive activities that 'can unduly limit the ability to extract the resource'. It was submitted by Mr Kingston, that without defined standards drawing the line between an appropriate level of control at the noise and vibration source, there is nothing to define a requirement that 'will unduly limit' extraction. We agree. We have already referred to the need to have defined standards at the pollution source to properly and adequately determine the need for, and the size of, an ARPA (buffer area). Similarly, those standards will properly and adequately determine whether any sensitive activity will unduly limit the extraction of aggregate.

[164] Because we are of the view that there must be defined standards setting a reasonable noise and vibration limit at the quarry boundary, consequential amendments will need to be made to the objectives and policies reflecting this.

10. INTERIM DECISION

[165] We summarise our interim findings as follows:-

(i) We find that there is jurisdiction for territorial authorities to make provision for reverse sensitivity rules (compatible land use planning) by the implementation of an ARPA (buffer zone) in zones other than the quarry zone.

(ii) The purpose of the Act and the provision of Part II when taken as a whole, give a clear mandate for controls to be included in plans which will prevent undue adverse effects and reduction in amenity values.

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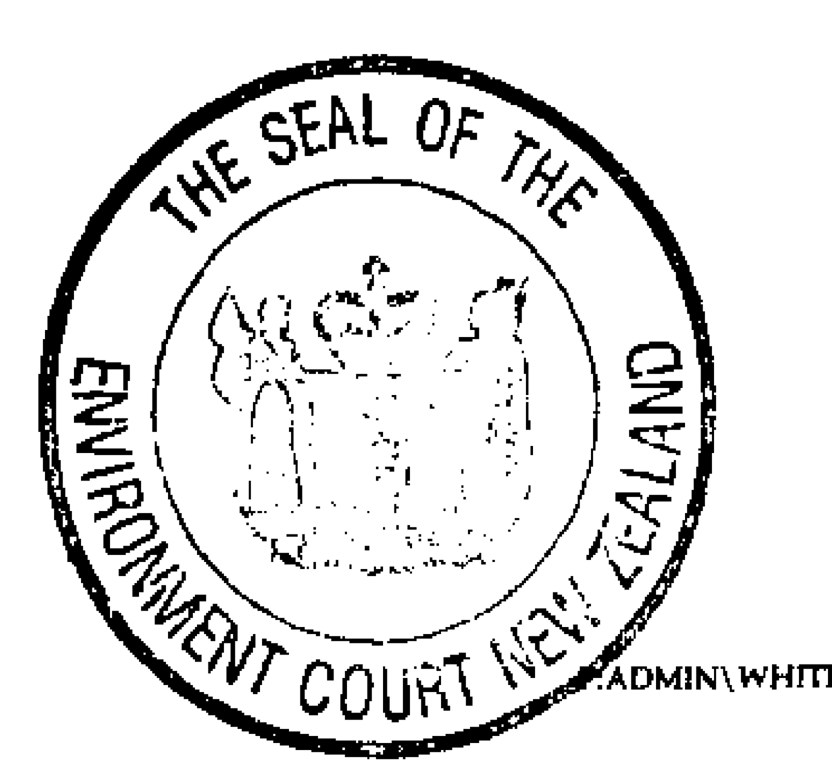
(iii) In promoting the sustainable management of natural and physical resources, particularly having regard to s.32(1)(c), the adverse effects of quarrying should be confined as far as possible to the site where those activities giving rise to the effects are carried out.

(iv) In controlling undesirable effects, territorial authorities should impose restrictions to internalise adverse effects as much as reasonably possible. It is only where those effects cannot be reasonably controlled by restrictions and controls aimed at internalisation, that compatible land use planning as sought by the appellants might be appropriate. Those are relatively rare circumstances and will vary from site to site.

(v) In the circumstances of this case, it is appropriate to take into account the cost to the quarry owner of implementing restrictions imposed to internalise effects. When we have regard to the importance of aggregate to the community, any unreasonable costs to the operation will be absorbed by the community at large. However, we hold that the evidence is inconclusive and not sufficiently probative for us to make a determination on the economic issues.

(vi) The datum for the set noise standard should be at the quarry boundary, and it is that which will determine the reasonable noise constraints that the quarry operator will need to work within. Again, the evidence was inconclusive on this matter, as was the evidence as to the appropriate quarry management to achieve the best practical option of noise level.

(vii) It is our tentative view that a vibration standard should be set at the quarry boundary, defining the reasonable restraints that should be imposed on the quarry operator. The evidence relating to vibration



was inclusive, both on the issue, and on the appropriate blasting regime.

[166] This means that the matter will have to be adjourned, to allow the parties to address this evidential need. We regret this course. But to impose restrictions of the kind contemplated on the use of land, such as the Richardson land, which may have quite serious consequences for the landowners without balancing compensation rights, should be done only when there is a clear evidential foundation.

[167] We are also conscious that to allow the appeal would result in serious consequences and further delays to the appellants, particularly Winstone.

[168] `Therefore, the appropriate course is to adjourn the matter sine die. This will enable the appellants, the respondent and the third party ,to consider the appropriate amendments that need to be made to define the appropriate controls at the interface boundary, and if need be the appropriate restrictions on adjacent land.

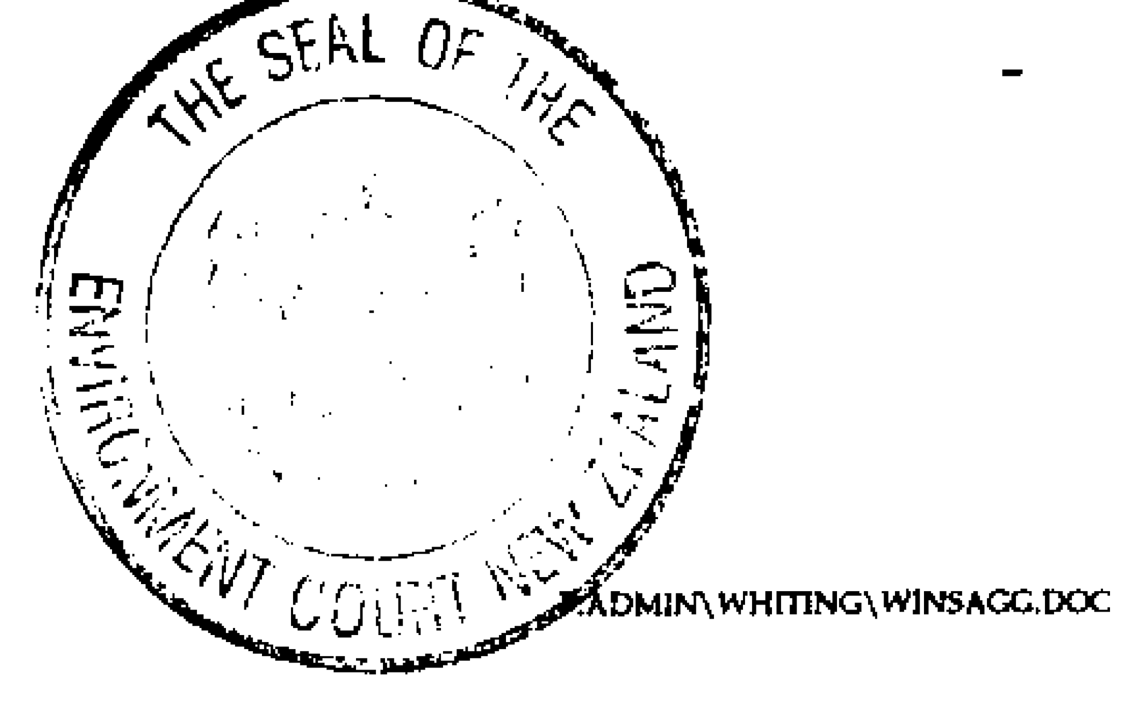
[169] On the matter coming back before us, and having regard to our interim determination, we would require:

(a) Planning evidence on the appropriate changes to the objectives, polices and rules.

(b) Noise evidence on the appropriate level to be imposed at the interface property boundary and if necessary the extent of any ARPA noise zone.

(c) Further evidence on the issue of vibration including:-

- Site specific empirical data



- Whether it is appropriate to impose levels at the interface boundary
- The necessity for and the extent of any ARPA vibration zone

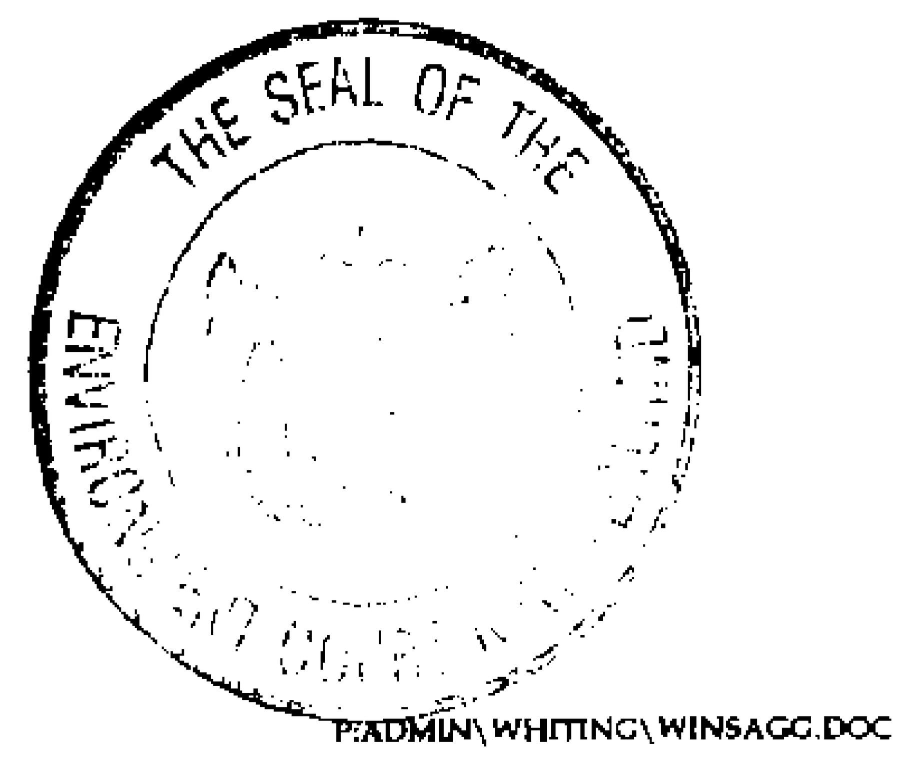
(d) Quantitative evidence on cost.

[170] No doubt, this will require further empirical study by the noise and vibration specialists on both sides. We hope that, at least, they will be able to agree on the empirical data and, preferably, also on the conclusions to be drawn from them.

[171] Leave is reserved for either party to refer the matter back to the Court on two weeks notice. In any event we direct that the proceedings are to be given a callover during the first general sitting of this division of the Court after 1 November 1998.

DATED at AUCKLAND this 14th day of August 1998.

R Gordon Whiting
Environment Judge



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ORDINANCE 66 RURAL 6 ZONE

661 ZONE STATEMENT:

The purpose of this zone is to cover areas where quarrying is undertaken on a large scale in the District. It provides also for uses associated with quarrying and industries using quarried material.

662 PREDOMINANT USES:

The following shall be predominant uses and buildings in the Rural 6 Zone:

(a) Farming, including bee keeping, but excluding the following; animal feed lots, wintering barns, poultry farming, pig farming, horse training centres and stables, veterinary hospitals, boarding and breeding kennels, greyhound training grounds and factory farming.

(b) Forestry including production forests, protection forests, farm forestry and tree nurseries.

(c) Portable sawmills, and the operation thereof; provided that such use is of a seasonal or temporary nature.

(d) The quarrying, mining and winning of materials occurring naturally in the zone provided that:

(i) Explosives shall be used only between the hours of 6 a.m. and 7 p.m. on normal working days.

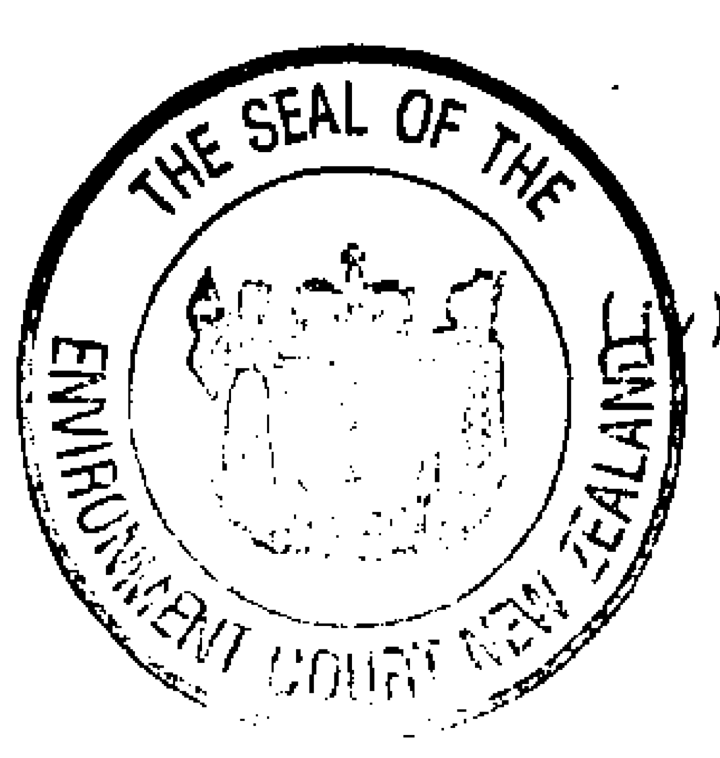
(ii) The provisions of the Quarries Act 1944 and of Section 77 of the Town and Country Planning Act 1977, the Water and Soil Conservation Act 1967, and the Water Pollution Act 1953, shall be complied with in all respects in regard to quarrying operations.

(iii) Explosives shall not be used to cause, outside the Quarry Zone, an amplitude of ground vibration related to frequency of vibration in excess of that set out in the following table.

Table of Frequency — Amplitude Relations

Frequency of ground motion in cycles per second -	Maximum amplitude of ground motion in millimetres.
Up to 10	0.203
10 - 15	0.152
15 - 20	0.102
20 - 30	0.076
30 - 40	0.051
40 - 60	0.038

The maximum amplitude is the maximum displacement of the ground from its mean or "at rest" position in the longitudinal direction between the blast and the measuring point.



) The quarry operator shall carry out such vibration measurements as the Council may from time to time require and should the quarry operator fail or neglect to do so, then the burden of

proof that the quarry operator has in any case not exceeded at any relevant point of measurement outside the quarry an amplitude or ground motion related to frequency of vibration in excess of the table set out under (iii) above, shall be upon such quarry operator.

(v) All quarrying is carried out in a manner that when all materials have been extracted from any area of the quarry as is possible and practicable, the area covered by the quarry shall be left in such a condition as the Council considers suitable for the land to be used for farming or forestry purposes.

(e) The crushing, screening, stockpiling and washing of quarried material; provided that adequate control measures are taken to prevent the pollution of any watercourse, drain, stream, river or underground water.

(f) Buildings for the crushing and screening of stone, and for the maintenance of plant, vehicles and machinery associated with the permitted uses in this zone.

(g) Canteens, diningrooms, ablution blocks, recreation rooms, or other facilities, for the convenience of those engaged in this zone.

(h) Workshops, offices, garages and stores.

(i) Accessory buildings for any of the foregoing purposes.

663 CONTROLLED USES:

Nil

664 CONDITIONAL USES:

The following shall be conditional uses in the Rural 6 Zone:-

(a) Residential accommodation accessory to a use permitted in this zone, and used exlusively as the household unit of any person whose duties require him to live on the premises.

(b) Works of public utility not deemed to be predominant uses by virtue of Section 64 of the Act.

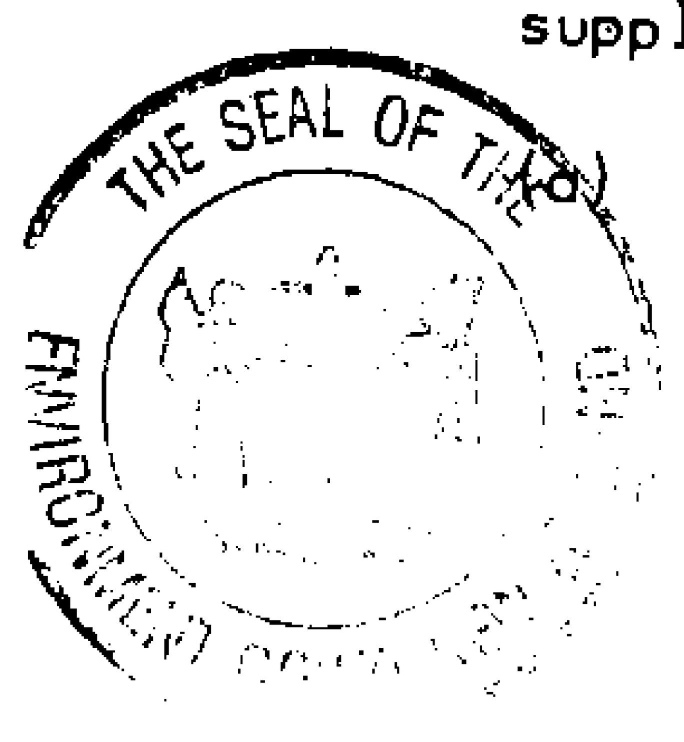
(c) Accessory buildings for any of the foregoing purposes.

665 SUBDIVISION REQUIREMENTS:

665.1 Subdivision for Quarry Sites:

665.1.1 General Requirements

In conjunction with any scheme plan of subdivision to create a site for an existing or proposed quarry, the following information shall be supplied to Council:-



(a) an indication of the economic life of the quarry or extraction area.

(b) the location of all existing and proposed buildings

(c) the provision of services, including disposal of stormwater and groundwater runoff

(d) access to and through the site

(e) the method of disposal of wastes, including tailings

(f) pollution control measures

(g) proposals for the restoration of spent areas, overburden disposal areas, and ultimate use of the site

(h) erosion control measures.

665.1.2 Minimum Area

No minimum area is specified, however all new boundaries shall be sited at least 30m clear of any excavation or filling areas.

665.2 Subdivision for Farming or Forestry Uses:

Any proposal to create a lot for farming purposes shall comply in all respects with the requirements for these uses specified in Ordinance 616 of this scheme.

665.3 Boundary Adjustments:

In this zone, the requirements of this Ordinance shall not apply to a subdivision if the Council is satisfied that the subdivision is intended solely for the adjustment of boundaries which will leave the new lots with similar areas to that of the original lots; provided that consent to such subdivision is made subject to a provision requiring the issue of one Certificate of Title on that boundary adjustment.

The provisions of this ordinance shall apply to adjoining sites within this zone, and with adjoining sites in the Rural 1 Zone.

665.4 General Clauses Relating to Subdivisions:

For general clauses relating to subdivisions, see Ordinance 1218.

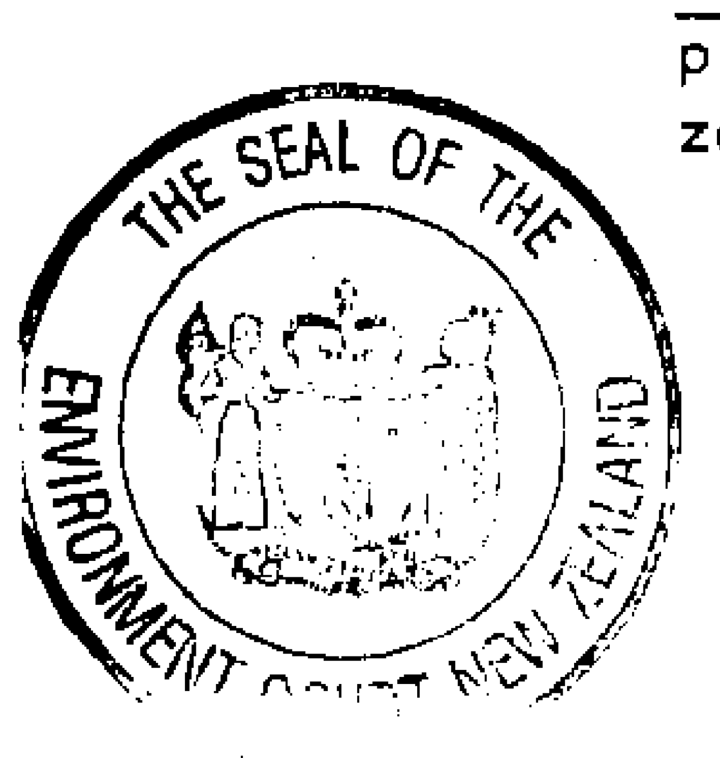
666 BULK AND LOCATION REQUIREMENTS:

666.1 Predominant Uses:

666.1.1 Maximum building height

All buildings 10 metres; provided that this shall not apply to conveyor belts and similar structures, and that at all times the height restrictions for airports are met (see Ordinance 1217).

666.1.2 Yards for quarries All excavation and stack pile areas shall be kept at least 30 metres from any boundary of the zone.



666.1.3 Yards for buildings

(a) Front yards — 12 metres

(b) Side and rear yards — 10 metres

666.2 Conditional Uses:

The bulk and location requirements in respect of any conditional use shall be determined by Council in the light of factors pertaining to each application; provided that where no such requirements are specified in the decision, the bulk and location requirements for predominant uses on the site shall apply.

666.3 Residential Uses as a Conditional Use:

666.3.1 Minimum site area

A residential building permitted as a conditional use in this zone shall have a minimum site area of 1000 square metres and a minimum frontage of 18 metres for a front site, or 3.6 metres for a rear site.

666.3.2 Yards

(a) Front yards — 12 metres

(b) Rear yards — 6 metres, except in the case of a rear site where the yard requirements shall be a continuous yard 3 metres wide from all boundaries.

(c) Side yards — 1.65 metres for dwellings
1.2 metres for accessory buildings.

666.3.3 Maximum building height — 9 metres

No part of any building shall exceed a height equal to 3 metres plus the shortest horizontal distance between that part of the building and the nearest site boundary; provided that at all times the height restrictions for Airports are met. (see Ordinance 1217)

666.4 Dispensation and Waiver from Bulk and Location Requirements:

For dispensation and waiver requirements see Ordinance 1215.

667 PARKING REQUIREMENTS:

667.1 Obligation of Owner or Occupier:

Every owner or occupier who constructs, or substantially reconstructs, alters or adds to a building or changes the use of any land or building in this zone shall make provision, in accordance with the requirements of this ordinance, for vehicles used in conjunction with the site (whether by occupiers, their employees or invitees or other persons) to stand on or, in the opinion of the Council, sufficiently close to that site but not on a road while being loaded or unloaded or awaiting use.

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667.2 Number of Parking Spaces Required:

(a) The number of parking spaces required for any use in the zone is as follows:-

Dwellinghouses	1 to each household unit
Quarrying uses	1 to every 3 persons employed in and around the quarry.
Industrial uses	1 to each 45 sq metres of open space used for such purposes and 1 to each 45 sq metres of gross floor area: or 1 to every 3 persons to be employed, whichever requirement is the greater.

(b) Notwithstanding the provisions of this ordinance, adequate parking spaces shall be provided for all trucks and other vehicles required for the operation of the quarry which are housed on the site whilst the quarry is not in operation i.e. at night and weekends.

667.3 General Provisions:

For general provisions relating to parking of motor vehicles, and dispensation and waiver provisions, see Ordinance 171.

668 SIGNS AND HOARDINGS:

668.1 Signs not Permitted:

(a) No signs shall be erected so close to any part of the road, or any corner or intersection as to:-

(i) obstruct or be likely to obstruct the view of users of the road, or

(ii) distract or be likely to distract the attention of users of the road, or

(iii) constitute or be likely to constitute in any way a danger to the public.

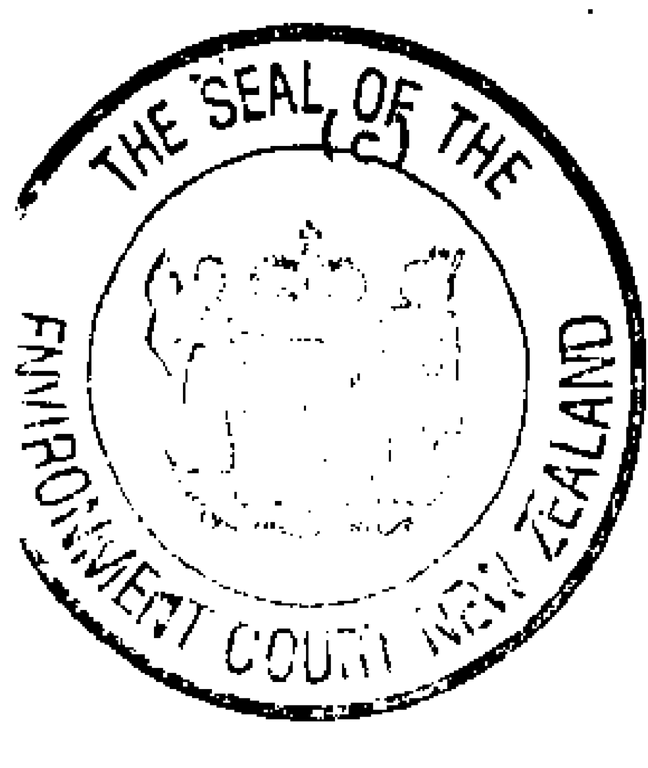
(b) Signs on any site shall only relate to the uses undertaken on that site.

668.2 Permitted Signs:

Signs shall be permitted in respect of the total property, or separate use areas, as follows:-

(a) One only single sided sign of not more than 0.5m^2 in area, which may identify the name and occupier of the quarry.

(b) One sign not exceeding 1m^2 in area indicating the name of any other premises on the site used for any permitted or existing use.



A sign, or signs, each of not more than 0.5m^2 in area, as may be required for the direction and control of vehicular and pedestrian traffic.

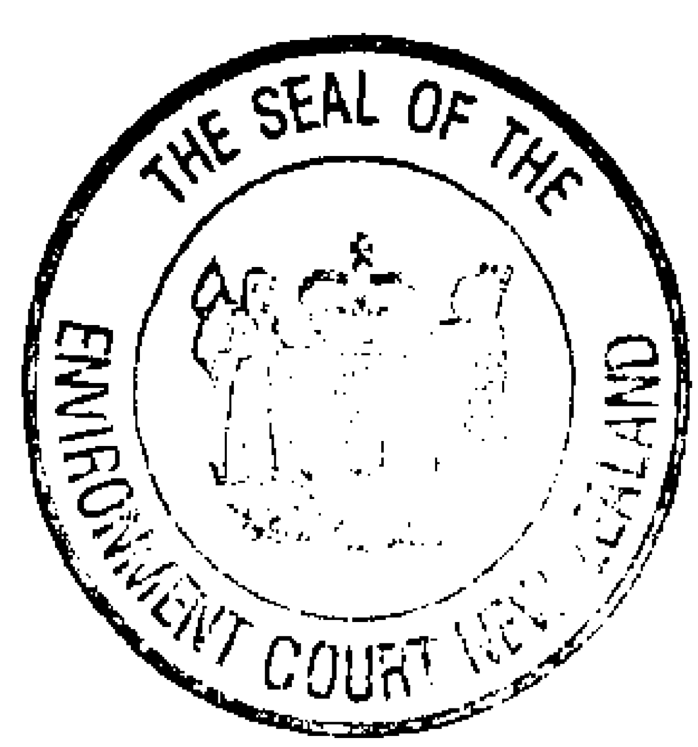
(d) A temporary sign, or signs, of not more than $1m^2$ in area, erected on a construction site for the duration of the construction project, to indicate the nature of the project, the owner, the architect and other consultants, and contractors.

668.3 General Policies Relating to Advertising:

For general policies relating to advertising, see section 1102 hereof.

Change No.3 Operative 9.12.85

For general provisions relating to dispensations and waivers from signs ordinances, refer Ordinance 1215.



ATTACHMENT B

6.48 QUARRY ZONE

6.49 DESCRIPTION

Quarrying is an activity which occurs at two principal locations within the District and the Quarry Zone is applied to these long-established areas of aggregate extraction. The provisions of the zone are designed to provide for the continuation of quarrying and associated uses in these areas subject to strict environmental controls on the operation of the quarry and the ultimate use of the lot. This is achieved through the provisions of the General Quarry Rule which requires the preparation of a Quarry Management Plan where any quarrying activity is undertaken.

Further, there is the on-going possibility that quarrying may occur beyond the boundaries of the present Quarry Zone. Therefore, the General Quarrying Rule will have application throughout the District. Any quarrying activity will be subject to the provisions of the rule to ensure that, while operations continue, nuisance elements are minimised and finally that restoration and final levels are co-ordinated through the Quarry Management Plans.

6.50 RESOURCE MANAGEMENT ISSUES

- The continuation of quarrying and protection of important resource areas as a significant economic activity in the District.
- The sustainable management of the landscape and landforms of the District.
- The avoidance and mitigation of any adverse effects of quarrying.
- The need to control the effects of particular activities associated with quarrying, such as blasting, vibration and noise.
- The need to ensure that the general environmental impacts and effects on amenity due to quarrying operations are minimised.
- The need to provide for site restoration and preparation for subsequent activities.
- The recognition of the need to minimise any adverse effects on water quality.
- The recognition and protection of cultural and heritage values of sites, buildings, places and areas.

6.51 RESOURCE MANAGEMENT STRATEGY

The resource management strategy for this zone is:

- to enable continued quarrying activities within clearly defined management guidelines so that visual and noise amenity and natural environmental values are appropriately managed.

- to ensure that quarried areas are reinstated with vegetation so that the amenities of surrounding areas are maintained and enhanced.

- to place specific controls on those aspects of quarry operations which are likely to lead to detrimental effects.

- to ensure that any quarry operations do not result in the lowering of the water quality or quantity of natural water systems on the land or ultimately surrounding coastal waters.

- to require the production of a Quarry Management Plan showing re-instatement proposals for all areas subject to quarrying activities.

6.52 OUTCOMES

The principal outcome sought by the strategy is to ensure that any significant adverse effects of quarrying and mining activities on the surrounding areas are avoided or mitigated to have a minimal impact on surrounding areas.

6.53 OBJECTIVES AND POLICIES

Objectives

6.53.1 To provide for the careful management and extraction of mineral resources and the restoration of exhausted quarries.

Policies

6.53.1.1 To implement a comprehensive set of rules for quarrying and to provide for the establishment and construction of ancillary activities.

6.53.1.2 To require a Quarry Management Plan for all land within the zone and which outlines operational matters and which gives an indication of the proposed end-state of the land once quarrying has ceased.

6.53.1.3 To require all new quarry operations to indicate ~~the~~ a potential end-use of the land before operations commence.

Objective

6.53.2 To impose controls which protect the environmental quality and amenity of the quarry site and of neighbouring properties.

Policies

6.53.2.1 To impose amenity controls at site boundaries.

6.53.2.2 To restrict hours during which explosives may be used in quarry operations.

6.53.2.3 To adopt controls designed to prevent or reduce vibration, dust, noise, and soil and water contamination and degradation.

6.53.2.4 To require the establishment and maintenance of buffer areas between quarry operations and adjacent activities.

6.53.2.5 To require significant historic places and areas to be protected from quarry operations.

6.54 EXPLANATION

Mineral extraction is a temporary activity and restoration of a quarry is required to prepare the land for the establishment of subsequent activities. To this end, the provisions of this zone include a comprehensive set of rules for quarrying. The purpose of these rules is to ensure that, during the course of quarrying, adverse effects on amenity are minimised and that site restoration and final levels are properly planned and co-ordinated. Such planning is required through the preparation of Quarry Management Plans.

Quarry Management Plans are required to show the proposals for the operation and restoration of quarried areas. In particular, Quarry Management Plans are required to show and describe a number of operational and managerial aspects of a quarrying operation. These include the area to be quarried, the location of buildings and plant, areas for the stockpiling of over-burden and existing and final contour levels.

6.55 RULES

6.55.1 Permitted Activities

Any quarry activity or industrial activity and any activity ancillary to the Quarry activities shall be regarded as a permitted activity in the Quarry Zone where it complies with the rules for permitted activities set out below.

1. *General Quarrying Rule*

(a) Height of buildings

No part of any building shall exceed a height equal to 3 metres plus the shortest horizontal distance between that part of the building and the nearest site boundary provided that:

~~no building shall exceed a maximum height of 10.5 metres except where the Council is satisfied that a greater height is in the best interest of the quarry and the community and is not detrimental to the amenities of the area.~~

No building shall exceed a height of 24 metres. Any proposals to exceed this limitation shall be subject to assessment as a Discretionary Activity.

(b) Yards.

(i) Quarrying Uses

~~Except with the permission of the Director of Regulation and Planning~~ No quarrying shall be carried out within 30 metres of each site boundary [illegible] obtained. Such distance is to be measured at right angles to the boundary or boundary to where the quarry is worked on the site except the excavation may be undertaken in this yard where:

- final levels will coincide with existing levels or proposed final levels on adjoining sites;
  and

- the site will be graded or batters formed which will ensure the stability of the land and that on adjoining sites for such purposes to which it may be subsequently put.

(ii) Industrial and Commercial Uses Other Than Quarrying

The following yards are required for uses other than quarrying.

Front yard - 30 metres provided that:

in the case of any ~~residential, recreational or canteen~~ administration building the minimum front yard requirement shall be 12 metres.

Side yard - 15 metres

Rear yard - 15 metres

Notes:

1. Where any yard is affected by a building restriction yard, that which has the greater dimension will apply.

(c) Lot coverage.

Lot coverage shall not exceed 30% of lot area.

(d) Quarry Management Plan.

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The operators and owners of each quarry shall furnish a Quarry Management Plan to the Council for its retention provided that in the case of existing quarries where a quarry plan has been submitted under any provision of an earlier requirement no further plan shall be required except where quarrying is proposed to be extended outside the area shown on that plan, and the Council's consent to such an extension is necessary.

Where the Plan requires the Council's consent to quarrying operations the Council may grant to refuse its consent or require any changes to be made to the Quarry Management Plan or impose other conditions as it sees fit.

All quarrying and restoration shall be carried out in accordance with the Quarry Management Plan which shall include the following information in plan form and in explanatory material:

(i) demarcation of the area to be quarried;

(ii) existing contours;

(iii) an indication of final contours and floor levels including the proposals for the coordination of final levels of adjoining land;

(iv) proposed ultimate drainage of quarried lands and include any water consents that it may be necessary to obtain;

(v) an indication of the period over which quarrying will continue, and of staged development;

(vi) provision for the disposal and/or stockpiling of overburden, waste and quarried material, including the areas to be used for stockpiling;

(viii) areas for stockpiling topsoil (where applicable);

(ix) provision for screening unsightly features from public view and fencing dangerous of potentially dangerous features;

(x) description of methods to be employed to prevent contamination of air or natural water and to comply with the Noise and Vibration provisions of these rules;

(xi) an indication of the route by which quarried material is to be removed from the lot;

(xii) provision for the progressive restoration of the lot such that the land will be left in such condition as the Council considers suitable for the establishment of those uses to which that land may subsequently be put; and

(xiii) description of methods to be employed [illegible]

(e) Noise.

The L10 noise level as measured at or within 30 metres from any dwelling shall not exceed the following limits:

Monday to Friday between the hours of 0700 - 1800 and Saturday between the hours of 0700 - 1600.

~~50 dBA~~ 55 dBA

At all other times including Sundays and Public Holidays: ~~38~~ 45 dBA.

The noise levels shall be measured and assessed in accordance with the requirements of the New Zealand Standard NZS 6801:1991 Measurement of Sound and NZS 6802:1991 Assessment of Environmental Noise.

The noise shall be measured with a sound level meter complying with the International Standard IEC 651 (1979): Sound Level Metres Type 1.

[illegible]

(f) Vibration and Blasting.

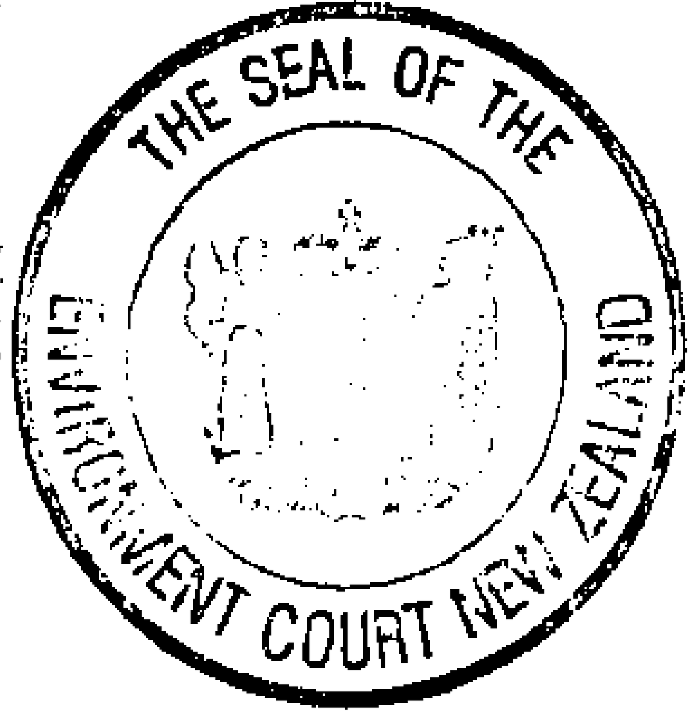
(i) The noise created by the use of explosives measured at ~~the boundary of the site~~ [illegible] shall either not exceed a peak overall sound pressure of 128dB or alternatively a peak sound level of 122dBC.

(ii) All blasting shall be restricted to between 9.00 am and 5.00 pm Monday to Friday except where necessary because of safety reasons.

(iii) Blasting shall be confined to two occasions per day except where necessary for safety reasons.

(iv) Where because of the irregular or infrequent nature of blasting starting of neighbouring tenants is likely than adequate public notification shall be given to those affected by this.

(v) When blasting the limit of particle velocity (peak particle velocity) measured on any foundation ~~(or uppermost full storey)~~ of an adjacent building not connected with the site, ~~related to the frequency of the ground vibration,~~ shall not exceed ~~the limits of Table 1 of DIN Standard 4150 Part (1986)~~ [illegible]. Peak particle



6.1.9 *Objective*

To provide for a range of rural living environments as appropriate for people who wish to live in rural areas.

Reasons for Objective

The reason for this objective is that the Council is aware that there is a desire for a variety of rural living lifestyles. Some people seek a residential style of site, others seek a site where they can graze a few animals or grow crops. Others again are looking for small to medium sized holdings where farming can be a supplement to their main employment. The Council considers that it is appropriate to provide for a wide range of lifestyles, in appropriate areas. The location of living environments above or in close proximity to an aggregate resource can make that resource unavailable. Therefore such land is considered to be an inappropriate area for rural living.

6.1.10 *Policies*

~~*a) The Council will make provision in a number of areas in the District for rural residential, semi rural, and small lot rural living. These will be areas where the soil is not of the highest quality for the production of food or areas which are already fragmented by subdivision for part time farming.*~~

a) *Areas for rural living environments (including rural residential and small lot rural) shall avoid areas of highest quality for the production of food and areas likely to be adversely affected by aggregate extraction activities in the Quarry Zone and from identified potential aggregate resources.*

Reasons for Policies (i.e. policies under 6.1.10)

The Council considers that direction should be given to the location of different styles of rural lifestyle so that the land which has less productive potential is given a greater priority for rural living than more productive land. The residential farm park concept has the potential to encourage the retention or formation of larger farm units while increasing the choice in respect of rural residential living types and potentially reducing the demand for lifestyle properties of 4 hectares or less. Residential activity in close proximity to existing quarries and rock resources identified for future quarrying may unduly limit the extraction of valuable aggregate resources. For this reason the plan's rules include special restrictions on residential activities on land in Aggregate Resource Protection Areas which are identified on the Planning Maps and explained in part 6.6.2.

Anticipated Results (i.e. results of policies under 6.1.10)

The demand for rural ~~residential~~ living environments will be met without putting unnecessary pressure on the highest quality land ~~for such activity~~ and without unduly limiting the operations of existing quarries or compromising the future ability to extract known potential aggregate resources.

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6.6 *Quarrying/Mineral Extraction*

The Hunua Range constitutes a valuable natural and physical resource in the District and the Auckland Region. Among other attributes it constitutes a major source of aggregate for the region. As quarries nearer the centre of the metropolitan area are worked out the potential for the Hunua's to supply the demand for aggregate will assume even greater significance.

Quarrying and mineral extraction can have significant effects on the environment. Not only do these activities change permanently the physical form of the land on which they are situated. They also can have off site effects which include noise, dust, traffic, contamination of ground and surface water, and visual detraction.

Other activities including residential and community activity can be sensitive to noise and vibration generated during quarrying and to adverse visual effects. The location of such sensitive activity in proximity to an aggregate resource can unduly limit the ability to extract the resource.

The Papakura District Plan - Section Three, Urban, makes specific provision for existing quarries or mineral extraction activities in future. ~~The District Plan does not attempt to predict or provide for this eventuality since it is possible for proposers of any such activity to seek a Change to the District Plan or to apply for a resource consent for a non complying activity~~. Any new mineral extraction activity shall require a change to the district plan or a resource consent.

6.6.1 Objectives

To promote the development of mineral resources of the Hunua area in an environmentally and culturally sensitive manner and to ensure that the extraction of mineral resources is not unnecessarily compromised by other activities which would be detrimentally affected by extraction and processing activities.

Reasons for Objectives

Papakura District contains important mineral resources, particularly rock aggregate which it is important to recognise and protect, and in respect of which it is important to determine whether they are to be exploited or to be preserved.

Add a new clause (e) to policy 6.6.2 and amend reasons and anticipated results as follows:

e) *Mineral resources shall not be compromised by the encroachment of activities which would be detrimentally affected by extraction and processing activities. which would, in turn, unduly limit quarry operations or the ability to extract in the future.*

Reasons for Policies

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The Council has determined that the development of its mineral resources is appropriate with respect to its duties to sustainably manage the resources of the District. ~~*Further, the Council considers that the policies are necessary to regulate any exploitation and to minimise any adverse environmental effects.*~~ *Further, the policies are necessary to regulate extraction and to avoid, remedy or mitigate any adverse effects from quarrying or from the encroachment of residential, educational and community activities on significant mineral resources. Aggregate minerals are a finite and non-renewable resource. The location of mineral extraction activities is limited to where the minerals are found. Development in close proximity to existing or future quarries may create conflicts which impede the efficient long-term extraction of aggregate resources. For these reasons the planning maps show Aggregate Resource Protection Areas in which rock resources will be protected by limiting other activities as follows:*

(i) *In a buffer area surrounding land planned for quarry activity in the Quarry zone in Hunua Gorge Road;*

(ii) *On land on the north side of Hays Stream which contains a potential resource for future extraction.*

The plan's rules include special restrictions on subdivision and on residential, educational and community activities on land in Aggregate Resource Protection Areas.

Anticipated Results

Mineral exploitation in Papakura will occur only as a result of thorough investigation and assessment of its effects and a decision that these effects are acceptable or can be sufficiently mitigated. Important aggregate resources will not be compromised.

Rule 7.1.2 (Permitted Activities in the Rural Papakura Zone) is amended,

(a) By adding a proviso to the following activities as shown:

- *One single household unit on each certificate of title.*

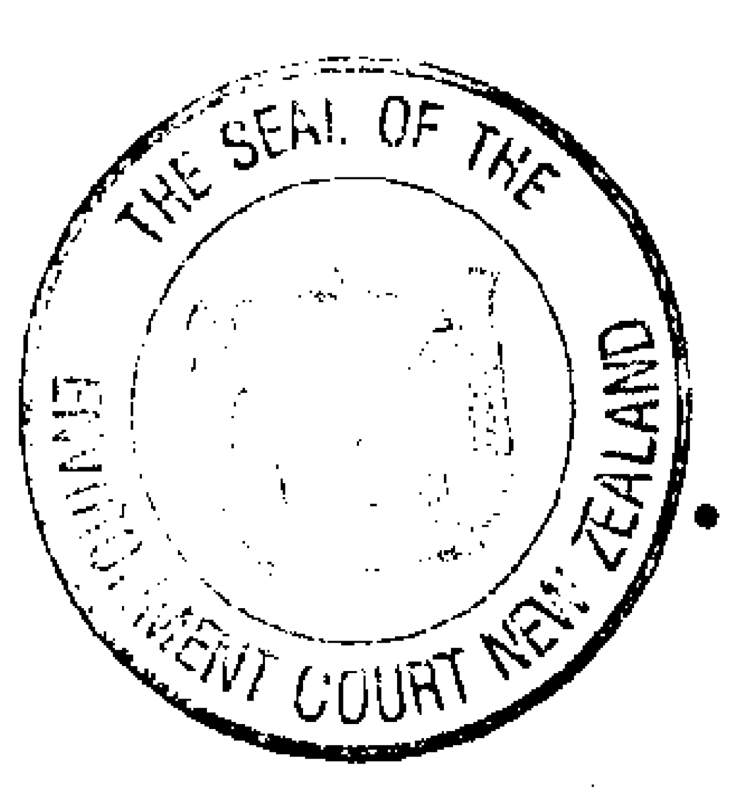
  (Proviso - on land in an Aggregate Resource Protection Area this is a discretionary activity.)

- *A single household unit on a lot created pursuant to the subdivision rules of this plan.*

  (Proviso - on land in an Aggregate Resource Protection Area this is a discretionary activity.)

- *A temporary household unit complying with rule 8.4.*

  (Proviso - on land in an Aggregate Resource Protection Area this is a discretionary activity.)



- *Farmstay accommodation provided that the farmer and family live on the premises and no more than 10 persons, inclusive of occupiers, family and staff are accommodated in the dwelling.*

  (Proviso - on land in an Aggregate Resource Protection Area this is a discretionary activity.)

- *Educational institutions which are not directly associated with and ancillary to farming activity, provided that such institutions are not permitted on land which has a classification, in terms of the NZ Land Use Capability Surveys I or II or III.*

  (Proviso - on land in an Aggregate Resource Protection Area this is a discretionary activity.)

(b) By adding the following new activity:

- *Prospecting and exploration as defined in the Crown Minerals Act 1991 and water well drilling, provided that the activity does not involve the removal or excavation of more than $100m^3$ of material, does not result in any increase in sediment flows to streams and rivers, complies with the NZ Standard NZS 6803P 1984 Measurement and Assessment of Noise from Construction, Maintenance and Demolition Work, and does not cause dust nuisance.*

Rule 7.1.3 (Controlled Activities in the Rural Papakura Zone is amended by adding a proviso to the following activity:

- *Papakainga housing on Maori land up to a maximum of four dwelling units at a density of not more than one unit per hectare complying with the special provisions stated in rule 8.6*

  (Proviso - on land in an Aggregate Resource Protection Area this is a discretionary activity.)

Rule 7.1.4 (Discretionary Activities in the Rural Papakura Zone) is amended by the addition of the following new activities:

- *Any activity listed as a permitted or controlled activity which is annotated "On land in an Aggregate Resource Protection Area this is a discretionary activity".*

  Prospecting and exploration as defined in the Crown Minerals Act 1991, and water well drilling which do not comply with the requirements for a permitted activity.

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Rule 7.1.5.2 (Controlled Activities under the heading of Subdivision in the Rural Papakura Zone) is amended by the addition of the following proviso at the end of the rule:

(Proviso - on land in an Aggregate Resource Protection Area subdivision is a discretionary activity.)

Rule 7.1.5.3 (Discretionary Activities under the heading of Subdivision in the Rural Papakura Zone) is amended by the addition of the following new activity.

- *Any activity listed as a permitted or controlled activity which is annotated "On land in an Aggregate Resource Protection Area this is a discretionary activity" and subject to the assessment criteria setout in Rule 8.14.*

Rule 7.3.2 (Permitted Activities in the Rural - Residential zone) is amended:

(a) By adding a proviso to the following activities as shown:

- *One single household unit on each certificate of title.*

  (Proviso - on land in an Aggregate Resource Protection Area this is a discretionary activity.)

- *Temporary household units complying with rule 8.4.*

  (Proviso - on land in an Aggregate Resource Protection Area this is a discretionary activity.)

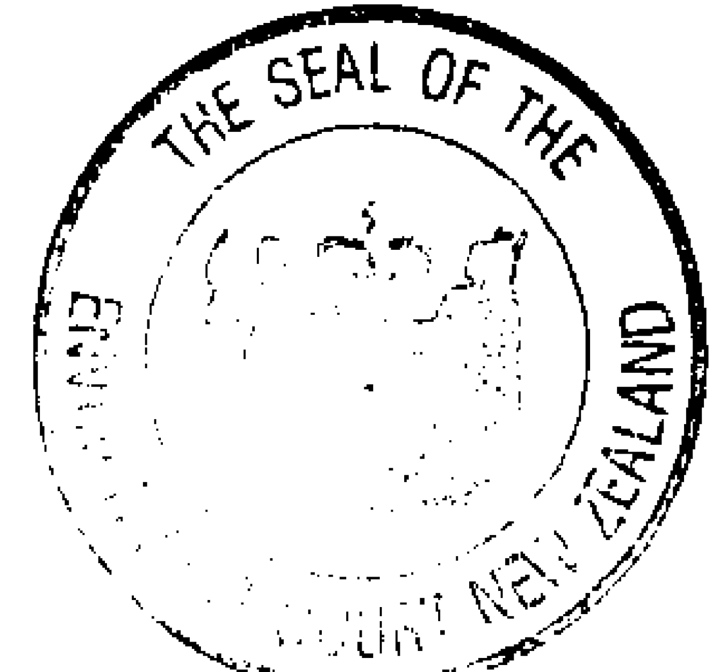
- *Doctor's surgeries.*

  (Proviso - on land in an Aggregate Resource Protection Area this is a discretionary activity.)

(b) By adding the following activity:

- *Prospecting and exploration as defined in the Crown Minerals Act 1991 and water well drilling, provided that the activity does not involve the removal or excavation of more than 100m³ of material, does not result in any increase in sediment flows to streams and rivers, complies with the NZ Standard NZS 6803P 1984 The Measurement and Assessment of Noise from Construction, Maintenance and Demolition Work, and does not cause dust nuisance.*

Rule 7.3.4 (Discretionary Activities in the Rural Residential Zone) is amended by the addition of the following new activities.



- *Any activity listed as a permitted or controlled activity which is annotated "On land in an Aggregate Resource Protection Area this is a discretionary activity".*

- *Prospecting and exploration as defined in the Crown Minerals Act 1991, and water well drilling which do not comply with the requirements for a permitted activity.*

Rule 7.3.5.2 (Controlled Activities under the heading of Subdivision in the Rural Residential Zone) is amended as follows:

7.3.5.2 ***Controlled Activities***
Subject to assessment against the relevant criteria set out in Rule 8.13 subdivision to a minimum lot size of 1 hectare provided that lot sizes may be reduced to a minimum of 4000m² if, for every lot of less than 1 hectare there shall be a corresponding lot of at least 2 hectares. (Proviso-on land in an Aggregate Resource Protection Area this is a discretionary activity).

Rule 7.3.5 (Subdivision in the Rural Residential Zone) is amended by the addition of a new rule as follows:

Rule 7.3.5.4 Discretionary Activities

- *Any activity listed as a permitted or controlled activity which is annotated "On land in an Aggregate Resource Protection Area this is a discretionary activity" and subject to the assessment criteria set out in Rule 8.14.*

Rule 7.5.2 (Permitted Activities in the Nature Conservation Zone) is amended as follows:

(a) By altering the first part of the fourth bullet point to read as follows:

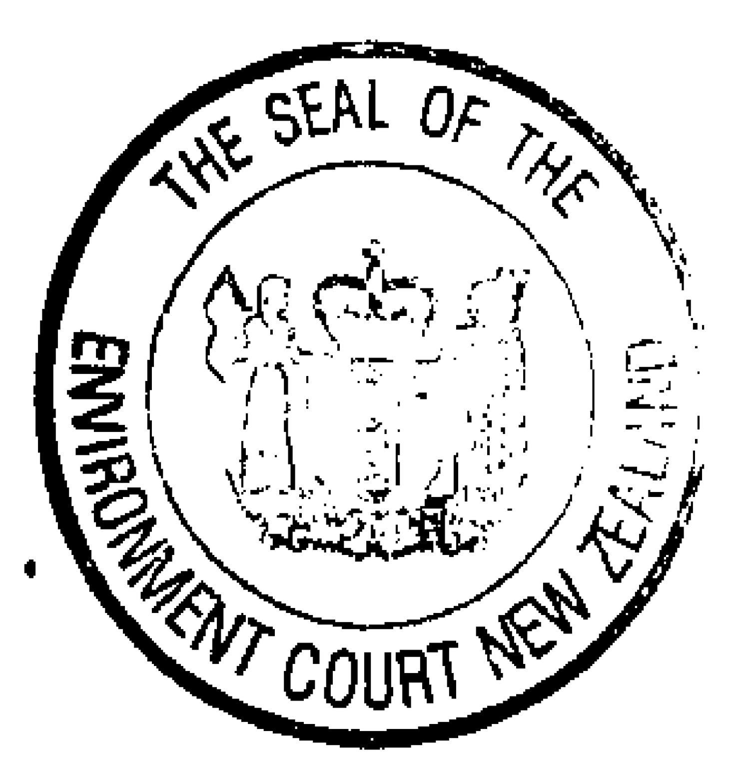
- *Provided that a safe and stable building platform, outdoor living area, access, on-site effluent disposal, and network utilities can be provided without the damage or removal of indigenous trees and vegetation, the following activities are permitted:*

  (i) A single household unit on each certificate of title.

  (Proviso - on land in an Aggregate Resource Protection Area this is a discretionary activity.)

  (ii) A temporary household unit complying with rule 8.4.

  (Proviso - on land in an Aggregate Resource Protection Area this is a discretionary activity.)



(b) By adding the following activity:

- *Prospecting and exploration as defined in the Crown Minerals Act 1991 and water well drilling, provided that the activity does not involve the removal or excavation of more than 100m³ of material, does not result in any increase in sediment flows to streams and rivers, complies with the NZ Standard NZS 6803P 1984 The Measurement and Assessment of Noise from Construction, Maintenance and Demolition Work, and does not cause dust nuisance.*

Rule 7.5.4 (Discretionary Activities in the Nature Conservation Zone) is amended by the addition of the following new activity.

- *Any activity listed as a permitted or controlled activity which is annotated "On land in an Aggregate Resource Protection Area this is a discretionary activity".*

- *Prospecting and exploration as defined in the Crown Minerals Act 1991, and water well drilling which do not comply with the requirements for a permitted activity.*

Rule 8.2.6.1 (General Subdivision Requirements) is amended as follows:

In approving any subdivision application in the rural areas of the District the Council will need to be satisfied that the physical characteristics of the site in terms of factors which include geology, slope, liability to flooding and liability to slipping, are suitable for the proposed subdivision layout and its intended purpose and will not result in adverse environment effects beyond the subdivision. The subdivision rules of Part 7 include special provisions for subdivision in the Aggregate Resource Protection Area.

Rule 8.13.1 (Controlled and Discretionary Activity Assessment Criteria - Nature Conservation Zone) is amended by the addition of the following clause.

8.13.1 Controlled and Discretionary Activity Assessment Criteria Nature Conservation Zone

In addition to the general matters outlined in Rule 8.14 and Rule 8.15, in granting a consent for a controlled activity or considering a discretionary activity in the Nature Conservation Zone the Council will assess the activity in terms of the following matters over which it has reserved control, and conditions of consent may be imposed in relation to these matters.

c) in respect of a land use consent application, effects on utilisation of aggregate resources.

d) In respect of residential activity located within any Aggregate Resource Protection Area identified on the planning maps:

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

- *the effect of the activity on potential utilisation of the mineral resource*
- *whether quarry operations will be unduly limited or future extraction compromised*
- *whether the building is located on the site and designed and constructed to mitigate any adverse effects of its proximity to existing and probable future quarry operations.*

Rule 8.14 (Discretionary Activity Assessment Criteria) is amended by the addition of the following clause

8.14 Discretionary Activity Assessment Criteria
In deciding whether to grant or refuse consent to a discretionary activity application and in imposing conditions if consent is granted, the Council will have regard to:

(q) In respect of a land use consent application, the effects on utilisation of aggregate resources.

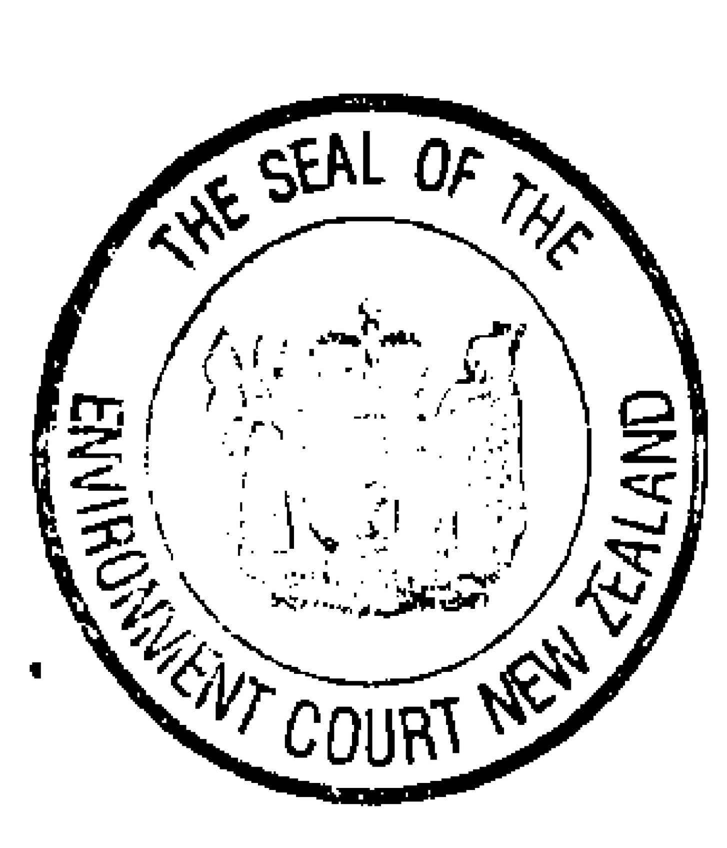
r) in respect of residential, education or community activity located within any Aggregate Resource Protection Area identified on the planning maps:

- *the effect of the activity on potential utilisation of the aggregate resource.*
- *whether quarry operations will be unduly limited.*
- *whether the building is located on the site and designed and constructed to mitigate any adverse effects of its proximity to existing and probable future quarry operations.*

(s) In respect of a subdivision consent application the extent to which activities consequential upon subdivision would result in effects which unduly compromise existing or potential quarrying of aggregate on any land in the Aggregate Resource Protection Area.. Factors which serve to mitigate effects, for example topography or resource consent conditions, may be taken into account in determining the desirability of a buffer requiring the separation of likely consequential activities from the aggregate resource.

Rule 8.19 (Effect of Quarry Operations on surrounding Activities) is amended as follows:

Activities which are located in close proximity to existing quarries can expect to experience occasional noise vibration and dust as a result of the operation of the quarry. Any residential, educational or community activity located within any Aggregate Resource Protection Area identified on the planning maps and any subdivision for such purposes of land which is located or partly located within any Aggregate Resource Protection Area shall be assessed as a discretionary activity.



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Activity in the Quarry Zone is controlled by the zone rules. Quarries are also controlled by other legislation. The noise level from construction maintenance and demolition activities within the Quarry Zone shall comply with and be assessed in accordance with the New Zealand Standard NZS 6803P: 1984. Measurement and Assessment of Noise from Construction. Maintenance and Demolition Work.

Planning Map No. 1 in the Rural Section of the Proposed District Plan is to be amended to show the location of an Aggregate Resource Protection Area.

Planning Map No. 1 in the Rural Section of the Proposed District Plan is to be amended to remove the Nature Conservation Zone from the land owned by Winstone Aggregates Ltd being Lot 1 DP60065, being the land comprised and described in Certificate of Title 18D/1181.

Appellant	**BECMEAD INVESTMENTS LIMITED**	1
Respondent	**CHRISTCHURCH CITY COUNCIL**	
Decision Number	A088/96	
Tribunal	Judge Bollard presiding, IG McIntyre, R Grigg	
Judgment Date	18/10/1996	
Counsel/Appearances	Milligan, JR; Dewar, AC; Hughes-Johnson, AC; Wylie, ED; Perpick, M; Gallen, AFJ; Arthur, BH; Clark, I; Tait, HM; Day, WA	5
Quoted	Canterbury United Council v Waimairi District Council (1989) 13 NZTPA 338; International Motor Inn v Waimairi District (1988) 13 NZTPA 82; Donnithorne v Christchurch City Council [1994] NZRMA 97, 103; Hall v Rodney District Council [1995] NZRMA 537; Osmond v Waipa District Council 2 ELRNZ 234; Chan v Auckland City Council [1995] NZRMA 68; Canterbury Regional Council v Waimakariri District Council 1 NZRMA 108; Falkner v Gisborne District Council [1995] 3 NZLR 622	10, 15
Statutes	Resource Management Act 1991, 1991/69, s2, s5(2), s5(2)(b), s6, s6(a), s6(e), s7, s32, s73(2), s74(2), s74(2)(a), s75(2), s104(1)(i), s367, s367(1), s367(2), s367(2)(b), First Schedule Cl 5, Cl 10; Town and Country Planning Act 1977, s3(1)(d), 5(2)(b); Resource Management Amendment Act 1996, s2(1), s3(1), s3(1)(c), s3(1)(d), s3(1)(g)	20, 25
Full text pages:	29	

Keywords

private plan change; metropolitan urban limits; soil high value

Significant in Planning and Law s5 30

Section 5, relevance of soil quality to sustainable management purpose. Act does not require protection of high quality soils as such, although depending upon the circumstances in a particular case that may be the outcome that is most consistent with the Act's purpose.

SYNOPSIS 35

Private plan change, seeking rezoning of 2 blocks of land, 20.89ha (Nunweek block) and 15.36ha (Tulett block) at the north west edge of Christchurch City from Rural H to Residential. Rural H zone relates to the "most productive and versatile land in the (former Waimairi) District". The zone is designed to give protection to the land for the production of food. Transitional Plan developed under TCPA and this statement reflected s3(1)(d) of that Act. Although Council initially opposed the change which dated from 1992, by 40

the time of the hearing the Council had completed its growth studies and the Proposed Christchurch City Plan zoned the land and others Living 1A, a transition residential zone between rural and full urban. The two blocks have potential for about 320 residential units.
Argument that consideration of change now would pre-empt review process rejected. Court considered it had sufficient evidence to decide the case now. Tribunal had previously, in 1989, rejected zoning these blocks residential on the ground that it would be contrary to the Regional Planning Scheme strategy of containment of metropolitan Christchurch.
Regional Planning scheme still relevant in terms of s367(2) as it only ceases to have effect when there is both a proposed regional policy statement and an operative regional coastal plan. However as the issues are unrelated to the Coastal Marine Area the regional planning scheme should be afforded little weight.

In considering the Proposed Regional Policy Statement the Court differed from the view taken in Osmond v Waipa DC 2 ELRNZ 234 and found that regard should be had to the most up-to-date statement (as modified by decisions on submissions), s28 RMAA 1996, (First Schedule Cl 10) confirms this finding.
Land contained Class 1 and 2 soils and would rate highly under the Horticultural Versatility System if drainage of the land occurred. Land however is sandwiched between residential development and active urban related recreation areas. Court not persuaded that horticultural potential of land will be realised in the future.
Held that Act does not require protection of high value soils as such but depending upon the circumstances in each case that may be an outcome that is most consistent with the Act's purpose. In other cases the soil quality may not be the determinative factor. Section 5(2)(b) speaks of life supporting capacity of air, water, soil and ecosystems in a general sense, not to soil quality as such. The provision "alludes to the need to safeguard the capacity of the four specified fundamentals of earthly reality to support life in all its variety". City Council supported Change and maintained an appropriate strategy was a combination of infill and peripheral expansion, potential for satellite town growth not sufficient to mitigate against the change. Evidence pointed to a shortage of land for development in the near future. No major physical impediment to use of land for urban purposes.
Proposed change confirmed.

FULL TEXT OF DECISION A88/96

Introduction and Background to the Case

At the outset of these proceedings we were informed that the outcome would have major resource management implications for the ongoing planning of Christchurch's urban/rural fringe, both at regional and district levels. The

reference to this Court stems from a request made by the appellants (to whom it will be convenient to refer simply as "Becmead") as long ago as 1992 pursuant to s73(2) of the Resource Management Act 1991 ("the Act"). The request was for a change to the Waimairi section of the Christchurch City Council's transitional district plan by rezoning (as Residential G2) two areas of land at the north-western edge of the city. The proposal was labelled "Change No 7", and will be referred to as "the Change".

The Change was publicly notified on 29 September 1992. Over four hundred submissions were lodged with the City Council in response, all but three in opposition. Ten further submissions were lodged in response to the initial submissions likewise opposing the change.

The hearing at first instance occurred before two independent commissioners appointed by the Council. Their recommendation was that the Change not be upheld on the basis that "from the evidence presented ... it is our view that rezoning would have significant adverse effects". But they added:

> *"It may be that further evaluation of these effects in the context of a broader evaluation of the options for meeting housing needs may lead the Council to the conclusion that these blocks and/or others should be rezoned in the District Plan Review."*

The commissioners' recommendation was adopted by the Council, resulting in Becmead lodging the present reference in early June 1993.

The two blocks of rural land affected were referred to during the hearing (which occurred in two phases in February and August this year) as the Nunweek block and the Tulett Park block - the first reflecting the name of the historical owner of the land; the second, the block's contiguity with a public reserve known as Tulett Park. The Nunweek block (20.89ha) is located between Harewood Road and Wairakei Road. It too lies adjacent to a reserve called Nunweek Park on the north-western side of the block, with Residential G zoning extending to the opposite south-eastern boundary. More particularly, the block is long in shape, with the two long boundaries being shared with the reserve and the residential area respectively. The block narrows gradually throughout its length as it proceeds south-westwards from Harewood Road.

The Tulett Park block (15.36ha) is also long in shape though rectangular. It is located between Claridges Road and Sawyers Arms Road. Immediately to the north-west is Tulett Park plus a site zoned Rural H occupied by a substantial long term non-rural activity, namely, the Papanui Workingmen's Club. The park activity and that of the club are adjacent to the whole of the block's north-western boundary. As with the Nunweek block, Residential G zoning abuts the other long boundary on the south-eastern side.

Both Nunweek Park and Tulett Park are actively used for public recreation purposes - the former featuring a hockey stadium, children's playground and fields used for rugby, hockey and for cricket in summer months. The latter

features a set of clubrooms, the main sports activities being soccer and cricket. 1
The land on the other side of Claridges Road, generally to the north is zoned Rural H, as is the land on the other side of Harewood Road as regards the Nunweek block. The two blocks themselves are both within the Rural H zone which is described in the transitional district plan as encompassing "the most productive and versatile land in the (former Waimairi district)". 5
From a statement in the plan defining the zoning it is explained that "the purpose of containing this land in one zone has been to give maximum protection of the land for the production of food". Seeing that the plan was prepared prior to the Act's introduction, this statement obviously reflected the matter of national importance specified in s3(1)(d) of the former Town 10 and Country Planning Act 1977 as to the avoidance of encroachment of urban development on land having a high actual or potential value for the production of food. As will become evident, the question of protecting rural land on the urban fringe containing good quality soils was a major issue in the appeal, with the parties adopting a range of positions as to how and to what extent 15 such a consideration is appropriate or called for in seeking to promote the current Act's purpose.
During a gestation period of four to five years dating from 1991, the City Council proceeded to undertake the steps, investigations and analyses required of it under the Act in and towards preparation of its first plan drafted under 20 the Act. That plan was formally proposed to the public by notification effected on 24 June 1995. Many submissions, and submissions upon submissions, were received. The Council intends to commence hearings shortly. The total hearing phase is expected to extend over many months. Significantly, at the 25 time the Change was originally considered, the proposed plan had not reached a point where urban growth proposals had been clarifed and developed in the manner that they were by the time the plan was notified.
The zoning proposed for the two blocks of land is Living 1A (Outer Suburban Boundary). This zoning is described as applying to a number of areas of 30 existing or proposed new residential developments on the interface between the urban and rural areas. The locations of the areas concerned are listed as:

"• *South of Styx Mill Road and East of Cavendish Road (Regents Park);*
- *Between Claridges Road and Sawyers Arms Road, and East of Tullett (sic) Park;* 35
- *Between the Styx River and Crofton Road;*
- *Between Harewood Road and Wairakei Road, and east of Nunweek Park;*
- *Between Yaldhurst Road and Broomfield, west of Masham Road.*
- *Between Westlake and Wigram Road.* 40
- *Part of the area south of the Burwood-Northcote Expressway, between Philpotts and Burwood Roads".*

The zone description goes on to state: 1

> *"These zones differ from the normal Living 1 Zones because of their location on the urban edge, where a range of constraints may apply, including airport noise, soil qualities, a need to ensure co-ordinated development of separately owned land, a need for buffer zones or identification of required open space or roading linkages. The graduated transition from urban to rural identity is a key aspect of the zone."* 5

Environmental results anticipated by virtue of the zoning are said to be as for the Living 1 zone, but include:

"(a) graduated lowering of residential densities to the rural zone boundary and/or the provision of public open space on that boundary, in order to both improve the quality of the rural-urban interface, and to send a clear signal that residental development beyond the rural edges is not to take place. 10

(b) The avoidance of aircraft noise intrusion into residential areas, and the avoidance of pressures to curtail airport operations. 15

(c) The provision of high quality living environments, with a mixture of densities, lower residential densities on the rural interface, enhancement of any natural or artificial waterways and provision of public open space.

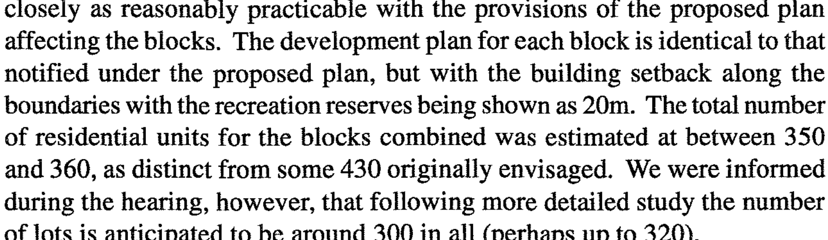
(d) (Not relevant for present purposes).

(e) A substantial provision of public open space in association with development of Nunweek, Tulett and Masham areas". 20

While we have had regard to the development standards and other provisions of the zoning proposed for the subject blocks, we refrain from attempting any comprehensive summary. It will suffice to note that development of each block is to be in general accordance with the layout shown on a development plan pertaining to each. A 30m building setback line is specified parallel to the common boundary of each block with the relevant adjacent reserve. In the course of the hearing it was indicated that the City Council was agreeable to the setback line in each case being adjusted to 20m; and on the strength of such evidence as was led on the issue we are content to accept that adjustment, bearing in mind that the the objections raised by the Regional Council and others were much more basic. 25 30

Another feature of the development plans is the requirement of a minimum lot size per unit adjoining the relevant park of 1500m^2. The requirement is also applicable in the case of the Nunweek block as to part of the land adjoining Harewood Road; furthermore, as to the parts adjoining the Workingmen's Club and Claridges Road in the case of the Tulett Park block. Ten metres wide building setbacks are specified as well in relation to the blocks' boundaries with the existing residential areas to the south-east. 35 40

Becmead's case was advanced on the basis of a re-draft of the Change, designed to lessen the extent of building development and to blend in as



closely as reasonably practicable with the provisions of the proposed plan affecting the blocks. The development plan for each block is identical to that notified under the proposed plan, but with the building setback along the boundaries with the recreation reserves being shown as 20m. The total number of residential units for the blocks combined was estimated at between 350 and 360, as distinct from some 430 originally envisaged. We were informed during the hearing, however, that following more detailed study the number of lots is anticipated to be around 300 in all (perhaps up to 320).

Some suggestion was advanced from one or more of those opposed to the Change that the hearing was, in effect, a premature consideration of the proposed plan's zoning approach to the blocks, and that because submissions are pending hearing before the City Council over the issue, the Change is without independent justification or purpose. We do not accept this. It has been known for a long time now that a change of zoning from rural to residential was proposed. The arguments both in favour of and against the Change (modified as indicated) were very fully canvassed before us against the background of both the Statement and the proposed plan (including the City Council's analysis under s32 leading to the plan's compilation). We consider that we are in a suitable position to resolve the issue without further delay.

The possibility of rezoning the subject blocks has previously been considered. Mr Milligan stated from the bar that at the time of the first review of the Waimairi district scheme in early 1970 thought was given to rezoning part of the land, but the issue was not pursued "in any determined or coherent way". When the second review was publicly notified in October 1983, both blocks retained a rural zoning. Following the hearing of objections the Waimairi District Council (as it then was) concluded that the blocks should be zoned Residential G - a decision which was taken on appeal: see <u>Canterbury United Council</u> v <u>Waimairi District Council</u> (1989) 13 NZTPA 338. At p 343 of the report the Planning Tribunal said this:

> *"Having carefully considered all the evidence given and the submission made in this case ... we are in no doubt at all that if either of these two blocks were to be zoned Residential G, this would amount to a failure to give effect to the relevant provisions of approved Section 1 of the regional scheme. This is because to so zone either block would, in our judgment, provide a significant opportunity for residential development that would tend to undermine the regional strategy of containment of metropolitan Christchurch."*

In another case reported not long beforehand (<u>International Motor Inn</u> v <u>Waimairi District</u> (1988) 13 NZTPA 82), the Tribunal discussed the relationship between regional and district schemes under the 1977 Act. It was pointed out that both regional and local planning authorities were duty-

bound to adhere to, and to give effect to, the provisions of an approved regional scheme. But the Tribunal noted that this duty, as with most matters of land use planning, often involved the exercise of a judgment, with the question whether the duty had been fulfilled in any particular case itself being a matter of judgment. Hence, with reference to the Canterbury regional scheme, the policies and objectives underlying provision of what was termed the "Green Belt" were perceived as binding at district planning level. Nevertheless, in approaching a policy clause of the regional scheme designed to prevent the erection of buildings within the Green Belt, save in special specified circumstances, it was held that the provision was "*... nothing more than a regionally-based means of achieving direction and control, and providing for some flexibility at a district level in the process*" (p.101).

Mr Milligan acknowledged that in the 1989 decision the Tribunal, in effect, held that the Nunweek and Tulett Park Blocks were within the Green Belt and that the policies and objectives for the Green Belt were such that the two blocks should be retained for rural purposes, with relevant district planning provisions reflecting the intent of the regional scheme. The following comment at p.344 of the report is, nevertheless, noteworthy:

> "*We have little doubt that if there were to be a relaxation of the policy of containment of metropolitan Christchurch, these two blocks would be prime candidates for zoning changes .... But we do not think the so-called defendable boundary argument should prevail now, in anticipation of this. In other words we think it is a regional matter, and we must say we find it somewhat surprising that if the respondent has had it in mind for some time to use these parks as defendable boundaries, it has not advanced that more vigorously, even to the point of requesting an inquiry during the process of regional review. That is the time when such a proposition should have been put forward.*"

Picking up on this passage, Mr Milligan reminded us that Becmead had had no right to object to the regional scheme when it was proposed. He submitted that it was thus by a "somewhat mechanistic" process that the Tribunal determined in 1989 that the relevant lands should remain within the Rural H zone.

Not surprisingly, the relevance of the regional scheme for present purposes was strongly contested. On 1 October 1993 a proposed regional policy statement (hereafter called "the Statement") was notified. Many submissions were lodged. The Regional Council has heard them and decisions were issued on 20 November 1995. Nine references on appeal have resulted, with some three of them challenging policies designed to protect what is described as "versatile land" (being Class I and II land, as per the NWASCO Land Use Capability Classification System) from non-rural activity - particularly urban encroachment liable to conflict with the land's availability and future potential

as a resource for primary production. We return to the Statement's provisions later.

At this point it is the very existence of the Statement that matters, inasmuch as s367 of the Act provides:

"367. Effect of regional planning schemes -

(1) Except as provided in subsection (2), every regional council and territorial authority, in carrying out any of its functions described in sections 30 and 31, shall have regard to the provisions of a regional planning scheme approved under section 24 of the Town and Country Planning Act 1977 in respect of the region or district immediately before the date of commencement of this Act, to the extent that those provisions are not inconsistent with Part II.

(2) Subsection (1) shall cease to apply to a regional council or territorial authority once there is, in respect of the relevant region or district, -

(a) A proposed regional policy statement; and

(b) In the case of a region which includes a coastal marine area, an operative regional coastal plan (other than a regional coastal plan deemed to be constituted under section 370(1)) in respect of the coastal marine area."

For the purposes of subs.(2)(b) it is common ground that the Canterbury region is one which includes a coastal marine area. It is also common ground that, thus far, an operative regional coastal plan of the kind adverted to in paragraph (b) does not exist - although such a plan is at the proposed stage, the time for submissions and further submissions having closed, but with the hearing and determination of them yet to be completed.

Counsel for Becmead and for the Regional Council were in agreement that because the regional coastal plan is not yet operative s367(2) does not apply in present circumstances, given the word "and" linking paragraph (a) of the subsection with paragraph (b). Hence, as Mr Milligan put it for Becmead, the regional scheme remains (as a matter of statutory construction) relevant pursuant to subs.(1), inasmuch as the region does not have both a proposed regional policy statement and an operative regional coastal plan. However, he went on to point out that the issues surrounding the Change do not relate to the coastal environment. Hence, he contended that whatever form the regional coastal plan may take when operative, its provisions would not be relevant in determining the "planning fate" of the subject blocks. For practical purposes, therefore, he contended that the regard to be paid to the provisions of the regional scheme in terms of s367(1) should be such as to result in the provisions of that document being afforded no weight. In other words, he invited us to accept the literal meaning of s367(2), while accepting as well that, because the two blocks are not within the coastal marine area, it would be in keeping with Parliament's intent that the contents of the Statement should

be paramount, to the point of eliminating any need to do more than have 1
passing regard to the provisions of the regional scheme as a matter of historical
background only.

We were reminded of the distinction in meaning to be drawn between "have
regard to" and "take into account"; see, for instance, Donnithorne v
Christchurch City Council [1994] NZRMA 97, 103. Furthermore, Hall v 5
Rodney District Council [1995] NZRMA 537 was pointed to, where the
Planning Tribunal declined to construe s367(2) as if the word "and" meant
"or". In that case it was observed:

> *"Although it seems unlikely that a proposed regional policy statement*
> *would add measures to those of an operative regional coastal plan that* 10
> *would be significant for functions under ss 30 or 31 which would*
> *otherwise be provided by an approved regional planning scheme under*
> *the former regime, we cannot conclude that they could never be relevant,*
> *or that it would be absurd to construe the section in that way."* (p.552)

Having advanced this comment, the Tribunal went on (at the same page) to 15
adopt a pragmatic approach by suggesting that the whole subsection should
take effect "according to whether the planning authority is giving consideration
to provisions which apply within the coastal marine area or not".

Mr Wylie contended that the Tribunal in Hall effectively treated the word
"and" as though it were "or", (having earlier disavowed a necessity to go that 20
far), by concluding that if the provisions under consideration are not applicable
in the coastal marine area, then, once there is a proposed regional policy
statement "the duty to have regard to the approved regional planning scheme
ceases to apply, irrespective of whether there is an operative regional coastal 25
plan in respect of the coastal marine area of the region". (ibid) We prefer a
slightly different approach to that in Hall - although we imagine that, in
practice, little or no difference to the overall outcome would normally result.
Assuming for purposes of argument there are provisions of the regional
planning scheme that are not inconsistent with Part II of the Act and have a 30
bearing on the case, we nevertheless consider that little weight should be
attached to them. This is so because of the existence of the Statement which
has been prepared under the Act, in terms of which comprehensive provisions
are incorporated bearing on issues relating to the region's general direction
as to the urban/rural fringe and the protection of rural land containing versatile 35
soils from urban encroachment. We consider it consonant with s367 and the
Act's broad purpose as a reform measure that, consequent upon notification
of the Statement, the regional scheme deriving from the 1977 Act ought not
to be afforded any significant weight in reference to issues unrelated to the
coastal marine area. In essence, those provisions have been overtaken by 40
those of the Statement.

Another question of law which it will here be convenient to address is whether,

in having regard to the Statement, we should view it in the form in which it was publicly notified or in the form that it has now attained consequent upon the Regional Council's decisions on submissions. Mr Milligan pointed to s74(2), the relevant part of which reads:

"(2) In addition to the requirements of section 75(2), when ... changing a district plan, a territorial authority shall have regard to -

(a) Any proposed regional policy statement ... on a matter of regional significance in respect of its district; and

... "

The relevant part of s75(2), in turn, reads:

"(2) A district plan shall not be inconsistent with -

...

(c) The regional policy statement, or any regional plan of its region in regard to any matter of regional significance or for which the regional council has primary responsibility under Part IV."

Mr Milligan submitted that the document to which s74(2)(a) requires us to have regard is that which was publicly notified and not the updated version. He drew our attention to the definition of "proposed plan" in s2 of the Act, which states that such a plan is one "... that has been notified under clause 5 of the First Schedule but has not become operative in terms of clause 20 of the First Schedule ...". (We note that the relevant part of the definition has not been altered by s2(1) of the Resource Management Amendment Act 1996 which received the Royal assent on 2 September 1996.) Counsel went on to contend that, whilst there is no definition of "proposed policy statement" in s2, it would be sensible to regard that term in the same light as a proposed plan, in that the notification provisions in clause 5 of the First Schedule specifically apply where a local authority "... has prepared a proposed policy statement or plan ...". According to the argument, because none of the alterations effected by the Regional Council's decisions on submissions has been notified in the manner required under clause 5, the document to which regard is to be had for the purpose of considering the Change is that which was actually notified. Our initial reaction to this line of reasoning when counsel raised it was that it seemed rather artificial and unreal. In assessing the merits of the Change, we wondered how Parliament could have intended that we should be prevented from having regard to the Statement in the light of decisions made by the Regional Council on submissions to the Statement. Rather, we thought that as the public input process progressed, so it might be expected that the Statement would all the better reflect how the Act's purpose was intended to be achieved from a regional planning perspective.

We were referred to Osmond v Waipa District Council 2 ELRNZ 234, where it was recently held by a differently composed panel from ourselves that, in assessing a resource consent against the provisions of a proposed district

plan, one should look at the provisions of the plan as notified rather than what they would be in terms of decisions on submissions (eg occurring between the first instance and appeal hearing). It was observed, however, that regard could nevertheless be had to any such decisions under s104 (1)(i) ("Any other matters that the consent authority considers relevant and reasonably necessary to determine the application"). In essence, it was held that the decisions in themselves effected no amendment to the plan at the time they were made while the plan still remained proposed in status.

Looking to the purpose and intent of the legislation, and notwithstanding anything to the contrary in *Osmond,* we adhere to the view that regard should be had to the most up-to-date state of the Statement in considering the change, so that the latest and presumably best informed planning position from a regional perspective may be weighed. Indeed, we are reinforced in our approach by the following section of the 1996 Amendment Act which, in our view, has now placed the matter beyond any doubt:

"*28. Validation -*

(1) Any proposed policy statement or proposed plan, or policy statement or plan, or part thereof, on which a decision has been made, under clause 10 of the First Schedule to the principal Act, before the commencement of this Act shall not be invalid because it includes decisions that were consequential alterations arising out of submissions or other relevant matters the local authority considered relating to matters raised in submissions.

(2) Any proposed policy statement or proposed plan, or policy statement or plan, or part thereof, on which a decision has been made, under clause 10 of the First Schedule to the principal Act, before the commencement of this Act shall be deemed to include any amendment which was made as a result of decisions on submissions to that proposed policy statement or proposed plan, whether or not those decisions were publicly notified.

(3) For the purposes of subsection (2) of this section, the amendments made as a result of decisions shall be deemed to have been included in the proposed policy statement or proposed plan from the date the local authority gave its decision under clause 10 of the First Schedule to the principal Act."

Plainly, it is intended that decisions by a regional council upon submissions to a proposed regional policy statement are to be paid regard to by a district council in analysing the merits of a district plan change in circumstances where regional planning aspects require consideration as here. We do not overlook, however, that references are pending bearing on critical issues in the Statement - issues to which we were urged to attach major weight by counsel for the Regional Council. Other counsel, including, in particular, Ms Arthur for the Minister for the Environment ("the Minister"), urged us to

attach little or no weight to the provisions in the Statement relating to the protection of rural land containing versatile soils from urban encroachment. Ms Arthur went so far as to submit that the relevant provisions are so redolent of outmoded thinking under the former Town and Country Planning legislation that we should forthwith declare them to be ultra vires the 1991 Act in these proceedings. This was suggested despite the existence of a reference by the Minister awaiting hearing from a decision of the Regional Council on a submission of the Minister raising the same issue. Because of the way the hearing developed, we apprehend that there is no alternative but to discuss and consider the Minister's line of argument, alongside the arguments of others at variance, despite our concern not to prejudge issues that, in the ordinary course, would come before the Court via references flowing from the submission process concerning the appropriateness or otherwise of the Statement's provisions.

Christchurch City Council's Case

In introducing the City Council's case, Mr Hughes-Johnson pointed out that, although the Council's decision in 1993 was not to uphold the Change, a memorandum was filed on 6 December 1995 indicating a shift in stance. Reference was made to altered circumstances as a result of the preparation and notification of the Council's first proposed plan under the Act. Further, it was submitted that the circumstances which had led to the Council's change of mind were quite different from those in Chan v Auckland City Council [1995] NZRMA 68 where the Planning Tribunal found that the respondent, acting as a local authority and not as a consent authority within the definition of the term under s2 of the Act, had gone beyond its own staff and employed an outside consultant who had not previously made a report and whose opinion supported a conclusion contrary to the Auckland City Council's decision. No suggestion arose in any quarter before us that the circumstances surrounding the present respondent's alteration of position were at all akin to those in Chan. We accept that, with the effluxion of time and ongoing events in the planning process, the City Council, with the assistance and advice of its officers, has genuinely concluded that the change should be upheld - consistent with the proposal in the proposed plan ("from this point called "the Plan") that the two blocks be residentially zoned.

As earlier mentioned, the Plan was publicly notified on 24 June 1995, with the City Council having, in effect, made a decision consequent upon its investigation and analysis under s32 of the Act that the blocks should be rezoned for residential purposes (Living 1A zone). Although, as yet, none of the provisions in the Plan has been tested via the hearing of submissions, we agree with the Council's senior planner, Mr R C Nixon, that in evaluating the Change at this point, it is reasonable, and indeed appropriate, to have regard to work carried out in and towards preparation of the Plan bearing on questions

such as the protection of land containing versatile soils for productive purposes and provision for future urban growth. We pause to add that a major source of contention centred on whether the Change and the relevant provisions of the Plan could stand in the face of certain provisions of the Statement, including particularly policy 6 in Part 7 (Soils and Land Use), reading:

"Policy 6

Avoid the irreversible use of versatile land where that use would:

(1) fail to safeguard the life-supporting capacity of versatile soil in the region;

(2) fail to sustain the potential of versatile land in the region to meet the reasonably foreseeable needs of future generations;

(3) have a significant adverse cumulative effect on versatile land in the region;

(4) result in inefficient use and development of versatile land."

- and, in view of objective 3 and policy 5 of Part 12 (Settlement and Built Environment), reading:

"Objective 3

Maintain the rural character in the proximity of Christchurch."

"Policy 5

Discourage urban development and the physical expansion of settlements where the use of land for such purposes would result in loss of areas containing significant amenity, landscape or ecological values in the proximity of Christchurch or adversely affect the maintenance of rural-urban contrasts where such effects meet the criteria of sub-chapter 20.4."

(Sub-chapter 20.4, it may be noted, seeks to set forth various criteria for determining when a matter is to be regarded as of regional significance. Other criteria are specified to assist in identifying regionally significant effects.)

It was common ground that the Plan is not as far advanced in the submissions/reference process as the Statement. But it was contended for the City Council that both documents are in a fluid state, with the City Council having filed a reference over various provisions of the Statement (including, in particular, policy 6), and with the Regional Council, in turn, having lodged submissions to the Plan challenging alleged inconsistencies with the Statement, including the proposed residential zonings of the subject blocks.

