BEFORE THE HEARINGS PANEL
FOR THE QUEENSTOWN LAKES PROPOSED DISTRICT PLAN

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of Hearing Streams 1A and 1B – Introduction, Strategic Direction, Urban Development, Tangata Whenua and Landscape chapters

---

CASEBOOK FOR QUEENSTOWN LAKES DISTRICT COUNCIL

HEARING STREAMS 1A AND 1B – STRATEGIC CHAPTERS IN PART B OF THE PROPOSED DISTRICT PLAN

7 MARCH 2016

Simpson Grierson
Barristers & Solicitors

J G A Winchester / S J Scott
Telephone: +64-3-968 4018
Facsimile: +64-3-379 5023
Email: sarah.scott@simpsongrierson.com
PO Box 874
SOLICITORS
CHRISTCHURCH 8140

INDEX TO CASES REFERRED TO BY QUEENSTOWN LAKES DISTRICT COUNCIL

Cases referred to by Queenstown Lakes District Council	**Tab**
Clearwater Resort Limited v Christchurch City Council HC Christchurch AP34/02, 14 March 2003	1
Colonial Vineyard Limited v Marlborough District Council [2014] NZEnvC 55	2
Long Bay-Okura Great Park Society Incorporated & Others v North Shore City Council EnvC Auckland A078/08, 16 July 2008 (pages 1-3, 27-36)	3
Palmerston North City Council v Motor Machinists Ltd [2014] NZRMA 519	4
Palmerston North Industrial and Residential Developments Limited v Palmerston North City Council [2014] NZEnvC 17	5
Re an Application by Christchurch City Council [1996] NZEnvC 97; (1996) 2 ELRNZ 431	6

174

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

AP 34/02

BETWEEN	CLEARWATER RESORT LTD AND CANTERBURY GOLF INTERNATIONAL LTD Appellant
AND	CHRISTCHURCH CITY COUNCIL Respondent

AP 35/02

AND BETWEEN	CHRISTCHURCH INTERNATIONAL AIRPORT LTD First Appellant
AND	CANTERBURY REGIONAL COUNCIL Second Appellant
AND	CLEARWATER RESORT LTD AND CANTERBURY GOLF INTERNATIONAL LTD First Respondent
AND	CHRISTCHURCH CITY COUNCIL Second Respondent

Hearing: 11 December 2002 and 6 March 2003

Appearances: JK Guthrie and PD Horgan for Clearwater Resort Ltd
JG Hardie for Christchurch City Council
JM Appleyard for Christchurch International Airport Ltd and Canterbury Regional Council

Judgment: 14 March 2003

RESERVED JUDGMENT OF WILLIAM YOUNG J

Index

	Paragraph
Introduction	[1]
The planning background	[3]
The Clearwater Resort	[7]
The legislative background	[11]
History	
General	[17]
Proposed plan as notified in 1995	[18]
Plan as amended following the hearing of submissions	[23]
Variation 52	[28]
Subsequent proceedings with respect to Variation 52	[34]
The issues in the Environment Court on Clearwater's reference	[35]
The approach of the Environment Court in the decision which is under appeal	[44]
The appeals to this Court	[46]
Overview	[47]
The extent to which challenges to the locations of the lines were made in Clearwater's submission	[50]
Whether challenges to the location of the noise contour lines are "on" Variation 52	
General	[55]
The test to determining whether a submission is "on" a variation	[56]
The 50 dBA noise contour line	[70]
The 55 dBA Ldn and the composite 65 dBA Ldn/ SEL 95 dBA noise contours	[79]
Other Issues	[83]
Disposition	[86]

Introduction

[1] These appeals from a judgment of the Environment Court require me to determine the availability to Clearwater Resort Ltd and Canterbury Golf International Ltd of certain arguments which they wish to run in the Environment Court on their reference to that Court in respect of Variation 52 to the Christchurch City Council's proposed plan.

[2] I originally heard these appeals on 11 December last year. In the course of preparing this judgment, I reached a view that I needed some further clarification on some of the issues presented by the case and therefore convened a further hearing on 6 March.

The planning background

[3] For many years, the City Council has set out to limit residential and other noise sensitive development in the vicinity of Christchurch International Airport. The purpose has been to avoid or limit noise complaints associated with aircraft movements. Such complaints would put pressure on the operations of the airport. Christchurch International Airport Ltd ("CIAL"), which operates the airport, naturally wishes to limit, as far as possible, the potential for such complaints.

[4] The City Council's proposed plan was notified in 1995. The proposed plan has evolved over time and so has the detail of the policies associated with the protection of Christchurch International Airport. I will discuss the detail of these policies and their evolution shortly. At this point in the judgment, it is sufficient to note that these policies have been referenced to noise contours, a concept which requires some brief explanation.

[5] The 50 dBA Ldn noise contour comprises land which will receive average night and day noise levels of 50 dBA when the airport is fully developed. The 55 dBA Ldn and 65 dBA Ldn noise contours have corresponding meanings. SEL noise contours reflect single event noise levels associated with the take-off of a particular

type of aircraft. So the composite 65 dBA Ldn/SEL 95 dBA noise contour consists of land which, when the airport is fully developed, is within either the 65 dBA Ldn noise contour or the SEL 95 dBA noise contour.

[6] I will shortly deal with the way in which the proposed plan has referred to noise contours in the expression and implementation of the City Council's general policy of protecting Christchurch International Airport from noise complaints. I note at this point, however, that in all versions of the proposed plan, noise contour lines apparently identifying the noise contours referred to in the various plans have been depicted on the planning maps.

The Clearwater Resort

[7] For a number of years, Clearwater Resort Ltd and Canterbury Golf International Ltd and another associated company (New Zealand Golf International Plan Ltd) have been engaged in a residential golf and hotel development in an area of land north of Johns Road and South of the Waimakiriri River. I will generally refer to all the relevant companies, without differentiation, as "Clearwater". The land Clearwater is developing is in reasonably close proximity to the airport.

[8] In the City Council's proposed plan, as notified in 1995, the land then owned by Clearwater was made the subject of a special zone Open Space 3D. This zone has origins which predate the notification of the proposed plan.

[9] Within this zone, development must occur in accordance with a development plan which is provided for in the proposed plan.

[10] Clearwater has subsequently acquired adjoining land which is rurally zoned in the proposed plan.

The legislative background

[11] Section 2, Resource Management Act 1991, defines a "variation" as meaning an:-

> alteration by a local authority to a proposed policy statement, plan, or change under Clause 16A of the First Schedule.

A variation is itself within the definition of "proposed plan" in the same section.

[12] Clause 6 of the First Schedule provides:-

> Any person, including the local authority in its own area, may, in the prescribed form, make a submission to the relevant local authority on a proposed policy statement or plan that is publicly notified ...

Accordingly, a person may make a submission "on" a variation.

[13] The First Schedule provides for public participation in relation to the hearing of submissions and decisions made in relation to them. In accordance with this process, submissions are to be publicly notified and further submissions may be made in support of or in opposition to the submissions made under clause 6. The relevant local authority will usually then hold a hearing (under clause 8B, First Schedule). It will then makes its decisions as to whether to accept or reject submissions.

[14] Clause 10(2) and (3) of the First Schedule provides:-

> (2) The decisions of the local authority may include any consequential alterations arising out of submissions and any other relevant matters it considered relating to matters raised in submissions.
>
> (3) The local authority shall give public notice of the fact that it has made its decisions, and the proposed policy statement or proposed policy plan shall be deemed to have been amended in accordance with those decisions from the date of notice.

[15] Clause 14 of the First Schedule provides:-

14. Reference Of Decision On Submissions And Requirements To The Environment Court

(1) Any person who made a submission on a proposed policy statement or plan may refer to the Environment Court—

(a) Any provision included in the proposed policy statement or plan, or a provision which the decision on submissions proposes to include in the policy statement or plan; or

(b) Any matter excluded from the proposed policy statement or plan, or a provision which the decision on submissions proposes to exclude from the policy statement or plan,—

if that person referred to that provision or matter in that person's submission on the proposed policy statement or plan.

[16] Clause 15 provides:-

15. Hearing By The Environment Court

(1) The Environment Court shall hold a public hearing into any provision or matter referred to it.

(2) Where the Court holds a hearing into any provision of a proposed policy statement or plan (other than a regional coastal plan) that reference is an appeal, and the Court may confirm, or direct the local authority to modify, delete, or insert, any provision which is referred to it.

History

General

[17] There is a lengthy history to planning controls associated with Christchurch International Airport. For present purposes, however, it is sufficient to start with the position as it was under the proposed Christchurch City Plan as notified in 1995.

Proposed plan as notified in 1995

[18] In the proposed plan as notified, the 65 dBA Ldn, 55 dBA Ldn and 50 dBA Ldn noise contours were depicted on the planning maps.

[19] Policy 6.3.7 was in these terms:-

> To ensure that urban growth does not occur in a manner that could adversely affect the operations of City airports

In the Explanation and reasons, there was this elaboration:-

> In order to ensure the International Airport's operations can continue without undue restriction, urbanisation will be prevented where noise impacts are expected to be significant. While aircraft are expected to be quieter by the year 2000, movements are anticipated to be more frequent. As a result of projections in noise investigations, residential development will not be allowed to occur within the 65 LdN noise contour, and between the 55 and 65 LdN noise contours new residential development will be discouraged and all additions to existing dwellings will require to be insulated. Insulation against noise will be required for all new development between the 50 and 55 LdN noise contours. This policy is expected to protect both airport operations and all future residents from adverse noise impacts.

[20] Policy 6.3.9 in the plan as notified was addressed to "urban extensions". The Explanation and reasons made oblique reference to Christchurch International Airport:-

> The policy recognises however, that not all choice can be accommodated, and there are distinct limits to growth in some sectors (eg towards the international airport).

[21] Rules in the proposed plan as notified required insulation in residential units built between the 50 and 55 dBA Ldn noise contours. Within the 65 dBA Ldn noise contour, residential units were a prohibited activity.

[22] In this judgment I will refer to the proposed plan as notified as "the 1995 version of the proposed plan".

Plan as amended following the hearing of submissions

[23] Following the hearing of submissions, the Council amended the proposed plan in a number of respects.

[24] The prohibition on residential units was extended to land within a composite 65 dBA Ldn/SEL 95 dBA air noise boundary. This rendered redundant the

65 dBA Ldn noise contour which was no longer depicted on the planning maps. The requirement of insulation between the 50 and 55 dBA Ldn contours was removed and instead insulation was required only between the 55 dBA Ldn noise contour and the air noise boundary.

[25] Policy 6.3.9 was amended so that it relevantly read:-

> The policy recognises however, that not all choices can be accommodated and that there are distinct limits to growth in some sectors (eg towards Christchurch International Airport and within the 50 LdN dBA noise contour).

The amendment to Policy 6.3.9 was responsive to a submission addressed squarely to that policy. In an effort to ensure consistency with Policy 6.3.9 the City Council amended Policy 6.3.7 so that the Explanation and reasons recorded:

> It is important that there be no extensions to urban residential zones within 50 dBA Ldn contour to avoid disturbance from aircraft noise.
>
> Between the 50 dBA LdN noise contour and the Air Noise Boundary, new urban residential development and other noise sensitive uses and development will be discouraged ... .

This amendment was not responsive to any particular submission. Accordingly, it was declared by the Environment Court to be *ultra vires*, see *National Investment Trust v Christchurch City Council* (unreported, decision C/89/99, judgment delivered 5 November 1999).

[26] I will refer to the proposed plan as it stood following amendments made after the hearing of submissions but allowing for the decision in the *National Investment Trust* case as "the pre-Variation 52 proposed plan".

[27] From the Council's point of view there was an incongruity between Policies 6.3.7 and 6.3.9 as expressed in the pre-Variation 52 proposed plan. The 50 dBA Ldn noise contour was referred to only in Policy 6.3.9 which dealt generally with urban extensions. It was not referred to at all in Policy 6.3.7 which was focussed directly on airport operations. It was this incongruity which was the driver for the promulgation of Variation 52.

Variation 52

[28] The salient features of policy 6.3.7 as expressed in Variation 52 are as follows:-

1. The policy itself is in these terms:-

> To discourage urban residential development and other noise sensitive activities within the 50 dBA LdN noise contour around Christchurch International Airport.

2. The Explanation and reasons record that residential development and other noise sensitive activities are not to occur within the "Air noise Boundary" (defined by reference to the composite 65 dBA Ldn/SEL 95 dBA noise contour).

3. As well, the Explanation and reasons records:-

> The Outer Control Boundary, [ie the 55 dBA Ldn noise contour] which is a threshold for the requirement for insulation, and the Air noise Boundary are identified on the planning maps. The 50 dBA Ldn is also shown as the point of reference for the application of Policy 6.3.7.

4. The explanation to the Variation includes the following note:-

> The proposed Variation does **not** alter the noise contours in the Proposed Plan, nor does it change the rules relating to subdivisions and dwellings in Rural Zones with insulation requirements for residential and other noise-sensitive activities.

[29] Variation 52 attracted a number of submissions. In response, the Council appointed a Commissioner to hear and make recommendations on the submissions. These were heard in March 2001. The Commissioner reported on 5 May 2001.

[30] Clearwater was amongst the parties who made submissions. I will refer to the particular position of Clearwater shortly.

[31] For the purposes of this part of my judgment it is sufficient for me to say that:-

1. The Commissioner held that to achieve the purposes of the Act it was necessary to discourage urban residential development and other noise sensitive activities within the 50 dBA Ldn noise contour; and

2. Accordingly the Commissioner made recommendations the effect of which was to uphold the new Policy 6.3.7 as stated in Variation 52 although amendments were proposed in relation to the Explanation and reasons.

[32] The Commissioner's recommendations were accepted by the Council.

[33] It is not necessary for me to set out in detail the Explanations and reasons as proposed by the Commissioner and accepted by the City Council.

Subsequent proceedings with respect to Variation 52

[34] Clearwater has referred Variation 52 to the Environment Court.

The issues in the Environment Court on Clearwater's reference

[35] In order to understand the issues which the Environment Court must address on Clearwater's reference, it is necessary to discuss in a little detail the arguments which Clearwater wishes to advance.

[36] Clearwater sees Variation 52, both as promulgated and as amended in accordance with the Commissioner's recommendations, as inhibiting its ability to:-

1. Obtain variations to the development plan already in place in respect of the open space 3D zone;

2. Extend its development into its adjacent rurally zoned land..

[37] In its submission on Variation 52, Clearwater's principal contention was expressed in these terms:-

> 2.1 The adoption of a policy to discourage urban residential development and other noise sensitive activities within the 50 dBA Ldn noise contour around Christchurch International Airport unreasonably affects present and future development potential of Clearwater Resort Ltd and land in or adjacent to the Open Space 3D zone.

As well there were contentions that:-

> 2.3 The operations of Christchurch International Airport Limited can be satisfactorily protected ... if a policy calling for insulation against noise is adopted in respect of development between the 55 and 65 dBA contours, rather than a policy of discouraging new noise sensitive developments.

and

> 2.4 The physical location of the 55 dBA Ldn noise contour and the composite 95 SEL dBA/65 dBA Ldn contour are located at too great a distance from Christchurch International Airport. Justification for the location on the planning maps for the noise contours has not been provided for during the statutory processes leading to the proposed plan as it is today and the inclusion of the contours in the plan is accordingly unlawful and *ultra vires* the Resource Management Act 1991.

[38] Amongst the decisions it sought were:-

> 3.1 In Policy 6.3.7 the adoption of the 55 dBA Ldn noise contour in substitution for the 50 dBA Ldn noise contour contained in Variation 52.
>
> ....

3.5 That the planning maps be redrawn to show the correct contour locations if the contour locations on the map are shown to be incorrect.

...

3.8 That the SEL 95 dBA contour line and is associated influence on land use planning be removed from the Plan.

[39] In the Environment Court, on its reference, Clearwater is confined to arguments:-

1. Associated with material in or excluded from the proposed plan which was referred to in its original submission (see First Schedule, clause 14(1)); and,

2. This only to the extent to which such arguments can be said to be "on" Variation 52 (see clause 6, First Schedule).

[40] Clearwater wishes to challenge the accuracy of the lines drawn on the planning maps which purport to identify the composite 65 dBA Ldn/SEL 95 dBA, 55 dBA Ldn and 50 dBA Ldn noise contours.

[41] The Christchurch City Council and CIAL are troubled at the prospect of a lengthy and technical hearing as to whether the contour lines are accurately depicted on the planning maps.

[42] Accordingly, the Environment Court was invited to determine, as a preliminary issue, whether Clearwater could raise, on the hearing of its reference, the contention that the contour lines were inaccurately drawn.

[43] As will be apparent from what I have said, the fundamental argument which Clearwater wishes to advance on the reference is that a policy of discouraging new residential development and other noise sensitive activities is not appropriate for the 50 dBA Ldn noise contour and that such a policy should apply only in relation to the 55 dBA Ldn contour. Whether this argument is in fact available to Clearwater may, in the end, turn on the extent to which Variation 52 merely makes explicit what was previously implicit in the pre-Variation 52 proposed plan. At this point in proceedings, however, neither CIAL nor the City Council seek a ruling from me as

to the availability to Clearwater of this fundamental argument. Clearwater also did not invite me to rule in a definitive way on this point. So, I put this issue on one side.

The approach of the Environment Court in the decision which is under appeal

[44] The judgment of the Environment Court now under appeal contains a reasonably discursive review of the issues as presented by the parties and as perceived by the members of the Court.

[45] For present purposes, I can summarise the judgment fairly by saying that the Court concluded that:-

1. It is open to Clearwater to assert that the planning maps do not depict the relevant noise contours accurately; this in support of its contention that the contours as depicted do not provide an appropriate basis for the implementation of the policy enunciated in the new Policy 6.3.7.

2. It is not open to Clearwater to seek to have the relevant noise contours redrawn on the planning maps.

The appeals to this Court

[46] CIAL and the Canterbury Regional Council have appealed against the first of the two conclusions just referred to and Clearwater against the second.

Overview

[47] Challenges to the location of the lines on the planning maps representing the composite 65 dBA Ldn/SEL 95 dBA, 55 dBA and 50 dBA noise contours are only available if appropriate reference was made to them in the original submission (see

clause 14(1), First Schedule) and if such challenges are indeed "on" the variation (see para [39] above).

[48] So it is sensible to consider first the extent to which challenges to the location of the lines were made in Clearwater's submission and secondly the whether challenges to the location of the noise contour lines are fairly "on" Variation 52.

[49] There is some artificiality to this process. This is because CIAL in particular, wishes to argue in the Environment Court that Variation 52 merely made explicit what was already implicit in the pre-Variation 52 proposed plan. On the basis of this argument it wishes to seek to persuade the Environment Court that Variation 52 effected no alteration in substance to the pre-Variation 52 proposed plan. If this is so, then, for reasons which I will come to shortly, it might follow that there is no scope for Clearwater to challenge Variation 52. At the hearing on 6 March, however, CIAL made it clear that it did not wish me to determine this issue on this appeal. Clearwater also did not wish me to resolve this issue. On this point, I refer back to what I said in para [43] above and note that I will revert to this point again in para [76] and [78] below.

The extent to which challenges to the locations of the lines were made in Clearwater's submission

[50] I have set out already the relevant parts of Clearwater's submissions.

[51] It is clear that the locations of the composite 65 dBA Ldn/SEL 95 dBA and the 55 dBA Ldn noise contour lines were challenged, see para [37] above.

[52] There was no specific reference to the 50 dBA Ldn noise contour in the submission. Mr Guthrie, however, pointed to the general words in the second sentence of para 2.4 (see para [37] above). As well the relief sought in para 3.5 is generally expressed. Mr Guthrie also told me that if any one of the contour lines could be shown to be wrong, this would necessarily mean that the other lines were wrong.

[53] Because I am of the view that it is not open to Clearwater to challenge the location of the 55 dBA Ldn contour and the 65 dBA Ldn/SEL 95 dBA noise contours (see below) the last of the points made by Mr Guthrie is of no particular moment. Further, and despite Mr Guthrie's submissions, I have been left with the view that the most natural reading of the submission is that the location challenge is confined to the two lines specifically identified and that general and non-specific references to the lines should be either regarded as referring back to those lines or alternatively, in the case of para 2.4, possibly to a separate ground of challenge referenced to s32, Resource Management Act.

[54] I am therefore of the view that there is no challenge to the location of the 50 dBA Ldn noise contour line. To use the language of clause 14(1) of the First Schedule, the location of that line was "not referred to" in Clearwater's submission.

Whether challenges to the location of the noise contour lines are "on" Variation 52

General

[55] In addressing this question I will discuss the test for determining whether a submission is "on" a variation and then apply that test to the three contour lines in issue. This necessarily means that I will apply the test to the location of the 50 dBA Ldn noise contour despite the conclusion expressed in the preceding section of my judgment. I will do this to cover the contingency that it may later be held that I am wrong in concluding that the location of this noise contour line was not challenged by Clearwater in its submission on Variation 52.

The test for determining whether a submission is "on" a variation

[56] Whether a submission is "on" a variation poses a question of apparently irreducible simplicity but which may not necessarily be easy to answer in a specific case.

[57] How should the Courts approach such a question?

[58] Obviously, such a question can only be answered by a Court as a matter of judicial assessment made in the general context of the scheme and purpose of the Resource Management Act.

[59] In the course of this dispute, three possible general approaches have been suggested:

1. A literal approach in terms of which anything which is expressed in the variation is open for challenge.

2. An approach in which "on" is treated as meaning "in connection with".

3. An approach which focuses on the extent to which the variation alters the proposed plan.

[60] Should a literal approach be taken?

[61] Such an approach was favoured by the Commissioner who heard the submissions on Variation 52 as is apparent from this passage from his report:-

> I read Clause 6 of the First Schedule – as modified in accordance with Clause 16A – as authorising the making of submissions "on the [Variation in the form that it has been] publicly notified ..." I therefore conclude that a submission may be made in respect to anything included in the text as notified, even if that submission relates to something that the Variation does not propose to alter. ... Conversely, it is not open to submit as to seek alterations of parts of the Proposed Plan not forming part of Variation 52 as notified. An example is the submissions which sought to raise again the question of whether the noise contours ought to be shown in the Planning Maps. The Variation as notified does not include any version of those maps. I record that I made my view in this regard clear at an early stage in the hearing and that, as a result, some submitters may well have refrained from developing submissions on that issue in the way that they might otherwise have done.

[62] The approach favoured by the Commissioner would leave a good deal to the idiosyncrasies of whoever drafts a particular variation. For instance, if a particular policy in a proposed plan is supported by three reasons (reasons (a) (b) and (c)) and the intention is to supplement these reasons with a fourth (reason (d)), the person drafting the variation might either replace the existing statement of reasons and set

out reasons (a), (b), (c) and (d) or simply specify that the existing reasons are to be supplemented by reason (d). On the Commissioner's approach, the first method would open up for challenge reasons (a), (b) and (c) (given that their text had been replicated in the variation) whereas the second approach would expose only reason (d) to challenge.

[63] For the reason just given, the Commissioner's approach might be thought to open up rather too much for challenge. But in another sense, it may be too restrictive. Say a line on a proposed plan purports to identify conclusively for all purposes associated with the plan a particular height contour (say 100 metres above sea level) and this line is the basis for design controls on residential units. Assume a variation which introduces a prohibition on residential development on land which is situated 100 metres above sea level. Assume as well a landowner whose property is on the wrong side of the line but who claims that the line is drawn too low on the hillside and that his property is in fact only 95 metres above sea level. In such a case, I would have thought that the land owner (who had perhaps been very happy with the design controls inserted by the proposed plan and for this reason had not previously bothered to challenge the location of the line) could fairly challenge the positioning of the line by way of submission on the variation and this irrespective of whether the planning maps were attached to the variation as notified. This is because the variation would involve a change of function for the contour line which would fairly open for challenge its location.

[64] Mr Guthrie's primary argument was that word "on" in the First Schedule to the Act should be construed as having a meaning akin to "in contact or connection with". He argued that the noise contours on the planning maps were a method for the implementation of Policy 6.3.7, as enunciated in Variation 52, and that a challenge to them could fairly be regarded as being "in connection with" Variation 52.

[65] I was not much attracted to Mr Guthrie's argument that "on" should be treated as meaning "in connection with". If so broad an approach were to be adopted it would be difficult for a local authority to introduce a variation to a proposed plan without necessarily opening up for re-litigation aspects of the plan which had previously been passed the point of challenge.

[66] On my preferred approach:-

1. A submission can only fairly be regarded as "on" a variation if it is addressed to the extent to which the variation changes the pre-existing status quo.

2. But if the effect of regarding a submission as "on" a variation would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected, this is a powerful consideration against any argument that the submission is truly "on" the variation.

[67] I will amplify these two considerations briefly.

[68] The first of the considerations is consistent with the arguments addressed to me by counsel for CIAL and the City Council. It is also consistent with the approach taken in the Environment Court in the judgment under appeal. Further, it seems to me to be in conformity with the scheme of the Resource Management Act which obviously contemplates a progressive and orderly resolution of issues associated with the development of proposed plans.

[69] The second of the considerations is consistent with the judgment of the Environment Court in *Halswater Holdings Ltd v Selwyn District Council* (1999) 5 ELRNZ 192. It is common for a submission on a variation or proposed plan to suggest that the particular issue in question be addressed in a way entirely different from that envisaged by the local authority. It may be that the process of submissions and cross-submissions will be sufficient to ensure that all those likely to be affected by or interested in the alternative method suggested in the submission have an opportunity to participate. In a situation, however, where the proposition advanced by the submitter can be regarded as coming out of "left field", there may be little or no real scope for public participation. Where this is the situation, it is appropriate to be cautious before concluding that the submission (to the extent to which it proposes something completely novel) is "on" the variation.

The 50 dBA noise contour line

[70] It will be recalled that I am of the view that the location of this noise contour line was not challenged by Clearwater in its submission. For the purposes of this section of my judgment I will assume that the location of the line was challenged in the submission and address the question whether this notional challenge is "on" Variation 52. Obviously some of the arguments relevant to this issue are also relevant to questions associated with the other noise contour lines.

[71] There are two possible bases on which it might be argued that the challenge to the location of the 50 dBA Ldn contour is "on" the variation:-

1. Variation 52 specifically provides that the planning maps are conclusive as to the location of the relevant noise contours but this was not explicit in the policies expressed in the pre-Variation 52 proposed plan.

2. The function of the 50 dBA Ldn noise contour line is different under Variation 52 from its function under the pre-Variation 52.

[72] If the 50 dBA Ldn noise contour line depicted on the planning maps in the pre-Variation 52 proposed plan was indicative only, an alteration which made it conclusive as to location would fairly be open to challenge by submission. In other words, if the effect of Variation 52 was to treat this contour line as being definitive when it had previously only been indicative, a challenge to its location would be "on" Variation 52.

[73] I am, however, perfectly satisfied that the references in the proposed plan to the 50 dBA Ldn noise contour in the proposed plan both as notified and in its pre-Variation 52 form must be taken as referring to the area defined as such on the planning maps. There are two reasons for this conclusion:-

1. It would be a little odd if the noise contour lines depicted on the planning maps were indicative only.

2. At least one rule in the pre-Variation 52 proposed plan refers to the "50 dBA Ldn airport noise contour line" and this must be a reference to the line as depicted on the planning maps.

[74] Accordingly, I would not see the explicit provision in the new Variation 52 to the effect that the noise contour lines are definitive as amounting to an alteration to the position as it was under the pre-Variation 52 proposed plan. So, the statement in Variation 52 to the effect that the 50 dBA Ldn noise contour line is the reference point for the new policy does not, in itself, have the consequence that a challenge to the location of the line is "on" Variation 52.

[75] On the other hand it is well arguable that the 50 dBA Ldn noise contour line has a function under Variation 52 which differs appreciably from its function under the pre-Variation 52 proposed plan. The 50 dBA Ldn contour line is now intended to be the limit of new residential development (albeit with some minor exceptions). The precise definition of its role under the pre-Variation 52 proposed plan is open to debate, but it is certainly arguable that the discouragement of residential development within the 50 dBA Ldn contour is firmer under Variation 52 than it was previously.

[76] I note in passing that CIAL wishes to reserve its position as to whether Variation 52 simply makes explicit what was previously implicit. I heard a good deal of argument on this point. But at the second hearing (on 6 March) Ms Appleyard indicated that she was not seeking a ruling from me on this question. So, I will just have to deal with the appeal on the assumption that there is a change of function.

[77] Assuming (for the purpose of this appeal) that there is a change of function, does this have the result that a challenge to the location of the 50 dBA Ldn noise contour line is "on" Variation 52? The class of people who could be expected to challenge the location of this line under the 1995 version of the proposed plan is likely to be different from the class of people who could be expected to challenge its location in light of Variation 52 and the different significance attached to the lines in the two plans. This is sufficient, on my appreciation, to warrant the conclusion that a challenge to the location of the line is fairly "on" the variation.

[78] So, if the location of the 50 dBA Ldn noise contour had been "referred to" in Clearwater's submission and challenged, I would have held that this challenge was "on" Variation 52, subject to the proviso that it would still have been open to Clearwater to maintain in the Environment Court its general argument that Variation 52 merely makes explicit was previously implicit in the pre-Variation 52 proposed plan.

The 55 dBA Ldn and the composite 65 dBA Ldn/SEL 95 dBA noise contours

[79] The location of the lines depicting these contours was challenged explicitly in Clearwater's submission. Accordingly, the only question for determination in respect of these lines is whether these challenges are "on" Variation 52.

[80] It is perfectly clear that the relevant contour lines depicted on the planning maps in the pre-Variation 52 proposed plan were intended to be definitive. I say this given the rules to which Ms Appleyard referred at the hearing on 6 March. Indeed this is rather more obvious than the corresponding position in relation to the 50 dBA Ldn contour line which does not figure so prominently in the rules in this version of the proposed plan. So the fact Variation 52 specifically references the policies enunciated to the contour lines as drawn cannot be regarded as having the consequence that a challenge to the contour lines is "on" Variation 52.

[81] At the hearing on 5 March Mr Guthrie accepted that these contour lines serve the same function under Variation 52 as they do in the pre-Variation 52 proposed plan.

[82] It follows that the challenge to their location is not "on" Variation 52 and may not be persisted with in the Environment Court on the hearing of its reference.

Other issues

[83] The arguments of counsel on all sides covered a broad range of issues, not all of which are addressed in this judgment.

[84] Because I have held that it is not open to Clearwater to challenge the locations of the various contour lines, it follows that there is no occasion for me to consider whether it would be appropriate to permit Clearwater to seek relief from the Environment Court involving the redrawing of the lines, an issue upon which I heard much argument. As well, given my conclusion that the locations of the lines are not open to challenge, I see little scope for the possible application of s293, Resource Management Act, another topic upon which I had the benefit of much argument. Further, given my conclusions, there seems little point in me reviewing complaints as to lack of specificity in the submission made by Clearwater. Arguments associated with such complaints were advanced to me by both CIAL and the City Council.

[85] That said, I will reserve leave to the parties to revert to me in relation to any outstanding issue; this to cover the contingency that there is something material in the arguments advanced to me which I have overlooked.

Disposition

[86] Accordingly, I dismiss the appeal by Clearwater and allow the appeal by CIAL and the Canterbury Regional Council. I hold it is not open to CIAL to challenge the locations of the noise contour lines which I have mentioned.

[87] CIAL, the Canterbury Regional Council and the City Council are entitled to costs which are to be fixed by the Registrar on a 2B basis.

[88] As indicated, I reserve leave generally to the parties to revert to me.

William Young J

Signed at 4.55 pm on 14 March 2003

Solicitors:
Anderson Lloyd Caudwell, Christchurch, for Clearwater Resort
AJ Prebble, Christchurch, for Christchurch City Council
Chapman Tripp Sheffield Young, Christchurch, for Christchurch International Airport Ltd and Canterbury Regional Council

BEFORE THE ENVIRONMENT COURT

Decision No. [2014] NZEnvC 55

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an appeal under clause 14 of the First Schedule to the Act

BETWEEN COLONIAL VINEYARD LIMITED

(ENV-2012-CHC-108)

Appellant

AND MARLBOROUGH DISTRICT COUNCIL

Respondent

Court:	Environment Judge J R Jackson Environment Commissioner J R Mills Environment Commissioner A J Sutherland
Venue:	Blenheim
Hearing dates:	9 to 13 and 16 and 17 September 2013. (Final submissions received 24 October 2013).
Appearances:	N Davidson QC and M J Hunt for Colonial Vineyard Limited S F Quinn and M Booth for Marlborough District Council Q A M Davies and D P Neild for New Zealand Aviation Limited and The Marlborough Aero Club (under s274) M Radich for Trustees of the Carlton Corlett Trust (under s274)
Date of Decision:	14 March 2014
Date of Issue:	14 March 2014

DECISION

A: Under section 290 of the Resource Management Act 1991:

(1) the appeal is allowed;

(2) the decision of the Marlborough District Council dated 31 July 2012 is cancelled; and

(3) Plan Change 59 as notified is approved subject to the changes stated in the Reasons below.

B: Subject to C, the parties are directed to discuss the proposed policies, maps and rules and if possible to lodge an agreed set by Wednesday 30 April 2014.

C: Under section 293 the council is directed to consult with the parties over the urban design principles included in Mr T G Quickfall's Appendix 4 and to lodge its approved version for approval by the Environment Court by 30 April 2014.

D: Leave is reserved for any party to apply for further directions (under section 293 of the RMA or otherwise) if agreement cannot be reached.

E: Costs are reserved.

REASONS

Table of Contents Para

1. Introduction [1]
   - 1.1 The issue: should the land be rezoned residential? [1]
   - 1.2 The vineyard and its landscape setting [2]
   - 1.3 Plan Change 59 [8]
   - 1.4 What matters must be considered? [17]
   - 1.5 The questions to be answered [22]

2. Identifying the relevant objectives and policies [25]
   - 2.1 The Marlborough Regional Policy Statement [25]
   - 2.2 The Wairau Awatere Resource Management Plan [29]
   - 2.3 NZS 6805 : the Air Noise Standard [45]
   - 2.4 Plan Changes 64 to 71 [52]

3. What are the benefits and costs of the proposed rezoning? [54]
   - 3.1 Section 32 RMA [54]
   - 3.2 The section 32 analysis in the application for the plan change [57]
   - 3.3 Applying the correct form of section 32 to the benefits and costs [63]

4.	What are the risks of approving PC59 (or not)?		[68]
	4.1	Introducing the issues	[68]
	4.2	Employment land	[75]
	4.3	Residential supply and demand	[98]
	4.4	Airports	[102]
	4.5	Noise	[106]
5.	Does PC59 give effect to the RPS and implement WARMP's objectives?		[150]
	5.1	Giving effect to the RPS	[150]
	5.2	Implementing the objectives of the WARMP	[152]
	5.3	Considering Plan Changes 64 to 71	[163]
6.	Does PC59 achieve the purpose of the RMA?		[164]
	6.1	Sections 6 and 7 RMA	[167]
	6.2	Section 5(2) RMA	[171]
7.	Result		[175]
	7.1	Having regard to the MDC decision	[175]
	7.2	Should the result be different from the council's decision?	[181]
	7.3	Outcome	[191]

---

1. Introduction

1.1 The issue: should the land be rezoned residential?

[1] The principal question in this proceeding is whether a 21.4 hectare vineyard in New Renwick Road on the southern side of the Wairau Plains near Blenheim should be rezoned for residential development, as sought in private Plan Change 59 ("PC59").

1.2 The vineyard and its landscape setting

[2] The vineyard is owned by Colonial Vineyard Ltd ("CVL"). The land is legally described as Lot 2 DP350626 and Lot 1 DP11019 ("the site"). The site is flat and is located south of New Renwick Road between Richardson Avenue and Aerodrome Road, on the periphery of Blenheim. It is west of the Taylor River which is about 100 metres away at its closest, and about 400 metres from the extensive reserves and walking tracks of the Wither Hills. The site is currently planted with Sauvignon Blanc grapes, and the north, south and east boundaries are lined by olive trees[1].

[1] M Davis, evidence-in-chief at para [9] [Environment Court document 3].

[3] The land opposite the site on the eastern and northern boundaries has Residential zoning[2]. The land to the south of the site is rural land owned by the Carlton Corlett Trust. It is currently in pasture and light industrial/commercial development and likely future light industrial development[3].

[4] Further to the south, on more land owned by the Carlton Corlett Trust, are the Omaka Aviation Heritage Centre and related aviation and engineering activities, and a Car Museum. An airport used for general aviation called "the Omaka airfield" adjoins the Omaka Museum site and is to the southwest of the CVL site.

[5] The Omaka aerodrome was established in 1928 and contains what are reputed to be the oldest set of grass runways in the country. The Marlborough Aero Club Inc., which is based there, is one of the oldest flying clubs in the country. Omaka is now the main airfield in Marlborough for general (as opposed to commercial) aviation. Operations include helicopter businesses for crop spraying and frost protection, pilot training and aircraft repair work. Omaka is also the home of the Aviation Heritage Centre which houses a superb collection of World War I aircraft and replicates and other memorabilia. The grass runways and the adjacent workshops in the hangars are of heritage value, whereas the helicopter operations and some of the aircraft maintenance are parts of the "air transport" infrastructure.

