

**BEFORE THE ENVIRONMENT COURT**

Decision No. [2014] NZEnvC 167

**IN THE MATTER** of an appeal under Clause 14 of the First  
Schedule of the Resource Management Act  
1991 (**the Act**)

**BETWEEN** MAN O'WAR STATION LIMITED  
(ENV- 2010-AKL-000336)  
MIGHTY RIVER POWER LIMITED  
(ENV-2010-AKL-000341)  
FEDERATED FARMERS OF NEW  
ZEALAND LIMITED  
(ENV-2010-AKL-000332)

Appellants

**AND** AUCKLAND COUNCIL  
Respondent

**AND** ENVIRONMENTAL DEFENCE SOCIETY  
INCORPORATED

**AND** SOUTH PONUI LIMITED  
Section 274 parties

Hearing: At Auckland, 20 and 21 May 2013. Site visit delayed to 18 October  
2013 to accommodate on-farm activities. Further submissions  
received from the parties up to 1 June 2014.

Court: Principal Environment Judge L J Newhook  
Environment Commissioner R M Dunlop  
Environment Commissioner I Buchanan

Appearances: Mr ME Casey QC and Mr MJE Williams for Man O'War Station  
Limited



Mr JA Burns and Ms L S Fraser for Auckland Council, Mighty River Power Limited and the Environmental Defence Society. (Ms NM de Wit for EDS in recent written submissions)

Mr P R Gardner for Federated Farmers of New Zealand Limited

Date of Decision: 29 July 2014

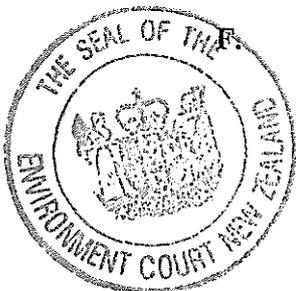
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**INTERIM DECISION OF THE ENVIRONMENT COURT**

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- A.** The Court's present finding is that the appeals should be dismissed except to the extent indicated below, subject however to resolution of certain aspects that may be influenced by the recent Supreme Court decision in *King Salmon*.
- B.** The references to "*naturalness*" in the text of PC8 are upheld except for the indicated amendment to Reasons 6.4.24 and subject to further submissions for which leave is granted.
- C.** On a tentative basis, Method 6.4.23.2(i) is to be retained unaltered and its accompanying Reason amended as indicated to allow for more neutral expression. Leave however granted for further submissions to be lodged in light of the recent Supreme Court decision in *King Salmon*.
- D.** Map Series 3A is to be amended as detailed in the decision by altering ONL boundaries on Waiheke Island and Ponui Island as directed (amended maps to be submitted for approval of the Court). This outcome might however need to be re-examined if the subject matter of C above alters significantly by agreement of the parties or after further submissions are considered by the Court.
- E.** Appendix F-2 is to be further considered by the parties in light of changes directed to ONL boundaries.

Timetable for further steps to be lodged by 11 August 2014.



F. Costs are reserved.

## REASONS FOR DECISION

### Introduction

[1] These appeals concern a geographically-limited part of an otherwise broadly-based Proposed Change 8 (PC8) to the Auckland Regional Policy Statement (ARPS). The Change introduced new policy provisions for Outstanding Natural Landscapes (ONL) and a new set of ONL maps for the Auckland Region. The appeals concern these provisions and related maps for Man O' War Station Limited (MOWS) properties at the eastern end of Waiheke Island and on Ponui Island in the Hauraki Gulf.

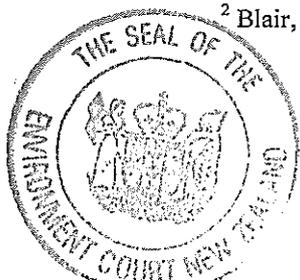
[2] Following the receipt of submissions on PC8 the council undertook further landscape assessment work, delaying the progress of the instrument. This resulted in a revised set of ONL maps for the Decisions Version of the Change released in 2010 (Decisions Version). Ten appeals were lodged against the council's decisions. By the time of the hearing a basis for determining all but three of these appeals had been agreed by some of the parties through alternative dispute resolution, including Court-annexed mediation. The changes were shown in a track change version of PC8 filed with a Memorandum of Counsel prior to a Pre-hearing Conference conducted on 24 July 2012. MOWS was not a signatory to the Memorandum<sup>1</sup>. As the previously described agreed matters have not been confirmed by consent order(s) the PC8 objectives, policies and methods cannot be said to be legally settled. They were, however, the provisions advanced by the council at the hearing and to which we refer in subsequent parts of our decision (the Hearings version)<sup>2</sup>.

[3] As we describe in more detail below, three aspects of the MOWS appeal remained alive before us. Two were concerned with the wording of a Method and an Issues

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<sup>1</sup> Burns and Fraser, Memorandum to the Court 23 July 2012 at [11]

<sup>2</sup> Blair, EIC, Annexure A: proposed consent order between the parties



Explanation. The third and most substantive matter was the proposed ONL boundaries on the company's large Waiheke Island and Ponui Island properties. Federated Farmers, which also has an appeal against the Ponui ONL, entered an appearance but did not take an active part in the hearing. Similarly, Mighty River Power and EDS took no part. No appearance was recorded for South Ponui Limited consistent with Mr Burns's advice that while it supported MOWS's case it would not attend<sup>3</sup>.

### **Matters agreed amongst the parties**

[4] Matters agreed amongst the parties and not requiring determination included the following:

- (a) All of the areas where ONL classifications were disputed have sufficient natural qualities for the purposes of s.6(b) ("outstanding natural features and landscapes");<sup>4</sup>
- (b) The eastern coastal fringe of MOWS's land on Ponui Island comprises an ONL there being no significant difference in the mapped landscape evidence of Mr S Brown and Ms BM Gilbert called respectively by the council and MOWS;<sup>5</sup> and
- (c) That the Stony Batter feature is an "outstanding natural feature" (ONF) albeit there was a difference between the landscape architect witnesses about the extent to which it should be included in an ONL<sup>6</sup>.

### **Disputed matters**

[5] Matters in dispute between the parties and requiring determination included:

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<sup>3</sup> Burns, Email to Court Registrar 17 May 2013

<sup>4</sup> Gilbert EIC at [10.3]

<sup>5</sup> Ibid, Appendix N(ii)

<sup>6</sup> Landscape Architecture joint expert witness caucus statement March 2013 [10].



- (a) MOWS challenged use of the term “*naturalness*” in both the PC8 Explanation to Issue 6.2.7.3 and in Reasons 6.4.24. As we describe in more detail below, MOWS was concerned with what it considered to be an over emphasis on “*naturalness*” relative to other factors relevant to ONL identification. It specifically sought the deletion of the following provisions,<sup>7</sup> which the council opposed:<sup>8</sup>
- (i) The reference to “*including naturalness*” in the 2<sup>nd</sup> paragraph of the Explanation to Issues 6.2.7.3 (in the context of adverse cumulative effects).
  - (ii) In the 4th paragraph of the Reasons statement [6.2.24] – “*This includes high levels of naturalness, which is one of the critical distinguishing components of an outstanding natural landscape*”.
  - (iii) The reference to “*including naturalness*” in the Reasons statement paragraph appearing at the top of the right hand column of text on [Hearings Version] pages 6-14.
- (b) MOWS sought that Landscape Method 6.4.23.2(i) and its accompanying Reason be deleted<sup>9</sup>, which the council opposed. The disputed Method, which comes under the heading of Landscape, reads:

“Council shall control the subdivision of land in Outstanding Natural Landscapes identified in Map Series 3A by using a range of appropriate techniques that may include:

- (i) Avoiding further subdivision beyond that provided for in district plans, particularly where Outstanding Natural Landscapes are also areas of high natural character and areas of significant indigenous vegetation and significant habitats of indigenous fauna”.

The Reasons statement at pages 6 - 13 of the Hearings Version that MOWS opposed reads that:

The Method provides flexibility as to the type of techniques to be used, but encourages avoidance of further subdivision in Outstanding Natural Landscapes which are also areas of high natural character and areas of

<sup>7</sup> Counsel for MOWS, 10 August 2012, at [14] and [16]

<sup>8</sup> Burns, Opening submissions at [23]ff

<sup>9</sup> Counsel for MOWS, 10 August 2012, at [3]ff and [6]

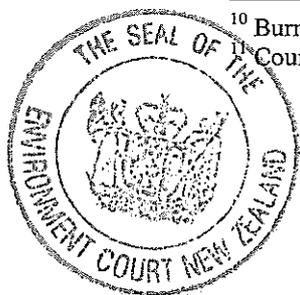


significant indigenous vegetation and significant habitats of indigenous fauna.

- (c) MOWS contested robustly whether parts of the Hearings Version Waiheke ONL 78 and Ponui ONL 85 comprise coherent “*landscapes*” and whether they are appropriately characterised as “*outstanding*”. As recorded following, MOWS led evidence that ONL 78 comprises coastal and interior landscape character areas with only parts of the former being an ONL. It argued that the council’s assessment methodology was flawed by failing to apply relevant factors. There was also a related dispute around whether the ONL “*quality bar*” should be set at a regional or national level with the council supporting the former<sup>10</sup> and MOWS contending, albeit with a degree of equivocation, that there is a case for the latter<sup>11</sup>.
- (d) The boundaries of ONLs 78 and 85 in the following locations:
- (i) In the catchment of Hooks Bay at the north eastern end of Waiheke;
  - (ii) The eastern flanks of the Puke Range running up to its central spine and extending towards Waiheke’s northern coastal fringe;
  - (iii) Inland from Man o’ War Bay at the south eastern end of Waiheke (related closely to (ii) above);
  - (iv) Along the northern coast extending inland between Cactus Bay and Owhiti Bay; and
  - (v) On MOWS’s land near the northern end of Ponui Island.
- (e) Whether an amended version of the ARPS Appendix F-2: Outstanding Natural Landscape Assessments of the Auckland Region for ONLs 78 and 85 sought by MOWS should be substituted for those in the Hearings Version. Council opposed such substitution on the basis that the tabulated entries in Appendix F-2 of the Decisions Version are a suitable précis of

<sup>10</sup> Burns, Closing submissions at [13]

<sup>11</sup> Counsel for MOWS, Opening submissions at [51]ff



key factors leading to the final assessment of each of the ONLs it supported<sup>12</sup>.

### What is the applicable law?

[6] The law to be applied is the version of the Act that existed in September 2005 when PC8 was publicly notified. Sections 59 to 62 of the Act provide the legal framework for considering a proposed change to a regional policy statement. We observe that sections 59 and 60 have remained unaltered since September 2005 and that the applicable versions of sections 61 and 62 are those which commenced in January 2005. The relevant version of s.32 is that which commenced in August 2005.

[7] What follows is a summary of the law pertaining at the time of the hearing of these appeals. It needs to be recorded however that since then, the Supreme Court has released an important decision *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited*<sup>13</sup> about certain legal aspects of *Outstanding Natural Landscapes*. This resulted in counsel in the present case approaching the Court to offer submissions on the potential impact of that decision. We granted leave for that on 7 May 2014, and received submissions from several parties up to 1 June. We will discuss relevant aspects of those submissions at various points in this decision.

[8] As Mr Burns identified in his opening submissions, the Court has developed a framework for considering proposed plan changes which is also applicable to RPS Changes. The framework is described in *Long Bay – Okura Great Parks Society Inc v North Shore City Council*,<sup>14</sup> which concerned a district plan Change notified in May 2004. The relevant factors have been summarised in subsequent decisions of the Court including in *Fairley v North Shore City Council*.<sup>15</sup> Whilst alert to differences in the detail of the relevant law from time to time, we adopt that summary which reads as follows:

<sup>12</sup> Burns Closing submissions [14] – [16]

<sup>13</sup> [2014] NZSC 38

<sup>14</sup> A078/2008

<sup>15</sup> (2010) NZEnvC 208 at [ 7]



In the circumstances of this Council initiated Plan Change, the otherwise lengthy list of factors to be analysed can be compressed. We consider whether the terms of the Plan Change:

- Accord with and assist the Council in carrying out its functions so as to meet the requirements of Part 2 of the Act
- Take account of effects on the environment; and
- Are consistent with, or give effect to (as appropriate) applicable national, regional and local planning documents.

[9] We adopt this framework together with Section 32 when determining the current appeals.

[10] In addition to the overarching purpose of the RMA in s5, Part 2 records matters of national importance to be recognised and provided for by functionaries under the Act (Section 6) and other matters to which they are to have particular regard (Section 7). A number are concerned with landscape and related considerations, including in summarised form:

- (a) Section 6(a) – recognise and provide for the preservation of the coastal environment and its protection from inappropriate subdivision, use and development;
- (b) Section 6(b) - recognise and provide for the protection of outstanding natural features and landscapes from inappropriate subdivision, use and development;
- (c) Section 6(c) – the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna; and
- (d) Sections 7(c) and (f) – have particular regard to the maintenance and enhancement of amenity values and the quality of the environment respectively.

[11] Although assisted little by submissions or evidence, we recognise the relevance of the Hauraki Gulf Marine Park Act 2000 and its purpose, which includes provision to *“integrate the management of the natural, historic, and physical resources of the Hauraki*



*Gulf, its islands and catchments*<sup>16</sup>. Section 7 sets out a broad spectrum of aspects of the Hauraki Gulf deemed to be matters of national importance. Section 8 records the objectives of the management of the Hauraki Gulf including (in summarised form) the maintenance and where appropriate enhancement of the contribution of its resources to the community's social and economic well-being, including for the purposes of recreation and enjoyment (s 8(e) and (f)). Under Section 9(2) a Regional Council must ensure that any part of a RPS that applies to the Hauraki Gulf does not conflict with ss 7 and 8. Section 10(1) provides that for the coastal environment of the Gulf, Sections 7 and 8 must be treated as a New Zealand Coastal Policy Statement (NZCPS) with the latter to prevail in the event of any conflict (ss (2)). Finally we note the directive in s.13 to functionaries exercising powers in respect of the Hauraki Gulf, including under the RMA, to have particular regard to the provisions of ss 7 and 8 HGMPA.

[12] It is also necessary that we recognise the significance of s.62(3) RMA, which provides that a RPS must give effect to a NZCPS.

[13] We are mindful of the direction in s.290A that we must have regard to the council's 2010 decision under appeal. Neither party made significant reference to the decision, perhaps because of the extensive ADR processes and series of amendments made to Change 8 following the council's first instance decision<sup>17</sup>.

