BEFORE THE ENVIRONMENT COURT

Decision No. [2015] NZEnvC139

IN THE MATTER	of the Resource Management Act 1991
AND	of an appeal pursuant to Clause 14 of the First Schedule of the Act
BETWEEN	APPEALING WANAKA INCORPORATED (ENV-2014-CHC-46) Appellant
AND	QUEENSTOWN LAKES DISTRICT COUNCIL Respondent
AND	NORTHLAKE INVESTMENTS LIMITED Applicant

Court:	Environment Judge J R Jackson Environment Commissioner J R Mills Environment Commissioner A C E Leijnen
Hearing:	In Wanaka on 2, 3, 4 and 5 March 2015 Site inspection 30 April 2015 (Final submissions received 4 May 2015)
Appearances:	Mr P Page and Ms J Caunter for Appealing Wanaka Incorporated Ms J Macdonald for Queenstown Lakes District Council Mr W Goldsmith and Ms M Baker-Galloway for Northlake Investments Limited
Date of Decision:	21 August 2015
Date of Issue:	21 August 2015

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

INTERIM DECISION

A: Under clause 15 of the First Schedule to the Resource Management Act 1991, the Environment Court:

(1) subject to (2) and Orders [B] and [C] approves Plan Change 45; and

(2) directs the Queenstown Lakes District Council to amend the "Amended Structure Plan" which is part of PC45 as indicated in the attached 'Reasons' unless any party indicates by 30 September 2015 that they wish to call evidence on the issue;

B: We reserve leave for:

(1) Appealing Wanaka Incorporated:

(a) to advise the court and other parties whether it wishes to continue with any of its *ultra vires* allegations (other than those about Chapter 4.9 of the Queenstown Lakes District Plan which have been adjudicated on); and

(b) if so, to lodge a memorandum of counsel setting the issue(s) and arguments out in detail;

— by 4 September 2015;

(2) the other parties to respond by 18 September 2015; and

(3) any reply from Appealing Wanaka Incorporated to be lodged and served by 2 October 2015.

C: We direct that the parties confer on:

(1) our powers to amend PC45 (see the last paragraph of the Reasons); and

(2) on the matters of detail raised in part 10 of the Reasons attached; and

— in the absence of agreement lodge affidavits (if necessary) and submissions on the issues under the following timetable:

- 30 September — submissions by Northlake
- 14 October — submissions by Queenstown Lakes District Council
- 21 October — submissions by Appealing Wanaka Incorporated

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- 4 November — replies by Queenstown Lakes District Council and Northlake Investments Incorporated

D: Leave is reserved for any party to apply for further or other directions in case we have overlooked any matter or if they have major difficulties with the timetables.

E: Costs are reserved.

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REASONS

1. Introduction

1.1 Plan Change 45

[1] The issue in this proceeding is whether or not to confirm Plan Change 45 ("PC45") to the Queenstown Lakes District Plan. That is a private plan change which proposes the residential development of a large area between the town of Wanaka and the Clutha River. The land in question is approximately 219.26 hectares ("the site") and is held in four separate ownerships as shown on the ownership plan annexed to this decision as "A".

[2] The question for us to decide is whether to confirm PC45 and rezone the site for both residential development and protection of special areas of landscape and ecological value or to cancel the decision of the Council. The principal difficulty in this case is that the objectives and policies about residential development in the district plan of the Queenstown Lakes District Council are so many, various and complex that the witnesses for the parties have not been able to agree which are the most relevant and/or whether they head in the same general directions. Those problems are compounded by the fact that all people concerned with resource management are still working through the

ramifications of the Supreme Court's decision in *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd*[1] *("EDS v NZ King Salmon").*

1.2 The history of Plan Change 45, the appeal and the parties

[3] A request to amend the Queenstown Lakes District Plan ("the QLDP") under clause 21 of the First Schedule to the Resource Management Act 1991 ("the RMA" or "the Act") was made by a Ms Lucy Meehan in July 2013. That request was accepted[2] and then notified by the Queenstown Lakes District Council on 1 August 2013. A summary of the decisions requested in submissions was publicly notified on 25 September 2013 and the period for further submissions closed on 9 October 2013.

[4] 124 primary submissions were lodged on PC45. The plan change went to a hearing by Council-appointed Commissioners Messrs D Whitney and L Cocks. They released their report and recommendations on 17 June 2014. After the Council accepted those recommendations — to approve PC45 as amended by the Commissioners — a notice of appeal by an unincorporated body of submitters was lodged with the Registrar of the Environment Court on 5 September 2014.

[5] Both the original requestor and the appellants have been succeeded by others. First, the original applicant, Ms Meehan, has been succeeded by Northlake Investments Limited ("Northlake"), a company in which she retains an interest. Second, on 24 February 2015 the court issued a (further) procedural decision[3] confirming that Appealing Wanaka Incorporated ("AWI") is the successor appellant to one of the earlier groups of submitters.

[6] PC45 is opposed by AWI on a number of grounds. First it says that the existing supply of land zoned for residential purposes in Wanaka is more than sufficient to meet the community's needs[4]; second it says that the lack of an identified urban growth boundary means that the court only has part of the picture[5]; third the plan change is premature because an upcoming review of the district plan will determine the

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1 *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38; [2014] 1 NZLR 593; [2014] NZRMA 195; (2014) 17 ELRNZ 442.
2 Under clause 25(2)(b) of Schedule 1 to the RMA.
3 *Appealing Wanaka and Others v Queenstown Lakes District Council* [2015] NZEnvC 23.
4 Submissions by the appellant dated 24 April 2015 para 17.3.
5 Submissions by the appellant dated 24 April 2015 para 17.4.

appropriate solution for urban growth; fourth PC45 does not achieve the objectives and policies of the operative district plan, nor is it the better option under section 32 RMA. Some *vires* issues are also raised. AWI only called two — albeit very experienced — witnesses: an urban designer Mr I C Munro and the planner Mr D F Serjeant. Mr Munro had previously prepared for the Council an urban design report[6] on PC45 which was presented at the Commissioners' Hearing. He was later engaged to support AWI in this proceeding, where he maintains the advice he gave in his earlier report to the Council.

[7] The Council played no active part at the hearing — it called no witnesses — but supports the plan change. However, an independent planner Ms V S Jones, who had been contracted by the Council to report on the plan change, was called by AWI under a witness summons. Ms Jones produced her section 42A report and some supporting documents to the Court. She also took the trouble — for which the court is grateful — to read the evidence lodged with the Registrar and then to lodge and serve a brief statement of evidence updating her expert opinions.

[8] It is common ground that the version of the RMA that must be applied is that in force between 1 October 2011 and 3 December 2013, that is before the Resource Management Amendment Act 2013 came into force[7].

1.3 The environment

The existing rural area

[9] The site is to the north and east of the residential areas of Wanaka town. Aubrey Road runs along the southern boundary of the site, and Peak View Road runs to its western boundary (but terminates short of the high point). Beyond that terminus a pine plantation known as "Sticky Forest" — a popular mountain bike recreational area[8] — covers the hill separating the site from Lake Wanaka. Outlet Road, the road to where the Clutha River begins, runs through the site. Adjacent to the site's eastern boundary is the Hikuwai Conservation Area, a kanuka shrubland managed by the Department of Conservation. This area contains a significant representative[9] sample of the Upper

6 I C Munro evidence-in-chief Appendix 2: 2013 Report [Environment Court document 17].

7 This is because the closing date for submissions was (as recorded above) 9 October 2013, and therefore, under clause 2 of Schedule 12 to the RMA the form of section 32 in existence between 1 October 2011 and 3 December 2013 applies.

8 J B Edmonds evidence-in-chief para 3.2.4 [Environment Court document 14].

9 J B Edmonds evidence-in-chief para 3.14 [Environment Court document 14].

Clutha kanuka shrubland and cushionfield: a modified but apparently relatively uncommon vegetation type.

[10] To the southwest a residential area known as the Kirimoko Block borders the site. It contains a plantation of conifers and a (largely undeveloped) low density residential zoning. Immediately north of the Kirimoko Block a Council water reservoir[10] is situated. A right of way provides vehicle access to the reservoir across part of the site connecting to Peak View Road (currently a private access road).

[11] The topography of the site is quite complex in that it is a mix of old moraine hummocks and riverine terraces incised by smaller (and formed later) water courses. The high point in the northwest is 410 metres above sea level ("masl") and the lowest point, 330 masl, is at the south-eastern end adjoining Aubrey Road. The vegetation of the site is largely introduced pasture, but there are areas of kanuka and smaller ones of matagouri and native tussocks. There are shelterbelts of mature pines, and some plantations of conifers as well as some wildings.

[12] The site borders an outstanding natural landscape which includes Lake Wanaka, although the lake cannot be seen from the site because its high point is at its western end. The site is immediately to the south of the Clutha River (itself an outstanding natural feature) which commences about one kilometre to the northwest where the water flows out of Lake Wanaka. Part of that landscape is the Council-owned Clutha River Reserve[11] to the north of the site. The reserve extends from Beacon Point/Outlet Road to Albert Town and contains a walking and cycling trail along the river edge.

The adjacent urban environment

[13] There is an enclave of "Rural-residential" land between part of the site and Aubrey Road as a result of an earlier subdivision by one of the site's landowners. That area is interesting because it reveals what Northlake claims is a likely outcome for the site if PC45 does not proceed. Across Aubrey Road, to the south of the site, is more

10 Located on Lot 13 DP 300734 and listed in the District Plan as Designation 314 Local Purpose (Water Reservoir).

11 Listed in the District Plan as Designation 116, 'Clutha Outlet Recreation Reserve'.

partly developed Rural Residential zoned land that extends up the lower slopes of Mount Iron, an Outstanding Natural Feature.

[14] In 2013 there were 6,471 people normally resident in Wanaka (that is 23% of the District's population). The housing statistics[12] are:

- there were 2,781 occupied dwellings and 1,752 unoccupied dwellings — total 4,533 dwellings (about 40% of houses are likely to be second or holiday homes)[13];
- the average household size was 2.4 persons, and 20% of Wanaka's households were single person households;
- in the year to December 2013 the Council issued 159 building consents for residential dwellings.

[15] The Council's 2013 estimates[14] were that zoned capacity for 5,686 dwellings exist in Wanaka and that the number of houses likely to be built in the next 20 years (from 2013) is 2,300. The evidence in respect of the site is that if PC45 proceeds then it is likely[15] that up to 600 of the houses at Northlake will be used for holiday homes, with the remainder (a little less than 900 at maximum build out) being lived in permanently.

[16] The median house price[16] in the Queenstown-Lakes district at January 2014 was $532,500; and the median income in January 2015 was about $74,970. Wanaka is affluent by New Zealand standards with slightly higher incomes than the New Zealand average[17]. Even so, the median multiple of income to house price as at that date was 7.10.

[17] There is one other aspect of the land market (for sections of residential zoned land) in the Wanaka basin which we should record. It is dominated by one family. The

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12 Statistics New Zealand quoted in the evidence of I C Munro evidence-in-chief para 5.13 [Environment Court document 17].
13 J A Long evidence-in-chief para 2.3 [Environment Court document 12].
14 Evidence of I C Munro para 5.15 [Environment Court document 17].
15 J A Long evidence-in-chief para 2.3 [Environment Court document 12].
16 Source: www.interest.co.nz/property/house-price-income-multiples (Accessed 12/13/15 1350).
17 J A Long evidence-in-chief para 2.7 [Environment Court document 12].

attached map[18] marked "B" shows some interests of the Dippie family — being Messrs A and E Dippie and various companies[19] apparently owned or controlled by them and their families — in Wanaka. Counsel for AWI tried to undermine this point by identifying other land — at Lake Hawea — which was zoned for residential development. That point failed when it emerged[20] a day or so later that Dippie family interests own much of that land also. Having recorded that situation we must also say that we received insufficient evidence to rely on[21] of any manipulation of the quality, timing or pricing of sections placed on the market by the interests of the Dippie family. We simply note at this point that the potential for monopolistic behaviour exists.

The value of the site as rural land

[18] After the hearing the Court asked for and received evidence of the value of the entire (original) 245 hectares covered by PC45 in its original version. In his affidavit for Northlake, dated 10 April 2015, Mr S G N Rutland of Auckland, Registered Valuer, deposed that the estimated gross market value of the use *Option 1 (Rural General Option Value)* for the land, assuming (counterfactually) that the land is undeveloped farm land in the Rural General Zone in the vicinity of Wanaka and is not currently subject to a plan change to rezone, is $30,000 per hectare (excluding GST)[22].

1.4 The purpose and detail of PC45

[19] The site is proposed to be managed under a new "Section 12.X" of the district plan as the "Northlake Zone". The new zone includes objectives, policies and a Structure Plan intended to guide future development under a staging process, with each stage guided by an "Outline Development Plan" and associated rules. Each Outline Development Plan will require details such as the indicative subdivision design, roading pattern, location of pedestrian and cycling connections, and location of "open space"[23] and recreational amenity spaces.

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18 Ex 14.1.

19 These were identified by Mr Edmonds as Orchard Road Holdings Limited, Willowridge Developments Limited and Beech Cottage Trustees Limited — transcript p 95.

20 Transcript p 96.

21 Quite apart from any natural justice issues: none of these landowners were parties or witnesses.

22 S G N Rutland affidavit dated 10 April 2015 para 9 [Environment Court document 34].

23 This has its own meaning and own chapter (20) in the QLDP.

[20] Rather confusingly, PC45 states its own purpose[24], even though there is no requirement for that under the RMA[25]. This is stated to be:

> ... to provide for a predominantly residential mixed use neighbourhood. The area will offer a range of housing choices and lot sizes ranging from predominantly low to medium density sections, with larger residential sections on the southern and northern edges. The zone enables development of the land resource in a manner that reflects the zone's landscape and amenity values.

It also contains express objectives which are[26] to provide a residential development with "a range of medium to low density and larger lots"[27] in close proximity to the wider Wanaka amenities; to attain best practice in urban design[28] and to achieve "high quality residential environments", which are well-connected[29] internally and to infrastructure networks outside the zone; to develop "tak[ing] into account"[30] the landscape, visual amenity, and conservation values of the zone; and to establish[31] areas for passive and active recreation.

[21] There are to be internal roads connecting to Aubrey Road, Outlet Road and Peak View Road. While Peak View Road was apparently always intended as an important walking and cycling route, the adjacent landowner Allenby Farms Limited (here represented by Northlake) has acquired an additional strip of land adjoining that access strip, so that the access strip available for future access use is now a minimum 20m wide along its full length, and wider in places. That width is adequate to accommodate vehicular access and would improve connectivity between PC45 and Wanaka generally[32]. All other infrastructure can connect to existing infrastructure[33], with upgrades to be provided at Northlake's expense where required.

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24 Para 12.X Northlake Special Zone [PC45 p 12X-1].
25 See section 75 for the compulsory and optional contents of a district plan.
26 Proposed Objectives (12.X.2) 1 to 6 [PC45 p 12.X-1 to -4].
27 Proposed Objective (12.X.2) 1 [PC45 p 12.X-1].
28 Proposed Objective (12.X.2) 2 [PC45 p 12.X-2].
29 Proposed Objectives (12.X.2) 3 and 6 [PC45 pp 12.X-3 and 12.X-4].
30 Proposed Objective (12.X.2) 4 [PC45 p 12.X-3].
31 Proposed Objective (12.X.2) 5 [PC45 p 12.X-3 and 12.X-4].
32 A A Metherell rebuttal evidence para 1.11 [Environment Court document 10].
33 J McCartney evidence-in-chief paras 10 and 11 [Environment Court document 13].

[22] Although the Northlake land is currently held in separate holdings by different owners, PC45 attempts to provide for integrated management of the whole site and adjacent land. It attempts this at three levels. First, it proposes a Structure Plan for the site (a copy dated 1 May 2015 is attached as "C"[34]). Second, it divides the Northlake land into different Activity Areas (each called an "AA" as shown on the Structure Plan), each with different management aims and methods. Third, it proposes a detailed level of design for all development in respect of small areas as they are developed: Outline Development Plans would address detailed design.

[23] The Activity Areas are[35]:

- Activity Area A, which contains the currently zoned Rural Residential part of the site. This part of the site[36] has a current "live" subdivision consent[37] for 64 lots, each over 4000m^2 in size and houses are currently being built on it.

- Activity Areas B1 to B5 which provide for housing of a similar nature to existing Wanaka with low density residential areas containing an average of 10 dwellings per hectare (average lot size of 700-800m^2).

- Activity Area D1, which enables more compact low density residential activities that would comprise around 15 dwellings per ha, or an average lot size of 450-500m^2. The planner for Northlake and "architect" of PC45, Mr J B Edmonds, wrote[38]:

> ... small houses, possibly including some attached housing (townhouses or terrace houses), and possibly two storey construction, would be expected to achieve this type of density. Private amenity may be lower than in the other activity area; however, this is compensated for by other benefits associated with the close proximity to community parks and facilities. Certain non-residential activities

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34 It should be noted that we have drawn a short orange line on this plan which is explained in Part 10 of this decision.

35 J B Edmonds evidence-in-chief para 2.3.1 [Environment Court document 14].

36 Lot 69 DP 371470.

37 Queenstown Lakes District Council reference RM051067.

38 J B Edmonds evidence-in-chief para 2.3.1 (3rd bullet) [Environment Court document 14].

(such as small scale retail) are enabled within this activity area, subject to compatibility with residential amenities.

- Activity Areas C1 to C5 which would enable larger residential lots that would result in around 4.5 dwellings per ha, with an average lot size of 1,500m^2. There are "Building Restriction Areas" within Activity Areas C1, C2 and C3 to reflect the higher landscape qualities of prominent hilltops, ridges and gullies in these parts of the site. Northlake proposes through rules relating to development (Activity status and linked development standards) to conserve the regenerating clusters of kanuka[39] and matagouri.

- Activity Area E is the land protected from development either because it abuts the Clutha River outstanding natural feature or because it encompasses areas of high natural value and/or is visually sensitive — for example the high points on the land, or land adjacent to Sticky Forest. This land is to be retained in a pastoral state.

[24] Other features of the proposed PC45 zone put forward by Northlake are that 20 sections are to be offered in the first development phase, at a cost of no more than $160,000 each, to the Queenstown Community Trust as "affordable housing". The applicant also proposes to provide a community indoor swimming pool, gymnasium, children's play area and tennis court, recreational areas, and pedestrian and cycleway trails. However, there does not appear to be any obligation that these are actually developed, even though space is provided for them. Rather there is a trigger point — a certain number of lots have to be sold before the owners feel obliged to supply these facilities.

1.5 The likely effects of PC45

[25] Many of the positive effects of PC45 have been identified in the description of PC45 above. We will discuss them in more detail later in respect of the objectives and policies of the QLDP about providing for the needs of the Wanaka community, but essentially there was very little challenge to the positive benefits asserted by Northlake.

39 P de Lange *A Revision of the New Zealand Kunzea* Phytokeys 40:1-185 (25 August 2014): At least some of the kanuka in the Wanaka area may be a separate species.

Effects on the supply of zoned land and/or sections

[26] Mr Munro, the urban designer for AWI, gave evidence of the effects of PC45. In his opinion PC45 would increase the zoned supply of land — using sections (allotments) as units — by 28% to (5,686 + 1,600 =) 7,286 sections. The Council's current (2013) predictions are that there may be a 20 year demand for 2,302 households in Wanaka. According to Mr Munro PC45 would result in a "surplus" zoned capacity of (7,286 – 2,302 =) 4,984 households over a relatively long 20 year planning period. In cross-examination Mr Munro said there were five times more sections than Wanaka would need in the near future, and development under PC45 would increase that to six times.

[27] Mr Munro was of the opinion[40] that such an "oversupply" of sections might cause wastelands in approved subdivisions both in Northlake and elsewhere in Wanaka: "... substantial gaps [between houses], sporadic stop start developments ..."[41] and "... an overall failure to establish anywhere ... a coherent sense of community or character as the district plan invariably describes as desirable in its residential zones"[42]. He also considered that would lead to sprawl[43].

Effects on other residents of Wanaka

[28] Mr Serjeant was more concerned with the amenity effects for neighbours of the site and remoter residents of Wanaka. He wrote[44]:

> For persons living on the current urban edge there is an expectation that the Northlake land would remain rural for at least the next 10-15 years. This expectation is supported by the District Plan policies that envisage a compact town and the avoidance of sprawl, and the recognition of ample infill and greenfields capacity closer to town. While specific views are not necessarily protected, I consider that the premature loss of the overall rural ambience is an adverse effect on these people.
>
> Urban amenity is provided as much by journeys through an urban area as by where we live. This is particularly the case in Wanaka which is placed within a much wider outstanding landscape. The town is developing a network of walking and cycling trails with on and off-road sections,

40 Transcript p 168.
41 Transcript p 168 lines 5-6.
42 Transcript p 168 lines 23-24.
43 Transcript p 168 line 28.
44 D F Serjeant evidence-in-chief para 51 [Environment Court document 18].

> complementing the private vehicle journey option. In my view, irrespective of the travel mode chosen, a higher quality journey is provided through a well-developed urban fabric than through a discontinuous series of suburban and rural neighbourhoods.

The first paragraph raises the probability of the direct effects on the amenities of near neighbours of the site on the south side of Aubrey Road. We consider that there are some real (if relatively minor) concerns which could be mitigated by some re-design of the Activity Areas. We consider the second paragraph is being precious: any such effects will be very minor, fleeting, and their number will dwindle over time.

Monetary costs

[29] A class of adverse effects of PC45 identified by Mr Serjeant were not physical effects on people or the environment, but extra costs[45] imposed on other people. We will consider these in our section 32 evaluation.

Effects of the "commercial area"

[30] If the sections on the site sell and are built on, then Mr J A Long, the retail consultant called for Northlake, considered that any of a café/restaurant, a convenience store, takeaway food outlets and a hairdresser/beautician might establish in Activity Area D[46]. Almost all residences would be within 900 metres[47] of any such retail outlets, making them within walking distance for most residents.

[31] Rentals[48] for the shops would be low, and so returns would be challenging for the developer or landlord. In Mr Long's opinion the businesses could be successful at a small scale (and we discuss the urban design consequences later)[49]. We accept Mr Long's evidence that any retail at Northlake will have "... no discernible impact on Albert Town or Three Parks"[50].

[32] Mr Serjeant alleged[51] there would be adverse effects in relation to:

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45 D F Serjeant evidence-in-chief paras 35-36 [Environment Court document 18].
46 J A Long evidence-in-chief para 2.10 [Environment Court document 12].
47 J A Long evidence-in-chief para 2.13 [Environment Court document 12].
48 J A Long evidence-in-chief para 2.19 [Environment Court document 12].
49 J A Long evidence-in-chief para 2.20 [Environment Court document 12].
50 J A Long evidence-in-chief para 9.7 [Environment Court document 12].
51 D F Serjeant evidence-in-chief para 41 [Environment Court document 18].

> … the overall convenience of access to the wide range of goods and services provided in existing centres and potentially in the proposed Northlake centre. This effect is not about trade competition, but the achievement and maintenance of the highest level of urban amenity that can derive from these centres.

[33] Later he added that[52]:

> Although the effect may not be significant, it has a high probability and it undermines the policy framework, which has an aspirational approach of creating positive effects, as opposed to the bottom-line assessment of avoiding adverse effects that Mr Long has undertaken.

We find that evidence rather disingenuous. If, as he appears to be suggesting, Mr Serjeant wishes to protect the shops in both Wanaka's "main street" near the waterfront of Lake Wanaka and in the proposed Northlake centre, he is clearly attempting to stop any trade competition from operators on the Northlake land. We would need considerably more evidence of adverse effects — as against the beneficial effects of (trade) competition[53] — before we could put something solid into the scales against PC45. In any event the adverse effects do not meet the threshold which takes them out of the trade competition category (as we discuss in Part 2).

2. Plan change considerations after *EDS v NZ King Salmon*

2.1 Identifying the matters to be considered

[34] The RMA provides a number of matters which a territorial authority must consider. The principal matters to be considered when preparing a plan or plan change are set out in sections 74 and 75 of the RMA. These state (relevantly):

> **74 Matters to be considered by territorial authority**
>
> (1) A territorial authority must prepare and change its district plan in accordance with—
>
> (a) its functions under section 31; and
>
> (b) the provisions of Part 2; and
>
> (c) a direction given under section 25A(2); and
>
> (d) its obligation (if any) to prepare an evaluation report in accordance with section 32; and
>
> (e) its obligation to have particular regard to an evaluation report prepared in accordance with section 32; and

52 D F Serjeant evidence-in-chief para 48 [Environment Court document 18].

53 To the extent we might be allowed to consider these: see section 104(3)(a) RMA.

(f) any regulations.

(2) In addition to the requirements of section 75(3) and (4), when preparing or changing a district plan, a territorial authority shall have regard to—

(a) any—

(i) proposed regional policy statement; or

(ii) proposed regional plan of its region in regard to any matter of regional significance or for which the regional council has primary responsibility under Part 4; and

(b) any—

(i) management plans and strategies prepared under other Acts; and

(ii) *[Repealed]*

(iia) relevant entry on the New Zealand Heritage List/Rārangi Kōrero required by the Heritage New Zealand Pouhere Taonga Act 2014; and

(iii) regulations relating to ensuring sustainability, or the conservation, management, or sustainability of fisheries resources (including regulations or bylaws relating to taiapure, mahinga mataitai, or other non-commercial Maori customary fishing),—

to the extent that their content has a bearing on resource management issues of the district; and

(c) the extent to which the district plan needs to be consistent with the plans or proposed plans of adjacent territorial authorities.

(2A) A territorial authority, when preparing or changing a district plan, must take into account any relevant planning document recognised by an iwi authority and lodged with the territorial authority, to the extent that its content has a bearing on the resource management issues of the district.

(3) In preparing or changing any district plan, a territorial authority must not have regard to trade competition or the effects of trade competition.

75 Contents of district plans

(1) A district plan must state—

(a) the objectives for the district; and

(b) the policies to implement the objectives; and

(c) the rules (if any) to implement the policies.

(2) A district plan may state—

(a) the significant resource management issues for the district; and

(b) the methods, other than rules, for implementing the policies for the district; and

(c) the principal reasons for adopting the policies and methods; and

...

(3) A district plan must give effect to—

(a) any national policy statement; and

(b) any New Zealand coastal policy statement; and

(c) any regional policy statement.

(4) A district plan must not be inconsistent with—

(a) a water conservation order; or

(b) a regional plan for any matter specified in section 30(1).

(5) ...

[35] Apart from their formal requirements[54] as to what a district plan must (and may) contain, those sections impose three sets of positive substantive obligations on a territorial authority when preparing or changing a plan. These are first to ensure the district plan or change accords with the authority's functions under section 31, including management of the effects of development, use and protection of natural and physical resources in an integrated way; second to give the proper consideration[55] to Part 2 of the RMA and the list of statutory documents in section 74 and section 75; and third to evaluate the proposed plan or change under section 32 of the RMA.

[36] On an appeal to this court we must also have regard to the local authority's decision[56].

[37] Of course where the subject of consideration is a plan change rather than a proposed new plan, that list of considerations also needs to consider the provisions of the plan being changed, that is the operative district plan. In fact, assessing how a plan change fits into an operative district plan may not be straight forward. Broadly, plan changes fall on a line between two extremes. At one end a plan change may be totally subservient to the objectives, policies and even rules of the operative district plan it proposes to amend, in which case the question of whether the plan change integrates the management of adverse effects is unlikely to arise. At the other end, rather than to fit within the district plan (other than in the necessary geographical sense that it must be within the district's boundaries) a plan change may be designed to be added to the operative plan. In the latter case, the first set of considerations under section 74(1)(a) RMA — integrated management — may be very important, as may Part 2 and the

54 Section 75(1) and (2) RMA.

55 This ranges from "according" with Part 2, through "giving effect to" or making provisions "not inconsistent with", to "having (particular) regard to".

56 Section 290A RMA.

statutory documents. It is therefore important to work out at the start where and how the plan change is proposed to fit into the operative district plan.

[38] Further complications arise where, as here, a proposed plan change contains its own objectives (including its "purpose"). At first sight section 74 and section 32 require each new objective to be tested against the principles of the Act but not against the other objectives and policies of the operative district plan. However, at least in cases where a plan change is designed to fit within an operative district plan, we consider the proper approach is to view the plan change (proposed purpose, subordinate objectives and all) as a policy change to implement the higher order objectives and policies in the operative district plan. A rezoning of land is a policy issue in the sense that, if confirmed by this court, the Council will be adopting "a course of action" designed to implement higher level objectives and policies: *Auckland Regional Council v North Shore City Council*[57].

[39] Before we turn to the positive obligations we should also refer to the one set of negative obligations — not to have regard to "trade competition or the effects of trade competition" — since the effects of PC45 on potential trade competitors was raised by the evidence. That provision is in section 74(3) and is oddly comprehensive. The mischief at which subsection (3) is directed would appear to be "the effects of trade competition on the profits of trade competitors, their lessors and (possibly) creditors". Instead subsection (3) appears to state that territorial authorities must not have regard even to the beneficial effects of trade competition, for example lower prices for consumers. Despite that the Supreme Court has confirmed that consequential economic and social effects are not the effects of trade competition — *Westfield (NZ) Ltd v North Shore City Council*[58]. We find this whole area of the law about the RMA very confusing: perhaps there is a distinction between the effects of competition (good) and those of trade competition (bad)?

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57 *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18 (CA) at 23; [1995] NZRMA 424 at 430; (1995) 1B ELRNZ 426 at 433.

58 *Westfield (NZ) Ltd v North Shore City Council* [2005] NZSC 17; [2005] 2NZLR 597 [2005] NZRMA 337 (SC) at [119] and [120]. The phrase "... and the effects of trade competition" was not in section 74(3) when *Westfield (NZ) Ltd v North Shore City Council* was decided, but we doubt if that would make any difference to the Supreme Court's approach.

2.2 According with the council's functions

[40] The first set of positive obligations — and counsel for AWI reminded us that this is the purpose[59] of a plan (or plan change) — is to ensure that the district plan or change accords with the council's functions under section 31. That is usually a relatively simple factual matter: if the plan proposes to manage the effects of the use, development or subdivision (or protection) of the land, then it accords with the council's functions. Any complications normally arise in respect of the council's first and most general function in section 31. That is:

> (a) the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district:

The notion of integrated management is very complex when faced with all the uncertainties of the future.

[41] In this case AWI argues that PC45 does not achieve integrated management of the effects of the development and use of the land and resources of the Wanaka area at all. Rather, it contends, the plan change is "entirely inward focused in terms of its design and analysis"[60]. This is of course a matter of fact, prediction, opinion, and degree on the evidence and will be considered in due course.

2.3 Implementing Part 2 and the list of statutory documents

[42] The second set of obligations in (and the major parts of) sections 74 and 75 appears to direct that, even on a minor plan change, the territorial authority has the onerous and wide-ranging task of traversing all the higher order objectives and policies in the hierarchy of superior documents that sits above the district plan, including the principles in Part 2 of the Act. That is the way sections 74 and 75 have been applied in a string of cases deriving from *Eldamos Investments Ltd v Gisborne District Council*[61],

59 Section 72 RMA.
60 Submissions of counsel for AWI dated 24 April 2015 at para 10.
61 *Eldamos Investments Ltd v Gisborne District Council* W 047/2005.

and more comprehensively since *Long Bay-Great Park Society Incorporated v North Shore City Council*[62].

[43] The recent decision of the Supreme Court in *EDS v NZ King Salmon*[63] sets out an amended — and simpler — approach to assessing plan changes under the second set of obligations in sections 74 and 75. The principle in *EDS v NZ King Salmon* is that if higher order documents in the statutory hierarchy existed when the plan was prepared then each of those statutory documents is particularised in the lower document. It appears that there is, in effect, a rebuttable presumption that each higher document has been given effect to or had regard to (or whatever the relevant requirement is). Thus there is no necessity to refer back to any higher document when determining a plan change provided that the plan is sufficiently certain, and neither incomplete nor invalid. This seems to have been accepted by the High Court in a recent decision — *Thumb Point Station Ltd v Auckland City Council*[64]. There Andrews J very succinctly put the approach as being that:

> In most cases, the Environment Court is entitled to rely on a settled plan as giving effect to the purposes and principles of the Act. There is an exception, however, where there is a deficiency in the plan[65]. In that event, the Environment Court must have regard to the purposes and principles of the Act and may only give effect to the plan to the degree that it is consistent with the Act.

We respectfully agree provided that the reference to giving effect to the "purposes and principles" [66] of the Act includes giving effect to the higher order statutory instruments, and indeed to the consideration of the other statutory documents referred to in sections 74 and 75 of the RMA.

[44] The reference to any "deficiency" in *Thumb Point* was a summary of *EDS v NZ King Salmon*. The latter case was concerned with the relationship between a plan change and a higher order statutory instrument that post-dated and therefore was not given

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62 *Long Bay-Great Park Society Incorporated v North Shore City Council* A 078/08 at [34].

63 *EDS v NZ King Salmon* (supra footnote 1) (SC).

64 *Thumb Point Station Ltd v Auckland City Council* [2015] NZHC 1035 (HC) at [31].

65 Citing *Eldamos Investments Ltd v Gisborne District Council,* W047/2005;*Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd,* above footnote 1.

66 Strictly, there is only one purpose (not more as Andrews J's plural "purposes" might suggest): section 5 RMA.

effect to in the operative district plan. The national policy statement in question was the New Zealand Coastal Policy Statement 2010 ("the NZCPS"). Arnold J stated[67]:

> ... the NZCPS gives substance to pt 2's provisions in relation to the coastal environment. In principle, by giving effect to the NZCPS, a regional council is necessarily acting "in accordance with" pt 2 and there is no need to refer back to the part when determining a plan change. There are several caveats to this, however, which we will mention shortly. ...

[45] The "caveats" were identified in a later passage where Arnold J stated[68]:

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

The Supreme Court makes it clear that, absent invalidity, incomplete coverage or uncertainty of meaning in the intervening statutory documents, there is usually no need to look at Part 2 of the RMA, at least on a plan change.

[46] Mr Goldsmith submitted for Northlake that "[a] district plan is not as pure an expression of the purpose of the Act for the district as the NZCPS is for the coastal marine area ... And a plan change is not strictly bound to 'give effect to' wider relevant plan provisions, compared to the strong directions in say the NZCPS". We hold that misses an important aspect of *EDS v NZ King Salmon*. That is, whatever the obligation in section 74 or section 75 is in respect of the relevant existing statutory document, that obligation has been given effect[69] or had regard[70] to, or been kept consistent with as the case may be, in the operative district plan (absent uncertainty of meaning, incompleteness or invalidity) if it has been carried out by or "particularised" in an objective or policy. It would be illogical if a higher order instrument which had to be given effect to does not need to be looked at (e.g. the NZCPS as in *EDS v NZ King Salmon*) but a lower order document which only needed to be had regard to in the

67 *EDS v NZ King Salmon* (supra footnote 1) (SC) at [85].
68 *EDS v NZ King Salmon* (supra footnote 1) (SC) at [90].
69 Section 75(3) RMA.
70 Much of section 74(2) and (2A).

preparation of the district plan must still be looked at (absent a deficiency in the plan). For example, a strategy prepared under the LGA 2002 might have been had regard to[71] and then particularised in a district plan in a very directive policy. That could then have a nearly determinative effect on the outcome of an application for a resource consent or plan change. Indeed that is, if we understand counsels' arguments correctly, part of the submissions for AWI.

[47] We conclude that, since *EDS v NZ King Salmon,* the method of applying the list of documents referred to in sections 75 and 76 of the RMA is this: first, if there are **1, 2, 3 ... n** documents in the hierarchy of statutory documents[72] — with **1** being Part 2 of the RMA and **n** being the operative district plan which is proposed to be changed — then the effect of *EDS v NZ King Salmon* is that the only principles, objectives and policies which normally (subject to the second and third points) have to be considered on a plan change are the relevant higher order objectives and policies in document **n**[73] (in this case the QLDP itself). Second, only if there is some uncertainty, incompleteness or illegality in the objectives and policies of the applicable document does the next higher relevant document[74] have to be considered (and so on up the chain if necessary). Third, if, since a district plan became operative, a new statutory document in any of the lists identified in section 74(2) and (2A) and section 75(3) and (4) has come into force, that must also be considered under the applicable test[75]. While the simplicity of that process may sometimes be more theoretical than real, since in practice plans may be uncertain, incomplete or even partly invalid, it is easier than the exhaustive and repetitive process followed before the Supreme Court decided *EDS v NZ King Salmon.*

Are there any later statutory documents to be considered in this proceeding?

[48] In this case two documents were suggested as being documents of the classes identified in section 74 (2)(b) RMA:

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71 Under section 74 (2)(b)(i).

72 Including National policy statements, operative and proposed regional policy statements and plans, and any direction from the Ministry for the Environment (under section 25A(2)): section 74(1) and (2) and 75(3) RMA.

73 Or, if there are none, those in document **n-1** (usually a regional plan or regional policy statement).

74 Or, where relevant, a section 74(2)(b) document. While strictly such documents are not part of the hierarchy, they still need to be had regard to; similarly an iwi document identified in section 74(2A) RMA has to be taken into account.

75 'Given effect to', 'not inconsistent with', 'had regard to' etc.

- the Queenstown Lakes District Growth Management Strategy dated April 2007 ("the GMS")[76]; and
- the Wanaka Structure Plan 2007 ("the WSP") — a strategy prepared under the LGA 2002.

As Mr Goldsmith pointed out to us, the GMS expressly records[77] that it is "... an expression of the legislative intent of the Council and the Council's intention is to translate the actions identified in the strategy into appropriate statutory documents". So it is not[78] a statutory document and we have no further regard to it. Other documents prepared for the Council were also referred to in evidence, but none of these qualifies as a document we must have regard to under the RMA, and in any event they culminate in the WSP.

[49] So the only document we must have regard to under section 74(2) RMA is the WSP. The WSP[79] includes provisional placement of some "urban growth boundaries" and a map of "Zoning Proposed", a copy of which is annexed marked "D". It will be noted that approximately one third of the site is white (to the east of the "Plantation/Sticky Forest") and the remaining two thirds is shaded in blue and white diagonal stripes, denoting a proposed "Urban/Landscape Protection" Zone.

[50] There is a legal issue about the WSP we can deal with briefly here. Counsel for AWI pointed out that the WSP stated (in its final words[80]) "This means the Council will undertake Plan Changes", whereas of course PC45 was requested by Northlake. That is at best a legal quibble and no weight should be given to it. As it happens, the relevant policies[81] in the district plan — introduced by the subsequent PC30 — are simply "To enable the use of Urban Growth Boundaries to establish distinct and defendable urban edges ..." and to "... defin[e] an UGB through a plan change [after taking certain listed

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76 Exhibit 14.3 produced by J B Edmonds.

77 GMS p 2 (Exhibit 14.3).

78 In *Monk v Queenstown Lakes District Council* [2013] NZEnvC 12 at [34] the court accepted the GMS as a statutory document under section 74(2)(b) RMA "... in the absence of argument".

79 The only document produced to us was called "The Wanaka Structure Plan Review" but we were told that the QLDC adopted it in December 2007.

80 Wanaka Structure Plan 2007 p 14.

81 Policy (4.9.3) 7.3 and 7.6 [Queenstown Lakes District Council Plan p 4-57].

matters into account]". The policies do not say that the plan change must be introduced by the Council.

[51] We were advised that an earlier plan change ("PC20") was proposed by the Council to establish an UGB for Wanaka but did not proceed beyond initial consultation, apparently due to budgeting constraints. The WSP was presumably taken into account when PC30 was prepared[82]. However, since the WSP goes into much more detail than PC30 (which prescribes how to locate UGBs in general rather than giving specific directions for any particular location) we will have regard to the WSP's key recommendations in part 7 of this decision.

2.4 Evaluation of a plan change under section 32

[52] The third set of obligations on a territorial authority when preparing a plan (change) is the section 32 evaluation. Section 32(3) of the RMA in its relevant form requires us to examine[83]:

> (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 way for achieving the objectives.
>
> ...

The section 32 assessment for policies and methods, including rules, requires examination of whether policies implement the objectives, and the rules (if any) implement the policies[84]. 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[85] of the district plan (or of the plan change if that introduces any), taking into account[86] (relevantly):

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82 PC30 became operative on 5 June 2012.

83 Section 32(3) (emphasis added), as it was until 2 December 2013. Section 32 as quoted was replaced with a new section by section 70 of the Resource Management Act Amendment Act 2013.

84 Section 75(1)(b) and (c) of the Act (also section 76(1)).

85 Section 32(3)(b) of the Act.

86 Section 32(4) of the RMA.

(a) the benefits and costs of the proposed 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; …

On an appeal[87] about a plan change, the Environment Court has the same duty[88] that the territorial authority has to evaluate the plan change under section 32.

[53] In *EDS v NZ King Salmon*[89] the only statement by the Supreme Court about section 32 of the RMA is rather gnomic. Arnold J simply quoted part of section 32(3) and then turned to the NZCPS (2010) stating[90]:

> Given the central role played by the NZCPS in the statutory framework, and because no party has challenged it, we will proceed on the basis that the NZCPS conforms with the RMA's requirements, and with pt 2 in particular. Consistently with s 32(3), we will treat its objectives as being the most appropriate way to achieve the purpose of the RMA and its policies as the most appropriate way to achieve its objectives.

[54] In this case we are not concerned with the application of a higher order instrument but with testing PC45's lower order objectives and policies for their efficiency and effectiveness at implementing the district-wide objectives and policies of the district plan. Of more assistance on our role under section 32 is the decision of the High Court in *Rational Transport Soc Inc v New Zealand Transport Agency*[91]. The High Court stated[92]:

> Section 32 requires a value judgment as to what on balance, is the most appropriate, when measured against the relevant objectives. "Appropriate" means suitable, and there is no need to place any gloss upon that word by incorporating that it be superior. Further, the Freshwater Plan does not only have stream protection as a sole object; …
>
> As to Mr Bennion's argument that s 32(3)(b) mandated that "each objective" had to be the "most appropriate way" to achieve the Act's purpose; i.e. it was an error to look at the combined

87 Under clause 14 of the First Schedule to the RMA.
88 Section 290(1) RMA.
89 *EDS v NZ King Salmon* (supra footnote 1) (SC).
90 *EDS v NZ King Salmon* (supra footnote 1) (SC) at [33].
91 *Rational Transport Soc Inc v New Zealand Transport Agency* [2012] NZRMA 298.
92 *Rational Transport Soc Inc v New Zealand Transport Agency* [2012] NZRMA 298 (HC) at paras 45 and 46.

> objectives; I do not agree that the Board is to be constrained in that way. It is required to *examine* each, and every, objective in its process of evaluation - that may, depending on the circumstances result in more than one objective having different, and overlapping, ways of achieving sustainable management of natural and physical resources (the purpose of the Act). But objectives cannot be looked at in isolation, because "the extent" of each may depend upon inter relationships …

[55] On that basis the evaluation under section 32(3) and (4) will be of the change as a whole, even if — as PC45 does — the plan change contains its own proposed "purpose" and, especially, objectives. Those must initially be taken as subordinate "policies" unless it is quite clear that either the operative district plan does not contemplate any plan changes and/or the plan change shows that it is designed to add to the operative district plan. The complications just identified in the previous sentence do not arise strongly in these proceedings because, as we shall see, the operative district plan contemplates residential rezonings, and PC45 is designed to fit within the QLDP notwithstanding that it purports to introduce new objectives. We should examine PC45 as if it is a policy change to the operative district plan.

3. What are the relevant objectives and policies to be considered?

3.1 The scheme of the plan

[56] The scheme of the QLDP is complex, especially on the subject of urban growth. Oversimplifying slightly, the plan has two broad tiers of objectives and policies — district-wide, and specific to subjects or areas. Those objectives and their policies and rules are contained in Volume 1A[93]. The 20 Chapters, with those most relevant to this proceeding in bold, are:

1. **Introduction**
2. Information …
3. **Sustainable Management**
4. **District Wide Issues**
5. Rural Areas
6. Queenstown Airport Mixed-Use Zone
7. **Residential Areas**

[93] Volume 1B contains the planning maps.

8. Rural Living Areas
9. Townships
10. Town Centres
11. Business and Industrial Areas
12. **Special Zones**
13. Heritage
14. Transport
15. **Subdivision Development ...**
16. Hazardous Substances
17. Utilities
18. Signs
19. Relocated Buildings ... and Temporary Activities
20. Open Space Zone-Landscape Protection.

We note that the different parts of the plan are called "sections" in the QLDP but to avoid confusion with parts and sections in the RMA we will call them "Chapters".

Sustainable management

[57] Chapter 3 contemplates[94] an enabling approach to development[95] and contains four basic aspirations of which two are anthropocentric and therefore particularly relevant here: enabling people's social, economic and health concerns to be met and allowing individuals and communities to provide for their well being[96].

District wide issues

[58] The principal, but not the only, higher order district-wide objectives and policies in the district plan are in Chapter 4. Chapter 4.2 of the district plan contains district-wide objectives and policies about the landscapes and visual amenities of the district. Objective (4.2.5) 1 seeks that subdivision, use and development in the district is undertaken in a manner which avoids, remedies or mitigates adverse effects on landscape and visual amenity values[97]. These include policies to discourage urban development in the outstanding natural landscapes and visual amenity landscapes of the

94 Chapters 1 and 2 are introductory.
95 Para 3.4 [Queenstown Lakes District Council Plan p 3-2].
96 Para 3.6 [Queenstown Lakes District Council Plan p 3-4].
97 Objective (4.2.5) 1 [Queenstown Lakes District Council Plan p 4-9].

district[98], and to avoid sprawling development and subdivision along roads[99]. There is a related policy[100] which seeks clear identification of extensions to urban areas by "design solutions to avoid sprawling development along the roads of the district". The open space and recreation policies require provision of open space and recreation reserves[101].

[59] The energy efficiency objective[102] in Chapter 4.5 has policies promoting "compact urban forms which reduce the length of and need for vehicle trips"[103] and the "compact location" of community, commercial, service and industrial activities, reduction of "the length of and need for vehicle trips"[104], and encouraging sufficiently large residential sites to enable solar energy to be generated for heating[105]. Other relevant objectives and policies relate to natural hazards[106].

[60] Chapter 4.9 on urban growth was the subject of a good deal of evidence and lengthy submissions so we outline its provisions and the arguments raised, in the next subpart of this decision.

[61] More recently the Council has identified a need for "affordable housing" and introduced a plan change ("PC24") to assist in its provision. The definition of that term is not provided, but from the context it appears to refer to relatively inexpensive housing for "low and moderate income households". Chapter 4.10 of the district plan — Affordable and Community Housing[107] — provides this objective[108]:

> Objective 1 Access to Community Housing or the provision of a range of Residential Activity that contributes to housing affordability in the District.