[6] The site and the airfield are about 600 metres apart at their closest. The 55 dBA Ldn noise contour from the Omaka airfield currently crosses the Carlton Corlett land in (approximately) an east-west line several hundred metres south of the site as shown in the acoustic engineer, Dr J W Trevathan's Plan B[4]. This contour is based on three months of data recorded by Mr D S Park and includes helicopter noise abatement paths as discussed later in this decision.

[7] Blenheim's urban area is to the north and east of the site. The Wither Hills lie south, and to the west and northwest is the Wairau Plain, principally covered in large-scale vineyards. Approximately 5 kilometres northwest of the site is Marlborough's main commercial airport at Woodbourne.

1.3 Plan Change 59

[8] CVL was the initiator of the request for a private plan change (PC59) to the Wairau Awatere Resource Management Plan ("WARMP"). The proposal for Plan Change 59 was lodged with the Marlborough District Council in April 2011. PC59 sought to rezone the site from Rural 3 (the Wairau Plain zone) to Urban Residential 1 and 2 to provide for residential development. The plan change also sought to amend or

2 T G Quickfall, evidence-in-chief [9](b) [Environment Court document 18].
3 T G Quickfall, evidence-in-chief [9](c) [Environment Court document 18].
4 J W Trevathan, supplementary brief of evidence, Attachment B [Environment Court document 14B].

add some policies[5] in the district plan, together with consequential changes to methods of implementation.

[9] CVL initiated its plan change following the initial completion of the Southern Marlborough Urban Growth Strategy 2010 ("the 2010 Strategy") that assessed the residential growth potential in different areas using a "multi-criteria" approach[6]. The analysis under the 2010 Strategy is quite comprehensive and CVL placed some reliance on that process and its findings as part of its section 32 analysis of PC59.

[10] CVL's original version of PC59 (as notified) sought the following:

(a) to produce a residential development consistent with good design principles;
(b) to rezone the bulk (15 hectares) of the site as Urban Residential 1;
(c) to rezone 6.4 hectares on the southern and western boundaries of the site as Urban Residential 2;
(d) to amend the WARMP by introducing proposed policies set out in Appendix 1 to the application;
(e) to amend Appendix G of the WARMP so that the CVL site be identified and the rules will require buildings to be constructed in accordance with the 'Indoor Design Sound Levels set out in Appendix M'[7].

[11] The only important policy change is that PC59 (as notified) proposes that policy (11.2.2)1.3 be amended as follows:

> Maintain high density residential use <u>close to open spaces and</u> within the inner residential sector of Blenheim located within easy walking distance to the west and[8] [south of] the Central Business Zone.

The underlined words are the addition. The effect of the proposed change would be to allow some relatively high density residential development close to open spaces, thus expanding the scope for residential development of the site, and elsewhere to the south of the CBD.

[12] The application for a plan change was approved for notification and publicly notified. There were submissions and a hearing. So far that was routine. However, at the council hearing CVL purported to amend its application to incorporate the following changes:

---

5 Policies (11.2.2)1.3; (19.3)1.7 and (19.7)1.8; (23.5.1)1.17 and 1.18; (29.2)8.1.
6 T G Quickfall, evidence-in-chief [15] [Environment Court document 18].
7 Commissioners' Decision para 12 – citing the CVL application at p 56.
8 PC59 actually uses the words "sought for" rather than "south of" but that misquotes (and makes nonsense of) the actual policy.

(a) the provision of an internal roading hierarchy including a primary local road and low speed residential streets;
(b) a requirement for acoustic insulation within the entire site for dwellings;
(c) a new zoning map;
(d) a concept plan showing likely roading connections and open space layout; and
(e) other changes to objectives and policies to better reflect those requirements in this location.

Changes (a) to (d) cause us no jurisdictional difficulties, but (e) may.

[13] The potential difficulties were compounded because the proposed objectives and policies were further amended in Mr Quickfall's evidence. CVL now proposes to add two new objectives to Section 23.6 of the WARMP[9]. The first is a new objective specific not to the site but to Omaka Aerodrome and the aviation cluster. This would be[10]:

> To recognise, provide for and protect on-going operation and strategic importance of the Omaka Aerodrome and aviation cluster (activities related to the Aerodrome).

While well-intentioned, the additions to objectives proposed by CVL at the council hearing and then, in an expanded version, to the court are beyond jurisdiction. They refer to land which is not the subject of the notified plan change (and not even contiguous to the site) and there are persons not before the court (e.g. some neighbours of the airfield) who might be affected by further amendments to the plan change. On the principles stated in *Hamilton City Council v NZ Historic Places Trust*[11] and *Auckland Council v Byerley Park Limited*[12], there must be considerable doubt about the court's jurisdiction to add the first objective. In any event, since no party suggested we give directions under section 293 in respect of them, we will not consider them further.

[14] Although the 2010 Strategy made some initial recommendations, the final recommendations are dated March 2013 and were adopted by MDC on 21 March 2013. These final recommendations note the importance of Omaka airfield as a regional resource and suggest that the appellant's land (the subject of PC59) be earmarked for employment activities, rather than residential. That is a significant shift from the 2010 Strategy's recommendations[13] as we shall discuss in more detail later.

[15] The council issued its decision declining CVL's application for private plan change on 31 July 2012. CVL appealed the decision to the Environment Court. The

---

9 We question the number: existing 23.6 of the WARMP relates to Methods of Implementation, not objectives or policies.
10 T G Quickfall, evidence-in-chief Annexure 4 [Environment Court document 18].
11 *NZ Historic Places Trust v Hamilton City Council* [2005] NZRMA 145 at [25] (HC).
12 *Auckland Council v Byerley Park Limited* [2013] NZHC 3402 at [41]-[42].
13 M J Foster, evidence-in-chief [1.11] [Environment Court document 27].

council supported its decision and was supported by the section 274 parties — NZ Aviation Ltd and the Marlborough Aero Club (together called "the Omaka Group") and the Carlton Corlett Trust.

[16] Throughout the hearing various terms were used to describe non-residential urban land. We will, with some reservations about the term's generality, follow the council's new practice and use the term "employment land" to encompass land suitable for business, retail and industrial uses.

1.4 What matters must be considered?

[17] Since these proceedings concern a plan change we must first identify the legal matters in relation to which we must consider the evidence. In *Long Bay-Okura Great Park Society Incorporated v North South City Council*[14] the Environment Court listed a "relatively comprehensive summary of the mandatory requirements" for the RMA in its form before the Resource Management Amendment Act 2005. The court updated this list in the light of the 2005 Amendments in *High Country Rosehip Orchards Ltd v Mackenzie District Council ("High Country Rosehip")*[15]. We now amend the list given in those cases to reflect the major changes made by the Resource Management Amendment Act 2009. The different legal standards to be applied are emphasised, and we have underlined the changes and additions[16] since *High Country Rosehip*[17]:

A. General requirements
   1. A district plan (change) should be designed to **accord with**[18] — and assist the territorial authority **to carry out** — its functions[19] so as to achieve the purpose of the Act[20].
   2. The district plan (change) must also be prepared **in accordance with** any regulation[21] (there are none at present) and any direction given by the Minister for the Environment[22].
   3. When preparing its district plan (change) the territorial authority **must give effect to**[23] any national policy statement or New Zealand Coastal Policy Statement[24].
   4. When preparing its district plan (change) the territorial authority shall:
      (a) **have regard to** any proposed regional policy statement[25];

---

14 *Long Bay-Okura Great Park Society Incorporated v North Shore City Council* Decision A78/2008 at para [34].

15 *High Country Rosehip Orchards Ltd v Mackenzie District Council* [2011] NZEnvC 387.

16 Some additions and changes of emphasis and/or grammar are not identified.

17 Noting also:
   (a) that former A6 has been renumbered as A2 and all subsequent numbers in A have dropped down one;
   (b) that the list in D has been expanded to cover fully the 2005 changes.

18 Section 74(1) of the Act.

19 As described in section 31 of the Act.

20 Sections 72 and 74(1) of the Act.

21 Section 74(1) of the Act.

22 Section 74(1) of the Act added by section 45(1) Resource Management Amendment Act 2005.

23 Section 75(3) RMA.

24 The reference to "any regional policy statement" in the *Rosehip* list here has been deleted since it is included in (3) below which is a more logical place for it.

25 Section 74(2)(a)(i) of the RMA.

(b) **give effect to** any operative regional policy statement[26].

5. In relation to regional plans:
   (a) the district plan (change) must **not be inconsistent** with an operative regional plan for any matter specified in section 30(1) or a water conservation order[27]; and
   (b) **must have regard to** any proposed regional plan on any matter of regional significance etc[28].
6. When preparing its district plan (change) the territorial authority must also:
   - **have regard to** any relevant management plans and strategies under other Acts, and to any relevant entry in the Historic Places Register and to various fisheries regulations[29] to the extent that their content has a bearing on resource management issues of the district; and to consistency with plans and proposed plans of adjacent territorial authorities[30];
   - **take into account** any relevant planning document recognised by an iwi authority[31]; and
   - not have regard to trade competition[32] or the effects of trade competition;
7. The formal requirement that a district plan (change) must[33] also state its objectives, policies and the rules (if any) and may[34] state other matters.

B. Objectives [the section 32 test for objectives]

8. Each proposed objective in a district plan (change) **is to be evaluated** by the extent to which it is the most appropriate way to achieve the purpose of the Act[35].

C. Policies and methods (including rules) [the section 32 test for policies and rules]

9. The policies are to **implement** the objectives, and the rules (if any) are to **implement** the policies[36];
10. Each proposed policy or method (including each rule) is to be examined, **having regard to its efficiency and effectiveness,** as to whether it is the most appropriate method for achieving the objectives[37] of the district plan **taking into account**:
    (i) the benefits and costs of the proposed policies and methods (including rules); and
    (ii) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods[38]; and
    (iii) if a national environmental standard applies and the proposed rule imposes a greater prohibition or restriction than that, then whether that greater prohibition or restriction is justified in the circumstances[39].

D. Rules

11. In making a rule the territorial authority must **have regard to** the actual or potential effect of activities on the environment[40].

---

26 Section 75(3)(c) of the Act [as substituted by section 46 Resource Management Amendment Act 2005].
27 Section 75(4) of the Act [as substituted by section 46 Resource Management Amendment Act 2005].
28 Section 74(2)(a)(ii) of the Act.
29 Section 74(2)(b) of the Act.
30 Section 74(2)(c) of the Act.
31 Section 74(2A) of the Act.
32 Section 74(3) of the Act as amended by section 58 Resource Management (Simplifying and Streamlining) Act 2009.
33 Section 75(1) of the Act.
34 Section 75(2) of the Act.
35 Section 74(1) and section 32(3)(a) of the Act.
36 Section 75(1)(b) and (c) of the Act (also section 76(1)).
37 Section 32(3)(b) of the Act.
38 Section 32(4) of the RMA.
39 Section 32(3A) of the Act added by section 13(3) Resource Management Amendment Act 2005.
40 Section 76(3) of the Act.

12. Rules have the force of regulations[41].
13. Rules may be made for the protection of property from the effects of surface water, and these may be more restrictive[42] than those under the Building Act 2004.
14. There are special provisions for rules about contaminated land[43].
15. There must be no blanket rules about felling of trees[44] in any urban environment[45].

E. Other statues:
16. Finally territorial authorities may be required to comply with other statutes.

F. (On Appeal)
17. On appeal[46] the Environment Court must **have regard to** one additional matter — the decision of the territorial authority[47].

[18] In relation to A above:

(1) it is expressly within the prescribed functions of the council to control[48] the actual or potential effects of the use, development and protection of land by establishing and implementing[49] objectives, policies and rules. Part 2 of the Act is considered later;
(2) there are no directions from the Minister for the Environment;
(3) no national policy statement is relevant, nor is the NZ Coastal Policy Statement;
(4) we outline the relevant provisions in the operative regional policy statement in Part 2 of this Decision;
(5) the regional plan is the district plan in this case because, as a unitary authority the Marlborough District Council has prepared a combined plan[50];
(6) none of the witnesses identified any relevant matter under this heading;
(7) section 75(2) would be satisfied by acceptance or refusal of PC59.

We will return to the issue of whether the plan change achieves the purpose of the RMA at the end of this decision.

[19] Item B is irrelevant since objectives of the district plan are not sought to be changed by the plan change as notified.

---

41 Section 76(2) RMA.
42 Section 76(2A) RMA.
43 Section 76(5) RMA as added by section 47 Resource Management Amendment Act 2005 and amended in 2009.
44 Section 76(4A) RMA as added by the Resource Management (Simplifying and Streamlining) Amendment Act 2009.
45 Section 76(4B) RMA — this "Remuera rule" was added by the Resource Management (Simplifying and Streamlining) Amendment Act 2009.
46 Under section 290 and Clause 14 of the First Schedule to the Act.
47 Section 290A RMA as added by the Resource Management Amendment Act 2005.
48 Section 31(1) RMA.
49 Section 31(1)(b) RMA.
50 Chapter 1 para 1.0 [WARMP p 1-1].

[20] In relation to C, a key part of the case is to consider the proposed new policy and the rezoning. Since the new policy effectively seeks to justify the zoning of the site for residential purposes, we will consider the policy and the zoning together under the section 32 tests. They require us to examine, having regard to the efficiency and effectiveness of the proposed policy change and zoning, whether they are the most appropriate method for achieving the objectives of the district plan.

[21] We will consider D in relation to the proposed rules at the appropriate time. E (Other statutes) is irrelevant. Finally, in relation to F: we will have regard to the Commissioners' decision at the end of this decision.

1.5 The questions to be answered

[22] In summary the questions which need to be answered under the list in the previous section are:

- what are the relevant provisions in the operative regional policy (which must be given effect to) and what are the relevant objectives in the WARMP — the operative district plan (which must be implemented by PC59)? [See 2 below];
- what are the benefits and costs of PC59 and the alternatives? [See 3 below];
- what are the risks of approving (or not) PC59? [See 4 below];
- does PC59 give effect to the RPS and is it the most appropriate method for achieving the objectives of the WARMP? [See 5 below];
- does PC59 achieve the purpose of the RMA? [See 6 below];
- should the result be different from the council's decision? [See 7 below].

[23] The first alternative in this case is, whether the site should be rezoned for residential development now or whether any urban rezoning should wait until a district plan review is carried out. It is largely uncontested (at least by the council, the Omaka Group position is less clear) that the site should be used for urban purposes. However, the case for the council before us was that the site should probably be used for industrial ("employment") purposes, and that should be resolved in a proposed plan review.

[24] The other choice is to do nothing. That is, to retain the existing zoning at present because of the alleged effects that residential development may have on future use of the Omaka airfield and the Omaka Aviation Heritage Centre.

2. Identifying the relevant objectives and policies

2.1 The Marlborough Regional Policy Statement

[25] We must give effect to any operative regional policy statement. In these proceedings the relevant document is the Marlborough Regional Policy Statement ("the RPS") which became operative on 28 August 1995. The policies and methods most relevant to this proceeding are found in the chapter on Community Wellbeing (Part 7 of the RPS). Objective 7.1.2 focuses on the quality of life, seeking to maintain and enhance the quality of life for people while ensuring activities do not adversely affect the environment. Implementing policy 7.1.5 seeks to avoid, remedy or mitigate adverse effects of activities on the health of people and communities. Another implementing policy is to enhance amenity values provided by the unique character of Marlborough settlements[51]. The explanation recognises that Blenheim is the main urban, business and service settlement in Marlborough.

[26] A further policy[52] enables the appropriate type, scale and location of activities by:

- clustering activities with similar effects;
- ensuring activities reflect the character and facilities available in the communities in which they are located;
- promoting the creation and maintenance of buffer zones (such as stream banks or 'greenbelts');
- locating activities with noxious elements in areas where adverse environmental effects can be avoided, remedied or mitigated.

[27] Objective 7.1.14 is to provide safe and efficient community infrastructure in a sustainable way. An important implementing policy relates to 'Air Transport'. The relevant policy, methods and explanation state[53]:

> 7.1.17 Policy – Air Transport
> [To] enable the safe and efficient operation of the air transport system consistent with the duty to avoid, remedy or mitigate adverse environmental effects.
>
> 7.1.18 Methods
> (a) Recognise and provide for Marlborough (Woodbourne) Airport as Marlborough's main air transport facility for both military and civilian purposes.
>
> *Marlborough Airport is an important link for air transport (for passengers and freight) between Marlborough and the rest of New Zealand and potentially overseas. Operation of the airport for civilian and military purposes is an important activity in Marlborough and it is appropriate that Council has a policy which reflects this.*

51 Policy 7.1.7 [RPS p 57].
52 Policy 7.1.10 [RPS p 59].
53 Policy 7.1.17 and 18 RPS.

(b) Commercial and industrial activities which support or service the air transport industry and defence will be provided for.

Facilities at Marlborough Airport and the associated RNZAF Base Woodbourne are well developed to serve air transport and military aviation needs. This policy recognises this and seeks to promote commercial and industrial development and military activities associated with air transport.

(c) Regulate within the resource management plans, land use activities which have a possible impact on the safe and efficient operation of air transport systems.

Urban development in the vicinity of Woodbourne Airport should be discouraged where the use of land for such purposes would adversely affect the safe and efficient operation of aircraft and airport facilities. Some controls may be necessary to ensure that activities do not conflict with the safe and efficient operation of aircraft operating into and out of Marlborough. The resource management plans will also provide for navigation aids within Marlborough which service aircraft using the airport and for any aircraft generally in the area.

It is noteworthy that the Woodbourne airport is identified as the main air transport facility for Marlborough. The Omaka airfield is not expressly mentioned. In his closing submissions for the council, Mr Quinn stated that the Omaka airfield is regionally significant[54] in respect of its provision of general aviation functions since Woodbourne is primarily a commercial airport for scheduled air services and some military activity. The RPS does not support that submission. At best the significance of the Omaka airfield is recognised at the policy level in the District Plan, (as we will see shortly). On the other hand, the Omaka airfield does have heritage values — especially in connection with the Aviation Heritage Centre — which we consider later.

[28] In relation to heritage values, objective 7.3.2 of the RPS requires that buildings and locations identified as having significant heritage value are retained. Potentially, that could apply to the Omaka airfield. However, the implementing policy[55] is to protect "identified" heritage features. The methods contemplate that resource management plans will identify significant features, and the Omaka airfield has not been so identified in the RPS.

2.2 The Wairau Awatere Resource Management Plan

[29] The combined district and regional plan for the Wairau Awatere area of the district is called "The Wairau Awatere Resource Management Plan" (abbreviated to "WARMP") and envisages its life as being ten years[56]. It became operative in full on 25 August 2011.

[30] The WARMP is in three volumes. Volume 1 contains 24 chapters of objectives and policies, the rules are in Volume 2, and zoning and other maps are in Volume 3. Of the many chapters of objectives and policies, three are of particular relevance in this proceeding. They are:

54 Closing submissions for Marlborough District Council, dated 4 October 2013, at [87].
55 Policy 7.3.3 RPS.
56 Chapter 1, para 1.5 [WARMP Vol 1 p 1-2].

Chapter 11	Urban Environments
Chapter 12	Rural Environments
...	
Chapter 22	Noise

[31] The principal policies guiding potential residential development are found in Chapter 11, to which we now turn.

Urban environments (Chapter 11)

[32] The first objective in this chapter of the WARMP is to maintain and create[57] residential environments which provide for the existing and future needs of the "community". The primary policy to implement that objective is to accommodate[58] residential growth and development of Blenheim within the current boundaries of the town. Policy 1.3 states:

> Maintain high density residential use within the inner residential sector of Blenheim located within easy walking distance to the west and[59] south of the Central Business Zone.

We have already recorded that PC59 proposes a minor change to this policy with the addition of words justifying high density residential use "close to open spaces".

[33] Some urban expansion is contemplated by policy 1.5 which is[60]:

> ... [to] ensure where proposals for the expansion of urban areas are proposed, that the relationship between urban limits and surrounding rural areas is managed to achieve the following:
>
> - compact urban form;
> - integrity of the road network;
> - maintenance of rural character and amenity values;
> - appropriate planning for service infrastructure; and
> - maintenance and enhancement of the productive soils of rural land.

[34] Chapter 11 of the WARMP also describes the sort of environment contemplated for an urban environment. Objective 11.4 provides for "the maintenance and enhancement of the amenities and visual character of residential environments".

---

57 Objective (11.2.2)1 [WARMP p 11-3].
58 Policy (11.2.2)1.1 [WARMP p 11-3].
59 PC59 actually uses the words "sought for" rather than "south of" but it misquotes (and makes nonsense of) the actual policy.
60 Policy (11.2.2)1.5 [WARMP p 11-3].

[35] Chapter 11 of the WARMP also provides for business and industrial activities. In relation to the latter the objective[61] is to contain the effects of industry within the two identified Industrial Zones: the heavy industrial activity in Industrial 1 Zone at Riverlands and Burleigh; and the lighter Industrial 2 Zone strung along State Highways 1 and 6. There is no objective or policy governing the creation of new industrial zones within the urban environments of the district.

The rural environment (Chapter 12)

[36] Chapter 12 contains two relevant sections, relating to General Rural Activities and to Airport Zones. Subchapter 12.4 which covers the area outside Wairau Plain's Rural 3 zoning[62] contains an objective[63] of providing a range of activities in the large rural section of the district. The implementing policy[64] seeks to ensure that the location, scale and nature, design and management of (amongst other activities) industry will protect the amenity values of the rural areas. In summary, any industrial growth in the Rural Zones is to be in the general rural areas, not in the lower Wairau Plain.

[37] In fact the land of most interest to this case is in special zones:

- the current zoning of the site[65] is Rural 3;
- the Omaka airfield is zoned[66] 'Airport Zone' (as are the Woodbourne and Picton airfields) in the WARMP;
- the Aviation Museum site to the northeast of the Omaka airfield is also zoned Rural 3.

[38] Chapter 12 (Rural Environments) of the WARMP sets out a range of issues, objectives and policies for the district's "Airport zone[s]". PC59 as notified did not include any amendments to chapter 12 and so it should be consistent with the objectives and policies in that chapter so far as that may be required by the plan. Paragraph 12.7.1 identifies[67] as an issue:

> Recognition of the need for and importance of national, regional and local air facilities, and providing for them, whilst avoiding, remedying or mitigating any adverse effects of airport activities on surrounding areas.

The explanation continues:

> Each of the air facilities has the potential to cause significant environmental effects including traffic generation, chemical / fuel hazard, landscape impact, and most significantly, noise pollution. The operational efficiency and functioning of Marlborough Airport, Base

61 Objective (11.4.2)1 [WARMP p 11-24].
62 Subchapter 12.2 pp 12-1 *et ff.*
63 Objective (12.4.2)2 [WARMP p 12-15].
64 Policy (12.4.2)2.5 [WARMP p 12-15].
65 See e.g. Map 155 in WARMP Vol 3.
66 See Maps 153 and 164 [WARMP Vol 3] which shows the airport zone in an ochre colour and specifically identifies "Omaka Airport".
67 WARMP Vol 1 p 12-22.

> Woodbourne, and Omaka Airfield requires continual on-site maintenance and servicing of aircraft, often associated with significant noise generation (engine testing in particular). It is essential for the continued development of industry, commerce and tourism activity in the District that a high level of air transport access is maintained. Performance standards will be applied to all activities within airport areas to avoid, remedy or mitigate adverse effects. **Likewise, the sustainability of the airport is also dependent on not being penalised by the encroachment of activities which are by their very nature sensitive to noise for normal airport operations.** (emphasis added).

[39] In that light, the objective and three policies for the airport zone(s) are[68]:

Objective 1	The effective, efficient and safe operation of the District's airport facilities.
Policy 1.1	To provide protection of air corridors for aircraft using Marlborough, Omaka and Picton Airports through height and use restrictions.
Policy 1.2	To establish maximum acceptable levels of aircraft noise exposure around Marlborough Airport and Omaka Aerodrome for the protection of community health and amenity values whilst recognising the need to operate the airport efficiently and provide for its reasonable growth.
Policy 1.3	To protect airport operations from the effects of noise sensitive activities.

[40] The methods of implementation identified are to represent the airfields as Airport Zones in the planning maps and then to establish rules to[69]:

> Plan rules provide for the continued development, improvement and operation of the airports subject to measures to avoid remedy or mitigate any adverse effects. Rules define the extent of the airport protection corridors through height and surrounding land use restrictions.
>
> Plan rules will, within an area determined with reference to the 55 Ldn noise contour (surveyed in accordance with NZS 6805 'Airport Noise Management and Land Use Planning'), require activities to be screened through the resource consent process and where permitted to establish noise attenuation will be required.
>
> | | |
> |---|---|
> | Performance Conditions | Conditions are included to protect surrounding residential land uses from excessive noise. |

[41] In fact no air noise contours or outer control boundaries have yet been introduced for the Omaka airfield. In contrast they <u>are</u> shown for the Woodbourne Airport on Map 147[70] as an "Airport Noise Exposure Overlay". CVL placed significant weight on this difference since the WARMP anticipated that an outer control boundary will be created for all the District's airports[71]. The council's evidence is that the process began for the Omaka airfield in 2007[72] and as demonstrated by the uncertainty in the noise evidence it will apparently take some time yet to resolve.

---

68 Objective 12.7.2 [WARMP p 12-23].

69 Para 12.7.7.3 [WARMP p 12-23 to 12-24].

70 WARMP Vol 3 Maps 146 and 147.

71 e.g. noise buffers surrounding the airport are considered the most effective means of protecting "their" operations (WARMP p 12-23).

72 R L Hegley, evidence-in-chief, para 5 [Environment Court document 25].

Noise (Chapter 22)

[42] Chapter 22 of the district plan essentially provides for the protection of communities from noise which may raise health concerns. The objective and most relevant policies are those in subchapter 22.3 which state:

Objective 1	Protection of individual and community health, environmental and amenity values from disturbance, disruption or interference by noise.
Policy 1.1	Avoid, remedy or mitigate community disturbance, disruption or interference by noise within coastal, rural and urban areas.
Policy 1.2	Include techniques to avoid the emission of excessive or unreasonable noises within the design of any proposal for the development or use of resources.
Policy 1.3	Accommodate inherently noisy activities and processes which are ancillary to normal activities within industrial and rural areas.

...

Subdivision (Chapter 23)

[43] We were referred to a number of policies in this chapter. Policy 1.6 requires decision-makers to "recognise the potential for amenity conflict between the rural environment and the activities on the urban periphery". Similarly policy 1.8 is to: "consider the effects of subdivision on the rural environment in so far as this contributes to the character of the Plan Area, and avoid or mitigate any adverse effects". Policy 23.4.1.1.11 is "to ensure that any adverse effects of subdivision on the functioning of services and other infrastructure and on roading are avoided, remedied or mitigated". We consider these policies are to be applied when a subdivision application or consent for land use is being applied for. They are not relevant when the rezoning of land is being considered. There is a plethora of policies — as identified above — to be considered already.

Rules

[44] For completeness we record that in the volume of rules[73], section 44 sets out the rules in the Airport Zone. These apply to Omaka airfield. The usual aviation activities are permitted activities[74]. Woodbourne Airport has its take-off and landing paths protected on the Planning Maps in accordance with Map 213 'Airport Protection and Designation 2'. Omaka airfield's flight paths are set out in a rule[75] rather than in a map.

2.3 NZS 6805: the Air Noise Standard

[45] It will be recalled that the methods of implementation in the district plan expressly contemplate application of the New Zealand Standard ("NZS 6805:1992") called "Airport Noise Management and Land Use Planning". That includes as the main recommended methods of airport noise management[76]:

73 WARMP Vol 2.
74 Rule 44.1.1 [WARMP Vol 2 p 44-1].
75 Rule 44.1.4.2.2 [WARMP Vol 2 p 44-3].
76 NZS 6805 para 1.1.5.

(a) ... establish[ing] maximum levels of aircraft noise exposure at an Airnoise Boundary, given as a 24 hour daily sound exposure averaged over a three month period (or such other period as is agreed).

(b) ... establish[ing] a second, and outer, control boundary for the protection of amenity values, and prescribes the maximum sound exposure from aircraft noise at this boundary.

[46] In relation to the latter, NZS 6805 explains:

1.4.2 *The outer control boundary*

1.4.2.1
The outer control boundary defines an area outside the airnoise boundary within which there shall be no new incompatible land uses (see table 2).

1.4.2.2
The predicted 3 month average night-weighted sound exposure at or outside the outer control boundary shall not exceed 10 Pa^2s (55 Ldn).

[47] NZS 6805 then describes how to locate the two boundaries. The two important points for present purposes are that once the technical measurements and extrapolations have been made, the decision as to where to locate the two boundaries is made under the procedures[77] for preparation of district plans under the RMA; and, secondly, that evaluative (normative) decisions have to be made by the local authority under clause 1.4.3.7 as to whether the predicted contours at the chosen date in the future are a "reasonable basis for future land use planning", taking into account a wide range of factors.

[48] For completeness we record that the standard then refers to two tables which are explained in this way[78]:

1.8 Explanation of tables

C1.8.1
All considerations of annoyance, health and welfare with respect to noise are based on the long term integrated adverse responses of people. There is considerable weight of evidence that a person's annoyance reaction depends on the average daily sound exposure received. The short term annoyance reaction to individual noise events is not explicitly considered since only the accumulated effects of repeated annoyance can lead to adverse environmental effects on public health and welfare. Thus in all aircraft noise considerations the noise exposure is based on an average day over an extended period of time — usually a yearly or seasonal average. (Further details may be obtained from US EPA publication 500/9-74-004 "Information on levels of environmental noise requisite to protect public health and welfare with an adequate margin of safety").

77 Schedule 1 to the RMA.
78 Para 1.8 NZS 6805.

Table 2

[49] A Table 2 is then introduced as follows[79]:

> Table 2 enumerates the recommended criteria for land use planning within the outer control boundary i.e. 24 hour average night-weighted sound exposure in excess of 10 Pa^2s.

Table 2 states:

> RECOMMENDED NOISE CONTROL CRITERIA FOR LAND USE PLANNING INSIDE THE OUTER CONTROL BOUNDARY BUT OUTSIDE THE AIR NOISE BOUNDARY

Sound exposure Pa^2s (1)	Recommended control measures	Day/night level Ldn (2)
>10	New residential, schools, hospitals or other noise sensitive uses should be prohibited unless a district plan permits such uses, subject to a requirement to incorporate appropriate acoustic insulation to ensure a satisfactory internal noise environment. Alterations or additions to existing residences or other noise sensitive uses should be fitted with appropriate acoustic insulation and encouragement should be given to ensure a satisfactory internal environment throughout the rest of the building.	>55

> NOTE –
>
> (1) Night-weighted sound exposure in pascal-squared-seconds or "pasques".
>
> (2) Day/night level (Ldn) values given are approximate for comparison purposes only and do not form the base for the table.

[50] There is a problem as to what Table 2 means. The MDC's Commissioners wrote[80]:

> There appear ... to be two alternatives we should consider viable:
>
> (a) that the qualification after the word *unless* only applies if the District Plan presently permits residential activity within the OCB. In such a case the Standard does not consider that the existing 'development rights' attaching to the land should be withdrawn on acoustic grounds alone. In such a case mitigation will be a sufficient response; or
>
> (b) that the qualification after *unless* applies to both existing and new district plan provisions where new residential activity is proposed subject to appropriate acoustic insulation.

They preferred the first interpretation[81].

[51] We are reluctant to step into this debate. It is not our task to establish an outer control boundary in this proceeding and so we do not need to establish the correct meaning of the Standard. We consider the proper approach to the standard is to use it as

79 Para 1.8.3 NZS 6805.
80 Commissioners' Decision para 118 [Environment Court document 1.2].
81 Commissioners' Decision para 119 [Environment Court document 1.2].

a guide — always bearing in mind, as we have said, that the standard itself involves value judgements as to a range of matters.

2.4 Plan Changes 64 to71

[52] Following the Southern Marlborough Urban Growth ("SMUGS") process the council notified Plan Changes 64-71 ("PC64-71") to rezone areas to meet the demand for residential land. CVL is a submitter in opposition.

[53] As noted by the Omaka Group, these plan changes do not form part of the matters the court is to consider in terms of the legal framework although the need for residential land was one argument put forward in support of PC59[82]. It is submitted by the Omaka Group that, given any future residential shortage will be addressed by PC64 to 71, the court should be cautious in giving weight to the effect of PC59 on this need[83]. For its part the council says that while that may be the case the court must still make its decision in the context of the relevant planning framework[84]. Notification of PC64 to 71 is a fact and that process is to be separately pursued by the council[85]. While there is no guarantee the plan changes will become operative in their notified form, they are — at most — a relevant consideration under section 32 of the RMA. PC64 to 71 are of very limited assistance to the court since these plan changes are at a very early stage in their development. They had not been heard, let alone, confirmed by the council at the date of the court hearing.

3. What are the benefits and costs of the proposed rezoning?

3.1 Section 32 RMA

[54] Under section 290 of the Act, the court stands in the shoes of the local authority and is required to undertake a section 32 evaluation.

[55] Section 32(1) to (5) of the Act, in its form prior to the 2013 amendments[86], states (relevantly):

> 32 Consideration of alternatives, benefits, and costs
>
> (1) In achieving the purpose of this Act, before a ... change, ... is publicly notified, a national policy statement or New Zealand coastal policy statement is notified under section 48, or a regulation is made, an evaluation must be carried out by —
> (a) ...
> (b) ...
> (ba) ...

82 Closing submissions for Omaka Group, dated 11 October 2013 at [26].
83 Closing submissions for Omaka Group, dated 11 October 2013 at [29].
84 Closing submissions for Marlborough District Council, dated 4 October 2013 at [72].
85 Closing submissions for Marlborough District Council, dated 4 October 2013 at [48].
86 Schedule 12 clause 2 Resource Management Amendment Act 2013: If Part 2 of the amendment Act comes into force on or after the date of the last day for making further submissions on a proposed policy statement or plan (as publicly notified in accordance with clause 7(1)(d) of Schedule 1), then the further evaluation for that proposed policy statement or plan must be undertaken as if Part 2 had not come into force.

(c) the local authority, for a policy statement or a plan (except for plan changes that have been requested and the request accepted under clause 25(2)(b) ... of Schedule 1); or
(d) the person who made the request, for plan changes that have been requested and the request accepted under clause 25(2)(b) ... of the Schedule 1.

(2) A further evaluation must also be made by —
(a) a local authority before making a decision under clause 10 or clause 29(4) of the Schedule 1; and
(b) ...

(3) An evaluation must examine —
(a) the extent to which each objective is the most appropriate way to achieve the purpose of this Act; and
(b) whether having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives.

(4) For the purposes of the examinations referred to in subsections (3) and ... an evaluation must take into account —
(a) the benefits and costs of policies, rules, or other methods; and
(b) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods.

(5) The person required to carry out an evaluation under subsection (1) must prepare a report summarising the evaluation and giving reasons for that evaluation.

[56] Mr T G Quickfall, a planner called by CVL, gave evidence that he prepared PC59 including its section 32 analysis[87]. He relied on that in his evidence-in-chief[88], writing "I am confident that section 32 has been met". To the opposite effect Ms J M McNae, a consultant planner called by the council, stated that the section 32 analysis was "inadequate"[89]. The other planners who gave evidence[90] did not write anything about the plan change in relation to section 32.

3.2 The section 32 analysis in the application for the plan change

[57] In fact, the analysis in the application for the plan change is confusing. Table 2[91] commences by referring to the appropriateness under section 32 of three objectives (in chapters 11, 19 and 23 respectively). However, PC59 does not seek to change any objectives or to add any new ones so that analysis is irrelevant.

[58] Slightly more usefully the next table in the application then contains[92] a qualitative comparison of the benefits and costs. In summary the Table stated that the proposed changes to explanation; policies, rules and other methods would lead to these benefits: better provision for urban growth, alignment with urban design principles, implements growth strategy and land availability report, implements NZS 4404:2010, provides for more flexible road design and more efficient layout, reduces hard surfaces,

87 Section 4 of the proposed plan change dated 28 April 2011.
88 T G Quickfall, evidence-in-chief para 30 [Environment Court document 18].
89 J M McNae, evidence-in-chief para 40 [Environment Court document 28].
90 M J G Garland, M A Lile, P J Hawes and M J Foster.
91 Proposed Plan Change 28 April 2011 p 25.
92 Proposed Plan Change 28 April 2011 p 26.

increases residential amenity through wider choice of roading types, and recognises Omaka airfield as regional facility and avoids reverse sensitivity effects.

[59] The only costs were the costs of the plan change in his view.