Other Parties' Cases

Notwithstanding the City Council's support for the Change, evidence from a comprehensive range of witnesses was adduced for the appellants. Taken together with the City Council's evidence, an impressive case was built up in favour of the Change. The rezonings were, in effect, supported by the Minister, inasmuch as he wished his concern conveyed at the possibility that the rezonings might be rejected through the attachment of weight to allegedly

invalid or misconceived provisions in the Statement centred on the concept of protecting land with soils of good quality. Mr Wylie indicated that the Regional Council's case was founded on the irreversible consequence that would flow from the rezonings in the face of the Statement's provisions, aimed at sustaining the potential of versatile land, (which is defined in the Statement as "Class I and II land, as per the NWASCO land use capability classification system"), and safeguarding the soil's life-supporting capacity. Ms Arthur, in turn, made it plain that it was this line of approach to the Change to which the Minister was opposed. If there were other grounds for opposing the rezonings, such as perceived likely adverse effects upon surrounding amenities, then the Minister was neither in support of nor opposed to the Change.

The position of the Christchurch Civic Trust ("the Trust") and that of various submitters who appeared in person or were represented was broadly supportive of the Regional Council. It was contended that rezoning of the subject sites for subdivision and residential use, given their potential for rural activity and their location at the outer fringes of existing urban development, would only serve to undermine planning efforts to contain urban sprawl and not result in new urban limit boundaries that could be confidently relied upon in the future as being fully defensible.

Evaluation and Assessment

Much evidence was adduced concerning the blocks' potential for horticultural production. Various experts called by the major parties indicated that the predominant soils on both sites are classified under the Land Use Capability System as Classes I and II. We accept the evidence of Mr T H Webb, called on behalf of the Regional Council, that 97% of the Nunweek block and 94% of the Tulett Park block is rated as LUC Classes I and II. And he went on to state that, in his view, 67% and 60% of the respective blocks have high potential versatility for horticultural production. However, a difference of opinion was evident between him and other counterpart experts as to how readily the productive potential might be realised on account of such aspects as provision of drainage and shelter belts, not to mention the need to maintain a reasonable buffer or separation strip from adjacent residential activities because of possible noise nuisance and chemical spray drift. On weighing all that the various witnesses qualified in horticulture and soils analysis had to say, we are satisfied that both blocks could be utilised for certain types of horticulture. But for this to happen, appropriate drainage improvement and management steps would have to be introduced. It is evident that the cropping pattern of both blocks hitherto has featured minimal management input, without expenditure of major capital to improve the blocks and thus enable their full productive capability to be realised and sustained from year to year. In short, their versatility for productive purposes is notably constricted, if not

impaired, through a continuing failure (deliberate one would suppose rather than through ignorance) to introduce necessary enhancing measures.

While, as mentioned, the predominant soils of both blocks are classified as Classes I and II under the Land Use Capability System, we accept that a further system adverted to in evidence as the Horticultural Versatility System is a more specific and objective classification system for present purposes. Under this system we find that the main soils on the sites are predominantly classes V3 and V5. However, it was evident that both blocks could be classified more highly if suitable drainage were supplied. Even so, the recent history of the blocks lends little confidence to the likelihood of their being improved to the standard necessary to realise their potential in terms of soil quality. The chances of the capital outlay involved in suitably draining the blocks actually being expended are, in our view, low. We also bear in mind various other factors raised going to land use management, with the costs inherent in following them through. Looked at overall, we are not persuaded that it is at all likely that such potential that either block has in theory for intensive rural use will be actively pursued in practice. Rather, in all probability the blocks will become more and more retarded on account of lack of capital input for rural activity utilisation, against the day when they can finally achieve recognition for urban development. Becmead and the City Council contend that that day has arrived.

It would be quite wrong to think that someone holding rural land in the vicinity of the urban fringe may, as a matter of course, expect that some privately held objective to obtain an urban rezoning will be served if the land is shown to be neglected. Much will depend upon the particular circumstances. Were the present sites in the state they are in other locations at or near the urban fringe, that hypothetical case would require its own appraisal against the relevant factors pertaining. But in the sites' existing locations, with each block sandwiched between residential development and large active urban-related recreation areas, we can perceive readily enough how and why they have remained as they are and what their future is realistically likely to be if the Change is rejected.

We accept the view of Becmead's horticultural consultant witness, Mr R A Brooks, that the blocks as they exist have low to moderate versatility for horticultural production. We also accept that there is an estimated 21,000 ha of similar soils available within a 40 to 50 km radius of Christchurch city and that major horticultural activities are successfully occurring on significantly larger properties, suitably drained and managed, representing ventures carrying the efficiencies of scale. Those properties do not depend on a location adjacent to the urban area, but they are generally close enough to avail themselves of ready transport and access to market outlets.

The spectrum of views we heard on the importance of protecting land with

versatile soils ranged from the Regional Council's strong concern, supported by the Trust and other submitters, to see the potential of the blocks retained for productive purposes, to the view conveyed by Ms Arthur for the Minister that the protection of such land is, as a matter of principle, not an appropriate resource management issue under the Act; or, if it is, is one to be afforded little weight. Mr Wylie and Mr Clark contended that counsel for the Minister was wrong in suggesting that no weight should be given to the Statement's aim to protect versatile land for the purpose of primary production; further, they strongly disagreed with the suggestion that, unless the soils of the subject blocks can be said to have some additional quality rendering them unique in some respect, it would be contrary to the Act's purpose for them to be retained for non-residential activity on account of the fact that they contain Class I and II soils in common with much other land in the Canterbury region. Putting it another way, given the acknowledged fact that the region is blessed with thousands of hectares of Class I and II soils, it was urged for the Minister that the Court should place little or no weight on the presence of either class of soil on the two blocks and upon the productive capability or potential of the relevant classes in contrast to other soil classes. The contrary argument, in summary, was that because of the importance of the versatile land resource of the region, based on both the quality of that resource and its extent, the proper management of it under the Act, both collectively and as regards particular areas (including for present purposes the subject blocks), is essential for the benefit of present and future generations.

In addressing Mr Clark's contentions in particular, Mr Gallen reiterated what Ms Arthur had previously emphasized - that Parliament did not see fit to bring forward the former matter of national importance specified in s3(1)(d) of the 1977 Act ("The avoidance of encroachment of urban development on, and the protection of, land having a high actual or potential value for the production of food"). By contrast, it was noted that certain matters referred to in ss 6 and 7 of the 1991 Act could be said to bear a resemblance with one or more other paragraphs of the former s3(1) - for instance, in reference to the coastal environment where the old s3(1)(c) may be compared with the current s6(a); also, the old s3(1)(g) as to the relationship of the Maori people and their culture and traditions with their ancestral land, which may be compared with the current (though expanded) s6(e). We accept immediately that no provision similar in wording to the former s3(1)(d) is to be found in today's legislation. This was acknowledged very shortly after the Act's introduction in Canterbury Regional Council v Waimakariri District Council 1 NZRMA 108, where it was observed (p 110):

> *"While it was pointed out that counterpart wording to s3(1)(d) of the 1977 Act has not been included in the matters of national importance specified in s6 of the 1991 Act, we nevertheless regard the protection and*

wise use and management of good quality soil land with high actual or potential value for food production as signal matters for consideration - both against the background of s5 and in terms of considerations under s7 such as para (b) "The efficient use and development of natural and physical resources"; and (g) "Any finite characteristics of natural and physical resources".

With the benefit of having considered the arguments of others, Mr Gallen indicated towards the end of the hearing that it was not the Minister's contention that the protection of land containing soils of high value for food production may not be a resource management issue on occasion. In some cases it was acknowledged it would be. Whether it is an issue depends on the circumstances in the particular district, or, if the matter is identified as being one of regional significance, in the relevant region. It was submitted, however, that the perceived value of soils under various classification methods needs to be distinguished from the ability to use the land for different purposes. One must, so it was contended, avoid introducing wholesale restrictions based on preserving the land's potential to produce food, with a consequent militation against due promotion of the Act's purpose. As we understood the thrust of the submission, one should not suppose that the Act's purpose will be automatically promoted by first identifying good quality soil land in rural or semi-rural areas, and then proceeding to plan on the basis that the land in question must be protected from activities that might run counter to maintenance of the land's potential to produce food. If reference is intended to an inflexible pre-determined strategy in this context, we would respectfully concur. One should not blithely proceed to introduce blanket objectives and means of attaining them on the basis of some exclusively conceived approach or outlook. Rather, consideration must be afforded to the full range of factors needed to be weighed in the circumstances of the case, so that enlightened resource management options, merited in the promotion of the Act's purpose, may be identified and pursued.

In many instances the presence of good quality soils will doubtless lead, after open-minded consideration of the mix of factors, to an approach which is geared to recognising, protecting, and encouraging efficient utilisation of the land's productive potential. But in other instances the outcome may be different, with the productive potential aspect, important though it may appear individually on account of provisions such as s7(b) and (f) and by reference to the definition of sustainable management as a whole, being effectively out-weighed by other considerations leading to the adoption of a different form of planning approach. In other words, the circumstances, on analysis, may dictate selection of a different option, anticipated to promote the Act's purpose more effectively. The passage from Waimakariri earlier quoted should be read in the light of these remarks.

Whether one is planning at regional or district level, many competing considerations obviously fall to be analysed and resolved in determining how sustainable management can be suitably promoted within the scope of one's function and authority. Clearly the Act contemplates that, by fulfilment of the comprehensive duties incumbent upon relevant bodies in the pre-steps to and formulation of plans and other instruments, coupled with the wide opportunity available for public submission and input, every region and district will fulfil its role in achieving the Act's purpose. But the widely differing nature of plans, policy statements and so on that are emerging and will continue to emerge are testimony of the many methods of approach which those concerned have been moved to adopt in promotion of the same end. Some plans may be thought to be distinctly reminiscent in their control mechanisms and general format to the transitional plans that they were designed to supersede. Others may be thought notably more innovative. Others again may appear excessively wordy and lacking in clarity.

How either the Statement or the Plan might be described in this context requires no comment for present purposes. We need only mention that we have no reason to suppose that either document has been compiled other than with careful attention to regional and district resource management issues as perceived by each body within its particular domain. We do not propose to make any finding on whether Policy 6 or any other provision of the Statement bearing on versatile land use is ultra vires the Act because, as will be seen, we do not consider such a finding necessary for present purposes.

Counsel for Becmead and the City Council each acknowledged that the presence of an abundance of high quality soils in the surrounding region, certainly by comparison with most other regions in the country, is a factor not to be ignored as an important consideration, both at the regional and district planning levels. Even so, it was contended that other considerations of importance have also to be weighed, including the need for an adequate "land bank" to accommodate perceived urban growth requirements up to and beyond the turn of the century. And it was the view of witnesses such as Mr I Thomson, Senior Planner for the City Council, that, on a careful appraisal of the present and likely future growth of Christchurch, the proposed rezoning of the subject blocks is consistent with Act's purpose and not liable to undermine the Statement's provisions in relation to versatile land. We return to the question of future urban growth later, but pause to observe that we were impressed with the evidence of both of the City Council's planning witnesses, Mr Thomson and Mr Nixon, and agree with them that upholding the Change will not compromise the Court's consideration of issues in references pending hearing that plainly have a range of focus going beyond these blocks.

It was contended for the Regional Council that, far from down-grading the

wise use and management of good quality soil land for productive purposes 1
by comparison with the 1977 Act, that consideration goes to the core of
promoting sustainable management, seeing that the life-supporting capacity
of soil is required to be safeguarded under s5(2)(b).
The following introductory passage headed "Life-supporting capacity" to the
Soils and Land Use section of the Statement is instructive. Amendments 5
introduced via decisions on submissions are italicized in parenthesis.

> *"Land and its covering soils are a fundamental resource having the same importance to the region's life as air and water.* ***[The life-supporting capacity of soil includes its productive value in terms of its ability to support a healthy complex of indigenous or introduced plants and animals above and within the soil.]*** *Reduction of the life-supporting capacity of soils, whether through depletion of quality or availability deprives present and future generations of a potential resource. The inter-generational dimension is important because in human terms soil is effectively a non-renewable resource - the time needed for the inorganic fraction of soils to develop is measured in thousands of years. Therefore, the generations of today must ensure they hand on the region's soil resource in a condition at least as* <u>*productive*</u> *[good] as it is now. To do this and still* ***[retain the soil's natural eco-system values or]*** *use soils to generate a substantial part of the region's economic wealth means managing them in a sustainable manner - protecting them or compensating them for any stress arising from their use. It is life-supporting capacity for which soils are, and will continue to be, a valued resource. Soil conservation - the protection of that capacity, is where management issues arise from".*

(Note: the word "productive" as underlined has been replaced by "good".)
It is of interest to observe from the foregoing that reference is made at various
points both to soil and to soils, whereas s5(2)(b) simply speaks of the life-
supporting capacity of soil, without grading that capacity in relation to different 30
types of soils. We agree with counsel for Becmead that para (b) of the
subsection is concerned with safeguarding the life-supporting capacity of air,
water, soil and ecosystems in a general sense - that is, the provision alludes to
the need to safeguard the capacity of the four specified fundamentals of earthly
reality to support life in its multifarious forms and interrelationships. A body 35
in authority is, in effect, enjoined to promote sustainable management on a
basis that will safeguard the capacity of the named aspects to support life in
all its variety. In practical terms it is necessary to make a careful value
judgement on whether the spirit and intent of the paragraph will be met and
given due weight via a particular planning approach, taking into account the 40
combined interaction of other approaches also employed in planning for the
relevant region or district.

Policy 6 of the Statement is followed by an explanation which it will be helpful to quote, both in the form as originally proposed and as modified through submissions. Further alteration may of course occur following the outcome of the references yet to be heard.

The original explanation read:

> *"It is accepted that uses of land that are practically irreversible, and in particular urban development, are necessary and valuable. This policy simply indicates that of the most versatile land in the region - the land most suited to a wide range of primary production because of its superior life-supporting capacity - this potential use should have a higher priority. Because only 6.5% of land in the region falls within these classes, quite small losses are relatively significant. On such land, uses that are practically irreversible should only be considered where necessary to achieve an overall benefit from all relevant natural or physical resources."*

The modified explanation reads:

> *"While other policies in this chapter focus on promoting sustainable management of all land, this policy addresses versatile land classified as Class I and Class II land. This follows responsibilities in ss.5(a), 5(b), 5(c) and 7(b) of the RM Act and fulfills the purpose of sustaining the potential of land to meet reasonably foreseeable needs of future generations for food production and sustaining the life-supporting capacity of soil.*
>
> *Class I and Class II land classified under the Land Use Capability Classification System defines the most versatile land, covering about 6.5% of the region. It has particular attributes which make it desirable to protect it from irreversible uses, as far as is possible. It is already used almost entirely for primary production, apart from land taken up for urban and industrial development. There are few existing indigenous ecosystem values and its most likely future use will continue to be for primary production.*
>
> *This versatile land supports the widest range of productive uses with the least level of inputs, because of its inherent qualities, eg. soil depth, water holding capacity. It is land which in general can sustain a given level of production with less inputs that would be required for other classes of land. It has superior potential for production, whether that be agriculture, forestry or some other form of production. Such versatile land is a scarce regional and national resource. Further irreversible uses should be avoided as far as possible to prevent foreclosing options for productive use. Quite small losses can be relatively significant.*
>
> *The policy recognises there will be some limited situations where there is little option but to allow irreversible development to occur. Examples could be where a town is completely surrounded by versatile land and any*

expansion will irreversibly use it, or where there are small patches of versatile land enclosed by urban development and its protection would not be efficient or practical. Before any decisions are made to allow such development the local authority concerned should satisfy itself that to do so would not be inconsistent with the policy.

It is not intended that the policy be applied so as to require landowners or occupiers to use their versatile land in a productive way, rather the intention is that the potential to use it productively is maintained".

Much evidence was addressed to the growth demand of Christchurch and the ability to accommodate that demand, whether by way of urban area infill, conversion of existing urban buildings for higher density accommodation, demolition and redevelopment to the same end, and "greenfield" uptake. Various witnesses for Becmead and the City Council supported a combination of these approaches. No suggestion was made for the Council that rural land, at or in the vicinity of the existing urban periphery, should be rezoned for urban activity merely on a market-led footing, let alone without full assessment. Rather, it was maintained that opportunity for urban growth within carefully selected peripheral "greenfield" areas had to be viewed as a necessary basis of approach in planning for the City's future, along with other bases such as infill development. On this footing, it was said that the housing market would be afforded the ability to operate in a combination of ways and thus provide a good range of choice to the consumer, both in terms of housing type and location. Hence, it was envisaged that the merits of various prospective areas (such as that referred to during the hearing as the Port Hills) would be analysed under the Act's process, taking into account as an important, but not necessarily determinative factor in any particular instance, the presence of elite soils. Further to this, it was contended that the Regional Council was seeking to place too great an emphasis on the productive potential of the subject blocks, without adequate recognition of other factors such as urban growth pressure and the blocks' location between existing urban development and the reserves. We have earlier noted the wider concern of those opposed to the Change, stemming from their perception of the Change's failure to recognise the need for a clear and reliable demarcation of the urban/rural interface.

All things considered, we think that the City Council's criticism of the Regional Council's stance on this occasion is not without substance. We hasten, however, to stress "on this occasion", because it must be appreciated that a decision to rezone these particular blocks is not to be taken as indicative, let alone determinative, of whether any other areas of rural land at or near the urban fringe should be rezoned.

Reference was made to the capacity of satellite towns such as Rolleston, Rangiora and Kaiapoi to absorb additional growth. We accept the view of

those witnesses who spoke of the existing potential for expansion of towns in the wider region as being limited, for reasons they gave bearing on availability of services and the like, and who spoke also of that potential not being a satisfactory present day answer for reducing the growth pressures focused upon Christchurch itself to any marked degree. If satellite town growth were actively sought to be boosted for the purpose of materially reducing Christchurch's demand in the future, it would doubtless require acceptance of a common strategy by various bodies at regional and district levels, arrived at after full analysis and public scrutiny. The fundamental threshold question would obviously be whether or not such a strategy should be developed and pursued in order to promote the Act's purpose, bearing in mind the difficulties that might be anticipated in different quarters over coping with pressures similar to those from which Christchurch was intended to be relieved (albeit on a commensurately smaller scale per town). Another major question would be the likelihood of people being successfully diverted from Christchurch in any case, given the need for adequate employment opportunity and the living attractions that a comparatively large urban area offers. We refrain from elaboration because the present occasion is not one warranting further conceptual discussion. It will suffice simply to observe that the scope which presently exists for satellite town growth is not of sufficient moment to militate against the Change.

Those opposed to the Change were adamant that to uphold it would be a step of major regional planning significance and amount to a failure to have proper regard to the Statement contrary to s74 (2)(a). Having carefully considered the Statement in relation to the Change and the import of the Change from both a regional and district perspective, we are unable to accept that contention. The explanation to policy 6 of the Statement, modified by the Regional Council's decisions upon submissions, has earlier been recorded. Given the history of the blocks and their particular locations, we regard this as one of those "limited situations" where there is little option but to uphold the Change, notwithstanding the soil quality of each block. We have paid due regard to the various provisions of the Statement to which we were directed during the hearing. While there may be room for argument as to whether the blocks qualify as "small patches" of versatile land, and whether they are "enclosed by urban development (where their) protection would not be efficient or practical", we consider that they meet the spirit of the wording. Viewed in relation to the rural expanse beyond the reserve areas adjacent to each block, it is not fanciful to regard the blocks as "small patches" for regional planning purposes. Neither is it unreasonable to view them as "enclosed" (at least substantially) by urban development - inasmuch as the function of the reserves is that of primarily serving the urban area population and will remain so. Counsel for the City Council provided sufficient information to assure and

satisfy us as to the Council's intent to implement formal vesting in each case for active recreation purposes under the Reserves Act.

We have noted the favourable impression gained from Mr Nixon's and Mr Thomson's evidence. According to the former, the Plan has added some 400ha of new zonings to help accommodate future urban growth. But in the light of a relatively rapid growth trend experienced over the last two years, after much of the investigation and analysis leading to the Plan's formulation was undertaken, Mr Nixon asserted that the Plan's provision for future urban growth would "almost certainly prove to be inadequate". Mr Thomson spoke of the Plan providing for the addition of approximately 424ha to the stock of land available for residential development excluding the Nunweek and Tulett Park blocks. On the preponderance of the evidence of the various witnesses who addressed the future urban growth issue, it appears to us that the Plan's provision is not over-liberal, but tends rather in the other direction. Hence, it does not appear that rezoning of the two blocks can be denied on a basis that the existing pool of undeveloped residential land, coupled with the Plan's further provision exclusive of the blocks, would render such contribution as the blocks themselves would make mere surplusage. On the contrary, we are satisfied that the blocks would fulfil a valuable role in helping to meet the City's reasonable, if not conservatively estimated, urban growth demand. We accept the views of the City Council's planning witnesses, supported by Mrs S Robson called for Becmead, that the rezoning of the blocks is justified, against the background of likely future annual uptake in relation to land hitherto zoned but undeveloped, and further zonings provided for in the Plan.

Plainly enough, a strong regulatory approach to urban growth has been applied to Christchurch in past years, centered upon the Green Belt concept as recognised and provided for in the regional scheme. Mr Clark on behalf of the Civic Trust, and other like-minded submitters such as Mr Day, expressed their concern at the challenge to the Green Belt's integrity which the Change in their eyes represents. For reasons previously discussed we have had regard to the regional scheme, but attach little weight to it by contrast with the Statement prepared pursuant to the current Act. We decline any comment as to how this Court might view the Statement in the context of references awaiting consideration, or how the City Council might be expected to deal with submissions as to various zonings designed to allow for future urban growth under the Plan. Nevertheless, for the purposes of this case we have, by necessity, had to make a finding on the evidence before us as to the perceived adequacy of the total sum of land proposed to be added to the existing (undeveloped) pool to meet future urban growth needs.

Evidence was led as to various new potential development locations focused upon in the Plan consequent upon the City Council's s32 analysis. We recognise that some areas may alter as a result of the submissions/reference

process. But having perused the City Council's reports relating to the fulfillment of the Council's duties under s32, along with what the City Council's witnesses had to say in their updated assessment of the Plan's future growth strategy, the blending of that strategy with the Statement and its aims, and the merits of the Change against the total background, we are satisfied that the case in support of the Change has been made out. We so conclude having considered various land use possibilities for the blocks that arose during the hearing including, horticulture, grazing, horse training, simple retention as open spaces without utilisation for rural activity in any real sense, subdivision and development for larger lot rural lifestyle blocks (e.g. of 1ha or more), and subdivision and development along the lines proposed. The thorough assessment of the City Council's witnesses in support of the Change, along with the evidence called for Becmead, fairly demonstrated that the Change as proposed is the most appropriate option and in fact can be regarded as necessary (in the sense of being expedient or desirable) in achieving the Act's purpose. We find that the Change is supportable against the background of the City Council's considerable analysis in relation to the Plan under s32, and after fully considering the various wide-ranging issues at both regional and district levels which were canvassed before us so extensively.

We have not overlooked criticisms raised by Mr Day and others as to likely adverse traffic effects, exacerbation of drainage difficulties within and beyond the blocks themselves, likely adverse visual effects for residential owners with properties currently abutting the blocks and enjoying pleasant open space outlooks, and potentially adverse noise effects from the operations of Christchurch Airport as regards the Nunweek block. Despite the forceful evidence of the lay witness, Mr M W Barnes, the evidence of the Council's traffic engineering witness, Mr M Calvert, was sufficient to persuade us that the impact on the road network through development of both blocks had been suitably investigated; further, that the potential vehicle trip generation of some 2050 vehicle trips per day for the Nunweek block and 2000 trips per day for the Tulett Park block would not have a significant impact on the surrounding road system. In short, we accept that the additional traffic volumes expected to be generated by the development of the blocks would be able to be absorbed without impinging upon the operating capacities of adjacent or nearby roads.

On the question of drainage, we were satisfied with the evidence of the senior engineering officer for the Water Services Unit of the City Council, Mr S D Bensberg, that the two blocks would be readily serviceable. It was observed that proper attention would need to be given to water quality protection and ground water recharge aspects during the subdivision and development phases. Mr Bensberg concluded that "provided the systems are designed in sympathy with the environment, both hydraulic and amenity requirements of the draft

City Plan can be satisfied". More particularly, it was pointed out that appropriate design proposals would be called for along these lines:

> *"That detention swales or ponds be installed as an integral component of the land drainage system in order to reduce peak flows, improve stormwater quality and redirect stormwater to groundwater recharge".*

Counsel for Becmead confirmed that his client was fully acceptive of the City Council's position over the need to adopt proper steps to ensure good and efficient drainage of the blocks, without significantly impacting on wider drainage issues, particularly with regard to the upper reaches of the Styx River and to the Wairarapa Stream. We have considered the evidence of Mr L J T Holdem and others who addressed the drainage aspect, but accept the expert assessment of Mr Bensberg. It must be understood, however, that our endorsement of the Change is on the express footing that design proposals of the kind envisaged will be devised and implemented - including the adoption of measures designed to ensure that the Wairarapa Stream passing along the southern boundary of the Nunweek block is not further degraded. Evidence was called from other City Council officers bearing on sewerage and water supply provision. That evidence, in conjunction with that of Mr Bensberg directed to stormwater drainage and disposal, left us satisfied that no major impediment of a practical nature stands in the way of the blocks' utilisation for residential subdivision and development in the manner contemplated by the Change.

As to the loss of open space outlooks from residential properties abutting the blocks, it must be accepted that planning under the Act embraces an inherently dynamic characteristic of accommodating new direction when deemed appropriate in the promotion of the Act's purpose. While residential subdivision and use of the blocks may introduce unwanted alteration to a landscape with which adjacent residents have long been familiar, no one can have supposed that use of the blocks for residential activity was not liable to occur at some point. That point has now arisen and we are satisfied that the provisions of the Change have been devised on a basis which will reasonably heed neighbouring owners' amenity concerns. In other words, we are satisfied that due account will be afforded to the question of amenities, having particular regard to relevant provisions of Part II of the Act, especially, s5(2). In summary, the Change will be in keeping with the Act's purpose, affording paras (a) to (c) of the subsection due weight and consideration so as to comply with their intent. We record, for completeness, our satisfaction that the Change is in terms which would not be likely to result in excessive interference with the attractive area of trees at the north-western corner of the Nunweek block.

On the question of noise effects, we note that the blocks are both beyond the airport 50 Ldn line recognised in the Plan. Although some criticism was raised in reference to a modification of the line to a revised position clear of

the Nunweek block in particular, we do not consider that the evidence as to noise is sufficiently compelling to warrant a finding that the Change should be declined under that head. Any noise effects of concern would be much more likely from activities occurring on the reserves. However, on that aspect we were left satisfied that the recreation activities would be able to be suitably controlled through the Council's ultimate authority so as not to weigh against the Change - remembering, too, that the Change has been designed with a degree of separation built in as to the erection of buildings on abutting lots, plus the fact that anyone choosing to live within either block would be expected to be aware at the outset of the presence of the reserve adjacent or nearby.

We have earlier commented on the meaning of s5(2)(b) of the Act - which, along with paras (a) and (c), needs to be read in the context of s5(2) as a whole, bearing in mind as well the various other provisions of Part II accessory to promoting the Act's purpose. The initial part of s5(2) speaks of enabling "people and communities to provide for their social, economic and cultural well-being and for their health and safety". In effect, that is intended to be brought about by "managing the use, development, and protection of natural and physical resources in a way, or at a rate" that will produce the relevant enabling outcome - the achievement of that outcome being addressed and pursued through the comprehensive system of planning and consent procedures which the Act provides for - ensuring always that paras (a) to (c) of the subsection are duly invoked and applied at the different authority levels in the process. As Barker J pointed out in Falkner v Gisborne District Council [1995] 3 NZLR 622 at 632:

> *"The Act prescribes a comprehensive interrelated system of rules, plans, policy statements and procedures, all guided by the touchstone of sustainable management of resources. The whole thrust of the regime is the regulation of the use of land sea and air. There is nothing ambiguous or equivocal about this."*

We have indicated that s5 (2)(b) is couched in a general way. It falls to be applied so that its broad requirement is met. Obviously, it is not to be taken as meaning that land containing soil of good quality, whatever its location, size and other features, is effectively proscribed from use in any circumstance for residential development and activity. The promotion of sustainable management in terms of s5 includes following those steps within the ambit of one's responsibility under the Act as we have earlier discussed. On that basis, well-researched planning documents, both in the sphere of relevant policies and objectives and in the methods of implementation, are intended to emerge and be seen to operate as cogent and dependable instruments.

On another note, the "irreversibility factor" is, we agree, an important matter in considering a rezoning of land where good soils are present as here. We have by no means overlooked it. Nevertheless, for the various reasons

appearing throughout an inevitably lengthy decision, we are not persuaded in this instance that the removal of the blocks from any future potential for rural activity is of sufficient moment to warrant rejection of the Change. In its amended form it is upheld accordingly. We have reflected upon the provisions of Part 12 of the Statement concerned with maintenance of the rural character in the proximity of Christchurch and are satisfied that, on account of the particular location of each block, with the substantial reserve area abutting the main north-western boundary in each case, that character will be satisfactorily maintained. We conclude that the regional planning thrust of the Statement in relation to the urban/rural interface and versatile land (as defined) will not be undermined to any significant degree by the Change. Whether that thrust should be totally endorsed or modified in some way, however, is outside the scope of these proceedings.

If any consequential order or direction is required, whether in relation to stormwater disposal or any other aspect as to the Change's practical implementation, leave is reserved to the City Council to apply within 21 days - other parties having a further 14 days in which to comment.

On the issue of costs, we hold the tentative view that these should lie where they fall. However, if anyone should seek to pursue the issue, a memorandum may be filed within the same period of 21 days, the party or parties from whom costs are sought having 14 days in which to respond.

BEFORE THE ENVIRONMENT COURT

[2010] NZEnvC 211

IN THE MATTER of six appeals under Clause 14 of the First Schedule of the Resource Management Act 1991

BETWEEN CLEVEDON CARES INCORPORATED (ENV-2007-AKL-000676)

NETHERLEA HOLDINGS LIMITED (ENV-2007-AKL-000689)

AUCKLAND REGIONAL COUNCIL (ENV-2007-AKL-000710)

ARDMORE AIRFIELD TENANTS & USERS COMMITTEE (ENV-2007-AKL-000716)

NGAI TAI UMUPUIA TE WAKA TOTARA INCORPORATED (ENV-2007-AKL-000718)

WAIROA RIVER CANAL PARTNERSHIP (ENV-2008-AKL-000222)

Appellants

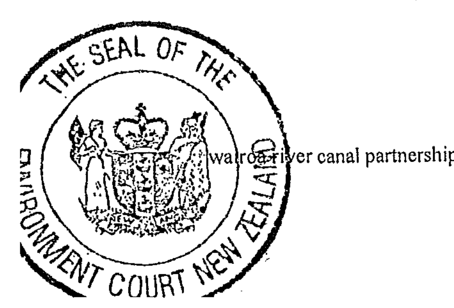
AND MANUKAU CITY COUNCIL

Respondent

Hearing at: Auckland on 18-22 May, 25-29 May, 21-25 September, 5-9 October and 21-23 December 2009

Court: Environment Judge R G Whiting
Environment Commissioner M P Oliver
Environment Commissioner K Prime

Counsel: Mr D Allan and Ms C Kirman on behalf of Clevedon Cares Incorporated
Ms C Greig for Clevedon Cares Incorporated
Ms M Dickey on behalf of Manukau City Council



Mr R Brabant and Mr J Brabant on behalf of Wairoa River Canal Partnership
Mr E Enright and Ms S Fraser on behalf of Auckland Regional Council
Mr B I J Cowper, Ms B Tree and B Watts on behalf of Ardmore Airfields Tenants and Users Committee
Ms P Kapua on behalf of Ngai Tai Umupuia Te Waka Totara Incorporated
Ms K Frazer on behalf of M Whitehouse and M Van Het Bolscher
Ms L Britton for Royal Forest and Bird Protection Society Incorporated
Mr K Glass for Pohutukawa Coast Community
Ms M Whitehouse for self
Ms R Pere for self and husband

DECISION OF THE ENVIRONMENT COURT

A. **For the reasons given in this decision, the appeals against the Plan Change are allowed and the Council's decision is cancelled.**

B. **Costs are reserved.**

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Introduction

[1] These appeals relate to Plan Change 13 (PC13) of the Manukau District Plan. PC13 seeks to introduce a new sub-Chapter 17.12 into Chapter 17 of the operative plan to enable the development of the Wairoa River Maritime Village, with a heavy focus on boating, in the lower reaches of the Wairoa River. It is proposed that the village would provide for up to 267 residential dwellings in a canal village layout.

[2] PC13 was initially a private plan change, initiated by the Wairoa River Canal Partnership (the partnership), which was adopted by the City Council pursuant to clause 25 of the First Schedule to the Act. The plan change attracted large numbers of supporting and opposing submissions. After a protracted hearing the Council upheld the plan change with some amendments. The Council's decision is set out in a report by the Council's Hearing Committee dated 1 August 2007.

[3] Five appeals were filed by opponents to the plan change:

[a] Clevedon Cares Incorporated;

[b] Auckland Regional Council;

[c] Ngai Tai Umupuia Te Waka Totara Incorporated (Ngati Tai);

[d] Netherlea Holdings Limited (Netherlea); and

[e] Ardmore Airfield Tenants and Users Committee (Ardmore Tenants).

[4] A large number of contested issues were raised in the appeals. Despite directions for expert witnesses to caucus and for the parties to define the issues, a large number of contested issues were canvassed at the hearing. We set those out in detail later in this decision.

[5] In August the partnership, who was also a submitter to the plan change adopted by the City Council, was granted leave to file an appeal. By its appeal the partnership proposed quite extensive amendments to the provisions of PC13. Clevedon Cares sought to have the appeal by the partnership struck out on the basis that the appeal contains a

number of elements not included in the notified version of the plan change, and falls outside the scope of the matters raised in the partnership's submission.

[6] The City Council generally supported the changes to PC13 proposed by the partnership. Its advisors consider it represents a "scaling back" of the development enabled by the plan change, reducing the scope of the plan change and its potential effects on the environment. However, there were some specific matters of drafting that caused concern. Early in the hearing the City Council and the partnership reached agreement on a final form of the plan change which was referred to as the 23 September 2009 version.

[7] In a minute of the Court, dated 28 November 2008, it was determined that the question of scope, being a matter of both fact and law, would better be addressed at the substantive hearing. Questions of jurisdiction based on scope are clearly interrelated with the Court's wide discretion to invoke section 293 of the Act. Because an exercise of discretion under section 293 involves, among other things, a consideration of the merits, we propose to consider first the proposal as enunciated in the appeal documents, as amended by the 23 September 2009 version of the plan change.

The Site and Surrounds

[8] The site and its surrounding landscape was described by a number of planning and landscaping witnesses. The site is made up of two parcels of land; the upland block which comprises approximately 111 hectares of steep to rolling land on the north-western side of North Road, 5 km north of Clevedon. It is a mixture of pine trees, remnant native forest and grazing land. The lowland block comprises approximately 123 hectares of generally flat, low-lying alluvial plain, draining eastwards to a 4 km long frontage to the Wairoa River. It is this lower block of land to which the evidence was mainly directed, as it is here that development is intended to be facilitated by PC13. The upper block is ancillary to the development by providing a location for disposal and treatment of sewage from the lowland block.

[9] We found Ms Absolum's description of the surrounding area to be both succinct and comprehensive.[1] It encapsulated what we saw on our site visit. We propose therefore to adopt her description.

[1] EIC, paras [4.1] – [4.12]

[10] A broad flat alluvial plain cuts across the Auckland Isthmus from the Pahurehure Inlet in the south-west (between Manurewa and Papakura) and the Wairoa Estuary in the north-east. The southern and western parts of this plain drain west to the Papakura Creek, while the northern and eastern parts of the plain, along with a large proportion of the western Hunua Ranges drain to the north-east via the Wairoa River.

[11] Clevedon Village is situated towards the northern end of this plain, just upstream from the confluence of the Tataia Stream and the Wairoa River, at a point where the valley floor narrows to about 1 km in width. To the south of Clevedon the valley is broad, about 4 km wide, bounded to the north-west by the Clevedon-Maraetai Hills and to the south-east by the western foothills of the Hunua Ranges. Here the flat valley floor is a patchwork of paddocks, the majority of which are used for grazing. Many of the paddocks have substantial and mature shelterbelts and fence line trees, creating a strong sense of enclosure, despite the flat landform of the valley floor.

[12] To the north of Clevedon the valley widens again in a broad band of alluvial river flats running along the western bank of the Wairoa River between the Clevedon-Maraetai Hills and the river estuary, extending northwards from Clevedon Village as far as the Whakakaiwhara Peninsula. The alluvial flats here are much more open in character with fewer shelterbelts and long vistas.

[13] Ms Lucas attached to her evidence-in-chief a number of graphic representations of the valley which help to place the site of the proposed plan change in a geographic and topographic context. We attach as Appendix 1 to this decision Attachment 7 of Ms Lucas' evidence.

[14] Much of the land in the Wairoa Valley is used for pastoral farming, with some areas for cropping. The grazing extends up the lower slopes of the hills to the west. Hump and hollow drainage patterns and ditches crisscross the land with post and wire fences and mixed hedgerows marking the boundaries of paddocks. Buildings are generally scattered with both farmhouses, and farm buildings and occasional rural lifestyle blocks. Vegetation comprises pasture with hedges, scattered specimen trees and occasional shelterbelts of a range of species, predominantly exotic.

[15] As the estuary broadens out to form Wairoa Bay, it is encircled by two, almost symmetrical promontories of higher land. The headland terminating in Whakakaiwhara

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

Point on the north-western side, and Koherurahi Point on the south-eastern side. The broad alluvial plain on the north-western side of the river extends all the way to the promontory, apart from a small area of higher ground, about 2 km south of the Whakakaiwhara Peninsula. The higher ground is topped at either end by pa sites, Te Oue to the north and Pehuwai to the south. On the southern edge of the estuary is a similar linear series of small headlands, many of which have pa sites on them, including Pouto Point.

[16] Beyond the river mouth, the waters of Tamaki Strait, the inner Hauraki Gulf are defined by the string of islands Karamuramu, Pakihi, Ponui and Waiheke. These islands also separate the Tamaki Strait from the Firth of Thames to the east.

[17] Ms Absolum summarised the physical landscape features of the lower Wairoa Valley as comprising:

- the forested mass of the Hunua Ranges to the south-east;
- the forested tops of the Clevedon-Maraetai Hills defining the valley's north-western side;
- the lower slopes of the hills in pasture;
- the broad flat, river flood plain under mixed pasture and cultivation;
- scattered exotic trees, hedgerows and occasional shelterbelts;
- the Wairoa River meandering across the valley floor with the river edge highlighted by dense mangroves;
- houses and buildings associated with agricultural activities and lifestyle blocks on the valley floor and lower slopes of adjacent hills;
- the river estuary with sand banks, salt marsh and mangroves; and
- coastal promontories marking the mouth of the river.

[18] We heard undisputed evidence that Ngai Tai Umupuia have had and still have a strong cultural relationship with the Wairoa Valley.

Proposed Plan Change 13 and Subsequent Amendments

[19] As we have said PC13 (as approved by Council decision) provides for the establishment and ongoing operation of the canal housing and recreational development, known as the Wairoa River Maritime Village, on a site approximately 5 km north of Clevedon Township, adjoining North Road. PC13 has two components:

[a] The principal component is the introduction of an entire new section into Chapter 17 – **Special Areas and Activities**, of the District Plan, being – ***"Section 17.12 Wairoa River Maritime Village"***. The new chapter has an explanatory "Introduction", then identifies "Resource Management Issues", "Objectives", "Policies", "Strategy for the Wairoa River Maritime Village", "Implementation", "Rules", "Anticipated Environmental Results" and "Procedures for Monitoring";

[b] The second component of PC13 is the introduction of rules into Chapter 9 – **Land Modification Development and Subdivision** – and Chapter 12 – **Rural Areas**. The rules relate to the construction and operation of the village wastewater disposal system on the land on the northern side of North Road, associated vegetation clearance and water supply.

Zoning

[20] The zoning framework in PC13 involves the creation of two new "Special" zones affecting the lowland block:

[a] the Maritime Village Residential zone; and

[b] the Maritime Village Recreation zone.

[21] The Maritime Village Residential zone covers an area of approximately 44 hectares (or 36% of the lowland block) and includes the proposed canals and housing area. The Maritime Village Recreation zone covers a surrounding area of approximately 79 hectares (or 64% of the lowland block) which has the proposed recreation and conservation areas, linked to the river by a walkway system.

Concept Plan

[22] The two proposed zones are in turn linked to a *"Wairoa River Maritime Village Concept Plan"* that is referred to in both the *"Policy"* and *"Rule"* components of the plan change. Attached as Appendix 2 is a copy of the Concept Plan as contained in the decisions version of the plan change.

[23] The Concept Plan shows existing features like North Road, the Wairoa River and mangroves, along with the proposed layout of the canals, roads, residential, amenity, community open space, pedestrian walkways, wetlands and plantings. It also shows the village and surrounding recreation/conservation area being developed in two stages.

Land Use Activities

[24] The rules in the two proposed zones generally follow the wider district plan approach and list a number of permitted, controlled, restricted discretionary, discretionary and non-complying activities. *"Development and Performance Standards"* covering matters like building height, yards, residential intensity, noise, vehicle access and the like are specified. *"Matters of control"* are outlined for controlled and restricted discretionary activities, along with *"assessment criteria"* for these two activity types and discretionary activities.

Maritime Village Residential Zone

[25] The Maritime Village Residential zone provides for a limited number of permitted activities, primarily being *"single household unit per site"*, *"home enterprises"*, and *"jetty straddles, boat ramps and associated facilities"*. *"Canals"*, *"lock to service the Wairoa River Maritime Village"*, and *"a single accessory building not exceeding 15m^2 gross floor area"*, are amongst the controlled activities.

[26] A list of restricted discretionary and discretionary activities in the Village Residential zone is more extensive. They include *"childcare services and facilities"*, *"community and healthcare services"*, and other similar land uses, with restricted discretionary thresholds set according to the number of children, number of staff and other factors. These rules are derived from policies directed at keeping the village primarily of a canal residential nature. In this regard *"travellers' accommodation"* is

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listed as a non-complying activity and no expressed provision is made for any form of commercial or industrial land use.

Maritime Village Recreation Zone

[27] The Maritime Village Recreation zone provides for a number of low key land uses as permitted activities. They include *"ecological restoration work"*, *"gardens"*, *"grazing as part of a management programme ... "*, *"landscaping in accordance with the landscape plan attached ... "*, and *"formed walkways ... "*. Buildings and facilities such as an information centre and interpretation facilities are provided for as restricted discretionary activities, whilst others, such as public toilets, shelters, sports fields and clubrooms are provided for as discretionary activities.

Development and Performance Standards

[28] The two proposed zones have different land use *"development and performance standards"* and *"subdivision rules"*. In the Residential zone household units are not to exceed *"a density of one per 650m^2 net site"* and there is a site coverage limit of 35% and a maximum building height of 8 metres. There are also yard controls, along with noise standards, and schedules of roof and wall colours. There is a limit of a total number of household units at 297 although this has since been amended to 267.

[29] The Recreation zone standards cover yards, building height (up to 8m), site coverage (up to 1% of net size area), noise and accessways. The accessway standards prescribe a minimum width, maximum gradient and other requirements.

Subdivision Controls

[30] The subdivision of land in the Residential zone is a restricted discretionary activity, provided certain specified standards are met; primarily no more than 297 (now 267) residential lots, a minimum net site area of 650m^2 and an average net site area of at least 750m^2. There are no rules on the subdivision of land in the Recreation zone.

District Plan Special Areas and Activities

[31] The proposed section 17.12 is very similar to other sections in the same chapter. It covers other *"special areas and activities"*, notably *"Papakaianga and Maori areas"*, *"Healthcare Activities"* (Middlemore Hospital), education activities, airport activities, boat harbour areas (Half Moon Bay and Pine Harbour Marinas) and *"mineral extraction areas"*.

Revised Proposed Plan Change

[32] The revised PC13 as set out in the Canal Partnership's appeal and as amended by agreement between the Canal Partnership and the City Council, differs in a number of respects from that approved by the Council. A revised concept plan has been introduced which we attached as Appendix 3. The main alterations made to PC13 are set out in some detail in the evidence of Mr Dunn which we repeat here[2]:

(i) The proximity of the site to pleasure boating areas, and basis of the revised concept plan and revised public access proposals, are highlighted in the "introduction";

(ii) The environmental enhancement and landscape/urban design elements of the revised concept plan, including the mix of housing types and proposed village centre site, along with the 'special' zone nature of PC13 are explained in the "Resource Management Issues". This section also explains the restrictions on business and other activities on the village centre site and residential areas;

(iii) A number of the "Objectives" and "Policies" are refined to reflect the amended Issues;

(iv) The "Strategy for the Wairoa River Maritime Village" is expanded, particularly in relation to the 'special' boating/canal nature of the village, mix of housing types, proposed village centre site and vehicle/walkway access arrangements;

(v) Clarification and expansion of the "Anticipated Environmental Results" and "Procedures for Monitoring";

(vi) Substantially revised 'Village' zone and 'Recreation' zone activity tables, with all development on the 'village centre site' being a restricted discretionary activity;

[2] Dunn, EiC, paragraph 25.

(vii) "Rules" limiting the total number of residential units and residential lots to 270 (not 297 as proposed);

(viii) An additional "Rule" on noise emissions from the 'village centre site';

(ix) Replacement of the "Development & Performance Standards" on intensity conditions, exceptions to maximum height, yards, vehicle access to household units and colour of buildings (in Rule 17.12.10), with a comprehensive set of "Infrastructure, Building and Landscaping" controls, as an appendix;

(x) Introduction of a "Village Centre Site – Development Standards" rule (Rule 17.12.10.3.2) similar to that in place for the Business 1 (Local Shops) zone in the operative District Plan;

(xi) Introduction of a rule on "Matters for Discretion – Restricted Discretionary Activities – Activities on the Village Centre Site" (Rule 17.12.12.1a);

(xii) Introduction of "Village Subdivision Design Guidelines" (Rule 12.12.15.1) into the plan change;

(xiii) Alteration of the rule on minimum net site area for a residential lot from $650m^2$ to $350m^2$ to reflect the expected mix of housing types, but with retention of the rule requiring a $750m^2$ average net site area;

(xiv) A more definitive rule on reserve contributions and esplanade reserves;

(xv) The rule on the maximum height of buildings in the 'Recreation' zone is altered to provide for buildings of up to 4m, rather than 8m, and the rule on building coverage in the same zone is altered to provide for individual buildings of not more than $150m^2$, rather than 1% of the net site area;

(xvi) The rule on kiosks in the 'Recreation' zone is deleted.

[33] The revised PC13 was, according to Mr Brabant, the response of the partnership to the appeals filed by the opponents to the plan change. In his opening Mr Brabant said:

> 3. After a number of appeals were filed by opponents of Plan Change 13, the Partnership took advice in relation to the matters raised in these appeals. Planning, landscape and urban design consultants engaged by the Partnership after the appeal process had commenced, advised that the village development design, the landscaping, and the wording of Plan Change 13 should be amended to respond to those appeals...

Legal Basis for Decision

[34] We are conscious that many of the contested issues involve a consideration of national, regional and district statutory instruments. While these instruments are largely effects-based, they also include values that are to be attributed to different aspects of the environment. The national and regional instruments include strategic directions or values for the Auckland Region. The relationship between effects and values was summarised by Baragawath J in the Court of Appeal decision of ***Auckland Regional Council v Rodney District Council and Parihoa Farms Limited***[3]:

> [12] ...The effects on the environment cannot be considered objectively without reference to the values that are attributed to different aspects of the environment by the relevant instruments. In this case, each of the documents has a slightly different perspective on the environment, and therefore attributes value to it in a different manner. Requirements for protection of important and sensitive values will frequently be expressed at a higher level of specificity in a district plan than in a regional plan, but that will not necessarily be so and was not the case here.

[35] There are six Schedule 1 Clause 14 appeals before the Court. The starting point for considering PC13 is section 74 of the Act. Section 74 prescribes matters to be considered by the Council in preparing and changing its district plan. That section requires the Council to change its district plan in accordance with:

[a] Its functions under section 31;

[b] The provisions of Part 2;

[c] Its duty under Section 32;. and

[d] Any regulation.

It also requires that the Council shall have regard to any proposed regional policy statement (subsection 2(a)(i)).

[36] Section 75 requires a district plan to state (among other things):

[a] The significant resource management issues for the district;

[b] The objectives sought to be achieved by the plan;

[3] [2009] NZCA 99 at paragraph 12

[c] The policies for those issues and objectives, and an explanation of the policies; and

[d] The methods (including rules if any) to implement the policies;

And:

A district plan must give effect to:

[a] Any national policy statement;

[b] Any New Zealand coastal policy statement; and

[c] Any regional policy statement.

[37] Section 32 of the Act contains directions that apply to the Council in relation to making decisions on accepting or rejecting any submission on a proposed plan change. As the Court pointed out in ***Long Bay-Okura Great Park Society Incorporated v North Shore City Council***[4]:

> Unlike local authorities [fn 76 see section 32(1)(c) of the RMA] the Environment Court does not have an express duty under section 32 to consider alternatives, benefits and costs. However, Parliament has stated that the Court is "not precluded" [fn 77 section 32A(2)] from taking into account the section 32 matters. As a matter of consistency with local authorities and out of respect for their reasoned decisions we consider it is usually desirable for the Environment Court also to carry out a section 32 evaluation to the extent justified by the evidence.

[38] The Court in ***Long Bay*** set out a comprehensive summary of the Act's mandatory requirements for district plans including changes to district plans. That comprehensive summary was referred to by all counsel and was referred to by most of the planning expert witnesses. The ***Long Bay*** decision applied the Act in its form prior to the Resource Management Amendment Act 2005. Notably, for present purposes, Section 75(3) of the Act requires that a territorial authority must "give effect to" any operative regional policy statement.

[39] As we have said, all Council referred to this well-known passage and some of the planning witnesses assessed PC13 in terms of the ***Long Bay*** framework. We do not in this decision propose to set it out as we do not propose to refer to all of the tests outlined

[4] Decision A78/2008, at paragraph [42].

in *Long Bay*. To do so would unnecessarily lengthen this decision. We propose to address only those tests that counsel for the appellants maintain PC13 fails to meet the required threshold. They are:

[a] Section 75(3) which requires the contents of a district plan to give effect to:

[i] Any national policy statement;

[ii] Any New Zealand coastal policy statement; and

[iii] Any regional policy statement.

[b] Section 74(1) which requires a territorial authority to prepare and change its district plan in accordance with:

[i] Its functions under section 31;

[ii] The provisions of Part 2; and

[iii] Its duty under section 32.

[c] Section 74(2)(a)(i) which requires that a territorial authority shall have regard to a proposed regional policy statement.

[40] We are required under section 290A of the Act to have regard to the Councils' decision. In so doing we are mindful that this is a de novo hearing and the Council and the Partnership had reached agreement on an amended version of the proposed plan change since the Council's decision. We also had the benefit of extensive evidence and cross examination.

The Relevant Statutory Instruments

[41] The planning witnesses in their evidence and counsel in their submissions referred to a number of statutory instruments. These were:

[a] The Resource Management Act 1991;

[b] Local Government (Auckland) Amendment Act 2004;

[c] Hauraki Gulf Marine Park Act 2000;

[d] New Zealand Coastal Policy Statement;

[e] Auckland Regional Policy Statement;

[f] Change 6 Auckland Regional Policy Statement;

[g] Manukau District Plan.

[42] As the issues require an integrated assessment of the Act, the relevant statutory instruments and matters of fact, we propose to discuss the relevant provisions that apply to a particular issue at the time we address that issue in this decision.

The Hearing

[43] The hearing took place over 26 working days. We heard from a large number of expert witnesses as well as witnesses from the local community. The witnesses were cross-examined at some considerable length. It is not possible in this decision to refer to all of what the various witnesses said in the contested issues. In coming to our decision we have carefully evaluated all of the evidence that has been put before us. We have also had regard to the lengthy submissions that we have heard from counsel and representatives of the parties. The evidence and submissions have been put in context by an extensive site visit.

The Issues

[44] In their opening statements counsel set out the primary contested issues. They were many and varied. In an endeavour to focus attention on the contested issues we, partway through the hearing, invited counsel to caucus in an endeavour to settle the issues still in contention. As a result counsel settled a List of Issues dated 21 September 2009.

[45] The List of Issues sets out twelve primary issues and a number of sub-issues. The issues cover a broad spectrum of matters which require a consideration of both fact and law. In our view the List of Issues can be simplified considerably by integrating the overlapping issues and identifying the key issues which are determinative to our decision. A continuous thread that underlay much of the opposition was the Auckland Regional Policy Statement (ARPS), to which the Plan Change must give effect to pursuant to

Section 75(3) of the Act. In this regard, four core issues emerged from the evidence and submissions. They are:

1. The *"urban containment"* provisions of the ARPS

2. The *"integrated management"* provisions of the ARPS

3. The effects on Maori, and

4. The effects on natural character, the coastal environment, landscape and amenity.

These we call the four *core* issues.

[46] Many of the other issues identified by the parties are subsumed in these four core issues, particularly Issues 1 & 2. For example, the *urban containment* and *integrated management* provisions of the ARPS are designed to avoid the adverse effects of uncontrolled urbanisation on natural and physical resources; the cumulative effects on the region's transport network and infrastructure; and the effects on social and economic sustainability. A failure to give effect to the ARPS provisions on urban containment and integrated management will result in a failure to establish a framework within which to assess these matters in a regional context.

[47] A number of the issues identified are issues that should more particularly be addressed in this case at the resource consenting stage. These include:

[a] Effects of climate change;

[b] Effects of onsite infrastructure;

[c] Effects on flooding;

[d] Effects on water quality and ecology; and

[e] Effects on traffic and the transport network.

We refer to these as the *consent* issues.

[48] A further stand-alone issue was raised by the Ardmore Tenants Committee, namely:

[a] The effects on over-flying aircraft using the low-flying zone.

We refer to this issue as the *stand-alone* issue.

[49] Finally, there is the question of the Court's jurisdiction which we refer to as the *jurisdictional* issue. We propose to:

[a] Discuss in detail the four core issues – Issues 1 & 2 can conveniently be dealt with together; and

[b] Because our findings on the four core issues are determinative of our decision, we will discuss briefly the consent issues, the over-flying aircraft issue, and the jurisdictional issue.

The Core Issues

Issues 1 & 2 – Does PC13 Give Effect to the ARPS Provisions Relating to "Urban Containment" and "Integrated Management?"

Section 75(3) of the Act

[50] Section 75(3) requires that the Plan Change *"must give effect to"* the operative Regional Policy Statement. We agree with Mr Allan, that with respect to Section 75(3) of the Act, the change in the test from *"not inconsistent with"* to *"must give effect to"* is significant. The former test allowed a degree of neutrality. A plan change that did not offend the superior planning instrument could be acceptable. The current test requires a positive implementation of the superior instrument. As Baragwanath J said in ***Auckland Regional Council v Rodney District Council***[5]:

> This does not seem to prevent the District Plan taking a somewhat different perspective, although insofar as it would be inconsistent, it would be ultra vires. (The 2005 Amendment to Section 75, requiring a District Plan to "give effect to"

[5] [2009] NZCA99

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national policy statements, NZCPS and Regional Policy Statements, now allows less flexibility than its predecessor).[6]

[51] The phrase *"give effect to"* is strong direction. This is understandably so for two reasons:

[a] The hierarchy of plans makes it important that objectives and policies at the regional level are given effect to at the district level; and

[b] The Regional Policy Statement, having passed through the Resource Management Act process, is deemed to give effect to Part 2 matters.

The Regional Strategy on Urban Containment and Integrated Management

[52] Chapter 2 of the ARPS sets out the strategic direction for the region. Part 2.5 states that the *"strategic direction for the Auckland region ... comprises the following strategic objectives and policies ... to achieve integrated management of the natural and physical resources of the whole region".* The critical provision in terms of accommodating growth is Objective 1 which says:

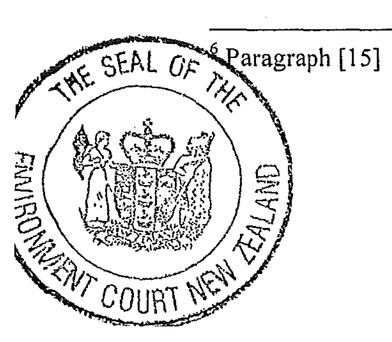
> To ensure that provision is made to accommodate the region's growth in a manner which gives effect to the purposes and principles of the Resource Management Act, and is consistent with these strategic objectives and with the provisions of this RPS.

This objective indicates a strong intent to deal with growth through a comprehensive, regionally focussed strategy.

[53] The strategic policies which give effect to the objectives are contained in Part 2.5.2 of the Policy Statement. Policy 3 sets out unequivocally the direction to contain urban development:

> 3. Urban development is to be contained, within the metropolitan urban limits shown on Map Series 1 and the limits of rural and coastal settlements as defined so that:
>
> (i) expansion of urban activities outside the metropolitan urban limits as defined and shown in the RPS from time to time is not permitted;

[6] Paragraph [15]



(ii) environmental values protected by the metropolitan urban limits and/or the limits of rural or coastal settlements are not adversely affected, and that the integrity of those limits is maintained;

(iii) urban intensification at selected locations is provided for and encouraged. Selection of these places will take into account, amongst other things, any significant adverse effects which arise from the interaction with any regionally significant infrastructure and other significant physical resources;

(iv) expansion of rural and coastal settlements outside the limits of existing urban zones and settlements (at the time of notification of the RPS or as shown or provided for in the RPS) is not permitted;

(v) the identification and provision of areas for future growth are managed through an integrated process on a regional basis and are consistent with the Strategic Direction.

[54] Policy 3 is a very strongly worded policy which provides a comprehensive description of the manner in which urban development can be accommodated. It strongly precludes urban development outside the MUL and existing urban areas and rural and coastal settlements, unless areas for further growth are identified and provided for in a managed way through an integrated process on a regional basis, consistent with the Strategic Direction.

[55] Part 2.6 of the Policy Statement is headed *"Regional Development"*. It contains regional development policies which give effect to the strategic direction set out in Part 2.5. Part 2.6.1 of the Policy Statement re-emphasises the urban containment objectives and policies of Part 2.5. Policy 1 requires the management of the growth of metropolitan Auckland over a 30 year time horizon in a manner that *"is consistent with the strategic direction"*, and requires regard to be had to a number of matters including:

[a] The rate of urban development;

[b] The capacity realistically available for further urban development;

[c] The need to recognise and provide for areas of significant natural and physical resources and protect them from urban development;

[d] Areas where provision shall be made for future urban development; and

[e] An explicit evaluation (as required by Section 32 of the Act) of the costs and benefits of alternative forms of development to accommodate Auckland's growth.

[56] Of importance to this case is Policy 2 which we quote in full:

> 2. Urban development shall be contained within the defined limits (including the metropolitan urban limits and the limits of rural and coastal settlements – referred to in Strategic Policy 2.5.2-3) shown in the RPS from time to time, and its form shall be planned and undertaken through an integrated process on a regional basis and in ways that are consistent with the Strategic Direction and:
>
> (i) provide for urban intensification around selected nodes and along selected transport corridors;
>
> (ii) provide for higher intensities of urban activities at selected locations within areas of new development;
>
> (iii) bring about patterns of activities that will mitigate the effects of increased travel and improve the energy efficiency and convenience of urban areas (refer to Chapter 4 – Policy 4.4.1-2, and Chapter 5 – Policy 5.4.1-3);
>
> (iv) enable the operation of existing regional infrastructure and the provision of necessary new or upgraded regional infrastructure which is operated and developed in a manner which ensures that any adverse effects of those activities on the environment are avoided, remedied or mitigated;
>
> (v) facilitate efficient provision of services (including utility services, transportation facilities or services, and community facilities and services, such as schools, libraries, public open spaces) through the utilization or upgrading of existing facilities, or the provision of new ones;
>
> (vi) maintain and enhance amenity values within the existing urban area, and achieve high standards of amenity in areas of new development;
>
> (vii) do not give rise to conflicts between incompatible land uses;
>
> (viii) avoids, remedies, or mitigates adverse effects on the environment.

[57] Part 2.6.2 of the Regional Policy Statement is headed *"Methods"*. In this part the Policy Statement sets out in some detail the manner in which the regional development policies shall be given effect to or implemented. Of relevance to urban containment are Methods 4, 7 and 8 which respectively state:

> 4. The Policies in 2.6.1, shall be given effect to the extent necessary and appropriate, through the provisions of any relevant regional plan, changes to the RPS, district plans, and the RLTS, and should be reflected in the annual plan process and any strategic planning process undertaken by a TA.
>
> ...

7. Each TA shall set out within its District Plan issues, objectives, policies and methods for enabling the management and development of rural and coastal settlements.

   This shall:

   i) be an integrated consideration of the relevant issues;

   ii) be integrated with the urban and rural components of the District Plan;

   iii) not be inconsistent with the RPS.

   Where this method has been complied with, expansion of rural and coastal settlements in district plans beyond the limits applying at the date of notification of the RPS shall be deemed to have been provided for the purposes of strategic objective 2.5.2.3(iv) and policy 2.6.1.2 of the RPS.

8. Significant new areas proposed for urban development, existing urban areas proposed for significant re-development, or significant new areas proposed for countryside living purposes are to be provided for through the Structure Planning Process (or other similar mechanism).

[58] It is against these strategic direction and regional development Objectives, Policies and Methods which provide a strategic framework for management of the region's growth, that we must assess this proposal. The Plan Change *"must give effect to"* them. The Canal Partnership says either:

[a] The objectives, policies and methods relating to urban containment do not apply, because the proposal is not *"urban development"* as defined in the Regional Policy Statement; or

[b] If the proposal is *"urban development"* as defined, it complies with Method 7 of the Strategic Direction and thus gives effect to the Auckland Regional Policy Statement.

Is the Proposal Urban Development?

[59] At the first instance hearing before the council, the council took the view that Plan Change 13 would provide for new "urban development". As we have said, a Notice of Appeal lodged by the partnership sought detailed amendments to the Plan Change and the Concept Plan; changes which are supported by the council. We were told by Ms Dickey, that this prompted a re-analysis by the council in co-ordination with its advisors of how

the development enabled by the Plan Change should be correctly categorised in terms of the ARPS. The council, supported by the Canal Partnership contended before us that the proposed development would not amount to "urban development".

[60] The relevant amendments were described by Mr Brabant in his opening statement:

> [a] A reduction in the number of residences from 297 to 270;
>
> [b] Detailed design controls developed for both architecture and landscaping;
>
> [c] The community/commercial building is relocated from the lock to the opposite (western) end of the maritime village where the canals and roads intersect, to create a village "heart";
>
> [d] A framework of kahikatea dominant planting is introduced throughout the maritime village;
>
> [e] A landscape design with an open rural character incorporating stands of trees has been designed for the perimeter of the site;
>
> [f] Restoration of former streams and wetlands have been developed further;
>
> [g] Restoration of indigenous forest on the banks of the Wairoa River have been developed further; and
>
> [h] Changes have been made in the vicinity of the lock and weir designed to have a more low-key and natural character, including a kayak/dingy landing.

[61] It was Mr Brabant's submission, that the amended design specifically focussed on ensuring that the character of the proposed maritime village is different from that of conventional urban, suburban or rural lifestyle patterns. This includes specific and detailed controls identifying a range of high quality building typologies which are cohesive and integrate with the waterways. This submission was supported by the evidence called by the council and the Canal Partnership, particularly the evidence of Mr Andreas de Graaf (architect), Mr Gavin Lister (landscape architect), Mr Dennis Scott (landscape architect), and Mr Maxwell Dunn (planner) called by the Canal Partnership; and Mr David Serjeant (planner) for the council.

[62] As we understand the evidence produced by the council and the Canal Partnership, the characteristics of the proposal, including the canals and their interface with the houses, together with the strong "woodland" framework of planting through and around the village, will create a distinctive maritime character. Looked at from the perspective of the site itself and the surrounding area, and from the perspective of the wider district area (the focus of the evidence of Mr Scott), the proposal would dictate neither an "urban" nor a "rural" nature.

[63] On the other hand, the evidence produced by the Regional Council and Clevedon Cares leads to a conclusion that the proposed village is "urban development" as defined in the ARPS. That evidence emphasised such matters as the scale, density, visual character, and dominance of engineered and built structures.

[64] We refer in particular to the evidence of Ms Melean Absolum (landscape architect), Mr Stephen Brown (landscape architect), Mr Mark Tansley (social economist), and Ms Sylvia Allan (planner) for the Regional Council; and Mr Denis Nugent (planner) for Clevedon Cares.

ARPS Definition of "Urban Development"

[65] *"Urban development"* is defined in the Policy Statement as:

> Urban development means development which is not of a rural nature. Urban development is differentiated from rural development by its scale, density, visual character, and the dominance of built structures. Urban development may also be characterized by a reliance on reticulated services (such as water supply and drainage) by its generation of traffic and includes activities (such as manufacturing), which are usually provided for in urban areas.

[66] We were referred by counsel to a number of authorities which reflect the principles that inform the interpretation of planning instruments. These include ***Powell v Dunedin City Council***[7] and ***Beach Road Preservation Society Incorporated v Whangarei District Council***[8] which support the need for a purposive approach to interpretation, which in this case means interpreting the definition in context. As noted by the Court of Appeal in ***Powell***, while it is appropriate to seek the plain meaning of a rule from the words themselves, it is not appropriate to undertake that exercise in a

[7] [2004] 3NZLR721
[8] [2001] NZRMA176

vacuum. Regard must be had to the immediate context of the words, and sometimes where an obscurity or ambiguity arises, it may be necessary to refer to the other sections of the Plan.

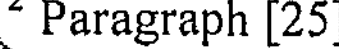
[67] It is clear from a reading of the ARPS, that urban expansion is not controlled because of urban expansion per se. It is the "threat" which urban development can pose to several environmental qualities and thresholds, including rural activity, landscape character, natural and cultural heritage, water quality and ecological values, and infrastructure, which underlays the need to contain urban development. These are all matters identified in Part 2.3 (Issues) of the ARPS as being potentially affected by urban expansion. We bear this in mind when interpreting the definition and applying it to the facts of this case.

[68] As for the definition itself, we had been referred to a number of authorities that had discussed its interpretation. In ***Runciman Rural Protection Society Incorporated v Franklin District Council***[9] the High Court held that in ascertaining the meaning of *"urban development"* one should look to the definition of that term as provided in the ARPS.[10] Whilst all parties to those proceedings had agreed that the proposal was an *"urban development"* under the ARPS, Courtney J made the obiter statement that in her view schools were an activity that themselves were neither inherently rural nor urban. It was the size and nature of a particular proposal for a school that would dictate whether or not it was an urban activity. As will be discussed shortly, this accords with comments subsequently made by Keane J in ***Ballantyne v Auckland Regional Council***[11].

[69] In ***Ballantyne***, the High Court noted that the defined concepts of *"rural character"* and *"urban development"* function by contrast:

> "Rural character" is to be inferred from the distinctive combinations of qualities which make an area "rural" rather than "urban". "Urban development" is development which is not of a rural nature.[12]

[70] With reference to the definition of *"urban development"* Keane J commented:



[9] [2006] NZRMA278
[10] Paragraph [33]
[11] HC Auckland 20 Dec 2007, CIV-2006-404-03234
[12] Paragraph [25]

> The first sentence proposes an antithesis. It states that "urban development" is not of a "rural nature". It does not define what "rural nature" is. The second sentence, by contrast, enables, indeed requires that antithesis to be worked through by reference to four criteria: scale – relative dimensions or degrees; density – denseness or mass per volume; visual character – visual qualities or characteristics; dominance of built structures – relative prominence within the environment. Singly or together they must invite the conclusion that what is proposed is urban, not rural, in character.
>
> The third sentence, by further contrast, invites but does not require an enquiry into whether the proposal relies on reticulated services, is characterized by generation of traffic, and includes activities usually provided for in urban areas. These are further illustrative and discretionary indicia.[13]

[71] The court then noted that the Environment Court had been correct in assessing the actual proposal for which resource consent was sought and assessing that proposal with reference to the indicia provided in the definition:

> The court was entitled to conclude that the activity proposed, "travellers' accommodation" both inherently and consistently with the district scheme, is neither rural nor urban and, consistently with ***Runciman***, to pass beyond the generic to the particular. That is precisely what the second sentence of the definition *"urban development"* calls for.[14]

[72] From the authorities Mr Allan synthesised a number of principles which we partly adopt with some amendments:

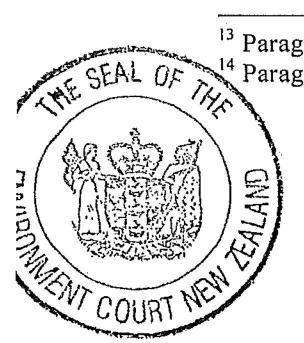
[a] When interpreting the term *"urban development"* one should look at the ARPS definition in context;

[b] The concept of *"urban development"* is defined, first by contrast with *"rural nature"* which is not defined although *"rural character"* is;

[c] A proposal may be neither inherently rural nor urban in the generic sense;

[d] The second sentence of the definition enables the enquiry to pass beyond the generic to the particular by reference to the four specified criteria: scale; density; visual character; dominance of built structures – to determine whether the proposal is either *"urban"* or *"rural"*;

[13] Paragraphs [58-59]
[14] Paragraph [61]



[e] The third sentence of the definition provides illustrative and discretionary factors that assist the assessment of whether the activities are ones usually provided for in urban areas;

[f] Any assessment is not to be made abstractly or formulaically, but should be made in the round bearing in mind the issues identified in Part 2.3 of the ARPS. Bearing this in mind we have regard to the evidence relating to the relative environmental qualities and thresholds identified and discussed elsewhere in this decision.

[73] We find the argument put forward by the council and the Canal Partnership that the proposal is neither inherently *"rural"* nor *"urban"* difficult to accept in view of the fact that it will contain 270 residences with a minimum lot size of $350m^2$, concentrated around the canals.

[74] It seems to us that overall the proposal is not of a "rural" nature so the antithesis of the first sentence of the ARPS definition would apply. Even Mr Lister, the landscape architect called by the Canal Partnership said:

> ... the maritime village itself will not have a rural character, but will have its own distinctive character relating to its maritime setting and function ...

[75] Notwithstanding, even if it was accepted that the proposal was neither inherently *"rural"* nor *"urban"* in the generic sense, we consider that it would become *"urban"* when you pass to the particular by applying the four specified criteria: scale; density; visual character; and dominance of built structures.

[76] As for scale, the residential component of the proposal consists of 270 residences with a minimum lot size of $350m^2$. This reflects the size of a small township. As Mr Tansley said, the residential component of the proposed development will be larger than that of Clevedon.[15] Mr Allan pointed out that witnesses for the partnership accept that the Plan Change provides for development that is not rural and will have a scale comparative with that of Clevedon Village.[16]

[15] Tansley, transcript pp 903-904
[16] See Lister EIC paragraph [98] and rebuttal paragraph [10]

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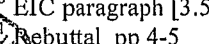
[77] As for density, the minimum lot size of 350m² with an average of 750m² is typical of New Zealand surburban densities. This was accepted by Mr Serjeant where he stated that the maritime village will have "an urban density in terms of lot size".[17] Mr Lister in his evidence-in-chief said:

> The maritime village will not have a rural character, given that it will constitute "densely grouped" housing compared with a typically scattered pattern of housing in rural areas. Nor will it have a conventional urban or suburban character ... [18]

[78] Some of the witnesses who gave evidence in support of the Plan Change sought to calculate density with reference to the whole lowland area including the canals and/or the recreational areas.[19] The issue here is whether the proposed form of development will have a density that is urban in nature. That is a function of the arrangement of dwellings enabled by the Plan Change, not simply a mathematical calculation. It is not the average lot size that is important, but the fact that a significant number of small lots and dwellings will be located within a small area of land. To calculate density with reference to the whole lowland area would, in our view, be artificial and would eschew reality.

[79] As for visual character, we agree with Ms Absolum when she concludes that the residential area will be urban in character.[20] We accept that the proposal has been sensitively designed with the residential and canal component surrounded by a recreational area containing wood lots, walkways and wetlands. Further, as Mr de Graaf told us, the maritime village has been designed to give a connection to the water and the plantings. This he said, differentiates the village from a typical suburban setting.[21] Notwithstanding, we are of the clear view that the residential component will be sufficiently prominent to create a visual character such that the development will reflect an urban quality.

[80] As for the dominance of built structures, the component parts would include not only the houses, but roads and a canal system. This will result in an engineered development. Again, notwithstanding the surrounding recreational area, the development as a whole will be sufficiently dominated by built structures to reflect an urban quality.

[17] EIC paragraph [6.31]
[18] EIC paragraph [98]
[19] See eg. de Graaf rebuttal paragraph [19]; de Graaf transcript pp 112, line [22] to pp 114, line [4]

[20] EIC paragraph [3.5]
[21] Rebuttal pp 4-5

[81] As for the third sentence of the definition, we are satisfied on the evidence that the proposal with its co-location of residential, retail, cafe and other commercial activities, together with community and recreational facilities, would be typical of the defining characteristics of urban areas. The residential component will rely on some reticulated services such as sewerage with the wastewater areas being located on the upland property.

[82] Considering all of the matters we have discussed, we are led to the inescapable conclusion that the proposal amounts to *"urban development"* as that phrase is defined in the ARPS.

Does Plan Change 13 Comply with Method 7 of the Strategic Direction of the ARPS?

[83] Having found that the proposal does constitute *"urban development"*, then the Relevant Strategic Direction Objectives and Policies in Part 2.5 and the Relevant Regional Development Objectives, Policies and Methods in Part 2.6 apply. Mr Brabant alternatively submitted that the establishment of the maritime village is in accordance with Method 2.6.2.7

[84] For convenience we set out again Method 2.6.2.7 in full:

> 7. Each TA shall set out within its District Plan issues, objectives, policies and methods for enabling the management and development of rural and coastal settlements.
>
> This shall:
>
> i) be an integrated consideration of the relevant issues;
>
> ii) be integrated with the urban and rural components of the District Plan;
>
> iii) not be inconsistent with the RPS.
>
> Where this method has been complied with, expansion of rural and coastal settlements in district plans beyond the limits applying at the date of notification of the RPS shall be deemed to have been provided for the purposes of strategic objective 2.5.2.3(iv) and policy 2.6.1.2 of the RPS.

[85] As we understand Mr Brabant's submission, Method 7 applies not just to the expansion of existing rural and coastal settlements, but also to any new development,

including as in this case, the creation of an entire new stand alone village. On the other hand, both Mr Enright and Mr Allan argued that Method 7 is effectively restricted only to expansion of rural and coastal settlements already identified in the Regional Policy Statement. There is no provision for development of a new settlement.

[86] Mr Brabant contrasted Method 7 with Strategic Policy 2.5.2.3(iv) which says:

> (iv) expansion of rural and coastal settlements outside the limits of **existing urban zones and settlements** (at the time of notification of the RPS or as shown or provided for in the RPS) is not permitted.
>
> *[emphasis Mr Brabant]*

[87] He particularly noted that the word *"existing"* qualifies the words *"urban zones and settlements"*. There is no such qualification in the opening sentence of Method 7. Nor is there any such qualification to the second sentence of Method 7.

[88] Again in the last sentence, the deeming provision, Mr Brabant noted the absence of the qualifying word *"existing"* before the words *"expansion of rural and coastal settlements"* and argues that the reference to "strategic objective 2.5.2.3(iv)" merely references the *"limits"* of rural and coastal settlements for the purpose of the deeming provision. It does not qualify in any way the enabling provisions for the management or development of rural and coastal settlements.

[89] We do not agree. We consider that Strategic Policy 2.5.2.3 is the lodestar for both Regional Development Policy 2.6.1.2 and Regional Development Method 2.6.2.7. Both reference to Policy 2.5.2.3, with Method 7 referencing direct to 2.5.2.3(iv) which is quite specific in not permitting expansion of rural and coastal settlements outside the limits of *"existing urban zones and settlements"*.

[90] As both Mr Allan and Mr Enright submitted, the Method should be interpreted in a way that gives effect to, or is consistent with the objectives and policies. Policy 2.5.2.3 and Policy 2.6.1.2 plainly do not permit urban development outside existing rural and coastal settlements. To accept Mr Brabant's argument would undermine the clear containment objectives and policies by allowing development outside the *"urban fence"*.

[91] Thus we are satisfied that both the Regional Development Policy and the Method apply to existing rural and coastal settlements as defined in the ARPS. Such an interpretation fits with, and is consistent with the strong containment policies and the strong direction for management of new development through an integrated process on a regional basis and in ways that are consistent with the strategic direction.

[92] Further, with regard to the deeming provision, this provides that where the Method 7 process has been complied with, then *"the expansion of rural and coastal settlements in district plans beyond the limits"* applying at the date of notification of the ARPS shall be deemed to have been provided for in terms of the purposes of Strategic Policy 2.5.2.3(iv). This policy provides that *expansion* of rural and coastal settlements outside the limits of existing urban zones and settlements is not permitted. The deeming provision, and indeed Strategic Policy 2.5.2.3(iv), is exclusively limited to *expansion* of rural and coastal settlements. The term *"expansion"* denotes the extension of something that already exists, in contrast to the creation of something new. The Concise Oxford Dictionary[22] relevantly defines the term expansion as:

1. the act or an instance of expanding the state of being expanded
2. enlargement of the scale or scope of (especially commercial) operations
3. increase in the amount of the state's territory or area of control

[93] *"Expand"* is relevantly defined as *"increase in size or bulk or importance"*.

[94] In our view it would be stretching the ordinary plain meaning of expansion *"of existing settlements"* to include the creation of a new settlement totally unrelated to any existing coastal or rural settlement.

[95] Mr Brabant relied, in part, on the ***Rimanui***[23] decision as supporting his position. In ***Rimanui***, the rezoning involved the expansion of an existing settlement policy area, rather than the creation of a new settlement. The Court held that the lack of direct physical contiguity was not relevant. The legal point being considered in this case was not directly at issue. Further, the zone change contemplated for Kawau Island in ***Rimanui*** did not involve urban development – a key point of difference. The Court in

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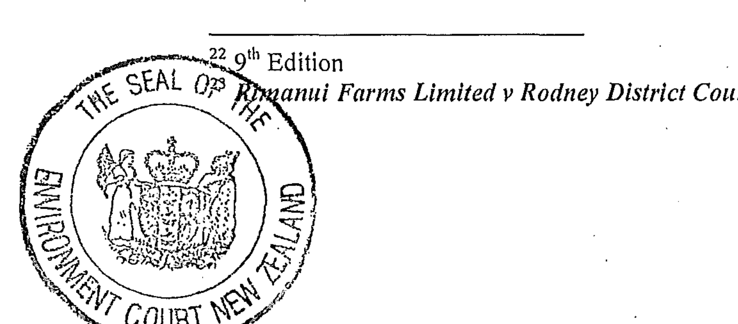
23 ***Rimanui Farms Limited v Rodney District Council***, A070/2008



Rimanui did not have to address the Section 75 arguments raised here in relation to Plan Change 13.

[96] We are satisfied, that looking at the ARPS as a whole, the clear direction is that new urban development outside the MUL or rural and coastal settlements, unless it is an extension of an existing rural or coastal settlement, requires a two-fold procedure. A district plan change preceded or paralleled by a change to the ARPS which, if approved, would either shift the MUL, or the limits of existing rural or coastal settlements, or define the new limits of rural and coastal settlements. This two-fold procedure would reflect the integrated managed approach envisaged by the ARPS.

Conclusion

[97] We have found that the proposed development would be *"urban development"* as that phrase is defined in the ARPS. We have also found that the plan change cannot invoke Method 7. It was also agreed that Method 2.6.2.8 is also not available.

[98] Even if we are wrong in our interpretation, then, for the following reasons, we find that Plan Change 13 does not adequately address the matters required by those methods.

[99] Both methods outline a process or mechanism for the integrated consideration and planning of urban development. Often this is referred to as "structure planning". We see such procedures as being entirely consistent with the Act, in particular the requirements of section 31(1)(a) and thus section 74(1).

[100] *"Integrated management"* is defined in the ARPS:

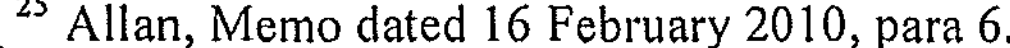
> Integrated Management means management of natural and physical resources:
> a) Where decision-making about the use, development or protection of natural and physical resources occurs in a holistic way;
> b) Which takes into account the full range of effects which may stem from any such decision over the short- and long- term; and
> c) Which considers effects by referring to section 3 of the RM Act, and may include effects on natural and physical resources and effects on the environment."

[101] In addition to the operative provisions (which we have set out previously), Change 6 to the ARPS, to which we are to *have regard*, unlike the operative ARPS, proposes a mechanism by which new rural and coastal settlements might develop. Part 2.6.2 Strategic Policies – Urban Containment contains Policy 6:

> Any proposal to establish or develop a new rural or coastal settlement that either creates capacity additional to that available under the district plan or does not meet the requirements specified in 2.6.2.5 will need, in addition to the matters outlined in 2.6.2.5(i-ix), to demonstrate that it:
>
> i. Supports the strategic direction of containment and intensification;
>
> ii. Will not compromise intensification within the areas identified in Schedules 1A and 1B;
>
> iii. Provides a clear differentiation between urban and rural areas, for example, through the use of water catchment boundaries and/or visual catchment boundaries in order to reduce pressure for future urban expansion; and
>
> iv. Meets the requirements of Method 2.6.3.9.

[102] Change 6, Part 2.6.3 Methods, outlines the process whereby proposals for new settlements are to be considered, including referral to the Regional Growth Forum for a region-wide strategic review of their appropriateness with reference to the Regional Growth Study. The results of that review would be taken into account in determining whether to change the Statement to include the new settlement in the RPS Schedule 1B. So although Change 6 outlines mechanisms for considering new settlements, it still requires a change to the RPS. Any related district plan change is required to be prepared in an integrated manner similar to the operative ARPS methods. This includes Appendix A, referred to in Change 6 Method 2.6.3.5, which identifies catchment management planning[24] and structure planning as relevant tools for integrated management.

[103] The ARC and Clevedon Cares position was that PC13 was inadequate in terms of these requirements for an integrated consideration of the relevant issues. In particular counsel for Clevedon Cares submitted[25] that: no assessment had been made of the potential effects on the neighbouring settlements such as Clevedon; no strategic planning consideration had been given to the potential for the Wairoa River settlement to act as a catalyst for further development beyond the plan change area; and it was not integrated with the existing urban and rural components of the District Plan, with no amendments being sought to any objectives and policies in the District Plan outside of the new ones



[24] This also links to the requirements of the ARC's Air, Land and Water Plan.
[25] Allan, Memo dated 16 February 2010, para 6.

being sought within the new special zoning for the settlement in Chapter 17. In essence the Society said that the plan change did not "fit" well within the strategic framework of the District Plan.[26]

[104] Ms Allan considered that the provisions of PC13 were internally focussed on the site and did not recognise the context[27]. In addition to expressing concerns about integration with the district plan, Ms Allan was also concerned about the lack of integration with the necessary regional-level consents that would be required in parallel to the district plan land use approvals. Under the Regional Plan – Coastal consents will be required for dredging, disturbance, discharges and diversions. This includes dredging of the river channel and the bar at the river mouth. In Ms Allan's opinion development associated with PC13 is not in accordance with policy elements of the Regional Plan – Coastal such that there may be some difficulty obtaining the necessary consents.[28]

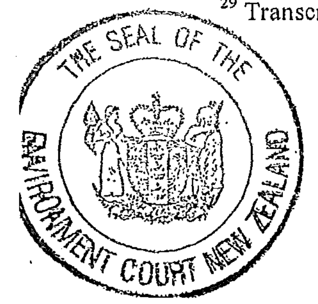
[105] In response to a number of questions from the Court, Mr Serjeant confirmed that he had not undertaken any analysis of the plan change in terms of the strategic framework or the higher order objectives and policies of the district plan. Nor was he aware of any such analysis being undertaken by the Council or any other parties.[29] This was consistent with the evidence of Ms de Ronde.

[106] We concur with Ms Allan and the submissions made for the ARC and Clevedon Cares. The plan change has been prepared in isolation. This applies to both the context *on the ground* and within the district plan. Regardless of which chapter it is filed into in the district plan, the provisions are required to be consistent with, and connected to, the general strategic direction and context for the Wairoa valley, the district and the region.

[107] We accordingly find that the plan change would not give effect to the ARPS in the following respects:

[a] The strong and unequivocal direction of the objectives and policies relating to urban containment; and

[26] Allan Submissions para 92
[27] Ms Allan, EIC, paras 241,242
[28] Ms Allan, EIC paras 222 – 232.
[29] Transcript pages 751 – 760.



[b] The strong policies relating to the provision of further urban growth to be managed through an integrated process and assessment on a regional basis and consistent with the Strategic Direction.

[108] The failure to give effect to these important provisions of the ARPS means that the necessary framework to enable an adequate regional wide assessment of the effects of the proposal has not been put in place. This relates particularly to the effects on natural and physical resources; cumulative effects on the transport network and infrastructure; and the effects on social and economic sustainability.

To What Extent Should Our Findings on Issues 1 & 2 be Modified by Change 6 to the ARPS?

[109] The provisions of Change 6 to the ARPS are not a consideration for us in terms of Section 75(3) of the Act, as they are not yet procedurally in force. However, they are a matter to which we *"shall have regard to"* under Section 74(2). These words indicate that such matters must be considered, but not necessarily followed. How much regard should be had to Change 6 depends in part on the stage it has reached through the participatory process.

[110] Proposed Change 6 was notified on 31st March 2005 as a requirement of the Local Government (Auckland) Amendment Act 2004. That Act directed all councils in the Auckland region to integrate their Land Transport and Land Use provisions to ensure consistency with the Auckland Growth Strategy, give effect to its growth concept, and contribute in an integrated manner to the Land Transport and Land Use matters specified in Schedule 5[30]. Decisions were released on 31st July 2007 and some 47 appeals have been lodged with the Environment Court against the regional council's decision in relation to both Change 6 and 7. Appeals remain extant against the provisions of Change 6 to the Strategic Direction Objectives and Policies, including all of the Urban Containment Policies and Methods, and new definitions of *"urban growth"* and *"urban activities"*.

[111] Change 6 is the result of a statutory directive. However, its provisions are currently subject to considerable uncertainty. Accordingly, the ARPS continues to be a relevant document until the appeals are determined. Because the outcome of the appeals

[30] Sections 39 & 40

is uncertain, the weight we should give to it should reflect that. In our view, very little weight should be given to Change 6. We also bear in mind that we are only required to have regard to the Change but must give effect to the operative document no matter what stage Change 6 is at.

[112] Because the primary document is the ARPS, we do not propose to set out in detail the provisions of Change 6. Generally, the Change seeks to endorse the growth concepts of the Auckland Regional Growth Strategy and to contain urban development and manage growth to achieve a range of environmental outcomes including:

[a] Protecting landscapes and maritime character;

[b] Maintaining or protecting natural character, amenity values and open space; and

[c] Maximising transport efficiency.

[113] It basically reiterates, in more prescriptive terms, the strategy of urban containment within defined limits – the MUL, and coastal and rural settlements.

[114] Accordingly, we find that our findings on the application of the ARPS should not be modified by Change 6.

Issue 3 - The Effects on Maori

Ko Kohukohunui te Maunga	Kohukohunui is the mountain
Ko Wairoa te Awa	Wairoa is the river
Ko Tikapa te Moana	Tikapa (Hauraki Gulf) is the ocean
Ko Tainui te Waka	Tainui is the canoe
Ko Umupuia te Marae	Umupuia is the Marae
Ko Ngai Tai te Iwi	Ngai Tai are the people

[115] The above pepeha encapsulates Ngai Tai's relationship to the Wairoa River and the surrounding land and sea. A relationship that those exercising functions under the Act shall recognise and provide for under Section 6(e) of the Act which provides:

6 Matters of National Importance

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:

...