[62] The implementing policies are[109]:

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98 Policy (4.2.5) 6(a) [Queenstown Lakes District Council Plan p 4-11].
99 Policy (4.2.5) 6(c) [Queenstown Lakes District Council Plan p 4-11].
100 Policy (4.2.5) 7 [Queenstown Lakes District Council Plan p 4-11].
101 Objective (4.4) 1.1 [Queenstown Lakes District Council Plan p 4-24].
102 Objective (4.5.3) 1 [Queenstown Lakes District Council Plan p 4-29].
103 Policy (4.5.3) 1.2 [Queenstown Lakes District Council Plan p 4-29].
104 Policy (4.5.3) 1.3 [Queenstown Lakes District Council Plan p 4-29].
105 Policy (4.5.3) 1.3 [Queenstown Lakes District Council Plan p 4-29].
106 Objective (4.8.3) 1 [Queenstown Lakes District Council Plan p 4-49].
107 Added by Environment Court consent order dated 17 July 2013 in *Infinity Investment GH Ltd v Queenstown Lakes District Council* (ENV-2009-CHC-46).
108 Objective (4.10.1) 1 [Queenstown Lakes District Council Plan p 4-59].
109 Policies (4.10.1) 1.1 to 1.3 [Queenstown Lakes District Council Plan p 4-59].

1.1 To provide opportunities for low and moderate income Households to live in the District in a range of accommodation appropriate for their needs.

1.2 To have regard to the extent to which density, height, or building coverage contributes to Residential Activity affordability.

1.3 To enable the delivery of Community Housing through voluntary Retention Mechanisms.

Residential areas (Chapter 7)

[63] Chapter 7 is concerned with residential and proposed residential areas (not merely zones) and so, if applicable – and AWI belatedly challenged this in its closing submissions – it is relevant. We outline its relevant provisions in part 3.3 below.

Special zones (Chapter 12)

[64] The final particularly relevant chapter is Chapter 12 of the QLDP, since that is the proposed home for the Northlake Zone's provisions. Chapter 12 — Special Zones — is introduced with the statement that[110]: "There are areas within the district, which require Special Zones." Residential zones are expressly included. PC45 is designed to be such a special "residential" zone in Chapter 12. It proposes its own suite of objectives, policies and rules.

[65] PC45 also suggests some consequential changes to rules in Chapters 14 (Transport) and 15 (Subdivision) of the operative district plan.

3.2 Subchapter 4.9: urban growth

[66] Subchapter 4.9 manages urban growth within the district. Of the eight urban growth objectives in Chapter 4.9, five are relevant (another relates to visitor accommodation[111] and the remaining two are site specific[112]). It is useful to see the relevant objectives together. They are:

> Objective 1 - Natural Environment and Landscape Values
>
> Growth and development consistent with the maintenance of the quality of the natural environment and landscape values.

110 Para 12 Introduction [Queenstown Lakes District Council Plan p 12-1].

111 Objective (7.9.3) 5 [Queenstown Lakes District Council Plan p 4-56].

112 Relating to Frankton Flats [Objective (4.9.3) 6] and the Wanaka Airport [Objective (4.9.3) 8] respectively.

Objective 2 - Existing Urban Areas and Communities

Urban growth which has regard for the built character and amenity values of the existing urban areas and enables people and communities to provide for their social, cultural and economic well being.

Objective 3 - Residential Growth

Provision for residential growth sufficient to meet the District's needs.

Objective 4 - Business Activity and Growth

A pattern of land use which promotes a close relationship and good access between living, working and leisure environments.

Objective 7 - Sustainable Management of Development

The scale and distribution of urban development is effectively managed.

[67] Two of the objectives — 3 and 7 — on urban growth in Chapter 4.9.3 are formulaic: they give decision makers directions about which dimensions of growth should be managed but not how. Objective 3 is to provide for "residential growth sufficient to meet the District's needs" and Objective 7 is to manage effectively the "scale and distribution" of that growth. (We agree with Mr Goldsmith and Mr Serjeant[113] that "scale" seems to refer to the volume of growth and "distribution" to its location). The words "sufficient" and "needs" in Objective 3 are not so straightforward.

Objective 3 Residential Growth

[68] There was considerable uncertainty at the hearing and submissions afterwards as to the meaning of "sufficient". Mr Goldsmith submitted for Northlake that it is a minimum. "Sufficient" is defined in The Shorter Oxford English Dictionary[114] as meaning "of a quantity, extent or scope adequate to a certain purpose or object". We consider that when "sufficient" is used without "necessary" — as in "necessary and sufficient" — then it is close to but something less than a maximum. Counsel for AWI submitted that the goal is to accommodate urban growth through "policies of consolidation"[115]. We pause to note that consolidation in the QLDP is directed at the

113 Transcript p 278-279.

114 The Shorter Oxford English Dictionary (Third Edition, 1985 OUP) page 2180.

115 AWI's closing submissions para 64 [Environment Court document 35].

distinction between urban and rural growth, and is rather different from the related concept of compactness (which is also important under the plan especially under the Energy objective discussed above). Counsel continued that "the use of the word sufficient" anticipated control over the scale and timing of urban growth. We accept that loose control is anticipated — but not more than that because of the enabling aspirations in the plan (Chapter 3) and in the implementing policies. So we accept the submission of counsel for AWI that the objective requires provision "for adequate residential growth".

[69] As for the "needs" referred to in Objective (4.9.3) 3, AWI took, with respect, a rather reductive position arguing in effect that the relevant needs are for zoned housing sections. For Northlake, Mr Goldsmith submitted that the needs are identified at length in other district-wide objectives. We consider that neither is fully correct, although Mr Goldsmith is closer: the needs are identified in objectives but also in policies and explanations. We will collate and summarise these later since the question of the community's "needs" arises repeatedly.

Objective 7 Sustainable Management of Development

[70] Objective (4.9.3) 7 and its policies were amended[116] by plan change 30, which became operative on 13 June 2012[117]. Because this objective and its policies were central to the appellant's case, we set them out in full[118]:

> Objective 7 Sustainable Management of Development
>
> The scale and distribution of urban development is effectively managed
>
> Policies:
>
> 7.1 To enable urban development to be maintained in a way and at a rate that meets the identified needs of the community at the same time as maintaining the life supporting capacity of air, water, soil and ecosystems and avoiding, remedying or mitigating any adverse effects on the environment.
>
> 7.2 To provide for the majority of urban development to be concentrated at the two urban centres of Queenstown and Wanaka.

116 Objectives (4.9.3) 5 and 6, respectively relating to Visitor Accommodation and the Frankton Flats (in the Wakatipu Basin), are irrelevant to this proceeding.

117 We note that PC29 supplied further policies to Objective (4.9.3) 7 which became operative on 21 May 2015. However, they are irrelevant because they relate to Arrowtown.

118 Objective (4.9.3) 7 [Queenstown Lakes District Council Plan p 4-57].

7.3 To enable the use of Urban Growth Boundaries to establish distinct and defendable urban edges in order to maintain a long term distinct division between urban and rural areas.

7.4 To include land within an Urban Growth Boundary where appropriate to provide for and contain existing and future urban development, recognising that an Urban Growth Boundary has a different function from a zone boundary.

7.5 To avoid sporadic and/or ad hoc urban development in the rural area generally. To strongly discourage urban extensions in the rural areas beyond the Urban Growth Boundaries.

7.6 To take account of the following matters when defining an Urban Growth Boundary through a plan change:

7.6.1 Part 4 district-wide objectives and policies

7.6.2 The avoidance or mitigation where appropriate of any natural hazard, contaminated land or the disruption of existing infrastructure.

7.6.3 The avoidance of significant adverse effects on the landscape, the lakes and the rivers of the district.

7.6.4 The efficient use of infrastructure, including transport infrastructure, and its capacity to accommodate growth.

7.6.5 Any potential reverse sensitivity issues, particularly those relating to established activities in the rural area.

7.7 To ensure that any rural land within an urban growth boundary is used efficiently and that any interim, partial or piecemeal development of that land does not compromise its eventual integration into that settlement.

7.8 To recognise existing land use patterns, natural features, the landscape and heritage values of the District and the receiving environment to inform the location of Urban Growth Boundaries.

[71] The Implementation Methods are[119]:

Objective 7 and associated policies will be implemented through a number of methods:

i District Plan Methods

Through plan changes that identify Urban Growth Boundaries within which effective urban design is encouraged.

119 Queenstown Lakes District Council Plan p 4-57.

ii Other Methods Outside the District Plan

(a) Confining the provision of new public urban infrastructural services exclusively to urban areas.

(b) Monitoring of land availability, development trends and projecting future growth needs.

(c) The use of Structure Plans to implement or stage development growth areas.

(d) Community Plans to identify local characteristics and aspirations.

(e) Studies and management strategies.

[72] AWI put a great deal of weight on Objective (4.9.3) 7 and its implementing policies. Its case included two legal arguments which we should consider here. The first was a jurisdictional argument that in the absence of an UGB the court could not even consider PC45; the second was an argument that PC30 imposed a gate which proposed PC45 could not pass: unless there is evidence identifying needs for sections or zoned land in Wanaka, PC45 cannot pass "Go". Mr D F Sergeant accepted[120] that was his position when cross-examined by Mr Goldsmith.

[73] There were two main threads to the jurisdictional argument raised by counsel for AWI. First they referred to the direction of Policy (4.9.3) 7.5 which "strongly discourages" urban growth in the absence of or outside an UGB. Counsel for AWI submitted this raised a jurisdictional bar: because there is no UGB for Wanaka PC45 could not succeed. We hold that is incorrect, since it effectively reads the relevant part of Policy 7.5 as "To avoid (or prohibit) urban extension in the rural areas …". A policy 'to strongly discourage' is close to but is not a directory policy as was the 'avoidance' policy in the NZCPS — the subject of the Supreme Court's decision in *EDS v NZ King Salmon*[121]. A discouragement policy — even when a strong one — still permits an applicant to request a plan change. While it is unfortunate that Northlake did not put forward a proposed UGB as part of PC45, the absence of an UGB is not fatal. The district plan expressly recognises that an UGB has "… a different function from a zone boundary"[122].

120 Transcript p 237 line 14.

121 *EDS v NZ King Salmon* (supra footnote 1) (SC).

122 Policy (4.9.3) 7.4 [Queenstown Lakes District Council Plan p 4-57].

[74] Second, counsel submitted that "absent … an [UGB], … provision for new urban zoned land within Wanaka does not find support in Part 4.9 of the Plan"[123]. They asked "how the court could know which policies apply until it knows where the UGB is"? Counsel compared this case with *Monk v Queenstown Lakes District Council Ltd*[124] ("*Monk*") where the court would not resolve a rezoning until it established where the UGB should be for Arrowtown. We find that there are quite large differences between this case and the Arrowtown situation before the court in *Monk*. Here PC45 is designed to fit within the district plan as part of Chapter 12. In the Arrowtown situation there were two plan changes before the court:

- PC29 which (rather confusingly) was a Council change adding some further (Arrowtown specific) policies to Objective (4.9.3) 7 as already amended by PC30; and
- PC39 which was a private plan change in respect of rural land immediately south of Arrowtown.

[75] In the Arrowtown situation the court decided that PC29 should be resolved first and did so — see *Monk v Queenstown Lakes District Council*[125] — and only then resolved the appeals on PC39 in *Cook Adams Trustees Ltd v Queenstown Lakes District Council*[126]. Among other important distinguishing factors between the Arrowtown and Northlake situations, is that PC30 sought to introduce both specific "district-wide" policies to implement Objective (4.9.3) 7 in relation to Arrowtown and an UGB for Arrowtown. Clearly, the wording of the policies had to be resolved and the UGB established before any rezoning under the later PC39 could be decided upon.

[76] If the Council had notified its PC20 (proposing an UGB for Wanaka) then the situation might have been different. However it did not. Nor is it correct that we cannot know what policies apply to PC45: very few substantive policies in the district plan (none in Chapter 7 and few in Chapter 4) contain references to urban growth boundaries, so there is a plethora of guidance in the District Plan. Further, as we shall see, there is

123 AWI's submissions dated 24 April 2015 para 6 [Environment Court document 35].
124 *Monk v Queenstown Lakes District Council Ltd* [2013] NZEnvC 12.
125 *Monk v Queenstown Lakes District Council* [2013] NZRMA 12.
126 *Cook Adams Trustees Ltd v Queenstown Lakes District Council* [2014] NZRMA 117.

some guidance about a proposed UGB in the vicinity of the site in the Wanaka Structure Plan.

[77] Turning to the application of Objective (4.9.3) 7, it is, as we have already observed, substantively empty. It is a formula requiring "effective" management of the scale and location of urban development, but what is to be achieved by that is left open by the objective itself. We hold that this objective is mechanistic — it is aimed at managing the scale and location of development so as to achieve the other district-wide objectives for urban growth in Chapter 4.9. Its implementing policies should be read in that light. Policy (4.9.3) 7.1 largely repeats earlier objectives[127]. Policies (4.9.3) 7.3[128] and 7.4 together with 7.6 and 7.8 provide a mini-scheme for the identification of Urban Growth Boundaries (now a defined term in the QLDP). Lastly, Policy (4.9.3) 7.7 is a transitional provision which we will refer to later when assessing the risks of the options open to us.

What housing related needs are identified in Chapter 4?

[78] The three relevant substantive objectives in Chapter 4.9 identify some of the needs to be satisfied:

(1) the first need identified in Chapter 4.9 of the district plan is to enable people and communities to provide for their social, cultural and economic wellbeing (Objective (4.9.3) 2). That is obviously a primary set of needs because it reflects section 5(2) of the RMA. We note too that the objective suggests any management of that need is obliged to be relatively light-handed and flexible because the district plan is not "... to provide for people's wellbeing" but to enable people and communities to provide for their own.

(2) the second need is [Objective (4.9.3) 1] to provide for urban growth and development consistent with the quality of the natural environment and landscape values. New Zealand citizens generally, and Queenstown Lakes residents in particular, are fortunate that their basic needs are (with a few

127 Specifically Objective (4.9.3) 3 (residential growth sufficient to meet the District's needs) and Objective (4.2.1) (adverse effects on landscape and visual amenity values).

128 This policy is not easy to understand: it has an enabling aspect (*Monk* [2013] NZEnvC 12 at [90]) and a restrictive component (*Monk* at [26]).

exceptions) well provided for and they have the fortunate need to protect their landscape values.

(3) the third need in Chapter 4.9 is to promote (again a non-prescriptive word) a close relationship and good access between living, working and recreation.

(4) we also note that other needs are set out in the objectives in Chapter 4.1 to 4.8 and 4.10 of the district plan and we summarised those very briefly earlier.

[79] The introduction to the "Issues" for urban growth states that "it is not possible to be precise about the level of growth to be planned for"[129] and then the statements of issues, policies and explanations elaborates on these needs:

- to have "the lifestyle preferences of the District's present and future population"[130] provided for;
- to manage the identity, cohesion and wellbeing of existing communities[131];
- "... enabl[ing] people and communities to provide for their .... wellbeing"[132] including "... commonality of aspirations, outlook, purpose and interests"[133].

Mr Goldsmith cross-examined Mr Sergeant at some length on these and other provisions in the district plan relating to needs, obtaining a concession in respect of each "need" and the provision relating to it that there was "no sense of limitation[134]" in any of them.

[80] We conclude that Chapter 4 and in particular subchapter 4.9 in the district plan are not strongly "interventionist"[135] about urban extensions or, at least, not as strongly as AWI suggests they are. That is because:

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129 4.9.2 Issues [Queenstown Lakes District Council Plan p 4-52].
130 Issue 4.9.2 (b) [Queenstown Lakes District Council Plan p 4-52].
131 Issue 4.9.2 (c) [Queenstown Lakes District Council Plan p 4-52].
132 Objective (4.9.3) 2 [Queenstown Lakes District Council Plan p 4-53].
133 Explanation to Objective (4.9.3) 2 [Queenstown Lakes District Council Plan p 4-54].
134 Specifically at Transcript p 268 lines 25 to 28 but more generally pp 264 to 273.
135 Submissions for AWI dated 24 April 2015 para 56 [Environment Court document 35].

(1) the objectives in Chapter 4 and their implementing policies have consistent themes of enabling opportunities for a complete range of urban and residential needs and aspirations;

(2) the quantity (scale) of urban development to be enabled (not "set") can only be quantified in very loose terms and in areas rather than in notional allotments, at least when considering a plan change;

(3) in essence the point of Policy (4.9.3) 7.1 is to enable urban development by using one of the implementation methods appropriately — either as residential or as special zones — so that landowners and developers are able to subdivide and develop their land at rates and in locations which meet the multifarious needs of the community (while meeting the bottom lines).

[81] We see only a general requirement for a requestor for a plan change to demonstrate that there is a shortfall in the current rate and quantity supplied of these needs precisely because of their broad and varied nature. In any event the question whether Policy (4.9.3) 7.1 is implemented is a matter of facts, predictions and opinion in specific contexts not simply a question of law. So in relation to the second legal argument[136] raised for AWI about Objective (4.9.3) 1, we hold that it is incorrect that the policy imposes with any precision a threshold as to the rate or scale of development which must be passed by a plan change.

3.3 The objectives and policies for residential areas (Chapter 7 of the district plan)

District-wide provisions

[82] Chapter 7 (Residential areas) of the district plan expressly includes further "district-wide" residential objectives and policies[137]. The first three of the four district-wide residential objectives — relating to availability of land, residential form and residential amenity respectively — are relevant. The first (Chapter 7) objective[138] — availability of land — is to provide sufficient i.e. adequate land to provide a diverse range of residential opportunities. It is important to understand what the plan requires a

136 See para [72] above.

137 Heading 7.1.2: District Wide Residential Objectives and Policies [Queenstown Lakes District Council Plan p 7-3].

138 Objective (7.1.2) 1 [Queenstown Lakes District Council Plan p 7 -3].

sufficiency of. In this more detailed objective it is an adequate supply of land to provide for a diverse range of residential opportunities.

[83] The first implementing policy is[139] "to zone sufficient land to satisfy demand for anticipated residential (and visitor) accommodation". The district plan appears to be intending to use the language of economics here. It does not do so very clearly. The only straightforward meaning to be taken from the policy in its context is that the Council seeks to zone sufficient land to satisfy the quantities of different types of sections/houses demanded by the various submarkets in housing. Most sections or houses are not ready substitute goods for others — that is why specific performance is a remedy for breach of contract in relation to land. So to satisfy demand requires identification of the demand relationships (curves) between the quantity demanded and the price per section for the residential allotment market of the District as a whole and for submarkets within and around Wanaka in particular. That would involve consideration of the type, characteristics and quantity of allotments demanded and of the factors that cause shifts in demand (and in supply). To zone an adequate (or sufficient) area of land requires far more than summation of the number of potential allotments.

[84] New residential areas are to be enabled[140] but in areas which "... have primary regard to the protection and enhancement of the landscape amenity"[141] and to assist that, a distinction is to be maintained between urban and rural areas.

[85] Compact growth is to be "promoted"[142], which leads to the second (Chapter 7) district-wide residential objective[143] (residential form). That focuses on compact "residential form" as distinguished from the rural environment. "Compact" here is a relative term: it is used to distinguish the consolidated urban environments from rural areas. Its first two policies are complementary. Policy (7.1.2) 2.1 seeks to limit peripheral, residential expansion[144]. Policy (7.1.2) 2.2 is to limit the spread of rural living and township areas, and to manage that expansion having regard to "the important district-wide objectives" (presumably those in Chapter 4). A further policy requires

139 Policy (7.1.2) 1.1 [Queenstown Lakes District Council Plan p 7-3].
140 Policy (7.1.2) 1.2 [Queenstown Lakes District Council Plan p 7-3].
141 Policy (7.1.2) 1.2 [Queenstown Lakes District Council p 7-3].
142 Policy (7.1.2) 1.3 [Queenstown Lakes District Council Plan p 7-3].
143 Objective (7.1.2) 2 [Queenstown Lakes District Council Plan p 7-4].
144 Policy (7.1.2) 2.1 [Queenstown Lakes District Council Plan p 7-4].

development forms to provide for increased residential density[145], at least in new residential areas, and "careful use of topography"[146]. We consider that the relevant policies for this proceeding are Policies (7.1.2) 2.1 and 2.4 since this proceeding is about the outward spread of existing residential areas, rather than about townships or rural living areas.

[86] The third objective — residential amenity — is to provide "pleasant living environments within which adverse effects are minimised while still providing the opportunity for community needs [to be satisfied]"[147]. Again the implementing policies appear to be relevant, so we will discuss them later.

Residential objectives and policies for Wanaka

[87] Moving down a tier in the internal hierarchy of objectives and policies, Chapter 7.3 of the district plan recognises the town of Wanaka as the second largest residential area in the district[148]. There is one relevant specific objective for Wanaka[149]:

> 1. Residential and visitor accommodation development of a scale, density and character within sub zones that are separately identifiable by such characteristics as location, topology, geology, access, sunlight or views.

In that objective, the phrase "... scale, density and character" is left hanging. In our view it generally refers back to the first three district-wide objectives in Chapter 7 which, it will be recalled, relate to availability of land, residential form and residential amenity respectively.

[88] The most relevant implementing policies are to provide[150] for some peripheral expansion of existing residential areas in Wanaka (and Albert Town), while retaining their consolidated form, and to organise[151] residential development around

145 Policy (7.1.2) 2.4 [Queenstown Lakes District Council Plan p 7-4].
146 Policy (7.1.2) 2.4 [Queenstown Lakes District Council Plan p 7-4].
147 Objective (7.1.2) 3 [Queenstown Lakes District Council Plan p 7-4 and 7-5]. The words in square brackets must be implied.
148 Para 7.3.1 [Queenstown Lakes District Council Plan p 7-13].
149 Objective (7.3.3) 1 - 4 [Queenstown Lakes District Council Plan p 7-13].
150 Policy (7.3.3) 1 [Queenstown Lakes District Council Plan p 7-14].
151 Policy (7.3.3) 4 [Queenstown Lakes District Council Plan p 7-14].

neighbourhoods separate from areas of predominantly visitor accommodation development.

3.4 Summary

What are the most relevant objectives and policies for PC45?

[89] The urban growth objectives of the district plan are, as observed by Mr Serjeant, rather confusingly found in several places within the district plan. We hold that there are three levels of substantive policy about such development. From the general to the specific they are:

1. district-wide objectives and policies in Parts 4.2, 4.4, 4.5 and 4.9 of the district plan;
2. the "district-wide" residential areas objectives and policies in Chapter 7.1;
3. the Wanaka provisions in Part 7.3.

In resolving which are the most relevant policies we must approach the operative district plan as a coherent whole: *J Rattray and Sons Ltd v Christchurch City Council*[152] per Woodhouse J. We must also avoid the trap of "... conclud[ing] too readily that there is a conflict between particular policies and prefer one over another, rather than making a thorough ... attempt to find a way to reconcile them" as Arnold J stated in *EDS v NZ King Salmon*[153]. On the other hand, later more specific objectives and policies should be applied rather than earlier more general ones (that is the "particularisation" approach working within a district plan) if that is what the scheme of the plan suggests.

[90] We hold that the most particular and therefore the most relevant objectives and policies and therefore those under which PC45 must be considered are:

(1) the Wanaka provisions in Chapter 7.3 and (to the extent they are limited or uncertain);
(2) the district wide objectives and policies in Chapter 7.1.

152 *J Rattray and Sons Ltd v Christchurch City Council* (1984) 10 NZTPA 59 (CA) at 61.
153 *EDS v NZ King Salmon* (supra footnote 1) (SC) at [131].

[91] In the situation before us it is arguable that the QLDP does not require us to look at any of the more general district wide objectives and policies in Chapter 4 generally (except where Chapter 7 contains a direction to go to Chapter 4 or is deficient). However, we should recognise that in fact many of the relevant (amended) provisions in Chapter 4.9 came into force over 10 years later than Chapter 7, so there is some uncertainty over whether Chapter 7 truly carries out the intentions of Chapter 4.9. Further, Chapter 4.10 certainly post-dates Chapter 7. We will therefore consider Chapter 4.9 and 4.10 as part of our analysis. In effect that brings in much of the relevant parts of Chapter 4.

[92] We discuss the extent to which PC45 is effective in implementing the objectives and policies of the QLDP from the bottom up i.e. under Chapter 7 first (part 4 of this decision) and then under Chapter 4 QLDP (part 6 of this decision). In between we consider the urban design evidence (in part 5) separately because much of the urban design evidence lacked grounding references to the district plan.

4. How effective is PC45 in implementing Chapter 7 of the QLDP?

4.1 Where should urban development occur at Wanaka (and on the site)?

[93] The most specific relevant provisions in the QLDP are in Chapter 7 and they expressly encourage[154] some peripheral urban growth at Wanaka (town). The district-wide policies in Chapter 7 also look at where urban development should be in two ways, first by considering the potential adverse effects of urban development on landscape and rural values; and second by examining potential adverse effects of sprawl on urban amenities. The first looks out into the superb country sides of the district, the second back into nearby residential development.

[94] As to the first, residential growth is to be enabled in areas which have "primary regard to the protection and enhancement of the landscape amenity"[155] and is to maintain a distinction between urban areas and rural areas to assist protection of the quality of the surrounding environment[156]. There was little suggestion in AWI's

154 Policy (7.3.1) 1 [Queenstown Lakes District Council Plan p 7-14].
155 Policy (7.1.2) 1.4 [Queenstown Lakes District Council Plan p 7-3].
156 Policy (7.1.2) 1.5 [Queenstown Lakes District Council Plan p 7-3].

evidence that these policies would not be implemented, and we are satisfied by Northlake's that they would be.

[95] As to the second — the effect of urban development — there is a range of implementing policies as to where development should occur. They are:

- to promote compact residential development[157];
- to contain the outward spread of residential areas and to limit peripheral expansion[158];
- to provide for increased residential density and "careful use of the topography"[159].

In Mr Edmond's opinion[160], Northlake's zone maintains the compact form of Wanaka. At first sight that is plausible. The outward spread of residential areas is clearly limited by (ultimately) the Clutha River and, to the south of that, the ONL line agreed by the landscape experts. For AWI Mr Munro gave a detailed analysis of why, in his opinion, PC45 does not achieve compact development. We examine that evidence under *Urban design* below because he tends to use "compactness" in a more general way than the district plan often does. We record that otherwise there was little or no specific criticism by the witnesses of Northlake's use of the topography of the site when setting out the Activity Areas.

4.2 How much development (if any) on the Northlake land?

[96] The relevant specific Wanaka objective[161] is poorly worded, and leaves open the "scale" of residential development, so that the district-wide objectives in Chapter 7 need to be referred to. The relevant district-wide objective[162] is to provide "sufficient land … for a diverse range of residential opportunities for the District's present and future urban populations"; and the implementing policy is "to zone sufficient land to satisfy … anticipated residential demand"[163].

157 Policy (7.1.2) 1.3 [Queenstown Lakes District Council Plan p 7-3].
158 Policy (7.1.2) 2.1 [Queenstown Lakes District Council Plan p 7-4].
159 Policy (7.1.2) 2.4 [Queenstown Lakes District Council Plan p 7-4].
160 J B Edmonds evidence-in-chief para 6.8.16 [Environment Court document 14].
161 Objective (7.3.3) 1 [Queenstown Lakes District Council Plan p 7-13].
162 Objective (7.1.2) 1 [Queenstown Lakes District Council Plan p 7-3].
163 Policy (7.1.2) 1.1 [Queenstown Lakes District Council Plan p 7-3].

[97] The direct evidence-in-chief for Northlake on this was very brief and not very helpful. Mr Edmonds wrote[164]:

> I note that both the objective and Policy 2.1 use the term 'sufficient land', which I interpret to mean that the Council should always maintain an over-supply of appropriately zoned land. This objective looks at providing for both current as well as future generations, consistent with Section 5. I do not consider that there is a good resource management reason to limit or stage the supply of residential zoned land in this particular case.

That may be, as we shall see, nearly correct — except we would not use the term "over-supply"[165] — but in view of the Council's section 42A report (produced by Ms Jones) and Mr Munro's 2013 report Mr Edmonds should have expanded on his reasons for this.

[98] Much of AWI's evidence is relevant to the question of whether PC45 implements what we hold to be the applicable policies in Chapter 7.1. First Mr Munro gave evidence that there is already sufficient land zoned residential to satisfy future demand. Second, in his opinion, if more houses are needed, there are better areas around Wanaka to zone for them. On the first point Mr Munro wrote[166]:

> If PC45 proceeded and accommodated 1,520 units ... over the next 20 years this may lead to remaining zoned areas in Wanaka achieving as little as 14% uptake in that period. That is not effective or efficient for those zoned areas, and would not achieve what I could describe as a "compact" outcome for Wanaka. I could not support it in urban design terms.

Identifying the demand for sections (of different types)

[99] One difficulty with Policy (7.1.2) 1.1 is that it tends to suggest that there is a single residential demand for "accommodation". Mr Meehan gave evidence of demand for different housing types in both the Wakatipu Basin and in the Northlake area[167]. In the absence of evidence to the contrary, we accept that evidence. There may very likely be demands for different quantities of apartments, small households, holiday homes, houses for low income households, middle income households, and wealthy households

164 J B Edmonds evidence-in-chief para 6.8.15 [Environment Court document 14].
165 An "over-supply" simply tends to cause prices to drop (causing a movement in the quantity demanded) which most consumers in NZ would think is desirable.
166 I C Munro evidence-in-chief para 2.5 [Environment Court document 17].
167 C S Meehan evidence-in-chief and rebuttal [Environment Court documents 7 and 7A].

etc. Further, each of the markets for those different (and other) types of households may be segmented further depending on the desires of the aspiring owners in relation to location, views, topography and other factors. The list of "needs" we have identified in the QLDP shows that it is alive to these complexities.

[100] Despite the criticism of Mr Meehan's subjectivity we find his evidence, read with that of Northlake's other witnesses, shows that Northlake would supply a range of different section types and houses which are not currently (on the evidence before us) for sale in any quantity at Wanaka. The areas in Meadowstone Drive and West Meadows Drive in the south-west of Wanaka may provide similar sections but we had no evidence as to the specific quantities actually on the market.

[101] In contrast we have doubts about the Council's 2013 model relied on by AWI's witnesses. That starts by purporting to "... identify a 2011-2031 twenty year demand for houses and holiday homes of 2,302"[168]. Then in his 2013 report Mr Munro stated[169]:

> The Council's model identifies that there is current capacity for 5,686 units in the Wanaka CAU, more than sufficient to meet this .... demand.

We note that, unlike the QLDP, the 2013 model is using economic language loosely. It uses "demand" when the context shows it is attempting to predict the quantity of (general, undifferentiated) units demanded.

[102] Mr Munro showed that he was aware of the submarket's identification problem — not treating all allotments (ice creams)[170] as if they are the same (vanilla), when there are in his view at least two different section types (vanilla and chocolate) — when he continued[171]:

> Even if a reduced supply of land for units broadly "comparable" to those proposed in PC45 of 50% total capacity is used (2,843 units), there is still sufficient capacity to fully accommodate predicted growth without the need for any up zoning of the PC45 land at all.

168 I C Munro evidence-in-chief Appendix 2 para 4.30 [Environment Court document 17].
169 I C Munro evidence-in-chief Appendix 2 para 4.31 [Environment Court document 17].
170 The reason for the metaphor will become apparent shortly.
171 I C Munro evidence-in-chief Appendix 2 para 4.31 [Environment Court document 17].

However, no basis was given by Mr Munro for his proposition that 50% of the available zoned "units" are similar to those in PC45. Indeed even within the PC45 site, not all areas are proposed to have the same housing typology — to the contrary, as we described in part 1 of this decision.

[103] Ms Jones referred to the Council's Special Housing Accord (October 2014), which states that[172]:

> In this Accord, the targets are focuses on the Wakatipu Basin, given its strong projected population and employment growth over the life of the Accord, together with the fact that land supply constraints are significantly greater than in the Upper Clutha.

She relied on that as supporting her opinion that there is "no hard evidence presented that … Wanaka is suffering from a constrained residential land supply …"[173]. With respect to Ms Jones, the Council's document does imply that there are land constraints in the Upper Clutha. Its point is only that those constraints are "significantly" lesser around Wanaka than they are in the Wakatipu Basin.

[104] Further, there is an air of unreality about AWI's evidence. Almost[174] all zones which restrict housing cause constraints in the quantity supplied — usually for a good resource management reason. In this district it is to protect outstanding natural landscapes and features and visual amenities. Elsewhere and more controversially they are used as de facto congestion controls since local authorities do not have the powers to impose congestion charges. Planners and urban designers are generally incorrect to suggest there is no evidence of constraints when zoning structures tend automatically to impose constraints on the quantity of houses that can be supplied (and that of course affects prices and hence affordability). However, we put no weight on the matters raised in this paragraph because they were not put to the witnesses.

[105] There is also evidence — discussed shortly — from several witnesses (Mr Edmonds, Mr Meehan and Mr Barratt-Boyes) for Northlake as to the ways in which the

172 http://www.qldc.govt.nz/assets/Uploads/Council-Documents/Strategies-and-Publications/Queenstown-Lakes-District-Housing-Accord.PDF
173 V S Jones statement-of-evidence para 4.20 [Environment Court document 16].
174 We are being cautious: in fact we can think of no exceptions.

site will provide "products" (sections) which are different from elsewhere in Wanaka. That suggests there is further segmentation into submarkets than Mr Munro allowed for. Having asserted the Northlake sections are different, we hold that Northlake did not have to prove more unless AWI produced evidence to the contrary. An assertion of broadly 'comparable' units is insufficient.

The planning horizon

[106] Time (and timing) is an important element in the assessment of the adequacy of the quantity of sections supplied to the market. Mr Serjeant wrote that "the longest time period for which the[e] supply must be adequate is 10 years"[175], referring to the RMA's requirement[176] that district plans are to be reviewed every 10 years. In fact, as we have recorded, Mr Munro considered that there is enough zoned land to supply new household demand for 20 years.

[107] In reply Mr Edmonds considered it was appropriate to plan for a longer period for several reasons of which we consider two are relevant: first, because Wanaka is growing "exceptionally fast"[177] (28.3% between 2001 and 2013), and second, because elsewhere in the district the Council has adopted long planning horizons. Mr Edmonds cited Alpha Ridge at Wanaka, and Kelvin Heights, Jacks Point, Frankton and "areas of 'commonage' land around the edge of Queenstown's CBD"[178]. He did not identify any adverse effects or blight associated with those areas and he was not cross-examined on that.

Differentiating points and submarkets

[108] A further (minor) aspect of Mr Munro's analyses which concerned us was his reference to[179]:

> The general premise that land supply is one factor that influences the cost (distinct from price) of housing, and that to ensure the lowest possible costs it is desirable to have a surplus of developable land available controlled by commercial competitors motivated to release product in

175 D F Serjeant evidence-in-chief para 31 [Environment Court document 18].
176 Section 79 RMA.
177 J B Edmonds rebuttal evidence-in-chief para 4.4(a) [Environment Court document 14A].
178 J B Edmonds rebuttal evidence-in-chief para 4.4(c) [Environment Court document 14A].
179 I C Munro evidence-in-chief p 28 [Environment Court document 17].

> the short term and inclined to lower prices against each other as the primary means of product differentiation.

[109] Our concern was substantiated by the urban designer for Northlake, Mr G N Barratt-Boyes, in his rebuttal evidence when he wrote[180]:

> ... there are a myriad of factors that make any new residential area more desirable than others. Often the proximity to schools, shops, amenity, open space, cultural and civic amenities, community facilities and character of the neighbourhood itself have a direct bearing on this decision. Affordability is also a key driver.

In the last sentence he agrees with Mr Munro, but unlike Mr Munro he has identified some of the other relevant factors that go into buyers' choices. We add that there was an exchange between the court and a second planner called by Northlake, Mr J A Brown, where he confirmed[181] that normal quantity supplied and price relationships apply in the markets for sections. He too quite properly tried to quantify his answer by saying[182] that differences in location and attributes also affect the relationship.

[110] In Mr Barratt-Boyes opinion[183]:

> PC45 provides choice, affordability and diversity as a new neighbourhood within the wider Wanaka area. It also offers a lifestyle choice and point of difference to other potential residential areas, proposed or existing.

We accept that evidence because it addresses the issue of the needs of people and community as identified in the district plan. Our difficulty with Mr Munro's position is again the air of unreality: he seems to have given little thought to the implications of *location, location, location*[184]. Location is a primary differentiator of one section from another.

[111] We also consider Mr Munro is wrong on a matter of terminology: a product differentiator means that there are two non-substitute products and they may have two

180 G N Barratt-Boyes rebuttal evidence para 6.3 [Environment Court document 9A].
181 Transcript p 18 line 4.
182 Transcript p 18 lines 6 and 7.
183 G N Barratt-Boyes rebuttal evidence para 6.4 [Environment Court document 9A].
184 Apparently first used by a Chicago realtor in 1926.

quantity demanded versus price relationships (curves). In contrast a change in price will simply move the quantity of similar sections (products) sold by whoever has sections on the market. Indeed Mr Munro seemed to acknowledge this. In an answer to a question from the court[185] as to whether:

> … at least in the short-term, just supplying more lots so that you're adding to the quantity of lots supplied does, other things being equal (and they may not be), tend to drive the price down doesn't it?

— Mr Munro answered (eventually)[186]:

> What would really make a difference is the nature of the product being offered and so for instance if Northlake lots with their nice north facing slope with water views were compared with Three Parks lots which are a bit more working-class, flatter, more enclosed in, less of that amenity.

Conclusions

[112] We find (without difficulty) that market differentiators for land include — in addition to location — topography, size, views, aspect and vegetation (all complicated by time). Demand and supply relationships (curves) to price are for a notionally identical[187] good (in this case, sections) and simply show the theoretical relationship between the quantity demanded (or supplied and the price). Sections which differ will usually have different demand/supply relationships. For example, markets in top end sections (with outstanding views, lake frontage and sunny locations) will usually have inelastic demand relationships (the quantity demanded is relatively insensitive to price increases), whereas middle and lower income housing sections tend to be more elastic (so a small decrease in price may cause a significant increase in the quantity demanded and vice versa). In the light of those complexities as illustrated in the evidence of Northlake's witnesses, Mr Munro's analysis seems very simplistic. It is easy to envisage that the Three Parks and Orchard Road areas where he considered development is preferable might be supplying completely different products from Northlake. Indeed, that was the evidence for Northlake.

185 Transcript p 176 lines 1-4.
186 Transcript p 176 lines 19-23.
187 Or at least are for readily substitutable goods.

[113] There is also a wider resource management issue here which is that it is important not to confuse zoning with the quantity of sections actually supplied. Land may be zoned residential but that does not mean it is actually assisting to meet the quantity of sections demanded. Only sections for sale can do that. There is no direct relationship between the number of sections theoretically able to be cut out of land zoned residential and the number of sections actually on the market at any one time especially when — as in Wanaka — there are very few landowners with land zoned for residential activities.

[114] The policy about satisfying "residential demand"[188] is relevant and that must be read in the context of the objective it implements. That refers to supply of adequate land to provide for "a diverse range of residential opportunities". As all the witnesses appeared to agree, sections of different qualities are likely to be priced differently, which suggests any assessment of demand has to be assessed continuously. Since the factors that go into assessing quality are multifarious, any evidence of demand should at least assess the quantity demanded at different prices. Thus the objective means that residential demand must be assessed as the sum of the demands for a diverse range of section types. In order to supply the quantity of residential sections demanded at any given price, the quantity of zoned land might have to be very large in proportion to the quantities demanded and in a variety of different locations. We think that is probably what Mr Edmonds meant by an "oversupply". We note that Ms Jones seemed to agree with Mr Edmonds[189].

[115] We find that an excessive quantity of sections or houses is not being supplied to the market. The site, while not necessary to meet strict numerical growth predictions when price and all the other factors are disregarded (which in practice they never are), offers points of difference to other available or potentially available land. We conclude that Mr Munro considerably oversimplified the situation when he wrote[190]:

> I cannot imagine how in light of such a magnitude of supply over demand there is any foreseeable scenario where an "undersupply" of zoned residential land could eventuate in

188 Policy (7.1.2) 1.1 [Queenstown Lakes District Plan p 7-3].
189 V S Jones statement-of-evidence para 4.13 [Environment Court document 16].
190 Evidence of I C Munro para 5.16 and 2.17.

> Wanaka. Without PC45 or any other private plan change request that scenario would require approximately 5,500 households to locate in Wanaka within the next District Plan review period of approximately 10 years (when further land could be released as necessary). This would amount to over four times the growth rate currently predicted and is in my view fanciful.

[116] We prefer the evidence of Northlake's witnesses. We hold that PC45 effectively achieves the relevant objectives and policies of Chapter 7 of the district plan in respect to the provision of sufficient land for a diverse range of residential opportunities.

5. Does PC45 implement the urban design objectives and policies in the district plan?

5.1 Urban design in the district plan

[117] The QLDP contains the following relevant provisions expressly relating to urban design[191]:

(Chapter 4)

- "to identify clearly the edges of … extensions to [existing urban areas] by design solutions …"[192]

- …

  3.2 To encourage new urban development, particularly residential and commercial development, in a form, character and scale which provides for higher density living environments and is imaginative in terms of urban design and provides for an integration of different activities, e.g. residential, schools, shopping[193].

  (and the explanation in the district plan is that a sustainable pattern of urban design ".... achieves cohesive urban areas through urban design that provides for efficient and effective network connectivity and coordination with existing systems …"[194]).

(Chapter 7)

- "to provide for and encourage new and imaginative residential development forms within the major new residential areas"[195].

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191 Several witnesses referred to the QLDC's *Urban Design Strategy* from 2009. However, that is not a document to which we must have regard so we have not considered it.

192 Policy (4.2.5) 7 [Queenstown Lakes District Council Plan p 4-11].

193 Policies (4.9.3) 3.1 to 3.4 [Queenstown Lakes District Council Plan p 4-54].

194 Explanation etc to Objective (4.9.3) 3 [Queenstown Lakes District Council Plan p 4-58].

195 Policy (7.1.2) 3.10 [Queenstown Lakes District Council Plan p 7-5].

- "to require an urban design review to ensure the new developments satisfy the principles of good design"[196].

  (the explanation[197] states:

  > Within the major new areas of residential zoning the Council strongly encourages a more imaginative approach to subdivision and development. The Council believes the quality of the District's residential environments would be significantly enhanced by design solutions that moved away from traditional subdivision solutions. In this respect the Council will be looking to encourage a range of residential densities, variations in roading patterns, imaginative use of reserves, open space and pedestrian and roading linkages, attention to visual outlook and solar aspect, and extensive use of planting).

We note that urban design as contemplated by the QLDP is largely internal to areas being developed. The outward looking factors are confined to design of edges of new urban areas, and to connectivity to and coordination with existing systems. However, for AWI's urban design witness Mr Munro, the subject seems to cover anything in the RMA that pertains to urban environments, and more.

5.2 Mr Munro's principles of urban design

[118] For AWI, Mr Munro referred to the NZ Urban Design Protocol 2005[198] as the basis for his work. He then described[199] how he has developed a standard urban design framework derived from a number of domestic and international authorities recognised as promoting best practice but varied to account for local circumstances. In summary, the key urban design principles relevant to PC45 in his opinion are as follows (we have footnoted what we consider are the principal relevant objectives and policies in the QLDP as we go through the list)[200]:

(a) to minimise resource, energy[201] and "environmental service inputs"[202] needed to enable wellbeing (this includes promoting public health);

(b) to be based on the most compact[203], mixed pattern of uses and networks possible;

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196 Policy (7.1.2) 3.13 [Queenstown Lakes District Council Plan p 7-5].
197 Explanation [Queenstown Lakes District Council Plan p 7-6 and 7-7].
198 A non-statutory document prepared by the Ministry for the Environment.
199 I C Munro evidence-in-chief para 4.1 [Environment Court document 17].
200 I C Munro evidence-in-chief para 4.2 [Environment Court document 17].
201 See Objective (4.5.3) 1 Efficiency [Queenstown Lakes District Plan p 4-29].
202 See Objective (4.9.3) 1 [Queenstown Lakes District Plan p 4-52].
203 See Policies (4.5.3) 1.2 [Queenstown Lakes District Plan p 4-29], Implementation method (4.9.3) 3(i)(a) [Queenstown Lakes District Plan p 4-54] and (Residential district-wide) Objective (7.1.2) 2 [Queenstown Lakes District Plan p 7-4].

(c) to minimise[204] the need for transport (by any mode) between activities;

(d) to maximise accessibility, diversity, and choice[205] for individuals and communities;

(e) to promote resilient, adaptable and long-term outcomes[206];

(f) to enhance local identity and character[207]; and

(g) to configure community investments to maximise "use" returns relative to capital and maintenance costs.

[119] We have several observations about Mr Munro's principles. The first is that they, like many collections of "principles" about urban design, contain pairs of principles that are at least in tension and may be in conflict in particular situations e.g. (b) and (d), (b) and (f), (c) and (g). Second and importantly, most of the principles are already largely contained in the district plan (as our footnotes show) but not under the heading "urban design" — see part 5.1 above. The exception is principle (g), for which we can find no Chapter 4 policy support.

[120] More generally, a difficulty with producing further "urban design" lists is that it is easy to substitute them for the matters with which we must be concerned — the relevant objectives and policies of the QLDP. We think that Mr Munro's list has caused him to skew the emphases in the plan. For example the only reference in his principles to ecosystems and the natural world which defines the edges of, urban places (this is important in the Queenstown Lakes District and in Wanaka in particular) is in the phrase "environmental service inputs". Another example is Mr Munro's "principle" that development "is to be based on the most compact, mixed pattern of uses and networks possible". That is incorrect. Compact growth is certainly promoted[208], but urban development is not based on the most compact pattern possible without regard to other considerations.

[121] Mr Munro's principles either omit or fail to emphasize a number of policies in the QLDP which are clearly relevant. Examples are:

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204 See Policy (4.5.3) 1.1 and 1.2 [Queenstown Lakes District Plan p 4-29].

205 See Objective (4.9.3) 1 [Queenstown Lakes District Plan p 4-53]; and Objective (7.1.2) 1 [Queenstown Lakes District Plan p 7-3].

206 See Policy (4.9.3) 3.2 [Queenstown Lakes District Plan p 4-54].

207 See Objective (7.3.3) 1 [Queenstown Lakes District Plan p 7-13].

208 "Promote compact urban towns" is the wording in Energy Policy (4.5.3) 1.1 [Queenstown Lakes District Plan p 4-29].