[60] Similarly, the application identified[93] the benefits of the proposed zoning as being:

- provides for immediate to short term further growth and residential demand;
- wider range of living and location choices;
- implements urban design principles;
- enables continued operation of Omaka and avoids reverse sensitivity effects; and
- improved connections to Taylor River Reserve.

The costs identified were "the replacement of rural land use with residential land use".

[61] The application for the plan change identifies it as being more efficient and effective although what PC59 is being compared with is a little obscure — presumably the status quo. That analysis merely makes relatively subjective assertions which are elaborated on more fully in the planners' evidence. It would have been much more useful if the section 32 report or the evidence had contained quantitative analysis. As the court stated — of section 7 rather than section 32 of the RMA, but the same principle applies — in *Lower Waitaki Management Society Incorporated v Canterbury Regional Council*[94]:

> ... it is very helpful if the benefits and costs can be quantified because otherwise the section 7(b) analysis merely repeats the qualitative analysis carried out elsewhere in respect of sections 5 to 8 of the Act.

[62] Section 4 of the application for the plan change then assessed[95] the following "alternative means for implementing the applicant's intentions":

> ...
> (i) Do nothing.
> (ii) Apply for resource consent(s).
> (iii) Initiate a plan change.
> (iv) Wait for the final growth strategy.
> (v) Wait for a council initiated plan change ...

---

93 Proposed Plan Change 28 April 2011 Table 3 p 26.

94 *Lower Waitaki Management Society Incorporated v Canterbury Regional Council* Decision 080/09 (21 September 2009).

95 Application for plan change 28 April 2011 pp 27-58.

We have several difficulties with that. First, we doubt if (i) or (v) would implement the applicant's intentions. Second, the application is drafted with reference to a repealed version of section 32.

3.3 Applying the correct form of section 32 to the benefits and costs

[63] The applicable test is somewhat different. As noted earlier, from 1 August 2003, with minor subsequent amendments, section 32 (in the form we have to consider[96]) requires an examination[97] of whether, having regard to their efficiency and effectiveness, the policies and methods are the most appropriate for achieving the objectives. Then subsection (4) reads:

> (4) For the purposes of the examinations referred to in subsection (3) and (3A) an evaluation must take into account —
>
> (a) the benefits and costs of policies, rules, or other methods; and
>
> (b) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods.

The reference to "alternative means" has been deleted, so read by itself, the applicable version of section 32(4) looks as if a viability analysis — are the proposed activities likely to be profitable? — might suffice. Certainly section 32 analyses are often written as if applicants think that is what is meant. However, the purpose of the benefit/cost analysis in section 32(4) is that it is to be taken into account when deciding the most appropriate policy or method under (here) section 32(3). The phrase "most appropriate" introduces (implicitly) comparison with other reasonably possible policies or methods. Normally in the case of a plan change, those would include the status quo, i.e. the provisions in the district plan without the plan change. Here, as we have said, the recently notified PC64 to 71 are also relevant as options.

[64] Given that the relevant form of section 32 contains no reference to alternatives, the applicant questioned the legal basis for considering alternative uses of the land. Counsel referred to *Environmental Defence Society Incorporated & Sustain Our Sounds v The New Zealand King Salmon Co. Ltd*[98] where Dobson J stated:

> If, in the course of contested consideration of a request for a plan change, a more appropriate means of achieving the objectives is raised, then there is nothing in s 32 or elsewhere in the RMA that would preclude the consenting authority having regard to that as part of its evaluation. That is distinctly different, however, from treating such an assessment as mandatory under s 32.

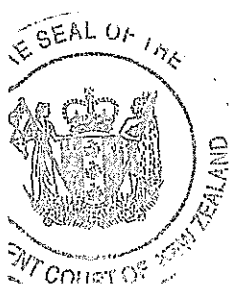
Given that the High Court decision in that proceeding was appealed direct to the Supreme Court (with special leave) we prefer to express only brief tentative views on the law as to alternatives under section 32. First, that 'most appropriate' in section 32

---

96 It was amended again on 3 December 2013 by section 70 Resource Management Amendment Act 2013.

97 Section 32(3) RMA.

98 *Environmental Defence Society Incorporated & Sustain Our Sounds v The New Zealand King Salmon Company Limited* [2013] NZRMA 371 at [171] (HC).



suggests a choice between at least two options (or, grammatically, three). In other words, comparison with something does appear to be mandatory. The rational choices appear to be the current activity on the land and/or whatever the district plan permits. So we respectfully agree with Dobson J when he stated that consideration of yet other means is not compulsory under the RMA. We would qualify this by suggesting that if the other means were raised by reasonably cogent evidence, fairness suggests the council or, on appeal, the court should look at the further possibilities.

[65] Secondly a review of alternative uses of the resources in question is required at a more fundamental level by section 7(b) of the RMA. That requires the local authority to have particular regard to the "efficient use of natural and physical resources". The primary question there, it seems to us, is which, of competing potential uses put forward in the evidence, is the more efficient use. We consider that later.

[66] For those reasons, Mr Quickfall was not completely wrong to rely on the analysis in section 4 of the application for the plan change when he relied on its qualitative comparison of alternatives. However, as we have stated the analysis is not, in the end, particularly useful because it adds little to the analysis elsewhere more directly stated in his and other CVL witnesses' evidence-in-chief.

[67] The only planner to respond in detail on section 32 was Ms McNae for the council. Her analysis[99] is as unhelpful as Mr Quickfall's for the same reason: it repeats subjective opinions stated elsewhere[100]. We will consider their differences in the context of the next section 32 question, to which we now turn.

4. What are the risks of approving PC59 (or not)?

4.1 Introducing the issues

[68] The second test in section 32 is to consider the risks of acting (approving PC59) or not acting (declining PC59) if there is insufficient certainty or information. We bear in mind that when considering the future, there is almost always some practical uncertainty about possible future environments beyond a year or two. A local authority or, on appeal, the Environment Court has to make probabilistic assessments of the "risk", recalling that a risk is the product of the probability of an event and its consequences (see *Long Bay Okura Great Park Society v North Shore City Council*[101]).

[69] The evidence on the risks of acting[102] (i.e. approving PC59) was that the experts were agreed that the following positive consequences are likely:

99 J McNae, evidence-in-chief para 53 [Environment Court document 28].
100 e.g. J McNae, evidence-in-chief para 54 [Environment Court document 28].
101 *Long Bay Okura Great Park Society v North Shore City Council* A078/2008 at [20] and [45].
102 See section 32(4) RMA.

(a) urgent demand for housing will be (partly) met[103];

(b) the site has positive attributes[104] for all the critical factors for residential development except for one. That is, the soils and geomorphological conditions and existing infrastructure and stormwater systems are all positive for such development. The exception is that the consequences for the roading network and other transport factors would be merely neutral;

(c) of the (merely) desirable factors[105], the site only shows positively on one factor — the proximity of recreational possibilities. It is neutral in respect of community, employment and ecological factors, and is said to be negative in respect of landscape although we received minimal evidence on that point;

(d) although the potential to develop land speedily is not a factor referred to in the district plan, we agree with CVL that it is a positive factor that the land is in single ownership and could be developed in a co-ordinated single way. The 2010 Strategy recognised[106] that with the anticipated growth rates the site might be fully developed within 3.5 years.

[70] The negative consequences of approving PC59 are likely to be:

(a) that versatile soils would be removed from productivity;
(b) that some rural amenities would be lost;
(c) that an opportunity for 'employment' zoning would be lost;
(d) there is the loss of a buffer for the Omaka airfield;
(e) there may be adverse effects on future use of Omaka airfield.

[71] The risks of not acting (i.e. refusing PC59) are the obverse of the previous two paragraphs.

[72] Few of the witnesses seemed much concerned with loss of rural productivity. As Mr Quickfall recorded[107] the site contains 21 hectares, and the Rural 3 Zone as a whole covers 17,100 hectares. Development of the whole site would displace 0.1228% from productive use. We prefer his evidence to that of Ms McNae.

---

103 Transcript p 427 (Cross-examination of Mr Bredemeijer).
104 South Marlborough Urban Growth Strategy May 2010 — summarised in T G Quickfall, evidence-in-chief Table 1 at para 25 [Environment Court document 18].
105 T G Quickfall, Table 1, evidence-in-chief at para 25 [Environment Court document 18].
106 2010 Strategy para 120.
107 T G Quickfall, evidence-in-chief para 54 [Environment Court document 18].

[73] On the effects of PC59 on rural character and amenity, again we accept the evidence of Mr Quickfall[108] that the site and its surroundings are not typical of the Rural 3 Zone. Rather than being surrounded by yet more acres of grapevines, in fact the site has sealed roads on three sides[109], beyond which are residential zones and some houses on two sides, and the Carlton Corlett land to the south. We accept that rural character and amenity are already compromised[110].

[74] The remaining questions raised by the evidence are:

- what is the supply of, and demand for, employment land?
- what is the reasonably foreseeable residential supply and demand in and around Blenheim?
- what is the current intensity of use, and the likely growth of the Omaka and Woodbourne airports?
- what effects would airport noise have on the quantity of residential properties demanded and supplied in the vicinity of the airports?

4.2 Employment land

[75] Obviously the risk of not meeting demand for industrial or employment land is reduced if there is already a good supply of land already zoned. There was a conflict of evidence about this, but before we consider that, we should identify the documents relied on by all the witnesses.

The Marlborough Growth Strategies

[76] In relation to the CVL land, all the planning witnesses referred to the fact that the MDC has been attempting to develop a longer term growth "strategy" which considers residential and employment growth. There are three relevant documents:

- the "Southern Marlborough Urban Growth Strategy" ("the 2010 Strategy") (this is the 2010 Strategy already referred to);
- the "Revision of the Strategy for Blenheim's Urban Growth" ("2012 Strategy")[111];
- the "Growing Marlborough ... district-wide ..." ("2013 Strategy").

It should be noted that the three strategies cover different areas — Southern Marlborough, Blenheim, and the whole district respectively. Further, as Mr Davies reminded us these documents are not statutory instruments.

[77] As we have recorded, PC59 was strongly influenced by the 2010 Strategy, so CVL was disappointed when the 2010 Strategy, after being put out for public

108 T G Quickfall, evidence-in-chief paras 57 and 58 [Environment Court document 18].
109 T G Quickfall, evidence-in-chief para 57 [Environment Court document 18].
110 T G Quickfall, evidence-in-chief para 58 [Environment Court document 18].
111 C L F Bredemeijer, evidence-in-chief Appendix 3 [Environment Court document 21].

consultation, was revised by the subsequent strategies. The council pointed out that, while the 2010 Strategy was relevant in terms of PC59, it had not undergone the process set out in Schedule 1 of the RMA and so was always subject to change[112].

[78] For the reasons given in the 2013 Strategy, Colonial's site (and its proposed PC59) was set aside as an option for Residential zoning and the matter left for this court to determine.

The council's approach

[79] Mr C L F Bredemeijer, of Urbanismplus and on behalf of the council, was the project manager and report author during the processes leading to the three Marlborough Growth Strategies[113]. He, in turn, engaged Mr D C Kemp, an economist and employment and development specialist, to investigate employment and associated land issues for the Marlborough region[114].

[80] In Mr Kemp's view the traditional rural services at present around the Blenheim town centre should be relocated and provision made for future growth in employment related activities which should be located away from the town centre. The CVL site, according to Mr Kemp, offers "an exceptional opportunity" for accommodating these activities[115]. He saw a need to protect the site as strategic land for existing, new and future oriented business clusters[116].

[81] To quantify the need for employment land up to the year 2031 Mr Kemp considered two scenarios. The first he called the Existing Economy Scenario and the second, a realistic Future Economy Scenario. The latter includes, in addition to all factors considered in the Existing Economy Scenario, consideration of the perceived shortfall in industrial land uses where Marlborough currently has less than expected employment ratios and provides for relocation of existing inappropriately located activities[117]. For the period 2008 to 2031 the Existing Economy Scenario led to a requirement for 69 hectares of employment land with 120 hectares required for the Future Economy Scenario[118]. These represent growth rates of 3.0 and 5.2 hectare/year respectively.

[82] Mr Kemp's figures were incorporated into the 2010 Strategy, being referred to as the "minimum" and the "future proofed" requirements[119]. The latter required:

---

112 Closing submissions for Marlborough District Council, dated 4 October 2013 at [24].
113 C L F Bredemeijer, evidence-in chief para 7 [Environment Court document 21].
114 D C Kemp, evidence-in-chief para 7 [Environment Court document 20].
115 D C Kemp, evidence-in-chief paras 11–19 [Environment Court document 20].
116 D C Kemp, evidence-in-chief para 26 [Environment Court document 20].
117 D C Kemp, evidence-in-chief paras 31 and 35 [Environment Court document 20].
118 D C Kemp, evidence-in-chief paras 33 and 36 [Environment Court document 20].
119 Southern Marlborough Growth Strategy 2010, p 108.

- 63 hectares for small scale Clean Production and Services;
- 7 hectares for Vehicle Sales and Services;
- 24 hectares for larger-scale Transport and Logistics; and
- 30 hectares for other "Difficult to Locate" activities with low visual amenity and potentially offensive impacts.

The 2010 Strategy then notes: "There is clearly sufficient employment land in Blenheim to meet all of these potential needs with the exception of "... 5 ha ..."". The 5 ha refers to land for "difficult to locate activities" which Mr Kemp acknowledged would be inappropriate to place on the site[120].

[83] Following the 2010 and 2011 Christchurch earthquakes the council sought reports on liquefaction prone land in the vicinity of Blenheim. The reports raised serious concerns about the suitability of some of the land identified for development in the 2010 Strategy. (No liquefaction issues were identified with respect to the site). The council recognised that there would be a severe shortfall of residential and employment land in Blenheim[121] assuming no change to the demand for employment land. Instead of there being "clearly sufficient" land for employment purposes there was now a shortfall of approximately 85 hectares[122]. Mr Hawes, planner for the council, appeared to accept this figure[123]. The court has no reason to dispute it and thus accepts it as the best estimate of employment land required to future proof Blenheim in this regard until 2031.

[84] To meet the perceived shortfall of 85 hectares, revised strategies for provision of employment land identified a preference for employment land development near Omaka and Woodbourne airports. That near Omaka included the site, which was identified in the 2010 Strategy for residential use[124] and the Carlton Corlett Trust land to its south[125]. This was seen as a logical progression of employment land north from the Omaka airport to New Renwick Road and as a solution to noise issues. These preferences were carried through to the 2013 Strategy which was released in March 2013 and ratified by the full council on 4 April 2013[126]. We note that neither CVL as the site's land owner nor adjacent residential owners and occupiers[127] were consulted about this change in preference from residential to industrial[128].

---

120 D C Kemp, evidence-in-chief para 25 [Environment Court document 20].
121 P J Hawes, evidence-in-chief paras 33 and 36 [Environment Court document 22].
122 C L F Bredemeijer, evidence-in-chief para 37 [Environment Court document 21].
123 P J Hawes, evidence-in-chief para 36 [Environment Court document 22].
124 P J Hawes, evidence-in-chief Figure 1 [Environment Court document 22].
125 P J Hawes, evidence-in-chief para 37.3 [Environment Court document 22].
126 P J Hawes, evidence-in-chief paras 44 and 46 [Environment Court document 22].
127 There are 84 adjacent residential properties, 31 of which face the site along New Renwick Road and Richardson Avenue.
128 C L F Bredemeijer, evidence-in-chief paras 44-46 [Environment Court document 21].

[85] The 2013 Strategy summarised planning over the last 5 or 10 years for urban growth as follows[129]:

> Land use and growth
> The original Southern Marlborough Urban Growth Strategy Proposal catered for residential and employment growth in a variety of locations on the periphery of Blenheim, including the eastern periphery. As explained earlier, the areas to the east of Blenheim were removed from the Strategy as a result of the significant risk and likely severity of the liquefaction hazard. This decision was made by the Environment Committee on 3 May 2012.
>
> The Strategy now focuses residential growth to the north, north-west and west of Blenheim and employment growth to the south-west. In this way, the Strategy will provide certainty in terms of the appropriate direction for growth for the foreseeable future.
>
> The Strategy, including the revision of Blenheim's urban growth, is based on the sustainable urban growth principles presented in Section 2.1. In assessing the suitability of these sites, it was clear that residential activity would encroach onto versatile soils to the north and north-west of Blenheim. The decision to expand in this direction was not taken lightly. However, given the constraints that exist at other locations, the Council did not believe it had any other options to provide for residential growth. The decision was made also knowing that land fragmentation in some of the growth areas had already reduced the productive capacity of the soil.

[86] In summary, the council's strategic vision with respect to provision of employment land is set out in the 2013 Strategy as[130]:

- a further 64 hectares for future general and large scale industry in the Riverlands area;
- additional employment land near the Omaka Aerodrome (53 hectares) and the airport at Woodbourne (15 hectares);
- possible future business parks near Marlborough Hospital, near Omaka and near the airport at Woodbourne.

[87] However, the 2013 Strategy expressly left open the future appropriate development of the (Colonial) site[131]:

> W2 (or Colonial Vineyard site)
> During the process of considering submissions on W2, the owners of the land requested a plan change to rezone the property Urban Residential to facilitate the residential development of the site. The Council declined to make a decision on this growth area to ensure there was no potential to influence the outcome of the plan change process. Given the delay caused by the liquefaction study and the subsequent revision, the plan change request has now been heard by Commissioners and their decision was to decline the request. This decision has been appealed to the Environment Court by the applicant. This appeal will be heard during 2013.
>
> Due to the effect of the liquefaction study on the strategy and the areas it identified for employment opportunities to the east of Blenheim, other areas have now been assessed in terms of their suitability for employment uses. This includes the W2 site and adjoining land in the vicinity of Omaka Aerodrome. Refer to the employment land section below for further details.

129 Page 36 of the 2013 Strategy.
130 2013 Strategy, p 30.
131 C L F Bredemeijer, evidence-in-chief Appendix 4 [Environment Court document 21].

> It is noted that if the plan change request is approved by the Court, the subsequent development of the rezoned land will assist to achieve the objectives of this strategy. If the Court does not approve the plan change then the Council will be able to promote Area 8 as an alternative.

CVL's approach

[88] Mr Kemp's approach was challenged by the applicant's witnesses on the grounds that:

- much industrial expansion and new employment occurs in the rural zone as discretionary activities. This reduces the need for industrial zoning. This factor was not mentioned by Mr Kemp[132];
- Mr Kemp's projections require an additional 3,650 employees to support them while Statistics New Zealand's projection of population growth for the same period is 2,700 persons[133];
- use of only one year's data on which to base projections is inappropriate. That the year is a boom year, 2008, and prior to the global financial crisis caused further concern[134].

[89] In predicting the future need for employment land CVL's witnesses preferred to consider the past take up of industrial land and to account for the areas of land available at present for employment land. They also considered which industries would be likely to develop on or relocate to the site. Mr T P McGrail, a professional surveyor, compared land use as delineated in a 2005 report to council with the existing situation for what he described as business and industrial uses. Noting the area of land available for these uses in 2005 was essentially the same as that available in 2013 he concluded the net take up of vacant land since 2005 has been "very low"[135]. As an example he records that in May 2008 54 hectares was rezoned at Riverlands but no take up of this land has occurred in the 5 years it has been available[136]. His evidence was that there have been three greenfield industrial subdivisions in the Blenheim area in the last 34 years of which 19 hectares has been developed[137]. This is at a rate of 0.56 hectares/year. That contrasts with the growth rates of 3.0 and 5.2 hectares/year adopted by Mr Kemp and noted above.

[90] In considering which industries may chose to locate or relocate to the site, Mr McGrail dismissed wet industries (on advice from the council) together with processing of forestry products and noxious industries including wool scouring and sea food processing on the basis of their effects on neighbouring residents[138]. Other employment uses discussed by Mr McGrail were aviation, large format retail and business. Due to

---

132 T P McGrail, Rebuttal evidence paras 37 and 38 [Environment Court document 9A].
133 T J Heath, Rebuttal evidence para 58 [Environment Court document 16].
134 T J Heath, Rebuttal evidence para 58 [Environment Court document 16].
135 T P McGrail, Rebuttal evidence paras 3–6 [Environment Court document 9A].
136 T P McGrail, Rebuttal evidence para 33 [Environment Court document 9A].
137 T P McGrail, Rebuttal evidence paras 26 and 28 [Environment Court document 9A].
138 T P McGrail, Rebuttal evidence paras 8–10 [Environment Court document 9A].

the Carlton Corlett Trust land's proximity to the airfield it would be preferred to the site for aviation related industries. This 31 hectares together with 42 hectares designated as Area 10, located immediately to the northwest of Omaka airfield, gives 73 hectares of land better suited to employment (particularly aviation) uses than the site.

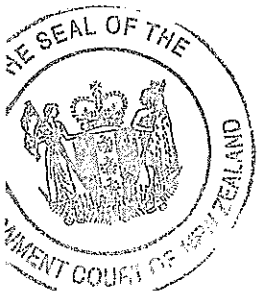
[91] Council has identified five areas, including the site, which are available for large format retail. Mr McGrail believed large format retail is well catered for even if the site becomes residential[139]. He also considered that some 50% of the types of business presently in Blenheim would not choose to locate or relocate to the site because they would lose the advantages that accrue by being close to main traffic routes and the town centre[140]. This underlay his skepticism of Mr Kemp's projections for business uptake of the site[141].

[92] Mr T J Heath, an urban demographer and founding Director of Property Economics Limited, was asked by CVL to determine if there was any justification for the council preferred employment zoning of the site[142]. To do so he assessed the demand for employment land using his company's land demand projection model. This uses Statistics New Zealand Medium Series population forecasts, historical business trends and accounts for a changing demographic profile in Marlborough. It first predicts increases in industrial employment which are then converted to a gross land requirement[143]. Use of this model to predict the need for future employment land was not challenged during the hearing.

[93] Industrial employment projections from the model suggested a 28% increase over the period 2013 to 2031 which translated to a gross land requirement of 49 hectares[144]. This result is considered by Mr Heath to be "towards the upper end of the required industrial land over the next 18 years". Two other scenarios are presented in his Table 3 each of which results in a smaller requirement[145]. Mr Heath then relied upon Mr McGrail's estimates of presently available employment land which totalled 103 hectares[146]. This comprised the 19 hectares identified by Mr McGrail and referred to above plus the 84 hectares of land available at Riverlands[147].

[94] During cross examination Mr Heath stated[148] "My analysis shows me you have zoned all the land required to meet the future requirements out to 2031". This was a reiteration of his rebuttal evidence where he wrote[149] "even at the upper bounds of

139 T P McGrail, Rebuttal evidence para 19 [Environment Court document 9A].
140 T P McGrail, Rebuttal evidence para 21 [Environment Court document 9A].
141 T P McGrail, Rebuttal evidence paras 21 and 22 [Environment Court document 9A].
142 T J Heath, Rebuttal evidence para 6 [Environment Court document 16].
143 T J Heath, Rebuttal evidence para 31 [Environment Court document 16].
144 T J Heath, Rebuttal evidence Table 3 [Environment Court document 16].
145 T J Heath, Rebuttal evidence paras 35and 36 [Environment Court document 16].
146 T J Heath, Rebuttal evidence Table 4 [Environment Court document 16].
147 T P McGrail, Rebuttal evidence Figure 2.
148 Transcript p 315.
149 T J Heath, Rebuttal evidence para 39 [Environment Court document 16].



49 hectares, there is clearly more than sufficient industrial land to meet Blenheim's and in fact Marlborough's future industrial needs ...".

Findings

[95] We ignore the 15 hectares near Woodbourne as this is Crown land that could form part of a Treaty settlement for Te Tau Ihu Iwi[150]. Its future is thus uncertain. The 53 hectares near Omaka includes the site (21.7 hectares) and the Carlton Corlett Trust land (31.3 hectares). The land owner of the latter has expressed a desire to develop the property to provide for employment opportunities[151]. Indeed, together the Carlton Corlett Trust land (31 hectares) and the further 64 hectares at Riverlands total 91.3 hectares. This is in excess of the 85 hectares sought by council for its future proofing to 2031.

[96] In addition to the lands listed above, council has identified 42 hectares of land (referred to as Area 10) to the west of Aerodrome road and north of the airfield for additional employment growth in the long term[152].

[97] The council strategy requires 89 hectares of employment land to future proof the need for such land in the vicinity of Blenheim. There is at present sufficient land available to provide for this without any rezoning. We conclude the need for employment land within a planning horizon of 18 years (to 2031) is not a factor weighing against the requested plan change.

4.3 Residential supply and demand

[98] Prior to 2011, there was a demand for between 100 and 150 houses a year and an availability of approximately 1,000 greenfield sites[153]. Based on that, counsel for the Omaka Group submitted there is no evidence that the alleged future shortfall will materialise before further greenfield sites are made available[154]. We are unsure what to make of that submission because counsel did not explain what he meant by "shortfall". There is not usually a general shortfall. Excess demand is an excess of a quantity demanded at a price. In relation to the housing market(s), excess demand of houses (a shortfall in supply) is an excess of houses demanded at entry level and average prices over the quantity supplied at those prices.

[99] Mr Hayward gave evidence for CVL that there has been "a subnormal amount of residential land coming forward from residential development in Marlborough"[155]. He also stated that there was an imbalance between supply and demand, with a greater quantity demanded than supply[156]. Further, none of the witnesses disputed Mr Hawes'

150 2013 Strategy, p 41.
151 2013 Strategy, p 40.
152 2013 Strategy, p 40.
153 Environmental Management Services Limited report, dated 11 January 2011.
154 Closing submissions for Omaka at [101].
155 A C Hayward, Transcript at p 98, lines 10-15.
156 A C Hayward, Transcript at p 103, lines 20-25.

evidence[157] that the Strategies are clear that there is likely to be a severe shortfall of residential land in Blenheim if more land is not zoned for that purpose.

[100] Plan Changes 64 to 71 would potentially enable more residential sections to be supplied to the housing market. However, in view of the existence of submissions on these plan changes, we consider the alternatives represented by those plan changes are too uncertain to make reasonable predictions about.

[101] We find that one of the risks of not approving PC59 is that the quantity of houses supplied in Blenheim at average (or below) prices is likely to decrease relative to the quantity likely to be demanded. That will have the consequence that house prices increase.

4.4 Airports

[102] In view of the importance placed on the Woodbourne Airport in the RPS, it was interesting to read the 2005 assessment by Mr M Barber in his report[158] entitled "Air Transport - Provision for the future use, development and protection of air transport facilities in Marlborough District – Part 1 Issues and options". He wrote[159] of Omaka:

> The principal threats to the sustainable use of Omaka Aerodrome arise from its proximity to Woodbourne/Blenheim Airport, the potential for encroachment on the obstacle limitation surfaces, and urban or rural-residential encroachment.

[103] Currently Omaka aerodrome may expand its operations as a permitted activity. However, it is uncertain what restrictions or protection may be put in place for Omaka by way of a future plan change process and it is in this uncertain context that the court is asked to determine what the likely noise effects of the airfield will be in the future.

[104] The Omaka Group argued that, given the uncertainty around the air noise boundary and outer control boundary which are likely to be imposed in the future, it is helpful to have regard to the capacity of the airfield. Although, as Mr Day conceded in cross-examination[160], the capacity approach is unusual, the Omaka Group argued it is sensible in the context of uncertainty about the level of use to consider the capacity of the airfield. This would allow for full growth in the future, regardless of the current recession[161]. CVL responded that the capacity approach is an argument not advanced by any witness and so there is no evidence as to the capacity of the airfield[162].

---

157 P J Hawes, evidence-in-chief paras 33 and 36 [Environment Court document 22].

158 P J Hawes, evidence-in-chief Appendix 2 [Environment Court document 22].

159 M Barber, "Air Transport - Provision for the future use, development and protection of air transport facilities in Marlborough District – Part 1 Issues and options" 8 December 2005 at p 40. (Appendix 2 to the evidence-in-chief of P J Hawes) [Environment Court document 22].

160 Transcript 501 line 3.

161 Closing submissions for Omaka at 81-82.

162 Closing submissions for Colonial Vineyards Ltd at 161.

[105] Mr Barber in his 2005 report wrote in relation to the potential for urban encroachment[163]:

> Clearly, there is considerable existing and future potential for urban residential development to the south-west of Blenheim which could result in encroachment on Omaka Aerodrome. To avoid possible adverse effects on the future safe and efficient operation of the aerodrome, it is important that the area likely to be subject to aircraft noise in the future be identified and appropriate protection measures be incorporated in the District Plan.

4.5 Noise

[106] In relation to the risks of acting when there is insufficient certainty and/or information about the subject matter of the policies or methods, we observe that the uncertainties are not about the current environment but about the environment in 15 or 25 years' time.

[107] Similarly the Marlborough Aviation Group was aware of the issue in 2008. As a former President, Mr J McIntyre, admitted in cross-examination[164], he wrote[165] of The Marlborough Aero Club Inc. in the President's Annual Report for 2008:

> The opening of the Airpark adjacent to the Aviation Heritage Centre is a positive aspect of this, but has thrown up some curly questions as to how operations should take place from this area. Concurrent with increased numbers of aircraft (of all types) is the concern that we will draw undue attention to ourselves with noise complaints, as we are squeezed by ever-increasing urban encroachment. On this front, it does not help that the District Council did not see fit to have the fact that airfield exists included in developer's information and LIM reports for the new sub division up Taylor Pass Road.

Current airport activity

[108] The site lies under the 01/19 vector runways[166] of the Omaka airfield. Thus it is subject to some noise from aircraft taxiing, taking off and landing. How much noise was a subject of considerable dispute.

[109] Two methods of assessing aircraft noise were put forward. CVL produced the evidence of Mr D S Park based on 2013 measurements and extrapolations. In December 2012 Mr Park had installed a system at the site for recording the radio transmissions made by pilots operating at Omaka. In this way he sought an understanding of aircraft noise data obtained at the site as described by Dr Trevathan[167] and to aid in the analysis of that data. In contrast the MDC and the aviation cluster initially relied on data collected at Woodbourne between 1997 and 2008 ("the Tower data"), extrapolated to the present. They later based their predictions out to 2039 on Mr Park's measurements, as discussed below.

---

163 M Barber, "Air Transport - Provision for the future use, development and protection of air transport facilities in Marlborough District – Part 1 Issues and options" 8 December 2005 at p 42. (Appendix 2 to the evidence-in-chief of P J Hawes) [Environment Court document 22].

164 Transcript p 732 lines 15-20 (Tuesday 17 September 2013).

165 Exhibit 35.1.

166 i.e. runways on which aircraft taking off are on bearings of 10° and its reciprocal 190° (magnetic) respectively.

167 J W Trevathan, evidence-in-chief para 5.1 [Environment Court document 14].

[110] Mr Park's figures relied on the fact that at unattended aerodromes, such as Omaka, it is normal for pilots to transmit, by radio, a VHF transmission, their intentions to take off or to land and their intended flight path. While this is a safety procedure it also provides a record of movements to and from the aerodrome. Once recorded on Mr Park's equipment the VHF transmissions were analysed to provide[168]:

- the number of takeoffs and landings by radio equipped aircraft at Omaka during the recording period;
- the approximate time of each movement;
- the runway used during each movement; and
- the aircraft registration.

An aircraft's registration allows it to be identified and thus categorised as either a helicopter or a fixed wing aircraft and, if the latter, as having either a fixed or a variable pitch propeller. This is necessary as the two types have different noise signatures with the variable pitch propellers being the louder. Helicopters are noiser again.

[111] The runway information suggests which movements are likely to have resulted in a noise event being recorded by the equipment on the site.

[112] At the time of filing his evidence-in-chief (22 February 2013) Mr Park had data from the period 10 January – 9 February 2013 only, which he acknowledged[169] was "a relatively short time". His rebuttal evidence filed on 3 July 2013 reported on data from the period 10 January – 8 April 2013. Data from the Easter Air Show was not captured as that used a different transmission frequency[170]. Data from 81 days was analysed, there being over 30,000 transmissions of which 7,553 related to movements at Omaka: 7,082 were fixed wing aircraft and 471 were helicopters.

[113] The results of Mr Park's monitoring were given as[171]:

• average fixed wing movements/day	87.4
• average fixed wing movements/night	0.8
• average helicopter movements/day	5.8
• average helicopter movements/night	0.6
• average use of runway 01 for takeoffs	26%
• ratio fixed pitch/variable pitch	84%/16%

168 D S Park, evidence-in-chief para 4.6 [Environment Court document 13].
169 D S Park, evidence-in-chief para 5.8 [Environment Court document 13].
170 D S Park, Rebuttal evidence para 11.2 [Environment Court document 13A].
171 D S Park, Rebuttal evidence para 11.4 [Environment Court document 13].

These numbers are subject to error from a number of causes including aircraft not equipped with radio, pilots choosing not to transmit their intentions, or by confusion of call signs. Mr Park chose to account for this by adding 10% to the recorded numbers: some 750 extra movements[172]. He also added 1.1 helicopter movements/night to reflect a suggestion from Mr Dodson that some night helicopter movements had been missed[173]. Whether this was before or after the 10% increase was not stated. The results of these adjustments[174] are given in terms of averages per day as:

- fixed wing 96.1
- helicopter 8.0

Mr Park noted[175] that the entry for helicopters should have been 7.5 flights per day. The quoted figure of 8.0 was retained by Mr Park and used in his subsequent projections of future helicopter movements.

[114] These figures are difficult but not impossible to understand. In summary:

- the figure of 96.1 fixed wing flights is an increase of 10% on the recorded figure for fixed wing movements/day of 87.4. The night movements of fixed wing aircraft are thus not included in the adjusted figures. We infer that the term "averages per day" used in connection with these figures means day time flights only;

- the figure of 7.5 helicopter flights can be obtained by increasing the recorded 5.8 day time helicopter flights by 10% and then adding 1.1. However this is mixing day and night flights and may well be a coincidence. For day flights only a 10% increase gives 6.4 flights, a figure that would fit into the averages per day table above. If the total of recorded day time plus night time helicopter flights (6.4) is increased by 10% and 1.1 flights added the result is 8.1 flights, a figure close to that used by Mr Park in his projections;

- of the fixed wing movements only those takeoffs from Runway 01 are assumed by Mr Park to result in noise effects on the site[176]. He reports 26.2% of day time fixed wing movements and 2.8% of fixed wing night time movements occur on Runway 01. Of the helicopter movements 25% of those departures to the north from Runways 01 and 07 together with 16.1% of those arrivals from the north on Runways 19, 25 and 30 were considered by Mr Park to have a noise effect on the site.

172 D S Park, Supplementary evidence para 3.4 [Environment Court document 13B].
173 D S Park, Rebuttal evidence para 11.6(b) [Environment Court document 13A].
174 D S Park, Rebuttal evidence para 11.11 [Environment Court document 13A].
175 Transcript p 143 lines 21-24.
176 D S Park, Rebuttal evidence para 11.12 [Environment Court document 13A].

[115] Dr Trevathan was asked[177] to provide a current 55 dB Ldn contour based on Mr Park's data from the period 10 January to 8 April 2013 for aircraft movements that affect the site. This contour is shown as crossing the Carlton Corlett land in a generally east/west direction and at least 180 metres from the site[178]. We find that helicopters departing and arriving fly directly[179] over the site at present. Dr Trevathan's modeling confirms that these flights make a significant contribution to the average noise levels experienced on the site. Similarly, flight paths for departures and arrivals from the east — on the 07/29 vector runways — lie directly over the residential area to the east of Taylor River[180].

[116] Mr A Johns, a member of the Marlborough Aero Club, challenged the reliability of Mr Park's VHF recordings and the data derived from them. He was concerned about the presence of unrecorded aircraft movements which included those by aircraft not equipped with radios, movements which the pilot chose not to report and those associated with the Air Show held at Easter 2013. Possible misidentification of aircraft type which would lead to an incorrect noise signature being assigned and the percentage of movements allocated to Runway 01 were other concerns. Mr Johns' information was based on his knowledge of actual use of Omaka airfield from, presumably, records held by the Marlborough Aero Club. Mr Park through his company, Astral Limited, sought access to these records[181] which would have allowed him to assess the accuracy of his VHF results. This request was declined[182] as the Omaka Group and the Aero Club did not consider the request "had merit". We note that Mr Johns did not produce any of these records in his evidence preferring simply to give aircraft types and movement percentages that cannot be verified. Since the Marlborough Aero Club did not cooperate with Mr Park's reasonable request, we prefer the latter's evidence.

[117] With respect to the flights associated with the Air Show Mr Park, based on his experience as chair of the Ardmore Airport Noise Committee, expressed the view that these would be excluded from any noise evaluation and expressly provided for in any Noise Management Plan that the Aero Club might produce and in any special recognition the council may wish to give the Air Show in the District Plan[183].