[14] Factors for assessing the significance of landscapes were determined by the Environment Court in *Pigeon Bay Aquaculture Ltd v Canterbury Regional Council*<sup>18</sup> and subsequently refined in *Wakatipu Environmental Society v Queenstown Lakes District Council*<sup>19</sup>. As the factors played a significant part in our hearing we set them out:

- (a) the natural science factors – the geological, topographical, ecological and dynamic components of the landscape;

<sup>16</sup> Section 3(a)

<sup>17</sup> Blair, EIC, Annexure A, Annotation key shows a sequence of 8 changes in the proposed consent order C8 version before the Court.

<sup>18</sup> [1999] NZRMA 209

<sup>19</sup> [2000] NZRMA 59



- (b) its aesthetic values including memorability and naturalness;
- (c) its expressiveness (legibility): how obviously the landscape demonstrates the formative processes leading to it;
- (d) transient values: occasional presence of wildlife; or its values at certain times of the day or year;
- (e) whether the values are shared and recognised;
- (f) its value to tangata whenua; and
- (g) its historical associations.

[15] These are commonly referred to as the “modified Pigeon Bay” or “WESI” factors. We use the latter term.

#### **What is the relevant planning framework?**

[16] In addition to the preceding statutory matters, it is necessary for the purposes of s 62(3) and s 32 to identify higher order NZCPS and RPS provisions that Change 8 is to implement. We endeavour to cut an efficient path through the repetitive materials commencing with the NZCPS.

#### **New Zealand Coastal Policy Statement (2010)**

[17] The NZCPS has the following relevant provisions:

- (a) Objective 2

To preserve the natural character of the coastal environment and protect natural features and landscape values through:

- Recognising the characteristics and qualities that contribute to natural character, natural features and landscape values and their location and distribution;



- Identifying those areas where various forms of subdivision, use and development would be inappropriate and protecting them from such activities;

...

(b) Objective 6

To enable people and communities to provide for their social, economic, and cultural wellbeing ... through subdivision, use and development, recognising that [amongst other things]:

- The protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits.
- 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 wellbeing of people and communities.

...

(c) Policy 7: Strategic planning. Summarised somewhat, provides:

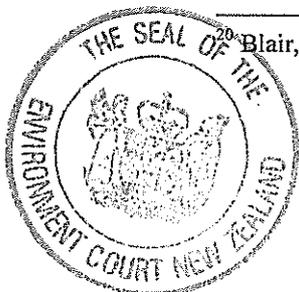
- (i) In preparing regional policy statements and plans it is, inter alia, appropriate to identify areas of the coastal environment where particular activities and forms of subdivision, use and development are inappropriate or may be inappropriate without considering effects, including through the consent process<sup>20</sup>
- (ii) and provide protection in these areas through objectives, policies and rules.

(d) Policy 13: Preservation of natural character:

- (1) To preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use and development:
  - (a) Avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character;

including by:

- (e) Ensuring that regional policy statements, and plans, identify areas where preserving natural character requires objectives, policies and rules, and include those provisions.




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<sup>20</sup> Blair, EIC at [49.5]

## (e) 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; and
- (b) 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; including by:
- (c) identifying and assessing the natural features and natural landscapes of the coastal environment of the region or district, at minimum by land typing, soil characterisation and landscape characterisation and having regard to:
  - (i) (summarized) the WESI factors (a) – (g) albeit differently expressed in some cases.
  - (ii) the presence of water including in seas, lakes, rivers and streams;
  - (iii) vegetation (native and exotic);
  - (iv) wild or scenic values;
- (d) ensuring that regional policy statements, and plans, map or otherwise identify areas where the protection of natural features and natural landscapes requires objectives, policies and rules; and
- (e) including the objectives, policies and rules required by (d) in plans.

[18] It would appear that matters (c) (ii) and (c) (iii) originated from the previously cited *Long Bay* criteria for determining “naturalness”<sup>21</sup>.

### Auckland Regional Policy Statement

[19] Ms K Blair, called by the council and the only planning witness in the case, provided a comprehensive summary of relevant parts of the operative RPS and the Hearings Version of Change 8. We note in particular:

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<sup>21</sup> A078/2008 at [135]



- (a) The operative *Strategic Objectives* 2.6.1.9 – .13 which reference relevant Part 2 matters;
- (b) The following settled *Landscape objectives*<sup>22</sup>:
  - (i) 6.3.4 – “To protect Outstanding Natural Landscapes from inappropriate subdivision, use and development;” and
  - (ii) 6.3.5 – “To maintain the overall quality and diversity of character and sense of place of the landscapes of the Region;” and
  - (iii) 6.3.6 – “To recognise that Outstanding Natural Landscapes may also be working rural landscapes and to enable appropriate activities that are consistent with the Strategic Direction in this RPS”.
- (c) The following settled *Landscape policies* (largely) as summarised by Ms Blair:
  - (i) P 6.4.22.1 – ONL shall be protected by ensuring subdivision, use and development ..... in these areas is appropriate in terms of its type, scale, intensity and location; and
  - (ii) P6.4.22.1(i) – Built elements are subservient to the [matters] that make the landscape an ONL; and
  - (iii) P6.4.22.1(iii) – maintain significant natural landforms and significant vegetation areas and patterns; and
  - (iv) P6.4.22.1(v) – Manage adverse visual and physical landscape effects on the components of the natural character of the coastal environment within the ONL consistent with Policy 7.4.4.
  - (v) P6.4.22.2(i) and (ii) – which enable the recognition of Amenity Landscapes and provide for their significant features to be

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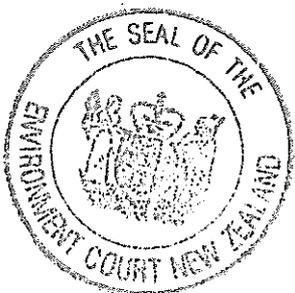
<sup>22</sup> Burns Opening submissions [15]



maintained and/or enhanced where they contribute positively to landscape values. Activities are required to avoid, remedy or mitigate adverse effects on Amenity Landscape amenities.

- (vi) P6.4.22.3 – is concerned with managing the adverse effects of activities on land immediately adjoining ONLs.
  - (vii) P6.4.22.6 – provides for ongoing primary production “as part of a working rural landscape” in ONLs, areas immediately adjoining them and in Amenity Landscapes.
  - (viii) P6.4.22.8 – states that the identification of landscape values in the Hauraki Gulf and their management shall provide for the objectives in s.8 of the HGMPA.
- (d) The following *ARPS Definitions*:
- (i) The operative definition of “naturalness (Landscape)” : In an Outstanding Natural Landscape “**naturalness**” means the qualities or landscape characteristics that are produced by nature, or natural processes, including rural land cover such as pasture, rather than landscapes that are dominated by built structures or that are highly domesticated. Naturalness occurs in both wild nature and cultured nature Outstanding Natural Landscapes, where a key distinction is the type of land cover.
  - (ii) Outstanding Natural Landscapes : In respect of Section 6.0 of the ARPS, Outstanding Natural landscapes are identified in Map Series 3a and described in Appendix F-2
  - (iii) Amenity landscapes : Are landscapes that have high levels of amenity value, which are those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes. Amenity landscapes may be identified in district and regional plans.
- (e) The following *ARPS Appendix F-2 provisions*

Appendix F-2 contains information on the attributes of the mapped Outstanding Natural Landscapes (ONLs). This information is derived from two regional landscape assessments. The first is the *Auckland*



*Regional Landscape Assessment 2003-04*, and the second is *Auckland Regional Policy Statement: Outstanding Natural Landscape Areas: Assessment Against WESI Criteria* (August 2008). The purpose of this appendix is to explain the methodology used in the studies and to present the key findings.

For each ONL Appendix F-2 records in tabular form information on the following factors;

- Landscape type, nature and description
- Elements, patterns, processes
- Natural science factors (geological/topographical; ecological; dynamic)
- Aesthetic factors (memorability; naturalness)
- Expressiveness
- Transient values.

Appendix F-2 records that the 2008 WESI criteria assessment of the Region's 85 ONLs addresses some, but not all of the criteria contained in the (then) proposed NZCPS. The WESI assessment complements the 2003-4 assessment undertaken using a different methodology<sup>23</sup>. The latter's results form part of the Appendix F-2 table<sup>24</sup>.

### The matters in dispute

[20] We move to our assessment of the matters in dispute, commencing with the challenges to higher order provisions before considering the ONL boundaries.

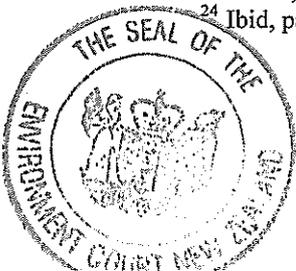
### *Should "Naturalness" be retained as an ONL factor?*

[21] It will be recalled that MOWS challenged the use of "*naturalness*" in both the Explanation to Issue 6.2.7.3 and in Reasons 6.4.24. In the Hearings Version:

- (a) Issue 6.2.7.3 is concerned with Adverse Cumulative Effects. The Explanation reads (in part) that "*Inadequate consideration of and response to adverse cumulative effects can result in a reduction or loss of diversity and quality, including naturalness, in Outstanding Natural Landscapes as fewer areas remain free from the presence of significant built structures*";
- (b) Section 6.4.24: Reasons: Landscape: explains that, amongst other things, Objective 6.3.4 is concerned with the specific requirements of s 6(b). Related Policy 6.4.22.1 is said to provide guidance on what is appropriate subdivision, use and development in ONLs with a key focus on

<sup>23</sup> ARPS, Appendix F-2 pp 1 - 3

<sup>24</sup> Ibid, page 3



maintaining factors important to the integrity of individual ONLs. The latter “*includes high levels of naturalness, which is one of the critical distinguishing components of an ONL*”;

- (c) Subsequent text in Section 6.4.24 explains that the most significant adverse cumulative effect on the Region’s island landscapes has been countryside living, resulting in fewer areas sparsely populated by buildings and more homogenous landscapes. This is said to have led to a reduction in the quality of the Region’s landscapes “*and a loss of landscape diversity, including naturalness*”.

[22] Mr Casey in opening submissions adopted MOWS’s 10 August 2012 Memorandum as the basis for its case.<sup>25</sup> While recognising “*naturalness*” as a necessary factor for an ONL, counsel contended that to qualify as such a landscape must also be “*outstanding*” in quality terms. MOWS was concerned that any subdivision, use or development must diminish the degree of naturalness of an ONL and fail assessment against Change 8 regardless of whether it was appropriate having regard to “*a broader range of considerations or factors bearing on landscape quality, and other than naturalness*”. MOWS acknowledged positive changes to the Hearings Version that better reflect and express the range of qualities that “*have informed determinations as to which natural landscapes ..... qualify as outstanding*”. These included references to the “*features, patterns, processes and qualities*” that make landscapes outstanding, including in Policy 6.4.22.1(i) and Appendix F. Nevertheless, MOWS remained sufficiently concerned about retention of the references to “*naturalness*” that it sought their removal.

[23] In his opening submissions for the council Mr Burns noted that it had shifted its view on what constitutes the key indicator of an ONL “*from the absence or subservience of the built environment to the natural ..... to [this] being one of the key indicators*”<sup>26</sup>. He observed that the Change 8 definition of “*Naturalness (landscape)*” includes rural land cover, such as pasture, rather than landscapes that are dominated by built structures and occurring in cultured nature ONLs. He submitted that very few areas in Auckland are wholly natural and that Change 8 recognises “*naturalness*” is the central indicator of

<sup>25</sup> MOWS Memorandum of Counsel, 12 August 2012 at [7]ff



an ONL “*without inappropriately elevating it at the expense of other qualities that may be present*”.

[24] Ms Blair’s evidence was to similar effect. In reply to questions put in cross examination, she did not accept that the Change’s reference to high levels of naturalness being a critical distinguishing component of an ONL was “*out of synch*” with the Hearings Version because the words put to her are properly read in conjunction with the Section’s preceding sentence, namely that Policy 6.4.22.1 has a “*key focus on maintaining the features, patterns, processes and qualities that make the landscape in question an Outstanding Natural Landscape*”<sup>27</sup>. Ms Blair deposed that the other references to “naturalness” challenged by MOWS were similarly appropriate when read in the context of supporting references to “*type, scale, intensity and location*” and the like<sup>28</sup>. Mr SK Brown, the council’s landscape architect witness, explained when cross examined that he supported the inclusion of “*elements, patterns and processes*” references in the PC8 text as these factors are as relevant as “naturalness” to the ONL assessment process. He considered it unnecessary to review his landscape assessments after their inclusion because the factors had already been taken into account when doing the assessments<sup>29</sup>.

#### *Assessment and Findings*

[25] The first reference to “*naturalness*” challenged by MOWS arises in the context of the Landscape Issue concerned with adverse cumulative effects, 6.2.7.3. The explanation to the Issue describes how inadequate consideration of such effects “*can result in a reduction or loss of diversity and quality, including naturalness in ONLs*” for given reasons. We find the reference to naturalness appropriate in this context and no detraction from subsequent references such as to “*features, patterns, processes and qualities*” in Policy 6.4.22.1(i).

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<sup>26</sup> Burns, Opening submissions at [23]ff

<sup>27</sup> TOP p 18

<sup>28</sup> Ibid

<sup>29</sup> Ibid p 71



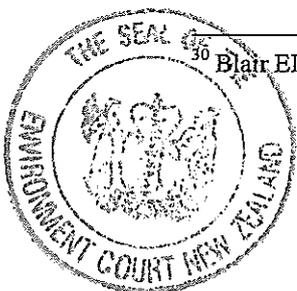
[26] In Reasons, 6.4.24 we accept that the degree of naturalness is a critical distinguishing component of an ONL; the others being that the subject area is both a landscape and outstanding. The balance of the 4<sup>th</sup> paragraph explains that the effect of development on “*natural landscape characteristics*” requires consideration alongside “*natural landscape elements*”. It is not entirely clear what the “*elements*” comprise but consider that they may reasonably be interpreted to be a reference to the “*natural landscape features, patterns, processes and qualities*” described in the 2<sup>nd</sup> and 4th paragraphs of 6.4.24. Assuming we are correct in this, we find that it would be better if the latter phrase were substituted for “*and elements*” and direct accordingly. We grant leave for submissions to be filed if we have misinterpreted the intent of the Change in this respect.

[27] Finally we come to the third contested reference to “*naturalness*” in Reasons 6.4.24. We concur with Ms Blair’s general point that read in its context, which includes reference to a reduction in the quality of the region’s landscapes, it is appropriate to include “*naturalness*” as an indicator without inappropriately elevating it at the expense of other qualities<sup>30</sup>. Further, we do not find the contested words inconsistent with outcomes sought by Policy 6.4.22.1(i).

[28] To summarise, MOWS’s challenge to the inclusion of references to “*naturalness*” is rejected except to the extent indicated above in respect of Reasons, 6.4.24, and subject to further submissions.