- the residential growth policy[209] to provide for lower density residential development in "appropriate areas";
- the policy to promote " a network of compact commercial centres which are easily accessible to, and meet the regular needs of residents of the surrounding residential environments"[210];
- the policy[211] "distinguish[ing] areas with … low density character from … [those] … located close to urban centres or transport routes where high density development should be encouraged"; and
- the subzone policy[212] specifically for Wanaka.

5.3 Urban design considerations for the site of PC45

[122] Returning to the express urban design considerations in the QLDP, the first related to establishing the boundaries of the site. Particularising the district-wide policy requiring identification of the urban edge of (in this case) Wanaka by a design solution[213], the relevant Wanaka objective provides that residential development[214] should be "… of a scale, density and character within [a] subzone … that [is] separately identifiable by such characteristics as location, topology, geology, access, sunlight, or views". The short answer to that complex prescription is that the Northlake site is so identifiable and has been carefully designed with respect to these matters.

[123] As for the (internal) implementing policies, the most specific seeks residential development organised around a separate neighbourhood[215] which is what PC45 proposes. The appellant barely disputed that the topography of the site provides a variety of landform suitable for a range of housing densities; that surrounding landforms afford a considerable degree of shelter from prevailing winds, the site's recreational attributes will be excellent[216], with the adjoining Lake Wanaka and Clutha River recreational corridor, extensive proposed walkway/cycleway linkages, and proposed internal

209 Policy (4.9.3) 3.4 [Queenstown Lakes District Plan p 4-54].
210 Policy (4.9.3) 4.2 [Queenstown Lakes District Plan p 4-55].
211 Policy (7.1.2) 3.14 [Queenstown Lakes District Plan p 7-5].
212 Policy (7.3.3) 1 [Queenstown Lakes District Plan p 7-13].
213 Policy (4.2.5) 7 [Queenstown Lakes District Plan p 4-11].
214 Objective (7.3.3)1 [Queenstown Lakes District Plan p 7-13].
215 Policy (7.3.1) 4 [Queenstown Lakes District Plan p 7-14].
216 C S Meehan evidence-in-chief para 12 [Environment Court document 7].

community facilities. Importantly the site is close to local schools[217], and is well located in relation to future potential public transport services. The Wanaka CBD and proposed Three Parks retail centre are only a little further away — although too far in the opinion of Messrs Munro and Serjeant. In any event the neighbourhood 'corner dairy' type development proposed would minimise travel requirements for day to day retail needs.

[124] Connected and compact development is an urban design imperative to ensure efficient use of infrastructure such as roading and services as well as community facilities such as schools, employment and commercial centres. The subject land is connected to Wanaka CBD by an identified future bus route and according to Mr Munro, is within a walking distance — of 800m at the Peak View Ridge access and of approximately 1600m at the midpoint of the land — to local primary and secondary schools. It would not be necessary for pedestrians or cyclists to cross an arterial road[218].

[125] Mr A A Metherell, a traffic expert called by Northlake, provided the court with analysis[219] of the existing roading network capacity and the integration of the PC45 development with that. The plan change provides for intersection upgrades. Traffic impacts were not challenged on the basis of provision made in the plan change for the necessary improvements.

[126] Servicing for water, sewerage, stormwater etc has been described to us as a cost the developer will bear. Although that was a matter under debate at the Council hearing it was not pursued with any vigour[220] at the hearing before us. Mr J McCartney, an experienced civil engineer called for Northlake, described the potential for the proponents to combine with the Council to provide an additional water supply that would benefit both this development and the wider community of Wanaka, where the current water supply has limitations. We were advised that Northlake could provide its own independent water supply and would not be reliant on any form of community infrastructure upgrade. Wastewater and stormwater drainage are also "enabled by the

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217 G N Barratt-Boyes evidence-in-chief para 5 (p 11) [Environment Court document 9].
218 G N Barratt-Boyes rebuttal evidence para 7.3 [Environment Court document 9A].
219 A A Metherell rebuttal evidence [Environment Court document 10].
220 There was some comment in the evidence-in-chief of several AWI witnesses but their criticisms were abandoned when cross-examined.

plan change"[221]. There was no suggestion that the management of the services could not be undertaken in a sustainable manner. We predict that servicing is not likely to be a significant cost or constraint to the community of Wanaka if this development proceeded.

The shops

[127] In Mr Munro's view a commercial node is "not supportable in urban design terms" if a maximum yield of 705 units over 20 years was imposed (as he suggested). He added[222]:

> Even if 1,600 units were to proceed in the zone and no additional connectivity was required I would still not be comfortable with a commercial node as it would either be inferior in urban design placement terms, or undermine other nodes if placed more desirably.

That overlooks Policy (4.9.3) 4.3 which promotes and seeks to enhance a "network of compact commercial centres … easily accessible to and meet[s] the regular needs of the surrounding residential environment …"[223].

[128] In Mr Long's opinion[224]:

> … a small, accessible on-foot, cluster of shops, pitched at independent retailers with a mix that supports each other, that doesn't compete with the large centres, is very desirable for a small residential community. It will help create a sense of place and be a focus for community identity. It could also help cut down on some trips, but my view is that planned regular/normal shopping trips will occur anyway.
>
> In summary, it will deliver positive outcomes from an urban design perspective, while not competing with the main centres. It will also help economic activity and employment, by creating accessible retail/commercial space for start-up and subsistence retailers and the like.

We prefer that evidence as showing PC45 implements the QLDP.

221 J McCartney evidence-in-chief para 5 [Environment Court document 13].
222 I C Munro evidence-in-chief para 6.15(b) [Environment Court document 17].
223 Policy (4.9.3) 4.2 [Queenstown Lakes District Plan p 4-55].
224 J A Long evidence-in-chief pras 6.10 and 6.11 [Environment Court document 12].

5.4 External urban design issues

[129] Mr Munro considered that, if more urban land was necessary (and he also considered it was not — a crucial point we will return to in part 6 of this decision), then there were other areas on which development would be preferable to the site. He showed these on a plan[225] which was the subject of some discussion by the witnesses and in cross-examination. In his opinion there were at least two, realistically developable, areas which should be preferred to the Northlake site. In preferring those he appeared heavily influenced by the fact that they are closer to the lakefront centre of Wanaka (although further from the Wanaka primary school).

[130] Northlake's urban designer Mr Barratt-Boyes first observed of Mr Munro's alternative areas that[226]:

> All the precincts generally gravitate outwards to the outer urban limit, with the existing town centre approximately in the middle. They all differ in character and offer varying forms of amenity and lifestyle choices.

While critical[227] of the accuracy of Mr Munro's isochrones, he pointed out that in relation to schools they "... place ... PC45 in a positive, unique location, relative to a significant proportion of other Wanaka residential areas to the south and east of the town centre"[228]. More broadly, and we consider with justification, he[229]:

> ... question[ed] the significant weight placed by Mr Munro on the ... walking distance isochrones without reference to other urban design considerations. Walking distance is a relevant factor, but in my opinion it is not the only relevant factor when asserting urban design outcomes.

We accept that evidence because, as we have held, the QLDP makes choice, opportunities and amenities important factors for us to consider.

225 I C Munro evidence-in-chief Figure 7 [Environment Court document 17].
226 N Barratt-Boyes rebuttal evidence-in-chief para 6.2 [Environment Court document 9A].
227 N Barratt-Boyes rebuttal evidence-in-chief para 7.2 [Environment Court document 9A].
228 N Barratt-Boyes rebuttal evidence-in-chief para 7.2 [Environment Court document 9A].
229 N Barratt-Boyes rebuttal evidence-in-chief para 7.4 [Environment Court document 9A].

[131] We referred to Mr Munro's oral evidence that the Northlake proposal PC45 would lead residential development to the edge of the urban boundary, leaving a "hole" in the town form when outlining the effects of PC45 in the first part of this decision. Mr Munro suggested[230] that development of the land in PC45 would lead to the remaining zonings in Wanaka being 85% empty and that would be "sprawl" with pockets of "stop/start" development.

[132] Mr Barratt-Boyes agreed that, from a strategic urban design perspective, sprawl is an important issue[231]:

> Urban sprawl is typically defined as the unplanned, uncontrolled spreading of urban development into areas adjoining the edge of a city or neighbouring regions. In my opinion PC45 is not urban sprawl. For that to be the case it would need to be uncontrolled and unplanned which it is not.
>
> The urban boundaries that limit future growth for Wanaka [indicated in the Wanaka Structure Plan] are clearly defined by geographical constraints e.g. the Cardrona River, Lake Wanaka, the Clutha River and the Crown Range. I believe these are very logical and legible physical boundaries within which Wanaka and its future urban form should sit.

The difference is that Mr Barratt-Boyes is talking about the sort of sprawl — housing randomly spread across the countryside or along rural roads — with which the QLDP is principally concerned (under the important Part 4.2 of the QLDP).

[133] Mr Munro compared PC45 with Jacks Point on the shores of Lake Wakatipu as an example of an undesirable stand-alone development. The short answer is that Jacks Point is provided for in the district plan. In any event, Northlake says PC45 is different. Mr Barratt-Boyes' response was that[232]:

> Jacks Point is divorced from both the Queenstown CBD and from Frankton. It is a standalone 'lifestyle' residential community conceived as a destination, set alongside and around a golf course, and with provision for two commercial villages.

230 Transcript p 168.
231 G N Barratt-Boyes rebuttal evidence para 4.2 [[Environment Court document 9A and 4.3].
232 G N Barratt-Boyes rebuttal evidence paras 5.3 and 5.4 [Environment Court document 9A].

> On the other hand, PC45 is close to schools and open space, connected to walking and cycling trails, and is stitched into its adjacent and neighbouring residential areas. The small local hub … creates a neighbourhood amenity… but not a new urban centre.

We prefer the evidence of Mr Barratt-Boyes and conclude that PC45 is not urban sprawl. Its development would implement the Chapter 7 objectives and policies.

[134] Finally, taking a view of the overall urban design merits of the proposal we note that Mr Munro largely agreed with the merits of PC45 in his 2013 report[233]:

> There is a fair case that the requestor's land will, in part, offer urban zoned land that is at least as meritorious as areas of land that have been zoned already, and in the case of land within a 2km isochrone of the schools, Wanaka centre or Three Parks; or within 400m of Aubrey Road, PC45 could offer superior urban design benefits to some of that zoned land. I support the enablement of land in PC45 that, while not necessary to meet Wanaka's growth needs, is superior to alternatives. This will promote competition in the land market as well as helping best serve the "compact" approach sought in Wanaka. If a competitive product can be released to market and it proves preferred by purchasers, this could lead to an improvement of urban form outcomes for Wanaka.

In fairness we should record that even in 2013 he was concerned about the rate of development. We consider this issue shortly (in 6.3 below).

6. Does PC45 effectively implement Chapter 4 of the QLDP?

6.1 Objectives (4.9.3) 1 and 4

[135] Objective (4.9.3) 1[234] is to have growth and development consistent with the maintenance of the quality of the natural environment and landscape values. This is a core linking objective in the district which relies on those values for much of its commerce and to maintain the qualities which residents come there for. We are satisfied that PC45 avoids[235] urbanisation of the outstanding natural landscape of the Clutha River Valley and protects[236] the visual amenity of the site and surrounding area. Objective (4.9.3) 4 then seeks a "pattern of land use which promotes a close relationship

233 I C Munro evidence-in-chief Appendix 2: Page 20 (2013 Report) [Environment Court document 17].
234 Objective (4.9.3) 1 [Queenstown Lakes District Plan p 4-52].
235 Policy (4.9.3) 1.1 [Queenstown Lakes District Plan p 4-52].
236 One small rearrangement of Activity Area E might be required as we discuss later.

and access between living, working and leisure environments[237]. PC45 is notable for its links between the living and leisure environments because of its proximity to the Clutha River and Sticky Forest and for the provision of walking and cycling tracks.

6.2 Objective (4.9.3): Sustainable management of development

Residential growth sufficient to meet the District's needs

[136] We have described how Objective [4.9.3] 3 is to provide[238] for residential growth "... sufficient to meet the District's needs" and how that needs to be read with Policy (4.9.3) 7.1. That policy, on which AWI's witnesses relied heavily, seeks to implement Objective (4.9.3) 7 (of effectively managing the extent and location of urban development) by "... enabl[ing] urban development to be maintained in a way and at a rate that meets the identified needs of the community ..."[239] (underlining added to demonstrate AWI's emphases). Much of the evidence discussed already in relation to Chapter 7 is relevant here, as is the list of needs identified earlier.

[137] Counsel for AWI submitted[240] that Objective (4.9.3) 7 and its implementing policies "... requires the integration of a range of issues and choices that are not addressed in the evidence". To illustrate the submission they suggested the policies raised the following questions:

(a) What is the identified need (in a residential capacity sense) of the Wanaka community in relation to urban growth?
(b) Where is that need best accommodated to avoid, remedy, or mitigate adverse effects on the environment?
(c) Where is the long term distinct division between rural and urban to be located?
(d) What land within the UGB should be rezoned for residential use now, and what should be preserved for "future urban development"?

Then they submitted that "none of those questions can sensibly be answered before the UGB has been set, and [PC45] is not the vehicle to set it".

237 Objective (4.9.3) 4 [Queenstown Lakes District Council Plan p 4-55].
238 Objective (4.9.3) 3 [Queenstown Lakes District Council Plan p 4-54].
239 Policy (4.9.3) 7.1 [Queenstown Lakes District Council Plan p 4-57].
240 Closing submissions for AWI (para 82) [Environment Court document 35].

[138] We have considered the evidence on these questions generally and in the earlier parts of this decision at length. Our specific consideration is set out below:

- Question (a) is not the correct question to derive from Policy (4.9.3) 7.1, since it both omits any reference of the introductory phrase 'To enable urban development to be maintained' and narrowly circumscribes the "identified needs" of the community in respect of urban development to a small artificial set of "residential capacity". The singular "need" rather than "needs" in counsels' question shows that AWI is being focused far too tightly to cover the extensive list of needs identified in part 3 of this decision. Further, the question put by counsel implicitly suggests tight control of "residential capacity", rather than management, which enables urban development by owners and developers to continue ("be maintained") in an improved (guided by other policies in Chapter 4) way and at a rate that provides the extensive list of opportunities and other needs identified in the QLDP;
- Question (b): for the reasons discussed in part 3 we consider that these policies do not require the local authority to second guess the market. The policies do not require a search for the "best" method of accommodating that "need" (which again should be "needs"). Rather they require an examination first of the enabling exercise under Policies (4.9.3) 7.1 and 7.3 (since an UGB is not being established in PC45) and second, measuring against the degree of achievement of all the other more specific policies in Chapter 4 of the QLDP, few if any of which require any sort of comparison to find the 'best' solution;
- Question (c) is, on the undisputed evidence, quite straight forward to answer. The division between rural and urban areas should probably in the long term be located either on the northern PC45 boundary, being the line drawn by the landscape architects described earlier or inside Activity Area E; and
- A variant of Question (d) — without the reference to an UGB — is considered in some detail below. We have already stated our conclusions on the legal issues raised by the lack of an UGB over the site.

Sustainable management of development

[139] Turning to the evidence on Objective (4.9.3) 7 and its policies, counsel for AWI submitted first that Northlake[241]:

> ... did not call any credible evidence that there is an insufficient supply of land in Wanaka such that the identified needs of the community cannot be met. It did not present any economic analysis of the prices available in Wanaka now at various levels of the property market.

The first sentence shows the deformation of Policy (4.9.3) 7.1 which we identified above. The words of the policy which require urban development (not land) to be maintained in a way and at a rate that meets "the identified needs of the community" — for much more than merely land — have been oversimplified with the effect that complexities of the policy are misrepresented. In fact AWI's question would have been more suitable as a test of whether PC45 achieves Chapter 7's objectives and policies, and we have considered similar issues raised by the evidence there.

[140] While we think counsel for AWI went too far when they described Mr Edmonds' one paragraph[242] about part 4.9 of the QLDP as extraordinary, it certainly was rather brief. Further, they referred[243] to Mr Page's cross-examination of Mr Edmonds[244] about the rate referred to in Policy (4.9.3) 7.1. We find the questions (and therefore the answers) unhelpful because they are predicated on a restricted interpretation of the policy which is, as we have already held, incorrect. Counsel suggested Mr Edmonds' answer to a point about the absence of an UGB was enlightening[245]. What we find enlightening in this otherwise rather unhelpful passage was Mr Edmonds' reference[246] to Mr Meehan's evidence. He described Mr Meehan as having "... identified — and [PC45] provides for — a range of other needs that are not currently being met by the District Plan in Wanaka. In particular areas such as Activity Area D, D1 so I believe that [PC] 45 does meet the identified needs of the community ...". That answer correctly

241 AWI closing submissions para 109(b) [Environment Court document 35].
242 J B Edmonds evidence-in-chief para 6.8.10 [Environment Court document 14].
243 AWI's closing submissions para 84 [Environment Court document 35].
244 Transcript p 107-108.
245 AWI's closing submissions footnote 38 [Environment Court document 35].
246 Transcript p 107 line 25 et ff.

applies Policy (4.9.3) 7.1. Counsel criticised[247] the reliance on Mr Meehan's evidence on the grounds he was not an expert, and had an interest in the outcome of the case. But the important points are that Mr Edmonds, who is an expert, accepted the evidence of Mr Meehan who gave evidence of facts as well as opinions. We give some weight to Mr Edmonds' expert opinion on this issue.

[141] In contrast was Mr Serjeant's evidence for AWI. Mr Serjeant did not strictly consider the policy. Instead he phrased his own question[248] — "Whether Wanaka needs additional land rezoned for residential development at the present time?"He described this as the "real" issue in the case[249]: and his answer was "no" relying on Mr Munro's evidence that Wanaka is likely only to have 2,302 new houses built in the 20 years from 2011 to 2031 and there is zoned provision for five times that many sections. Consequently in his opinion there is no need for any more.

[142] An aspect of Policy (4.9.3) 7.1 ignored by Mr Serjeant in his framing of the question is that it is an "enabling" policy, consistent with the enabling theme of the district plan as a whole. It is to enable urban development to be maintained not "to manage" it. Cross-examined on this Mr Serjeant said[250] " ... because there is no demand [for sections] the plan change should be refused". That is an empty and confusing[251] assertion. One can only make such a statement at a price or in a price range. There would likely be a higher quantity of sections demanded in Wanaka if they were only $50,000 each.

[143] Mr Serjeant was cross-examined extensively[252] by Mr Goldsmith on the application of the Objective (4.9.3) 7 and its policy 7.1. In an exchange between the court and Mr Serjeant he confirmed that[253] he agrees that sections are sold at different prices because they offer different qualities to buyers. Yet there was a revealing passage in cross-examination which shows that he retains a fundamental rationing approach to

247 AWI's closing submissions para 85 [Environment Court document 35].
248 D F Serjeant evidence-in-chief para 14 [Environment Court document 18].
249 D F Serjeant evidence-in-chief para 14 [Environment Court document 18].
250 Transcript pp 237-8.
251 As so often happens when witnesses use this language, it is unclear whether Mr Serjeant is talking about demand or the quantity demanded?
252 Transcript pp 261-267.
253 Transcript pp 231-232.

housing supply in the district. Mr Goldsmith was examining[254] about Objective (4.9.3) 3. After making it clear he was speaking hypothetically the exchange went:

> Q. … If you provide more than is sufficient without creating adverse effects in your view is the objective met?
>
> A. (Mr Sergeant) It's just so hypothetical I can't imagine that. I mean you could put any proposition hypothetical like that and I could potentially agree with it but I don't because it doesn't meet the district needs and one ice cream's enough for a child. There might be two and then three and four and five and they're going to get sick aren't they?

That suggests that Mr Sergeant thinks the plan is ultimately about rationing the supply of zoned land (ice creams) to what it considers is acceptable. There is an uncomfortable paternalism about this. In any event, we hold that rationing is not what the objectives and policies, read as a whole, aim for at all. The issue under the plan is not how many ice creams or sections are good for people but increasing the opportunities by increasing the quantity and range of products supplied and thus potentially reducing the price of some.

[144] Mr Serjeant was also concerned that Northlake and its advisors were "… interpreting the objective so that it's limitless"[255]. We agree there is sometimes a suggestion of that, but at other places Mr Edmonds (and Mr Brown) properly applied the relevant objectives and policies. Further, some of the policies are very open-ended so there is room for considerable disagreement over when an activity might reasonably be said to come within them — especially since the policies pull in different directions. On balance, we prefer the evidence of Mr Edmonds and Mr Brown.

6.3 <u>When should any urban development occur?</u>

[145] Counsel for AWI submitted that PC45 does not implement the direction in Policy (4.9.3) 7.1 that the <u>rate</u> of development is managed. We have already given our reasons for holding that the rate of development is to be enabled not managed but we briefly consider the evidence that the Council should manage staging of development of the site (although it apparently does not want to).

254 Transcript p 266.
255 Transcript p 266 line 28.

[146] Mr Munro put forward an alternative to PC45 which involved a staged release of the land. He considered his "demand" figures under a number of "lenses" e.g.: accessibility (walkable isochrones[256]), "pure land merit", and proportioning development pro-rata yield across Wanaka, and derived his opinion of an acceptable development yield for PC45 land of up to 512 dwellings over the next 20 years. He then considered whether development of the PC45 land was strategically appropriate in the contribution it would make to the objectives for Wanaka as a whole. He again referred us to his earlier report[257] where he came to the opinion that in order for the PC45 development to successfully integrate with Wanaka as part of a coherent and well-planned expansion, it should be contained in terms of yield to 442 dwelling units until at least 2025. In addition, the permitted development should be subject to a location constraint to along the southern edge of the PC45 land running along Aubrey Road and the rear of existing rural residential development fronting that road. He recommended that the highest possible densities be employed, subject to landscape constraints, to consume as little land as possible so as to avoid a large scale and relatively isolated stand alone node that would undermine the vision for Wanaka as a compact, well connected settlement.[258]

[147] In his rebuttal evidence Mr Edmonds described[259] how the rules of PC45 ensure that the initial stages of development "... will be focused within the Activity Area D1". In his opinion other staging requirements would not be necessary. We accept that evidence and consequently we accept Mr Goldsmith's submission that delaying the release of PC45 land would contribute little to sustainable management because:

- much of the land in question has been signalled for development for some time in the WSP (as we shall see in the next part of this decision);
- there is general agreement over the design and components of the development proposed;

256 An isochrone connects the points at which persons leaving for an identified destination would normally take the same time (making certain assumptions) to reach it.

257 I C Munro evidence-in-chief Appendix 2 [Environment Court document 17].

258 I C Munro evidence-in-chief Appendix 2: Paras [5.2-5.5] Page 20 (2013 Report) [Environment Court document 17].

259 J B Edmonds rebuttal evidence paras 13.1 to 13.7 [Environment Court document 14].

- the proposal will not place a strain on existing infrastructure and is in a planned location in terms of connectedness with Wanaka as a whole as it will continue to develop;
- while the release of the site to development over the next year or so may affect the release of other residential land into the market, it is unlikely to provide any undermining of the objectives and policies for Wanaka in the QLDP.

6.4 Compact development

[148] On the compactness or consolidation themes in the QLDP, Mr Serjeant referred to the policy[260] on providing for high density residential development in residential areas and continued[261]:

> Density is a relative term and in the Wanaka context higher densities are really only medium to high density with lot sizes down to 300m^2 per dwelling unit. In paragraphs 6.8.11 and 6.8.12 Mr Edmonds refers to the PC45 response to the affordable housing objective. While I recognise the importance of affordable housing to the district, the provision of up to 250 dwelling units, including affordable housing units, within Activity Area D1 is in direct conflict with Policy 3.2 and 3.3 above which directs the provision of high(er) density housing in appropriate areas and the combination of residential and commercial development so as to achieve the integration of different activities. It is clear to me that the provisions intend higher density development to locate around existing centres. The urban structure of Wanaka is relatively simple (ie not multi-nodal) and the expectation is that density will concentrically reduce rather than have suburban 'islands' of increased density, with consequent demand for competing open space and other community services in those locations.

We have several concerns with that. First, Mr Serjeant places too much weight on Policy (4.9.3) 3.3. As we have said, that is only a formula. He could just as easily (and equally wrongly) have justified PC45 under the following Policy (4.9.3) 3.4 which provides for low density residential development in "appropriate areas" also. In fact Policies (4.9.3) 3.3 and 3.4 require reference to other policies to determine what is appropriate. Cross-examined on that he conceded[262] that policy 3.3 needs to be applied in the light of the district's needs objectives (and of course they seek other targets than simply

260 Policy (4.9.3) 3.3 [Queenstown Lakes District Council Plan p 4-54].
261 D F Serjeant evidence-in-chief para 78 [Environment Court document 18].
262 Transcript p 268 line 7 et ff.

compactness). Second, reading the district plan as a whole, these policies need to be read with the specific Wanaka policy[263] of organising residential development around neighbourhoods. We predict that PC45 is likely to achieve that because it is designed to do so. Third, we have already pointed out that the district plan tends to use 'consolidation' for what Mr Serjeant (and Mr Munro) call compactness.

[149] In fact Mr Serjeant's point would have been better made in respect of the more specific Chapter 7 policy[264] which is "To provide limited opportunity for higher density residential development close to the Wanaka town centre". We have given that careful thought because at first sight PC45's Activity Area D1 goes against this policy. However, this policy needs to be read in the light of both the 'higher density close to transport routes' and to the affordable housing policies and we consider they justify the slightly contentious Activity Area D1 in combination with the Wanaka neighbourhood policy just referred to and other wider integration policies in Chapter 4.9. We find that PC45 will contribute to a relatively compact Wanaka. While it is not as compact as Mr Serjeant, Mr Munro and Ms Jones would like it to be, we hold that their conception is not necessarily what the district plan contemplates as most appropriate.

6.5 Affordable and Community Housing (Chapter 4.10)

[150] An "advice note" says[265] that the objectives and policies[266] of Chapter 4.10 of the district plan — Affordable and Community Housing[267] — are to be applied in the assessment of plan changes. Despite that, it was not well or thoroughly considered by the experts. Mr Edmonds, the planner for Northlake, quoted[268] the notified version of Chapter 4.10 which is not the operative provision. He described[269] how within PC45's Activity Area D1 the density range of up to 15 dwellings per hectare would result in smaller lots which would tend to be more affordable[270]. He also referred[271] to the provision of the 20 expressly "affordable lots" at a maximum price of $160,000. Mr

263 Policy (7.3.3) 4 [Queenstown Lakes District Plan p 7-14].
264 Policy (7.3.3) 3 [Queenstown Lakes District Plan p 7-14].
265 Queenstown Lakes District Plan p 4-59.
266 Quoted above in part 3.1 of this decision.
267 Added by Environment Court consent order dated 17 July 2013 in *Infinity Investment GH Ltd v Queenstown Lakes District Council* (ENV-2009-CHC-46).
268 J B Edmonds evidence-in-chief para 6.8.10 [Environment Court document 14].
269 J B Edmonds evidence-in-chief para 6.8.12 [Environment Court document 14].
270 J B Edmonds evidence-in-chief para 6.8.12 [Environment Court document 14].
271 J B Edmonds evidence-in-chief para 6.8.12 [Environment Court document 14].

Barratt-Boyes only referred to it indirectly when he talked about the types of housing likely to be built under PC45 — stand alone houses with clusters of "zero-lot" or terrace houses. Ms Jones referred to the evidence of Mr Barratt-Boyes and Mr Meehan and concluded that there will not be a "significant" amount of "true medium to high density" housing at Northlake. In our view almost any amount of such housing would be a success given what appears to be the strong desire of purchasers in this district for space around them. That is consistent with Mr Munro's position: he seemed to consider PC45's proposal did not meet his concept of affordable housing but approved this aspect of the plan change anyway. Finally Mr Serjeant, who had obviously relied on Mr Edmond's wrong quotation in preparation of his evidence, deleted his comments on the issue[272].

7. Having regard to the Wanaka Structure Plan

[151] As stated earlier, we must have regard to the WSP. Published in 2007, the WSP's purpose is "... to provide a tool for the Council to manage growth in Wanaka over the next 20 years"[273]. Each of the parties placed considerable weight on (different) aspects of the WSP.

[152] The first 13 recommendations are general. The remaining come under headings as follows[274] (relevantly)[275]:

- *Retaining Wanaka's Landscape Character*
- *Retaining the character of the settlement*
- *Protecting and enhancing entrances to the town*
- *Movement Networks*
- *Providing for High Quality Green (open space) and Blue (urban) Networks*
- *Providing for a vital town centre*
- *Promoting sustainability initiatives*

272 See J B Serjeant evidence-in-chief para 78 [Environment Court document 18].
273 Wanaka Structure Plan 2007 p 1.
274 Wanaka Structure Plan 2007 p 11 et ff.
275 Wanaka Structure Plan 2007. Key Recommendations 57 and 58 on visitor accommodation are omitted.

We will discuss these largely in order, clustering a few related key recommendations where appropriate. We also add some further subheadings (in brackets) within the 'General' recommendations.

General recommendations

[153] The first Key Recommendation ("KR") is not really a recommendation at all, but simply states that the growth figures had been updated to reflect the most recent studies (as at 2007). The growth boundaries in the "Zonings Proposed" Map — annexure "D" — reflect these figures which are, of course, out of date. Further they suffer from the same sort of problems we have identified in the 2013 predictions as to "capacity".

[154] The next KR is that [276]:

> 2. The Structure Plan will not incorporate a detailed 'staging plan', but will consider preferred staging principles when the structure plan is implemented into the District Plan. Initial investigations indicate that urban development is preferred south of the existing golf course (bound by SH84 and Ballantyne Rd), while development in the proposed Urban Landscape Protection Zone north of Aubrey Road is preferred over other land contained in this zone in the structure plan area.

It is not immediately clear what are the "staging principles" referred to in KR 2. The witnesses for AWI assumed they contemplated staging within an area to be rezoned. However, for several reasons we consider that is wrong. First the WSP applies to an area greater than the existing urban area of Wanaka, second, two areas are identified — one south of the golf course and one being part of the site (within the proposed Urban Landscape Protection Zone) — as preferred. We consider the more likely intention of this recommendation is that the staging is as between residential zones (in a general sense) as shown on attachment "D" to this decision. We hold that KR 2 does not promote detailed within-zone staging. The result is that at least part of the site — the area within the Urban Landscape Protection Zone — is favoured for development earlier rather than later.

[155] That is reinforced by KR 11 which states:

[276] Wanaka Structure Plan 2007 p 11.

> 11. The revised Structure Plan identifies a proposed 'Urban/Landscape Protection' area in the north east of the proposed structure plan area. The 2004 Structure Plan identified this area as an open space. This area is considered suitable for development due to its proximity to community and education facilities and to future public transportation linkages. It also reflects the fact that this area is already zoned for rural residential purposes, which is not considered to be an efficient use of the land (and also precludes its use for recreation/open space). The Urban/Landscape Protection area has been shown immediately fronting Aubrey Road, however the exact location of future development should be determined further during the Plan Change process. The outer growth boundary adjacent to the Clutha River has been amended (located further south to the 2004 structure plan) in recognition of the need to protect this land from inappropriate development.

This is a crucial recommendation for the site because the WSP expressly recognises at least a large part of the site is suitable for residential development.

(Open space)[277]

[156] KR 3 deals with open space issues. The WSP leaves the specific area and location of open spaces to be resolved at the plan change and/or resource consent stage. PC45 contains some proposals in respect of these matters, with a particular concentration on connectivity (see KR 14) across different ownerships within the site and across boundaries to existing roads and tracks (for pedestrians and cyclists).

[157] We note that KR 10 adds:

> 10. The Structure Plan identifies 'Plantation Forest' (i.e. "Sticky Forest") as a potential landscape protection area. This highlights the landscape sensitivity of this area as well as its potential to contribute to open space and recreation networks. …

Mr Edmonds pointed out that future trail connections are planned between the site and Sticky Forest[278].

(Neighbourhood centres)

[158] KR 4 also identifies locations for potential "neighbourhood centres" as "commercial/retail" on the map. It adds[279]:

277 We use brackets around subheadings where we supply them: they are not used by the WSP itself.
278 J B Edmonds evidence-in-chief Attachment 3 p 119 [Environment Court document 14].
279 Key Recommendation 4 [Wanaka Structure Plan 2007 p 11].

> 4. An appropriate location for a further neighbourhood centre … in the vicinity of Plantation Road/Aubrey Road will be considered prior to implementing the structure plan into the District Plan.

PC45 proposes a neighbourhood centre on the site to the north of Aubrey Road (a little more than one kilometre from Plantation Road). Given the explanation for the choice of location in the evidence of Mr Long[280], we consider that is appropriate. The evidence of Mr Serjeant and Mr Munro was not convincing on this issue (see Part 1.5). Mr Long gave evidence[281] of what he said was a successful small operation — the Grazë café at "Lake Hayes"[282] — and suggested the same could occur on the site. The success of a shop like this will depend on how well it is set up and marketed. We have already discussed the desirability of a small neighbourhood commercial centre from an urban design perspective, and we consider that PC45's proposal is consistent with this recommendation.

(Growth boundaries)

[159] Growth boundaries in the area are described by KR 5 in this way[283]:

> 5. The land that is located outside the inner (20 year) growth boundary but within the outer growth boundary will be identified as remaining Rural General as it is currently not needed to meet the 20 year growth needs. This aims to clearly signal to the community and landowners that this land is not considered suitable for additional development within the short to medium term future. Future guidance on the appropriate use of this land will be considered at the implementation stage.

[160] In the vicinity of the site, the WSP proposed both an "Inner Growth Boundary" ("pIGB") and an "Outer Growth Boundary" ("pOGB"). The location of both on the site is shown on annexed plan "D". The WSP clearly envisages part of the site — that within the pIGB — being urbanised, but subject to the constraints of the topography in this area as indicated by the WSP's proposed "Urban/Landscape Protection" zoning for the southern two-thirds of the site, as shown on annexure "D". That suggests that PC45 is at least heading in the right direction to achieve the WSP.

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280 J A Long rebuttal evidence para 7.2 [Environment Court document 12A].

281 J A Long evidence-in-chief Exhibit 12.1 [Environment Court document 12].

282 The inverted commas are because the "Lake Hayes Estate" is not at Lake Hayes but south of the State Highway on a terrace above the Kawarau River.

283 Key Recommendation 5 [Wanaka Structure Plan 2007 p 5].

[161] KR 5 is that the land between the pIGB and the pOGB will be identified as remaining Rural General because it was (at 2007)[284] "... currently not needed to meet the 20 year growth needs". Since that recommendation expressly signalled to the land owners that the northern one third of the site was not considered suitable for urban development in the medium term future, it is obviously against development of that part of the site as Mr Edmonds quite properly acknowledged in his evidence-in-chief[285].

[162] Against that we were advised that[286] the landscape experts for Northlake and the Council agreed before the hearing that there is "no landscape logic" to the pOGB as drawn across the site. Further, Mr Goldsmith pointed out that 83% of Northlake's proposed development would occur inside the pIGB. The 250 residential lots outside the pIGB but inside the pOGB represent only one or two years supply of allotments.

[163] No other reason for supporting the pIGB as a limit on development of the site was put forward. We accept that the concept of an outer growth boundary running along the edge of the higher landform points overlooking Lake Wanaka and the Clutha River, and intended to constrain urban growth within a clearly delineated UGB, is valid in an RMA context and achieved the important district-wide policies in part 4.2 of the QLDP. We agree with Mr Goldsmith[287] that: "The detail of this part of the pOGB in the WSP was not properly analysed and is not valid". We also accept that a boundary in the location agreed between Mr Baxter and Dr Read may well be an appropriate UGB. While we have no jurisdiction to incorporate a UGB into the district plan through PC45, we accept that the outer boundary of Activity Area E might be a valid and enforceable boundary. Preferable might be a line on the inside of Activity Area E (or at least E2).

Retaining Wanaka's Landscape Character

[164] The KRs on landscape include[288]:

> 14. A high amenity network of open space and recreation spaces should be provided to ensure that the settlement retains a strong connection to the adjacent landscape.

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284 KR 5 [WSP p 10].
285 J B Edmonds evidence-in-chief Attachment 3 p 117 [Environment Court document 14].
286 W J Goldsmith opening submissions para 15.10 [Environment Court document 4].
287 W J Goldsmith opening submissions para 15.9 [Environment Court document 4].
288 Key Recommendations 14 et ff [Wanaka Structure Plan 2007 p 11-12].

15. Maintain existing view corridors that offer high amenity landscape interpretation opportunities.
16. Limit development in areas identified as having landscape sensitivity and encourage development in the most logical, convenient and less sensitive areas of the town.

[165] KR 16 makes two points[289] — development in areas of landscape sensitivity should be limited, and development should be encouraged in "... the most logical, convenient and less sensitive areas of town". We have already recorded that Mr Munro put forward his own extensive analysis[290] of what in his view were more logical and convenient areas to develop. However, this KR must of course be considered in the context of the others, including those which expressly recognise the site as suitable for development. KR 16 cannot be used to subvert the more specific recommendations.

[166] The ONL boundary has been identified and drawn to exclude the slopes falling to the Clutha River. The Activity Area A and the Building Restriction Areas also limit development to protect other areas of landscape sensitivity.

[167] We find that PC45 achieves these recommendations in (nearly) exemplary fashion.

Retaining the Character of the Settlement

[168] The "character" recommendations are:

18. Provide for street layouts that are legible and interconnected.
19. Ensure that the layout of new development areas responds to the site context, site characteristics, setting, landmarks and views.
20. Ensure that the layout of new development areas creates a strong sense of place that reflects the character of the existing settlement. In particular local streets should reflect a sense of 'informality' with a less regimented arrangement of planting, a lack of kerbing and channelling and casually connecting pedestrian ways where practicable. The use of drainage swales should also be considered where possible. Design covenants could be used in new subdivisions to assist in achieving a specific character.

289 KR 16 [WSP p 11].
290 I C Munro evidence-in-chief 2013 Report [Environment Court document 17].

[169] KR 19 and KR 20 were agreed to be relevant. They relate to internal urban design factors, and on those issues we prefer the evidence of Mr Barratt-Boyes for Northlake (discussed in part 5 of this decision).

(Density of development)

[170] KR 23 is to:

> 23. Ensure that any higher density development is appropriately designed and located to enable for diversity of housing choice while retaining the overall low density character and feel of the settlement.

We consider the Northlake Structure Plan — annexure "C" — shows that will be achieved for the reasons given by Mr Barratt-Boyes in his evidence.

8. Evaluating PC45 under section 32 RMA

8.1 Introduction

[171] We have considered how effectively PC45 implements the relevant objectives and policies of the district plan in parts 4 to 6 of this decision. Because the relevant objectives and policies are, with one exception, not strongly directory and aim to enable a variety of outcomes, we hold that considerations of the efficient use of the land and other resources of the Wanaka area arise. We now examine the (limited) evidence on benefits and costs and the risks of acting or not acting. Those are both factors which help answer the question whether PC45 is more efficient than the status quo and other options put forward in the evidence in achieving the objectives and policies of the district plan.

8.2 The benefits and costs

What costs?

[172] We received little quantified evidence of the benefits and costs of the proposal. In relation to infrastructure, we had the uncontested evidence[291] of Mr J McCartney, a civil engineer for Northlake, that there would be no external costs imposed on the district in respect of any such alleged, but unidentified, costs.

[291] J McCartney evidence-in-chief Attachment 4 [Environment Court document 13].

[173] Mr Serjeant wrote that a result of PC45 being implemented would be that some "... additional costs ... will arise if already serviced land [of other developers] remains undeveloped"[292]. He explained by pointing out[293] that development contributions are usually taken by the Council at the time of issuing the section 224(c) RMA certificate to a subdivider which allows titles for new allotments to issue. That cost[294] is not recouped by the subdivider until the land is sold. Mr Serjeant then said that the risk of delays in offsite developers being repaid "... should not be increased through an oversupply of land created by Council zoning supply"[295]. While we do not accept there is likely to be an "oversupply" that is harmful to the public interest, we do accept that developers' holding costs may increase. It appears to us that these are costs imposed on trade competitors which they must accept (as would Northlake's developers) as a cost of trading and which we should not take into account: section 74(4) RMA. Since we did not hear argument about this we have regard to these costs but regard them as minor for the reasons we now give.

[174] First, any "oversupply" (of goods which do not spoil) from the point of view of developers is an opportunity or benefit for purchasers. As a general rule an increase in supply of sections in a market will lead to a lower price and movement in the quantity demanded, so that a greater quantity of sections is sold. That assumes of course that there are enough sellers in the relevant market to provide a competitive supply curve and we have considerable doubts that is so given the restricted ownership of residentially zoned land in the Upper Clutha Basin. The risks this creates we discuss (briefly) in part 8.3 of this decision. The net effect is that the extra holding costs caused to competitors by developers of the PC45 land are very likely to be outweighed by the benefits to purchasers because they will pay lower prices, as Mr Serjeant agreed[296] in an exchange with the court.

[175] In any event developers can, and routinely do, keep an eye on the market and develop their subdivisions in stages[297]. A result is that they only pay financial contributions for allotments they are seeking a section 224 certificate for. In other words

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292 D F Serjeant evidence-in-chief para 35 [Environment Court document 18].
293 D F Serjeant evidence-in-chief para 36 [Environment Court document 18].
294 Initially a private cost, but ultimately a social cost too.
295 D F Serjeant evidence-in-chief para 36 [Environment Court document 18].
296 Transcript p 231 lines 10 to 32 and p 232 lines 19 to 28.
297 Transcript p 254 line 26 et ff.

any trade competitor of Northlake can manage the costs of its financial contribution to a considerable extent.

[176] Of more relevance as offsite social costs are other potential effects identified by Mr Serjeant. He referred to the potential problems of earlybirds (our word) buying sections in the Three Parks subdivision and then living in an unattractive environment because other people who might have moved there have brought elsewhere, so the Three Parks subdivision languishes. However, he accepted[298] in cross-examination that it would only apply to people in a relatively small area (one stage of a subdivision). While we accept that there is a cost — and we accept Ms Jones' evidence[299] of the benefits of a 'built-out' neighbourhood — we consider that is a minor and temporary cost.

[177] Secondly he referred to delays in introducing public transport to Wanaka as a result of relatively more far-flung PC45 development. But he accepted[300] that this is a complex exercise in which PC45 has countervailing advantages in proximity to schools[301].

The net social benefit

[178] Ultimately of course it is desirable to know the net social benefit of any new proposal such as PC45 and compare it with the net social benefit of the status quo (or any other realistic potential use of the resources put forward in the evidence). The proposal with the greater[302] net social benefit is the most efficient use of the resources.

[179] The best way of quantifying and comparing the social benefit of different options for the management of a resource is to compare the relative net benefits of each, calculated in dollars per unit of resource per year if that is possible. Often it is not. In particular the quantification becomes difficult when:

298 Transcript p 257 lines 16 and 17.
299 V S Jones statement para 4.18 [Environment Court document 16].
300 Transcript p 261 lines 1 to 7.
301 Transcript p 260 lines 25 to 29.
302 Or "greatest" benefit if there are more than two choices before the local authority.

(a) there are large uncosted externalities (e.g. pollution, traffic congestion[303] or effects on significant ecosystems[304], outstanding natural landscapes or amenity values); and

(b) there are competing uses of land in one of which (residential use) much of the value may not be easily monetarised in cash flow terms (obviously it is much easier to capitalise as a purchase price).

Perhaps for one of those reasons we were not given any evidence going towards a cost benefit analysis. However, we asked for and were given valuations by a registered valuer called by Northlake.

[180] Land values provide good empirical evidence of the highest and best use as assessed by markets, provided of course there are only minor uncosted and relevant externalities to take into account. In situations involving land resources where lifestyle considerations mean that non-monetary benefits contribute greatly to the value of the land, valuations may be a good proxy because they more accurately reflect the "highest and best use" of the land in the eyes of consumers.

[181] Comparing the predicted approximate value of the land for three types of use shows:

Option 1 — (Rural General Option Value) $30,000 per hectare[305].

Option 2 — Rural Residential Option Value
Valued on the basis the land has been subdivided to a rural residential density as in Activity Area A, namely lot sizes of minimum 4,000^{m2} ready to sell: the gross market value is $530,000 (excluding GST)[306] per hectare.

303 Loosening urban boundaries (in areas much larger than Wanaka) while not dealing with the costs of traffic congestion may be futile.
304 For example, under section 7(c) RMA.
305 See para [12] S G N Rutland affidavit dated 10 April 2015 [Environment Court document 34].
306 S G N Rutland affidavit dated 10 April 2015 para 13 [Environment Court document 34].

Option 3 — PC45 Option Value

Valued on the basis that the land has been subdivided in accordance with PC45; the estimated gross market value is $1,220,000 (excluding GST)[307] per hectare.

[182] Options 2 and 3 are predictions rather than opinions about the current state of affairs, but the evidence was asked for and given as an approximation so that the court could identify the relative value of the Northlake land for the three possible uses discussed. On that basis AWI did not seek to challenge it (although it was given the opportunity to do so). What the valuation evidence reveals is that the market values of residential land at Wanaka are over 40 times Rural General land values. Even allowing for a large margin of error, and for the complete lack of quantification of all costs (the development costs and financial contributions are likely to be formidable for option 3), that is an extraordinary difference and suggests that PC45 is the most efficient outcome. That is consistent with the evidence of Ms Jones who considered efficiency issues briefly. She described the Rural Residential zoning (which includes the site) that surrounds urban Wanaka as "inherently inefficient"[308] and piecemeal subdivision of that land as inefficient also[309].

[183] We conclude that rezoning the site as a type of residential zone is more likely than not to give considerably more benefits to society than retaining it as Rural General and more net benefit than rezoning it for rural-residential uses because it is difficult to conceive of the costs of the remote and apparently minor adverse effects identified by AWI as outweighing even the net benefits of the PC45 development compared with those other options. This conclusion is speculative so we will give it little weight in our overall evaluation, but it is worth recording because the net benefits and costs appear to be on the PC45 side of the ledger.

307 S G N Rutland affidavit dated 10 April 2015 para 15 [Environment Court document 34].
308 V S Jones statement of evidence para 3.1(d) [Environment Court document 16].
309 V S Jones statement of evidence para 3.1(e) [Environment Court document 16].

8.3 The risk of acting or not acting

[184] Another matter we must take into account is the risk of approving[310] PC45 or of refusing it ("not acting").

[185] We identified above three options that were put forward for the site. We discuss the risks of options 1 and 3 below, together with variants on option 2. In the wording of section 32(4), options 1 and 3 are:

> *Option 1: the risk of not acting (i.e. refusing PC45 so that the site remains Rural General).*
>
> *Option 2A: low density residential as recommended by Mr Munro.*
>
> *Option 3: the risk of acting (i.e. approving PC45).*

We have called the middle option 2A because it is different from option 2 assessed by the valuer[311]. It is assessed because it was Mr Munro's preferred option if the site is not to remain Rural General.