(e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.

[116] Sections 7(a) and 8 of the Act are also relevant. They respectively provide:

7 Other Matters

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to –

(a) Kaitiakitanga;

...

8 Treaty of Waitangi

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

[117] As was said in ***McGuire v Hastings District Council***:[31]

These are strong directions, to be borne in mind at every stage of the planning process.

[118] The strong directions regarding Maori values contained in the Act have been reflected by equally strong provisions in the relevant planning instruments. The New Zealand Coastal Policy Statement, through principles 8 & 9 and Chapter 2, exhort the protection of characteristics of the coastal environment that are of special value to tangata whenua. The ARPS, which like the New Zealand Coastal Policy Statement, must be given effect to, contains in Chapter 3 objectives, policies, and methods, that address the cultural and heritage aspect of Maori and their relationships to their ancestral lands, water, sites, waahi tapu, and other taonga. Similarly, the District Plan contains strong provisions that reflect the Act. The combined effect of these provisions is that they must

[31] [2002] NZRMA (PC) 81 at para [21]

be considered and applied in accordance with the Act's directions. They are not there merely to give lip-service to the Act.

[119] Four witnesses gave evidence on tangata whenua issues:

[a] Mr Lawrence John Beamish and Mr Matthew Carl Green for the Ngai Tai Umupuia Te Waka Incorporated;

[b] Dr Rod Clough, an archaeologist called by the Canal Partnership; and

[c] Ms Brigitte Doreen de Ronde, a consultant planner called by the Manukau City Council.

[120] Mr Green, a Ngai Tai tribal historian, produced a report titled *Ko Wairoa te Awa, Ngai Tai Culture and Heritage Report on Wairoa River, Clevedon.* In his evidence he emphasised the importance of the Wairoa River to Ngai Tai. Its importance to Ngai Tai can be summarised and encapsulated in the following passages from his evidence:

- ... the Wairoa is the Awa (waterway) central to the identity of Ngai Tai or Ngati Tai. The river is regarded as central to tribal and personal identity and hence Ngai Tai introduce themselves with a pepeha which includes the statement "Ko Te Wairoa Te Awa."[32]

- The mana of the river is inextricably linked to the mana of the people.[33]

- Every part of the river is sacred to Ngai Tai, from its headwaters to kohukohunui to its outlet at Maraetai Moana. The west bank of the lower river is also regarded as having great significance as a waahi tapu, from Te Ruato burial swamp to Te Whakakaiwhara Peninsula.[34]

- ... the mudflats of the river are known in Ngai Tai tradition as urupa burial grounds ...[35]

[121] Mr Green told us that the sites proposed for the canal and its service area fall within two important areas known to Ngai Tai ancestors as Tauranga Kawau and Taka Te Kauere. Tauranga Kawau describes the once extensive swamps and inter-tidal areas inside the river mouth. Taka Te Kauere refers to that part of the development area from

[32] EIC para [5]
[33] EIC para [6]
[34] EIC para [8]
[35] EIC para [11]

the low rise of the lowland property extending back into the proposed service area on the upper property. With regard to Taka Te Kauere he said:

> Taka Te Kauere describes literally burial preparations associated with Te Kauere, the native tree more commonly known in other dialects as puriri. In essence this practice deals with the heaping of one's dead on top of the puriri trees, allowing the flesh to rot before the bones were then cleaned and buried. That practice normally took place over a period of a year and forms the basis of the practice today where a year is generally regarded as an appropriate time between the tangihanga and unveiling of the headstone.[36]

[122] As well as emphasising the sacredness of the river to Ngai Tai, Mr Green discussed in some considerable detail in pages 118 – 126 of his report the waahi tapu status of the lands surrounding the river and in particular in and near the proposed site. In his report he says:

> From the information collated to date, the primary waahi tapu directly affected by the canal proposal are the mudflats of the river's west banks, including the canal entrance itself; Taka Te Kauere within the upper part of the property; ... and undoubtedly other waahi tapu not yet positively located, given the time constraints placed on the gathering and filing of this evidence.[37]

[123] Mr Green concluded:

> The impacts of Plan Change 13 may further be seen to seriously contravene the tapu of Te Wairoa and its many associated waahi tapu. As stated already, the entirety of the lower river's west bank is known to be comprised of urupa and the creation of the canal will disturb these waahi tapu.

[124] In response to a question from Mr Enright regarding the cultural significance of connecting the canal to the river, he replied:

> The technical definition of it being part of the coastal marine area sort of has very little cultural meaning, but the diversion of the course of the river and the drawing of water from the river which is I think all parties are not contesting the fact that it is a waahi tapu to Ngai Tai, is viewed as culturally inappropriate to divert the course of that water because of its tapu nature and to use it for a purpose which is also seen as inappropriate to Ngai Tai.
>
> There are also issues surrounding I think what was commented on in the earlier cultural and heritage assessment report issued by Te Waka Totara Trust. The Waimate and Waikemo [sic] properties of that water are due to the internment of Ngai Tai ancestors within the lower reaches of the river, so the lower reaches of

[36] EIC para [12]
[37] EIC para [1] – [6]

> the river are inherently tapu to our people. So, yes, there are a lot of significant cultural issues for us about diverting the course of that river for those purposes, and drawing from that water.[38]

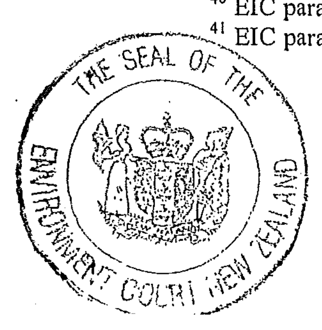
[125] Responding to a question from the court, Mr Green said:

> There was an older name for the same area which sounds very similar, Takata, one word, "Takata", rather than "Taka Te Kauere". And this was a name given by earlier tangata whenua prior to the arrival of the Tainui waka, but who are also acknowledged as ancestors of Ngai Tai in this area, and it referred also to burial practices in the same area which were slightly different to those adopted later by Ngai Tai migrant people.
>
> It, as I have been told, was that in the earlier period and when there was less warfare the burial practices were slightly different and that there was a sort of mummification type of process that took place in this location. It still included the people being suspended in the trees but there was smoking of the bodies using certain parts of the puriri tree which is where the name "Kauere" comes from, is to do with those particular parts of the puriri associated with those burial rituals.
>
> Part of that process also included the draining of the – you will forgive me if I am a little uncomfortable discussing this in a forum like this –but the draining of the fluids of the body and that according to the korero the fluids of the body flowed down from the trees into the area which is the development site itself and into the swamps, into the river, and there is a link between the tapu of the tupapaku from the whenua down to the swamps, down to the Wairoa River. And that was the particular association that I was only recently given permission to elaborate on.

[126] Under cross-examination by Mr Brabant, Mr Green was pressed to specify the area of waahi tapu within the village complex area. He replied that Ngai Tai buried their dead into the Wairoa River where the soft tidal mud easily accommodated this ritual and customary practice.

[127] Mr Beamish, the CEO of the Ngai Tai Umupuia Te Waka Totara Trust, told us that Plan Change 13 fails to recognise the cultural significance of the site to Ngai Tai and the related iwi Pare Hauraki and Pare Waikato.[39] He maintained[40] that the plan change fails to protect the cultural uniqueness of this area and its waahi tapu status, and that Ngai Tai and other iwi still visit the sites of significance to conduct karakia and other rituals.[41]

[38] Transcript pages 302 & 303
[39] EIC para [5]
[40] EIC para [7]
[41] EIC para [7]



[128] In response to a question from the court regarding Taka Te Kauere, he replied, "*... again, to put a pinpoint on the map is contrary to the korero of our tepuna*" revealing a reluctance on the part of iwi to divulge the actual location of such places.

[129] Dr Clough, the archaeologist called by the applicant, told us that there were no evident habitation sites in the immediate area and that swamps are not normal places of permanent habitation.[42] Referring to the Ngai Tai submission, he fully acknowledged the cultural significance with the Wairoa River and surrounding areas to Ngai Tai.[43] However he noted, that the submission does not specifically identify sites of cultural significance within the project area, adding that the important burial place of Tara-te-irirangi is over 1km up river.[44] He stated that there is no physical or historical evidence to indicate that the project area was extensively settled or exploited,[45] nor was he aware of any archaeological evidence that the proposed village site was used for burial rituals.[46] He concluded that on the basis of archaeological examination, the area appears to have been used only by:

> ... temporary or transient groups moving up and down the river, and gathering resources ...[47]

[130] Under cross-examination by Ms Kapua, he emphasised that he was not tangata whenua and that Maori values should come from tangata whenua[48] reiterating similar comments he made in his rebuttal evidence.[49]

[131] Ms de Ronde, the consultant planner called by the Council, acknowledged that Council Officers would have been aware of the general waahi tapu status of the Wairoa River to Ngai Tai since consultation meetings with iwi on Proposed Plan Change 13.[50] She again reiterated this under cross-examination.[51]

[132] Ms de Ronde also recognised Ngai Tai's close ancestral connection with the Wairoa River and their right to exercise kaitiakitanga over their ancestral lands within

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[42] EIC para [23]
[43] ECI para [25]
[44] EIC para [35]
[45] EIC para [6]
[46] EIC para [7]
[47] Rebuttal, para [10]
[48] Transcript, page 360
[49] Rebuttal, para [13]
[50] EIC para [6.3]
[51] Transcript, page 321

that area.[52] Her main issue was the lack of specific information pertaining to the extent, condition, and/or location of waahi tapu in the Plan Change 13 area. Under cross-examination by Ms Kapua she emphasised,[53] *"None of that specificness is related to that site"*.

[133] Mr Brabant in his closing submissions, submitted that ... *"the court should decide questions of fact on evidence of probative value"*, especially when assessing conflicting evidence and opinions concerning the presence or not of waahi tapu, urupa, or locations alleged to be tapu. He further submitted that, *"none of the urupa referred to in the cultural impact assessment report ... by Mr Beamish ... are located on the subject site"*.

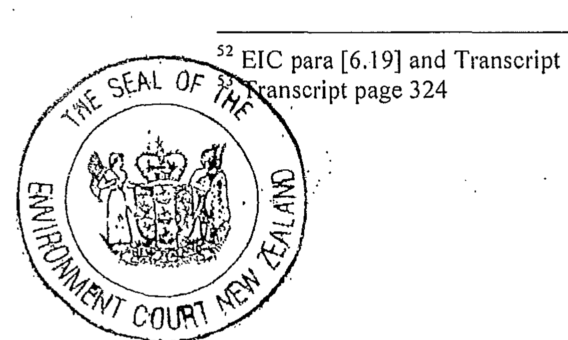
[134] Ms Kapua in her opening submissions asserted that Plan Change 13 does not recognise and provide for the relationship that Maori and their culture and traditions have with this land, this water, the sites, the waahi tapu, and the taonga of Ngai Tai. Nor she said does the plan change have regard to kaitiakitanga or take account of the Treaty of Waitangi.

Evaluation of Effects on Maori

[135] We are satisfied from the evidence, especially the comprehensive and detailed evidence of Mr Green, that there exists an exceptionally strong relationship between Ngai Tai and the Wairoa River, its banks and the adjacent lands. This relationship has developed over many years of occupation, during which sensitive and meaningful cultural practices were carried out; practices which are still acknowledged today by Ngai Tai visiting the sites of significance to conduct karakia and other rituals. We have no difficulty in concluding that Ngai Tai derive their identity as a people from this area, this river, and these lands.

[136] We find that Ngai Tai, their culture and traditions, have a strong relationship with their ancestral lands, water, sites, the waahi tapu and taonga. A relationship which we must recognise and provide for as a matter of national importance. There was some argument about the exact location of waahi tapu sites. In this instance, identification by means of cartographic location is not important. Section 6(e) of the Act requires us to recognise and provide for the relationship of Maori, their culture and traditions with their

[52] EIC para [6.19] and Transcript page 314
[53] Transcript page 324



ancestral lands, water, sites, and taonga, as well as waahi tapu sites. In this case, notwithstanding sites identified by the Maori witnesses as waahi tapu, and whether such sites lie within the proposed canal site, we find that there is a strong relationship to ancestral lands (which includes the site), water (which will be affected by the canal development) and taonga (the river which will be affected by the proposed development).

[137] Our finding does not necessarily mean that the proposal is stymied. We need to have regard to our finding in the context of the proposal and having regard to the whole of the evidence and the benefits that may accrue from the proposal. However, such an appraisal cannot be adequately made without a carefully managed regional-wide integrated assessment as is required by the ARPS. The strategy that is required by the provisions of the ARPS is to ensure that such decisions are not made on an ad hoc site by site basis.

Issue 4 - The Effects on Natural Character, the Coastal Environment, Landscape and Amenity

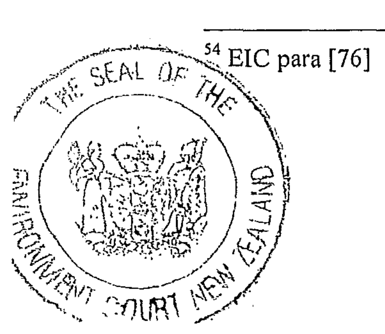
[138] Natural character, the coastal environment, and landscape issues are very much interrelated. In this estuarine rural area these related values underlay the amenity of the surrounding area, both in the context of the site and its immediate surrounds and the wider regional context.

[139] The site and the immediate surrounding area have been modified over time by farming activities. The site sits within the coastal environment. As Mr Dunn, planning consultant for the partnership said:

> The site is generally considered to be within the "coastal environment". The site adjoins the coastal marine area and is generally within the visual catchment of the coast.[54]

[140] We summarise the relevant statutory documents that apply to this issue.

[54] EIC para [76]



Statutory Provisions

The Act

[141] The site being within the coastal environment Section 6(a) applies. It provides:

> **6 Matters of national importance**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
>
> (a) The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development.

[142] All the landscape architects who gave evidence agreed that the site is not contained within an *"outstanding natural landscape"*. Accordingly, Section 6(b) does not apply. However, the *Auckland Regional Plan: Coastal* identifies the whole of the Wairoa River Estuary and Whakakaiwhare as falling within a regionally significant landscape. Thus, Sections 7(c) and (f) apply. They respectfully provide:

> **7 Other Matters**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to –
>
> (c) the maintenance and enhancement of amenity values:
>
> ...
>
> (f) maintenance and enhancement of the quality of the environment;

The New Zealand Coastal Policy Statement

[143] The New Zealand Coastal Policy Statement contains general principles which include reference to Part 2 of the Act and lists 14 more specific general principles. Of particular relevance to this issue are:

> 1. Some uses and developments which depend upon the use of natural and physical resources in the coastal environment are important to "the social, economic and cultural well-being" of "people and communities". Functionally, certain activities can only be located on the coast or in the coastal marine area.

2. The protection of the values of the coastal environment need not preclude appropriate use and development in appropriate places.

3. The proportion of the coastal marine area under formal protection is very small and therefore management under the Act is an important means by which the natural resources of the coastal marine area can be protected.

4. Expectations differ over the appropriate allocation of resources and space in the coastal environment and the processes of the Act are to be used to make the appropriate allocations and to determine priorities.

[144] Chapter 1 sets out five policies to give effect to the preservation of the natural character of the coastal environment, the lodestar of which is Policy 1. It provides:

Policy 1.1.1

It is a national priority to preserve the natural character of the coastal environment by:

(a) encouraging appropriate subdivision, use or development in areas where the natural character has already been compromised and avoiding sprawling or sporadic subdivision, use or development in the coastal environment;

(b) taking into account the potential effects of subdivision, use, or development on the values relating to the natural character of the coast environment, both within and outside the immediate location; and

(c) avoiding cumulative adverse effects of subdivision, use and development in the coastal environment.

[145] Policy 1.1.3 is also important, as is Policy 1.1.5. They respectfully provide:

Policy 1.1.3

It is a national priority to protect the following features, which in themselves or in combination, are essential or important elements of the natural character of the coastal environment:

(a) landscapes, seascapes and landforms, including:

(i) significant representative examples of each landform which provide the variety in each region;

(ii) visually or scientifically significant geological features; and

(iii) the collective characteristics which give the coastal environment its natural character including wild and scenic areas;

(b) characteristics of special spiritual, historical or cultural significance to Maori identified in accordance with tikanga Maori; and

(c) significant places or areas of historic or cultural significance.

Policy 1.1.5

It is a national priority to restore and rehabilitate the natural character of the coastal environment where appropriate.

The Auckland Regional Policy Statement (ARPS)

[146] Chapter 7 of the ARPS is particularly relevant to this issue. It sets out in some considerable detail the Issues, Objectives, Policies, and Methods that are to apply to the complex and diverse coastal environment of the Auckland Region. The Objectives and Policies relevantly seek to protect the natural character, landscape and amenity of the coastal environment from inappropriate development.[55]

[147] When preserving the natural character of the coastal environment and protecting it from inappropriate development, decision-makers are exhorted to take into account the fact that Auckland's coastal environment ranges from areas which are predominantly in their natural state to areas which have been highly modified.[56]

[148] Policies of 7.4.4.1(i)(c) and (d) direct us to avoid adverse effects on the coastal landforms and their features, elements, and patterns which contribute to landscape values and scenic and visual values. The need for preservation and protection needs to be balanced with the recognition that some forms of development are dependent on the coastal environment[57] as they have a functional need to locate there. Such development is enabled and considered appropriate where any adverse effects can be avoided, remedied, or mitigated.[58] Overall, a precautionary approach is signalled where potentially significant adverse effects may arise.[59]

[149] The Policy Statement requires the complex interrelationship between the land and sea in the coastal environment to be managed in an integrated manner. Issue 7.2.9 provides:

[55] See particularly Objective 7.3.1 and Policy 7.4.10
[56] Issue 7.2.1
[57] See Issue 7.2.3
[58] For example, see Objectives 7.3.3 and 7.3.4
[59] See Policy 7.4.10.3

> 7.2.9 Fragmented management of the land and water components of the coastal environment has, and could lead to, undesirable environmental outcomes.

Under this issue the statement says:

> Achieving the environmental outcomes in relation to the key issue outlined above, through objectives, policies and methods of this chapter, requires an integrated management approach between all agencies with resource management responsibilities in the coastal environment.

[150] Policy 7.4.10(2)(xii) links Chapter 7 with Chapter 2 – Regional Overview and Strategic Direction. Clearly, to give effect to the ARPS requires development in the coastal environment to be managed in an integrated way in accordance with the directions in Chapter 2. As we have found, in this case that did not occur. For reasons we are about to give, we consider that the potential adverse effects on natural character and landscape are considerable and thus need to be assessed as part of an integrated management approach. This will enable their significance in the regional context to be properly determined.

Auckland Regional Plan: Coastal

[151] The *Auckland Regional Plan: Coastal* covers the coastal marine area – the area below Mean High Water Springs, the point 1km upstream from a river mouth, or the point calculated by multiplying the width of the river mouth by 5, whichever is less. The Plan maps the upstream extent of the coastal marine area on the Wairoa River as a point opposite the site, a short distance (approximately 300m) upstream of the canal entrance. The coastal marine area includes the river itself and adjacent tidal mangroves, salt marsh, and mudflats.

[152] The river opposite the site in the vicinity of the canal entrance is classified as Coastal Protection Area 2, and areas downstream and the fringes of the river on the opposite bank are zoned as Coastal Protection Area 1. These are generally wetlands, salt marsh and mangrove forest.

[153] The portion of the river deemed to be within the coastal marine area is classified as a *"regionally significant landscape"* in common with the shoreline of the adjacent part

of the coast. This is a matter to which we have already adverted to, and such a classification brings into play Sections 7(c) and (f) of the Act.

[154] Section 4 of the Plan addresses landscape matters. Objective 4.3.1 relevantly seeks to protect the key elements, features, and patterns of regionally significant landscapes (as identified in the Plan Maps) from inappropriate subdivision use and development in the coastal environment. Objective 4.3.2 seeks to maintain and enhance the diversity, integrity and landscape quality of the coastal environment.

[155] Policy 4.4.2 provides that:

> Subdivision, use and development in the coastal marine area shall be considered inappropriate where it would result in significant adverse effects on those key elements, features and patterns which contribute positively to the landscape quality, aesthetic value and landscape sensitivity of those areas identified in the Plan as being Regionally Significant Landscapes of the coastal environment.

[156] Policy 4.4.5 sets out seven matters to which particular regard will be had in assessing the effects of subdivision, use and development in the coastal marine area. These include:

[a] Integration of adjacent areas of the coastal marine area and adjacent land above Mean High Water Springs;

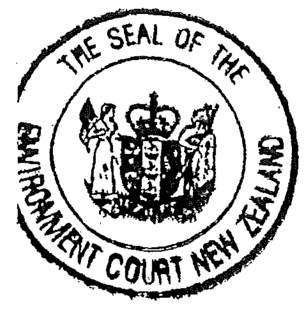
[b] Maintaining visual links between the coastal marine area and adjacent land;

[c] Maintaining and enhancing appropriate vegetation patterns (particularly indigenous);

[d] Maintaining natural variation of the foreshore; and

[e] Maintaining topography of the seabed in particular areas.

[157] Other chapters of the Plan cover natural character, natural features and ecosystems, and public access. These generally reflect the provisions of Part 2 of the Act and the New Zealand Coastal Policy Statement.



Manukau City Operative District Plan

[158] The site is located within the Rural 1 Zone in the Operative District Plan, which, together with the other rural zones and related provisions, is described as being designed to relevantly provide the following outcomes:

[a] Open rural landscape character;

[b] Uncompromised rural coastal environment;

[c] Retention of areas of ecological significance, indigenous vegetation and fauna in the rural areas;

[d] A stock of high-quality soils that are accessible and useable;

[e] A healthy environment (e.g. good air quality, acceptable noise levels); and

[f] High quality streams and coastal water.[60]

[159] The Rural 1 Zone is primarily directed at maintaining rural activities and productivity, whereas Manukau City's Rural 2 and Rural 3 Zones are directed towards accommodating countryside living. In Section 12.9.1, the Rural 1 Zone is described as being designed to accommodate:

> ... primary production activities such as farming, forestry and quarrying to occur. A limited range of other activities such as rural industries and services, cleanfills, recreational and tourist activities are also able to locate in the rural area subject to being able to avoid, remedy or mitigate any adverse effects on the environment. **It is also important that the rural zone maintains the integrity of the urban containment** and the business policies set out in Chapters 4 City Environment and 14, Business Areas.
>
> To mitigate the adverse effects of residential activity on the rural environment countryside living is also limited in this zone to manage the effects outlined above. A number of limited households for countryside living can be established and lots subdivided. The restrictions put in place aim to limit the number of dwellings in the rural area and thus help to retain rural character, landscape quality and minimise incidents of conflicts between rural activities and "countryside" residents.
>
> *[added emphasis]*

[60] See Section 12.7

[160] The Rural 1 zoning makes provision for a range of often quite utilitarian activities and structures – from farming and pig-keeping to production forestry and greenhouses – Section 12.9.1 of the Plan clearly stipulates that non-rural activities and development:

> ... are constrained to avoid adverse effects on the rural environment and in particular the cumulative effects of such activities. These include:
>
> - the effect on the rural character and amenity values of the rural area;
> - the effect on the productive potential of the soil resources from building coverage and fragmentation;
> - the effect on landscape qualities and open space amenity values;
> - the effect of carrying out activities on neighbours.

Hauraki Gulf Maritime Park Act 2000

[161] The purpose of the Hauraki Gulf Maritime Park Act 2000 as set out in Section 3 includes integrating the management of the natural, historic, and physical resources of the Hauraki Gulf, its islands, and catchments. Sections 7 and 8 are to be regarded as though they were a national policy statement under the Resource Management Act. Accordingly, Plan Change 13 must give effect to those sections by virtue of Section 75(3) of the Act.

[162] A careful reading of Sections 7 and 8 which are in general terms, leads us to the conclusion that it adds nothing to the statutory directions of the Resource Management Act, the provisions of the New Zealand Coastal Policy Statement, or the more detailed provisions of the ARPS and Coastal Plan.

The Site's Landscape Setting

[163] We have described the site and surrounding landscape earlier in this decision.[61] The landscape witnesses all described the modified character of the river and its margins – the moorings, boats, jetties, sheds and slipways which clearly leave an imprint on the current river corridor. They also referred in some detail to the adjacent modified farmland. The earlier vegetation cover has been almost completely removed, the land drained by a network of ditches and in some cases floodgates, the field and shelter-belt

[61] Paras [8] – [19]

patterns are rectilinear and include hedgerows of weed species, and stock have access to the riverbank.[62]

[164] Notwithstanding the modified character, all of the landscape witnesses recognised to a varying degree a measure of natural character. Mr Lister opined that the river and its margins would have *a moderately high degree of natural character.* But the adjacent farmland was *highly modified.*[63]

[165] Ms Absolum had this to say:[64]

> 4.20 Despite these structures, the natural elements and patterns of the river remain largely unchanged. In terms of natural processes within this part of the coastal environment, many of them remain unchanged. Although the volume of water in the river is reduced by two water catchment dams in the Hunua Ranges, the river still flows, the tides still rise and fall. On the land natural processes have been changed more dramatically, but vegetation and the absence of built structures still dominate.
>
> 4.21 In my opinion, when assessed on a scale of 'pristine' to 'highly modified urban', the lower Wairoa Valley has areas of high natural character and the protection of these is a national priority.

[166] Mr Brown had this to say[65]:

> 38. Although the Wairoa River is therefore far from pristine, its sinuous waterway, mangrove margins, banks and marshland all reinforce the pleasant and distinctive interplay of natural and cultural dimensions at play within the Wairoa Valley/Clevedon landscape. Having regard to that interplay in its entirety, I consider that the Wairoa River Canal Partnership site lies within what would now be typically referred to as an Amenity Landscape. It is not outstanding at either the regional or city/district level, but it is sufficiently characterful, unified, coherent and – in a compositional sense –appealing, that I believe it qualifies as such in terms of section 7(c) of the Resource Management Act ...

[167] With regard to the site and surrounds, Mr Scott has this to say[66]:

> 31. The catchment has been highly modified since human settlement. The once expansive lowland kahikatea forest and wetland systems have now been cleared, resulting in a landscape that is dominated by pastoral

[62] See Lister EIC para [87]
[63] EIC para [87]
[64] Absolum, EIC, paras [4.20] – [4.21]
[65] Brown, EIC, para [38]
[66] Scott, EIC, paras [31] and [38]

> activities. Clearance of the land has contributed to the situation of the lower Wairoa River and estuarine system. There can be no doubt that the natural character of this coastal environment has been modified. While there is a remnant natural character, the components of this landscape show substantial modification and loss of ecological quality and diversity.
>
> ...
>
> 38. The surrounding rural area is now comprised of a number of relatively small land holdings with associated landscaped gardens, small-scale orchards, vineyards, constructed ponds, small wetland and a number of individual moorings to the river. These developments have increasingly 'domesticated' and landscaped the rural corridor environment ... They have also enhanced the managed character of that semi-rural environment.

[168] We acknowledge that the site has been highly modified by many years of farming. We also note the marine and farming structures in and on the banks of the Wairoa River. Nevertheless, we consider that the Wairoa Valley landscape within which the site is set still retains a strong natural character and landscape quality. We agree with Mr Brown when he said[67]:

> 32. It would be fair to say that, as a whole, the Wairoa Valley landscape is less than spectacular or exemplary. Nevertheless, the relatively soft-edged interplay of natural and cultural elements within it, and the coalescence of different landscape features (listed above) around a gently meandering Wairoa River, lend this landscape a certain unity and cohesion, tranquility, charm and identity – or sense of place – that is unique within the Auckland Region. Duders Regional Park, and views from it, capture most of these qualities.

Landscape Effects

[169] All of the landscape architects carried out a detailed assessment of the effects of the Proposed Plan Change on the natural character and landscape of the Wairoa Valley. Mr Lister discussed:

[a] The orientation of the houses to the canals;

[b] The variety and intricacy of the canal edge;

[c] The focus provided by the village centre;

[d] The vegetation framework;

[67] Brown, EIC, para [32]

[e] The recreational attributes; and

[f] The effects on surrounding river character and amenity.

[170] He concluded[68]:

> 130. The proposal will have a distinctive character different from that of conventional suburban, urban, or lifestyle patterns, by means of the architectural and landscaping controls discussed above.
>
> 131. The effects on rural character of the surrounding landscape will be substantially avoided by the village's design: particularly the concentration of the woodland framework within the canal area and the creation of an open parkland landscape around the perimeter.
>
> 132. The proposal will enhance environmental sustainability through the extensive restoration, which will connect the hill to the river and restore a type of vegetation that is now missing from the valley.

[171] Mr Scott made an analysis on a regional and sub-regional basis, including the *historic and emerging nodal settlement patterns of the wider contextual landscape*[69]. He concluded[70]:

> 26. In my opinion, the proposed village is consistent with the historic and emerging nodal settlement patterns of the wider contextual landscape. In addition, the village offers an innovative and unique lifestyle option. The proposed form of the development has a distinctive character that contrasts and complements the existing traditional and conventional urban, suburban and rural residential patterns.

[172] Mr Scott described in some detail the effects of the proposal on natural character and rural character. He concluded[71]:

> 74. In my opinion, the proposed Wairoa Maritime Village is an appropriate development in this location, and is consistent with the historic and emerging settlement patterns of the wider contextual landscape.
>
> 75. While the maritime village itself will not have a rural character, the village design character will reflect the maritime setting and function within a restored natural and ecological landscape framework. The rural

[68] Lister, paras [130] – [132]
[69] Scott, EIC, para [22] and following
[70] Scott, EIC, para [26]
[71] Scott, EIC, paras [74] – [76]

character of the surrounding landscape will be maintained, which is also consistent with the wider landscape settlement pattern.

76. The maritime village will enhance access to and along the coastal marine area and river for both residents and recreational visitors.

[173] Ms Absolum made a detailed landscape assessment with particular reference to the relevant statutory instruments. She concluded[72]:

7.1 The Wairoa Valley is a broad, open and attractive rural area, with only limited rural residential development. Despite its relative proximity to Auckland city it retains its particular rural qualities and these are valued by the local community.

7.2 The canal housing proposal is urban in character and will occupy a substantial area, in excess of 85ha. The level of built development, including terraced housing around the commercial centre, will create a suburban environment with both roads and canals separating rows of houses.

7.3 The Wairoa Valley at present maintains a very clear pastoral rural character; this character will be significantly altered by the introduction of development in line with either the PC13 or RPC provisions.

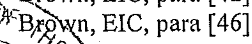
7.4 The site is within the coastal environment with important coastal natural character values. The proposed residential zone will introduce a substantial urban element which will break through the coastal edge of the site, thus impacting adversely on natural character of the site, its river margins and the coastal environment beyond the site.

7.5 The proposed canal housing will have adverse impacts on the amenity values and cultural landscape values of the local area as appreciated by the local community, both Maori and Pakeha.

7.5 *[sic]* Although environmental enhancement initiatives are proposed, in my opinion they do not sufficiently avoid, remedy or mitigate the adverse impacts on the landscape character, natural character or amenity values of the lower Wairoa Valley.

[174] Mr Brown was of the view that inserting the canal development into the area *would fundamentally change its character*.[73] He questioned the credibility of the proposed screening and found it *inconceivable that the proposed canal housing and village centre would remain benign in terms of landscape effects*.[74] He concluded[75]:

[72] Absolum, EIC, paras [7.1] – [7.5]
[73] Brown, EIC, para [42]
[74] Brown, EIC, para [46]



48. There is an obvious attraction to concepts that promote development in exchange for rehabilitation and extension of natural habitats and ecosystems. The aesthetic connotations of canal based urban or suburban developments add another layer of appeal to the Wairoa River Partnership scheme. This is reinforced by the idea of some new and different form of development that doesn't quite fit existing development models within the Auckland Region.

49. From my standpoint, however the proposal is unambiguously suburban, and I believe that it fully complies with the ARPS's description of 'urban development'. With reference to the village centre, it perhaps even connotes mixed use or medium intensity forms of development. This, combined with its appeal, as both a place to live and destination for day-trippers, is precisely what would undermine the existing rural/natural character of both the site and its wider river valley setting.

...

51. ... the current proposal appears to be arbitrary and responds to site specific conditions, rather than having careful and considered regard for its wider implications. If local history is a guide, it would almost certainly provide the spur for more wide ranging change to the Wairoa River catchment in the future.

52. As such, I believe that the Wairoa River Canal Partnership proposal and Plan Change 13 (including Revised PC13) are diametrically opposed to the protection and/or maintenance of the very landscape and amenity values espoused in both the regional and district policy documents. Accordingly, it is my opinion that Plan Change 13 is not appropriate and the land subject to the current appeals should continue to be zoned Rural 1.

Evaluation of Effects on Natural Character, the Coastal Environment, Landscape and Amenity

[175] We have considered the expert landscape evidence carefully and we have been helped in our understanding of that evidence by our site visit. We are conscious of the fact that the canal proposal has been carefully designed from an engineering and architectural point of view. We also recognise the rehabilitation and extension of natural habitats and ecosystems that is proposed in exchange for the development.

[176] Balanced against these positive results, we are mindful that the relevant statutory instruments chart a direction for the valley[76] that revolves around the protection of its existing rural values and remnant natural character. We conclude that to allow the

[75] Brown, EIC, paras [48] – [49], [51] – [52]
[76] As pointed out by Mr Brown, see EIC para [50]

proposal without a thorough integrated assessment would result in too fundamental a change to the nature and landscape values of the Wairoa Valley. The current proposal is too site-specific. Without a regional-wide integrated management assessment, as is required under the ARPS, we are unable to determine its wider implications for the region and the district.

[177] The real question that emerges from this exercise is whether a fundamental change to the nature and landscape of the Wairoa Valley is warranted without a regional-wide integrated assessment?. We say the answer is no. It is for this very reason that there are clear strategen directions in the ARPS that must be given effect to.

Cultural Heritage Landscape

[178] Ms Lucas, addressed the cultural heritage values of the subject site and surrounding landscape to tangata whenua and assessed Plan Change 13 on them. The cultural assessment did not include non tangata whenua values. For Maori values she relied upon the evidence called by Ngai Tai Umupuia te Whaka Totora Incorporated.

[179] No detailed submissions were received from counsel for the regional council or Clevedon Cares as to the provisions of the Act that ground the concept of a cultural heritage landscape within the court's jurisdiction. Ms Lucas told us that her assessment was relevant to Sections 6(b), 6(e), 6(f) and 7(c) of the Act.

[180] As to Section 6(b), that section requires us to recognise and provide for the protection of *outstanding natural features and landscapes* – not cultural heritage landscapes. All of the parties and the other landscape witnesses agreed that there was no outstanding natural feature or landscape that needed protection.

[181] As to Section 6(e), which requires us to recognise and provide for the relationship of Maori with their ancestral lands etc, we have discussed this under the heading *Effects on Maori.*

[182] As to Section 7(c), which requires us to have regard to the maintenance and enhancement of amenity values, that is not relevant to the question of jurisdiction other than the fact that a reduction in Maori values within our landscape may cause a loss of amenity values.

[183] We are thus left with Section 6(f) which provides:

> **6 Matters of national importance**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
>
> ...
>
> (f) the protection of historic heritage from inappropriate subdivision, use, and development:
>
> ...

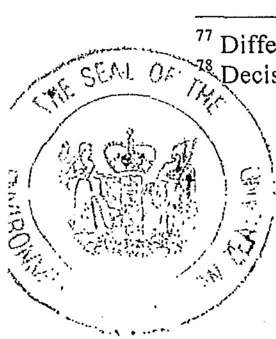
[184] Section 2 of the Act defines *historic heritage* as:

> (a) means those natural and physical resources that contribute to an understanding and appreciation of New Zealand's history and cultures, deriving from any of the following qualities:
>
> (i) archaeological:
>
> (ii) architectural:
>
> (iii) cultural:
>
> (iv) historic:
>
> (v) scientific:
>
> (vi) technological; and
>
> (b) includes—
>
> (i) historic sites, structures, places, and areas; and
>
> (ii) archaeological sites; and
>
> (iii) sites of significance to Māori, including wāhi tapu; and
>
> (iv) surroundings associated with the natural and physical resources

[185] In this division of the court,[77] we discuss the application of these sections to the concept of a cultural heritage landscape in ***Waiareka Valley Preservation Society Incorporated and Ors v Waitaki District Council & Otago Regional Council.***[78] For the reasons there given we find that it is open to us to find, on sufficiently probative evidence, that the Wairoa Valley, or part of it, is a cultural heritage landscape. For such a landscape to be of sufficient substance to warrant protection as being a matter of *national importance*, would depend on its significance and the effects of the proposed canal

[77] Differently constituted

[78] Decision No. C058/2009, paras [224] – [231]



village on it. It is also important to recognise the need to avoid the double counting of Maori issues which are specifically provided for in Sections 6(e), 7(a) and 8 of the Act.

[186] Ms Lucas based her methodology on the cultural values model used by Ms Janet Stephenson in the Akaroa case study, which in turn was based on a trial study conducted in Bannockburn, Central Otago – commonly referred to as the *Bannockburn Heritage Landscape Study* published in a monograph in September 2004.[79] The primary purpose of the Bannockburn study was to trial a newly developed methodology for investigating heritage at a landscape scale. The monograph described its content:

> **Identification**
>
> The study offers an understanding of the landscape both spatially and as it has evolved over time through human interaction. It identifies relationships between physical features in the land, both where these evolved simultaneously and where they evolved sequentially. It also provides information about the relationships between people and the landscape, both in the past and today. It attempts to identify key heritage features, stories and traditions in the Bannockburn landscape.

[187] It defines heritage landscape as:

> (a) **Heritage Landscape** – is a landscape, or network of sites, which has heritage significance to communities, tangata whenua, and/or the nation.

[188] The authors of the monograph entered into a complex and detailed inter-disciplinary methodology of spatial analysis, using connectivities between superimposed layers of history.[80] No such study has been undertaken here.

[189] Ms Lucas characterised and analysed the landscape context with regard to:

- Biophysical;
- Historical; and
- Cultural dimensions.

[190] She evaluated the heritage landscape with respect to:

[79] Stephenson, J: Bauchop, H; Petchey, P. [2004]: Bannockburn Heritage Landscape Study, Wellington: Department of Conservation Te Papa Atawhai
[80] See abstract page 9

- Heritage fabric;
- Natural science value;
- Time depth;
- Tangata Whenua Value;
- Cultural Diversity;
- Legibility and Evidential Value;
- Shared and Recognised Value;
- Aesthetic Value; and
- Significance.

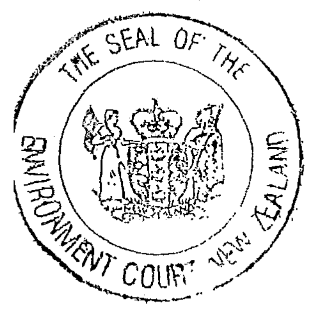
[191] As we have said, Ms Lucas relied on the evidence produced by the Maori appellant. She related a summary of historical and cultural evidence they presented, then undertook an evaluative exercise in accord with the Bannockburn study.

[192] Ms Lucas was not assisted in her evaluation by any other expert as had been the case in the Bannockburn studies. As we have said, such an analysis is complex and requires a spatial analysis, using connectivities between superimposed layers of history. It requires a multi-disciplinary input covering historical, cultural, archaeological, and landscape expertise depending on the circumstances. For Ms Lucas to extend her landscape expertise to the other disciplines is a big ask.

[193] Because of the strong direction in the Act to *recognise and provide for* matters of national importance, decision makers under the Act should not hold that a landscape qualifies as a cultural heritage landscape under Section 6(f) without adequate expert evidence of a probative nature. There requires sufficient intensity of heritage fabric woven into the landscape to warrant the application of Section 6(f). We are satisfied that the evidence in this case falls short of enabling us to make such a finding. We have, of course, identified the importance of Maori values under Section 6(e).

Effects of Our Findings on Core Issues

[194] Our findings on these *core* issues lead us to the inescapable conclusion that to allow the Plan Change would have:



[a] Significant adverse effects on Maori;

[b] Significant adverse effects on natural character, the coastal environment, landscape and amenity;

[c] Would fail to give effect to the strong provisions contained in the ARPS on [a] and [b] above as is required by Section 75(3) of the Act;

[d] Would fail to give effect to the strong provisions of the ARPS on *urban containment* and *strategic direction* as is required by Section 75(3) of the Act; and

[e] Would fail to achieve the function of integrated management pursuant to Section 31(a) and thus Section 74(1) of the Act.

[195] In our view these findings are fatal to the proposal. We are conscious of the effort put in by the architects and engineers to produce a quality product. But the proposal needs to be evaluated in terms of the planning framework, particularly the strong provisions of the ARPS to which we have already referred. We are also conscious of the benefits that the proposal, if it proceeds, would generate. But our findings weigh too heavily against approving the Plan Change.

[196] We find that the proposed Plan Change would not assist the Council in terms of carrying out its functions – being the integrated management of, and control over effects of, the use, development or protection of land – in order to achieve the purpose of the Act.

[197] Having so found, it is not necessary for us to consider the other issues. However, for completeness, we discuss each briefly.

The Consent Issues

[198] There are five contested issues in this group. In so grouping these matters we acknowledge that they do include a strategic component, to which we have already referred, which should be considered as part of an integrated management analysis. In considering matters of this kind, the proponents of the Plan Change have, in our view, a

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relatively low threshold at this stage to satisfy us that these are matters that can be appropriately addressed at the consent stage. There may be cases where the evidence is such that it is blatantly obvious that such matters cannot be appropriately addressed at the consent stage. Or there may be matters where it is obvious that there is considerable uncertainty as to whether such matters can be appropriately addressed at the consent stage. In the first case, that would be a clear factor weighing against the approval of the Proposed Plan Change. Indeed, it may well be its death-knell. In the later case however, the court should be more circumspect and leave an opportunity for those proposing the Plan Change to remove any such uncertainty.

[199] In this case, these are effects which, as we have said, would be addressed at the consenting stage for land use consents applied for under the provisions of the Proposed Plan Change, or for regional consents. We heard a voluminous amount of evidence relating to these issues. It would be wrong for us to determine these matters at this stage of the proceedings without a full understanding of the resource consent applications and the proposed conditions of consent.

[200] We are satisfied on the evidence that all of the contested matters in the Group 2 effects could be addressed appropriately at the consent stage.

Jurisdictional Issue

[201] All parties agreed that this issue need not be considered by the court if the court decided on the merits to not approve the Plan Change. We having decided not to approve the Plan Change, we do not address this issue.

Effects on Over-Flying Aircraft

[202] This issue was raised by Ardmore Airfield Tenants and Users Committee, an incorporated body comprising the various tenants of Ardmore Airfield, and representing those that use the airfield. Ardmore Airfield is located approximately 5kms northeast of Papakura township and 12km southwest of the proposed maritime village. The airfield is located within the Wairoa Valley.

[203] A designated low-flying zone is located in the mouth of the Wairoa River, approximately 1km northeast of the proposed maritime village. This limited flying zone was established in 1965.

[204] We were told that the limited flying zone is an integral part of flight training and that aircraft and helicopters use the zone to practice manoeuvring between sea level and 500 feet ASL, with most exercises being carried out at 200 feet ASL.

[205] Because the airfield is located within the Wairoa Valley, the valley largely dictates a main transit route to and from Ardmore through the valley, over the proposed maritime village, to the designated low-flying zone.

[206] It was the committee's concern that the proposed maritime village introduces a significant urban residential population into this area. The residents may well be subject to noise from over-flying aircraft transiting through the Wairoa Valley, descending into and ascending from the low-flying zone, and using the low-flying zone. The committee is concerned that aircraft noise will be annoying to residents of the village and will give rise to reverse sensitivity complaints.

[207] This issue gives rise to two sub-issues:

Sub-Issue 1 A legal issue as to whether the High Court decision in ***Dome Valley District Residents Society Incorporated v Rodney District Council***[81] excludes consideration of the effect of the Proposed Plan Change on over-flying aircraft; and

Sub-Issue 2 Whether in fact aircraft noise will be a potential effect which is likely to give rise to reverse sensitivity complaints.

[208] The first issue is an interesting legal question and on the face of it, it is a moot point as to whether or not the principles of law enunciated in the High Court decision, and therefore binding on us, applies with respect to a plan change. However, it is not necessary for us to resolve this matter for the purposes of arriving at a clear decision on this appeal. Although it is an arguable question as to whether or not the effect of low-flying aircraft will be such that the noise generated would be likely to lead to complaints,

[81] 01/08/08, Priestley J, HC Auckland, CIV-2008-404-000587

we are satisfied that, on balance, reverse sensitivity issues have not been made out. Because we are going to refuse to approve the Plan Change for other reasons it is not necessary, in the interests of brevity, to discuss in detail our reasons for so finding.

Comment

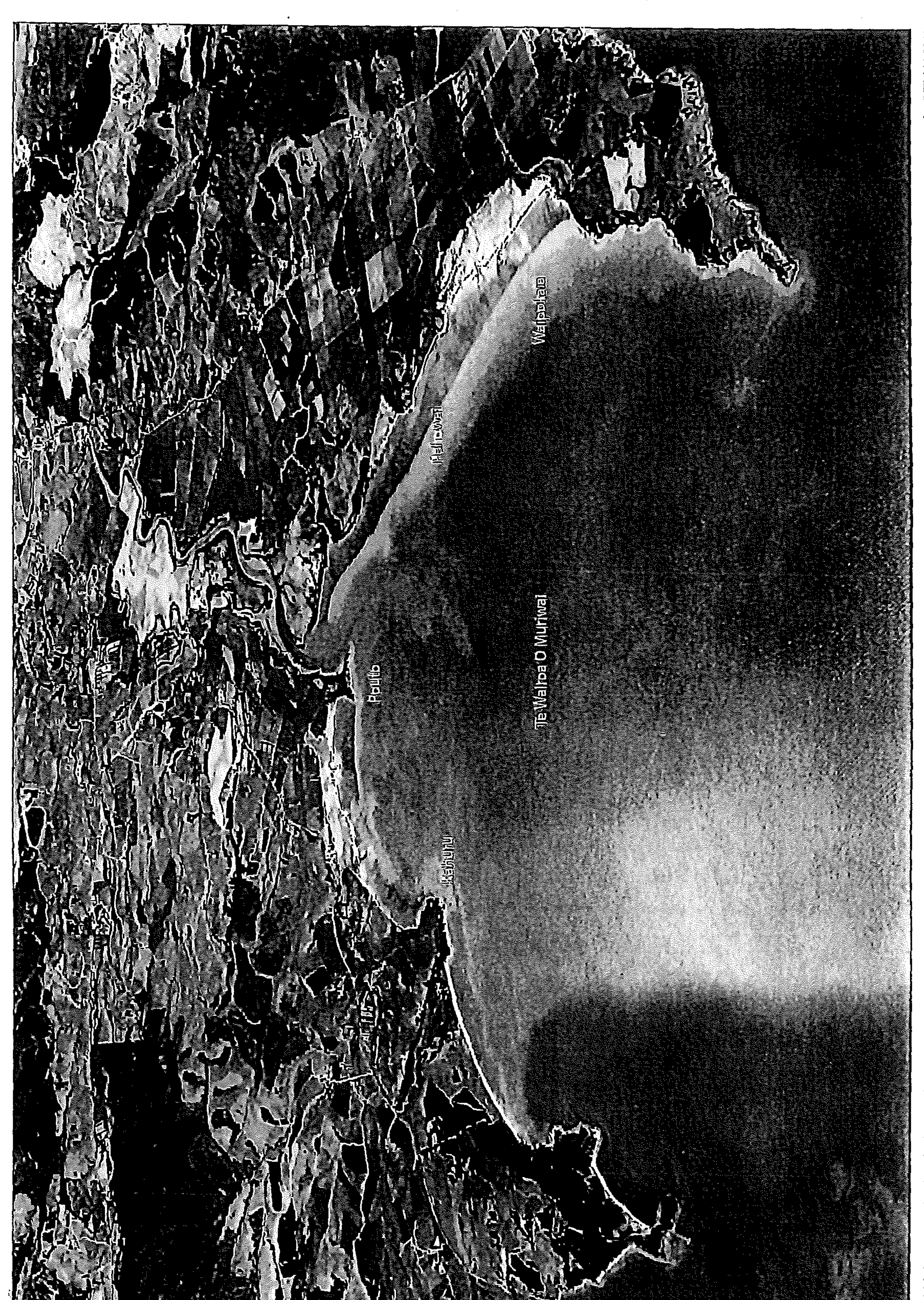
In this case a proliferation of evidence, including documentation was placed before us. It reflects a tendency that appears to be getting worse rather than better. The proliferation of material placed before us was exacerbated by the failure of the appellants opposed to the Plan Change to identify the core issues. We were faced with a wide range of issues, many of which were not determinative of the result. The wide range of matters canvassed by those opposed to the Plan Change resulted in those supporting it having to aduce evidence to address them. For this reason we are tentatively of the view that costs should lie where they fall. Further, it is not usual to award costs on a plan change appeal.

DATED at Auckland this 22nd day of June 2010

For the Court:

R G Whiting
Environment Judge

Appendix 1 – Te Wairoa o Muriwai, Context photograph.

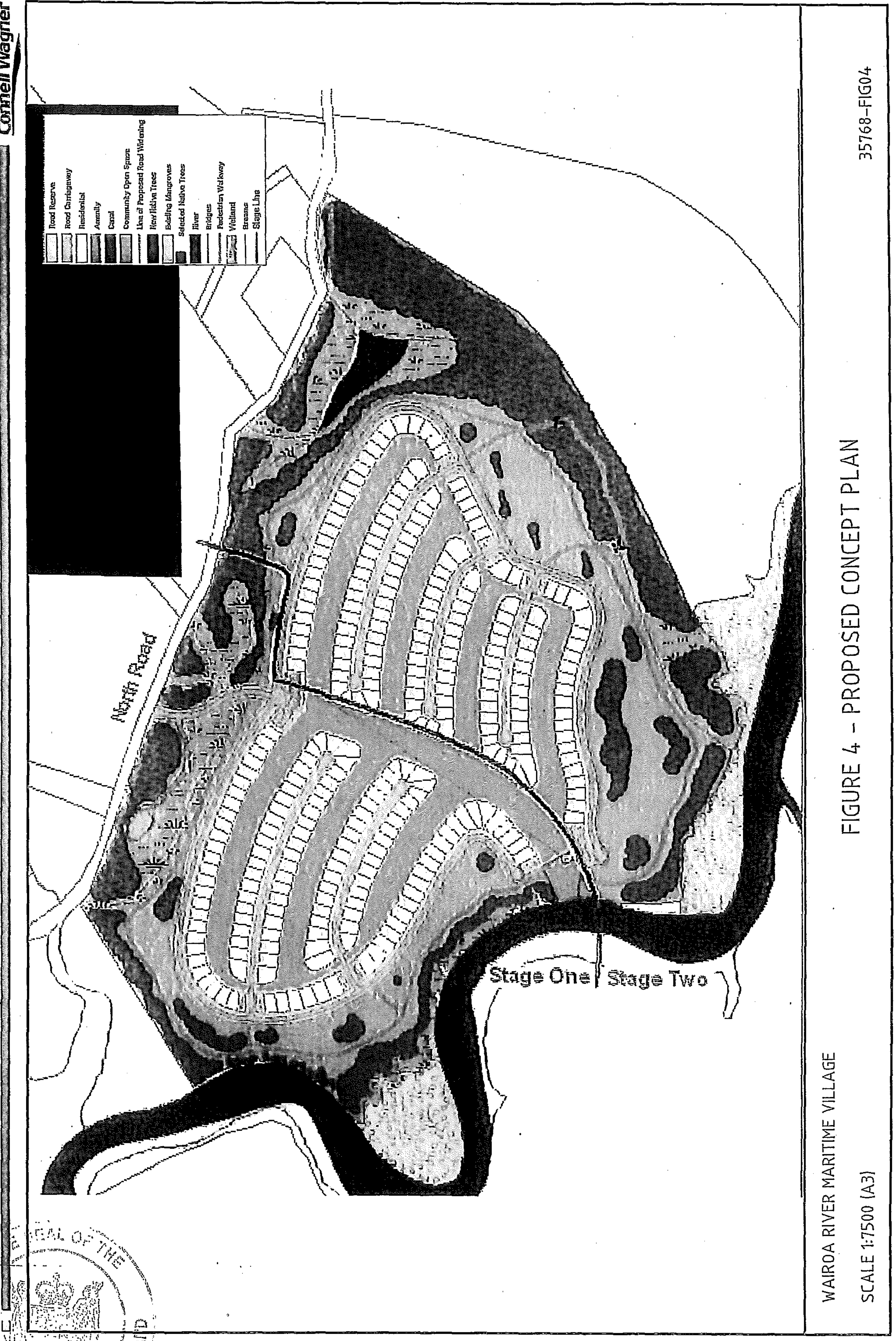


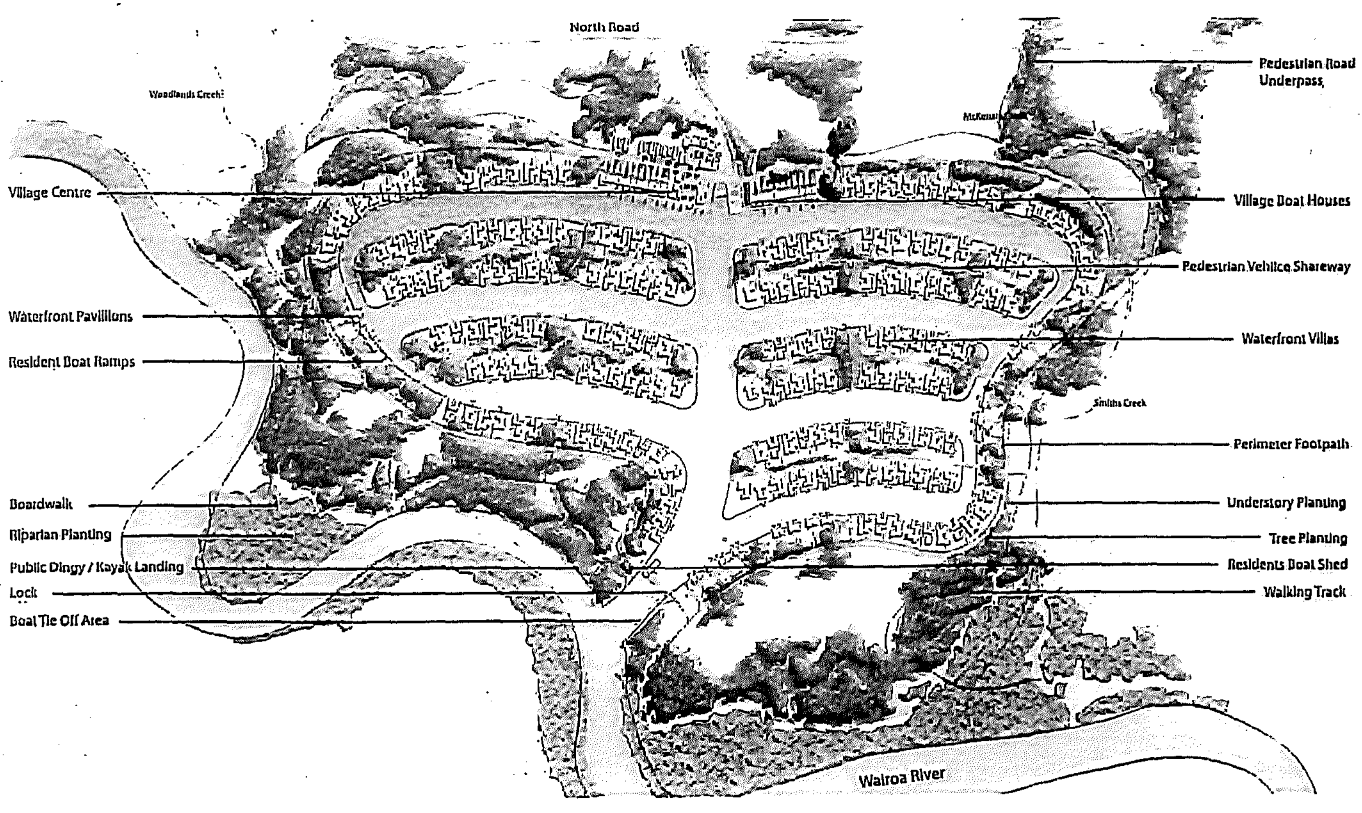
Te Wairoa O Muriwai, from Koherurahi (left) to Whakakaiwhara (right)

Village Site

Geographx (NZ) Ltd 2009
Base photo 2003/04

Appendix 2 – Wairoa River Maritime Village, Concept plan, Council's decision version.





WAIROA RIVER MARITIME VILLAGE

SCALE 1:7500 (A3)

FIGURE 5 – REVISED CONCEPT PLAN

35768–FIG05

BEFORE THE ENVIRONMENT COURT

Decision No. [2014] NZEnvC 119

IN THE MATTER	of an appeal pursuant to Clause 14 of the First Schedule of the Resource Management Act 1991
BETWEEN	RICHARD BLACK (ENV-2012- CHC-000132)
	Appellant
AND	WAIMAKARIRI DISTRICT COUNCIL
	Respondent

Hearing at: 26, 27 and 30 August 2013; further submissions received from the parties up to 5 March 2014

Court: Principal Environment Judge LJ Newhook
Environment Commissioner J Mills
Environment Commissioner E von Dadelszen

Appearances: Mr MM Bell for the Appellant
Mr AJ Prebble for the Respondent

Date of Decision: 29 May 2014

DECISION OF THE ENVIRONMENT COURT

A. Appeal dismissed.

B. Costs reserved.

C. Leave reserved to apply under s293 concerning problematic Plan Change provisions.

REASONS FOR DECISION

Introduction

[1] The appellant, Richard Black, has appealed a decision by Waimakariri District Council to decline the relief sought in his submission concerning Plan Change 32 ("**PC 32**") which was designed to establish a boundary for future growth at the settlement of Mandeville, about 5km west of Kaiapoi, and identifying various characteristics that any growth within the boundary should achieve. The appellant wished to have the boundary line moved outward to include his rural property on the outskirts of this small settlement, essentially a mapping issue. The appeal sought as well, the relief "*any further amendments to Plan Change 32 required as a consequence of allowing this appeal,*" and this prayer attained considerable focus during the hearing because PC32 introduced a new Objective (18.1.2) and a new Policy (18.1.2.1) that were claimed to be poorly drafted and needing amendment.

[2] The appeal was initially filed complaining about the omission from within the Mandeville Growth Boundary ("**MGB**"), of the land of the appellant at 82 Ohoka Meadows Drive, and that of his neighbour Mr M Cotton, at number 83. The latter's property was withdrawn prior to commencement of preparation for the hearing, and as an apparent consequence two parties under s 274 RMA withdrew, the Poultry Industry Association of New Zealand and Tegel Foods Limited.

[3] The MGB is shown outlined in red on a Locality Map attached as Appendix A, and variously includes pieces of land zoned Residential 4A, Residential 4B, and Rural. The appellant's property is shown labelled "Black" immediately southeast of an area zoned Residential 4B (a rural-residential zone). It is a property of approximately 4ha in size, with legal description Lot 3 DP 394407.

[4] Many factual issues were the subject of agreement recorded in a Joint Statement filed in February 2013, some details from which we record shortly.

Key issues agreed and others unresolved

[5] The planning witnesses for each of the two parties prepared a joint statement in April 2013 setting out matters agreed between them and matters the subject of disagreement.

[6] Key issues agreed were fourfold:

(a) Further rural residential growth at Mandeville needs to be managed;

(b) The key issue for this appeal is whether the MGB line is located in the most appropriate place in relation to the appellant's land; rather than the appropriateness of the boundary line approach as a policy to manage rural residential growth at Mandeville;

(c) If there is going to be a line approach to manage growth it should relate to the form and function of the Mandeville settlement, and needs to make good sense in terms of urban form and function;

(d) The rural residential zone provides an appropriate housing choice and there is a demand for this type of development.

[7] There was disagreement as to:

(a) whether the appellant's land should be included within the MGB, the factors being whether or not any adverse effects on the environment would result;

(b) whether the site readily integrates with the adjoining rural residential zone (access in fact being through that zone), and whether the site is distinguishable from other rural sites adjoining and outside the MGB;

(c) whether inclusion would be consistent or inconsistent overall with relevant statutory and non-statutory documents;

(d) whether inclusion would achieve the requirements of Objective 18.1.2 promulgated in PC 32 (depending on what the objective means);

(e) whether inclusion of the site within the MGB would meet the requirements of Policy 18.1.2.1 promulgated in PC 32 (depending on what the policy means).

Statutory and non-statutory documents examined

[8] It was agreed that relevant statutory documents[1] to consider are:

(a) The Canterbury Regional Policy Statement;

(b) Proposed Change 1 to the Regional Policy Statement (Commissioners' decision version dated 20 September 2012);

(c) The Waimakariri District Plan (and of course PC 32 itself);

(d) The Canterbury Recovery Strategy

[9] It was agreed that non statutory documents to be considered include:

(a) The Waimakariri District Rural Residential Development Plan 2010 ("**RRDP**"), promulgated under the Local Government Act 2002;

(b) The [then draft] Environment Canterbury Land Use Recovery Plan ("**LURP**").

Plan Change 32

[10] The relevant provisions of PC 32 are in 2 principal parts, each relating to a chapter of the operative district plan, and are as follows:

> **Chapter 18**
>
> ***Constraints on Development and Subdivision***
>
> *Environmental Results Expected*
>
> Mandeville
>
> a. Further disjointed and peripheral growth at Mandeville is avoided to prevent further encroachment of the Mandeville settlement into the surrounding Rural Zone.
>
> b. The characteristics of the surrounding Rural Zone are maintained or enhanced by limiting further effects associated with the growth and development within Mandeville.

[1] Statutory in the sense of being generated under the RMA

c. Lot sizes within the boundary of Mandeville remain consistent with the minimum and average lot sizes of the Residential 4A and 4B zones.

d. The form, function and characteristics of Mandeville are enhanced by the consolidation of new growth with existing subdivision and development to achieve an integrated environment within a defined growth boundary.

e. Subdivision and development within Mandeville is provided with reticulated services.

Objective 18.1.2

Provide for limited growth and development within the existing Mandeville settlement that achieves:

a. A compact living environment within a rural setting;

b. Consolidation of the existing Mandeville settlement by providing for new subdivision and development within the existing Mandeville settlement boundary;

c. Provision and utilisation of reticulated infrastructure and services;

d. The maintenance and enhancement of the characteristics of the Residential 4A and 4B Zones;

e. Promotion of the use of alternate transport modes for transit within the Mandeville Settlement; and

f. The preservation of the distinct and distinguishable boundaries of the Mandeville settlement.

Policy 18.1.2.1

Limit Mandeville settlement to within its boundary existing at 20 September 2011 shown on District Plan Maps 56, 57, 91, 91A, 92, 93 and 167

Chapter 17: Residential Zones

Table 17.1: Residential Zone
Characteristics – Residential 3 and 4A/B

***Residential** 3...*

Residential 4B

- Predominant activity is living;
- detached dwellings and associated buildings;
- dwelling density is lowest for Residential Zones;
- dwellings in generous settings;
- average lot size of 0.25-1.0 hectare;
- limited number of lots located in a rural environment;
- rural style roads or accessways;
- opportunity for a rural outlook from within the zone;

- few vehicle movements within the zone;
- access to zones not from arterial roads;
- community water and/or sewerage schemes; and
- limited kerb, channelling and street lighting

The relevant statutory framework

[11] Section 74(1) of the RMA is the starting point for preparing and changing a District Plan. This provides:

> (1) A territorial authority must prepare and change its District Plan in accordance with –
>
> (a) its functions under s 31; and
> (b) the provisions of Part 2; and
> (c) a direction given under s 25A(2); and
> (d) its obligation (if any) to prepare an evaluation report in accordance with s 32; and
> (e) its obligation to have particular regard to an evaluation report prepared in accordance with s 32; and
> (f) any regulations.

[12] Stated simply, rules are to implement the policies of the District Plan, and the policies are to implement the objectives above them.[2] It was of interest in this context that uncertainties as to the meaning of the proposed new objective and new policy featured strongly during the hearing.

[13] By s 75(3) a District Plan must give effect to any National Policy Statement... and any Regional Policy Statement. In addition to those requirements, when preparing or changing a District Plan, a territorial authority shall, by s 74(2) have regard to any proposed Regional Policy Statement (here Proposed Change 1 to the Canterbury RPS). By s 74(2)(b), the territorial authority shall also have regard (amongst other things) to management plans and strategies prepared under other Acts, which of relevance here include:

(a) The Urban Development Strategy ("**UDS**")

(b) The Rural Residential Development Plan ("**RRDP**")

(c) The LURP (which was a draft plan at the time of the hearing, but was confirmed by the Minister of Local Government in December 2013[3].

---

[2] ***Long Bay-Okura Great Park Inc Soc v North Shore City Council***, NZEnvC A078/08 at paragraphs [31 to [34]

[3] Gazetted on 6 December 2013

[14] By s 32(1) the evaluation report required under the Act must:

(a) Examine the extent to which the objectives of the proposal being evaluated are the most appropriate way to achieve the purpose of the Act; and
(b) Examine whether the provisions of the proposal are the most appropriate way to achieve the objectives by –
    (i) Identifying other reasonably practicable options for achieving the objectives; and
    (ii) Assessing the efficiency and effectiveness of the provisions in achieving the objectives; and
    (iii) Summarising the reasons for deciding on the provisions; and
(c) Contain a level of detail that corresponds to the scale and significance of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the proposal.

[15] We note that the High Court in ***Rational Transport Soc Inc v New Zealand Transport Agency***[4] held that "most appropriate" in s 32(1)(a) does not need to be the superior method; but that instead a value judgement is required as to what, on balance, is the most appropriate when measured against the relevant objectives; that "appropriate" means suitable; and that there is no need to place a gloss upon the word by incorporating that it be superior.

[16] By s 32(1)(a) RMA, a key function of a territorial authority in giving effect to the Act, is the establishment, implementation and review of objectives, policies and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district. We shall commence with the effects aspect because that underpins many of the other issues that are required (to their various degrees) to be considered by statute.

Environmental effects of relevance

[17] Each party called the evidence of a landscape architect and a planner. A high level of agreement was reached between each of these two groups of experts in the joint statements that they prepared after conferencing. We have been able to make use of a lot of that material in place of quite extensive sections of the evidence-in-chief of each witness. It can also be said that we gained the impression during the hearing that effects on the environment was ultimately not the subject of much controversy[5]. Also by way of preliminary observation, and as is so often the case, little change occurred in the opinions of the witnesses while under cross-examination.

---

[4] [2012] NZRMA 298
[5] Mr Prebble for instance signalling at para [7] of his opening submissions for the council that great issue was not taken with the appellant's landscape evidence.

[18] The planners were Ms F Aston, called by the appellant, and Mr M C Bacon, a staff planner at the council. They agreed that:

(a) In the context of the zoning of the adjoining Ohoka Meadows Rural-Residential zone, and if re-zoned for Rural Residential purposes under the current District Plan provisions, the most appropriate zoning for the Black site would be Residential 4B.

(b) Water and sewerage reticulation is available from existing Mandeville infrastructure.

(c) The nearby power transmission lines would not assist in the identification of a logical growth boundary.

(d) Adverse reverse sensitivity effects from the existing poultry farm in Mandeville Road, having regard to current farming practices, are unlikely to arise at the Black property; and there are no other lawfully established intensive farming activities in the immediate surrounding area that could give rise to actual or potential adverse reverse sensitivity effects having regard to information in the Council's effluent-spreading database.

(e) The existing right of way driveway to the site (which runs through the residential 4B zone) has the capacity to service future potential rural residential lots up to four in number.

[19] There was a moderate level of disagreement between the planners about rural character and landscape effects, which is best however dealt with in the context of analysis of the landscape architect's evidence.

[20] Similarly, there was a minor level of disagreement between the planners about the potential for general adverse amenity effects, again best resolved in the context of the landscape evidence.

[21] The landscape witnesses were Mr JE Head for the appellant, and Mr AW Craig called by the respondent. They conferred and produced a helpful joint statement of matters agreed and unresolved. They confirmed that they had each employed a definition of landscape that "*landscape reflects the cumulative effects of physical and cultural processes*", sourced from their professional institute. They also agreed that landscape character is defined by a combination of factors including landform, vegetation cover and patterns, water bodies and areas of human activity. In

the case of this site, they agreed that the landscape character area that must be considered includes the settlement of Mandeville and its rural context. They advised that the methodologies adopted by each of them, were the same.

[22] The landscape witnesses made the following record of key facts and assumptions:

(a) The landscape character of the site is currently rural, and is typical of the contextual rural environment.

(b) The site's amenity is chiefly derived from abundant open space in proportion to built form that is further dominated by the presence of vegetation, including pasture. Ephemeral attributes such as tranquillity also contribute to amenity.

(c) There are no significant natural features on the site, and nor does it exhibit high levels of naturalness. That is, it has been fully modified for farming purposes.

(d) The site adjoins part of the existing Mandeville residential 4B Zone located around Ohoka Meadows Drive. A portion of the site boundary corresponds to the proposed Mandeville Growth Boundary.

(e) No consideration given to any other influences on growth such as traffic management, service reticulation, indeed any matters other than landscape.

(f) An assumption made that residential 4A and 4B activity generally results in high amenity.

(g) Acceptance that potential rezoning for Residential 4B activity within the site would change the character of the landscape from one that is typically rural to one that is typically rural residential.

(h) Acceptance that the change just described would result from higher building density and land use likely devoted to amenity outcomes, and would result in greater apparent diversity compared to existing site character.

(i) Agreement to take into account statutory aspirations where they affect landscape outcomes for Mandeville and future Residential 4A and 4B growth.

(j) Identification of actual and potential landscape influences on Residential 4A and 4B growth centred on Mandeville.

(k) Agreement to describe landscape design principles that would apply to urban growth centred on Mandeville.

Analysis

[23] We now record the matters of opinion agreed by the landscape architects, the matters on which they differed, our analysis of the latter, and findings.

[24] The landscape architects agreed that a Rural Residential 4A or 4B type development of this site would more than likely result in high amenity and that there would be relatively minor change to the existing rural character of the area. We considered this to be quite an important finding in relation to an called-for characteristic in PC32 for the Residential 4B Zone recorded (in Chapter 17) of the District Plan, "*opportunity for rural outlook from within the zone*"; and potentially therefore also to assist with answering the question of whether the appellant's proposal would meet the requirements of the proposed new Objective and new Policy (subject to whatever those mean, a topic we will come to).

[25] The landscape architects also agreed that the extent of any potential Residential 4A or 4B type development of the site is relatively small; therefore there would be little appreciable change to the extent of rural character of the rural land surrounding Mandeville following development of the site. We make the same observations about this agreement, as for the last.

[26] The landscape architects agreed that the site currently adjoins and is accessible via a private right of way through an area of rural residential development connected to Ohoka Meadows Drive, and therefore the site can be internally integrated with same. This agreement would appear to assist with the resolution of whether the proposal would align with sub-paragraphs (a), (b) and (c) of new Objective 18.1.2 (whatever is meant by "*the existing Mandeville settlement*"), and the new Chapter 17 provisions that address roading, access and infrastructure matters.

[27] The landscape architects went further and recorded their substantial agreement that the site has a logical integration with and would "complete" this part of Mandeville's rural residential zone (although Mr Craig recorded that he wasn't quite sure what "complete" meant). A further agreement reached appears to us to make that slight qualification unimportant: that there is no landscape constraint, such as might be dictated by major natural or physical boundaries, to growth centred on

Mandeville, and therefore there is no landscape reason why the appellant's land cannot be included within the Mandeville Growth Area. Once again, we believe this to be an important matter in the context of the overall dispute.

[28] The "flip side" of the last point produced a disagreement, with Mr Head advising that the site is distinguishable from other land surrounding Mandeville's "UGB" (which we infer to mean MGB) in that it can be readily integrated with an area of established rural residential development; while on the other hand Mr Craig felt that apart from the right of way connection to Ohoka Meadows Drive, the site is indistinguishable from other rural land surrounding land Mandeville, being generically the same as the other rural landholdings in the area and having no unusual qualities. Our finding about this aspect is that the proposed objective and policy, so far as one can discern their meaning, are essentially concerned with the form and operation of the Mandeville settlement rather than with avoidance of precedent-setting. Further, this is not of course being a case involving an application for consent to a non-complying activity. Indeed, the very next point, also the subject of disagreement, expressly addressed a concern of Mr Craig's that contiguous landowners might seek their own plan changes and that "*regarding landscape effects, there is no reason why growth cannot continue unabated in Mandeville.*" We reiterate the point about precedent.

[29] The landscape witnesses agreed that the form of this site proposes a small area of rural residential development extending into a rural zone; and that physical connection with and outlook to, a rural zone would be comfortably achieved. There was some play made in questioning of the witnesses about the potential for the subject site to intrude into rural outlook from existing rural residential properties in Ohoka Meadows. However, Mr Craig conceded under cross examination by Mr Bell, that visibility from Ohoka Meadows Drive is not going to alter because of the presence of [existing] shelter belts[6].

[30] As to an element of the new Objective calling for consolidation of the existing Mandeville settlement (and leaving aside the vexed question of what is "existing" and at what date), the two witnesses agreed that the site is located close to the Mandeville Domain, (there being no present central commercial hub), and is located on the same (south) side of Tram Road which would encourage walk-ability.

[6] Transcript p23, lines 21 to 25.

[31] As to the question of whether amendment of the location of the MGB to include the site would provide a logical and consistent boundary to the Mandeville Rural Residential Zone (and again without addressing the question of what is meant by "existing"), there was a measure of agreement that this might provide a defensible boundary. It was also agreed that, considered in isolation, the appellant's land would achieve this outcome, there being no particularly logical landscape reason for the Council's proposed boundary, and no obvious alternative boundary short of the Waimakariri River, other settlements, or State Highway 1.

[32] To Mr Craig's view that the subject site is unexceptional and that there is no logical basis in landscape terms to either include or exclude the appellant's land from rural residential, Mr Head rejoined that the land is exceptional and that it is one of only four properties that remain on the periphery of the MGB that, if developed, would become integrated with an existing area of Mandeville's Rural Residential zoning. To this, we would add by way of observation, that the appellant's property is the only one of those presently offering access into the local Mandeville local roading network, as opposed to having access from arterial roads, thereby satisfying one of the characteristics that PC 32 inserts into chapter 17 of the District Plan. Mr Head, under cross examination by Mr Prebble, acknowledged that this feature was probably the "strongest spoke in [his] argument"[7].

[33] Finally, the two witnesses agreed that as a matter of best landscape practice, the preferred method of managing growth is via a management or structure plan that takes into account the integration of growth areas with the surrounding environment. Also that a planned boundary is a necessary technique to provide people with confidence in their living environment. We observe that this agreement still begs the question of where the line should be, but we do note that the appellant put forward a possible structure plan.

Debate about the meaning of the new Objective and new Policy

[34] At the start of this decision we recorded that the main thrust of the appeal was about a mapping issue. Concerns about the true meaning of key aspects of the Objective and Policy were essentially only raised by a side wind, a prayer for relief reading "*any further amendments to Plan Change 32 required as a consequence of allowing this appeal.*"

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[7] Transcript p126 lines 20 to 23.

[35] This latter aspect of the appeal took on considerable life of its own in the hearing. We start by observing that there can be no doubt that there is an unfortunate vagueness in some of the wording of each of the Objective and the Policy. That is, the commencing words in the Objective "*...within the existing Mandeville settlement*", and the use of the same phrase in sub-paragraph (b), and the use of the phrase "the Mandeville settlement" in sub-paragraph (f), seem to beg the question as to precisely what the extent of the Mandeville settlement is and at what date.

[36] At first blush the answer might be thought to be provided in the Policy, which reads "Limit Mandeville settlement to within its boundary existing at 20 September 2011 shown on District Plan Maps 56, 57, 91, 91A, 92, 93, and 167". However things are not as easy as that.

[37] Mr Bell submitted on behalf of the appellant that there are several problems with the wording of the policy. He noted that the Council had accepted that the date 20 September 2011 must be regarded as being incorrect. There seemed to be acknowledgement by both parties that the date 3 December 2011 would be the logical date, because that was the date of promulgation of PC 32. Mr Bell submitted, however, that that did not cure all the problems. The policy cross-refers to several maps, including Map 167 promulgated in PC 32 where, of course, the appellant's property is excluded. Nevertheless, one of the other maps listed, 93, includes the appellant's property.

[38] Next, he submitted that the Policy employs the term "*boundary*" whereas the other references are variously to "*Mandeville settlement*", or "*Mandeville settlement boundary*", or "*Mandeville settlement.*" He suggested that the intention was probably to refer to the MGB in Map 167 of PC 32, whereupon a preferable wording throughout would have been "*Mandeville Growth Boundary*", not "*Mandeville settlement*" or variants.

[39] Mr Bell submitted that whatever the meaning of the Policy, even if it were to be re-worded by correcting the date and making other grammatical changes, the Policy would not yet line up with Objective 18.1.2, despite the fact that it is required that the Policy be the most appropriate means to achieve the Objective.

[40] Mr Bell submitted that on the evidence it is not possible to know what the "existing Mandeville settlement" is, exactly. He perceived that the Council's planning witness Mr Bacon held a view that it would not include any rural areas

except the San Dona subdivision, a view his own planner Ms Aston accepted. Mr Bell pointed out that therefore the use of the word "existing" before Mandeville settlement in the Objective would mean that subdivision development and use that had been confined within an area quite a bit smaller than the MGB established by Policy 18.1.2.1, and that sub-paragraph (b) of the Objective is contradictory where it talks about new subdivision being consolidated within the existing Mandeville settlement and then allows for development within the existing Mandeville Settlement Boundary.

[41] Mr Bell offered the suggestion that it might be necessary to remove the word "existing" from the Objective completely, and that wording suggested by Ms Aston for that provision in her rebuttal evidence, would be entirely appropriate.

[42] Mr Bell submitted that changes should be made for "clarification purposes." He recommended that the Court consider using its powers under s293(1) RMA to make such amendments because he submitted they are clearly warranted.

[43] The above submissions on behalf of the appellant were delivered in Court on the final day of the hearing, and represented a refinement of Mr Bell's opening submissions. Interestingly he did not appear to repeat a submission that arguably the appellant's property was within the MGB at 20 September 2011 because part of the access leg was located within the Residential 4B Zone. We think that such an argument would have been a long bow at best, and clearly runs counter to what is shown on proposed new Map 167.

[44] Interestingly, Mr Prebble in his reply submitted that the concerns of the appellant in the evidence of Ms Aston and the submissions of Mr Bell, were "over-stated." We think Mr Prebble was right to avoid submitting that they were completely wrong. He acknowledged that some grammatical tidying up could be achieved, and the date 3 December 2011 placed in the Policy, conceding that if necessary s293 could be used, and submitted that there would be no need for public notification if that course were to be followed.

[45] Mr Prebble then turned to the amendment for the Objective suggested by Ms Aston. He submitted that it would not be necessary to address the issue raised about uncertainty in the Policy, and that more importantly the proposed amendment would amount to a dramatic watering down of the rationale for the MGB in the Objective. He submitted that if all references to "existing" were removed, the fundamental basis

for the Growth Boundary would be removed, which would undermine the Objective to the point where it would become ineffective.

[46] We are inclined to think that submission misses the point, but that possibly Ms Aston's suggestion does as well. There remains the problem, for instance, of differences between Map 93 and proposed Map 167, and the question of whether the San Dona subdivision is in or out. We have the view that the total plan change package would need to be tightened up by regularising the phraseology throughout to achieve consistency, providing some grammatical improvements, but most importantly by including a definition of the phrase ultimately chosen in order to offer precise geographical definition, preferably by way of a map as at or pre-dating the promulgation of the proposed Plan Change. That would probably require the exercise of powers under s293. We shall see whether this will be required.

Weighting of relevant documents

[47] At the time of the hearing, Mr Bell submitted that Proposed Change 1 to the Regional Policy Statement, and the LURP, were not yet operative, and therefore fell simply to be had regard to, under s74(2) RMA. There has been a significant change regarding the LURP, as earlier noted, it having been gazetted and made operative from 6 December 2013.

[48] We shall address in a separate section of this decision, the issues around the new status of the LURP, and the legal impact of that for the present proceedings.

[49] Concerning the RRDP promulgated under the Local Government Act 2002, Mr Bell submitted that it contained a preference for development "to the south of Tram Road."[8] We note however that the reference to a growth location to the south of Tram Road is cross-referenced to Map sheet A5 at page 31 of the RRDP, from which it appears that most of the appellant's property is in fact excluded.

[50] Mr Bell submitted that the RRDP "*already appears to be substantially out of date as stated by Fiona Aston at 8.17 of her primary evidence.*" He noted that the preferred growth areas do not include a Plan Change 10 area which has been approved by the respondent for rural residential re-zoning and provides for 141 lots described being situated north of Tram Road. He submitted that in an unsuccessful appeal to the

[8] At p28.

Environment Court about PC 4,[9] the Court gave the RRDP very little weight, noting that the Waimakariri District Council had approved two plan changes which would release up to 190 new allotments, including the 141 just mentioned.

[51] In reply, Mr Prebble accepted that the RRDP is substantially out of date and does not include the PC 10 land, this because the PC 10 decision post-dated the RRDP. He submitted that while the RRDP might benefit from updating, this does not take away the fact that PC 32's MGB reflects the preferred growth areas in the RRDP.

[52] Mr Prebble's submission is essentially correct. We observe as well that while the Court would normally place little weight on an instrument like the RRDP, promulgated other than pursuant to Schedule 1 RMA, recovery legislation in Canterbury places a different perspective on it today. We will comment further on this in the following discussion of provisions of the LURP.

[53] We now discuss the situation brought about by the LURP having been gazetted and made operative on 6 December 2013. Counsel filed further submissions in February and March this year after the gazetting was drawn to our attention by Mr Prebble.

[54] Appendix 2 of the LURP provides amendments to the Canterbury Regional Policy Statement, including provision of a policy 6.3.9 – "Rural Residential Development," which provides:

> In Greater Christchurch, rural residential development further to areas already zoned in District Plans as at 1 January 2013 can only be provided for by territorial authorities in accordance with adopted rural residential development strategy prepared in accordance with the Local Government Act 2002 subject to [certain stated qualifications].

[55] The RRDP previously described is, Mr Prebble argued, an "adopted rural residential strategy" for the purposes of policy 6.3.9.

[56] Mr Prebble then submitted that under s75(3)(c) RMA, a District Plan "*must give effect to a Regional Policy Statement*" (which by definition means an operative Regional Policy Statement). Mr Prebble placed emphasis on the word "must".

[57] Counsel drew our attention to s 23 of the Canterbury Earthquake Recovery Act 2011 ("CERA") which provides to the relevant extent:

[9] ***Canterbury Fields Management Ltd v Waimakariri District Council, ENV-2010-CHC-196***

> (1) On and from the notification of a Recovery Plan in the *Gazette*, any person exercising functions or powers under the Resource Management Act 1991 must not make a decision or recommendation that is inconsistent with the Recovery Plan on any of the following matters under the Resource Management Act 1991:
>
> ...
>
> (f) the preparation, change, variation, or review of an RMA document under Schedule 1.

[58] Mr Prebble submitted that this makes it clear that the LURP is to be fully applied from the date of the gazetting, and there are no transitional provisions to exclude processes commenced before the gazetting.

[59] Mr Prebble submitted that with effect from 6 December 2013, the appellant's land, not already having been zoned for rural residential development and falling outside of the rural residential development area in the approved RRDP for Mandeville, cannot be the subject of such provision in the District Plan. He submitted that the LURP, introducing as it does new and now operative provisions to the RPS (in particular policy 6.3.9), has a determinative role in these proceedings.

[60] Mr Bell accepted on behalf of the appellant, certain aspects of Mr Prebble's submissions as follows:

- the LURP was gazetted on 6 December 2013;
- the LURP makes Policy 6.3.9 operative [we infer that he meant that the gazetting of the LURP on 6 December 2013 made policy 6.3.9 operative];
- the respondent's RRDP is an "adopted Rural Residential Development Strategy" as referred to in Policy 6.3.9;
- Section 23 of the CERA has retrospective effect on appeals lodged before the LURP was notified where no decision has issued before the LURP was gazetted in December.

[61] Mr Bell then however put forward two prime submissions being reasons why Plan Change 32 should not be seen as inconsistent with the LURP.

[62] His first argument was that Plan Change 32 does not re-zone land nor does it provide for rural residential development; therefore it would not be a breach of Policy 6.3.9.

[63] He submitted that the LURP, in its Appendix 1, defines rural residential activities as "*... residential units outside the identified Greenfield Priority Areas at an average density of between one and two households per hectare.*" He argued that while rural residential activities are defined, there is no definition in the LURP of rural residential development. This seems to us to be an overly fine distinction in the present circumstances.

[64] Mr Bell also submitted that the District Plan refers to rural residential development as being comprised of the residential 4A and 4B zones, with characteristics set out in chapter 17 and generally having average lot sizes of 0.5-1.0 ha respectively.

[65] He noted that the District Plan definition of rural residential development is referred to in the RRDP in its "Background section", and in section 2.1 "Rural Residential Development". In the "Executive Summary" of the RRDP, Rural Residential Development is said to be "*the subdivision and use of land to cater for the needs of those wishing to live within a rural or semi-rural setting.*"

[66] Mr Bell submitted that from the foregoing definitions, if rural residential development is to occur, either the land has to be re-zoned Rural Residential 4A or 4B, or subdivided down to rural-residential sizes. He returned to his argument that PC32 does not seek to re-zone any land to rural residential. He submitted that the new Objective and Policy do not of themselves provide for rural residential development at Mandeville because they don't re-zone or subdivide land; neither therefore does the relief sought by the present appeal.

[67] Mr Bell's second submission was that even if he was wrong with his first, the proposal in the appeal would still be in accordance with the RRDP (similarly the content of PC32). He essentially returned to his theme of PC32 not re-zoning land, referring to the various provisions in the RRDP about broad identification of locations, and locations for potential rural-residential development; also to the effect

that the provisions of the RRDP are indicative only.[10] He pointed to similar themes elsewhere in the RRDP.[11]

[68] He submitted again in light of the quoted provisions from the RRDP, that PC32 and the relief sought by the present appellant would not breach policy 6.3.9 of the LURP. Our concern with this submission was with Mr Bell's continuing emphasis on the fact that the plan change does not seek to re-zone land (which seems reasonably clear in itself) but also that it does not "provide for" rural residential development (being the wording of policy 6.3.9).

[69] Mr Bell went on to draw our attention to another plan change, PC21, decisions on which were notified on 14 December 2013, 8 days after the LURP was gazetted and made operative. Drawing our attention to the relevant mapping there, Mr Bell submitted that part of the area identified in PC21 as a Development Plan Growth Location is located outside of the preferred development location for Ohoka. He referred to remarks of the hearing commissioners that while they were to have regard to the indications of how growth may be managed as set out in the RRDP, they were not required to follow those indications "slavishly."

[70] Mr Bell added that if PC21 was in breach of LURP policy 6.3.9, then so too would be the inclusion of the San Dona area in the Mandeville Growth Boundary Area. He submitted however that, being only indicative as to preferred growth locations, and needing to be "updated and tightened by way of plan change later", such provision in each case would not be in breach of policy 6.3.9.

[71] Employing an old adage "*two wrongs don't make a right*" (actually three in this instance), the PC21 decisions and/or the inclusion of the San Dona area in the MGB cannot influence our decision here. Further, the present proceedings are not in the nature of an application for Declaration or Enforcement Order in relation to the legality or otherwise of the other 2 situations.