### ***Possible Impact of the Supreme Court Decision in King Salmon***

[29] The point has arrived in this decision where we will embark on a discussion of the cases offered by the parties who appeared, first concerning the wording of a Method and its accompanying Reason in the ARPS, and secondly concerning the proper extent of mapping of ONLs on the properties owned by Man O’War Station Limited on Waiheke Island and Ponui Island.



[30] Potential impacts on those two aspects of the case from the recent Supreme Court decision, have been foreshadowed in the submissions recently lodged on behalf of some of the parties. We will therefore set out at this juncture, the positions of the parties in that regard, before analysing the evidence and submissions received at the hearing last year, and then making findings about what should happen next in the current proceedings.

[31] Some weeks ago the Supreme Court released its important decision *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited*<sup>β1</sup>

[32] In a joint submission the parties indicated that there might be impacts for the present litigation from the Supreme Court majority decision in the following respects:

- (a) The ONL mapping issue;
- (b) Our consideration of changes to the Objectives, Policies and Methods in PC8 resulting from the agreed position of all parties to the appeals on that topic, and some minor remaining contested changes which were also the subject of the hearing.

[33] Counsel for the Appellant Man O'War and Auckland Council in the present case lodged an agreed statement. They submitted that the Supreme Court had held:

- (a) "Spot zoning" for an activity (having a discretionary activity status or lesser) that would have significant adverse effects on an outstanding natural landscape, would not give effect to Policies 13(1)(a) and 15(a) of NZCPS 2010, and as such does not comply with s 67(3) and (b) RMA.
- (b) That in determining whether a Plan Change "gives effect" to the NZCPS 2010, recourse should not be had back to Part 2 of the Act, except in cases of invalidity, incomplete coverage, or uncertainty of meaning; by giving effect to the NZCPS a Regional Council is necessarily acting in accordance with Part 2.



- (c) That an overall judgment approach to the NZCPS listing potentially relevant considerations which will have varying weight and different factor situations, is incorrect as a matter of law as to the manner in which the NZCPS should be given effect to through planning instruments under the Act. Put another way, the overall judgment approach is incorrect, where it would support a proposal that does not otherwise give effect to the NZCPS.
- (d) Environmental protection is a core element of sustainable management, that may legitimately be applied and given primacy through planning documents under the Act, and Policies 13 and 15 of NZCPS provide something in the nature of a “bottom line” consistent with the definition of sustainable management.
- (e) The overall judgment approach set by the Environment Court in *North Shore City Council v Auckland Regional Council*, applying the High Court decision in *New Zealand Rail Limited*, is incorrect.

[34] Counsel for these two parties considered that the import of the Supreme Court’s decision, properly construed relevant to the issue actually before it, ranged somewhere between the first four aspects above, and does not extend so far as to effectively displace an overall judgment approach under the Act more generally. They offered argument in support of their proposition. Counsel for the *Environmental Defence Society* in the present case foreshadowed an argument that the fifth factor might be at play and should be considered in a different light from that submitted upon by the other two counsel.

[35] Counsel noted, in relation to the mapping aspect of the present case, that the main issue before us is **whether and to what extent** Man O’War farm comprises an ONL. This is in contrast to the Supreme Court’s decision having been about planning consequences under NZCPS 2010 of an ONL agreed or found to be present.

[36] Counsel for Man O’War, while generally agreeing that the present case is not about planning consequences, offered a qualifier that, bearing in mind the “planning

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<sup>31</sup> [2014] NZSC 38.



implications” arising the Supreme Court having set a “bottom line” rather than an “overall judgment” approach to NZCPS 2010 in areas of coastal environment mapped as ONL, a conservative approach should be taken to the mapping exercise.

[37] Man O’War noted that at last year’s hearing of this case it had advocated for a comparatively high threshold as to what is meant by the term “outstanding”, including application of that threshold being assessed at a national scale. It now suggested that the expert landscape witnesses might have taken a different view of what should be mapped as an outstanding natural landscape if they had understood that there might be different consequences after *King Salmon*. Counsel however offered the proper concession that this would of course be speculation, but continued to submit that the decision of the Supreme Court should militate in favour of a more conservative (higher) threshold of what comprises an outstanding natural landscape.

[38] Counsel for the council submitted in opposition on this point, reiterating that the observation about evidence possibly now being changed, is speculation. Perhaps more importantly, Mr Burns submitted that whether and to what extent land on Man O’War Station is an ONL is a matter of fact, based on the Court’s consideration of the evidence heard, and application of relevant criteria in PC8. The planning consequences would flow from the fact that the land is an ONL, and are not relevant to determining whether it is an ONL or not.

[39] We agree with that submission. However, without rehearsing at this point our findings about the standard that must be reached at law for mapping land as ONL, we acknowledge that one aspect of mapping that could yet be subject to change is the extent to which any further changes to ARPS wording might drive re-examination of it.

[40] We reiterate that the several parties to the litigation concerning PC8 – including some who did not appear at the hearing – had reached agreement in high measure on the wording of Issues, Objectives and Policies of PC8, after which those who appeared before us confined their arguments to a handful of aspects. Parties have now signaled that they might wish to re-visit the earlier agreements in light of the *King Salmon* findings.



[41] Counsel for the Environmental Defence Society, Ms N M deWit reminded us of her disagreement with the view of other Counsel that the findings of the Supreme Court do not extend to effectively displace an overall judgment approach under the Act more generally than in relation to the operation of certain policies in the NZCPS. She conceded that it was possible to interpret the Supreme Court decision as accepting that s 5 RMA does not of itself set environmental bottom lines in the sense envisioned in early Planning Tribunal cases, but nevertheless she submitted that the Supreme Court did not endorse the overall broad judgment approach adopted in *New Zealand Rail Limited*. She offered generalised argument about what could be entailed before submitting that the correct approach would depend on the particular circumstances of particular cases. She therefore supported the argument by Counsel for the Council that planning consequences will follow from determination of whether certain land is an ONL or not, depending on the evidence on each occasion.

[42] We inferred as well that she subscribed to the request for leave to revisit the agreement amongst the parties about the wording of Issues, Objectives and Policies of PC8 in light of the King Salmon decision.

[43] Counsel for Federated Farmers, Mr P R Gardner, also supported the request for such leave, based on quite detailed submissions he lodged about alleged uncertainties in the Supreme Court decision, particularly for the owners and occupiers of production farmland.

***Should Method 6.4.23.2(i) and its accompanying Reason be retained?***

[44] MOWS's case was founded on the concerns expressed in its previously cited 12 August 2012 Memorandum, which it was content be dealt with on the papers without calling evidence.<sup>32</sup> In summary, MOWS contended that Method 6.4.23.2(i) contains insufficient direction for the purposes of s 75(3) as the meaning of the words "*avoiding further subdivision beyond that provided for in district plans*" is uncertain. It foresaw implementation difficulties in the context of the new Auckland Unitary Plan (one council

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<sup>32</sup> Memorandum of Counsel, 12 August 2012 at [114]



and one plan) and with the intended meaning of the words “*provided for in district plans*” (for example in relation to activity status). MOWS was also concerned with what it characterised as the Method’s “*avoidance approach*” in situations where an ONL also has high natural character or is subject to s 6(c) RMA. Further, it saw a contradiction between the council’s proposed Hauraki Gulf Islands’ district plan, which allows for a greater relative density of subdivision within areas of ONL where significant indigenous vegetation is protected, and the contested Method. Finally, MOWS challenged the description of the Method statement at pages 6 - 13 seeking its deletion, but without supporting reasons.

[45] For the Council, Mr Burns submitted that Method 6.4.23.2(i) is consistent with, and follows from, the objectives and policies of the RPS concerned with the protection of significant landscape values<sup>33</sup>. He identified support for the Method in sections 6(a) – (c) and in NZCPS Objectives 2 and 6 and Policies 7, 13 and 15(a). Our attention was drawn to the Court’s finding in *Wairoa Canal Partnership* that “a RPS cannot impose a rule but it may contain policies and methods directed to a particular end or outcome to be achieved through a district plan which must not be inconsistent with it<sup>34</sup>. Mr Burns also cited relevant case law stating that “a policy may be either flexible or inflexible, broad or narrow.”<sup>35</sup> He submitted that *Wairoa Canal* was on point to the extent that it dealt with a similar challenge to a RPS policy direction that subdivision be avoided. Relying on Ms Blair’s evidence, he submitted that the proposed Method does not preclude subdivision in an ONL. Rather it provides a tool or technique for district planning rules to utilise in giving effect to the RPS objectives and policies for ONLs.

[46] In closing submissions Mr Burns rejected the contention that the Method would act as a veto on subdivision, first because it is not a policy and, secondly, because it affords a discretion not a prohibition. He also addressed the implications of the council being a unitary authority, noting this does not mean it no longer needs strategic direction at the RPS level on the content of district rules. He continued:

<sup>33</sup> Burns, Opening submissions at [17]ff

<sup>34</sup> *Wairoa Canal Partnership v Auckland Regional Council* (2010) 16 ELRNZ 152 at [14]

<sup>35</sup> *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18, (1995) 1B ELRNZ 426 (CA)



Under s.80(8) ..... the Unitary Plan must still identify those parts of the plan that are part of the RPS and those that are regional or district rules. District plan rules can still be subject to a private plan change. In effect, the fact that the RPS is part of a Unitary Plan does not diminish its function within the hierarchy of planning documents.<sup>36</sup>

[47] Ms Blair emphasised that Method 6.4.23.2(i) needs to be read in the context of its introductory limb, which requires councils to control subdivision in ONLs identified in the RPS. This is to be done “using a range of appropriate techniques” that may include those listed in sub-sections (i) and (ii). She deposed that although Method 6.4.23.2(i) is not mandatory, it “*is nevertheless a very significant provision, especially when considered in the context of the objectives and policies from which it is derived*”<sup>37</sup>.

[48] Ms Blair conducted a comprehensive evaluation of the Method against relevant ARPS Strategic and Landscape objectives and policies. She identified policy provisions for subdivision in rural areas that give priority to the protection of natural, heritage and landscape resources and values, with an emphasis on ONLs that have significant landscape, natural character, heritage and ecological values. Ms Blair deposed that Method 6.4.23.2(i) is necessary to give effect to these policy directions, which in turn are supported by the higher order planning provisions described above. She opined that the words “beyond that provided for in district plans” strongly indicates that development associated with subdivision in identified areas is not envisaged, but that subdivision per se need not be avoided where it is consistent with the overall policy approach.

[49] Ms Blair undertook a thorough s.32 type evaluation of the disputed Method concentrating on its likely efficiency and effectiveness, having first defined these terms<sup>38</sup>. From an efficiency perspective, she concluded that the resources identified in the RPS would be protected more quickly and consistently than if a less directive or inconsistent policy approach was proposed<sup>39</sup>. From an effectiveness perspective she deposed that integrated management is a key statutory consideration, both between planning instruments and across the RPS. On the basis of a considered review of these and other

<sup>36</sup> Burns, Closing submissions at [21]

<sup>37</sup> Blair, EIC at [19]

<sup>38</sup> *Ibid* at [63]ff

<sup>39</sup> *Ibid* at [67]



relevant factors, she concluded that retention of the Method as proposed is more effective and efficient than either the Decisions Version or its deletion<sup>40</sup>.

[50] Responding to questions put in cross examination, Ms Blair did not accept that the Method constitutes a prohibition on subdivision. She deposed that it is more correctly viewed as a technique that may be used to control subdivision to protect specific landscape attributes. In her view it effectively sets the baseline for “*appropriate*” subdivision and development at what is provided for in the relevant district plan.

[51] Ms Blair accepted that the Method would have limited application to the Region’s legacy district plans as their provisions are largely settled. However, it would apply to any plan change applications and non-complying activity consent applications. Ms Blair noted that, as operative Unitary Plan provisions are some years off, in the interim it is useful to retain strong RPS directions for the protection of areas of high natural character and areas of significant indigenous vegetation and habitats in ONLs<sup>41</sup>. Replying to further questions, she characterised the contested provision as “*essentially an avoidance method*” and opined that the words “*what is provided for in district plans*” effectively mean controlled, restricted discretionary and discretionary activities. Ms Blair did not accept Mr Williams’s proposition that the disputed Method goes beyond what is mandated or warranted by the NZCPS, which we took to be a reference to the latter’s Policy 15, and possibly also Policy 13.<sup>42</sup> Nor did she accept that the Method sought to elevate the s.6 matters, which underpin relevant NZCPS provisions, to “*veto*” status. This was because the Method admits to the possibility of subdivision, including by way of non complying activity consent, subject to “*a very careful and deliberate assessment of what is appropriate ..... and to provide [for that] in district plans*”.

#### *Assessment and findings*

[52] We have determined that retaining the contested Method in the ARPS is consistent with national and regional planning documents and meets the requirements of

<sup>40</sup> Ibid at [75]

<sup>41</sup> TOP, pp 12-13

<sup>42</sup> Ibid, pp 14-15



Part 2 RMA. In giving effect to the RPS objectives and policies, our current view is that Method 6.4.23.2(i) is appropriate in ensuring that Policy 15 of the NZCPS is addressed in district plans by avoiding adverse effects of subdivision on outstanding natural landscapes in the coastal environment. It also recognises the importance of protecting outstanding natural landscapes required by s 6(b) and provides an appropriate mechanism for achieving this. Overall, the MOWS case did not undermine Ms Blair’s comprehensive planning assessment and conclusions. We were not persuaded in terms of the provisions of s.32 RMA that a better outcome would result from deletion of the contested provision. We prefer the approach taken by Change 8 and find at this stage that the Method and related Reasons explanation should be retained as set out in the Hearings Version.

[53] As previously recorded, MOWS also sought deletion of that part of 6.4.23 (Reasons)<sup>43</sup> concerned with Method 6.4.23.2(i). We were not greatly assisted by submissions or evidence on this subject but note that, summarised, the Reason says that the Method “*encourages*” avoidance of further subdivision in ONLs. We do not consider that this is necessarily an accurate or neutral description of the Method. Our present finding is that the words “*but encourages*” would be better deleted and the words “*and may include*” substituted.

[54] Our findings on these aspects of ARPS wording are subject to what we have held concerning the *King Salmon* decision of the Supreme Court, noting that the parties have leave to persuade us (or otherwise) that these findings might need to be re-visited along with wording of the ARPS the subject of earlier agreement amongst all parties.