[118] Mr Johns gave a list[184] of historic aircraft which were misidentified as modern aircraft. Having been identified by Mr Park the movements made by these aircraft would have been recorded and thus included in the total number of movements. It is

177 J W Trevathan, Rebuttal evidence para 3.1 [Environment Court document 14A].
178 J W Trevathan, Supplementary evidence Attachment 2 [Environment Court document 14B].
179 D S Park, evidence-in-chief para 65 [Environment Court document 13].
180 D S Park, evidence-in-chief Annexure 3, Figures 5 and 6 [Environment Court document 13].
181 D S Park, Supplementary evidence para 3.1 and Exhibit A [Environment Court document 13B].
182 D S Park, Supplementary evidence para 3.1 and Exhibit B [Environment Court document 13B].
183 D S Park, Rebuttal evidence para 8.2 and Supplementary evidence para 3.23 [Environment Court documents 13A and 13B respectively].
184 A Johns, Supplementary evidence para 18 [Environment Court document 24A].

likely the assigned noise category would have been in error. Reference to 48 flights of an Avro Anson, a World War II bomber, that appeared to have been missed by Mr Park was made by Mr Johns[185]. In his oral evidence[186] he stated that subsequent to filing his written evidence he had identified that the bomber had used a call sign unknown to Mr Park and that at least half the bomber's flights had been recorded, but not recognised as such, by Mr Park.

[119] Another consideration which adds uncertainty is that the split between variable pitch and fixed pitch propeller aircraft will influence the location of any derived contour[187]. Mr Johns, from a "back of the envelope" calculation, suggested aircraft with variable pitch propellers make up close to 20% of the total fixed wing aircraft movements[188]. Mr Park's measurements over the three month period indicated a figure of 16%.

[120] Mr Park's recordings indicated runway 01 was used for 26.2% of the fixed wing takeoff movements[189]. Mr Johns, having made allowance for the interruption to movements on runway 01 from the Air Show, suggested 28% which he noted was closer to the estimate provided by Mr Sinclair for the modelling done by Mr Hegley for the council[190]. In taking all these perceived deficiencies in Mr Park's recording and analysis into account[191] Mr Johns believed "a greater level of error should be allowed for than the 10% suggested by Mr Park". No alternative figure was produced by Mr Johns. We found that the 10% increase in movements (over 700) allowed by Mr Park is more than sufficient to cover at most 24 flights (48 movements) by the bomber that may have been missed.

Findings

[121] We prefer Mr Park's data set to that of the Aero Club because the latter derives from flights at a period of unusually intense activity immediately prior to the global financial crisis. For example, on the numbers of flights in 2008, Mr J McIntyre wrote[192] in the President's Annual Report for 2008:

> After dipping slightly last year, flying hours were up again with 2288 hours chalked up for the Clubs 80th year. This is the highest since 1990/91 and is heartening in the face of rocketing fuel prices and escalating charges from all quarters.

The 2013 base data from Mr Park can be used to predict the location of noise contours near and over the site in 2038. The court is not charged with fixing these contours and indeed does not have sufficient information to do so. Rather, we are interested in the

185 A Johns, Supplementary evidence para 20 [Environment Court document 24A].
186 Transcript pp 525-526.
187 As recorded above: Variable pitch propellers are louder than fixed pitch propellers.
188 A Johns, Supplementary evidence para 30 [Environment Court document 24A].
189 D S Park, Rebuttal evidence para 11. 12 [Environment Court document 13].
190 A Johns, Supplementary evidence para 33 [Environment Court document 24A].
191 A Johns, Supplementary evidence para 43 [Environment Court document 24A].
192 Exhibit 35.1.

contours as an indication of what could happen in the next 25 years. For this purpose we are satisfied that Mr Park's data is an appropriate base from which to project forward.

Future noise

[122] In fact some attempts had been made to establish likely noise contours. The experts endeavoured to formulate a growth rate and applied it to the current use to calculate the contours which would restrict the airfield's growth. Mr Park and Dr Trevathan, the experts for CVL, adopted a compounding annual growth rate of 2.7% for fixed wing aircraft[193]. Mr Foster, for the council, gave unchallenged evidence that were a proposed World War II fighter squadron project to eventuate then a 4% per annum growth rate would be more realistic[194]. Looking at the Tower data one could calculate a compounding growth rate of 4.4%[195] which provides support for Mr Foster's proposed growth rate. Omaka submits that any certainty in the contours proposed by Dr Trevathan is diminished by the uncertainty around the flight numbers supplied by Mr Park[196].

[123] Parallel to the SMUGS process, the council commissioned reports from Hegley Acoustic Consultants as an initial step to introducing airnoise boundaries and outer control boundaries.

[124] Mr R Hegley, of Hegley Acoustic Consultants, was commissioned in 2007 to undertake acoustic modelling of Omaka airfield[197]. He based his model on data provided by Mr Sinclair[198] which included growth rates to determine aircraft numbers up to the selected design year of 2028. These growth rates were not recorded in Mr Hegley's evidence. Mr Park deduced, from Mr Sinclair's evidence to the initial hearing[199], that they were[200]:

- fixed wing 2.7% per annum
- helicopter 10% per annum

The projected values used by Mr Hegley to derive his 55 dB Ldn contour were not recorded in his evidence.

[125] Mr Park[201] used Mr Hegley's growth rates to project his one month of recorded movements out to 2028 and provided the data to Dr Trevathan for his derivation of the

193 Transcript at 178 line 32ff.
194 M J Foster, evidence-in-chief at [6.17] [Environment Court document 23].
195 A Johns, supplementary evidence at [12].
196 Closing submissions for Omaka at 53.
197 R L Hegley, evidence-in-chief para 5 [Environment Court document 25].
198 R L Hegley, evidence-in-chief para 17 [Environment Court document 25].
199 D S Park, evidence-in-chief Annexure 1A [Environment Court document 13].
200 D S Park, evidence-in-chief paras 5.12–5.16 [Environment Court document 13].
201 D S Park, evidence-in-chief, para 5.19 [Environment Court document 13].

resultant 55 dB Ldn contour. Doubt was expressed by Mr Park over the 10% growth rate for helicopters which he considered excessive[202].

[126] Initial projections used by Mr Hegley on behalf of the council were 20 year projections from 2008, i.e. out to 2028. In preparing for the hearing all witnesses agreed this was too short for airport planning and agreed 2038 to be an appropriate planning horizon. The rates of growth in fixed wing and helicopter movements were not agreed.

[127] With concern having been expressed by a number of witnesses in their evidence-in-chief over the inadequacy of a 2028 design year, attention turned to providing projections out to the agreed year of 2038. Mr Hegley was instructed by the council to project out to 2038 retaining the 2.7% and 10% per annum growth rates for fixed wing and helicopters respectively[203]. He was asked to use the aircraft flight numbers as presented in Dr Trevathan's evidence-in-chief[204]. These figures came from Mr Park and were thus based on his one month of VHF recorded data. At this point all use of the alternate data set favoured by the Airport Cluster and the Aero Club ceased.

[128] Mr Park also considered the 2038 design year. He retained the 2.7% growth rate to 2038 for fixed wing aircraft and used a 6.6% growth rate for helicopters both applied to his three month 2013 base data[205]. The latter he considered appropriate in view of the CAA helicopter registration records[206] which show a 4.4% per annum growth rate from 1993 until 2013 with a period (8 years) having a maximum growth rate of 7.8% per annum. The 6.6% rate is 50% above the long term growth rate and will result in almost five times as many helicopter movements in 2038 suggesting up to 35 helicopters will be operating from Omaka at that time. In Mr Park's view the 6.6% growth rate is adequate to account for the special nature of helicopter operations from Omaka[207]. The planning consultant[208] for the council, Mr Foster, who has extensive experience in airport planning, stated that the 2.7% growth rate for fixed wing aircraft is not unreasonable[209] and that 6.6% as a growth rate for helicopters is realistic[210].

[129] Using these growth rates and Mr Park's adjusted 2013 data for flight movements the projected movements for 2038 expressed as averages per day are[211]:

- fixed wing 187.1
- helicopter 39.7

---

202 D S Park, evidence-in-chief, para 5.17 [Environment Court document 13].
203 R L Hegley, evidence-in-chief para 29 [Environment Court document 25].
204 R L Hegley, evidence-in-chief para 27 [Environment Court document 25].
205 D S Park, Rebuttal evidence, para 11.7 [Environment Court document 13].
206 D S Park, Rebuttal evidence Annexure 1 [Environment Court document 13A].
207 D S Park, Rebuttal evidence paras 11.9 and 11.10 [Environment Court document 13A].
208 M J Foster, evidence-in-chief paras 1.2 – 1.4 [Environment Court document 27].
209 M J Foster, evidence-in-chief para 6.27 [Environment Court document 27].
210 Transcript at 646 line 24.
211 D S Park, Rebuttal evidence para 11.11 [Environment Court document 13A].

The percentages of these flights to affect the site were assumed to be the same as those derived from Mr Park's 2013 data.

The 55 dB Ldn contours

[130] Noise contours are produced using software referred to as an Integrated Noise Model ("INM"). The acoustic experts agreed[212] this software was appropriate to predict future noise levels at Omaka airfield and that the model aircraft types and settings that have been developed by Mr Hegley and Marshall Day Acoustics and confirmed by Dr Trevathan's measurements to be appropriate. The software requires at a minimum the input of runway locations, aircraft types and numbers of flights and flight tracks. There is disagreement over the helicopter flight tracks that should be modelled.

[131] Helicopters taking off towards and landing from the north currently track over the site[213]. Mr Hegley has used these tracks in his INM modelling. Mr Park believes these tracks create unnecessary disturbance over the site and to adjacent residential areas[214]. He thus proposed "helicopter noise abatement flight paths". On takeoff to the north a helicopter would veer slightly right and as it crossed New Renwick Road it would turn left and follow the Taylor River. Approaches from the north would come along the river and turn right to reach the eastern edge of the airfield[215]. Such noise abatement paths, according to Mr Park, are in common use at other aerodromes in New Zealand and are in accord with both the Aviation Industry Association of New Zealand's code of practice for noise abatement and Helicopter Association International guidelines[216].

[132] Mr M Hunt, an acoustics expert for the council, found the use of selected flight paths to reduce noise on the ground to be highly unusual but not unheard of. He was also concerned over the practicality of the paths suggested by Mr Park and how they could be imposed and enforced[217]. Mr Day, acoustic consultant to the Omaka Group, also found the approach unusual in that it moved flight paths so as to push the noise over existing residences to avoid noise on a future residential development[218]. This criticism was echoed by Mr Dodson, Managing Director of Marlborough Helicopters and holder of a Commercial Helicopter Pilot Licence. He described the noise abatement tracks as "clearly an inferior option from a noise abatement perspective and arguably is a less safe option"[219].

[133] Opinion as to the efficacy of the abatement paths was clearly divided. One reason is that no evaluation of the noise effects generated by flights along the abatement

---

212 Joint Statement of Acoustic Experts dated 21 August 2013 Exhibit 14.1 para 5.
213 D S Park, evidence-in-chief Annexure 3 figures 5 and 6 [Environment Court document 13].
214 D S Park, evidence-in-chief para 6.9 [Environment Court document 13].
215 D S Park, evidence-in-chief Annexure 3 figure 8 [Environment Court document 13].
216 D S Park, evidence-in-chief paras 6.10–6.15 [Environment Court document 13].
217 M J Hunt, evidence-in-chief paras 55 and 58 [Environment Court document 26].
218 C W Day, evidence-in-chief para 3.6 [Environment Court document 23].
219 O J Dodson, evidence-in-chief para 21 [Environment Court document 30].

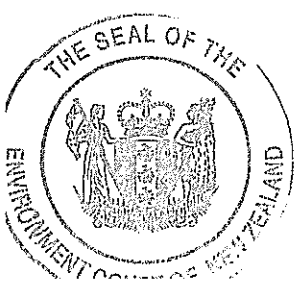
paths, and in particular on the residences along the river, has been carried out. The court has no power to introduce or enforce any flight paths and offers no view as to the appropriateness of the proposed paths at Omaka.

[134] The court received a number of 55 dB Ldn contours from the parties each derived under different assumptions. We list each contour received:

- Mr Hegley's 2028 contours: errors in the derivation of his first contour were corrected with a second contour being produced. Because both contours were for only 15 years in the future, they are disregarded.
- Mr Hegley's 2038 contour: this incorporates Mr Park's flight information for Runway 01 from one month of VHF recordings, annual growth rates of 2.7% and 10% for fixed wing aircraft and helicopter movements respectively, and uses the current flight paths from all runways. This contour crosses the site in an east/west direction with some 45% (9.6 ha)[220] of the site inside the contour.
- Dr Trevathan's 2028 contour: being only a 15 year projected contour this too is disregarded.
- Dr Trevathan's 2038 contours: all four contours are based on the three months (10 January – 8 April 2013) of recorded VHF data and a 2.7% growth rate for fixed wing aircraft movements. Two annual growth rates for helicopter movements, 6.6% and 7.7% (being 10% to 2028 and 4.4% for 2028 -2038), are used and for each there are contours with and without helicopter noise abatement paths.

[135] Dr Trevathan's contours all cross the site from east to west at varying distances from the southern boundary. The most intrusive contour is the 7.7% annual growth rate for helicopters with no abatement paths. It is at most 112.1 metres from the boundary[221] and encompasses 3.84 hectares. The least intrusive contour is the 6.6% annual growth rate for helicopters with abatement paths. This contour is not more than 42.9 metres from the boundary[222]. It encompasses 1.11 hectares.

[136] Dr Trevathan's contour assumed that helicopters would use "noise abatement flight paths" where helicopters alter course shortly after takeoff in order to reduce noise. At Omaka such a route would require a heading change of 10 degrees after takeoff from runway 01 to follow the Taylor River north and pass over an industrial area[223]. This flight path was used by Dr Trevathan in his modeling. It is a significant difference to Mr Hegley's modeling which used the current flight paths.



220 M J Hunt, evidence-in-chief para 62 [Environment Court document 26].
221 T P McGrail, Rebuttal evidence figure 7 [Environment Court document 9A].
222 T P McGrail, Rebuttal evidence figure 6 [Environment Court document 9A].
223 D S Park, evidence-in-chief para 6.20 [Environment Court document 13].

[137] The Omaka Aero Club has not implemented noise abatement paths for helicopters as an attempt to protect the amenity of its neighbours. Mr Dodson, of Marlborough Helicopters, states his company has a written policy to avoid overflying built areas whenever possible[224] but we received no indication that this policy is adopted by Omaka as an airport. Should the helicopter numbers increase at the suggested rate of 10% per annum there very likely will be reverse sensitivity effects arising from the helicopter tracks to the east which may force Omaka to adopt noise abatement paths (as suggested by Mr Park). Such paths operate at other New Zealand airports including Ardmore. Mr Park believes such paths should be developed for Omaka[225] in accordance with the Helicopter Association International guidelines and the Aviation Industry Association of New Zealand Code of Practice. The former includes a guideline[226] for daily helicopter operations which reads "Avoid noise sensitive areas altogether, when possible ... Follow unpopulated routes such as waterways".

[138] We see this as a possible way to protect residents' amenity and still let Omaka grow some of its operations as predicted out to 2038. There are differences of opinion[227] regarding the practicality and efficacy of the proposed tracks which we acknowledge. Further, as suggested by witnesses for the Omaka Group, those flight tracks might impose more noise on residents east of the Taylor River. We cannot ascertain from the noise contours (see the next paragraph) whether or not that is likely to be the case. Despite that we accept this approach in principle and thus regard Dr Trevathan's 2038 contour[228] as the best indication of the likely (but still inaccurate) location of the 55 dB Ldn contour in the vicinity of the site in 2038.

[139] The 55 dB Ldn contour was also plotted by Mr McGrail as a complete contour surrounding the aerodrome[229]. It encloses 349 existing residential properties east of the Taylor River. To obtain this contour Dr Trevathan assumed movements on runways other than 01 to be those recorded in a Hegley Acoustic Consultants' report which he attached to his evidence as Attachment 6. In the light of Mr Park's 2013 recording, Dr Trevathan was not confident about the correctness of these movements and thus believed the contour at places away from the site was incorrect[230]. He gave no indication of the magnitude or location of discrepancies from a "correct" contour.

Findings

[140] The 2013 55 dB Ldn noise contour produced by Dr Trevathan and not challenged by any witness will expand as airport activity increases. The court accepts Mr Day's view that the contour will reach the residential area east of the Taylor River

224 O J Dodson, evidence-in-chief para 17 [Environment Court document 30].
225 D S Park, evidence-in-chief para 6.16 [Environment Court document 13].
226 D S Park, evidence-in-chief para 6.15 [Environment Court document 13].
227 D S Park, evidence-in-chief para 6.2 [Environment Court document 13] and O S Dodson, evidence-in-chief para 21 {Environment Court document 30].
228 J W Trevathan, evidence-in-chief Attachment 9 [Environment Court document 14].
229 T P McGrail, Rebuttal evidence figure 4 [Environment Court document 9A].
230 J W Trevathan, evidence-in-chief para 6.2 [Environment Court document 14].

before it reaches the site[231]. It is the general view of the acoustic witnesses, and the court concurs, that there has not been sufficient work done to enable the location of a 55 dB Ldn noise contour for 2038 either near the site or for the airport as a whole. Not only is there insufficient information, but in any event there is considerable uncertainty as to the likely character of future use of the Omaka airfield.

[141] As a set the contours are sufficient to indicate to the court, the Omaka Group Aero Club and the council what may occur in the future. They will be a useful guide when formulating noise abatement procedures by way of a Noise Management Plan and possible protection within the District Plan.

Noise mitigation measures

[142] In addition to the use of abatement paths, Dr Trevathan provided a number of other suggestions for mitigating noise effects on the Colonial land[232]:

(i) aviation themed subdivision;
(ii) covenants;
(iii) situating houses so that outdoor areas are to the north;
(iv) reducing dwelling density on the southern boundary;
(v) mechanical ventilation;
(vi) acoustic insulation.

[143] Dr Trevathan suggested that the development could have an aviation theme[233], so that only people who liked airfield noise would choose to live there. As counsel for Omaka pointed out, this relies on people correctly identifying themselves as not being noise sensitive. Further, as the noise level is predicted to increase over time it is difficult to assess whether people will be able to cope with the noise in the future.

[144] The effectiveness of "no-complaints" covenants was discussed by Mr P Radich, an experienced lawyer in Marlborough, who gave evidence for Carlton Corlett Trust. While he accepted covenants are legally enforceable[234], Mr Radich was cautious about their effectiveness since they really just signal a problem rather than providing an effective solution[235]. He said that enforcement was dependent on how reasonable the covenanter thought it and whether they were the original covenanter[236]. Further, it is not council practice to enforce private covenants as such disputes are viewed as a private matter for the parties to determine themselves[237].

231 Transcript pp 514-515.
232 J W Trevathan, evidence-in-chief para 10.1 [Environment Court document 14].
233 J W Trevathan, evidence-in-chief para 10.11 [Environment Court document 14].
234 *South Pacific Tyres Ltd v Powerland (NZ) Ltd* [2009] NZRMA 58 (HC).
235 Transcript at 748 line 17.
236 Transcript at 749 line 7.
237 Transcript at 750 line 14.

[145] It was suggested each house on the CVL site could be situated to the south of its allotment so that the outdoor areas were further away, although Dr Trevathan acknowledged this would not protect residents from the noise of planes flying overhead[238].

[146] With regard to acoustic ventilation, Dr Trevathan accepted that if all houses on the Colonial land were outside the OCB any additional insulation would be unnecessary[239]. As for mechanical ventilation, this allows people to keep windows closed reducing internal noise levels. However, since the internal noise level is already satisfactory with open windows at the level of external noise likely to be experienced on the Colonial land (depending on where the future airnoise boundary is) mechanical ventilation is not needed[240].

[147] In our view the only mitigation which is desirable is the registration of "no-complaints" covenants. The other measures would simply add costs without gaining commensurate benefits. We have considered whether even the proposed covenants will give sufficient benefits to outweigh the transaction costs of imposing them. Counter-considerations are that, as we find elsewhere, residents east of the Taylor River are likely to be affected by noise from aircraft taking off and landing at Omaka airfield before residents on the site — yet, so far as we know, there are no covenants imposed on the Taylor River residents. Further, there are likely to be other limitations on helicopter numbers operating from Omaka (e.g. conflict with Woodbourne operations).

[148] Over-riding those concerns is that airports — even those with very small numbers of aircraft using them — are potentially subject to "noise" complaints. Such complaints may have a critical mass beyond which the legality (or existing use rights) can potentially become irrelevant in the face of political pressure. Further, there is a suggestion by the High Court that councils are responsible for ensuring that nuisance issues do not arise through activities it allows: *Ports of Auckland Limited v Auckland City Council*[241].

[149] Since CVL is volunteering the covenants, we consider they should be accepted.

5. Does PC59 give effect to the RPS and implement WARMP's objectives?

5.1 Giving effect to the RPS

[150] We judge that PC59 would give effect to the Regional Policy Statement. It would enhance the quality of life[242] by supplying houses while not causing adverse effects on the environment, and it would appropriately locate a type of activity

238 Transcript at 245 line 7.
239 J W Trevathan, evidence-in-chief para 10.1 [Environment Court document 14].
240 Transcript at 246 line 21.
241 *Ports of Auckland Limited v Auckland City Council* [1999] 1 NZLR 600 at 612 (HC).
242 Regional objective 7.1.2.

(residential development) which would cluster[243] with housing to the north and east, reflect the local character and provide the use of the river banks and beyond that, the Wither Hills.

[151] The air transport policy in the RPS — which focuses on Woodbourne — would not be affected.

5.2 Implementing the objectives of the WARMP

[152] The question for the court in this proceeding is whether the rezoning of a 21.4 hectare vineyard on the southern side of the Wairau Plains near Blenheim for 'residential' development, given its proximity to Omaka airfield, would promote the objectives and policies of the WARMP and the sustainable management of the district's natural and physical resources.

[153] The most relevant policy — (11.2.2)1.5 — requires that any expansion of the urban area of Blenheim achieves specified outcomes. We consider these in turn. In relation to achieving a compact urban form we note that development of the CVL would add to an existing part of Blenheim. In some ways it would tidy the existing rather anomalous residential enclaves along New Renwick Road and Richardson Avenue, both adjacent to the site.

[154] No issues were raised in relation to integrity of the road network. The site is adjacent to three roads, and can be suitably developed.

[155] As for maintenance of rural character and amenity values, the rural character of the site will be reduced, but the site is already rather anomalous in that respect since it has residential development to the north and east, and the business activities of the Omaka airfield and the Heritage Museum to the south.

[156] Appropriate planning for service infrastructure is an important issue. A significant feature of the site is that all services are readily available at a reasonable cost. The section 42 report presented to the council hearing stated "The development of the site is not constrained by the development of services"[244].

[157] Infrastructure must also be provided within the site to each dwelling. The site is essentially flat with a fall of 4 to 5 metres from southwest to northeast. This will allow the sewer and stormwater services to be easily staged throughout the development of the site[245]. Planning for this will necessarily be part of the overall development plan for the site and will produce no difficulties.

243 Regional policy 7.1.10.
244 T P McGrail, evidence-in-chief para 13 [Environment Court document 9].
245 T P McGrail, evidence-in-chief para 11 [Environment Court document 9].

[158] The 2010 Strategy assessed the site, along with nine other locations, for the provision of water, sewer and stormwater services. It found that "Development in this area can be connected to existing networks without upgrades of infrastructure"[246]. We conclude appropriate planning has been done for service infrastructure to the site and thus no further planning is necessary in this regard.

[159] Perhaps the key service infrastructure issue in the case — and a central issue in the proceeding — is the extent to which residential development of the site might restrain future development of the Omaka airfield. We discuss that in our conclusions below.

[160] No issue was raised in relation to productive soils.

[161] The Rural Environments section (Chapter 12) of the WARMP recognises the importance of the airport zone(s) and the explanatory note states that noise buffers surrounding the airport are the most effective means of protecting the airport's operation[247]. The RPS also requires that buildings and locations identified as having significant historical heritage value are retained[248] and as we have found Omaka airport to be a heritage feature this is relevant in terms of its protection, especially with reference to section 6(f) of the Act. We consider the covenant suggested as a mitigating measure by CVL can assist in that regard so that the heritage operation — flights of old aircraft — can continue and grow (within reason).

[162] While the objectives and policies of the WARMP give some protection to Omaka there is a "balance"[249] to be achieved with activities that might be affected by them. In summary we consider PC59 meets more objectives and policies (especially the important ones) than not, and thus represents integrated management of the district's resources.

5.3 Considering Plan Changes 64 to 71

[163] We consider the Plan Changes 64-71 are only relevant to the extent they show that the council has other solutions to the problem of supplying land for further residential development and we considered them earlier. We reiterate that these plan changes are at such an early stage in their development we should give them minimal weight.

246 SMUGS 2010 Summary for Public Consultation, p 14.
247 Wairau/Awatere Resource Management Plan 12.7.2, explanatory note at pp 12-23.
248 RPS objective 7.3.2.
249 M J Foster, evidence-in-chief para 4.14 [Environment Court document 27].

6. Does PC59 achieve the purpose of the RMA?

[164] In *Hawthorn*[250], the future state of the environment was considered in a land use context. The Court of Appeal concluded that[251]:

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

The future state of the environment includes the environment as it might be modified by permitted activities and by resource consents that have been granted where it appears likely those consents will be implemented. It does not include the effects of resource consents that may be made in the future. CVL submitted that, in a plan appeal context, this must extend to the prospect of plan changes or even plan reviews with entirely uncertain outcomes at some indeterminate time in the future[252]. CVL accepts there is a requirement to consider the future environment and has endeavoured to do so in its evidence using a predicted level of activity and effects associated with it. However, while the projections to 2038 will influence the resolution of the plan, CVL says the plan must also reflect other influences over those 25 years[253].

[165] Counsel for the Omaka Group submitted we should distinguish *Hawthorn* as concerning a resource consent application rather than a plan change. If the proposed airnoise boundary is to be taken into account as part of the environment the Omaka Group suggested that great care needs to be taken in assuming that airnoise and (outer control) boundaries will protect the community from noise and reverse sensitivity effects when there is currently no plan change proposed[254]. CVL argued that Omaka misses the point — section 5 applies to all functions under the RMA[255].

[166] The council submitted that, given the timing of PC59, before restrictions or protection are put in place for Omaka through a future plan change process, the planning environment as it is today is the appropriate reference. Mr Quinn submitted that the policy and planning framework of the WARMP:

- affords the district's airports, including Omaka, a high level of protection relative to land use aspirations around the airport;
- provides that an outer control boundary should be created for Omaka and specifically cites NZS 6805 and states that any 55 dBA Ldn noise contour must be surveyed in accordance with it; and

250 *Queenstown Lakes District Council v Hawthorn Estate Limited* (2006) 12 ELRNZ 299
251 *Queenstown Lakes District Council v Hawthorn Estate Limited* (2006) 12 ELRNZ 299 at [57]
252 Closing submissions for CVL, dated 21 October 2013 at [48].
253 Closing submissions for CVL, dated 21 October 2013 at [55].
254 Closing submissions for Omaka, dated 11 October 2013 at [11].
255 Closing submissions for CVL, dated 21 October 2013 at [54].

- allows expansion of the Omaka aerodrome as a permitted activity.

6.1 Sections 6 and 7 RMA

[167] Section 6 of the Act concerns matters of national importance. Only one paragraph in section 6 is relevant. Section 6(f) provides for the protection of historic heritage from inappropriate subdivision, use, and development and is relevant for two reasons. First, the three grass runways are claimed to be the longest surviving set in New Zealand. They were prepared in 1928 and have been used ever since. Secondly, there is the world-class collection of World War I aircraft and replicas, superbly displayed with other thematic memorabilia, at the Aviation Heritage Centre.

[168] We accept it is a matter of national importance to protect those heritage values, and to allow their responsible expansion. There was no evidence that residential activities on the site will cause reverse sensitivity effects on the Omaka airfield in the near future. The evidence did establish that a business as usual approach for the Omaka airfield as a whole might cause issues for residents of the CVL site and thus potential reverse sensitive effects (complaints) by 2039. But not all activities at the Omaka airfield have heritage value. In particular there are helicopter and other general aviation activities whose expansion will need to be carefully examined by the council as it makes its decision about an outer control boundary for the airfield. Given those circumstances, we hold that the heritage values of the airfield need not be affected by the plan change and so give this factor minimal weight in the overall weighing exercise.

[169] Section 7 of the Act sets out other matters the court is to have particular regard to when making its decision. Section 7(b) of the Act concerns the efficient use and development of natural and physical resources and we will consider it in the context of the section 32 analysis. Section 7(c) provides for the maintenance and enhancement of amenity values and section 7(f) is also relevant since it talks about maintenance and enhancement of the quality of the environment. Both these matters are covered by and subsumed in the objectives and policies in the district plan.

[170] Counsel for the Omaka Group suggested[256] that section 7(g) of the RMA could be relevant but there was no specific evidence about that. There are extensive grass flats on the Wairau Plains so we consider that that argument cannot get off the ground.

6.2 Section 5(2) RMA

[171] The ultimate purpose of any proposed plan or plan change under the RMA is to achieve the purpose of the RMA as defined in section 5 of the Act. In the case of a plan change (depending on its breadth) that purpose is usually subsumed in the greater detail and breadth of the operative objectives and policies which are not sought to be changed. That is broadly the situation in this proceeding as we have discussed already.

256 Closing submissions for Omaka para 172.

[172] In terms of section 5 of the RMA the proceeding comes down to this: we must weigh enabling of a potential small community of residents on the site in the near future (in a situation where there is a relative undersupply of houses) against the potential longer-term (post 2038) disenabling expansion of activities on the Omaka airfield as the aviation cluster would like. We have found that the evidence, that growth in activities which would need to be restricted is unlikely, is more plausible than the evidence of greater growth (e.g. to 35 helicopters operating from the airfield by 2038). While we have recognised above the superb heritage value represented by the grass airstrips and the Aviation Heritage Centre, those can be protected into the future without causing reverse sensitivity effects if the site is rezoned under PC59.

[173] We also take into account that it is possible that some limitation on, in particular, helicopter movements at Omaka airfield may be necessary in the future. However, it will not necessarily be as the result of complaints from residents of the site. On the evidence it is more likely to be caused by complaints from occupiers of the council's subdivision east of Taylor River, or as a result of restrictions imposed by CAA, in order to safeguard operations at Woodbourne.

[174] In any event we have found that the objectives and policies of WARMP favour acceptance of the PC59 rather than its refusal. Our provisional view is that PC59 should be approved. However, there are some further considerations.

7. Result

7.1 Having regard to the MDC decision

[175] In accordance with section 290A of the Act the court must have regard to the decision which is the subject of the appeal.

[176] The Commissioners' Decision deals with the site in two parts. "Area A" is outside a notional outer control boundary ("OCB") and Area B is within the OCB. In respect of the area inside the contour — Area B — the Commissioners concluded[257]:

> 122. We consider that Area B should not be rezoned to accommodate new residential development. Sufficient reasons for that conclusion are:
>
> (a) The Standard directs that new residential activity should not be located in the OCB;
>
> (b) The reverse sensitivity effects on the Omaka Aerodrome from new residential development will be serious and potentially imperil the present and future operations of the Omaka Aerodrome not least by demand by residents to limit aviation related activities;
>
> (c) New residential development will not achieve the settled WARMP goals as expressed in the following provisions:
> (i) Section 11.2.1, Objective 1;
> Section 12.7.2, Objective 1. Section 11.2.2, Objective 2.

257 Commissioners' Decision para 122 [Environment Court document 1.2].

(ii) Section 22.3, Policy 1.1
Section 23.4.1, Policy 23.4.1 and Section 12.7.2, Policies 1.2 and 1.3.

(d) By reason of (a) – (c) above MDC is not assisted by PPC 59 in carrying out its functions under RMA s 31(1)(a) and PPC 59 does not achieve the overarching purpose of the RMA of sustainable management.

[177] In respect of mitigation they decided[258]:

(a) That full noise insulation (not just of bedrooms) was required;

(b) That insulation would have been inadequate mitigation because it did not allow for natural airflow from open windows which is an adverse amenity effect;

(c) Noise insulation within the building fabric does not address wider amenity concerns;

(d) We do not support the use of no complaint methods in this context as an adequate mitigation method to achieve the social wellbeing of the community which is a key component of sustainability.

[178] While Area A is outside of the OCB and therefore potentially suitable for residential development the Commissioners identified the following issues[259]:

124. The difficulties are:

(a) the total urban design concept presented by CVL is based on the whole site being developed for new residential use;

(b) there was no urban design assessment of the appropriateness of development on Area A alone;

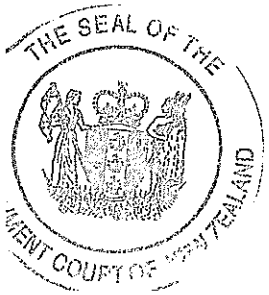
(c) there is no concept plan for Area A alone that can be used in order to ensure an appropriate planning outcome is achieved;

(d) it is unclear how the balance of the site (Area B) will be utilised in the long term. Conceivably it can be used for other purposes such as industrial development. An integrated solution will need to be carefully thought through and more detailed analysis undertaken.

[179] On balance the Commissioners considered that:

> ... the risk of approving new residential development on Area A by rezoning presents an unacceptable risk of poor strategic planning and lack of integrated development. A comprehensive strategic planning exercise is part of MDC's work stream and review of the WARMP and there is no pressing need for new residential land[260].

[180] The Commissioners' overall conclusion was that the application in its entirety should be declined[261].



258 Commissioners' Decision para 120 [Environment Commissioner document 1.2].
259 Commissioners' Decision para 124 [Environment Commissioner document 1.2].
260 Commissioners' Decision para 125 [Environment Commissioner document 1.2].
261 Commissioners' Decision para 126 [Environment Commissioner document 1.2].

7.2 Should the result be different from the council's decision?

[181] First, we have found the plan change meets more objectives and policies of the WARMP than not. This finding is in contrast to the Commissioners who found the goals of the WARMP would not be achieved.

[182] There was repeated reference in the evidence of the council's witnesses to PC59 not representing integrated management. That evidence reiterated the findings of the Commissioners' decision quoted above. We have taken special care to identify and consider the relevant objectives and policies of the district plan (the WARMP) and we find that PC59 is more likely than not to achieve most of the relevant objectives, and to do so in a generally integrated way.

[183] We also accept counsel for CVL's argument that the council is being inconsistent. Mr Davidson QC and Mr Hunt wrote[262]:

> If the Council is reliant on the notion that PC59 is a pre-emptive strike to a fully integrated process under the RMA then it [the Council] stands against the very process it utilised in Plan Changes 64 – 71. The importance of integrating Employment land use was not matched with any similar urgency or affirmative action.
>
> If Plan Changes 64 – 71 are thought to be fully integrated because they are incorporated as part of the final iteration of SMUGS then the same can be said of Colonial, which is expressly acknowledged to give effect to the Growth Strategy (with the only qualification that it be approved by the Environment Court).

[184] Second, the Commissioners' decision is predicated on the assumption that a (future) outer control boundary would cross the site dividing it into the two areas identified by the Commissioners as 'A' and 'B'. We do not consider that assumption is justified, because, as we have stated, the location of any future outer control boundary depends on a number of value judgements which we cannot (should not) make now.

[185] In fact, it was agreed by all parties that the noise contours provided to the Commissioners were for too short a time period and were erroneous. The 2038 timeline was agreed and the council accepted Mr Park's data as appropriate for projecting future noise levels. Dr Trevathan's 2038 contour with abatement paths is our preferred prediction although we accept it with due caution especially since we share Mr Park's scepticism that 30 helicopters will be using the Omaka airfield even by 2038.

[186] That analysis assumes that the Omaka airfield will continue to grow as it has in the recent past. However, as NZS 6805 recognises, there is a normative element to establishing where outer control boundaries should go. That exercise of judgement under the objectives and policies of the district plan and, ultimately, under section 5 of the RMA requires us to consider whether the Omaka airfield can, or should, develop at whatever pace supply (under the Aero Club's policies) and demand drive.

---

262 Final submissions for CVL paras 30 and 31 [Environment Court document 39].

[187] It seems probable (and appropriate) that some constraints in growth of the Omaka airfield — especially in helicopter numbers — will be appropriate due to two constraints independent of development of the site. These are the recent residential development east of the Taylor River, and the requirements of the Woodbourne airfield as it grows. Mr Day stated[263] that any 55 dB Ldn contour would expand on to the land east of the Taylor River well before it reaches the site.

[188] Third, the Commissioners were influenced by the need for "employment" land. While the obvious alternatives for the land are between the proposed Residential zoning and the existing Rural zone, we accept that the realistic alternatives for the site are residential versus some kind of "employment" use in the sense discussed earlier.

[189] We have found that industrial zoning of the site is likely to be an inefficient use of the resource. Nor would that inefficiency be sufficiently remedied by consideration of the Omaka airfield.