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[10] Provisions of RRDP drawn upon by Mr Bell: Executive Summary at p 3; Context, paragraph 1.1 at p 4; Primary Objectives 1.3; Anticipated Outcomes 1.5

[11] For instance Settlement Size at p 29 concerning further consultation with the community to ascertain boundary limits before any further development is undertaken at Mandeville, Map Sheet 05 at p 31 highlighting an area labelled "Preferred Development Location" and talking of "extended location of additional growth to be determined following further consultation".

[72] In his submissions and reply Mr Prebble slightly regretted having, in his initial submissions on the point, stressed "re-zoning of the Black land." In so doing, he reminded us that the relevant words of policy 6.3.9 of the LURP are:

> In Greater Christchurch, a rural residential development further to areas already zoned... as at 1 January 2013 can only be provided for... in accordance with an adopted [RRDP]...[underlining provided by us]

[73] Mr Prebble submitted in short that the purpose of PC32 is to establish the new objective and policy framework to provide for further rural residential development at Mandeville in accordance with the RRDP.

[74] We have thought about this carefully, and consider that the statutory emphasis is in fact slightly different. What we perceive is that to set a boundary to geographically limit growth of future rural residential development in circumstances where further plan change activity will be necessary to make full provision for such zoning, the present plan change makes some provision for it. We have the view that some, or any, provision is provision of one kind or another.

[75] As to Mr Bell's second submission, Mr Prebble accepted that the RRDP and PC32 are preliminary or provisional in nature, and would require further plan changes to be initiated. He then set about identifying some provisions within the RRDP which he submitted were more definitive in nature than tentative. He referred to s1.1 "Context":

> The development plan is intended to provide a level of certainty to landowners, developers, the Council...

He also referred to s1.5 "Anticipated Outcomes":

> The development plan provides a level of certainty to the Council, landowners, developers and property investors regarding the location and infrastructure requirements for growth and development. It also provides some certainty as to the general spatial extent of development and an understanding of what the surrounding area may look like in future.

Consideration

[76] Mr Bell's first and second submissions and therefore also Mr Prebble's responses, are somewhat bound up. Picking up on our finding that some or any provision is indeed "provision," we do not consider that there is much to be gained by making a semantic comparison of various provisions of the RRDP as to whether they are tentative or more definitive in nature. It is perhaps unfortunate that the importance

of the RRDP has been significantly elevated by a combination of s23 of the CERA and policy 6.3.9 of the LURP, given that the RRDP was never intended as a statutory instrument under the RMA, was never put through the Schedule 1 RMA processes, and is somewhat imprecise and wordy in its structure. However, such is the nature of emergency legislation. We are also left slightly wondering in policy terms how the limitation of rural residential growth around small settlements in Waimakariri District derives from the need for emergency legislation for recovery from the Christchurch earthquakes; but it is not our place to inquire into such a policy matter in these proceedings. The CERA is what it is, and we are bound to uphold its terms as we find them.

[77] By s75(3)(c) the District Plan must give effect to the Regional Policy Statement, which now includes policy 6.3.9. The appellant's property is beyond the provision at Mandeville for rural residential activity in the adopted RRDP. The effect of this is that we cannot allow the relief sought by the appellant.

[78] The outcome probably would have been the same had the LURP not been made operative, because, by s74(2)(a)(i) RMA, we would have had to have regard to those provisions.

[79] That would have been a fine call however, because we consider that the issue of effects on the environment when assessed as required by s32(1)(c) is evenly balanced as to whether inclusion or exclusion of the appellant's property would be the "most appropriate" way for the Objective to achieve the purpose of the Act and for the other provisions to achieve the Objective. For instance we felt that the fact of the accessway to the appellant's land being through rural residential zoned land created a point of difference from other rural land surrounding him. Activities like the transporting of livestock through Residential 4B land could be less than desirable. At the end of the day however the line has to be drawn somewhere, and the professional witnesses variously considered that the "horse has already bolted" at Mandeville[12], and as already recorded, there is no other completely logical available line short of the Waimakariri River or some other neighbouring settlements. We go so far as to acknowledge the legitimacy of the policy of the plan change in general terms, managing the form and size of Mandeville.

[12] Answers in cross examination of Mr Craig by Mr Bell, Transcript p21, lines 8 to 17.

[80] Those factors and the other findings we made in the section of this decision on environmental effects being relatively evenly balanced, we would have resolved matters by having regard to the LURP and the RRDP, for all their foibles.

[81] The appeal must be dismissed.

[82] Before concluding, we remember the submissions of both counsel about s293, and as to whether the provisions of the new Objective and the new Policy should be amended. We are also mindful of Mr Bell's submissions about whether the San Dona area of Mandeville is validly brought inside the MGB. The provisions of subsections (4) and (5) of s293 could prove apposite in that regard. An alternative for the council might however be a further plan change. Counsel should signal a response before the Court closes its file. This decision must be regarded as final so far as the relief sought by Mr Black is concerned, but leave in relation to possible s293 matters will remain open until 18 July 2014.

[83] Costs are reserved, but are unlikely to be an issue in a plan change dispute of the present variety.

SIGNED at AUCKLAND this 29th day of May 2014

For the Court

L J Newhook
Principal Environment Judge

APPENDIX A. Locality Map

WAIMAKARIRI DISTRICT COUNCIL

RESIDENTIAL 4A ZONE

RESIDENTIAL 4B ZONE

Mandeville Growth Boundary. Refer Policy 18.1.2.1

Wards Road

Bradleys Road

Modena Place

46

48

Tram Road

81

85

Black

Cotton

McHughs Road

Ohoka Meadows Drive

Mandeville Recreation Reserve and Sports Ground

Mandeville Road

Whites Road

North Eyre Road

Logans Road

Baileys Road

NOTE:
Disclaimer - refer to map legend sheet

Metres

0 100 200 500

Scale 1:20,000 (A4)

Mandeville North Growth Boundary

167

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Appellant	**COUNTDOWN PROPERTIES (NORTHLANDS) LTD AND COUNTDOWN FOODMARKETS NZ LTD; FOODSTUFFS (OTAGO SOUTHLAND) PROPERTIES LTD; TRANSIT NEW ZEALAND**
Respondent	**DUNEDIN CITY COUNCIL**
Applicant	**ML INVESTMENT CO LTD AND WOOLWORTHS (NZ) LTD**
High Court Nos	AP 214/93 AP 215/93, AP 216/93
Tribunal	Barker J (presiding) Williamson J & Fraser J
Judgment Date	7/3/1994
Counsel/Appearances	RJ Somerville & RJM Sim; TC Gould; DG Bigio; ED Wylie; ARP More; NS Marquet
Quoted	Manukau City Council v Trustees of Mangere Law Cemetery (1991) 15 NZPTA 58, 60; Environmental Defence Society v Mangonui County Council (1988) 12 NZPTA 349, 353; Royal Forest & Bird Protection Society Inc v W A Habgood (1987) 12 NZPTA 76, 81-2; Northern Milk Vendors' Association Inc v Northern Milk Ltd [1988] 1 NZLR 530, 537; Wellington City Council v Cowie [1971] NZLR 1089; Kirkham v Attenborough [1897] 1 QB 201, 203; Calvin & Carr (1980) AC 574; AJ Burr Limited v Blenheim Borough [1982] NZLR 1; Love v Porirua City Council, [1984] 2 NZLR 308; Meade v Wellington City Council (1978) 6 NZPTA 400; Morrow v Tauranga City Council A6/80; Nelson Pine Forest Limited v Waimea County Council (1988) 13 NZPTA 69, 73; Noel Leeming Limited v North Shore City Council (No. 2) (1993) 2 NZRMA 243, 249; Haslam & Meadow Mushrooms Ltd v Selwyn District Council & Canterbury Regional Council C71/93; Batchelor v Tauranga District Council (No. 2) [1992] 2 NZLR 84; Wellington International Airport Ltd v Air New Zealand Ltd [1993] 1 NZLR 671, 675; KB Furniture Ltd v Tauranga District Council [1993] 3 NZLR 197; Ashburton Borough v Clifford [1969] NZLR 921, 943; Auckland City Council v Auckland Heritage Trust (1993) 1 NZRMA 69; Bitumix Ltd v Mt Wellington Borough [1979] 2 NZLR 57; McLeod Holdings v Countdown Properties (1990) 14 NZPTA 362; Waimea Residents Association Inc v Chelsea Investments Ltd Davison CJ, Wellington M 616/81, 16/12/81.; Environmental Defence Society Inc v Tai

	Tokerau District Maori Council v Mangonui County Council [1989] 13 NZPTA 197; Wainuiomata District Council v Local Government Commission, Wellington, 20/9/9/1989 CP 546/89.; Port Otago Ltd v Dunedin City Council Dunedin AP 112/93.
Statutes	Resource Management Act 1991, 1991/69, s6, s7, s8, s19, s31, s32, s34, s39, s43, s52, s53, s64(4), s65(4), s73(2), s74, s76, s290, s293, s299, s311, s373(3), First Schedule cl 10, cl 14, cl 16; Town and Country Planning Act 1977, 199/121, s150(1), s150(2); High Court Rules, R718A

Keywords

district plan change; zoning; point of law; declaration; procedural

Significant in Planning and Procedure - s32

The Full Court of the High Court upheld the Planning Tribunal's decision, W53/93. The Court reaffirmed the principles enunciated in the Tribunal's decision on the role of a s32 analysis and the distinction between the timing of a s32 analysis on a privately initiated plan change versus one initiated by council or government.

SYNOPSIS

This decision is 74 pages long. For this reason the full text has not been included here.

Foodstuffs, Countdown and Transit NZ all appealed to the High Court on the grounds that the Tribunal's decision was erroneous in law.

The appeals were heard by a Full Court of 3 Judges. The appeals by Foodstuffs and Countdown were dismissed. The appeal by Transit NZ was allowed by consent, by remitting the matter back to the Tribunal for further consideration and determination, and the possible exercise of its powers under s293 or Clause 15(2) of the First Schedule, in relation to proposed agreed alteration to certain rules relating to access to the site.

The High Court decision runs to 74 pages. It appears that some 23 grounds of appeal were raised. Not all of those grounds were pursued; and the Court grouped some of the grounds in delivering its judgment. The principal rulings given by the Court were:

(a) With a plan change initiated privately, adopting comes at the time when the Council decides, after hearing all the submissions, that it should adopt the change. In the case of a plan change requested by another authority or by the Minister, to which s32(3) applies, a Council receiving the request will have to adopt the change prior to advertising the change; and therefore must complete its s32 report by that stage.

(b) The definition of 'proposed plan' does not apply to privately requested plan changes. Accordingly there is no restriction as to the time when persons making submissions on a privately requested plan change may raise the question of non-compliance with s32. They do not have to do so in their submission.

(c) The Tribunal was not in error in its ruling as to the timing of the s32 'exercise' by the respondent Council, nor as to the adequacy of the s32 analysis.

(d) The Council or Tribunal must consider whether any amendment made to a plan change as publicly notified goes beyond what is reasonably and fairly raised in submissions made on the plan change. That will usually be a question of degree, to be judged by the terms of the proposed change and of the content of the submissions. (The Court described as 'unhelpful', the test articulated by the Tribunal in Haslam & Meadow Mushrooms v Selwyn District Council, C71/93.) But the Tribunal had not erred in the manner it dealt with amendments in this case.

(e) The Tribunal had not erred in declining to defer a decision on the proposed plan change pending the review of the Council's plan.

(f) The Council had not erred in using zoning as the technique of the plan change. It followed the decision in Batchelor v Tauranga District Council (No. 2) [1992] 2 NZLR 84, and agreed with the 'pragmatic' approach to transitional plans articulated in KB Furniture v Tauranga District Council [1993] 3 NZLR 197. The Court approved the Tribunal's ruling that s76(4)(e) does not preclude similar rules in other cases where they are needed.

(g) The Tribunal had correctly ruled that it had the powers conferred by s293, although in the end the Tribunal had not exercised those powers and had acted only pursuant to Clause 15(2) of the First Schedule. The Court differed from the Tribunal's conclusion as to s290. The Court held that the nature of the process before the Tribunal, although called a reference, is also in effect an appeal from the decision of the Council. (The terminology used in Clause 15 of the First Schedule links that Clause with s290.) But it said that even if the Tribunal had held that s290 applied, the steps the Tribunal would have taken in its deliberation and judgment would have been no different from those it in fact took.

(h) The Tribunal had not failed to apply the correct legal test when it confirmed the proposed plan change. That ruling involved an examination of the meaning of the word 'necessary' in s32; the Court held that in its context the word has a meaning similar to 'expedient' or 'desirable' rather than 'essential'. The Court went on to say that s32 is only part of the statutory framework; that s74 requires a council to prepare and change its district plan in accordance with its functions under s31, the provisions of Part II, its duty under s32 and any regulations. The Tribunal's conclusions on page 128 had to be read in the light of 2 earlier paragraphs on page 127. *"Reading the relevant part of*

the Tribunal's decision as a whole, we consider that its approach was correct....."

In the course of its decision, the Court set out its approach to appeals from decisions of the Planning Tribunal. It said that the Court will only interfere with those decisions if it considers that the Tribunal -

(i) applied the wrong test; or
(ii) came to a conclusion without evidence or one to which on the evidence it could not reasonably have come; or
(iii) took into account matters which it should not have taken into account; or
(iv) failed to take into account matters which it should have taken into account.

The Court also said:

(v) The Tribunal should be given some latitude in reaching findings of fact within its areas of expertise.
(vi) Any error of law must materially affect the result of the decision, before the Court should grant relief.
(vii) In dealing with reformist legislation, the responsibility of the Courts, where problems have not been specifically provided for in the Act, is to work out a practical interpretation appearing to accord best with the intention of Parliament.

FULL TEXT OF AP214/93; AP215/93; AP216/93

Introduction:

These appeals from a decision of the Planning Tribunal ('the Tribunal') given on 4 August 1993 have significance beyond their particular facts. They involve the first consideration by this Court of various provisions of the Resource Management Act 1991 ('the RMA') - a statute which made material alterations to the way in which land use and natural resources are managed. A number of statutes, notably the Town & Country Planning Act 1977 ('the TCPA') were repealed by the RMA and the regimes which they imposed were altered significantly, both in form and in substance. Although the RMA was amended extensively last year, counsel assured the Court that its decision is likely nevertheless to offer long-term guidance to local authorities and to professionals concerned with planning. Counsel were agreed that transitional provisions in the 1993 amendment required these appeals to be determined under the provisions of the 1991 Act without reference to the 1993 amendment. All three appeals were heard together by a Court of three Judges which was assembled because of the importance of the issues raised and the need for guidance in the early stages of the RMA's regime. At the commencement of the hearing, the Court was advised by counsel for the appellant, Transit NZ Limited ('Transit') that his client had reached a settlement with the first respondent, the Dunedin City Council ('the Council') and the second respondents, M L Investment Company Limited and Woolworths (NZ) Ltd,

(called collectively 'Woolworths'). This settlement was on the basis that, if the other two appeals were substantially to fail, agreement had been reached on the appropriate rules for parking, access and traffic control which should be incorporated in the relevant section of the Council's District Plan.

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

(a) Countdown Properties (Northlands) Limited and Countdown Foodmarkets New Zealand Limited (collectively called 'Countdown'); and
(b) Foodstuffs (Otago/Southland) Limited ('Foodstuffs').

Like most local bodies in New Zealand, the Dunedin City Council underwent major territorial changes in 1991 as a result of local body re-organisation. Instead of being just one of several territorial authorities in the greater Dunedin region, the Council now exercises jurisdiction over a greatly enlarged area which includes all the former Dunedin municipalities plus areas of rural land formerly located in several counties. Allowing a certain straining of the imagination in the interests of municipal efficiency, the 'city', as now defined, penetrates into Central Otago, past Hyde, and up the northern coast, including within its boundaries a number of seaside townships such as Waikouaiti.

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

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

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

Essentially, these appeals are concerned with a request by Woolworths to the Council, seeking a plan change to rezone a central city block from an existing

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

Both appellants operate supermarkets within the same general area in or near the Dunedin central business district. They lodged submissions in opposition to the plan change with the Council and appeared at a hearing of submissions before a Committee of the Council. Dissatisfied with the Council's decision in favour of the plan change, they initiated references to the Tribunal under clause 14 of the First Schedule to the RMA ('the First Schedule'). The concept of a 'reference' of a proposed plan change to the Tribunal instead of an appeal to the Tribunal is part of the new approach found in the RMA. The appellants subsequently appealed to this Court alleging errors of law in the Tribunal's decision. Appeal rights to this Court are governed by s299 of the RMA but are similar in scope to those conferred by the TCPA.

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

In addition to the references, there was a related application to the Tribunal by Countdown seeking the following declarations under s311 of the RMA -

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

(b) whether the Council could lawfully complete the evaluation and assessments required by s32 of the RMA subsequent to the public hearing of submissions on the plan change.

The first question was considered by Planning Judge Skelton sitting alone; on 1 February 1993, he determined that it was permissible for Woolworths to request the Council to change its transitional district plan at the request of Woolworths and to promote the change in the manner set out in the First Schedule. There was no appeal against that decision. The second question

was subsumed with other matters raised in the references, and was left for argument in the course of the substantive hearing before the Tribunal.

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

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

Chronology

Woolworths' request, made pursuant to s73(2) of the RMA, was received by the Council on 19 December 1991. In addition to asking for the change of zoning of the relevant land from Industrial to Commercial, Woolworths provided the Council with an environmental analysis of the request and some suggested rules for a new zone. On 20 January 1992, the Planning and Environmental Services Committee of the Council, acting under delegated authority, resolved to "agree to the request" in terms of Clause 24(a) of the First Schedule of the Act ('the First Schedule'). This resolution was made within 20 working days of receiving the request as required by Clause 24. The Council also resolved to delegate to the District Planner authority to prepare the plan change, undertake all necessary consultations and to request and commission all additional information as required by the RMA. There was consultation by the Council with Woolworths as envisaged by the legislation, which requires private individuals seeking plan changes to underwrite the Council's expenses in undertaking the exercise.

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

Some 15 submissions on the plan change were received by the Council and a summary prepared. A further 66 notices of opposition or support were then generated; a public hearing was convened at which submissions were made by the parties involved in this present appeal plus many others who had either made submissions or who had supported or opposed the submissions of others. After the public hearing, a draft report purporting to address matters contained

in s32 of the RMA, was presented to the Council Planning Hearings Committee by a Mr K. Hovell, a consultant engaged by the Council to advise it on the proposed change. It was found by the Tribunal as fact, that the analysis required by s32 (to be discussed in some detail later) was not prepared by the Council until after the hearing of submissions. Obviously therefore, no draft s32 report was available for comment at the public hearing of the submissions.

After the hearing of submissions, amendments were made by the Committee to a draft s32 analysis prepared by Mr Hovell; a final version was prepared by him at the Committee's direction on 31 July 1992. The Tribunal found that Mr Hovell acted as a secretary and did not advise the Committee at this stage of its deliberations. On 11 August 1992, the Committee acting under delegated powers, decided that the change be approved. It had amended both the policy statements and the rules from those which had originally been advertised. The extent to which these amendments could or should have been made will be discussed later. All those who had made submissions were supplied with the Council's decision, a legal opinion from the Council's solicitors and a revised report from Mr Hovell headed "Section 32 Summary".

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

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

Approach to Appeal

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

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

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

Moreover, the Tribunal should be given some latitude in reaching findings of fact within its areas of expertise. See Environmental Defence Society v Mangonui County Council (1988), 12 NZTPA 349, 353.

Any error of law must materially affect the result of the Tribunal's decision

before this Court should grant relief. Royal Forest & Bird Protection Society Inc v W.A. Habgood Ltd (1987), 12 NZTPA 76, 81-2.

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

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

Grounds 1, 2 and 3

1. The Tribunal misconstrued the provisions of s32(1) when it held that the first respondent adopted the objectives, policies, and rules contained in Plan Change No 6 at the time when it made its decision that the plan change be approved in its revised form;
2. The Tribunal applied the wrong legal tests and misconstrued the Act when it concluded that the first respondent performed the various legal duties imposed on it by s32
3. The Tribunal misconstrued s32 and s39(1)(a) of the Act and failed to apply the principles of natural justice by holding that the report of the first respondent's s32 analysis did not need to be publicly disclosed before the first respondent held a hearing on proposed plan change 6.

These grounds are concerned with the Council's duty under s32 of the RMA and can be dealt with together by a consideration of the following topics -

(a) Was the Council correct in not fulfilling its duties under s32(1) of the RMA before it publicly notified the plan change and called for submissions? Put in another way, was the Council right to carry out the s32 analysis after the public hearing of submissions but before it published its decision?

(b) Should the Council have made a s32 report available to persons making submissions on the plan change?

(c) Was the Council's actual s32 report an adequate response to its statutory responsibility?

(d) If the Council was in error in its timing of the s32 report or in the adequacy of the report as eventually submitted, was the error cured by the extensive hearing before the Tribunal an independent judicial body before which all relevant matters were canvassed?

Section 32 of the Act at material times read as follows -

> *"32 Duties to consider alternatives, assess benefits and costs, etc - (1) In achieving the purpose of this Act, before adopting any objective, policy, rule or other method in relation to any function described in subsection (2), any person described in that subsection shall -*

(a) Have regard to -

(i) the extent (if any) to which any such objective policy, rule, or other method is necessary in achieving the purpose of this Act; and

(ii) other means in addition to or in place of such objective, policy rule, or other method which, under this Act or any other enactment, may be used in achieving the purpose of this Act, including the provision of information, services, or incentives, and the levying of charges (including rates); and

(iii) the reasons for and against adopting the proposed objective, policy, rule, or other method and the principal alternative means available, or of taking no action where this Act does not require otherwise, and

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

(c) Be satisfied that any such objective, policy, rule, or other method (or any combination thereof) -

(i) is necessary in achieving the purpose of this Act; and

*(ii) is the most appropriate means of exercising the function, having regard to its efficiency and effective*ness relative to other means.

(2) Subsection (1) applies to -

(a) The Minister, in relation to -

(i) the recommendation of the issue, change, or revocation of any national policy statement under sections 52 and 53;

(ii) the recommendation of the making of any regulations under section 43.

(b) The Minister of Conservation, in relation to-

(i) the preparation and recommendation of New Zealand coastal policy statements under section 57'

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

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

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

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

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

Consideration must first be given to the method ordained by the RMA for implementing a plan change initiated by persons other than public bodies. s73(2) provides -

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

Clause 2 of the First Schedule requires -

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

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

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

Clause 28 requires the local authority to prepare the change in consultation with the applicant and to notify the change publicly within 3 months of the decision to agree to the request; (copies of the request must be served on persons considered to be affected). 'Any person' is entitled to make submissions in writing; clause 6 details the matters which submissions should cover. In particular, a submitter must specify what it is he, she or it wants the Council to do. There is no statutory restriction on who can make a submission. It is doubtful whether the local authority can make a submission to itself under the RMA in its original form. The Court of Appeal in Wellington City Council v Cowie [1971] NZLR 1089 held that a local authority could not object to its own proposed scheme. The TCPA was changed to permit this. A similar provision was not found in the RMA; we were told by counsel that the 1993 amendment now permits the practice. In this case, the Council's development planner lodged a submission which the Tribunal found was lodged in his personal capacity.

The local authority must prepare a summary of all submissions and then advertise the summary seeking further submissions in support or opposition. The applicant for the plan change is entitled to receive a copy of all submissions and has a right to appear at the hearing as if the applicant had made a submission and had requested to be heard. The local authority must fix a hearing date, notifying all persons who made a submission and hold a public

hearing; the procedure at the hearing is outlined in s39 of the RMA; notably, no cross-examination is allowed.

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

The Act does not define the phrase used in s32(1) "before adopting". The word "adopting" is not used in the First Schedule, which in reference to plan changes uses the words "proposed" (clause 21), "prepared" (clause 28), "publicly notified" (clause 5), "considered" (clauses 10 and 15), "amended" (clause 16), and "approved" (clauses 17 and 20). Section 32 also uses "to set" which implies a sense of finality.

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

The Tribunal's findings on the local authority's s32 duties can be summarised thus.

(a) Read in the context of s32(2) the word "adopting" as used in s32(1) refers to the action of a local authority which, having heard and considered the submissions received in support of or in opposition to proposed objectives policies and rules, decides to change the measure from a proposal to an effective planning instrument.

(b) The duties imposed by s32 are to be performed before adopting", that is, before the change is made into an effective planning instrument.

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

(d) If Parliament had intended that in every case s32 duties were to be performed before public notification of a proposed measure, and that people would have been entitled to make submissions about the performance of them, then there

would have been words to express that intention directly.

(e) A separate document of the local authority's conclusions on the various matters raised in s32(1) is not required to be prepared, let alone published for representations or comments, before the decision is made.

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

The essential argument for Foodstuffs and Countdown is that the Tribunal was wrong in law and that s32 requires the Council to prepare the report before advertising the plan change or at the latest before the hearing of submissions regarding a plan change; it cannot fulfil its obligations under s32 after that point.

Interpreting the provisions of s32 of the RMA must commence with an examination of the words used in the section having regard not only to their context, but also to the purposes of the Act. s32(2) describes the persons to whom the duties it imposes shall apply. They are the Minister for the Environment, the Minister of Conservation and every local authority.

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

Under s32(1) the local authority involved in the setting of objectives, policies and rules must complete certain duties before adopting such objectives, policies or rules. We see no reason to read the phrase "before adopting" other than in its plain and ordinary meaning. Adopting involves the local authority making an objective, policy or rule its own. The Appellants submitted that the phrase requires the duties to be carried out prior to public notification of change. They argued that the local authority adopts a privately requested change prior to public notification because it had, by then, set or settled the substance of the requested change.

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

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

Lord Esher, MR in Kirkham v Attenborough, [1897] 1 QB 201, 203 held that, with a contract for sale of goods, there must be some act which showed that a transaction was adopted, an act which was consistent only with the person being a purchaser. In this case, there is no act of the Council which shows anything other than an initial acknowledgment that:

(a) the proposed change has more than a little planning merit; and
(b) a performance of prescribed duties to invest the proposed plan change with a form whereby its merits can be assessed by the public submission process.

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

During argument, two obstacles to this view were signposted They concerned, first, s32(3) and, second, s19. It was submitted that s32(3) clearly indicated that "before adopting" must mean "prior to public notification"; otherwise, the public would not have the right to challenge an objective policy or rule on the grounds of non-compliance with s32. This conclusion followed, it was argued, from the necessity for the challenge to be in a submission under Clause 6 in respect to a proposed plan or change to a plan.

The Tribunal accepted that s32(3) was capable of giving that indication but concluded that, if Parliament had intended the s32 duties to be performed before public notification, then there would have been express words to that effect.

The first point to consider is whether s32(3) applies to a privately requested plan change. In the definition section of the RMA, "proposed plan" means "a proposed plan or change to a plan that has been notified under clause 5 of the First Schedule but has not become operative in terms of clause 20 of the First Schedule; but does not include a proposed plan or change originally requested by a person other than the local authority or a Minister of the Crown".

The Tribunal held:

(a) there was no exclusion of privately requested changes in the words "change to a plan" in s32(3)(a);
(b) the use of the term "proposed plan" in the first phrase of s32(3) does not

preclude a challenge to the Council's performance of its s32 duties in a submission under clause 16 of the First Schedule.

With respect we do not agree. There is no reason to read down the second part of the definition of "proposed plan" which clearly indicates that the definition of proposed plan does not apply to privately requested plan changes; accordingly, there can be no restriction as to the time when persons making submissions on a privately requested plan change may raise non-compliance with s32 by the Council. They do not have to do so in their submission.

This approach to s32(3) supports our view on the timing of the "adopting" of the plan change by the local authority. The Tribunal held, in this case, that the plan was not 'adopted' for the purposes of s32 until it had heard and considered the submissions on the plan change. It was enough for it to provide the s32 report at the time when it gave its decision on the submissions which it had heard and considered.

We agree with the Tribunal's decision in the result, although differing on the interpretation of s32(3) We hold that the "adopting" by the local authority under s32(1) takes place at a different time with a privately requested plan change than it does when the plan change is initiated by the local authority itself or at the request of another local authority or a Minister. This view follows from our interpretation of s32(3) A person making a submission on a plan change instituted by a Minister or local authority can challenge the sufficiency of the s32 report only in his or her submission on the plan change. We give this interpretation in the hope this important Act will prove workable for those who must administer it but at the same time, preserve the rights of persons affected by a plan change.

When a private individual requests a scheme change, the local authority's options are fairly limited. It can only reject the application out of hand if a plan change is 3 months away or if the request is frivolous, vexatious or shows little or no planning merit or is unclear or inconsistent or affects a policy statement or plan which has been operative for less than two years. At the stage of the initial request, the local authority could not possibly have carried out a potentially onerous s32 investigation. It may not have time to do so even within the 3 months required under clause 28 of the First Schedule before notifying publicly the plan change.

Whilst a privately-inspired plan change may pass the threshold test, as the investigative process unrolls, the local authority may come to the view that the requested change is not a good idea; it may wish to await the hearing and consideration of the submissions before deciding whether to 'adopt' it. It will have to consider the wider implications of a proposed plan change during a period limited by clause 28 to 3 months. These considerations would often be canvassed at the hearing of submissions, as they were in this case, without a s32 report being prepared. A local authority might not be therefore in a

position to 'adopt' the plan change until it had the s32 report; it could need the public hearing and consideration of submissions to flesh out that report to its own satisfaction.

In response to the argument that those making submissions should have access to a s32 report because the Act in s32(3) clearly envisages their having the right to comment on a s32 report, the answer lies in the interpretation we have given to s32(3) There is no restriction on the time in which a s32 report can be challenged on a privately requested plan change; therefore, persons wishing to refer the Council's decisions or submissions to the Tribunal can criticise the s32 report by means of a reference to the Tribunal.

However, the situation is different for those plan changes to which s32(3) applies; i.e. plan changes initiated by the local authority itself or requested by a regional authority or another territorial authority or by a Minister. In those situations, the s32 report would have to be available at the time the plan change is advertised because of the limitation contained in s32(3) on the right to comment on the adequacy or otherwise of a s32 report. For scheme changes requested by a Minister or a local authority, such comment may only be made in a submission on the plan change.

It is no answer to say that a person making a submission in advance of knowing the contents of a s32 report should include as a precaution a statement that the s32 report was inadequate; this was suggested in argument by counsel for the Council. Such a course would make a mockery of the process and would imply little cause for confidence in the competence of the local authority.

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

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

In the case of a plan change requested by another authority or by the Minister to which s32(3) applies, a Council receiving the request will have to 'adopt' the change prior to advertising the change and therefore complete its s32 report by that stage. Again, the Council may not ultimately 'approve' the change because it may come to a different view on the wisdom of doing so after hearing the submissions or after a Tribunal direction.

As to the argument that time is needed for a s32 report, one imagines that other local authorities or a Minister in requesting the change should be in a

position to supply the territorial authority with most of the information needed for its s32 evaluation of the proposal. If there were not time available within the 3 months, then there is power for the local authority under s38(2) to increase the time to a maximum of double. One would not envisage, however, a regional council or a Minister requesting a change without providing sufficient **prima facie** information justifying the request which would make the adopting process simple.

The time for 'adopting' the plan change therefore in terms of s32 is a 'moveable feast' depending on whether or not the plan change is initiated by a private individual.

Section 19 of the RMA is as follows -

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

This section allows activities to be undertaken in accordance with a new rule as if it had become operative, provided that the new rule has been publicly notified and the time for making submissions or appeals against the new rule has expired and no submissions or appeals have been made. The appellants argued that this section implies that consideration under s32 must take place before the time for making or lodging submissions or appeals against the new rule have expired; otherwise, activity could be undertaken which was contrary to s32

The Tribunal did not place any weight on the argument under s19. We have carefully considered the submissions and conclude that, while s19 may appear to produce the possibility of an anomalous situation, it does not affect the powers of a local authority in setting objectives, policies or rules. In particular, it does not reflect upon the time at which the local authority adopts such an objective, policy or rule. Section 19 is concerned with activities which may be undertaken. It is not concerned, as s32 is, with the rule-making process. Even if a person takes the risk of commencing activity before approval of a change, that activity does not affect the policy, objective or rule itself. Whatever the position about such activity, a local authority is still required to

be satisfied of the matters arising under s32(1)(a); (b) and (c). Certainly there are no words within s19 which purport to affect the duty under s32 Our general approach is supported, we think, by the difference between officially promoted and privately requested changes in their interim effect. Section 9(1) of the RMA provides as follows-

> *"No person may use any land in a manner that contravenes a rule in a district plan or proposed district plan unless the activity is -*
> *(a) Expressly allowed by a resource consent granted by the territorial authority responsible for the plan; or*
> *(b) An existing use allowed by s10 (certain existing uses protected). ..."*

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

In the result, we believe that the Tribunal came to the correct decision about the timing of the s32 report; in the circumstances of this case, the report was properly 'adopted' at the time when the Council gave its decision on the submissions.

In Ground 3 of the appeal it was argued that the principles of natural justice required persons making submissions to a local authority to have a s32 report available to them prior to the hearing of submissions. Reference was made to s39(1)(a) of the RMA requiring an appropriate and fair procedure at a hearing. We did not consider that there is any merit in this submission. Section 39 requires a public hearing with appropriate and fair procedures. Such a hearing took place on this occasion. There was no report or analysis under s32 available since the local authority had been under no duty to carry it out prior to that time. The applicant and those making submissions were able to call evidence. When the report did come into existence, it was circulated to the parties. Later, during the reference to the Tribunal, there was ample opportunity to criticise the content of the report and to make submissions and call evidence concerning all aspects of it. We reject Ground 3.

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

These same criticisms were considered by the Tribunal which concluded that, while the Council's s32 analysis report did not scrupulously follow the language of s32(1), it was not substantially deficient in any respect. After

weighing the appellant's detailed criticisms, we are of the view that the Tribunal was correct in the robust and practical view that it took. It was suggested in submissions that the Tribunal incorrectly permitted an inadequate compliance by the Council with its s32 duties upon the basis that local authorities were still learning the extent of their responsibilities under the Act. We do not share that view. We note that the Tribunal stated -

> *"In our opinion failures to perform the s32 duties in substance which are material to the outcome should not be excused. However deficiencies of form that are not material to the outcome, may properly be tolerated, at least in the introductory period when functionaries are still learning the extent of their responsibilities under the Act."*

Earlier it stated -

> *"Although functionaries are not to be encouraged in expecting that failure to comply with duties imposed by s32 can be condoned compliance needs to be considered in terms of a reasonable comparison of the material substance of what is done with what is required if any deficiency that may be discovered from a punctilious scrutiny of a s32 assessment results in a requirement to return to the starting point as in some board games, the Act will not provide a practical process of resource management addressing substance not form."*

We agree with those views.

Since our conclusions are that the Tribunal was not in error in relation to either the timing of the s32 exercise or the adequacy of the First Respondent's s32 analysis, there is no need to consider in depth the matter raised in the fourth question under this heading.

It is sufficient to note that the references to the Tribunal took place by way of a complete re-hearing. Any defect of substance in the Council's decision and s32 analysis was capable of exploration and resolution by the Tribunal. Even if there had been an error, we believe that it would have been corrected by the detailed, careful and extensive hearing by the Tribunal over a period of 16 days when detailed evidence was given by 19 witnesses and thorough submissions made by experienced Counsel. We are conscious of the approach described in Calvin v Carr, (1980) AC 574, A J Burr Limited v Blenheim Borough, [1982] NZLR 1 and Love v Porirua City Council, [1984] 2 NZLR 308.

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

Ground 4.

That the Tribunal applied the wrong legal tests and misconstrued the Act when it held that the first respondent did not exceed its lawful authority in

making the amendments to the proposed plan change that were incorporated in the revised version of the change appended to its decision.

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

Mr Marquet for the Council helpfully provided a compilation which, in each case, demonstrated:

(a) the provision as advertised;

(b) the provision in the form settled by the Council after the hearing of submissions;

(c) the appellants' criticism of the alteration or addition;

(d) (where applicable) the submission on which the alteration or addition was said by the Tribunal to have been based;

(e) the Tribunal's decision in respect of each alteration or addition; and (f) other relevant references. We have found this compilation extremely helpful; we do not think it necessary to embark on the same detailed analysis of Counsel's submissions which occupied some 20 pages of the Tribunal's judgment, because we agree generally with the Tribunal's approach and its decision in respect of each individual challenge.

The Tribunal categorised the challenged variants into five groups:

(a) Those sought in written submissions;

(b) Those that corresponded to grounds stated in submissions;

(c) Those that addressed cases presented at the hearing of submissions;

(d) Amendments to wording not altering meaning or fact;

(e) Other amendments not in groups (a) to (d).

Clause 6 of the First Schedule refers to the making of submissions in writing on any proposed plan change. A person making a submission is required by clause 6 to state whether he/she wishes to be heard in respect of the submissions and to state the decision which the person wishes the local authority to make. A prescribed form requires the statement of grounds for the submission.

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

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

Clause 10 of the First Schedule states that, after hearing the submissions "the local authority concerned shall give its decision **regarding the submissions** and state its reasons for accepting or rejecting them". This is to be compared with Regulation 31 of the Town and Country Planning Regulations 1978 which stated that "the Council shall **allow or disallow each objection either wholly or in part...**" (Emphasis added)

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

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

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

Counsel relied on Meade v Wellington City Council (1978), 6 NZTPA 400 and Morrow v Tauranga City Council (A6/80 Planning Tribunal, 13 December 1979) which emphasised that a Council's role under a scheme change was to allow or disallow an objection.

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

> *"...that an informed and reasonable owner of land on which there was native forest should have appreciated that, if NFAC's objection was allowed and the logging or clearing of any areas of native forest became a conditional use, then either conditions would need to be introduced into the ordinance relating to conditional use applications, or at some stage or other the Council would adopt a practice of requiring certain information to be supplied prior to considering such applications. Had the Council adopted the conditions to the ordinances that it presented to the Tribunal at the time of the hearing of the objection, I am quite satisfied that no one could reasonably have been heard to complain that they had been prejudiced by lack of notice. Such a decision would accordingly have been lawful."*

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

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

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

> *"...it is important to observe that the whole scheme of the Act contemplates notice before changes are made by a local authority to the scheme statement and ordinances in its plan. It follows that when an authority is considering objections to its plan or a review of its plan it should not amend the provisions of the plan or the review beyond what is specifically raised in the objections to the plan which have been previously advertised."*

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

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

did on this occasion. It will usually be a question of degree to be judged by the terms of the proposed change and of the content of the submissions.

The danger of substituting a test which relies solely upon the Court endeavouring to ascertain the mind or appreciation of a hypothetical person is illustrated by the argument recorded in a decision of the Tribunal in Meadow Mushrooms Ltd v Selwyn District Council & Canterbury Regional Council (C.A.71/93, 1 October 1993). The Tribunal was asked to decide whether it was either "plausible" or "certain" that a person would have appreciated the ambit of submissions and consequently the need to lodge a submission in support or opposition. We believe such articulations are unhelpful and that the local authority or Tribunal must make a decision based upon its own view of the extent of the submissions and whether the amendments come fairly and reasonably within them.

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

In the present case, we find it difficult to see how anyone was prejudiced by the alterations in the Council's finished version. The appellants did not (nor could they) assert that they had not received a fair hearing from either the Council or the Tribunal. They expressed a touching concern that a wider public had been disadvantaged by the unheralded additions to the plan. We find it difficult to see exactly who could have been affected significantly other than those 81 who made submissions to the Council. More importantly, it is hard to envisage that any person who had not participated in the Council hearing and the Tribunal hearing could have offered any fresh insight into the wisdom of the proposed plan change. We make this observation considering the exhaustive scrutiny given to the proposal by a range of professionals.

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

There is only one variation which requires specific mention. That is the change to Rule 4. After the hearing of objections, the Council added a Rule to the effect that "any activity not specified in the preceding rules or permitted by the Act is not permitted within the zone unless consent is obtained by way of resource consent". We find that there was no submission which could have

justified that insertion. Nor is the fact that the omission may have been mentioned in evidence appropriate; because the jurisdiction to amend must have some foundation in the submissions.
We do not see this omission as fatal. The Tribunal held, correctly, that there is power to excise offending variations without imperilling the scheme change as a whole. If Rule 4 can be excised, then s373(3) of the RMA would apply; that subsection provides as follows -

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

We say generally that no-one seems to have been disadvantaged by the amendments. Even where the relationship to the submissions was somewhat tenuous, it seems quite clear that at the extensive hearing before the Council, most of the matters were discussed. If they were not discussed before the Council, they were certainly discussed before the Tribunal at great length.
In fact the whole of the appellant's case can hardly be based on any lack of due process. Their objections to the plan were considered at great length and fairness by the Tribunal. Any complaints now (such as those under this ground) are of the most technical nature. We see nothing in this ground of appeal which is also rejected.

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

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

Ground 7.
The Tribunal misdirected itself when it determined that the Act restricts the authority of a territorial authority to decline to approve a plan change where it raises issues that have implications beyond the area encompassed by the plan change and which, in the instant case, should more appropriately be dealt with at a review of the transitional district plan.
Although these two grounds relate to discrete findings by the Tribunal, they cover similar ground and will be considered together. The appellants claimed that significant resource management issues involving the whole Dunedin

City area arise when a Council is addressing a plan change involving only part of the district; consequently, any change to the district plan must have implications for other parts of the district. The appellants asserted that the Tribunal should have referred the proposed plan change back to the Council with the direction that it should be cancelled because the forthcoming review of the whole district plan was a more appropriate way of managing the resource management issues involved.

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

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

The Tribunal went on to point out that clause 25 of the First Schedule provides that a local authority may defer preparation or notification of a privately requested change only where a plan review is due within 3 months; the review was due to be publicly notified at the end of 1994 at the earliest; it was not likely to be operative before 1997. The Tribunal further held that this was not the unusual case where a change should be deferred
and that the express provision for deferment in the First Schedule shows an intent by the Legislature that deferment is not intended for reviews that are more remote.

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

Ground 8.

The Tribunal wrongly construed the ambit of the first respondent's lawful functions under Part V of the Act and in particular, misconstrued s5(2), s9, s31(a), s31(b) and s76 by allowing the first respondent to direct and control the use and development of natural and physical resources within the subject block.

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

Counsel submitted that the plan change should have created a framework intended to enable people in communities to provide for their own social, economic and cultural wellbeing (the words of s5 of the RMA). Much was made of the difference between the RMA and the TCPA. Section 5 was said to be either or both 'anthropocentric' and 'ecocentric'.

Consideration of s76 is required -

"Section 76.

(1) A territorial authority may, for the purpose of
  - *(a) Carrying out its functions under this Act; and*
  - *(b) Achieving the objectives and policies of the plan,- include in its district plan rules which prohibit, regulate, or allow activities.*

(2) Every such rule shall have the force and effect of a regulation in force under this Act but, to the extent that any such rule is inconsistent with any such regulation, the regulation shall prevail.

(3) In making a rule, the territorial authority shall have regard to the actual or potential effect on the environment of activities including, in particular, any adverse effect; and rules may accordingly specify permitted activities, controlled activities, discretionary activities, non-complying activities, and prohibited activities.

(4) A rule may -
  - *(a) Apply throughout a district or a part of a district;*
  - *(b) Make different provision for -*
  - *(i) Different parts of the district; or*
  - *(ii) Different classes of effects arising from an activity:*
  - *(c) Apply all the time or for stated periods or seasons;*
  - *(d) Be specific or general in its application;*
  - *(e) Require a resource consent to be obtained for any activity not specifically*

referred to in the plan."

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

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

Similar submissions about s5 the new philosophies of the RMA and the need to abandon the mindset of TCPA procedures were given to the Full Court in Batchelor v Tauranga District Council (No 2) [1992] 2 NZLR 84; that was an appeal against a refusal by the Tribunal to grant consent to a non-complying activity. The Court said at 89 -

> *"Our conclusion on the competing submissions about the application of s5 to this case is that the section does not in general disclose a preference for or against zoning as such; or a preference for or against councils making provision for people; or a preference for or against allowing people to make provision for themselves. Depending on the circumstances, any measures of those kinds may be capable of serving the purpose of promoting sustainable management of natural and physical resources."*

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

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

We find the Batchelor and K.B. Furniture cases of great relevance when considering this ground of appeal; they looked at the underlying philosophy between the two Acts and, in particular, the application of s5 of the RMA. In Batchelor's case, the Tribunal had taken a similar pragmatic view to that

taken by the Tribunal in this case. The Full Court held that there was no general error in an approach which recognised the difficulty of operating with a transitional plan, conceived as a scheme under the TCPA, yet deemed to be a plan under the RMA. Zoning is a method of resource management, albeit a rather blunt instrument in an RMA context; under a transitional plan, activities may still be regulated by that means.

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

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

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

Ground 9.

"That the Tribunal applied the wrong legal tests and misconstrued the Act when it concluded that the incorporation of Rule 4 in plan change No 6 is intra vires the Act, and in particular by concluding that Rule 4 is within the bounds of s76 of the Act and by determining that Rule 4 is necessary with reference to the transitional plan rather than the provisions and purposes of the Act."

This ground is rather similar to Ground 4.

Rule 4 of plan change 6 provides: "Any activity not specified in rules 1-3 above or permitted by the Act is not permitted within the zone unless consent is obtained by way of a resource consent". The contention of the appellants is that this rule purports to require persons undertaking a number of activities expressly referred to in the district plan to acquire a resource consent before they can proceed. It was submitted that this rule was **ultra vires** the rule-making power of s76 (cited above).

Counsel for the appellants drew on the well-known principles that a Court is reluctant to interpret a statute as restricting the rights of landowners to utilise their property unless that interpretation is necessary to give effect to the express words of the RMA Act; in a planning context, this principle is demonstrated by such authorities as Ashburton Borough v Clifford [1969] NZLR 921, 943. Counsel submitted that s9 introduced a permissive regime and that the ability of the local authority to reverse that presumption is prescribed by s74(4)(e); that normal principles of statutory interpretation should properly have applied

to the construction of s76
The Tribunal held that there must be one coherent planning instrument in the context of a hybrid transitional district plan and for the purposes of marrying provisions prepared under one Act which are to change a plan prepared under another Act. "We infer that the need in such circumstances for a rule requiring resource consent to be obtained for activities in one zone that are specifically referred to elsewhere in the plan has on balance more probably been overlooked from the list in s76(4) than deliberately excluded. The rule is clearly within the general scope of s76(1) and we do not consider that it was ultra vires respondent's powers".
The Tribunal did not find helpful (and neither do we) various maxims of statutory interpretation advanced by the appellants. The Tribunal could not believe that the Legislature intended, by providing expressly for such rules in the circumstances referred to in s76(4)(e); to preclude similar rules in other cases where they are needed. We think the Tribunal's reasoning sound and find no reason to depart from it.
Mr Marquet referred to a decision of the Tribunal in Auckland City Council v Auckland Heritage Trust (1993), 1 NZRMA 69 where Judge Sheppard held that a reference anywhere in a plan to a particular activity was sufficient to preclude the application of s373 to a zone which did not permit that activity. We agree with the criticisms of Mr Marquet of this decision in that no reference was made in it to the ability of a Council to make different provisions for different parts of a district.
In that case, there had been a provision protecting buildings specified in the schedule from alteration or destruction. As alteration or destruction was referred to in the plan, the Judge held that other buildings were not constrained by the rule that demolition and construction can only take place with a resource consent because that requirement was limited only to the scheduled buildings. Such a view could have the effect of taking away control formerly had under the district scheme. However, we are not concerned with the correctness of the Auckland Heritage Trust decision.
Even if the Tribunal were wrong in that decision, then our view, already discussed under Ground 4, is that s373(3) applies; a transitional district plan must be deemed to include a rule to the effect that every activity not specifically referred to in the plan is a non-complying activity.
We reject this ground of appeal.

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

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

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

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

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

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

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

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

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

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

questions of fact and degree which are capable of judgment and were upheld. We do not consider that the Tribunal incorrectly applied the law or came to a decision that was so unreasonable that it could no stand. This ground of appeal is also dismissed.

Ground 11.
That the Tribunal's conclusion that the land in the block the subject of Plan Change No 6 is in general an appropriate location for large scale vehicle orientated retailing is a conclusion which on the evidence it could not reasonably come to.
This ground was withdrawn at the hearing and is therefore dismissed.

Ground 12
That the Tribunal's decision accepting the evidence adduced by the second respondent about the economic effects of proposed change No 6 were so unreasonable, that no reasonable Tribunal, properly considering the evidence, and directing itself in law, could have made such a decision.
This ground relates to the evidence of a statistical retail consultant, Mr M.G. Tansley, who generally supported the plan change. No witness was called to contradict his evidence. The appellants made detailed and sustained criticisms of his evidence before the Tribunal and claimed that Mr Tansley did not have the relevant expertise to predict economic effects of the proposed change. The Tribunal held that an economist's analysis would not have assisted it any more than did Mr Tansley's.
In a close analysis of Mr Tansley's evidence, counsel for Countdown examined the witness's qualifications and his approach to a cost and benefit consideration of the proposed plan change; they alleged deficiencies in his predictions about the economic effects of the change. These matters were before the Tribunal when they made their assessment of the evidence. Its decision (p.34) records the Tribunal's appreciation of such criticisms.
The Court is dealing with the decision of an specialist Tribunal, well used to assessing evidence of the sort given by Mr Tansley, who was accepted by the Tribunal as an expert. We see no reason for holding that the Tribunal should not have accepted his evidence. Although it is possible for this Court to hold in an appropriate case that there was no evidence to justify a finding of fact, it should be very loath to do so after the Tribunal's exhaustive hearing. The Tribunal is not bound by the strict rules of evidence. Even if it were, the acceptance or rejection of Mr Tansley's evidence is a question of fact. We see this ground of appeal as an attempt to mount an appeal to this Court against a finding of fact by the Tribunal - which is not permitted by the RMA. We therefore reject this ground of appeal.

Ground 24.
The Tribunal erred in law and acted unreasonably by failing to consider either

in whole or in part the evidence of the appellants and by reaching a decision regarding the merits of the plan change that no reasonable Tribunal considering that evidence before it and directing itself properly in law could reasonably have reached. In particular the Tribunal failed to consider the evidence of the following - Anderson, Page, Nieper, Cosgrove, Hawthorne, Bryce, Chandrakumaran, Constantine, Edmonds.

This ground is similar to ground 12, so we consider it next. The appellants complaint here is that the Tribunal took considerable time to analyse the Council's and Woolworths' witnesses views on the appropriateness of the location for the commercial zone and on the economic and social effects of allowing the proposed change. They claim, in contrast, that the witnesses called by the appellants on the same topics were not considered at all or not given the same degree of attention. The Tribunal heard full submissions by the appellants as to reliability of opposing witnesses, but, the appellants submitted before us, it failed to place any weight at all on the evidence given by the appellants' witnesses. The Tribunal was said to have been unfairly selective and that, therefore, its decision was against the weight of evidence and one which no reasonable Tribunal could have reached.

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

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

Ground 13.

That the Tribunal applied the wrong legal tests and misconstrued the Act when it held that Change No 6 assisted the first respondent in carrying out its functions in order to achieve the statutory purpose contained in Part II of promoting sustainable management of natural and physical resources and that the change is in accordance with the function of s31.

Ground 14.

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

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

Grounds 15, 16, 17 and 18:

15. That the Tribunal erred in law by holding that s290 of the Act did not apply to the references in Plan Change No 6.
16. That the Tribunal misconstrued the statute when it held that it did not have the same duty as the first respondent to carry out the duties listed in s32(1).
17. That the Tribunal misconstrued the Act when it held that it has the powers conferred by s293, when considering a reference pursuant to clause 14.
18. That the Tribunal misdirected itself by failing to apply the correct legal test when it purported to confirm Plan Change 6, namely by deciding that it was satisfied on balance that implementing the proposal would more fully serve the statutory purpose than would cancelling it.

The first step in the appellant's argument to the Tribunal on this part of the hearing was that s290 of the RMA applied to the proceedings. That section reads-

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

The second step in the argument was that pursuant to s290(1) the Tribunal had a duty to carry out a s32(1) analysis in the same way as the Council had. The Tribunal held that s290 did not apply because the proceedings were not an appeal against the Council's decision as such and that the Tribunal was not under the same duty as the Council to carry out the duties listed in s32(1) It went on to say -

> *"However the Tribunal's function is to decide whether the plan change should be confirmed, modified, amended, or deleted. To perform that function, the matters listed in s32(1) are relevant. We therefore address those matters as a useful method to assist us to perform the Tribunal's functions on these references."*

The Tribunal then considered those matters in detail.

The appellant's submission to this Court is that the Tribunal was wrong as a matter of law in holding that s290 did not apply and in determining that it was not itself required to discharge the s32 duties.

The Tribunal also held that s293 of the RMA, unlike s290, was applicable and that it had the powers conferred thereby. Section 293 (in part) is as follows -

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

Although s293 refers to "plan" which (by the relevant definition) means the operative district plan and changes thereto, the Tribunal considered that, because there is no mechanism by which there could be an appeal to the Tribunal against the provisions of an operative plan, for s293 to have any application to plans, therefore, it must apply to appeals against provisions of proposed plans and proposed changes to plans. It accordingly held that the context requires that the defined meanings do not apply and that it has the powers conferred by s293 in respect of a proposed change as well as those conferred by clause 15(2) of the First Schedule. That clause is as follows -

> *"(2) Where the Tribunal holds a hearing into any provision of a proposed policy statement or plan (other than a regional coastal plan) that reference is an appeal, and the Tribunal may confirm, or direct the local authority to modify, delete, or insert, any provision which is referred to it."*

The appellants submit that the Tribunal was wrong as a matter of law in holding that it had the powers conferred by s293 in the present case.

Mr Marquet accepted (as he had before the Tribunal) that s290 and 293 both applied and that the Tribunal had the powers set out in those provisions but contended, for reasons amplified in his submissions, that there had been no error of law.

Mr Gould supported the Tribunal's findings. He argued, however, that on a careful reading of the decision the Tribunal did not rely upon the powers contained in s293 but instead on its jurisdiction under clause 15(2) of the First Schedule. It had correctly defined its function, he contended, and in the performance of that function, had reviewed all the elements of s32. He submitted that even if the Tribunal had the duties under s32 of the Council

(but in a manner relevant to an appeal process), the steps it would have taken in its deliberation and judgment would have been no different. No material effect would arise, he submitted, if the Tribunal were found to be technically in error in its views as to s290 and s293.

We consider that, for the reasons given by the Planning Tribunal, it correctly determined that it had the powers conferred by s293 although we accept Mr Gould's submission that, in the end, the Tribunal did not exercise those powers and acted only pursuant to clause 15(2) of the First Schedule.

We differ from the Tribunal's conclusion as to s290. In our view, the nature of the process before the Tribunal, although called a reference, is also, in effect an appeal, from the decision of the Council. In addition, the provisions in clause 15(2) that a reference of the sort involved here is an 'appeal' and a reference into a regional coastal plan pursuant to clause 15(3) is an 'inquiry' link, by the terminology used, clause 15 in the First Schedule with s290.

The general approach that the Tribunal has the same duties, powers and discretions as the Council is not novel. s150(1) and (2) of the TCPA conferred upon the Tribunal substantially the same powers as s290(1) and (2) of the RMA; in particular, s150(1) provided that the Tribunal has the same "powers duties functions and discretions" as the body at first instance. Under that legislation, the Tribunal's approach to plan changes was that the Tribunal is an appellate authority and not involved in the planning process as such. This principle was discussed in this Court in Waimea Residents Association Incorporated v Chelsea Investments Limited (Davison CJ, Wellington, M616/81, 16 December 1981).

There was no provision in the TCPA corresponding to s32 of the RMA but the judgment of Davison CJ is relevant as confirming the judicial and appellate elements of the Tribunal's function even although it had the same powers and duties as the Council.

We accept Mr Gould's submission that even if the Tribunal had decided that s290 applied and it had the same duties as the Council (in a manner relevant to its appellate jurisdiction) the steps it would have taken in its deliberation and judgment would have been no different from those set out in detail in pages 121 to 125 of the decision.

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

We deal with the alternative point first. The Tribunal in its decision discussed the submissions made by counsel and the judgments of the Court of Appeal in Environmental Defence Society Inc and Tai Tokerau District Maori Council v Mangonui County Council [1989] 13 NZTPA 197 and of Greig J in

Wainuiomata District Council v Local Government Commission (Wellington, 20 September 1989, CP546/89).

The Tribunal considered that in s32(1) 'necessary' requires to be considered in relation to achieving the purpose of the Act and the range of functions of Ministers and local authorities listed in s32(2) In this context, it held that the word has a meaning similar to expedient or desirable rather than essential.

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

We return now to the appellants' primary submission.

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

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

But we do not think it is correct that the Tribunal adopted this test in place of the more rigorous requirement that it be satisfied that the provisions are necessary. Section 32 is part only of the statutory framework; by s74 a territorial authority is to prepare and change its district plan in accordance with its functions under s31 the provisions of Part II, its duty under s32 and any regulations. This was fully apprehended by and dealt with appropriately by the Tribunal. It said at p.127 -

> *"We have found that the content of proposed Plan Change 6 would, if implemented, serve the statutory purpose of promoting sustainable management of natural and physical resources in several respects; and that the proposal would reasonably serve that purpose; and would serve the aims of efficient use and development of natural and physical resources, the maintenance and enhancement of amenity values, the recognition and protection of the heritage values of building and area and the maintenance and enhancement of the quality of the environment.*

We have also found that the measure is capable of assisting the respondent to carry out its functions in order to achieve that purpose, and is in accordance with those functions under s31; that its objectives, policies and rules are necessary, in the sense of expedient, for achieving the purpose of the Act; that the proposed rules are as likely to be effective as such rules are able to be; and that the objectives, policies and rules of the plan change are in general the most appropriate means of exercising the respondent's function."

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

In our view, the Tribunal applied the correct test when considering the relevant part of s32 it asked itself whether it was satisfied that the change was necessary and held, after a full examination, that it was. On the basis of that and numerous other findings, it then proceeded to the broader and ultimate issue of whether it should confirm the change or direct the Council to modify, delete or insert any provision which had been referred to it. It determined that, on balance, implementing the proposal would more fully serve the statutory purpose than would cancelling it and that the Council should accordingly be free to approve the plan change. Reading the relevant part of the Tribunal's decision as a whole we consider that its approach was correct and that it did not err in law as the appellants contend. This ground of appeal is dismissed.

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

<u>Ground 20</u>.
In considering Plan Change No 6 in terms of s5 of the Act the Tribunal erred in failing to consider the effects of the Plan Change on the sustainable management of the State Highway, on the reasonably foreseeable transportation needs of future generations, and on the needs of the people of the district, pedestrians, and road users, as to their health and safety, and on the need to avoid, remedy or mitigate adverse effects of the plan change on the transportation environment of the Dunedin district.

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

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

<u>Ground 23</u>.
The Tribunal erred in considering the effectiveness of the rules contained in the Plan Change, and in particular wrongly determined that the issue of what are appropriate rules for vehicle access should be resolved by the appellant and the first respondent through the process of proposed draft plan change 7 or some informal process.
These grounds were not argued because of the settlement reached by Transit

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

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

Counsel for Countdown who submitted that the new rules contained within the settlement agreement required public notification before the local authority or Tribunal could proceed to include them in the plan change. Further, it was contended that the Tribunal had refused such proposed amendments sought by Transit upon the basis that Transit's submission to the Council had not specifically stated the amendments sought and that that was final because it had not been appealed. Reference was made to s295 of the RMA viz -

> *"that a decision of the Planning Tribunal ... is final unless it is re-heard under s294 or appealed under s299*

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

All parties accepted that the Tribunal had power under clause 15(2) of the First Schedule to confirm or to direct the local authority to modify, delete or insert any provision which had been referred to it; as well, it had powers to direct changes under s293 of the RMA. The latter power includes a specific power to adjourn a hearing if it considers that some opportunity should be given to interested parties to be notified of and to consider the proposed change. The detailed procedure is contained in s293(3).

On the penultimate page of its decision the Tribunal stated -

> *"The other two amendments sought by Transit would replace general provisions about the design of vehicle accesses to car parking and service and loading areas with detailed rules containing specific standards. However, although Transit's submission to the respondent on the plan change referred to pedestrians crossing Cumberland Street mid-block, and to the design and location of accesses and exits, it did not state that the submitter wished the respondent specifically to make the amendments that were sought in Transit's*

reference to the Tribunal. Further, those amendments were not put to the respondent's traffic engineering witness, Mr N.S. Read, in cross-examination by Transit's counsel.

The applicants' traffic engineering witness, Mr Tuohey, proposed a different rule about design and location of vehicle accesses, and that is also a topic currently being considered within the Council administration, focusing on a draft Plan Change 7. In all those circumstances, we do not feel confident that the specific provisions sought by Transit would necessarily be the most appropriate means of addressing the concern raised by it. We are content to know that both Transit and the respondent are actively considering the issues which the amendments sought by Transit are intended to address."

We do not read those paragraphs, in the context of the Tribunal's decision as a whole, as a concluded finding upon Transit's reference to the Tribunal. We accept that these amendments, now settled upon, may be within the Tribunal's jurisdiction under s293 or clause 15(2) of the First Schedule.

In Port Otago Limited v Dunedin City Council (Dunedin, AP112/93, 15 November 1993, Tipping J expressed the view that it would be a rare case in an appeal on a point of law where this Court could substitute its own conclusions on the factual matters underlying the point of law for that of the Tribunal. He considered, and we agree, that unless the correctly legal approach could lead to only one substitute result, the proper course is to remit the matter to the Tribunal as R.718A(2) of the High Court Rules empowers.

Accordingly, we allow Transit's appeal by consent and remit to the Tribunal for its further consideration and determination the possible exercise of its powers under s293 or Clause 15(2) of the First Schedule in relation to the rules forming part of the settlement.

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

Section 300-307 of the RMA provide detailed procedure for the institution of appeals to this Court under s299 and for the procedure up to the date of hearing. In our view, it is unfortunate that such detailed matters of procedure are fixed by statute. Our reasons are:

(a) statutes are far more difficult to alter than Rules of Court should some procedural amendment be considered desirable;
(b) most statutes are content to leave procedural aspects to the Rules once the statute has conferred the right of appeal;
(c) the High Court Rules in Part X aim for a uniform procedure for all appeals to this Court other than appeals from the District Court.

There is much to be said for having the same rules for similar kinds of appeals. Although the RMA goes into considerable detail on procedure, it is silent on the powers of the Court upon hearing an appeal from the Tribunal. One might

have thought that the power of the Court on hearing an appeal might have been a better candidate for legislative precision than detailed provisions which are similar to but not identical to well-understood and commonly used rules of Court. We hope that, at the next revision of the Act, consideration be given to reducing the procedural detail in s300-s307 and that the same measure of confidence be reposed in the Rules of Court as can be found in other legislation granting appeal rights from various tribunals or administrative bodies.

Result

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

Royal Forest and Bird Protection Society Inc v Southland District Council

High Court Christchurch AP198/96
15 July 1997
Panckhurst J

Rules — Planning instruments — Ultra vires — Submissions lodged in relation to plan — Amendment to plan — Whether substance of amendment was raised in submissions — Proper test for whether rule was ultra vires — Resource Management Act 1991

The proposed district plan contained two rules, one in respect of heritage matters (HER.5, which applied district-wide), and one in respect of the coastal area (COA.4). The appellant submitted that the former was inadequate to protect natural flora and fauna, and the latter provided adequate protection. After all submissions had been considered the respondent inserted a new rule into the Heritage section of the plan, affecting the entire district (HER.3) in terms almost identical to Rule COA.4 The new Rule transformed removal of native flora and fauna into a discretionary activity. Rayonier NZ Ltd, which owned thousands of hectares of forest containing native undergrowth, argued that Rule HER.3 was ultra vires. The Planning Tribunal held that it was. The Tribunal held that the new Rule went beyond matters raised in submissions lodged with respect to the plan. The appellant considered that the rule was not ultra vires, as the matter was fairly raised in its submissions to the respondent.

Held (allowing the appeal):

(1) The respondent was required to consider whether the amendment went beyond what was reasonably and fairly raised in submissions in respect of the plan change. Determination of this question should have been approached in a realistic workable fashion rather than from the perspective of legal nicety. This test could not be substituted for other extraneous considerations.

(2) Submissions made in relation to the heritage section of the plan clearly raised the theme of greater control upon activities likely to affect native flora and fauna. The substance of Rule HER.3 was properly raised in submissions on the plan. Rule HER.3 was within the scope of the appellant's submission with respect to Rule HER.5. The respondent did not reject the appellant's submission in that regard. The respondent was

aware that the adoption of Rule HER.3 would impact upon the entire district. The Tribunal erred in law in deciding that Rule HER.3 was ultra vires the respondent.

Cases referred to in judgment

Countdown Properties (Northlands) Ltd v Dunedin City Council (1994) NZRMA 145

Environmental Defence Society Inc v Mangonui County Council (1987) 12 NZTPA 349

Nelson Pine Forest Ltd v Waimea County Council (1988) 13 NZTPA 69

Appeal

This is an appeal pursuant to s 299 Resource Management Act 1991.

P J Milne for the appellant
B J Slowly for the respondent
B I J Cowper for Rayonier NZ Ltd

PANCKHURST J.

Introduction

In a decision delivered on 1 July 1996 the then Planning Tribunal ("the Tribunal") held that a rule included in the Southland District Council's District Plan, by way of amendment to the proposed Plan, was ultra vires the Southland District Council ("the Council"). Such decision reflected an application of the principle recognised in *Countdown Properties (Northlands) Limited v Dunedin City Council* [1994] NZRMA 145, and other cases, that an amendment to a Plan should not go beyond what was reasonably and fairly raised in submissions lodged in relation to that Plan. This requirement flows from a value which underscores the Resource Management Act 1991: that there should be public participation in the resource management process.

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

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

clearance of native vegetation, as such provisions may impact upon the company's ability to harvest its crop.

Background

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

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

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

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

Section 3 of the Plan was entitled **"General Objectives Policies Methods and Rules"**. This section was further divided into thirteen subsections of diverse content, ranging from **"Manawhenua Issues"** to **"Public Works and Network Utilities"**. Section 3.4 was entitled **"Heritage"** and was devoted to three heritage types namely: natural, built, and cultural. Importantly for present purposes section 3.4 is of district-wide application. By proposed Rule HER.5 it was provided:

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

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

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

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

For present purposes it is not necessary to consider the submission in greater detail, other than to note the concern that there were in RF & B's

view no controls on indigenous vegetation clearance, save for the quite circumscribed controls contained in proposed Rules HER.5 and COA.4. In argument counsel for RF & B summarised what RF & B sought in these terms:

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

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

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

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

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

and activity which would otherwise have a controlled status would become a permitted activity.

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

The new Rule read:

Rule HER.3 – Indigenous Flora and Fauna

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

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

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

RF and B's Contentions

In the present appeal pursuant to s 299 of the Act, RF & B alleges that the Tribunal erred in law in three respects:

(a) in finding that Rule HER.3 was not reasonably and fairly raised in RF & B's submission on the proposed Plan,
(b) in taking into account irrelevant considerations, namely the reasoning by which the Council justified the inclusion of Rule HER.3 and the circumstance that the general Heritage submission of RF & B seeking greater control of activities affecting indigenous vegetation or fauna was in the Tribunal's view *"disallowed by the Council"*, and
(c) in failing to take into account its own finding that RF & B's Heritage submission was publicly notified in a way that would

have made it perfectly clear it was seeking in the Heritage section of the Plan a new Rule to control the clearance, logging or other use of land that would adversely affect indigenous vegetation, by making such activities discretionary.

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

Was HER.3 fairly raised?

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

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

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

The Court then made some general observations concerning the extent to which the Act encouraged public participation in the resource management process. In this context it noted that persons making submissions were unlikely to fill in the forms exactly as required by the First Schedule, but opined that the process should not be one "bound by formality". I agree with, and adopt, the approach embraced in the Countdown Properties judgment.

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

In the present case submissions made in relation to s 3.4, the **Heritage section**, clearly raised the theme of greater control upon activities likely to

adversely affect indigenous vegetation. The Tribunal accepted as much at p 6 of its decision when it held:

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

Rayonier, for example, readily appreciated the significance of RF & B's submission and moved to counter it. Had the Council, in the context of a decision concerning the **Heritage** section, and in response to submissions thereon, decided to introduce Rule HER.3, a vires argument could hardly even have been raised.

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

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

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

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

> "The Committee has carefully read and listened to all of the submissions that have been made in respect of this Rule. As a result of that consideration the Committee has decided that the Rule should have the following amendments and that it should apply to the whole of the District and as a consequence be included in the **Heritage** section:"

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

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

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

Against that background the Tribunal concluded Rule HER.3 was ultra vires for three reasons. First, it found that the Rule was *"clearly founded on, and only on, the submissions and cross submissions made on Rule COA.4"*. Moreover the Tribunal considered that *"none of the submissions or cross submissions on that Rule sought the resultant Rule HER.3"*. Second, the Tribunal found that *"although there are similarities between Rule HER.3 and (what) was sought by RF & B, there are important differences"*. In this regard the Tribunal noticed the specific exceptions in respect of forest management plans and the link between Rule HER.3 and Method HER.9 whereby determinations about whether indigenous vegetation was *"significant"* were to be made. Accordingly Rule HER.3 was described as *"a different rule"* from what was sought by RF & B. Third, the Tribunal found that the **Heritage** submission made and relied upon by RF & B to support Rule HER.3 was disallowed by the Council. Decision 3.4.2.201, read as a whole, led the Tribunal to this conclusion.

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

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

Then followed the ultra vires ruling.

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

> "An expert tribunal, such as the Planning Tribunal, ought to be given some latitude to reach findings of fact which fall within the area of its own expertise even in the absence of evidence to support such findings; and some latitude in reaching findings of fact made in reliance upon its own expertise in the evaluation of conflicting evidence; and some latitude in reaching conclusions based on its expertise, without relating them or being able to relate them to specific findings of fact; but care should be taken to ensure that expertise is not used as a substitute for evidence such that the burden of proof is unfairly shifted."

I accept these observations have some application in the present context. The Tribunal undoubtedly possesses expertise in relation to the evaluation of the process for public participation prescribed in the First Schedule. It must see and consider many examples of that process in the course of its

work. On the other hand, the present are not findings of fact in the conventional sense. The Tribunal did not hear contested evidence and therefore enjoy an opportunity not possessed by this Court. The subject findings are rather conclusions drawn in the main from the Council's **Decisions on Submissions** issued on 1 August 1995. I accept it is appropriate to afford those findings special recognition as emanating from an expert Tribunal, but I do not accept counsel's submissions that the findings are decisive of the present problem.

Mr Milne for RF & B squarely confronted each of the reasons advanced by the Tribunal for its ruling. As to the point that Rule HER.3 was founded only on submissions made in relation to Rule COA.4, he argued that the Tribunal's focus upon the reasons given by the Council was wrong in law; as the sole issue was whether the new Rule went beyond what was reasonably and fairly raised in RF & B's **Heritage** submission. Put another way, the ultimate issue was whether the public had received a fair crack of the whip; had enjoyed the opportunity to be heard in answer to RF & B's **Heritage** submission before Rule HER.3 was included in the Plan. Likewise, counsel disputed the finding that there were important differences between Rule HER.3 and what RF & B sought in its **Heritage** submission. He accepted there were differences, but argued such were as to matters of emphasis. The new Rule was fairly to be seen as a watered down version of what RF & B sought in the first place, counsel contended. Moreover, he submitted the proper test was not whether Rule HER.3 was *"materially different"* from, but whether its substance was *"reasonably within"* the scope of, the submission made by RF & B.

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

Conclusion

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

As to the three matters relied upon by the Tribunal in support of its ultra vires ruling I do not see them, either singly or in combination, as supportive of the essential ruling. Unquestionably the Council's process of reasoning was curious, in that it made the decision to include Rule HER.3 in the **Heritage** section, in the context of its consideration of the **"Coastal Resource Area"** section. But such a curious process of reasoning does not detract from the fact that the content of Rule HER.3 was squarely raised in RF & B's **Heritage** submission. In real terms no-one could be heard to argue that during the public consultative process they were denied the

opportunity to oppose a change sought by RF & B. Put another way, the subsequent faulty reasoning of the Council does not impinge upon the effective process of consultation which preceded it.

Further the Tribunal's view that there were important differences between Rule HER.3 and what RF & B sought in its **Heritage** submission, is not helpful. I accept counsel's argument that the new rule was nothing more than a watered down version of what RF & B sought. Moreover the required approach was to ask whether Rule HER.3 was within the scope of RF & B's submission, rather than whether there were material differences. Likewise, I am not at all confident that a sensible reading of the Council's decision leads to the conclusion that it rejected RF & B's **Heritage** submission. In the absence of an express acceptance or rejection of this submission I am of the view that the proper conclusion to be drawn is that the Council accepted the thrust of RF & B's **Heritage** submission, by including Rule HER.3 in the **Heritage** section; albeit that the process of reasoning adopted was curious. Lastly, I reject the concern averted to by the Tribunal that the Council did not appreciate in introducing Rule HER.3 that *"it was controlling all activities relating to indigenous vegetation throughout the District. . ."*. Such conclusion is not tenable when one has regard to the terms of Decision 4.6.2.191 where, albeit in the **"Coastal Resource Area"** section, the Council expressed its belief that an amendment could *"be sensibly applied throughout the whole District through its inclusion as Rule HER.3"*.

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

The formal determination of the Court is that the Tribunal erred in law in determining that Rule HER.3 was ultra vires the Council. Accordingly such ruling is set aside. Counsel for Rayonier submitted that should the appeal be allowed, the case should be remitted to the Environment Court for consideration on its merits. I agree. In that regard it is appropriate to make two observations. First, the present vires decision may not preclude parties before the Environment Court from challenging the merits of Rule HER.3 by reference to the terms of the Council decision which produced it. Second, Rayonier in support of the Tribunal's vires ruling, argued that because the Council introduced rule HER.3 in the context of its decision in the **"Coastal Resource Area"** section, Rayonier could not challenge the merits of the new rule before the Environment Court. This because it had not made submissions or sought to be heard in relation to the **"Coastal Resource Area"** of the Plan. I doubt that this can be so. The decision of this Court that Rule HER.3 is not ultra vires, because it was reasonably and fairly raised in RF & B's **Heritage** submission, must carry the consequence that Rayonier has standing to challenge the new Rule. It made a cross submission in direct response to RF & B's **Heritage** submission. Just as the curious process of reasoning whereby the Council

introduced Rule HER.3 does not make the Rule ultra vires, nor can that same process of reasoning deny Rayonier standing which it would otherwise undoubtedly possess.

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

Appellant	**Vivid Holdings Ltd**	1
Decision Number	C086/99	
Court	Judge JR Jackson	
Judgment Date	17/5/1999	
Counsel/Appearances	Todd, GM; Macdonald, JE; Goldsmith, WP; McDonald, NT; Marquet, NS; Stamers-Smith, S	5
Quoted	Atkinson v Wellington Regional Council, W013/99, 4 NZED 272; Bayley v Manukau City Council, CA115/98, [1998] NZRMA 513, 3 NZED 772, (1998) 4 ELRNZ 461; CBD Development Group v Timaru District Council, C043/99, 4 NZED 490; Christchurch International Airport Ltd v Christchurch City Council, C077/99; Countdown Properties (Northlands) Ltd v Dunedin City Council, [1994] NZRMA 145, 3 NZPTD 157, 1B ELRNZ 150; Hilder v Otago Regioanl Council, C122/97, 3 NZED 18; Kaitiaki Tarawera Inc v Rotorua District Council, A007/98, 3 NZED 134, (1998) 4 ELRNZ 181; Leith v Auckland City Council, A034/95, [1995] NZRMA 400, 4 NZPTD 334; Murray v Whakatane District Council, [1997] NZRMA 433, 2 NZED 557, 3 ELRNZ 308; Nelson Pine Forests Ltd v Waimea County Council, (1988) 13 NZTPA 69; Re An Application by Christchurch City Council (Montgomery Spur), C071/99; Romily Properties Ltd v Auckland City Council, A095/96, 2 NZED 34; Royal Forest & Bird Protection Society Inc v Southland District Council, [1997] NZRMA 408, 2 NZED 575; Telecom NZ Ltd v Manawatu-Regional Council, W066/97, 2 NZED 592; Telecom NZ Ltd v Waikato District Council, A074/97, 2 NZED 590; Westmark Investments Ltd v Auckland City Council, A050/95, [1995] NZRMA 570, 4 NZPTD 440, 1B ELRNZ 455	10, 15, 20, 25, 30
Statutes	Resource Management Act 1991, s67, s75, s75(1)(a), s274, s279(4), s293, s293(2), s310, s311, First Schedule cl 6, cl 7, cl 8, cl 10, cl10(2), cl 14, cl 14(1); Resource Management (Forms) Regulations, form 4; Town and Country Planning Act 1977	35
Full text pages:	19	

Keywords

district plan ; reference ; rural rezoning ; rural residential ; validity of reference 40

Significant in Law, RMA First Schedule cl 14 1
Matters to be taken into account to determine whether a submission and subsequent reference is lawful.

SYNOPSIS

Proceedings questioning the validity of a reference by the Wakatipu 5 Environmental Protection Society (the "Society"). The proposed Queenstown Lakes District Plan provided for a Growth Management Strategy and zoned certain areas of land Rural Residential, enabling subdivision to 4,000m2. The Society's submission opposed any new Rural Residential zones until the Growth Management Strategy had identified a need for them. Many other 10 submissions were lodged in respect to the issue of rural subdivision and development. The Council completely rejected the Society's submission, effectively dropping the idea of a Growth Management Strategy and immediately increasing available rural living areas as Rural Residential and Rural Lifestyle zones. The Society's appeal sought either the deletion of all 15 Rural Living zones in the Proposed District Plan, the reinstatement of the previous provisions of the notified Plan, or that the whole matter be referred back to the Council for further consideration.

Vivid Holdings, a submitter, sought a declaration that the Court had no 20 jurisdiction to grant some of the relief requested by the Society.

The Court commented on the meaning of clause 14(1) First Schedule RMA, identifying the matters to be taken into account to determine whether a submission and subsequent reference is lawful. The Court held that for a 25 reference to be lawful, the appellant must have made a submission, and the submission must relate to a provision or the absence of a provision in the Plan and raise in a general way, a relevant "resource management issue" [5 ELRNZ 265 @ 15]. Further, the reference must be within the general scope of the submission or the Proposed Plan as notified or somewhere in between 30 the two.

In respect to the Society's submission, the Court found that with the Council no longer intending to proceed with the Growth Management Strategy, the Society's submission made it clear that it opposed new rural residential development throughout the district. As such, the relief sought (the deletion 35 of all Rural Residential zones which were not included in the Proposed Plan), was a subset of that submission.

The Court held that the failure by the Society to lodge cross-submissions against submissions seeking the rezoning to Rural Residential on specific 40 areas of land, did not mean that those decisions of Council were not affected by the Society's appeal. The Court held that the Society's general reference opposing Rural Residential zoning beyond that in the Proposed Plan was

valid and fairly within the scope of the original submission. The omission of the Society in failing to file further submissions in respect to submissions seeking further Rural Living zones, and the failure to refer the proposed exclusion of a Growth Management Strategy to the Environment Court, were not fatal to the Society's reference. Accordingly, the Court held that it had jurisdiction to grant the relief sought and set the Society's reference down for a prehearing conference.

FULL TEXT OF C086/99

Introduction

1. This proceeding is about the validity of a reference by the Wakatipu Environment Protection Society ("the Society") to this Court. The issue is of significance to many rural landowners in the Queenstown Lakes District. The Queenstown Lakes District Council ("the Council") publicly notified its proposed district plan ("the proposed plan") under the Resource Management Act 1991 ("the Act") on 10 October 1995. Part 6 of the proposed plan dealt with urban growth. The explanation for the objective of sustainable growth management stated that a growth management strategy ("GMS") was "seen as essential to the sustainable management of the District's resources and amenities ..."[1]. Part 8 of the proposed plan, called "Rural-Residential Areas", provided for low-density lifestyle residential opportunities in certain rural locations throughout the District. A rural-residential zoning enabled subdivision[2] of the relevant land to a minimum lot size of around 4,000 m2.

2. The Society lodged a submission ("the Society's submission") relating to part 8 of the proposed plan . The submission states (relevantly):

   Our submission is that we oppose any new RR zones until the Growth Management Survey/Strategy has shown that there is a need for them and the preferred area(s) for them. The areas in the plan do not appear to be designed in a sustainable pattern as there is no provision for co-ordinated landscape treatment. This will lead to piecemeal development. We seek the following decision from the Council:
   Refer RR zones for more study as part of the Growth Management Survey/ Strategy.

3. The Council's summary[3] of submissions states in respect of the Society's submission that the Society:

   opposes any new Rural Residential zones until the Growth Management Survey/Strategy has shown that there is a need for them and the preferred area(s) for them. There is no provision for co-ordinated landscape treatment in the Rural Residential areas in the plan and this will lead to peicemeal [sic] development.

It will be seen that this is nearly a copy of the submission. Under the heading 'Decision Requested', the Council summary simply copies the decision sought as stated in the Society's submission (quoted above).

4. The issue of rural subdivision and development attracted many submissions. After months of hearings the Council issued its decision ("the revised plan"). The revised plan:

   (1) deletes part 6 of the proposed plan and thus all reference to the GMS; and
   (2) retains as Rural Residential the zoning of some of the land zoned Rural Residential in the proposed plan; and
   (3) zones as Rural Residential certain other land that had a different zone in the proposed plan; and
   (4) introduces a new zone, called the "Rural Lifestyle" zone, applying to:
      (a) some of the land previously zoned Rural Residential in the proposed plan; and
      (b) certain other land previously zoned Rural Downlands;
   (5) contains a completely new part 8 called "Rural Living Areas" which contains mainly new objectives, policies and rules in respect of Rural Residential and Rural Lifestyle land.

5. In effect the Council has completely rejected the Society's submission and has gone in the opposite direction. Instead of having no rural-residential subdivision until a growth management strategy is completed it has, in the revised plan, dropped the idea of a growth management strategy completely and immediately increased the rural living areas. The decision *Issue 6 – Urban Growth* states:

   > *... it was inappropriate for* [the Council] *to make any decision with respect to whether a growth management strategy should be conducted [and] ... the Council has not budgeted for such a strategy and ... there are presently no plans for it to be implemented.*

6. The rules for both the Rural Residential and Rural Lifestyle zones are contained in a single chapter (Part 8 – Rural Living Areas) of the revised plan. The provisions for each zone are almost identical. The only significant difference is in the minimum lot sizes:
   (a) the minimum lot size in the Rural Residential zone is 4,000 m2;
   (b) the minimum lot size in the Rural Lifestyle zone is 1 hectare provided that the lots to be created by subdivision (including the balance lot) do not average less than 2 hectares.[4]

7. The Society lodged a reference[5] with the Environment Court in respect of the relevant Council decision[6]. Under the heading "Relief Sought" in

the reference the Society requests that:

The Court make an interim decision referring the entire plan back to council for it to reconsider its decisions to give better effect to the purpose of the Act
Alternatively ...
5. Decision 8/1.1.7
5.1 Either reinstate the rural residential zone provisions of the Proposed District Plan (Oct 1995) or 5.2 Delete all rural living zones of the Proposed District Plan (July 1998) and replace with rural general zoning.

The Society's reference also seeks other relief, but that is not challenged in this proceeding.

8. Vivid Holdings Ltd ("Vivid") owns a property near Arrowtown. Vivid lodged a submission on the proposed plan seeking that the Rural Downlands zoning of its property be changed to Rural Residential. This submission was accepted in part by the Council which rezoned the property Rural Lifestyle, and the land therefore falls into one of the categories described above[7].

9. Vivid has now applied to the Court under section 311 of the Resource Management Act 1991 ("the Act") for a declaration that the Court has no jurisdiction to grant some of the relief requested by the Society[8]. Vivid is supported by all other persons who appeared except the Society.

10. None of the parties questioned whether an application for a declaration is the appropriate mechanism in this case. The usual procedure would be an application under section 279(4) for an order striking out all or part of the Society's reference. However, I am satisfied that the Court has jurisdiction because section 310 of the Act gives power to declare:

    (a) The existence or extent of any function, power, right, or duty under the Act. [my emphasis]

    The question in this case involves the extent of the Society's right to refer the Council's decision to this Court.

The Arguments

11. For Vivid, Mr Todd's first submission was that the Society's first relief sought – that the Court refer the entire plan back to the Council for reconsideration – fails to meet the requirement of Form 4 of the Resource Management (Forms) Regulations 1991 ("the regulations") to state the relief sought. A similar issue arose in Leith v Auckland City Council[9]. The appellant there sought "*withdrawal of and/or substantial modification of the plan*". The Court stated that such a failure could lead the Court to

decline jurisdiction. The reasons were that: 1

The present references fail to identify relief that could be granted other than a direction for withdrawal of the proposed district plan. No modification to the plan that would meet the appellants' cases has been specified with any particularity at all. The result is that the respondent had nothing specific to focus its evidence on, and the Tribunal is consequently not able to give adequate consideration to amendments to the proposed district plan that it might direct the respondent to make if any of the appellants' challenges is found to be justified. 5

12. Mr Todd's second argument was that the Society's reference fails to meet what he called the accepted test which is: 10

Whether the relief goes beyond what is reasonably and fairly raised in submissions.[10]

He submitted: 15

(a) That the relief sought in the original submission was clearly tied to reconsidering the Rural Residential issue as part of a Growth Management Strategy.

(b) That the Wakatipu Environmental Society had clearly filed a submission in relation to the Growth Management issue. 20

(c) That the Queenstown Lakes District Council in releasing its decisions decided to delete all reference to Growth Management and provision for the adoption of a Growth Management Strategy.

(d) That the Wakatipu Environmental Society did not appeal the Council's decision deleting all reference to Growth Management and the provision to adopt a Growth Management Strategy. 25

(e) That its failure to file a Reference in respect to such decision is fatal to it now seeking to rely on an original submission where the relief sought in that submission was clearly tied to the provision for a Growth Management Strategy being retained as part of the Plan. 30

13. A third and alternative argument was that the reference filed by the Society now seeks something different to what was sought in the original submission. In particular, relief 5.1 sought by the Society's reference was inconsistent with the original submission which sought no more subdivision in the rural residential zone. Finally in respect of relief 5.2, he noted that the Society did not generally file further submissions in respect of submissions which sought zoning for rural-residential purposes. It only made three such cross-submissions, whereas many specific submissions (about 85) were made to the Council seeking rural-residential zoning for particular pieces of land. A significant number of those submitters are represented in this proceeding and are seeking to have the 35 40

Society's reference declared invalid. 1

14. For other parties Mr Goldsmith submitted first that because the Society has not requested reinstatement of the growth management strategy, the relief sought cannot be granted. Alternatively he said that the Society's submission could only refer: 5

    (a) to rural residential land referred to in the proposed plan, not to land which has subsequently been zoned as 'rural living'; or
    (b) to land which was covered by a cross-submission by the Society (and there were only 3 such cross-submissions).

15. Mr McDonald adopted the submissions of Messrs Todd and Goldsmith. 10 For the Council Mr Marquet submitted that:
    (a) the first relief sought is void for uncertainty;
    (b) ... the relief sought in paragraph 5 of the Society's reference is not mandated by the original submission by the Society.

The role of references in the preparation of district plans 15

16. The First Schedule to the RMA contains a code for the process of notifying a proposed plan and the making of submissions on it[11]. The relevant clauses for present purposes are those which give power to make submissions, to make a cross-submission on a submission, and to refer a decision to the Environment Court. Clause 6 gives the power to make a 20 primary submission on a proposed plan and the Society's submission was made under Clause 6. The power to make a further or cross submission is contained in clause 8. Vivid and others lodged cross-submissions under this clause against the Society's submission. 25

17. The primary rule as to the scope of references is clause 14 of the First Schedule to the Act. Rather strangely, almost none of the decisions[12] on the scope of references discuss the wording of clause 14. The submissions of counsel in this case did not even refer to clause 14. That states: 30

    14. Reference of decision on submissions and requirements to the Environment Court

    (1) Any person who made a submission on a proposed policy statement or plan may refer to the Environment Court

    (a) Any provision included in the proposed policy statement or plan, or a provision which the decision on submissions proposes to include in the policy statement or plan; or 35

    (b) Any matter excluded from the proposed policy statement or plan, or a provision which the decision on submissions proposes to exclude from the policy statement or plan, 40

    if that person referred to that provision or matter in that person's submission on the proposed policy statement or plan.