***The parties’ broad cases on ONL identification***

[55] We commence by addressing landscape assessment methodologies. A considerable, and indeed unnecessary, amount of evidence and hearing time was devoted to this subject. The Court has previously commented on the limitations of the “Q Sort” public preference methodology, which the council initially applied in 2003 – 2004 as the

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<sup>43</sup> Hearings Version p 6-13 RH column



principal way of identifying ONLs.<sup>44</sup> For some time the Court has preferred to apply the WESI factors although that is not to say robust public preference research on the relative values of different landscapes has no place in landscape evaluation. In this case, while the council initially started out using Q Sort, it chose subsequently to reassess its findings by applying the WESI factors. The appellant’s landscape architect witnesses also adopted the latter approach. We find that both parties acted properly in doing so. There is therefore no need for us to determine the validity or otherwise of the Q Sort methodology on this occasion.

[56] We turn now to more substantive aspects of the parties’ cases on the identification of ONLs. Much of what follows was at the heart of MOWS’s case and the evidence it called in support.

[57] MOWS contended that the PC 8 mapping on which both disputed ONLs are based is fundamentally flawed because council applied a wrong legal test and methodology when determining what properly constitutes an ONL. The extent of the two proposed ONLs on MOWS land was said to create major limitations for its subdivision, use and development given the provisions of the previously discussed Method 6.4.23.2(i); the NZCPS (2010) provisions that would be triggered; implications for district plan controls on subdivision and land use; and limited appeal opportunities against the Auckland Unitary Plan which MOWS expected would incorporate Change 8 in a “*consistent fashion*”.<sup>45</sup> Having reviewed the statutory genesis of s 6(b), available meanings of “*outstanding*”, and case law around the assessment context to be applied (district, regional, national) counsel for MOWS submitted that the threshold triggering s 6(b) action should “*be set at the very highest level*”.<sup>46</sup> By that we apprehend counsel were suggesting the ONL assessment bar should possibly be set at a national level (and this has been raised again in the most recent submissions about *King Salmon*).

[58] With the exception of Waiheke’s northern coastal fringe from Cactus Bay to Thumb Point, MOWS’s counsel submitted that on the evidence it called most of what is

<sup>44</sup> *Pita Whanau v Northland District Council*, A14/08 at [82] & [83]

<sup>45</sup> Casey, Opening submissions at [9] ff

<sup>46</sup> *Ibid* at [60]



identified in PC8 as ONL does not meet the necessary threshold<sup>47</sup>. MOWS called 2 landscape witnesses, Ms B M Gilbert and Mr D G Mansergh. On the basis of their evidence it was submitted that if the Court were to adopt a national assessment context, Mr Mansergh's landscape evidence, particularly the lesser areal extent of ONL that he identified, should be preferred to that of Ms Gilbert who supported a larger coastal fringe ONL 78 than him.<sup>48</sup> (Both MOWS landscape architect witnesses supported lesser areas than the council's landscape witness Mr S K Brown).

[59] MOWS's counsel referred to case law, tracing how factors for assessing landscape significance have evolved through cases including *WESI*<sup>49</sup> and been adopted and applied over time by the Court and experts. Counsel noted that more recently in *Upper Clutha Tracks*<sup>50</sup> the WESI factors were grouped into three components, namely:

- (a) The bio-geographical elements, patterns and processes;
- (b) The associative or relationship contributions; and
- (c) The perceptual aspects.

[60] We mention this, firstly, because Ms Gilbert used these groupings in her evidence on what constitutes "a landscape" and whether it is "outstanding"<sup>51</sup> and secondly, because of the Court's finding in *Upper Clutha Tracks* that "*a full description of a landscape in terms of [these] three sets of components will assist to answer the questions whether [a landscape] is natural and/or outstanding.*"<sup>52</sup> In MOWS's submission the council and Mr Brown had paid no regard to the Court-mandated assessment approach (or anything like it) and the council's 2008 application of the WESI factors to the previously mapped ONLs<sup>53</sup> appeared to be superficial.<sup>54</sup>

<sup>47</sup> Ibid at [62]

<sup>48</sup> Ibid at [65]

<sup>49</sup> [2000] NZRMA 59

<sup>50</sup> *Upper Clutha Tracks Trust v Queenstown-Lakes District Council* [2010] NZEnvC 432 at para [50].

<sup>51</sup> Gilbert EIC [2.4]

<sup>52</sup> [2010] NZEnvC 432 [51]

<sup>53</sup> Undertaken in Auckland regional Landscape Assessment 2003 – 2004 – Change 8 Appendix F-2 p 1.

<sup>54</sup> Case Opening submissions [71].



[61] MOWS accepted that it was not open to the Court to rectify the fundamental errors MOWS perceived in council’s formulation of PC8 as a whole. Rather it sought the substitution of revised Appendix F-2 text describing the attributes of ONLs 78 and 85 on its land, and that the amended description provide the basis for revised boundaries for ONLs 78 and 85 in the previously described disputed locations.

[62] Mr Burns summarised the council’s approach to Change 8 as comprising a two phase process. As previously mentioned, in Phase 1 the Q Sort method was used to assess ONL values throughout the region. Phase 2 involved the application of the WESI factors to align the assessment criteria with those determined by the Court and “*review the proposed ONL’s for consistency and robustness*”. In Mr Burns’s submission Phase 2 confirmed a large degree of consistency between the results of both assessment phases<sup>55</sup>.

[63] Mr Burns submitted that the ONL boundaries in the Hearings Version, which Mr Brown supported, should be preferred to those proposed by the MOWS landscape witnesses. Responding to MOWS’s case that its Waiheke property comprises both internal and coastal landscape character areas, he argued that for RPS purposes an “*holistic rather than a compartmentalised approach should be taken.*”<sup>56</sup> He cited *High Country Rosehip Orchards Ltd*<sup>57</sup> as authority for the proposition that when considering the extent of an ONL the best approach is to consider the landscape as a whole and not divide a cohesive whole into two parts.

[64] Mr Burns criticised Ms Gilbert for undertaking detailed interior and coastal character area analyses at the “*expense of the whole*” and concluding, on this compartmentalised basis, that pasture/vineyards at Hooks Bay plus the coastal backdrop at Man O’War Bay should be excised from the ONL. Applying the somewhat dramatic language of *Rosehip*, he described this as smashing a larger landscape into pieces. Mr Burns characterised Ms Gilbert’s evidence as contrary to the top down approach which the Act adopts to planning instruments and not recognising the “*overarching regional*”

<sup>55</sup> Burns, Opening submissions [33].

<sup>56</sup> Burns, Opening submissions at [40]ff

<sup>57</sup> *High Country Rosehip Orchards Ltd v Mackenzie District Council* [2011] NZEnvC387



*assessment of ONLs that takes a broader view of landscapes within the context of the whole of the region*". In his submission:

The role of the regional policy statements is to identify regional values and issues and provide strategic direction. The District Plan should then address the detailed analysis required to give effect to the objectives and policies outcomes of the regional policy statement.<sup>58</sup>

[65] He submitted that, "taking a top down approach to planning, such features may well be protected through district planning provisions, but that is not a reason to exclude them from an otherwise ONL identification".

[66] Mr Burns contended that Ms Gilbert had also erred by conflating the processes of regional policy landscape assessment and the district plan provisions designed to implement such. In his submission her analysis was better suited to a district plan zoning exercise than an ONL assessment for the RPS. He contended that Ms Gilbert had compartmentalised the various features of the landscape and severed some from the landscape, in part, on the basis that they are protected elsewhere. He gave as an example Ms Gilbert's proposal that a line be drawn through the Stony Batter ONF relying on district plan rules and partial ONL recognition to provide protection. He urged the Court to avoid compartmentalisation and cited *Waireka Valley Preservation Society* as authority for the proposition that in a regional context the specifics of a particular landscape are to be assessed as to their overall effect on the outstanding natural values within the landscape as a whole<sup>59</sup>.

[67] It will be seen from analysis of the parties' cases that follows, that we struggle with the approach advocated by MOWS that identification of ONLs should be on a national rather than a regional scale. Two concerns arise. First, the task could become enormously complex – query impossible. Secondly, one might be forgiven for postulating that if pristine areas of New Zealand like parts of Fiordland, the Southern Alps and certain high country lakes, were to be regarded as the benchmark, nothing else might ever qualify to be mapped as Outstanding. These remarks should be seen as tentative at this

<sup>58</sup> Burns, Opening submissions at [43]

<sup>59</sup> *Waireka Valley Preservation Society Inc v Holcim NZ Ltd*, C058/2009 at [170] and [175]



stage because MOWS has signaled it wishes to maintain this line of submission. We simply signal our discomfort and leave the matter open for the present.

[68] We turn now to the specifics of the two disputed ONLs on the evidence heard so far.

*What are the appropriate boundaries for ONL 78?*

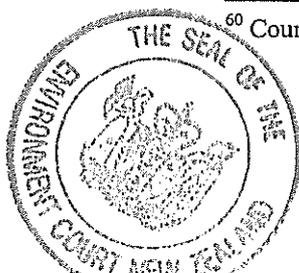
[69] Drawing on Ms Gilbert's evidence, MOWS contended that its Waiheke property comprises two landscapes; the coastal environment landscape character area (CELCA) where natural patterns, elements, processes and features dominate and an interior landscape character area (ILCA) characterised by productive land uses (pasture, vineyards, olives), shelter belts and bush lined slopes. The areas likely to "evoke" a ranking of "outstanding" were said to be those in the CELCA and the "historically and geologically rich" area associated with Stony Batter. Whilst displaying "aesthetic coherence and visual integrity" the ILCA was said not to be "conspicuous, eminent or remarkable" (being alleged qualifying tests for "outstanding"). In MOWS's submission the ILCA was similar in character and quality to much of the Island's eastern and southern coastal hinterland not identified as ONL by PC8. Applying *Rosehip*, Ms Gilbert's ILCA was characterised as a "handsome landscape but not an outstanding one in the regional context"<sup>60</sup>.

[70] It was also MOWS's case that it is insufficient for a landscape to simply be capable of description in WESI terms; rather those factors must be used to express the relative contribution that different parts of the landscape make in support of an overall analysis. Before a landscape can be rated "outstanding" its component features must stand out, it submitted, as being "extraordinary, stupendous, exceptional, dazzling or a superior example".

[71] Counsel for MOWS criticised Mr Brown's evidence on a number of counts. Namely that he sought to elevate "picturesque" or "handsome" landscapes to

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<sup>60</sup> Counsel for MOWS, Opening submissions [77]



“outstanding” by using poetic terms; that it lacked the objectivity of Ms Gilbert’s application of the Upper Clutha factors (bio-geographical elements, patterns and processes); erroneously used other Waiheke landscapes for comparative purposes (as opposed to those of the Region); and used rarity as a test (as opposed to value)<sup>61</sup>.

[72] MOWS’s witness Mr Mansergh deposed that the methodology used by the council to identify the PC8 ONLs, including ONL 78 was fundamentally flawed as it failed to “appropriately apply all of the relevant factors and tests required to determine if an area is in fact an ONL”<sup>62</sup>. He attributed this to council’s reliance on “Q Sort” and that not being designed to identify the region’s ONLs. The methodological shortcomings that he identified led him to conclude that “the [regional landscape assessment] has included landscapes and features at Man O’War Bay and on Ponui Island (and probably other places) that, while highly attractive, do not meet the threshold for being outstanding”<sup>63</sup>. In short, he considered that the threshold had been set too low<sup>64</sup>. He gave the opinion that “... a landscape is an amalgam of features that have an identifiable spatial association or relationship that give rise to cultural and perceptual values”. We find that to be an interesting observation which we return to in the context of Stony Batter.

[73] Mr Mansergh criticised the Decisions Version Appendix F-2 descriptive analysis for not providing useful support for either the Change’s mapping or the relevant objectives/policies<sup>65</sup>. He anticipated that this perceived shortcoming would create subsequent implementation difficulties.

[74] Specifically on ONL 78, Mr Mansergh reached the conclusion that:

...the landscape containing Man O’ War Station is comprised of a series of outstanding natural features that are predominantly found around the coastal edge and within the naturally vegetated gully system extending into the hinterland beyond Owhiti Bay (in particular).<sup>66</sup>

<sup>61</sup> Ibid [84] – [87]

<sup>62</sup> Mansergh EIC [24]

<sup>63</sup> Ibid [104]

<sup>64</sup> Ibid [138]

<sup>65</sup> Ibid [68]ff

<sup>66</sup> Mansergh EIC [118]



[75] He deposed that where outstanding features are not present or are widely dispersed, the contextual landscape ceases to be outstanding and this tends to occur in the hinterland of the island, particularly where the landscape is more rural in character. He expressly eschewed the following from “outstanding” status<sup>67</sup>:

- (i) Forested and bush covered valleys and hill slopes within the island hinterland.
- (ii) Wetland areas located in the valley floor and hinterland seepages.
- (iii) Gently to moderately steep rolling pasture covered hill country.
- (iv) Vineyards.

[76] When it came to mapping ONL 78, Mr Mansergh recognised challenges in dealing with the gradual change in the composition of the landscape from the coastal edge to the interior, and from east to west. He was attracted to the use of “geophysical” (ridgelines, stream or bush edges) and “socio-physical” (road or property lines) boundaries provided they did not affect the overall rating of the landscape as an ONL<sup>68</sup>. He deposed that in most instances adjoining ONF and/or ONL, which are homogenous in their overall characteristics and equally extraordinary, are part of the same ONL. Mr Mansergh cited the Court’s decision in *Long Bay*, (which we acknowledge), as supporting that proposition<sup>69</sup>.

[77] This led Mr Mansergh to opine that the northern coast from Cactus Bay to Thumb Point, including a significant portion of the catchment in the hinterland behind Owhiti Bay, “*clearly constitutes an ONL*” because both the outstanding and more ordinary features contained within the landscape collectively make it “conspicuous, eminent and remarkable by comparison with other similar landscapes in the region”<sup>70</sup>. He was not convinced, however, that Waiheke’s southern and eastern coastline and hinterland are

<sup>67</sup> Ibid [121]

<sup>68</sup> Ibid [124]

<sup>69</sup> Long Bay-Okura Great Parks Society Inc v NS City Council (A078/2008)

<sup>70</sup> Mansergh EIC [127]ff and Attachment 3.



outstanding when considered in the context of the Region’s coastal landscapes. He considered them “highly attractive” and potentially falling within the ambit of an amenity landscape under s.7(c) RMA and PC8 Policy 6.4.22.2.

[78] Notably, Mr Mansergh considered the differences between his ONL and that supported by Ms Gilbert “relatively small” and attributable primarily to “application of the ONL threshold”<sup>71</sup>. More particularly, he considered that the difference between them was down to “... *very small and sometimes subtle differences in the associative and experiential values associated with the northern coast*” and its formative processes (high energy environment producing cliffs, bays and rocky outcrops) compared to the more sheltered eastern and southern coastlines. He opined that if the classification of a landscape came down to subtle differences, it was not clearly an ONL. Conversely, where a landscape is obviously an ONL there is typically little disagreement between experts<sup>72</sup>.