Option 1 — Retention of Rural General zoning and rejection of PC45

[186] Rejection of PC45, as recommended by Mr Serjeant, obviously means the zoning of the majority of the PC45 land would remain Rural General. The obvious risk is that part or all of the site would be subject to an application for a discretionary subdivision at some time in the near future. Indeed that has occurred already in this area — Activity Area A[312] adjacent to Aubrey Road has already been subdivided in that way with, in our view, inferior results in terms of the objectives and policies of the QLDP. An application for resource consent to develop a significant part of the site in that way was withdrawn at the Council's request in favour of a holistic approach by way of PC45, which addresses all the land.

310 "Acting" in terms of section 32(A) RMA.
311 That is the presiding Judge's fault: he worded the question to counsel incorrectly.
312 No longer part of the site.

[187] Mr Meehan, on behalf of himself and Allenby Farms Limited, stated that, if PC45 is cancelled and the existing Rural General zone is retained, the community can expect the landowners to pursue other development options. Those would probably involve either discretionary subdivision and land use application or a plan change seeking some form of low density "rural living"[313] development. These would forgo most of the corresponding PC45 benefits and efficiencies in achieving the objectives and policies of the QLDP. That potential outcome must be carefully considered.

[188] Mr Brown expanded on this in his evidence called in rebuttal. He wrote[314]:

> ... [of] the risk that land is suitable for residential growth could be fragmented prior to the opportunity for a comprehensive, integrated planning outcome. The more that land is fragmented the more difficult it is to develop comprehensively and efficiently, and this is a significant risk.

He preferred a comprehensive approach now to "any sort of holding pattern"[315]. That is reinforced by the evidence[316] of Mr Barratt-Boyes that another considerable advantage of PC45 is that it is very likely to avoid the risk of sporadic subdivision of the site which may not give effect to the desirable urban design goals.

[189] Mr Serjeant refused to answer questions about those issues because he regarded discretionary development as speculative. Given the extensive history of precisely such development to the south of the site that seemed slightly evasive. We accept that it would be difficult for the Council to resist ad hoc development enabled by way of discretionary activity resource consent under the Rural General Zones provisions.

[190] Finally we consider the risks of refusing PC45 on the supply of sections to the housing market(s) in the Upper Clutha. This is where the restricted ownership of residentially zoned land becomes relevant. We say immediately that we accept the submission of counsel for AWI that there is insufficient evidence of collusion to find that the housing market(s) is (are) suffering from deliberate monopolistic behaviour. However, that was not why the evidence of Mr Meehan and others covered the restricted

313 See Chapter 8 of the Queenstown Lakes District Council Plan.
314 J A Brown rebuttal evidence para 4.9 [Environment Court document 6].
315 J A Brown rebuttal evidence para 4.9 [Environment Court document 6].
316 G N Barratt-Boyes evidence-in-chief 9 [Environment Court document 9A].

ownership of land in the area. As counsel for Northlake submitted, that ownership creates a risk of suppressing the quantity of sections supplied and we should take that into account. This is a factor that favours PC45.

Option 2A — The low density residential outcome (recommended by Mr Munro)

[191] A second possible outcome appears a standard, suburban, low density residential zoning for an area inside the WSP pIGB. That would develop part of the site for about 700 houses (instead of about 1,500 houses). It would, in Mr Goldsmith's words, give "a much more limited range of residential product" and there would not be any community facilities, nor neighbourhood retail provision nor any affordable houses. The sections that would result would provide a desirable place to live for a reduced number of people (those who can afford property at the higher end of the already expensive Wanaka price range).

[192] A further creative slant on a similar theme was a staged approach suggested by Ms Jones whereby a larger lot (low density) subdivision would be undertaken and then at a point in the future these lots would be able to be further developed on an infill basis[317]. Mr Goldsmith examined the practicality of this suggestion with Ms Jones[318]. We are satisfied that this approach would not lead to best planning practice as integrated planning of such features as access, services and dwellings would not be optimised and could lead to unnecessary cost. In our experience large lot lifestyle or small-holding subdivision and subsequent re-subdivision rarely results in good urban form. We regard Ms Jones' idea as an off-the-cuff response in cross examination, which on reflection has few merits. Her other option in her statement of evidence — some development now in exchange for deferred zoning of the remainder — has more merit but is still likely to be less efficient than PC45.

Option 3 — the risks of approving PC45

[193] Counsel for AWI submitted[319] that there were four risks of approving PC45. None of them are risks in the proper sense of being the product of a probability of an

317 Transcript p 133 [4/3/15 1211].
318 Transcript p 136 [4/315 1211].
319 AWI's closing submissions para 128 [Environment Court document 35].

adverse effect and the cost of its consequences. However, in deference to counsel we will consider them briefly:

- If "sufficient" means any amount more than is necessary, then the more land developed the better. All land (not just the PC45 land) within the Wanaka Structure Plan 2007 UGB could therefore be developed without control.

This is a non-sequitur and we consider it no further. We have discussed the application of "sufficient" in its context earlier.

[194] Next:

- The UGB process to be determined by the district plan review is undermined because part of it will have been set absent of any comparative analysis of absorbing the "identified need" for urban growth elsewhere. This is not what integrated management means.

We have already observed that the UGB process is not compulsory, nor is development in the absence of an UGB prohibited. We consider integrated management in part 9.

[195] Next counsel submitted:

- The "staging plan" referred to in the [WSP] and inferred from Part 4.9 of the Plan will have already been set. For the next twenty years, Northlake will be "the stage". Again, this outcome would be absent of any comparative analysis of achieving the goal of compact urban form.

We have held this is a mistaken understanding of the WSP and what it means by "staging". We consider lack of compact form next.

[196] Finally:

- The Rural Residential Zone on Aubrey Rd will have no continuing function or integrity against a goal of "compact urban form". The effect of up-zoning the Rural Residential zone has not been considered. The UGB, the PC45 site and the Aubrey Rd Rural Residential zone all have to be managed in an integrated way. That has not been attempted, or even considered, by the Requestor.

The main policies[320] on this issue "promote" compactness. We have already found that PC45 is likely to do this to a satisfactory extent.

[197] Turning to risks properly so-called: the risks of approving PC45 are on-site and off-site. The on-site risks are relatively minor and would be largely borne by the developers and/or subsequent purchasers of lots, for example, there is a possibility that insufficient houses will be built to trigger construction of the communal facilities (swimming pool etc). There is also a risk that shops in the neighbourhood centre in Activity Area D will not be able to trade successfully. However, as Mr Barratt-Boyes observed that is largely a risk for the developer or at least the owner of the building as to the level at which they pitch rents. We have accepted Mr Long's unchallenged evidence[321] that a small commercial node will not affect other existing (or possible future) retail centres in Wanaka.

[198] Off-site there is a probability that subdivisions in the Three Parks area may be slower to sell (if they are even put on the market). The "tumbleweed" scenario identified in *Westfield Ltd v Upper Hutt City Council*[322] may be literal in the case of some of this land. However, we consider the social costs of slower sales would be relatively low, especially if the landowners at the time lower their prices as a response to new market conditions (a shift in supply) and/or an increase in the number of sections on the market (a supply movement). That would enable the Three Parks area to become an area for aspirational owners — people who wish to work in the area but cannot otherwise afford to live there.

[199] And of course PC45 is likely to reduce the risk of anti-consumer behaviour from current owners of undeveloped but zoned residential land by introducing more competition into the section/housing market(s) in Wanaka.

320 Policies (4.5.3) 1.1 and 1.2 [Queenstown Lakes District Council Plan p 4-29].
321 J A Long evidence-in-chief parts 7 and 8 [Environment Court document 12].
322 *Westfield Ltd v Upper Hutt City Council* W44/2001.

9. Assessing the most appropriate objectives and policies

9.1 The matters to be weighed and the Council's decision

[200] The final part of our decision on a plan change is to weigh up the four[323] relevant sets of considerations:

(1) whether the plan change is more effective than the status quo in achieving the relevant objectives and policies in the operative district plan and in other — usually higher, but here a lower (the WSP) — later statutory instruments not directly particularised in the district plan;

(2) the section 32 evaluation of the plan change against the relevant alternatives;

(3) whether the plan change accords with the local authority's functions, particularly — in the case of a territorial authority — managing the integrated effects of the use, development and protection of land and the other resources of the district; and

(4) having regard to the decision of the Council.

[201] As to (4), we respectfully agree with the outcome of the Commissioners' Hearing and most of the reasons they gave, and give the decision considerable weight. We consider the Council decision no further, but summarise our consideration of the first three matters in the following paragraphs after dealing with one other legal argument raised for AWI.

[202] Counsel for AWI submitted that no consideration had been given to alternative (off-site) areas for the residential development proposed by PC45 for the site. The Supreme Court decision in *EDS v NZ King Salmon* [324] establishes that there is no obligation to look at alternative sites. That is "... permissible, but not mandatory"[325]. In this case there are no matters of national importance (under section 7 RMA) raised to make that desirable; nor is there any proposal in PC45 which involves exclusive use of a

323 The three sets of territorial authority's obligations identified in para [41] above plus our obligation under section 290A RMA.

324 *EDS v NZ King Salmon* (supra footnote 1) (SC).

325 *EDS v NZ King Salmon* (supra footnote 1) (SC) at [166].

public resource to make consideration of alternatives "unavoidable"[326]. Further, "Of the six areas identified by Mr Munro (additional to Northlake), four are essentially undevelopable; which leaves only the Orchard Road block and Three Parks"[327]. We have found those are not likely to supply (many) comparable sections. Even Mr Munro conceded in his 2013 Report that PC45 was likely to provide superior allotments, so in our discretion we consider it is not necessary to look at alternative sites for urban development.

9.2 Does PC45 effectively implement the QLDP?

[203] Evaluated in terms of its effectiveness in achieving the relevant objectives and policies of the district plan, in parts 4 to 6 of this decision we predicted that PC45 is likely to[328]:

(1) encourage new urban development[329] which is imaginative in terms of urban design (the affordable housing outlined by Mr Meehan) and which integrates different activities:
   — the network of roads and tracks linking residences and providing for recreational biking and walking;
   — the small commercial centre[330]; and
   — the nearby schools.

(2) assist (potentially) in the definition[331] of an UGB on the site;

(3) provide sufficient land for 1,500 (approximately) residential units and a diverse range of residential opportunities[332];

(4) enable new residential accommodation[333] on the site including a number of residential allotments at the more affordable[334] end of the price range (in Activity Area D1) for middle or lower income households ;

(5) observe the constraints[335] imposed by the natural and physical environment;

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326 *EDS v NZ King Salmon* (supra footnote 1)(SC) at [168] and [170]-[173].
327 J D Edmonds rebuttal evidence para 12.11 [Environment Court document 14A].
328 This list generally follows the sequential order of objectives and policies in the district plan.
329 Policy (4.9.3) 3.2 [Queenstown Lakes District Council Plan p 4-54].
330 Policy (4.9.3) 4.2 [Queenstown Lakes District Council Plan p 4-55].
331 Policy (4.9.3) 7 [Queenstown Lakes District Council Plan p 4-57].
332 Objective (7.1.2) 1 [Queenstown Lakes District Council Plan p 7-3].
333 Policy (7.1.2) 1.2 and 1.4 [Queenstown Lakes District Council Plan p 7-3].
334 Policy (4.10.1) 1.1 [Queenstown Lakes District Council Plan p 4-59].
335 Policy (7.1.2) 1.1 [Queenstown Lakes District Council Plan p 7-3].

(6) maintain a distinction between urban and rural areas[336] through the use of Activity Areas, conservation and design controls in the proposed rules;

(7) contain the outward spread[337] of Wanaka by detaining development areas which do not spread along, but away from, Aubrey Road, by restricting access arrangements;

(8) provide for development which carefully uses the topography[338] as shown on the attached "Structure Plan" marked "C";

(9) create a sense of neighbourhood[339] community and wellbeing by providing for centrally placed community facilities[340] (a neighbourhood centre and a swimming pool);

(10) by developing adjacent to Aubrey Road to provide for peripheral expansion[341] of Wanaka; and

[204] In addition PC45 generally carries out the Key Recommendations of the WSP.

[205] Against these positive aspects, Mr Munro summarised his principal concerns with PC45[342]:

> I disagree that sustainable management will be promoted by providing residential land in Wanaka when there is already a surplus, and where the new zoned land is inferior in urban design terms than existing zoned land. This is likely to lead to more dispersal, lower take up rates of existing zoned areas, less connected neighbourhoods, and overall a watering down of the "compactness" consistently seen by the community as essential to Wanaka's character and wider sense of identity. This amounts to urban design inefficiencies and ineffectiveness in terms of the operative zones and the overall outcome for Wanaka that PC45 would enable.

We have found that Mr Munro is likely to be incorrect in his conclusions that there is a surplus of residential land in Wanaka and is wrong that the site is inferior in urban design terms as contemplated by the QLDP.

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336 Policy (7.1.2) 1.5 [Queenstown Lakes District Council Plan p 7-3].
337 Policy (4.9.3) 3.2 [Queenstown Lakes District Council Plan p 4-54].
338 Policy (4.9.3) 4.2 [Queenstown Lakes District Council Plan p 4-55].
339 Policy (7.3.3) 2 [Queenstown Lakes District Council Plan p 7-14].
340 Policy (7.1.2) 3.1 [Queenstown Lakes District Council Plan p 7-5].
341 Policy (7.3.3) 1 [Queenstown Lakes District Council Plan p 7-14].
342 I C Munro evidence-in-chief para 31 [Environment Court document 17].

[206] As for the assertion that the community sees compactness as essential, we consider that the correct position is that the QLDP perceives consolidation/compactness as important and not spreading into the landscapes of the District as very important. PC45 implements both sets of policies especially the latter. We find that the main defects of PC45 from an effectiveness perspective are that it enables extensions of urban Wanaka which are not as compact/consolidated as might be achieved, and second that it is development outside an UGB which is to be "strongly discourage[d]".

[207] Giving due weight to those negatives, we conclude that overall PC45 is, in all the circumstances outlined, more appropriate than the status quo or the options put forward by Mr Munro and Ms Jones.

9.3 Section 32 evaluation: efficiency

[208] The sketch of benefits and costs suggests that the net social benefit of PC45 is more likely than not to be positive compared with the status quo or Mr Munro's staging. Similarly, the risk analysis favours PC45 over the alternatives. Having regard to efficiency of PC45 in achieving the relevant objectives and policies of the district plan, we consider PC45 is the most appropriate way of achieving those objectives.

9.4 Integrated management of the effects of use, development and protection

[209] We have considered the integrated management of the scale of effects of PC45 carefully. We appreciate that the addition of (potentially) 1,600 housing units increases the housing stock by approximately 35% (say, one-third). Counsel for AWI suggest that PC45 would introduce "a level of development never previously seen in Wanaka"[343]. That is not correct: it introduces the potential for such development under a carefully planned template — the Northlake site will only be developed as and when the developers consider all the relevant factors that suggest (to them) another stage should proceed. Counsel for the appellant submitted in closing[344] that "It is not the role of the District Council, or this Court, to pick winners in the market or to tackle growth capacity in the district". Counsel for Northlake agree but then submit that the appellant's approach "... being one of complete Council control over release of land through a ... staging process, could not result in any outcome other than the Council ... picking

343 AWI closing submissions para [101] [Environment Court document 35].
344 AWI closing submissions para 15(b) [Environment Court document 35].

winners through the District Plan". We agree with that submission and consider that AWI misconceives the QLDP: the district plan does not deliberately pick winners — it enables, encourages, and in certain cases strongly discourages, certain behaviour but that is as powerful as its intervention in the market place for land goes (recognising that rezonings may well amount to picking winners indirectly).

[210] We accept that it is theoretically open for the positive relevant considerations to be outweighed by other factors such as the policy discouraging urban extensions in the rural areas beyond urban growth boundaries, considerations of compactness and, overarching, by the exercise of the function to integrate the effects of use and development of land. For example, counsel for AWI submitted that PC45 would pre-empt both the plan review and the setting of an UGB, relying on the evidence of Mr Munro. Mr Goldsmith's reply[345] was that only the Council knows the reasons the Council put PC20 (which proposed an UGB for Wanaka) on hold, and the implications and consequences of the Council putting PC20 on hold (such as the potentiality or likelihood of an intiative such as PC45). The Council processed the Three Parks PC16[346] and the North Three Parks PC4[347] without a UGB in place; the Council must know whether or not, and if so when, it intends notifying a Wanaka-wide UGB; and further the Council must have its own view of whether or not the approval of PC45 would undermine the District Plan review in general or any proposed Wanaka-wide UGB in particular. Further, the Council accepted the Commissioners' PC45 recommendation and supports the PC45 decision in these proceedings, despite the District Plan review supposedly being notified later this year. We accept that is a fair statement of the position. In the circumstances we do not accept that the review is being subverted.

[211] The evidence of Mr Munro and Ms Jones seems influenced by their opinions about the past development of Wanaka. Ms Jones wrote with commendable directness[348]:

345 W Goldsmith submissions for Northlake in reply para 4.3 [Environment Court document 38].
346 Notified April 2009, made operative January 2011.
347 Notified March 2012, made operative July 2013.
348 V S Jones statement of evidence para 4.3 [Environment Court document 16].

> I agree with Mr Munro that the development of the northern peninsula is unfortunate and has resulted in areas of new development that are dependent on the private vehicle travel in the same way that Northlake will be at least for the next 20 years, if it is approved. In this respect, I think the phrase 'two wrongs don't make a right' is apt. I also agree that the historic Rural Residential areas that surround the Wanaka town are not desirable and, in a perfect world, would be intensified over time[349].

That sums up many of their concerns. However while those concerns may be justified by (some) urban design principles, they are not justified by reference to the operative district plan. Recurring themes in the district plan are enjoyment and maintenance of amenities and the landscape, enabling people to provide for their needs and lifestyle preferences. We doubt that many of the people who live on the Peninsula west and southwest of the site consider that their neighbourhood(s) are "unfortunate".

[212] We hold that it is fundamentally incorrect to see PC45 as a second wrong which compounds alleged earlier errors by the Council.

[213] While we appreciate that PC45 will make Wanaka less compact than AWI's witnesses and Ms Jones would like, we consider it does have some energy-saving advantages (in addition to the costs of extra travel to the lakefront or to a supermarket) in its proximity to Wanaka's schools and to recreational facilities. It also contains a proposal for small-scale shops to create its own neighbourhood. We consider that the argument PC45 will not manage the adverse effects of development in an integrated way is significantly overstated. Much will depend on the internal staging adopted by the developers and indeed on market conditions at the time of sale. Even if those go badly we consider the effects will be relatively temporary. In the longer term Wanaka will fill out to within a respectful distance of its natural topographical boundary (the Clutha River), in a completely appropriate and well integrated way. We conclude that the integrated management of effects favours PC45 over the options.

349 Section 42A report, Section 6.

10. Result

10.1 Conclusions

[214] Weighing all the matters outlined above, we conclude that PC45 is (provided some minor changes are made as raised in the next section) the most appropriate method of achieving the relevant objectives and policies of the district plan and that it will achieve integrated management of the resources of Wanaka. We are encouraged in these conclusions by the Hearing Commissioners' decision which was to the same effect. We will make (conditional) orders confirming that judgment.

10.2 Amendments to plans

[215] Since the following matters were not put to the parties or their relevant witnesses, they are provisional. Any party may apply to call evidence in respect of any of them.

[216] There is a low ridge in the centre of the site at the eastern end of (we think) the Allenby Farms Ltd property. There are patches of kanuka and native shrubs (and exotic weeds) on both the sunny northern side of this ridge and, more densely, on the southern side. While the flat ridge top is suitable for residential development, the kanuka and native shrubs should be protected. Any roading should go to the south of them. The Structure Plan will need to be re-drawn to show another tree protection area and relocation of the (notional) road.

[217] In the Stokes/Gilbertson block, at the eastern end of the site, two changes seem to be desirable to protect amenities:

(a) the whole of the gully should be a building restriction area (there is an anomalous residential C4 area at the northern end at present which should be cut off at the orange line drawn by us on plan "C");

(b) the land to the east of the gully in B5 should have minimum zoning size lots of 4,000m^2 (being a minimum Rural Residential scale) to protect the visual amenities of the elevated houses to the south of Aubrey Road.

[218] Third, there should be a walking track from the north-western high point on the site which overlooks the public reserve and camping area at the start of the Clutha River and down the ridge parallel to the Clutha River, to connect the two walking/cycling links shown on the Structure Plan. Because of potential erosion problems this may not be suitable for mountain bikes.

10.3 The objectives, policies and rules of PC45

The objectives and policies

[219] We hold that the rather anodyne objectives and policies of PC45 appropriately implement the particular objectives and policies of Chapter 7, and the more general policies in Chapter 4 of the district plan.

The rules

[220] In *Suburban Estates Ltd v Christchurch City Council*[350], a case about a new district plan for Christchurch City, the Environment Court wrote:

> [40] We conclude that when considering methods of implementation (including rules) the purpose of the Act as defined in section 5 is not the starting point at all; it is the finishing point, to be considered in the overall exercise of the territorial authority's judgement under Part II of the Act[351]. We hold that the overarching purpose of the Act — that is sustainable management, and the elements of Part II — are largely presumed to be met by, and subsumed in, the objectives, policies and methods contained in the revised methods of the City Plan. If that is not the case then there is an element of re-inventing the wheel if all the matters to be considered (to use a neutral term) under sections 5 to 8 of the Act have to be separately applied to the zoning.

With the exception of the first sentence, which is more applicable to a new (proposed) plan than a plan change, that passage largely fits with *EDS v NZ King Salmon.* Thus the objectives and policies to be implemented are primarily those in PC45 itself, now that we have confirmed those. Only where they are incomplete or uncertain do we need to refer to Chapters 7 or 4 of the district plan. Subject to some minor points raised below,

350 *Canterbury Regional Council (Suburban Estates Ltd) v Christchurch City Council* C 217/2001 at p 23.

351 As required by section 74(1) RMA.).

we consider the proposed rules effectively and efficiently implement the policies in PC45.

[221] In relation to the proposed rules in PC45 we note that when making a rule the territorial authority must also have regard to the actual or potential effect of activities on the environment[352]. In addition, there are several other considerations about rules (which have the force of regulations[353]) in section 76 of the RMA. Of these one is potentially relevant. Section 76(4B) states that there must be no blanket rules about felling of trees[354] in any urban environment[355]. Do the areas and rules for tree protection comply with section 76 (4B) RMA? We require an agreed position and/or submissions on this issue.

[222] We also have questions about the practicalities of other rules which should be considered to ensure the objectives and policies of the Plan and Plan Change are appropriately implemented:

(a) it appears there is an arrangement in the activity list where buildings are disjointed from the activities which might occupy them. This means that some categories of buildings appear permitted or controlled activities but the actual *residential* activity which will occupy them requires restricted discretionary consent. Thus the criteria which would be invoked to assess a residential activity will not necessarily be applied at development of the building stage. This could for instance allow remnant stands of native planting to be removed as only the Tree Protection Area and Area E are protected. This outcome might not implement Objectives 4 and Policy 4.2 of PC45;

(b) the requirement for no more than one residential unit on a site seems to be counterproductive in terms of efficient site planning, where contiguous areas of open space and shared features could be employed to achieve a

352 Section 76(3) RMA.

353 Section 76(2) RMA.

354 Section 76(4A) RMA as added by the Resource Management (Simplifying and Streamlining) Amendment Act 2009.

355 Section 76(4B) RMA — this rule was added by the Resource Management (Simplifying and Streamlining) Amendment Act 2009.

better urban design solution (consistent with PC45 Objective 2 and Policy 2.4);

(c) the rule permitting an underground structure to be excluded from maximum building coverage may reduce planting opportunity and perhaps these structures should be considered in a different way?

(d) there does not seem to be a rule addressing the external edge of the zone to the east where planting could assist the definition of this urban edge to be consistent with the Objectives and Policies introduced to the Plan through PC30. We note rules for planted edges facing Aubrey Road and Outlet Road might provide a model for addressing this issue;

(e) Activity Area E1 and Activity Area E4 seem to require the maintenance of a *pastoral state*. This directive will not protect trees or encourage additional enhancement planting. We request this wording be adjusted to address this concern which we consider does not accord with the Objectives of the Plan Change (e.g. PC45 Objective 4 and Policy 4.2, Objective 2 and Policy 2.1);

(f) is Activity C appropriately nominated given its natural attributes including proximity and buffer role to the ONL and the predominance of existing vegetation? We suggest this area should be nominated as a further Activity Area E (say E3). This would accord with Objective 4 and Policy 4.2 of the Plan Change.

10.4 Interim Decision

[223] Our decision will be interim for four reasons:

(1) the Amended Structure Plan will need to be redrawn;

(2) the objectives, policies and rules may need to be amended in respect of the matters raised in part 10.3;

(3) we are unsure of our powers to make the changes suggested in (1) and (2) — under the First Schedule or under section 293 RMA? — and will seek submissions on that; and

(4) we are unclear whether AWI wished to pursue its 'vires' arguments and in respect of what, so we will reserve leave for it to lodge more detailed

submissions on those (other than on Objective (4.9.3) 7 which we have resolved).

For the court:

J R Jackson
Environment Judge

Attachments

A: Ownership and site plan (Attachment "D" in Mr Goldsmith's opening bundle).

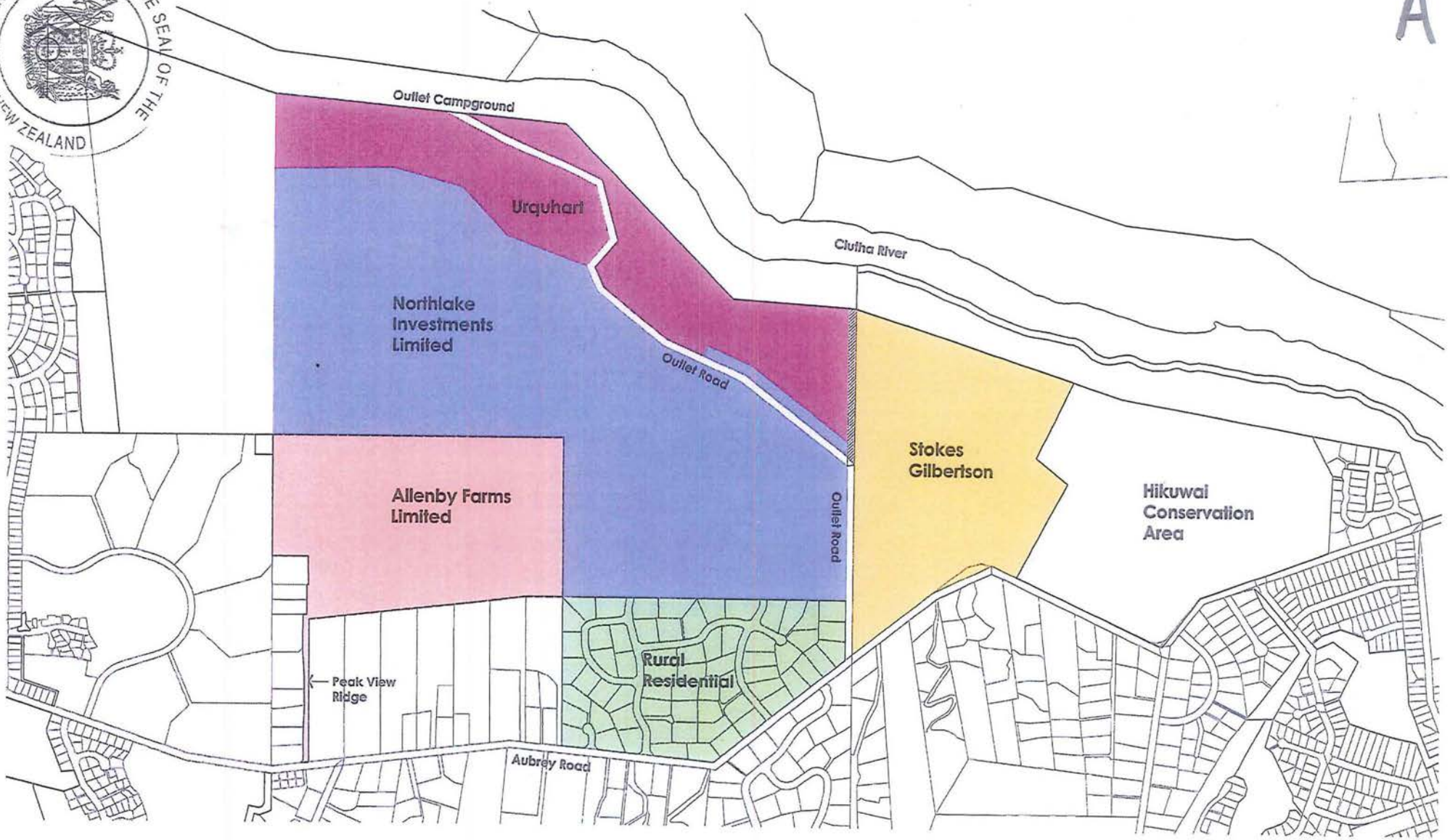
B: Map of Dippie Family interests (Ex 14.1).

C: Northlake's Amended Structure Plan dated 1 May 2015.

D: "Zoning Proposed" map from the Wanaka Structure Plan 2007.

ENVIRONMENT COURT OF NEW ZEALAND
THE SEAL OF THE

A



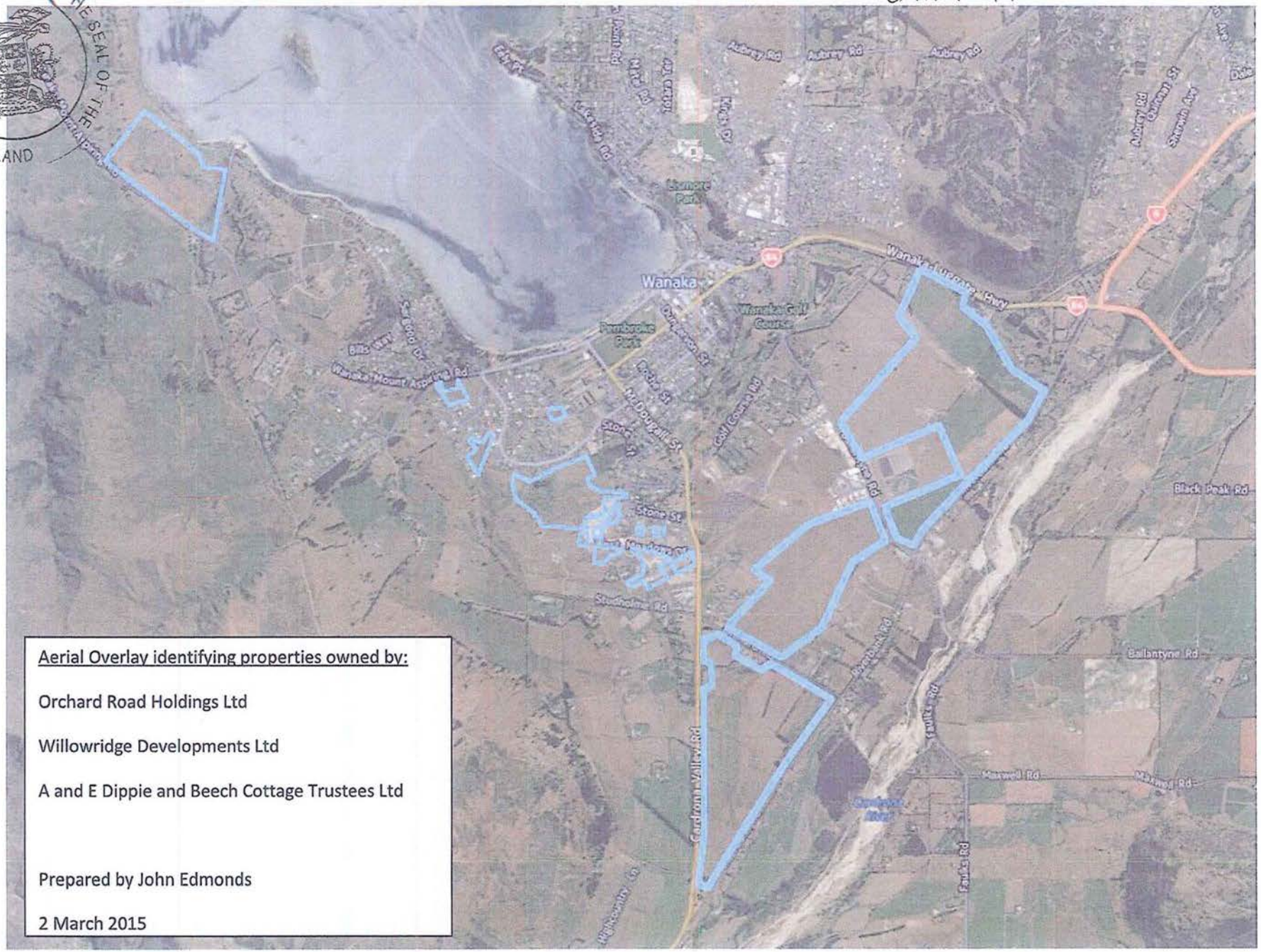
NORTHLAKE WANAKA - LAND OWNERSHIP PLAN (Note: Some coloured land is outside the PC45 Zone)

REFERENCE 1949-SK32 SCALE = 1:5000 AT A3 20 Feb 2015

baxter design group

Exhibit 14.1

B



Aerial Overlay identifying properties owned by:

Orchard Road Holdings Ltd

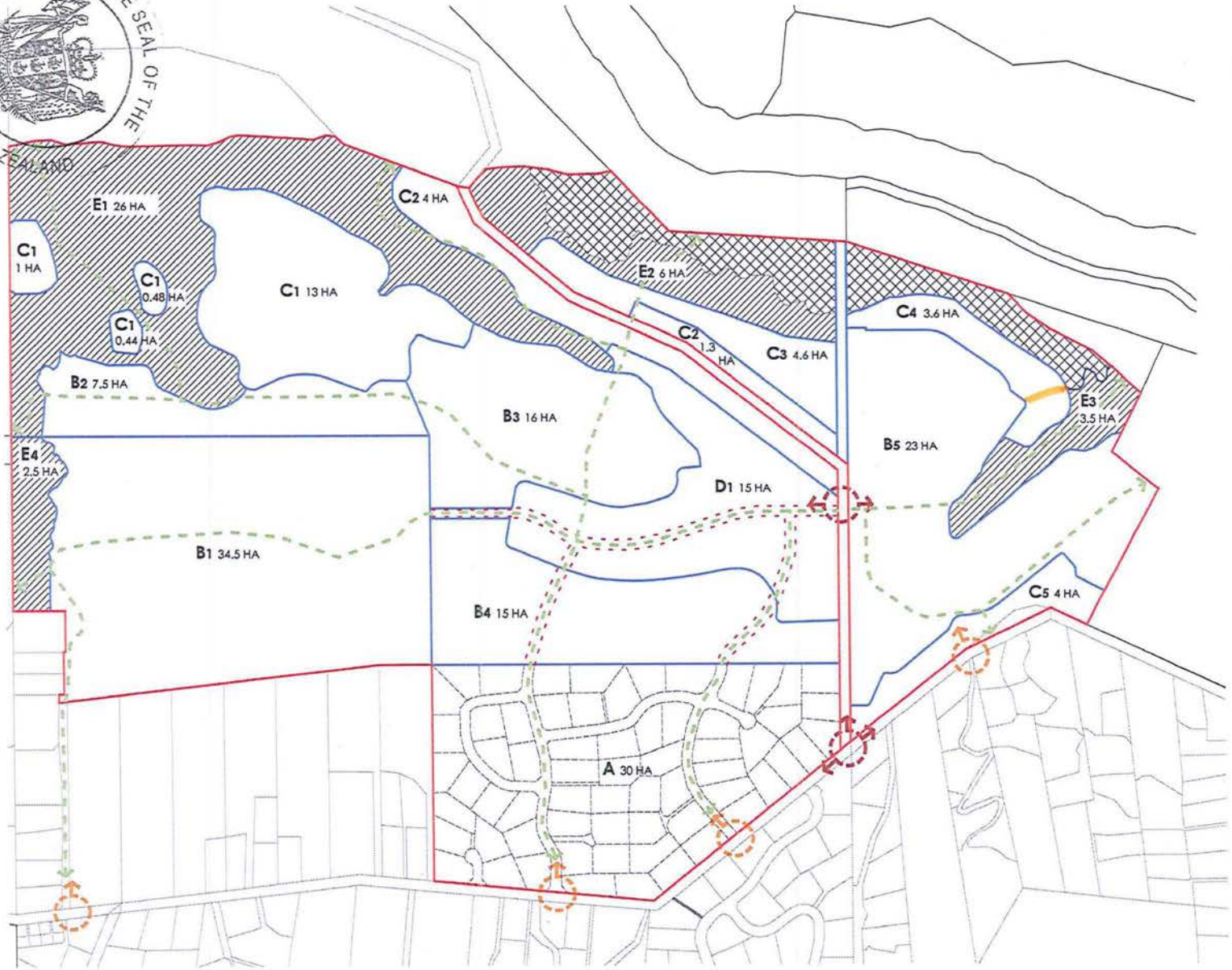
Willowridge Developments Ltd

A and E Dippie and Beech Cottage Trustees Ltd

Prepared by John Edmonds

2 March 2015

C



KEY

- Zone Area = 219.26ha (excludes legal roads)
- A - E Activity Areas
- Activity Area boundary
- Required walkway / cycle links
- Primary entries
- Secondary entries (indicative)
- Building Restriction Area
- Tree Protection Area and Building Restriction Area
- Required road links

North

NORTHLAKE STRUCTURE PLAN

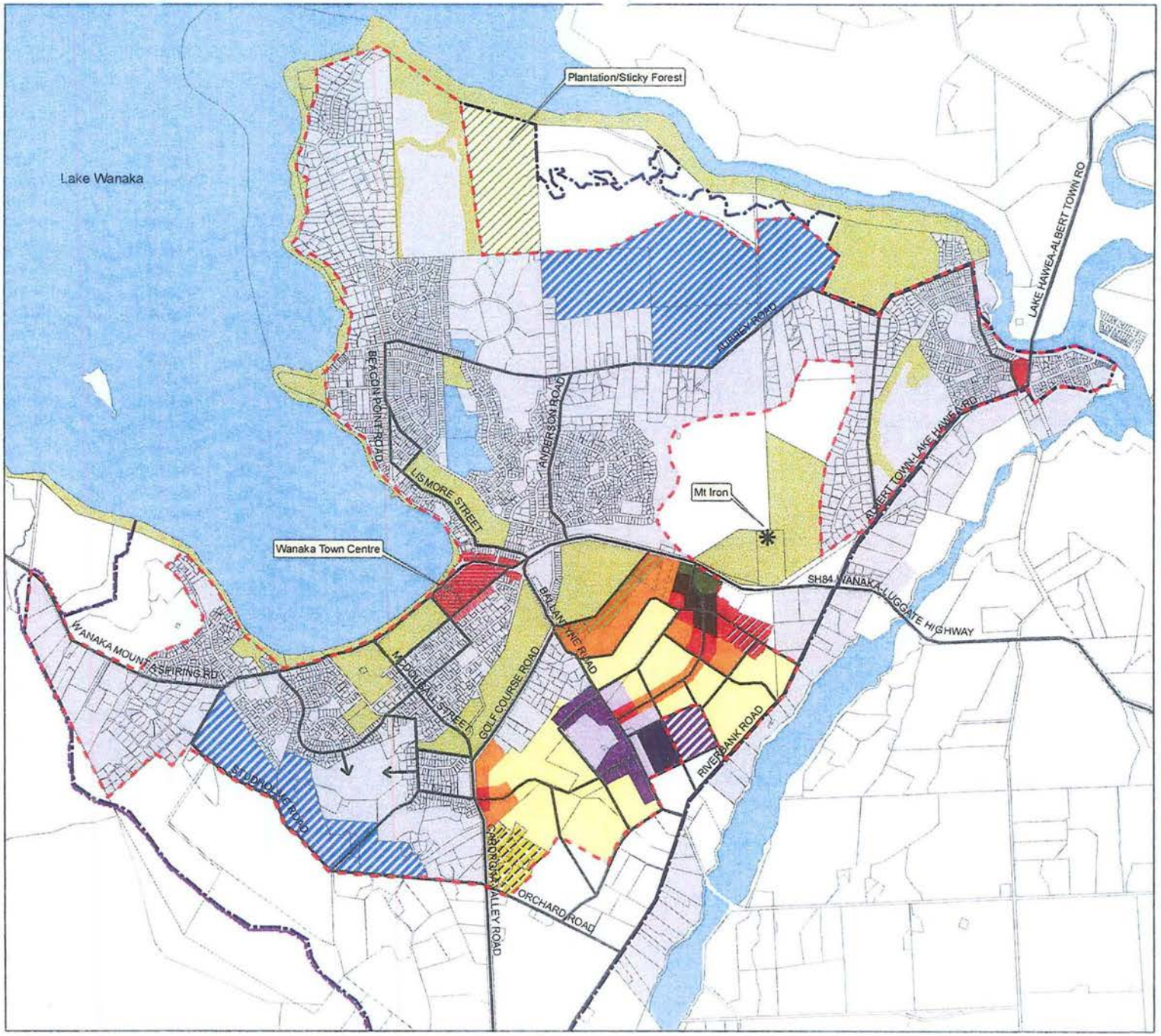
REFERENCE: 1949-SK58 Scale = 1:8000 @A3 - 01 May 2015

baxter design group

D

Zoning Proposed

- Structure Plan Inner Growth Boundary
- Structure Plan Outer Growth Boundary
- Outstanding Natural Landscape (ONL) Line
- ONL Line Not Confirmed
- Road Network (Indicative)
- Retail Core
- New Open Spaces/Reserves
- Wanaka Town Centre
- Education
- Area Subject to Further Study
- Visitor Accommodation Overlay
- Urban/Landscape Protection
- Existing Open Spaces/Reserves/Golf Club
- Deferred Mixed Business/Office/Technology
- Deferred Future Commercial/Retail
- Commercial/Retail
- Mixed Business
- Existing Business/Industrial
- Industrial Yard based
- Medium/High Density Residential
- Low Density Residential
- Landscape Protection Area
- Mixed Use Zone
- Existing Zoned/Developed Areas
- Water



Indicative zone boundaries only, subject to review at implementation stage

DECISION OF THE ENVIRONMENT COURT

MANAWATU – WANGANUI REGIONAL COUNCIL

PROPOSED ONE PLAN APPEALS

PART 1 – INTRODUCTION AND PRINCIPLES

PART 2 – LANDSCAPES AND NATURAL FEATURES

PART 3 – INDIGENOUS BIOLOGICAL DIVERSITY

PART 4 – SUSTAINABLE LAND USE/ACCELERATED EROSION

PART 5 – SURFACE WATER QUALITY – NON-POINT SOURCE DISCHARGES

BEFORE THE ENVIRONMENT COURT

	Decision No [2012] NZEnvC 182
IN THE MATTER	of appeals under cl 14 of Schedule 1 to the Resource Management Act 1991
BETWEEN	ANDREW DAY (ENV-2010-WLG-0000158) CHIEF OF THE NZ DEFENCE FORCE (ENV-2010-WLG-000144) EARNSLAW ONE LTD (ENV-2010-WLG-000146) FEDERATED FARMERS OF N Z (ENV-2010-WLG-000148) GENESIS POWER LTD (ENV-2010-WLG-000159) HANCOCK FOREST MANAGEMENT NZ LTD (ENV-2010-WLG-000161) HORTICULTURE NZ (ENV-2010-WLG-000155) MERIDIAN ENERGY LTD (ENV-2010-WLG-000149) MINISTER OF CONSERVATION (ENV-2010-WLG-000150) N Z FOREST MANAGERS LTD (ENV-2010-WLG-000164) N Z HISTORIC PLACES TRUST (ENV-2010-WLG-000147) N Z PORK INDUSTRY BOARD (ENV-2010-WLG-000151) N Z TRANSPORT AGENCY (ENV-2010-WLG-000153) OSFLO SPREADING INDUSTRIES LTD (ENV-2010-WLG-000143) P F OLSEN LTD (ENV-2010-WLG-000165) PROPERTY RIGHTS IN NEW ZEALAND INC (ENV-2010-WLG-000152) RAYONIER N Z LTD (ENV-2010-WLG-000162) TRUSTPOWER LTD (ENV-2010-WLG-000145) WANGANUI DISTRICT COUNCIL (ENV-2010-WLG-000156) WATER and ENVIRONMENTAL CARE ASSOCIATION INC (ENV-2010-WLG-000160) WELLINGTON FISH AND GAME COUNCIL (ENV-2010-WLG-000157) Appellants
AND	THE MANAWATU-WANGANUI REGIONAL COUNCIL Respondent

Court: Environment Judge C J Thompson
Environment Commissioner K A Edmonds
Environment Commissioner J R Mills

DECISION ON APPEALS: PART 1 - INTRODUCTION AND PRINCIPLES

Decision issued: 31 AUG 2012

Costs are reserved

PART 1 – Introduction and Principles **Page**

Introduction

[1-1] The Proposed One Plan was notified by the Manawatu-Wanganui Regional Council on 31 May 2007. It was given the name *One Plan* because the Council took advantage of s80(2) of the RMA and merged into one document both a Regional Policy Statement (Part 1 of the One Plan) and a Regional Plan (Part 2). The Regional Council's *first generation* Plans were: the Manawatu Catchment Water Quality Plan, the Manawatu-Wanganui Beds of Rivers and Lakes and Associated Activities Plan, the Manawatu-Wanganui Region Oroua Catchment Water Allocation and River Flows Plan, the Manawatu-Wanganui Regional Air Plan, the Manawatu-Wanganui Regional Coastal Plan and the Manawatu-Wanganui Regional Land and Water Plan. Those six Plans have been operative since the 1990s and early 2000s – and the topics covered by them are incorporated into the One Plan.

[1-2] Throughout the Parts of the decision, we shall use the widely-adopted acronym *POP* in referring to the Proposed One Plan.

[1-3] The rohe of the Regional Council covers a substantial part of the central and southern North Island, incorporating parts of the Waitomo, Stratford and Taupo Districts, the whole of the Ruapehu, Rangitikei, Wanganui, Manawatu, Tararua and Horowhenua Districts, and Palmerston North City. Its topography varies from the largely rolling to flat and quite intensively farmed and cultivated expanses of Horowhenua and Manawatu, to the high mountains of the Tararua and Ruapehu Districts. Substantial rivers run through it, and it has a long, flat coastline to the west, and a shorter and much steeper coastline marking the eastern boundary of the Tararua District.