18. Clause 14(1) requires an answer to three questions to establish whether a reference is lawful:

    (1) Did the appellant make a submission?
    (2) Does the reference relate to either:
        (i) a provision included in the proposed plan; or
        (ii) a provision the local authority's decision proposes to include; or
        (iii) a matter excluded from the proposed plan; or
        (iv) a provision which the local authority's decision proposes to exclude?
    (3) If the answer to any of (2) is 'yes', then did the appellant refer to that provision or matter in their submission (bearing in mind this can be a primary submission[13] or a cross-submission[14])?

19. It is difficult to see how a submitter can refer[15] directly in their submission to provisions or matters which a decision proposes to include or exclude unless their submission has been accepted by the local authority in which it is unlikely the submitter will be referring the matter to the Court. No one can reliably anticipate the collective mind of the local authority. I consider that in order to start to establish jurisdiction a submitter must raise a relevant 'resource management issue'[16] in its submission in a general way. Then any decision of the Council, or requested of the Environment Court in a reference, must be:

    (a) fairly and reasonably within the general scope of:
        (i) an original submission[17]; or
        (ii) the proposed plan as notified[18]; or
        (iii) somewhere in between[19]

    provided that:

    (b) the summary of the relevant submissions was fair and accurate and not misleading[20].

20. The leading authorities on the scope of local authority decisions are <u>Countdown</u>[21] and <u>Royal Forest & Bird Protection Society Inc</u> v <u>Southland District Council</u>[22]. In the latter case Panckhurst J adopted <u>Countdown</u> and stated:

    ... [T]he assessment of whether any amendment was reasonably and fairly raised in the course of submissions, should be approached in a realistic workable fashion rather than from the perspective of legal nicety.

    I hold that the same interpretative principle applies to the assessment of the scope of references and whether they raise sufficient matters under clause 14 of the First Schedule to establish jurisdiction.

The requirements of clause 14 in this case

21. The Society filed a submission and it does relate to provisions included in Part 8 of the proposed plan – the objectives, policies and rules for rural-residential activities. In addition, the Council's decision proposes to exclude the growth management strategy and consequent objectives and policies from the proposed plan so the Society could have referred that excluded provision to the Court. The Society has chosen not to do that. In fact the Society has in its reference (paragraphs 5.1 and 5.2) sought different relief which focuses on what the Council decision proposes to include, that is further rural-residential zoning and the creation of a rural lifestyle zone, together grouped in a new Part 8 called "Rural Lifestyle".

22. The Society's primary submission clearly raised the issue of rural-residential subdivision. It opposed any new rural-residential zones. Admittedly that was only until a growth management "survey/strategy" was completed, but that is no longer going to occur. I cannot think it is reasonable to hold (as Vivid and others have requested) that the Council's decision not to proceed with a growth management survey and/or strategy knocks out the Society's submission or right to refer the Council's decision. To the contrary, I consider that, in the absence of such a survey/strategy being completed, the Society has made it clear that it opposes new rural-residential development throughout the district. When the Society's reference seeks as alternative relief, not the deletion of all rural-residential zones, but the deletion of those which were not included in the proposed plan, that relief can be seen as a subset of what it referred to in its submission. The relief is within the scope of the Society's original submission because the Society referred to "*no more rural-residential zoning*". That phrase can fairly and reasonably be seen as relating to both provisions included in the proposed plan and to provisions the decision proposes to include (i.e. in the revised plan). Since this is "*a question of degree to be judged by the terms of the proposed [plan] and of the contents of the submission*"[23] I now consider the relevant factors.

23. In Westmark Investments Ltd v Auckland City Council[24] Barker J was considering "so-called grounds for submission ... being a statement against planning controls generally" and whether these were sufficient to establish a valid reference to the Planning Tribunal. He compared the primary submission with those in Countdown and said:

I acknowledge, as was done in the Countdown case at 167, that persons making submissions are unlikely to fill in the forms exactly as required by the First Schedule, even when the forms are provided to them by a local authority. The Full Court noted that the Act encourages public

participation in the resource management process; that the ways whereby citizens participate in that process should not be bound by formality.

The comments were made in the context of assertions to the Court that the wider public had been disadvantaged. In that case, there was no doubt that all parties before the council and before the Tribunal, knew exactly what the issues were; there was no question of a broad general attempt to torpedo a whole plan by a submitter who did not even to [sic] attempt to follow the form and made broad assertions unsupported by any substance.

I note that in the Countdown case, there were discussions about possible amendments to the plan presented at the hearing of submissions. That possibility, as discussed by the Tribunal and by the Court in Countdown, cannot diminish the duty of somebody making a submission to attempt to say exactly what it is in the plan that is objected to and what result is sought. Latitude about the lack of formality surely must be directed to the wording of the relief sought or to the specificity of the parts of the plan to which objection is taken. For example, if the submitter said that he or she did not like the height restrictions in a particular zone or height restrictions in general and asked that these all be removed that would be sufficient probably.[25]

24. Without elevating Barker J's words into an independent test or checklist for compliance with the First Schedule, it is useful to consider how the Society's submission might measure against the considerations Barker J identified. In this case, I find that:

(1) all persons who read the Council's summary of submissions, and all parties to this case, knew exactly what the Society's issue was – whether or not there should be more rural residential subdivision;
(2) there is no question of an attempt by the Society in its reference to torpedo the whole revised plan;
(3) the Society has generally followed the forms in the regulations in both its submission and in its reference;
(4) the opposition to rural-residential zoning is supported by at least one matter of substance – especially in the Queenstown-Lakes district – and that is the reference in the primary submission to landscape values.

I also note that by analogy with Barker J's example with respect to height restrictions, it is probably sufficient if the Society's submission (and thus by extension its reference) stated it did not like rural-residential zonings in general. In fact the Society has gone further, and has now cut down the relief it is seeking.

25. I therefore hold that in this case the Society's reference is jurisdictionally sufficient when it seeks no further rural-residential subdivision or activity beyond what was in the proposed plan. That is so even if the issue is inextricably involved in fact with individuals' submissions and the Council's decision on them. My decision on that point may be conclusive on the jurisdictional issue but the following aspects of the policy and scheme of the Act are also relevant.

The Society's failure to lodge further submissions on rural-residential issues

26. First, I do not overlook that a local authority's decision can neither propose to include a provision nor exclude a matter unless there is a submission to that effect (or it is a consequential alteration[26]. In this context, a provision is a form of words describing an issue, objective, policy, rule or other method, or reason etc[27]. Thus in this case the Council could only propose to rezone other areas as rural-residential if there were submissions seeking that. If there were such submissions then they had to be summarised and notified. The Society therefore had an opportunity to lodge cross-submission on any such primary submissions. The issue is whether this leads to the conclusion that in general the Society's reference cannot relate to further rural-residential subdivision beyond what was in the proposed plan? In other words: is the failure to lodge cross-submissions on individuals' submissions seeking rural-residential zoning fatal?

27. Secondly, it is the policy of the RMA to encourage public participation[28]. If I hold that the Society's reference is invalid, then that policy is not being carried out. Of course, in this case, many people will be affected by the Society's reference, and may have to appear and call evidence when they did not expect to because there were no cross-submissions on their primary submissions. Those matters are partly a consequence of the scheme and policy of the RMA, and partly a matter which can be dealt with in the hearing procedure by this Court. For example, the Society can be directed to give particulars as to which specific pieces of land it opposes rural-residential zonings for.

28. Thirdly, as to the scheme of the RMA, the Court has the wide power in section 293 of the Act to change any provision of a plan when hearing a reference to the Court. Certainly this power is exercised cautiously and sparingly,[29] but its existence suggests that if the Court is concerned that other interested persons should be heard then it can remedy that by directing notification under section 293(2). I consider that one of the reasons Parliament has given the Environment Court the powers in section 293, especially in section 293(2) is to cover the situation where

the relief the referrer is seeking is not spelt out in adequate detail in the submission and/or the reference. Obviously it is good practice to spell out precisely the relief sought[30], but it is not essential to do so. If it is not and the Court considers a reasonable case for a particular change to a proposed plan is made out but that interested persons have not had adequate notice -
because the relief was not stated, or not clearly - then the Court can exercise its powers under section 293(2).

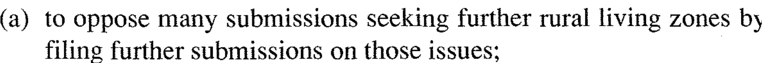
29. That section covers the situation which came before the High Court under the Town and Country Planning Act 1977 ("the TCPA") in Nelson Pine Forests Ltd v Waimea County Council.[31] In that case the Maruia Society had made a submission to the local authority seeking that the activity of clearing native forest and scrub be a conditional use in the district scheme. The Council despite opposition from NPF in an objection, introduced conditional use status for land clearance. Ordinances (rules) concerning conditions to be attached to the activity if consented to, were proposed by the Council to the Planning Tribunal on appeal. Holland J stated:

The Court considers that an informed and reasonable owner of land on which there was native forest should have appreciated that, if NFAC's objection was allowed and the logging or clearing of any areas of native forest became a conditional use, then either conditions would need to be introduced into the ordinance relating to conditional use applications, or at some stage or other the council would adopt a practice of requiring certain information to be supplied prior to considering such applications. Had the council adopted the conditions to the ordinances that it presented to the Tribunal at the time of the hearing of the objection, I am quite satisfied that no one could reasonably have been heard to complain that they had been prejudiced by lack of notice. Such a decision would accordingly have been lawful.[32]

30. Thus, there was the possibility under the TCPA that the Planning Tribunal's decision could go beyond the local authority's decision by way of amending a plan[33], but it is certain that the Environment Court may do so under the RMA because of its powers under section 293 of the Act. Thus in unusual cases, and at this stage I do not think this case is one, people may be involved at a late stage even though they had not previously been involved in the new plan process or at the reference level. But my point here is that there is a safeguard for them, to ensure they can be given a chance to be heard.

31. In the circumstances I consider the second and third aspects of the scheme and policy of the Act which I have identified outweigh the first. An aim

of the Act is to assist and encourage public participation in the plan process. It does not impose two sets of procedural hurdles in front of interested persons which they must jump, or if they fail, be excluded from the process. If, as I have held, the Society's general reference opposing rural-residential zoning beyond that proposed in the proposed plan is valid as fairly and reasonably within the scope of the original submission, then the omissions of the Society:



(a) to oppose many submissions seeking further rural living zones by filing further submissions on those issues;
(b) to refer the proposed exclusion of a growth management strategy from the plan to the Environment Court

- are not fatal to the Society's reference (paragraphs 5.1 and 5.2).

Outcome

32. In the circumstances I hold that the Court does have jurisdiction to grant the relief sought by the Society in paragraphs 5.1 and 5.2 of its reference. The Court is likely however to decline jurisdiction in respect of the first relief sought in the Society's reference. In the meantime, because the Court has jurisdiction, Vivid's application for a declaration is refused.

33. Costs are reserved, although my initial view is that they should lie where they fall for two reasons: first the Society is the author of all the difficulties because its original submission and reference are both unclear; secondly, while Vivid and the supporting parties have been unsuccessful, there was genuine doubt about the true legal status of parts of the reference.

34. The Society's reference will now be set down for a pre-hearing conference. It may be possible at that time to refine the issues further. The persons who appeared in this proceeding and those who filed submissions seeking rural-residential zoning for their land should consider whether they wish to appear under section 274. In the meantime I prefigure my intention (subject to any submissions on the issue) to direct the Society to serve its reference (minus any attachments) on the persons who made submissions seeking rural-residential zoning of their land.

FOOTNOTES

1. Proposed plan p6/9
2. Under Part 15 of the proposed plan
3. Under Clause 7 of the First Schedule to the Act
4. See the table of minimum lot sizes in the revised plan in para 15.2.6.3 [p.15/16]
5. RMA 1394/98
6. Decision 8/1.1.7
7. In paragraph 4(4)(b)
8. Quoted above in para 7
9. [1995] NZRMA 400, 411
10. Atkinson v Wellington Regional Council Decision No: W13/99
11. Recent decisions on this issue include Re An Application by Christchurch City Council (Montgomery Spur) C71/99 and Christchurch International Airport Ltd et anor v Christchurch City Council C77/99 (the Templeton Hospital case)
12. eg Atkinson v Wellington Regional Council (Decision W13/99): Telecom NZ Ltd v Manawatu-Regional Council Decision W66/97; Telecom New Zealand Ltd v Waikato District Council Decision A74/97 and Hilder v Otago Regional Council Decision C122/97 although this decision refers to clause 14. An exception is CBD Development Group v Timaru District Council Decision C43/99. The leading cases in the High Court Countdown Properties (Northlands) Ltd v Dunedin City Council [1994] NZRMA 145; Royal Forest and Bird Protection Society Inc v Southland District Council [1997] NZRMA 408 are of course on the scope of a local authority's decision making powers under clause 10 rather than on clause 14.
13. Under clause 6 of the First Schedule
14. Under clause 8 of the First Schedule
15. CBD Development Group v Timaru District Council Decision C43/99
16. As the term is used in section 75(1)(a) of the Act
17. Countdown Properties (Northlands) Ltd v Dunedin City Council [1994] NZRMA 145; Royal Forest and Bird Protection Society Inc v Southland District Council [1997] NZRMA 408; Atkinson v Wellington Regional Council W13/99 is a recent example referred to by Mr Todd
18. Telecom NZ Ltd v Waikato District Council A74/97 at p4
19. CBD Development Group v Timaru District Council C43/99
20. Re An Application by Christchurch City Council (Montgomery Spur) C71/99 and Christchurch International Airport Ltd et anor v Christchurch City Council C77/99
21. [1994] NZRMA 145
22. [1997] NZRMA 408 at 413

23. Countdown [1994] NZRMA 145 at 166
24. [1995] NZRMA 570 at 572
25. Westmark at p575
26. Under clause 10(2)
27. See section 75 (for district plans) and section 67 (for regional plans)
28. See Murray v Whakatane District Council [1997] NZRMA 433 (HC) and Bayley v Manukau City Council [1998] NZRMA 513; (1998) 4 ELRNZ 461
29. See Kaitiaki Tarawera Inc v Rotorua District Council (1998) 4 ELRNZ 181 at 188; also Romily Properties Ltd v Auckland City Council A95/96 at p6
30. Leith v Auckland City Council [1995] NZRMA 400
31. (1988) 13 NZTPA 69
32. (1988) 13 NZTPA 69 at 73
33. See the Nelson Pine Forest Ltd case at p74

5

Shaw v Selwyn District Council

10 High Court Christchurch
20, 21 February; 19 March 2001
Chisholm J

Resource management – District plan – Reference to Environment Court – Whether Environment Court had jurisdiction – Whether reference went beyond
15 *scope of original submission – Whether variation and plan change merged – Effect of objectives and policies on rule changes – Whether references on transitional plans should be rejected on jurisdictional grounds – Resource Management Act 1991, s 75(1) and First Schedule, cls 1(1), 14(1), 15 and 16B.*

The district council introduced plan changes to replace transitional plan rules
20 concerning subdivision. Under the proposed rules subdivision into allotments down to 10 ha was to be a controlled activity and subdivision down to 4 ha a discretionary activity. Mr and Mrs Shaw lodged a submission seeking to reduce the minimum allotment sizes below those proposed. Halswater Holdings Ltd (Halswater) sought the ability to subdivide down to 0.5 ha. The council rejected
25 these proposals but modified the plan change by adding a new policy that provided for subdivision down to 2 ha as a non-complying activity where specified criteria were met. The Shaws and Halswater lodged references to the Environment Court.

Following a pronouncement by the Environment Court on another
30 reference concerning the plan change that the policy might be ultra vires, the council notified a variation to delete the policy. Applefields Ltd (Applefields) lodged a submission opposing that variation and seeking either: (a) reinstatement of the policy in its entirety; or (b) reinstatement with modifications to avoid any vires problems. When deletion of the policy was
35 affirmed by the council, Applefields lodged a reference which sought relief on the grounds of (a) and (b) above, plus a new ground, (c), concerning subdivision.

The Court concluded that it had no jurisdiction to grant the relief sought in the Applefields reference because the reference went beyond the original
40 submission. The Court also concluded that it had no jurisdiction to grant the Shaw/Halswater references because they proposed new rules which could not be justified on the basis of the objectives and policies of the transitional plan and the submissions proposed no new objectives and policies. On appeal, Applefields argued that its position was protected by cl 16B of the First
45 Schedule to the Resource Management Act 1991 which provided that a submission against a provision in a plan was deemed to be a submission against any provision substituted for that provision by a variation.

Held: 1 To the extent that the relief claimed by Applefields in its reference to the Environment Court went beyond its original submission and the variation

the Environment Court had no jurisdiction to hear it. The variation and plan change had not merged. Clause 16B of the First Schedule to the Resource Management Act 1991 was designed to protect those who had lodged a submission or appeal relating to a provision in a policy statement or plan before the variation substituted a new provision. Applefields' submission was lodged after the variation had been notified, therefore cl 16B could not have any application (see paras [16], [17], [18], [19], [36]). 5

2 At least in the context of a transitional plan it was not a ground for rejecting a reference on purely jurisdictional grounds that it proposed rules which were inconsistent with the objectives and policies in the plan concerned. Clause 14(1) of the First Schedule to the Resource Management Act 1991 prima facie entitled a referrer to a hearing. While the submissions had not attempted to formulate specific objectives and policies, both had signalled the need for modifications to existing ones to support their proposed rules. A workable approach to assessing whether all parties were sufficiently informed about the relief sought by submitters required the Court to take the whole relief package into account. The Environment Court was to reconsider the Shaw/Halswater references on their merits on the basis that new objectives and policies were suggested in them and their submissions (see paras [26], [30], [31], [35]). 10 15 20

Royal Forest and Bird Protection Society Inc v Southland District Council [1997] NZRMA 408 applied.

Appeal allowed in part.

Other cases mentioned in judgment

Atkins v Whangarei District Council (Environment Court, Whangarei, A 6/2000, 25 January 2000, Environment Judge D F G Sheppard). 25

Haslam v Selwyn District Council (1993) 2 NZRMA 628.

McKay v Whangarei District Council (Environment Court, Whangarei, A 5/2000, 21 January 2000, Environment Judge D F G Sheppard).

Telecom New Zealand Ltd v Manawatu-Wanganui Regional Council (Environment Court, Wellington, W 66/97, 17 July 1997, Her Honour Judge Kenderdine). 30

Yates v Selwyn District Council (Environment Court, Christchurch, C 44/99, 31 March 1999, Environment Judge J R Jackson).

Appeal 35

This was an appeal by Mr J G and Mrs H Shaw, Halswater Holdings Ltd and Applefields Ltd, the appellants, from a decision of the Environment Court rejecting their references on a Selwyn District Council plan change and variation on jurisdictional grounds.

P A Steven for the appellants. 40

K G Smith for the Selwyn District Council.

M Perpick for the Canterbury Regional Council.

Cur adv vult

CHISHOLM J. [1] References lodged by the appellants in relation to a change to the Selwyn District Council transitional plan and a variation thereto were rejected by the Environment Court on jurisdictional grounds (Christchurch, C 183/00, 26 October 2000, Environment Judge J R Jackson). The appellants claim that the Court erred in law by determining their references 45

on jurisdictional grounds and declining to consider them on their merits. Orders are sought cancelling the Environment Court decision and referring the references back to the Court for determination on their merits.

Background

5 [2] Selwyn District Council introduced plan change 25 (the change) for the purpose of replacing outmoded transitional plan rules relating to subdivision/erection of dwellings in that part of its district known as the "green belt" which is adjacent to the boundary with Christchurch city. Under the proposed new rules subdivision into allotments down to 10 ha was to be a 10 controlled activity and subdivision down to 4 ha a discretionary activity. Erection of dwellings on the resulting allotments was to be a permitted activity.

[3] Mr and Mrs Shaw lodged a submission seeking relief in various forms aimed at reducing the minimum allotment sizes below those proposed in the change. Various submissions under the umbrella of the Halswater group of 15 companies (the Halswater group) sought site-specific changes of zoning coupled with the ability to subdivide down to 5000 sq m. The council rejected the relief sought by Mr and Mrs Shaw and the Halswater group but modified the change by adding a new policy (Policy 2) which recognised the possibility of subdivisional consents for a non-complying activity down to an allotment 20 size of 2 ha in cases where criteria specified in the policy could be met.

[4] References to the Environment Court were lodged by Mr and Mrs Shaw and the Halswater group. In each case the relief sought in the reference broadly reflected the relief sought in the original submission. Notwithstanding its stance that there was no jurisdiction to grant the relief sought by the Halswater group, 25 the council entered into negotiations with that group. Ultimately those parties placed a consent memorandum before the Environment Court without prejudice to the council's stance that there was no jurisdiction to grant the zoning relief sought by the Halswater group. In due course the Environment Court heard argument about the Court's power to grant the relief sought in the various 30 references.

[5] By its decision of 25 March 1999 (the first decision) the Court concluded that it did not have jurisdiction to grant the rezoning relief sought by the Halswater group but that there was nevertheless a "kernel of relief" remaining in the reference which could be considered on its merits, namely, the request for 35 a minimum allotment size of 5000 sq m as a controlled activity and the establishment of a dwelling on any such allotment as a permitted activity. Except for that component the relief sought in the Halswater group's reference was struck out. Although the relief sought in the Shaw reference also seems to have been challenged by the councils, the Court concluded that the relief sought 40 in that reference could be considered on its merits. There was no appeal against the first decision.

[6] A few days later the Environment Court released its decision in *Yates v Selwyn District Council* (Environment Court, Christchurch, C 44/99, 31 March 1999, Environment Judge J R Jackson) which arose from another 45 reference concerning the change. In *Yates* the Court recorded its view that part of Policy 2 might be ultra vires. This prompted the council to notify variation 1 to the change for the purpose of deleting Policy 2. Applefields lodged a submission opposing that variation and seeking either reinstatement of Policy 2 in its entirety or with such modification as may be necessary to avoid any vires

problems. When the deletion of Policy 2 was affirmed by the council, Applefields lodged a reference with the Environment Court. In terms of relief sought the reference went somewhat further than the submission.

[7] The appellants' references were heard together by the Environment Court over a period of six hearing days during August 2000. Full cases on the 5 merits were advanced by the referrers, the regional council and Minister for the Environment. Although Selwyn District Council also opposed the references, it seems that the council's opposition was on a more restricted basis, but for present purposes that is not a matter of moment. It is common ground that the matter was contested on the merits, no issues having been raised by any of the 10 parties as purely jurisdictional issues.

[8] In its decision of 26 October 2000, which is the decision under appeal, the Court concluded that it had no jurisdiction to grant the relief sought in the Applefields reference because the relief sought went beyond the variation and the company's original submission. The Shaw/Halswater group references also 15 failed. In relation to those references the Court concluded that it had no jurisdiction to grant the relief sought because there was nothing in the objectives and policies of the transitional plan that could justify rules of the type proposed by the referrers and no new objectives and policies had been sought in the referrers' submissions. 20

Grounds of appeal

[9] In relation to the Applefields reference it is claimed that the Environment Court erred when it declined jurisdiction on the basis that the relief sought by Applefields did not refer to a matter that was contained in its submission. Applefields maintains that the whole, or alternatively at least part, of the relief 25 sought in its reference was within the scope of its submission.

[10] Several errors of law are advanced in relation to the references lodged by Mr and Mrs Shaw and the Halswater group, namely, that the Court erred when it decided:

- That as a matter of jurisdiction the proposed rules sought to be 30 included by them had to be justified by objectives and policies either in the transitional plan or in the references themselves.
- There was nothing in the specific objectives and policies in the transitional plan as amended by the change which justified the rules sought by the appellants. 35
- That:

  "The scheme of those objectives and policies, especially when read in the light of and given further precision by the zone statements, is clear and unambiguous in our view: the policy is that in the Rural 2 and 3 zones there is a minimum lot size of four (4) hectares." 40

- The Court had no jurisdiction to consider the merits of the relief sought because no new objectives sought or policies were suggested in either referrers' submission.
- That the referrers were seeking a completely new set of objectives and policies, which objectives and policies were not sought in the original 45 submission or reference.
- That it was outside the jurisdiction of the Court to grant the relief sought by the referrers for the reason that the original submission or reference did not contain "*any* relevant suggestions for appropriate objectives and policies . . .". 50

Underlying each of these grounds of appeal is the theme that the Environment Court should have determined the references on their merits rather than rejecting them on jurisdictional grounds.

Applefields' reference

5 **[11]** Since the appeal arising from this reference revolves around the relief sought in the submission and reference, it is helpful to reproduce the request for relief in each of those documents. The submission:

"(a) That the Council reinstates Policy 2 in its entirety.

Alternatively

10 (b) That the Council reinstate Policy 2 in amended form to reflect the concerns of the Court in Yates v Selwyn District Council ie. To redraft the policy so that it is in keeping with the original intention but in such a way so as to avoid any perceived concerns about the vires of the provision. For example, to delete the reference to non-complying 15 activities and redraft the criteria as objectives.

(c) All consequential or other amendments to give effect to this submission."

And the reference:

"(a) That the Council reinstate Policy 2 in its entirety

20 Or in the alternative if the relief sought in paragraph (a) cannot be had:

(b) That the Council reinstate Policy 2 in amended form to reflect the concerns of the Court in Yates v Selwyn District Council, i.e. to redraft the policy so that it is in keeping with the original intention but 25 in such a way as avoids any perceived concerns about the vires of the provision. For example, to delete the reference to non-complying activities and redraft the criteria as objectives.

Or in the alternative if the relief sought in paragraphs (a) or (b) cannot be had:

30 (c) That Policy 2 be redrafted and inserted in Change 25 as follows (or to like effect):

To provide for a pattern of subdivision and density of building development around the boundary of townships in the green belt area in Selwyn District which reflects the character of the location and 35 potential constraints.

Explanation

Policy 2 recognises that some townships in the green belt area contain allotments which are already subdivided to less than 4 hectares in size. Policy 2 contemplates further subdivision in these areas 40 provided that any adverse effects on the environment are minor. The pattern of subdivision and density of development around townships in the green belt area will be subject to a degree of control to reflect the potential adverse effects on the environment, including:

- The effects on soil and water resources;
- 45 The potential for conflict arising from increased residential density under the Airport Flight Path Noise Contours on Christchurch International Airport.

(d) Any consequential amendments to give effect to any of the above reliefs."

Before the Environment Court it was argued on behalf of the councils that the relief sought in para (c) of the reference should not be granted because it went beyond the scope of the original submission. That allegation was rejected by Applefields.

[12] The Environment Court considered that cl 14(1) of the First Schedule to the Resource Management Act 1991 governed the scope of the reference. In terms of that clause the Court accepted that Applefields had made a submission and that its reference related to a provision excluded from the plan (Policy 2) but it found that Applefields had not referred to the matter in its submission with the result that:

> ". . . the relief sought in the reference goes beyond the variation (which sought deletion of policy 2) or the Apple Fields submission seeking reinstatement of policy 2 in plan change 25 (albeit in a legal form). Neither the variation nor the submission seeks an extension of policy 2. Nor can a request for consequential relief extend the scope of the reference. . . ."

Thus the Court concluded that it had no jurisdiction to grant the relief sought by Applefields and declined to consider the reference any further.

[13] Ms Steven complained that the Environment Court had ignored the first two grounds of relief in the submission, both of which had been repeated in the reference. She said that those grounds had not been abandoned and that while the focus might have been on the third ground, legal argument had been advanced about the desirability of having a policy relating to subdivision as a non-complying activity and about the vires of Policy 2. She noted that the Court had not commented on those arguments. Ms Steven also submitted that even if the third ground of relief set out in the reference went beyond the original submission, it was nevertheless authorised by cl 16B of the First Schedule to the Act.

[14] It is common ground that the Environment Court was right when it decided that the scope of the reference was governed by cl 14(1) of the First Schedule to the Act which provides:

> **14. Reference of decision on submissions and requirements to the Environment Court** – (1) Any person who made a submission on a proposed . . . plan may refer to the Environment Court —
>
> (a) Any provision included in the proposed . . . plan, or a provision which the decision on submissions proposes to include in the . . . plan; or
>
> (b) Any matter excluded from the proposed . . . plan, or a provision which the decision on submissions proposes to exclude from the . . . plan, —
>
> if that person referred to that provision or matter in that person's submission on the proposed . . . plan.

By virtue of cls 1(1) and 16A(2) of the First Schedule that provision applies to plan changes and variations. If a reference complies with cl 14(1) the Court is required by cl 15 to hold a hearing into the provision or matter referred to it. In other words, it could not in the ordinary course of events reject the reference on purely jurisdictional grounds.

[15] On the face of its decision the Environment Court rejected the reference on the basis of the relief sought in para (c), presumably on the basis that it was under the impression that the first two grounds had been abandoned. When he prepared his submissions in relation to this appeal Mr Smith was also under that

impression. But faced with Ms Steven's firm stance that the first two grounds of appeal had not been abandoned, both Mr Smith and Ms Perpick were forced to acknowledge that there was no record of any formal abandonment. Nor did they attempt to refute Ms Steven's submission that argument had been
5 advanced on behalf of Applefields about the desirability of Policy 2 and about its vires.

[16] Given that situation I must proceed on the basis that when the Environment Court declined jurisdiction it was under a misapprehension. If the Court had been aware of the true situation and had taken into account paras (a),
10 (b) and (d) of the reference, all of which effectively duplicated the submission, a determination on the merits would have been necessary. It was submitted that since a determination on the merits would have produced the same outcome it would be pointless to now refer the matter back. I cannot be sure about that. Under those circumstances the safest course is to refer the matter back so that
15 the Environment Court can consider the relief sought in paras (a), (b) and (d) of the reference on the merits.

[17] In my opinion the Environment Court was correct when it rejected the relief claimed in para (c) of the reference on the basis that the relief sought went beyond the submission and the variation. Before Policy 2 could apply the four
20 criteria specified in the policy had to be met. That fundamental requirement is absent from the redrafted Policy 2 and accompanying explanation advanced in para (c) of the reference. Thus this paragraph goes beyond the scope of the variation. It also goes beyond the original submission which only sought to reinstate the policy in its entirety or with such modification as might be
25 necessary to avoid any ultra vires problem, there being no suggestion that the ultra vires problem (if there was in fact a problem) stemmed from the four criteria specified in the policy.

[18] In reaching that conclusion I have not overlooked Ms Steven's argument relying on cl 16B of the First Schedule to the Act. That clause provides:

30 > **16B. Merger with proposed policy statement or plan** – (1) Every variation initiated under clause 16A shall be merged in and become part of the proposed policy statement or plan as soon as the variation and the proposed policy statement or plan are both at the same procedural stage; but where the variation includes a provision to be substituted for a
35 > provision in the proposed policy statement or plan against which a submission or an appeal has been lodged, that submission or appeal shall be deemed to be a submission or appeal against the variation.

Relying primarily on the second part of this clause following the semicolon, Ms Steven argued that by the time the Applefields reference was lodged with
40 the Environment Court the variation had caught up with the plan change and the two merged. Thus, she submitted, when considering the scope of the original submission the Environment Court should have taken into account not only Applefields' original submission to the variation but also the submission of the Halswater group to the plan change.

45 [19] I cannot accept that proposition. The second part of cl 16B is designed to protect the position of those who have lodged submissions or appeals *before* a variation substitutes a provision for the provision against which the submission or appeal had been lodged. In that situation the submission or appeal

automatically becomes a submission or appeal against the variation which is, of course, entirely logical. On the other hand, the Applefields submission was lodged *after* the variation had been notified with the result that cl 16B cannot have any application.

Smith/Halswater group references 5

[20] Before the Environment Court it was argued in opposition to these references that they must fail because the rule changes they sought could not be justified by any objective or policy. As far as I can gather, these arguments were not advanced as jurisdictional points but rather as reasons for declining the references on the merits. 10

[21] The Environment Court started from the proposition that the proper approach was to state objectives and policies and to then design methods (including rules) to implement those objectives and policies. It decided that if a reference seeks to introduce rules which are inconsistent with existing objectives and policies it could not succeed unless the submission included 15 appropriate new objectives and policies. On the Court's analysis there was nothing in the transitional plan objectives and policies capable of justifying the rules sought in the references. And it found that no new objectives and policies had been proposed in the submission, an omission which it considered was not capable of remedy by the production of objectives and policies at the hearing. 20 Thus the references were rejected on the basis that the Court did not have jurisdiction.

[22] For the appellants Ms Steven emphasised that the plan under consideration is a thoroughly out-of-date transitional plan which had not been prepared under the Resource Management Act. Under those circumstances, she 25 submitted, it was especially important for the Court to determine the compatibility of the proposed rules with the objectives and policies and the implications of any incompatibility on the merits rather than as a matter of jurisdiction. Ms Steven indicated that she had not been able to locate any other instance where, faced with a reference to a transitional plan, the Environment 30 Court had rejected the reference on purely jurisdictional grounds.

[23] At least within the context of a transitional plan the rigid proposition that the Court should reject a reference *on purely jurisdictional grounds* if the rules proposed in the reference are inconsistent with the objectives and policies in the plan would appear to be suspect. Several factors count against it. First, its 35 rigidity. If the proposition is sound it would logically have to apply on all occasions regardless of the degree of inconsistency. Secondly, if a reference complies with cl 14(1) of the First Schedule, then prima facie cl 15(1) of the First Schedule entitles the referrer to a hearing into the provision or matter referred. In other words, the referrer is entitled to a determination on the merits. 40 Finally, the proposition does not sit comfortably with the realities of a transitional plan which has not been prepared under the Resource Management Act and is nothing more than a transitional mechanism. Transitional plans cannot be expected to reflect the cohesion and precision that might be expected of a plan prepared under the Resource Management Act. There have even been 45 instances where the Environment Court has declined to give any weight to some transitional objectives and policies because they were so out of place in the context of the Resource Management Act: see, for example, *Atkins v Whangarei District Council* (Environment Court, Whangarei, A 6/2000,

25 January 2000, Environment Judge D F G Sheppard) and *McKay v Whangarei District Council* (Environment Court, Whangarei, A 5/2000, 21 January 2000, Environment Judge D F G Sheppard).

[24] Probably the Environment Court did not intend to introduce a rigid proposition along the lines discussed in the previous paragraph. There is some merit in the point made by Mr Smith and Ms Perpick that despite the Court's indication that it was rejecting the references because it did not have jurisdiction and that it had not considered the merits, the decision has many of the trappings of a decision on the merits. This is particularly so in the case of its initial conclusion that nothing in the specific objectives and policies in the transitional plan (as amended by the change) was capable of justifying rules of the type sought by the referrers. That conclusion involved a detailed analysis of the relevant objectives and policies as well as consideration of counsel's submissions. The Court's conclusion that the scheme reflected by the plan was "clear and unambiguous" and that the objectives and policies are so inflexible that they effectively direct the content of methods of implementation (including rules) was probably inevitable.

[25] It seems to be implicit in the next phase of the Court's reasoning that if the rules proposed in the reference could not be justified by objectives and policies the Court would be entitled to reject the reference on purely jurisdictional grounds without considering the merits. For reasons already expressed I doubt that such an approach is justified, at least in situations where the instrument is a transitional plan. In this instance, however, the fact that the Environment Court seems to have dealt with the matter on a purely jurisdictional footing has probably not materially affected the outcome to this point. Obviously the Court has seen the matter in very black and white terms along the lines that given the total absence of relevant objectives and policies in the plan, the proposed rules could not be contemplated unless appropriate objectives and policies could be introduced via the references. While the Court may have taken a short cut in reaching that conclusion, it has nevertheless obviously given that aspect careful consideration and I am not satisfied that its conclusion would have been any different if it had dealt with that aspect on the merits.

[26] To this point no case has been made out for the conclusions reached by the Environment Court to be revisited. On the other hand, it seems to me that there is substance in the appeal to the extent that it relates to the final phase of the Court's reasoning, namely, its conclusion that the appellants' submissions had not suggested any new objectives and policies which were capable of saving the proposed rules. That conclusion must stand or fall on the submissions and references lodged by Mr and Mrs Shaw and the Halswater group.

[27] In their submission Mr and Mrs Shaw sought (by way of various alternatives) reductions in subdivisional lot size coupled with the right to erect a dwelling. They also sought:

> "(f) Any necessary amendments to objectives and policies".

On my reading of the overall request for relief, this request for any necessary amendments to objectives and policies applies to all earlier alternatives, not only to the request for relief under para (d). This follows from the fact that the immediately preceding para (e) expressly refers to *all* the earlier alternatives. While the reference uses different wording and in some respects it might be argued that the relief therein goes beyond the scope of the submission, there can

be no such suggestion in the case of the request for consequential orders amending the objectives and policies which is plainly within the scope of the corresponding request in the submission.

[28] As already discussed, only the request by the Halswater group for site-specific subdivision down to an allotment size of 5000 sq m coupled with the right to erect a dwelling survived the Court's first decision. Supplementary relief was also sought in the submission and reference. In the submission the request was for:

> "(v) Such other consequential and incidental amendments, deletions, or additions to the . . . objectives and policies . . . as may be necessary or expedient to give effect to the purpose and intent of the decisions sought in the above paragraphs."

This request was repeated in the reference. There was some suggestion that the Court's first decision had effectively struck out the request for supplementary relief. I do not believe that was the intention of the Court. The request for supplementary relief was severable and there was no reason for it to have been struck out. Accordingly I proceed on the footing that the requests for supplementary relief in the submission and reference survived the Court's first decision.

[29] It can be seen that neither the submissions or references attempted to actually formulate specific objectives and policies. The introduction of specific objectives and policies during the course of the hearing attracted adverse comment from the Court. Ms Steven argued, however, that the objectives and policies presented at the hearing were reasonably and fairly within the scope of the original submissions and references and should not have been disregarded by the Environment Court.

[30] As Panckhurst J commented in *Royal Forest and Bird Protection Society Inc v Southland District Council* [1997] NZRMA 408 (HC) at p413:

> ". . . it is important that the assessment of whether any amendment was reasonably and fairly raised in the course of submissions, should be approached *in a realistic workable fashion rather than from the perspective of legal nicety.*" (Emphasis added.)

One of the underlying purposes of the submission process is to ensure that the relevant local authority and all other potentially interested parties are sufficiently informed about the relief sought by the submitter. In *Haslam v Selwyn District Council* (1993) 2 NZRMA 628 at p 634 the Planning Tribunal employed the test:

> ". . . whether the amendment . . . is such that any person who did not lodge a submission would have done so if the application information available for examination had incorporated the amendment."

When determining whether the underlying purpose of the submission process has been met the Courts have consistently concentrated on substance rather than form.

[31] The Environment Court reached the conclusion that:

> ". . . no new objectives and policies were suggested in either referrers' submission."

Although it is true that no new objectives and policies were actually formulated in either referrers' submission, there can be little doubt that both submissions signalled that the relief package was intended to include such modification to

the objectives and policies as might be necessary to support the proposed rules. In my opinion the "workable" approach discussed by Panckhurst J required the Environment Court to take into account the *whole* relief package detailed in each submission when considering whether the relief sought had been reasonable and fairly raised in the submissions. Given the nature of the proposed rules I cannot conceive that anyone could have been under any illusion that the submissions were seeking not only a reduction in lot size (and associated relaxation in relation to dwellings) but also any necessary modification to the objectives and policies. In other words, I do not think that anyone could justifiably complain that they would have lodged a submission if they had been aware that the referrers were seeking amendments to the objectives and policies. They were on notice that such amendments were contemplated.

[32] I note that a somewhat similar issue arose in *Telecom New Zealand Ltd v Manawatu-Wanganui Regional Council* (Environment Court, Wellington, W 66/97, 17 July 1997, Her Honour Judge Kenderdine) where a relatively broad-brush approach had been adopted in the submission and reference in relation to objectives and policies. Despite this lack of specificity the Environment Court concluded that no one had been disadvantaged and that it had jurisdiction to hear the appeal on its merits. In contrast to that approach it seems to me that on this occasion the Environment Court adopted an unduly narrow approach when it reached its conclusion that no new objectives had been suggested by either referrer.

[33] At the hearing the referrers were entitled to provide more detail about the proposed objective and policies, but that did not entitle them to go beyond the scope of the packages signalled in their submissions and references. If on reconsideration of this matter on the merits the Environment Court decides that the references have merit it would, of course, be entitled to cut back the amendments proposed in Exhibit 12.1 to ensure that the modified objective and policies were not wider than was absolutely necessary to support the rules.

[34] One final matter. The Environment Court noted that Mr and Mrs Shaw were seeking to have objectives and policies that would fit the rules proposed by them whereas under the Resource Management Act the proper approach is to first state the objectives and policies and then to design methods to implement those objectives and policies (see s 75(1)(b), (c) and (d)). Undoubtedly the Court's observation is technically right. But I did not understand the Court to be suggesting that a reference could be rejected on the basis of that technicality. In my opinion any such suggestion would cut across the non-legalistic approach described by Panckhurst J in *Royal Forest and Bird Protection Society Inc v Southland District Council.*

[35] Summary: I reject the appeal arising from the Shaw and Halswater group references except to the extent that the Court has concluded that those references should not be considered on their merits because no new objectives or policies had been proposed in the submissions. The Environment Court is to reconsider those references on their merits on the basis that new objectives and policies *were* suggested in the submissions and references.

Outcome

[36] The appeal is allowed in part. The Environment Court is to reconsider the relief sought in paras (a), (b) and (d) of the Applefields reference on the merits. The Shaw and Halswater group references are also to be reconsidered on the merits on the basis that a new objective and new policies were suggested

in the submissions and references. Leave is reserved to any party to apply further should any clarification of these orders become necessary. If the parties are unable to reach agreement as to costs they may submit memoranda for consideration.

Appeal allowed in part. 5

Solicitors for the appellants: *Lane Neave Ronaldson* (Christchurch).
Solicitors for the Selwyn District Council: *Buddle Findlay* (Christchurch).
Solicitors for the Canterbury Regional Council: *Wynn Williams & Co* (Christchurch).

Reported by: Pamela Pye, *Solicitor* 10

GENERAL DISTRIBUTORS LTD v WAIPA DISTRICT COUNCIL

High Court, Auckland (CIV-2008-404-4857) 21, 22 October:
Wylie J 19 December 2008

District Plan — Land — Commercial development — Large format retail development in town centre — Planned development included a supermarket — Rezoning of land from residential and rural to general zoning — Respondent approved plan change, provided retail development 1.2 km from the town centre — Appeal to Environment Court — Appeal dismissed — Environment Court purported to amend plan in a way not sought in plan change as notified — Appeal to High Court — Submitted Environment Court lacked jurisdiction to amend plan in such a way, and that it had applied s 74(3) Resource Management Act 1991 in a way which subverted unchallenged plan objectives — Interpretation Act 1999 s 5(1); Resource Management Act 1991, ss 2, 7, 32, 74(1), 74(3), 94(2)(a), 94D, 104(3)(a), 104(8), 274, 293, 299, 301, Part 1, Schedule 1; Resource Management Amendment Act 1997; Resource Management (Forms, Fees, and Procedure) Regulations 2003.

A privately initiated plan change proposed a large format retail development in the town centre of Te Awamutu. The proposed development, which included a supermarket tenanted by a subsidiary of Foodstuffs (Auckland) Ltd, would rezone an area of 6.08 ha from residential and rural to general zoning. The respondent, the Waipa District Council ("the council"), approved a plan change but provided for the retail development 1.2 km from the town centre. The appellant, General Distributors Ltd ("GDL"), was a subsidiary of Foodstuffs rival Progressive Enterprises Ltd ("Progressive"). Progressive owned or supplied three existing supermarkets in Te Awamutu.

GDL appealed to the Environment Court to overturn the plan change. The Court dismissed the appeal, and instead purported to amend the plan in a way not sought in the plan change as notified, nor as expressly sought by any submitter. Further the Environment Court held that any effects on the town centre would be minor, and that the change would not have consequential flow-on effects on the town centre, other than those of normal trade competition.

GDL subsequently appealed to the High Court on grounds that the

Environment Court lacked jurisdiction to change the plan in such a manner, and that it had applied s 74(3) Resource Management Act 1991 ("RMA") in a way which subverted unchallenged plan objectives.

Held, (1) the Environment Court lacked the jurisdiction to approve an amendment to an explanation contained in one objective of the consent documentation. In finding that the explanation was sufficiently connected to the plan change and submissions to warrant approval, the Court had erred. Nor was the reworded explanation an iterative extension of matters discussed at the council hearing. What was discussed at the council hearing was irrelevant when considering whether or not the Court had jurisdiction to approve an amendment to a plan change. Rather, it is the terms of the proposed change and the content of the submissions filed which delimit the Environment Court's jurisdiction. (para 64)

(2) Section 74(3) RMA does not preclude a territorial authority preparing or changing its district plan, from considering those wider and significant social and economic effects which are beyond the effects ordinarily associated with trade competition. Indeed, it is obliged to do so under s 74(1) RMA. (para 93)

(3) Local authorities promulgating plans, or changing plans, must not have regard to trade competition, or to the effects which are normally associated with trade competition. The promotion of town centre consolidation, and the dispersal of commercial activity, however, are legitimate resource management issues because they can raise significant social and economic concerns. Provision can properly be made for them in district plans. In the present case the Environment Court was required to disregard trade competition and any effect on the town centre ordinarily associated with, or expected from, normal trade competition. That is what is required by the prohibition contained in s 74(3) RMA, as interpreted by the Supreme Court in *Discount Brands*. Here, the Environment Court had not erred in its approach to trade competition issues. (paras 94, 96, 100)

Discount Brands Ltd v Westfield (NZ) Ltd [2005] NZSC 17; [2005] 2 NZLR 597; (2005) 11 ELRNZ 346; [2005] NZRMA 337 referred to

(4) There was nothing in the Environment Court's analysis which had tainted its comments on the application of s 293 RMA. It was clear from the wording used by the Environment Court that it was simply indicating that, but for its finding on the issue of jurisdiction, it would have invoked s 293. (para 104)

Comment, councils, and the Environment Court on appeal, should be cautious in making amendments to plan changes which have not been sought by any submitter, simply because it seems that there is a broad consistency between the proposed amendment and other provisions in the plan change

documentation. In such situations it is being assumed that the proposed amendment is insignificant, and that it does not affect the overall tenor of the plan change. The High Court doubted that that conclusion should be too readily reached. Lawyers and planners will often seek to bolster their arguments by reference to particular provisions contained in a plan, and that it is difficult in advance to predict how significant or otherwise certain passages or words in a plan may prove to be. To reason that an amendment can be made because it is consistent with the broad tenor of a plan change, begs the question — why is it being belatedly sought by one side and why is it being resisted by the other? (para 63)

Appeal dismissed.

Cases referred to

AFFCO NZ Ltd v Far North DC (No 2) (1994) 1B ELRNZ 101; [1994] NZRMA 224

Campbell v Christchurch CC [2002] NZRMA 332

Countdown Properties (Northlands) Ltd v Dunedin CC (1994) 1B ELRNZ 150; [1994] NZRMA 145

Discount Brands Ltd v Westfield (NZ) Ltd [2005] NZSC 17; [2005] 2 NZLR 597; (2005) 11 ELRNZ 346; [2005] NZRMA 337

Northcote Mainstreet Inc v North Shore CC (2004) 10 ELRNZ 146

Royal Forest & Bird Protection Soc Inc v Southland DC [1997] NZRMA 408

Shaw v Selwyn DC [2001] 2 NZLR 277; [2001] NZRMA 399

Smith v Takapuna CC (1988) 13 NZTPA 156

Vivid Holdings Ltd, Re an application by (1999) 5 ELRNZ 264; [1999] NZRMA 467

Appeal

This was an unsuccessful appeal against an Environment Court decision which dismissed an appeal against the Waipa District Council's decision to approve a change to its District Plan.

C N Whata and *J D Gardner* for appellant
P M Lang for respondent
D R Clay and *V N Morrison* for first s 301 party
L F Muldowney for second s 301 party

WYLIE J (reserved): [1] This is an appeal from a decision of the Environment Court in relation to a proposed plan change — Plan Change 53 — to the Operative Waipa District Plan ("the District Plan"). It raises essentially two issues:

(a) whether the Environment Court had jurisdiction to amend the District Plan in a way which was not sought in the plan change as notified,

and which was not expressly sought by any submitter or further submitter; and

(b) whether the way in which the Environment Court approached the prohibition contained in s 74(3) of the Resource Management Act 1991 ("the Act") subverts unchallenged objectives and policies contained in the District Plan.

Relevant factual background

[2] Plan Change 53 is a privately initiated plan change. It was initiated by Bilimag Holdings Ltd ("Bilimag"). It seeks to rezone an area of 6.08 ha situated at 670 Cambridge Rd, Te Awamutu from residential and rural zoning to general zoning. It also seeks a number of changes to existing objectives, policies and rules contained in the District Plan.

[3] The overall purpose of the plan change is to provide for a large format retail development (including a supermarket) on the subject site, which is situated approximately 1.2 km from the Te Awamutu town centre.

[4] Bilimag requested the Waipa District Council ("the council") to undertake the change to its District Plan pursuant to cl 21(1) in the First Schedule to the Act. It lodged a draft plan change together with an evaluation made under s 32 of the Act.

[5] The council did not adopt the plan change under cl 25(2)(a). Rather it accepted the request and proceeded to notify it under cl 25(2)(b) of the Act.

[6] Bilimag did not lodge a submission. It was of course nevertheless entitled to appear at the hearing before the council — cl 29(3) of the First Schedule to the Act.

[7] Various submissions were lodged, including a submission by The National Trading Company of New Zealand Ltd ("NTC"). NTC is a wholly-owned subsidiary of Foodstuffs (Auckland) Ltd ("Foodstuffs"). Foodstuffs trades under various banners including Pak'n Save, New World and Four Square. It is the proposed tenant of the supermarket space which would be enabled by the plan change. NTC, in its submission supported the change, claiming that it is consistent with the purpose and principles of the Act, that it will benefit the economic and social wellbeing of the Te Awamutu community and that any adverse effects are mitigated through conditions and the proposed rules. No changes to the wording of the plan change were sought.

[8] A submission was also lodged by the appellant — General Distributors Ltd ("GDL"). GDL is a subsidiary of Progressive Enterprises Ltd ("Progressive"). Progressive also trades under various banners including Countdown, Woolworths and Fresh Choice. It owns and operates one of the two existing supermarkets in Te Awamutu, which trades under the Woolworths banner. The other supermarket trades under the Fresh Choice

banner. It is independently operated but is supplied by Progressive. GDL's submissions asserted that the plan change will not promote sustainable management, that it will not promote the centre based planning framework contained in the District Plan and it will undermine the District Plan's integrity and coherence.

[9] Thus the scene was set for yet another supermarket tussle without which planning and resource management law in this country would be so much the poorer.

[10] Round one was before the council through its Regulatory Committee ("the committee"). It held a hearing and issued its decision on 19 December 2006. The committee recorded in its decision that it heard a substantial amount of technical and expert evidence, particularly in relation to economic effects on the Te Awamutu town centre. Substantial submissions were presented by both NTC and GDL. In the event the committee was satisfied that the proposed plan change would promote the sustainable management of natural and physical resources, and that it was in accordance with the purpose of the Act. It concluded that its effects would be minor, and in particular that the recognition and protection of the town centre afforded by the plan would not be compromised by adoption of the plan change. The council through the committee resolved that the plan change should be approved, with some relatively minor modifications.

[11] Round two was before the Environment Court. Bilimag, NTC and GDL all appealed. There were two s 274 parties — Thornbury Properties Ltd and Transit New Zealand. Bilimag sought minor changes to some aspects of the plan change approved by the council. NTC also sought changes to the plan change. GDL, supported by Thornbury Properties Ltd, sought that the council's decision be overturned and that the proposed plan change be declined.

[12] In the event the appeals by Bilimag and NTC were settled by consent with the council, and on the first day of the hearing consent documentation was filed. An amended version of the plan change incorporating the amendments made by the council in its decision and further agreed changes was also filed. GDL did not consent and it submitted that the Environment Court had no jurisdiction to approve some of the changes the other parties had agreed.

[13] GDL's appeal proceeded to a hearing. It was heard over a period of some 20 days, spread over five separate periods, commencing in November 2007 and concluding in February 2008. The Environment Court issued its decision on 8 June 2008. Subject to one minor change, it approved the plan change in the form agreed by Bilimag, NTC and the council. It considered that any effects on the Te Awamutu town centre will be no more than minor. It dismissed GDL's appeal.

[14] GDL has appealed to this Court and round three has been heard by

me. GDL's appeal raises five points of law — four of which are interrelated. NTC and Bilimag appear having given notice under s 301 of the Act.

[15] I will outline the relevant details of the District Plan and the proposed plan change before turning to the points raised on appeal.

The District Plan

[16] The District Plan became operative on 1 December 1997. It uses zoning to identify areas within the district suitable for various groups of activities, and then sets performance standards and assessment criteria to control and manage the environmental effects of activities occurring within the zones.

[17] There are two substantial towns in the district — Cambridge and Te Awamutu. As the Environment Court noted at para 8 of the decision under appeal, for commercial activities within these towns there are only two zones — namely the town centres zone and the general zone.

[18] In Te Awamutu, the town centres zone comprises seven blocks of land in the centre of the town. It is largely surrounded by the general zone, although there are isolated pockets of general zoning which are not immediately contiguous to the town centre zone. There are then industrial, residential and rural zones beyond the general zone.

[19] The zone statement for the town centres zone records that the zone contains concentrations of the most visitor and employee intensive activities such as retailing, personal services and offices. The broad strategy is to concentrate visitor-intensive activities — particularly retailing — in the defined central area, and to discourage the spread of visitor-intensive activities in the surrounding general and residential zones. Performance standards for the zone recognise the need to maintain a high standard of amenity for the large numbers of people working in and visiting the town centre.

[20] Relevant objectives and policies contained in the operative plan include the following:

(a) *Objective C01*
To sustainably manage the resources embodied in the central areas of the main towns in the district so that they efficiently meet community needs.

(b) *Objective C03*
To ensure minimal adverse effects of commercial activities on other activities, on people, and on the wider environment.

(c) *Objective C04*

To manage the development and redevelopment of the town centres in a way which enhances environmental quality and meets community outcomes.

(d) *Policy C03*
To require the containment of visitor-intensive activities (particularly retailing) in defined "core" areas (the Town Centres Zone) of Te Awamutu and Cambridge.

(e) *Policy C04*
To allow a wide range of activities which benefit from central locations in the area around the retail "core" ("General Zone") in Te Awamutu and Cambridge and Kihikihi town centre.

(f) *Policy C06*
To encourage energy efficiency by allowing intensive development in town centre areas, and requiring concentration of visitor-intensive activities, particularly retailing.

The plan change

[21] As noted, the plan change seeks to rezone residential and rural zoned land in Cambridge Rd to general zone.

[22] The executive summary in the public notice of the plan change stated as follows:

> The proposed changes to the objectives/policies for commercial activities relate to:
> - Recognising that there maybe circumstances where commercial activities could establish outside of town centres or surrounding general zone areas.
> - Providing for commercial activities outside of town centres where it (sic) can be demonstrated that any adverse effects on the environment of these activities will be no more than minor.
> - Altering the prescriptive wording of some policies to provide a more flexible approach to commercial activities outside of town centres.
> - Consequential amendments to policy explanations and the zone statements for the town centre and general zones.

[23] There are various references in the plan change document itself, and in the s 32 report accompanying it, to the effect that adopting the plan change will have a no more than minor effect on the environment in the Te Awamutu town centre.

[24] As notified, the plan change did not seek to amend objectives C01, C03 or C04. It did however seek to alter the explanation to objective C04. The proposed alterations were as follows:

> The broad strategy for sustainable management of the town centres in the district is to consolidate visitor-intensive activities (particularly retailing) in defined 'core' areas (Town Centres Zone) ~~surrounded~~*supported* by mixed activity areas occurring for the wide range of activities ~~which benefit from a central location~~ (General Zone)

in any urban community.

It is recognised that there may be circumstances (such as lack of availability of suitably sized land parcels) where it is not possible for proposed large scale commercial developments to be located in areas surrounding the defined 'core areas'. Council may consider the extension of the General Zone to locations that do not surround the Town Centres Zone.

[25] The plan change as notified proposed a new objective C05 and accompanying explanation to read as follows:

To provide for commercial activities outside the Town Centre zone where there are social and economic benefits for the community and where it can be demonstrated that any adverse effects on the environment of the town centre concerned will be no more than minor.

Explanation

While visitor-intensive activity is generally to be concentrated in the Town Centre zone there may be circumstances where other areas may be able to be developed for commercial/mixed use activities without impacting on the role or function of the town centre concerned. Council may consider the establishment of visitor-intensive activities in areas removed from the Town Centre Zone (or surrounding General Zone) where it is demonstrated that such activities will have no more than minor adverse effects on the town centre concerned.

[26] There were amendments to policy C03 and a new policy C04A was proposed. The new policy and explanation was to read as follows:

To provide for commercial/mixed use activities in areas of the District which do not form or surround existing town centres, to an extent that it can be demonstrated that such activities will not undermine the role and function of the town centres, as contained within the Town Centre Zone and the General Zone areas surrounding the town centres of Cambridge and Te Awamutu.

Explanation

While commercial activities are generally to be concentrated in the Town Centre Zone or the surrounding General Zone (policy C03, C012) there may be circumstances where other areas may be able to be developed for commercial/mixed use activities without impacting on the role or function of the town centre concerned. Council may consider the establishment of visitor-intensive activities in areas removed from the Town Centre Zone (or surrounding General Zone) where it is demonstrated that such activities will have no more than minor adverse effects on a town centre concerned.

[27] There were other amendments and alterations proposed, including to the general zone statement, the town centres zone statement, and the rules.

The appeal

[28] The appeal is brought pursuant to s 299 of the Act. The right of appeal conferred by that section is limited to points of law.

[29] It is a trite observation that this Court should be slow to interfere with decisions of the Environment Court within its specialist area. To succeed GDL must identify a question of law arising out of the Environment Court's decision and then demonstrate that that question of law has been erroneously decided by the Environment Court — *Smith v Takapuna CC* (1988) 13 NZTPA 156.

[30] The applicable principles were summarised in *Countdown Properties (Northlands) Ltd v Dunedin CC* (1994) 1B ELRNZ 150; [1994] NZRMA 145 at pp 157-158, p 153. In that case the full Court — Barker, Williamson and Fraser JJ — noted as follows:

> this Court will interfere with decisions of the Tribunal only if it considers that the Tribunal—
>
> (a) Applied a wrong legal test; or
>
> (b) Came to a conclusion without evidence or one to which on the evidence, it could not reasonably have come; or
>
> (c) Took into account matters which it should not have taken into account; or
>
> (d) Failed to take into account matters which it should have taken into account.
>
> See *Manukau City v Trustees Mangere Lawn Cemetery* (1991) 15 NZTPA 58, 60.
>
> Moreover, the Tribunal should be given some latitude in reaching findings of fact within its areas of expertise. See *Environmental Defence Society Inc v Mangonui County Council* (1988) 12 NZTPA 349, 353.
>
> Any error of law must materially affect the result of the Tribunal's decision before this Court should grant relief. *Royal Forest & Bird Protection Society Inc v W A Habgood Ltd* (1987) 12 NZTPA 76, 81-82.

[31] These observations have been cited and followed in numerous cases and I adopt them for the purposes of this appeal.

[32] I will address the jurisdictional issue first — namely whether or not the Environment Court had jurisdiction to amend the District Plan in a way which was not sought in the plan change as notified and which was not expressly sought by any submitter or cross-submitter — and then deal with the Environment Court's approach to the trade competition prohibition under s 74(3), and whether that approach subverted unchallenged objectives and policies in the District Plan.

Jurisdiction of the Environment Court to amend District Plan

Explanation to objective C04 — the council's and the Environment Court's decisions

[33] GDL focused on the explanation to objective C04.

[34] The council decision on the explanation adopted the wording proposed in the plan change as notified — see para 24 above — with one exception. In the second line of the second paragraph it deleted the word "possible" and replaced it with the word "feasible".

[35] The provenance of that change is unclear. It was not sought in any submission, but counsel were agreed that nothing turns on it.

[36] The notices of appeal filed in the Environment Court by NTC and Bilimag sought that the explanation to objective C04 should be further amended, by adding after the words "where it is not feasible" the words "or is inappropriate".

[37] The consent order submitted by Bilimag, NTC and the council went beyond the notices of appeal. It sought to delete the explanation to objective C04 in its totality, and to replace it with the following:

> The District Plan anticipates that visitor-intensive activities will generally be located in the Town Centres zone. It is also recognised that there may be circumstances when large scale visitor-intensive activities may be appropriately located in the General zone including poor site availability in the Town Centre zone or avoidance of adverse effects on Town Centre amenity. It is therefore appropriate to provide for visitor-intensive activities as permitted activities in the Town Centre zone and to complement that with provision for consideration of large scale visitor-intensive activities in the General zone.

[38] It was this version of the explanation to objective C04 which was ultimately approved by the Environment Court.

[39] The Environment Court considered whether it had jurisdiction to make the amendment. It referred to the decision of the full Court in *Countdown Properties*. It also referred to the decisions in *Re an Application by Vivid Holdings Ltd* (1999) 5 ELRNZ 264; [1999] NZRMA 467, *Royal Forest & Bird Protection Soc Inc v Southland DC* [1997] NZRMA 408, and *Campbell v Christchurch CC* [2002] NZRMA 332, at para 20. The Environment Court stated at para 33 as follows:

> The issue therefore is whether the changes where jurisdiction is challenged seek to materially depart from the basic premise of the notified version of the Plan Change and its supporting documentation. Or to put it another way, whether the change sought falls '*fairly and reasonably*' or by '*reasonable implication*' within the general scope of a submission and/or the proposed plan as notified.

It then found at para 45 as follows:

> We find that the words '*or [is] inappropriate*' are within the Court's jurisdiction. We consider the reworded phrase contained in the consent documentation is sufficiently connected, all-be-it tenuously. The reworded phrase is an iterative extension of the matters discussed at the Council hearing and no one would be disadvantaged by the proposed amendment.

GDL's appeal — jurisdiction to amend

[40] The first question of law posed by GDL in the notice of appeal as question 3[a] is expressed as follows:

> Is the Environment Court empowered to grant relief to an Applicant for a plan change to amend the District Plan in circumstances where the relief sought:
> (a) was not included in the Notified Plan Change or associated reportage;
> (b) was not included in submissions on the Notified Plan Change (including the submission by the Applicant);
> (c) was not included in the Decisions version of the Plan Change; and
> (d) materially affects the interpretation and application of unchallenged objectives and policies of the District Plan.

[41] The question widely expressed, but it was common ground that it is confined to the explanation for objective C04 which the Environment Court ultimately approved. The question is also not well worded — because it assumes propositions which are open to debate — in particular that the amendment materially affects the interpretation and application of the District Plan.

[42] An additional question — question 3[g] — read as follows:

> Was the Environment Court required to determine that sufficient retailing opportunity existed in order to maintain objectives to focus attention entirely on areas surrounding the Town Centre?

[43] Although the connection between the two questions is not obvious — at least to me — no separate argument was mounted by GDL in regard to question 3[g]. Rather this question was subsumed within the argument presented on question 3[a].

Submissions for GDL

[44] GDL says that the specific explanation to objective C04 approved by the Environment Court was not included in the plan change as notified.

[45] Mr Gardner-Hopkins referred me to the various statutory provisions. He pointed out that the request for the plan change was made pursuant to cl 21 in the First Schedule to the Act. The council accepted it, and proceeded to notify it under cl 26. Pursuant to cl 29(1), Part 1 of the First Schedule applied. Any person was able to make a submission to the council on the proposed plan change — see cl 6. Any submission was to be in the prescribed form; Form 5 in the Resource Management (Forms, Fees, and Procedure) Regulations 2003. *Inter alia* that form states that a submission should detail whether the submitter supports or opposes the specific provisions, or "wish[es] to have them amended". Notification was given by the council of the submissions — cl 7 — and there was then the opportunity for further submissions — cl 8. A hearing was held by the

council — cl 8(b). It was required to give its decision, including its reasons for accepting or rejecting the submissions — cl 10(1). There was then the appeal to the Environment Court — cl 14(1). That clause provides that a person who made a submission may appeal. Relevantly, cl 14(2) provides as follows:

> However a person may appeal under subclause 1 only if the person referred to the provision or the matter in the person's submission on the proposed policy statement or plan.

[46] The submission made on behalf of GDL was that the explanation to objective C04 approved by the Environment Court had not been referred to in any submission.

[47] Mr Whata submitted that the amendment reflected a major shift in emphasis. He submitted that it:

(a) removes the policy thrust to consolidate retailing in core areas, unless it is not possible to locate that activity in those areas;
(b) recognises largely unfettered circumstances when large scale visitor activity may be appropriately located outside of the core areas;
(c) endorses provision for consideration of large scale visitor-intensive activity outside core areas.

[48] He submitted that the amendment had not been foreshadowed by the submission process or subsequently until the appeal stage, and then only in the consent order. He emphasised that the plan change had been overtly promoted:

(a) as having no impact on the broad strategy of consolidation of visitor-intensive activity (particularly retailing) within the town centres zone;
(b) as continuing to protect the town centre from the adverse effects; and
(c) as a no risk plan change.

As he put it, if the explanation is changed, the public "could quite rightly claim to have been played false", because members of the public would have had no opportunity to have input into it, and could not have anticipated it.

[49] He accepted that the amendment is a change to an explanation, but submitted that it is still significant, and that explanatory notes can be relevant to the interpretation of objectives and policies.

[50] He referred to the case law to the effect that amendments to a plan cannot go beyond the scope of what is fairly and reasonably raised in submissions on a plan change, and submitted that, in the absence of a submission seeking a change to the broad strategy of the District Plan, there was no jurisdiction for the Environment Court to rewrite the explanation to objective C04 and that the Court had erred in doing so.

Submissions for the council, Bilimag and NTC

[51] Mr Lang for the council submitted first that the amendment made by the Environment Court to the explanation to objective C04 did not amount to a change to the broad strategy contained in the District Plan. He argued that the amendment was consistent with the plan change proposal when read as a whole, and that it was a change that could reasonably have been anticipated to result from consideration of the plan change proposal by the council and by the Court. He referred specifically to the suite of proposed changes to the objectives and policies, including the addition of objective C05, and the addition of the further policy C04A. He submitted that these changes clearly signalled an intention to expand the range of opportunities for location of general zones to complement the town centres zone. He submitted that the proposed changes have a common purpose and theme, namely to provide greater flexibility in the strategy for managing visitor-intensive activity and development, and that, in that context, the changes to the explanation to objective C04 are consistent with the intent and theme of the proposed plan change, and could have been anticipated as a potential outcome of the plan change process.

[52] He also submitted that NTC had referred to the issue of location of large format retailing in its submission. He referred in particular to para 3.5 which reads as follows:

> Vehicle-orientated large format retailing is a legitimate form of retailing and land use is best suited locations beyond the town centre.

As Mr Lang put it, the submission involved NTC in that issue and gave fair indication to any reader that NTC might pursue the issue of the location of large format retailing in the plan change process, in a way that assisted large format retailing locating outside the town centre.

[53] Much the same arguments were made by Mr Muldowney on behalf of Bilimag, and Mr Clay on behalf of NTC.

Analysis

[54] The promulgation of district plans and any changes to them is a participatory process. Ultimately plans express community consensus about land use planning and development in any given area. To this end the Act requires that public notice be given by a local authority before it promulgates or makes any changes to its plan. There is the submission/further submission process to be worked through. A degree of specificity is required in a submission — cl 6 in the First Schedule and Form 5 in the Regulations. Those who submit are entitled to attend the hearing when their submission is considered and they are entitled to a decision which should include the reasons for accepting or rejecting their submission. There is a right of appeal to the Environment Court but only if

the prospective appellant referred to the provision or the matter in the submission — cl 14(2) of the First Schedule.

[55] One of the underlying purposes of the notification/submission/ further submission process is to ensure that all are sufficiently informed about what is proposed. Otherwise the plan could end up in a form which could not reasonably have been anticipated resulting in potential unfairness.

[56] There is of course a practical difficulty. As was noted in *Countdown Properties* at p 170, p 165, councils customarily face multiple submissions, often conflicting, and often prepared by persons without professional help. Both councils, and the Environment Court on appeal, need scope to deal with the realities of the situation. To take a legalistic view and hold that a council, or the Environment Court on appeal, can only accept or reject the relief sought in any given submission would be unreal.

[57] The Act recognises this. Clause 14(2) requires only that the provision or matter has been referred to in the submission.

[58] In relation to amendments proposed to plan changes, the Court in *Countdown Properties* formulated the following test at pp 171-172, p 166:

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

[59] In *Royal Forest & Bird Protection Soc Inc*, Pankhurst J at p 413 adopted the *Countdown Properties* test and went on to comment as follows:

> it is important that the assessment of whether any amendment was reasonably and fairly raised in the course of submissions, should be approached in a realistic workable fashion rather than from the perspective of legal nicety.

[60] This approach requires that the whole relief package detailed in submissions be considered when determining whether or not the relief sought is reasonably and fairly raised in the submissions — see *Shaw v Selwyn DC* [2001] 2 NZLR 277; [2001] NZRMA 399, at para 44.

[61] Here the change to the explanation to objective C04 was not specifically sought in any submission or further submission. NTC's submission supported the plan change, and highlighted the features of large format retailing which potentially make it inappropriate within the Town Centres zones. It did not however seek to change the explanation to objective C04. The submission as a whole did not contain anything which approximates the wording or the approach contained in the proposed explanation. Rather the submission endorsed the plan change as notified, recorded that it incorporated "appropriate provisions", and sought that it be

approved without amendment. In my view it cannot be said that the change to the explanation to objective C04 falls fairly and reasonably within the scope of NTC's submission.

[62] Nor in my view is the change to the explanation signalled in the proposed plan change as notified. I accept Mr Lang's argument that the change to the explanation is consistent with the overall tenor of the plan change, and in particular with new objective C05 and new policy C04A. That broad consistency however did not to my mind signal to the public that the explanation to objective C04 might be altered in the way ultimately approved by the Environment Court. Members of the public reading the public notice of the plan change, and the summary of submissions on it, were entitled to assume that no amendment was proposed or sought to the explanation to objective C04 beyond that signalled in the plan change as notified.

[63] In my view councils, and the Environment Court on appeal, should be cautious in making amendments to plan changes which have not been sought by any submitter, simply because it seems that there is a broad consistency between the proposed amendment and other provisions in the plan change documentation. In such situations it is being assumed that the proposed amendment is insignificant, and that it does not affect the overall tenor of the plan change. I doubt that that conclusion should be too readily reached. Lawyers and planners will often seek to bolster their arguments by reference to particular provisions contained in a plan, and that it is difficult in advance to predict how significant or otherwise certain passages or words in a plan may prove to be. To reason that an amendment can be made because it is consistent with the broad tenor of a plan change, begs the question — why is it being belatedly sought by one side and why is it being resisted by the other?

[64] It is ultimately a question of degree, and perhaps even of impression, but in my view the Environment Court erred when it found that the explanation contained in the consent documentation was sufficiently connected to the plan change and the submissions to warrant its approval. There is nothing in either the change or the submissions to establish that connection. Moreover, I cannot see that the reworded explanation is an "iterative extension" of matters discussed at the council hearing as suggested by the Environment Court. Even if it were, I do not consider that this permitted the amendments approved by the Environment Court. Notwithstanding an obiter passage in *Countdown Properties* at pp 172-173, p 167 which might suggest to the contrary, in my view what was discussed at the council hearing is irrelevant when considering whether or not there is jurisdiction to approve an amendment to a plan change. Rather it is the terms of the proposed change and the content of submissions filed which delimit the Environment Court's jurisdiction. What occurred at the council or the Environment Court hearing and whether or not anyone would be

disadvantaged by the amendment are matters more appropriately addressed by the Environment Court when it is considering whether or not s 293 of the Act should be invoked.

[65] In my view the Environment Court did not have jurisdiction as a matter of law to approve the amendment to the explanation to objective C04.

[66] The council, Bilimag and NTC, argued that even if the Environment Court did not have jurisdiction to amend the explanation, that any error it made in this regard was immaterial, because the Court clearly signalled that it was prepared to invoke its powers under s 293 to direct the council to make the amendment. Mr Whata submitted that the Environment Court's indication at para 53 that it would not have hesitated to invoke s 293 was bound up with its approach to what he called the "trade competition filter". This leads directly to the other second key issue raised by the appeal. I deal with this and then return to the s 293 point below at paras 102-106.

Section 74(3) — trade competition — unchallenged objectives/policies

Section 74(3) — Environment Court's decision

[67] Having determined that it had jurisdiction to approve the amendment to the explanation to objective C04, the Environment Court then went on to consider whether or not it should approve the plan change. It considered the relevant statutory framework, and noted the submissions made by GDL. It then summarised what it saw as the single crucial issue before it as follows:

> Whether the plan change is the most appropriate way to enable large format retailing having regard to the objectives and policies that seek to accord primacy to the town centre.

[68] It discussed the relevance of retailing effects and referred specifically to s 74(3). It noted that it was common ground that flow-on effects, or more precisely the consequential social and economic effects, caused by a change in trading patterns was a matter it must have regard to. It discussed what amount to consequential social and economic effects by reference to the judgment of Randerson J in *Northcote Mainstreet Inc v North Shore CC* (2004) 10 ELRNZ 146. In considering the appropriate balance to be adopted when considering these flow-on effects, it referred to the Supreme Court decision in the same case, which is reported as *Discount Brands Ltd v Westfield (NZ) Ltd* [2005] 2 NZLR 597; (2005) 11 ELRNZ 346. In that case the Court found that effects must be "significant" before they can properly be regarded as being beyond the effects ordinarily associated with trade competition: at para 120.

[69] The Environment Court took the term "significant" to mean consequential upon or beyond effects ordinarily associated with trade competition on trade competitors.

[70] It then considered the evidence before it and concluded inter alia that the proposed new retailing centre which would be enabled by the plan change would not have consequential flow-on effects on the town centre either in the medium or long term other than what could be expected by normal trade competition — see para 142(iv). It concluded that the plan change was the most appropriate way to enable large format retailing having regard to the unchallenged objectives and policies in the plan that seek to accord primacy to the town centre.

GDL's appeal — s 74(3)

[71] GDL's notice of appeal posed the following questions:

- Was the Environment Court required by law (including s 74(3) of the Act) to disregard any effect on the Town Centre ordinarily associated with trade competition or expected by normal trade competition, irrespective of the unchallenged objectives and policies of the District Plan to protect the town centre?
- What is the meaning of trade competition under s 74(3) of the Act?

And/or

- Was the Environment Court required by law to have regard to all effects on the Town Centre, including those effects ordinarily associated with trade competition, where assessment of those effects is relevant to the attainment of the unchallenged objectives and policies of the District Plan referred to in paragraph 2(b)(i)-(iii) above?

And in particular:

- Was the Environment Court required to assess the Plan Change against *any* adverse impact it might have on the Town Centre, and the unchallenged objectives and policies identified in the District Plan to protect the Town Centre.

[72] In addition, the notice of appeal queried whether the Environment Court adopted an incorrect threshold of effects, and a wrong definition of the words "no more than minor" contained in the plan, and alleged that its decision was irrational — questions 3[f] and [h].

[73] Mr Muldowney submitted that the errors are linked, and that they are capable of being distilled down to one core proposition — namely the alleged subversion of the unchallenged objectives and policies of the District Plan via collateral operation of the trade competition ban. Mr Whata expressly accepted that this analysis was correct. I therefore deal with all of these alleged errors together.

Submissions for GDL

[74] GDL submitted that the most important matter for the Environment

Court to determine was whether the proposed new centre would have a more than minor effect on the town centre. It noted the Environment Court's conclusions that the distributional effects of the proposed new centre would have no effect on the town centre "other than what could be expected by normal trade competition" — para 141 — and that the new centre would not have consequential flow-on effects on the town centre in either the medium or long term "other than what could ordinarily be expected by normal trade competition" — para 142(iv). Mr Whata referred to the passage from the decision of Blanchard J set out below at para 89, and then went on to submit that context is everything. He argued that in the present case, there were unchallenged objectives and policies in the District Plan which seek to accord primacy to the town centre, and which embrace a broad strategy of consolidation of visitor-intensive activities in the town centre. He submitted the Environment Court should have assessed the effects of the plan change against *any* adverse impact it might have on the town centre, and against these unchallenged objectives and policies. He relied on a passage in the judgment of Elias CJ in *Discount Brands* at para 17. He submitted that in the circumstances, it was erroneous and contrary to the explicit objectives of the District Plan to disregard effects that materially reduce the visitor-intensive activity in the core areas, and affect the primacy of the town centre as the focal point for visitor-intensive activities.

[75] Further, he submitted that there is nothing in s 74(3) that requires the Court to disregard effects that are relevant to the attainment of legitimate resource management purposes as manifested in unchallenged objectives and policies. He submitted that the words "trade competition" used in s 74(3) mean the operation of the market, comprising producers, retailers, and consumers of goods, and that the prohibition on having regard to trade competition does not prevent consideration of adverse effects on the environmental quality of town centres, if the District Plan identifies that value as being important to the community. It was his submission that the section does not require effects "ordinarily associated with" or "expected by normal" trade competition to be disregarded; rather it requires that "trade competition" be disregarded. It was asserted that trade competition ought not to be given a meaning that is inconsistent with the attainment of sustainable management, and that in the present context, due regard should have been given to the direct impacts on visitor-intensive activity in the town centre, irrespective of the fact that those impacts are ordinarily associated with trade competition. He submitted that the Environment Court had failed to assess those direct impacts, because it relied on what he called the "trade competition filter" derived from the passage in the judgment of Blanchard J.

Submissions for the council, Bilimag and NTC

[76] Counsel for the council, Bilimag and NTC variously argued that GDL's appeal attempted to subvert clear and express prohibition in s 74(3) against having regard to trade competition.

[77] It was submitted that the starting point is the wording in the section itself, and that the Court, applying s 5(1) of the Interpretation Act 1999, should take a purposive approach to the interpretation and application of the subsection. It was said that GDL's appeal attempts to subvert the prohibition by blurring the accepted definition of trade competition, and suggesting that if the proposed objectives and plan call for an assessment of any effects, then the s 74(3) prohibition should give way to the proposed objective. It was submitted that the subsection is intended to exclude trade competition (including its effects) from consideration. It was said that the counterpart section, s 104(3)(a), has been consistently interpreted in this manner, and that to exclude the effects of trade competition from consideration would be inconsistent with the scheme of the Act. It was argued that the Courts have recognised that limiting trade competition to effects solely on trade competitors is unworkable, given the interrelationship between trade competitors and their market. It was argued that trade competition effects include both direct effects on trade competitors, and the broader social and economic effects on those they serve, and that the line is drawn at the point where those broader social and economic effects become significant. Effects which do not reach the "significant" threshold have been described by the Court as effects ordinarily associated with trade competition and trade competitors, or effects normally associated with trade competition on trade competitors. It was submitted that there was no inconsistency between the judgments of Elias CJ and Blanchard J, and that both were consistent with the proposition that trade competition effects must be disregarded, and whether in the context of a notification decision (as in *Discount Brands*) or in relation to a decision whether or not to adopt a plan change. It was submitted that the Environment Court had correctly applied Blanchard J's significance test, that it had undertaken a detailed analysis of the evidence, and properly concluded that no such effects arose.

Analysis

[78] Section 74(3) provides as follows:

> (3) In preparing or changing any district plan, a territorial authority must not have regard to trade competition. It was introduced to the Act in 1997 by the Resource Management (Amendment) Act 1997.

[79] There is a similar provision in s 104(3)(a) which provides that a consent authority must not have regard to trade competition when considering an application for a resource consent.

[80] The original prohibition was contained in what was s 104(8). It was limited to resource consent applications and it was in rather narrower terms. It read as follows:

> When considering an application for a resource consent a consent authority shall not take into account the effects of trade competition on trade competitors.

[81] This provision was amended. It is now s 104(3)(a) and it is no longer necessary that the effects of trade competition be on trade competitors before they become an irrelevant consideration. The amendment widened the scope of the subsection to trade competition per se regardless of who is affected. This was acknowledged by the then Planning Tribunal in *AFFCO NZ Ltd v Far North DC (No 2)* (1994) 1B ELRNZ 101; [1994] NZRMA 224, at pp 118-119, p 237.

[82] Parliament has not seen fit to define the words “trade competition”, and in my view wisely so. The words are ordinary English words, and they should carry their ordinary and common sense meaning. They refer succinctly to the rivalrous behaviour which can occur between those involved in commerce.

[83] Mr Whata sought to argue that s 74(3) requires simply that “trade competition” be disregarded — and not its effects. I agree with Mr Muldowney that this is sophistry. The Act is effects based, and s 74(3) is in my view intended to ensure that trade competition, and its effects, are not to be had regard to in preparing or changing a district plan.

[84] The base proposition has long been that planning law should not be used as means of licensing or regulating competition — see *Northcote Mainstreet Inc* at para 52 and the cases there cited. These comments were referred to by Blanchard J with apparent approval — see *Discount Brands* at para 89.

[85] Read literally, the prohibition in s 74(3) could cut across other provisions contained in the Act, and in particular the purpose and principles of the Act set out in Part 2.

[86] The purpose of the Act is of course to promote the sustainable management of natural and physical resources, and the words “sustainable management” *inter alia* refer to the use and development of resources in a way which enables people and communities to provide for their social and economic wellbeing. Further s 7 requires all persons exercising all functions and powers under it to have particular regard to the efficient use and development of natural and physical resources, and to the maintenance and enhancement of amenity values. These broad provisions are backed up by the wide definitions given to the words “environment”, and “amenity values” in s 2 of the Act.

[87] The Courts have striven to give effect to the statutory prohibition, and to the wider purposes and principles of the Act, by making it clear that it is only trade competition and those effects ordinarily associated with trade competition, which are required to be ignored under s 104(3)(a), and which cannot be had regard to when preparing or changing a district plan under s 74(3). Effects may however go beyond trade competition and become an effect on people and communities, on their social, economic and cultural wellbeing, on amenity values and on the environment. In such situations the effects can properly be regarded as being more than the effects ordinarily associated with trade competition.

[88] This proposition was discussed by the Supreme Court in *Discount Brands* and in particular by Elias CJ and Blanchard J. At para 89, Blanchard J noted as follows:

> In his judgment in the High Court Randerson J observed that there was a statutory policy that the Act was not to be used as a means of licensing or regulating competition. Section 104(8) precluded a consent authority from having regard to the effects of trade competition on trade competitors when considering an application for a resource consent. But broader economic and social impacts might flow if a proposal were to result in the decline of an existing shopping centre to the extent that it would no longer be viable as a centre, with consequent adverse effects on the community as a whole or at least a substantial section of it:
>
> > 'Such effects might include the loss of investment in roading and other infrastructure as well as the loss of amenity which could result from the closure or serious decline in the attractiveness or viability of the centre as a whole. Loss of employment opportunities on a significant scale might also qualify as adverse effects for these purposes. So too the possibility that important community services associated with shopping centres might cease to be appropriately located to serve persons attracted to the shopping centre.'

His Honour went on to confirm Randerson J's description of the threshold at which social and economic effects which may flow on from trade competition can become relevant, namely when they go beyond those effects normally associated with trade competition, and become significant. Blanchard J stated at paras 119-120 as follows:

> [119] An important matter which the council's Regulatory and Hearings Committee needed to inform itself upon was the effect which the activity proposed by Discount Brands might have on the amenity values of the existing centres — on the natural or physical qualities and characteristics of those areas that contributed to people's appreciation of their pleasantness, aesthetic coherence, and cultural and recreational attributes. The committee was required to disregard the effects of trade competition from the Discount Brands centre, since competition effects would have to be disregarded upon the substantive hearing of the resource consent application. But, as Randerson J said, significant economic and social effects did have to be taken into account. Such effects on amenity values would be those which had a greater impact on people and their communities than would be caused simply by

trade competition. To take a hypothetical example, suppose as a result of trade competition some retailers in an existing centre closed their shops and those premises were then devoted to retailing of a different character. That might lead to a different mix of customers coming to the centre. Those who had been attracted by the shops which closed might choose not to continue to go to the centre. Patronage of the centre might drop, including patronage of facilities such as a library, which in turn might close. People who used to shop locally and use those facilities might find it necessary to travel to other centres, thereby increasing the pressure on the roading system. The character of the centre overall might change for the worse. At an extreme, if the centre became unattractive it might in whole or part cease to be viable.

[120] The Court of Appeal considered that only 'major' effects needed to be considered, since only then would the effect on the environment be more than minor, in terms of s 94(2)(a). But in equating major effects with those which were 'ruinous' the Court went too far. A better balance would seem to be achieved in the statement of the Environment Court, which Randerson J adopted, that social or economic effects must be 'significant' before they can properly be regarded as beyond the effects ordinarily associated with trade competition on trade competitors. It is of course necessary for a consent authority first to consider how trading patterns may be affected by a proposed activity in order that it can make an informed prediction about whether amenity values may consequentially be affected.

[89] GDL sought to rely on a passage at para 17 in the judgment of Elias CJ in *Discount Brands*. It was suggested that there was an inconsistency between the judgments of Elias CJ and Blanchard J. The passage relied on reads as follows:

In context, therefore, the application in the present case had to be assessed against any adverse impact it might have on the amenity values of existing shopping centres, and the policies identified in the district plan to confine business activities generally to centres within North Shore City identified by the district plan. It required the 'thorough evaluation' provided for by policy 4, designed in particular to consider the impact upon the amenity values of the existing centres. And in policy 5 it looked to the 'advocacy' of community-based groupings in the identification and promotion of 'the essential qualities of individual centres'.

[90] Particular emphasis was placed on the use of the words "any adverse impact". GDL submitted that the Environment Court in the present case should have assessed the effects of the plan change against *any* adverse impact it might have on the town centre.

[91] In my view, the passage in the judgment of Elias CJ in *Discount Brands* at para 17 is not concerned with identifying the appropriate test for distinguishing between effects that are to be considered under the Act, and effects which may not be considered due to either s 74(3) or s 104(3)(a). The paragraph was concerned with the analysis that was appropriate in *Discount Brands*, given the District Plan provisions there in issue. That is

clear from the discussion of the District Plan rules which precedes the paragraph, and by the use of the words "in context" at the beginning of the paragraph. It is apparent from other parts of her judgment that Elias CJ shared the view expressed by Blanchard J that while the effect of trade competition was irrelevant, other "wide ranging matters were required to be taken into account" — see, eg para 8. I do not consider that there is an inconsistency as asserted by GDL.

[92] The views expressed by Blanchard J were agreed with and adopted by the other Judges in the Court — see Keith J at para 57, Tipping J at paras 142 and 150, and Richardson J at paras 178 and 179. They formed part of the ratio of the case, and they are binding on the Environment Court and this Court.

[93] It follows that s 74(3) does not preclude a territorial authority preparing or changing its district plan, from considering those wider and significant social and economic effects which are beyond the effects ordinarily associated with trade competition. Indeed it is obliged to do so in terms of s 74(1).

[94] Mr Whata sought to elevate GDL's arguments by submitting that strict application of the *Discount Brands* test would mean that district plans could not provide for town centre consolidation, or prevent dispersal of commercial activity, unless there was a serious decline. I do not consider that this argument has any merit. Local authorities promulgating plans, or changing plans, must not have regard to trade competition, or to the effects which are normally associated with trade competition. The promotion of town centre consolidation, and the dispersal of commercial activity however are legitimate resource management issues, because they can raise significant social and economic concerns. Provision can properly be made for them in district plans.

[95] There is no set definition of those effects which are normally associated with trade competition, or those which are significant. The examples cited by Randerson J in *Northcote Mainstreet Inc* at para 54, and by Blanchard J in *Discount Brands* at para 119, provide a useful benchmark against which to evaluate alleged significant social and economic effects on a case by case basis.