[190] It would (also) be inefficient to block residential development of the site because of perceived future reverse sensitivities of the Omaka airfield sometime after 2030. That is for two reasons: first, the best estimate of the 55 dB Ldn contour in 2038 depends on helicopter growth (30 helicopters operating out of the airfield) which we consider is unlikely; and secondly, there are more than likely to be other constraints[264] on such growth of Omaka airfield use in any event — for example complaints from residents of the new subdivision east of Taylor River, and operational demands of the Woodbourne airport as its operations increase in size and frequency.

7.3 Outcome

[191] Weighing all matters in the light of all the relevant objectives and policies, we conclude comfortably that the scales come down on the side of PC59 in general terms. We conclude that the purpose of the RMA and of the WARMP are better met by rezoning the site part as Urban Residential 1 and part as Urban Residential 2 as shown in the notified application subject to any adjustments for services as described by Mr Quickfall in his evidence.

[192] Two new objectives were proposed by CVL for the new section 23.6.1 of the WARMP. Those objectives are beyond jurisdiction as we discussed earlier. However, they are well-intentioned, and the second in particular seeking to introduce urban design principles — is potentially very useful. We consider they can be introduced as policies.

[193] We generally endorse the amendments to the policies and rules as stated in Mr Quickfall's Appendix 4 (subject to the *vires* deletions discussed at the beginning of this

263 Transcript pp 514-515.
264 Transcript p 160 lines 20-30.

decision) but we expect the parties to agree on the amended policies and rules in the light of these Reasons. For the avoidance of doubt we record that we regard the best practice urban design principles identified in Mr Quickfall's Appendix 4 as important and expect them to be written into PC59 (since no party opposed them) although we doubt whether they should be in "section 23.6" since that already exists in the WARMP. Since we have some doubts as to our jurisdiction under section 290, we will make an order under section 293 in respect of the urban design principles in order they may be introduced as policies, rather than as objectives. In case it assists we see these as implementing the urban growth objectives in the WARMP and thus tentatively suggest they should be located there.

For the court:

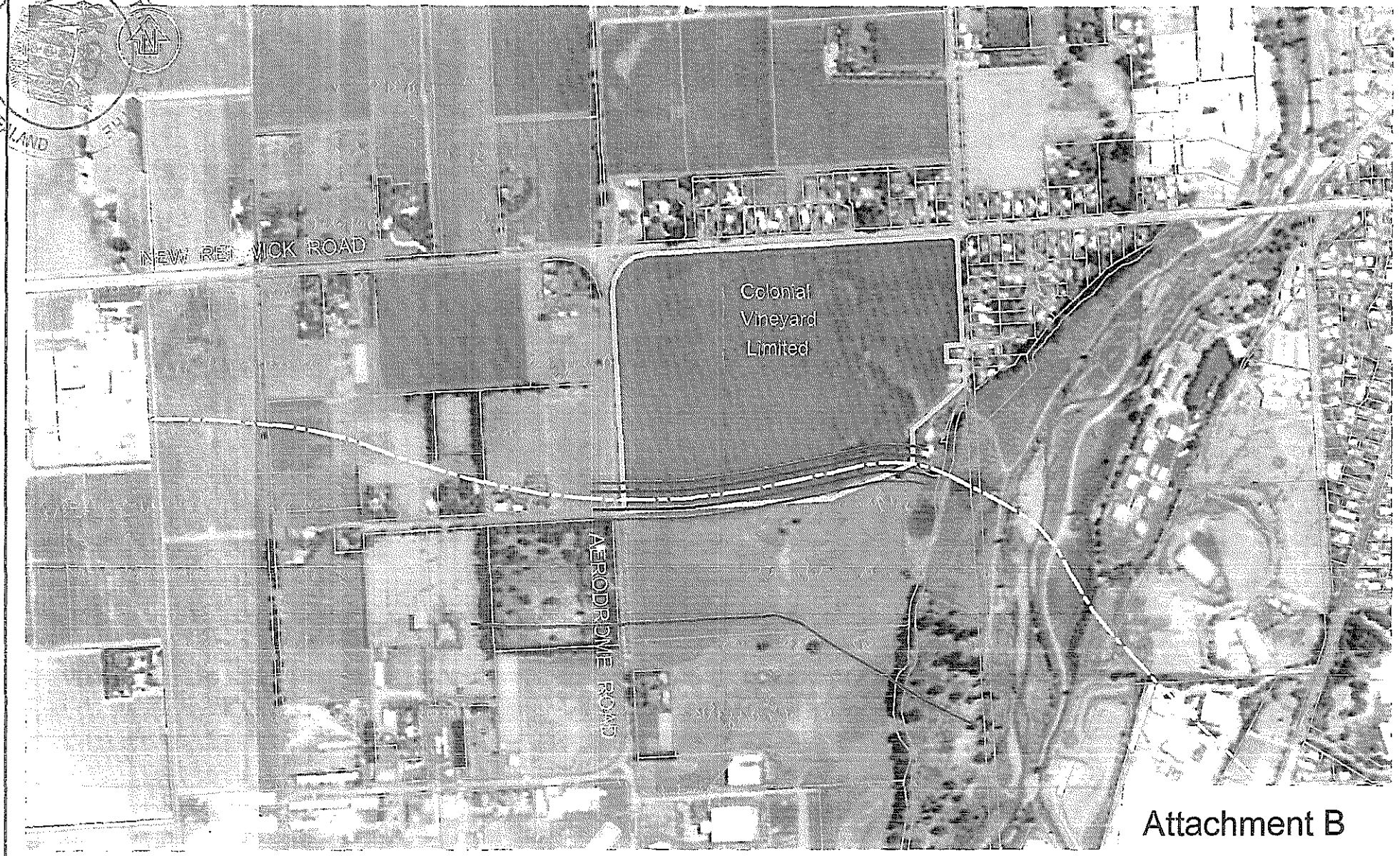
J R Jackson
Environment Judge

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

A J Sutherland
Environment Commissioner

Attachment 1: Site Map.

JacksojJud_Rule\d\Colonial Vineyards v Marlborough DC.doc



Attachment B

Ayson and Partners Ltd
REGISTERED PROFESSIONAL SURVEYORS
Davidson Ayson House
4 Nelson Street, P.O. Box 256
Blenheim, New Zealand
Ph 03 579 2099, Fax 03 578 7028
Email: office@aysonandpartners.co.nz
www.aysonandpartners.co.nz
Consultants in Surveying, Resource Management, Subdivision and Land Development

SUPPLEMENTARY EVIDENCE OF JEREMY TREVATHAN

2038 55dB Ldn Noise Exposure Contour. Based on updated flight movement data provided by Dave Park including helicopter abatement tracks

- Change to contour if 2013 fixed wing *and* helicopter flight numbers increased or decreased by 5 %
- Change to contour if 2013 fixed wing *and* helicopter flight numbers increased or decreased by 10 %
- Approximate 2013 55 dB Ldn contour

SCALE (A3)	JOB NUMBER	
1:6000	13217	
DATE 09.09.2013	SHEET 25	ISSUE A
LB GW / CHECK TM		

0 10 20 30 40 50 60 70 80 90 100mm

J:\13200\13217-Colonial Env Court\AutoCAD\13217 NP 3E & 4E.dwg

ATTACHMENT 1

BEFORE THE ENVIRONMENT COURT

Decision No. A 078/2008

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of appeals against the decision of the North Shore City Council on Proposed Plan Change 6 and Variation 66 to the North Shore District Plan under clause 14(1) of the First Schedule to the Act

BETWEEN LONG BAY-OKURA GREAT PARK SOCIETY INCORPORATED

(ENV-2006-AKL-894)

AUCKLAND REGIONAL COUNCIL

(ENV-2006-AKL-901)

LANDCO LIMITED

(ENV-2006-AKL-902)

S B & L A SINGLETON

(ENV-2006-AKL-903)

Appellants

AND NORTH SHORE CITY COUNCIL

Respondent

Hearing: Auckland on 16-20, 23-27, 30 and 31 July, 1-3 August and 9-11 and 15-19 October 2007
Site inspections on 8 October and 12 November 2007
Final submissions received 23 May 2008

Court: Environment Judge J R Jackson
Environment Commissioner M P Oliver
Environment Commissioner R M Dunlop

Appearances: Messrs A Galbraith QC, D Kirkpatrick and V Rive for Landco Limited
Mr M Williams for Long Bay-Okura Great Park Society Incorporated
Ms J Campbell for the Auckland Regional Council
Dr R Somerville QC, Mr P McNamara, and Ms N Tahana for North Shore City Council
Ms H Andrew, L Brookes, R Devine and L Crone for New Zealand Historic Places Trust (as a section 274 party)
Mr J Lewis for Okura Environmental Group (as a section 274 party)
Ms J Sherard for Ngati Whatua Ngä Rima O Kaipara (as a section 274 party)

Date of issue: 16 July 2008

INTERIM DECISION

A: Under section 290(2) of the Resource Management Act 1991 the Environment Court amends the decision by the North Shore City Council in relation to Plan Change 6 to its operative district plan by:

(1) allowing in part the Appeal ENV-2006-AKL-894 by Long Bay-Okura Great Park Society Incorporated but otherwise refusing the relief sought;

(2) allowing in part Appeal ENV-2006-AKL-901 by Auckland Regional Council but otherwise refusing the relief sought;

(3) allowing in part Appeal ENV-2006-AKL-902 by Landco Limited but otherwise refusing the relief sought.

B: Appeal ENV-2006-AKL-903 by S B and L A Singleton is adjourned for further submissions and evidence.

C: Under section 290(2) of the Resource Management Act the Environment Court amends the North Shore City Council's decision to which the appeals relate as stated in the reasons for this Decision;

D: Pursuant to section 293 of the RMA, the Court directs that the NSCC:

(1) consult with Landco and the other parties and submit to the Court:

(a) a draft structure plan Land Use Strategy map giving effect to the findings and judgements in this Interim Decision by 30 November 2008;

(b) a final version of the Land Use Strategy (17B.1.3) and the Land Use Strategy map by 31 March 2009;

(2) if agreement between the parties cannot be reached on the Land Use Strategy and final Land Use Strategy map, then leave is reserved to the parties to refer any outstanding issues – including any issue about the functionality of the Strategy and implementing map – to the Court, so long as the issue does not attempt to breach the spirit and intent of this Interim Decision;

(3) after completion of step (1) and, if necessary step (2), the NSCC is to further consult with Landco and the other parties about amending the balance of Plan Change 6 in accordance with:

(a) the spirit and intent of this Interim Decision;

(b) the Land Use Strategy and Land Use Strategy map resolved under (1) and (2) above;

(c) Part 5 of this decision;

(4) if agreement cannot be reached under (3) leave is reserved to apply to the Court for a hearing in respect of those matters.

E: Leave is reserved:

(1) to any party to apply for a conference in respect of outstanding issues with respect to the Upper Valley;

(2) to any party to apply for further or other directions in case:

(a) the Court has overlooked anything; or

(b) a timetable needs to be changed.

F: Costs are reserved.

REASONS FOR DECISION

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

for further evidence and submissions if the parties consider it is necessary to have this issue resolved in the light of our substantive determination. For the purposes of that determination we will assume we have jurisdiction to consider evidence about a possible supermarket within the LBSPA. Any jurisdictional limits on the size of its floor plan and activity status are matters we can resolve later (if necessary).

0.6 Procedural issue: The requirements of the RMA when preparing a district plan

0.61 Introduction

[30] Because these proceedings are about a plan change we must first identify the legal matters under which we must consider the evidence. As a preliminary point we record that the parties agreed that these appeals should be resolved under the Resource Management Act 1991 in its form prior to[43] the Resource Management Amendment Act 2005 because Variation 66 and Plan Change 6 were notified prior to 9 August 2005 (the date that the 2005 Amendment came into force).

0.62 Listing the requirements

[31] Counsel for Landco suggested that to identify the relevant considerations we should apply the 'tests' in *Eldamos Investments Limited v Gisborne District Council*[44]:

A. An objective in a District Plan is to be evaluated by the extent to which:
   1. it is the most appropriate way to achieve the purpose of the Act (s 32(3)(a)); and
   2. it assists the territorial authority to carry out its functions in order to achieve the purpose of the Act (s 72): and
   3. it is in accordance with the provisions of Part 2 (s 74(1)).

B. A policy, rule, or other method in a District Plan is to be evaluated by whether:
   1. it is the most appropriate way to achieve the objectives of the plan (s 32(3)(b)); and
   2. it assists the territorial authority to carry out its functions in order to achieve the purpose of the Act (s 72):
   3. (if a rule) it achieves the objectives and policies of the plan (s 76(1)(b)).

---

43 See section 131(1) of the Resource Management Amendment Act 2005.
44 W47/2005 at para 128.

[32] Dr Somerville QC of counsel for the NSCC, submitted in closing that *Eldamos* omits:

> - The requirement under section 75(2), as it was prior to its amendment in 2005, for the district plan to give effect to any national policy statement or New Zealand coastal policy statement, and not be inconsistent with any regional policy statement or regional plan for any matter specified in section 30(1);
> - The evaluation under section 32 needing to take into account the matters in section 32(4)(a) and (b).

That may not be completely fair to the Court in *Eldamos*, since the most obvious reading of the quoted paragraph is that it is simply an attempt to restate the requirements of section 32 of the Act. However, we accept that there is some unnecessary repetition in subparagraphs 2 of each of the *Eldamos* tests; and that *Eldamos* omits the reference to benefit/cost and risk analyses. With respect that makes the *Eldamos* 'tests' rather incomplete since everything else in section 32 is at best uninformative and merely states one requirement of the fuller list of considerations in section 74.

[33] We have other concerns with any purported application of *Eldamos* which suggests (contrary to *Eldamos* itself) that it gives a full summary of the statutory tests to be considered in the preparation of a district plan (or plan change). First such an approach attempts to fit the different, substantive, and arguably higher-order directions of sections 72, 74 and 76 into a section 32 (procedural) evaluation which is rather inappropriate. Secondly, if a full summary of all the statutory tests (i.e. not just section 32) is desired then it is preferable to start at the top end of the hierarchy since those objectives and policies influence what comes after. Thirdly, both *Eldamos* and section 74 omit some of the relevant considerations.

[34] A relatively comprehensive summary of the mandatory requirements[45] for district plans or plan changes – with the different statutory tests emphasised for convenience – is:

45 Noting again that this is under the pre-2005 Amendment version of the RMA.

A. General requirements

1. A district plan (change) should be designed to **accord with**[46], and assist the territorial authority **to carry out** – its functions[47] so as to achieve, the purpose of the Act[48].

2. When preparing its district plan (change) the territorial authority **must give effect to** any national policy statement or New Zealand Coastal Policy Statement[49].

3. When preparing its district plan (change) the territorial authority shall:

   (a) **have regard to** any proposed regional policy statement[50];

   (b) **not be inconsistent with**[51] any operative regional policy statement[52].

4. In relation to regional plans:

   (a) the district plan (change) must **not be inconsistent with** an operative regional plan for any matter specified in section 30(1) [or a water conservation order][53]; and

   (b) **must have regard to** any proposed regional plan on any matter of regional significance etc[54];

5. When preparing its district plan (change) the territorial authority must also:

   - **have regard to** any relevant management plans and strategies under other Acts, and to any relevant entry in the Historic Places Register and to various fisheries regulations[55]; and to consistency with plans and proposed plans of adjacent territorial authorities[56];

---

46 Section 74(1) of the Act.
47 As described in section 31 of the Act.
48 Sections 72 and 74(1) of the Act.
49 Section 75(3)(a) and (b) of the Act.
50 Section 74(2) of the Act.
51 Note: under the Resource Management Amendment Act 2005 section 75(3)(c) now requires an operative RPS to be given effect to in a district plan.
52 Section 75(3)(c) of the Act.
53 Section 75(5) of the Act.
54 Section 74(2)(a) of the Act.
55 Section 74(2)(b) of the Act.
56 Section 74(2)(b) of the Act.

- **take into account** any relevant planning document recognised by an iwi authority; and
- not have regard to trade competition[57];

6. The district plan (change) must be prepared **in accordance with** any regulation[58] (there are none at present);
7. The formal requirement that a district plan (change) must[59] also state its objectives, policies and the rules (if any) and may[60] state other matters.

B. Objectives [the section 32 test for objectives]

8. Each proposed objective in a district plan (change) **is to be evaluated** by the extent to which it is the most appropriate way to achieve the purpose of the Act[61].

C. Policies and methods (including rules) [the section 32 test for policies and rules]

9. The policies are to **implement** the objectives, and the rules (if any) are to **implement** the policies[62];
10. Each proposed policy or method (including each rule) is to be examined, **having regard to its efficiency and effectiveness**, as to whether it is the most appropriate method for achieving the objectives[63] of the district plan **taking into account**:
    (a) the benefits and costs of the proposed policies and methods (including rules); and
    (b) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods[64].

---

57 Section 74(3) of the Act.
58 Section 74(1) of the Act.
59 Section 75(1) of the Act.
60 Section 75(2) of the Act.
61 Section 32(3)(a) of the Act.
62 Section 75(1)(b) and (c) of the Act (also section 76(1)).
63 Section 32(3)(a) of the Act.
64 Section 32(4) of the Act.

D. Rules

11. In making a rule the territorial authority must **have regard to** the actual or potential effect of activities on the environment[65].

E. Other statutes:

12. Finally territorial authorities may be required to comply with other statutes. Within the Auckland Region they are subject to:
    - the Hauraki Gulf Maritime Park Act 2000;
    - the Local Government (Auckland) Amendment Act 2004.

[35] We discuss the general considerations raised by A in the remainder of this part of this decision and again, where relevant, in Part 4.0 (overall consideration). We comment on B below. We also discuss aspects of B and C in Part 3.0 (Predictions) of this decision and then again in our overall consideration. Consideration of D (Rules) is largely premature in this interim decision. E (other statutes) is discussed in Part 2.0 (the law).

0.63 The territorial authority's functions

[36] Most of the territorial authority's functions specified in section 31 of the RMA are relevant in these proceedings. Integrated management[66] of effects is the core of these proceedings, with the other functions of the Council examples of that: there are natural hazards[67] – the steep slip-prone slopes – to consider; maintenance of the diversity[68] of indigenous plants and animals is an issue; as is (to a small extent) the mitigation of noise[69]. Finally, both proposed structure plans propose the control of subdivision[70] to carry out the Council's functions.

---

65 Section 76(3) of the Act.
66 Section 31(1)(a) of the RMA.
67 Section 31(1)(b)(i) of the RMA.
68 Section 31(1)(b)(iii) of the RMA.
69 Section 31(1)(d) of the RMA.
70 Section 31(2) of the RMA.

0.64 Plan change is to accord with and achieve the purpose of the RMA

[37] Particular problems arise in the context of a plan change – such as Plan Change 6 we are considering – as to how it is to 'accord with'[71] and 'achieve'[72] the purpose of the Act where either the operative district plan contains (settled) objectives which the plan change does not seek to alter, or the district plan has a hierarchy of objectives and the plan change only seeks to change or add lower-order objectives.

[38] Jurisdictional problems may arise if a plan change does not seek to add any new objectives because then a submission seeking a new objective may not be 'on' the plan change – see *Canterbury Regional Council v Christchurch International Airport Limited*[73].

[39] Where there is a hierarchy of settled objectives, policies and methods there are two extreme possibilities. At one end of the continuum is the situation where none of the settled objectives and policies are proposed to be amended by the plan change. In that case they may not properly be proposed to be changed in a submission. Where there are higher level settled objectives then we agree with *Suburban Estates Limited v Christchurch City Council*[74] that Part 2 RMA considerations are largely subsumed in those settled objectives and policies of the district plan. At the other extreme is the position where the variation or plan change is clearly setting off in a direction of its own with different objectives and policies. In that case, as the Planning Tribunal (as the Environment Court was then called) stated in *Kennedys Bush Road Neighbourhood Association v Christchurch City Council*[75]:

> It must ... be remembered at all times when considering [Transitional and Proposed District] plans, that these proceedings relate to a change to those plans and therefore such a change, if considered otherwise desirable, should not be arbitrarily rejected merely because it may conflict with some arguable policy or objective which may at first sight appear to apply to it.

---

71 Section 74(1) of the RMA.
72 Section 32(3)(a) of the RMA.
73 High Court, Christchurch, William Young J.
74 Decision C217/2001 at paragraphs [36] and [40].
75 Decision W63/1997 at p. 22.

We consider that principle, with the word 'arbitrarily' omitted as (we hope) unnecessary, is correct.

[40] This case is intermediate between those positions although in our view closer to the *Suburban Estates Limited* end of the continuum because (as will appear) submitters have not tried to, and probably could not – on the *Clearwater* principle – have acquired jurisdiction to, amend objectives and policies at a sufficiently high level in the district plan to carve out a completely separate, stand-alone plan change. That means we need to discuss the scheme of the district plan in some detail.

[41] There are further complications in this case arising out of other legislation – not the RMA – which make it unusual. We are faced with two sets of competing nearly 'settled' higher level objectives and policies. First there are the objectives and policies in the operative district plan. Secondly there are those contained in other plan changes which have not yet been approved or notified as operative, which is a scenario we do not think the RMA or its First Schedule ever contemplated. We will discuss both sets of higher-level objectives and policies in due course.

0.65 Section 32 of the Act

[42] Unlike local authorities[76] the Environment Court does not have an express duty under section 32 to consider alternatives, benefits and costs. However, Parliament has stated that the Court is 'not preclude[d]'[77] from taking into account the section 32 matters. As a matter of consistency with local authorities and out of respect for their reasoned decisions we consider it is usually desirable for the Environment Court also to carry out a section 32 evaluation to the extent justified by the evidence.

[43] Section 32 states (relevantly):

76 See section 32(1)(c) of the RMA.
77 Section 32A(2).

32 Consideration of alternatives, benefits, and costs

(1) In achieving the purpose of this Act, before a proposed plan, proposed policy statement, change, or variation is publicly notified, a national policy statement or New Zealand coastal policy statement is notified under section 48, or a regulation is made, an evaluation must be carried out by –

...

(c) the local authority, for a policy statement or a plan ...

(2) A further evaluation must also be made by –

(a) a local authority before making a decision under clause 10 ...

(3) An evaluation must examine –

(a) the extent to which each objective is the most appropriate way to achieve the purpose of this Act; and

(b) whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives.

(4) For the purposes of this examination, an evaluation must take into account –

(a) the benefits and costs of policies, rules, or other methods; and

(b) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods.

(5) The person required to carry out an evaluation under subsection (1) must prepare a report summarising the evaluation and giving reasons for that evaluation.

(6) The report must be available for public inspection at the same time as the document to which the report relates is publicly notified or the regulation is made.

Significant changes were made to section 32 by the RMAA 2003, including introduction of the concept of risk. But before we turn to the subject of risk we must point out a peculiarity of the drafting of the new section.

[44] Subsection (3) states that an evaluation must examine certain matters (which are different) in relation to:

(a) each objective; and

(b) 'the policies, rules or other methods'.

The curiosity is that while section 32(4) appears to go on and state what is required of each examination or evaluation, on a closer reading of subsection (4) it only refers to

'policies, rules [and] methods', not to objectives. We infer, despite the apparent equality of subsection (4) with (3), that Parliament intended subsection (4) to be read as if it were a qualification of subsection 3(b) only. That is, no cost/benefit or risk analysis (see below) appears to be required in the evaluation of proposed objectives. Summarising the new section 32(3) and (4) to this point in relation to objectives we hold:

(1) they do not require (or preclude) a local authority (or the Environment Court) carrying out a cost/benefit and/or risk analysis of the objectives; but

(2) each objective needs to be examined as to whether it is the most appropriate way to achieve the purpose of the Act or, in these proceedings, the purpose of the settled higher order objectives.

Risk analysis

[45] The risk analysis required by section 32 refers back to the definition of 'effect' in section 3 of the Act. The word includes[78]:

...

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

The conjunction of 'low probability' and 'high potential impact' strongly suggests the concept of risk because the relationship between probabilities of an effect and its consequences or costs is incorporated in the definition of 'risk'. The relationship can be expressed as a simple product:

Risk = Probability of an effect X Cost of consequences.

So the RMA requires local authorities to examine both the probability of an effect and its consequences or costs (i.e. the risk).

78 Section 3 of the Resource Management Act 1991.

[46] Rather than describing the evaluation of probabilities as "fact-finding", it is preferable in our view to describe it as risk assessment. That follows quite neatly from the definition of 'effect' in section 3. It is also, as we have seen, appropriate under section 32 of the RMA with its reference to risk. Accordingly we hold that assessing the probability of each alleged effect and its consequences is a separate and necessary step in the Court's judicial functions under section 32 as well as for the reasons we discuss in Part 3.0. We consider the evaluation required by section 32 – to the extent we can on the evidence we were given – in Part 4 of this decision.

Palmerston North City Council v Motor Machinists Ltd

High Court Palmerston North CIV 2012-454-0764; [2013] NZHC 1290
13, 20 March; 31 May 2013
Kós J

Resource management — Appeals — Proposed district plan change — Whether submission "on" a plan change — Whether respondent's submission addressed to or on the proposed plan change — Procedural fairness — Potential prejudice to people potentially affected by additional changes — Whether respondent had other options — Resource Management Act 1991, ss 5, 32, 43AAC, 73, 74, 75 and 279 and sch 1; Resource Management (Simplifying and Streamlining) Amendment Act 2009.

The Council notified a proposed district plan change (PPC1). It included the rezoning of land along a ring road. Four lots at the bottom of the respondent's street, which ran off the ring road, were among properties to be rezoned. The respondent's land was ten lots away from the ring road. The respondent filed a submission that its land too should be rezoned. The Council said the submission was not "on" the plan change, because the plan change did not directly affect the respondent's land. The Environment Court did not agree. The Council appealed against that decision.

Held: (allowing the appeal)

The submission made by the respondent was not addressed to, or "on", PPC1. PPC1 proposed limited zoning changes. All but a handful were located on the ring road. The handful that were not on the ring road were to be found on main roads. In addition, PPC1 was the subject of an extensive s 32 report. The extension of the OBZ on a spot-zoing basis into an isolated enclave within Lombard Street would have reasonably required s 32 analysis to meet the expectations of s 5 of the Act. It involved more than an incidental extension of the proposed rezoning. In addition, if incidental extensions of this sort were permitted, there was a real risk that people directly or potentially directly affected by additional changes would be denied an effective opportunity to respond as part of a plan change process. There was no prejudice to the respondent because it had other options including submitting an application for a resource

consent, seeking a further public plan change, or seeking a private plan change under sch 1, pt 2 of the Act (see [47], [49]).

Clearwater Resort Ltd v Christchurch City Council HC Christchurch AP34/02, 14 March 2003 approved.

Other cases mentioned in judgment

Countdown Properties (Northlands) Ltd v Dunedin City Council [1994] NZRMA 145 (HC).

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

Halswater Holdings Ltd v Selwyn District Council (1999) 5 ELRNZ 192 (EnvC).

Naturally Best New Zealand Ltd v Queenstown Lakes District Council EnvC Christchurch C49/2004, 23 April 2004.

Option 5 Inc v Marlborough District Council (2009) 16 ELRNZ 1 (HC).

Appeal

This was an appeal by the Palmerston North City Council against a decision of the Environment Court in favour of the respondent, Motor Machinists Ltd.

JW Maasen for the appellant.

B Ax in person for the respondent.

KÓS J. [1] From time to time councils notify proposed changes to their district plans. The public may then make submissions "on" the plan change. By law, if a submission is not "on" the change, the council has no business considering it.

[2] But when is a submission actually "on" a proposed plan change?

[3] In this case the Council notified a proposed plan change. Included was the rezoning of some land along a ring road. Four lots at the bottom of the respondent's street, which runs off the ring road, were among properties to be rezoned. The respondent's land is ten lots away from the ring road. The respondent filed a submission that its land too should be rezoned.

[4] The Council says this submission is not "on" the plan change, because the plan change did not directly affect the respondent's land. An Environment Court Judge disagreed. The Council appeals that decision.

Background

[5] Northwest of the central square in the city of Palmerston North is an area of land of mixed usage. Much is commercial, including pockets of what the public at least would call light industrial use. The further from the Square one travels, the greater the proportion of residential use.

[6] Running west-east, and parallel like the runners of a ladder, are two major streets: Walding and Featherston Streets. Walding Street is part of a ring road around the Square.[1] Then, running at right angles between

---

1 Between one and three blocks distant from it. The ring road comprises Walding, Grey, Princess, Ferguson, Pitt and Bourke Streets. See the plan excerpt at [11].

Walding and Featherston Streets, like the rungs of that ladder, are three other relevant streets:

(a) *Taonui Street:* the most easterly of the three. It is wholly commercial in nature. I do not think there is a house to be seen on it.
(b) *Campbell Street:* the most westerly. It is almost wholly residential. There is some commercial and small shop activity at the ends of the street where it joins Walding and Featherston Streets. It is a pleasant leafy street with old villas, a park and angled traffic islands, called "traffic calmers", to slow motorists down.
(c) *Lombard Street:* the rung of the ladder between Taonui and Campbell Streets, and the street with which we are most concerned in this appeal. Messrs Maassen and Ax both asked me to detour, and to drive down Lombard Street on my way back to Wellington. I did so. It has a real mixture of uses. Mr Ax suggested that 40 per cent of the street, despite its largely residential zoning, is industrial or light industrial. That is not my impression. Residential use appeared to me considerably greater than 60 per cent. Many of the houses are in a poor state of repair. There are a number of commercial premises dotted about within it. Not just at the ends of the street, as in Campbell Street.

MML's site

[7] The respondent (MML) owns a parcel of land of some 3,326 m^2. It has street frontages to both Lombard Street and Taonui Street. It is contained in a single title, incorporating five separate allotments. Three are on Taonui Street. Those three lots, like all of Taonui Street, are in the outer business zone (OBZ). They have had that zoning for some years.

[8] The two lots on Lombard Street, numbers 37 and 39 Lombard Street, are presently zoned in the residential zone. Prior to 1991, that land was in the mixed use zone. In 1991 it was rezoned residential as part of a scheme variation. MML did not make submissions on that variation. A new proposed district plan was released for public comment in May 1995. It continued to show most or all of Lombard Street as in the residential zone, including numbers 37 and 39. No submissions were made by MML on that plan either.

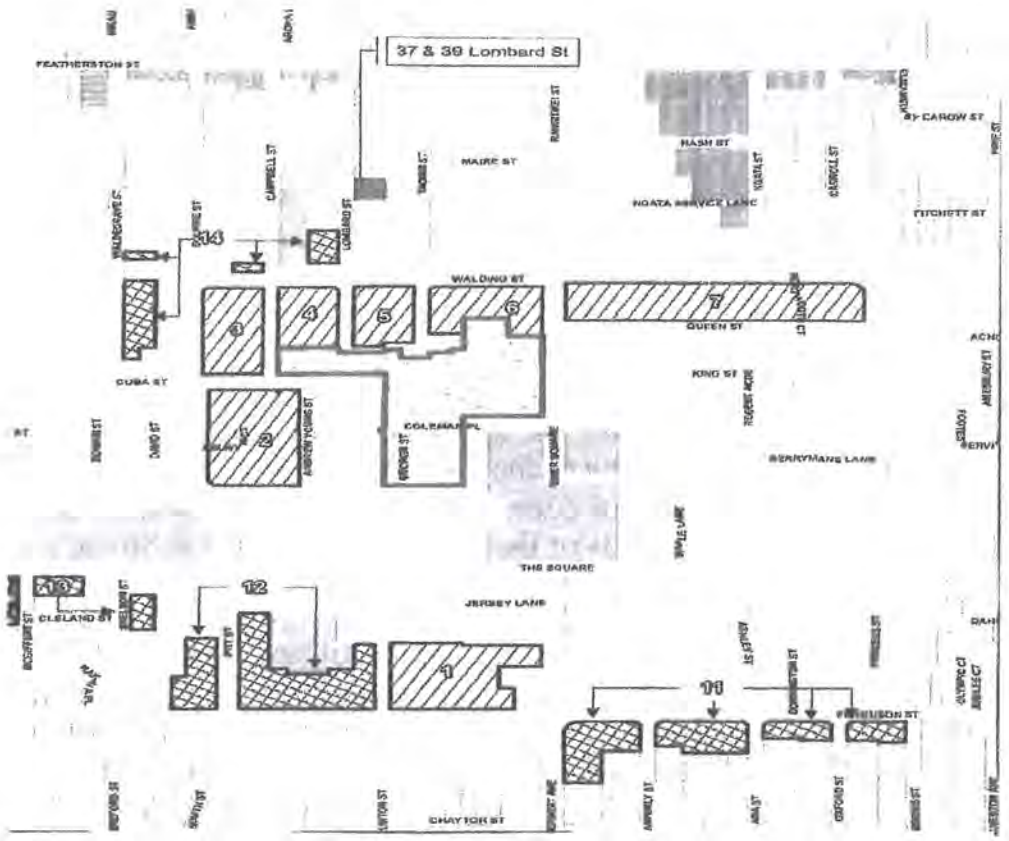
[9] MML operates the five lots as a single site. It uses it for mechanical repairs and the supply of automotive parts. The main entry to the business is on Taonui Street. The Taonui Street factory building stretches back into the Lombard Street lots. The remainder of the Lombard Street lots are occupied by two old houses. The Lombard Street lots are ten lots away from the Walding Street ring road frontage.

Plan change

[10] PPC1 was notified on 23 December 2010. It is an extensive review of the inner business zone (IBZ) and OBZ provisions of the District Plan. It proposes substantial changes to the way in which the two business zones manage the distribution, scale and form of activities. PPC1 provides for a less concentrated form of development in the OBZ, but

does not materially alter the objectives and policies applying to that zone. It also proposes to rezone 7.63 ha of currently residentially zoned land to OBZ. Most of this land is along the ring road.

[11] Shown below is part of the Council's decision document on PPC1, showing some of the areas rezoned in the area adjacent to Lombard Street.



[12] As will be apparent[2] the most substantial changes in the vicinity of Lombard Street are the rezoning of land along Walding Street (part of the ring road) from IBZ to OBZ. But at the bottom of Lombard Street, adjacent to Walding Street, four lots are rezoned from residential to OBZ. That change reflects long standing existing use of those four lots. They form part of an enterprise called Stewart Electrical Limited. Part is a large showroom. The balance is its car park.

MML's submission

[13] On 14 February 2011 MML filed a submission on PPC1. The thrust of the submission was that the two Lombard Street lots should be zoned OBZ as part of PPC1.

[14] The submission referred to the history of the change from mixed use to residential zoning for the Lombard Street lots. It noted that the current zoning did not reflect existing use of the law, and submitted that the entire site should be rezoned to OBZ "to reflect the dominant use

---

2 In the plan excerpt above, salmon pink is OBZ; buff is residential; single hatching is proposed transition from IBZ to OBZ; double hatching is proposed transition from residential to OBZ.

of the site". It was said that the requested rezoning "will allow for greater certainty for expansion of the existing use of the site, and will further protect the exiting commercial use of the site". The submission noted that there were "other remnant industrial and commercial uses in Lombard Street" and that the zoning change will be in keeping with what already occurs on the site and on other sites within the vicinity.

[15] No detailed environmental evaluation of the implications of the change for other properties in the vicinity was provided with the submission.

Council's decision

[16] There were meetings between the Council and MML in April 2011. A number of alternative proposals were considered. Some came from MML, and some from the Council. The Council was prepared to contemplate the back half of the Lombard Street properties (where the factory building is) eventually being rezoned OBZ. But its primary position was there was no jurisdiction to rezone any part of the two Lombard Street properties to OBZ under PPC1.

[17] Ultimately commissioners made a decision rejecting MML's submission. MML then appealed to the Environment Court.

Decision appealed from

[18] A decision on the appeal was given by the Environment Court Judge sitting alone, under s 279 of the Resource Management Act 1991 (Act). Having set out the background, the Judge described the issue as follows:

> The issue before the Court is whether the submission ... was on [PPC1], when [PPC1] itself did not propose any change to the zoning of the residential land.

[19] The issue arises in that way because the right to make a submission on a plan change is conferred by sch 1, cl 6(1): persons described in the clause "may make a submission on it". If the submission is not "on" the plan change, the council has no jurisdiction to consider it.

[20] The Judge set out the leading authority, the High Court decision of William Young J in *Clearwater Resort Ltd v Christchurch City Council*.[3] He also had regard to what might be termed a gloss placed on that decision by the Environment Court in *Natural Best New Zealand Ltd v Queenstown Lakes District Council*.[4] As a result of these decisions the Judge considered he had to address two matters:

(a) the extent to which MML's submission addressed the subject matter of PPC1; and
(b) issues of procedural fairness.

[21] As to the first of those, the Judge noted that PPC1 was "quite wide in scope". The areas to be rezoned were "spread over a comparatively wide area". The land being rezoned was "either contiguous

---

3 *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.

4 *Naturally Best New Zealand Ltd v Queenstown Lakes District Council* EnvC Christchurch C49/2004, 23 April 2004.

with, or in close proximity to, [OBZ] land". The Council had said that PPC1 was in part directed at the question of what residential pockets either (1) adjacent to the OBZ, or (2) by virtue of existing use, or (3) as a result of changes to the transportation network, warranted rezoning to OBZ.