Approach to the hearing and the structure of the decision

[1-4] As is indicated by the intitulement of this decision, the POP attracted a number of appeals, which was hardly surprising given its breadth of coverage and its approach as a second-generation regional planning document. Through extensive negotiations, Court-assisted mediation and expert witness conferencing, differences over many topics have been resolved. We take this opportunity to commend the parties, and their witnesses, for their willingness to constructively participate in those processes, and to thank those members of the Court who facilitated some of them.

Many of the concerns of appellants and those who had joined the proceedings as s274 parties were dealt with in that way, and they did not take part in the hearings.

[1-5] Broadly described, the topics still requiring resolution in at least some respects are: Landscapes and Natural Features; Biodiversity; Sustainable Land Use/Accelerated Erosion, and Surface Water Quality – Non-Point Source Discharges. The hearings were arranged to deal with each of those as a discrete topic.

[1-6] As the parties are aware, for a significant part of the hearing the evidence recording equipment failed. It appeared to be recording but in fact it was not. We have been able to rely upon the contemporaneous notes taken by the members of the Court to assist our collective memories of the evidence, and we have to say that they and the written briefs of evidence-in-chief have sufficed, as we heard little to substantively contradict the evidence-in-chief in the course of cross-examination.

[1-7] We should also say clearly that in coming to our conclusions we will not attempt a written review of all of the evidence we heard. To do so would make the decision of intolerable and unnecessary length. For instance, on the Surface Water Quality topic alone we had evidence from 47 witnesses, some of whom lodged two or three briefs. As is customary in this Court, the members of the Court pre-read the written briefs of each witness, so that only cross-examination, re-examination and clarifying questions from the Court was required after each witness was sworn. The evidence on some issues went to extremely fine levels of detail on aspects of modelling, for example, and we do not think it necessary to lay out all of that in considering the appropriate contents of relatively high-level policy documents.

[1-8] We propose to structure the decision so as to deal with the general background of POP and the legal principles we are to be guided by in considering the evidence and coming to decisions in this Part, and then have separate Parts dealing with the individual topics, as set out in para [1-5].

The roles and functions of a regional council

[1-9] The functions required of a regional council are extensive, and are set out in s30 of the RMA (and it is common ground that the Act as it stood between 2005 and 2009 is the version to be applied in dealing with these appeals). Section 30 is set out in full in Appendix 1 to this part of the decision. Of all the functions contained in that section, very few do not have some relevance in considering the outstanding topics of these appeals.

A summary of requirements for regional policy statements and regional plans

[1-10] Those functions are complemented by the contents required of a regional policy statement contained in s62, the full text of which is contained in Appendix 2.

[1-11] The equivalent requirements for regional plans are in s67, and the full text of that section is in Appendix 3.

[1-12] Rounding out those requirements are the provisions of s32, set out at Appendix 4. These describe the evaluation required of the contents of a proposed plan or policy statement. In particular, we note subsections (3) and (4).

[1-13] Drawn from the Act, we set out a working summary of the matters to be taken into account in assessing and approving Regional Policy Statements and Regional Plans:

Regional Policy Statements

1. The purpose of a regional policy statement is to achieve the purpose of the Act (s59).
2. In relation to other RMA documents, the regional policy statement must:
   - not be inconsistent with any water conservation order;
   - give effect to a national policy statement;
   - give effect to a New Zealand Coastal Policy Statement (s62(3));
3. The regional council shall have regard to the extent to which the regional policy statement needs to be consistent with the policy statements and plans of adjacent regional councils ((s61(2)(b)).
4. When preparing its regional policy statement the regional council shall:

- have regard to any management plans and strategies under other Acts, and to any relevant entry in the Historic Places Register and to various fisheries regulations (s61(2)(a));
- take into account any relevant planning document recognised by an iwi authority (s61(2A)(a)); and
- not have regard to trade competition (s61(3)).

5. The regional policy statement should be prepared in accordance with the regional council's functions under s30, the provisions of Part 2, and its duty under s32 and regulations (s61).

6. The regional policy statement must state its significant issues, objectives, policies for the issues and objectives and methods (excluding rules) to implement the policies, principal reasons, environmental results, processes for dealing with cross boundary issues, the local authority responsible for specifying objectives, policies and methods (for various purposes in s62(1)(i)) and procedures used to monitor the efficiency and effectiveness of the policies or methods contained in the statement (s62).

Regional Plans

1. The purpose of a regional plan is to assist a regional council to carry out its functions in order to achieve the purpose of the Act (s63).

2. When preparing its regional plan the regional council must give effect to any national policy statement or New Zealand Coastal Policy Statement (s67(3)).

3. The regional plan must not be inconsistent with any other regional plan for the region or a water conservation order or a determination of the Chief Executive of the Ministry of Fisheries about aquaculture permits (s67(4)).

4. When preparing its regional plan the regional council shall:

(a) have regard to any proposed regional policy statement in the region (s66(2));

(b) give effect to any operative regional policy statement (s67(3)(c));

(c) have regard to the extent to which the plan needs to be consistent with the regional policy statements and plans or proposed regional policy statements and plans of adjacent regional councils (s66(2)(d)).

5. A regional plan must also record how it has allocated a natural resource under s30(1)(fa) or (fb) and (4), if it has done so (s67(4)).

6. When preparing its regional plan the regional council shall also:

- have regard to the Crown's interests in land of the Crown in the CMA (s66(2)(b));

- have regard to any management plans and strategies under other Acts, and to any relevant entry in the Historic Places Register and to various fisheries regulations (s66(2)(c));
- take into account any relevant planning document recognised by an iwi authority (s66(2A)(a)); and
- not have regard to trade competition (s66(3)).

7. A regional council must prepare a regional plan in accordance with its functions under s30, the provisions of Part 2, any direction given by the Minister for the Environment, and its duty under s32 and any regulations (s66).

8. A regional plan must also state its objectives, policies to implement the objectives and the rules (if any) (s67(1)) and may (s67(2)) state other matters.

9. The rules (if any) are for the purpose of carrying out its functions (other than those in s30(1)(a) and (b)) and achieving the objectives and implementing the policies of the plan (s67(1)(c) and s68(1)).

10. In making a rule the regional council shall have regard to the actual or potential effect on the environment of activities (s68(3)).

Part 2 of the RMA

[1-14] Every decision made under the RMA must be guided by the provisions of Part 2 of that Act, which contains its purpose and principles. Three sections of Part 2 are to be considered. Section 8, requiring consideration of the principles of the Treaty of Waitangi has, of course, featured in the Council's work on POP to this point. But there are no Treaty issues directly arising from the matters we have to resolve, so we shall not set it out here.

[1-15] Section 7 contains matters to which decision-makers are to ... *have particular regard*:

> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—
>
> (a) Kaitiakitanga:
>
> (aa) The ethic of stewardship:
>
> (b) The efficient use and development of natural and physical resources:
>
> (ba) The efficiency of the end use of energy:
>
> (c) The maintenance and enhancement of amenity values:
>
> (d) Intrinsic values of ecosystems:
>
> (e) Repealed.

(f) Maintenance and enhancement of the quality of the environment:

(g) Any finite characteristics of natural and physical resources:

(h) The protection of the habitat of trout and salmon:

(i) The effects of climate change:

(j) The benefits to be derived from the use and development of renewable energy.

[1-16] Section 6 contains matters declared to be of national importance, which decision-makers are to are to *recognise and provide* for:

> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
>
> (a) The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:
>
> (b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:
>
> (c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:
>
> (d) The maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers:
>
> (e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.
>
> (f) the protection of historic heritage from inappropriate subdivision, use, and development.
>
> (g) the protection of protected customary rights.

There do not seem to be any issues directly arising under paras (e), (f) and (g), but one way or another all other matters of national importance arise and the POP must *...recognise and provide for* ... them.

[1-17] All of those issues lead to the purpose of the Act, contained in s5:

> 5 Purpose
>
> (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
>
> (2) In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while—
>
> (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and

(c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

Section 32

[1-18] Section 32 RMA requires an evaluation to be made of objectives, policies, rules and other methods contained in proposed policy statements and plans. The full text of the section is set out in Appendix 4. For present purposes the particularly relevant parts of the section are these:

(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.

(3A) This subsection applies to a rule that imposes a greater prohibition or restriction on an activity to which a national environmental standard applies than any prohibition or restriction in the standard. The evaluation of such a rule must examine whether the prohibition or restriction it imposes is justified in the circumstances of the region or district.

(4) For the purposes of the examinations referred to in subsections (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.

[1-19] The requirements of the section will of course be met by at least some of the general reasoning of the decision-maker in coming to conclusions about the planning document in question, so that general reasoning can be referred to in explaining, in terms of s32, decisions about appropriateness, benefits and costs, and, where relevant, risks: see eg *Foodstuffs (Otago Southland) Properties Ltd v Dunedin CC* (1993) 2 NZRMA 497. The plan or statement provisions in question should be considered as a part of whole, and may overlap, or inter-relate with, others: see eg *Rational Transport Soc v N Z Transport Agency* HC Wellington CIV-2011-485-2259, 15 December 2011. The tests are to be read in the context of Part 2 of the Act, and not considered just in monetary terms: see *Port Otago Ltd v Dunedin CC* (C004/2002). And in assessing issues such as flora and fauna habitat, landscape, amenity and the impacts of such values on industry and farming communities, economic analysis will be of limited value: see *Minister of Conservation v Otago RC* (C0071/2002).

[1-20] In respect of each Part of the decision to follow, these are the principles we shall be guided by in coming to decisions as to whether the plan or RPS provisions in question meets the s32 requirements, but we will not repeat this recitation of them, or the decisions interpreting them, for each Part.

Section 290A – the Council's decision

[1-21] Section 290A requires the Court to ... *have regard to* ... the first instance decision that is the subject of the appeal. In this set of appeals, DV POP contains that decision, made in this instance by a Hearings Panel under delegated authority from the Council. Section 290A does not mean that the first instance decision is presumed to be correct and that an appellant has the onus of demonstrating that it is incorrect. But it does require the Court to give the decision genuine and open-minded consideration in coming to its decision. There is also the view that where an issue is finely balanced on the material before the Court, the first instance decision can be given weight as an expression of informed local opinion on a matter of local significance. That might be the more so in a Plan appeal, where questions of policy are particularly significant: - see eg *H B Land Protection Soc Inc v Hastings DC* (W57/2009).

[1-22] In this series of appeals, we also should note that in the course of negotiation, mediation and expert witness conferencing before and during the hearing, the Council has been prepared to make a number of changes, some fundamental, to the provisions of DV POP. Those changes will be apparent as we move through the topics. So what we are dealing with now is not, in many respects, the *pure* decisions version of POP, and for those issues s290A is thus of limited or no practical effect. But some elements of the DV POP remain and we shall have regard to it accordingly. Where we differ from it, we shall endeavour to explain the reasons for so doing.

Results

[1-23] The outcomes will be indicated at the conclusion of each part of the decision. In many, if not all, cases the conclusions we reach may require redrafting of various provisions of POP. Several of the parties suggested, and we entirely agree, that the most efficient way of dealing with that will be to ask the Council, conferring where necessary with affected parties, to redraft the provisions and to then present the Court

with them for approval. To that extent, the Decision may be regarded as *interim*. We ask that the revisions and redrafted provisions be returned to the Court for consideration by Friday, 26 October 2012.

[1-24] In each case where changes to Plan provisions are required, there may need to be consequential changes to other provisions in the same *stream*. For instance, if a Policy requires redrafting, there may need to be consequential changes to Rules to ensure that they implement, or achieve, the objectives and policies of the plan. Similarly, policies may need attention to ensure that they continue to implement objectives, and so on.

[1-25] In the process of drafting those final versions, we think it will also be necessary to cross-refer to the draft Consent Orders already prepared to give effect to the mediated and negotiated outcomes. Various RPS and Plan provisions have been adapted since those agreements were made, and it may be necessary to revisit the terms of the draft Consent Orders.

Costs

[1-26] It is the usual practice of the Court to not make awards of costs on plan appeals, and we do not encourage any applications here. However, as a matter of formality, we shall reserve costs. If there is to be any application it should be lodged within 15 working days of the issuing of the final decision approving the Plan provisions, and any response should be lodged within a further 10 working days.

Appendix 1 – full text of s30 – Functions of regional councils

30 Functions of regional councils under this Act

(1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:

(a) The establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the natural and physical resources of the region:

(b) The preparation of objectives and policies in relation to any actual or potential effects of the use, development, or protection of land which are of regional significance:

(c) The control of the use of land for the purpose of—

(i) Soil conservation:

(ii) The maintenance and enhancement of the quality of water in water bodies and coastal water:

(iii) The maintenance of the quantity of water in water bodies and coastal water:

(iiia) the maintenance and enhancement of ecosystems in water bodies and coastal water:

(iv) The avoidance or mitigation of natural hazards:

(v) The prevention or mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances:

(ca) the investigation of land for the purposes of identifying and monitoring contaminated land:

(d) In respect of any coastal marine area in the region, the control (in conjunction with the Minister of Conservation) of—

(i) Land and associated natural and physical resources:

(ii) the occupation of space on land of the Crown or land vested in the regional council, that is foreshore or seabed, and the extraction of sand, shingle, shell, or other natural material from that land:

(iii) The taking, use, damming, and diversion of water:

(iv) Discharges of contaminants into or onto land, air, or water and discharges of water into water:

(iva) The dumping and incineration of waste or other matter and the dumping of ships, aircraft, and offshore installations:

(v) Any actual or potential effects of the use, development, or protection of land, including the avoidance or mitigation of natural hazards and the prevention or mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances:

(vi) The emission of noise and the mitigation of the effects of noise:

(vii) Activities in relation to the surface of water:

(e) The control of the taking, use, damming, and diversion of water, and the control of the quantity, level, and flow of water in any water body, including—

(i) The setting of any maximum or minimum levels or flows of water:

(ii) The control of the range, or rate of change, of levels or flows of water:

(iii) The control of the taking or use of geothermal energy:

(f) The control of discharges of contaminants into or onto land, air, or water and discharges of water into water:

(fa) if appropriate, the establishment of rules in a regional plan to allocate any of the following:

(i) the taking or use of water (other than open coastal water):

(ii) the taking or use of heat or energy from water (other than open coastal water):

(iii) the taking or use of heat or energy from the material surrounding geothermal water:

(iv) the capacity of air or water to assimilate a discharge of a contaminant:

(fb) if appropriate, and in conjunction with the Minister of Conservation,—

(i) the establishment of rules in a regional coastal plan to allocate the taking or use of heat or energy from open coastal water:

(ii) the establishment of a rule in a regional coastal plan to allocate space in a coastal marine area under Part 7A:

(g) In relation to any bed of a water body, the control of the introduction or planting of any plant in, on, or under that land, for the purpose of—

(i) Soil conservation:

(ii) The maintenance and enhancement of the quality of water in that water body:

(iii) The maintenance of the quantity of water in that water body:

(iv) The avoidance or mitigation of natural hazards:

(ga) the establishment, implementation, and review of objectives, policies, and methods for maintaining indigenous biological diversity:

(gb) the strategic integration of infrastructure with land use through objectives, policies, and methods:

(h) Any other functions specified in this Act.

(2) A regional council and the Minister of Conservation may perform the functions specified in subsection (1)(d) to control the harvesting or enhancement of aquatic organisms to avoid, remedy, or mitigate –

(a) the effects on fishing and fisheries resources of occupying a coastal marine area for the purpose of aquaculture activities;

(b) the effects on fishing or fisheries resources of aquaculture activities.

(3) However, a regional council and the Minister of Conservation must not perform the functions specified in subsection (1)(d)(i), (ii), or (vii) to control the harvesting or enhancement of aquatic organisms for the purpose of conserving, using, enhancing, or developing any fisheries resources controlled under the Fisheries Act 1996.

(4) A rule to allocate a natural resource established by a regional council in a plan under subsection (1)(fa) or (fb) may allocate the resource in any way, subject to the following:

(a) the rule may not, during the term of an existing resource consent, allocate the amount of a resource that has already been allocated to the consent; and

(b) nothing in paragraph (a) affects section 68(7); and

(c) the rule may allocate the resource in anticipation of the expiry of existing consents; and

(d) in allocating the resource in anticipation of the expiry of existing consents, the rule may—

(i) allocate all of the resource used for an activity to the same type of activity; or

(ii) allocate some of the resource used for an activity to the same type of activity and the rest of the resource to any other type of activity or no type of activity; and

(e) the rule may allocate the resource among competing types of activities; and

(f) the rule may allocate water, or heat or energy from water, as long as the allocation does not affect the activities authorised by section 14(3)(b) to (e).

Appendix 2 – full text of s62 RMA – The required contents of a regional policy statement

62 Contents of regional policy statements

(1) A regional policy statement must state—

(a) the significant resource management issues for the region; and

(b) the resource management issues of significance to –

(i) iwi authorities in the region and

(ii) the board of a foreshore and seabed reserve to the extent that those issues relate to that reserve; and

(c) the objectives sought to be achieved by the statement; and

(d) the policies for those issues and objectives and an explanation of those policies; and

(e) the methods (excluding rules) used, or to be used, to implement the policies; and

(f) the principal reasons for adopting the objectives, policies, and methods of implementation set out in the statement; and

(g) the environmental results anticipated from implementation of those policies and methods; and

(h) the processes to be used to deal with issues that cross local authority boundaries, and issues between territorial authorities or between regions; and

(i) the local authority responsible in the whole or any part of the region for specifying the objectives, policies, and methods for the control of the use of land—

(i) to avoid or mitigate natural hazards or any group of hazards; and

(ii) to prevent or mitigate the adverse effects of the storage, use, disposal, or transportation of hazardous substances; and

(iii) to maintain indigenous biological diversity; and

(j) the procedures used to monitor the efficiency and effectiveness of the policies or methods contained in the statement; and

(k) any other information required for the purpose of the regional council's functions, powers, and duties under this Act.

(2) If no responsibilities are specified in the regional policy statement for functions described in subsection (1)(i)(i) or (ii), the regional council retains primary responsibility for the function in subsection (1)(i)(i) and the territorial authorities of the region retain primary responsibility for the function in subsection (1)(i)(ii).

(3) A regional policy statement must not be inconsistent with any water conservation order and must give effect to a national policy statement or New Zealand coastal policy statement.

Appendix 3 – full text of s67 RMA – The required contents of a regional plan

67 Contents of regional plans

(1) A regional plan must state—

(a) the objectives for the region; and

(b) the policies to implement the objectives; and

(c) the rules (if any) to implement the policies.

(2) A regional plan may state—

(a) the issues that the plan seeks to address; and

(b) the methods, other than rules, for implementing the policies for the region; and

(c) the principal reasons for adopting the policies and methods; and

(d) the environmental results expected from the policies and methods; and

(e) the procedures for monitoring the efficiency and effectiveness of the policies and methods; and

(f) the processes for dealing with issues—

(i) that cross local authority boundaries; or

(ii) that arise between territorial authorities; or

(iii) that arise between regions; and

(g) the information to be included with an application for a resource consent; and

(h) any other information required for the purpose of the regional council's functions, powers, and duties under this Act.

(3) A regional plan must give effect to—

(a) any national policy statement; and

(b) any New Zealand coastal policy statement; and

(c) any regional policy statement.

(4) A regional plan must not be inconsistent with—

(a) a water conservation order; or

(b) any other regional plan for the region; or

(c) a determination or reservation of the chief executive of the Ministry of Fisheries made under s186E of the Fisheries Act 1996.

(5) A regional plan must record how a regional council has allocated a natural resource under section 30(1)(fa) or (fb) and (4), if the council has done so.

(6) A regional plan may incorporate material by reference under Part 3 of Schedule 1.

Appendix 4 – Full text of s32 RMA

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—

(a) the Minister, for a national policy statement or a national environmental standard; or

(b) the Minister of Conservation, for the New Zealand coastal policy statement; or

(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 Part 2 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 Part 2 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) the relevant Minister before issuing a national policy statement or New Zealand coastal policy statement.

(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.

(3A) This subsection applies to a rule that imposes a greater prohibition or restriction on an activity to which a national environmental standard applies than any prohibition or restriction in the standard. The evaluation of such a rule must examine whether the prohibition or restriction it imposes is justified in the circumstances of the region or district.

(4) For the purposes of the examinations referred to in subsections (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.

(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.

Hearing: at Palmerston North on 26 and 27 March 2012

DECISION: PART 2 – LANDSCAPES AND NATURAL FEATURES

Counsel and parties participating in this topic:

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A J L Beatson and N J Garvan for Meridian Energy Ltd
J C Campbell and J A Munro for Mighty River Power Ltd
S J Ongley and A Camaivuna for the Minister of Conservation
L C R Burkhardt for TrustPower Ltd
W J Bent – s274 party
A M Mildon for herself, and for R G Mildon, Huatau Marae and Tararua Aokautere Guardians – s274 parties
J W Maassen and N Jessen for the Manawatu-Wanganui Regional Council

PART 2 – Landscapes and Natural Features **Page**

Introduction

[2-1] This topic had two principal points requiring resolution. First, what provisions would be sufficient and appropriate to address TrustPower Ltd's interest in securing a policy pathway for *repowering* [ie the replacement of existing turbines] its existing windfarms, known as T1 and T2, at the northern end of the Tararua Ranges, to the east of Palmerston North city. Secondly, whether POP's Policy 7-7 should be in the form as resolved at Court-assisted mediation, or in an alternative form proposed by some of the participating energy companies.

TrustPower's position – repowering of its existing windfarms

[2-2] TrustPower wished to see more recognition of its existing investment in the Tararua windfarms and did not want to be forced to, figuratively if not literally, start afresh when it comes time to replace the existing turbines. It feared that might come about because, as seems generally accepted, the northern Tararuas are at or close to windfarm saturation point and cumulative adverse effects are large on the planning horizon. Its immediate concerns with Policy 7-7 (set out in para [2-6]) were that it might be *triggered* by its repowering of the existing windfarms.

[2-3] During the course of the hearing TrustPower and the Council were able to agree on a formula of words which satisfied them both. In a joint memorandum, this was presented to us as:

> **Amend Explanation to Policy 7-7 by adding the following text:** (Insert at end of fourth paragraph in 7.7)
>
> In the application of Policy 7-7(aa) to the repowering of existing wind farms within their consented site or footprint, the assessment of cumulative landscape and visual effects and their significance should not be limited to the consideration of one factor, such as changes in height. Instead the changes to the existing environment should be considered in their entire context including any benefits from reduced density and a more visually coherent pattern of development with respect to the characteristics and values of the ONFL. In this context, 'repowered' means the replacement of turbines that have reached the end of their economic life with updated turbine technology to continue to make the best use of the available energy resource.
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> **Amend Policy 3-4 Renewable Energy by adding the following clauses:**
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> (v) the benefits of enabling the increased generation capacity and efficiency of existing renewable electricity generation facilities
>
> (v) the logistical or technical practicalities associated with developing, upgrading, operating or maintaining an established renewable electricity generation activity

Amend the Explanation to Policy 3-4 by adding the following text (Insert at end of first paragraph in 3.7.1)

In relation to the application of Policy 3-4(v), 'upgrading' has the ordinary meaning of the word, as used in the National Policy Statement on Renewable Electricity Generation 2011. [We note that the NPS does not define the term 'upgrading' and we proceed on the assumption that the parties meant no more than that the term should be given its ordinary meaning of 'raising to a higher standard'].

[2-4] The agreement contained, as one might expect, the proviso that if the Court was persuaded to remove or make more significant changes to Policy 7-7(aa) then that formula may require revision. No other party overtly disagreed with that resolution, so far as it affects the repowering of existing windfarms, and neither do we. Subject to the wider issues relating to Policy 7-7, this agreement deals with the first issue requiring resolution.

The content of Policy 7-7

[2-5] The issue of *Landscape* appears in Chapter 7 of POP, the title of which is *Indigenous Biological Diversity, Landscape and Historic Heritage.* Although the debate centres on Policy 7-7, the Objective to which it gives effect is of course also relevant. As amended at Court-assisted mediation, it provides:

Objective 7-2: Outstanding natural features and landscapes, and natural character

(a) The characteristics and values of:

(i) the Region's outstanding natural features and landscapes, including those identified in Schedule F, and

(ii) the natural character of the coastal environment, *wetlands*, *rivers* and *lakes* and their margins

are protected from inappropriate subdivision, use and development.

(b) Adverse effects including cumulative adverse effects, on the natural character of the coastal environment, *wetlands, rivers* and *lakes* and their margins, are:

(i) avoided in areas with outstanding natural character, and

(ii) avoided where they would significantly diminish the attributes and qualities of areas that have high natural character, and

(iii) avoided, remedied or mitigated in other areas.

(c) Promote the rehabilitation of or restoration of the natural character of the coastal environment, wetlands, rivers and lakes and their margins.

[2-6] Also as modified at Court-assisted mediation, the two Policies related to Objective 7-2(a)(i) now read as:

Policy 7-7: Regionally outstanding natural features and landscapes
The natural features and landscapes listed in Schedule F Table F1 must be recognised as regionally outstanding and must be spatially defined in the review and development of district plans. All subdivision use and development directly affecting these areas must be managed in a manner which:

(aa) avoids significant adverse cumulative effects on the characteristics and values of those outstanding natural features and landscapes, and

(a) except as required under (aa), avoids adverse effects as far as reasonably practicable and, where avoidance is not reasonably practicable, remedies or mitigates adverse effects on the characteristics and values of those outstanding natural features and landscapes.

Policy 7-7A: Assessing outstanding natural features and landscapes
The Regional Council and Territorial Authorities must take into account but not be limited to the criteria in Table 7.2 when:

(a) identifying outstanding natural features and landscapes, and considering whether the natural feature or landscape is conspicuous, eminent, remarkable or otherwise outstanding, and

(b) considering adding to, deleting from, or otherwise altering, redefining or modifying the list of outstanding natural features or landscapes listed in Table F1 of Schedule F, or

(c) considering the inclusion of outstanding natural features or landscapes into any district plan, or

(d) establishing the relevant values to be considered when assessing effects of an activity on:

(i) outstanding natural features and landscapes listed in Table F1 of Schedule F, or

(ii) any other outstanding natural feature or landscape.

The relevant portions of Schedule F in the decisions version are these:

(da) The skyline of the Puketoi Ranges defined as the boundary between the land and sky as viewed at a sufficient distance from the foothills so as to see the contrast between the sky and the solid nature of the land at the crest of the highest points along the ridges	(i) Visual and scenic characteristics, particularly the visual prominence of the skyline in the eastern part of the Region (ii) Geological features, particularly the asymmetrical landform termed a cuesta

(ia) The skyline of the Ruahine and Tararua Ranges – defined as the boundary between the land and sky as viewed at a sufficient distance from the foothills so as to see the contrast between the sky and the solid nature of the land at the crest of the highest points along ridges. The skyline is a feature that extends along the Ruahine and Tararua	(i) Visual and scenic characteristics, including aesthetic cohesion and continuity, its prominence throughout much of the Region and its backdrop vista in contrast to the Region's plains (ii) Importance to tangata whenua and cultural values (iii) Ecological values including values associated with remnant and

Ranges beyond the areas in (h) and (i) above	regenerating indigenous vegetation (iv) Historical values (v) Recreational values

The references to ... *the areas in (h) and (i) above* in (ia) ... are to the Ruahine Forest Park and the Tararua Forest Park respectively.

Table 7.2, mentioned in Policy 7-7A as containing the criteria to be considered, is this:

Table 7.2 Natural Feature and Landscape Assessment Factors

Assessment factor	Scope
(a) Natural science factors	These factors relate to the geological, ecological, topographical and natural process components of the natural feature or landscape: (i) Representative: the combination of natural components that form the feature or landscape strongly typifies the character of an area. (ii) Research and education: all or parts of the feature or landscape are important for natural science research and education. (iii) Rarity: the feature or landscape is unique or rare within the district or Region, and few comparable examples exist. (iv) Ecosystem functioning: the presence of healthy ecosystems is clearly evident in the feature or landscape.
(b) Aesthetic values	The aesthetic values of a feature or landscape may be associated with: (i) Coherence: the patterns of Land cover and land use are largely in harmony with the underlying natural pattern of landform and there are no, or few, discordant elements of land cover or land use. (ii) Vividness: the feature or landscape is visually striking, widely recognised within the local and wider community, and may be regarded as iconic. (iii) Naturalness: the feature or landscape appears largely unmodified by human activity and the patterns of landform and land cover are an expression of natural processes and intact healthy ecosystems. (iv) Memorability: the natural feature or landscape makes such an impact on the senses that it becomes unforgettable.
(c) Expressiveness (legibility)	The feature or landscape clearly shows the formative natural processes or historic influences that led to its existing character.

(d) Transient values	The consistent and noticeable occurrence of transient natural events, such as daily or seasonal changes in weather, vegetation or wildlife movement, contributes to the character of the feature or landscape.
(e) Shared and recognised values	The feature or landscape is widely known and is highly valued for its contribution to local identity within its immediate and wider community.
(f) Cultural and spiritual values for tangata whenua	Māori values inherent in the feature or landscape add to the feature or landscape being recognised as a special place.
(g) Historical associations	Knowledge of historic events that occurred in and around the feature or landscape is widely held and substantially influences and adds to the value the community attaches to the natural feature or landscape.

The Council's position

[2-7] The Council supports the present text of Policy 7-7, or something very close to it, because it believes that it provides direction on the appropriate/inappropriate use and development of Outstanding Natural Features and Landscapes (ONFLs) to ensure that their qualities and values are not compromised. It also believes that the importance of renewable energy generation is well recognised and supported by Chapter 3 of POP.

Genesis' position

[2-8] Genesis operates the Tongariro Power Scheme on the central plateau of the North Island, and has also applied for resource consents to establish and operate the Castle Hill windfarm. Both are within, or partly within, the region. It also has substantial generating assets elsewhere in the country. Mr Hovell advised that his client's position was that in its present form Policy 7-7(aa) is generally inconsistent with the purpose of the RMA; that it fails to give effect to the National Policy Statement for Renewable Electricity Generation (NPSREG) (and s7(j)); that it is not the most appropriate way to achieve Objective 7-2; that the Policy's requirement of avoidance of cumulative adverse effects does not promote the sustainable management of resources, and that the Council's assessment of *inappropriate* (in terms of s6(b)) development in relation to ONFLs is flawed.

[2-9] The version of Policy 7-7 advanced as curing those shortcomings by the consultant planner called by Genesis, Mr Richard Matthews, is this:

Policy 7-7: Regionally outstanding natural features and landscapes
The natural features and landscapes listed in Schedule F Table F1 must be recognised as outstanding and must be spatially defined in the review and development of district plans. All subdivision, use and development:

i) within these areas must be managed in a manner which:

(aa) avoids significant adverse cumulative effects on the characteristics and values of those outstanding natural features and landscapes as far as reasonably practicable and, where avoidance is not reasonably practicable, remedies or mitigates those effects, and

(a) except as required under (aa), avoids, remedies or mitigates adverse effects on the characteristics and values of those outstanding natural features and landscapes.

ii) directly affecting these areas must be managed in a manner which avoids, remedies or mitigates adverse effects on the characteristics and values of those outstanding natural features and landscapes.

The significant differences between his version and the post-mediation version are of course that his version would require *avoidance* of significant adverse cumulative effects caused by subdivision, use and development *within* the ONFLs, and then only *as far as reasonably practicable*, with remedy and mitigation as options. Further, his version would allow the options of avoidance, remedy and mitigation for subdivision, use and development *directly affecting* (but not necessarily within) the ONFLs.

[2-10] Mr Matthews expresses the view that ... *In some instances, avoidance may not be practicable, therefore the option to remedy or mitigate any potential adverse cumulative effects should be provided.* We cannot agree with that proposition, for the reasons we shall shortly discuss. In any event, given the lack of opposition to TrustPower's modified version, we take it that it is regarded as, at least, acceptable.

Mighty River Power's position

[2-11] Within the region, Mighty River Power Ltd (MRP) has consent for a windfarm at Turitea, somewhat to the south of the existing windfarms on the Tararua ranges to the east of Palmerston North, and it is in the course of seeking consent for a further windfarm on the Puketoi Range, east of Eketahuna. It also has hydro development interests on the Whangaehu River, north of Whanganui. Broadly, it supports Chapter 7 of POP but believes that two matters need improvement: – Policy 7-7, and the definitions of the Tararua, Ruahine and Puketoi Ranges as ONFLs in Schedule F.

[2-12] MRP points out, as do the other power companies, that electricity is essential to providing for the wellbeing of people and communities. Further, supplying electricity from renewable sources not only meets that need but also contributes to managing the effects of climate change, and the conservation of resources for the benefit of future generations. No one disputes those propositions.

[2-13] Ms Campbell goes on to submit that Policy 7-7 fails to give effect to Part 2 and the NPSREG – Policies C, E2 and E3 in particular, and that there is an internal conflict between Chapter 3 and Policy 7-7 of POP.

[2-14] The issue of the definitions of some ONFLs in Schedule F of POP was debated among the landscape architecture witnesses, and we shall discuss that as a discrete topic.

Meridian's position

[2-15] For Meridian, Mr Beatson and Ms Garvan make rather similar criticisms of Policy 7-7 and Schedule F. Dealing with the policy, the submission is that Objective 7-2(a) is quite consistent with s6(b) in speaking of *inappropriate use and development* but the Policy is at odds with the Objective because it effectively imposes a blanket prohibition on *any* use and development which brings about significant cumulative adverse effects on an ONFL. The Meridian position therefore is that significant cumulative adverse effects on an ONFL do not necessarily mean that the use or development causing those effects will be inappropriate in s6 terms, and that in adopting the present formula of Policy 7-7, the Council is creating an internal inconsistency within POP, and is failing to give effect to the Act.

[2-16] As between the energy companies, it can be seen that there are common themes in the issues they raise and we shall address the arguments in a common way also, rather than by addressing each set of submissions individually.

The section 274 parties' positions

[2-17] For the s274 parties she represented, Ms Mildon made it clear that they entirely agree with the position taken by the Council, and the evidence presented by Ms Clare Barton, the Council's planning witness, and Mr Clive Anstey, the Council's landscape witness, in support of it. She powerfully made the point that the physical and visual environment is much more than just *a view*, and that landscapes can range from the small and discrete to the bold and panoramic. She suggested that there could be no more obvious example of cumulative adverse effects than the southern Ruahine/northern Tararuas and the ... *conglomeration of disparate windfarms* ... along its skyline and ridges and spurs. She strongly disagreed with the view that that section of the skyline should be excluded from Schedule F(ia) on the basis that it was already strongly compromised. She maintained that, notwithstanding its present state, it remains an indivisible part of the panorama from the Manawatu plains.

[2-18] Mr John Bent was also entirely supportive of the Council's stance in respect of cumulative effects, reminding us of the Court's comment in *Outstanding Landscape Protection Society v Hastings DC* [2008] NZRMA 8 ... "If a consent authority could never refuse consent on the basis that the current proposal is ... *the straw that will break the camel's back*, sustainable management is immediately imperilled".

[2-19] Against that background we shall discuss the issues raised by the power company appellants, which can be grouped under generic heads.

Policy 7-7 – conflict with the NPS Renewable Electricity Generation 2011

[2-20] Section 62(3) RMA requires an RPS to give effect to a National Policy Statement (NPS). Turning to the NPSREG, it first confirms that the development and operation of renewable energy generation activities are a matter of national significance and are the objective of the NPS. The particularly relevant portions of this NPS appear to be:

> C. Acknowledging the practical constraints associated with the development, operation, maintenance and upgrading of new and existing renewable electricity generation activities

Policy C1

Decision-makers shall have particular regard to the following matters:

(a) the need to locate the renewable electricity generation activity where the renewable energy resource is available;

(b) logistical or technical practicalities associated with developing, upgrading, operating or maintaining the renewable electricity generation activity;

(c) the location of existing structures and infrastructure including, but not limited to, roads, navigation and telecommunication structures and facilities, the distribution network and the national grid in relation to the renewable electricity generation activity, and the need to connect renewable electricity generation activity to the national grid;

(d) designing measures which allow operational requirements to complement and provide for mitigation opportunities; and

(e) adaptive management measures.

Policy C2

When considering any residual environmental effects of renewable electricity generation activities that cannot be avoided, remedied or mitigated, decision-makers shall have regard to the offsetting measures or environmental compensation including measures or compensation which benefit the local environment and community affected.

E2 Hydro-electricity Resources

Policy E2

Regional policy statements and regional and district plans shall include objectives, policies, and methods (including rules within plans) to provide for the development, operation, maintenance, and upgrading of new and existing hydro-electricity generation activities to the extent applicable to the region or district.

E3 Wind Resources

Policy E3

Regional policy statements and regional and district plans shall include objectives, policies, and methods (including rules within plans) to provide for the development, operation, maintenance and upgrading of new and existing wind energy generation activities to the extent applicable to the region or district.

[2-21] So there is an initial acknowledgement that there may be practical constraints in both establishing new generating infrastructure, and operating, maintaining and upgrading existing infrastructure. And that is followed by a very clear acknowledgement in Policy C2 that there may be adverse environmental effects that

cannot be avoided, remedied or mitigated. In that case, the possibility of offsetting or compensation is specifically raised. But there is no affirmation that this sort of infrastructure occupies so special a place in the order of things that it may be established no matter what its effects may be. In other words, the regime that applies to generation infrastructure is the same regime that applies to other subdivisions, uses or developments, save for the additional factor of the NPS.

[2-22] It has to be accepted of course that the *constraints* in establishing and operating generation infrastructure can cut both ways. The infrastructure can only be established where the resource exists – generally in high and exposed places for wind, and generally in confined river valleys for hydro. Windfarms will therefore generally be prominently visible, and hydro dams may drown picturesque valleys, or channel otherwise naturally flowing rivers. As always in cases of sensitive receiving environments, it will be a matter of judgement as to which factor will hold sway: - the benefits of renewable generation on one side or, for instance ... *the protection of outstanding natural features and landscapes from inappropriate ... use, and development* ... in terms of s6(b), on the other.

[2-23] There really is no greater conflict or incompatibility between Policy 7-7 and the NPSREG than there is between s6(b) and s7(j). The two are reconcilable - both must be given their appropriate weight and a decision then must be made as to whether the proposed development would be *inappropriate* in that receiving environment.

[2-24] POP must be read as a whole and, when it is, it does not read as *thwarting* the NPS. While Policy 7-7 speaks of the recognition of ONFLs and the avoidance of one type of adverse effect, that does not mean that POP as a whole does not give effect to the NPS, any more than s6(b) could be said to fail to give effect to s7(j). If one reads, for instance, Chapter 3 of POP, it is clear that energy infrastructure is given its place in the scheme of things and that, as with any other RMA decision involving values and outcomes, it is to be weighed against other relevant factors.

Policy 7-7 – not the appropriate way to achieve Objective 7-2(a)

[2-25] Objective 7-2 is set out in full at para [2-5]. For ease of reference, we repeat the relevant portion here:

> **Objective 7-2: Outstanding natural features and landscapes, and natural character**
>
> (a)The characteristics and values of:
>
> (i) the Region's outstanding natural features and landscapes, including those identified in Schedule F, and
>
> (ii) the natural character of the coastal environment, *wetlands*, *rivers* and *lakes* and their margins
>
> are protected from inappropriate subdivision, use and development.
>
> (b) Adverse effects including cumulative adverse effects, on the natural character of the coastal environment, *wetlands, rivers* and *lakes* and their margins, are:
>
> (i) avoided in areas with outstanding natural character, and
>
> (ii) avoided where they would significantly diminish the attributes and qualities of areas that have high natural character, and
>
> (iii) avoided, remedied or mitigated in other areas.

[2-26] The energy companies largely relied upon the evidence of Mr Matthews and Ms Irene Clarke, a consultant planner, called by Meridian, in support of the argument that the Policy does not give effect to Objective 7-2 or, as it was put for Meridian, it is *at odds with* the Objective. Ms Clarke's evidence might be better considered under the next, and partially overlapping, topic. Mr Matthews' view is that the policy ... *provides no direct link that makes it clear that the characteristics and values of the region's ONFLs are to be protected from inappropriate subdivision, use and development.* He goes on to say that there is no policy which provides an assessment of what might be appropriate development in an ONFL, contrasting it with the guidance given in the treatment of natural character in Objective 7-2(b). That management guidance requires that adverse effects on areas with high natural character be avoided where practicable, or otherwise remedied or mitigated, but (a) gives no such guidance.

[2-27] We agree that there may be some difference between the approach to landscape and that of natural character in Objective 7-2, but we fail to see that it somehow renders Policy 7-7 invalid. We see no incompatibility between the Objective and the Policy for landscape and natural character.

Requiring avoidance of cumulative adverse effects does not promote sustainable management

[2-28] In beginning the discussion of *cumulative effects* we think we can do no better than to cite a portion of the evidence given by Mr Frank Boffa, a Landscape Architect called by TrustPower. It sets out what we understand to be the current thinking on what cumulative effects may actually be, and how to consider them. Mr Boffa's evidence was acknowledged by many of the other landscape architects at the hearing. He said this:

> [6] In the context of landscape and visual effects, cumulative effects are generally considered in relation to additional changes resulting from a new wind farm in conjunction with other surrounding (existing and consented) wind farms. The current approach to assessment of cumulative effects tends to be an additive approach where the effects (even if only minor) of proposed subsequent activities are added to and assessed in conjunction with the effects of existing installations.
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> [7] This approach accords with the Parliamentary Commissioner for the Environment's (PCE) 2006 *Report Wind Power, People and Place*, which suggests that the consideration of cumulative effects requires the consideration of the effects of several wind farms located together and that the cumulative effects of wind farms relate particularly to landscape and visual impact ...
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> [8] The assessment of cumulative landscape and visual effects are often considered under the following headings –
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> *(a)* Simultaneous effects – where more than one wind farm and/or parts of them and their component elements and infrastructure are seen in a single field of view.
>
> *(b)* Successive effects – where more than one wind farm and/or parts of them and their component elements and infrastructure are seen in successive views from a single viewpoint.
>
> *(c)* Sequential effects – where a sequence of full or partial views over wind farms and their component elements and/or infrastructure are seen when moving through the landscape (as along a road or highway).
>
> [9] The *PCE* in *Wind Power, People and Place*, cites guidance published by the Scottish Natural Heritage as being the most comprehensive on cumulative effects. The guidance states that cumulative landscape and visual effects can arise from:
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> - The number of and distance between individual wind farms;
> - How wind farms relate to each other visually;
> - The overall character of the landscape and its sensitivity to wind farms; and

- The siting and design of wind farms.

[10] I tend to agree with the PCE in that the Guidance on how cumulative effects can arise looks to consider a wider range of factors rather than just how wind farms are viewed from particular locations. ...

[12] ... internal cumulative effects considerations tend to relate to the spatial composition of the turbines within a wind farm development relative to their overall visual coherence ... the consideration of internal cumulative effects tends to be focussed more on spatial design considerations relative to the development's 3 dimensional envelope and the patterns and appearance of the wind farm overall relative to this.

[2-29] In considering Policy 7-7(aa) and the cumulative effects of new or expanded windfarms, Mr Boffa goes on to say:

> With respect to Policy 7-7(aa), which requires the avoidance of significant adverse cumulative effects, taken at face value this is a reasonable requirement where additional wind farms or the expansion of existing wind farms are proposed. *(He goes on to distinguish the repowering of existing windfarms but, as recorded, that has been dealt with).*

For the reasons set out elsewhere, we entirely agree with that view.

[2-30] Ms Campbell encapsulated the further point made by the energy companies (other than TrustPower) in her submition that because of the number of windfarms in the region now; the places where future windfarms are likely to be proposed; the nature of windfarms and the wide range of their possible cumulative effects, ... *any proposal in the region for a windfarm will almost certainly have a cumulative effect*, and that the cumulative effect ... *could well be considered significant.* The general position was that such an outcome would place an unreasonable burden on energy companies attempting to go about their business.

[2-31] We think that there are four responses to that submission. The first is that a cumulative effect will not necessarily arise from the construction of any other windfarm in the region. It would, for instance, be very difficult to mount a *cumulative effect* argument by adding the effects of a proposal in the Ruapehu District to those already existing on the Tararuas, east of Palmerston North.

[2-32] The second is that if there are cumulative effects on the receiving environment that, upon proper inquiry, are shown to be significant and to outweigh the acknowledged benefits of renewable energy generation, then it would be entirely proper to say ... *enough is enough.* That is exactly what the structure of the RMA provides for.

[2-33] The third response is to repeat that Policy 7-7 does not apply across the whole region – it is actually very site-specific. It applies only to those ONFLs listed in Table F1 of Schedule F and, insofar as practical impact on further windfarms is concerned, probably only to Item (da) – the skyline of the Puketoi Range; and Item (ia) – the skyline of the Ruahine and Tararua Ranges.

[2-34] Fourthly, it must be recognised that these provisions of POP were not drafted against the background of a blank regional canvas. The skyline and slopes of the Tararuas and Ruahines, south and east of Palmerston North, already accommodate more wind turbines per hectare than anywhere else in the country. It could reasonably be argued that the area has long since given effect to the NPSREG, and to s7(j), and that the time is near (some say it has passed) when, to give effect to other provisions of Part 2 – s6(b) in particular - decision-makers will have to say ... *enough is enough.*

[2-35] Ms Clarke noted that Objective 7-2 is not under appeal and is, in her view, an appropriate method of achieving the purpose of the Act. But it is her view that ... *Policy 7-7 is neither effective, efficient nor appropriate with reference to Objective 7-2(a).* In summary, she considers that it introduces an approach to cumulative effects which the Objective does not seek; that it potentially predetermines what is inappropriate subdivision use or development, and that it does not efficiently achieve the objective because Schedule F, defining ONFLs and their boundaries, is not accurate.

[2-36] Ms Clarke acknowledges the importance of considering cumulative effects, but asserts that a requirement to avoid all significant cumulative effects goes further than directing an appropriate consideration of them. She sees that as ... *a directive*

and restrictive approach in how to protect the ONFL which is inconsistent with Part 2. Similar views were expressed by other witnesses called by the energy companies.

[2-37] The thrust of the submissions on the topic was that the focus on only *avoid* in Policy 7-7 seeks to recast Part 2 and that can only be done where there is a ... *strong evidential basis* ... and where all relevant factors have been considered. In working through the argument it is helpful to bear clearly in mind that Policy 7-7 does not speak of *every* adverse effect being avoided. It is much more precise than that, requiring the avoidance only of ... *significant adverse cumulative effects on the characteristics and values of those outstanding natural features and landscapes. Those* being the natural features or landscapes listed in Schedule F.

[2-38] Taking *significant* to have the meaning ascribed in the Concise Oxford – *extensive or important enough to merit attention* – what is to be avoided are adverse effects of that magnitude which are *cumulative* – ie which are additional to other adverse effects. So the end result is that, on only the defined features in this extensive region, additional adverse effects on characteristics and values are to be avoided, and the options of remedying or mitigating that category (and that category only) of adverse effect are not available.