[96] In my view the Environment Court in the present case was required to disregard trade competition and any effect on the town centre ordinarily associated with or expected from normal trade competition. That is what is required by the prohibition contained in s 74(3), as interpreted by the Supreme Court in *Discount Brands*.

[97] There are various objectives and policies contained in the District Plan which seek to protect the existing town centre, and which recognise its importance to the people and community it serves. Those objectives and policies are not inconsistent with the prohibition contained s 74(3) for the

reasons I have explained above.

[98] GDL did rely on new objective C05, which seeks to provide for commercial activities outside the town centre zone where there are social and economic benefits, and where it can be demonstrated that any adverse effects on the environment of the town centre concerned *will be no more than minor*. GDL claimed that this objective sets the threshold, and that there is nothing in s 74(3) of the Act that requires the Court to disregard effects that are relevant to the attainment of a legitimate resource management purpose.

[99] To my mind, GDL's argument is flawed. The statutory prohibition is the primary driver, and the wording contained in proposed objective C05 cannot undermine the statutory prohibition. The reference to adverse effects in objective C05 can only be a reference to relevant effects — ie those that are beyond the effects of trade competition. There is nothing in the Act which allows a district plan to modify the effect of s 74(3) in the way in which GDL contends. If Parliament had intended that district plans should be determinative, it could have introduced s 74(3) with the words, "subject to the rules in any district plan". This approach has been taken in other provisions of the Act — see for example s 94D, which permits notification requirements to be modified by district plan rules.

[100] In my view the Environment Court did not err in its approach to trade competition issues. It did not proceed on an erroneous definition of threshold effects, and its decision cannot be said to be irrational. Rather it made a full assessment on the evidence before it, and it correctly applied s 74(3).

Materiality

[101] I have found the Environment Court erred when it concluded that it had jurisdiction to approve the amendment to the explanation to objective C04.

[102] That however is not the end of that matter. The Environment Court went on to observe as follows:

> [52] With regard to the possibility of applying section 293 of the Act is concerned, we agree that section 293 should be used cautiously and sparingly:
> (a) It deprives potential parties or interested persons of their right to be heard by the local authority;
> (b) The Court has to discourage careless submissions and references;
> (c) The Court has to be careful not to step into the arena — the risk of appearing partisan is the great disadvantage of inquisitorial methods.
>
> [53] However, if we are wrong with respect to our findings on the issue of jurisdiction we would have no hesitation in invoking section 293 of the Act. All of the matters contested reasonably arise out of the wording of the Plan Change

as modified in the decisions version and are part of the natural progression of the planning process. There is unlikely to be any non-party affected and no one would be disadvantaged.

[103] The council, Bilimag and NTC argued that the Environment Court had in fact exercised its discretion under s 293.

[104] I do not consider that that is the case. It is clear from the wording used by the Environment Court that it was simply indicating that, but for its finding on the issue of jurisdiction, it would have invoked s 293.

[105] Contrary to the submissions advanced for GDL, in my view the Environment Court has approached the issue of trade competition, and the prohibition contained in s 74(3) correctly, and there is nothing in its analysis which tainted its comments on the application of s 293. The Environment Court's preparedness to invoke s 293 provides an answer to the jurisdictional issue. The point becomes immaterial and I therefore decline to remit the matter to the Environment Court.

Conclusion

[106] Accordingly, the appeal is dismissed. The council, Bilimag and NTC are entitled to costs. I direct that any application for costs is to be filed within 10 working days of the date of this judgment. Any response by GDL is to be filed within a further 10 working days. Any final submissions in reply by the council, Bilimag and NTC are to be filed within a further 5 working day period. I will then deal with costs on the papers filed, unless I require the assistance of counsel.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2016-404-2336
[2016] NZHC 138

BETWEEN	ALBANY NORTH LANDOWNERS Plaintiff
AND	AUCKLAND COUNCIL Defendant

[Continued over page]

Hearing: 28 November - 2 December 2016

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T Mullins for Auckland Memorial Park Ltd
S Ryan for Franco Belgiorno-Nettis
R Brabant and R Enright for Character Coalition Inc & Anor
M Savage for Howick Ratepayers and Residents Assoc Inc & Anor
R Enright for The Straits Protection Society Inc and South Epsom Planning Group Inc & Anor
A A Arthur-Young and S H Pilkington for Strand Holdings Ltd
R E Bartlett QC for Summerset Group Holdings Ltd
A A Arthur-Young and D J Minhinnick for Valerie Close Residents Group
H Atkins for Village New Zealand Ltd
R Brabant for Wallace Group Ltd
M Casey QC and M Williams for Man O'War Farm Ltd
R J Somerville QC, K Anderson and M J L Dickey for Auckland Council
C Kirman and A Devine for Housing Corporation New Zealand and Minister for the Enironment
S F Quinn and A F Buchanan for Ting Holdings Ltd
S J Simons and R M Steller for Property Council of New Zealand
R M Devine for Ngati Whatua Orakei Whai Rawa Ltd

Judgment: 13 February 2017

JUDGMENT OF WHATA J

This judgment was delivered by me on 13 February 2017 at 11.30 am,
pursuant to Rule 11.5 of the High Court Rules.
Registrar/Deputy Registrar
Date: …………………………

CIV-2016-404-2298

BETWEEN	AUCKLAND MEMORIAL PARK LIMITED Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2323

BETWEEN	AUCKLAND UNIVERSITY OF TECHNOLOGY Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2333

BETWEEN	FRANCO BELGIORNO-NETTIS Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2335

BETWEEN	FRANCO BELGIORNO-NETTIS Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2351

BETWEEN	BUNNINGS LIMITED Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2326

BETWEEN	CHARACTER COALITION INC LTD & ANOR Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2327

BETWEEN	CHARACTER COALITION INC LTD & ANOR Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2322

BETWEEN	STEPHEN HOLLANDER Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2321

BETWEEN	HOWICK RATEPAYERS AND RESIDENTS ASSOCIATION INCORPORATED & ANOR Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2320

BETWEEN	JPR ENTERPRISES & ORS Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2324

BETWEEN	NORTH EASTERN INVESTMENTS LIMITED & ANOR Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2325

BETWEEN	NORTH EASTERN INVESTMENTS LIMITED & ANOR Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2349

BETWEEN	THE STRAITS PROTECTION SOCIETY INCORPORATED Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2350

BETWEEN	STRAND HOLDINGS LIMITED Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2344

BETWEEN	SUMMERSET GROUP HOLDINGS LIMITED Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2305

BETWEEN	VALERIE CLOSE RESIDENTS GROUP Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2341

BETWEEN	VILLAGE NEW ZEALAND LIMITED Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2316

BETWEEN	WALLACE GROUP LIMITED Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2331

BETWEEN	MAN O'WAR FARM LIMITED Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2302

BETWEEN	SOUTH EPSOM PLANNING GROUP INCORPORATED & ANOR Plaintiff
AND	AUCKLAND COUNCIL Defendant

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APPENDIX A

APPENDIX B

APPENDIX C

Introduction

[1] The Auckland Unitary Plan (AUP) is a combined 30 year plan, incorporating for the first time a regional policy statement, a regional plan and a district plan for Auckland in one document. It represents the culmination of a mammoth undertaking by the Auckland Council (the Council) and an Independent Hearings Panel (IHP) over the span of several years. The scale of this task reflects the significance of the AUP to the people and communities of Auckland and beyond.

[2] This Court's relatively discrete involvement has been triggered by 51 appeals and judicial review applications. A central issue for 20 of those proceedings is whether the recommendations made by the IHP on the proposed Auckland Unitary Plan (the PAUP) were within scope of the submissions. If they were not in scope, then affected persons have the right to appeal on the merits of the decisions of the Council based on those recommendations to the Environment Court.

A guide

[3] This judgment answers the following preliminary questions agreed by the parties:

(a) Did the IHP interpret its statutory duties contained in Part 4 of the Local Government (Auckland Transitional Provisions) Act 2010 (the Act) lawfully, when deciding whether its recommendations to the Council were within the scope of submissions made in respect of the first Auckland Combined Plan?

(b) Did the IHP have a duty to:

(i) Identify specific submissions seeking relief on an area by area basis with specific reference to suburbs, neighbourhoods or streets?

(ii) Identify when it was exercising its powers to make consequential alterations arising from submissions?

(c) Was it lawful for the IHP to:

(i) Determine the scope of submissions by reference to another submission?

(ii) Determine the proper scope of a submission by reference to the recommended Regional Policy Statement?

(d) To what extent are principles (regarding the question of scope) established under the Resource Management Act 1991 (the RMA) case law relevant, when addressing scope under the Act?

(e) Did the IHP correctly apply the legal framework in the specified test cases?

(f) Are the appellants'/applicants' allegations against the Council concerning the IHP's determination on issues of scope appealable pursuant to the Act and/or reviewable?

(g) What relief can the High Court grant the appellants/applicants if the IHP and/or the Council acted unlawfully in respect of the IHP's determination on an issue of scope under the Act?

(*The Preliminary Questions*)

[4] In order to properly understand the decisions made by the IHP and the Council, it is necessary to consider the full context within which they were made. Consequently, the judgment is divided into three key parts. It commences by describing the various parties to the proceeding and the characteristics of each of their particular claims – [5]-[9]. Part B provides the background to the current proceeding, tracing through both the legislative and factual context to the development of the AUP– [10]-[91]. With that background in mind, in Part C I address the Preliminary Questions in the order they are given above – [92]-[302].

PART A: THE PARTIES

[5] The appellant/applicant parties actively involved in the preliminary question proceeding on scope are:

(a) **Albany North Landowners Group (ANLG).** ANLG brings an appeal regarding the decision made by the Council to adopt recommendations of the IHP to zone the ANLG site as Future Urban Zone, which prohibits the subdivision and development of its site. ANLG contend no submission provided scope for the FUZ zoning.

(b) **Character Coalition Inc and Auckland 2040 Inc**. The Character Coalition represents over 55 community organisations in the Auckland area that have a collective interest in protecting the character and heritage of Auckland. Auckland 2040 is coalition of local groups that have expressed concern with the implications of the PAUP. These two societies have brought appeal and judicial review challenges to the decision of the Council to accept the zoning recommendation of the IHP in relation to 29,000 residential properties, which the IHP said was within the scope of submissions requesting changes to residential zoning in the notified PAUP. They argue that the rezoning of the 29,000 properties was out of scope.

(c) **Howick Ratepayers and Residents Association Inc (HRRA).** The HRRA made a submission on the PAUP addressing the zoning of land at Howick. The Council accepted a recommendation of the IHP which resulted in modified zonings of certain land at Howick being included in the PAUP. The HRRA has appealed to the High Court to challenge the rezoning of 65 properties which it argues were not sought by any submitter or identified by the IHP as being out of scope.

(d) **Strand Holdings Ltd (SHL).** SHL owns property that was affected by the Council's acceptance of the IHP's recommendation to relocate the origin point of the Dilworth View Protection Plane (the Viewshaft), which protects the street view of the Dilworth Terrace houses in Parnell.

The relocated Viewshaft places height restrictions on SHL's property. SHL brings judicial review proceedings alleging that the IHP made an error of law in not identifying this recommendation as beyond the scope of submissions.

(e) **Wallace Group Ltd (WGL).** WGL appeals against the decision of the Council to rezone the property owned at 55 Takanini School Road, Takanini (the site) to a Residential Mixed Housing Suburban Zone. WGL owns a property that directly adjoins the northern portion of the site and the rezoning directly impacts its ability to develop and use its land. The notified version of the PAUP retained the status quo zoning, which was split zoning, with the northern portion zoned Light Industry. WGL argues that there were no submissions seeking a change of the status quo zoning.

(f) **Man O'War Farm Ltd (Man O'War).** Man O'War owns rural property on Waiheke Island that is bounded on three sides by 24 km of coastline. It appeals against the IHP's recommended definition of coastal hazard, namely "land which may be subject to erosion over at least a 100 year timeframe", which was adopted by the Council. The issue in its appeal was whether the definition was within the scope of submissions to the PAUP and/or is void for uncertainty.

[6] The Council was the respondent in all proceedings. Its role in relation to the AUP, which will be discussed at [294], was to accept or reject the IHP's recommendations on the PAUP and to determine the final form of the PAUP.

[7] There were a number of parties that supported the Council:

(a) **The Minister for the Environment (the Minister) and Housing New Zealand Corporation (HNZC).** The Minister (on behalf of Cabinet) and HNZC, along with the Ministry for Business, Innovation and Employment (MBIE), were submitters on the PAUP and presented at the hearings. In this proceeding, the Minister and HNZC supported the Council in respect of the challenges brought by Auckland 2040 and the

Character Coalition to the Council's acceptance of specific residential zoning recommendations. These parties contend that their submissions provided scope to upzone the 29,000 properties said to be out of scope.

(b) **Ting Holdings Ltd**, trading as Ockham Residential (Ockham). Ockham appeared in opposition to Character Coalition and Auckland 2040's appeal and judicial review application. Ockham undertakes large scale brownfield apartment developments and was a submitter on the PAUP. Its submission was one of the submissions relied on by the IHP to provide jurisdiction and scope for the residential rezoning recommendations made.

(c) **Property Council of New Zealand (Property Council).** The Property Council is a not-for-profit organisation that represents commercial, industrial and retail property owners, managers, investors and advisors. It made submissions and further submissions on the notified versions of the PAUP, and presented evidence before the IHP. Throughout the hearings process, the Property Council advocated for residential upzoning and intensification. It argues that the residential zoning recommendations on the properties affected by the Character Coalition and Auckland 2040 proceedings were within the scope of the relief sought in its submissions to the IHP.

(d) **Ngati Whatua Orakei Whai Rawa Ltd (Whai Rawa).** Whai Rawa supported the Council in respect of the Strand Holdings test case. It argued that its submission to the IHP on the Viewshaft brought the IHP's recommendation within scope.

(e) **Summerset Group Holdings Ltd and Equinox Capital Ltd (Equinox).** Equinox have a property interest in the property subject to the WGL appeal. They made submissions on the role of the IHP and the legal principles that should be applied in relation to issues of scope under the Act.

[8] The IHP did not take an active role in the proceedings.

Acknowledgement

[9] I wish to acknowledge the considerable assistance afforded to me by counsel for all parties represented at the hearing of this matter. Given the depth and breadth of those submissions and conversely the requirement for a succinct judgment, I have not been able to cite all argument as fully as might be expected. The relevant themes drawn from submissions should, however, be evident to counsel.

PART B: BACKGROUND AND FRAME[1]

Establishment of Auckland Council, adoption of Auckland Plan

[10] One of the first priorities for the Council after it was established as a territorial authority on 1 November 2010 was to prepare and adopt a spatial plan for Auckland to provide a comprehensive and effective long-term strategy for Auckland's growth and development. This became known as the Auckland Plan, which was adopted on 29 March 2012.

[11] Following the adoption of the Auckland Plan, the Council's next significant planning priority was the development of the AUP consistent with the vision and foundations set out in the Auckland Plan. The AUP was to meet the requirements of the following planning instruments:[2]

> (a) *A regional policy statement* (RPS): an RPS achieves the purposes of the RMA by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region;[3]

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1 A common bundle was produced by the Council without objection and the information supplied therein has formed the basis of this background narrative, along with the relevant legislation.

2 Local Government (Auckland Transitional Provisions) Act 2010, s 122(2).

3 Resource Management Act 1991, s 59.

(b) *A regional plan*: the purpose of a regional plan is to assist the Council to carry out its region-wide functions, including:[4]

(i) the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the natural and physical resources of the region;[5] and

(ii) Preparation of objectives and policies in relation to any actual or potential effects of the use, development or protection of land which are of regional significance.[6]

A regional plan must also give effect to national and regional policy statements.[7]

(c) *A district plan*: a district plan is to assist a territorial authority to carry out its district level function, including the establishment of objectives, policies and methods to achieve integrated management of the effects of the use, development or protection of land and associated natural and physical resources of the district.[8] The district plan must be consistent with any regional plan.

[12] It was envisaged that, once approved, each of these elements of the AUP would be deemed to be plans or policy statements separately approved by the Council.[9] Out of a concern that the AUP be prepared in a timely fashion, the Council raised with the Government the possibility of legislative changes to provide unique processes for the development of a combined plan for Auckland.

New legislation for development of the AUP

[13] The Government introduced legislation in December 2012, in the form of the Resource Management Reform Bill, which would speed up the processes for developing

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4 Section 63(1).
5 Section 30(1)(a).
6 Section 30(1)(b).
7 Section 67(3).
8 Section 31(1).
9 Local Government (Auckland Transitional Provisions) Act 2010, s 122(3).

the AUP. The then Minister for the Environment, Hon Amy Adams, stated in the first reading:[10]

> I am concerned that under existing law Auckland Council estimates that its first Unitary Plan could take up to 10 years to become operative. No one benefits from long, drawn-out, and expensive processes, during which time Auckland's development stagnates in a cloud of uncertainty. Auckland's economy is too important to New Zealand for us to wait up to a decade for the plan to be implemented. Auckland represents some of our most pressing housing affordability issues, and the council needs to be able to make changes to address this issue without long delays.

[14] The expectation was that under the new process the AUP would become operative within three years from notification, instead of the six to 10 years likely under the First Schedule Process of the RMA.[11] On 4 September 2013, Part 4 was inserted into the Act, which allowed for such a process to proceed by adopting a one-off hearing process. The hearing process is discussed in greater detail below at [34] – [51].

Notification of the draft PAUP

[15] At the same time as legislation to create a streamlined process was being considered by Parliament, the Local Board, local iwi and key stakeholders were notified of the AUP and were provided an opportunity to consult with the Auckland Council about it and offer feedback. This occurred between September and November 2012. On 15 March 2013 the draft PAUP was notified and public consultation followed until May 2013.

Section 32 Report

[16] The Council was required to prepare an evaluation report in accordance with the requirements in s 32 of the RMA (the s 32 Report).[12] Such reports involve examination of the extent to which the objectives being evaluated are the most appropriate way to achieve the purpose of the RMA.

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10 (11 December 2012) 686 NZPD 7331.
11 (27 August 2013) 693 NZPD 12851-12852.
12 Local Government (Auckland Transitional Provisions) Act 2010, s 115(d).

[17] The s 32 process ran parallel to development of the AUP from the initiation of the project in November 2010.[13] It involved extensive consultation with the public spanning two years, including with key stakeholders such an HNZC, local boards, Character Coalition and Ockham. The report also refers to engagement with around 16,500 Aucklanders on the draft plan, with feedback analysed by subject matter experts, including the impact on zoning.[14] The Report was notified on 30 September 2013. The new Act also required that the s 32 Report be provided to the Ministry for the Environment for auditing as soon as practicable.[15] That audit occurred in November 2013.

[18] Significantly for present purposes, the s 32 Report addressed urban form and land supply in detail. The central resource management issue to be addressed is identified as the provision of an additional 400,000 new dwellings over the next 30 years to support an additional one million people living and working in Auckland, referring to the need to accommodate these new dwellings in existing urban areas, as well as ensuring that there is a sufficient supply of greenfield land.[16] It notes that the PAUP outlines the expected distribution of dwelling land supply to be 70 per cent in the existing Auckland urban core; that is, 280,000 additional new houses by 2041.[17]

[19] The urban core was to be marked out by the Rural Urban Boundary (the RUB), which was intended to be "a defensible, permanent rural-urban interface and not subject to incremental change".[18] The RUB was contrasted with the status quo Metropolitan Urban Limit (the MUL), which is the tool used to control the speed of peripheral expansion into greenfield areas around Auckland.[19] The MUL is located at the edge of existing urbanised areas while the RUB was proposed to be located some further distance away.

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13 Auckland Council *Section 32 Report – Part 1 for the Proposed Auckland Unitary Plan* (30 September 2013) at 15.
14 At 45-46.
15 Section 126.
16 Auckland Council *2.1 Urban form and land supply – section 32 evaluation for the Proposed Auckland Unitary Plan* (30 September 2013) at 4.
17 At 5.
18 At 4.
19 Auckland Unitary Plan Independent Hearings Panel *Report to Auckland Council – Overview of recommendations on the proposed Auckland Unitary Plan* (22 July 2016) at 65.

[20] The s 32 Report considered a number of alternatives as to how to accommodate residential and business growth in Auckland:[20]

(a) The status quo policy of retaining the current RPS policies and approach, using a statutory urban boundary – the MUL, able to be amended by way of plan change;

(b) The preferred alternative – a quality compact Auckland approach using a defensible long term statutory urban boundary – the RUB, with targets up to 70% of dwellings inside metropolitan urban area (as at 2010) and orderly, timely and planned development with the RUB consistent with Auckland's development strategy; and

(c) A laissez-faire approach – an expansive alternative with no growth management tool, relying on plan changes to accommodate growth in whatever form it may present itself.

[21] In relation to each of these three alternatives, the s 32 Report considered their appropriateness, effectiveness and efficiency. It also took into account economic, social and cultural costs, risks and benefits, as well as the environmental benefits and risks of each alternative.

[22] The preferred approach is said to be an approach:[21]

> … combining targets for both intensification and greenfield areas of Auckland, a planned, staged and orderly land delivery and development capacity process, supported by a long-term, a defensible rural urban boundary (the Rural Urban Boundary), is considered to offer a more robust urban growth management process than other options. This approach is considered to be more pro-active, enabling and integrated when compared with retaining the current RPS provisions or taking a less regulated approach. The RUB provisions and targets, the land supply objectives and policies will provide greater certainty to Auckland's communities, infrastructure providers and the development sector about the timing and location of growth, while still ensuring all environmental safeguards are in place.

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20 Auckland Council, above n 1, at 25-33
21 At 34.

[23] The s 32 Report addresses the implications of the initially proposed five residential zones, namely Large Lot, Rural and Coastal settlements, Single Home, Mixed Housing and Terrace and Apartments zones. The report records that the Mixed Housing zone was split into two zones – Mixed Housing Urban (MHU) and Mixed Housing Suburban (MHS) in August 2013.[22] The final description given to these zones in the s 32 Report is noted below at [26].

[24] Capacity modelling based on the March 2013 draft of the PAUP identifies that the capacity for additional residential dwellings is 38,576 on parcels that are vacant and have a residential base zone; 78,584 on parcels that have infill potential and have a residential base zone and 231,004 if all parcels that have a residential base zone are redeveloped to their maximum capacity at the modelled consent category.[23] The s 32 Report observes that no technical reports underpin this information.[24] The Report then states:[25]

> Once the Unitary Plan is notified (post all changes made by Councillors) a final model will be developed, along with the required technical reports and documentation. A large proportion of the Draft Model will be able to be reused, but some aspects will need to be redeveloped to reflect the notified rules and spatial data. It is intended that this information and the model can be used to inform the formal public engagement and hearings process with respect to growth issues generally and location specific questions as appropriate.

[25] It is also noted that the capacity information is not fully accurate because the new MHS and MHU zones will likely decrease and increase respectively the number of additional dwellings that were originally zoned Mixed Housing in the March 2013 drafts, and also that minor changes continue to be made to maps and the rules.[26]

[26] The controls and permitted land use activities for the six proposed residential zones in the notified PAUP are described, namely:

(a) *Large Lot*: Large Lot zones were applied in locations on the periphery of Auckland's urban areas, forming a transition between rural land and

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22 Auckland Council *2.3 Residential zones – section 32 evaluation for the Proposed Auckland Unitary Plan* (30 September 2013) at 5.

23 At 7. See also Harrison Grierson and New Zealand Institute of Economic Research *Section 32 RMA Report of the Auckland Unitary Plan Audit* (November 2013) at 48.

24 Auckland Council, above n 22, at 8.

25 At 8.

26 At 9.

urban land. Development on these sites was identified as being limited to one dwelling per 4000 m^{2}.[27]

(b) *Rural and Coastal Settlements*: The Rural and Coastal Settlement Zone was applied in settlements mostly forming a transition between rural or coastal land and rural production land. Development on these sites was also identified as being limited to one dwelling per 4000 m^2.[28]

(c) *Single House Zone* (SHZ): The SHZ was applied in settlements on the periphery of urban Auckland, in most historic character and conservation overlay areas and in selected parts of Auckland that do not have good access to public transport. It limited development to one dwelling per 500 m^2.[29]

(d) *Mixed Housing Urban* (MHU): This was identified as a key residential zone where change was anticipated. The zone is one of transition where some sites would stay in a similar form of one dwelling per 300 m^2 and other sites would be redeveloped for terraced housing or town houses.[30]

(e) *Mixed Housing Suburban* (MHS): Identified as one of the broadest residential plans in the AUP. The zone would be one of transition with some sites staying in a similar form of one dwelling per 400 m^2 and others being redeveloped for more intensive residential development such as terraced housing or town houses.[31]

The Report states:[32]

> The Mixed Housing Urban and Mixed Housing Suburban Zones make up approximately 49% of residential land. Both zones allow for four dwellings as a permitted activity provided the dwellings meet the density and development controls of the zone.

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27 At 28.
28 At 30.
29 At 32.
30 At 40.
31 At 34-35.
32 At 3.

(f) *Terrace Housing and Apartment Zone* (THZ): The THZ zone was identified as a key residential zone where change is anticipated and encouraged. The zone would be typically applied between the centres and the Mixed Housing Urban zone, and will be one of transition with some sites remaining in the form of one dwelling until sites can be amalgamated or re-developed by either current or future owners. One dwelling per site would be a permitted activity, two to four a discretionary activity, and no density limits would apply where five or more dwellings are proposed and the site meets certain site size and road frontage controls.[33]

[27] After conducting a cost benefit analysis of the proposed zones against the alternatives of (i) the status quo and (ii) removing all rules, the s 32 Report concludes that the package of six residential zones provided for "sufficient variation and housing choice" and that the inclusion of two mixed housing zones "will make a positive impact on housing affordability in the Auckland market".[34]

Notification of the PAUP

[28] The PAUP was then required to be notified and submissions invited.[35] This occurred on 30 September 2013. Under ss 123(4)–(5) of the Act it was not necessary for copies of the public notice of the PAUP to be sent to affected landowners, except for the owners and occupiers of land to which a designation or heritage order applied.[36]

[29] At this point, any person was able to make a submission on the PAUP, and further submissions could be made by any person representing a relevant aspect of public interest, any person with an interest greater than the one the public has, or the local authority.[37] Many of the parties to this proceeding made submissions on the PAUP and some made further submissions. Overall, more than 9400 submissions composed of 93,600 unique requests and over 3800 further submissions containing over 1,400,000 points were made to the IHP.

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33 At 45-46.
34 At 51.
35 Local Government (Auckland Transitional Provisions) Act 2010, s 115(1)(e).
36 Sections 123(4) and (5).
37 Resource Management Act 1991, sch 1 cls 6 and 8.

[30] The Council, in accordance with the RMA, prepared and notified a summary of the submissions, and forwarded all the relevant information obtained up to that point to the specialist hearing panel, the IHP.[38]

The IHP: Role, Function

[31] The IHP is a specialist panel appointed by the Minister for the Environment and the Minister of Conservation.[39] During the first reading of the Resource Management Reform Bill, Hon Amy Adams described the composition of the IHP, and its general role, as follows:[40]

> The Unitary Plan developed by the council after enhanced consultation will be referred to a hearings panel appointed by me and the Minister of Conservation in consultation with the council and the independent Māori Statutory Board, to ensure that the consideration is properly independent. There will be the usual guidelines applied for making appointments, including a high degree of local knowledge, competency, and understanding of tikanga Māori. The process will involve all the dispute resolution options available in the Environment Court, and provide the board with wide discretion to control its processes to ensure that it is easily accessed and understood by all.

[32] It was envisaged that a one-off hearing process carried out by the IHP would "streamline and improve" the development of the AUP, and ensure Aucklanders would have comprehensive input and a "high-quality independent review of the council plan".[41]

[33] Its functions are set out in full in s 164 of the Act. Those functions include holding and authorising pre-hearing meetings, conferences of experts and alternative dispute resolution processes, commission reports, holding hearing sessions, making recommendations to the Council and to regulate its processes as it thinks fit. The procedure adopted must, however, be "appropriate and fair in the circumstances".[42] The submission and hearing process was also subject to a strict statutory timetable, with limited powers for extension.[43]

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[38] Schedule 1, sub-cls 7(1)(a) and (b).
[39] Local Government (Auckland Transitional Provisions) Act 2010, s 115(1)(g).
[40] (11 December 2012) 686 NZPD 7331.
[41] (11 December 2012) 686 NZPD 7331.
[42] Section 136.
[43] Sections 123(7)–(9).

The issue of scope emerges

[34] The IHP chose to structure the hearings according to topics based on the way the Council had grouped its submissions, which resulted in approximately 80 hearing topics. The IHP took an approach that generally moved from the general to the specific, dealing first with topics relating to the RPS then moving through to site-specific issues.[44]

[35] The IHP provided interim guidance on certain hearing topics to assist submitters. Relevant guidance on Topic 013 RPS included the following note:[45]

> It is appropriate to enable higher residential densities in and around centres and corridors or close to public transportation routes, social facilities or employment opportunities. A broad mix of activities should be enabled within centres. A wide range of housing types and densities should be enabled across the urban area.

[36] At around this time, it became apparent that the Council in the development of the PAUP had "relied on theoretical capacity enabled by the Unitary Plan, rather on the measure of capacity that takes into account physical and commercial feasibility, which the Panel refers to as 'feasible enabled capacity', and defines as:[46]

> …the total quantum of development that appears commercially feasible to supply, given the opportunities enabled by the recommended Unitary Plan, current costs to undertake development, and current prices for dwellings. The modelling of this capacity at this stage is not capable of identifying the likely timing of supply.

[37] During the panel session on Urban Growth (Topic 013) on 25 February 2015, the IHP directed extensive analytical work and modelling to be done.[47] The IHP convened two expert groups to develop methods to estimate the feasible enabled capacity of the PAUP and of the possible alternatives put to the Panel.

[38] Meanwhile, in July 2015,the IHP also released its interim guidance on "Best practice approaches to re-zoning, precincts and changes to the Rural Urban Boundary (RUB)". The interim guidance requested that the parties should ensure any evidence

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[44] Auckland Unitary Plan Independent Hearings Panel, above n 19, at 23.
[45] Auckland Unitary Plan Independent Hearings Panel *Interim Guidance Text for RPS Topic 013* (23 February 2015) at [11].
[46] Auckland Unitary Plan Independent Hearings Panel, above n 19, at 49.
[47] At 47, 49 and 69.

provided for the hearing on the residential topics should address matters included in the guidance.[48] The relevant parts of the interim guidance for present purposes provided:

> 1.1. The change is consistent with the objectives and policies of the proposed zone. This applies to both the type of zone and the zone boundary.
>
> 1.2. The overall impact of the rezoning is consistent with the Regional Policy Statement.
>
> …
>
> 1.11. Generally no "spot zoning" (i.e. a single site zoned on its own).

[39] The two expert groups convened by the IHP met on several occasions in 2015 and prepared a report which was uploaded to the IHP on 27 July 2016. The results of their capacity forecasts identified a severe shortfall in the PAUP relative to expected residential demand. The results in the report are summarised in the IHP's "Report to Auckland Council Overview of recommendations on the proposed Auckland Unitary Plan" (the Overview Report):[49]

> The results …found that the feasible capacity enabled by the proposed Auckland Unitary Plan as notified at 213,000 fell well short of the long-term projections for demand for an additional 400,000 dwellings.

[40] The Council responded to this new information in late 2015 by filing in evidence revised objectives, policies and rules for residential zones that enabled significantly greater capacity. These changes removed density rules for the MHU and MHS zones and relied on bulk and location provisions to regulate amenity, which significantly increased capacity estimates.[50]

[41] The hearings on residential zones (topics 059–063) then commenced on 14–28 October 2015. By this stage the issue of scope had become a major issue. Auckland 2040, Character Coalition, the HRRA and HNZC made submissions challenging or supporting the Council's revised position as in or out of scope.[51]

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48 Auckland Unitary Plan Independent Hearings Panel, *Interim Guidance – Best practice approaches to re-zoning, precincts and changes to the Rural Urban Boundary (RUB)* (31 July 2015) at 1.

49 Auckland Unitary Plan Independent Hearings Panel, above n 19, at 49.

50 Overview Report at 49–50.

51 Auckland Unitary Plan Independent Hearings Panel *Report to Auckland Council Hearing Topics 059 - 063: Residential zones* (22 July 2016) at 28-30.

[42] From the available record, the Council filed revised zoning maps on 17 December 2015 based on more intensive zoning around centres, transport nodes and along transport corridors.[52] The maps outlined certain areas where the zone change was said to be "out of scope". This triggered a request to allow affected home owners to make late submissions and a request the IHP to reject such "out of scope" changes as they apply to Westmere. Auckland 2040 also sent a memorandum seeking interim guidance on the IHP's power to consider "out of scope zoning changes" and asserted that the majority of the changes to zoning that the Council had proposed were "out of scope". HNZC filed a memorandum in reply on 13 January 2016 stating that the Corporation and other government submitters' submissions provided scope for rezoning and that the Council was in error in referring to some rezoning as "out of scope".

[43] On 14 January 2016, the IHP issued a direction refusing to grant the requests for waivers for late submissions (both general and specific) and refusing to reject the Council's material as to its position on residential zoning at that present time. The IHP notes, in summary:[53]

(a) The IHP has a general power to consider out of scope submissions;

(b) The IHP must adhere to an appropriate and fair hearing procedure and act in accordance with principles of natural justice; and

(c) It must be persuaded that it would be appropriate for the matter to be the subject of an out of scope submission.

[44] The Council's proposed zoning maps were uploaded to the IHP website on 26 January 2016. Three weeks later, on 18 February 2016, the IHP issued a further direction clarifying its position. In short, the direction records:[54]

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52 Auckland Unitary Plan Independent Hearings Panel, above n 19, at 50.

53 Auckland Unitary Plan Independent Hearings Panel *Topics 080/081 – Rezoning and Precincts: Directions of Chairperson in relation to Auckland Council's preliminary position on residential zonings and issues of scope and waivers for late submissions* (14 January 2016) at 3.

54 Auckland Unitary Plan Independent Hearings Panel *Topics 080/081 – Rezoning and Precincts: Clarification of directions of Chairperson in relation to Auckland Council's preliminary position on residential zonings and issues of scope and waivers for late submissions* (18 February 2016) at 1-2.

(a) The panel does not regard itself as having an unlimited power to make out of scope recommendations;

(b) The panel must proceed in accordance with the principles of natural justice, the requirements of the Act and the RMA, including the s 32 requirements;

(c) The submission stage is an important part of the process, as is the identification of significant resource management issues and methods to address them;

(d) The panel has heard evidence for 18 months and is aware of the range of issues that rezoning may raise including accommodating population growth and the effect of intensity on residential amenity; and

(e) The panel is conscious that any person affected by an out of scope recommendation has a full right of appeal to the Environment Court and that it is a safeguard for any person prejudiced by an out of scope recommendation.

[45] However, the Auckland Council then retracted some of the revised zoning maps on 24 February 2016 in areas where the Council considered the changes to be out of scope of any submissions made to the IHP. This resulted in a revised set of Council proposed "in-scope" changes to residential zoning.[55] The Council resolution retracting the maps records:[56]

> That the Governing Body:
>
> c) note that the proposed 'out of scope' zoning changes (other than minor changes correcting errors or anomalies) seek to modify the Proposed Auckland Unitary Plan in a substantial way.
>
> d) note that the timing of the proposed 'out of scope' zoning changes impacts the rights of those potentially affected, where neither submitter

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55 Auckland Unitary Plan Independent Hearings Panel, above n 19, at 50.

56 Auckland Development Committee *Proposed Auckland Unitary Plan – revised zoning maps incorporating the Governing Body decision of 24 February 2016* (Auckland Council, Council Resolution Number GB/2016/18, 24 February 2016) at 170.

or further submitter, and for whom the opportunity to participate in the process is restricted to Environment Court appeal.

e) in the interests of upholding the principle of natural justice and procedural fairness, withdraw that part of its evidence relating to 'out of scope' zoning changes (other than minor changes correcting errors and anomalies).

[46] The IHP responded to the Council's retraction in the following way on 1 March:

> The Hearings Panel has considered this memorandum and notes counsels' advice as to how they may act in accordance with their instructions as set out in the resolution of the Governing Body to withdraw that part of the evidence lodged by the Council relating to "out of scope" zoning changes.
>
> The Hearings Panel will be proceeding with the hearings in accordance with its existing procedures. Parties may present their cases generally as they wish, within the scheduling constraints of this process.
>
> The presentation of personal submissions by submitters and legal submissions by counsel on behalf of submitters is expected to reflect the positions of submitters.
>
> The presentation of evidence by persons who appear as experts must be in accordance with the Code of Conduct for Expert Witnesses. It is essential that a person giving expert evidence does so on an independent basis, and not affected by the position of the submitter calling that witness.

The hearings on rezoning and precincts

[47] Meanwhile, between 15 and 25 February 2016 there were hearings on general rezoning and precincts (Topic 80). HNZC made submissions, but there is no reference to the HRRA, Character Coalition or Auckland 2040 appearing.

[48] On 1 March 2016 the IHP issued interim guidance for Topic 081 Rezoning and precincts (Geographic areas). The purpose of the guidance was to set out the IHP's approach to submissions on proposals for re-zoning and precincts in the Greenfield areas proposed to be located within the RUB.

[49] Hearings then followed between 3 March and 29 April 2016 on Topic 081. HNZC, Auckland 2040, the HRRA appeared before the IHP on these topics; however, there is no reference to the Character Coalition in the hearing records.

[50] HNZC presented first and among other things called the Council's retracted evidence (including mapping evidence) by way of summons and also produced a

combination of new zoning maps for some areas within the region. These are referred to as the "evidence or merits based maps" as they purport to show how the application of HNZC's rezoning principles could be applied across the region. During this presentation the IHP requested HNZC to provide shape files (i.e. spatial mapping) to illustrate the scope for the zoning changes of HNZC's primary submission. This request was confirmed in a published memorandum dated 22 March 2016. These maps, together with another set of the evidence or merits maps, were produced on 6 May 2016. As they are based on HNZC's proximity criteria, they are referred to as the "proximity maps".

[51] Mr Brabant for Auckland 2040 appeared on 24 March 2016 and submitted on the proposed changes to the SHZ and the subsequent proposal for the substantial upzoning of the SHZ. He argued that these changes were outside the scope of submissions, and provided submissions on whether specific changes to the zone wording or mapping were reasonably foreseeable and whether recommending the requested changes would create procedural unfairness.

IHP Recommendations

[52] On 22 July 2016, the IHP provided the Council with its formal report and recommendations, which was subsequently published by the Council on its website on 25 July 2016. On 19 August 2016, the Council publically notified its decisions on the IHP's recommendations.

[53] The following topics, which have been referred to above, are of relevance to the zoning aspects of the present appeal:

(a) Topic 013, Urban Growth;

(b) Topic 016/017, Rural Urban Boundary;

(c) Topics 059 to 063, Residential Zones;

(d) Topic 080, Rezoning and Precincts (General); and

(e) Topic 081, Rezoning and Precincts (Geographic Areas).

[54] Broadly, the IHP's recommendations on these topics address what the Panel identified as the issue of greatest significance facing Auckland: its capacity for growth.[57] It states that:[58]

> The overarching approach to a combined resource management plan for Auckland starts with the development strategy for a quality compact urban form as set out in the Auckland Plan…based on existing centres and corridors…

[55] Consequently, the IHP recommended enabling greater capacity by both allowing for greater intensification of existing urban areas and identifying areas at the edges of the existing metropolis suitable for urbanisation.[59]

[56] The Executive Summary of the Overview Report recorded the following salient recommendations:[60]

> i. Affirming the Auckland Plan's development strategy of a quality compact urban form focussed on a hierarchy of business centres plus main transport nodes and corridors.
>
> ii. Concentrating residential intensification and employment opportunities in and around existing centres, transport nodes and corridors so as to encourage consolidation of them while:
>
> a. allowing for some future growth outside existing centres along transport corridors where demand is not well served by existing centres; and
>
> b. enabling the establishment of new centres in greenfield areas after structure planning.
>
> …
>
> vi. Supporting the Council's submission to remove density controls as a defining element of residential zones.
>
> vii. Revising a number of the prescriptive residential bulk and location standards to enable additional capacity while maintaining residential amenity values.
>
> viii. Promoting better intensive residential development through outcome-based criteria for the assessment of resource consents.

57 Auckland Unitary Plan Independent Hearings Panel, above n 19, at 9.
58 At 9.
59 At 9.
60 At 10-11.

ix. Supporting numerous submissions seeking more flexible residential zones and mixed-use zones around centres and transport nodes and along corridors to give effect to the development strategy in the Auckland Plan by:

a. enabling housing choice with a mix of dwelling types in neighbourhoods to reflect changing demographics, family structures and age groups; and

b. encouraging adaptation of existing housing stock to increase housing choice.

[57] The IHP observed that, unlike the PAUP, its recommended Plan was consistent with the Auckland Plan target of locating 60 to 70 percent of enabled residential capacity in the within the existing urban footprint.[61] It considered that the PAUP's 70/40 capacity distribution between urban and future urban development was not supported by the evidence. It instead "recommended regional policy statement objectives and policies to promote the centres and corridors strategy and quality compact urban form and … deleted the reference to a predetermined 70/40 spatial distribution of that capacity".[62]

[58] The recommendations made by the IHP in response to each topic hearing need to be seen in light of this. Among other things, the IHP's recommendations on matters such as the RUB, residential zoning and rezoning and precincts are guided by a desire to achieve the targets of the Auckland Plan and RPS.

Topic 013 – Urban Growth

[59] Topic 013 addressed the RPS provisions relating to urban growth, the extent to which the PAUP enabled sufficient development capacity to achieve a quality compact urban form, and whether there should be greater recognition of the character and amenity values of existing neighbourhoods with respect to intensification.[63]

[60] In the Panel's own words, "urban growth issues permeated most topics heard", and thus "the Panel's response to urban growth issues likewise permeates most topics in

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61 At 57-58.
62 At 58.
63 Auckland Unitary Plan Independent Hearings Panel *Report to Auckland Council Hearing topic 013 – Urban growth* (22 July 2016) at 6.

order for the recommended Plan to provide a coherent response to the growth issues facing the Auckland Region."[64]

[61] The Panel recommended a new section B2.4 Residential Growth to address how residential intensification will be provided for. This responded to the Auckland Plan's envisaged need for 400,000 additional dwellings, and the severe shortfall in the PAUP relative to expected residential demand identified by the two expert groups. The Panel considered the AUP should err toward over-enabling. Many of the corresponding recommendations on Topic 013 are listed at [54]-[57], including:[65]

(a) The centres and corridors strategy accompanied by "significant rezoning with increased residential intensification around centres and transport nodes, and along transport corridors (including in greenfield developments)";

(b) Enabling of capacity in residential, commercial and industrial zones, for example by removing density rules in more intensive residential zones; and

(c) Being "more explicit as to the areas and values to be protected by the Unitary Plan (e.g. viewshafts, special character, significant ecological areas, outstanding natural landscapes, and so forth) and otherwise enabl[ing] development and change".

[62] On the matter of residential capacity, the IHP projected demand for 400,000 new sites by 2041, and examined the feasible enabled capacity with the PAUP as notified, PAUP with the Council's modified rules and the IHP recommended Plan. Only the IHP recommended Plan is assessed as providing for the projected demand.

[63] The IHP report on urban growth notes that B2 Urban growth contains fundamental objectives and policies affecting almost all resource management issues in

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64 At 6.
65 At 7.

the region and the Panel's recommendations on this topic influenced its approach to all other hearing topics.[66]

[64] The IHP records that the reference documents relied upon by the IHP includes the 013 submission points' pathway reports and parties and issues reports.

Topics 016, 017 Rural Urban Boundary, 080 Rezoning and Precincts (General) and 081 Rezoning and Precincts (Geographic Areas)

[65] The IHP provided its recommendations on these topics in one report. Previously, on 31 July 2015, it issued interim guidance to all parties about best practice approaches to rezoning, precincts and changes to the RUB. This included observations that zone boundaries need to be defensible and that the IHP would generally avoid spot zoning.[67] It also records all parties generally agreed with this overall approach.[68]

[66] The Panel recommended that the land zoned Future Urban Zone be expanded from 10,100 hectares to approximately 13,000, reflecting that in its view increased residential capacity had to come outside the existing metropolitan limit as well as within.[69]

[67] An extension of the RUB in the Albany area is recommended "where future development would be an extension of the Albany Village" and "[i]t is easily accessible and infrastructure services can be extended readily to the area given its close proximity to the Village".[70]

[68] This report also records that a particular concern for the IHP was the reasonableness of recommended zone changes to persons who were not active submitters. It observes that where the matter could reasonably have been foreseen as a

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[66] At 17.

[67] Auckland Unitary Plan Independent Hearings Panel *Report to Auckland Council – Changes to the Rural Urban Boundary, rezoning and precincts: Hearing topics 016, 017 Rural Urban Boundary, 080 Rezoning and precincts (General) and 081 Rezoning and precincts (Geographic areas)* (22 July 2016) at 5-6.

[68] At 8.

[69] At 9.

[70] At 13.

direct and logical consequence of a submission point, the Panel has found that to be within scope.[71] I return this statement of approach below.

[69] The Panel's approach to precincts and rezoning precincts is said to be in line with the promotion of a quality compact urban form focusing on capacity around centres, transport nodes and corridors.[72] This led to recommended upzoning around these features, and while the Panel generally avoided rezoning the inner city special character areas (such as Westmere and Ponsonby), it did so in areas "where other strategic imperatives dominate", such as Mt Albert.[73]

[70] The IHP also writes that:[74]

> The Panel's approach to land use controls has been to, as far as practicable, establish a clear and distinct descending hierarchy from overlay to zone to precinct (where applicable) based on relevant regional policy statement provisions.
>
> …overlay constraints…have generally not been taken into consideration as far as establishing the zoning is concerned. That is, the 'appropriate' land use zoning has generally been adopted regardless of overlays. That approach leaves overlays to perform their proper independent function of providing an important secondary consideration, whereby solutions and potential adverse effects can be assessed on their merits. It also avoids the risk of double-counting the overlay issue both at the zone definition and then at the overlay level. In many instances this has resulted in consequential rezoning changes. In Newmarket, for example, the Panel has upzoned the centre to Business - Metropolitan Centre Zone; removed the particular building height restrictions; and relied upon the Volcanic Viewshaft and Height Sensitive Areas Overlay (along with general development controls) to govern individual site structure heights.
>
> As a consequence of the approach to zoning noted above, typically the setting aside of an overlay from a residential site for the purpose of establishing the zoning, has resulted in upzoning of that site by one order of dwelling typology – commonly from Residential - Single House Zone to Residential - Mixed Housing Suburban Zone for instance (indeed, the Residential - Mixed Housing Suburban Zone has become the new 'normal' across many parts of the city). This residential upzoning has most commonly arisen from the uplifting of the flooding overlay, which in no way diminishes the relevance of that, or any other, overlay because of its importance in the hierarchy of controls.

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71 At 18.
72 At 18.
73 At 18.
74 At 18-19.

[71] The panel also accepted a 400-800m walkability metric from key transport nodes, corridors and town centres from HNZC when applying higher density zones in residential areas, considering that in the long term such zoning was appropriate.[75]

[72] Finally, the IHP relevantly observes that in areas with dense HNZC property ownership (such as around Mangere township), it has in-filled upzoning across other properties where HNZC sought higher densities to make a more logical block.[76]

Topics 059-063 – Residential Zones

[73] The relevant overall IHP recommendations relating to residential zoning are as follows:[77]

(a) Provide greater residential development capacity (linked with the spatial distribution of the residential zones);

(b) Greater development on sites as of right, provided they comply with the development standards; and

(c) A more flexible outcome-led approach to sites developed with five or more dwellings in the MHS Zone and MHU Zone and for all development in the THZ.

[74] The IHP notes that:[78]

> This report needs to be read in conjunction with the Panel's Report to Auckland Council – Overview of recommendations July 2016 and Report to Auckland Council – Rural Urban Boundary, rezoning and precincts July 2016 relating to residential zones and precincts, as the combined recommendations provide an integrated approach to residential development – i.e. the various residential zones and the provisions within them and their spatial distribution.

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75 At 19.
76 At 20.
77 Auckland Unitary Plan Independent Hearings Panel, above n 51, at 4-5.
78 At 5.

[75] Further:[79]

> In summary the combination of the zonings and zone provisions would not give effect to the regional policy statement's objectives and policies relating to a quality compact urban form, a centres plus strategy and housing affordability. These are also major policy directives in the Auckland Plan to which the proposed Auckland Unitary Plan must have regard.
>
> It is the Panel's view that the proposed Auckland Unitary Plan did not have sufficient regard to the Auckland Plan and would not give effect to the regional policy statement as notified nor as amended through the submission and hearing process.

[76] As noted, the issues of capacity for residential growth and spatial distribution of residential and mixed zones are addressed in those reports.[80]

[77] Specific relevant anticipated outcomes include:[81]

> i. Overall, the residential development capacity has been better enabled by the changes recommended.
>
> ii. The Panel recommends the retention of the zoning structure of the six residential zones, but has recommended a number of changes to the zone provisions…
>
> iii. The purpose of the Residential – Single House Zone has been amended and clarified to better reflect its purpose.
>
> iv. There are no density provisions for the Mixed Housing Suburban, Mixed Housing Urban and Terrace Housing and Apartment Buildings Zones, but development standards and resource consents are applied, as addressed below.
>
> v. Up to four dwellings are permitted as of right on sites zoned Residential – Mixed Housing Urban Zone and Residential – Mixed Housing Suburban Zone which meet all the applicable development standards.
>
> vi. Five or more dwellings require a restricted discretionary activity consent in the Residential – Mixed Housing Suburban Zone and Residential – Mixed Housing Urban Zone
>
> …
>
> xiii. [a number of] development standards, particularly in Residential – Mixed Housing Suburban, Residential – Mixed Housing Urban and Residential – Terrace Housing and Apartment Buildings Zones, have been deleted; some recommended by the Council and others by the Panel…

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79 At 10.
80 At 7.
81 At 5-6.

[78] This report also dealt with the type of development enabled by each residential zone. The Panel observed that based on much of the evidence, "residential provisions needed to be more enabling and to provide for greater residential capacity." [82] The IHP was influenced by the number of submitters including HNZC, Ockham, and MBIE who "considered that the proposed Auckland Unitary Plan fell well short of implementing this strategic direction of providing greater residential intensification."[83]

[79] The IHP observed that the combination of zonings and zone provisions would not give effect to the RPS's objectives and policies relating to a quality compact urban form, a centres based strategy and housing affordability. The IHP referred to and agreed with the evidence given on behalf of HNZC, which suggested that a "bold and innovative approach" which will provide for residential activities and development would need to include:[84]

> - Moderate increases to the permitted height limits in appropriate locations (being in and around centres, and within walking distance of public transport facilities and other recreational, community, commercial and employment opportunities and facilities);
>
> - Significant reductions in, or removal of, land use density controls (particularly in the Residential – Mixed Housing Suburban and the Residential – Mixed Housing Urban zones);
>
> - A reduction in the currently proposed extensive suite of quantitative development controls, such that a limited number of quantitative controls are retained to address the key matters which have the potential to create adverse effects external to a site, most notably in relation to amenity effects (such as retention of building height, height in relation to boundary and yard, building coverage, impermeable surface controls for instance); with the remainder of controls which relate to potential effects internal to a site being addressed in a more flexible way through the use of design-related matters of discretion and assessment criteria; and
>
> - A simplified yet potentially strengthened, suite of matters of discretion and assessment criteria, particularly in relation to development control infringements (in order to address concerns of neighbours in relation to amenity impacts, and provide clear guidance to processing planner to assist in their assessment), as well as design assessment…

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[82] At 8.
[83] At 10.
[84] At 12.

[80] On the SHZ, the Panel referred to a proposal by the Council to recast the SHZ and to the opposing submissions by, among other Auckland 2040. Preferring in part Auckland 2040's position, the Panel found that the zone applies to:[85]

> i. some inner city suburbs, albeit with the special character overlay;
>
> ii. some coastal settlements (e.g. Kawakawa Bay); and
>
> iii. other established suburban areas with established neighbourhoods (e.g. parts of Howick, Cockle Bay, Pukekohe and Warkworth)."

[81] The IHP also recommended retaining MHS and the MHU:[86]

> The Panel finds that the Residential - Mixed Housing Suburban Zone will facilitate some intensification while retaining a more suburban character, generally defined by buildings of up to two storeys. The Residential - Mixed Housing Urban Zone will provide for a more intensive building form of up to three storeys, facilitating a transition to a more urban built character over time. The Residential - Mixed Housing Urban Zone also provides for a transition in built character between suburban areas (zoned Residential - Mixed Housing Suburban Zone) and areas of higher intensification with buildings of five to seven storeys in areas zoned Residential - Terrace Housing and Apartment Buildings Zone.

[82] The IHP then recommended the removal of all density provisions in the MHS, MHU and THZ zones, but it rejected an outcome-led approach to development, preferring a combination of a more enabling approach with a rule-based approach.[87] For this purpose, some development standards (e.g. unit size) are however recommended for deletion as they do not serve an urban form purpose.

[83] The Report identified submission point pathway reports 059, 060, 062, 063 and parties and issues reports as relevant to the IHP's recommendation.

Appeal and review rights

[84] The only appeal rights available in respect of the proposed plan are as follows:

> (a) The right of appeal to the Environment Court under section 156 or 157 of the Act:

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85 At 13-14.
86 At 15.
87 At 16-17.

(b) The right of appeal to the High Court under section 158 of the Act.

[85] Section 156 and 158 of the Act provide the following rights of appeal (in summary):

(a) Under ss 156 a submitter may appeal to the Environment Court on any decision of the Council accepting a recommendation that was out of scope of the submissions or that rejects an IHP recommendation; and

(b) Under s 158, a submitter may appeal to the High Court on any decision of the Council that accepts an IHP recommendation but only on points of law.

[86] Any decision of the Environment Court may be appealed to the senior courts in the usual way under the appeal provisions of the RMA pursuant to s 308.[88] By contrast, appeals to the Court of Appeal are not available pursuant to s 158.[89]

[87] Section 159 of the Act provides a right to judicially review the decision of the Council:

159 Judicial review

(1) Nothing in this Part limits or affects any right of judicial review a person may have in respect of any matter to which this Part applies, except as provided in sections 156(4) and 157(5) (which apply section 296 of the RMA, that section being in Part 11 of that Act).

(2) However, a person must not both apply for judicial review of a decision made under this Part and appeal to the High Court under section 158 in respect of the decision unless the person lodges the applications for judicial review and appeal together.

(3) If applications for judicial review and appeal are lodged together, the High Court must try to hear the judicial review and appeal proceedings together, but need not if the court considers it impracticable to do so in the circumstances of the particular case.

[88] As noted in s 159(1), the right of judicial review is subject to s 296 of the RMA, which provides:

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[88] Local Government (Auckland Transitional Provisions) Act 2010, s 156(4).
[89] Section 158(5).

296 No review of decisions unless right of appeal or reference to inquiry exercised

If there is a right to refer any matter for inquiry to the Environment Court or to appeal to the court against a decision of a local authority, consent authority or any person under this Act or under any other Act or regulation—

(a) no application for review under Part 1 of the Judicature Amendment Act 1972 may be made; and

(b) no proceedings seeking a writ of, or in the nature of, mandamus, prohibition, or certiorari, or a declaration or injunction in relation to that decision, may be heard by the High Court—

unless the right has been exercised by the applicant in the proceedings and the court has made a decision.

[89] The effect of ss 159(1) of the Act and 296 of the RMA is to prevent a person from bringing a judicial review application where he or she has a right to appeal to the Environment Court against the decision of the Council.

Thresholds for appeal and review

[90] The thresholds for oversight of specialist tribunals are well settled in the RMA jurisdiction.[90] This Court is slow to interfere with decisions of the Environment Court within its specialist area.[91] The same deference should be afforded to the IHP, having regard to, among other things, the scale, complexity and policy content of its task. But as the question of scope also bears on natural justice considerations, close scrutiny by this Court is to be expected.[92]

[91] Accordingly I approach the appellate and review exercises on the following basis. I may test the IHP's scope decisions for error of law, irrelevant considerations or failure to have regard to relevant considerations, procedural impropriety and/or unreasonableness, which includes a conclusion without evidence or one to which on the evidence it could not have reasonably come.[93] The objective of the appeal or review procedures on the issue of scope is to secure both legality and substantive fairness. To

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90 *Countdown Properties (Northlands) Ltd v Dunedin City Council* (1994) 1B ELRNZ 150 (HC).
91 *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59 (HC).
92 *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597.
93 *Countdown Properties (Northlands) Ltd v Dunedin City Council*, above n 90.

this end, I must examine the IHP's exercise of discretion on scope so as to ensure it was exercised lawfully and fairly.[94]

PART C: THE PRELIMINARY QUESTIONS

Did the IHP interpret its statutory duties contained in Part 4 of the Act lawfully, when deciding whether its recommendations to the Council were within the scope of submissions made in respect of the first Auckland Combined Plan?

[92] Several issues arising under this question are addressed in the context of the subsequent questions. The focus of this question at the hearing was whether the frame adopted by IHP for the purpose of identifying out of scope recommendations was correct. I outline the legislative frame on scope and the IHP's frame below, before turning to the arguments of the parties.

The legislative frame

[93] Section 144 of the Act sets out the IHP's recommendatory powers:

> **144 Hearings Panel must make recommendations to Council on proposed plan**
>
> (1) The Hearings Panel must make recommendations on the proposed plan, including any recommended changes to the proposed plan.
>
> (2) The Hearings Panel may make recommendations in respect of a particular topic after it has finished hearing submissions on that topic.
>
> (3) The Hearings Panel must make any remaining recommendations after it has finished hearing all of the submissions that will be heard on the proposed plan.
>
> *Scope of recommendations*
>
> (4) The Hearings Panel must make recommendations on any provision included in the proposed plan under clause 4(5) or (6) of Schedule 1 of the RMA (which relates to designations and heritage orders), as applied by section 123.
>
> (5) However, the Hearings Panel—
>
> (a) is not limited to making recommendations only within the scope of the submissions made on the proposed plan; and

94 *McGrath v Accident Compensation Corporation* [2011] NZSC 77, [2011] 3 NZLR 733.

(b) may make recommendations on any other matters relating to the proposed plan identified by the Panel or any other person during the Hearing.

(6) The Hearings Panel must not make a recommendation on any existing designations or heritage orders that are included in the proposed plan without modification and on which no submissions are received.

Recommendations must be provided in reports

(7) The Hearings Panel must provide its recommendations to the Council in 1 or more reports.

(8) Each report must include—

(a) the Panel's recommendations on the topic or topics covered by the report, and identify any recommendations that are beyond the scope of the submissions made in respect of that topic or those topics; and

(b) the Panel's decisions on the provisions and matters raised in submissions made in respect of the topic or topics covered by the report; and

(c) the reasons for accepting or rejecting submissions and, for this purpose, may address the submissions by grouping them according to—

(i) the provisions of the proposed plan to which they relate; or

(ii) the matters to which they relate.

(9) Each report may also include—

(a) matters relating to any consequential alterations necessary to the proposed plan arising from submissions; and

(b) any other matter that the Hearings Panel considers relevant to the proposed plan that arises from submissions or otherwise.

(10) To avoid doubt, the Hearings Panel is not required to make recommendations that address each submission individually.

[94] Mandatory relevant criteria for the purpose of making recommendations are listed at s 145. Key among those criteria are ss 145(1)(d) and (f):

(d) include in the recommendations a further evaluation of the proposed plan undertaken in accordance with section 32AA of the RMA; and

…

(f) ensure that, were the Auckland Council to accept the recommendations, the following would be complied with:

(i) sections 43B(3), 61, 62, 66 to 70B, 74 to 77D, 85A, 85B(2), 165F, 165G, 168A(3), 171, 189A(10), and 191 of the RMA:

(ii) any other provision of the RMA, or another enactment, that applies to the Council's preparation of the plan.

[95] Section 148(3) also relevantly states:

> (3) To avoid doubt, the Council may accept recommendations of the Hearings Panel that are beyond the scope of the submissions made on the proposed plan.

The IHP approach to scope

[96] It is important not to cherry pick parts of the Panel's explanation of its approach to scope and with that qualification in mind, I find that the IHP approach included the following key elements:

(a) Consideration of:[95]

(i) The plan provisions as notified, together with any relevant section 32 reports prepared by the Council;

(ii) The submissions and further submissions;

(iii) Material lodged by the Council and submitters;

(iv) The relevant plan-making provisions of the RMA, especially sections 32 and 32AA and the provisions specifically listed in section 145(1)(f) of the Act;

(v) The Auckland Plan; and

[95] Auckland Unitary Plan Independent Hearings Panel, above n 19, at 28-29.

(vi) The specialist knowledge and expertise of the members of the Panel in relation to making statutory planning documents based on sound planning principles

(b) An acknowledgement of the power to make out of scope recommendations;[96]

(c) The guidance afforded by existing jurisprudence on scope;[97]

(d) The Panel's recommendations generally lie between the provisions of the Unitary Plan as notified and the relief sought in submissions on the Unitary Plan, including consequential amendments that are necessary and desirable to give effect to such relief.[98]

(e) Identifying four types of consequential change:[99]

(i) Format/language changes;

(ii) Structural changes;

(iii) Changes to support vertical/horizontal integration and alignment, to give effect to policy change, to fill the absence of policy direction, and to achieve consistency of restrictions or assessments and the removal of duplicate controls; and

(iv) Spatial changes, for example where a zone change for one property raises an issue of consistency of zoning for neighbouring properties and creates difficulty in identifying a rational boundary.

(f) On changes supporting vertical integration, following a top down approach so that consequential amendments to the plan to achieve integration with overarching objectives and policies, which were drawn

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96 At 28.
97 At 26-28.
98 At 24.
99 At 29-30.

from higher level policy statements. Given the logical requirement for a plan to function in this way, these changes would normally be considered to be reasonably anticipated.[100]

(g) On the issue of spatial consequential changes, where there were good reasons to favour rezoning sought in a submission and good reasons to include neighbouring properties as a consequence, even where there were no submissions from the owners of them neighbouring properties, including the neighbouring properties in recommendations because it saw that the overall process including notification, submission, summarising points of relief, further submission and late submission and further submission windows provided the real opportunity for participation by those potentially affected.[101]

(h) Assessing consequential changes in several dimensions, being:[102]

  (i) Direct effects: whether the amendment would be one that directly affects an individual or organisation such that one would expect that person or organisation to want to submit on it.

  (ii) Plan context: how the submission of a point of relief within it could be anticipated to be implemented in a realistic workable fashion; and

  (iii) Wider understanding: whether the submission or points of relief as a whole provide a basis for others to understand how such an amendment would be implemented.

(i) Framing the assessment of scope provided by broadly couched submissions in response to the resource management issues which can be identified in relation to them and in the context of many other submissions which are relevant to more detailed aspects of the AUP

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[100] At 32.
[101] At 34.
[102] At 30.

provisions. More specifically, the strategic framework of the RPS, submissions seeking greater intensification round existing centres and transport nodes, and submissions seeking retention of special character areas were relied on to assist in understanding how more generalised submissions ought to be understood.[103]

(j) A review of zoning issues by area with reference to submissions on each area.[104]

(k) Identifying remaining out of scope recommendations.[105]

[97] The effect of all of this is exemplified in the following passage taken from the IHP's report to the Auckland Council on the Rural Urban Boundary, Rezoning and Precincts:[106]

> A particular concern of the Panel in deciding whether to recommend rezoning and precincts has been the reasonableness of that to persons who were not active submitters and who might have become active had they appreciated that such was a possible consequence.
>
> **Where the matter could reasonably have been foreseen as a direct or otherwise logical consequence of a submission point the Panel has found that to be within scope.** Where submitters, such as Generation Zero, have provided very wide scope for change the Panel has been guided by other principles – such as walkability; access to multi-modal transport; proximity to centres; and so forth – in finessing such change.

[98] For ease of reference I refer to the IHP test for scope as the reasonably foreseen logical consequence test.

Argument (in brief)

[99] On the Council's view (supported by the 'in scope' parties), a generous approach was needed, given the scale of the planning exercise. The Council submitted that the IHP was not bound by common law principles and could recommend changes that were not expressly sought in a submission provided that the changes reasonably and fairly arise from the submissions and that they achieves the purpose of the Act. Whether a

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103 At 33.
104 At 34.
105 At 34-35.
106 Auckland Unitary Plan Independent Hearings Panel, above n 67, at 17-18 (emphasis added).

recommendation was reasonably and fairly raised or sufficiently foreseeable was an evaluative matter for the IHP and not this Court. Moreover a strict interpretation of scope, requiring precise correspondence between submission and recommendation would be absurd and unworkable, with the prospect of a very large part of the evaluative exercise transferring to the Environment Court contrary to the clear policy of Part 4. It submitted further, in any event, that the IHP adopted a robust methodology in accordance with the express statutory requirements and established principle.

[100] By contrast, several of the "out of scope" parties emphasised:[107]

(a) Contrary to the Council's argument, nothing in the scheme of Part 4 suggests a more generous approach to scope is permissible. The IHP was under a duty to clearly identify and make decisions that were within scope;

(b) It was not sufficient to be satisfied that the recommendation "fairly and reasonably relate" to the submissions. Section 144 requires a clear nexus between the relief sought in submissions and the recommendations – that is the relief must be *necessary* and arising from the submissions based on what a reasonable person would understand from the relief sought in the submission;

(c) The IHP reports do not transparently demonstrate by reference to specific submissions that the requisite nexus was established by the IHP;

(d) While the IHP reports purport to adopt an area by area approach, they do not specify what submissions supported the recommendations to upzone 29,000 properties (this claim is also addressed below in terms of the second question);

(e) A finding of scope to rezone neighbouring properties "where there are no submissions" was clearly erroneous and not saved by the proviso that

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[107] Ms Arthur Young for SHL did not join with the other out of scope parties on this issue. Mr Martin Williams for Man O' War largely confined his submission to maintaining that existing jurisprudence provided requisite guidance on scope.

there should not be amendments without a "real opportunity for participation";

(f) The test on the issue of scope laid down in *Countdown*[108] has evolved over time with the more recent expression of the test by Kós J in *Motor Machinists*[109] (discussed below at [126]-[128]) providing greater assistance and demanding more surety about whether the public had a reasonable opportunity to submit;

(g) The IHP had to be satisfied that an affected person was on notice of a potential change to the PAUP. This could only be achieved if any affected person was put on reasonable enquiry about the potential for the change recommended by the IHP (this aspect is addressed more squarely in the context of the test cases below at [165] – [176];and

(h) The IHP erred by relying on generic submissions or the RPS to establish area or site specific zone changes (this claim is addressed below in terms of the third question at [148] – [153].

Assessment

[101] The question of scope raises two related issues: legality and fairness. Legality is concerned with whether the IHP has adhered to the statutory requirement to identify all recommendations that are outside the scope of submissions (at s 144(8) of the Act). The second issue of fairness is about whether affected persons have been deprived of the right to be heard.

[102] I am satisfied that the IHP did not misinterpret its duties on the issue of scope in either respect, having regard to the words and text used at s 144, informed by purpose[110] and context,[111] including the scheme of Part 4 and the relevant parts of the RMA.[112] In short, the IHP approach:

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108 Above n 90.

109 *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290, [2014] NZRMA 519.

110 Interpretation Act 1999, s 5; *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [24].

111 *McQuire v Hastings District Council* [2000] UKPC 43, [2002] 2 NZLR 577 at [18]-[19].

(a) Addresses the relevant statutory criteria;

(b) Is consistent with the RMA's policy of public participation;

(c) Accords with the schemes of Part 4 and relevant parts of the RMA;

(d) Largely conforms with orthodox jurisprudence dealing with scope; and

(e) Is not materially inconsistent with the approach and principles set out in *Clearwater*[113]/*Motor Machinists*[114].

[103] It is necessary to elaborate on each of these points.

The statutory criteria

[104] For present purposes, the key relevant s 144 criteria are:

(a) **Section 144(1)**: The IHP must make recommendations "on" the proposed plan. Proposed plan is defined as the proposed combine plan prepared by the Auckland Council in accordance with ss 121-126; that is the notified PAUP. The significance of this is that the IHP's jurisdiction to make recommendations is circumscribed by the ambit of the notified PAUP.

(b) **Section 144(5)**: The IHP recommendations are not limited to the scope of the submissions on the PAUP. The jurisdiction therefore to recommend changes to the PAUP is not limited by the relief sought in submissions.

(c) **Section 144(8)(a)**: The IHP must identify "the recommendations [on a topic or topics] that are beyond the scope of the submissions made in respect of that topic or those topics". This duty involves three evaluative steps: an assessment of the effect of a recommendation, an assessment of

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112 *Royal Forest and Bird Protection Society of New Zealand v Buller Coal* Ltd [2012] NZHC 2156, [2012] NZRMA 552, at [13]; *Discount Brands Ltd v Westfield (New Zealand) Ltd*, above n 92, at [6].

113 *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.

114 *Palmerston North City Council v Motor Machinists Ltd*, above n 109.

the scope of a submission or submissions and an assessment of whether the effect of the recommendation is beyond the scope of the submission.

(d) **Section 144(8)(c)**: The IHP must provide "reasons for accepting or rejecting submissions", and may do so by grouping the submissions according to provisions or subject matter.

(e) **Section 144(9)(a)**: The IHP may report on "consequential alterations necessary to the proposed plan arising from submissions". While the requirement to report is discretionary, it is implicit that the consequential alterations are a necessary corollary of submissions.

(f) **Section 145(d) and (f)**: In formulating recommendations, the IHP must include a further s 32 evaluation and ensure that the matters specified at s 145(1)(f) are complied with, namely RMA decision making criteria relating to the promulgation of plans. Accordingly, the IHP could not make recommendations without being satisfied about compliance with the listed matters.

[105] It was not suggested that the IHP was under any misapprehension about the ambit of of its powers to make recommendations pursuant to ss 144(1) and 144(5). The focal point of criticism for present purposes is whether the IHP properly interpreted and discharged the duty to identify recommendations that were beyond "scope" in the sense of being satisfied that consequential changes were "necessary" and/or fairly made.

[106] Dealing first with the requirement for "necessary" alterations; no particular definition of "necessary" featured in argument, but Character Coalition submitted that reasonably foreseeable is a lower threshold than necessary. But "necessary" is not an unfamiliar term in environmental law. Dealing with the meaning of "unnecessary subdivision", Cooke P said in *Environmental Defence Society Ltd v Mangonui County Council* "necessary is a fairly strong word falling between expedient or desirable on the one hand and essential on the other".[115] This definition of necessary was subsequently applied to the interpretation of an earlier incantation of s 32 and the evaluation of

[115] *Environmental Defence Society Inc v Mangonui County Council* [1989] 3 NZLR 257 (CA) at 260.

whether an objective, policy or rule was "necessary" to achieve sustainable management.[116]

[107] I consider this definition of necessary should apply to the meaning of consequential alterations "necessary" to the proposed plan arising from submissions. It adequately meets the natural justice considerations underpinning the scope provisions without unduly fettering the attainment of the Act's purpose by literally limiting the relief to that sought in the submission – an approach to planning processes long rejected by the Courts.[117] As the Full Court in *Countdown* put it:[118]

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

[108] It is tolerably clear that the IHP framed its scope decision employing a similar definition of necessary when it expressed the requirement for the consequential relief to be "necessary" in two ways – that is the consequential changes must be "necessary and desirable" and "foreseen as a direct or otherwise logical consequence of a submission".

[109] I address the issue of fairness when dealing with the common law approach to scope. I first turn to consider the wider context in terms of the duty to identify recommendations that are beyond the scope of submissions.

Policy of public participation

[110] Participation by the public in district and regional plan processes is a long standing policy of the RMA.[119] The First Schedule process envisages an opportunity for participation by affected persons. There must be public notification of a proposed policy statement or proposed plan.[120] Directly affected ratepayers must be served a copy of a

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116 *Westfield (New Zealand) Limited v Hamilton City Council*, [2004] NZRMA 556 (HC) at [25].
117 *Countdown Properties (Northlands) Ltd v Dunedin City Council*, above n 90, at 170.
118 At 170.
119 *Discount Brands Ltd v Westfield (New Zealand) Ltd*, above n 92.
120 Clause 5(1)(b).

public notice of a proposed plan of by a territorial authority.[121] Regional Councils must send a copy of a public notice and such further information as the council thinks fit relating to a proposed policy statement or plan to any person likely to be directly affected by the proposed policy or the plan.[122] Any notice must, among other things, state that any person may make a submission on the proposed planning instrument.[123] Any person (except trade competitors unless directly affected by a non trade competition effect) may make a submission. The Council must then give public notice of the availability of a summary of submissions and any person may make further submissions in support or opposition to a submission.[124] Public hearings must be held, unless no submitters wish to be heard.[125]

[111] Part 4 of the Act incorporates the Schedule 1 process from the RMA, save that it does not require service of a public notice on directly affected persons[126] and unlike the usual RMA processes, there are no full rights of appeal to the Environment Court except for recommendations that are out of scope or in respect of recommendations rejected by the Council.[127] A process for re-notification of out of scope changes pursuant to s 293 was also removed. Some of the 'out of scope' parties contended that these amendments to the usual process heightened the need for caution and surety about scope. Conversely, it was said by some of the 'in scope' parties that this showed a more relaxed statutory policy toward the involvement of affected landowners. For my part I do not consider that the differences enhance or diminish the policy of public participation. These modifications streamline the process but do not materially derogate from that policy, given also the requirement to identify out of scope recommendations and the right of appeal by any person unfairly prejudiced by such recommendations.[128]

[112] I am satisfied the IHP was cognisant of this policy as is evident from the decision elements described at [96](a)(ii) and (h). Furthermore, the requirement for each recommendation to be a reasonably foreseen logical consequence of a submission point is consistent with the attainment of this policy. It enables robust recognition of the right

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121 Clause 5(1A).
122 Clause 5(1C).
123 Clause 5(2).
124 Clauses 7 and 8.
125 Clause 8B.
126 Section 123.
127 Section 156.
128 Sections 144(8) and 156(3).

to make a submission while ensuring that the public are not caught by changes that could not have been reasonably anticipated.

The scheme of Part 4 and the RMA

[113] The Scheme of Part 4 and relevant parts of the RMA envisage:

(a) A streamlined process in terms of rights of participation by the public;

(b) An iterative promulgation process, commencing with the s 32 analysis of the costs and benefits of the PAUP prior to notification, a central Government audit of the s 32 report, an alternative dispute resolution process, a full hearing process before the IHP, a further s 32 report on proposed changes to the PAUP, recommendations by the IHP, decisions on the recommendations by the Council, and limited rights of appeal; and

(c) Any recommendation will be made having regard to the usual requirements for regional and district planning instruments, including ss 66-67 and 74-75 of the RMA, which require (among other things) compliance with the functions of territorial authorities at ss 30 and 31, the provision of Part 2 (purpose and principles) and the obligation to give effect to higher order planning instruments (e.g. national policy statement, any New Zealand coastal policy statement, any regional policy statement and in the case of District Plans, any regional plan).

[114] The IHP's integrated approach to scope noted at [96](a)(iv), (f) and (g) accords with this scheme and more broadly with the orthodox top down and integrated approach to resource management planning demanded by the RMA, particularly in the context of a combined plan process. Submissions on the higher order objectives and policies inevitably bear on the direction of lower order objectives and policies and methods, including zoning rules given the statutory directions at ss 66-75 of the RMA.[129] Given that all parts of the combined plan are being developed contemporaneously, it would have been wrong for the IHP to promulgate objectives, policies and rules without regard

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[129] *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [11].

to all topically relevant submissions, including submissions dealing only with the higher order matters. Provided the lower order recommendation is a reasonably foreseen logical consequence of the higher order submission, taking such an integrated approach to scope was lawful.

Orthodoxy

[115] The reasonably foreseen logical consequence test also largely conforms to the orthodox "reasonably and fairly raised" test laid down by the High Court in *Countdown* and subsequently applied by the authorities specifically dealing with the issue of whether a Council decision was authorised by the scope of submissions. This orthodoxy was canvassed in some detail in the IHP overview report, which I largely adopt. A Council must consider whether any amendment made to a proposed plan or plan change as notified goes beyond what is reasonably and fairly raised in submissions on the proposed plan or plan change.[130] To this end, the Council must be satisfied that the proposed changes are appropriate in response to the public's contribution. The assessment of whether any amendment was reasonably and fairly raised in the course of submissions should be approached in a realistic workable fashion rather than from the perspective of legal nicety.[131] The "workable" approach requires the local authority to take into account the whole relief package detailed in each submission when considering whether the relief sought had been reasonably and fairly raised in the submissions.[132] It is sufficient if the changes made can fairly be said to be foreseeable consequences of any changes directly proposed in the reference.[133]

[116] As Wylie J noted in *General Distributors Limited v Waipa District Council* the underlying purpose of the notification and submission process is to ensure that all are sufficiently informed about what is proposed, otherwise "the plan could end up in a form which could not reasonably have been anticipated resulting in potential unfairness".[134]

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130 *Countdown Properties (Northlands) Ltd v Dunedin City Council,* above n 90.
131 *Royal Forest and Bird Protection Society of New Zealand v Buller Coal*, above n 112.
132 *Shaw v Selwyn District Council* [2001] 2 NZLR 277 at [31].
133 *Westfield (New Zealand) Ltd v Hamilton City Council,* above n 116*,* at [73]-[74].
134 *General Distributors v Waipa District Council,* above n 91, at [55].

[117] Any differences between the *Countdown* orthodoxy and the IHP's 'reasonably foreseen logical consequence' test are largely semantic. The IHP's concern for natural justice is repeated in a number of different ways in the Reports. The IHP's test is simply one way of expressing an acceptable method for achieving fairness to potentially affected persons.

[118] For completeness, I do not consider the language or scheme of Part 4 envisages a departure from the *Countdown* orthodoxy. The only material point of difference is that Part 4 is more streamlined, but as noted, the policy of public participation remains strongly evident and there is nothing in the legislation to suggest that the longstanding careful approach to scope should not apply.

The Clearwater two step test

[119] Some of the appellants emphasised that the two step *Clearwater* test as applied by Kós J (as he then was) in *Motor Machinists*, not the *Countdown* test, provided the better frame for scope. I disagree to the extent that it is said to depart from the *Countdown* orthodoxy. Given the significance of this aspect to the parties, I will address the *Clearwater* approach in some detail.

[120] The *Clearwater* case concerned whether a submission was "on" a variation to the noise contour polices of the then proposed Christchurch District Plan. William Young J identified his preferred approach as:[135]

> 1. A submission can only fairly be regarded as "on" a variation if it is addressed to the extent to which the variation changes the pre-existing status quo.
>
> 2. But if the effect of regarding a submission as "on" a variation would be to permit a planning instrument to be appreciably amended without a real opportunity for participation by those potentially affected, this is a powerful consideration against any argument that the submissions is truly "on" the variation.

[121] A variation, as distinct from a full plan review, seeks to change an aspect only of a proposed plan and in the *Clearwater* case, the Council sought to introduce a variation (Variation 52) to remove an incongruity between policies dealing with urban growth and

135 *Clearwater Resort Ltd v Christchurch City Council*, above n 113, at [66].

protection of the Christchurch airport. The proposed plan placed constraints on residential development within specified noise contours. Variation 52 contained no proposal to adjust the noise contours, but the submitter, Clearwater, wanted to challenge the accuracy of the contours on the planning maps. The Court was not concerned with whether the scope of the submission was broad enough to include a particular form of relief (as was the case in *Countdown, Royal Forest, Shaw* and *Westfield*). Rather, the Court was literally concerned with whether the submission was "on" the variation at all.

[122] Relevantly, William Young J also stated in relation to the second *Clearwater* step:[136]

> It is common for a submission on a variation or proposed plan to suggest that the particular issue in question be addressed in a way entirely differently from the envisaged by the local authority. It may be that the process of submissions and cross submissions will be sufficient to ensure that all those likely to be affected by or interested in the alternative method suggested in the submission have the opportunity to participate. In a situation, however, where the proposition advanced by the submitter can be regarded as coming out of "left field", there may be little or no real scope for public participation. Where this is the situation, it is appropriate to be cautious before concluding that the submission (to the extent to which it proposes something completely novel) is "on" the variation.

[123] William Young J went on to hold that assuming Clearwater's submission sought a change to the 50 dBA contours, it would have been "on" the variation because "[t]he class of people who could be expected to challenge the location of this line under [the notified proposed plan] is likely to be different from the class of people who could be expected to challenge it in light of Variation 52."[137] By contrast, Clearwater's submission on the 55dBA Ldn and the composite 65 dBA Ldn/SEL 95 dBA noise contours was not "on" the variation because it was clear that "the relevant contour lines depicted on the planning maps in the pre-Variation 52 proposed plan were intended to be definitive".[138]

[124] Ronald Young J applied the *Clearwater* steps in *Option 5 Incorporated*, noting that the first point may not be of particular assistance in many cases, but that it is highly relevant to consider whether the result of accepting a submission as on a variation

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136 At [69].
137 At [77].
138 At [80].

would be to significantly change a proposed plan without the real opportunity for participation by affected persons.[139] In this case the Judge placed some significance on the fact that at least 50 properties would have their zoning fundamentally changed without any direct notification "and therefore without any real chance to participate in the process by which their zoning will be changed."[140] Ronald Young J added that there was nothing to indicate to that "the zoning of their properties might change."[141] In concluding that the submission was not on the variation Judge observed that the Environment Court correctly took into account:[142]

a) The policy behind the variation;

b) The purpose of the variation;

c) Whether a finding that the submission on the variation would deprive interested parties of the opportunity for participation.

[125] The Court also noted the appellant's submission was to be contrasted with the more modest intention of Variation 42 which was to support the central Blenheim CBD and to avoid commercial developments outside the CBZ.

[126] More recently, the *Clearwater* test was applied by Kós J, in *Motor Machinists.* This case concerned a plan change about the distribution of business zones. The appellant had sought extension of the "Inner Business" zone to its land. The Environment Court rejected this submission as out of scope. Kós J agreed, observing that a very careful approach must be taken to the extent to which a submission may be said to satisfy both limbs one and two of the *Clearwater* test. The Judge emphasised the importance of protecting the interests of people and communities from submissional side-winds. The absence of direct notification was noted as a significant factor, reinforcing the need for caution in monitoring the jurisdictional gateway for further submissions.[143]

[127] The first limb was said to be the dominant consideration, namely the extent to which there is a connection between the submission and the degree of notified change

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139 *Option 5 Inc v Malborough District Council* (2009) 16 ELRNZ 1 at [34].
140 At [35].
141 At [36].
142 At [41].
143 *Palmerston North City Council v Motor Machinists Ltd*, above n 109, at [43].

proposed to the extant plan. This is said to involve two aspects: the breadth of the alteration to the status quo entailed in the plan change and whether the submission addressed that alteration.[144] The Judge noted that one way of analysing that is to ask whether the submission raises matters that should have been addressed in the s 32 evaluation and report. If not the submission is unlikely to fall within the ambit of the plan change.[145] The Judge added that incidental or consequential extensions of zoning change proposed in the plan change are permissible provided that no substantial further s 32 analysis is required to inform affected persons of the comparative merits of that change. The second limb is then directed to whether there is a real risk that persons directly affected by the additional change, as proposed in the submission, have been denied an effective response.[146]

[128] Kós J also disapproved the approach taken by the Environment Court in *Naturally Best New Zealand Ltd v Queenstown Lakes District Council*[147]*,* noting that *Countdown* was not authority for the proposition that a submission "may seek fair and reasonable extensions to a notified variation or plan change".[148]

[129] Returning to the present case, the Auckland Unitary Plan planning process is far removed from the relatively discrete variations or plan changes under examination in *Clearwater, Option 5* and *Motor Machinists*. The notified PAUP encompassed the entire Auckland region (except the Hauraki Gulf) and purported to set the frame for resource management of the region for the next 30 years. Presumptively, every aspect of the status quo in planning terms was addressed by the PAUP. Unlike the cases just mentioned, there was no express limit to the areal extent of the PAUP (in terms of the Auckland urban conurbation). The issues as framed by the s 32 report, particularly relating to urban growth, also signal the potential for great change to the urban landscape. The scope for a coherent submission being "on" the PAUP in the sense used by William Young J was therefore very wide.

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144 At [80].
145 At [81].
146 At [82].
147 *Naturally Best New Zealand Ltd v Queenstown Lakes District Council* NZEnvC Christchurch C108/06, 30 August 2006.
148 At [70].

[130] Furthermore, I do not accept that a submission on the PAUP is likely to be out of scope if the relief raised in the submission was not specifically addressed in the original s 32 report. I respectfully doubt that Kós J contemplated that his comments about s 32 applied to preclude departure from the outcomes favoured by the s 32 report in the context of a full district plan review. Indeed, Kós J's observations were clearly context specific, that is relating to a plan change and the extent to which a submission might extend the areal reach of a plan change in an unanticipated way. A s 32 evaluation in that context assumes greater significance, because it helps define the intended extent of the change from the status quo.

[131] By contrast a s 32 report is, in the context of a full district plan review, simply a relevant consideration among many in weighing whether a submission is first "on" the PAUP and whether the proposed change requested in a submission is reasonably and fairly raised by the submission.[149]

[132] To elaborate, the primary function served by s 32 is to ensure that the Council has properly assessed the appropriateness of a proposed planning instrument, including by reference to the costs and benefits of particular provisions prior to notification.[150] Section 32 does not purport to fix the final frame of the instrument as a whole or an individual provision. The section 32 report is amenable to submissional challenge[151] and there is no presumption that the provisions of the proposed plan are correct or appropriate on notification.[152] On the contrary, the schemes of the RMA and Part 4 clearly envisage that the proposed plan will be subject to change over the full course of the hearings process, including in the case of the PAUP, a further s 32 evaluation for any proposed changes which is to be published with (or within) the recommendations on the PAUP. While it may be that some proposed changes are so far removed from the notified plan that they are out of scope (and so require "out of scope" processes), it cannot be that every change to the PAUP is out of scope because it is not specifically subject to the original s 32 evaluation.[153] To hold otherwise would effectively consign

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[149] As it is in terms of the substantive assessment – see Resource Management Act 1993, ss 67 75.

[150] See Derek Nolan (ed) *Environmental and Resource Management Law* (5th ed, LexisNexis, Wellington, 2015) at 3.91.

[151] Section 32A.

[152] *Leith v Auckland City Council* [1995] NZRMA 400 at 408.

[153] I accept that as Environment Court Judge Jackson said in *Well Smart Investment Holding (NZQN) Ltd v Queenstown Lakes District Council* [2015] NZEnvC 214 at [38] that the *Motor Machinists*

any submission beyond the precise scope of the s 32 evaluation to the Environment Court appellate procedure. This is not reconcilable with the streamlined scheme of Part 4.

[133] The important matter of protecting affected persons from submissional side-winds raised by Kós J must be considered alongside the equally important consideration of enabling people and communities to provide for their wellbeing, in the context of a 30 year region-wide plan, via the submission process. [154] Take for example a landowner affected by a rule in a proposed plan that will remove a pre-existing right to develop his or her property in a particular way. The RMA does not envisage, via s 32, that he or she would be precluded from seeking by way of submission a form of relief from the proposed restriction that was not specifically considered by the s 32 assessment and report.[155]

[134] A corollary of the foregoing analysis is that the IHP did not err by failing to determine scope strictly by reference to the options considered in the s 32 reports. Rather, the IHP was not constrained by the s 32 reportage for the purpose of establishing whether a submission was "on" the PAUP.

Summary

[135] In accordance with relevant statutory obligations, the IHP correctly adopted a multilayered approach to assessing scope, having regard to numerous considerations, including context and scale (a 30 year plan review for the entire Auckland region), preceding statutory instruments (including the Auckland Plan), the s 32 reportage, the PAUP, the full gamut of submissions, the participatory scheme of the RMA and Part 4, the statutory requirement to achieve integrated management and case law as it relates to scope. This culminated in an approach to consequential changes premised on a

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dicta now creates a situation whereby if a local authority's s 32 evaluation is (potentially) inadequate that may cut out the range of submissions that may be "on" the plan change. But as explained at [129], this dicta was specifically directed to plan changes, not full plan reviews.