[79] In reply to questions put in cross examination, Mr Mansergh acknowledged that the relatively small disagreements over assessment he said existed between him and Ms Gilbert had resulted in major [spatial] differences on what should be included in ONL 78<sup>73</sup>. Mr Mansergh clarified that the threshold he had adopted for “outstanding” was at a regional level<sup>74</sup>.

[80] He explained that he ranked the Owhiti Bay – Carey Bay landscapes illustrated in Mr Brown’s Annexure 11 as outstanding but not the Hooks Bay/Anita Bay landscapes (Annexure 9) because the former are “*just slightly more rugged*” and have a “*slightly higher aesthetic value*”. He attributed the difference in rankings to a combination of factors (coastal geomorphology; how the foreground, background and elements within fit together; and the experiential perspective gained by travelling through the landscape(s)<sup>75</sup>. From his answers describing the foregoing differences as subtle, and the Annexure 9 landscapes as being on the cusp of outstanding, we gained the impression that Mr

<sup>71</sup> Ibid [126]. See also Mansergh EIC Attachment 3 and Ms Gilbert EIC Appendix H(iii)

<sup>72</sup> Ibid [133]

<sup>73</sup> TOP p 118

<sup>74</sup> Ibid p 119



Mansergh's rankings were very finely balanced and involved judgements on which experts might reasonably disagree<sup>76</sup>. Mr Mansergh acknowledged that if the geological features (part Stony Batter) in Mr Brown's Photographs 59 and 60 (Annexure 35) were an ONF this need not preclude their inclusion in an ONL. However, he held that the views seawards towards Opopo Bay showed a very attractive landscape but not an ONL<sup>77</sup>. Again there is a sense of the witness exercising very fine judgement.

[81] Ms Gilbert gave extensive and we think carefully framed evidence on ONL 78 and related aspects of the case. She commenced her evidence by applying the WESI factors grouped under the *Clutha Track* grouped headings to both define what she considered the relevant "landscapes" at the eastern end of the Island and develop a full description/understanding of them. Through a detailed, analytical process she arrived at her previously described coastal environment landscape character area (CELCA), internal landscape character area (ILCA), and mapped extent of Stony Batter<sup>78</sup>. We note that the map at Ms Gilbert's Annex F does not rate the quality of either landscape character area. The basis for defining her CELCA was described in some detail<sup>79</sup>. Included were the NZCPS description of the extent and characteristics of the coastal environment (Policy 1) and case law on how the inland boundary of the coastal environment should be determined<sup>80</sup>.

[82] Ms Gilbert adopted the nearest dominant ridgeline "*to delineate the inland boundary for the majority of the extensive lengths of coastal cliffs and small scale bays along the northern coast extending from the boundary west of Cactus Bay to Thumb Point and the majority of the inland boundary of the ONL extending from the south end of Hooks Bay to the north end of Man o' War Bay*"<sup>81</sup>. The nearest dominant ridgeline was defined using quantified data, photographs and "*extensive field survey by land and water*". At Owhiti Bay, and between Anita and Huse Bays, the exercise was said to be vexed by "*the complex patterning of stream valley systems back dropping these portions*

<sup>75</sup> Ibid p 121

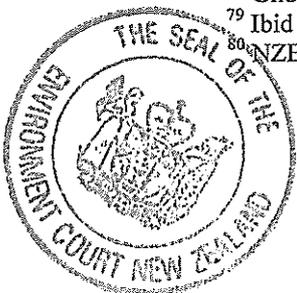
<sup>76</sup> ibid

<sup>77</sup> Ibid p 123

<sup>78</sup> Gilbert, EIC Sections 5- 6 and Appendices A-B plus F-G.

<sup>79</sup> Ibid Appendix G

<sup>80</sup> NZEnvC C45/2008



*of the coastline*". Ms Gilbert explained that in these locations universal adoption of the ridgeline technique would, possibly, have resulted in the inclusion of substantial areas of predominantly pastoral land distant from the sea and lacking either visual connection or coastal influence. For these reasons, in the locations indicated, her finally defined inland boundary "*coincides with areas that are highly visible from the coast and exhibit a high degree of aesthetic coherence by virtue of the strong link between landform and vegetation patterns that enable them to read as part of the wider bush lined coastal cliffs and headlands sequence*"<sup>82</sup>.

[83] Based on the analysis we have described, Ms Gilbert was not convinced that the area identified as ONL 78 in either Change 8 or in the revised mapping accompanying Mr Brown's evidence qualifies as "a landscape"<sup>83</sup>. To ascertain the qualitative significance of the landscape character areas that she had identified Ms Gilbert turned her mind to whether "*there [is] a natural landscape (or series of natural landscapes or features) within the MOWS landholdings that qualify as outstanding in comparison with others within the region*"<sup>84</sup>. Support for adopting a regional perspective when preparing a regional instrument such as PC8 is contained in the WESI decision, which we respectfully adopt in this respect<sup>85</sup>. For these purposes Ms Gilbert adopted qualitative threshold tests for "outstanding" derived from case law and a NZILA Practice Note which no party challenged<sup>86</sup>. We need not cite all the specific tests identified. It suffices to record that they all require a landscape to be remarkable, exceptional or notable at the relevant scale, or similar. Perhaps the most prosaic test given is that ONLs "*should be so obvious (in general terms) that there is no need for expert analysis*"<sup>87</sup>, a sentiment we can readily subscribe to. We offer the passing observation that readers could be forgiven for feeling exhausted after reading the extensive debates about landscape reported in this decision (as we ourselves did in assimilating the enormous quantities of evidence). We

<sup>81</sup> Gilbert EIC Appendix G [10]

<sup>82</sup> Ibid [13]

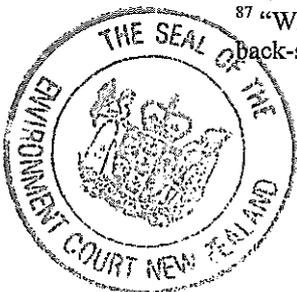
<sup>83</sup> Ibid [4.1]

<sup>84</sup> Ibid [4.2]

<sup>85</sup> NZRMA C 180/99 [85] and Burns Closing submissions [13]

<sup>86</sup> Gilbert EIC [4.3]

<sup>87</sup> "WESI" [2000] NZRMA 59 at para [99]. Our own inclination is to regard this approach as a checking or back-stop mechanism for the more detailed analysis recommended by the Court in that decision.



are bound to agree with previous Court decisions that a principled approach is required, but at what point does an enquiry become needlessly complex ?

[84] Ms Gilbert agreed with Mr Mansergh that the threshold for “outstanding” applied in the council “Q Sort” and “WESI” assessments that underpin PC8 “*may well have been*” set too low across the region, with the result that landscapes not exceptional, conspicuous, eminent or particularly notable (at a regional level) have been included<sup>88</sup>. Ms Gilbert opined that neither Mr Brown’s evidence nor PC8 Appendix F-2 indicate satisfactorily how the PC8 ONL ratings have been derived<sup>89</sup>.

[85] Ms Gilbert explained that her ONL assessment methodology was based on the NZILA Best Practice Note (2010), which provides for a two step process. Namely “characterisation” which requires the identification of distinctive types of landscape based on their distinctive patterns (natural and cultural features, processes and influences)<sup>90</sup> and their geographical delineation. Rating follows characterisation as a second and distinct step<sup>91</sup>.

[86] Applying the methodology described, Ms Gilbert concluded that her CELCA contains features that “do draw attention, are conspicuous and remarkable and are noteworthy at a regional level”<sup>92</sup>. Whilst likely to be similar to other stretches of the Region’s coastline, Ms Gilbert considered that the minimal presence or subservience of built modifications, sense of remoteness and relatively high level of naturalness, sets the MOWS Waiheke coastal fringe apart from many other portions of the Waiheke coastline and other natural coastal landscapes of the Region. She concluded that the majority of the CELCA “confers” a ranking of outstanding<sup>93</sup>. Ms Gilbert mapped the extent of the CELCA which she assessed to be outstanding, helpfully setting it alongside the PC8 Decisions Version map and Mr Brown’s revision for comparative purposes<sup>94</sup>.

<sup>88</sup> Gilbert EIC [4.5]

<sup>89</sup> Ibid [4.6]

<sup>90</sup> The WESI factors

<sup>91</sup> Ibid [7.1]ff and Gilbert EIC Appendix A

<sup>92</sup> Gilbert EIC [8.15]

<sup>93</sup> Ibid [8.17]

<sup>94</sup> Ibid Appendix H



[87] We now review Ms Gilbert's evidence on specific locations.

*Man O' War Bay/Puke Range eastern flanks*

[88] Both parties would include the headlands either side of the Man O' War Bay and exclude its immediate backshore. They disagreed over the correct classification of land higher in the catchment extending up the Puke Range's south eastern flanks to its spine. While Ms Gilbert included this area in her unrated CELCA<sup>95</sup> she did not consider it to be an ONL. Conversely Mr Brown included it in his ONL 78. There was also a relatively minor difference on where the ONL boundary should be drawn at the southern end of the Bay, with Ms Gilbert supporting a slightly larger and Mr Brown a slightly smaller area<sup>96</sup>. In her analysis of the Bay Ms Gilbert noted<sup>97</sup>:

- (i) The degree of built development and physical infrastructure present; and
- (ii) Its accessibility and extreme popularity in summer; and
- (iii) Diminished sense of remoteness occasioned by the preceding factors; and
- (iv) Mr Brown's concurrence that at least part of the Man O' War Bay landscape should be deleted from the ONL.

[89] Ms Gilbert was critical of Mr Brown's evidence on the basis that the ONL he supported did not form a separate catchment or landscape character area independent of the balance of the (modified) Bay<sup>98</sup>. She opined that the Bay is less natural and exhibits a moderate level of modification relative to other parts of MOWS's Waiheke land. The patterning of the Bay's built development was considered to be typical of many of the bays further to the south, which comprise a mix of developed and undeveloped landscapes largely excluded from ONL 78<sup>99</sup>. More specifically, she considered the level

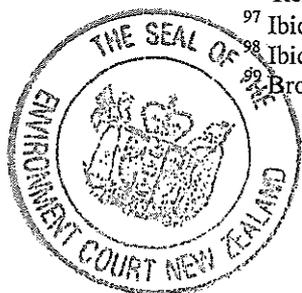
<sup>95</sup> Ibid Annex F(i)

<sup>96</sup> Refer Ms Gilbert EIC Appendices H(ii) and I and Mr Brown's EIC Annex's 1 and 7<sup>96</sup>.

<sup>97</sup> Ibid [8.19] and Appendix B

<sup>98</sup> Ibid [8.24]ff

<sup>99</sup> Brown EIC Annex 1.



of modification and resultant reduction in naturalness at Man O' War Bay to be similar to that displayed by the string of bays immediately to the south (Wairere, Kiripaka and Waikopou) that are excluded from ONL 78<sup>100</sup>.

[90] In Ms Gilbert's judgment it followed that the ridgeline delineation method used to determine excluded portions of the landscape at Wairere, Kiripaka and Waikopou Bays should also be used at Man O' War Bay as shown on her Annex H, particularly as both areas are back-dropped by substantial areas of bush. By way of further detail, Ms Gilbert indicated that the "inland delineation" shown on her Annex H was produced using council aerial photography and contour data and "*broadly corresponds to the council's Significant Ridgeline mapping shown on [her] Annex C(i)*"<sup>101</sup>. We understand the latter to be a reference to the Significant Ridgeline notation in the council's Auckland District Plan: Hauraki Gulf Islands Section (HGI) at Sheet 23 Map 1. On that basis it is evident that the ONL boundary inland of Wairere, Kiripaka and Waikopou Bays does coincide generally with the Significant Ridgeline, while at Man O' War Bay the Ridgeline is within council's ONL 78 and excluded from Ms Gilbert's<sup>102</sup>. While many of the large scale ridgelines running through the interior including the Puke Range were said to be highly memorable, Ms Gilbert deposed that "this ridgeline does not warrant inclusion as an ONL in its own right"<sup>103</sup>.

### *Hooks Bay*

[91] Ms Gilbert opined that Hooks Bay lacks the naturalness qualities evident in the majority of the MOWS coastal fringe. She characterised it as having "working rural landscape patterns, elements and processes".

[92] Ms Gilbert agreed with Mr Brown that the area which he supported excluding from the Decisions Version lacks the necessary qualities for an ONL because of its poor aesthetic coherence and visual integrity<sup>104</sup>. However, she considered that a significantly

<sup>100</sup> *ibid*

<sup>101</sup> Gilbert EIC [8.28]

<sup>102</sup> See also Gilbert EIC Appendix C(i)

<sup>103</sup> Gilbert EIC [8.46]

<sup>104</sup> Gilbert EIC [8.37]



larger area should be excluded than Mr Brown did, as shown on her Annex H(iii). In her opinion his boundary does not correspond with “*a clearly legible landscape boundary and nor does it read as a particularly different landscape character area [from] the balance of Hooks Bay*”<sup>105</sup>. As at Man O’ War Bay, Ms Gilbert recommended that the ONL be based on ridgeline patterning and that it exclude the “bay” as defined by the nearest dominant ridgeline. She based the boundaries that she supported largely on the mapped ridgelines in her Appendix C(i) and the ILCA boundaries in her Appendix F(i).

#### *Cactus Bay – Owhiti Bay*

[93] Ms Gilbert did not appear expressly to address the disputed ONL 78 boundary between Cactus Bay and Owhiti Bay in her Landscape Evaluation<sup>106</sup>. In this location the Decisions Version generally extends ONL 78 from the coast inland to Man O’ War Bay Road. Ms Gilbert would exclude three areas north of the Road that are located in her ILCA<sup>107</sup>. As already noted, Ms Gilbert described the characteristics of her ILCA at some length, but without specific reference to the area inland from Cactus Bay – Owhiti Bay. However we note her overall opinion that none of the landscape attributes which she ascribed to the ILCA, either individually or collectively, make it “*conspicuous, eminent or remarkable*”. Rather, in her opinion, the interior is similar to much of the coastal hinterland on the eastern and southern parts of Waiheke. In short, Ms Gilbert found the ILCA landscape handsome but not outstanding. Ms Gilbert gave “*the attractive mixed pasture and bush lined inland stream valley systems to the south of Piemelon Bay and SW of Cowes Bay Road*” as examples of landscapes of a similar character and/or quality to the ILCA<sup>108</sup>.