[2-39] As a matter of principle, if it is open to a local authority, pursuant to s77A and s77B, to classify activities as *permitted* (at one end of the spectrum) to *prohibited* (at the other), then it seems unexceptionable for a local authority to say, in effect, ... *this category of land cannot absorb further significant adverse effects on its characteristics and values, even if some remedy or mitigation can be offered.* We know of no requirement in the law that all of the options to avoid, remedy or mitigate any adverse effect must always be recited, no matter what the nature of the effect may be, how minor or serious it may be, or how delicate or robust the receiving environment.

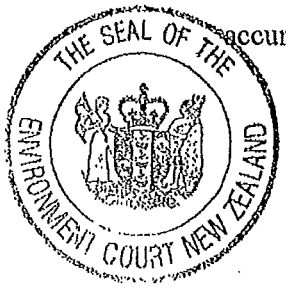
[2-40] A similar situation arose in *Wairoa River Canal Partnership v Auckland RC* [2010] NZEnvC 309. There, the ARC had adopted a Policy in its RPS which provided:

> Countryside living avoids development in those areas or parts of areas identified, in the RPS, including Appendix B, or in regional or district plans, as having significant ecological, heritage or landscape value or high natural character and that contain:
>
> (a) significant ecological value; or
>
> (b) significant historic heritage (excluding significant historic built heritage); or
>
> (c) outstanding natural features and landscapes; or
>
> (d) high natural character;

In holding that the Policy was a proper one to be included, the Court said:

> [14] It is to be noted that an RPS may not, of itself, contain rules that prohibit, regulate or allow activities. But it may contain policies and methods directed to a particular end or outcome, with those policies and methods to be given effect through a District Plan, which must not be inconsistent with the RPS: - see s75(2)(b) and *North Shore CC (Re an Application)* [1995] NZRMA 74. Similarly, a *policy* may be either flexible or inflexible, broad or narrow: - see *ARC v North Shore CC* [1995] NZRMA 424.
>
> [15] In examining the proposed Policy 3 itself, the first thing to be noted is that it does not attempt to impose a prohibition on development - to *avoid* is a step short of to *prohibit*. Secondly, the *avoidance* is quite strongly qualified. CSL is to be avoided only in areas identified in the planning documents and that actually do contain significant ecological values; significant historic heritage; outstanding natural features or landscapes, or high natural character.
>
> [16] Certainly, the use of the term *avoid* sets a presumption (or a direction to an outcome) that development in those areas will be inappropriate and that, in both the linguistic and legal senses, really answers the point that the appellants attempt to make.

[2-41] Mr Hovell, and Mr Beatson and Ms Garvan, suggested that this decision could and should be distinguished, but we do not agree. Its reasoning was not activity specific, nor Auckland metropolitan area specific, and is applicable whether or not a s6 matter is in issue. That said, of course we do not rely on the *Wairoa* decision as an *authority*. It is simply the decision on an appeal in which a similar argument arose. In this instance, the NPSREG does not overwhelm all other planning considerations and it is, in any event, given effect to in the RPS and Plan, as we have discussed elsewhere. We simply consider that the *Wairoa* decision accurately states the relevant law, and that we should apply the same view here.



[2-42] Mr Hovell submitted that Policy 7-7(aa) was determined ... *by Council in reference to s6(b) in a vacuum*... and he referred us to the evidence of Ms Barton at paras 14 and 82. We have to say that we find little or no support for the submission in those passages. Para 14 refers to the recognition of the limitation of the capacity of ONFLs to absorb the effects of development, and to absorb cumulative effects in particular. Para 82 continues the same theme and makes the point that the capacity of ONFLs should not be exceeded ... *unless there are compelling reasons for consent to be granted.* Ms Barton goes on to express the view that the issue of significant adverse cumulative effects should be addressed, and that whether or not effects of a given proposal fall within the rubric of *significant adverse cumulative effects* can be addressed on a case by case basis. We see nothing to disagree with in any of that. We see no deficiency in the Council's reasoning in adopting Policy 7-7, nor any gap in the evidence upon which it might have relied in coming to the view that the Scheduled ONFLs were worthy of their place there, and should be shielded from further or other significant adverse effects on their characteristics and values. Further, we do not think that the Council has foreclosed consideration of protection of the ONFLs from *inappropriate* subdivision, use and development. What may or may not be *inappropriate* will be considered in the context of a resource consent application.

Conflict with POP Chapter 3 – infrastructure

[2-43] In introducing the topic of infrastructure relating to energy, Chapter 3 of POP is quite fulsome:

> Energy
>
> Access to reliable and sustainable energy supplies is essential to the way society functions. People and communities rely on energy for transportation, and electricity for everyday activities at home and at work. A reliable and secure supply of energy, including electricity, is fundamental for economic and social wellbeing. Furthermore, the demand for electricity is increasing.
>
> Government has developed energy strategies and made changes to the RMA to encourage energy efficiency and greater uptake of renewable energy over use of non-renewable resources. Renewable energy means energy produced from solar, wind, hydro, geothermal, biomass, tidal, wave and ocean current sources.
>
> The Government has made a commitment to reduce New Zealand's greenhouse gas emissions and to achieve increasingly sustainable energy use. This commitment is

> expressed by the inclusion of sections 7(ba), 7(i) and 7(j) in the RMA in 2004 and in national strategy and policy documents dealing with energy, renewable energy, energy efficiency and conservation, and electricity transmission.
>
> The electricity transmission network is recognised by a national policy statement as a matter of national significance.
>
> As at 2009, the Government's target is for 90% of New Zealand's electricity generation to be from renewable energy resources by 2025. Collectively these Government policy instruments seek to achieve economy-wide improvements in the efficiency of energy use and an increase in the supply of energy from renewable energy resources.
>
> Given these national policy instruments and the presence of significant renewable energy resources with potential for development in the Region, the Regional Council recognises that it needs to provide for the development of renewable energy resources and the use of renewable energy.
>
> The Region has potential for the development of renewable energy facilities, given the areas with high wind speeds, the potential to develop hydroelectricity resources, and some potential for the use of wave energy around the coastline.
>
> The development and use of renewable electricity generation facilities face a number of barriers that include the difficulty in securing access to natural resources as well as functional, operational and technical factors that constrain the location, layout, design and generation potential of renewable energy facilities. The adverse environmental effects of renewable electricity generation facilities can also be a barrier, if they are not appropriately avoided, remedied or mitigated.

[2-44] That extract makes it clear that the Council was fully aware of the government's targets for renewable energy generation, and there is specific mention of ss7(ba), 7(i) and 7(j). Notable too is the last sentence, clearly recognising that adverse environmental effects can be a barrier to generation development if they cannot be avoided, remedied or mitigated. In other words, even a goal as important as renewable energy generation will not necessarily prevail over any other consideration. As with all RMA decisions involving benefits and disbenefits, it will be a question of deciding where the balance between them should lie, having regard to the factors and criteria set out in the primary and subordinate legislation.

[2-45] The decisions version of Chapter 3 then has this Objective:

Objective 3-1: Infrastructure and other physical resources of regional or national importance

To have regard to the benefits of infrastructure and other physical resources of regional or national importance by enabling their establishment, operation, maintenance and upgrading.

And these Policies:

Policy 3-3: Adverse effects of infrastructure and other physical resources of regional or national importance on the environment

In managing any adverse environmental effects arising from the establishment, operation, maintenance and upgrading of infrastructure or other physical resources of regional or national importance, the Regional Council and Territorial Authorities must:

(a) allow the operation, maintenance and upgrading of all such activities once they have been established, no matter where they are located,

(b) allow minor adverse effects arising from the establishment of new infrastructure and physical resources of regional or national importance, and

(c) avoid, remedy or mitigate more than minor adverse effects arising from the establishment of new infrastructure and other physical resources of regional or national importance, taking into account:

(i) the need for the infrastructure or other physical resources of regional or national importance,

(ii) any functional, operational or technical constraints that require infrastructure or other physical resources of regional or national importance to be located or designed in the manner proposed,

(iii) whether there are any reasonably practicable alternative locations or designs, and

(iv) whether any more than minor adverse effects that cannot be adequately avoided, remedied or mitigated by services or works can be appropriately offset, including through the use of financial contributions.

Policy 3-4: *Renewable energy*

(a) The Regional Council and Territorial Authorities must have particular regard to:

(i) the benefits of the use and development of renewable energy resources including:

(A) contributing to reduction in greenhouse gases,

(B) reduced dependency on imported energy sources,

(C) reduced exposure to fossil fuel price volatility, and

(D) security of supply for current and future generations,

(ii) the Region's potential for the use and development of renewable energy resources, and

(iii) the need for renewable energy activities to locate where the renewable energy resource is located.

(aa) The Regional Council and Territorial Authorities must give preference to the development of renewable energy generation and use of renewable energy resources over the development and use of non-renewable energy resources in policy and plan development and decision-making, except with regard to providing for security of supply in "hydro dry" years.

(b) The Regional Council and Territorial Authorities must generally not restrict the use of small domestic-scale renewable energy production for individual domestic use.

[2-46] What is to be taken from those provisions is a recognition of the importance of renewable generation, eg Objective 3-1, Policy 3-4(a) and Policy 3-3(b). What should be noted is the emphasis on *minor* adverse effects in that provision, and the direction in Policy 3-3(c) that more than minor adverse effects must be managed by being avoided, remedied, mitigated or even offset. Those are the sort of issues which can and should be taken account of in considering a particular proposal, when its benefits and disbenefits can be identified and their relative weights and importance assessed.

The dictating of a non-complying activity status in District Plans

[2-47] A theme common to several parties was that the terms of Policy 7-7 should not be upheld because they would be likely to lead territorial authorities who had Schedule F ONFLs in their districts to make activities in them *non-complying*, thus significantly raising the bar to resource consents by bringing into play the threshold tests of s104D.

[2-48] If that did happen, we fail to see why, if the Policy is adopted for good reason, such a consequence would count against it now. There are many activities that have *non-complying* status, and for good reason – usually because the receiving

environment is regarded as particularly delicate or vulnerable and/or the activity in question is particularly noisome or noisy, or in some other way likely to produce serious adverse effects. If the Policy did affect District Plans in that way, a (for instance) windfarm proposal in a Schedule F ONFL could be advanced as having cumulative adverse effects that are no more than minor. If that argument succeeded, then the proposal will not fall foul of Policy 7-7 either, because the cumulative adverse effects will not, by definition, be *significant*.

[2-49] We note that the *Board of Inquiry into the Transmission Gully Plan Change Request*, in its decision and report of October 2011, at section 10.7, took it as a given that the possibility of requiring avoidance of adverse effects, without an option of remedy or mitigation, is an available provision, but chose not to adopt it on the material before it. There is no suggestion that such a provision was ultra vires. In the decision on the ensuing appeal to the High Court – *Rational Transport Society Inc v Board of Inquiry and Anor* [2012] NZRMA 298 (HC) at para [13] the provision of the Freshwater Plan to which the Plan Change applied is cited. It requires *avoidance* of adverse effects on identified wetlands, lakes and rivers and their margins, with no mention of remedy or mitigation. Again, the citation is without comment and again there is no hint in the judgment that such a provision could not stand, as a matter of law.

The definition of some ONFLs

[2-50] The definition of one of the ONFLs mentioned in Schedule F (which is part of the Regional Policy Statement component of POP) is also at issue. The ONFL in question is, as mentioned in para [2-6], described in the decisions version of POP as:

> (ia) The skyline of the Ruahine and Tararua Ranges – defined as the boundary between the land and sky as viewed at a sufficient distance from the foothills so as to see the contrast between the sky and the solid nature of the land at the crest of the highest points along ridges.
>
> The skyline is a feature that extends along the Ruahine and Tararua Ranges beyond the areas in (h) and (i) above.

There was some disagreement among the Landscape Architect witnesses about this. At an early stage Mr Coombs, engaged by MRP, and Mr Anstey, engaged by the Council, agreed on a revised formula, in these terms:

> (ia) The series of highest ridges and highest hilltops along the full extent of the Ruahine and Tararua Ranges, including within the Forest Parks described in Items (h) and (i).

[2-51] In the course of the first round of expert landscape witness conferencing the formula was further modified to read:

> (ia) The main and highest ridges and highest hilltops along the full extent of the Ruahine and Tararua Ranges, including within the Forest Parks described in (h) and (i).

[2-52] Mr Stephen Brown, a consultant landscape architect engaged by Meridian, was able to attend the resumed expert conference. Mr Brown had the view, and Mr Coombs appeared to come to agree with him, that the area of ridgeline (or skyline) between the Pahiatua Track and Wharite Road did not meet the ONFL criteria and should be excluded from Item (ia). They considered that the area is now highly modified and does not display the characteristics and values which ought to be associated with that item. They thought that the removal of the words ... *the full extent of*... from the description would go some way to meeting their concerns. Mr Brown considers that the Manawatu Gorge, which lies within the area he would exclude, should be an ONFL in its own right, which it is.

[2-53] Mr Brown's questioned area contains the part of both ranges between the southern-most extent of the Te Rere Hau windfarm and the northern edge of the Te Apiti windfarm – a linear distance of c14 – 15km. In his evidence he describes this part of the ranges landscape as:

> ... a present-day sequence of ridges and hilltops that is not only visually dishevelled and devoid of any real sense of cohesion and unity; it is also blatantly 'cultural' as opposed to 'natural'. Thus, while the ranges' landform may well remain apparent – indeed, it is emphasised by the historic clearance of native forest across both Ranges – it is visually subjugated by the matrix of pastoral, forestry and energy generation activities/structures that sit atop almost every visible ridge and hilltop. In my opinion, this landscape is certainly expressive; but rather than affirming the integrity of a natural or outstanding landscape – let alone both together – it clearly articulates the idea of a highly modified, and rather utilitarian, 'energy production' landscape.

He goes on to express the view that it is doubtful that, considered in isolation, any landscape architect would regard this sequence of ridges and hilltops as an ONFL, and that it is only the association with the extended ranges and state forest parks to the north and south that gives rise to the proposed ONFL under the description of *the*

full extent of the Ruahine – Tararua chain. He considers that the area would not meet the amended *Pigeon Bay* factors set out in Table 7.2 of POP, and that even that table does not contain an important factor – ie does ... *this landscape or feature stand out among the other landscapes and features of the district?* His preference for the scope of the ONFL would be:

> Visual natural and scenic characteristics of the Ruahine and Tararua ranges, as defined by the series of highest hilltops along the Ruahine and Tararua Ranges, including the skyline's aesthetic cohesion and continuity, its prominence throughout much of the Region and its backdrop vista in contrast to the Region's plains.

[2-54] Further, he does not see the area as *outstanding* in the sense of it being ... *conspicuous, eminent, especially because of excellence ... remarkable in ...* (see *Wakatipu Environmental Society Inc v Queenstown Lakes DC* [2000] NZRMA 59).

[2-55] Mr Coombs remains content with the wording agreed between himself and Mr Anstey, and now adopted by the Council. That is:

> (ia) The series of highest ridges and highest hilltops along the full extent of the Ruahine and Tararua ranges, including within the Forest Parks described in items (h) and (i).

The characteristics and values associated with that ONFL are said to be:

> (i) Visual, natural and scenic characteristics of the skyline of the Ruahine and Tararua ranges, as defined by the series of highest ridges and highest hilltops along the full extent of the Ruahine and Tararua Ranges, including the skyline's aesthetic cohesion and continuity, its prominence throughout much of the region and its backdrop vista in contrast to the Region's plains.
>
> (ii) Importance to tangata whenua and cultural values
>
> (iii) Ecological values including values associated with remnant and regenerating indigenous vegetation
>
> (iv) Historical values
>
> (v) Recreational values.

[2-56] Mr Anstey has the opposite view to that of Mr Brown. He acknowledges that the full extent of the landscape has not yet been assessed, but while the portion in question is at a lower elevation and is not high in natural character, he considers its ridgeline is still natural. The lower elevation and the presence of turbines does not, in his view, mean that it ceases to be *outstanding*. He regards it as retaining elements

that make it outstanding, and emphasises that it is part of a continuum that should not be broken down into little sections. He regards the recognition of the full extent of the skyline as being clearly required, with the series of highest ridges and highest hilltops being distinctive physical features which together *inform* the skyline.

[2-57] It is the position of MRP that in the absence of a sufficient consensus among the expert witnesses, such a definitive direction (ie including the full extent of both ranges) should not be enshrined in the RPS.

[2-58] We are then faced with an irreconcilable difference of expert views presented by people eminent in the field. This is plainly a matter on which informed and reasonable people may hold different views, and neither view can be the only correct one. We are not convinced that the MRP suggestion is the better way of resolving the issue – this is not a matter to be settled by a majority vote, although we must note that the one energy company with windfarms at the northern end of the Tararuas, TrustPower, does not share the view that the area should not be within the ONFL. It is the case also that such status is not new, in the sense that the whole skyline is described as an ONFL in the operative RPS.

[2-59] While regarding the area around the windfarms as ... *about as disturbed and modified as most rural landscapes get* ... Mr Brown is prepared to accept ... *a certain symbolic value associated with the idea of protecting the physical continuity and linkage of both Ranges.* It is plain, we acknowledge, that the presence of multiple turbines along the Te Rere Hau to Te Apiti stretch of the Ranges, and the pastoral land around them, deprives the area of some of its *natural* characteristic. But it remains nevertheless part of a continuum of landform having visual and scenic characteristics and it remains, undoubtedly, part of the prominent backdrop vista from and to the region's plains. That is largely the way the ridges and hilltops have been seen in earlier windfarm litigation – for instance in the decision of the Turitea Board of Inquiry the Te Apiti turbines were regarded as sitting comfortably in the landscape without undermining its characteristics and values.

[2-60] While there is no crisp, *one way or the other* answer, we conclude that the whole of the landform forming the eastern backdrop to the Manawatu plains, and the

western backdrop to the northern Wairarapa/Tararua valley should be treated as one continuous entity, and we consider that the provisions now proposed by the Council give effect to that conclusion.

[2-61] That being so, we do not need to consider further amendments to Schedule F, or the possibility of having to use s293 to do so.

Summary of conclusions

[2-62] The specific concern of TrustPower about repowering its existing windfarms has been dealt with to its satisfaction, and that of the Council, and we see no reason to disagree with that outcome. The amendments to the explanations to Policies 3-4 and 7-7, and the amendment to Policy 3-4 itself, as set out in para [2-3] are approved.

[2-63] In terms of the principles discussed in Part 1 and set out in its Appendices, and the arguments raised, we consider that the provisions of POP (in particular Policy 7-7) requiring the *avoiding* of significant cumulative effects, without the specific alternatives of *remedying* or *mitigating*:

- give effect to the NPSREG – see paras [2-20] to [2-24].
- are the most appropriate way of achieving the Objectives, particularly Objective 7-2 – see paras [2-25] to [2-27].
- achieve the purpose of the Act – see paras [2-28] to [2-42].
- are not in conflict with Chapter 3 of POP – see paras [2-43] to [2-46].
- are not flawed because they may lead to activities having *non-complying* status in district plans – see paras [2-47] to [2-49].

[2-64] Nor do we find that the Council's interpretation of *inappropriate* in terms of s6(b) is flawed. Further, the definition of Item (ia) in Schedule F set out in para [2-55] is satisfactory – see paras [2-50] to [2-61].

[2-65] We ask that the Council, in consultation with other affected parties as necessary, redraft the affected portions of POP accordingly and present them for approval: - see para [1-23].

Hearing: at Palmerston North: 28 – 30 March and 16 April 2012

DECISION: PART 3 – INDIGENOUS BIOLOGICAL DIVERSITY

Counsel and parties participating in this topic:

P R Gardner for Federated Farmers of New Zealand
H A Atkins for Horticulture New Zealand
A J L Beatson and N J Garvan for Meridian Energy Ltd
K Serjeant for the Wellington Fish and Game Council
S J Ongley and A Camaivuna for the Minister of Conservation
J Gregory for Transpower NZ Ltd and Powerco Ltd
L C R Burkhardt for TrustPower Ltd
J W Maassen and N Jessen for the Manawatu-Wanganui Regional Council

PART 3 – Indigenous Biological Diversity **Page**

Introduction

[3-1] This part of the Decision involves the provisions on indigenous biological diversity (indigenous biodiversity for short) in both the regional policy statement and regional plan components of the POP and the land use rules applying to it.

[3-2] The Council's position was that rare and threatened habitats should receive a greater degree of recognition and protection, and that its policy and rule framework with *discretionary* activity status for activities in rare, threatened and at-risk habitats would achieve this.

The parties' positions

[3-3] The Minister of Conservation and the Wellington Fish and Game Council wanted a stronger policy and rule response, with *non-complying* activity status for activities in rare and threatened habitats on the basis that this would mean that consent could be granted only after close inquiry.

[3-4] Meridian Energy Ltd, TrustPower (adopting Meridian's submissions and sharing some witnesses), Transpower NZ Ltd and Powerco Ltd supported the Council's position on *discretionary* activity status. While there were slightly different positions on some issues, the energy companies basically sought changes to the policy and rule regime in both the RPS and the Regional Plan which would change the scope of the criteria that qualified habitats for *rare and threatened* status and treat them in the same way as *at-risk* habitats, as well as to the hierarchy of actions to be taken in considering effects on all three types of habitats. These changes were opposed by the Council, the Minister, and Fish and Game as weakening the recognition and protection of indigenous biodiversity.

[3-5] Federated Farmers submitted that there is no justification for the approach of managing indigenous biodiversity at a regional scale and opposed the rule framework. In an earlier decision in the same set of proceedings ([2011] NZEnvC 403) the Court held that the RMA empowered the Regional Council to make rules to control land use for the purpose of maintaining indigenous biodiversity - a decision

since upheld by the High Court – see *Property Rights in NZ Inc v Manawatu-Wanganui RC* [2012] NZHC 1272.

[3-6] The parties' positions evolved up to and during the hearing, which made it difficult for everyone involved. A further complication was the change in the Council's position from the provisions of the DV POP. The outcomes of mediation and the expert witness conferencing, particularly from the ecologists and the planners, were not always well aligned.

Biodiversity - the resource, issue and general approach

[3-7] The decline of indigenous biodiversity is one of the four most critical issues addressed in the POP. The Plan records that the region has only 23% of its original vegetation cover and 3% of its wetland habitat remaining. Most of the forest is found in the hill country and the ranges, with fragments scattered throughout the lower-lying and coastal areas of the Region, where typically less than 10% of original habitat remains. That remaining natural habitat is small, fragmented, and under pressure from pests and disturbance. Much of the remaining indigenous biodiversity is in poor condition and health.[1] We note here that there was evidence from ecologists that the state of indigenous biodiversity now differs from what was recorded in the POP when it was notified in 2007. For example Dr Philippe Gerbeaux, an expert on wetlands giving evidence for the Minister, says that only 2.6% of wetland habitat now remains.

[3-8] The Plan has a focus on habitats, rather than individual species or genetic diversity, as the mechanism to most effectively sustain regional indigenous biodiversity into the future. It categorises habitats into *rare, threatened* or *at-risk habitats.* The description in the s42A report of Ms Fleur Maseyk, an ecologist, broadly explains the framework:

> ... the proposed framework for protection of indigenous biodiversity is based on habitat types rather than individual species. Habitat types were largely identified using predictive modelling. Comparisons between former and current extent of habitat types was conducted to determine degree of loss. Original and current extent of indigenous vegetation cover was primarily projected using robust national spatial

[1] 7.1.2 DV POP

data sets and predictive models. The use of these national spatial data sets and predictive models is common practice for analysis of this sort, and for determining the need for priorities for protection of indigenous biodiversity. These data sets also serve as key reference data for expected spatial distribution of each habitat type.

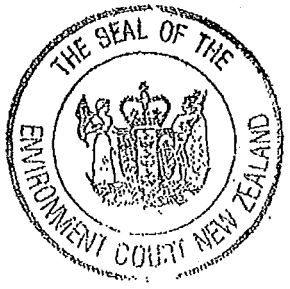
[3-9] Schedule E of the Plan identifies 32 habitats that are *rare, threatened* or *at-risk habitats*. These habitats are not depicted on the maps but are identified in the first table in the schedule (Table E.1). However, for a habitat to then qualify, it must meet at least one of the criteria described in the second table (Table E.2(a)) and not be excluded by one of the criteria in the third table (Table E.2(b)). The criteria in Table E.2(a) set thresholds (particularly size thresholds) above which a habitat type makes a major contribution to biodiversity. The exclusions in Table E.2(b) of the schedule relate to matters such as planted vegetation.

[3-10] Ecology and planning witnesses explained the advantages of this predictive approach over the traditional mapping and scheduling, or the listing of specific areas of indigenous biodiversity, as:

- habitat extent can change over time through natural or induced disturbance or successional events, and static maps can become quickly out of date
- determining the exact extent of an area of habitat in time and space is best done by in-field confirmation, guided by ecologically defined descriptions
- restrictions on activities, or a requirement to obtain a resource consent, only apply to the area of interest
- consistent treatment of the resource
- being more effective and efficient.

[3-11] There is an introductory provision to Schedule E that states:

> It is recommended that a suitably qualified expert is engaged for assistance with interpreting and applying Schedule E. This could be:
>
> (a) a consultant ecologist, or
>
> (b) the Regional Council staff, who currently provide this service free of charge, including advice and a site visit where required in the first instance. It may that following this initial provision of information, the proposal will require an Assessment of Ecological Effects to be provided as a component of the consent application. In such instances it is recommended that a consultant ecologist be engaged to conduct the assessment.



> The Regional Council can, in all cases, provide any spatial data and existing information where available as relevant to the habitat and the proposed activity.

[3-12] There was no argument about the risks posed to the habitats. No party contested the general approach, (with the exception of Federated Farmers on the regulation of biodiversity) but there was some concern about the inclusion of some habitats, notably cliffs, scarps and tors.

Cliffs, scarps and tors

[3-13] There was a challenge from Meridian, TrustPower, Transpower and Powerco to the broad description of ... *cliffs, scarps and tors*... and the extent and application of this habitat type as a *rare habitat.*

[3-14] There was some agreement between the ecologists, Ms Maseyk, called by the Council, Ms Amy Hawcroft for the Minister, and Mr Matiu Park, for Meridian and TrustPower, that the definition or description of the naturally uncommon habitat type called *cliffs, scarps and tors* in Schedule E could be further refined, given time. This habitat type includes ecosystems where the relevant background publication: - Williams et al 2007[2] - indicates that further research may be required to determine whether the ecosystem is indeed *rare.*

[3-15] In closing submissions (particularly Appendix B) the Minister put forward proposed changes to Schedule E and associated definitions of *cliffs, scarps and tors,* and also three other related habitat types that would also require amendment – *screes and boulderfields, active dunelands,* and *stable dunelands.* These were recommended by Ms Hawcroft. The proposed amendments are to ensure that only those habitats comprising ecosystems clearly identified as *rare* in Williams et al 2007, be included as *rare habitats.*

[3-16] We direct that the ecologists should confer and refine the description habitat type and prepare a joint statement which includes the reasons for that refinement. (If there is any disagreement between the ecologists that should be identified to the

[2] Williams, PA; Wiser SK; Clarkson, B; Stanley: "New Zealand's historically rare terrestrial ecosystems set in a physical and physiognomic framework" NZ Journal of Ecology (2007) NZJEcol 19.

Court along with the reasons for that disagreement in the normal way). The Council, in consultation with other affected parties as necessary should redraft Schedule E, with an explanation of the reasons for those amendments, and outlining suggested options for the process the Court could follow to consider and, if appropriate, to action those changes.

Objectives

[3-17] Objective 7-1: Indigenous biological diversity in the Regional Policy Statement component of the POP is not in contention. It provides:

> Protect areas of significant indigenous vegetation and significant habitats of indigenous fauna and maintain indigenous biological diversity, including enhancement where appropriate.

This objective reflects section 6(c) RMA which states that a matter of national importance to be recognised and provided for is:

> The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna.

It also reflects the responsibility of the Regional Council to maintain indigenous biodiversity in the region under s62(1)(i) RMA.

[3-18] Part II, the Regional Plan component of the POP, has in Chapter 12 - *Indigenous Biological Diversity* the following Objective 12-2: (this is not in contention - other than by Federated Farmers in terms of responsibility for regulation):

> The regulation of vegetation clearance, land disturbance, forestry and cultivation and certain other resource use activities to protect areas of significant indigenous vegetation and significant habitats of indigenous fauna or to maintain indigenous biological diversity, including enhancement where appropriate.

RPS Policies

[3-19] The first RPS policy (7-1) in contention apportions the responsibilities for controlling land use activities for the purpose of maintaining indigenous biological diversity in the Region, as required by s62(1)(i). The Regional Council is to be responsible for developing objectives, policies and methods to establish a region-wide approach for maintaining indigenous biodiversity, including enhancement where appropriate. The Regional Council must also develop rules controlling the use

of land to protect areas of significant indigenous vegetation and significant habitats of indigenous fauna, and to maintain indigenous biodiversity, including enhancement, where appropriate.

[3-20] Only Federated Farmers took issue with the first policy, raising the merits of the apportionment of responsibilities, and opposing the concept of the regional plan containing rules controlling the use of land for indigenous biodiversity. Its position was that any rules should be in district plans. We return to this argument later.

[3-21] The second policy in contention (Policy 7-2A) concerns the management of activities affecting indigenous biological diversity. It introduces and differentiates between *rare and threatened habitats*, and *at-risk habitats*, with the Glossary to the POP defining these to be: - *an area determined to be* [in the particular category] *in accordance with Schedule E and, for the avoidance of doubt, excludes any area in Table E.2(b).* It then provides for their regulatory treatment. This was the focus of the hearing, along with the related policies in the Regional Plan (to which we refer and return when necessary).

[3-22] Federated Farmers also had concerns about the wording of a policy on the existing use of productive land. The Minister also had an appeal point on this clause and in closing advised that an agreement had been reached with Federated Farmers that the clause be reworded as:

> (iv) not restrict the existing use of production land where the effects of such land use on rare habitat, threatened habitat or at-risk habitat remain the same or similar in character, intensity or scale.

However Ms Barton, the planning witness for the Council, considered the qualifier *unreasonably* (which was in the original policy) should be retained. We concur with that view.

[3-23] The energy companies also had a concern about the wording of Policy 7-2A and sought cross-references to Chapter 3 the Infrastructure chapter.

[3-24] Part 1 - the RPS part of the POP - includes Chapter 3 (which is beyond challenge) on infrastructure. Chapter 3 has Objective 3-1:

> To have regard to the benefits of infrastructure and other physical resources of regional or national importance by enabling their establishment, operation, maintenance and upgrading.

[3-25] Policy 3-1 then lists the infrastructure the Council must recognise, including the national grid and electricity distribution, and pipelines and gas facilities. Policy 3-3 sets out the requirements for the regional council and territorial authorities when managing adverse environmental effects arising from new infrastructure. Policy 3-3(a) relates to existing infrastructure, (b) to new infrastructure, stating that minor adverse effects should be allowed, and (c) sets out the factors that should be taken account when assessing new infrastructure as being:

- The need for new infrastructure
- The functional, technical and operational constraints of infrastructure
- Reasonably practicable alternative locations and designs
- Offsetting more than minor effects that cannot be avoided, remedied or mitigated.

[3-26] Policy 3-4 requires the regional council and territorial authorities to have regard to the benefits of the use and development of renewable energy resources.

[3-27] For the RPS Policy 7-2A Management of activities affecting indigenous biological diversity - the Council proposed some changes pertinent to infrastructure as follows:

> For the purpose of managing indigenous biological diversity in the Region:
>
> (e) When regulating the activities described in (c) and (d), the Regional Council must, and when exercising functions and powers described in Policy 7-1, Territorial Authorities must:
>
> ...
>
> (ii) consider indigenous biological diversity offsets in appropriate circumstances as defined in Policy 12-5.
>
> (iii) allow the maintenance, operation and upgrade of existing structures, including infrastructure [and other physical resources of regional or national importance as identified in Policy 3-1].

[3-28] Transpower and Powerco wished the wording of Policy 7-2A (e)(ii) in the DV POP to remain, with the retention of the following piece in brackets which the Council proposed to remove:

> (ii) consider indigenous biological diversity offsets in appropriate circumstances as defined in Policy 12-5, [which may include the establishment of infrastructure and other physical resources of regional or national importance as identified in Policy 3-1].

The Minister was neutral as to whether clause (ii) should also state that the circumstances where offsets are considered *may include other physical resources of regional or national importance as identified in Policy 3-1.* (There was some confusion about the position of the parties on the bracketed part of (ii) with a suggestion that it may have been agreed but was omitted from the version presented to us.)

[3-29] We do not consider that the bracketed addition to Policy 7-2A(e)(ii) adds anything further than is already set out in policy in Chapter 3 which deals with infrastructure and other physical resources of regional or national importance and which refers to *offsetting more than minor effects that cannot be avoided, remedied or mitigated.* In any case, Policy 7-2A (with the associated Policy 12-5) does not impose any restriction on the types of activities that can be considered for indigenous biological diversity offsets. There has to be a limit to the extent to which there are cross-references between the various provisions in the RPS. Accordingly we do not agree to the addition of the bracketed wording.

[3-30] Appendix A of closing submissions on behalf of the Minister referred to there now being a lack of agreement on the bracketed addition to Policy 7-2A(e)(iii) [3-27], indicating that the amendment had previously been agreed between the Minister and the Council. We are not clear on the reason for the addition or for that matter the Minister's opposition to it. The clause is limited to *existing structures* and the definitions of maintenance, operation and upgrade are not open-ended. The definitions in the DV-POP in front of us impose constraints on the nature and extent of the activity and adverse effects on indigenous biodiversity (among other adverse effects). Policy 3-1 contains a long list of infrastructure and other physical resources of regional and national importance and we do not understand the Minister to have

any quibble with the content of that policy. The RMA defines *infrastructure* in terms of the Council's function of the strategic integration of infrastructure with land use through objectives, policies and methods (s30(1)(gb)). Most, if not all, of the items listed would come under that definition of infrastructure in any event. In the absence of argument, we find Policy 7-2A(e)(iii) as proposed by the Council acceptable

[3-31] Ms Helen Marr, the planning witness for the Minister, gave evidence that she generally agreed that the DV POP gives effect to the national policy statements on electricity generation and electricity transmission in part through Chapter 3 "Infrastructure, Energy, Waste, Hazardous Substances and Contaminated Land". However she noted that the obligation to give effect to these national policy statements does not end with Chapter 3 which is contained in Part I – the RPS component of the POP. Appropriate cross-reference, or specific provisions, may be required in Part II – the regional plan component of the POP. (We return to this when discussing the policy framework of the regional plan.)

[3-32] Other RPS policies were not in issue.

Other Provisions

[3-33] The RPS contains a number of non-regulatory methods which refer to biodiversity. It also has these anticipated environmental results – which were not in issue:

> Except for change because of natural processes, or change authorised by a resource consent, by 2017, the extent of rare habitat, threatened habitat or at-risk habitat is the same as (or better than) that estimated prior to this Plan becoming operative, and the number of at-risk habitats has not increased.
>
> By 2017, the Region's top 100 wetlands and top 200 bush remnants will be in better condition than that measured prior to this Plan becoming operative.

What should the approach to recognising significant indigenous vegetation and habitats be?

[3-34] The POP (both the RPS Policy 7-2A and Regional Plan policies) differs in its approach to the recognition (and subsequent policy treatment) of habitats identified in Schedule E as *rare and threatened habitats*, which are deemed to be significant

indigenous vegetation and significant habitats of indigenous fauna in terms of s6(c), and *at-risk habitats* which are not so deemed.

[3-35] All parties agreed that not all *at-risk habitats* are worthy of automatic s6(c) recognition as *significant indigenous vegetation and significant habitats of indigenous fauna.* The *at-risk* habitats are therefore subject to a second tier of assessment of significance beyond the methodology that informed the creation of Schedule E. This involves the assessment of individual areas against the criteria for assessing the significance of an area of habitat in Policy 12-6. The ecologists agreed that greater discretion is appropriate for habitats classified as *at-risk*, but areas of these habitat types are also vulnerable and subject to pressures that result in their continued decline, and therefore warrant some protection.

[3-36] The Council, the Minister, and Fish and Game consider *rare* and *threatened* habitats are, by definition, s6(c) significant indigenous vegetation and significant habitats of indigenous fauna. Accordingly, they contend that policy should reflect this. We were provided with a revised version of the policy provisions by Ms Barton at the conclusion of the hearing to make that intention clear. The Minister provided some amendments to those provisions with the intention of avoiding arguments that might arise from some of the terminology and language used. We use that version for further discussion.

[3-37] The energy companies wanted *rare* and *threatened* habitats to be treated the same way as *at-risk* habitats, and, before being determined to be a significant habitat, to go through the same additional filter (or second tier assessment) of the significance test that applies to *at-risk* habitats. In addition Mr Park proposed:

- the criteria for assessing significance of, and the effects of activities on, an area of habitat (Policy 12-6) should require *functioning ecosystem processes* as a threshold for representativeness of habitats (in addition to the other requirements).
- the condition of the habitat should be considered in assessing significance (rather than dealing with this at the stage of considering effects and the other matters in the resource consent process).

- *Should rare and threatened habitats be, by definition, significant?*

[3-38] The DV POP emphasised the importance of site visits in assessing habitats. The evidence of Ms Barton, Ms Maseyk and Ms Hawcroft confirmed that site visits have always been anticipated to check whether a habitat as it exists *in the field* meets the objective criteria for *rare* or *threatened* habitat under Schedule E, Tables 1, 2(a) and 2(b). If the criteria are met, then such habitats are determined to be *significant* within the meaning of s6(c) and no additional subjective or evaluative exercise is required.

[3-39] We find in favour of *rare* and *threatened* habitats being deemed *significant* for the following reasons:

- the highly vulnerable status of *rare* and *threatened* habitats and the state of remaining biodiversity in the region
- disturbance of *rare* habitats is very likely to cause local extinction of indigenous species, or of ecosystem type, because these habitats are spatially highly limited, meaning that species that rely on them are unable to move into adjoining suitable habitat.
- *threatened* habitats, which have less than 20% of the original extent of the habitat remaining, will show a sharp decline in the number of species likely to survive if more original habitat is lost, based on the species-area curve. Even very small losses of habitat below the 20% threshold can significantly impact on species' ability to survive.
- the scarcity of wetlands
- it reflects international biodiversity treaties and conventions New Zealand is a signatory to, and the Biodiversity Strategy.
- it reflects the Government's policy direction as stated in the *Statement of National Priorities for Protecting Rare and Threatened Native Biodiversity on Private Land* (MfE, 2007).
- the robust analytical approach to identifying rare and threatened species.
- the types of habitats, with the classifications describing the characteristics in Schedule E, are able to be identified.
- the objective, rather than subjective, nature of the characteristics.

- any deficiencies in identifying base information would be dealt with by another filter or layer, in considering the effects and the sustainability of the habitat.

- *Should 'functioning ecosystem processes' be a prerequisite to representativeness?*

[3-40] The criteria for significance are used for determining the ecological values of *at-risk* habitats, as well as being a consideration in the resource consent process. As proposed by the Council, Minister and Fish and Game, only one criterion within Policy 12-6 needs to be met for an area of habitat to be considered significant.

[3-41] Mr Park considered *functioning ecosystem processes* should be a prerequisite for representativeness, but this raised several questions. We accept that there is cause for concern: - the evidence of Ms Maseyk and Ms Hawcroft was that incorporating the concept of *functioning ecosystem processes* into Policy 12-6 as a criterion to be met, in addition to being either under-represented habitat type (criterion (i)(A)), or highly representative habitat type (criterion (i)(B)), would raise the threshold unacceptably high. It would mean that considerably fewer *at-risk* sites would pass the *significance* test, allowing for greater freedom to impact on indigenous biodiversity unrestrained by the resource consent process. This would be inappropriate given the evidence on the significance of the habitat types listed in Schedule E, and the demonstrated continued vulnerability and decline of areas of these habitat types. In addition, it would undermine the proper consideration of the values of these habitats during the resource consent process.

- *Should 'condition' be a criterion for significance?*

[3-42] Mr Park expressed concern about using *condition* in deciding the significance of habitats. As an example, he emphasised the degraded condition of the wetlands located in the Horowhenua sand dune country. However, in cross-examination, Mr Park conceded that given the rarity of these wetland habitats, a policy of avoiding adverse effects, even for wetlands in a degraded state, is appropriate.

[3-43] Ms Maseyk, Ms Hawcroft and Dr Gerbeaux were of the opinion that biodiversity which is not in good condition, or not of good quality, still has an

important role to play in biodiversity maintenance. Dr Gerbeaux referred to the same point for wetlands, making it clear that even small and modified areas of wetland habitat within the region are ecologically significant. These witnesses painted a graphic picture of the consequence of continuing to take out, or discount, the values of biodiversity across the region on the basis of its condition.

- *Conclusion on recognition of habitats*

[3-44] We agree with Ms Maseyk and Ms Hawcroft that the Council's approach reflects the appropriate process for determining ecological significance (and thus a demonstrated need for regulatory protection and a resource consent process) with the consideration of site-specific values and condition (critical to making sound management decisions) occurring at the resource consent stage. At the resource consent stage Policy 12-6 (b) requires consideration of:

> The potential adverse effects of an activity on a rare habitat, threatened habitat or at-risk habitat must be determined by the degree to which the proposed activity will diminish any of the above characteristics of the habitat that make it significant, while also having regard to any additional ecological values and to the ecological sustainability of that habitat.

[3-45] We conclude that the effects of the additional criteria proposed by Mr Park would not achieve the Objective and Policy of the RPS, or the Objective of the Plan, or Part 2 of the Act. We accept that *condition* is brought in through the sustainability point in the Policy and can and should be dealt with at the resource consent stage when considering effects (including cumulative effects) and the other matters required under section 104. Mr Park's approach, we think, confuses these two steps and cuts across the need for a strong planning framework and a precautionary approach to a scarce and irreplaceable natural resource.

What should the policy framework for considering resource consents comprise?

[3-46] Policy 12-5 specifically relates to consent decision-making for activities in *rare, threatened* and *at-risk habitats* ... and it is in issue.

[3-47] Under Policy 12-5 there is a different basis for granting consents that involve *any more than minor adverse effects* on a habitat's representativeness, rarity and

distinctiveness, or ecological context, for *rare*, *threatened* or *at-risk* habitat which is assessed to be an area of significant indigenous vegetation or a significant habitat of indigenous fauna. As proposed by the Council, the Policy contains a hierarchy of considerations, as follows:

- Avoid any more than minor adverse effects first
- Where these adverse effects cannot reasonably be avoided, remedy or mitigate adverse effects. [There are differences of opinion on whether this should only occur at the point where the adverse effect occurs, and what might be involved].
- Where these adverse effects cannot reasonably be avoided, remedied or mitigated the residual effects are to be offset. [There are differences of opinion on what an offset involves and whether it should result in a net indigenous biological diversity gain, and whether it should be the last resort.]

[3-48] The Minister preferred the rewording of Policy 12-5(b) as follows:

> Consent must generally not be granted for resource use activities in a rare habitat, threatened habitat, or at-risk habitat assessed to be an area of significant indigenous vegetation or a significant habitat of indigenous fauna under Policy 12-6, unless:
>
> (i) Any more than minor adverse effects on that habitat's representativeness, rarity and distinctiveness, or ecological context assessed under Policy 12-6 are avoided.
>
> (ii) Where any more than minor adverse effects cannot reasonably be avoided, they are remedied or mitigated at the point where the adverse effect occurs.
>
> (iii) Where any more than minor adverse effects cannot reasonably be avoided, remedied or mitigated in accordance with (b)(i) and (ii), they are offset to result in a net indigenous biological diversity gain.

[3-49] The Minister's position was that if the term *offsets* is used in a plan, and is expressly available to applicants wishing to undertake activities in areas having biodiversity value, the term should be used consistently with the Business Biodiversity Offsets Programme principles (BBOP principles).

[3-50] In closing submissions the Minister put forward two optional definitions:

> For the purposes of this Policy:

> *Offset* means a measurable conservation action designed to achieve no net loss and preferably a net gain of biodiversity on the ground once measures to avoid, minimise and remedy adverse effects have been implemented.
> *Minimise* means to reduce the duration, intensity and/or extent of adverse effects.

If adopted, these definitions would need to be consistent with the policy framework.

[3-51] Meridian did not oppose the reference to and use of biodiversity offsets in policy, but opposed the hierarchy of avoid, remedy, minimise and offset, seeking flexibility so that the applicant could determine the most appropriate approach, having weighed up all factors, effects, risks, costs and benefits under the framework of the POP. Its position was that allowing flexibility of options can result in a better environmental benefit than would a rigid policy. Meridian and other energy companies also opposed the requirement for a *net gain* for a biodiversity offset.

- *What are the BBOP principles?*

[3-52] Mr Spencer Clubb, a Senior Policy Analyst with the Department of Conservation, who is leading the drafting of good practice guidance on the application of biodiversity offsetting in New Zealand, gave evidence. During technical expert conferencing all the ecological experts giving evidence agreed that the term *biodiversity offsets* should be consistent with the Business and Biodiversity Offsets Programme (BBOP) definition and principles. These were initially developed in 2006, and work since has changed the sequence of, but not the content of, the principles.

[3-53] The BBOP principles define *biodiversity offsets* as:

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

[3-54] The Proposed National Policy Statement on Indigenous Biodiversity similarly defines *biodiversity offsets* as:

> ... measurable conservation outcomes resulting from actions which are designed to compensate for more than minor residual adverse effects on biodiversity, where those affects arise from an activity after appropriate prevention and mitigation measures have been taken. The goal of biodiversity offsets is to achieve no net loss and preferably a net gain of biodiversity on the ground with respect to species composition, habitat structure and ecosystem function.

[3-55] There are a set of principles establishing a framework for designing and implementing biodiversity offsets and verifying their success (and criteria and indicators). Of particular relevance is Principle 3 of the BBOP principles:

> Adherence to the mitigation hierarchy: A biodiversity offset is a commitment to compensate for significant residual adverse impacts on biodiversity identified after appropriate avoidance, minimisation and on-site rehabilitation measures have been taken according to the mitigation hierarchy.

[3-56] Mr Clubb's evidence was that *minimisation* means: ... measures taken to reduce the duration, intensity and/or extent of impacts that cannot be completely avoided, as far as is practically feasible. Residual adverse effects that are left over after avoidance, minimisation and rehabilitation, are required to be offset.

[3-57] Mr Clubb said that there is a clear distinction and a clear hierarchy, that places biodiversity offsetting as a separate activity, designed to address residual adverse effects only after avoiding, remedying and mitigating those effects has taken place. He also said that biodiversity offsetting provides a means by which decisions can be made about proposals for *exchanging* or compensating for biodiversity loss in a more robust, transparent and accurate manner.