[154] See also *Bluehaven Management Ltd v Western Bay of Plenty District Council* [2016] NZEnvC 191 at [29]-[40].

[155] Iacknowledge that in *Power v Whakatane District Council* HC Tauranga CIV-2008-470-456, 30 October 2009 an 11th hour proposal to amend height controls was rejected as out of scope, it not being raised by a submission. But as Allan J in that case noted at [43], "[i]n the end, the jurisdiction issue comes down to a question of degree and, perhaps, even impression".

reasonably foreseen logical consequence test which accords with the longstanding *Countdown* "reasonably and fairly raised" orthodoxy and adequately responds to the natural justice concerns raised by William Young J in *Clearwater* and Kós J in *Motor Machinists*.

[136] Whether the IHP correctly applied the requisite threshold tests in the test cases is addressed below at [165] – [170].

Did the IHP have a duty to:

> **(a) Identify specific submissions seeking relief on an area by area basis with specific reference to suburbs, neighbourhoods or streets?**
>
> **(b) Identify when it was exercising its powers to make consequential alterations arising from submissions?**

[137] Character Coalition and Auckland 2040 submit that the IHP, having purportedly resolved scope on an area by area basis, should have identified the specific supporting submissions seeking corresponding relief on that basis. It says s 144(8) expressly directs the IHP to address these matters in its report to the Council. The requirement to identify is also said to accord with the public importance of requiring reasons from decision makers.[156]

[138] The Council (and supporting parties) responded that:

(a) It is absurd and unrealistic to expect the IHP to identify every submission that it relied upon, noting for example that issues of growth and housing capacity involved a very large percentage of the approximately 93,000 submissions on the PAUP;

(b) Sections 144(9) and (10) expressly permit grouping of submissions; and

(c) In any event, the IHP identified the out of scope submissions as it was required to do by s 144(8)(a) and identified submission points relied upon in relation to specific topics.

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156 *Singh v Chief Executive Officer Department of Labour* [1999] NZAR 258.

Assessment

[139] The answer to both questions is no, but more importantly, I see no flaw in the IHP's reporting having regard to the provisions of s 144 in light of the statutory purpose, the scheme of Part 4 and in context. This conclusion should be read together with my conclusions on the legality of the approach taken by the IHP traversed in detail above.

[140] For ease of reference, to repeat s 144(8) states:

> (8) Each report must include -
>
> (a) the Panel's recommendations on the topic or topics covered by the report, and identify any recommendations that are beyond the scope of the submissions made in respect of that topic or those topics; and
>
> (b) the Panel's decisions on the provisions and matters raised in submissions made in respect of the topic or topics covered by the report; and
>
> (c) the reasons for accepting or rejecting submissions and, for this purpose, may address the submissions by grouping them according to—
>
> (i) the provisions of the proposed plan to which they relate; or
>
> (ii) the matters to which they relate.

[141] Contrary to the submission made by Character Coalition and Auckland 2040 this section does not expressly or by necessary implication require the IHP to identify and respond to specific submissions. Rather s 144(8) plainly contemplates:

(a) Identification of out of scope recommendations;

(b) Grouping of submissions by topic; and

(c) Responding to those submissions collectively on a topic by topic basis.

[142] This 'group' or collective identification and response approach is supported by:

(a) The discretion (not duty) at s 144(9) to identify matters relating to consequential alterations arising from the "submissions" (plural);

(b) The very clear direction at s 144 (10):

> (10) To avoid doubt, the Hearings Panel is not required to make recommendations that address each submission individually.

[143] Approaching the issue purposively and in light of the scheme of Part 4, it is, as Mr Somerville QC submitted, unrealistic to expect the IHP to specify and then state the reasons for accepting and rejecting each submission point. As Ms Kirman helpfully noted there were approximately 93,600 submission points in respect of the PAUP. It would have been a Herculean task to list and respond to each submission with reasons, especially given the limited statutory timeframe to produce the reports (3 years). Furthermore, the listing of individual submissions and the reasons given would inevitably have involved duplication, adding little by way of transparency or utility to interested parties, provided the issues raised by the submissions are addressed by topic in the reasons given by the IHP. Accordingly I can see no proper basis for reading into s 144(8) a mandatory obligation for greater specificity than that adopted by the IHP, namely to identify groups of submissions on a topic by topic basis.

[144] I acknowledge that the IHP reference to having resolved the issue of residential intensification on an "area by area" basis invites speculation as to which submissions or groups of submissions provided the foundation for a planning outcome. As matters have unfolded, this aspect has assumed some significance and with the agreement of Counsel I requested a report pursuant to s 303(5) from the IHP identifying the submissions said to support the outcomes for specific test cases. But it does not follow that the IHP erred by not undertaking this exercise in its reports. The Act plainly envisages resolution of issues by topic not by individual submission or area. The requirement for elaboration at this stage simply provides assistance for the purpose of the appellate and review exercise.

Was it lawful for the IHP to:

> **(a) Determine the scope of submissions by reference to another submission?**
>
> **(b) Determine the proper scope of a submission by reference to the recommended Regional Policy Statement?**

[145] It remains unclear to me precisely what specific recommendations these questions purport to address. The questions appear to be based on limbs (B) and (C) of the third alleged error of law raised in the Character Coalition proceeding. It is pleaded:

> There were methodological errors in the Hearing Panel's approach to scope for the SHZ and MHS rezoning of the 29,000 properties. The methodological errors were adopted by Council (third error). The errors of law were:
>
> …
>
> (B) The Hearings Panel interpreted the scope of generic submissions by reference to the scope of non-generic submissions ("More specifically, there are submissions seeking greater intensification around existing centres and transport nodes as well as submissions seeking that existing special character areas be maintained and enhanced. The greater detail of these submissions assists in understanding how the broader or more generalised submissions ought to be understood."). The scope of a submission cannot be understood by reference to another submission, and it is an irrelevant consideration or wrong legal test to do so.
>
> (C) The Hearings Panel interpreted the scope of submissions by reference to the proposed regional policy statement being evaluated and the subject of recommendations in the Report: ("The strategic framework of the regional policy statement also assists in evaluating how the range of submissions should be considered"). It is circular for the Hearings Panel to draft the recommended regional policy statement, then infer scope in light of the regional policy statement as drafted by it. The proper scope of a submission cannot be understood by reference to a recommended regional policy statement and it is an irrelevant consideration or wrong legal test to do so.

[146] Problematically the pleadings do not particularise specific instances of error, although this may be because the pleadings also allege at limb (A) that the Hearings Panel failed to identify submissions that created scope on an area by area basis and for each area failed to identify whether rezoning was in reliance on one or more submissions or on consequential powers.

[147] In any event, I address the stated questions on an in principle basis to the extent that it may assist the resolution of the pleaded claim.

Assessment

[148] The answer to both questions is yes.

[149] First, as noted at [114] and [135], there can be nothing wrong with approaching the resolution of issues raised by submissions in a holistic way – that is the essence of integrated management demanded by ss 30(1)(a) and 31(1)(b) and the requirement to give effect to higher order objectives and policies pursuant to ss 67 and 75 of the RMA. It is entirely consistent with this scheme to draw on specific submissions to resolve issues raised by generic submissions on the higher order objectives and policies and/or the other way around in terms of framing the solutions (in the form of methods) to accord with the resolution of issues raised by generic submissions.

[150] Second, I could not find a reference in the IHP report purporting to adopt an approach of *enlarging* relief sought in submissions solely by reference to the RPS (though ANLG submit that this error underpinned the decision to zone its land FUZ - discussed below at [270] – [278]. The quote by the IHP in the Character Coalition pleading does not suggest that relief sought has been enlarged by the RPS. Rather it simply states that the framework of the regional policy statement assists in evaluating how the range of submissions should be considered. There can be nothing wrong with this as a statement of methodology:[157]

(a) The RPS sets the policy frame for the regional plan and the district plan so any outcome that gives effect to that policy is prima facie permissible and to be anticipated;[158]

(b) Whether any purported outcome based on the RPS is out of scope of the submission will depend on the wording of the submission – it is not unlawful per se reach an outcome on a submission by reference to the

[157] See also discussion at [102], [135].
[158] *Royal Forest and Bird Protection Society of New Zealand v Buller Coal*, above n 112, at [24], [26].

RPS[159] – for example the submission may simply seek residential intensification of a zone without specifying the precise form of that intensification, but any form must give effect to the RPS.[160]

[151] Conversely, the consequences of failure to have due regard to higher order objectives and policies when formulating a lower order planning instrument were exemplified by the outcome of the *King Salmon*. The Supreme Court (by majority) stated that:[161]

> Parliament has provided for a hierarchy of planning documents the purpose of which is to flesh out the principles in section 5 and the remainder of Part 2 in a manner that is increasingly detailed both as to content and location It is these documents that provide the basis for decision making, even though Part 2 remain relevant.

[152] Within the present context, the RPS sits at the head of the hierarchy and drives the direction of both the regional and district plan.

[153] Third, the theoretical concerns raised by the Character Coalition (and others) about over-extending the recommendations by adopting a top-down approach are offset by the self imposed requirement that the planning outcome must be a reasonably foreseen and otherwise a logical consequence of a submission. This provides a clear bulwark against cross pollination of submissions (vertically or horizontally) in a way that is unfair to potential submitters. If for example the relief sought in relation to Devonport has no reasonably foreseeable or otherwise logical consequence for Grey Lynn, then that relief will likely be out of scope in terms of Grey Lynn. But that is an evaluative matter, not an error of law. Framing the scope of general submissions to accord with the RPS and the cross pollination of submissions for the purpose of making recommendations is not per se unlawful.

To what extent are principles (regarding the question of scope) established under the RMA case law relevant, when addressing scope under the Act?

[154] I have addressed this question above at [114].

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159 See discussion in *Clearwater*, above n 113, at [70]-[78].

160 As required by Local Government (Auckland Transitional Provisions) Act 2010, s 145(1)(f) and Resource Management Act 1991, s 67.

161 At [151].

Did the IHP correctly apply the legal framework in the test cases?

The test cases

[155] At the first case management conference on the appeal and judicial review proceedings before this Court, I directed (without objection from any party) that a preliminary question procedure should be adopted in relation to the central issue of whether the IHP recommendations were within the scope of submissions. The form of the questions, together with test cases, was developed by the parties, culminating in the Preliminary Questions noted at [3] and nine test cases:

(a) Mount Albert;

(b) Glendowie;

(c) Blockhouse Bay;

(d) Judge's Bay Parnell;

(e) Wallingford St, Grey Lynn;

(f) The view shaft on the Strand;

(g) 55 Takanini School Rd;

(h) The Albany North Landowner's Group site; and

(i) The Man O'War test case.

[156] At the hearing I also resolved that the upzoning of 65 Howick properties identified by the HRRA should also be addressed as a test case.

[157] The first five test cases (and the Howick properties) concern residential zoning and whether the IHP recommendations to upzone affected areas were within scope of the submissions in respect of those areas. I propose to address these test cases first at a

general level, and then on an individual basis. The remaining test cases are fact specific and will be dealt with individually.

[158] The parties produced agreed statements of fact for each test case, which have been largely adopted by me.

Identification of relevant submissions

[159] As noted at [101], the issue of scope has two related aspects: legality and fairness.

[160] In order to address the first aspect, I base my assessment on the submissions identified by the IHP in the report produced at my request on 20 December 2016. While other submissions appear to confer jurisdictional scope, the submissions relied upon by the IHP provide the basis for the legality of its decision. The second aspect however triggers broader considerations. This assessment is not confined to what the IHP considered conferred jurisdictional scope. Rather, the resolution of questions of procedural and substantive fairness depends on the full context, including the s 32 report, the PAUP, the full public record of submissions and the hearing process.

The Maps

[161] A residual issue highlighted by the 'out of scope' parties is that the IHP refers to having relied on HNZC "839 A + C series maps". There was some confusion as to which set of maps the IHP was referring to, the C series evidence maps or the C series proximity maps. In a subsequent report dated 7 February 2017, the IHP clarified that the "839 A + C series maps" refer to maps produced by HNZC in evidence; that is the maps that illustrated HNZC submission 839 entitled "Rezoning Summary for HNZC Properties and Consequential Amendments". The IHP also noted that it requested HNZC to provide a shape file that joined together its zoning shape file (reflected in evidence) and the Council's in scope evidence version of its zoning shape file. HNZC then lodged that shape file and subsequently maps depicting information in the shape file entitled "Scope Categories A and C – Evidence Zone Map Series (the Maps). In any event, as those maps were not produced with the primary submissions notified to the public they cannot enlarge the scope of the primary submission. The 'out of scope'

parties therefore contend that insofar as the IHP placed reliance on the maps, this evinces jurisdictional error. I do not accept this complaint. The maps are simply spatial representations of HNZC's primary submission. Whether they do so accurately for the purpose of the assessment of scope was an evaluative matter for the IHP. Provided that the potential for the zone changes illustrated by the Maps was made clear in the written submission, the IHP could properly refer to them for the purpose of assessing scope.

Overview of test cases on residential zoning

[162] Character Coalition, Auckland 2040 and HRRA collectively submit (in summary):

(a) A number of the generalised submissions seeking upzoning were so far reaching that they were not "on" the PAUP, as informed by the s 32 process;

(b) The IHP recommendation upzoned more than 29,000 homes previously identified by the Council as out of scope;

(c) While generalised submissions sought residential intensification across the Auckland region, none of the submissions specifically identified these 29,000 homes for residential intensification of the type recommended by the IHP;

(d) The notified plan, the submissions and the summary of submissions did not put the 29,000 affected residents (among others) on reasonable enquiry about the potential for wholesale upzoning of their neighbourhoods, and in particular:

    (i) A landowner cannot be reasonably expected to enquire beyond the provisions (including maps), submissions and summary of submissions specifically referring his or her address or neighbourhood;

(ii) The generalised submissions did not specifically refer to the 29,000 affected homes (including the 65 homes identified by the HRRA as out of scope); and

(iii) The submissions were largely inaccessible, particularly as they were not ordered in terms of streets or neighbourhoods.

(e) The 29,000 affected landowners have not had a reasonable opportunity to voice their concerns; and

(f) There is nothing in the IHP reports to show that the IHP turned its mind to the implications for these landowners and notably:

(i) The IHP report does not identify the submissions said to support the upzoning of these properties;

(ii) The formal requirements of s 144(8)(b) in terms of identifying the relevant submissions and the reasons for accepting or rejecting them have not been met, further illustrating a lack of attention given to affected persons; and

(iii) The IHP claims to have addressed scope on an area by area basis but there is nothing in the reports to support this claim.

[163] The Council, HNZC, Ministry for the Environment, Ockham, Property Council and Equinox respond (in summary) that:

(a) A key issue for the PAUP was the extent of the provision for urban intensification to accommodate growth;

(b) The generalised submissions seeking region wide intensification were plainly directed to this issue and therefore within the scope of the PAUP;

(c) The combination of generalised, area and site specific submissions provided ample scope for the IHP recommendations. The Council, for example, identified four categories of submissions that provided scope:[162]

(i) **Category 1** - RPS objectives and policies;

(ii) **Category 2** - objectives a policies for residential zones, removal of overlays etc;

(iii) **Category 3** - patterns of zoning; and

(iv) **Category 4** – upzoning for particular areas or sites.

(d) The test is not whether affected persons were put on "reasonable enquiry" – there is no authority to suggest that a test based on the subjective competency of the affected person to access Council's search engine is mandated, but that test is satisfied in any event;

(e) Preliminary mapping of the spatial extent of the scope of a sample of submissions available to the IHP in relation to the test cases show that the IHP had sufficient scope to recommend the residential zoning relief set out in the test case areas. Specifically, HNZC submitted that submissions seeking changes through narrative description, but in a way that enables identification of whether or not land is affected, are also valid. This included submissions seeking to change zoning applying to:

(i) All land subject to a given use, for example in Ockham's submission 6099-4, which sought to rezone as MHU all areas zoned MHS under the PAUP;

(ii) All land within a specific distance of a particular category of land use or zone, for example in Ockham's submission 6099-7 which

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[162] This is the Council's categorisation. Dr Kirman for The Minister for the Environment and HNZC identified six submission typologies which fall within the four categories identified by the Council.

sought a THZ zone for all land within 10 minutes' walk of transport nodes;

(iii) All land within an area of the Region that is described through identifying its boundaries, for example submission 5478-54 by Generation Zero, which sought rezoning of all MHS land to MHU within the area bounded by State Highway 20 to the South, the Southern Motorway to the East, Onehunga railway line to the Southeast, and the Waitemata Harbour to the North; and

(iv) Submissions seeking reinstatement of an earlier zoning proposal, for example, Property Council's submission 6212-22 to reinstate the residential zoning under the 2013 draft Unitary Plan.

(f) In any event, non property specific or generic submissions have always provided scope to enable changes in accordance with orthodox macro level approaches to planning and the RMA's focus on integrated and sustainable management; and

(g) The recommendations were a reasonably foreseen consequence of the issues addressed by the PAUP and the submissions on those issues.

The submissions on residential intensification

[164] The submissions identified by the IHP as conferring scope, together with the Council's publicly notified summary of those submissions are set out in **Appendix A** to this judgment. A selection of submissions identified by the "in scope" parties as providing scope is set out in **Appendix B**. A selection of further submissions is also set out in **Appendix C**.

A helicopter view

[165] The IHP identified a broad spectrum of submissions said to provide scope for the recommendations. Particular emphasis was placed on the Council's "in scope" submissions and the HNZC submissions.

[166] Generally speaking, the IHP's recommendations were plainly within the jurisdictional scope of these submissions on the PAUP. First, there is nothing "left field" about the recommendations or the submissions. The extent and form of urban residential intensification was a major issue raised by the s 32 reports, with the precise extent, form and location of such intensification left open for final resolution through the notified hearing process.[163] These submissions (among other) simply address this major issue by seeking substantially greater provision for residential intensification throughout Auckland. The s 32 reports also identify competing positions, including those of, for example, HNZC, Ockham and Character Coalition, and refer to a "laissez faire" approach as one alternative option to providing for urban growth. Accordingly, it should have come as no surprise to any person genuinely interested in residential intensification and or residential amenity to see the competing positions thoroughly ventilated in submissions on the PAUP.

[167] Second, the submissions relied upon by the IHP and others clearly envisaged comprehensive amendments to the policy framework and consequential changes to the methods (including zones) used to give effect to that policy framework and the potential for substantially increased residential intensification both in areal extent and density. In this regard, I have examined the evidence maps for the test case areas and I am satisfied they fairly illustrate the wide scope conferred by the HNZC submissions, see especially submissions 839-17 and 18 (Appendix B). I am also satisfied, save where I indicate below, the recommended changes broadly fall within the areal extent of the requested changes in the Maps.

[168] Third, there are corresponding and equally comprehensive submissions and further submissions seeking maintenance of the status quo in terms of residential amenity. These submitters were plainly alive to the prospect of changes to residential zones given the pressing issue of urban growth. For example, in response to one of Generation Zero's submissions, Auckland 2040 in further submission wrote that the submission, if allowed, "would permit unrestricted apartment development across all residential areas other than those zoned SH…[and] encourage removal of the existing housing and its replacement with high density and multi storey development."[164]

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163 Auckland Council, above n 14, at 5.
164 See also Appendix C.

[169] I am also satisfied that at a high level of generality, the recommendations made by the IHP were reasonably and fairly raised by the submissions identified by the IHP. The Summary of Decisions Requested (SDR), a publically available summary of submissions made to the IHP, describes the broad effect of the foregoing and other submissions. They alert the reader to the potential for significant changes to the proposed plan as it relates to provision for residential intensification. Indeed, an interested landowner reading, for example:

(a) the HNZC submission summaries would see requests for comprehensive zoning changes throughout Auckland based on proximity criteria together with requests for zoning changes to enable site specific upzoning of its landholdings;

(b) the Ockham submission summaries would see a request for comprehensive zoning changes based on very broad locational criteria, including proximity to transportation nodes and arterial routes located, as well as more general requests to see the size of the SHZ reduced and density controls deleted;

(c) the Auckland Property Investors Association Inc submission summaries would see a request for changes based on locational criteria, including sites within 700m of a railway station and centres; and

(d) the Generation Zero submission summaries would see a general request to make changes necessary to achieve the Auckland Plan and RPS targets elaborated upon below at [170].

[170] In summary, a landowner genuinely interested in preserving local residential amenity when presented with the submissions identified by the IHP (and others) on residential zoning must have appreciated that broad and detailed changes to the nature and extent of residential zoning throughout Auckland were sought by numerous parties, and indeed had been contemplated since the creation of the Auckland Plan. The vision of a quality compact urban form which could house 70% of a projected 1,000,000 new residents by 2040 within the existing metropolis by intensifying primarily near centres

and transport hubs was first signalled in the Auckland Plan, the s 32 reportage, and subsequently in a multitude of submissions, which individually and collectively foreshadowed change. Each envisages change based on cascading levels of intensification, with highest levels of intensification within or close to centres, and along arterial and connecting routes, together with increased provision for residential activity within mixed urban and suburban environments, spreading out from these key hubs. The Housing New Zealand submission is simply an example of the cascading intensification sought by the Council and submitters which would have alerted landowners to zoning requests to enable upzoning of a constellation of residential sites across Auckland. Accordingly, I see no error in the IHP's summary of its approach to scope, particularly its approach to consequential changes outlined at [96].

Accessibility of Council website

[171] I have considered whether the presentation of the summary of decisions sought on the council website may have affected the ability of interested landowners to participate in the submission process. Concerns were raised by Mr Brabant and Mr Enright about the usability of the Council's website and submission summaries. The basic tenor of their submission was that interested landowners would not have been put on notice of changes affecting them because a search for submissions on a particular address, street or neighbourhood would not have triggered notification of, for example, the HNZC or Ockham submissions.

[172] I agree a search on a specific address, street or neighbourhood might not uncover submissions seeking residential intensification at an address, street or neighbourhood. However, I do not accept that this is the standard of enquiry to be expected of a potentially affected landowner on matters as significant as 30 year provision for urban growth and residential amenity. It is not necessary to be precise about the standard, but it must be reasonable in the context of the planning process and the issue under consideration. The present context included a s 32 report signalling that major residential intensification was needed and required major reformation of Auckland residential zones. The central issue raised by the "out of scope" parties is the effect of provision for residential intensification on local character and amenity. In this context, a reasonable level of diligence is to be expected by landowners genuinely interested in

preserving the status quo, whether at a site specific or more general neighbourhood or zone level. It is not sufficient to simply examine the PAUP maps or the summary of submissions on those maps, which as the s 32 report signalled, were based on preliminary assessments of growth only. Rather, a reasonable landowner genuinely interested in preserving, for example, the status quo in terms of local character and amenity should be expected to search more broadly on topics such as urban growth and residential zoning which directly affect residential character and amenity.

[173] The Council noted that the submissions seeking residential intensification were coded to a “RPS”, “Urban Growth”, “Residential Zones” and Topic “Residential”; Theme “Zoning” and Topic “Central” and Theme “General” and Topic “Cross Plan Matters”. A cursory search of topics such as “Urban Growth” and “Residential” quickly brought into frame submissions relief on zoning and intensification, including those seeking wholesale reformation of residential zones to accommodate growth. A more refined, but not arduous search, also revealed changes specifically affecting various neighbourhoods and in particular by reference to the HNZC submission. I am satisfied therefore that the Council summary of submissions was sufficiently accessible to persons genuinely interested in the issues of urban growth, residential intensification and residential amenity to provide sufficient notice of the potential for changes of the kind recommended by the IHP.[165]

[174] I am fortified in this view by the record of further submissions on the submissions underpinning the IHP’s urban growth. To illustrate, the Character Coalition, representing over 55 community groups,[166] and Auckland 2040 made comprehensive further submissions in opposition to submissions by several of the abovementioned

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165 The use of the search engine was not a matter of evidence, but I was given a presentation about its use and
it formed part of the common bundle of information (by link) tabled for my consideration.

166 Including the following residents’ associations: Birkenhead Residents’ Association, Castor Bay Ratepayers’ & Residents’ Association Inc, Eden Park Neighbours’ Association, Ellerslie Residents Association Inc, Freemans Bay Residents’ Association, Grey Lynn Residents’ Association, Herne Bay Residents’ Association, Hill Park Residents’ Association, Howick Residents and Ratepayers’ Association, Laingholm District Citizens Association, Mangere Bridge Residents and Ratepayers, Milford Residents Association, Mission Bay Residents Association, Mt Albert Residents’ Association, Northcote Residents’ Association, Orakei Residents Society, Orewa Ratepayer and Resident Association, Point Chevalier Residents Againts THABS Inc., Snells Beach Ratepayer and Resident Assoc, South Kaipara Ratepayers’ Association, St Heliers/Glendowie Residents Association, Te Atatu Residents and Ratepayers Association, and Titirangi Residents and Ratepayers Association.

submitters seeking upzoning of residential zones throughout Auckland. The Council summary of decisions requested was obviously sufficiently accessible to trigger submissions by genuinely interested parties.

[175] One further issue put in argument was whether a "subjective" test of notice was appropriate. Mr Bartlett QC for Equinox submitted that it was simply a matter of whether there was a submission, literally construed, that was on point. If so, it conferred jurisdiction. There is support for this approach in *Countdown*, which cautioned about the "danger of substituting a test which relies solely upon the Court endeavouring to ascertain the mind or appreciation of a hypothetical person"[167]. The Court observed:[168]

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

[176] This has attractive simplicity but I think it is preferable, when dealing with a planning process of the present scale, to be cautious about the extent to which affected persons are fairly on notice of potential for changes that might substantially change, for example, their residential amenity. To that extent I prefer to approach the assessment employing a test based on what might be expected of a reasonable person in the community at large genuinely interested in the implications of the PAUP for him or her. It is the type of assessment that Judges must regularly make on behalf of the community in resource management matters.[169]

The Council's change of position

[177] Some emphasis was placed firstly on the Council's December 2015 position signalling the potential for upzoning of 29,000 or 7% of "out of scope" properties and secondly the resolution of the Council to withdraw from supporting changes to enable the upzoning of those properties. The "out of scope" parties submitted that these facts

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167 *Countdown Properties (Northlands) Ltd v Dunedin City Council*, above n 90, at 172.
168 At 171-172.
169 *Watercare Services Ltd v Minhinnick* [1998] 1 NZLR 294 (CA) at 304-305.

support their argument that the recommendations upzoning those properties were always out of scope and that reasonable property owners relied on the Council's rejection of its own upzoning as out of scope. They contend that as a consequence of the Council's February resolution, affected landowners may have believed nothing further was required of them, compounding the unfairness of allowing unanticipated out of scope proposals to form part of the IHP's considerations in the first place. I was also referred to passages of evidence of an experienced urban planner and convenor of Auckland 2040, Richard Burton, recording that many residents had only come to the realisation that there may be significant changes to their zoning proposed by the Council because "they had not been notified and are only finding out about it through media coverage and word of mouth". While it is conceded that Auckland 2040 was able to argue that the proposed upzoning was out of scope because it was a submitter on the HNZC submission, they submit that this did not cure these process concerns.

[178] The underlying theme of the submissions of the 'out of scope' parties is that the 29,000 upzoned landowners had a reasonable expectation that the PAUP set the frame for residential zoning and the Council resolution of February 2016 affirmed that expectation. But I do not accept that the s 32 report or the PAUP provided a proper basis for such an expectation. I have addressed the relevance of s 32 report and notified PAUP in detail above. They do not purport to fix a final frame for residential intensification and explicitly foreshadow the need for further modelling work. The PAUP could realistically only be seen as a starting point for consideration as clearly evidenced by the wide ranging and voluminous submissions seeking changes to it, including many by the 'out of scope' parties and other submitters seeking maintenance of low density, special character and heritage areas, among other things in the face of proposed intensification. Accordingly, while the February resolution records the then position of the Council, and is a factor to be weighed in terms of the reasonableness of the IHP's assessment on scope, it did not affirm or give rise to any reasonable expectation as to outcome.

[179] I turn now to consider the test cases.

Mount Albert

[180] The Mount Albert test case area includes the residential area bounded by Oakley Creek, Unitec Campus on Carrington Road, Segar Ave, Chamberlain Park, Burnside Ave, Martin Ave, Rossgrove Terrace, Wairere Ave, Alberton Ave, Mount Albert Road, Mount Royal Ave, Richardson Road, Harlston Road, and Ennismore Road. This includes New North Road from Alberton Ave to Ennismore Road.

[181] The test case area includes the Mount Albert town centre located along New North Road and Mount Albert maunga (Owairaka). The Unitec Wairaka campus is located on Carrington Road which is on the fringe of the test case area. A number of primary and secondary schools are also located within or close to the test case area, including Mount Albert Grammar School.

[182] There are also a number of open spaces located close to and in the test case area, which include Phyllis Reserve, Chamberlain Park, Mount Albert War Memorial Reserve, Alice Wylie Reserve, Allendale House and Reserve, Anderson Park and Mount Albert – Owairaka Domain.

[183] The area is within walking distance of a rapid and frequent public transport service network running along New North Road, Carrington Road, and Mount Albert Road along with the western railway line. Two train stations, Mount Albert and Baldwin station are located within the test case area.

[184] In the Notified PAUP, residential intensification and zoning for Mount Albert was provided through the application of the:

(a) THZ to the north of Mount Albert town centre and along Carrington Road and New North Road;

(b) MHU zone adjacent to THZ, and along Woodward Road, New North Road, Carrington Road, Seaview Terrace, and Asquith Ave; and

(c) MHS zone was applied across remaining parts of Mt Albert.

[185] Within the notified PAUP, the Pre-1944 Building Demolition Control, Special Character and Volcanic Viewshafts Height Sensitive Area overlays were applied over many residential properties within the Mount Albert test case area. A less intensive zone (e.g. SHZ) was applied to properties affected by the Special Character and Volcanic Viewshafts Height Sensitive Area overlays. The Mount Albert test case area is also affected by a number of flood plain hazards, introduced and identified as part of the non-statutory geospatial layer in the notified Proposed Auckland Unitary Plan. A less intensive zone (e.g. SHZ) was applied to properties affected by the flooding layer.

[186] Following the hearings of submissions in Topic 081, the Council filed maps which set out its position on proposed rezonings. The Decisions version of the Unitary Plan retained a mix of SHZ, MHS, MHU, THZ and Mixed Use, however, the largest proportion of residential land is now MHU.

Argument

[187] The Council contends that all 4 categories of submission (see [163] above]) can be found in relation to Mt Albert, providing a comprehensive basis for the upzoning recommendations:

(a) Category 1 – directed towards the region wide strategic need to intensify, particularly around centres and along transport corridors resulting in greater intensification around the Mt Albert centre and key transport routes such as New North Road, Woodward Road, Richardson Road and Carrington Road;

(b) Category 2 – on objectives and policies, overlays and Auckland wide provisions directed to spatial change and requiring rezoning to ensure consistency with higher order strategic objectives and policies, resulting in (among other things):

(i) increased walking distances to be imposed when applying a higher density residential zoning near transport corridors (e.g. increased use of THZ and MHU around New North Road,

Carrington Road and Woodward Road and around the Mt Albert town centre); and

(ii) Removal of overlays that affected underlying zoning.

(c) Category 3 – on the pattern of zoning, for example the Ockham submission seeking to enlarge THZ on all residential sites within five minutes walk of all main arterials (e.g. New North Road) or the Jacques Charroy submission seeking intensification of the inner suburbs including Mt Albert.

(d) Category 4 – on specific sites, with 186 submission points seeking site specific relief, a significant portion of these sought upzoning (including HNZC submissions affecting 340 properties).

[188] Character Coalition and Auckland 2040 accept the category 3 and 4 submissions based on clear locational criteria provide scope for upzoning. But they submit that:

(a) the submissions are not otherwise sufficiently explicit to clearly signal other or consequential changes of the extent made by the IHP;

(b) only 831 of the 2380 properties upzoned by the IHP were subject to site specific requests; and

(c) without any identification of the submission or submissions relied upon the Council's reliance on submissions affording scope is conjectural.

Assessment

[189] I am satisfied that submissions identified by the IHP provided jurisdictional scope for the recommendations. The listed generalised submissions plainly signal the potential for significant change throughout Mt Albert and the HNZC 'A and C series maps' for Mt Albert (Mount Albert – GIS-4215672-42b, Point Chevalier – GIS-4215672-42b) are illustrative of spatial extent of relief sought by the HNZC submissions.

[190] I am also satisfied that the recommended changes for residential zoning in Mt Albert are reasonably and fairly raised by submissions. Mt Albert was identified at the outset as a centrally located suburb with major transportation infrastructure, and was thus destined for significant residential intensification. Furthermore, I accept the Council's submission that the combination of the four categories of submission seeking upzoning in Mt Albert provided ample notice to persons genuinely interested in residential amenity that the recommended changes were a potential outcome of the submissions. In addition, having regard to the scope to make change afforded by the generalised submissions, I agree with the IHP that the consequential upzoning of properties was a logical consequence of locational and site specific submissions expressly seeking upzoning of approximately 831 properties spread throughout Mt Albert.[170]

Glendowie

[191] The Glendowie test case area includes the residential area bounded by Glendowie Road, Riddell Road, St Heliers Bay Road, Sylvia Road, Yattendon Road, Vale Road, Clarendon Road, Cliff Road and the coastline.

[192] The test case area includes three large open spaces: Churchill Park, Glover Park and Glendowie Park. The Saint Heliers local centre is the closest local centre to the residential area and is located outside the test case area on Tamaki Drive and St Heliers Bay Road.

[193] A number of primary and secondary schools are also located close to or within the test case area: Sacred Heart College on West Tamaki Road, Glendowie College on Crossfield Road, and Churchill Park School (a primary school) on Kinsale Ave.

[194] There are a number of residential properties in parts of the test case area that are within walking distance of a frequent public transport service that runs every 15 minutes along St Heliers Bay Road and Tamaki Drive. Three local connector bus services run at

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[170] This is the figure identified by Character Coalition and Auckland 2040 as representing the properties affected by locational or site specific requests. The total number of affected properties is identified as 2380.

various times during the day through the test case area and link up to the frequent public transport services.

[195] In the notified PAUP, residential intensification and zoning for Glendowie was provided through the application of the:

(a) MHU zone to properties along Yattendon Road, Rarangi Road, Clarendon Road;

(b) The application of the MHS zone to properties along Riddell Road and west of Maskell Street/Waimarie Street; and

(c) A SHZ was applied throughout the rest of the Glendowie test case area.

[196] In the notified PAUP, the neighbourhood shops located on the corner of Waimarie Street/Maskell Street and on the corner of Riddell Road/Maskell Street were zoned neighbourhood centre.

[197] Within the notified PAUP, the Pre-1944 Building Demolition Control, Special Character and Significant Ecological Area overlays apply over a number of residential properties within the Glendowie test case area. A less intensive zone (e.g. SHZ) was applied to properties affected by the Special Character and Volcanic Viewshafts Height Sensitive Area overlays.

[198] The Glendowie test case area is also affected by a number of flood plain hazards, introduced and identified as part of the non-statutory geospatial layer in the notified PAUP. A less intensive zone (e.g. SHZ) was applied to properties affected by the flooding layer.

[199] Following the hearings of submissions in Topic 081, the Council filed maps which set out its position on proposed rezonings.

[200] In the Decisions version of the Unitary Plan, Glendowie is predominantly zoned MHS, with smaller areas of SHZ to the north east and MHU to the west.

Argument

[201] The Council submits:

(a) The impact of Category 1 submissions can be seen by the widespread rezoning of SHZ areas to MHS and the rezoning of MHS areas on the outskirts of the test case area to MHU;

(b) The Category 2 submissions by HNZC, particularly relating to the removal of overlays, and other broader submissions on residential objectives and policies, supported the IHP's approach to scope;

(c) Category 3 submissions, for example by Ockham, illustrate scope for the reduction of SHZ within Glendowie and MHU upzoning along St Heliers Bay road;

(d) 27 site specific Category 4 submissions were made in relation to Glendowie, providing a basis for some consequential change.

[202] The Character Coalition and Auckland 2040 contend:

(a) No resident of Glendowie would have likely located the generalised submissions and if he or she had seen them considered they applied to Glendowie given that none of the streets identified by the submissions are Glendowie streets.

(b) With only 27 properties identified there was no scope for consequential changes.

Assessment

[203] In addition to the general submissions identified by the IHP as conferring scope, reliance was also placed on HNZC A+C series maps and 3 site specific submissions.

[204] My general observations at [166]-[168] dealing with jurisdictional scope above apply with equal force to this test case. I have also examined the HNZC evidence A and C Maps for Glendowie (Saint Heliers – GIS-4215672-42b) and, as outlined at [167], I am therefore satisfied that jurisdictional scope was conferred by the generalised submissions.

[205] On the second issue of fairness, the Council emphasised the Category 1 and 2 submissions as providing the requisite scope.

[206] I agree a search of the SDR by reference to urban growth and or residential zones quickly unveils submissions clearly signalling the potential for great changes in residential zoning throughout the Auckland region based on seeking stronger provision for intensification sought and through various locational criteria that may have direct application to Glendowie. The following table includes a sample of these submissions, which should be read in conjunction with the submissions in Appendices A and B.

Submitter	**Submission**	**Summary of the submission**
Community of Refuge Trust (CORT)	CORT opposes the Compact City notion that large segments within the city (Single House + Mixed Housing Suburban zones) can avoid responsibility for intensification based on the argument contained within 3.3 that their areas are somehow special due to their character, identity and heritage. The Council already has existing tools to protect these characteristics if they are truly unique. To argue that 85% of the city including the Single House, Large Lot, Rural & Coastal and Mixed Housing Suburb zones are all special zones that exclude medium density housing is a counterproductive to the success of the Compact City model. CORT argues the Single House zone promotes the opposite of the Compact City model promoted by the Council. It strengthens property owners' rights to resist intensification. The zone promotes the car use, challenges the development of efficient public transport and supports communities through regulation avoid responsibility for the sustainable growth of the city.	Reject the Compact City notion that large segments within the city (Single House + Mixed Housing Suburban zones) can avoid responsibility for intensification based on the argument that their areas are somehow special due to their character, identity and heritage. Amend the extent of the Single House zone significantly to less than 10% of the Auckland area.

	Recommendations The zone size is significantly reduced, ideally to less than 10% of the Auckland area.	
Ben Smith	The Auckland Plan clearly outlines Auckland's housing shortage and the need for 13,000 new homes in Auckland every year for the foreseeable future. Point 129 of the Auckland Plan outlines 60% to 70% of total new dwellings inside the existing core urban areas as defined by the 2010 MUL. The Auckland Plan also specifies that the Council will be responsive to the strong demand for housing in Auckland and ensure that supply of housing meets demand. Point 132 of the Auckland Plan specifies that "The Unitary Plan will support this strategy. Auckland Council will implement enabling zoning across appropriate areas in the new Unitary Plan. This will maximise opportunities for (re)development to occur through the initial 10- to15-year life of the Unitary Plan, while recognising the attributes local communities want maintained and protected". … In order to achieve this objective, the Auckland Council should amend zoning allocation, building heights, and building coverage. … If the Proposed Plan is not declined, then amend it as outlined below: – Pertaining to the zoning allocation of the Unitary Plan: – Re-zone some areas currently planned for Single Housing for the Mixed Housing Suburban Zone. – Re-zone some areas currently planned for Mixed Housing Suburban for the Mixed Housing Urban Zone – Re-zone some areas currently planned for Mixed Housing Urban for the Terraced Housing/Apartments Zone.	Reconsider allocation of residential zoning to ensure the Auckland Plan requirement of 60-70% of 13,000 new dwellings per year be built within the 2010 MUL. Upzone some areas of Auckland to provide for more housing. For example: Rezone areas of Single House to Mixed Housing Suburban, areas of Mixed Housing Suburban to Mixed Housing Urban and areas of Mixed Housing Urban to Terraced Housing and Apartment Buildings [no specific locations provided].
Cooper and Associates	Greater proportion of land to be designated as Mixed Housing Urban especially in areas of high land value, adjacent to large natural features and along transit corridors” and a “Greater proportion of land designated as	Increase the extent of the Mixed Housing Urban zone.

	terrace housing/apartments especially in areas of high land value, adjacent to large natural resources (parks, waterfront etc) and along transit corridors. Increasing the height limit of these areas to 8-12 stories will also provide a good middle ground for the development proposition.	

[207] Furthermore, the merits of upzoning generally and questions of scope were thoroughly investigated by the IHP, including with the benefit of detailed submissions and evidence from representative groups such as Character Coalition and Auckland 2040.

[208] The Council properly conceded that there are relatively few area or site specific submissions (categories 3 and 4) referring to Glendowie. The prospect of widespread foreseeable consequential spatial change is not so readily inferred from those entries. Given this, it is difficult to be definitive about the level of specific notice to residents of Glendowie or as Messrs Brabant and Enright put it, where the line for change was to be drawn. But, as Ms Kirman noted for HCNZ, throughout the IHP's process for refining the purpose objectives and rules for the SHZ, both Auckland 2040 and the Character Coalition acknowledged the recasting of the objectives and policies for the SHZ, if accepted would result in significant changes. This strongly indicates awareness of the generalised submissions seeking broad change. For example, legal submissions for Auckland 2040 noted:

> The inevitable consequence of the proposed changes to the SHZ description and the objectives and policies is that the zone could no longer be applied to the majority of the areas currently shown in the PAUP maps as SHZ. If these sweeping changes to the zone provisions were accepted, it follows that either the Auckland Council or other party to the hearings will seek the removal of the existing zoning from the majority of the properties presently zoned SHZ.

[209] Overall, I am therefore satisfied that there was a sufficient basis for the recommendations given the full background to the submission process, and the numerous requests for upzoning based on the Council's categories 1 and 2 submissions, in combination with submissions based on broad locational criteria (for example 700m from town centres, relative proximity to arterial and connecting routes, and other high

amenity areas identified for intensification such as schools and public parks).[171] In this context, there is an air of Shire like unreality to the submission that the residents of Glendowie would not have appreciated that there might be broad changes to their residential landscape. It is also significant that the nature of the upzoning in this test case area is clearly tailored to its environs, with most of the rezoning to MHS. To reiterate, the IHP envisaged that the "Residential - Mixed Housing Suburban Zone will facilitate some intensification while retaining a more suburban character, generally defined by buildings of up to two storeys."[172] This illustrates that the IHP has not applied open ended submissions *carte blanche* to achieve upzoning. Rather the MHS zone is a compromise between the current SHZ and the more intense MHU and THZ applied in areas that are more directly implicated by the centres and corridors strategy. In balancing the competing agendas of submitters, and achieving consistency with the Auckland Plan and RPS, then, the IHP has proceeded in a manner that could have been reasonably anticipated by Glendowie residents genuinely interested in local residential amenity.

Blockhouse Bay

[210] The area covered by this test case is relatively large, and consists primarily of low-density suburban neighbourhoods. It is an area that has reasonable walking proximity to nine arterial roads with access to public transport, but there are some neighbourhoods and/or streets that do not have close proximity to a town or local centre.

[211] The Blockhouse Bay test case area includes a number of separate neighbourhoods of varying sizes in an established low-density suburban environment. Ten of the chosen neighbourhood areas are close to the coastal environment of the Manukau Harbour and adjoining significant recreation and open space areas. The other identified locations further north are outside walking distance to the transport network. There are however a number of schools across the test case area including Blockhouse Bay Primary, Blockhouse Bay Intermediate, St Dominic's School and Chaucer School, as well as numerous parks including Blockhouse Bay Recreational Reserve, Grittos Domain, Craigavon Park and Miranda Reserve.

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171 See Appendices A and B for elaboration.
172 Auckland Unitary Plan Independent Hearings Panel, above n 51, at 15.

[212] The zoning for the majority of the test case area in the PAUP as notified was SHZ and MHS. Maps prepared by the Auckland Council in December 2015 showing proposed upzoning of some 27,000 residential properties including all of those in the Blockhouse Bay test case area were uploaded to the IHP's website on 26 January 2016. Following the hearings of submissions on Topic 081, the Council produced residential zoning maps which set out its position on proposed rezoning as part of its Closing Remarks on the topic. The maps showed retention of the SHZ in the test case area.

[213] Following recommendations from the IHP, the majority of the SHZ areas were upzoned to MHS, and the majority of the MHS areas were upzoned to MHU. The THZ zone south of Bolton Street was also enlarged.

Assessment

[214] The IHP identified a number of general and specific submissions said to confer jurisdiction, including the HNZC submission: refer Appendix A.

[215] I was not able to verify close correspondence between the HNZC Maps (Mount Roskill - GIS-4215672-42b, New Lynn - GIS-4215672-42b) and Barton and Wade Streets. But, in any event, as with Mt Albert, I am satisfied that given the depth and breadth of the submissions relating to residential intensification generally and Blockhouse Bay in particular, the recommendations were not beyond the jurisdictional scope conferred by the submissions identified by the IHP.

[216] I am also satisfied that IHP's recommended amendments to the residential zoning are reasonably and fairly raised by the submissions, for the reasons given at [190] and [209] above, but also given that a large number of submissions that specifically identified Blockhouse Bay, including the following:

Submitter	**Submission**	**Summary of the submission**
Helen Geary	Blockhouse Bay. This very average housing quality suburb is mostly zoned single house with very little mixed zoning or intensification planned. Surely all parts of Auckland should experience some intensification, and this could allow some heritage areas to be downzoned. I seek that: Blockhouse Bay have some areas	Rezone some areas in Blockhouse Bay from Single House zone to Mixed Suburban [inferred to mean Mixed Housing Suburban zone] to correspond with down-zoning to Single House zone area of Mt

	upzoned from single house to mixed suburban, to correspond with downzoning to single house zone of areas of Mt Eden (ie. Ashton Road).	Eden (i.e. Ashton Road).
NZIA	THAB would provide additional height/density along New Windsor Road and Blockhouse Bay Road ridges and zoned to support higher densities and align additional density with view and daylight amenity. THAB & MHU would provide additional height/density along Blockhouse Bay Road (south of New Windsor Rd) and Whitney Street with an increase in the legibility of 'north/south' visual/movement links connecting the neighbourhood to surrounding town centres. Blockhouse Bay Town Centre SH and MHS zoning doesn't make use of proximity to Town Centre. Highly sought after residential area where high land values would support apartment type investment and development. Near Town Centre: Recommend THAB or Mixed Use with conditions that 2+ levels THAB to be provided over any non-residential use(s) below. Significant movement streets linking Town Centres: MHU & MHS provides additional density along Margate Road/Mary Dreaver Street link, Terry Street & Bolton Street with an increase in legibility of 'east/west' visual/movement links within the neighbourhood. Blockhouse Bay North – New Windsor South THAB & MHU provides additional height/density along New Windsor Road, Wolverton Road, Tiverton Road and Blockhouse Bay Road and align additional density with view and daylight amenity. THAB & MHU provides additional height/density along Taylor Street and Whitney Street with an increase in the legibility of 'north/south' visual/movement links connecting ttle neighbourhood to surrounding town centres. MHU provides additional density along Margate Road/Mulan Street/Mary Dreaver Street/Etc link and the Terry and Bolton Street links with an increase in legibility of the 'east/west' visual/movement links within the neighbourhood.	Rezone land on Blockhouse Bay Road, New Windsor Road and Ballard Avenue, Avondale as shown in the submission [refer to page 100/104] from Single House and Mixed Housing Suburban to Mixed Housing Urban and Terrace Housing and Apartment Buildings. Rezone land surrounding Blockhouse Bay Town Centre as shown in the submission [refer to page 100/104] from Single House and Mixed Housing Suburban to Mixed Housing Urban and Terrace Housing and Apartment Buildings. Rezone land around Blockhouse Bay and New Windsor as shown in the submission [refer to page 104/104] from Single House and Mixed Housing Suburban to Mixed Housing Urban and Terrace Housing and Apartment Buildings.
Edward Jones	THAB zone within 350 metres of the Blockhouse Bay Local centre. … The property within 250 metres of the Blockhouse Bay Local Centre is ideally suited to the THAB zone as they are within a short walk of the bus routes to Downtown Auckland,	Amend Terrace Housing and Apartment Zone to include the East side of Blockhouse Bay Road between Exminster Street and the Taylor Street intersection.

	New Lynn, Onehunga/Penrose and the local retail and community facilities. … I would like to see the THAB zone extended to include the East side of Blockhouse Bay Road between Exminster Street and the Taylor Street Intersection. If these properties were to be developed as terraced housing or apartments they would balance out the west side of Blockhouse Bay Road forming an impressive entry to the Blockhouse Bay Shopping Centre as you approach from the North. These few properties have the same attributes as those on the opposite side of the road and would be equally suited to a THAB zone.	Retain the Terrace Housing and Apartment Buildings zone where properties are in close proximity to town/local centres and public transport, and in particular 491, 491A and 493 Blockhouse Bay Road. Retain the Terrace Housing and Apartment Buildings Zone for the properties at 491, 491A and 493 Blockhouse Bay Road, Blockhouse Bay.

Judges Bay

[217] Judges Bay, Parnell is a small residential neighbourhood within Parnell comprising a number of residential streets. Judges Bay has strong connections to early Auckland settlement that is reflected in its street layout and the presence of special character and historic heritage buildings. It is an inner city suburb, with reasonable proximity to both the Ports of Auckland and the Central Business District (CBD).

[218] The Judges Bay test case area includes properties in the residential area bounded by Judges Bay Road, Taurarua Terrace, Canterbury Place, St Stephens Avenue and Judge Street. Judges Bay is characterised by low-density housing in close proximity to the coastal areas of Judges Bay and Hobson Bay as well as Dove-Myer Robinson Park, Martyn Fields Reserve and Point Park. Judges Bay has historic heritage values and is home to a significant Auckland recreational amenity (Parnell Baths). The identified area in Judges Bay is not serviced by a frequent transport network. The only significant bus route is along Gladstone Road to the west.

[219] The notified zoning of the area was primarily SHZ, with several large blocks of MHS zoning and a block between Gladstone Road and Taurarua Terrace zoned as THZ. Maps prepared by the Council showing proposed upzoning of some 29,000 residential properties including those identified in the test case area of Judges Bay were uploaded of the IHP's website on 26 January 2016. The Council subsequently withdrew the rezonings shown on the 26 January 2016 maps in February. Following the hearings of submissions on Topic 081, the Council filed maps which set out its position on proposed rezoning which was to retain the SHZ in the test case area.

[220] In the PAUP decisions version, the MHS zone around Bridgewater Road and Judges Bay Road was expanded, and the SHZ decreased accordingly. The THZ zone was down-zoned to MHU, and the area on the other side of Taurarua Terrace was upzoned from SHZ to MHU.

Assessment

[221] The general submissions identified by the IHP provided jurisdictional scope to upzone properties in Judges Bay, including the HNZC submission as illustrated by the HNZC C series evidence maps (Auckland Central - GIS-4215672-42b, Orakei - GIS-4215672-42b).

[222] I am also satisfied that the recommended changes are fairly and reasonably raised by the submissions. The intensification of the central isthmus, namely the inner city suburbs, of which Parnell and Judges Bay are clearly part, was, like the upzoning of Mt Albert, emphasised throughout the Unitary Plan process. Inner city areas were always more directly implicated in the centres and corridors strategy, given their proximity to the Auckland CBD, and consequently a number of high amenity areas and transport nodes. In addition to the submissions already mentioned, the table below sets out the submissions that clearly signalled the residential areas within the central Isthmus, including Parnell in a manner that was not specified in the notified PAUP.

Submitter	**Submission**	**Summary of the submission**
Liam Winter	I therefore recommend that the Council considers market demand and viability more explicitly in settling residential zones, rather than simply downzoning where there is opposition to intensification and upzoning where communities are less vocal. Given that intensification is more viable with higher land values, I suggest a return to more aggressive upzoning in the central isthmus and coastal areas to increase housing supply in these high demand areas.	Seeks a more aggressive upzoning in the central isthmus and coastal area to increase housing supply in these high-demand areas.
Helen Geary	Parts of Gladstone Rd parallel to Taurarua Tce are zoned THAB, backing straight on to a single house zone. It is inappropriate and hugely compromising to have heritage housing in this position, in one of the most important heritage residential areas in the city. I see that: this part of Gladstone Rd be rezoned	Rezone parts of Gladstone Road parallel to Tauarua Terrace, Parnell, from Terrace Housing and Apartment Building zone to Mixed Urban zone [inferred to mean Mixed Housing Urban zone] to protect the values of the heritage residential area.

	mixed urban.	
Ho Yin Anthony Leung	The Central Isthmus should be upzoned to mixed housing urban or to THAB.	Rezone the Central Isthmus to Mixed Housing or Terrace Housing and Apartment Buildings.
Harsha Ravichandran	The Central Isthmus should be upzoned to mixed housing urban or to THAB.	Rezone the central isthmus to Mixed Housing Urban or to Terrace Housing and Apartment Building zone

[223] As with Glendowie, the nature of the change is evidently proportionate and considerate of the local context, where relatively discrete changes have been made. While some parts of Judges Bay were upzoned following the IHP's recommendations, other parts were downzoned. Moreover, considering the level of intensification that might normally be anticipated in an inner city suburb, a mixture of SHZ, MHS and MHU is relatively deferential to the area's special character and heritage qualities. I have no reason to suspect that the IHP did not have a sufficient basis to make an evaluative judgment as to the nexus of generalised submissions and the upzoning of Judges Bay.

Wallingford St, Grey Lynn

[224] Wallingford Street is representative of a residential cul-de-sac containing 18 residential properties. This street is at the periphery of a significant area of older and mainly special character housing, an area that was proposed to be zoned SHZ when the PAUP was notified.

[225] The majority of the residential buildings are pre-1944 "special character" houses, and the pattern and style of residential development in the adjoining neighbourhood is low-density and mainly older homes, many subject to the Special Character overlay. The identified street is not serviced by a frequent transport network. The closest bus routes are along Richmond Road to the north and Williamson Avenue to the south, each within reasonable proximity of the street. Immediately to the west of Wallingford Street is Grey Lynn Park which consists of several large recreational sports fields and tree-lined park walking tracks.

[226] Maps prepared by the Council in December 2015 showing proposed upzoning of some 29,000 residential properties including the identified properties in the Wallingford

Street test case area were uploaded to the IHP's website on 26 January 2016. The Council subsequently withdrew the rezoning shown on the 26 January 2016 maps in February. Following the hearings of submissions on Topic 081, the Council produced residential zoning maps which set out its position on proposed rezoning as part of its Closing Remarks on the topic. The maps showed retention of the SHZ in the test case area.

[227] However, in the decisions version of the PAUP, the majority of the properties have been rezoned MHU.

Assessment

[228] The general submissions identified by the IHP as illustrated in the HNZC C series Maps (Point Chevalier - GIS-4215672-42b) provide jurisdictional scope for upzoning in Grey Lynn for the reasons already expressed above at [166] – [168].

[229] As to the second issue of fairness, the reasoning at [222]-[223] applies equally here, and moreover multiple submitters sought upzoning of Grey Lynn. The table below sets out the further submissions that provided scope to upzone Wallingford St, Grey Lynn in a manner that was not specified in the notified PAUP.

Submitter	**Submission**	**Summary of the submission**
Andrew Rice	Please, more intensive housing in the inner city met areas – Ponsonby, Grey Lynn, St Mary's Bay for example. The plan is too soft on high build. Why? It seems a bit of a cop out. If young people are ever to have a chance to buy some place to live within Auckland's inner city then clearly the plan needs more intensification. Allow more high builds would be my main submission.	Further intensify inner city areas, particularly Grey Lynn and St Mary's Bay
Abhishek Reddy	Supported: – Areas of Mixed Use and centres in Newton, Grafton Against:	Rezone tracts of Grey Lynn to provide more of the Mixed Use and Terrace Housing and Apartment Buildings zones.

	– Excessive Single House zoning from Grey Lynn through to Grafton Suggested: More Mixed Use and THAB in places such as: – Around the future Newton rail station, near St Benedicts St – Much of Grafton West, around Seafield View Rd and Park Rd – Tracts of Grey Lynn	
Patrick Fontein	Upzone Auckland's City Fringe. Especially the areas around the new City Rail Loop Stations. Review all areas within 3-5km of CBD to Mixed Use, greater height.	Recognise the need to up zone the city fringe especially around the City Rail Loop stations and introduce more Mixed Use and greater height within 3-5km of the CBD.

[230] While individual properties in Wallingford St are not specified, a reasonably diligent person genuinely interested in preserving residential amenity in Grey Lynn would have been well aware of the potential for upzoning in one of Auckland's most centrally located suburbs.

Howick

[231] The HRRA made a submission on the notified PAUP and addressed the zoning of land at Howick. The Council accepted a recommendation of the IHP which resulted in modified zonings of certain land at Howick being included in the PAUP. The HRRA has appealed to the High Court challenging the zoning of 65 properties not sought by any submitter or identified by the IHP as out of scope.

[232] The properties subject to the appeal are located along Bleakhouse Road, Ridge Road, Mellons Bay Road, Picton Street, Park Hill Road and Glenfern Road in Howick. In the notified version of the PAUP, the properties were zoned SHZ. In the decisions version of the AUP, the properties were zoned MHU.

Assessment

[233] The IHP relied on general submissions to establish scope. Except for Ridge Road, the HNZC Maps (Half Moon Bay - GIS-4215672-42b) do not appear to correspond to the Howick properties.

[234] Mr Savage for HRRA reviewed the submissions identified by the "in scope" parties as conferring jurisdiction to show that the 65 properties were not expressly captured by them.[173] He also stressed that HRRA was an active and diligent participant in the publically notified process, positively seeking relief that preserved the residential amenity of Howick, including the 65 properties. At no stage was it alerted to the fact that the 65 properties might be subject to the recommended changes. Mr Savage supported this submission by referring to Council reportage on Topic 080 describing the 65 properties as "out of scope". I surmise had HRRA been alerted to that prospect it would have provided tailored submissions to show why these properties ought not to be upzoned.

[235] With respect to the care taken by Mr Savage, the breadth of the relief sought by the full collective of general submissions conferred jurisdictional scope to make zoning changes in Howick. He skilfully emphasised specific aspects of the submissions in order to show lack of relevant scope. For example Mr Savage noted that the HNZC submissions were prefaced by the words:

> "For sites where Housing New Zealand seeks that they be rezoned to Mixed Housing Urban..."

[236] Reference is also made to Tables produced by HNZC which state:

> Housing New Zealand requests rezoning on the identified sites for the following reasons…

173 Reference is made to all HNZC submissions, named 839-17 and -18; Adam Weller 3167-8; Habitat for Humanity Greater Auckland Limited 3600-10; Matthew B Avery 5938-5 and -6; Crainleigh 7491-1; Liam Winter 5002; John Coady 7130-2; Cooper and Associates 6042; Auckland Property Investors Association 8969-2; David Madsen 7098-1, -3, -7; Ockham 6099; Mahi Properties 5476. See also the table at [238] and Appendix B.

[237] Mr Savage then makes the point that the 65 properties are not specifically identified.

[238] But this submission belies the full import of the HNZC submission, which sought a coherent zoning framework to accommodate the upzoning of its sites. Other general submissions are dissected by Mr Savage in a similar way to emphasise that they were focused on other areas and not Howick. But their collective and individual thrust was plain – upzoning of residential land to accommodate urban intensification throughout the Auckland region. Some of those submissions are very broadly framed, and by themselves too generic to reasonably signal changes at specific locations. Nevertheless, in reality, the generalised submissions squarely raised the issue of residential intensification, including in Howick. A sample of these types of submissions is noted in the table below (**emphasis added**).

Submitter	**Submission**	**Summary of the submission**
Matthew B Avery	Prioritise High Density Housing to neighbourhoods close to high amenity areas. Part 1, Chapter B, 2.1 Policy 2 states: "Enable higher residential densities and the efficient use of land in neighbourhoods: c. **In close proximity to existing proposed large open spaces**, community facilities, education and healthcare facilities". (The council has FAILED to apply this policy. There are many instances where this zoning has not been applied to land clearly within walking distance of large open spaces. The Council has failed to apply this zoning in particular to the Auckland central suburbs, eg - Grey Lynn, Mount Eden, and to **all coastal amenities**. Central Auckland **and coastal suburbs** must participate in the intensification of Auckland also)	Include coastal properties in areas of intensification, especially areas that are near transport routes (including ferries) and metropolitan and town centres.
Cranleigh	The PAUP identifies the importance of focusing density around town centres and major transport corridors. However, the principle of placing "greatest density" on greatest amenity" areas, has not been sufficiently leveraged. If we are to grow the attached housing and apartment market, then the opportunity to focus this lifestyle where there is a high level of amenity and a market demand for it is a great opportunity - **areas such as parks and coastlines** are an obvious example of this principle. The PAUP does not deliver on this.	Rezone to provide for more density around areas where there is a high level of amenity, **such as parks and coastlines**, not just around town centres and major transport corridors
Paul Bridget	Furthermore, greater intensity (taller buildings)	Focus greater intensity in high

	should be focussed on existing high amenity parts of the city where high quality intensive developments are likely to be financially viable and people will be prepared to live in apartment style dwellings (eg **Eastern suburb** and central suburb ridgelines, north facing hill slopes and **coastal edges**).	amenity parts of the city, e.g. **Eastern Suburbs**, Central Suburb rigdelines, North facing hill slopes and **coastal edges**.
David Madsen	Housing within 250m from the boundary of the commercial town centres should have the ability to be intensified to a greater level than currently indicated e.g. terraced, apartment type dwellings or mixed zone (commercial/residential).	**Increase intensification within 250m of Town Centres**. Rezone sites further away than this as Single House or Mixed Housing [not specified] zones
John Coady	If good urban design practice is followed, the density of sites adjacent to park land should be more intensive, rather than less intensive, so that an increased number of residents can take advantage of the amenity living next to an open space provides", "A more thorough analysis of residential land adjacent to open space should be undertaken to ensure that lots adjacent to open space (perhaps with bushland being the exception, such as the Centennial Park example cited above) are zoned "mixed housing suburban" or "mixed housing urban" (depending on context), rather than "single housing"" and "Further analyse the potential for other **residential sites adjacent to parkland** to be zoned as mixed housing rather than single housing and rezone as appropriate.	Consider zoning residential sites adjacent to parkland to a Mixed Housing zone rather than a Single House zone.
Adam Weller	I really like the creation of 2 mixed housing zones: urban and suburban. My concern is over the use of Suburban compared to Urban in the Unitary Plan. There needs to be a lot more Mixed Housing Urban or even Terrace Housing around key transport areas, especially in the centre of Auckland…**Howick is one of the worse areas with such a large single house zone, very short sighted and not what Auckland needs at all.**	Provide additional Mixed Housing Urban or Terrace Housing and Apartment Buildings zoning around key transport areas, especially in the centre of Auckland and reduce the amount of Mixed Housing Suburban Zone.

[239] Furthermore, as noted by Mr Somerville, there are numerous further submissions by HRRA opposing the general submissions and supporting submissions seeking among other things, heritage status for Old Howick and pre-1944. Plainly the prospect of change arising from generalised submissions was known to them and presumably residents of Howick genuinely interested in the preservation of local character and amenity.

[240] The central remaining issue is whether the submissions relied upon by the IHP reasonably and fairly raised the prospect of the recommended changes insofar as

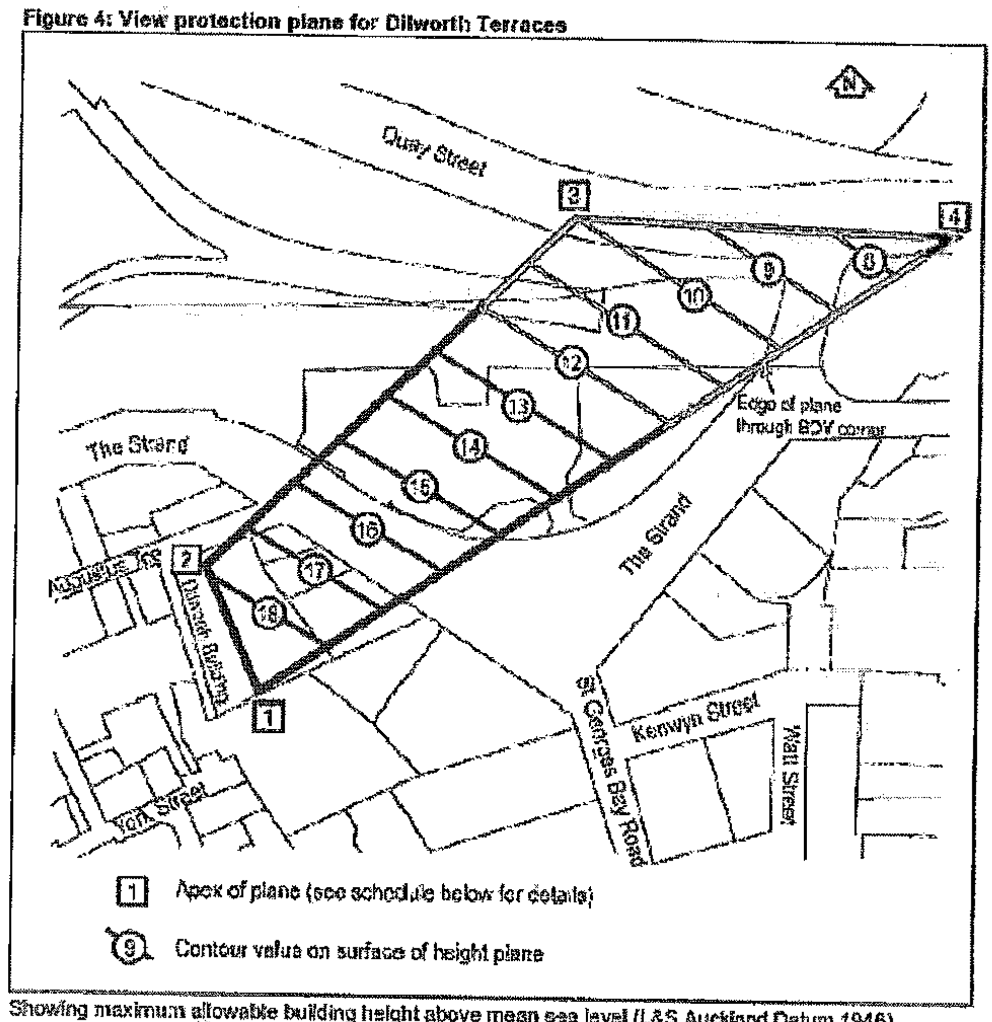
concerns the 65 affected Howick properties. For the reason just mentioned the general submissions identified by the IHP (and others) fairly raised the issues that HRRA are now seeking to re-litigate though specifically in relation to the 65 identified properties. I see no broader unfairness by upholding the IHP decision on scope as it affects those properties.

The Viewshaft on the Strand

[241] The SHL proceedings have been brought by way of judicial review and relate to the recommendation of the IHP and the decision of the Council in relation to the Dilworth terraces view protection plane (Viewshaft). The IHP's Report on hearing topics 050-054 - City Centre and business zones (July 2016) recommended that the "origin point of the viewshaft be relocated on The Strand, as shown in the revised viewshaft diagram accompanying the text of the Unitary Plan." The Council accepted the IHP's recommendation.

[242] The Dilworth Terraces are a row of heritage houses at the top of the escarpment above The Strand. The Notified Plan proposed the inclusion of the Dilworth Terraces View Protection Plan (Proposed Viewshaft). The Proposed Viewshaft is a development control located in 1.4.4.6 of the Notified Plan. The purpose of the Proposed Viewshaft is to manage the scale of development to protect the view of the Dilworth Terraces from the eastern end of Quay Street. The effect of the Proposed Viewshaft is that the height of a building, including any structure on the roof of a building, subject to the Proposed Viewshaft must not exceed the height limits specified on Figure 4: View protection plan for Dilworth Terraces. The Proposed Viewshaft contains Figure 4:

Figure 4: View protection plane for Dilworth Terraces



Showing maximum allowable building height above mean sea level (L&S Auckland Datum 1946)

[243] SHL's property at 117-133 The Strand, Parnell (Property) was not affected by the Proposed Viewshaft. In the Notified Plan, the Property was zoned Light Industry, which imposes a 20 metre height limit on buildings within that zone. Primary submissions on the Proposed Viewshaft were made by Ngati Whatua Whai Rewa Ltd (submission 872); New Zealand Historic Places Trust (Heritage New Zealand Pouhere Taonga) (submission 371); The Strand Bodies Corporate (submission 1615); Dilworth Body Corporate (submission 6152); and Charles R Goldie (submission 6496).

[244] The IHP recommended that the Property be rezoned to Business Mixed Use, which imposes a height limit of 18 metres. The IHP also recommended relocating the

Proposed Viewshaft to The Strand. The IHP did not identify the relocation as being beyond the scope of submissions made in respect of Topic 050.

[245] The Council accepted the recommendation that the Proposed Viewshaft be relocated to The Strand (Decisions Viewshaft). The Property is affected by the Decisions Viewshaft. The Decisions Viewshaft imposes a lower height limit than in the underlying zone in the northern portion of the Property, ranging from 12 metres on the Property's frontage to The Strand to approximately 17 metres on the Property's north-western boundary. Resource consent as a non-complying activity is required to infringe the height limit imposed by the Decisions Viewshaft.

SHL's claim

[246] The first cause of action in the SHL proceedings is that the IHP applied the wrong legal test. SHL claims that:

> [44] In making its recommendation regarding the Proposed Viewshaft, the [Panel] acted pursuant to an error of law in breach of section 144 of the [Local Government (Auckland Transitional Provisions) Act 2010 (LGATPA)].

[247] SHL says that:

(a) the only submissions relevant to the Viewshaft did not seek the relocation of the origin of the Viewshaft "in the manner" of the IHP's recommendation;

(b) as a consequence of applying the incorrect legal test (or misapplying the correct legal test) the IHP made a recommendation that was beyond scope and failed to identify it as such, and therefore:

(c) the IHP made an error of law.

[248] SHL identifies parts of Whai Rawa's submission that relate to the Viewshaft. In particular:

> That changes be made to the PAUP ... and in particular make provision for ... an amendment to the area affected by the Dilworth Terraces Special Height Plane. (submission point 3)
>
> The Dilworth Terraces View Protection Plane (1.4.4.6 and any associated assessment criteria) are reviewed and further investigated in accordance with Council's report and any resulting amendments to the relevant provisions, as a result of the further investigation be implemented. It is recommended that views from the Strand potentially be explored. (Submission point 37.)

[249] The scope issue was addressed at the Topic 050 hearing, in particular in the legal submissions for the Council, Whai Rawa, and the Dilworth Terraces Body Corporate:

(a) the Council's and Whai Rawa's position was that the option of the Viewshaft being moved to The Strand was reasonably and fairly raised in Whai Rawa's submission; but

(b) Dilworth Terraces Body Corporate's position was that the amendments to the Viewshaft proposed by Whai Rawa were beyond the jurisdiction for the IHP to consider because the submission was vague and uncertain and "sought no more than a review of information and the implementation of possible outcomes of that review."

Argument

[250] The Council and Whai Rawa contend that:

(a) The Whai Rawa submission and the SDR sufficiently signalled the potential for the Viewshaft to be shifted to affect the Strand site, with specific reference to:

> Review and further investigate development control 4.6 'Dilworth Terraces View Protection Plane' (and any associated assessment criteria) in accordance with the Council's report and implement any resulting amendments to the relevant provisions. Also explore views from The Strand. Refer to details in submission at page 14/25 of volume 4.

(b) SHL was not diligent about protecting its interests, having made submissions on its property only;

(c) The Viewshaft only partially affects the development of the SHL properties;

(d) Changes of this nature were to be expected, given among other things the prospect of zone changes;

(e) Other submitters actively engaged on the merits of the Viewshaft and Dilworth Terraces Body Corporate, and opposed the Whai Rawa relief sought on jurisdictional grounds (and so demonstrating that affected persons had sufficient notice of the submission); and

(f) If the IHP has erred, the matter should be referred back to the IHP for reconsideration.

[251] SHL contends:

(a) The Whai Rawa submission does not expressly seek relief in the form of removing the Viewshaft from its land;

(b) The Whai Rawa submission was categorised by the theme "City centre zone" while the SHL site was zoned Light Industry and sought rezoning to Mix Use, so had no interest in searching the SDR as it relates to City Centre zone;

(c) At the hearing Whai Rawa proposed three solutions, none of which were addressed in the submission;

(d) The SHL property was the only additional property affected by the by the relocation;

(e) The Council has effectively shifted the burden of the Viewshaft from one owner to another without affording the affected owner an opportunity to be heard; and

(f) To be a logical consequence of a submission, the submission must be clear about the prospect for the recommended change – but there is no specificity in the submission as to what is meant by "amend".

Assessment

[252] The Whai Rawa submission literally seeks that "views from the Strand potentially be explored" and records that Whai Rawa "is keen to work with the Council to resolve this issue and amend the plane accordingly." It therefore provides jurisdictional scope to address identification of views from the Strand and to amend the Viewshaft.

[253] But there is no clear suggestion in the submission that the Viewshaft will be relocated to the SHL site. The SDR also does not provide a clear signal that the Viewshaft may be shifted to the SHL site. If anything, the SDR notations relied upon by the Council suggests a relatively confined scope for change insofar as it summarises the relief as "refine the location and extent of the Dilworth Terraces Height Plane as it applies to the Quay Park Precinct, which is not obviously relevant to SHL, and then the other submission point somewhat vaguely suggests '[r]eview and investigate development control 4.6 "Dilworth Terraces View Protection Plane"… in accordance with the Council's report.*"* It makes no mention of an alternate Viewshaft affecting SHL's land.

[254] Other parties participated in the Viewshaft hearings as primary submitters. But their participation does not suggest that with reasonable diligence SHL would have appreciated the potential affect of the Whai Rawa submission on its property. These primary submitters sought that the proposed Viewshaft be retained in its existing form or deleted. There was nothing obvious in the background reportage or the Whai Rawa submission to reasonably signal to SHL the prospect that the Viewshaft might move to its properties.

[255] It is also relevant that the relocation of the Viewshaft is disenabling of SHL while enabling of Whai Rawa. It reduces SHL's capacity to develop its site while increasing the capacity to develop Whai Rawa's site. I agree with SHL that submissions seeking greater enablement for the submitter at the direct expense of another landowner

should be framed with sufficient specificity to secure the involvement of the affected landowner.

[256] Accordingly, unlike the seachange that was foreshadowed in relation to residential zoning generally, the issues raised by the Whai Rawa submissions were discrete, yet had the acute disenabling effect of relocating the Viewshaft to cover the SHL site. Greater specificity was required in order to fairly put SHL on sufficient notice of the potential effect of the submission on it. It was neither reasonable nor fair to amend the Viewshaft's location to directly affect the SHL site without at least affording SHL an opportunity to be heard.

55 Takanini School Rd

[257] The property at 55 Takanini School Road, Takanini (the Site) is located on the eastern side of Takanini School Road between Popes Road to the north and Manuroa Road to the south. The Site's main frontage is along Takanini School Road. The northern portion of the Site adjoins 3 Popes Road to the north and abuts the southern portion of 296 Porchester Road (WGL's land) to the east. Both the adjoining properties are zoned Light Industry.

[258] The northern portion of the Site was split-zoned under the Auckland Council District Plan Papakura Section as Industrial 1 in the northern portion and Residential 8 in the southern portion.

[259] The Notified PAUP retained the split-zoning of the Site. This reflected the mix of surrounding land use including light industry to the north and predominately residential to the south.

[260] The Site was subject to one submission, that of the land owner Takanini Central Limited ("TCL"). The submission provided:

> i) Rezoning of the southern portion of the site to Mixed Housing Suburban under the PAUP to ensure efficient use of land in accordance with the Residential 8 zoning of the site, and Part 2, Section 7(b) of the Act;
>
> ii) Inclusion of rules equivalent to the Takanini Structure Plan Area 6 for the Residential 8 zone for subdivision and residential development as

stand-alone rules for the southern portion of the site under the PAUP within the Takanini Sub-Precinct A area; and

iii) Inclusion of the rules equivalent to the operative Industrial 1 zone for retail activities, studio warehousing, offices and residential development as stand-alone rules for the site under the PAUP within the Takanini Sub-Precinct A area;

iv) And specifically new rules that have the following effect:

a. Retail activities ancillary to, and part of a permitted activity on the same site are a Controlled Activity provided that retail activities do not occupy more than 30% of the gross floor area of the industry and retail premises combined, or 200 square metres, whichever is the lesser;

b. Studio warehousing development is a Controlled Activity where it complies with development controls such as shape factor, building design and lot layout;

c. Office activities ancillary to an industrial activity on the site and the office GFA exceeds 30% of all buildings on the site or 100m2 is provided as a Restricted Discretionary Activity;

d. Retail activities ancillary to, and part of a permitted activity on the same site that occupy more than 30% of the gross floor area of the industry and retail premises is a Discretionary Activity;

e. Office activities ancillary to an industrial activity that exceeds 30% of all buildings on site or 100m2 is a Discretionary Activity;

f. Residential activities complying with internal noise standards, is a Discretionary Activity.

[261] The TCL submission requested that the dual zoning as notified be retained over the Site, but requested that the southern part of the property be upzoned from SHZ to MHS. The zoning as notified of that part of the property with a common boundary with the WGL land was Light Industrial (the same zoning as the WGL property) and no change was requested to that zoning.

[262] At the hearing a planning consultant giving evidence on behalf of TCL asked that the whole of the site be zoned residential and the IHP in its Recommendation Report agreed with that request, removing the Light Industrial zone. The result creates a direct interface between an industrial and a residential zone to the detriment of the WGL property in respect of permitted uses, development controls and performance standards.

[263] The Council adopted without alteration the recommendation of the IHP, purportedly on the submission by TCL. This uplifted the Light Industry zone on the northern portion of the TCL site. Although this was not requested by the TCL submission, the IHP recommendation did not state that the zoning decision was made outside the scope of any submission.

Submissions identified by IHP

[264] The IHP identified the TCL submission as providing jurisdiction.

Preliminary issue

[265] The Council contended that the WCL appeal was never identified in any minutes or correspondence as suitable for resolution as a test case on scope. It also says that it is not suitable for determining preliminary scope issues, though the reason for this is not stated.

[266] On the merits, the Council submits that the upzoning of the entire TCL site is an example of the application by the IHP making consequential amendments to the PAUP based on the combination of generalised submissions and site specific upzoning. It is noted that two area by area submissions confer scope (HNZC 839-8217 and Suzanne and Alan Norcott 6214-27). It is also noted that WCL was a submitter on the TCL submission but chose not to attend the hearing and conversely was an active participant on Topic 081. The Council was supported in its submission by Equinox (a mortgagee in possession of the TCL site).

[267] Mr Brabant for WGL maintains that:

(a) A decision on scope will resolve the WGL appeal;

(b) TCL sought to retain Light Industry zoning for the northern portion of the relevant site;

(c) The other two submitters did not seek upzoning of the TCL site to Mixed Use;

(d) WGL was lead to believe that TCL was only seeking to upzone the southern portion of its site and that this was confirmed in TCL's expert's primary evidence.

(e) The prospect of upzoning the TCL site was only raised in TCL's expert's supplementary evidence at the hearing date;

(f) The final zoning map produced by the Council did not refer to the upzoning of the northern portion of the site; and

(g) The generic submissions relied upon by the IHP and the Council to establish scope are inapposite as they relate to upzoning of residential zones, not industrial zones.

Assessment

[268] I agree with Mr Brabant that the generic submissions relied upon by the IHP, such as the HNZC submissions addressing residential zones, do not obviously signal the potential for residential upzoning in locations such as the TCL site which were notified as light industrial. I also consider that Mr Brabant makes a cogent point that WCL had no reason to thoroughly review submissions seeking upzoning of residential sites, but the TCL submission does raise the prospect of Mixed Use in an adjacent location. This would appear to confer jurisdictional scope on the basis that rezoning the whole site, instead of only part of it, is a reasonably foreseeable consequence of an integrated planning approach. But, the matters raised by Mr Brabant (though largely in reply[174]) bring into play broader considerations of fairness, and in particular whether in the peculiar circumstances of the case, being the limited basis upon which TCL sought to upzone the northern portion of its site, together with the TCL expert's primary expert evidence and position adopted by the Council planning team, WGL was effectively misled into assuming that the northern portion of the site was never at risk of upzoning to MHU. While not as stark as the SHL case, the disenabling effect of the recommended change, combined with the TCL submission and primary evidence raises natural justice considerations.

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[174] In fairness to Mr Brabant and WGL several of the matters raised by the Council were not foreshadowed to Mr Brabant in advance of the presentation of the case for WGL.

[269] While, as counsel submits, this is not a 'scope' case, I am nevertheless satisfied that it was not fair and reasonable in the specific circumstances of this test case to treat the extension of the Mixed Use Zoning to the northern portion of the TCL site as appropriate without affording WCL an opportunity to submit on the consequences of that upzoning for its site.

The Albany North Landowners' Group site

[270] ANLG pleads that the Council erred in law by zoning the ANLG site Future Urban Zone (FUZ) where:

(a) this was not sought in any submission; and

(b) the requirement under s 144(8) of the Act, for the Panel to identify any recommendations that are beyond the scope of submissions, was not met.

[271] In comparison to other test cases where the spatial application of zones has informed the zoning applied to individual sites, the ANLG case relates to the zoning of a discrete block of land, where the zoning of adjacent land or a zoning pattern has not determined the zoning applied.

[272] ANLG's Notice of Appeal pleads:

> (a) The Proposed Plan as notified proposed that ANLG site be zoned a mix of Large Lot Residential and Countryside Living.
>
> (b) The submission by ANLG sought that the ANLG site be rezoned either:
>
> (i) A mix of Mixed Housing Suburban and Single House Zones;
>
> (ii) Or, if that zoning was not successful, FUZ.
>
> (c) By legal submissions dated 29 April 2016, ANLG formally withdrew its alternative relief seeking FUZ. This was confirmed by letter dated 2 May 2016.
>
> (d) No other submissions sought FUZ for the ANLG site or specifically addressed zoning of the ANLG site.
>
> (e) The ANLG site is the only land in this location to be zoned FUZ. Accordingly, the zoning is not consequential to zoning of adjacent land or required in order to achieve a coherent zoning pattern.

(f) There is no general submission or further submission which would provide scope for the FUZ zoning of the ANLG site.

[273] The submission, which was later withdrawn, provided:

> The Group seeks the following changes to the PUP:
>
> …
>
> (c) Change the zoning of the land inside the new RUB to the Future Urban Zone.
>
> The reasons for the Group's requested changes are set out in parts 4.2 - 4.5 below. The reasons are supported by the following technical reports:
>
> - Infrastructure Assessment Report, dated May 2013, and addendum dated February 2014, prepared by Terra Consultants, attached, marked B;
> - Transport assessment report, dated 31 May 2013, prepared by Traffic Design Group, attached, marked C;
> - Landscape and Visual Assessment, dated May 2013, prepared by LA4 Landscape Architects, attached, marked D; and
> - Urban Design Assessment, dated May 2013, prepared by Urbanismplus, attached, marked E;
> - Stormwater assessment, dated February 2014, prepared by Stormwater Solutions, attached, marked F.

Argument

[274] Ms Baker-Galloway for ANLG submits, in short, that the imposition of a "FUZ" zoning was not reasonably and fairly raised by any submission, given that ANLG had withdrawn its submission seeking that relief. Nor, she submits, was it necessary to achieve vertical or horizontal integration. The central complaint therefore is that the IHP found scope to impose a FUZ zoning on the ANLG's land simply to give effect to the RPS when there was no jurisdiction to do so. I also understand that the recommended changes in the final form are more disenabling that the PAUP as notified.

[275] The Council responded that the withdrawal of the ANGL submission did not remove scope, because ANGL sought to extend the RUB to its site, which if granted, required the IHP to assess the most appropriate form of complementary zoning for the site. The selection of FUZ, in preference to declining the relief altogether or imposing immediate upzoning to Mixed Use, was an evaluative decision available to the IHP. The

Council also identified other submissions which, it says, provided scope for FUZ, including the following submission:

(a) Robert Harpur (957-3): "Cut back on the greenfields developments planning in the RUBs in the south, north west and north of Auckland";

(b) Harold Waite (939-7): "Cut back the areas zoned for Mixed Use Housing and terrace housing and have a staged release for development"; and

(c) Kevin Birch (6253-1): "Reconsider the FUZ and rural areas rezoned Residential and apply appropriate zonings which take into account infrastructural constraints."

Assessment

[276] I agree with the Council. ANGL, by seeking to extend the RUB to its location, must have known that the IHP would be required to ensure that the new zoning applicable to the land within the RUB was the most appropriate form of land use for the site. In this particular case, the IHP identified FUZ as the most appropriate zoning for that part of the site within the RUB. It is not for this Court to test the merits of that assessment. It is a fairly clear example of providing relief that is somewhere between that sought by the submitter and the notified plan.

[277] Significantly also, ANGL, by seeking FUZ, signalled to the world that this might be a potential outcome and so there can be no challenge based on orthodox scope grounds. Indeed in seeking FUZ as an alternative relief, ANGL must have, at least at the time of making the submission, understood the FUZ zoning to be a suitable option. This then aligns with the other submissions noted by the Council seeking a measure of control in relation to land incorporated within an extended RUB.

[278] I also understand that ANGL had the full opportunity to challenge the merits of the FUZ zoning at the hearing. If that is the case, then the substantive basis for the appeal is weak. If I were to reverse the IHP decision on scope grounds that would likely mean that the ANGL would need to persuade the Environment Court that it was "unduly

prejudiced" by the imposition of the FUZ. [175] That prospect must be small. While that cannot by itself provide a basis for disallowing an appeal based on lack of scope, given the clear natural justice purpose of the scope provisions, the error in this particular case, if any, lacks materiality.

Man O' War Farm

[279] Man O' War pleads that the Council erred in law by including an amended definition of "Land which may be subject to coastal hazards" in the AUP which was not sought in any submissions, without the requirements of s 144(8) of the Act being met (by the IHP). Paragraph 14 of Man O' War's amended Notice of Appeal pleads as follows:

> The grounds of this Part (C) of the appeal are as follows:
>
> (a) when notified, the Unitary Plan set rules for activities (including buildings and structures) on land which may be subject to natural hazards (Part 4.11 of the Unitary Plan as notified).
>
> (b) The appellant opposed these provisions with reference to the phrase "land which may be subject to natural hazards" as applied under Policy 1 of section CS.12 of the Unitary Plan as notified, and as then defined under the Unitary Plan.
>
> (c) The Hearings Panel recommended and Auckland Council adopted revised definitions of such areas including a new definition of "Land which may be subject to coastal hazards" as including any land which may be subject to erosion over at least a 100 year timeframe. No submissions to the Unitary Plan requested such a revised definition.
>
> (d) A reader of the Unitary Plan will not be able to determine including with reference to the Unitary Plan maps, whether land in coastal areas falls within that definition, and as such the definition and the provisions of the Unitary Plan triggered by the definition are void for uncertainty and ultra vires.

[280] By way of relief, Man O'War seeks that the revised definition be deleted, and/or a declaration whereby the substantive issue regarding the provisions of the Unitary Plan triggered by the revised definition could be addressed by the Environment Court.

[281] The notified definition of "Land which may be subject to natural hazards" was:

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[175] Local Government (Auckland Transitional Provisions) Act 2010, s 156(3)(c).

Any land:

- Within a horizontal distance of 20m landward from the top of any coastal cliff with a slope angle steeper than 1 in 3 (18-degrees)
- On any slope with an angle greater than or equal to 1 in 2 (26-degrees)
- At an elevation less than 3m above MHWS if the activity is within 20m of MHWS
- Any natural hazard area identified in a council hazard register/database or GIS viewer.

[282] Policy 1 (Section C5.12 of the PAUP as notified) stated:

1. Classify land that may be subject to natural hazards as being:

    a. within a horizontal distance of 20m from the top of any cliff with a slope angle steeper than 1 in 3 (18 degrees)

    b. on any slope with an angle greater than or equal to 1 in 2 (26 degrees)

    c. at an elevation less than 3m above MHWS if the activity is within 20m of MHWS

    d. any natural hazard area identified in the councils' natural hazard register, database, GIS viewer or commissioned natural hazard study.