#### *MOWS Stony Batter Landscape Feature*

[94] This feature sits largely within the Hearings Version of ONL 78 and was addressed specifically by Ms Gilbert. Her landscape characterisation assessment identified a cluster of four discrete areas as the “Stony Batter Landscape Feature” with

<sup>105</sup> Ibid [8.40]

<sup>106</sup> Gilbert EIC Section 8

<sup>107</sup> Gilbert EIC Appendix F(i)



their mapped extent based on HGI district plan provisions (Conservation land unit, archaeological sites, boulder field SES)<sup>109</sup>.

[95] She described the features as eminent and remarkable and deposed that they warrant an “outstanding” ranking because of “[their] exceptionally high values with respect to historic heritage and geological values, coupled with the public accessibility, ..... memorability and ..... expressiveness”<sup>110</sup>. She concluded that Stony Batter is better described as an outstanding natural feature (than an ONL) because there is no clear landform, land cover or land use features that delineate its extent as a landscape. Furthermore, “there is a lack of consistency between the extremely high landscape values associated with Stony Batter and the surrounding area”.

[96] Ms Gilbert described her approach to mapping a Stony Batter ONF as appearing to be consistent with how Regionally Significant Volcanic Features have been recorded in the ARPS, namely using the relevant district plan zone boundaries. She considered this appropriate where, like the volcanic cones, Stony Batter has geological and heritage values and there is a difficulty, firstly, in defining the feature as a landscape and, secondly, delineating its “outstanding” extent<sup>111</sup>.

[97] Importantly we think, Ms Gilbert acknowledged that her ILCA forms part of the context for and outlook from the Stony Batter ONF she identified.

[98] We are not confident that the ARPS and PC8 provide properly for ONFs on Waiheke Island<sup>112</sup>. This may not be a material factor because the council’s revised ONL 78 boundaries largely incorporate the Stony Batter features that Ms Gilbert mapped (refer her Appendix H(iii)). However, it was MOWS’s case that significant parts of Stony Batter should be excluded from ONL 78. We find no record of MOWS addressing this

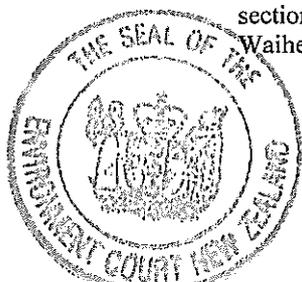
<sup>108</sup> Ibid [8.52]

<sup>109</sup> Ibid Appendix H(i).

<sup>110</sup> Ibid [8.58]

<sup>111</sup> Ibid [8.62]

<sup>112</sup> ARPS Section 6: Heritage at [6.1] states that Change 8 includes Map Series 3a and at page 6 in the same section indicates the RPS is concerned with the protection of ONF. However Map Series 3a Map 16: Waiheke does not have an ONF notation in the key. Nor does it identify Stony Batter as an ONF. We also



issue in submissions and are left with the impression from Ms Gilbert's evidence that it is appropriate to rely on HGI district plan provisions to recognise and provide for the protection of those parts of the feature outside the ONL boundaries that she and Mr Mansergh supported. That would be an injustice to the remarkable Stony Batter landscape in our view. The position could be resolved subject to what we decide about its hinterland.

*Is there a Waiheke Island Amenity Landscape on MOWS's land?*

[99] Finally, we note that Ms Gilbert addressed management of the MOWS land that she would exclude from ONL 78, namely her ILCA and CELCA areas not rated as ONL. She acknowledged that subdivision, use and development in the ILCA have the potential to impact upon the quality and integrity of ONL 78 and Stony Batter ONF<sup>113</sup>. In this respect she considered it significant that:

- (i) The HGI district plan protects [known] ecological, archaeological, SES features and significant ridgelines within the ILCA; and
- (ii) The ILCA is a working rural landscape 90% of which is located in HGI district plan Landform 5 (Productive land) and prone to change as evidenced by recent experience at Hooks Bay.

[100] She concluded that visual character and quality are the key landscape attributes requiring management in her ILCA as the HGI plan protects ecological and archaeological resources. Ms Gilbert deposed that her ILCA meets the criteria for an Amenity and/or Visual Amenity Landscape given in two publications<sup>114</sup>. It is not necessary for us to set the publications' definitions out in full but we note they apply to working landscapes that are expected to evolve in response to "*rural economies, land uses and settlement patterns*". Ms Gilbert concluded that the ILCA could "*be the very type of [Amenity] landscape to which proposed [PC8] Policy 6.4.22.2 and Method*

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see that ONF is defined in the ARPS Appendix D: at page 8. Puzzlingly the definition refers to features identified in Map Series 3a.

<sup>113</sup> Gilbert EIC [8.65]



6.4.23.4 *could be applied*<sup>115</sup>. We note the Method Statement is discretionary and applies to regional and district plans (not the ARPS). We consider that it could be relevant that the suite of HGI district plan zones is spatially settled (acknowledging that some detailed controls within certain of them on land owned or related to that of the present appellant remain under appeal in the HGI Plan, the relevant proceedings having been heard consecutively with the present appeal). We presume that Ms Gilbert would also consider her non-ONL CELCA areas suitable for inclusion in an Amenity Landscape.

[101] In reply to questions in cross examination, Ms Gilbert accepted that an ONF such as Stony Batter may form part of an ONL but maintained her position that not all of Stony Batter warranted inclusion in ONL 78 because of the land form patterning in both the Hooks Bay catchment and the area to the east of Hooks Bay<sup>116</sup>. Ms Gilbert acknowledged that the ridge lines above the eastern shorelines of Hooks Bay and Anita Bay as shown on Mr Brown's Photographs 15/16 backdrop the coastal environment when viewed from the water, but did not rate either landscape as outstanding when questioned by Mr Burns.<sup>117</sup> We have difficulty reconciling those answers with Ms Gilbert's explanation to the Court that the central portion of Photograph 15 "with the green ridgeline" was more or less included in her Anita Bay ONL<sup>118</sup>. We are also uncertain about her answer to the Court on Photograph 15 at Hooks Bay. Here Ms Gilbert, while probably correctly unsure about the accuracy of Mr Brown's viewing point 16, considered the majority of the view would be included in her ONL.

[102] Ms Gilbert did not resile from excluding the land in Mr Brown's Photograph 23, taken from Stony Batter Road northwards to the sea, from her ONL - except for Thumb Point, its tombola and the foreground ONF<sup>119</sup>. We note her explanation, that this was (again) based primarily on the view from the water as shown in Mr Brown's Photograph

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<sup>114</sup> R.Peart for EDS "The Landscape Planning Guide for Peri-urban and Rural Areas" and Beca/Stephen Brown Environments "Assessment for the Whangarei District (2005)".

<sup>115</sup> Gilbert EIC [8.73]

<sup>116</sup> Ibid p 95

<sup>117</sup> Ibid p 96

<sup>118</sup> Ibid p 106-107

<sup>119</sup> Ibid p 98



16 (Annex 9). She considered “*long range coastal views*” from within MOWS like those in Photograph 23 “*attractive,*” but not necessarily outstanding<sup>120</sup>.

[103] In response to a series of questions on her classification of the east Puke Range area illustrated in Mr Brown’s Annexures 1/27/28 and her Annexure H, Ms Gilbert deposed that:

- (a) She excluded the area illustrated in Photographs 44/46, which she agreed contained the largest stand of kauri forest on Waiheke, solely because of the level of modification/built environment in the Man O’ War Bay catchment<sup>121</sup>.
- (b) There would definitely be a difficulty if the Man O’ War catchment were excised from ONL 78 given it would otherwise extend from Thumb Point to the Orapiu Road<sup>122</sup>. Ms Gilbert considered it unfortunate that her assessment was limited to the MOWS but maintained her position at (a) above.

[104] When asked about the apparent congruence between her revised ONL 78 Appendix F-2 Landscape Type, Nature and Description and Mr Brown’s Photograph 44 taken in the Man O’ War Bay catchment, Ms Gilbert conceded “in that view” the Appendix gives a “fair description” of what the photograph shows. She deposed that Mr Brown’s oblique photograph showed a different view of the catchment from the points in the Bay, and at sea, on which her assessment was based. Ms Gilbert acknowledged that in some situations it might be appropriate to adopt different delineation tools (land cover, land use), but held firmly to the view that in Man O’ War Bay the catchment delineation method was appropriate and the catchment’s less modified areas did not tip the balance in favour of it being “outstanding”<sup>123</sup>.

<sup>120</sup> Ibid p 99

<sup>121</sup> TOP p 100 and p 102

<sup>122</sup> We do not see an Orapiu Road on Exhibit 4 and are inclined to think Mr Burns and the witness had in mind Cowes Bay Road given ONL 78 as shown on Mr Brown’s Annexure 1 terminates, in part, in the vicinity of Cowes Bay.

<sup>123</sup> TOP p 103



[105] Mr Brown gave robust evidence in chief in support of the council’s revised ONL 78 boundaries. He considered that, like other PC8 ONLs, it had been through a rigorous process of assessment, re-assessment and refinement. He considered ONL 78 was outstanding and “important in relation to the heritage values of [the Auckland] region/city”<sup>124</sup>. We were materially assisted by Mr Brown’s response to Ms Gilbert’s evidence on the assessment and delineation of landscapes. We first review his evidence on these broad aspects before turning to his rebuttal for assistance with specific locations.

*What is a “Landscape”?*

[106] Mr Brown acknowledged Ms Gilbert’s proposition that ONL 78 was challenged by the absence of distinguishing features and clearly legible landscape boundaries; but deposed that in reality its delineation was not “so easily addressed”<sup>125</sup>. Taking the substantial north-south Puke Range as an example, he noted its various south east facing components (elevated bush clad slopes, mixture of bush and pasture, pasture and [in places] coastal settlements). On its western side the vegetation pattern is different again. Mr Brown opined that, taking the approach he attributed to Ms Gilbert, it was likely only the physically contiguous forest would be recognised as ONL. Yet this would be to “ignore the importance of the underlying landform, the relationship of much of the coastal landscape with the Hauraki Gulf, its volcanic boulder field, and a range of more subtle features that contribute to the character, identity and values of the MOWS land”. Mr Brown considered that Ms Gilbert placed too much emphasis on views of landscape(s) from “outside” as distinct from viewing them within. He illustrated this by the experience of entering Man O’ War [Bay] on land from the north as opposed to viewing the landscape from the sea. Without reference to specific WESI factors, he considered the Man O’ War landscape viewed from within to be “more intimate and fine-grained than [when] viewed in a more remote fashion; it is also more diverse, rich and multi-layered”<sup>126</sup>.

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<sup>124</sup> Brown EIC [43]

<sup>125</sup> Brown Rebuttal [4]ff

<sup>126</sup> Ibid [7]



[107] Mr Brown deposed that the “more subtle variations and distinctions” (in local terrain, vegetation cover, relationship to the Gulf, different perspectives from roads) which he considered should determine ONL boundaries went beyond single landforms or hydrological features of the type Ms Gilbert considered apposite. Instead of separating landscapes Mr Brown considered features of the type described often unify them by “acting as a visual/physical landmark and giving them a signature”<sup>127</sup>.

[108] He deposed that by addressing the NE Waiheke landscape via a range of component parts (coastal environment, interior landscape, Man O’ War Bay, Hooks Bay) Ms Gilbert had dissected the ONL and dealt with its characteristics and values in a “forensic manner”<sup>128</sup>. This missed the point, in his opinion, that ONL 78 as defined by council “is not just a series of discrete catchments, a coastal fringe and inland area” or pockets of bush and pasture. Rather the key qualities of ONL 78 in Mr Brown’s view “evolve from the merger of multiple elements and attributes”, namely<sup>129</sup>:

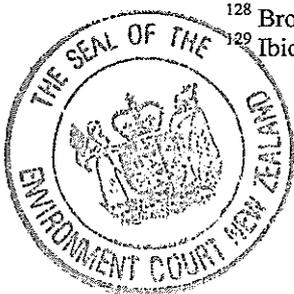
- (a) The area’s dramatic landform: centred on the Puke Range, but also evolved from physical interaction with the Hauraki Gulf – culminating in specific landmarks like Thumb Point and Owhiti Bay.
- (b) The related drama and dynamism of views both of/towards, and from, the sea.
- (c) The Puke Range forest that, together with other bush/coastal forest remnants, imbue the landscape with its feeling of endemic naturalness and lend it a very distinctive and appealing visual structure.
- (d) The volcanic “tor” field near Stony Batter.
- (e) The gun battery remains at Stony Batter”.

Mr Brown found these features to be a wholly natural and continuous sequence extending from the Puke Range to the coast. He illustrated his analysis by reference to views from

<sup>127</sup> Ibid [8]

<sup>128</sup> Brown Rebuttal [29]

<sup>129</sup> Ibid [30]



different locations both at sea and on land, which encompassed some or all of the features described. He did not accept that lines could be drawn across “this landscape” arbitrarily severing the connections he described. Nor did he accept that at Man O’ War Bay the landscape could be separated on the basis of contour data that correlates with HGI district plan Significant Ridgeline mapping done for a different purpose<sup>130</sup>. Mr Brown took issue with Ms Gilbert’s separately defined landscapes for three primary reasons<sup>131</sup>:

- (a) Failure to acknowledge that her “ILCA” has any sort of relationship with the coastline and waters of the Hauraki Gulf.
- (b) While rural productive activities take place across most of the MOWS land it is the preponderance of bush lined slopes/gullies and “slopes draped over a network of ridgeline systems and stream valleys” that distinguishes most of ONL 78 and sets it apart from neighbouring areas largely stripped of bush and wetlands.
- (c) ONL 78 demonstrates cohesion and visual integrity atypical of the rest of eastern and southern Waiheke.

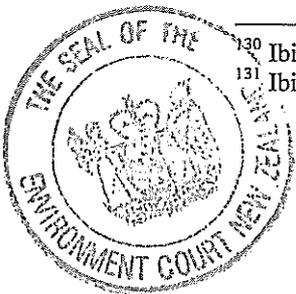
[109] In rebuttal evidence Mr Brown addressed each of the areas where there was a difference between him and the MOWS witnesses on where the ONL 78 boundaries should be set. We deal with each in turn.