What weight should we give the BBOP principles?

[3-58] Mr Clubb went on to say that the approach to biodiversity offsetting as proposed by the Minister for the POP is consistent with international best practice. He considered the BBOP definition and principles for biodiversity offsetting are appropriate to New Zealand and that application of all the principles is necessary. He said that, by definition, biodiversity offsetting seeks to address residual adverse

effects arising from project development after appropriate prevention and mitigation measures have been taken. He said that the definition and principles of offsetting as a final step in the *mitigation hierarchy* (and often referred to in BBOP as a *last resort*) have been agreed by international consensus, including from prominent members of the ecological community in NZ and overseas.

[3-59] We also note that the Proposed National Policy Statement on Indigenous Biodiversity, on which the POP approach is modelled, reflects BBOP principles. Notwithstanding that it has no statutory effect, and the number of submissions made on it, we consider the document is worthy of respect as a reflection of considered opinion, particularly as it reflects international best practice.

[3-60] Finally, there is the evidence of the ecologists about the state of biodiversity in the region and the high risks – likelihood and consequences – of adopting any less rigorous approach.

Should offsetting be required?

[3-61] An argument was made that a biodiversity offset is a subset of remediation or mitigation (and even, potentially, avoidance) and should not be specifically referred to or required.

[3-62] Meridian submitted that the *Final Decision and Report of the Board of Inquiry into the New Zealand Transport Agency Transmission Gully Plan Change Request* has close parallels with the matters considered by the Court and that it had taken this approach. The appeal to the High Court against this decision did not deal with this particular matter.

[3-63] With respect to the Board of Inquiry, we do not consider that offsetting is a response that should be subsumed under the terms *remediation* or *mitigation* in the POP in such a way. We agree with the Minister that in developing a planning framework, there is the opportunity to clarify that offsetting is a possible response following minimisation – or mitigation - at the point of impact.

[3-64] A related argument was that the law does not allow the policy approach of a hierarchy, but requires that any proposal should be treated in the round under the *avoid, remedy or mitigate* mantra. We have already dealt with that argument in Part 2 of the decision dealing with Landscape. We find it acceptable and appropriate for the regional plan to state a preference for the way effects on biodiversity should be dealt with, including by instituting a hierarchy.

Should avoidance be the first response?

[3-65] We had understood from the planners' conferencing record that the planners agreed that avoiding significant adverse effects should be pursued before moving to the lower level of remedying or mitigating such effects. There were some questions about this in the course of the hearing. However, avoidance is the first response in the BBOP principles and we accept the reasons given to us by various ecology and planning witnesses for that.

What should the second step of remedying and mitigating provide for?

[3-66] In relation to Policy 12-5(b) and (c), the planners' conferencing record states:

> The Planners for TrustPower/Meridian, Transpower/Powerco, and Federated Farmers agreed that offset mitigation outside the affected area should be an option (not a last resort) for an applicant to propose and a decision-maker to consider, if it achieves a net indigenous biodiversity gain. The planners for MWRC and MoC/WFCG consider that wording that requires the consideration of onsite mitigation before offsite mitigation or offsetting is more appropriate.

[3-67] During the hearing, differences emerged on what onsite mitigation, as opposed to offsets, would involve. The Minister's position was that an applicant should look to mitigate adverse effects at the point where the adverse effect occurs (in BBOP terms, after *minimising*) prior to having the option of *offsetting* outside or beyond that point:

> (ii) Where any minor adverse effects cannot reasonably be avoided, they are remedied or mitigated at the point where the adverse effect occurs.

The ecology and planning witnesses for the Minister gave evidence that offsetting principles should be applied to *all* adverse effects that are *left over* after mitigating at the point of impact.

[3-68] In cross-examination Ms Maseyk said that while it was preferable for mitigation to be at the point of the area affected, it should at least be as close to possible to it, and not beyond the ecological district. Ms Maseyk also considered that remedying or mitigating could involve, for example, fencing and undertaking pest management for another area with ecological values on a farm. She did not see that it need involve *like with like*.

[3-69] Ms Barton responded to the cross-examination of Ms Maseyk by putting forward the following revision:

> (ii) Where any significant adverse effects cannot reasonably be avoided, they are remedied or mitigated within the area of habitat directly affected by the activity or if that is not possible as close as possible to the area affected but not beyond the same ecological district.

[3-70] Mr Park also took a very broad view of remedying or mitigating, although he conceded he was not a planner.

What should the third step of offsetting involve?

[3-71] The Minister considered that offsetting principles should be applied to *all* adverse effects that are *left over* after mitigating at the point of impact. For these *residual* adverse effects, a net biodiversity gain is to be achieved. The Minister submitted that this principle should apply to any exchanges in biodiversity values, even where an applicant proposes to address such adverse effects *within* property boundaries, and even if that is at the *farm scale*.

[3-72] Other parties rejected the requirement for a net gain or even no net loss. Some argued that such a strict approach may not align with a regional council's function under s30(1)(ga) which requires only the maintaining of indigenous biodiversity. TrustPower submitted that a net indigenous biological diversity gain approach is at least a high-end approach to maintaining biological diversity, if not more than that. TrustPower also opposed the approach on the basis that the RMA is not a *no-effects* statute requiring all adverse effects to be fully avoided, remedied or mitigated in all circumstances and that the net indigenous biological diversity gain approach is unnecessarily restrictive. It also submitted that s6(c) of the RMA does

not automatically mean a no loss or net gain approach. There was also a suggestion that offsetting residual adverse effects should be an aspirational goal.

[3-73] Mr Clubb gave evidence that biodiversity offsetting represents an exchange of biodiversity, even where it is like-for-like, and that there are good reasons for offsetting being last in the hierarchy. He said that any exchange of biodiversity, even if it is within quite close proximity, represents a certain loss of biodiversity value for an uncertain gain in biodiversity values elsewhere. If the BBOP principles are not applied to such exchanges then, over time, biodiversity will not be maintained.

[3-74] We had evidence from ecologists that without a net gain, there will be the continued loss of biodiversity. Also that non-compliance with the BBOP principles would result in the *continued nibbling away* of habitats, allowing further fragmentation and greater cumulative loss across the region.

Should there be greater flexibility for the use of offsets?

[3-75] Meridian and TrustPower opposed prescribing what they considered to be a rigid approach to the use of biodiversity offsets such as the proposed avoid, remedy, mitigate, offset hierarchy, requiring every adverse effect to be avoided, remedied, mitigated or offset and establishing policy criteria around what sorts of offsets should be provided in what circumstances. TrustPower submitted that it would use biodiversity offsets as a means of addressing biodiversity effects, but wanted flexibility which it considered to be consistent with the framework and purpose of the RMA.

[3-76] We accept the evidence of the planners, Mr Clubb, and some of the ecologists, that too much flexibility would certainly contribute to the continuing loss of biodiversity. Ms Marr and Ms Barton gave evidence that while the approach with the various steps is prescriptive, there is the opportunity to step-down the policy hierarchy when designing and consenting proposals. Mr Clubb said that the existence of the *mitigation hierarchy* would not unreasonably constrain biodiversity offsetting as a means of achieving good biodiversity outcomes: - the requirement to minimise effects within the area affected is to be followed as far as is practically feasible. While it is clear that all feasible efforts must be undertaken to mitigate

within the site, this does not preclude good biodiversity outcomes from being achieved through an offset where this will be a better approach than impractical or unfeasible on-site mitigation.

[3-77] We accept Mr Clubb's opinion that uncertainty associated with achieving biodiversity gains through offsetting is one reason why it is further down the *mitigation hierarchy* than avoidance and minimisation, which have more certain outcomes for biodiversity. As Mr Clubb said, mitigation and compensation not required to meet the principles of biodiversity offsetting is even less certain to deliver desired biodiversity outcomes.

[3-78] We do not accept TrustPower's proposition that the policy approach is so narrow as to be likely to inhibit or confine innovative approaches which lead to sound and desirable biodiversity outcomes. Nor does it act as a veto to infrastructure proposals of national significance which may have significant adverse effects.

[3-79] In addition, we do not accept the suggestion made by some witnesses that the approach makes for additional complexity. The approach has the benefit of setting down clear steps which a resource consent application, evidence and decision-making have to address in a logical and robust manner. This is likely to result in improved analysis and evaluation of proposals, thereby reducing the risk of further biodiversity loss.

- *Are there problems with the application of biodiversity offsetting?*

[3-80] TrustPower submitted that there are a number of practical difficulties associated with implementing such an approach.

[3-81] The Minister accepted that biodiversity offsetting, and the methodologies surrounding it, are a developing field. However, the Minister's position was that the basic principles and definition of offsetting will not change and are now well established.

[3-82] Mr Clubb said that of particular importance is the explicit calculation of biodiversity losses and gains at matched impact and offset sites. He said there must

be a form of rigour, otherwise it is impossible to demonstrate that gains match or exceed losses.

[3-83] Mr Clubb also gave evidence that the Department of Conservation is currently managing a three-year Biodiversity Offsets Research Programme. This is to be used to develop best practice guidance, consistent with international best practice. The programme is due for completion in mid 2012 and it is hoped best practice guidance will be available in draft form at about the same time.

[3-84] We will later consider the proposal from the Minister to add a provision to Policy 12-5(d), so that any biodiversity offsetting calculation is proportionate to the effects, and will overcome the potential difficulties raised by opponents of the approach.

[3-85] We also note that biodiversity offsetting was recently applied by the Environment Court in the *MainPower NZ Ltd v Hurunui District Council* [2011] NZEnvC 384 – a windfarm case.

- *Should the test be 'reasonably' or 'reasonably practicable'?*

[3-86] The BBOP principles use the term *as far as is practically feasible* as the criterion or point for when decision-making should cascade down to another level on the hierarchy.

[3-87] In her evidence in chief Ms Marr used *reasonably practicable* and proposed the following definition:

> *Reasonably practicable* requires consideration of the nature of the activity, the sensitivity of the receiving environment to adverse effects, possible alternative locations, designs or methods based on the current state of knowledge, the likelihood of successfully achieving avoidance, and financial implications.

[3-88] She said that this was broadly based on the definition of *to the extent practicable* adopted in the *Transmission Gully Plan Change* report (see para 3-62]). Ms Marr said that this wording would capture the concepts of whether alternatives are available, based on current states of knowledge and financial implications, or conversely whether the constraints were such that alternatives were not available.

She said that it would involve more explicit recognition of the provisions in the renewable electricity generation and electricity transmission national policy statements and Chapter 3 (the RPS) of the POP. We note that the wording also contains elements of the definition of the *best practicable option* in the RMA.

[3-89] Ms Marr's approach was rejected by the other planners at their conferencing with a preference for simply using the word *reasonably* and leaving that word undefined. However, Mr Schofield, planning witness for Meridian, subsequently recommended using the phrase *reasonably practicable*.

[3-90] The Minister submitted that the inclusion of a definition of *reasonably practicable*, or explicit recognition of constraints, is not necessary in order to give recognition to the provisions in the energy National Policy Statements and Chapter 3 of the One Plan, but if *reasonably practicable* is to be used, it should be defined.

[3-91] In closing submissions the Minister preferred *reasonably* and so do we. As with *reasonably practicable* farming practices (which we discuss in Part 5) this concept is hard to nail down. The definition proposed by Ms Marr illustrates the subjective nature of what needs to be considered and ultimately weighed. *Reasonably* is an objective test, capable of being applied by decision-makers.

- *Conclusion on hierarchy of responses*

[3-92] We accept the approach of a hierarchy reflecting the BBOP principles. We find that the provisions put forward by the Minister of Conservation, in closing submissions with some amendments, better provide for maintaining indigenous biodiversity.

What should the biodiversity offset policy contain? What should an offset allow?

[3-93] Policy 12-5(d) contains the approach to (criteria for) an offset. The Council version provides that an offset must:

> (i) provide for a net indigenous biological diversity gain within the same habitat type, or where that habitat is an *at-risk habitat*, provide for that gain in a *rare habitat* or *threatened habitat* type, and

(ii) generally be in the same ecologically relevant locality as the affected habitat, and

(iii) not be allowed where inappropriate for the ecosystem or habitat type by reason of its rarity, vulnerability or irreplaceability, and

(iv) have a significant likelihood of being achieved and maintained in the long term and preferably in perpetuity, and

(v) achieve conservation outcomes above and beyond that which would have been achieved if the offset had not taken place.

These place limits on what can be provided and counted (or considered) as a net indigenous biological diversity gain in the assessment of a resource consent. They also provide for a biodiversity offset not to be allowed in certain circumstances. We had evidence that these criteria draw on the BBOP principles.

[3-94] Some parties opposed the requirement in (i) for a net indigenous biological diversity gain, with Mr Schofield seeking its replacement with reference to *maintaining indigenous biodiversity*. For the reasons given earlier we hold there is good reason to retain Policy 12-5(d) in its current form.

[3-95] In closing submissions the Minister proposed two changes which we accept. These are to reword (d) as follows:

(i) provide for a net indigenous biological diversity gain within the same habitat type, or where that habitat is not an area of significant indigenous vegetation or a significant habitat of indigenous fauna, provide for that gain in a rare habitat or threatened habitat type, and

(ii) reasonably demonstrate that a net indigenous biological diversity gain has been achieved using methodology that is appropriate and commensurate to the scale and intensity of the residual adverse effect, and ...

[3-96] The first is to avoid any confusion regarding significant areas and the second should answer some of the concerns about the methodology in requiring it be proportionate to the nature and scale of the residual effect on biodiversity.

[3-97] With the above amendments proposed by the Minister we find the criteria for an offset based on the BBOP principles appropriate.

Should there be regulation at a regional level?

[3-98] Before considering the rule framework in detail we consider the challenge from Federated Farmers about the allocation of responsibilities for managing biodiversity through policy, and more particularly the requirement for regional rules administered by the Regional Council. Mr Gardner for Federated Farmers submitted that leadership by the Regional Council should not involve regulation, but regulation (if any) should be left to territorial authorities.

[3-99] Mr Gardner repeated many of the arguments put forward at the earlier hearing that the legal context supports responsibility for biodiversity at a regulatory level being with the territorial authorities. We did not, and still do not, agree. The RMA makes it clear that a regional plan may adopt a regulatory approach to biodiversity. However, we cover off the points he made for completeness.

[3-100] Mr Gardner submitted that s33 of the RMA provides local authorities with the power to transfer their responsibilities to another public authority, and this had not occurred for biodiversity. That may be so, but it is a function which a regional council may undertake under s30(1)(ga), and no transfer is necessary for the Regional Council to undertake this function.

[3-101] He went on to submit that the practicalities and dynamics of achieving the integrated management of biodiversity are such that any rules relating to biodiversity should appear in district plans and not the regional plan. Federated Farmers' main concern was the way in which existing use rights apply, alleging control under the regional plan amounts to the expropriation of rights granted under the RMA through the district plan. This is on the basis that existing lawful uses that contravene a district plan rule may continue if their effects are the same or similar in character, intensity and scale to those which existed before the rule, but activities that contravene a regional rule must apply for consent within six months. He said this was equally applicable to instruments such as resource consents and certificates of compliance granted by the territorial authorities. Mr Gardner submitted that very clear wording is needed for legislation to be read as expropriating rights without compensation.

[3-102] Ms Lynette Neeson a farmer, Dr Tessa Mills, a policy analyst, and Mr Shane Hartley, a planner, gave evidence for Federated Farmers.

[3-103] Policy 7-2A in the RPS portion of the POP specifically provides that the Regional Council and territorial authorities must not unreasonably restrict the existing use of production land where the effects of such land use on rare, threatened or at risk habitats remain the same or similar in character, intensity and scale.

[3-104] We find that there are sound resource management reasons for the approach of regulating biodiversity through the POP to achieve the objectives of the Plan and the *sustainable management of natural resources*. These include:

- the benefits of a consistent regional approach
- the links between biodiversity and water quantity and quality issues that are the responsibility of the region
- the parlous state of indigenous biodiversity in the region and the immediate need for regulation.

Discretionary v non-complying activity status

[3-105] The Council approach (supported by others) is that *discretionary* activity status, supported by strong policy, is sufficient to achieve the objectives of the POP and Part 2 of the RMA.

[3-106] The position of the Minister and Fish and Game is that activities in *rare* and *threatened* habitats should be *non-complying* and not *discretionary*. The Minister and Fish and Game propose the following to address issues raised by the parties:

- Bundling – a possible exemption for activities requiring consent as a result of indigenous biodiversity rules (a technical issue).
- Recognition of infrastructure in consent consideration matters (covered separately under the *exemption* heading).

- *A bundling exemption*

[3-107] The energy companies raised concerns about the legal principle of bundling of consent status for infrastructure proposals, based on the *non-complying* status for

indigenous biodiversity rules. They regarded it as comprising a major hurdle for the consenting of worthwhile energy projects.

[3-108] The Council had initially proposed (but later moved away from) the following as a way of getting around the bundling issue:

> Where there is a proposal involving electricity generation or electricity transmission and the proposal involves, as a component of it, an activity that triggers a non-complying classification because of its effect on rare habitats or threatened habitats then [that activity will be assessed separately and] the classification of the other elements of the proposal and its constituent activities must not take on the non-complying classification by virtue of the bundling principle.

[3-109] The primary position of the Minister was that there is no need for a non-bundling policy or rule, as the case law on bundling is appropriate. The Minister considered that it is not the case that components of Policy 12-5 would get *picked-off* for separate consideration and the Policy must be read as a whole.

[3-110] As a secondary position, the Minister was prepared to delete the words in brackets in para [3-108] or alternatively, to add to the words after Policy 11A-7 Sites with multiple activities, and activities covering multiple sites:

> There may be circumstances where individual activities are considered at their given classification rather than the most stringent activity classification. Such circumstances will include activities associated with electricity generation or electricity transmission where a more stringent activity classification would otherwise apply to elements of the proposal by virtue of a component activity that triggers non-complying classification because of its effect on rare habitats or threatened habitats.

[3-111] The other parties questioned whether any exemption provisions (even a Rule) would work, raising doubts about the legality of such an approach. We find that there is no justification for including such an exemption from the bundling principle. We conclude that there is a discretion for the exercise of the bundling principle in law (as is already recognised in Policy 11A-7). That is sufficient.

- *The gateway test of 'not contrary to' objectives and policies?*

[3-112] Clearly the *effects* gateway test under s104D is not the target, given the consent policy applies to *any more than minor adverse effects.*

[3-113] The Council prefers *discretionary* activity status because:

- The same, if not better, results can be achieved through *discretionary* activity status.
- The policy framework is strong and actively discourages activities in and effects on *rare* and *threatened* habitats.
- Practical application and workability, tested in practice under POP, resulting in workable outcomes for land owners and protection of important areas of indigenous biodiversity. The biodiversity provisions are a trigger for an on-site discussion with landowners on their activity, resulting in elective avoidance of Schedule E listed habitat. Biodiversity can also be discussed alongside water quality provisions and rules regarding land to determine the best outcome.
- The history and nature of *non-complying* activity status. A historical argument as to the origin, roots and changes in the nature of what was a specified departure under the Town and Country Planning Act.
- A more philosophical approach, based on there being few *non-complying* activities in the Plan, with *discretionary* activity status generally the default category.
- There is a potential for technical knock-out through the gateway test rather than a focus on achieving a sound environmental outcome.
- *Discretionary* activity status does not result in trade offs that automatically rule out *rare* and *threatened* habitats to avoid *non-complying* status when a better biodiversity outcome may be able to be achieved involving activities in these habitats.

[3-114] The energy companies also added:

- Infrastructure, such as power transmission and reticulation and access to infrastructure, cannot avoid *rare* and *threatened* habitats.

- There is the potential for a worse result, with *at risk* habitats opted for rather than *rare* and *threatened* habitats, when the effects might be greater.
- The option selection and consent process is made more complex and costly.
- The flexibility of *discretionary* activity status is particularly needed to choose paths or routes for infrastructure.
- The policy framework is not suitable for an evaluation of whether a proposal is contrary to objectives and policies.
- It is difficult to find out whether a *rare* and *threatened* habitat and therefore *non-complying* activity status is involved.
- An application for a *discretionary* activity needs to be just as robust and a consent authority has to undertake a robust assessment, the objectives and policies provide clear direction to decision makers so issues will not be missed and there is greater certainty for applicants.

[3-115] We agree with the Minister and Fish and Game that *non-complying* activity status is the better approach. Our reasons are:

- The evidence of Ms Maseyk, Ms Hawcroft and Dr Gerbeaux informed us that there are few activities affecting *rare* and *threatened* habitats which would have minor adverse effects.
- *Non-complying* status sends a strong signal.
- If there is no s104D gateway, the consent authority need only have regard to the biodiversity policy framework, among other matters, including Part 2. Under s104(1) the decision-maker must give genuine attention and thought to any relevant provisions of a plan, but has discretion to decide there are countervailing considerations outweighing the strict application of even a strongly expressed policy. The greater discretion afforded to a decision-maker under a *discretionary* activity rule is inadequate to ensure biodiversity is maintained in the region. *Non-complying* activity status results in a more focussed examination of the biodiversity objectives and policies: -these are not just one of a number of plan provisions to have regard to.
- Section 6(c) is not a veto, but it has more weight if it is a s6(c) type gateway, and not only one of the matters to have regard to.

- The need for some caution comes with the need to be satisfied that the proposal is not contrary to the objectives and policies.
- Other similar uses in the Plan involving resources at their limit (e.g. water) have *non-complying* activity status. Water is similar in that it involves a consent applicant obtaining information from the Council on the resource e.g. volumes already allocated.
- It would be clear to a decision-maker whether or not a proposal was contrary to the direction set by the provisions. A proposal would only meet the objectives and policies if it can demonstrate that it is designed to take reasonable measures to, first, avoid more than minor adverse effects, and, second, take reasonable measures to remedy or mitigate these effects and finally offset residual effects.
- *Non-complying* status need not militate against the process of working with landowners.

[3-116] In conclusion, we are not assured that a better, or even a similar, biodiversity result could potentially be achieved through considering proposals in the round through a *discretionary* activity status. Even though Part 2 provisions infuse the decision-making process under s104(1) they do not provide the same level of certainty that biodiversity will be maintained. While the policy is strong, there is the opportunity for applicants to step-down or work through the hierarchy and pass the gateway test for objectives and policies even where it is not possible to avoid all rare and threatened habitats. We therefore do not accept there is a high risk of technical knock-out arguments militating against sound proposals.

Should there be an exemption for certain activities?

[3-117] If *non-complying* activity status was to be decided upon, Meridian, TrustPower, Transpower and Powerco sought an exemption for renewable electricity generation and transmission activities within *rare* and *threatened* habitats as *discretionary* activities on the basis of:

- their strategic importance and national benefits
- the national policy statements applicable to these activities
- particular problems with the bundling approach for these projects, which may extend across property and regional boundaries

- whether *non-complying* activity status gives effect to the RPS.

These considerations were advanced on the basis of not being relevant to other less constrained activities such as farming.

[3-118] A primary reason advanced for seeking an exemption was a concern about the ability of renewable energy and reticulation projects under the POP to pass the gateway tests in s104D RMA. A particular problem was perceived as infrastructure proposals being contrary to the specific indigenous biodiversity objectives and policies of the regional plan where (as was highly likely) these involved significant adverse effects on *significant habitats.* A related concern was that Chapter 3 in the RPS dealing with infrastructure and energy was not relevant to the gateway test, as the objectives and policies were not in, or referred to, or the matters contained in them, reflected in the regional plan.

[3-119] Ms Marr did not accept that renewable electricity and transmission projects should be given a separate (or *discretionary*) activity status as opposed to other activities. She considered that it would be preferable to alter Policy 12-5 to address the various concerns and to include direct consideration of the benefits of transmission or renewable energy generation rather than to lower the activity status across the board.

[3-120] In the Regional Plan part (Part 2) of the POP, Policy 12-5 on consent decision-making for activities in *rare habitats, threatened habitats* and *at-risk habitats* contains as its first limb the requirement (among other things) to have regard to (for all activities):

> (i) the Regional Policy Statement, particularly Objective 7-1 and Policy 7-2A

Ms Marr proposed the addition of the following in a new subclause (v), which was supported by Transpower and Powerco: ...

> for electricity transmission and renewable energy generation activities, any national, regional or local benefits arising from the proposed activity.

In that circumstance she still considered that assessing the Policy against the *not contrary to* test remains a useful exercise.

[3-121] Mr Le Marquand, planner for Transpower, Mr Schofield, Mr Hartley and Ms Barton considered that the amendments proposed by the Minister and Fish and Game Council indicated a willingness to attempt to recognise and deal with issues with *non-complying* activity status for energy and electricity transmission. However, all considered it more efficient and effective to retain the certainty of the policy intent while requiring *discretionary* activity consent.

[3-122] In closing submissions the Minister proposed splitting Policy 12-5A into two parts - (1) and (2) - in order to enable an elevated consideration for electricity transmission and renewable energy activities in a new sub-clause 2, and provided a rewording. The proposed addition is:

> (2) For electricity transmission and renewable energy generation activities, providing for any national, regional or local benefits arising from the proposed activity.

That would be different from Ms Marr's earlier proposition to include a specific reference to having regard to the benefits of electricity transmission and renewable energy generation activities.

[3-123] We accept the proposal advanced by the Minister, but not the exemption to *non-complying* activity status sought by the energy companies. We find the compass of the new Policy 12.5A(2) will ensure the benefits of electricity transmission and renewable energy generation activities are factored into the decision-making without cutting across the hierarchy of consideration and treatment of adverse effects on significant indigenous vegetation and significant habitats of indigenous fauna.

[3-124] Transpower and Powerco still proposed the addition of the following criterion:

> (vi) when assessing offsets, the appropriateness of establishing infrastructure and other physical resources of national or regional significance.

This was advanced on the basis of its inclusion in the DV POP. This is limited to offsets rather than the hierarchy of consideration of adverse effects and uses the word *appropriateness* which rather begs the question. Along with our concerns about the wording, we do not accept there is a need for such a provision.

Giving Effect to the National Policy Statements

[3-125] Section 62(3) RMA requires a regional plan to give effect to a National Policy Statement (NPS). There are three relevant National Policy Statements.

[3-126] We considered the NPS Renewable Energy Generation 2011 (NPS REG) in Part 2 – Landscape. In that decision we commented that the NPS recognises that there may be adverse environmental effects from generation activities that cannot be avoided, remedied or mitigated, and that the possibility of offsetting is specifically raised. But we also said that there is no affirmation that this sort of infrastructure occupies so special a place in the order of things that it may be established no matter what its effects may be and that the regime that applies to generation infrastructure is the same regime that applies to other uses and developments. That must surely also be the case for the activity status for renewable energy generation.

[3-127]Turning to the NPS Electricity Transmission 2008 (NPS ET), the objective is to recognise the national significance of the electricity transmission network by facilitating the operation, maintenance and upgrade of existing and the establishment of new transmission resources *while* managing the adverse environmental effects of the network. While there are many policies directed at ensuring that the benefits, and practical constraints of, operating, maintaining, developing and upgrading the electricity reticulation network are factored into decision-making, there are also policies on managing the environmental effects of transmission. These include:

> Policy 3
>
> When considering measures to avoid, remedy or mitigate adverse environmental effects of transmission activities, decision-makers must consider the constraints imposed on achieving those measures by the technical and operational requirements of the network.
>
> Policy 4
>
> When considering the environmental effects of new transmission infrastructure or major upgrades of existing transmission infrastructure, decision-makers must have regard to the extent to which any adverse effects have been avoided, remedied or mitigated by the route, site and method selection.

As with the NPSREG, we do not find that the NPSET gives electricity transmission activities so special a place in the order of things that it should override the regime

that applies to indigenous biodiversity. In any case we were not persuaded that this regime would present insurmountable obstacles to continuing to operate and expand the electricity transmission network to meet the needs of present and future generations.

[3-128] There is also the *New Zealand Coastal Policy Statement 2010* to be given effect to. NZCPS Policy 11 is to protect indigenous biological diversity in the coastal environment and contains a strong policy direction to avoid all adverse effects of activities on the matters referred to in part (a). That includes indigenous ecosystems and vegetation types that are threatened in the coastal environment, or are naturally rare.

[3-129] In our view there is nothing in the NPS documents that means *non-complying* activity status would be inappropriate for renewable electricity generation and electricity transmission under the policy and rule framework proposed for the regional plan.

Outcome on discretionary v non-complying

[3-130] We conclude that there is no justification for an exemption from the activity status for renewable electricity generation and electricity transmission under the policy framework in the Regional Plan portion of POP. All activities should be *non-complying*.

[3-131] In terms of effectiveness we have already covered the reasons why *non-complying* activity status would be more effective in maintaining indigenous biodiversity. These reasons equally apply to electricity generation and reticulation activities.

[3-132] A lot of emphasis was put on the difficulties infrastructure proposals might face, with functional, operational or other constraints and in avoiding significant adverse effects on rare and threatened habitats, such as may be the case with route selection for transmission lines. We consider the evidence of planning witnesses that these difficulties would translate into problems with meeting the objectives and policies to be overstated. There is a cascade in the policy with a series of steps to be

followed to evaluate significant adverse effects on significant indigenous biodiversity. There are appropriate responses which allow such constraints to be considered. The hierarchy of consideration and treatment includes as a last resort the ability to offset residual adverse effects.

[3-133] We do not accept that it is difficult to find out whether a *rare* and *threatened* habitat is involved, particularly as witnesses explained the extensive information gathering and comprehensive environmental assessment that would be undertaken for example for route selection for new major reticulation.

[3-134] We recognise that renewable energy and electricity transmission projects may involve large areas or corridors of land and multiple activities and that this *may* involve the bundling of these activities together for assessment. However, a decision-maker has a discretion as to whether to bundle such activities.

[3-135] We do not accept that *non-complying* activity status would be an impediment to the assessment of projects that would otherwise merit full consideration under s104 and Part 2 of the RMA. We do not accept that there is a high risk of technical knock-out arguments militating against sound proposals.

[3-136] For those reasons, we find that the proposed policy and rule framework would give effect to the National Policy Statements and the RPS.

[3-137] Section 7(j) of the RMA requires that all persons exercising functions and powers under the RMA, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to the benefits to be derived from the use and development of renewable energy. Those benefits include, in economic terms, enhancing the security of supply and strengthening the diversity of generation sources as well as environmental benefits. The revised policy now proposed by the Minister appropriately allows the consideration of the benefits of such infrastructure projects under the policy and rule regime.

[3-138] After considering the many matters in Part 2 (besides s6(c)), the intrinsic values of ecosystems in s7(d), maintenance and enhancement of the quality of the

environment in s7(f) and the finite characteristics of natural resources in s7(g) that relate to indigenous biodiversity, there is also the need to safeguard the life supporting capacity of ecosystems as part of the *sustainable management of natural and physical resources.* We find that that an exemption for electricity generation and transmission as a discretionary activity would not promote *sustainable management.*

Summary of conclusions: Part 3

A. The ecologist witnesses should confer and refine the description of habitats and the Council should then report to the Court. Para [3-16].

B. Policy 7-2A should be redrafted in accordance with Paragraphs [3-27] to [3-30].

C. Rare and threatened habitats should, by definition, be significant in terms of s6. Paragraph [3-39].

D. Policy 12-6(a)(i) on representativeness should have *functioning ecosystem processes* as an alternative criterion and not a prerequisite. Paragraphs [3-41] and [3-45].

E. *Condition* should not be a criterion for significance. Paragraphs [3-44] and [3-45].

F. BBOP principles are a sound basis for policy. Paragraphs [3-58] to [3-60].

G. Offsetting is better not regarded as remediation or mitigation and comes last in the hierarchy. Paragraphs [3-63] to [3-64].

H. The term *reasonably* throughout Policy 12-5 is preferable to *reasonably practicable.* Paragraph [3-91].

I. Provisions should be added to Policy 12-5(d) to better describe and to qualify the methodology for evaluating net indigenous biodiversity gain. Paras [3-95] to [3-97].

J. There are sound resource management reasons for regulating biodiversity through the POP. Paragraph [3-104].

K. There is no justification for the Plan attempting an exemption to the bundling principle. Paragraph [3-111].

L. Non-complying activity status is the correct approach. Paragraph [3-115] and [3-116].

M. There is no justification for exempting renewable energy and electricity transmission from non-complying activity status. Paragraph [3-130] and [3-138].

N. The POP regional plan provisions give effect to NP Statements and the RPS Paragraph [3-136].

Result and Directions

[3-139] We generally approve the amendments proposed in Appendix A to the Closing Submissions for the Minister - (with some limited exceptions). We attach the relevant parts of that Appendix, noting that we have made no decisions on the optional definitions (*offset* and *minimise*) put forward by the Minister. We direct the Council to prepare the necessary amendments and consequential amendments to the POP to give effect to this part of the decision after consulting, as appropriate, with the other affected parties.

Appendix A
(As presented by the Minister of Conservation)

Policy 7-2A: Management of activities affecting indigenous biological diversity

For the purpose of managing indigenous biological diversity in the Region:

(a) Habitats determined to be rare habitats and threatened habitats under Schedule E must be recognised as areas of significant indigenous vegetation or significant habitats of indigenous fauna.
(b) At-risk habitats that are assessed to be significant under Policy 12-6 must be recognised as areas of significant indigenous vegetation and significant habitats of indigenous fauna.
(c) The Regional Council must protect rare habitats, threatened habitats, and at-risk habitats identified in (a) and (b), and maintain and enhance other at-risk habitats by regulating the activities through its regional plan and through decisions on resource consents.
(d) Potential adverse effects on any rare habitat, threatened habitat or at risk habitat located within or adjacent to an area of forestry must be minimised.
(e) When regulating the activities described in (c) and (d), the Regional Council must, and when exercising functions and powers described in Policy 7-1, Territorial Authorities must:
    (i) allow activities undertaken for the purpose of pest plant and pest animal control or habitat maintenance or enhancement,
    (ii) consider indigenous biological diversity offsets in appropriate circumstances as defined in Policy 12-5, which may include the establishment of infrastructure and other physical resources of regional or national importance as identified in Policy 3-1,
    (iii) allow the maintenance , operation and upgrade of existing structures, including infrastructure and other physical resources of regional or national importance as identified in Policy 3-1, and
    (iv) not restrict the existing use of production land where the effects of such land use on rare habitat, threatened habitat or at-risk habitat remain the same or similar in character, intensity and scale.

Objective 12-2: Regulation of activities affecting indigenous biological diversity

The regulation of resource use activities to protect areas of significant indigenous vegetation and significant habitats of indigenous fauna or to maintain indigenous biological diversity, including enhancement where appropriate.

Policy 12-5A: Regional rules for activities affecting indigenous biological diversity

The Regional Council must require resource consents to be obtained for vegetation clearance, land disturbance, cultivation, bores, discharges of contaminants into or onto land or water, taking, use, damming or diversion of water and activities in the beds of rivers or lakes within rare habitats, threatened habitats and at-risk habitats, and for forestry that does not minimise potential adverse effects on those habitats, through regional rules in accordance with Objectives 11A-1, 11A-2 and 12-2 and Policies 11A-1 to 11A-8.

Policy 12-5: Consent decision-making for activities in rare habitats, threatened habitats and at-risk habitats

(a) For activities regulated under Rule 12-6 and Rule 12-7, the Regional Council must make decisions on consent applications and set consent conditions on a case-by-case basis,

(1) For all activities, having regard to:

(i) the Regional Policy Statement, particularly Objective 7-1 and Policy 7-2A,

(ii) a rare habitat or threatened habitat is an area of significant indigenous vegetation or a significant habitat of indigenous fauna,

(iii) the significance of the area of habitat in terms of its representativeness, rarity and distinctiveness, and ecological context, as assessed under Policy 12-6,

(iv) the potential adverse effects of the proposed activity on significance, and

(v) for activities regulated under ss13, 14 and 15 RMA, the matters set out in Policy 12-1(h) and relevant objectives and policies in Chapters 6, 13, 15 and 16.

(2) For electricity transmission and renewable energy generation activities, providing for any national, regional or local benefits arising from the proposed activity.

(b) Consent must generally not be granted for resource use activities in a rare habitat, threatened habitat, or at-risk habitat assessed to be an area of significant indigenous vegetation or a significant habitat of indigenous fauna under Policy 12-6, unless:

(i) Any more than minor adverse effects on that habitat's representativeness, rarity and distinctiveness, or ecological context assessed under Policy 12-6 are avoided.

(ii) Where any more than minor adverse effects cannot reasonably be avoided, they are remedied or mitigated at the point where the adverse effect occurs.

(iii) Where any more than minor adverse effects cannot reasonably be avoided, remedied or mitigated in accordance with (b)(i) and (ii), they are offset to result in a net indigenous biological diversity gain.

(c) Consent may be granted for resource use activities in an at-risk habitat assessed not to be an area of significant indigenous vegetation or a significant habitat of indigenous fauna under Policy 12-6 when:
  (i) There will be no significant adverse effects on that habitat's representativeness, rarity and distinctiveness, or ecological context as assessed in accordance with Policy 12-6, or
  (ii) Any significant adverse effects are avoided.
  (iii) Where any significant adverse effects cannot reasonably be avoided, they are remedied or mitigated at the point where the adverse effect occurs.
  (iv) Where significant adverse effects cannot reasonably be avoided, remedied or mitigated in accordance with (c)(ii) and (iii), they are offset, to result in a net indigenous biological diversity gain.

(d) An offset assessed in accordance with (b)(iii) or (c)(iv), must:
  (i) provide for a net indigenous biological diversity gain within the same habitat type, or where that habitat is not an area of significant indigenous vegetation or a significant habitat of indigenous fauna provide for that gain in a rare habitat or threatened habitat type, and
  (ii) reasonably demonstrate that a net indigenous biological diversity gain has been achieved using methodology that is appropriate and commensurate to the scale and intensity of the residual adverse effect,
  (iii) generally be in the same ecologically relevant locality as the affected habitat, and
  (v) not be allowed where inappropriate for the ecosystem or habitat type by reason of its rarity, vulnerability or irreplaceability, and
  (vi) have a significant likelihood of being achieved and maintained in the long term and preferably in perpetuity, and
  (vii) achieve conservation outcomes above and beyond that which would have been achieved if the offset had not taken place.

Optional definitions proposed by the Minister of Conservation:

For the purposes of this Policy:
Offset means a measurable conservation action designed to achieve no net loss and preferably a net gain of biodiversity on the ground once measures to avoid, minimise and remedy adverse effects have been implemented.

Minimise means to reduce the duration, intensity and/or extent of adverse effects.

Hearing: at Palmerston North: 17 to 19 April 2012

DECISION: PART 4 – SUSTAINABLE LAND USE/ACCELERATED EROSION

Counsel and parties participating in this topic:

P R Gardner for Federated Farmers of New Zealand
H A Atkins for Horticulture NZ and for Fonterra Co-operative Group Ltd
C J Sinnott for New Zealand Transport Agency
J A Burns for Wellington Fish and Game Council and the Minister of Conservation
N Jessen and J W Maassen for the Manawatu-Wanganui Regional Council

PART 4 – Sustainable Land Use/Accelerated Erosion **Page**

Introduction

[4-1] The issue of sustainable land management, including hill country land use, was a key focus of the POP. The wider dimensions of the negative effects on water quality were another important element, such as erosion accelerating the transport of Phosphorus (P) into waterways, contributing to the problems considered in Part 5 of the Decision.

[4-2] The DV-POP made some significant changes to the NV-POP, and further changes were made as a consequence of mediation and expert planning conferencing arising from appeals. While there were still differences on the policies, the focus of the hearing was largely about the rules, with Horticulture NZ, Federated Farmers and Fish and Game still having concerns about several of the provisions.

[4-3] The issues requiring resolution were:

- Whether the objectives and policies of Chapter 5 (the RPS), with its cross-references to Chapter 6 reflected the integrated management of land and water.
- Some policies in Chapter 12 - the Regional Plan.
- What should the threshold size be for small-scale land disturbance as a *permitted* activity in the rules?
- Riparian setbacks – what should their width be and how should land use activities associated with cultivation and ancillary erosion and sediment control land uses, as well as other activities within the setbacks, be treated in the rules?
- Should cultivation and ancillary erosion and sediment control land uses in a Hill Country Erosion Management Area (HCEMA) require a consent?
- What should the *permitted* activity performance conditions be for cultivation for land use works to minimise sediment runoff to water?
- Should cultivation and ancillary erosion control and sediment land uses be required to comply with a visual quality condition or standard to be a *permitted* activity?
- Should the default activity status for the rules requiring resource consents where there is non-compliance with the conditions and standards be *restricted discretionary* or *discretionary*?

- Could the reserved-discretionary matters in the *controlled* and *restricted discretionary* rules be redrafted to better achieve effectiveness and efficiency?

The Regional Policy Statement

[4-4] Chapter 5 (the Land chapter) of the RPS part of the POP, as now proposed by the Council,[1] contains the following objectives:

> Objective 5-1: Managing accelerated erosion
>
> By the year 2017, 50% of farms within hill country land subject to an elevated risk of accelerated erosion will have in place, or be in the process of putting in place, farm-wide sustainable land management practices to minimise accelerated erosion and to provide for the water management values set out in Schedule AB by reducing sediment loads entering waterways as a result of accelerated erosion.
>
> Objective 5-2: Regulating potential causes of accelerated erosion
>
> Land is used in a manner that ensures:
>
> (a) accelerated erosion and increased sedimentation in water bodies (with resultant adverse effects on people, buildings and infrastructure) caused by vegetation clearance, land disturbance, forestry or cultivation are avoided as far as reasonably practicable, or otherwise remedied or mitigated, and
>
> (b) sediment loads entering waterways as a result of accelerated erosion are reduced to the extent required to be consistent with the water management objectives and policies for water quality set out in Chapter 6 of this Plan.

[4-5] Horticulture NZ and Federated Farmers sought to soften and replace the words *to provide for* with *to advance the achievement of the* water management values set out in Schedule AB in Objective 5-1. Those parties submitted that this approach would align the objective with what was proposed by some parties for water quality – an approach we reject in Part 5 of the Decision and we also do so here for the same reasons: - ultimately, that it would not promote ... *the sustainable management of natural and physical resources* under the RMA.

[1] Exhibit C1 One Plan Sustainable Land Use and Accelerated Erosion Hearing

[4-6] The relevant supporting policies proposed by the Council are[2]:

Policy 5-1 Encouraging and supporting sustainable land management

The Regional Council will encourage and support the adoption of sustainable land management practices by:

(a) working with relevant owners and occupiers of farms within hill country land subject to an elevated risk of accelerated erosion to prepare voluntary management plans under the Council's Sustainable Land Use Initiative (SLUI) or Whanganui Catchment Strategy, which identify sustainable land management practices for each farm and work programmes for implementing any agreed changes.

(b) monitoring the implementation of voluntary management plans and sustainable land management practices within hill country land subject to an elevated risk of accelerated erosion and reporting this information on a two-yearly basis, and reviewing the effectiveness of the sustainable land management practices, and

(c) responding to requests from owners or occupiers of land that is not within hill country land subject to an elevated risk of accelerated erosion to prepare a management plan, provided this does not impede the achievement of (a).

Policy 5-2A Regulation of land use activities

(a) In order to achieve Objective 5-2, the Regional Council must regulate vegetation clearance, land disturbance, forestry and cultivation through rules in this Plan and decisions on resource consents, **so as to minimise any increase in the risk of erosion, minimise discharges of sediment to water, and maintain the benefits of riparian vegetation for water bodies.**

(b) ...

(c) The Regional Council will generally allow vegetation clearance, small-scale land disturbance, forestry and cultivation to be undertaken without the need for a resource consent if conditions are met. Vegetation clearance and land disturbance require a resource consent if they are undertaken in Hill Country Erosion Management Areas or in coastal

[2] Exhibit C 1

foredune areas. Any other large-scale land disturbance activities will also require resource consent.

[4-7] Horticulture NZ and Federated Farmers did not support the addition of the bolded words in Policy 5-2A(a). We consider that those words give guidance that would otherwise be lacking on what is required of regulation and the management of activities to achieve the objective. The evidence of Mr Phillip Percy, a planner giving evidence for Fish and Game, and Mr Phillip Hindrup, a planner giving evidence for the Council supported this.

[4-8] In addition there is the following policy:

Policy 5-5: Supporting codes of practice, standards, guidelines, environmental management plans and providing information on best management practices

The Regional Council must ...

(a) support the development of codes of practice, standards, guidelines and other sector-based initiatives targeted at achieving sustainable land use,

(b) recognise appropriately developed and administered codes of practice, standards, guidelines or environmental management plans targeted at achieving sustainable land use, and incorporate them within the regulatory framework where applicable, and

(c) make information describing best management practices for reducing erosion and maintaining water quality and soil health available to all available landowners, occupiers, asset owners, consultants, developers and contractors.

[4-9] The Council also proposed to add the words *accelerated erosion* to the *Anticipated Environmental Result* in 5.6:

> By 2017, there will be a net reduction in the adverse effects on water quality, people, buildings and infrastructure caused by accelerated erosion, and hill country and coastal foredune wind erosion in the Region.

Without these words the provision does not make sense and we agree that this is a minor change that can and should be made.

[4-10] Horticulture NZ and Federated Farmers did not support the links to Policies 6-1, 6-2, 6-3, 6-4 and 6-7 and the indicators of:

- Level of achievement of Schedule D numerics for deposited sediment, visual clarity and Phosphorus
- Changes to long-term mean sediment discharges of rivers to sea
- % of farms within the SLUI priority catchments that have Whole Farm Business Plans (WFBPs) in place and are being implemented.

[4-11] While Horticulture NZ questioned whether there is *scope* to add matters to the Anticipated Environmental Results, we conclude that these are consequential changes (requiring some amendment) in the light of the following points:

- There is undeniably a link between erosion and sediment and water quality, a point we do not understand any of the parties to take issue with. The integrated management of land and water resources would seem to justify the cross-referencing of water quality policies. Indeed Objective 5-2 refers to Chapter 6 of the RPS.
- Part 5 of this decision on the issue of the approach to and naming of Schedule D limits.
- Given the emphasis in the POP on the voluntary adoption and implementation of WFBPs as a method of reducing the risk of erosion and sedimentation, it would seem reasonable to have the percentage of such farms in the SLUI priority catchments as a measure (accepting that by itself it would not confirm the effectiveness of these Plans which is a reason for other additional indicators).
- The Anticipated Environmental Result indicators reflect the approach in the objectives and policies. The implementation of voluntary management plans is closely aligned to measuring progress in the achievement of Objective 5-1 and Policy 5-1 in particular, as reducing sediment loads entering waterways (and flowing into the sea) is aligned to Objective 5-2 and Policy 5-2A.