[22] On that basis, the Judge noted, the Lombard Street lots met two of those conditions: adjacency and existing use. The Judge considered that a submission seeking the addition of 1619 m^2 to the 7.63 ha proposed to be rezoned was not out of scale with the plan change proposal and would not make PPC1 "something distinctly different" to what it was intended to be. It followed that those considerations, in combination with adjacency and existing use, meant that the MML submission "must be *on* the plan change".

[23] The Judge then turned to the question of procedural fairness. The Judge noted that the process contained in sch 1 for notification of submissions on plan changes is considerably restricted in extent. A submitter was not required to serve a copy of the submission on persons who might be affected. Instead it simply lodged a copy with the local authority. Nor did cl 7 of sch 1 require the local authority to notify persons who might be affected by submissions. Instead just a public notice had to be given advising the availability of a summary of submissions, the place where that summary could be inspected, and the requirement that within 10 working days after public notice, certain persons might make further submissions. As the Judge then noted:

> Accordingly, unless people take particular interest in the public notices contained in the newspapers, there is a real possibility they may not be aware of plan changes or of submissions on those plan changes which potentially affect them.

[24] The Judge noted that it was against that background that William Young J made the observations he did in the *Clearwater* decision. Because there is limited scope for public participation, "it is necessary to adopt a cautious approach in determining whether or not a submission is on a plan change". William Young J had used the expression "coming out of left field" in *Clearwater*. The Judge below in this case saw that as indicating a submission seeking a remedy or change:

> ... which is not readily foreseeable, is unusual in character or potentially leads to the plan change being something different than what was intended.

[25] But the Judge did not consider that the relief sought by MML in this case could be regarded as falling within any of those descriptions. Rather, the Judge found it "entirely predictable" that MML might seek relief of the sort identified in its submission. The Judge considered that sch 1 "requires a proactive approach on the part of those persons who might be affected by submissions to a plan change". They must make inquiry "on their own account" once public notice is given. There was no procedural unfairness in considering MML's submission.

[26] The Judge therefore found that MML had filed a submission that was "on" PPC1. Accordingly there was a valid appeal before the Court.

[27] From that conclusion the Council appeals.

Appeal

The Council's argument

[28] The Council's essential argument is that the Judge failed to consider that PPC1 did not change any provisions of the District Plan *as it applied to the site* (or indeed any surrounding land) at all, thereby leaving the status quo unchanged. That is said to be a pre-eminent, if not decisive, consideration. The subject matter of the plan change was to be found within the four corners of the plan change and the plan provisions it changes, including objectives, policies, rules and methods such as zoning. The Council did not, under the plan change, change any plan provisions relating to MML's property. The land (representing a natural resource) was therefore not a resource that could sensibly be described as part of the subject matter of the plan change. MML's submission was not "on" PPC1, because PPC1 did not alter the status quo in the plan as it applied to the site. That is said to be the only legitimate result applying the High Court decision in *Clearwater.*

[29] The decision appealed from was said also by the Council to inadequately assess the potential prejudice to other landowners and affected persons. For the Council, Mr Maassen submitted that it was inconceivable, given that public participation and procedural fairness are essential dimensions of environmental justice and the Act, that land not the subject of the plan change could be rezoned to facilitate an entirely different land use by submission using Form 5. Moreover, the Judge appeared to assume that an affected person (such as a neighbour) could make a further submission under sch 1, cl 8, responding to MML's submission. But that was not correct.

MML's argument

[30] In response, Mr Ax (who appeared in person, and is an engineer rather than a lawyer) argued that I should adopt the reasoning of the Environment Court Judge. He submitted that the policy behind PPC1 and its purpose were both relevant, and the question was one of scale and degree. Mr Ax submitted that extending the OBZ to incorporate MML's property would be in keeping with the intention of PPC1 and the assessment of whether existing residential land would be better incorporated in that OBZ. His property was said to warrant consideration having regard to its proximity to the existing OBZ, and the existing use of a large portion of the Lombard Street lots. Given the character and use of the properties adjacent to MML's land on Lombard Street (old houses used as rental properties, a plumber's warehouse and an industrial site across the road used by an electronic company) and the rest of Lombard Street being a mixture of industrial and low quality residential use, there was limited prejudice and the submission could not be seen as "coming out of left field". As Mr Ax put it:

> Given the nature of the surrounding land uses I would have ... been surprised if there were parties that were either (a) caught unawares or (b) upset at what I see as a natural extension of the existing use of my property.

Statutory framework

[31] Plan changes are amendments to a district plan. Changes to district plans are governed by s 73 of the Act. Changes must, by s 73(1A), be effected in accordance with sch 1.

[32] Section 74 sets out the matters to be considered by a territorial authority in the preparation of any district plan change. Section 74(1) provides:

> A territorial authority shall prepare and change its district plan in accordance with its functions under section 31, the provisions of Part 2, a direction given under section 25A(2), its duty under section 32, and any regulations.

[33] Seven critical components in the plan change process now deserve attention.

[34] First, there is the s 32 report referred to indirectly in s 74(1). To the extent changes to rules or methods in a plan are proposed, that report must evaluate comparative efficiency and effectiveness, and whether what is proposed is the most appropriate option.[5] The evaluation must take into account the benefits and costs of available options, and the risk of acting or not acting if there is uncertain or insufficient information about the subject matter.[6] This introduces a precautionary approach to the analysis. The s 32 report must then be available for public inspection at the same time as the proposed plan change is publicly notified.[7]

[35] Second, there is the consultation required by sch 1, cl 3. Consultation with affected landowners is not required, but it is permitted.[8]

[36] Third, there is notification of the plan change. Here the council must comply with sch 1, cl 5. Clause 5(1A) provides:

> A territorial authority shall, not earlier than 60 working days before public notification or later than 10 working days after public notification was planned, either —
>
> (a) send a copy of the public notice, and such further information as a territorial authority thinks fit relating to the proposed plan, to every ratepayer for the area where that person, in the territorial authority's opinion, is likely to be directly affected by the proposed plan; or
>
> (b) include the public notice, and such further information as the territorial authority thinks fit relating to the proposed plan, and any publication or circular which is issued or sent to all residential properties and Post Office box addresses located in the affected area – and shall send a copy of the public notice to any other person who in the territorial authority's opinion, is directed affected by the plan.

Clause 5 is intended to provide assurance that a person is notified of any change to a district plan zoning on land adjacent to them. Typically territorial authorities bring such a significant change directly to the attention of the adjoining land owner. The reference to notification to persons "directly affected" should be noted.

---

5 Resource Management Act 1991, s 32(3)(b). All statutory references are to the Act unless stated otherwise.

6 Section 32(4).

7 Section 32(6).

8 Schedule 1, cl 3(2).

[37] Fourth, there is the right of submission. That is found in sch 1, cl 6. Any person, whether or not notified, may submit. That is subject to an exception in the case of trade competitors, a response to difficulties in days gone by with new service station and supermarket developments. But even trade competitors may submit if, again, "directly affected". At least 20 working days after public notification is given for submission.[9] Clause 6 provides:

> **Making of submissions**(1) Once a proposed policy statement or plan is publicly notified under clause 5, the persons described in subclauses (2) to (4) may make a submission on it to the relevant local authority.
>
> (2) The local authority in its own area may make a submission.
>
> (3) Any other person may make a submission but, if the person could gain an advantage in trade competition through the submission, the person's right to make a submission is limited by subclause (4).
>
> (4) A person who could gain an advantage in trade competition through the submission may make a submission only if directly affected by an effect of the proposed policy statement or plan that —
>
> (a) adversely affects the environment; and
>
> (b) does not relate to trade competition or the effects of trade competition.
>
> (5) A submission must be in the prescribed form.

[38] The expression "proposed plan" includes a proposed plan change.[10] The "prescribed form" is Form 5. Significantly, and so far as relevant, it requires the submitter to complete the following details:

> The specific provisions of the proposal that my submission relates to are:
>
> [*give details*].
>
> My submission is:
>
> [*include* —
>
> - *whether you support or oppose the specific provisions or wish to have them amended; and*
> - *reasons for your views*].
>
> I seek the following decision from the local authority:
>
> [*give precise details*].
>
> I wish (*or* do not wish) to be heard in support of my submission.

It will be seen from that that the focus of submission must be on "specific provisions of the proposal". The form says that. Twice.

[39] Fifthly, there is notification of a summary of submissions. This is in far narrower terms – as to scope, content and timing – than notification of the original plan change itself. Importantly, there is no requirement that the territorial authority notify individual landowners directly affected by a change sought in a submission. Clause 7 provides:

> **Public notice of submissions**(1) A local authority must give public notice of —

---

9 Schedule 1, cl 5(3)(b).
10 Section 43AAC(1)(a).

(a) the availability of a summary of decisions requested by persons making submissions on a proposed policy statement or plan; and
(b) where the summary of decisions and the submissions can be inspected; and
(c) the fact that no later than 10 working days after the day on which this public notice is given, the persons described in clause 8(1) may make a further submission on the proposed policy statement or plan; and
(d) the date of the last day for making further submissions (as calculated under paragraph (c)); and
(e) the limitations on the content and form of a further submission.

(2) The local authority must serve a copy of the public notice on all persons who made submissions.

[40] Sixth, there is a limited right (in cl 8) to make further submissions. Clause 8 was amended in 2009 and now reads:

Certain persons may make further submissions(1) The following persons may make a further submission, in the prescribed form, on a proposed policy statement or plan to the relevant local authority:
(a) any person representing a relevant aspect of the public interest; and
(b) any person that has an interest in the proposed policy statement or plan greater than the interest that the general public has; and
(c) the local authority itself.

(2) A further submission must be limited to a matter in support of or in opposition to the relevant submission made under cl 6.

[41] Before 2009 any person could make a further submission, although only in support of or opposition to existing submissions. After 2009 standing to make a further submission was restricted in the way we see above. The Resource Management (Simplifying and Streamlining) Amendment Bill 2009 sought to restrict the scope for further submission, in part due to the number of such submissions routinely lodged, and the tendency for them to duplicate original submissions.

[42] In this case the Judge contemplated that persons affected by a submission proposing a significant rezoning not provided for in the notified proposed plan change might have an effective opportunity to respond.[11] It is not altogether clear that that is so. An affected neighbour would not fall within cl 8(1)(a). For a person to fall within the qualifying class in cl 8(1)(b), an interest "in the proposed policy statement or plan" (including the plan change) greater than that of the general public is required. Mr Maassen submitted that a neighbour affected by an additional zoning change proposed in a submission rather than the plan change itself would not have such an interest. His or her concern might be elevated by the radical subject matter of the submission, but that is not what cl 8(1)(b) provides for. On the face of the provision, that might be so. But I agree here with the Judge below that that was not Parliament's intention. That is clear from the select committee report proposing the amended wording which now forms cl 8. It is worth setting out the relevant part of that report in full:

Clause 148(8) would replace this process by allowing councils discretion to seek the views of potentially affected parties.

---

11 See at [25] above.

> Many submitters opposed the proposal on the grounds that it would breach the principle of natural justice. They argued that people have a right to respond to points raised in submissions when they relate to their land or may have implications for them. They also regard the further submission process as important for raising new issues arising from submissions, and providing an opportunity to participate in any subsequent hearing or appeal proceedings. We noted a common concern that submitters could request changes that were subsequently incorporated into the final plan provisions without being subject to a further submissions process, and that such changes could significantly affect people without providing them an opportunity to respond.
>
> Some submitters were concerned that the onus would now lie with council staff to identify potentially affected parties. Some local government submitters were also concerned that the discretionary process might incur a risk of liability and expose councils to more litigation. A number of organisations and iwi expressed concern that groups with limited resources would be excluded from participation if they missed the first round of submissions.
>
> We consider that the issues of natural justice and fairness to parties who might be adversely affected by proposed plan provisions, together with the potential increase in local authorities' workloads as a result of these provisions, warrant the development of an alternative to the current proposal.
>
> We recommend amending clause 148(8) to require local authorities to prepare, and advertise the availability of, a summary of outcomes sought by submitters, and to allow anyone with an interest that is greater than that of the public generally, or representing a relevant aspect of the public interest, or the local authority itself, to lodge a further submission within 10 working days.

[43] It is, I think, perfectly clear from that passage that what was intended by cl 8 was to ensure that persons who are directly affected by submissions proposing further changes to the proposed plan change may lodge a further submission. The difficulty, then, is not with their right to lodge that further submission. Rather it is with their being notified of the fact that such a submission has been made. Unlike the process that applies in the case of the original proposed plan change, persons directly affected by additional changes proposed in submissions do not receive direct notification. There is no equivalent of cl 5(1A). Rather, they are dependent on seeing public notification that a summary of submissions is available, translating that awareness into reading the summary, apprehending from that summary that it actually affects them, and then lodging a further submission. And all within the 10-day timeframe provided for in cl 7(1)(c). Persons "directly affected" in this second round may have taken no interest in the first round, not being directly affected by the first. It is perhaps unfortunate that Parliament did not see fit to provide for a cl 5(1A) equivalent in cl 8. The result of all this, in my view (and as I will explain), is to reinforce the need for caution in monitoring the jurisdictional gateway for further submissions.

[44] Seventhly, finally and for completeness, I record that the Act also enables a private plan change to be sought. Schedule 1, pt 2, cl 22, states:

> **Form of request**

(1) A request made under clause 21 shall be made to the appropriate local authority in writing and shall explain the purpose of, and reasons for, the proposed plan or change to a policy statement or plan [and contain an evaluation under section 32 for any objectives, policies, rules, or other methods proposed].

(2) Where environmental effects are anticipated, the request shall describe those effects, taking into account the provisions of Schedule 4, in such detail as corresponds with the scale and significance of the actual or potential environmental effects anticipated from the implementation of the change, policy statement, or plan.

So a s 32 evaluation and report must be undertaken in such a case.

Issues

[45] The issues for consideration in this case are:

(a) Issue 1: When, generally, is a submission "on" a plan change?
(b) Issue 2: Was MML's submission "on" PPC1?

Issue 1: When, generally, is a submission "on" a plan change?

[46] The leading authority on this question is a decision of William Young J in the High Court in *Clearwater Resort Ltd v Christchurch City Council.*[12] A second High Court authority, the decision of Ronald Young J in *Option 5 Inc v Marlborough District Council,*[13] follows *Clearwater. Clearwater* drew directly upon an earlier Environment Court decision, *Halswater Holdings Ltd v Selwyn District Council.*[14] A subsequent Environment Court decision, *Naturally Best New Zealand Ltd v Queenstown Lakes District Council*[15] purported to gloss *Clearwater.* That gloss was disregarded in *Option 5.* I have considerable reservations about the authority for, and efficacy of, the *Naturally Best* gloss.

[47] Before reviewing these four authorities, I note that they all predated the amendments made in the Resource Management (Simplifying and Streamlining) Amendment Act 2009. As we have seen, that had the effect of restricting the persons who could respond (by further submission) to submissions on a plan change, although not so far as to exclude persons directly affected by a submission. But it then did little to alleviate the risk that such persons would be unaware of that development.

Clearwater

[48] In *Clearwater* the Christchurch City Council had set out rules restricting development in the airport area by reference to a series of noise contours. The council then notified variation 52. That variation did not alter the noise contours in the proposed plan. Nor did it change the rules relating to subdivisions and dwellings in the rural zone. But it did introduce a policy discouraging urban residential development within the 50 dBA Ldn noise contour around the airport. *Clearwater's* submission

---

12 *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.
13 *Option 5 Inc v Marlborough District Council* (2009) 16 ELRNZ 1 (HC).
14 *Halswater Holdings Ltd v Selwyn District Council* (1999) 5 ELRNZ 192 (EnvC).
15 *Naturally Best New Zealand Ltd v Queenstown Lakes District Council* EnvC Christchurch 49/2004, 23 April 2004.

sought to vary the physical location of the noise boundary. It sought to challenge the accuracy of the lines drawn on the planning maps identifying three of the relevant noise contours. Both the council and the airport company demurred. They did not wish to engage in a "lengthy and technical hearing as to whether the contour lines are accurately depicted on the planning maps". The result was an invitation to the Environment Court to determine, as a preliminary issue, whether *Clearwater* could raise its contention that the contour lines were inaccurately drawn. The Environment Court determined that *Clearwater* could raise, to a limited extent, a challenge to the accuracy of the planning maps. The airport company and the regional council appealed.

[49] William Young J noted that the question of whether a submission was "on" a variation posed a question of "apparently irreducible simplicity but which may not necessarily be easy to answer in a specific case".[16] He identified three possible general approaches:[17]

(a) a literal approach, "in terms of which anything which is expressed in the variation is open for challenge";
(b) an approach in which "on" is treated as meaning "in connection with"; and
(c) an approach "which focuses on the extent to which the variation alters the proposed plan".

[50] William Young J rejected the first two alternatives, and adopted the third.

[51] The first, literal construction had been favoured by the commissioner (from whom the Environment Court appeal had been brought). The commissioner had thought that a submission might be made in respect of "anything included in the text as notified", even if the submission relates to something that the variation does not propose to alter. But it would not be open to submit to seek alterations of parts of the plan not forming part of the variation notified. William Young J however thought that left too much to the idiosyncrasies of the draftsman of the variation. Such an approach might unduly expand the scope of challenge, or it might be too restrictive, depending on the specific wording.

[52] The second construction represented so broad an approach that "it would be difficult for a local authority to introduce a variation of a proposed plan without necessarily opening up for relitigation aspects of the plan which had previously been [past] the point of challenge".[18] The second approach was, thus, rejected also.

[53] In adopting the third approach William Young J applied a bipartite test.

[54] First, the submission could only fairly be regarded as "on" a variation "if it is addressed to the extent to which the variation changes the pre-existing status quo". That seemed to the Judge to be consistent with

---

16 *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003 at [56].
17 At [59].
18 At [65].

the scheme of the Act, "which obviously contemplates a progressive and orderly resolution of issues associated with the development of proposed plans".

[55] Second, "if the effect of regarding a submission as "on" a variation would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected", that will be a "powerful consideration" against finding that the submission was truly "on" the variation. It was important that "all those likely to be affected by or interested in the alternative methods suggested in the submission have an opportunity to participate".[19] If the effect of the submission "came out of left field" there might be little or no real scope for public participation. In another part of [69] of his judgment William Young J described that as "a submission proposing something completely novel". Such a consequence was a strong factor against finding the submission to be on the variation.

[56] In the result in *Clearwater* the appellant accepted that the contour lines served the same function under the variation as they did in the pre-variation proposed plan. It followed that the challenge to their location was not "on" variation 52.[20]

[57] Mr Maassen submitted that the *Clearwater* test was not difficult to apply. For the reasons that follow I am inclined to agree. But it helps to look at other authorities consistent with *Clearwater*, involving those which William Young J drew upon.

Halswater

[58] William Young J drew directly upon an earlier Environment Court decision in *Halswater Holdings Ltd v Selwyn District Council*.[21] In that case the council had notified a plan change lowering minimum lot sizes in a "green belt" sub-zone, and changing the rules as to activity status depending on lot size. Submissions on that plan change were then notified by the appellants which sought:

(a) to further lower the minimum sub-division lot size; and
(b) seeking "spot zoning" to be applied to their properties, changes from one zoning status to another.

[59] The plan change had not sought to change any zonings at all. It simply proposed to change the rules as to minimum lot sizes and the building of houses within existing zones (or the "green belt" part of the zone).

[60] The Environment Court decision contains a careful and compelling analysis of the then more concessionary statutory scheme at [26]–[44]. Much of what is said there remains relevant today. It noted among other things the abbreviated time for filing of submissions on plan changes, indicating that they were contemplated as "shorter and easier to digest and respond to than a full policy statement or plan".[22]

---

19 At [69].
20 At [81]–[82].
21 *Halswater Holdings Ltd v Selwyn District Council* (1999) 5 ELRNZ 192 (EnvC).
22 At [38].

[61] The Court noted that the statutory scheme suggested that:[23]

> ... if a person wanted a remedy that goes much beyond what is suggested in the plan change so that, for example, a submission can no longer be said to be "on" the plan change, then they may have to go about changing the plan in another way.

Either a private plan change, or by encouraging the council itself to promote a further variation to the plan change. As the Court noted, those procedures then had the advantage that the notification process "goes back to the beginning". The Court also noted that if relief sought by a submission went too far beyond the four corners of a plan change, the council may not have turned its mind to the effectiveness and efficiency of what was sought in the submission, as required by s 32(1)(c)(ii) of the Act. The Court went on to say:[24]

> It follows that a crucial question for a Council to decide, when there is a very wide submission suggesting something radically different from a proposed plan as notified, is whether it should promote a variation so there is time to have a s 32 analysis carried out and an opportunity for other interested persons to make primary submissions under clause 6.

[62] The Court noted in *Halswater* the risk of persons affected not apprehending the significance of submissions on a plan change (as opposed to the original plan change itself). As the Court noted, there are three layers of protection under cl 5 notification of a plan change that do not exist in relation to notification of a summary of submissions:[25]

> These are first that notice of the plan change is specifically given to every person who is, in the opinion of the Council, affected by the plan change, which in itself alerts a person that they may need to respond; secondly clause 5 allows for extra information to be sent, which again has the purpose of alerting the persons affected as to whether or not they need to respond to the plan change. Thirdly notice is given of the plan change, not merely of the availability of a summary of submissions. Clause 7 has none of those safeguards.

[63] Ultimately, the Environment Court in *Halswater* said:[26]

> A submissions on a plan change cannot seek a rezoning (allowing different activities and/or effects) if a rezoning is not contemplated by a plan change.

[64] In *Halswater* there was no suggestion in the plan change that there was to be rezoning of any land. As a result members of the public might have decided they did not need to become involved in the plan change process, because of its relatively narrow effects. As a result, they might not have checked the summary of submissions or gone to the council to check the summary of submissions. Further, the rezoning proposal sought by the appellants had no s 32 analysis.

---

23 At [41].
24 At [42].
25 At [44].
26 At [51].

[65] It followed in that case that the appellant's proposal for "spot rezoning" was not "on" the plan change. The remedy available to the appellants in that case was to persuade the council to promote a further variation of the plan change, or to seek a private plan change of their own.

Option 5

[66] *Clearwater* was followed in a further High Court decision, *Option 5 Inc v Marlborough District Council*.[27] In that case the council had proposed a variation (variation 42) defining the scope of a central business zone (CBZ). Variation 42 as notified had not rezoned any land, apart from some council-owned vacant land. Some people called McKendry made a submission to the council seeking addition of further land to the CBZ. The council agreed with that submission and variation 42 was amended. A challenge to that decision was taken to the Environment Court. A jurisdictional issue arose as to whether the McKendry submission had ever been "on" variation 42. The Environment Court said that it had not. It should not have been considered by the council.

[67] On appeal Ronald Young J did not accept the appellants' submission that because variation 42 involved some CBZ rezoning, any submission advocating further extension of the CBZ would be "on" that variation. That he regarded as "too crude". As he put it:[28]

> Simply because there may be an adjustment to a zone boundary in a proposed variation does not mean any submission that advocates expansion of a zone must be on the variation. So much will depend on the particular circumstances of the case. In considering the particular circumstances it will be highly relevant to consider whether, as William Young J identified in *Clearwater*, that if the result of accepting a submission as on (a variation) would be to significantly change a proposed plan without a real opportunity for participation by those affected then that would be a powerful argument against the submission as being "on".

[68] In that case the amended variation 42 would change at least 50 residential properties to CBZ zoning. That would occur "without any direct notification to the property owners and therefore without any real chance to participate in the process by which their zoning will be changed". The only notification to those property owners was through public notification in the media that they could obtain summaries of submissions. Nothing in that indicated to those 50 house owners that the zoning of their property might change.

Naturally Best

[69] Against the background of those three decisions, which are consistent in principle and outcome, I come to consider the later decision of the Environment Court in *Naturally Best New Zealand Ltd v Queenstown Lakes District Council*.[29]

[70] That decision purports to depart from the principles laid down by William Young J in *Clearwater*. It does so by reference to another

---

27 *Option 5 Inc v Marlborough District Council* (2009) 16 ELRNZ 1 (HC).
28 At [34].
29 *Naturally Best New Zealand Ltd v Queenstown Lakes District Council* EnvC Christchurch C49/2004, 23 April 2004.

High Court decision in *Countdown Properties Ltd v Dunedin City Council*.[30] However that decision does not deal with the jurisdictional question of whether a submission falls within sch 1, cl 6(1). The Court in *Naturally Best* itself noted that the question in that case was a different one.[31] *Countdown* is not authority for the proposition advanced by the Environment Court in *Naturally Best* that a submission "may seek fair and reasonable extensions to a notified variation or plan change". Such an approach was not warranted by the decision in *Clearwater*, let alone by that in *Countdown*.

[71] The effect of the decision in *Naturally Best* is to depart from the approach approved by William Young J towards the second of the three constructions considered by him, but which he expressly disapproved. In other words, the *Naturally Best* approach is to treat "on" as meaning "in connection with", but subject to vague and unhelpful limitations based on "fairness", "reasonableness" and "proportion". That approach is not satisfactory.

[72] Although in *Naturally Best* the Environment Court suggests that the test in *Clearwater* is "rather passive and limited", whatever that might mean, and that it "conflates two points,"[32] I find no warrant for that assessment in either *Clearwater* or *Naturally Best* itself.

[73] It follows that the approach taken by the Environment Court in *Naturally Best* of endorsing "fair and reasonable extensions" to a plan change is not correct. The correct position remains as stated by this Court in *Clearwater*, confirmed by this Court in *Option 5*.

Discussion

[74] It is a truth almost universally appreciated that the purpose of the Act is to promote the sustainable management of natural and physical resources.[33] Resources may be used in diverse ways, but that should occur at a rate and in a manner that enables people and communities to provide for their social, economic and cultural wellbeing while meeting the requirements of s 5(2). These include avoiding, remedying or mitigating the adverse effects of activities on the environment. The Act is an attempt to provide an integrated system of environmental regulation.[34] That integration is apparent in s 75, for instance, setting out the hierarchy of elements of a district plan and its relationship with national and regional policy statements.

[75] Inherent in such sustainable management of natural and physical resources are two fundamentals.

[76] The first is an appropriately thorough analysis of the effects of a proposed plan (whichever element within it is involved) or activity. In the context of a plan change, that is the s 32 evaluation and report: a comparative evaluation of efficiency, effectiveness and appropriateness of options. Persons affected, especially those "directly affected", by the

---

30 *Countdown Properties Ltd v Dunedin City Council* [1994] NZRMA 145 (HC).
31 At [17].
32 At [15].
33 Section 5(1).
34 Nolan (Ed) *Environmental and Resource Management Law* (4th ed, Lexis Nexis, Wellington 2011) at 96.

proposed change are entitled to have resort to that report to see the justification offered for the change having regard to all feasible alternatives. Further variations advanced by way of submission, to be "on" the proposed change, should be adequately assessed already in that evaluation. If not, then they are unlikely to meet the first limb in *Clearwater*.

[77] The second is robust, notified and informed public participation in the evaluative and determinative process. As this Court said in *General Distributors Ltd v Waipa District Council*:[35]

> The promulgation of district plans and any changes to them is a participatory process. Ultimately plans express community consensus about land use planning and development in any given area.

A core purpose of the statutory plan change process is to ensure that persons potentially affected, and in particular those "directly affected", by the proposed plan change are adequately informed of what is proposed. And that they may then elect to make a submission, under cls 6 and 8, thereby entitling them to participate in the hearing process. It would be a remarkable proposition that a plan change might so morph that a person not directly affected at one stage (so as not to have received notification initially under cl 5(1A)) might then find themselves directly affected but speechless at a later stage by dint of a third party submission not directly notified as it would have been had it been included in the original instrument. It is that unfairness that militates the second limb of the *Clearwater* test.

[78] Where a land owner is dissatisfied with a regime governing their land, they have three principal choices. First, they may seek a resource consent for business activity on the site regardless of existing zoning. Such application will be accompanied by an assessment of environment effects and directly affected parties should be notified. Secondly, they may seek to persuade their council to promulgate a plan change. Thirdly, they may themselves seek a private plan change under sch 1, pt 2. Each of the second and third options requires a s 32 analysis. Directly affected parties will then be notified of the application for a plan change. All three options provide procedural safeguards for directly affected people in the form of notification, and a substantive assessment of the effects or merits of the proposal.

[79] In contrast, the sch 1 submission process lacks those procedural and substantial safeguards. Form 5 is a very limited document. I agree with Mr Maassen that it is not designed as a vehicle to make significant changes to the management regime applying to a resource not already addressed by the plan change. That requires, in my view, a very careful approach to be taken to the extent to which a submission may be said to satisfy both limbs 1 and 2 of the *Clearwater* test. Those limbs properly reflect the limitations of procedural notification and substantive analysis required by s 5, but only thinly spread in cl 8. Permitting the public to enlarge significantly the subject matter and resources to be addressed through the sch 1 plan change process beyond the original

---

35 *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59 (HC) at [54].

ambit of the notified proposal is not an efficient way of delivering plan changes. It transfers the cost of assessing the merits of the new zoning of private land back to the community, particularly where shortcutting results in bad decision making.

[80] For a submission to be on a plan change, therefore, it must address the proposed plan change itself. That is, to the alteration of the status quo brought about by that change. The first limb in *Clearwater* serves as a filter, based on direct connection between the submission and the degree of notified change proposed to the extant plan. It is the dominant consideration. It involves itself two aspects: the breadth of alteration to the status quo entailed in the proposed plan change, and whether the submission then addresses that alteration.

[81] In other words, the submission must reasonably be said to fall within the ambit of the plan change. One way of analysing that is to ask whether the submission raises matters that should have been addressed in the s 32 evaluation and report. If so, the submission is unlikely to fall within the ambit of the plan change. Another is to ask whether the management regime in a district plan for a particular resource (such as a particular lot) is altered by the plan change. If it is not then a submission seeking a new management regime for that resource is unlikely to be "on" the plan change. That is one of the lessons from the *Halswater* decision. Yet the *Clearwater* approach does not exclude altogether zoning extension by submission. Incidental or consequential extensions of zoning changes proposed in a plan change are permissible, provided that no substantial further s 32 analysis is required to inform affected persons of the comparative merits of that change. Such consequential modifications are permitted to be made by decision makers under sch 1, cl 10(2). Logically they may also be the subject of submission.

[82] But that is subject then to the second limb of the *Clearwater* test: whether there is a real risk that persons directly or potentially directly affected by the additional changes proposed in the submission have been denied an effective response to those additional changes in the plan change process. As I have said already, the 2009 changes to sch 1, cl 8, do not avert that risk. While further submissions by such persons are permitted, no equivalent of cl 5(1A) requires their notification. To override the reasonable interests of people and communities by a submissional side-wind would not be robust, sustainable management of natural resources. Given the other options available, outlined in [78], a precautionary approach to jurisdiction imposes no unreasonable hardship.

[83] Plainly, there is less risk of offending the second limb in the event that the further zoning change is merely consequential or incidental, and adequately assessed in the existing s 32 analysis. Nor if the submitter takes the initiative and ensures the direct notification of those directly affected by further changes submitted.

Issue 2: Was MML's submissions "on" PPC1?

[84] In light of the foregoing discussion I can be brief on Issue 2.

[85] In terms of the first limb of the *Clearwater* test, the submission made by MML is not in my view addressed to PPC1. PPC1 proposes limited zoning changes. All but a handful are located on the ring road, as

the plan excerpt in [11] demonstrates. The handful that are not are to be found on main roads: Broadway, Main and Church Streets. More significantly, PPC1 was the subject of an extensive s 32 report. It is over 650 pages in length. It includes site-specific analysis of the proposed rezoning, urban design, traffic effects, heritage values and valuation impacts. The principal report includes the following:

> 2.50 PPC1 proposes to rezone a substantial area of residentially zoned land fronting the Ring Road to OBZ. Characteristics of the area such as its close proximity to the city centre; site frontage to key arterial roads; the relatively old age of residential building stock and the on-going transition to commercial use suggest there is merit in rezoning these sites.
>
> ...
>
> 5.8 **Summary Block Analysis** – Blocks 9 to 14 are characterised by sites that have good frontage to arterial roads, exhibit little pedestrian traffic and have OBZ sites surrounding the block. These blocks are predominately made up of older residential dwellings (with a scattering of good quality residences) and on going transition to commercial use. Existing commercial use includes; motor lodges; large format retail; automotive sales and service; light industrial; office; professional and community services. In many instances, the rezoning of blocks 9 to 14 represents a squaring off of the surrounding OBZ. Blocks 10, 11, 12 and 13 are transitioning in use from residential to commercial activity. Some blocks to a large degree than others. In many instances, the market has already anticipated a change in zoning within these blocks. The positioning of developer and long term investor interests has already resulted in higher residential land values within these blocks. Modern commercial premises have already been developed in blocks 10, 11, 12 and 13.
>
> 5.9 Rezoning Residential Zone sites fronting the Ring Road will rationalise the number of access crossings and will enhance the function of the adjacent road network, while the visual exposure for sites fronting key arterial roads is a substantial commercial benefit for market operators. The location of these blocks in close proximity to the Inner and Outer Business Zones; frontage to key arterial roads; the relatively old age of the existing residential building stock; the ongoing transition to commercial use; the squaring off of existing OBZ blocks; and the anticipation of the market are all attributes that suggest there is merit in rezoning blocks 9 to 14 to OBZ.

[86] The extension of the OBZ on a spot-zoning basis into an isolated enclave within Lombard Street would reasonably require like analysis to meet the expectations engendered by s 5. Such an enclave is not within the ambit of the existing plan change. It involves more than an incidental or consequential extension of the rezoning proposed in PPC1. Any decision to commence rezoning of the middle parts of Lombard Street, thereby potentially initiating the gradual transition of Lombard Street by instalment towards similar land use to that found in Taonui Street, requires coherent long term analysis, rather than opportunistic insertion by submission.

[87] There is, as I say, no hardship in approaching the matter in this way. Nothing in this precludes the landowner for adopting one of the three

options identified in [78]. But in that event, the community has the benefit of proper analysis, and proper notification.

[88] In terms of the second limb of *Clearwater*, I note Mr Ax's confident expression of views set out at [30] above. However I note also the disconnection from the primary focus of PPC1 in the proposed addition of two lots in the middle of Lombard Street. And I note the lack of formal notification of adjacent landowners. Their participatory rights are then dependent on seeing the summary of submissions, apprehending the significance for their land of the summary of MML's submission, and lodging a further submission within the 10-day time frame prescribed.

[89] That leaves me with a real concern that persons affected by this proposed additional rezoning would have been left out in the cold. Given the manner in which PPC1 has been promulgated, and its focus on main road rezoning, the inclusion of a rezoning of two isolated lots in a side street can indeed be said to "come from left field".

Conclusion

[90] MML's submission was not "on" PPC1. In reaching a different view from the experienced Environment Court Judge, I express no criticism. The decision below applied the *Naturally Best* gloss, which I have held to be an erroneous relaxation of principles correctly stated in *Clearwater.*

Summary

[91] To sum up:

(a) This judgment endorses the bipartite approach taken by William Young J in *Clearwater Christchurch City Council*[36] in analysing whether a submission made under sch 1, cl 6(1) of the Act is "on" a proposed plan change. That approach requires analysis as to whether, first, the submission addresses the change to the status quo advanced by the proposed plan change and, secondly, there is a real risk that persons potentially affected by such a change have been denied an effective opportunity to participate in the plan change process.

(b) This judgment rejects the more liberal gloss placed on that decision by the Environment Court in *Naturally Best New Zealand Ltd v Queenstown Lakes District Council,*[37] inconsistent with the earlier approach of the Environment Court in *Halswater Holdings Ltd v Selwyn District Council*[38] and inconsistent with the decisions of this Court in *Clearwater* and *Option 5 Inc v Marlborough District Council.*[39]

(c) A precautionary approach is required to receipt of submissions proposing more than incidental or consequential further changes to a notified proposed plan change. Robust, sustainable

---

36 *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.

37 *Naturally Best New Zealand Ltd v Queenstown Lakes District Council* EnvC Christchurch C49/2004, 23 April 2004.

38 *Halswater Holdings Ltd v Selwyn District Council* (1999) 5 ELRNZ 192 (EnvC).

39 *Option 5 Inc v Marlborough District Council* (2009) 16 ELRNZ 1 (HC).

management of natural and physical resources requires notification of the s 32 analysis of the comparative merits of a proposed plan change to persons directly affected by those proposals. There is a real risk that further submissions of the kind just described will be inconsistent with that principle, either because they are unaccompanied by the s 32 analysis that accompanies a proposed plan change (whether public or private) or because persons directly affected are, in the absence of an obligation that they be notified, simply unaware of the further changes proposed in the submission. Such persons are entitled to make a further submission, but there is no requirement that they be notified of the changes that would affect them.