*Puke Range and Man O’ War Bay*

[110] Mr Brown did not accept Ms Gilbert’s (and presumably Mr Mansergh’s) “segregation” of the MOWS landscape north and west of Man O’ War Bay from the Puke Range (and ONL 78) as in his view the Range - including its native forest, regenerating bush and stream corridors - anchors the landscape in geophysical structure and natural heritage terms. The Bay’s shore margins excepted, he considered the interplay of identified features to be “quite exceptional” including in respect of relevant Q Sort “outstanding natural landscape” criteria and the WESI factors of natural science values, aesthetic values and expressiveness. Mr Brown noted that the anchoring role of the Puke

<sup>130</sup> Ibid [34]

<sup>131</sup> Ibid [35]



Range is identified in the Appendix F-2 description of ONL 78 under a number of the WESI factors used as reporting headings (geological/topographical, memorability, expressiveness). He gave the opinion that removal of the Puke Range and its ridge/forest “extensions” from ONL 78 would be analogous to removing a substantial part of the Waitakere Ranges from the Waitakere Ranges and Coastline ONL<sup>132</sup>.

*Cactus Bay – Owhiti Bay*

[111] Mr Brown observed that the Gilbert and Mansergh proposed ONL 78 boundary north of Man O’ War Bay Road is well down the escarpments and slopes that provide a backdrop to this stretch of coastline<sup>133</sup>. This is certainly the case to a significant extent in two locations. In contrast, the ONL boundary that Mr Brown supported runs largely along Man O’ War Bay Road, which in this area is generally on the main ridgeline immediately inland of the coast. This may be an appropriate place to note that PC8 records “The boundary lines of each Outstanding Natural Landscape area are not intended to be exact lines, but indicate a zone of up to 50 metres width”<sup>134</sup>.

[112] Mr Brown deposed that the full sequence of coastal slopes and headlands leading up to the Man O’ War Bay and Stony Batter Road ridges<sup>135</sup> are clearly visible in views from out at sea and from Owhiti Bay, Cactus Bay and Garden Cove<sup>136</sup>. He considered that the MOWS witnesses had paid scant regard to the landforms and skylines central to the coastal character and identity of ONL 78 in this location. He deposed that the boundary they supported between Garden Cove and Owhiti Bay was based inappropriately on bush areas in the HGI district plan Land Units 6 and 7<sup>137</sup>. We think from Mr Mansergh’s Attachment 3, preceding west to east, that MOWS’s case might be better described as basing the inland Cactus Bay – Garden Cove ONL boundary on a combination of the district plan’s Significant Ridgeline control and Land Unit 1 (coastal

<sup>132</sup> Brown Rebuttal [95]

<sup>133</sup> Ibid [41]ff

<sup>134</sup> PC 8 Appendix F-2 p 5

<sup>135</sup> Ibid [55]

<sup>136</sup> Ibid [41]

<sup>137</sup> Ibid [42]



cliffs) and, at Owhiti Bay, predominantly on Land Unit 6 (re-generating slopes) but including some Land Unit 5 (productive land) south of Man O' War Road.

### *Stony Batter*

[113] As previously indicated, the Stony Batter assemblage of surface boulders, ecological communities and historic military relics are included in the Decisions Version ONL 78 and very substantially in the Hearings Version. The features are identified separately in the HGI district plan across a number of discrete sites<sup>138</sup>. Mr Brown noted that Ms Gilbert had considered whether Stony Batter was a “feature” or “landscape” but held there was a more fundamental question, namely whether the protection of Stony Batter is a s.6(b) matter<sup>139</sup>. He emphasised that at least some of the values that attach to Stony Batter do not derive from it being a “natural” landscape. They are man-made modifications. He deposed that their presence and contribution to the Waiheke landscape was not central to the delineation of the ONL’s boundaries above Hooks Bay. He dealt with the significance of the Stony Batter natural landscape in the context of Hooks Bay, which we turn to next.

[114] We understand that Mr Brown supported the council’s case that Stony Batter is part of and appropriately included in ONL 78.

### *Hooks Bay*

[115] It will be recalled that Mr Brown supported excluding from ONL 78 a part of the Hooks Bay catchment which the Decisions Version included fully; albeit a smaller area than Ms Gilbert supported excluding<sup>140</sup>.

[116] Mr Brown responded to Ms Gilbert’s criticism that his revised area was based on neither a legible landscape boundary nor a different character area by pointing out that

<sup>138</sup> HGI District Plan Appendix 1a – Schedule of archaeological sites, Appendix 1b – Schedule of buildings, objects, properties and places of special value, Appendix 1d – Schedule of sites of ecological significance and Appendix 1e – Schedule of geological items.

<sup>139</sup> Brown Rebuttal [43]ff

<sup>140</sup> Brown EIC Annexure 7



the “landscape structure and patterning” of the catchment’s central area had changed fundamentally since 2008 as a result of bush clearance and shoreline erosion<sup>141</sup>. Notwithstanding this development, which his revised boundary allowed for, he held that other parts of the catchment should be kept in the ONL. He pointed specifically to the following areas as retaining ONL qualities<sup>142</sup>:

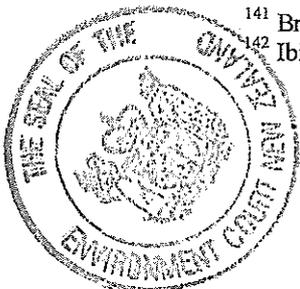
- The more peripheral parts of Hooks Bay towards the cliff-line west of Thumb Point and Anita Bay (interplay of bush, pasture and coastal edge).
- Vegetated coastal escarpments, bluffs and shoreline margins around Thumb Point, Anita Bay and beyond (high degree of naturalness and coherence juxtaposed with the sea).
- High ridges around Stony Batter important within views from within Hooks Bay and from the sea. The ridges, together with spurs descending towards Thumb Point and Anita Bay, were said to “define the “edges” of the visible landscape and form the main skyline in views back into, and across, Hooks Bay”.

[117] Mr Brown acknowledged that his revised boundary left a hollowed out non-ONL area at the centre of Hooks Bay. However he contended that it retained the more natural periphery of Hooks Bay, including the sequence of ridgeline and bush stands around Thumb Point; the ridgeline and its immediate “apron” either side of the Stony Batter gun emplacements; and the combination of coastal escarpment, stream corridors and bush-lined slopes that lead into Anita Bay. He accepted Ms Gilbert’s criticism that demarcation of the ONL in this way did not align with any one distinguishing feature, but contended this would be the case “almost irrespective” of where the boundary was drawn.

[118] Mr Brown deposed that the boundary Ms Gilbert supported, which he described as running along the outer ridgeline of most of Hooks Bay before picking up a ridge centrally located within Anita Bay “*would remove the important upper slope/ridgeline backdrop to Hooks Bay and the sense of connection between the elevated Stony Batter ridgeline and Thumb Point*”. Furthermore “*it would .... appear to arbitrarily divide*

<sup>141</sup> Brown rebuttal [48]ff

<sup>142</sup> Ibid [48]



*Anita Bay in two*". Ms Gilbert's boundary is certainly close to the shoreline at Anita Bay. Mr Brown opined that Ms Gilbert had been overly influenced by areas of existing and regenerated bush and given insufficient weight to:

- The underlying landform;
- Remnant forest/bush/scrub - beyond that recognised in Ms Gilbert's evidence<sup>143</sup> - significant in terms of its interaction with the landform;
- The importance of Hooks Bay's upper ridges and more peripheral spurs, escarpments and slopes as viewed from the sea; and
- The importance of views from around Stony Batter looking down on this landscape, including from around the road to Stony Batter and public walking tracks off it.

In Mr Brown's opinion there is no perfect solution to where the boundary should be set but he held firmly to the view that the revision he proposed at Hooks Bay should not be further contracted<sup>144</sup>.

[119] Unsurprisingly, Mr Brown found little in Mr Mansergh's evidence that he agreed with given the latter's support for "*an even more dramatically reduced ONL*" than Ms Gilbert's. He found Mr Mansergh's evidence confounding to the extent that "*the hinterland landscapes from Man O' War Bay through to Anita Bay and Stony Batter actually share the same [ONL] qualities [assigned] to the coastline between Owhiti Bay and Hooks Bay*"<sup>145</sup>.

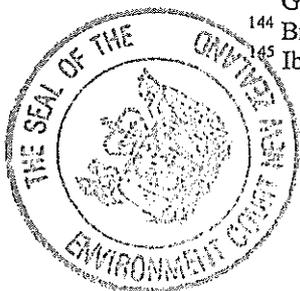
### *Amenity Landscape*

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<sup>143</sup> Gilbert EIC Appendix H(iv)

<sup>144</sup> Brown Rebuttal [51]

<sup>145</sup> Ibid [92]



[120] Responding to Ms Gilbert's evidence that some of the MOWS's Waiheke land might be classified as Amenity Landscape, Mr Brown noted that although Policy 6.4.22.2 provides for such, the category is not used in the RPS<sup>146</sup>. Mr Brown deposed that the RPS definition of Amenity Landscape is shaped by s.7(c), which is explicit in Issue 6.2.72. In his opinion ONL 78 goes well beyond providing for s.7(c) matters and has been applied in north eastern Waiheke to a landscape that is increasingly rare across the Region<sup>147</sup>. In short, he considered the Amenity Landscape concept to be something of a red herring.

[121] In reply to questions put in cross examination, Mr Brown did not accept that it would have been "of more value" if council had assessed Amenity Landscapes at the same time as ONLs because they are much softer edged, more difficult to define and were outside the determined scope of work<sup>148</sup>. Nor did Mr Brown accept that the council erred in its ONL methodology by not commencing the process with the modified Pigeon Bay approach (WESI factors) because:

- (a) Those doing the assessment were aware from the outset that some of the WESI factors (heritage, tangata whenua values) had already been studied for RPS purposes; and
- (b) The WESI factors were considered to be very broad and the study team tried to find a method to better attach values to the Region's landscape through public engagement, leading to the initial adoption of Q Sort<sup>149</sup>.

However, Mr Brown did accept that the WESI factors were not explicitly applied until the council's 2008 review of PC8 when mapping errors were corrected, some ONLs refined and others deleted<sup>150</sup>. He also accepted that the 2008 review resulted in no change to ONLs 78 and 85.

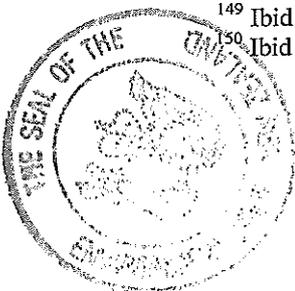
<sup>146</sup> Consistent with previously noted Method 6.4.23.4 which provides that the council may identify Amenity Landscapes in its RMA plans (as distinct from the RPS).

<sup>147</sup> Brown rebuttal [60]ff

<sup>148</sup> TOP p 28

<sup>149</sup> Ibid p 41 and p 44

<sup>150</sup> Ibid p 42



[122] Mr Brown did not anticipate changes to his revised Hooks Bay ONL if the sprayed bush were to become pasture in the future because of what he described as “lost patterning”, which determines how different landscape elements read together<sup>151</sup>. He did not accept the PC8 methodology was flawed by not considering likely future activities consistent with *Lammermoor*<sup>152</sup> because of the uncertainty he foresaw in trying to anticipate future activities. Mr Brown considered there were times when some assessment factors or values must be ascribed greater weight than others to avoid lapsing into a “tick box” mentality<sup>153</sup>. We have no difficulty with that answer, but are less sure about his dismissal of ONL 78 being the Gulf’s largest privately owned operating farm when answering that “the landscape” was the relevant consideration (in his assessment). That may be too dismissive of an aspect of *Lammermoor*. Be that as it may, Mr Brown was firm in his view that having applied the relevant criteria it is necessary to stand back and evaluate the sum of the parts. He considered that especially apt in the current case and referenced the Court’s decision in *Waireka Valley Preservation Society*<sup>154</sup> as authority for that approach. Mr Brown considered it important in the current appeals that the landscape be assessed as viewed from both the land and sea. While hesitant to comment on the work of a professional colleague, he offered the opinion that Ms Gilbert had undertaken a “thorough examination in terms of a land based analysis” but was less comfortable in terms of her sea-based examination and consideration of the whole<sup>155</sup>. Mr Brown rejected counsel’s suggestion he may have reached a conclusion about the ONLs and then sought to retrospectively justify them, including through the wording of Appendix F-2<sup>156</sup>.

[123] Mr Brown acknowledged he had not explained in his own language or terminology what matters made a landscape outstanding. He explained that the team who undertook the Q Sort study consciously left this for the public to determine. For the WESI-type study, there was an implicit understanding that those landscapes which rated

<sup>151</sup> Ibid p 46

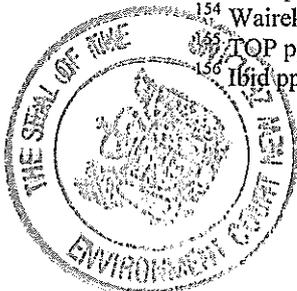
<sup>152</sup> NZEnvC C103/2009 [202(1)]

<sup>153</sup> TOP p 47

<sup>154</sup> *Waireka Valley Preservation Society Inc v Holcim NZ Ltd* C058/2009 [170] – [175]

<sup>155</sup> TOP pp 48 and p 64

<sup>156</sup> Ibid pp 48- 49



very highly or highly for most or some key factors should be rated “outstanding”<sup>157</sup>. We do not recollect Mr Brown indicating what were considered the “key” WESI factors or how they were selected.

[124] In reply to questions on his Rebuttal evidence about specific ONL boundary locations, Mr Brown deposed that:

- (a) Ms Gilbert’s boundary at Cactus – Owhiti Bays generally went to the inland ridgeline, except in a catchment at the western end of Owhiti Bay, instead of running up to Man O’ War Bay Road which he supported<sup>158</sup>.
- (b) He supported inclusion of all of the Puke Range eastern slopes up to the spine as they comprise the back drop to the full sequence of bays down the eastern coastline and an extensive forest area. He did not accept that they were handsome and/or picturesque landscapes as opposed to outstanding<sup>159</sup>.
- (c) The inland ONL boundary he supported at Kiripaka and Waikopou Bays (south of Man O’ War Bay) reflects the degree of built modification in those visual catchments<sup>160</sup>.

[125] Mr Brown did not consider Ms Gilbert’s CELCA and ILCA necessary for ONL assessment purposes for two reasons. Firstly, because PC8 is not concerned with the natural character of the coastal environment. And secondly, because the landscapes concerned have varying degrees of connectedness with the coast they are not amenable to mapping in the way Ms Gilbert proposed<sup>161</sup>. In short, he did not see any need to define the character areas. Mr Brown agreed that in *Owhiti Bay*<sup>162</sup> he gave evidence that there was a “marked dichotomy” between the coastal fringe dominated by natural elements and processes and a modified coastal hinterland which aligned with Ms Gilbert’s ILCA<sup>163</sup>.

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<sup>157</sup> Ibid p 62.