[283] A number of submissions made on the definition were submitted to the Court, however, it became clear during the hearing that the relevant submission for the purposes of scope was that of Bernd Gundermann, which sought the following relief:

> Recognise that development in coastal areas needs to be considered with a significantly larger time frame. Planning for coastal areas must exceed 100 years.

[284] The IHP's recommended definition, which was accepted by the Council was:

Any land which may be subject to erosion over at least a 100 year time frame:

(a) within a horizontal distance of 20m landward from the top of any coastal cliff with a slope angle steeper than 1 in 3 (18 degrees); or

(b) at an elevation less than 7m above mean high water springs if the activity is within:

  (i) Inner Harbours and Inner Hauraki Gulf: 40m of mean high water springs; or

> (ii) Open west, outer and Mid Hauraki Gulf: 50m of mean high water springs.
>
> Any land identified as being subject to one per cent annual exceedance probability (AEP) coastal storm inundation (CSI).

[285] The specific scope issue raised by this test case is whether the following aspect of the IHP's recommended amended definition of "land which may be subject to coastal hazards":

> ... any land which may be subject to erosion over at least a 100 year timeframe

was reasonably and fairly raised in the course of submissions.

Argument

[286] Mr Williams, for Man O War, submitted:

(a) Relevant submissions sought greater certainty and the IHP recommended the opposite by incorporating an indefinite aspect into the criteria for land use requiring resource consent - that is "land which may be subject to erosion over at least a 100 year timeframe";

(b) The IHP recommendation could not have been reasonably anticipated by an affected land owner and therefore was out of scope, especially given the degree of uncertainty arising from the indefinite aspect;

(c) While there were submissions that sought that the Unitary Plan show, identify or make "quantifiable" areas affected by coastal erosion, the recommended definition does none of these things;

(d) Prejudice arises to all of the coastal properties falling within the expanded areas now referenced in the expanded definition;

(e) Submitters could have reasonably anticipated that a longer term management approach might be applied to planning for coastal hazards, extending over 100 years, and accounting for climate change, but they

could not have anticipated being left uncertain as to whether they were caught by the coastal hazard provision requiring resource consent;

(f) The hearings process, including mediations and expert conferral about the definition of coastal hazards did not expand the scope of the submissions – citing *Waipa*; and

(g) The substantive issue raised by Part C of the Man O' War appeal is closely related – namely the indefinite aspect means the relevant provision is ultra-vires for lack of certainty.

[287] The Council responded:

(a) The changes at issue occurred as part of a broader restructure of the natural hazards provisions that was developed through two comprehensive rounds of mediations and hearings;

(b) The amended definition was within the scope of submissions addressed to the defined phrase "land which may be subject to natural hazards" as "coastal hazards" is a subset of the more general "natural hazards";[176]

(c) The amendment is consistent with Policy 24 of the New Zealand Coastal Policy Statement (NZCPS) which notes that "Hazards risks, over at least 100 years, are to be assessed…";[177]

(d) The specific amendment is a reasonably foreseeable consequence of the submissions, including the Gundermann submission noted at [283], particularly given the requirement to achieve consistency with the NZCPS; and

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[176] Referring to submissions, for example, by Tonkin and Taylor seeking the following relief: "re examine the
definition of "land that may be subject to natural hazards".

[177] Department of Conservation *New Zealand Coastal Policy Statement 2010* (3 December 2010).

(e) The amended definition is not indefinite – it has specific parameters including a horizontal distance of 20m landward of any coastal cliff with a slope angle steeper than 1 in 3 (18 degrees).

Assessment

[288] I do not agree with the basic premise underlying Man O' War's scope challenge. The Gundermann submission plainly brought into frame the prospect of changes to the coastal hazard provisions to enable assessment of coastal erosion "over at least a 100 year timeframe". When the broader submissions seeking definitional change are then also taken into account, a land owner of coastal property should have appreciated that one method to achieve the Gundermann relief could be via definitional change and the qualifying criteria for applications for resource consent. When that is overlaid with Policies 24 and 25 of the NZCPS, and the statutory requirement to give effect to it in regional and district level policy, there can be no serious complaint when the consenting criteria bring in 'an over 100 year' timeframe for assessment.

[289] It is unnecessary for me to resolve whether the hearings process cured any underlying lack of scope.[178] But what the hearing and mediation process (as described by the Council[179]) reveals is that the definitional issue was thoroughly ventilated. This supports the conclusion that the submissions put that issue squarely on the table. It also mitigates the prospect of substantive unfairness, insofar as it appears both sides of the argument were considered.

[290] As to the ultra vires issue, this test case procedure was not triggered to address that issue. I therefore do not propose to resolve it, save to encourage the parties to think about the workability of an indefinite threshold as a criterion for resource consent.

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178 As noted by Mr Williams, Wylie J in *General Distributors v Waipa District Council,* above n 91, deprecated reliance of the hearings process to expand the scope of the Plan change as notified. The relevance of that dicta to the present case is contestable. That case concerned whether an explanatory note that was not subject to the Plan Change application could be changed. Wylie J found it could not and that evidence given about it could not expand the scope of the plan change.

179 I was not taken to a record of the process on this aspect.

Are the appellants'/applicants' allegations against the Council concerning the IHP's determination on issues of scope appealable pursuant to the Act and/or reviewable?

[291] The Council submits that issues of scope must be resolved by way of judicial review of the IHP decision on scope. It says that Council had no jurisdiction to accept or decline a determination that a recommendation was within scope. It could only decide whether the recommendation should be accepted or rejected.

[292] Strand Holdings Limited submits that it could only proceed by way of judicial review because it did not have an appeal right, not having submitted on the provisions subject to the IHP recommendation in dispute.

[293] Character Coalition, Auckland 2040, Albany North and Man O' War contend that a decision by the Council based on an erroneous assumption that a recommendation is in scope must be appealable on a point of law. This is important because the decision to accept the recommendation as in scope, when it was not, unlawfully deprived them of the ability to pursue a substantive right of appeal to the Environment Court.

Assessment

[294] The IHP is empowered to make recommendations that are within or beyond the scope of submissions[180] and is obliged to identify recommendations that are beyond scope.[181] The Council is empowered to make decisions on the recommendations. It may accept or reject the recommendations.[182] It does not need to hear evidence, and may only consider submissions and evidence tabled with the IHP.[183] If the Council rejects the recommendation, then it must provide an alternative solution that is within scope of the submissions. Section 148(3) makes clear however that the Council may accept recommendations that are beyond the scope of the submissions on the proposed plan. The Council is strictly circumscribed by s 148(4) to issue a decision accepting or rejecting the recommendation. A decision to accept a recommendation may include alteration with minor effect or to correct a minor error. The Council had 20 working days to make its decisions.

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[180] Local Government (Auckland Transitional Provisions) Act 2010, s 144(5).
[181] Section 144(8)(a).
[182] Section 148.
[183] Section 148(2).

[295] Section 158 confers a limited right of appeal to the High Court as noted at [85].

[296] Section 158(5) incorporates sections 299(2) and 300 - 307 of the RMA in terms of appeals. Notably, s 308 enacting a right of appeal to the Court of Appeal is not included. Section 159 then preserves the right of judicial review, but a person must not apply for judicial review of a decision made under s158 in respect of a decision unless the person lodges the judicial review and appeal together. Unless impracticable, the appeal and review must be heard together.

[297] Given the foregoing, it is tolerably clear that the Council decision making power is binary – it must either accept or reject the recommendations, and it must do so quickly. It does not expressly or by necessary implication contemplate a decision accepting a recommendation while at the same time rejecting an IHP finding about scope. This is reinforced by the appeal rights procedures. Section 156 confers a limited right of appeal on submitters in relation to any decision of the Council rejecting the IHP's recommendation or to any person in relation to any decision by the Council to accept a recommendation where "the Hearings Panel had identified the recommendation as being beyond the scope of submissions". Section 158 then confers a right of appeal to this Court on the Council's decisions to accept a recommendation on the provisions of the plans while s 159 preserves the right to seek judicial review, presumably in relation to the IHP's decisions on, among other things, scope, which triggers an orthodox administrative law issues of procedural fairness.

[298] But this does not mean that on appeal the High Court cannot examine whether the IHP decision on scope was unlawful. The purpose of any appeal on a point of law is to test the legality of the Council decision. While the issue of scope is essentially about procedural fairness, a recommendation assuming scope when there was none is contrary to the scheme and policy of public participation of Part 4 and the RMA. It is unlawful. Plainly, the Council cannot lawfully accept an unlawful recommendation. If that were not the case, the right of appeal to the High Court would be largely meaningless. For example, any failure by the IHP to ensure that the recommendation complied with the matters specified at s 145 would be beyond challenge.

[299] There will be persons, like SHL, who having not submitted on the relevant provision, only have recourse to a remedy through judicial review. The availability of judicial review is most obviously directed to this type of applicant who has not had any say on a relevant provision in the proposed plan. Conversely, the scheme of the RMA envisages that submitters cannot judicially review a decision while they enjoy rights of appeal. In any event, the availability of judicial review to correct error presents no bar to the High Court appellate procedure on the issue of scope.

What relief can the High Court grant the appellants/applicants if the IHP and/or the Council acted unlawfully in respect of the IHP's determination on an issue of scope under the Act?

[300] This Court on appeal may, having found error of law, make any decision it thinks should have been made.[184] This is significant in the present case, because the full corrective power on appeal avoids, where appropriate, the need to refer the relevant aspect of the decision back to the Council or IHP, though this power is used sparingly.[185] In the present context that logically means that if this Court declares that a recommendation is out of scope or otherwise unlawful, it may make any decision the Council could have made, including to accept or reject an out of scope recommendation. Of course this Court may decide to refer the matter back for reconsideration by the Council. This may be most appropriate approach where the error as to scope bears on the substantive merits of a provision and policy considerations.

[301] The position is slightly different in relation to the power to grant relief under judicial review. The exercise of supervisory jurisdiction is corrective not substantive. Unless the correction results in a different decision, this Court will ordinarily refer the matter back to the person empowered by Parliament to make the decision.[186] In this case the special scheme of Part 4 must colour this orthodoxy. It has an inbuilt system for addressing out of scope recommendations, namely the right of appeal to the Environment Court. It is permissible and preferable in this context to correct an unlawful decision on scope only to the extent necessary to trigger this appeal right.

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184 High Court Rules 2016, rule 20.19.
185 *Taylor v Hahei Holidays Ltd* [2006] NZRMA 15 (CA).
186 *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 at [97].

Outcome

[302] The answers to the preliminary questions are:

(a) Did the IHP interpret its statutory duties contained in Part 4 of the Local Government (Auckland Transitional Provisions) Act 2010 (the Act) lawfully, when deciding whether its recommendations to the Council were within the scope of submissions made in respect of the first Auckland Combined Plan?

Yes

(b) Did the IHP have a duty to:

(i) Identify specific submissions seeking relief on an area by area basis with specific reference to suburbs, neighbourhoods or streets?

No

(ii) Identify when it was exercising its powers to make consequential alterations arising from submissions?

No

(c) Was it lawful for the IHP to:

(i) Determine the scope of submissions by reference to another submission?

Yes

(ii) Determine the proper scope of a submission by reference to the recommended Regional Policy Statement?

Yes

(d) To what extent are principles (regarding the question of scope) established under the Resource Management Act 1991 case law relevant, when addressing scope under the Act?

See discussion at [101]-[136]

(e) Did the IHP correctly apply the legal framework in the test cases?

(i) Mt Albert – Yes

(ii) **Glendowie** – **Yes**

(iii) **Blockhouse Bay – Yes**

(iv) **Judges Bay – Yes**

(v) **Wallingford Street – Yes**

(vi) **Howick** – **Yes**

(vii) **Strand Holdings Limited – No**

(viii) **WGL – No**

(ix) **Albany – Yes**

(x) **Man O War – Yes**

(f) Are the appellants'/applicants' allegations against the Council concerning the IHP's determination on issues of scope appealable pursuant to the Act and/or reviewable?

Both

(g) What relief can the High Court grant the appellants/applicants if the IHP and/or the Council acted unlawfully in respect of the IHP's determination on an issue of scope under the Act?

See discussion at [300]-[301]

Effect of Judgment/Relief

[303] The purpose of resolving the test cases was to provide affected appellants with guidance on the issue of scope. It will be for them to decide whether and to what extent they wish to pursue their appeals in light of my decision. It should be evident that I consider the appeals concerning residential upzoning and the Albany and Man O' War appeals should be dismissed on the question of scope, while the SHL and WGL appeals should be upheld on the same issue. My current view is that the SHL and WGL matters should now be referred to the Environment Court for resolution.

[304] The parties are invited to file a joint memorandum in respect of relevant appeals for case management purposes within 10 working days. A further case management conference will be set down in relation to the scope appeals on the first available date thereafter.

Costs

[305] The parties have leave to seek costs. Submissions no longer than three pages in length are to be filed within 10 working days, unless the parties agree otherwise.

APPENDIX A		
SUBMISSIONS RELIED UPON BY THE IHP		
GENERAL SUBMISSIONS		
Submitter	Number	Summary of submission (as published by Auckland Council on its website)
Minister for the Environment and Ministry of Business, Innovation and Employment	318-1	Adjust the zoning, overlays, development controls and other rules to provide sufficient residential development capacity and land supply to meet Auckland's 30 year growth projections and the development objectives of the PAUP and the Auckland plan
	318-3	Improve the PAUP integrity by reconciling its polices and methods with its RPS level objectives. The approach for doing this should focus on increasing development capacity to provide housing supply and choice across a wide range of new and existing locations
	6319-1	Align policies and rules with strategic objectives to provide sufficient capacity for growth including through appropriate density provisions and zoning.
	6319-2	Align policies and rules with strategic objectives to provide sufficient capacity for growth including freeing development from complicated policies and rules.
	6319-4	Amend the zoning, overlays and development controls and other rules such that they do not constrain provision of sufficient residential development to meet Auckland's long term (30 year) growth projections and proactively enable efficient growth in areas of high market demand.
	6319-7	Enable more residential development through green field expansion and by enabling greater density in existing neighbourhoods.
	6319-8	Amend zoning provisions to correct the misalignment between areas of high demand and the areas where growth is provided for.
	6319-10	Clarify why many zoning decisions across the city have been made. Inefficient use of market attractive land and protecting the micro amenity of neighbourhoods in the short term will seriously compromise the macro-utility of the city as a whole.
	6319-11	Amend the zoning, overlays and density rules to re-establish and ensure alignment with the strategic objectives of the Auckland Plan and the Regional Policy Statement to provide sufficient development capacity.
Housing New Zealand Corporation	839-2	Amend the PAUP to ensure that the residential zones enable urban intensification, at a scale necessary to provide 70% of the City's residential demand as the population grows (refer to page 4/10 of vol 2 of the submission for details).

	839-3	Amend the PAUP to encourage housing choice in the residential zones.
	839-5	Recognise that the PAUP unreasonably differentiates against multi-unit developments, which could discourage urban regeneration projects.
	839-17	Amend the PAUP to consistently apply the Regional Policy Statement direction for urban intensification around centres, frequent transport networks and facilities and other community infrastructure.
	839-18	Amend the PAUP to increase the extent of areas zoned for greater residential intensification to achieve the desired urban uplift, and to support other significant resources (e.g. the public transport network.)
Ockham Holdings Ltd	6099-1	Replace all residential zone provisions and zoning maps to achieve the outcomes set out in the submission.
	6099-2	Delete the 'construct' of density from all sections of the plan.
	6099-3	Merge the Mixed Housing Urban and Terrace Housing and Apartment Buildings zones to create a new Terrace Housing and Apartment Buildings zone.
	6099-4	Rezone all land in the Mixed Housing Suburban zone to Mixed Housing Urban (MHU) zone and apply the new MHU zone to all residential sites with access off all main arterial and connecting road such as New North Road, Sandringham Road, Dominion Road, Mt Eden Road, Manukau Road, Great South Road, Pt Chevalier Road, Great North Road etc; and reduce the extent of the Single House zone accordingly. Refer to Figure 1 showing arterials and collectors where the MHU should be applied on page 26/92 of the submission.
	6099-5	Reduce the size of the Single House zone.
	6099-6	Extend the Terrace Housing and Apartment Buildings (THAB) zone to cover all residential sites located with five minutes walking distance of all main arterials and connecting roads such as New North Road, Sandringham Road, Dominion Road, Mt Eden Road, Manukau Road, Great South Road, Pt Chevalier Road, Great North Road etc; and reduce the extend of the Mixed Housing Suburban and Single House zones accordingly. Refer to Figure 1 showing example of where the THAB zone should be applied on page 26/92 of the submission.
	6099-7	Rezone all land within 10 minutes walking distance of train stations and transport nodes (except for Business zoned land) to Terrace Housing and Apartment Buildings zone.
	6099-10	Delete all density controls.
Property Council New Zealand	6212-2	Review all rules and requirements in the PAUP to ensure they achieve the RPS objectives and policies 2.1 and 2.3

	6212-3	Retain policies.
	6212-4	Review all rules and requirements to ensure they achieve the RPS targets for urban growth.
Auckland Property Investors Association Inc	8969-2	Extend the Terrace Housing and Apartment Buildings zone to more sites, particularly along arterial roads and within 700m walk of railway stations and centres.
	8969-3	Combine the Mixed Housing Urban and Suburban zones to a single zone encompassing 50% of all residential sites in Auckland and apply the proposed Mixed Housing Urban controls to it.
Generation Zero	5478-3	Retain the compact city model.
	5478-4	Retain the requirement for no more than 40 per cent of new dwellings to be located outside the 2010 MUL.
	5478-36	Amend rules to increase dwelling capacity within existing urban boundaries as per Regional Policy Statements.
	5478-57	Retain up-zoning in areas around New Lynn, Avondale, Glen Innes, Panmure and Papatoetoe.
	839-4295	Rezone 18,20,16, TASMAN AVENUE,11,9,13, SEGAR AVENUE, Mount Albert from Mixed Housing Suburban to Mixed Housing Urban.
	Remaining Reference Numbers	Each submission reflects the above: a specific suggestion to rezone the properties.
	839 A + C series maps	
	303-3	Rezone properties on Carrington Road, Mt Albert from Mixed Housing Suburban to Mixed Housing Urban.
	7276-2	Rezone all of Wairere Ave, Mt Albert, from Single House to Mixed Housing Suburban.
SPECIFIC SUBMISSIONS RELIED ON BY THE IHP IN RELATION TO MT ALBERT		
Housing New Zealand Corporation	839-4295	Rezone 18,20,16, TASMAN AVENUE,11,9,13, SEGAR AVENUE, Mount Albert from Mixed Housing Suburban to Mixed Housing Urban.
	Remaining Reference Numbers	Each submission reflects the above: a specific request to rezone HNZC properties.
	839 A + C series maps	
Rose Dowsett	303-3	Rezone properties on Carrington Road, Mt Albert from Mixed Housing Suburban to Mixed Housing Urban.

Joseph Erceg	7276-2	Rezone all of Wairere Ave, Mt Albert, from Single House to Mixed Housing Suburban.
John Childs	4903-1	Rezone 16 Knight Avenue, Mt Albert from Single House to Terrace Housing and Apartment Buildings and other properties within Knight Avenue to Terrace Housing and Apartment Buildings
Anton Sengers	4895-1	Retain Mixed Housing Suburban zone for 45 Alberton Avenue, Mt Albert
	4895-45	Retain Mixed Housing Suburban zone on 47 Alberton Avenue, Mt Albert
Pantheon Enterprises Ltd	2516-1	Retain the Mixed Housing Suburban zone at 45 Alberton Avenue, Mount Albert.
	2516-49	Retain the Mixed Housing Suburban zone at 47 Alberton Avenue, Mt Albert.
Vincent Carl Heeringa	1430-1	Rezone 1 Mt Albert Rd, Mt Albert from Single House to Mixed Housing.
Hiltrud Gruger, Gregor Storz	968-1	Retain the current residential District Plan provisions in the area referred to as the Springleigh Estate, and bordered by the Western Railway, Oakley Creek, Unitec and Woodward Rd, Mt Albert
Auckland Council	5716-2802	Rezone 3 Raetihi Crescent, Mount Albert (Lot 33 DP 17374) and 5 Raetihi Crescent, Mount Albert (Lot 32 DP 17374) from Mixed Housing Suburban to Single House. Refer to submission, Volume 4, page 3/35 and Attachment 538, Volume 20.
	5716-2848	Rezone part of 33 Ennismore Road, Mount Albert (Pt Lot 11 DP 19853) from Single House to Mixed Housing Suburban. Refer to submission, Volume 4, page 5/35 and Attachment 580, Volume 20.
Gavin Logan	6083-3	Rezone 15 Harbutt Avenue, Mt Albert to Terrace Housing and Apartment Buildings.
NZ Institute of Architects	5280-118	Rezone land on Kingsland Street and New North Road, Kingsland as shown in the submission [refer to page 3/104], from Single House to Terrace Housing and Apartment Buildings.
	5280-123	Rezone land on Allendale Road, Mount Albert Road and Richardson Road, Mt Albert as shown in the submission [refer to page 5/104], from Single House to Mixed Housing Suburban zone with appropriate heritage protection.
	5280-124	Rezone land within Mount Royal Avenue, Mount Albert Road, La Veta Avenue , Mt Albert as shown in the submission [refer to page 5/104], from Single House to Mixed Housing Suburban with a review of the special character overlay.
	5280-117	Rezone land on New North Road, Richardson Road, Mount Albert Road and Duart Avenue, Mt Albert as shown in the submission [refer to page 3/104], from Single House, Mixed Housing Suburban to Mixed Housing Urban
Urban Design Forum	5277-116	Rezone land on McLean Street, Richardson Road, Mount Albert Road, Woodward Road and New North Road, Mt Albert as shown in the submission [refer to page 3/104], from Single

		House, Mixed Housing Urban and Mixed Housing Suburban to Terrace Housing and Apartment Buildings.
	5277-115	Rezone land on New North Road, Richardson Road, Mount Albert Road and Duart Avenue, Mt Albert as shown in the submission [refer to page 3/104], from Single House, Mixed Housing Suburban to Mixed Housing Urban.
	5277-117	Rezone land on Kingsland Street and New North Road, Kingsland as shown in the submission [refer to page 3/104], from Single House to Terrace Housing and Apartment Buildings.
	5277-121	Rezone land on Allendale Road, Mount Albert Road and Richardson Road, Mt Albert as shown in the submission [refer to page 5/104], from Single House to Mixed Housing Suburban zone with appropriate heritage protection.
	5277-124	Rezone land on Burns Avenue and Northcroft Street, Takapuna as shown in the submission [refer to page 7/104], from Single House and Mixed Housing Suburban to Terrace Housing and Apartment Buildings.
SPECIFIC SUBMISSIONS RELIED ON BY THE IHP IN RELATION TO GLENDOWIE		
Housing New Zealand Corporation	839 A + C series maps	
CIT Holdings	6240-1	Rezone 14-30 Waimarie Street, St Heliers, from Single House to Mixed Housing Suburban.
Rental Space Ltd	6969-5	Rezone 5 and 9 The Rise, St Heliers, from Single House to a zone that reflects the existing characteristics and recognises the potential for further development, such as Mixed Housing Suburban, and provides for a density of at least 5 residential units on the land with a building height of 8 to 10m.
	6969-1	Reject the Single House zone, and related provisions, at 5 and 9 The Rise, St Heliers.
Auckland Presbyterian Hospital Trustees Ltd	4429-4	Rezone St Andrews retirement village at 207 Riddell Road, Glendowie and all St Andrews landholdings in Glendowie from Special Purpose - Retirement Village to Mixed Housing Urban.
SPECIFIC SUBMISSIONS RELIED ON BY THE IHP IN RELATION TO BLOCKHOUSE BAY		
Area A – Lynbrooke Avenue area		
Housing New Zealand	839 A + C series maps	
Area B – Barton and Wade Street area		
Geoff Bennett	2791-9	Rezone 42 Connaught St, Blockhouse Bay from Single House to Mixed Housing Suburban.

Housing New Zealand	839 A + C series maps	
Area C – Keats Place Bolton Street area		
Housing New Zealand	839-4193	Rezone 85B,77,75,73,85A,71,83,69,87D,81,87B,87C,79,87A, BOLTON STREET,24,39,37,43,41, MARLOWE ROAD, Blockhouse Bay from Single House to Mixed Housing Urban.
	839 A + C series maps	
Area D – Boundary Rd to Whitney Street area		
Housing New Zealand	839-722	Retain Single House at 9, JAMAICA PLACE, Blockhouse Bay.
	839-631	Retain Single House at 28, JAMAICA PLACE, Blockhouse Bay.
	839-1226	Retain Single House at 174,172, WHITNEY STREET, New Windsor-Blockhouse Bay.
	839-1225	Retain Single House at 69, MULGAN STREET, New Windsor.
	839 A + C series maps	
Carson Duan	6164-1	Rezone 45 Boundary Road, 87 and 89 Dundale Avenue, Blockhouse Bay from Single House to Mixed Housing.
Brian and Ruby Lowe	2468-1	Rezone 49 Boundary Road, Blockhouse Bay from Single House to a higher density zone to enable subdivision.
Ellen Ma	42-1	Rezone 87 and 89 Dundale Avenue Blockhouse Bay from Single House to Mixed Housing.
NZ Institute of Architects	5280-263	Rezone land on Rosamund Avenue, John Davis Road and Boundary Road, Mount Roskill as shown in the submission [refer to page 58/104] from Single House to Mixed Housing Suburban.
Urban Design Forum	5277-261	Rezone land on Rosamund Avenue, John Davis Road and Boundary Road, Mount Roskill as shown in the submission [refer to page 58/104] from Single House to Mixed Housing Suburban.
Mohammed Faruk	9409-1	Rezone 29 Dundee Place, Blockhouse Bay, so it can be subdivided into 2 sections or provide for the house or granny flat to be extended [inferred].
SPECIFIC SUBMISSIONS RELIED ON BY THE IHP IN RELATION TO JUDGES BAY		
Housing New Zealand	839 A + C series maps	

Masfen Holdings Ltd	5968-16	Delete the Special Character Residential Isthmus A, B and C overlay from 21 and 23 Judges Bay road and 17 and 23 Bridgewater Road, Parnell.
Rolf and Peter Masfen	6411-1	Delete the overlay from sites 102 and 102A St Stephens Avenue and 12 Rota Place. Parnell.
Civic Trust Auckland	6444-101	Rezone Gladstone Road from Parnell to Taurarua Terrace from Terrace Housing and Apartment Buildings to Single House.
SPECIFIC SUBMISSIONS RELIED ON BY THE IHP IN RELATION TO GREY LYNN		
Housing New Zealand	839 A + C series maps	
NZ Institute of Architects	5280-11	Acknowledge that the PAUP has had significant residential intensification removed from it when compared with the draft Plan. There is a need to relook at all the methods providing for and restricting residential intensification including the spatial location of residential and business zoning, overlays including the volcanic view shaft, height sensitive areas and heritage and character areas if the aspirations of the Unitary Plan are to be achieved [refer to page 9-10/39]. Review and amend the application of different zones based on the examples provided in the submission [refer to pages 1-104/104] and to address concerns raised in the submission.
SPECIFIC SUBMISSIONS RELIED ON BY THE IHP IN RELATION TO TAKANINI		
Takanini Central	4986-1	Rezone southern portion of 55 Takanini School Road, Takanini to mixed housing suburban
NO SPECIFIC SUBMISSIONS RELIED ON BY THE IHP FOR HOWICK. SEE GENERAL SUBMISSIONS ABOVE.		

APPENDIX B			
KEY GENERAL SUBMISSIONS TO THE IHP			
Submitter	Number	Summary of submission (as published by Auckland Council on its website)	Key Quotes
Minister for the Environment	318-1	Adjust the zoning, overlays, development controls and other rules to provide sufficient residential development capacity and land supply to meet Auckland's 30 year growth projections and the development objectives of the PAUP and the Auckland plan	"I seek that the zoning, overlays, development controls and other rules be adjusted to provide sufficient residential development capacity and land-supply – particularly in areas of high market demand – to meet Auckland's long-term (30 year) growth projections, as well as the development objects of the AUP itself."
	318-3	Improve the PAUP integrity by reconciling its polices and methods with its RPS level objectives. The approach for doing this should focus on increasing development capacity to provide housing supply and choice across a wide range of new and existing locations	" I seek that the Proposed AUP's policies and methods be reconciled with its RPS-level objectives, improving the AUP's integrity, and that the approach for doing this focus on increasing development capacity to provide housing supply and choice across a wide range of new and existing locations."
Housing New Zealand Corporation	839-2	Amend the PAUP to ensure that the residential zones enable urban intensification, at a scale necessary to provide 70% of the City's residential demand as the population grows (refer to page 4/10 of vol 2 of the submission for details).	"…the provisions of the residential zones are not sufficiently enabling of urban intensification (particularly urban regeneration) at a scale that is necessary to provide for 70% of the City's residential demand as the population grows. Failing to enable or provide for appropriately located and designed residential growth within the urban area will mean the Unitary Plan will not be consistent with, nor aid the implementation of, the strategic directions identified in the Auckland Plan."
	839-3	Amend the PAUP to encourage housing choice in the residential zones.	"…the provisions of the residential zones do not sufficiently encourage housing choices that are both necessary to support the social and economic demands of Auckland's community and are identified as appropriate in the Regional Policy Statement sections of the Proposed AUP."
	839-5	Recognise that the PAUP unreasonably differentiates against multi-unit developments, which could discourage urban regeneration projects.	"…the Proposed AUP provisions unreasonably differentiate against multi-unit developments…the potential outcome of the higher 'consenting hurdles' of this approach will discourage urban regeneration projects (in favour of more ad-hoc infill type developments) and potentially result in both poorer urban design outcomes…and potentially in the failure to achieve the desired urban uplift sought."
	839-17	Amend the PAUP to consistently apply the Regional Policy Statement direction for urban	"With respect to residential zoning…there has been inconsistent application of the Regional Policy Statement direction for urban intensification opportunities around

		intensification around centres, frequent transport networks and facilities and other community infrastructure.	Centres, Frequent Transport Networks and facilities and other community infrastructure (e.g. education facilities)."
	839-18	Amend the PAUP to increase the extent of areas zoned for greater residential intensification to achieve the desired urban uplift, and to support other significant resources (e.g. the public transport network.)	"In particular, Housing New Zealand is concerned that the extent of areas zoned for greater residential intensification is not sufficient to achieve the desired urban uplift, nor to support other significant resources (e.g. the public transport network)." "To this end, Housing New Zealand is concerned that substantial rezoning is required to achieve the outcomes of the Auckland Plan and the Regional Policy Statement. In response, Housing New Zealand seeks the rezoning of a notable proportion of its land. Table 3 provides a summary of property specific rezoning submissions. These specific property submission points are made in addition to the submission matters that Housing New Zealand has made with zone, overlay and precinct provisions (Table 1). In this regard, it is important to note that the specific relief identified in terms of zoning requests is contingent on the provisions of the District Plan zones, overlays and precincts (to achieve the outcomes that Housing New Zealand is seeking). In summary, rezoning requests are made for the following broad reasons: a. There are a number of Housing New Zealand properties and sites that are within walking access of Frequent Transport networks and facilities, education and other social facilities and/or centres such that they warrant a zoning that would enable further urban intensification from that currently proposed (e.g. a shift from proposed zonings of Single House and Mixed Housing Suburban to Mixed Housing Urban, Terrace Housing and Apartments or in a few cases to Mixed Use); b. There are a few Housing New Zealand properties and sites where the zoning proposed in the Proposed AUP is inconsistent with the current development pattern on or surrounding the site and it is considered an alternate zone is more appropriate to these sites' existing or proposed zoning; c. There are a number of Housing New Zealand properties that appear to have been 'down-zoned' (compared with either existing zoning or surrounding zoning) on the basis of infrastructure constraints (primarily flood hazard notations). It is submitted that these areas are better managed through the

			application of Overlays to address resource values/issues (such that if these issues can be addressed, the wider zoning pattern appears appropriate for the site); d. There are a few Housing New Zealand properties and sites that appear to have been ‘down-zoned’ (compared with either existing zoning or surrounding zoning) on the basis of Overlays (particularly built character/heritage). These values are also mapped and identified through Overlays and it is considered more appropriate to retain that method to manage these resource values. Managing resource values through both Zone and Overlay provisions essentially results in double-layered management of a single resource value, which is considered an overly onerous process which potentially undermines the philosophical approach to managing land use matters through a standardised suite of Zones while managing resource values through the applications of Overlays; and e. There are a few Housing New Zealand sites where Housing New Zealand considers that alternative zonings will better enable it to deliver positive social and community outcomes (meeting the social and economic wellbeing of the community.”
Ockham Holdings Ltd	6099-1	Replace all residential zone provisions and zoning maps to achieve the outcomes set out in the submission.	“At the overarching level the submitter seeks the following relief; …”that the Council declines the PAUP in respect of all residential zoning provisions and zoning maps. That the residential provisions be reformulated to achieve the outcomes set out below.”
	6099-2	Delete the 'construct' of density from all sections of the plan.	“Remove the PAUP ‘construct’ of density from all sections of the plan.”
	6099-3	Merge the Mixed Housing Urban and Terrace Housing and Apartment Buildings zones to create a new Terrace Housing and Apartment Buildings zone.	“Merge all MHU and THAB zoned land to create a new THAB zone.”
	6099-4	Rezone all land in the Mixed Housing Suburban zone to Mixed Housing Urban (MHU) zone and	“Rezone as MHU all areas zoned MHS under the notified PAUP…Apply the new MHU zone to all residential sites with access off all main arterials and connecting

		apply the new MHU zone to all residential sites with access off all main arterial and connecting road such as New North Road, Sandringham Road, Dominion Road, Mt Eden Road, Manukau Road, Great South Road, Pt Chevalier Road, Great North Road etc; and reduce the extent of the Single House zone accordingly. Refer to Figure 1 showing arterials and collectors where the MHU should be applied on page 26/92 of the submission.	roads such as New North Road, Sandringham Road, Dominion Road, Mt Eden Road, Manukau Road, Great South Road, Pt Chevalier Road, Great North Road and so on"
	6099-5	Reduce the size of the Single House zone.	"Decrease the size of the Single House zone."
	6099-6	Extend the Terrace Housing and Apartment Buildings (THAB) zone to cover all residential sites located with five minutes walking distance of all main arterials and connecting roads such as New North Road, Sandringham Road, Dominion Road, Mt Eden Road, Manukau Road, Great South Road, Pt Chevalier Road, Great North Road etc; and reduce the extend of the Mixed Housing Suburban and Single House zones accordingly. Refer to Figure 1 showing example of where the THAB zone should be applied on page 26/92 of the submission.	"Enlarge the THAB zone to all residential sites located within 5 minutes' walk of all main arterials and connecting roads – such as New North Road, Sandringham Road, Dominion Road, Mt Eden Road, Manukau Road, Great South Road, Pt Chevalier Road, Great North Road etc and reduce the extent of MHS and Single house zone accordingly."
	6099-7	Rezone all land within 10 minutes walking distance of train stations and transport nodes (except for Business zoned land) to Terrace Housing and Apartment Buildings zone.	"Zone all land within 10 minutes' walk of train stations and transport nodes [which is not Business zoned] as THAB."
	6099-10	Delete all density controls.	"Remove all density related controls for the residential zones and Mixed Use zone except that for the Single House zone a minimum subdivision gross site area of 400m2 should apply to any new lots."
Property Council New Zealand	6212-2	Review all rules and requirements in the PAUP to ensure they achieve the RPS objectives and policies 2.1 and 2.3	
	6212-3	Retain policies.	

	6212-4	Review all rules and requirements to ensure they achieve the RPS targets for urban growth.	
Auckland Property Investors Association Inc	8969-2	Extend the Terrace Housing and Apartment Buildings zone to more sites, particularly along arterial roads and within 700m walk of railway stations and centres.	"We submit that more sites particularly along all arterial roads, within 700 metres walk away from railway stations, town centres and shopping centres should have a THAB zone classification."
	8969-3	Combine the Mixed Housing Urban and Suburban zones to a single zone encompassing 50% of all residential sites in Auckland and apply the proposed Mixed Housing Urban controls to it.	"We submit that there should be a return to a single Mixed Housing Zone encompassing approximately 50% of all residential sites in Auckland, and this should have the same planning controls of the Mixed Housing Urban Zones as set out in the PAUP notified on 30 September 2013."
Ministry of Business, Innovation and Employment	6319-1	Align policies and rules with strategic objectives to provide sufficient capacity for growth including through appropriate density provisions and zoning.	"MBIE's concern with the Unitary Plan as proposed is that it does not follow through on its strategic objectives (which are generally supported) with appropriately-aligned policies and rules: - By not providing sufficient capacity through which appropriate zonings and density provisions to meet Auckland's forecast growth"
	6319-2	Align policies and rules with strategic objectives to provide sufficient capacity for growth including freeing development from complicated policies and rules.	"…By failing to free development from complicated policies and rules that will create high transaction costs, thereby limiting innovation and responsiveness of supply to demand."
	6319-4	Amend the zoning, overlays and development controls and other rules such that they do not constrain provision of sufficient residential development to meet Auckland's long term (30 year) growth projections and proactively enable efficient growth in areas of high market demand.	"The general relief sought is that: - Where necessary to achieve alignment with the objectives of the Auckland Plan and the Regional Policy Statement sections of the Proposed Unitary Plan are adjusted and amended such that they do not constrain provision of sufficient residential development to meet Auckland's long term (30 year) growth projections, and proactively enable efficient growth in areas of high market demand."
	6319-7	Enable more residential development through green field expansion and by enabling greater density in existing neighbourhoods.	"Unless supply is increased it is unlikely that a substantial change in house prices will be achieved, given increasing demand and restricted supply, unless the proposed Unitary Plan enables more residential development through both greenfield expansion, and just as importantly, by enabling greater residential densities in existing neighbourhoods."
	6319-8	Amend zoning provisions to correct the misalignment between areas of high demand and the areas where growth is provided for.	"…the misalignment between the regional level objectives and the district-level provisions are expressed through: … - A deliberate down-zoning apparent between the draft Unitary Plan released

			in March 2013, and the proposed version, creating a misalignment between areas of high demand and the areas where growth is provided for, which may create additional uncertainty for infrastructure providers, and additional cost to housing provision as developers challenge through out-of-zone consents, the development rules and zonings in order to achieve economically viable development.”
	6319-10	Clarify why many zoning decisions across the city have been made. Inefficient use of market attractive land and protecting the micro amenity of neighbourhoods in the short term will seriously compromise the macro-utility of the city as a whole.	“There is little justification for why many zoning decisions across the city have been made – i.e. why ostensibly market-attractive areas near transport and employment etc have been zoned at low densities (or lower densities than indicated in the draft Auckland Unitary Plan in March 2013). Inefficient use of market attractive land while protecting micro-amenity of neighbourhoods in the short term will seriously compromise the macro-utility of the city as a whole, and detract from the overarching vision of Auckland as the world’s most liveable city – attractive, economically efficient and socially equitable.”
	6319-11	Amend the zoning, overlays and density rules to re-establish and ensure alignment with the strategic objectives of the Auckland Plan and the Regional Policy Statement to provide sufficient development capacity.	“MBIE seeks amendment to the zoning and density rules pertaining across the region to re-establish and ensure alignment with the strategic objectives of the Auckland Plan and the Regional Policy Statement sections of the proposed Unitary Plan, with the zoning, overlays and development controls and other rules adjusted to provide sufficient residential development capacity and land-supply – particularly in areas of high-market demand – to meet Auckland’s long-term (30 year) growth projections.”
Community of Refuge Trust (CORT)	4381-2	Reject the Compact City notion that large segments within the city (Single House + Mixed Housing Suburban zones) can avoid responsibility for intensification based on the argument that their areas are somehow special due to their character, identity and heritage.	“CORT opposes the Compact City notion that large segments within the city (Single House + Mixed Housing Suburban zones) can avoid responsibility for intensification based on the argument contained within 3.3 that their areas are somehow special due to their character, identity and heritage. The Council already has existing tools to protect these characteristics if they are truly unique. To argue that 85% of the city including the Single House, Large Lot, Rural & Coastal and Mixed Housing Suburb zones are all special zones that exclude medium density housing is a counterproductive to the success of the Compact City model.”
Tim Daniels	4600-1	Retain compact city model approach to intensification.	“I fully support the compact city model approach to intensification, in particular the concept of land within and adjacent to centres, frequent public transport routes and facilities being the primary focus for residential intensification.”
	4600-2	Retain density approaches in zoning particularly the no density provision allowed for in the Terrace Houses and Apartment Buildings and Mixed Housing Urban zone.	“I also fully support the approaches to density in the zoning approaches especially the no density provision allowed for in THAB and within mixed housing urban as this will provide for additional growth in areas where public transport is highest and allows for sustainable development of the city.”

	4600-3	Rezone areas around bus routes along strategic roads (e.g., Great North Road, New North Road and Dominion Road) to Terrace Housing and Apartment Buildings and Mixed Housing Urban.	"When you look at the zoning along the key bus routes along strategic roads such as Great North Road, New North Road and Dominion Road where high frequent buses are currently located and are going to be further enhanced by Auckland Transport investment strategy in coming years the zoning is not as high as it could be in parts. It is suggested that these areas and other similar roads should be re-considered in respect of there zoning and upzoned as appropriate to THAB and mixed housing urban zones."
Jacques Charroy	5116-1	Rezone (e.g. to Terrace Housing and Apartment Buildings) to increase the housing stock close to the city centre ie. in the inner suburbs of Parnell, Mt Eden, Epsom, Mt Albert, Kingsland, Freemans Bay, Ponsonby, Grey Lynn and Arch Hill.	"Transport and housing issues are intimately linked and could be best solved together by increasing the housing stock close to the city center, thereby reducing the need for transport, ie in the inner suburbs of Parnell, Mt Eden, Epsom, Mt Albert, Kingsland, Freemans Bay, Ponsonby, Grey Lynn, Arch Hill etc ... This is where densification of housing needs to happen first and be the most intense, regardless of what the few people living there at the moment want. The effect of this would be a more manageable transport system, giving the residents of these areas the choice of walking or biking to downtown Auckland as an alternative to taking the bus. This would help alleviate congestion much more readily than what the current plan would do."
Habitat for Humanity Greater Auckland Limited	3600-10	Delete the Single House zone.	"Habitat submits that the Single Housing Zone be abolished in an effort to ensure that the area within the RUB is able to be developed to its full potential."
Louis Mayo	4797-106	Rezone almost all of the Auckland Isthmus area as Mixed Housing, and delete all Single House zone within the Isthmus area.	"[A]lmost all of the Auckland Isthmus area should be included in the mixed housing urban zone. There is no reason for anywhere in the Isthmus to be in the single housing zone as it meets all the prerequisites for high-quality densification."
Ben Smith	4796-2	Reconsider allocation of residential zoning to ensure the Auckland Plan requirement of 60-70% of 13,000 new dwellings per year be built within the 2010 MUL.	"The Auckland Plan clearly outlines Auckland's housing shortage and the need for 13,000 new homes in Auckland every year for the foreseeable future. Point 129 of the Auckland Plan outlines 60% to 70% of total new dwellings inside the existing core urban areas as defined by the 2010 MUL. The Auckland Plan also specifies that the Council will be responsive to the strong demand for housing in Auckland and ensure that supply of housing meets demand. Point 132 of the Auckland Plan specifies that "The Unitary Plan will support this strategy. Auckland Council will implement enabling zoning across appropriate areas in the new Unitary Plan. This will maximise opportunities for (re)development to occur through the initial 10- to15-year life of the Unitary Plan, while recognising the attributes local communities want maintained and protected" …

			In order to achieve this objective, the Auckland Council should amend zoning allocation, building heights, and building coverage. … If the Proposed Plan is not declined, then amend it as outlined below: Pertaining to the zoning allocation of the Unitary Plan: - Re-zone some areas currently planned for Single Housing for the Mixed Housing Suburban Zone. - Re-zone some areas currently planned for Mixed Housing Suburban for the Mixed Housing Urban Zone - Re-zone some areas currently planned for Mixed Housing Urban for the Terraced Housing/Apartments Zone."
	4796-1	Upzone some areas of Auckland to provide for more housing. For example: Rezone areas of Single House to Mixed Housing Suburban, areas of Mixed Housing Suburban to Mixed Housing Urban and areas of Mixed Housing Urban to Terraced Housing and Apartment Buildings [no specific locations provided].	
Generation Zero	5478-2	Retain the compact city model.	
	5478-8	Amend Objective 2: Up to 70 per cent of total new dwellings by 2040 occurs is occurring within the metropolitan area 2010.	"Generation Zero supports the aim for 70% of urban growth over the next 30 years to be within the 2010 MUL….The wording need to confirm that, by 2040, 70 per cent of development is occurring within the 2010 MUL and that no more than 40 per cent of development has occurred outside the 2010 MUL."
	5478-57	Upzone across the urban area where this supports the Regional Policy Statement aims of intensifying near centres and in areas accessible to high quality public transport.	"These areas of upzoning alone are not enough to meet the 70% intensification target. Therefore we also give more general support to other areas of upzoning across the urban area where that upzoning supports the proposed Regional Policy Statement aims of intensifying near centres and in areas accessible to high quality public transport."
Cranleigh	7491-1	Rezone to provide for more density around areas where there is a high level of amenity, such as parks and coastlines, not just around town centres	"The PAUP identifies the importance of focusing density around town centres and major transport corridors. However, the principle of placing "greatest density" on greatest amenity areas has not been sufficiently leveraged. If we are to grow the

		and major transport corridors	attached housing and apartment market, then the opportunity to focus this lifestyle where there is a high level of amenity and a market demand for it is a great opportunity – areas such as parks and coastlines are an obvious example of this principle. The PAUP does not deliver on this.

APPENDIX C			
KEY FURTHER SUBMISSIONS TO THE IHP			
Submitter	Number	Submissions Opposed	Key Quotes
Auckland 2040	412	Oppose: Generation Zero	Support: "The submission by Generation Zero, if allowed, would have the effect of removing the distinction between the MHS and MHU zones." "Not only would the maximum height and densities be similar but most significantly the requested increase in height would permit unrestricted apartment development across all residential areas other than those zoned SH. The submissions also seek a significant reduction in the SH zone and Character areas." "The MHU and THAB zones in PUP have been located primarily around arterial roads and commercial centres. These zones encourage removal of the existing housing and its replacement with high density and multi storey development. Auckland 2040 is not opposed to such zonings, but is opposed to development occurring in an uncoordinated, haphazard fashion…They also seek significant extension of those zones which will add further to the issues as expressed above."
		Oppose: New Zealand Institute of Architects and Urban Design Forum	" "
		Oppose: Property Council of New Zealand	" "
		Oppose: Housing New Zealand Corporation	" "
		Oppose:	" "

		Ockham Holdings Limited	
Character Coalition	2209	Oppose: Property Council New Zealand	Support: The submission by Property Council, if allowed, would have the effect of removing the distinction between the MHS and MHU zones." "Not only would the maximum height and densities be similar but most significantly the requested increase in height would permit unrestricted apartment development across all residential areas other than those zoned SH. The submissions also seek a significant reduction in the SH zone and Character areas." "The MHU and THAB zones in PUP have been located primarily around arterial roads and commercial centres. These zones encourage removal of the existing housing and its replacement with high density and multi storey development. The Character Coalition is not opposed to such zonings, but is opposed to development occurring in an uncoordinated, haphazard fashion…They also seek significant extension of those zones which will add further to the issues as expressed above."
		Oppose: New Zealand Institute of Architects	" "
		Oppose: Housing New Zealand Corporation	"In order to accommodate Auckland's residential growth, intensification within our existing suburbs will be required, but Council must ensure a development mix is sensitive to the existing character of Auckland's residential areas. Council must balance the need for intensification with the desirability, including economic, of retaining the residential character of the majority of the suburbs."
Howick Ratepayers and Residents Association	216	Oppose: New Zealand Institute of Architects and Urban Design Forum	"The submission by Institute of Architects and Urban Design Forum, if allowed, would have the effect of removing the distinction between the

Incorporated			MHS and MHU zones.” “Not only would the maximum height and densities be similar but most significantly the requested increase in height would permit unrestricted apartment development across all residential areas other than those zoned SH. The submissions also seek a significant reduction in the SH zone and Character areas.” “The MHU and THAB zones in PUP have been located primarily around arterial roads and commercial centres. These zones encourage removal of the existing housing and its replacement with high density and multi storey development. Howick Ratepayers and Residents Association Inc is not opposed to such zonings, but is opposed to development occurring in an uncoordinated, haphazard fashion…They also seek significant extension of those zones which will add further to the issues as expressed above.”
		Oppose: Ockham Holdings Limited	“ “
		Oppose: Generation Zero	“ “
		Oppose: Property Council New Zealand	“ “
		Oppose: Housing New Zealand Corporation	“ “
		Support: Howick Ratepayers and Residents Association Incorporated	“It is a grave oversight of the Unitary Plan that Old Howick has not been gazetted as an Historic Heritage Suburb Area. We believe that Historic Howick must be recognised as a special “Village” and that the suburban nature of this Village based around second oldest Selwyn church in NZ and the traditional Pub, market place and village square and memorials to early Maori and Pioneers must be preserved at all costs.”

			"We reject the progressive whittling away of protection for old Howick as seen in the maps below – from Heritage status to Single House with an overlay, to parts downgraded yet further to the Mixed Housing Suburban zoning." "We fear the haphazard approach to development which will be fostered any undifferentiated zoning as it stands whereby incongruous newly developed large edifices could be built in areas of predominantly pre 1944 homes leading to an ugly intrusion in a character landscape and devaluing the esthetic (sic) appearance of whole neighbourhoods."

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)

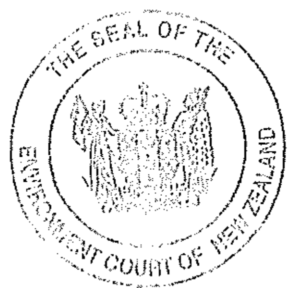
REMARKABLES PARK LIMITED AND SHOTOVER PARK LIMITED

(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.

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

[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]

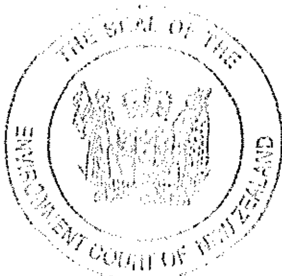
Outcome

[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.

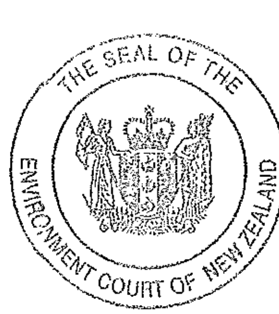
[13] Mr Mead, also a planner for the QLDC, mused that food and beverage outlets may be up to $500m^2$ or $1000m^2$ gross floor area.[10]

[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.

[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.

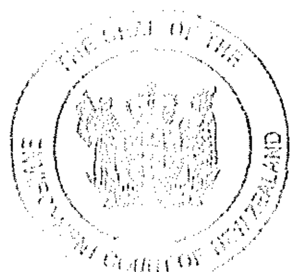
Outcome

[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]

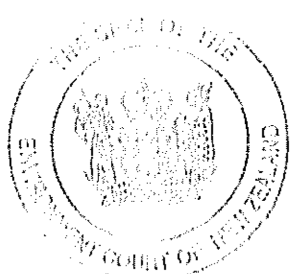
Objective 9 - Activity Area E2 (Mixed Business Corridor)

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.

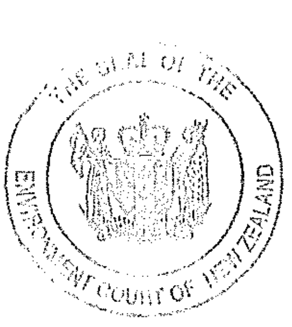
- the term "business" is preferable to "commercial" in both the Objective heading and sub-paragraph "A" because the latter is defined in the Plan in a way that may foreclose activities the council envisages populating the zone. Mr Mead intended that "business" be given its normal meaning as a "wide ranging 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

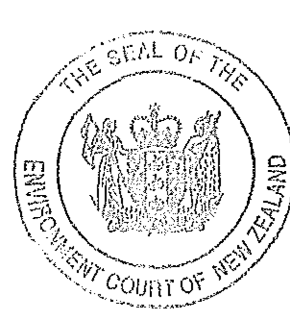
[30] A number of policies required determination as a result of either unresolved differences between the parties or questions by the court arising out of the witnesses' joint statements and/or evidence. We have found it most efficient to commence by setting out the wording of the disputed policies supported 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

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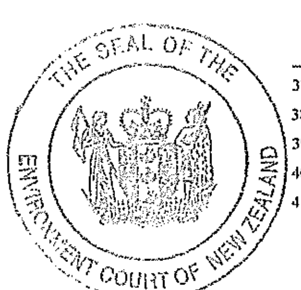
[35] Hutton, Fifth Statement 14 February 2014 [17]; Mead, Fourth Supplementary Statement 14 February 2014 [88] and revised planners' JWS 25 February 2014; Edmonds, Third Supplementary Statement 18 February 2014 [6.9] and Transcript 471; and Brown, Statement of Evidence 11 March 2014 [4]ff limited to 200m² 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)

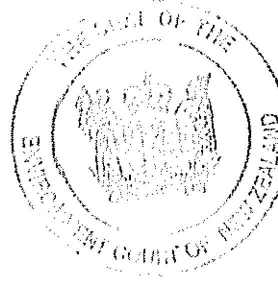
[42] Transcript at 411, 446-447.
[43] Transcript 401.

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]

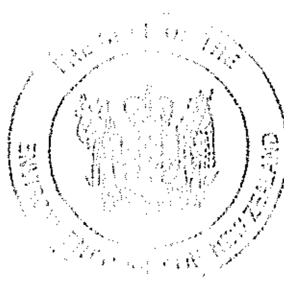
[50] Mr J Brown helpfully distilled the strategic E2 issues down to two matters. Firstly, the identification of an appropriate mix of activities within jurisdiction and, secondly, securing the built form/amenity outcomes sought.[56] Although he considered the size of buildings to be important he did 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

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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.

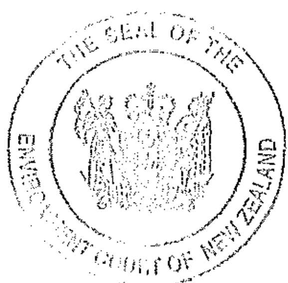
(d) Controlling the design and layout of drive through facilities.

[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

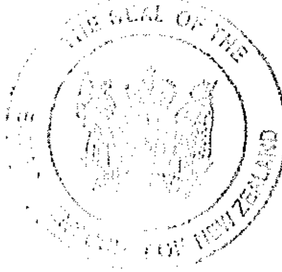
[71] Policy 9.12 is concerned with managing the effects of development and activities at the interface of Activity Areas C2 and E2, with the QLDC finally supporting the following wording:[75]

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.

[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

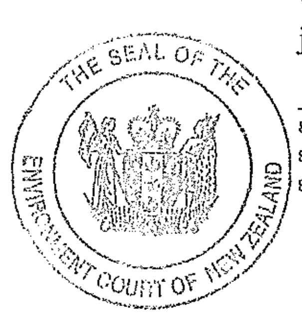
Introduction

[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.

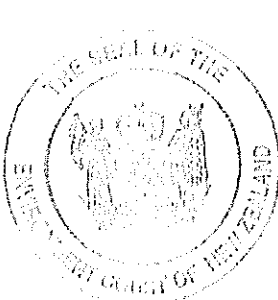
(c) Delete the requirement for an outline development plan process for Activity Area E.

(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)].

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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.

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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.

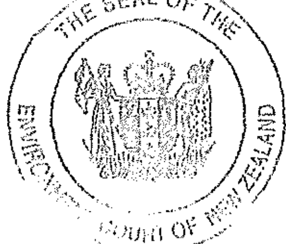
(B) Section 274 party to SPL's appeal

[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)).

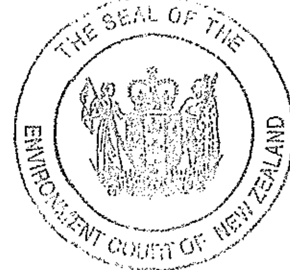
[105] SPL's general relief included the following:

> **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.



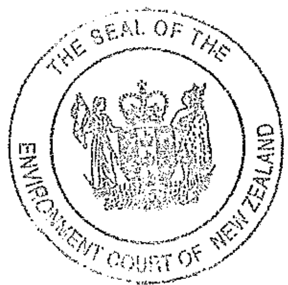
[105] The notice of appeal also proposed residential activities, but for reasons we set out it did so without having sought this in submissions and further submissions on the plan change.

[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.

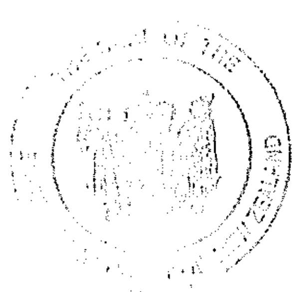
[114] Subject to an appeal to a higher court reviving jurisdiction, the Environment Court is *functus officio* on its decision at paragraph [508] to approve mid-sized retail activities and at paragraph [509] limiting the size of retail activities to $500m^2$ and $1000m^2$ gfa within AA-E2.

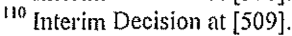
(C) Other retail

[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.

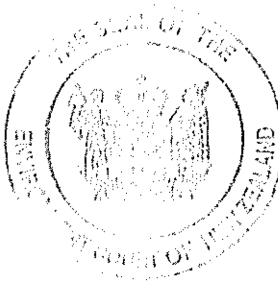
[121] We come now to the second aspect of this subject that has troubled the court through these proceedings and which underpinned the concern expressed in the first Interim Decision. Namely, if AA-A were to vest as reserve, might it constitute such a large part of the land owner's reserve contribution 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.

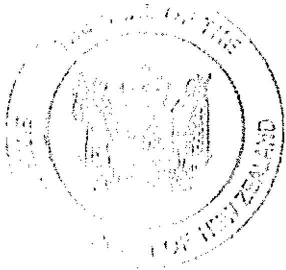
[129] PC19(DV) contains an objective, policy and rules concerning the use of Outline Development Plans within Activity Areas C1, C2 and E2.[123] While the parties propose amendments to the higher order provisions of PC19(DV), to provide a necessary level of context we set out the relevant provisions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

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[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.

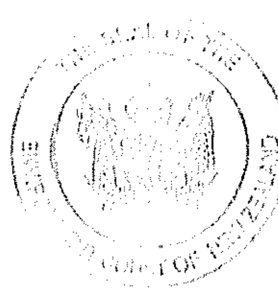
[138] The expert witnesses in their second JWS discussed the purpose of the ODP provisions in the context of PC19. We come back to their evidence later.

[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:

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[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

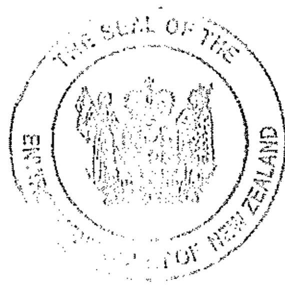
(3) If an activity is described in this Act, regulations, or a plan or proposed plan as a restricted discretionary activity, -

(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

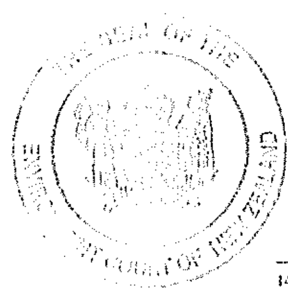
(c) Any destruction of, damage to, or disturbance of, the habitats of plants or animals in, on, or under the land; or

(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

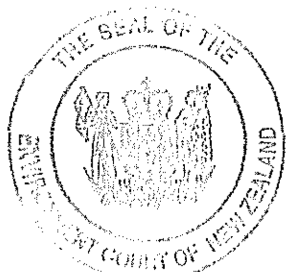
Submissions in support by QLDC and QCL

[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]

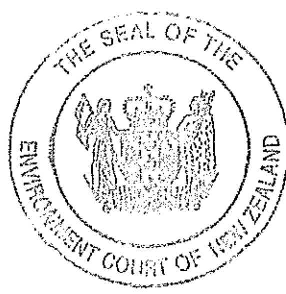
(c) without an approved ODP the use of land would contravene a rule in a Plan and therefore s 9(3) of the Act;

(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

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[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.

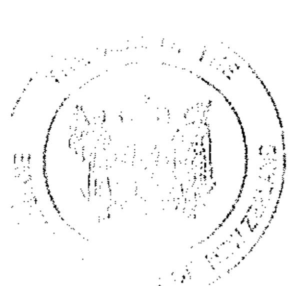
[164] We turn next to the issue identified by the court.

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:

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[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?

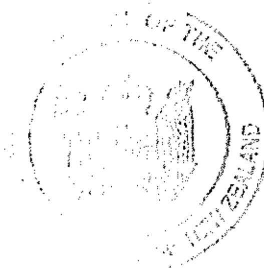
Issue: Can the status of a permitted activity, or indeed any activity be determined by a prior grant of consent?

[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)).

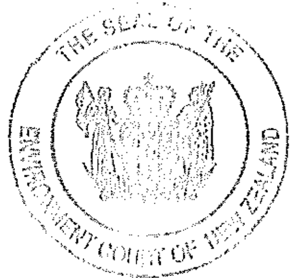
[175] We return to the rule for permitted activities which was the particular focus of QLDC and QCL submissions. Rule 12.19.1.1 identifies a garden centre and its ancillary activities,[161] and the activities in Table 1 as belonging to the class of permitted activities subject to compliance with:

- 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).

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

[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

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[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

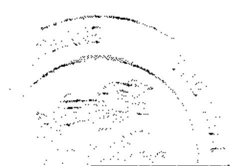
9.5 To ensure buildings and site development results in a high level of visual interest when viewed from the EAR through a combination of generous areas of glazing at ground floor, building modulation and detailing, positioning of main building entrances visible from the street, integration of signage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

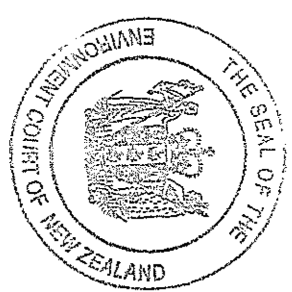
b. *~~the location and size of retail activities.~~ Developments should enable a combination of different types of activities to occur within the sites covered by the ODP, ~~either arranged vertically (in multiple stories of buildings) or horizontally (adjacent to one another)~~: and*

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;*

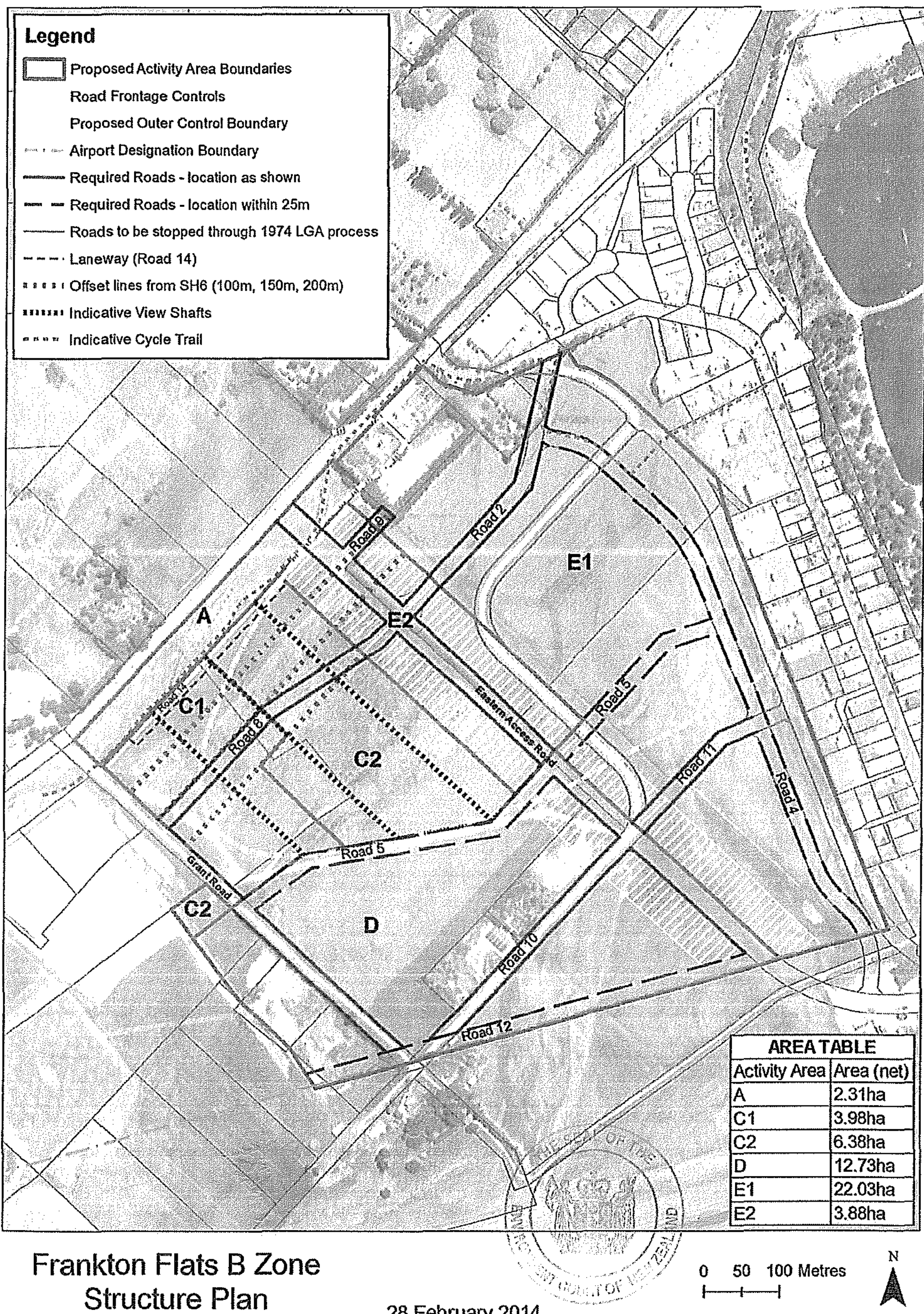
c. *secure the Area's ongoing maintenance and management; and*

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.

Annexure B



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

BEFORE THE ENVIRONMENT COURT

Decision No. [2016] NZEnvC 65

IN THE MATTER	of an application for declarations under Part 12 of the Resource Management Act 1991 ("RMA")
BY	AUCKLAND COUNCIL
	(ENV-2015-AKL-000138)
	Applicant

Hearing at: in Chambers

Full Court: Principal Environment Judge L J Newhook
Environment Judge B P Dwyer
Environment Judge J E Borthwick

Counsel: J Hodder QC and M G Wakefield for Applicant
T Daya-Winterbottom for Viaduct Harbour Holdings Ltd, in support
W S Loutit and K M Stubbing for Fletcher Construction Developments Ltd, Tamaki Redevelopment Co and Kauri Tamaki Ltd, in support
D R Clay and A F Theelen for Ngati Whatua Orakei Whai Rawa Ltd, in opposition
R B Enright for Wiri Oil Services Ltd, in opposition
K R M Littlejohn and K and D Schweder, in opposition
Dr R J Somerville QC as *Amicus Curiae*

Date of Decision: 15 April 2016

Date of Issue: 15 April 2016

FINAL DECISION OF FULL COURT OF THE ENVIRONMENT COURT ON APPLICATION BY AUCKLAND COUNCIL FOR DECLARATIONS REGARDING THE LAWFULNESS OF FRAMEWORK PLAN PROVISIONS IN THE PROPOSED AUCKLAND UNITARY PLAN

A: Pursuant to s 313(a) of the Resource Management Act 1991 the Environment Court makes the following declaration:

Declaratory order AA

On becoming an operative combined plan under the Local Government (Auckland Transitional Provisions) Act 2013 (LG(ATP)A) and Part 5 of the RMA (commencement), the Council's Proposed Auckland Unitary Plan (PAUP) may lawfully include a provision enabling an application for a bundle of land use consents under Part 6 of the RMA which authorise the key enabling works necessary for development associated with the first stage of urbanization and/or redevelopment of brownfield and greenfield land within identified specific geographical areas (precincts) as set out in the attachments to this decision marked "Chapter G" and "Chapter K".

B: Pursuant to s 313(c) of the Resource Management Act 1991 the Environment Court declines to make the following declaration:

Declaratory order C

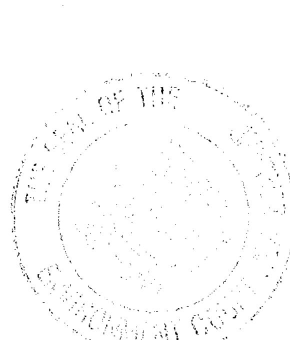
On commencement, the PAUP may lawfully provide that, in assessing and determining a resource consent application for an activity in a precinct, the consistency of that activity with an approved framework plan application for that precinct is, in terms of s 104 of the RMA, a matter to which regard must be had by the consent authority.

REASONS FOR DECISION

Introduction

[1] In March 2016 the Environment Court released its Interim Decision on Auckland Council's application for declaratory orders regarding the lawfulness of framework plan provisions in the proposed Unitary Plan.[1]

[2] The Court, having declined to make three of the five declaratory orders sought, directed Auckland Council to confer with the other parties and file submissions responding to the Interim Decision and to address five specific concerns raised by the Court.[2]



[1] [2016] NZEnvC 56.
[2] Minute dated 29 March 2016.

[3] Auckland Council filed its further submissions,[3] with separate submissions being filed on behalf of Fletcher Construction Developments Ltd and Tamaki Redevelopment Company,[4] Messrs K and F D Schweder[5] and Wiri Oil Services Ltd.[6]

[4] Once again we are grateful for counsel's diligence when responding to the Court's directions within the timeframe set.

The outstanding declaratory orders

[5] This decision concerns Auckland Council's application for amended declaratory orders AA and C as follows:

Declaratory order AA

> On becoming an operative combined plan under the Local Government (Auckland Transitional Provisions) Act 2013 (LG(ATP)A) and Part 5 of the RMA (commencement), the Council's Proposed Auckland Unitary Plan (PAUP) may lawfully include the provisions proposed for framework plan applications for specific geographical areas (precincts) as set out in the attachments to this amended application marked "G1" and "BK1" to be sought by means of a resource consent application for land uses under Part 6 of the RMA.

Declaratory order C

> On commencement, the PAUP may lawfully provide that, in assessing and determining a resource consent application for an activity in a precinct, the consistency of that activity with an approved framework plan application for that precinct is, in terms of s 104 of the RMA, a matter to which regard must be had by the consent authority.

Further Revision to Chapters G and K

[6] Attached to Auckland Council's submissions are further revisions to Chapters G and K of the Unitary Plan, and these are referred to in this decision as the second revision.

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[3] Memorandum dated 7 April 2016.
[4] Memorandum dated 7 April 2016.
[5] Memorandum dated 11 April 2016.
[6] Memorandum dated 13 April 2016.

[7] In the second revision Auckland Council proposes to adopt the language of 'framework consents' proposed by counsel for K and D Schweder, Mr Littlejohn. The provisions clearly differentiate between "an application for a framework consent" on the one hand and, following approval, "a framework consent" on the other. It is now clear for the reader of the Unitary Plan as to whether it is the application or the consent that is spoken of.

[8] The concept of a framework consent is well defined and consistently applied in Chapter G (second revision).

[9] The concept of a framework consent follows:

> Framework consents are resource consents that authorise activities associated with the first stage of urbanisation and/or redevelopment of brownfield and greenfield land within identified precincts (such as roading networks, public open space, walking/cycling networks, infrastructure (e.g. stormwater and wastewater networks), earthworks and (in some instances) building location and scale).

[10] The purpose of a framework consent is:

> The purpose of framework consents is to <u>ensure</u> the integrated development of land within the identified precincts and to authorise the key enabling works necessary for that development.
>
> [our emphasis]

[11] Mr Littlejohn submits "enable" and not "ensure" is semantically more consistent with the Act and better reflects the fact that a consenting regime is permissive, not mandatory.[7] We accept his submission.

[12] The advantages of a framework consent are then expanded upon as follows:

> The ability to apply for framework consents is provided for within identified precincts. In those identified precincts there will be provisions that contain specific:
>
> - objectives and policies that articulate the development outcomes for the precinct or sub-precinct;
> - rules that give effect to those development outcomes;
> - mechanisms that incentivise the use of framework consents as a first stage process for land development;
> - assessment criteria that need to be addressed as part of applications for framework consents;

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[7] Memorandum Schweder at [4].

- information requirements for applications for framework consents, as specified in clause 2.7.3, unless otherwise specified in the precinct provisions.

[13] Chapter K (second revision) contains the template for rules pertaining to 33 precincts or sub-precincts. In summary, the template for Chapter K (second revision) are as follows:

- a catch-all rule provides that unless otherwise stated the activities, controls and assessment criteria that apply to the underlying zones and separately the Auckland-wide rules, also apply to the precinct;
- an Activity Table that identifies the status of certain activities within the particular precinct. An application for a framework consent is a restricted discretionary activity. The table is to separately list those land use activities which may be sought as part of an application for a framework consent as restricted discretionary activities;
- buildings and subdivisions that are not the subject of a framework consent are subject to the tests for notification under ss 95 to 95H of the Act;
- an application for a framework consent and applications for buildings and subdivision on sites that are the subject of a framework consent, will be considered as a restricted discretionary activity without the need for public notification. Limited notification may be required, where any owner of land within a precinct or sub-precinct has not given their approval to the application for consent;
- a rule requires an applicant for framework consent to apply for land use consent for certain land use activities which are listed;[8]
- different development controls may apply to buildings subject to whether consent has been granted for a framework consent (5 Controls);
- in respect of an application for a framework consent the council would restrict its discretion to matters listed in Chapter G at 2.6.1, and "the overall development layout, being the layout and design of roads, pedestrians linkages, open spaces, earthworks areas and land contours, and infrastructure location";[9]

[8] Rule 3 Framework Consents.
[9] There may be other relevant matters of discretion for an individual precinct which the template notes has yet to be identified.

- for applications for buildings (including alterations and additions) and applications for subdivision, the matters of discretion include consideration of the buildings and subdivision "relative to overall development, including...". We observe that the phrase "relative to overall development" is ambiguous. For present purposes we have assumed the phrase refers to both the environment in the *Hawthorn Estates Limited v Queenstown Lakes District Council*[10] sense and secondly, the building or subdivision activities for which consent is sought (6.1 Matters of discretion);
- regardless of whether an application for framework consent has been granted, for all building applications the matters of discretion include the same matters that would apply to an application for framework consent (2.6.1). We make the further observation that the merits of this rule is a matter for the Independent Hearing Panel. It is unclear to us whether 2.6.1 is to be applied insofar as those matters are relevant to the particular application building or subdivision consent or something else (6.1 Matters of discretion);
- the assessment matters for applications for a framework consent, buildings and subdivision include the relationship of the matters requiring consent to the activities authorised by other resource consents granted in respect of the precinct or sub-precinct (6.2 Assessment Criteria); and
- an application for a framework consent is to be accompanied by certain information, the requirements of which are listed in this chapter (7 Special information requirements).

Consideration

[14] We are satisfied that a rule enabling consent to be applied for a bundle of land use activities that would authorise the key enabling works necessary for the integrated development[11] of land is *intra vires* the Act. Provided that the consent expressly allows the consent holder to use land in a manner that contravenes a district rule (s 9(3)), the

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[10] [2006] NZRMA 2014 at [84] i.e. the future state of the environment as it might be modified by the implementation of resource consents where it appears likely that those consents will be implemented.

[11] See purpose statement in Chapter G (second revision).

rule is *intra vires* the Act even though other resource consents will be required to authorise further development of the land.

[15] A district council's ability to make rules is constrained by ss 77A and 87A. If the consent does not authorise the consent holder to use land in a manner that contravenes a district rule, but instead purports to authorise a plan about the future use of land, such a rule would be *ultra vires* the Act. Ngati Whatua Orakei Rawa Ltd, supporting the second revision, captured the *vires* issue neatly in its submission that the revision helps remove the previous ambiguity that framework consents are planning tools observing "[a] framework consent is not something for which consent must be obtained of itself".[12]

[16] Subject to the comment we make above concerning the matters of discretion and assessment criteria (which are matters for the Independent Hearings Panel) we considered the template provisions in Chapter K (second revision) to have a clear, succinct structure with its key terms "applications for framework consents" and "approved framework consents" applied consistently throughout.

Other matters

Fletcher Construction Developments Ltd and Tamaki Redevelopment Company ("Fletchers")

[17] Fletchers filed further submissions attaching a revised version of Chapters G and K for the Tamaki Precinct. Counsel for Fletchers thought it would be of assistance to the Court to see how the template provisions in Chapter K would work for a specific precinct.

[18] In the Tamaki Precinct example, Fletchers has further developed the concept of a 'framework consent' by differentiating between 'integrated consents' on the one hand and 'development consents' on the other. 'Integrated consents' is used to describe the

[12] Memorandum Auckland Council at [37].

enabling phase of land use consents.[13] The term 'development consents' is used to describe the delivery land use phase of the project.[14]

[19] We make the observation that there may be little or no synergy between the content of an application for an 'integrated consent' and the land use activities identified for an integrated consent. To illustrate, in the Tamaki Precinct it is proposed that an integrated consent must be sought for one or more identified land use activities; one of which is archaeology. An application for an 'integrated consent' must include, amongst other matters, (c) development yield/density, (g) subdivision and stage, (h) interface with surrounding environment/lots. It is difficult to understand how these matters are relevant in the circumstances where the activity to which the application relates is archaeology and at first blush Fletcher's integrated consent appears to be a plan for the future.

[20] As the content of each individual precinct is a matter for the Independent Hearing Panel to decide, and in the absence of any response from Auckland Council (or other interested parties) on the Fletchers' precinct provisions, we shall not comment further.

K and D Schweder

Clarification of activity status in absence of neighbours' approvals

[21] The Schweders seek that Chapters G and K (second revision) be amended to make explicit that an application for a framework consent can only be made in respect of all of the land in a precinct or sub-precinct where the applicant owns all of the land or, where land is in multiple ownership, the application is made with the written consent of all of the landowners. If these circumstances do not apply then a landowner may still apply for resource consent (without being disadvantaged by activity status) and have their proposal assessed in the normal way. The Schweders propose amendments to each chapter in support of their submission.

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[13] Integrated consents were previously referred to as Framework Plan or Framework Consent in the council's latest version.
[14] Memorandum Fletchers at [7]-[9].

[22] We consider Chapters G and K adequately address the Schweders' concerns. Based on the template provisions, if an application for building or subdivision consent is lodged for sites that are not the subject of a framework consent the applicant is not disadvantaged in terms of activity status. An application for a building or subdivision consent is a restricted discretionary activity whether or not a framework consent has been granted. What changes is the notification process, with the tests for notification under ss 95 to 95H applying.

[23] As the submission largely concerns the clarity around specific provisions the Unitary Plan, it remains open to the Schweders to pursue this matter before the Independent Hearing Panel.

Incentives

[24] The notification process and land use and development controls are used to incentivise the application for framework consents. It is not clear whether the status of the activity will change depending on whether there is an approved framework consent, it may do.

[25] In the form of land use and development controls Chapter K (second revision) retains the incentive of greater development rights which are to be conferred if the framework consent process is followed (5, Control). More particularly, Chapter K gives by way of an example different height limits which will apply to buildings depending on whether or not a framework consent has been granted. We are not told what the status of a building application that does not comply with the controls would be. Height limits are one incentive; other incentives include site intensity and building coverage.

[26] On the topic of land use and development control type incentives in the Interim Decision the Court declined to make Declaratory Order D, finding Declaratory Order A (which the Court also declined to make) contextually over-arches Declaratory Order D.[15]

[15] Interim Decision at [171].

[27] Declaratory order D states:

> On commencement, the PAUP may lawfully include provisions designed to encourage framework plan applications for precincts, which provisions are more advantageous for resource consent applicants if a framework plan application has been approved for that precinct than would otherwise be applicable.

[28] Mr Littlejohn submits in declining to make the declaration implicitly the Court accepted the submissions of the *Amicus Curiae*. Therefore, he submits, the precinct plans cannot include incentivised development rights.[16] We doubt Mr Littlejohn is right in his last submission and upon further reflection, it would have been helpful to the parties had the Interim Decision addressed directly the *vires* of the incentives in the context of both options being pursued by the Council at that time.

[29] In March 2016 Dr Somerville, as *Amicus*, submitted that a rule providing for building height increases with an approved framework plan is *ultra vires* s 76(3) of the Act. This section requires the territorial authority to have regard to the actual or potential effect on the environment of activities, including any adverse effect.[17] The language used by s 76(3) makes this a mandatory requirement – "in making the rule, the territorial authority <u>shall</u> have regard…".

[30] While Wiri Oil Services is generally supportive of the position taken by Mr Littlejohn, in its view it is only where an incentive leads to a differential activity status can it be said that the provision is *ultra vires.*[18]

[31] We gained little assistance on this topic from the affidavit of Ms Dimery, who does not address s 76 (3) but rather the merits of the incentive provision.[19]

[32] The parties will recall that the Court explored this topic with counsel during the March hearing. The Court was left with the impression that the actual or potential effects of activities that are subject to the relevant land use and development controls is a matter to be determined under an application for the former "framework plan". This reinforced a view that what would be applied for was in the nature of a plan.

[16] Memorandum Schweder at [9]-[14]. No doubt Mr Littlejohn is correct in this last submission.
[17] Submissions of Amicus Curiae at [5].
[18] Memorandum Wiri at [10].
[19] Sworn 14 October 2015 at [72(c)].

[33] The Court is usually hesitant to be drawn on policy matters where the views of the territorial authority are not known. Chapter K is a template for 33 precincts and sub-precincts. The Court is being asked, in effect, to make a declaration on the *vires* of a provision without evidence on what actually is proposed, and without the benefit of evidence addressing s 76 (3). The Court will not make declaratory orders in an evidential vacuum, and we confirm the decision to decline Declaratory Order D.

Description of Activities

[34] At paragraphs [149]-[154] of the Interim Decision the Court repeated concerns expressed during the course of the hearing that the rules requiring consent for certain land use activities as part of a framework application were either *ultra vires* s 77A(1) and s 77B(3) of the Act or alternatively void for uncertainty.

[35] Auckland Council responded by advising that the Chapter K provisions are template provisions only.[20] They are not, and never were, intended to demonstrate what the final Chapter K (which makes provision for 33 precincts) would look like in the PAUP.

[36] We understand Auckland Council would have the land use activities listed in Chapter K (second revision) treated as if they were placeholders, carrying little or no semantic information. Auckland Council has now clarified that:

> The precinct provisions included in the PAUP will reflect the specific activities that require land use consent for each identified precinct. Those activities will reflect the site characteristics and development outcomes and objectives for particular precinct, as will the provisions relevant to framework consents.[21]

[37] This clarification is important, because the description of the land use activities reinforced the Court's impression that what was proposed to be granted *ultra vires* the Act would be a consent for a plan and not a consent authorising a bundle of land use activities.

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[20] Attached to Ms Dimery's initial affidavit and the amended application for declarations dated 1 March 2016.

[21] Memorandum Auckland Council at [10]. The statement is contained in Chapter K (3 Framework consents)

Deeming consents

[38] Finally, at paragraph [147] of the Interim Decision we recorded Wiri Oil Services Ltd's concern with the validity of a provision in a plan which deems consents granted under earlier ("legacy") planning instruments to be an "approved framework plan".

[39] Auckland Council makes clear it will seek the definition "approved framework plan" be deleted from the Unitary Plan. If the Independent Hearings Panel makes this decision, then we with agree with Auckland Council and the *Amicus Curiae*[22] there would be no deeming provision.[23] The Council has accepted that consents granted under the legacy instruments cannot be deemed to be "framework consents", as these consents have not been assessed and approved pursuant to the provisions in Chapter K.[24]

[40] Auckland Council is correct in its observation that a resource consent granted pursuant to an earlier "legacy" planning instrument will remain a resource consent despite the legacy planning instrument (under which the consent was granted) being replaced by the Unitary Plan. That is because any consent, until declared invalid by a Court with competent jurisdiction, is to be administered and enforced in accordance with its terms.

[41] That said, we do not necessarily agree with Auckland Council's unqualified submission that consents granted under the legacy planning instruments are of enduring relevance. The relevance of any resource consent is nuanced. This is implicitly recognised in Auckland Council's submission in relation to the assessment criteria that "planners will need to consider any approved framework consents (or equivalent framework consents), which are a part of the receiving environment (as per *Hawthorn Estates Limited v Queenstown Lakes District Council* [2006] NZRMA 2014 at [84])". The Court of Appeal is talking about the future state of the environment as it might be modified by the implementation of resource consents where it appears <u>likely</u> that those consents will be implemented: per *Hawthorn Estates Limited v Queenstown Lakes District Council* at [84]. We recognise consent authorities are challenged on a daily

[22] Dr Somerville email dated 6 April 2016.
[23] Memorandum Auckland Council at [16].
[24] Memorandum Auckland Council at [18(b)].

basis by the requirement to reach an informed view as to the likelihood of resource consents being implemented.

[42] We are aware of difficulties that may arise for consent holders where the planning environment changes upon a new District Plan becoming operative. Auckland Council alludes to this at paragraph [18(d)] of its submission.[25] Consents granted under legacy planning instruments may, however, bring different challenges, particularly for those consents that do not actually authorise any works. The difficulty administering such consents is the subject matter of the Environment Court decision *184 Maraetai Road Ltd v Auckland Council.*[26]

[43] As the content of the Unitary Plan, including its interface with framework plan type consents, is not a matter for us to determine, we will not comment further.

[44] Returning to Wiri Oil Services Ltd, we record that this party accepts the concerns that it raised in relation to deemed consents have now been addressed.

Declarations

[45] On 1 March 2016 Auckland Council amended its application for declarations. The amendments reflect the wording of revised Chapters G and K that are the subject matter of the Interim Decision.

[46] The Council has not amended the application to respond to the second revision of Chapters G and K.

[47] The Court is prepared to make, with modifications, Declaratory Order AA.

[48] Attached to and forming part of these orders are Chapters G and K (as modified by the Court). The modifications to these chapters address issues of *vires* and issues of

[25] The Council submits "There may be situations where specific provisions or development controls used in ("legacy") planning instruments refer to equivalent framework consents. In that instance the Chapter K provisions for those particular precincts may need to preserve those provisions or development controls through tailored provisions that ensure that those provisions will endure. This can only be achieved by way of a case-by-case review of the Chapter K precinct provisions against the legacy planning instruments that provide for equivalent framework consents".

[26] [2015] NZEnvC 213 at[8]-[9].

uncertainty which have been the focus of our decision. The content and merits of Chapters G and K as they may be applied in the context of the 33 precincts and sub-precincts is to be determined by the Independent Hearings Panel.

[49] The Court will decline to make Declaratory Order C. In the second revision of Chapters G and K reference to the "consistency of that activity with an approved framework plan" in the matters of discretion or assessment criteria was deleted with new provisions substituted. Auckland Council advises this was done in order to remove from the Council's determination of any restricted discretionary activity any assessment against "consistency", and also to remove perceived uncertainty and possible contravention s 104(1)(b) raised by other parties.[27] Declaratory Order C has not been amended to follow suit. Given the amendments made to Chapters G and K the Court declines to make Declaratory Order C as there remains no live issue for the Court to determine.

Outcome

[50] Pursuant to s 313(a) the Environment Court makes the following declaration:

Declaratory order AA

> On becoming an operative combined plan under the Local Government (Auckland Transitional Provisions) Act 2013 (LG(ATP)A) and Part 5 of the RMA (commencement), the Council's Proposed Auckland Unitary Plan (PAUP) may lawfully include a provision enabling an application for a bundle of land use consents under Part 6 of the RMA which authorise the key enabling works necessary for development associated with the first stage of urbanization and/or redevelopment of brownfield and greenfield land within identified specific geographical areas (precincts) as set out in the attachments to this decision marked "Chapter G" and "Chapter K"..

Declaratory order C

[51] Pursuant to s 313(c) the Environment Court declines to make the following declaration:

[27] Memorandum Auckland Council at [13(d-h)].