(d) The first limb of the *Clearwater* test requires that the submission address the alteration to the status quo entailed in the proposed plan change. The submission must reasonably be said to fall within the ambit of that plan change. One way of analysing that is to ask whether the submission raises matters that should have been addressed in the s 32 evaluation and report. If so, the submission is unlikely to fall within the ambit of the plan change. Another is to ask whether the management regime in a district plan for a particular resource is altered by the plan change. If it is not, then a submission seeking a new management regime for that resource is unlikely to be "on" the plan change, unless the change is merely incidental or consequential.

(e) The second limb of the *Clearwater* test asks whether there is a real risk that persons directly or potentially directly affected by the additional changes proposed in the submission have been denied an effective opportunity to respond to those additional changes in the plan change process.

(f) Neither limb of the *Clearwater* test was passed by the MML submission.

(g) Where a submission does not meet each limb of the *Clearwater* test, the submitter has other options: to submit an application for a resource consent, to seek a further public plan change, or to seek a private plan change under sch 1, pt 2.

Result

[92] The appeal is allowed.

[93] The Council lacked jurisdiction to consider the submission lodged by MML, which is not one "on" PPC1.

[94] If costs are in issue, parties may file brief memoranda.

Reported by: Carolyn Heaton, *Barrister and Solicitor*

Re Palmerston North Industrial and Residential Developments Ltd

[2014] NZEnvC 17

Environment Court, (ENV-2013-WLG-69; 73) 16, 17 December 2013; 4 February 2014

Judge Dwyer, Commissioners A C E Leijnen, J R Mills

Resource management — Plans — District — Change or variation — Urban Growth Plan — Proposed plan change that would remove Urban Growth Plan notation from land — Whether proposed plan change amounted to a rezoning of land — Whether proposed plan change amounted to a change of the rules applicable to the rural zoning of land — Whether relief sought went beyond the scope of the proposed plan change — Resource Management Act 1991, ss 32, 79, 79(3).

Resource management — Remedies — Declaration — Proposed plan change — Urban Growth Plan — Proposed plan change that would remove Urban Growth Plan notation from land — Whether proposed plan change amounted to a rezoning of land — Whether proposed plan change amounted to a change of the rules applicable to the rural zoning of land — Whether relief sought went beyond the scope of proposed plan change — Resource Management Act 1991, ss 32, 79, 79(3).

The first applicant, Palmerston North Industrial and Residential Developments Ltd (PNIRDL), owned land zoned "Rural" in the Palmerston North District Plan. Under the District Plan, the land was subject to a notation that it formed part of an Urban Growth Path (UGP). In September 2010, the second applicant, Palmerston North City Council (the Council), formally adopted a Residential Growth Strategy (RGS), which included most of the land owned by the first applicant. In September 2012, the Council adopted an addendum to the RGS, which identified a second area not within the original UGP, the Whakaronga Residential Area (WRA) as the primary growth option for the City.

The Council introduced Proposed Plan Change 6 (PPC6), which would rezone the WRA area from rural to residential area for providing short to medium term greenfield residential growth of Palmerston North. It also sought to remove the UGP from the District Plan, and amend Rural Zone Objective 1 and its associated Polices and Explanation relating to the UGP land.

While PNIRDL supported the urban growth in the WRA, it considered that some of the land contained in the UGP should continue to be supported as an area to accommodate urban growth. PNIRDL sought to amend PPC6 by incorporating its land into the WRA (para 16(b) of its submission), or enabling the land to be subject to urban growth provisions equivalent to those in the WRA (para 16(c) of its submission).

The issue before the Court in these proceedings was whether or not the relief sought in submissions 16(b) and (c) was within jurisdiction as being on PPC6. The parties agreed that the PPC6 would be put on hold pending completion of a review of airport noise.

Held, (1) not only did PPC6 not amount to a rezoning of the land with the UGP, neither did it propose any amendments to the Rules applicable to Rural Zone land with the UGP. PPC6 sought to rezone the WRA to give effect to the Council's Urban Growth Strategy which identified the WRA as the appropriate area for residential growth. By identifying a different area, PNIRDL sought a different outcome. PPC6 altered the status quo by uplifting the UGP notation, not by rezoning the UGP land, nor by bringing down new rules on it. Although PPC6 proposed neither a rezoning nor a rule change, these were the remedies that PNIRDL sought. Paragraphs 16(b) and (c) of the PNIRDL submission went further than just challenging the uplifting of the UGP notation and the rezoning of the WRA land. It also sought the rezoning of, or the imposition of, new District Plan Rules on the PNIRDL land. By seeking those outcomes, paras 16(b) and (c) went beyond the changes to the status quo proposed by PPC6. (paras 41, 43, 47, 49)

(2) PPC6 was not a review of the wider provisions of either the Rural or Residential Zones. Section 79(3) of the Resource Management Act 1991 did not advance PNIRDL's argument in this case. What s 79(3) provides is that even if, after having conducted a review of any provision of a District Plan, the local authority determines that particular provision does not require alteration, it must still regard that determination not to alter the provision as if it was a plan change and undertake the sch 1 process in respect of it. Section 79(3) gives parties who claim to be affected by retention of the status quo the opportunity to challenge that. (para 53)

(3) It was apparent from perusal of the PPC6 documents that the Council did not review, nor make any determination as to matters pertaining to, the Rural zoning of the UGP land as part of its Sectional Review. It was apparent that there were considerable obstacles in the paths of persons who wished to challenge the zoning of properties which were outside the boundaries of the land subject to plan review. However, the issues arising out of para 16(b) and (c) of PNIRDL's submission arose at a quite fundamental level, irrespective of the provisions of s 79. Those aspects went beyond addressing the extent to which PPC6 alters the status quo by seeking either a rezoning or a change to Rules in the Rural Zone applicable to the UGP land, neither of which were proposed by PPC6. (paras 55, 59, 60)

Motor Machinists Ltd v Palmerston North City Council [2013] NZHC 1290, applied

(4) Although it is correct that the suitability of the UGP land for development was considered in all of the reports referred to other than the final Urban Design Report, that did not support the conclusion reached by PNIRDL which overlooked the context within which these reports had been included in PPC6. That context was the promotion of the WRA for residential development. The various reports provided the basis for the s 32 analysis contained in PPC6, and must be read in conjunction with that analysis. No one reading the s 32 analysis would have any apprehension or impression that the reports were being considered in support of a rezoning of or rule change for the UGP land, nor that such rezoning or rule change was a potential outcome of the PPC6 process. There was nothing in the s 32 evaluation which gave rise to any suggestion that rezoning or a rule amendment in respect of the UGP land was a likely outcome of the PPC6 process. (paras 64, 66)

(5) The PPC6 requires that development within the WRA is undertaken in general accordance with the Structure Plan. The Structure Plan shows the arrangement of land use types, identifies public infrastructure, and seeks to enable integration of development on the WRA with surrounding development. Consideration of s 32 analysis is only one way of considering whether or not a submission is on a plan change. Consideration of the s 32 analysis in this case highlights the restricted and specific nature of PPC6, and is contrary to PNIRDL's contention that the UGP land

has been subject to a similar level of evaluation as the WRA land. That is demonstrated (inter alia) by the absence of any options consideration in respect of the UGP land and the absence of any consideration of Structure Plan requirements which might be generated by development on the UGP land. The absence of any consideration of those issues in the initial s 32 analysis simply emphasizes the limited extent of PPC6 and the extent to which PNIRDL's proposals for rezoning or amending Rural Zone Rules go beyond what is contemplated. (paras 67-69)

(6) The manner in which PPC6 alters the management regime in respect of the PNIRDL land is by removal of the UGP notation and alterations of the corresponding Objectives and Policies. In neither instance did the outcomes sought by the PNIRDL arise out of the proposals contained in PPC6. Having regard to all of the above matters, paras 16(b) and (c) of the PNIRDL submission are not on PPC6. We decline to make the declarations sought. (paras 71, 73, 74, 76)

Cases referred to

Clearwater Resort Ltd v Christchurch City Council HC Christchurch AP34/02, 14 March 2003

Halswater Holdings Ltd v Selwyn District Council (1999) 5 ELRNZ 192 (EnvC)

Motor Machinists Ltd v Palmerston North City Council [2013] NZHC 1290

Option 5 Inc v Marlborough District Council (2009) 16 ELRNZ 1 (HC)

Appeal

This was an unsuccessful application for declarations seeking relief in relation to a proposed change to a District Plan

M J Slyfield for Palmerston North Industrial and Residential Developments
J W Maassen and *N Jessen* for Palmerston North City Council
R J Fowler QC for Palmerston North International Airport Ltd (s 274 party)

Cur adv vult

JUDGE DWYER, COMMISSIONERS A C E LEIJNEN, J R MILLS

Introduction

[1] On 24 September 2013, Palmerston North Industrial and Residential Developments Ltd (PNIRDL) applied to the Court for declarations in the following terms:

1. In respect of the written submission dated 21 June 2013 lodged by Palmerston North Industrial and Residential Developments Limited in response to Proposed Plan Change 6 to the Palmerston North City District Plan (**the submission**):
   (a) The relief sought in paragraph 16(a), and the matters raised in all associated paragraphs, are within the jurisdiction of Plan Change 6;
   (b) The relief sought in paragraph 16(b), and the matters raised in all associated paragraphs, are "on" Plan Change 6 within the meaning of clause 6(1) of Schedule 1 to the Resource Management Act;
   (c) The relief sought in paragraph 16(c), and the matters raised in all associated paragraphs are "on" Plan Change 6 within the meaning of clause 6(1) of Schedule 1 to the Resource Management Act.

[2] It will be seen from the above that the declarations sought relate to issues raised in paras 16(a), (b) and (c) of a submission filed by PNIRDL in response to a Proposed Plan Change 6 (PPC6)[1] to the Palmerston North City District Plan (the District Plan). The matters raised in the relevant paragraphs were as follows:

> 16. PNIRDL seeks one of the following outcomes, or — to the extent that the outcomes may be complementary to each other — a combination of some of the following outcomes:
>
> (a) That PC 6 be put on hold pending completion of the airport noise review.
>
> (b) That PC6 be amended to incorporate into the Proposed Urban Growth Area all of PNIRDL's land on its own or in any combination with some or all of
>
> (i) the land to the west of PNIRDL's land that forms part of the Operative Urban Growth Area,
>
> (ii) the land to the south of PNIRL's land that forms part of the Operative Urban Growth Area,
>
> (iii) the land that was notified as the Proposed Urban Growth Area. Such amendments would include:
>
> • amending the zoning maps and structure plan to reflect the new growth boundaries,
>
> • adding airport noise provisions (policies and rules/ standards) that would apply to land inside the Outer Control Zone resulting in airport noise controls no more onerous than under operative R 10.7.1.1.(h),
>
> • adding text to specify that the airport noise contours are shortly to be reviewed, and
>
> • Making only consequential amendments as may be required for consistency with the changes described above.
>
> (c) Any alternative relief that enables PNIRDL's land, on its own or in combination with some or all of
>
> (i) the land to the west of PNIRDL's land that forms part of the Operative Urban Growth Area,
>
> (ii) the land to the south of PNIRDL's land that forms part of the Operative Urban Growth Area,
>
> to be subject to urban growth provisions equivalent to those proposed for the Proposed Urban Growth Area, and additional performance standards for Airport Noise Control no more onerous than those under Operative R 10.7.1.1.(h).

We will return in further detail to these matters in the Background section of this decision.

[3] The other parties to these proceedings, Palmerston North City Council (the Council) and Palmerston North International Airport Ltd (the Airport Company) did not oppose the relief sought under Application 1(a) (para 16(a) submission), but opposed the relief sought under paras 1(b) and (c) of the application (paras 16(b) and (c) — submission)[2].

---

1 The Plan Change document refers to the Proposed Plan Change as being PPC6. Counsel and witnesses commonly referred to PC6. We will use the term PPC6 being the term used in the Plan Change document.

2 On occasions, where appropriate, in the balance of the decision we will refer to the provisions of the application for declaration and the submission together (eg para 1(a)/16(a)).

[4] The PNIRDL application triggered the filing of an application for declarations by the Council on 14 October 2013. The Council sought declarations in the following terms:

> [1] The Palmerston North City Council applies for the following declarations:
>
> (a) Any evaluation under RMA, s 32 on a proposal under RMA, Schedule 1 to rezone to residential any land within the Urban Growth Path — Kelvin Grove in Map 9.1 of the Operative Palmerston North District Plan (not within the Whakarongo Residential Area under Proposed Plan Change 6);
>
> (i) Must assess the scale of reverse sensitivity effects on the Palmerston North Airport;
>
> (ii) Must assess the economic impact of reverse sensitivity effects on the Palmerston North Airport;
>
> (iii) Must not assume the land will be served by infrastructure (other than by means of connections to existing services where sufficient capacity exists) funded by Palmerston North City Council unless the Palmerston North City Council expressly provides for that infrastructure by a decision made under the Local Government Act 2002 where available network capacity is limited;
>
> (iv) Must assess the nature, timing and provision of water, wastewater and stormwater infrastructure necessary to service the area for residential use;
>
> (v) Must evaluate the option against other options for urban growth available in Palmerston North.

[5] On 3 December 2013, counsel filed a joint statement advising that PNIRDL Declaration 1(a)/16(a) had been agreed to by all parties (subject to some amendments and one area of residual dispute) so that a declaration could be made on those matters. In paras 1(a)/16(a) PNIRDL sought that PPC6 be put on hold pending completion of an airport noise review. We were informed that the Council has in fact put PPC6 on hold. We advised the parties during the course of the hearing that in our view the issue of putting PPC6 on hold was an administrative matter for the Council and was not the appropriate subject of a declaration by the Court. We understood Mr Slyfield to accept our view in that regard and we do not propose to take that aspect of the application any further.

[6] The joint statement advised that the declarations sought by PNIRDL in paras 1(b)/16(b) and 1(c)/16(c) remained in dispute and we will return to the context of those applications in the Background section of this decision.

[7] For the sake of completeness, we record that it was agreed by the Council that if we declined to make the declarations sought by PNIRDL in paras 1(b)/16(b) and 1(c)/16(c) on the basis that the relief sought in those respective paras was not *on* PPC6, then there was no need for the Court to make the declarations sought by the Council.

Background

[8] PNIRDL owns a parcel of land containing 23.8 ha adjacent to the corner of Kelvin Grove Rd and Stoney Creek Rd bordering the north-eastern corner of Palmerston North City's residential area known as Kelvin Grove. The land is zoned Rural in the District Plan.

[9] In addition to its Rural zoning, PNIRDL's land (together with adjacent Rural Zone land owned by other parties) is subject to a notation contained in Map 9.1 and referred to in the Rural chapter of the District Plan showing that the land forms part of an *Urban Growth Path* (UGP). The UGP notation contained in Map 9.1 has been

included in the District Plan since it was first notified in 1995[3]. We were told that at that time it was the Council's preferred urban growth node for Palmerston North, by virtue of its proximity to the city and generally flat contour[4].

[10] The UGP notation does not constitute a zone and does not contain within it any rules directing the form of urban growth which might be undertaken within the UGP. The UGP land is generally subject to the same Objectives, Policies and Rules as all other Rural Zone land in the District Plan with one addition. Section 9 — Rural Zone contains one Objective together with related Policies and Explanation which relate specifically to the UGP land, namely:

> **Objective 1**
>
> **To protect rural land from the adverse effects of unnecessary and unplanned urban expansion.**
>
> **Policies**
>
> 1.1 To protect the urban growth path for the City identified in Map 9.1.
>
> 1.2 To ensure, as far as possible, that existing urban land is fully utilised before the rural land contained within the identified urban growth path is released for urban purposes.
>
> 1.3 To ensure that the urban conversion of the land contained within the identified urban growth path proceeds in an orderly manner.
>
> 1.4 To avoid, where possible, the fragmentation of land contained within the identified urban growth path into small blocks.
>
> **Explanation**
>
> It is important that future urban expansion within the City is carefully managed in order to ensure that the indiscriminate conversion of productive agricultural land for urban purposes is avoided.
>
> By identifying on Map 9.1 an urban growth path for the City, the Council is signalling how it will address, in part, the City's anticipated growth requirements over the next 10 to 15 year time horizon, and its desire to see the balance of the high quality rural land within the City retained for productive purposes.
>
> To facilitate the efficient urban conversion of land situated within the growth path, the Council considers that further fragmentation of these land holdings into smaller rural — residential blocks should be avoided. Additionally, the Council will also endeavour to ensure that existing land identified for urban purposes in the Kelvin Grove and Aokautere areas is utilised to its fullest extent prior to any land situated in the growth path being released for urban purposes.

[11] Accordingly, the status quo under the District Plan in respect of the PNIRDL land (as well as other land in the UGP) is that:

- The land is contained in the Rural Zone and is subject to the Objectives, Policies and Rules generally applicable in that zone;
- Additionally, the land is covered by the UGP notation in Map 9.1 which is specifically the subject of Objective 1, Policies 1.1-1.4 and their associated Explanation.

[12] We observe that other than signalling an ultimate intention that the land identified in Map 9.1 is to be used for the City's anticipated urban growth requirements, the Objective and Policies do not seek to enable any particular form of urban growth or development on the UGP land[5] but rather seek to protect the UGP

3 Becoming operative in December 2000.

4 Affidavit of D J Batley (Council Policy Planner), 11 October 2013, at [30].

5 The District Plan defines *Urban Areas* as meaning "any land zoned Residential, Business, Industrial, Institutional, North East Industrial, Recreation, Caccia Birch".

land from fragmentation until such time as it is required for that growth or development. These provisions are clearly restrictive rather than permissive and effectively ***land bank*** the land for future undefined urban development.

[13] Since the District Plan was initially notified there has been a significant change to its provisions affecting the UGP as well as a review of the Council's intentions for future urban development, both of which impact directly on the PNIRDL land.

[14] The first of these was the introduction of Variation 1 to the (then) Proposed District Plan in 1998. Variation 1 introduced into the Proposed District Plan an identification of Control Zones relating to Air Noise Contours generated by aircraft activities from Palmerston North Airport. We were told by Mr P Thomas (PNIRDL's planning witness) that the Air Noise Contours were based on noise studies undertaken in 1993 and 1997 which have been due for review since 2010[6].

[15] The Air Noise Contours define a hierarchy of Control Zones from the Air Noise Contour closest to the Airport where potentially noise sensitive activities are prohibited, to an Inner Control Zone lying between the 65-60Ldn contours and finally an Outer Control Zone lying between the 60-55Ldn contours. The Inner and Outer Control Zones both require the provision of sound insulation in the design of dwellings and other buildings used regularly for accommodation within those Zones. A higher level of insulation is required in the Inner Control Zone than the Outer Control Zone.

[16] The Inner and Outer Control Zones extend over substantial portions of the UGP land at Kelvin Grove. A narrow finger of the Inner Control Zone intrudes into the western/south-western portion of the UGP (including a small area of the western/south-western portion of the PNIRDL land) and the Outer Control Zone covers most of the rest of the UGP land including most (but not all) of the remainder of the PNIRDL land.

[17] Additionally, the Council has been reviewing its urban growth strategy and commissioning reports as part of that review since 2008. A detailed description of those reports is contained in Mr Thomas' affidavit of 18 September 2013. The reports include:

- A soils and land use capability report undertaken by AgResearch dated July 2010;[7]
- A flood risk assessment report undertaken by Barnett and MacMurray Ltd dated July 2010;[8]
- A flood risk assessment report undertaken by River Edge Consulting Ltd dated October 2010;[9]
- A report including an assessment of the effects of residential development at Kelvin Grove on the viability and role of Local Business Zones undertaken by Property Economics Ltd dated February 2011;[10]
- A report on issues associated with airport noise undertaken by Acousafe Consulting and Engineering Ltd dated May 2011;[11]

6 Thomas Affidavit, 18 September 2013, at [20], [21].

7 Thomas Affidavit, 18 September 2013, Attachment H.

8 Thomas Affidavit, 18 September 2013, Attachment I.

9 Thomas Affidavit, 18 September 2013, Attachment L.

10 Thomas Affidavit, 18 September 2013, Attachment M.

11 Thomas Affidavit, 18 September 2013, Attachment N.

- A liquefaction and related ground failure hazard report undertaken by GNS Science dated July 2011;[12]
- A ground contamination assessment report undertaken by Tonkin & Taylor Ltd dated September 2011;[13]
- A liquefaction assessment report undertaken by Tonkin & Taylor Ltd dated August 2012;[14]
- An urban design report undertaken by Mclndoe URBAN dated February 2013.[15]

[18] All of the reports identified above considered issues relevant to the UGP land at Kelvin Grove. The reports commonly addressed not just the UGP land itself but a wider area of land at Kelvin Grove bounded by Kelvin Grove Rd, James Line, Napier Rd and Stoney Creek Rd. The (generally) southern portion of this area is the subject of PPC6 and is now known as the Whakarongo Residential Area (WRA). The WRA contains approximately 54 ha, all of which falls outside the Air Noise Contours and nearly all of which is outside the area presently included in the UGP at Kelvin Grove, although it borders the UGP in part. The WRA does not adjoin the PNIRDL land.

[19] In September 2010, the Council formally adopted a Residential Growth Strategy. The Strategy identified Kelvin Grove as one of the preferred options for greenfield residential growth of the city whilst noting that "the remaining land beneath air noise contours may be best suited to industrial development".[16] That conclusion was driven by concerns as to the potential for conflict between residential development and airport activities on land within the Air Noise Contours. As we have noted, most of the PNIRDL land lies within those contours whereas land in the WRA does not. Accordingly, the Growth Strategy identified the WRA as being its preferred option for residential urban growth at Kelvin Grove rather than the PNIRDL land (nor other land within the Air Noise Contours), notwithstanding that the WRA was not within the UGP and the PNIRDL land was within the UGP.

[20] This process led Mr Batley to the conclusion that "by 2010 all of the land within the Urban Growth Path — Kelvin Grove not within the Whakarongo Residential Area had been eliminated by the Council as a candidate for residential urban growth. A significant reason for this was the presence of the Inner and Outer Control Zones that relate to airport noise".[17]

[21] In September 2012 the Council adopted an Addendum to the Residential Growth Strategy identifying the WRA as the primary growth option for the City to provide for its short to medium term residential growth requirements.

PPC6

[22] PPC6 was introduced by the Council to give effect to the determinations which the Council had made under the process set out above. The public notice of PPC6 summarised its intent in these terms:

> **The intent of Proposed Plan Change 6 can be summarised as follows:**
>
> - Implement Council's Residential Growth Strategy (September 2010) and Addendum (September 2012) within the District Plan.

12 Thomas Affidavit, 18 September 2013, Attachment O.

13 Thomas Affidavit, 18 September 2013, Attachment P.

14 Thomas Affidavit, 18 September 2013 Attachment Q.

15 Thomas Affidavit, 18 September 2013, Attachment S.

16 Batley Affidavit, 11 October 2013, at [32].

17 Batley Affidavit, 11 October 2013, at [33].

- Rezone land in the Whakarongo Residential Area (the area bounded by James Line, Napier Road, Stoney Creek Road and the southern extent of the Kelvin Grove Cemetery that is wholly located outside of the air noise contours) from Rural to Residential Zone for the purposes of providing for the short to medium term greenfield residential growth of Palmerston North.
- Introduction of the Whakarongo Residential Area Structure Plan to guide development patterns and layout.
- Inclusion of a comprehensive policy framework in the District Plan to ensure good urban design outcomes with respect to form, function and layout are achieved.
- A Restricted Discretionary Activity Status for all subdivision within the Whakarongo Residential Area with associated assessment criteria to ensure these outcomes are achieved and development happens in an appropriate and integrated manner.

[23] In addition to the above summary of intention in the public notice, pt 1 of PPC6 itself contained the following description:

> Proposed Plan Change 6 (PPC6) involves the introduction of new provisions to the Subdivision, Residential, and Rural Zone sections of the District Plan to enable integrated greenfield development for residential purposes within the Whakarongo Residential Area, as shown on Map 7A.1. Changes to the Planning Maps are also required to show the extent of the Whakarongo Residential Area. Subdivision and development is to be in accordance with the Whakarongo Structure Plan, so that development forms a logical, planned and integrated extension of the urban boundary and contributes towards the City's long term goals and residential growth plans.
>
> This area was identified in the Palmerston North City Residential Growth Strategy (2010) and Addendum (2012) as being the most appropriate area for the continued growth of Palmerston North City. PPC6 gives effect to the Residential Growth Strategy via the District Plan.

[24] It will be apparent from the above statements that PPC6 is limited in its scope. That is also apparent from the s 32 report which forms part of PPC6 and which identifies the purpose of PPC6 in these terms:

> 1.5 The primary purpose of PPC6 is to rezone the area of land identified as the Whakarongo Residential Area in the Residential Growth Strategy for the purpose of residential development. A secondary focus is to include urban design and sustainability provisions in the District Plan to ensure greenfield residential areas are attractive and welcoming places, recognising the strategic direction of Council.
>
> 1.6 This plan change gives effect to the contents of the Residential Growth Strategy via the Palmerston North City District Plan.[18]

[25] It is further apparent from the above statements that PPC6 is not intended to be a wider review of all of the provisions of the District Plan relating to the Rural or Residential Zones contained in the plan. That is spelled out quite specifically in the s 32 Report to PPC6 which records:

> 1.31 A review of the Rural and Residential Zones of the District Plan is currently underway and may contain objectives and policies relevant to this Residential Growth review.[19]

[26] Although PPC6 is not a general review of Rural Zone provisions it does propose some alterations to those provisions. Those alterations are:

- Removal from the District Plan of Map 9.1 showing the UGP in the Rural Zone at Kelvin Grove;

---

18 PPC6, at 27.

19 PPC6, at 35.

- Amendments to Rural Zone Objective 1 and its associated Policies and Explanation relating to the UGP land.

[27] The amendments proposed to the Objective, Policies and Explanation are as follows:

> **Objective 1**
>
> To protect rural land from the adverse effects of unnecessary and unplanned urban expansion.
>
> **Policies**
>
> 1.1 To protect rural land that has been identified in Council strategies as potentially suitable for future urban growth.
>
> 1.2 To ensure, as far as possible, that existing urban land is fully utilised before rural land is released for urban purposes.
>
> 1.3 To ensure that the urban conversion of the land proceeds in an orderly manner.
>
> 1.4 To avoid, where possible, the fragmentation of rural land that has been identified in Council strategies as potentially suitable for future urban growth into small blocks.
>
> **Explanation**
>
> It is important that future urban expansion within the City is carefully managed in order to ensure that the indiscriminate conversion of productive agricultural land for urban purposes is avoided. Additionally the Council will also endeavour to ensure that existing land identified for urban purposes is utilised to its fullest extent prior to any rural land being released for urban purposes.

[28] PNIRDL's submission to PPC6 supported urban growth provisions for Palmerston North but opposed PPC6 to the extent that it supported urban growth in the WRA and removed support for urban growth on the PNIRDL land and other land in the UGP. It contended that at least some of the land presently contained in the UGP should continue to be supported in the District Plan as an area to accommodate urban growth. The specific terms of the relief which it sought in that regard and which are relevant to our present considerations are largely set out in [2] (above) however we briefly summarise that relief as follows:

- Putting PPC6 on hold pending completion of an airport noise review (Submission 16(a)). We refer to our earlier comments in that regard;[20]
- Amending PPC6 to incorporate the PNIRDL land (and possibly other land in the UGP) into the WRA (Submission 16(b));
- Alternatively, enabling the PNIRDL land (and possibly other land in the UGP) to be subject to urban growth provisions equivalent to those in the WRA (Submission 16(c));
- Rejecting the deletion of Map 9.1 and the related UGP provisions (Objective 1 and Policies 1.1-1.4) from the District Plan (Submission 16(d)).

[29] The issue before the Court in these proceedings is whether or not the relief sought in Submissions 16(b) and (c) is within jurisdiction as being on PPC6. As we have noted, the other parties to these proceedings have agreed to PPC6 being put on hold and we do not propose making any declaration in that regard. There is no dispute that PNIRDL was entitled to oppose the removal of Map 9.1 and the UGP provisions from the District Plan (Submission 16(d)) and that aspect of the PNIRDL submission does not form part of this application for declaration.

---

20 See [5] (above).

Clause 6, sch 1 RMA

[30] The right to make a submission in respect of a proposed policy statement or plan (including a change or review of such documents) is contained in cl 6 of sch 1 RMA which relevantly provides:

> (1) Once a proposed policy statement or plan is publicly notified under clause 5, the persons described in subclauses (2) to (4) may make a submission *on it* to the relevant local authority. (Our emphasis)

[31] There is no dispute that PNIRDL is a *person* who was entitled to make a submission in respect of PPC6. The matter in dispute in these proceedings is whether or not paras 16(b) and (c) of its submission were *on* PPC6. PNIRDL contended that those provisions of its submission were on the Plan Change whereas the Council and Airport Company contended that they were not.

[32] Before turning to that issue there is a further aspect of the PNIRDL submission to which it is appropriate to refer at this time. That is contained in [17] of the submission which states:

> In the event that none of these outcomes [ie the outcomes sought in para 16 of the submission] is possible, and the only remaining outcome is that PC 6 be confirmed in a manner that in effect treats the operative Outer Control Boundary as a zone boundary (promoting urban growth on one side and precluding urban growth on the other side of the boundary), then PNIRDL seeks that PC 6 be rejected; which will enable the (overdue) review of the Outer Control Boundary to be completed and to guide an urban growth plan change for this area (to an appropriate extent).

[33] We refer to this particular aspect of the submission because the proposition that PPC6 in effect treats the Outer Control Boundary as a zone boundary is reflected in the submissions made on behalf of PNIRDL in support of its contention that its submission was on PPC6. We will return to that matter shortly.

The legal principles

[34] There was no argument between the parties as to the legal principles which are applicable in determining whether or not a submission is on a plan change. The cases referred to by counsel included the High Court decisions in *Clearwater Resort Ltd v Christchurch City Council*[21], *Option 5 Inc v Marlborough District Council*[22] and *Palmerston North City Council v Motor Machinists Ltd*[23].

[35] In *Clearwater*, William Young J identified the *preferred approach* to determining whether or not a submission was on a plan as comprising two considerations:[24]

> 1. A submission can only fairly be regarded as "on" a variation if it is addressed to the extent to which the variation changes the pre-existing status quo.
> 2. But if the effect of regarding a submission as "on" a variation would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected, this is a powerful consideration against any argument that the submission is truly "on" the variation.

[36] In *Motor Machinists*, Kós J adopted the approach contained in *Clearwater* and added (inter alia) the following observations:

> [80] For a submission to be on a plan change, therefore, it must address the proposed plan change itself. That is, to the alteration of the status quo brought about by that change. The first limb in Clearwater serves as a filter, based on

21 HC Christchurch AP34/02, 14 March 2003.

22 (2009) 16 ELRNZ 1 (HC).

23 [2013] NZHC 1290.

24 At [66].

> direct connection between the submission and the degree of notified change proposed to the extant plan. It is the dominant consideration. It involves itself 2 aspects: the breadth of alteration to the status quo entailed in the proposed plan change, and whether the submission then addresses that alteration.
>
> [81] In other words, the submission must reasonably be said to fall within the ambit of the plan change. One way of analysing that is to ask whether the submission raises matters that should have been addressed in the s 32 evaluation and report. If so, the submission is unlikely to fall within the ambit of the plan change. Another is to ask whether the management regime in a district plan for a particular resource (such as a particular lot) is altered by the plan change. If it is not then a submission seeking a new management regime for that resource is unlikely to be "on" the plan change … Yet the Clearwater approach does not exclude altogether zoning extension by submission. Incidental or consequential extensions of zoning changes proposed in a plan change are permissible, provided that no further s 32 analysis is required to inform affected persons of the comparative merits of that change. …

[37] Counsel for PNIRDL identified four questions which he contended should be considered in determining the extent to which PPC6 changes the status quo, being the first of the *Clearwater* factors and being the *dominant* factor identified in *Motor Machinists*. The four questions were:

- What is the breadth of the alteration to the status quo entailed in PPC6?
- Does PNIRDL's submission address that alteration?
- Does PNIRDL's submission raise matters that should have been addressed in the s 32 evaluation?
- Is the management regime for the relevant resource (PNIRDL's land and other UGP land) altered by PPC6?

We use those questions as the template for our considerations.

What is the breadth of the alteration to the status quo entailed in PPC6?

[38] PNIRDL contended that PPC6 changes the status quo for both the WRA land and for land contained within the UGP. The WRA land is to be removed from the Rural Zone and included in the Residential Zone as a specifically identified area called the Whakarongo Residential Area containing a discrete set of rules applicable to that area. The change of status quo in respect of the UGP land is the uplifting of the UGP notation in Map 9.1 and amendments to Objective 1 and Policies 1.1-1.4 applicable to the UGP land.

[39] Insofar as the first change (including the WRA in the Residential Zone) is concerned, we note that [17] of PNIRDL's submission seeks that PPC6 be rejected in toto. Although that aspect of the submission is not the subject of these proceedings, it appears to us that such a submission must be seen as being on PPC6. It is the second change to the status quo, namely uplifting the UGP notation from the PNIRDL land together with the amendments to the Objective and Policies which is relevant to these proceedings.

[40] PNIRDL made the following concession in its submissions to us:

> In respect of the land within the UGP, PC 6 does not amount to a re-zoning, but it does alter the status quo in a fundamental and significant way.[25]

[41] We concur with that concession and make the further observation that not only does PPC6 not amount to a rezoning of the land within the UGP, neither does it propose any amendments to the Rules applicable to Rural Zone land within the UGP.

25 NIRDL's submission, at [39]

Although PPC6 proposes neither a rezoning nor a rule change, those remedies are precisely what PNIRDL seeks in its paras 16(b) and (c). These are to be accomplished in one of two ways:

- Inclusion of the PNIRDL land (and possibly other land within the UGP) in the WRA (para 16(b)); or alternatively;
- By making the PNIRDL land (and possibly other land within the UGP) subject to urban growth provisions allowing residential development similar to those applicable in the WRA.

[42] PNIRDL advanced the following propositions in support of its contention that uplifting the UGP notation over the land at Kelvin Grove alters the status quo of that land in a fundamental and significant way:

> 40. The status quo for the land comprising the UGP includes its demarcation on Map 9.1 of the Operative District Plan, and the triggering of associated policies (1.1-1.4) that aspire to protect the land for orderly urban growth. Within the entire operative District Plan, the demarcation of the UGP and imposition of related policies are the sole mechanisms that make any provision for future expansion of the urban area.
>
> 41. It is acknowledged that the UGP "overlay" and associated policies do not trigger any different rules for the consideration of residential development within the rural area; but any residential development within the UGP would (in the absence of PC 6) be evaluated in the context that this land is within the only identified urban growth area in the Operative Plan.
>
> 42. PNIRD submits that it is artificial and misleading to consider the "status quo" of the UGP by examining only the UGP provisions. It is equally part of the status quo that there is no other land within the jurisdiction of the District Plan that has been formally identified in the Plan as a potential growth area. It is also part of the status quo that the land at Whakarongo is simply zoned "rural", without any overlay or associated policies to suggest it might be an area for future residential growth.
>
> 43. PC 6 changes all of these things, and it is the totality of that change that establishes what the breadth of PC 6 is.
>
> 44. PNIRD submits that the removal of the sole provisions that identify an area appropriate for urban growth, and the concurrent creation of another set of new growth provisions, inevitably signals that land in the WRA is appropriate for residential growth, and land in the UGP is not. That is a very significant alteration, not only for the WRA, but equally for the UGP.
>
> 45. Further, PNIRD submits that PC 6 materially alters the function of the outer control boundary. Under the operative provisions, PNIRD's land and the land adjacent to it is identified as the Urban Growth Path **despite** being inside the OCB. Under PC 6 the Urban Growth Path is treated as no longer appropriate for urban growth **because** it is within the OCB. Any party coming to the new plan provisions "after the event" may have difficulty discerning the significance of this change; but from the present vantage point the significance is clear. PC 6 is making the Outer Control Boundary a dividing line between land on which residential growth is generally appropriate, and land on which there is a strong presumption that residential growth is inappropriate. Presently, the OCB does not fulfil that function.

[43] In a general sense the PNIRDL submissions appear to us (without having heard any evidence on the merits) to accurately summarise the consequences of uplifting the UGP notation contained in Map 9.1 and rezoning the land within the WRA. Paragraphs 16(d) and 17 of the PNIRDL submission enable it to pursue both of those matters, including any contended change of function of the Outer Control Boundary and whether or not residential development is appropriate within that Boundary. However, paras 16(b) and (c) of the PNIRDL submission go further than

just challenging the uplifting of the UGP notation and the rezoning of the WRA land, but also seek the rezoning of or the imposition of new District Plan Rules on the PNIRDL land. We will address that subject under the next heading of this decision. Before doing so we make one further observation on the issue of alteration of the status quo.