<sup>158</sup> Ibid p 52

<sup>159</sup> Ibid pp 53, 55 and 59

<sup>160</sup> Ibid p 58

<sup>161</sup> Ibid p 65

<sup>162</sup> *Man O’ War Station Limited v Auckland Regional Council* [2010] NZEnvC 248

<sup>163</sup> TOP p 67



[126] Mr Brown accepted that the Appendix F-2 ONL description should be concise and precise. And, in particular, that it should identify the factors that have driven the evaluation process resulting in a landscape's "outstanding" rating. He conceded that he had not taken the opportunity to review Ms Gilbert's alternatively worded Appendix F-2 and was reluctant to consider changes to it in the absence of its co-author<sup>164</sup>.

### **Assessment and findings**

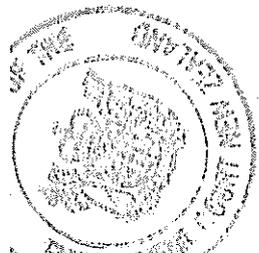
#### *Puke Range/Man O' War Bay Assessment and findings*

[127] During the Court's site visit to the Northeastern part of Waiheke Island we viewed all parts of MOWS proposed to be included in ONL 78 from both land and sea viewpoints described for the photographic evidence of Mr Brown and Ms Gilbert. The extensive visit enabled us to understand the evidence of the 3 landscape witnesses and compare and contrast their views (also the many provisions of the regional and district planning instruments analysed in evidence).

[128] During the visit it became obvious to us that the appellant's property on Waiheke Island offered a mosaic of landscape features including the bush clad eastern slopes of the Puke Range, an interspersed network of bush gullies, pastureland, vineyards and geological features, flanked by a series of coastal headlands, escarpments and ridges leading out to the waters of the Hauraki Gulf. These features interact in a manner that, viewed from either land or sea, makes it difficult to identify distinctly separate landscapes for assessment of significance in a regional context. This observation is consistent with the approach taken by Mr Brown and summarised earlier. In particular we consider that these "landscapes" have varying degrees of connectedness to the coast but ultimately read in the round for the viewer. With one exception near Cactus Bay that we will come to, we do not find it appropriate to separate coastal and inland landscape areas for individual assessment as recommended by Ms Gilbert for her CELCA and ILCA.

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<sup>164</sup> Ibid pp 68-69



*Man O' War Bay and eastern Puke Range*

[129] When viewed from the sea offshore from the headland between Garden and Waiti Bays the bush clad Puke Range eastern flanks present as part of one landscape that extends from the predominantly bush covered Kauri Point – Huse Bay - Opopo Bay panorama around to bush areas above the coast south west of the Man O' War backshore. Mr Brown includes this full panorama in his ONL assessment, with the exception of a small area around the modified Man O' War Bay backshore. We agree with this assessment, noting that the relatively small area of intrusion by built development at Man O' War Bay does not sufficiently intrude into the backdrop bush landscape to warrant exclusion of that backdrop as recommended by Ms Gilbert.

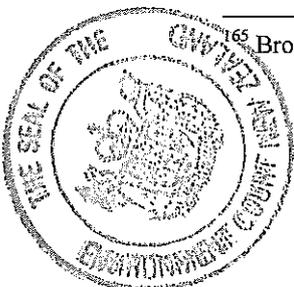
[130] As viewed on land from both Man O' War Bay Road and Cowes Road we were in no doubt that the Puke Range east flanks are part of an ONL both in their own right and as part of the views to the coast as shown in Mr Brown's photographs 44 and 45.<sup>165</sup>

*Hooks Bay*

[131] Viewed from the sea, Hooks Bay is a large landscape comprising multiple elements and landforms that rise from the foreshore to skyline ridges. From Thumb Point headland running in an arc to the south-east there is the tombola, pasture south-west of the tombola, bushed gullies, pasture with sporadic bush, and bush with sporadic pasture. There is a risk, which Ms Gilbert succumbs to, of compartmentalising the landscape to the detriment of the whole especially as viewed from a distance offshore. We observed and agree with the witnesses that modified parts of the landscape behind the Bay should be excluded (sprayed bush and eroded land). However like Mr Brown we include:

- (a) The area of bush running up to the ridge SW of the tombola. With this area incorporated in the ONL there is a greatly diminished case for excluding any of the area between it and the Thumb Point headland which reads as part of one landscape;

<sup>165</sup> Brown Statement of Rebuttal at Annexure 27



- (b) All of the elevated land up to and running around the skyline ridge in a mix of pasture and bush that ties the backdrop to the Bay and landscape together, including in places visible parts of Stony Batter; and
- (c) The heads of the two gullies behind Anita Bay and east of Stony Batter, that demonstrate strong relief, a mix of natural vegetative cover with bush in the gullies and which are an integral part of the whole.

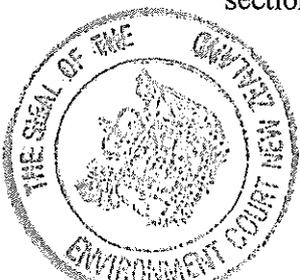
[132] When viewed from the land, and in particular from the high points on Stony Batter, we found that Ms Gilbert's easternmost ILCA is not separate but instead an integral part of panoramic land/seascapes over the Gulf, including all of Hooks Bay and significantly incorporating the Coromandel Peninsula.

[133] We agree with Mr Brown's Hooks Bay ONL assessment which also very largely incorporates Ms Gilbert's mapped Stony Batter outstanding natural feature(s).

*Cactus Bay – Owhiti Bay*

[134] There are three areas where Ms Gilbert and Mr Mansergh differ from Mr Brown along this section of the north Waiheke Island coastline.

[135] The first disputed area is a relatively small parcel south-west of Cactus Bay and north of Man O' War Bay Road. As viewed from the sea the disputed area is not a significant part of the landscape, being largely at the top of a slope that rises from the coast including through an open NE facing gully. The relief is relatively subdued in comparison with the coastline further to the east. The area reads with adjoining land to the west, which has a similar landform. It contains tree crops at higher levels with the more visible foreground slope comprising mixed quality vegetation; bush interspersed with woolly nightshade, pines and macrocarpa. The area adjoins the undisputed ONL to the west. When viewed from the land on publicly accessible Man O' War Bay Road, we found the landforms subdued and the vegetation natural but containing significant non native elements including shelter planting. The seaward views were confined to limited sections of the road and appear to open up principally when looking west to east. Where



views are available they did not appear “extraordinary” or “a superior example”. While resistant to compartmentalising views of the coastal environment, and mindful of the uncontested ONL either side, overall we found this relatively small area did not warrant ONL status, and was sufficiently discrete from the ONL components as to realistically be capable of avoiding the “compartmentalizing” tag.

[136] The second area is north-east of Cactus Bay, between it and Garden Cove. Viewed from the sea this presents as a headland; strong coastal presence and relief; vegetation a mix of coastal bush, pasture and some tree crops. The disputed area rises to the ridgeline behind the coast and provides a backdrop to the landscape that is part of the undisputed ONL extending east towards Thumb Point. From the land on publicly accessible Man O’ War Bay Road, the views are intermittent but where available include some wide landscape/seascapes. We agree with Mr Brown that this area rates as ONL.

[137] The third area is between Garden Cove – Owhiti Bay. Its physical attributes and landscape qualities are similar to Area 2. The landscape presents as pasture behind predominantly coastal fringe bush rising up to the Man O’ War Bay Road ridgeline. These features all read together and present as an integral part of ONL behind Owhiti Bay extending to Thumb Point

[138] We have no difficulty agreeing with all of the landscape witnesses that the area behind Owhiti Bay extending up to Stony Batter and north-east to Thumb Point is an ONL.

[139] Using Ms Gilbert’s Appendix H(iii) as a reference given that it maps the competing suggested ONLs, we direct that the ONL mapping employ Mr Brown’s version in Man O’ War Bay and the Eastern Puke Range, Hooks Bay (taking in the 4 areas of “ONF” suggested by MOWS on and adjacent to Stony Batter), and the second and third of the 3 described areas between Cactus Bay and Owhiti Bay. The first described of those areas is not to be mapped ONL.



*Amenity Landscape ?*

[140] We find no basis for directing that any Amenity Landscape be mapped where we have directed deletion of previously mapped ONL. This is because while Policy 6.4.22.2 makes reference to such, Method 6.4.23.4 records that the technique to be employed is that the council may identify Amenity Landscapes in lower order plans. There is no mechanism for mapping them in the RPS.

**ONL 85 Ponui Island**

[141] Ms Gilbert opined that despite having differing character areas, Ponui Island essentially reads as one large landscape character area with a fairly high degree of consistency in terms of landscape patterns, elements and processes that create a distinctive identity<sup>166</sup>. Ms Gilbert agreed with the council's case that:

- (i) ONL status was appropriate for the *“natural, dramatic and highly attractive coastal fringe along the eastern side of the [MOWS] property dominated by an almost continuous sequence of bush clad cliffs and headlands”*<sup>167</sup>.
- (ii) The ONL should be removed from land south of Ruthe Passage and Chamberlain's Bay (that is, the northern end of the island).

[142] She disagreed with the council over the inclusion of an area on the western side of the Island extending west – east from the vicinity of Ponui Head/Shark Bay to the east coast ONL<sup>168</sup>. Based on a detailed landscape analysis, she summarised the disputed area in these terms:

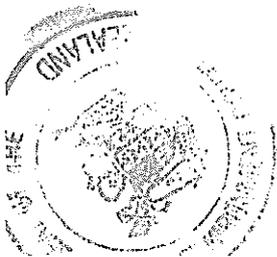
..... the western portions of the property do not in my opinion exhibit a sense of naturalness, drama or remoteness that make them remarkable. Similarly the lack of aesthetic integrity, continuity and cohesion in the majority of these areas of the landholding means that they fail to qualify as conspicuous in terms of their visual qualities<sup>169</sup>.

<sup>166</sup> Gilbert EIC [7.14].

<sup>167</sup> Ibid [8.75] and Annexure N(ii)

<sup>168</sup> Ibid [8.101]ff

<sup>169</sup> Ibid [8.96]



[143] Finally, Ms Gilbert deposed that the northern and western portions of the Island exhibit sufficient landscape qualities to warrant consideration as Amenity Landscapes<sup>170</sup>.

[144] Mr Mansergh concurred with both Ms Gilbert’s amended ONL 85 mapping and descriptive analysis<sup>171</sup>.

[145] Mr Brown supported significant changes to the Decisions Version of ONL 85 after viewing the Island on the ground, which provided (unsurprisingly) a clearer *“understanding of the interplay of physical components across its inland areas, together with related landscape patterning and structure”*<sup>172</sup>. Mr Brown, consequently supported the removal of land behind Chamberlain’s Bay and an area extending inland from the Shark Bay - Oranga Bay headland on the western side.

[146] As noted, the principal difference between Mr Brown and the MOWS witnesses was whether ONL 85 should apply to an area on an east – west axis from south of Bryants Bay (on the east coast) to the headland north of Shark Bay. Mr Brown described the area as capturing *“two major stream corridors, some stands of forest/bush that culminate in large tracts immediately west of the Bryant’s Bay bluffs and terrain that is rolling to steep, but confined to the one valley corridor and coastal hinterland near Bryant’s Bay”*<sup>173</sup>. He opined that the area has a highly attractive sequencing of natural features (landforms, vegetation and streams), that is also very expressive, aesthetically appealing and legible in terms of the WESI factors.

[147] Mr Brown considered much of his general rebuttal evidence on MOWS’s case apposite to the amendments it sought for ONL 85. More particularly, he considered that the reduced ONL Ms Gilbert supported on Ponui did not adequately reflect the difference between “mundane” parts of the Island’s working landscape and the *“highly attractive interplay between coastlines, stands of native bush, pasture and landforms”* previously described<sup>174</sup>.

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<sup>170</sup> Ibid [8.105]

<sup>171</sup> Mansergh, EIC [136]

<sup>172</sup> Brown EIC [35] and Annexure 2 (Decisions Version) and Annexure 19 (Revised Version)

<sup>173</sup> Brown Rebuttal [63]

<sup>174</sup> Ibid [62]



[148] In response to questions put in cross examination, Mr Brown said he considered the fundamental ONL 85 issue to be the importance placed on “*the interplay of remnant bush and forest areas with pasture*” in the disputed valley catchment north of Shark Bay relative to the agreed coastal fringe ONL. He accepted it had different qualities from the dramatic coastline, comparing it to the transitional area on NE Waiheke as one moves away from the “main headland” towards Man O’ War Bay and up onto the Puke Range slopes<sup>175</sup>.

### **Assessment and findings**

[149] The view from the sea to the west of the proposed ONL on the applicant’s Ponui property comprises a partially bush fringed headland, beaches and a mix of pasture and bush either side of the ridge extending back from coast. There is an attractive and particularly large stand of bush on the south facing inland slope. The relief is relatively subdued compared to Waiheke Island. There is little or nothing in the landscape that differentiates it from either the non ONL land to the south behind Poroaki Bay or the non ONL land to the north on Ponui Head. In short, it presents as a working landscape. It is relatively attractive without being outstanding having regard to the WESI factors and the prosaic sounding back-stop check already mentioned that “*it should be so obvious (in general terms) that there is no need for expert analysis*”. On the land there are no public viewing points and nothing evident to change our sea-based conclusion that the land does not rate as ONL. We agree with the landscape assessment and recommendation of Ms Gilbert for the north portion of Ponui Island, finding that only the eastern coastal margin and seascape of the island has the attributes for ONL status. We direct that the mapping of the ONL on Ponui Island is to be amended in line with Ms Gilbert’s Appendix N(ii).

### **Appendix F-2**

[150] Consequential changes might be required to the wording of this Appendix to reflect Court’s decisions on ONL boundaries. We direct the respondent to consult with

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<sup>175</sup> Ibid p 70



the parties and lodge any proposed revisions, hopefully agreed, but with succinct comments by individual parties if not agreed.

### **Result**

[151] The current indication is that the Hearings Version text of PC8 should be confirmed except for the limited amendments indicated in the body of the decision. This conclusion is tentative however in light of the recent decision of the Supreme Court in *King Salmon*.

[152] ONLs 78 and 85 in Map Series 3A of PC8 are to be revised as directed in this decision, subject to possible further consideration of mapping should wording in the ARPS change after further agreement or input from parties.

[153] Appendix F-2 may be amended in the manner indicated in the last section of this decision, but is otherwise tentatively confirmed.

[154] Counsel are to confer and lodge a joint memorandum by 11 August 2014 proposing a timetable for further steps to resolve this litigation.

[155] Costs are reserved.

**DATED** at AUCKLAND this 29<sup>th</sup> day of July 2014

For the Court



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LJ Newhook  
Principal Environment Judge