[44] It appears to us that the PNIRDL submission presumes that the fact that its land is presently included within the UGP identifies that the land is appropriate for *residential growth*.[26] We consider that presumption to be wrong. The notation indicates that the land contained within the UGP is appropriate for *urban growth*. The term *urban growth* is not defined in the District Plan. However, we refer to the definition of *urban areas* set out in footnote 5 (above) providing that the term *urban areas* means land zoned Residential, Business, Industrial, Institutional, North East Industrial, Recreation or Caccia Birch. It is clear from the definition that urban activities extend considerably beyond just residential activity. The change to the status quo brought about by PPC6 is removal of identification of the PNIRDL land as being suitable for any form of urban growth, not just residential growth.

Does PNIRDL's submission address that alteration?

[45] As we have observed in [43] (above), paras 16(d) and 17 of PNIRDL's submission which challenge the uplifting of the UGP notation on the PNIRDL land and the rezoning of the WRA land undoubtedly address the extent of the alteration to the status quo brought about by PPC6. None of the other parties dispute that those aspects of the PNIRDL's submission are on PPC6. The status quo in respect of the UGP land would be restored if Map 9.1 and the related UGP provisions were retained in the District Plan as PNIRDL seeks in its submission 16(d). Similarly, the status quo in respect of the WRA land would be restored if submission 17 of the PNIRDL submission was upheld. Those two elements of the submission accordingly address the totality of the Plan Change which PNIRDL (quite correctly) submits must be taken into account.

[46] PNIRDL's submission to this hearing tacitly recognises the obvious difficulty in contending that submissions 16(b) and 16(c), which seek a rezoning or change of rules for PNIRDL's land, are on PPC6 which does neither of those things. PNIRDL sought to overcome that difficulty by pointing to the subject matter of PPC6 which it said was the introduction of "a new comprehensive residential growth area, the effect of which is to extend the urban area of Palmerston North".[27]

[47] PNIRDL submitted that the outcome which it sought was the same as that sought by PPC6, albeit in respect of a different area. We disagree with that submission. PPC6 seeks to rezone the WRA to give effect to the Council's Urban Growth Strategy which has identified the WRA as the appropriate area for residential growth. By identifying a different area, PNIRDL *ipso facto* seeks a different outcome.

[48] PNIRDL further submitted that its land and all of the other land comprising the UGP was already the subject of PPC6. That is correct as PPC6 proposes the removal of Map 9.1 and its associated Objective and Policies from the District Plan. It went on to contend that "PC 6 is a plan change that seeks to introduce a totally new greenfield growth zone. That PC 6 proposes such zone on land other than the UGP does not undermine a conclusion that PNIRDL's submission directly engages with the extent to which PC 6 proposes to change the status quo".[28]

---

26 Cf [41] and [44] PNIRDL's submission, set out in [42] (above).

27 PNIRDL's submission, at [51]

28 PNIRDL's submission, at [56].

[49] We consider that PNIRDL's submissions in that regard do not address the extent of alteration to the status quo which PPC6 proposes in respect of the UGP land. PPC6 alters the status quo in respect of that land by uplifting the UGP notation, not by rezoning the UGP land nor by bringing down new rules on it. By seeking those outcomes, paras 16(b) and (c) go beyond the changes to the status quo proposed by PPC6.

[50] In further support of the proposition which it advanced, PNIRDL referred to the provisions of s 79 RMA as amended in 2009. These provisions postdate both *Clearwater* and *Option 5*. Section 79 provides for review of provisions (ie parts) of policy statements and plans[29] or full reviews of policy statements and plans.[30]

[51] In this case, the review undertaken by PPC6 is a review of only certain provisions of the District Plan and is subject to provisions of s 79(1)-(3) which relevantly provide as follows:

> (1) A local authority must commence a review of a provision of any of the following documents it has, if the provision has not been a subject of a proposed policy statement or plan, a review, or a change by the local authority during the previous 10 years:
>
> (a) a regional policy statement:
>
> (b) a regional plan:
>
> (c) a district plan.
>
> (2) If, after reviewing the provision, the local authority considers that it requires alteration, the local authority must, in the manner set out in Part 1 of Schedule 1 and this Part, propose to alter the provision.
>
> (3) If, after reviewing the provision, the local authority considers that it does not require alteration, the local authority must still publicly notify the provision—
>
> (a) as if it were a change; and
>
> (b) in the manner set out in Part 1 of Schedule 1 and this Part.

[52] PPC6 is described in the Plan Change documents in these terms:

> Palmerston North City Sectional
> District Plan Review
> Proposed Plan Change 6:
> Whakarongo Residential Area

[53] It is apparent from use of the term Sectional District Plan Review and from the descriptions of PPC6 contained in [22]-[25] (above) that PPC6 is a review of those provisions of the District Plan which must be altered to give effect to the Council's Urban Growth Strategy in respect of the WRA. As we noted in [25] (above), PPC6 is not a review of the wider provisions of either the Rural or Residential Zones.

[54] Mr Slyfield submitted that s 79(3) "ensures that there is an opportunity to submit on any aspect of a District Plan through the process of review under" s 79.[31] He contended that the topic of the Sectional Review in PPC6 is *urban growth* and that PPC6 was the only part of the Sectional Review where PNIRDL's concerns could be raised. He suggested that if a review process was too *compartmentalised* there was a risk of frustrating concerns about appropriate provisions for a particular land resource[32].

[55] We do not consider that the provisions of s 79(3) advance PNIRDL's argument in this case. What s 79(3) provides is that even if, after having conducted a review of any *provision* of a District Plan, the local authority determines that a particular

29 Section 79(1)-(3).

30 Section 79(4)-(7).

31 PNIRDL's submission, [57].

32 PNIRDL's submission, at [61].

provision does not require alteration, it must still regard that determination not to alter the provision as if it was a plan change and undertake the sch 1 process in respect of it. Section 79(3) gives parties who claim to be affected by retention of the status quo the opportunity to challenge that.

[56] It is apparent from perusal of the PPC6 documents that the Council did not review nor make any determination as to matters pertaining to the Rural zoning of the UGP land at Kelvin Grove as part of its Sectional Review. As we noted in [25] (above), para 1.31 of the s 32 Report on PPC6 recorded that a review of the Rural and Residential Zones of the District Plan was underway and that review might contain objectives and policies relevant to the Residential Growth Review.

[57] In his submission for the Council, Mr Maassen contended:

> Palmerston North City Council is entitled to put forward changes to provisions in its district plan at any time to provide for urban growth in particular areas (in this case Whakarongo Residential Area), without risking opening the debate to a much wider one of where else growth should occur. Proposing an area to be rezoned does not open the door to submission on "where else", but "whether and how". This is the point of *Palmerston North City Council v Motor Machinists Ltd*.[33]

We concur with that statement.

[58] Mr Maassen also referred us to this Court's decision in the *Halswater Holdings* case[34] where the Court held that "a submission on a plan change cannot seek a rezoning (allowing different activities and/or effects) if the rezoning was not contemplated by the plan change".

[59] Uncritically accepting the above as a statement of the law at that time, we are uncertain as to how it might now be affected by the provisions of s 79(3) (and (7)) RMA. Either way, and having regard to the provision of *Motor Machinists* (which postdates the 2009 amendment), it is apparent that there are considerable obstacles in the paths of persons who wish to challenge the zoning of properties which are outside the boundaries of the land subject to a plan review.

[60] However, it appears to us that the issues arising out of para 16(b) and (c) of the PNIRDL submission arise at a quite fundamental level irrespective of the provisions of s 79. Namely, that those aspects of PNIRDL's submission go beyond addressing the extent to which PPC6 alters the status quo by seeking either a rezoning or a change to Rules in the Rural Zone applicable to the UGP land, neither of which are proposed by PPC6.

Does PNIRDL's submission raise matters that should have been addressed in the s 32 evaluation?

[61] This issue arises out of remarks made by Kós J in *Motor Machinists* where he observed that one way of analysing whether a submission fell within the ambit of a plan change was "to ask whether the submission raises matters that should have been addressed in the s 32 evaluation and report. If so, the submission is unlikely to fall within the ambit of the plan change".[35]

[62] PNIRDL contended that its submission does not raise matters which should have been addressed to any greater degree than they were in the s 32 evaluation whilst making the point that his Honour observed an analysis of the s 32 evaluation was only one of the ways of approaching this question.

[63] PNIRDL went on to submit that the s 32 evaluation of PPC6 "contains a robust multi-disciplinary assessment of the inclusion of the UGP land within a new growth

33 Council submissions, at [6].

34 *Halswater Holdings Ltd v Selwyn District Council* (1999) 5 ELRNZ 192 (EnvC).

35 *Motor Machinists*, at [81].

zone".[36] In support of that proposition PNIRDL referred to the various reports which we identified in [17] (above) and contended that those reports raise "all of the relevant resource management issues relevant to potential re-zoning of the whole of the Kelvin Grove area (ie the WRA ***and*** the UGP)".[37] It went on to submit that within those reports "the UGP was subjected to an equivalent level of scrutiny as the WRA, the only exception being in relation to the final urban design structure plan".[38]

[64] Although it is correct that the suitability of the UGP land at Kelvin Grove for development was considered in all of the reports referred to other than the final Urban Design Report, that does not support the conclusion reached by PNIRDL which overlooks the context within which these reports have been included in PPC6. That context is the promotion of the WRA for residential development. The various reports provide the basis for the s 32 analysis contained in PPC6 and must be read in conjunction with that analysis. No one reading the s 32 analysis would have any apprehension or impression that the reports were being considered in support of a rezoning of or rule change for the UGP land nor that such rezoning or rule change was a potential outcome of the PPC6 process.

[65] Section 3 of the s 32 analysis[39] is an evaluation of alternatives and identification of the preferred option for development. Consistent with the rest of the s 32 report, it is apparent that the Evaluation section is restricted to consideration of alternatives to the option of introducing new Objectives, Policies and Rules relating to management of the use and development of the land in the WRA. It does not contain any evaluation pertinent to the UGP land. The options which were evaluated in respect of the WRA land were:

- Retaining the status quo;
- Proceeding with PPC6;
- Rezoning the WRA land residential with no other changes to the District Plan, including no Structure Plan for the WRA area.[40]

[66] Having considered those options, the s 32 analysis concluded that the appropriate option for the WRA was to proceed with PPC6.[41] There was no equivalent analysis undertaken of rezoning the UGP land or amending the Rules of the Rural Zone to enable residential development of the UGP land because enabling development of the UGP land was not the subject matter of PPC6. There is nothing in the s 32 evaluation which gives rise to any suggestion that rezoning or rule amendment in respect of the UGP land is a likely outcome of the PPC6 process. In our view such an outcome would be seen as *out of left field.*

[67] A particularly significant feature of PPC6 is the incorporation into the District Plan of Map 7A.1 being a Whakarongo Structure Plan. PPC6 requires that development within the WRA is undertaken in general accordance with the Structure Plan.[42] The Structure Plan shows the arrangement of land use types, identifies public infrastructure and seeks to enable integration of development on the WRA with surrounding development. It is integral to the development of the WRA. No such Structure Plan exists for the UDP. The reason for that is apparent from the Urban Design Report, dated February 2013 referred to in [17] (above). Namely:

---

36 PNIRDL's submission, at [74].

37 PNIRDL's submission, at [74].

38 PNIRDL's submission, at [75].

39 PPC6, at 54-57.

40 PPC6, at 54, at [3.4].

41 PPC6, at 56.

42 PPC6, eg: Policies 1.2 and 1.3 and r 7A.5.2.1(1) (third bullet point) and r 7A.5.2.2.

> 7.1 This plan change has been tailored specifically to Whakarongo, with the structure planning workshops ensuring that key features and constraints are appropriately recognised, local opportunities identified, and development optimised.

[68] We accept that consideration of a s 32 analysis is only one way of considering whether or not a submission is on a plan change. However, consideration of the s 32 analysis in this case highlights the restricted and specific nature of PPC6 and is contrary to PNIRDL's contention that the UGP land has been subject to a similar level of evaluation as the WRA land. That is demonstrated (inter alia) by the absence of any options considerations in respect of the UGP land and the absence of any consideration of Structure Plan requirements which might be generated by development on the UGP land.

[69] It is correct, as noted in the submissions for PNIRDL, that the Council is obliged to undertake a further s 32 analysis at the time of considering submissions and issuing its decision on PPC6 when issues such as those identified above would be considered. However, the absence of any consideration of those issues in the initial s 32 analysis simply emphasises the limited extent of PPC6 and the extent to which PNIRDL's proposals for rezoning or amending Rural Zone Rules go beyond what is contemplated by PPC6.

Is the management regime for the relevant resource (PNIRDL's land and other UGP land) altered by PPC6?

[70] This question also arises out of the *Motor Machinists* case and was identified in that case as another way of analysing whether submissions can reasonably be said to fall within the ambit of a Plan Change. PNIRDL pointed to the fact that the expression used by the Court was whether the *management regime* is altered by a plan change rather than whether the *zoning* was altered.

[71] We do not consider that answering this question assists PNIRDL's position. As we have observed previously, the manner in which PPC6 alters the management regime in respect of the PNIRDL land is by removal of the UGP notation contained in Map 9.1 and alterations of the corresponding Objective and Policies. Those alterations are addressed under para 16(d) of PNIRDL's submission.

[72] PNIRDL also contends that "the concurrent creation of a whole new set of growth provisions for the WRA"[43] fundamentally alters the management regime for the UGP. Even if that is correct, that issue is addressed in [17] of PNIRDL's submission.

[73] In neither instance above do the outcomes sought by PNIRDL of rezoning its land or amending the rules applicable to that land arise out of the proposals contained in PPC6.

Outcome

[74] Having regard to all of the above matters we determine that paras 16(b) and (c) of the PNIRDL submission are not *on* PPC6. Having reached that conclusion, it is not necessary for us to address the second *Clearwater* consideration as to participation of other potentially affected parties nor is it necessary for us to address the matters raised by the Council's application for declaration.

[75] We decline to make declarations 1(b) and 1(c) sought by PNIRDL.

---

43 PNIRDL's submission, at [83].

Costs

[76] Costs are reserved. Any costs applications by the Council or the Airport Company may be made and responded to in accordance with the provisions of the Court's *Practice Note*.

Appeal dismissed

Reported by Kara Hudson

Applicant	**Christchurch City Council**
Decision Number	W177/96
Tribunal	Judge Willy presiding
Judgment Date	29/11/1996
Counsel/Appearances	Steven, PA; Milligan, JR
Quoted	Mutual Shipping Corporation of New York v Baystone Shipping Co of Monrovia [1985] 1 Aller 520; Sunde v Sunde [1992] DCR 80
Statutes	Resource Management Act 1991, 1991/69, First Schedule Cl 16, Cl 16(2), Cl 17
Full text pages:	13

Keywords

District Plan; errata

Significant in Planning & Procedure Clause 16 First Schedule

Extent to which Clause 16 permits alteration to a plan without the need for a variation. Held effect of amendments must be neutral and correction of errors is limited to correcting a slip in expression but not content (2 ELRNZ 440 at 42).

SYNOPSIS

Declaration, extent to which First Schedule, Clause 16(2) RMA empowers a Council to update information or correct minor errors. Council had provided a list of errata as part of the Proposed Plan. Alterations included changes to the description of scheduled items, zoning errors and rule errors.

The Court restated the importance of public participation in plan preparation and held that alteration to information must have minor effects and correction of errors extends only to minor errors.

Updating of information is allowed by Cl 16(1) but only where such alterations had they been in the original proposed plan would not have been such that anyone would have bothered to make a submission. In determining this the touchstone should be: does the amendment affect (prejudicially or beneficially) the rights of some members of the public or is it neutral? If neutral it is permitted by Cl 16.

Correction of errors should be approached in the same way as Rule 12 of the District Court Rules 1992. The fundamental principle of the "slip rule" is that it may only be used to correct a slip in the "expression" of a judgment not the "content".

There is no limitation as to when such errors can be corrected. It is not the timing of when errors are corrected, but the content and substance of them which is at issue. The Court ruled on various specific errata finding a number were outside the discretions contained in Cl 16. Examples of modifications outside Cl 16(1) are:

- Change in the species name of a scheduled tree where there are other trees

on the site,

- Correction of a zoning error, or
- Rewording of a rule to clarify its meaning.

FULL TEXT OF DECISION W177/96

Introduction

This is an application by the Christchurch City Council for the following declarations:

(a) That the amendments set out in Annexure B to the affidavit of Robert Charles Nixon can lawfully be made to the Proposed City Plan and are within the powers of the Christchurch City Council to make the same at any time prior to the Proposed City Plan being approved pursuant to clause 17 of the First Schedule to the Act, by virtue of the provisions of clause 16(2) of the First Schedule; and

(b) That the amendments set out in Annexure B to the affidavit of Robert Charles Nixon fall within the scope of clause 16(2) of the First Schedule to the Act in that they can properly be considered either as alterations to information which alterations are of minor effect, or as corrections to minor errors.

The application was called on for hearing before Judge Bollard and members of the Tribunal on 16 August 1996. The Tribunal recorded the appearances of Mr Hearn QC seeking to be heard on behalf of members of the Christchurch Planning Bar Association. Mr Hearn QC advised that the Association wished to *"present argument contrary to that to be advanced by the Council so that the Tribunal could be in a position of being fully informed on the counter ruling views and thus make an unformed (sic) decision"*.

An urgent hearing was requested and the matter came on before me sitting alone. Mr Milligan presented the argument on behalf of the Association.

Background

The matter at issue is the extent to which the Christchurch City Council can avail itself of the provisions of Clause 16(2) of the First Schedule to the Act. This Clause empowers a Council to amend a proposed plan by altering the contents where to do so is of minor effect, or to correct minor errors. The results of such a process are generally described as "errata".

The reason for the involvement of the Association is that its members all of whom practice regularly in the Environment Court are becoming increasingly concerned at the extent to which this power is being invoked by Councils, and the importance of the substance of some alterations to proposed plans sought effected in this way.

The concern is twofold.

- The alterations are being made without any public participation or even notification

- Members of the Association are finding it increasingly difficult to advise clients precisely what are the provisions of proposed plans as they affect the property rights and expectations of their clients.

The Association wishes the Court to regard this as a test case and to lay down some guidelines for the proper interpretation and use of the errata power. The vehicle chosen to do that is the series of alterations to the Christchurch City District Plan annexed to the affidavit of Mr R C Nixon, filed in support of the application. That is necessary because of the well established reluctance of Courts to decide issues in an academic way.

That said, Miss Steven for the Council, seeks only a decision on the declaration before the Court. Counsel does acknowledge however that a decision on the more general issues raised will assist her client and possibly other Councils.

The Facts

These are set out in the affidavit of Mr Nixon sworn on 13 August 1996 as follows:

> *"On 22 March 1995, the Christchurch City Council formally resolved to publicly notify its Proposed City Plan on 24 June 1995. In the four to five weeks leading up to notification of the Plan and while the Plan was in the process of being finally printed, it became apparent that there were a number of errors and omissions in the text of the Plan and on the planning maps.*
>
> *Having taken advice it was decided that these errors and omissions could be cured by invoking the provisions of Clause 16(2) of the First Schedule of the Resource Management Act. This clause enables a Council to amend a proposed plan to alter any information where that is of minor effect, or to correct minor errors.*
>
> *Consequently the Plan was notified including a list of Errata (Amendment No 1 (24 June 1995)). That list of Errata included 100 corrections to the text of the Plan and four amendments to the planning maps. Replacement pages incorporated the Errata were issued in 1 August 1995 to all those persons who had purchased copies of the Proposed City Plan and who had advised the Council that they wished to receive an updating service. From 1 August all copies of the Proposed City Plan sold contained the replacement pages incorporating the corrections and did not include the list of Errata."*

During the submission period the Association wrote to the Council in the following terms:

> ***"1. THE** specific issue raised by the proposed Plan that this submission relates to is as follows: The issue of errata purporting to be part of the City Plan as publicly notified and (on 1 August 1995) of replacement pages with instructions that the pages purportedly 'replaced' be destroyed.*
>
> ***2. MY** submission is that:*

(a) It is unclear whether or not the document headed 'Errata: Amendment No. 1 (24 June 1995)' issued with all copies of the proposed City Plan since that Plan was publicly notified on 24 June 1995 was a part of the proposed Plan as approved for public notification by resolution of the Christchurch City Council. If it was not, then the 'Errata' can only be seen as part of the proposed Plan if its issue is authorised by clause 16(2) of the First Schedule to the Act;

(b) On the proper construction of the First Schedule to the Act the power provided by clause 16(2) thereon 'to alter any information ... or ... correct any minor errors' may only be exercised after all submissions to, or appeals in relation to, a proposed Plan have been dealt with and before approval of the Plan in its final form under clause 17;

(c) In any event there is at least one case where the 'replacement pages' introduce an alteration which does not reflect the 'errata'.

(d) In all the circumstances the procedures adopted by the Council have the potential to confuse and mislead ordinary members of the public who may reasonably be in doubt as to the precise form of the proposed District Plan, the manner in which it might affect them, whether they should make a submission in relation to it, and the form and content of any such submission.

***3. I** seek the following decision from the local authority:*

(i) a determination on the part of the Christchurch City Council to seek an enforcement order in terms of s314(f) or alternatively

(ii) the renotification of a precisely identified document as the proposed District Plan for the City of Christchurch.

***4. I** do wish to be heard in support of these submissions.*

.....

(J R Milligan)

for the Christchurch Planning Bar Assn"

The Council's response to that submission is to make the present application for declarations set out above.

The Statutory Provisions

First Schedule Clause 16 provides:

"16. Amendment and variation of proposed policy statement or plan -

(1) A local authority shall amend its proposed policy statement or plan to give effect to any directions of the Planning Tribunal.

(2) A local authority may make other amendments to the proposed policy statement or plan to update any information or correct any minor errors.

(3) Where a local authority decides to make amendments at any time prior to approval of the policy statement or plan (other than under subclause (2)), the provisions of this Schedule relating to consultation

and public participation apply to any such variation as far as they are applicable and with necessary modifications."

This wording is the result of an amendment made in July 1993. (1993 No. 65 s215).

Clause 16(2) originally read:

"(2) A local authority may make other amendments to the proposed policy statement or plan to update any information or correct any minor errors."

"(3) Where a local authority decides to make amendments at any time prior to the approval of the policy statement or plan (other than under this clause (2)), the provisions of this schedule relating to conciliation and public participation apply to any such variations as far as they are applicable and with necessary modification."

Clause 16A provides:

"Variation of proposed policy statement or plan -

(1) A local authority may initiate variations (being alterations other than those under clause 16) to a proposed policy statement or plan, or to a change, at any time before the approval of the policy statement or plan.

(2) The provision of this Schedule, with all necessary modifications, shall apply to every variation as if it were a change."

Clause 16B provides:

"Merger with proposed policy statement or plan -

(1) Every variation initiated under clause 16A shall be merged in and become part of the proposed policy statement or plan as soon as the variation and the proposed policy statement or plan are both at the same procedural stage, but where the variation includes a provision to be substituted for a provision in the proposed policy statement or plan against which a submission or an appeal has been lodged, that submission or appeal shall be deemed to be a submission or appeal against the variation.

(2) From the date of public notification of a variation, the proposed policy statement or proposed plan shall have effect as if it had been so varied."

The statutory scheme was to replace the original Clause 16 by amending 16(2) and introducing Clauses 16A and 16B.

It is the 1993 amendments which are relevant to this case.

It is in the light of these provisions that the errata in this case must be considered. I set them out as follows:

The Errata:

1. Plan provision: Volume 3, Part 10, Appendix 4 (Heritage/Notable Trees) Under 33 Aikmans Road, Pt Lot 8 DP 5376 (p 10/49) the common name for the protected tree is given as *"Pin Oak"*. This should read *"Scarlet Oak"*.

   Nature of issue: Drafting error in the text.

2. Plan provision: Volume 3, Planning Map 51A

An additional area of land has been added to Westlake Park and should now be zoned *"Open Space 2"* rather than *"Living 1"*.

Nature of issue: Update information - the additional land is owned by the Council and is to be used as a park. This results from subdivision consents and vesting of reserves subsequent to the preparation of the City Plan.

(Refer copy of appended maps)

3. Plan provision: Volume 3, Part 8, Appendix 1 (p 8/36 - 8/37)

This appendix lists roads proposed to be stopped, and these roads are also shown on the relevant planning maps with *"cross symbols"* on the section of legal road affected.

Roads shown to be stopped along the Styx River (on Planning Maps 1, 4, 11 and 19) were not however also included on the list of roads to be stopped in Appendix 1, Part 8.

Nature of issue: Omission of road stopping that should be shown on **both** an appendix and the planning maps from one of these - in this case the appendix.

4. Plan provision: Volume 3, Planning Map 37A

St Thomas of Canterbury School (a private school, not designated) near Takaro Avenue in Sockburn is zoned Cultural 3. Part of the area shown as being in this zone as part of the school, is in fact not owned by the school and should be zoned Living 1.

Nature of issue: Error on the Planning Map.

(Refer copy of appended maps)

5. Plan provision: Volume 3, Part 14, Clause 4.2.1 (cross-reference in the Subdivision Section)

At the end of Clause 4.2.1 (p 14/9) is an italicised cross-reference to Clause "4.3.2". This should refer to Clause "4.3.8".

Nature of issue: Drafting error in the text.

6. Plan provision: Volume 3, Part 2, Clause 2.2.6

In the Living 1, H, RS, RV and 2 zones, Clause 2.2.6 (p 2/14) specifies *"Separation from Neighbours"*, including a range of rules relating to building setbacks in specified circumstances.

Subclauses (a) and (b) of Clause 2.2.6 read as follows:

"(a) an accessory building may be located within 1.8m of internal boundaries where the total length of walls of accessory buildings facing, and located within 1.8m of each internal boundary does not exceed 9m in length;

(b) where an internal boundary of a site immediately adjoins an access or part of an access, which is owned or partly owned with the site or has a registered right-of-way over it in favour of that site, the minimum building setback from that internal boundary shall be 1m."

Subclause (b) was intended to relate to setback from internal boundaries for a dwelling unit, but not accessory buildings. Subclause (a) states they may be located within 1.8m of internal boundaries, but subclause (b) limits accessory buildings to a setback of 1m. This defeats the intention of the rule in subclause (a).

Subclause (b) needs to be amended to read as follows:

"(b) where an internal boundary of a site immediately adjoins an access or part of an access, which is owned or partly owned with the site or has a registered right-of-way over it in favour of that site, the minimum building setback from that internal boundary shall be 1m; ***except as provided for under subclause (a) above;"***

(Subsequent subclauses would be renumbered accordingly.)

7. Plan provision: Volume 3, Planning Map 40A

Two allotments used for commercial/residential purposes on the corner of Hillview Street and Nursery Road were shown as designated for *"Primary School"* (PS) and subject to the *"Cultural 3"* zone applicable to school sites (see enlargement).

These allotments are not part of the school, and were not requested to be designated by the Ministry of Education. They should also be zoned *"Business 3B"* (B3B).

Nature of issue: Map drafting error by Council staff.

(Refer copy of appended maps)

8. Plan provision: Volume 3, Part 14, Appendix 1 (Esplanade Reserve and strip schedule - p 14/39)

This appendix specifies the esplanade reserves/strips to be set aside along particular waterways as required by the rules in Clause 6.3 and 6.4 (pp 14/17-18). The widths specified in Columns A and B on p 14/39 are intended to specify the width in **metres**. The appendix however only states a figure (eg "20" or "12").

Nature of issue: Omission of the word *"metres"* at the head of each column, or *"m"* after each number in the column.

The Council's Submissions

Mr Steven submits that all of the foregoing errata are within the power conferred by Clause 16(2). Counsel contends that each of them can properly be described as being of minor effect. Mr Milligan agrees that some are, but contends some are not. In addition Mr Milligan submits:

1. The right of the Council to invoke the power contained in Clause 16.2 can only be exercised after all appeals have been dealt with.
2. There is a distinction between drafting errors and any second thoughts which the Council may have about the contents of its proposed plan.

Before dealing with the submission I think it would be helpful to place those provisions in their statutory context.

The Scheme of the Act

Clause 16 is among those parts of the Resource Management Act which ensure the preservation of the right of the public to participate in the Resource Management process. In this context it is important to keep in mind that whereas the Town and Country Planning Act was concerned with the regulation and control of land based activities, the present statute is concerned with the wise use and management of resources as they are defined in the Act. In particular the whole thrust of the Resource Management Act is a concern with the effects which a given activity may have on resources. On occasions that approach will result in a type of de facto zoning of land but that is not the primary intention of the legislation.

When set against that background, public participation in the local authority plan preparation process becomes vital to its success. The bringing together of a body of rules governing activities which are permitted (conditionally or otherwise) and those which are not, is no more than the Council's forecast as to which activities will result in adverse effects arising from use of resources, and those which will not. Thus in general terms permitted activities are those which have little or no adverse effects, whereas prohibited activities are those which the Council can properly say in advance will have significant adverse effects which cannot be mitigated. Between those extremes are those activities which have adverse effects but which, when considered in the light of any conditions will be no more than minor.

In all of this however it is important not to loose sight of the fact that the resources under consideration belong to the community (either in private or public ownership) they are not in any sense the property of the Council. Secondly, any proscription imposed by a Council on the use of resources is a fetter on the right of the property owner to the use and enjoyment of that property. It is therefore the most basic requirement of fairness that those whose rights may be affected by a provision in a proposed plan shall have a full and effective right to be heard by the Council before it settles on the final content of the plan, and brings it into law.

The *"full"* right of participation is amply protected by the relevant provisions of the Act. That is not what this application is about. It is concerned with the effective exercise of the right of participation in the plan making process. Clearly if a Council is free to publicly notify its proposed plan, hear submissions on it and then when the time for submissions is closed, make some significant alteration without allowing those affected to be heard, then the right of public participation would be rendered ineffective.

Parliament recognised this in enacting Clause 16 (as amended). The power conferred on the Council to amend a draft plan *"without further formality"* is a recognition of the human condition that from time to time errata will creep into the most carefully drafted documents. Where that happens it would be a waste of public money to require the Council to go to the expense of re-

opening the full public participation process. The public have no legitimate interest in the matter other than to know that such errors, which change nothing affecting their rights, will be corrected. Certainly it cannot be anticipated that more public money than is necessary will be spent on correcting drafting errors.

I don't understand Mr Milligan to quarrel with any of this. Counsel's concern is with what the Association sees as a growing tendency to merge correction of errata with changes to matters of substance. For example, counsel draws attention to items 4, 6 and 7 of the schedule of examples and submits that each of them involves matters of principle which, if to be proceeded with, should be the subject of the variation procedure provided for in Clause 16. The difficulty in any given case is to know where to draw the line. That difficulty can only be resolved by construing the words of the statute and ascertaining the intention of Parliament.

Alteration of Information

Clearly Clause 16(1) confers a power to amend a proposed plan by altering information or correcting errors. In the case of alterations to information the alteration must have *"minor effect"*. In the case of correction of errors the power extends only to minor errors. Of necessity therefore the power cannot extend to errors which are more than minor or changes to information supplied by the plan which will have an effect that is more than minor.

Viewed in that way the clause is concerned with two distinct possibilities. The first relates to alteration of *"information"*. The term is not defined in the Act and presumably Parliament intends it to refer to anything said in the plan which informs the public of their rights and obligations. If that is so then it would seem that Parliament intended to permit a Council *"without formality"* to change any information contained in the plan but only if the effect of the change is minor. The Act is silent as to *"effect on whom"*, but must logically intend to refer to anybody whose rights or obligations will be affected by the amendment. If there is anybody in that category then the Council must pass to the next step and satisfy itself that the effect on such person or persons will be minor.

As to what is meant by minor Mr Milligan submits it is an amendment limited to something which if it had been in the original proposed plan nobody would have bothered to make submissions about it. That approach has attractions because in dealing with this part of the power to amend it is clear that we are concerned not with mere drafting errors but with matters of substance. Given the care with which Parliament has protected the rights of public participation it is inconceivable that it is intended by Clause 16 to take away that right by allowing the Council to make belated changes to the information contained in the plan, including something which had it been present in the proposed plan might have drawn a submission. Or by deleting something which had it

not have been present might also have resulted in some submission.
In deciding what might or might not have drawn a submission I consider the touchstone should be; does the amendment affect (prejudicially or beneficially) the rights of some member of the public, or is it merely neutral. If neutral it is a permitted amendment under Clause 16, if not so then the amendment cannot be made pursuant to Clause 16. Although to put it in that abstract way may seem unhelpful, I rather think that like pink elephants the neutral changes will be easier to recognise than to describe. Item 1 of the Schedule of examples illustrates the point. A tree at 33 Aikmans Road, Christchurch is to be protected. It is described in the proposed plan as a Pin Oak. The owner knows he or she has the tree on the property and will have had a chance to make submissions about whether it should be protected. If it is the only oak tree then to amend the plan by describing it correctly is to change the information in the plan, but the effect on the owner is neutral. It would be a different matter however if there are several oak trees some of which are Scarlet Oaks and some Pin Oaks. It would be quite wrong and misleading to allow the owner to think that the Pin Oak was to be protected, something which might be acceptable only to find that it is the scarlet oak which might be a tree shading the house, dropping leaves and otherwise intended for an early demise.
If the proposed amendments are approached in that way it should present no practical difficulty in deciding whether they are merely of minor effect or something more substantial requires a variation under Clause 16A.

Correction of Errors

The other matter with which Clause 16 is concerned is the correction of errors. This is quite different from the alteration of information. An error is simply a mistake or inaccuracy which has crept into the plan. The obvious example is a spelling mistake or reference to a wrong paragraph number where there can be no doubt what number is intended. It is analogous to the use of the slip rule in other Court Proceedings. Thus rule 12 of the District Courts Rules 1992 make provisions for correction of a judgment which contains a clerical mistake or error arising from an accidental slip or omission. The fundamental principle applicable to the use of the slip rule is that it may only be used to correct a slip in the "expression' of a judgment not the 'content". For the fine line between an error which constitutes a slip and one which does not see Mutual Shipping Corporation of New York v Baystone Shipping Co of Monrovia [1985] 1 All ER 520 and Sunde v Sunde [1992] DCR 80.
In my view Clause 16 should be approached in a similar way with the added qualification that the clause allows only the correction of 'minor' errors. The use of the adjective minor may not add much to the exercise. By definition slips in spelling, punctuation, cross referencing and the like will be minor in nature because their correction will not cause prejudice to any person or give

rise to misunderstanding. Providing the draftsperson seeks only to clarify what is clearly intended by the document and does not in any way make a change to it which alters its meaning then the correction will be within Clause 16. Anything which makes alterations to the content of the document cannot be achieved *"without further formality"* by reliance on Clause 16.

Timing of reliance on Clause 16

Mr Milligan submits that a Council may only invoke the power contained in Clause 16 after all appeals have been dealt with.

I mean no disrespect to Council's careful submissions but I have concluded that if Parliament had intended to restrict the power in that way it would have said so. I do not find it at all surprisingly that it did not.

The preparation of a proposed plan is a complex and time consuming exercise. It requires the balancing of many competing elements. Changes will have to be made as submissions are dealt with, and decisions of the Environment Court become available. Local circumstances will change necessitating variations and so on. I can see no utility in preventing the Council from monitoring for errors as the process proceeds. In particular the Council should be free to do what it did in this case and publish a list of errata when first notifying its proposed plan. I accept that it would be better if the Council got it right the first time, but that is a counsel of perfection. As long as it is clear to those affected just what are the (amended) provisions of the proposed plan which affect them then no harm is done. A list of unambiguous errata published with the plan when first notified is unlikely to mislead anybody. Property owners have rights of objection and appeal. At either stage the effect of the errata in question can be considered and ruled upon.

The Council should be free to correct minor errors or amend information having only minor effect at such time as best suits its administrative purposes. If it approaches the task in the way set out above then, given that the correction of such errata will by definition affect nobody's rights, they can safely be attended to at any time whether before or after the submission process has been completed. If the proposed changes do affect rights then they cannot be achieved by recourse to clause 16 at any time after the time for submissions is closed.

Viewed in this way the answer to the first question is yes; and if required I will make the declaration sought.

I now deal with the question of whether the specific errata are within clause 16. I find as follows:

1. Unless the evidence is clear that only one oak tree exists on the property this is an amendment of substance, and not allowed by clause 16.
2. Raises a matter of substances about which there might have been submissions therefore not within clause 16.
3. Raises an issue as to whether the public relied upon the planning maps,

or Appendix 1, part 8. Not within clause 16.

4. Raises a question of what should be the zoning of the additional land. Submissions may have suggested it be other than Living 1. Not within clause 16.
5. Clearly within the slip rule mere correction of a minor error.
6. Raises questions of substance about which submitters rights need to be heard. Not within clause 16.
7. Raises a matter of substance similar to 4 above. Not within clause 16.
8. Clearly within the slip rule being the correction of a minor error.

I am conscious that these are only a few examples of many but the answer may be helpful to Council in deciding how it should approach its task in having recourse to Clause 16.

Costs

No order as to costs are sought.