[4-12] Horticulture NZ and Federated Farmers also opposed some wording in the *Explanations and Principal Reasons* in 5.7, seeking that vegetation clearance, land disturbance and cultivation within or close to waterbodies be softened to activities with *increased potential to cause discharges of sediment to water*. We prefer the expression *high risk of causing discharges of sediment to water* as a better reflection of Policy 5-2A and the evidence.

The Policy Framework in the Regional Plan

[4-13] The regional plan part of the POP must give effect to the RPS – see s67(3)(c). Chapter 12 of POP (Land Use Activities ...) contains one objective:

> Objective 12-1: Accelerated erosion – regulation of vegetation clearance, land disturbance, forestry and cultivation.
>
> The regulation of vegetation clearance, land disturbance, forestry and cultivation in a manner that ensures:
>
> (a) accelerated erosion and any associated damage to people, buildings and infrastructure and other physical resources of regional or national importance are avoided as far as reasonably practicable, or otherwise remedied or mitigated.

[4-14] It contains two policies that specify how activities will be regulated and provide guidance on consent decision-making respectively.

[4-15] The first policy at issue (with the difference in parties' positions noted) was:

> Policy 12-1A Regional rules for vegetation clearance, land disturbance, forestry and cultivation:
>
> The Regional Council must:
>
> (a) ... (relevant to biodiversity)
>
> (b) manage the effects of vegetation clearance, land disturbance and cultivation by requiring resource consents for those activities:
>
> (i) adjacent to some water bodies,
>
> (ii) involving the removal of some woody vegetation in Hill Country Erosion Management Areas,
>
> (iii) involving land disturbance [Fish and Game sought to add *or cultivation*] in Hill Country Erosion Management Areas,
>
> (iv) involving large-scale land disturbance, or
>
> (v) within a coastal foredune.

It was clear from the evidence that cultivation in HCEMAs has similar effects to land disturbance and it should be added.

[4-16] The second policy at issue (with the difference noted) was:

> Policy 12-1 Consent decision-making for vegetation clearance, land disturbance, forestry and cultivation

For vegetation clearance, land disturbance, forestry or cultivation and ancillary discharges to and diversions of surface water that requires resource consent under Rule 12-4 or Rule 12-5, the Regional Council must make decisions on consent applications and set conditions on a case-by-case basis, having regard to:

(aa)the Regional Policy Statement, particularly Objective 5-2 and Policies 5-2A and 5-5.

(fa) managing the effects of land disturbance, including large-scale earthworks, by requiring Erosion and Sediment Control Plans or other appropriate plans to be prepared.

(fb) managing the effects of forestry by requiring Erosion and Sediment Control Plans or other appropriate plans to be prepared.

(fc) managing the effects of cultivation on water bodies through the use of sediment run-off control methods and setbacks from water bodies.

Horticulture NZ and Federated Far

managing the effects of cultivation on water bodies through the use of appropriate sediment run-off control methods which may include setbacks from water bodies.

[4-17] We do not accept the version of Policy 12-1(fc) offered by Horticulture NZ and supported by Federated Farmers. The evidence made it clear that sediment run-off control methods and setbacks from waterbodies are required to manage the effects of cultivation and should be considered as part of the consent process; and the addition of the word *appropriate* adds nothing.

[4-18] There may need to be consequential changes to Policy 12-1 to correctly cross-reference rules.

The Rule Framework

[4-19] Mr Jessen, for the Council, submitted that to give effect to the RPS and the Regional Plan the rule framework must:

(a) Implement Policy 5–2A(c) by providing a permitted rule for land disturbance, vegetation clearance, cultivation and forestry;

(b) Implement Policy 5-2A(c) by providing a stronger activity classification (requiring a resource consent) for activities that take place on Hill Country Erosion Management Areas (HCEMAs), or adjacent to *some water bodies;*

(c) Implement Policy 5-2A(a) by tailoring performance standards, conditions, or discretions in the rule framework so as to avoid or otherwise remedy or mitigate the effects of accelerated erosion;

(d) Implement Policy 5-5 by incorporating codes of practice, standards, guidelines or environmental management plans into the regulatory framework where applicable.

[4-20] We pause to note that in the ensuing paragraphs we discuss the issue of riparian margins. In the source documents these are variously described, seemingly at random, as riparian *margins*, riparian *setbacks* and riparian *buffers*. We shall use the term *setback*, or *riparian setback*, but we take all those terms as being synonymous.

[4-21] Mr Jessen submitted that the Council was generally supportive of the approach taken by the Hearing Panel and explained that changes had been agreed to the policy framework, and also to the rule framework, where the Council had agreed to meet concerns raised by some Appellants. The changes are as follows:

(a) regulatory control over small scale land disturbances (under 2,500m^2) through a *permitted* activity rule;

(b) the lowering of the slope criteria for identifying HCEMAs from 28 degrees to the NV-POP level of 20 degrees;

(c) larger setback distances from high quality or sensitive waterways;

(d) riparian setbacks are to apply to ephemeral streams with an active bed width greater than 1m;

(e) all the *permitted* activity rules require a performance standard condition to regulate ancillary discharges allowed by DV POP, requiring compliance with Schedule D numerics for visual clarity as a minimum water quality standard;

[4-22] Some of these changes are opposed by other parties. For completeness we note that Mr Hindrup also proposed that the default activity status for land uses that could not meet the conditions of a *permitted* activity or *controlled* activity rule should be a *restricted discretionary* activity and not a *discretionary* activity, a change opposed by Fish and Game.

Small-scale Land Disturbance

[4-23] Again for completeness, we note and agree with the addition of a total area up to 2500m^2 per property per 12-month period to rule 12-1A. We had no evidence that any higher figure would achieve the objectives and policies of the Plan, despite submissions by Federated Farmers questioning it.

Regulation of Activities in Riparian Setbacks

[4-24] In the NV POP certain activities in the riparian setbacks of specified water bodies were not a *permitted, controlled* or *restricted discretionary* activity but were regulated by Rule 12-5 as a *discretionary* activity:

(b) For rivers, lakes and natural wetlands:

(i) In areas where the land slope is between 0 degrees and 15 degrees, within 10m of the bed of a river, lake or wetland.

(ii) In areas where the land slope is greater than 15 degrees, within the strip of land bordered by the bed of a river, lake or wetland, and a setback distance (being not less than 10m) at which the slope reduces to 15 degrees or 100m whichever is the lesser. (sic)

(c) For artificial water bodies, within 5m of the wetted perimeter of the water bodies.

[4-25] The DV POP moved away from this approach to a uniform riparian setback of 5 metres from rivers, lakes and wetlands.

[4-26] Fish and Game had a concern about a uniform setback of only 5m being required for small-scale land disturbance, large-scale land disturbance, cultivation and ancillary land disturbance for the purposes of constructing erosion and sediment control methods to minimise runoff to water, and vegetation clearance and land disturbance in a HCEMA, in which a resource consent would be required to undertake these activities (the question of the resource consent category we deal with later). There now appears to be general agreement (with the exception of Federated Farmers) that for these activities a 10m setback should apply to wetlands and sites valued for trout spawning, as identified in Schedule AB. And for land disturbance and cultivation, Sites Of Significance - Aquatic (SOS-A) as defined in Schedule AB. We note that Counsel for Federated Farmers submitted, in apparent contradiction to the planning evidence of its witness, Mr Shane Hartley, that 5m setbacks should apply universally. Dr Jack McConchie, a water resources scientist, for Federated

Farmers had questioned the definition and identification of particularly sensitive water bodies and appeared to consider the 5m width adequate.

[4-27] By the time of the hearing there were several questions remaining for the Court:

(a) what should the setback distances be from those waterways not on the agreed list of sensitive and highly valued waterways?

(b) should the setback be variable depending on slope?

(c) should the setback condition apply to intermittently flowing streams with active bed widths greater than 1m, or those with active bed widths greater than 2 metres?

(d) for cultivation, should ancillary land disturbance for the purposes of constructing erosion and sediment control methods to minimise runoff to water inside a setback be *permitted* or require a resource consent, and if so what category of resource consent?

The Council's position

[4-28] In support of the 5m riparian setbacks the Council called Dr John Quinn, a water quality scientist, and Mr Allan Kirk, the Environmental Coordinator (Whanganui Catchment Strategy) who has a Bachelor of Agriculture Economics degree. Both witnesses supported a well managed 5m setback from 'normal' waterways and water bodies. Dr Quinn suggested that such a setback would result in an up to 80 percent reduction of sediment in surface run-off. This would decrease as hill slope, angle and clay content increase and soil infiltration decreases.

Fish and Game's position

[4-29] Associate Professor Death, a freshwater ecology specialist for Fish and Game, recommended a minimum setback width of 10m (and 20m for sensitive sites). Mr Norm Ngapo, a soil conservation witness for Fish and Game, suggested a minimum 6m setback on flat land (up to 7 degrees) and 10m beyond for slopes between 8 and 20 degrees. For all other slopes above 20 degrees he suggested a riparian setback of at least 20 metres. The risk of sedimentation discharge increases when works are carried out on land steeper than 7 degrees.

[4-30] Associate Professor Death's evidence was that the role of riparian setbacks goes further than the prevention or reduction of sediment discharges. They also serve to maintain the natural character and proper ecological functioning of in-stream ecosystems. He proposed an alternative approach with a formula to calculate an appropriate riparian setback which, in his view, is a more practical solution than the slope angle method for calculating setback as part of the regulatory framework. This formula uses LUC average slope x by .62 added to a base buffer of 10 metres: i.e. buffer width = 10 + 0.62 x slope (m).

[4-31] In opening, Mr Burns for Fish and Game submitted the rules should provide for a variable setback based on slope:

- For pre-existing slopes between 0-7 degrees – 6m for activities on land adjoining lakes and rivers, and 10m for land adjoining wetlands and sites of significance;
- For pre-existing slopes between 7-20 degrees – 10m for all activities;
- For activities in Hill Country Erosion Management Areas (slopes over 20 degrees) – 10m for all activities.

Horticulture New Zealand's position

[4-32] While Horticulture New Zealand accepted the concept of variable setbacks, it wished to be able to undertake *ancillary activities* within that setback. The modified Rule 12-3 that Ms Lynette Wharfe, its planning witness, proposes requires that the restriction on the activities that could occur in the setback apply only to *cultivation* (as defined in the DV-POP) and not to ancillary land disturbance for the purposes of constructing erosion and sediment control methods to minimise run-off to water. The purpose of her modification to the rule is to allow for sediment control measures to be undertaken within any required setback distance.

[4-33] Mr Andrew Barber, an agricultural engineer, gave evidence for Horticulture NZ suggesting that various sediment control measures such as bunding and benched headlands can be extremely effective in minimising sediment loss. Where these measures are in place stormwater does not flow across an imposed setback - making such a setback superfluous to minimise sediment loss. His evidence is that it makes sense to have a riparian setback *or* other more appropriate and effective sediment

control measures such as those listed above - but not both a setback and sediment control measures.

[4-34] In answers to questions, Ms Wharfe was unable to specify any limits/restrictions to the type or scale of the measures that Horticulture New Zealand may want to undertake within 5m of a waterway.

[4-35] Mr Garth Eyles, a sustainable land management witness for Fish and Game, was clear that both the measures being undertaken and the substrate were important considerations when considering the placement of such measures within any riparian setback.

[4-36] Mr Ngapo's evidence was that sediment control often employed a range of measures. He was clear that for sediment control measures to replace a riparian setback, the sediment control plan would need to be assessed as a whole.

[4-37] We accept Mr Jessen's submission that a setback condition in a *permitted* activity rule cannot create an optimum riparian margin. We are mindful of Mr Hindrup's concerns that the definition of a *riparian setback* be simple to remember and to apply. We are satisfied from the evidence that a 5m setback is a realistic approach for land with a lower slope angle, providing a high degree of protection against sedimentation of waterways without placing too heavy a burden on farmers and growers.

[4-38] However, we are concerned about the efficacy of a 5m setback from a waterway in steeper country. Mr Percy favoured a slope angle trigger, although he did recognise this would make it more difficult to identify setbacks on the ground.

[4-39] Mr Jessen submitted that too many people would require the *assistance of technical expertise* (particularly estimating the angle of slope) to calculate the relevant riparian setback. We agree that an approach along the lines proposed by Professor Death would present considerable challenges. However, we find a slope angle of 20 degrees as the trigger for a 10m setback would be acceptable and could be applied by land users. We are aware that slope as a trigger is applied in several

regional plans around the country, including in the neighbouring Waikato Regional Council area, as Mr Hartley pointed out. In any case the Council is already proposing slope as the determinant of whether or not land falls within a HCEMA. The 10m setback also relates well to the evidence the experts gave us on risks of erosion from cultivation and ancillary land disturbance activities in the Hill Country Erosion Management Area.

Should the condition apply to intermittently flowing streams with active bed widths greater than one metre or greater than two metres?

[4-40] All setback options proposed have sub-clauses that capture rivers that are not permanently flowing; - ie that are ephemeral.

[4-41] The DV POP adopted a 2m active bed width as the threshold for capture by this Rule (Rule 12-4 A). No reason was given by the Panel for selecting this figure. Horticulture New Zealand supports a 2m bed width. The only expert evidence on this matter was provided by Associate Professor Death and Mr Ngapo. Both supported a 1m bed width and Associate Professor Death concluded:

> As water runs down hill, management of small and ephemeral streams is critical for management of downstream larger waterways and biodiversity, this protection and management needs to be given to all ephemeral streams greater than 1m and all permanently flowing streams.

[4-42] Mr Christopher Keenan, Manager Natural Resources and Environment for Horticulture New Zealand, also gave evidence that growers had told him: ... *there are some, but very few, instances of water courses with an active bed width greater than 2m.* That would mean that very few, if any, of the region's ephemeral waterways would be captured by this Rule.

[4-43] Ms Wharfe's evidence was that there would be difficulties in defining the active bed of an ephemeral stream. While Horticulture NZ acknowledged that only natural or modified natural watercourses would be caught, there would be practical difficulties with this due to the nature of the drainage and irrigation systems throughout the region. Mr Keenan's evidence was that there are a number of totally

artificial watercourses and it is almost impossible to determine what is totally artificial from what has been modified. We were not convinced of that and we had no expert evidence to substantiate it. Ms Wharfe too conceded that Horticulture NZ may accept the 1m capture threshold if amended wording (concerning modified water courses) is accepted. She advocated further expert conferencing to try to reach agreement on this matter.

[4-44] Ms Wharfe also indicated that there would be significant economic costs to growers if 1m was chosen, but we have no substantive evidence about that.

[4-45] We have already noted there was no evidence to challenge that of Associate Professor Death or Mr Ngapo, who advocated a 1m threshold on environmental grounds. We accept their evidence on this point.

Activity Status of Sediment Mitigation Measures Inside the Setback

[4-46] As a backstop Horticulture NZ supported *restricted discretionary* status for ancillary (to cultivation) land disturbance for the purposes of constructing erosion and sediment control methods to minimise run off to water inside the setbacks from water bodies. This was on the basis that this status would be commensurate with the potential level of effects and provide the Council with the ability to assess the activities and impose appropriate conditions. (This went along with supporting *restricted discretionary* activity status for cultivation activities not complying with the relevant *permitted* activity requirements.)

[4-47] Fish and Game considered *discretionary* activity status a better fit with the objectives and policies to deal with the effects of land disturbance ancillary to cultivation within the setbacks.

[4-48] In view of the evidence, noted above, regarding the potential effects and the variation and scale of possible mitigation measures, and the importance of the substrate when considering whether and where such measures are to be appropriately placed, we conclude that it is essential that the activity category can adequately deal with these matters. However, we leave open the question whether at least certain activities within a setback could be adequately dealt with as a *restricted*

discretionary resource consent or whether full *discretionary activity* consideration is required, including the need to notify affected bodies such as Fish and Game for example. A change in status of course depends not only on the approach and content of the rule but also whether it would better achieve the objectives and policies of the Plan and Part 2 of the Act. This is a matter we ask the Council to consider in the course of redrafting the provisions, with such consultation as is appropriate.

Findings on Setbacks

[4-49] The setbacks from wetlands, the beds of lakes and permanently flowing rivers, and intermittently flowing rivers (or streams) of greater than 1m width should be:

- 5m on land under 20 degrees in slope, and
- 10m for:
  - A wetland as identified in Schedule E.
  - Sites valued for trout spawning as identified in Schedule AB.
  - Sites of Significance - Aquatic as identified in Schedule AB (only for small-scale land disturbance, large-scale land disturbance, cultivation and ancillary land disturbance for the purposes of constructing erosion and sediment control methods to minimise run off to water, vegetation disturbance and land disturbance in a HCEMA, and not for vegetation clearance outside a HCEMA).
  - Land over 20 degrees in slope.

None of these rules for vegetation disturbance and vegetation clearance override those that deal with rare, threatened and at-risk habitats.

Should cultivation and ancillary activities in a HCEMA require consent?

[4-50] *Cultivation* is defined in the DV POP as:

Cultivation means preparing land for growing pasture or a crop and the planting, tending and harvesting of that pasture or crop but excludes:

(a) direct drilling of seed.

(b) no – tillage practices.

(c) recontouring land.

(d) forestry.

(e) the clearance of woody vegetation and new tracking in a Hill Country Erosion Management Area.

[4-51] The threshold conditions or requirements of Rule 12-3 of the DV POP (among others) require that cultivation and ancillary land disturbance for the purposes of constructing erosion and sediment control methods to minimise run off to water is not undertaken in a coastal foredune area. We have already dealt with the riparian setbacks that would apply to cultivation.

[4-52] The POP defines a *Hill Country Erosion Management Area* to mean:

> any area of land with a pre-existing slope of 20 degrees or greater on which *vegetation clearance, land disturbance, forestry* or *cultivation* is being or is to be undertaken.

(Earlier we noted the DV-POP had a slope of 28 degrees but the Council took a different position on this subsequently and returned to the NV-POP slope of 20 degrees.)

[4-53] Fish and Game considered a *restricted discretionary* resource consent should also be required for all cultivation (and ancillary land disturbance) in the HCEMA. Horticulture NZ was not opposed to this, but the Council was.

[4-54] Mr Hindrup's position was that, notwithstanding the added risks of erosion and sediment loss in cultivating slopes, because cultivation is not widely employed on hill country the risks posed are not great enough to warrant *restricted discretionary* activity status.

[4-55] Mr Kirk explained that cultivation is mainly carried out on flatter land, but with advances in technology and cheaper chemical and application costs, it is becoming more common on steeper land. He discussed the risks of cultivation (eg impacts on water quality as a result of sedimentation and accelerated erosion) on steeper land, particularly if managed poorly. Risks increase with greater slope and closer proximity to waterways.

[4-56] Fish and Game argued that, irrespective of how much cultivation on steeper land occurs, if it is likely to give rise to adverse effects it should be regulated. Counsel submitted that a resource consent is required for all other activities on HCEMAs which may cause adverse effects, and cultivation should be controlled in those areas as well. We note though that Fish and Game is not concerned with minimum tillage/direct drilling and zero tilling in these areas.

[4-57] Mr Kirk's evidence was that not only is the steeper land vulnerable between the time it is sprayed (and the dying pasture is grazed – often by cattle) and the time the over-sown pasture or crop becomes established, it is also vulnerable when put under an intensive grazing regime to harvest the over-sown pasture or crop.

[4-58] Mr Eyles' evidence was that cultivation (by tractor) was becoming more common on slopes of between 20 degrees and 30 degrees. Traditional cultivation adds to the time that cultivated, vegetation-free soil is exposed to rain and subject to the risk of run-off/erosion.

[4-59] We find the evidence of both Mr Kirk and Mr Eyles on the risks of cultivation on steeper land persuasive. For this reason we do not agree with Mr Hindrup that control of cultivation on slopes greater than 20 degrees is unnecessary - particularly in the light of his concessions that ... *there was little downside to such a rule* ... and that ... *there was no clear cut choice in my mind... as to whether such a rule should apply.*

[4-60] For all of those reasons we agree with Fish and Game on this point and find that cultivation on slopes greater than 20 degrees should be a *restricted discretionary* activity. (This does not extend to cultivation and ancillary activities within the riparian setbacks which are dealt with separately in this decision.)

[4-61] We also conclude that there needs to be a consequential change to the definition of a *Hill Country Erosion Management Area* to include ancillary (to cultivation) land disturbance for the purposes of constructing erosion and sediment control methods to minimise run off to water. We observe that that is probably a

consequence of the DV POP treating cultivation differently from land disturbance – a change from the NV POP.

What should certain performance conditions for the permitted activity cultivation rule require?

[4-62] One issue was the approach to the permitted activity condition/standard/term:

> For vegetable crops listed within the Commodity Levies (Vegetables and Fruit) Order 2007 a paddock assessment must be undertaken in accordance with the Code of Practice for Commercial Vegetable Growing in the Horizons Region (Horticulture New Zealand) Version 2010/2.

This was agreed by all parties. The Council sought to add:

> ... and bunding, silt traps, interception drains, to minimise sediment runoff to water must be installed prior to and maintained during cultivation.

[4-63] Horticulture NZ sought to qualify this with the addition of words along the line of ... *appropriate methods including...bunding...* . We find the addition proposed by Horticulture NZ would result in an unacceptable level of uncertainty for a *permitted* activity rule.

[4-64] A paddock assessment by itself of course would provide no assurance that the actions required to minimise sediment runoff proposed by the Council, and supported in evidence, would occur. However, the second part of condition (d) as proposed by the Council appears to largely repeat condition:

> (b) Bunding, silt traps, interception drains or other alternative methods to minimise sediment run-off to *water* must be installed prior to and maintained during cultivation.

We conclude that as condition (b) also applies to cultivation for vegetable crops, the second part of condition (d) as proposed by the Council is unnecessary.

Should the visual quality standard apply?

[4-65] A further issue was whether to have a requirement to comply with the Schedule D Visual Quality Standards/Numerics (which we consider to be conditions

setting limits or quantitative thresholds for *permitted activity* status in this context) set out in the MWRC V POP.[3]

[4-66] Mr Hindrup's evidence was that the Code of Practice for Commercial Vegetable Growing in the Horizons Region (Horticulture NZ) version 2010/2 (COP) (referred to at para [4-62] [4-71] and [4-78]) provides useful – indeed essential - information on management practices for ensuring erosion is minimised on cultivated land. He considered that the inclusion of the document as a performance condition would give effect to Policy 5-5 POP which says:

> The Regional Council must ... recognise appropriately developed and administered codes of practice, standards, guidelines or environmental management plans targeted at achieving sustainable land use, and incorporate them within the regulatory framework where applicable.

[4-67] However, the Council acknowledged the limitations of the COP – noting the conference of the technical experts[4] who agreed that this method alone will not provide sufficient certainty that water quality outcomes intended by s70 RMA and Schedule D visual clarity limits will consistently be achieved.

[4-68] Mr Hindrup's evidence is that the Schedule D performance conditions (requiring compliance with the Schedule D visual clarity threshold limit appropriate to a *permitted* activity), in conjunction with the COP, provide the most efficient and effective means of preventing or minimising the adverse environmental effects of any discharge.

[4-69] Federated Farmers and Horticulture New Zealand do not support the use of the Schedule D Standards and regard the COP as sufficient. They regard the use of Schedule D as a condition to be impractical and unenforceable.

[4-70] Ms Wharfe's evidence is that understanding and enforcing such a condition is problematic. Associate Professor Death disagreed with Ms Wharfe and stated that:

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[3] Any ancillary discharge of sediment into water must not, after reasonable mixing, cause the receiving water body to breach the water quality numerics for visual clarity set out in schedule D for that water body

[4] Record of Technical Conference in March 2012.

> A 20 percent change of visual clarity standard in Schedule D is scientifically accepted clear and enforceable ... and is commonly used even by school children.

Nor did he accept Ms Wharfe's evidence that it may be difficult to attribute blame to a particular property when a discharge occurred. He stated: *I can't really imagine any practical situation where that would happen ... .*

[4-71] We agree with Mr. Hindrup when he says that:

> It may be, over time, reliance on the COP and other minimisation methods may indeed adequately address the effects of sedimentation in waterways caused by cultivation, however given the technical experts' concerns in relation to the COP I consider that this performance standard is a necessary, enforceable and measurable boundary of effects for the permitted activity rule.

[4-72] For all those reasons we find that the combination of both threshold conditions for a *permitted* activity fulfills the Council's responsibilities and provides greater assurance that the requirements of s70 RMA would be met. Where either *permitted* activity threshold cannot be met, there is always the opportunity to apply for a resource consent.

Default Activity Status

[4-73] Fish and Game were concerned about a late change to the default activity status for activities which did not meet the conditions, standards or terms of the other rules in Chapter 12. The default status had been *discretionary* and it appeared that Mr Hindrup proposed it be changed to *restricted discretionary.* When questioned on this, he considered the matters over which discretion would be restricted could be clearly specified and that there would be no public notification for activities falling under Rule 12-4. He said that during his time at the Regional Council there had been no public notification required as the landowners tended to agree with the way the Council was managing or working with them.

[4-74] Fish and Game questioned whether, apart from the Horticulture NZ appeal which is confined to cultivation and ancillary activities, there is the scope to seek that change.

[4-75] Stepping back from these specific rules and considering the rule framework holistically, we compare the *discretionary* activity default status here with that for activities covered in Part 5 of this decision and nitrogen leaching. It could raise bundling issues, although this is not the main reason for raising it. It may be that a default *restricted discretionary* activity rule could deal with the issues. Such a rule of course would need to specify the matters discretion is to be exercised over and more limited in its nature than a *discretionary* activity, otherwise there would be no justification for the change.

[4-76] We put this matter back to the Council to further consider and report on, after considering our comments on the general approach in the rule framework to *controlled* and *restricted discretionary* activities.

General Approach in the Rule Framework

[4-77] We had a number of questions about the effectiveness of the rules that relate to the way in which the matters over which control is reserved (for *controlled* activity status) and the discretions (for *restricted discretionary* activity status) which we put to planning witnesses. The planning witnesses, Mr Hindrup for the Council, Mr Percy for Fish and Game, and Ms Wharfe for Horticulture NZ, agreed that there was room for improvement.

[4-78] For large-scale land disturbance a *controlled* activity must be undertaken in accordance with an *Erosion and Sediment Control Plan* (Rule 12-1). There is a long list of matters over which control is reserved (or *restricted* to use the language in the Rule). The main concern (as Mr Hindrup confirmed) is the adverse effects of the activity and associated sediment run-off on soil conservation, surface water quality and aquatic ecology. We still have a number of questions, the tenor of which we put to several of the planning witnesses:

- The condition/standard/term requires the activity be undertaken in accordance with an *Erosion and Sediment Control Plan.* Control is then restricted to the provision of an erosion and sediment control plan. Presumably it is intended that the decision-maker has discretion to seek changes to the provisions or contents of an erosion and sediment control plan to ensure the activity adequately deals with the adverse effects.

- The principles and erosion and sediment control measures set out in particular provisions of the Erosion and Sediment Control Guidelines for the Wellington Region (September 2002); and for cultivation and ancillary activities the measures in the Code of Practice for Commercial Vegetable Growing in Horizon Region (Horticulture New Zealand Version 2010/2) may *inform* the decision on whether those effects are adequately dealt with. It would be preferable to present them in that way (as a subset of the consideration of whether the adverse effects of concern are adequately dealt with).
- The condition restricts activities on land in or within riparian setbacks, but then there is control/discretion restricted to the provision of setbacks from water bodies. Is this intended to allow consideration of setback distances greater than those required as a threshold condition? If so it should make that clear. If it is intended to deal with the treatment or management of setbacks required by the condition, there could be questions about whether it cuts across and undermines the threshold condition requiring the activity not occur on land within the setback.
- There is a need to consider further the *Achievement of the water quality numerics set out in Schedule D.* What is intended here, given the performance condition requiring:
    - Any ancillary discharge of sediment into water must not, after reasonable mixing, cause the receiving water body to breach the water quality limits (amended from numerics reflecting its threshold nature) for visual clarity set out in Schedule D for that water body?

[4-79] For vegetation clearance, land disturbance and cultivation and ancillary land disturbance for the purposes of constructing erosion and sediment control methods to minimise run off to water (to be added) in a HCEMA, the *restricted discretionary activity* (Rule 12-4) raises a number of similar questions.

Overlap with Decision Part 5 – Surface Water Quality decision

[4-80] There are some matters that overlap with Part 5 of the decision – Surface Water Quality - and will require amendment in the light of the decisions made in that part. We ask that the Council prepare the necessary changes to the terminology to

bring the objectives, policies and rules into line with our decision, conferring with other parties as required. That particularly relates to replacing the word *numerics* with a word that reflects it being a limit, threshold, condition, standard, or requirement for an activity to qualify for a particular resource consent category.

Summary of Conclusions – Part 4

A. We do not accept the Horticulture NZ and Federated Farmers proposal to amend Objective 5-1 – para [4-5]

B. We accept the Council's proposed amendment of Policy 5-2A – para [4-7]

C. We accept the Council's proposed amendment of the Anticipated Environmental Results in 5-6 – para [4-10] and [4-11]

D. We prefer the expression *high risk of causing discharges of sediment to water* in the Explanation and Principal Reasons in 5-7 – para [4-12]

E. Cultivation in HCEMAs should be included in Policy 12-1A – para [4-15]

F. We do not accept the version of Policy 12-1(fc) offered by Horticulture NZ – para [4-17]

G. Rule 12-1A should be amended to provide for small scale land disturbance – para [4-23]

H. A riparian margin of 5m is appropriate for low slope angle land – para [4-37]

I. A slope angle of 20° should trigger the requirement of a 10m riparian setback – para [4-39]

J. A 1m active bed width should trigger the riparian setback requirements – para [4-45]

K. Findings on riparian setbacks are all summarised at para [4-49]

L. Ancillary land disturbance (to cultivation) for the purposes of constructing erosion and sediment control methods to minimise run off to water in setbacks requires a resource consent (category to be further considered) - see paras [4-46] to [4-48]

M. Cultivation and ancillary land disturbance in a HCEMA requires a *restricted discretionary* resource consent - paras [4-50] to [4-61]

N. No amendment is needed to the permitted activity condition referring to vegetable crops listed within the Commodity Levies (Vegetables and Fruit) Order 2007 - paras [4-62] to [4-64]

O. The Schedule D visual quality condition or standard is to be a threshold requirement for cultivation and ancillary activities. - paras [4-65] to [4-72]

[4-81] We refer the following matters back to the Council in accordance with the general request contained in Part 1, para [1-23]:

A. Is there a need for any consequential amendments to the policies in the POP to correctly cross-reference Rules- see para [4-18]

B. Could ancillary activities (to cultivation) in a riparian setback be dealt with by a *restricted discretionary* activity rather than a *discretionary* activity? – para [4-48]

C. What consequential changes need to be made to the definition of a *Hill Country Erosion Management Area* to include ancillary land disturbance activities? - para [4-61]

D. What should the default activity status be – *restricted discretionary* or *discretionary* activity? – para [4-76]

E. How should the rules for *controlled* and *restricted discretionary* activity status be improved? – para [4-78] and [4-79]

F. What changes need to be made to the rules and other provisions in line with Part 5 of the decision? – para [4-80]

G. Are there any other consequential changes that need to be made to the POP?

Hearing: at Palmerston North: 30 April – 4 May, 21 – 25 May, and at Wellington 7 June 2012

DECISION: PART 5 - SURFACE WATER QUALITY – NON-POINT SOURCE DISCHARGES

Counsel and parties participating in this topic:

A E Day
P R Gardner for Federated Farmers of New Zealand Inc
J J M Hassan, L Hinchey and K E Viskovic for Fonterra Co-operative Group Ltd
H A Atkins for Horticulture New Zealand
E M Jamieson and A Camaivuna for the Minister of Conservation
M G Conway for the Palmerston North City Council
M R G Christensen for Ravensdown Fertiliser Co-operative Ltd
J A Burns and C Malone for the Wellington Fish and Game Council
J W Maassen and N Jessen for the Manawatu-Wanganui Regional Council

PART 5 - Surface Water Quality – Non-Point Source Discharge **Page**

Introduction

[5-1] This topic was the most contested of those requiring decisions from the Court. The central issue was the amounts and types of run-off and leachates arising from farming activities which find their way into waterbodies – primarily the rivers and lakes of the region. The run-offs and leachates of concern are primarily nitrogen (N) and phosphorus (P), and both contribute significantly to the growth of periphyton in the water.

[5-2] Most of the evidence on this topic focussed on nitrogen (N), and so shall we in this part of the decision. While both have similar effects on aquatic environments, their sources are different. The most concise explanation of the difference we saw is in the report of the Parliamentary Commissioner for the Environment: *Water quality in New Zealand: Understanding the Science* (2010), and we quote a passage from Chapter 9 of the report:

> The two nutrients get into water by largely different routes. Nitrogen occurs in forms that are highly soluble in water and so can travel via groundwater as well as across surfaces. This makes it particularly elusive – preventing it getting into water is a major challenge. Most phosphorus, on the other hand, gets into water with soil and if the soil can be stopped from getting into water, so will the phosphorus. Once in the water, however, much of the phosphorus is locked up in sediment and can be there for a very long time.
>
> Excess nutrients can have dramatic effects on water bodies. Nitrogen and phosphorus stimulate plant growth, leading to algal blooms (sometimes toxic), oxygen depletion, and ecological damage. Ammonia can kill fish, and elevated nitrate levels can make aquifers undrinkable.

That will explain why the evidence, and the decision, for this Part focuses on nitrogen. The phosphorus issue finds its place in Part 4 of the decision – Sustainable Land Use and Accelerated Erosion.

[5-3] Periphyton is a term covering communities of algae, fungi, bacteria, diatoms and cyanobacteria. It is the primary productive base of many aquatic ecosystems and is a natural part of freshwater biodiversity. But where there are elevated nutrient levels in the water, particularly in unshaded and low flood frequency waters, it flourishes and becomes a nuisance, accumulating into thick, slimy mats. That in turn affects the water's ability to sustain biodiversity and healthy aquatic ecosystems; it produces

toxins and irritants making the water unsuitable for drinking by humans and animals, and for contact recreation. It can also physically clog water intakes for irrigation, water supply and industry.

[5-4] Broadly, the leachates and run-off come from faeces and urine deposited by farm animals, and from fertiliser applied to the land for pasture and crop purposes. Either or both of leaching and run-off will occur in almost any conditions where the raw material is present, but it follows that where rainfall is plentiful the rates will generally be higher, and with porous soils the rate of leaching will likely increase. This diffuse type of discharge of contaminants to water (or to land and thence to water) is known as *non-point source discharge* to distinguish it from discharges from a clearly identifiable *point source* such as an outfall from a sewage treatment plant.

[5-5] We note here that the POP recognises throughout the importance of farming and its contribution to the cultural social and economic wellbeing of the people and communities across the region. We are mindful of this strong theme in deliberating on the options presented by the parties.

What is being addressed

[5-6] The DV POP, at Chapter 6, summarises the issue concisely:

> The quality of many rivers and lakes in the region has declined to the point that ecological values are compromised and contact recreation such as swimming is considered unsafe. The principal causes of this degradation are:
>
> (a) nutrient enrichment caused by run-off and leaching from agricultural land, discharges of treated wastewater, and septic tanks
>
> (b) high turbidity and sediment loads caused by land erosion, river channel erosion, run-off from agricultural land and discharges of stormwater
>
> (c) pathogens from agricultural run-off, urban run-off, discharges of sewage, direct stock access to water bodies and their beds and discharges of agricultural and industrial waste.

[5-7] We should say, at this early point, that it does not answer that fundamental issue to say, as some did in addressing these appeals, that there is no present need to enhance water quality because the quality of some of the rivers and waterbodies in the region is no worse than average figures for similar water elsewhere in the country.

That is an unappealing argument, the logical extension of which would be to say that so long as the natural quality of all of the country's rivers and lakes deteriorates at more or less the same rate, then we need do nothing to improve any of them. In response to such a view, we simply point to Part 2 of the RMA, and its use of phrases such as ... *sustaining the potential of natural ... resources; safeguarding the life-supporting capacity of ... water; ... the preservation of the natural character of ... wetlands, and lakes and rivers;* and ... *intrinsic values of ecosystems.*

[5-8] We should immediately say also that we have little sympathy for the line of argument that we should defer taking decisive action in the field of improving water quality (or, at the very least halting its further decline) because ... *the science is not sufficiently understood* ... or that ... *further analysis could give a more comprehensive process* ... or similarly phrased excuses for maintaining more or less the status quo. We will never know all there is to know. But what we undoubtedly do know is that in many parts of the region the quality of the natural water is degraded to the point of being not potable for humans or stock, unsafe for contact recreation, and its aquatic ecosystems range between sub-optimal and imperilled. We also know what is causing that decline, and we know how to stop it, and reverse it. To fail to take available and appropriate steps within the terms of the legislation just cited would be inexcusable.

[5-9] Related to that point, some parties put a great deal of emphasis on setting in place *voluntary or educative* approaches to tackling the acknowledged problems – meaning that time should be taken to educate and persuade all of those with a stake in the region's water quality towards a joint, and preferably voluntary, programme. *The Dairying and Clean Streams Accord* (of which more later) might be held up as an example of that style of approach. We have no difficulty with approaches of that kind – they are laudable, as far as they go. But history suggests plainly enough that alone they do not suffice to effectively deal with the problem. We agree with Dr Alison Dewes' (called by Fish and Game) comments that:

> Voluntary approaches have merit as innovators and early adapters tend to engage in this process. However, this approach alone is unlikely to achieve the desired environmental outcomes as it will not capture the worst polluters, nor will it account for rapid changes in land use that can occur in short time frames as a result of unpredictable changes in market forces.

> ... there cannot be a reliance on voluntary approaches alone. I agree with Neels Botha where, in his evidence, he illustrates that voluntary approaches alone are unlikely to be as effective as a mix of policy instruments.

Even if those programmes exist, they need the reinforcement of a regulatory regime to set measurable standards and to enforce compliance with them by those who will not do so simply because ... *it is the right thing to do*.

[5-10] A variant of the theme was the proposition advanced by Dr Antony Roberts, the Chief Scientific Officer for Ravensdown, among others, that a *collaborative approach* involving the community setting acceptable N loss targets for individual catchments was required. He did not consider the One Plan process met this requirement, notwithstanding the ability of the community to participate in the formulating of policy and rules, and suggested that controls should only apply in the interim while such agreed targets are set. However, we recognise that the region has urgent water quality issues that require immediate action and are the focus of the POP. In addition there is the opportunity for the community to revisit objectives, policies and rules at any time in the future under the One Plan, such as on a catchment-specific basis.

[5-11] At para [5-209] we begin a discussion of the use of the term *numerics* in the POP. In the course of working through the positions and propositions of the various parties leading up to that point, we shall use terms such as *limits*, *maximums (*or *maxima) standards* and *targets*. In so doing we should not be taken to be approving or endorsing the terms as used in those contexts. That terminology needs to be carefully refined, and is dependent on the context – for instance whether it is being used in a policy or a rule.

Notified version of POP (NV POP)

[5-12] The notified version of POP (NV POP) brought within a regulatory regime the four intensive land uses of dairying, intensive (ie involving the use of irrigation) sheep and beef farming, cropping, and commercial vegetable growing, both existing and new. The regulatory regime was based around Land Use Capability (LUC) classification with limits on nitrogen leaching varying according to the LUC class of the land in question. Further, the N leaching limits became more stringent from year 1

and thereafter at years 5, 10 and 20. It covered existing uses (except extensive sheep and beef farming) in 34 targeted water management sub-zones (WMSZ) within 11 catchments as well as new uses throughout the Region. The philosophy of this version was, and is, strongly supported by the Minister of Conservation and Fish and Game.

Decisions version of POP (DV POP)

[5-13] For the reasons it gave, the Hearing Panel established by the Council, comprised both of elected Councillors and independent appointees, made significant changes to the NV POP. Principally, intensive sheep and beef farming, cropping, and commercial vegetable growing were dropped from the regime regulating N leaching, leaving only new (and existing, within *targeted water management sub-zones*) dairy farming within it. The LUC basis of control (with one exception – new dairy operations at year 1 throughout the region) was set aside in favour of a regime of *reasonably practicable farming practices*. Further, a number of the targeted WMSZs were removed from the DV POP regime altogether, with a reduction to 24 WMSZs within seven catchments. There are varying degrees of support for that version among the parties.

The Council's position – the MWRC-V-POP

[5-14] There have been extensive discussions and negotiation between the parties since the DV POP was issued, the appeals lodged and (in some respects) since Court-assisted mediation. While they have not resulted in overall agreement, they have produced a further version of the debated portions of the POP which the Council, and some parties, to a greater or less extent, find acceptable. It was presented as the MWRC-V-POP.

[5-15] This version would base the figures for N leaching on the LUC classification for the land in question. It would allow a three year period of grace for existing dairy uses to achieve compliance (unless a resource consent in a more stringent activity class was obtained), but it would not have a staged reduction of the leaching limit over a period of years. It would require a review of the situation in 2017, with the possibility of bringing all rural land use activities including horticulture (commercial vegetable growing) into the regime after that review. That review would also consider amending the cumulative nitrogen leaching maximums. As additional land use

activities are regulated the policy framework may include nitrogen trading mechanisms.

Mr Day's position

[5-16] Mr Day is generally, if not necessarily in every detail, aligned with the Minister's and Fish and Game's positions, with the significant difference that he advocates for the immediate introduction of an N leaching rights trading scheme. He does support an LUC based method, the regulation of other land uses such as all sheep and beef farming, and opposes the *grandparenting* of existing levels of N loss.

Federated Farmers' position

[5-17] Federated Farmers argued that quite apart from the merits of the issue, there is no scope to bring extensive sheep and beef farming within the nitrogen management regime, but agrees that it would be appropriate to include intensive (ie irrigated) sheep and beef farming within a rule regime. It does not agree that cropping (for fodder) should be an included activity and, apart from agreeing with the view that the casual basis on which land is used for cash cropping makes management of a resource consent regime too hard, it has no view about vegetable production. It submits that low risk dairying should be a *permitted* activity. The Federation generally supports the DV POP, and opposes the use of the LUC classification system as the basis for such a regime. It believes that there is uncertainty about what *reasonably practicable* steps might be. It does however support a so-called single figure N leaching regime where existing dairy farms should be required to do what is ... *reasonably practicable ... to reduce N leaching beyond a certain level to be given permitted activity status.* The Federation's proposed regime for new (beyond a *permitted* activity leaching level) and existing dairy farms involved progressively more stringent activity status at increasing leaching levels, with the Council having power to require reasonably practicable N leaching mitigation.

Fonterra's position

[5-18] Fonterra considers that all N-leaching land uses should be captured by the regime, otherwise dairying will be left to carry an unfair burden, but that to bring in extensive sheep and beef farming at present would be premature, and that it should be left to a future plan change. Such a change in the future could also, it suggests, be a

vehicle for developments such as giving effect to the National Policy Statement Freshwater Management (NPSFM), a trading regime, and bringing other catchments and other forms of intensive farming into the rule regime. It is concerned that existing dairying should be treated conservatively, and that existing dairy farmers should not be ... *put* ... *out of business*. Fonterra proposes what its planning witness, Mr Gerard Willis, describes as a hybrid planning approach containing an element of capping some farmers at their current leaching rate (*grandparenting*), requiring and defining the adoption of reasonably practicable measures (the *best practicable option*) and beyond that the consideration of the *natural capital* approach.

Horticulture NZ position

[5-19] Horticulture NZ supports the DV POP, and accepts that it would be appropriate to review the regime in 2017. It opposes the positions taken by the Minister and Fish and Game; in particular it regards an LUC based regime as inappropriate for vegetable growing because it regards LUC as a pasture based classification system. Its view is that if vegetable growing is brought within a rules framework, it should be as a *permitted* activity. Its proposed addition of Domestic Food Supply as a value to Schedule AB of POP has been agreed with the Council in the course of mediation, and the Minister and Fish and Game have since accepted that also.

Minister of Conservation and Fish and Game positions

[5-20] These two parties were much of one mind on the issues and it is convenient to deal with them together. They take the view that intensive sheep and beef farming, horticulture and cropping should be reinstated in the Rule regime now, as should Lake Horowhenua, Coastal Rangitikei and the coastal lakes. They submit that for both of those issues, waiting until a regime review in 2017 to deal with them is simply to allow the situation to get worse, and would not comply with the requirement to give effect to provisions such as the NZ Coastal Policy Statement 2010 (NZCPS), the NPSFM, and the Act generally. As a broad proposition, both prefer the NV POP to the version arrived at by the Hearings Panel. Fish and Game also oppose the three year period of grace proposed for compliance by the Council, but accepts the possibility of a step-down being required in consent conditions.

Palmerston North City's position

[5-21] Palmerston North City was largely content with the DV POP and raised only one substantive issue at the hearing – that of whether the term *numerics* in describing various leaching quantities in Schedule D would be more appropriate than standards, limits or targets. The City's submission is that it would be more appropriate, and we discuss that issue later, under the heading *The term 'numerics'*.

Ravensdown's position

[5-22] Ravensdown expressly accepts that water quality in parts of specified catchments in the region requires improvement. It disputes however that a thorough regulatory regime can be put in place because there is a ... *lack of a sufficiently detailed understanding of the relationship between actual land uses and actual effects on water quality.* That is particularly so, it says, in the case of the effects of dairy farming, while acknowledging that dairying has, and continues to, contribute to the current state of the water quality in specified catchments through N losses. It proposes a regime requiring ... *improvement towards* ... target loads over a five year period; non regulatory methods such as good practice and education; investigation of links between intensive farming and actual effects, aiming towards an agreed criteria or standard for each WMSZ to be introduced by way of a Plan Change. In the meantime it proposes that both new and existing dairy farms leaching under a single figure be *permitted* activities; and others require consent and the adoption of ... Tier 1 *reasonably practicable farm management practices.*

An overview of the relevant portions of POP – first, the Regional Policy Statement

[5-23] There are two relevant objectives on water quality:

> Objective 6-1 Water management Values
>
> Surface water bodies and their beds are managed in a manner which safeguards their life supporting capacity and advances the achievement of the Values in Schedule AB.[1]
>
> Objective 6-2 Water quality
>
> (a) Surface water quality is managed to ensure that:

[1] Fish and Game and the Minister wanted the underlined words added and the Regional Council and all other parties except Fonterra was prepared to accept that. Instead Fonterra wanted *with particular regard to safeguarding life supporting capacity* added to the end of the Objective.

(i) water quality is maintained in those rivers and lakes where the existing water quality is at a level sufficient to support the Values in Schedule AB,

(ii) water quality is enhanced in those rivers and lakes where the existing water quality is not at a level sufficient to support the Values in Schedule AB,

(iii) accelerated eutrophication and sedimentation of lakes in the Region in prevented or minimised,

(iv) the special values of rivers protected by water conservation orders are maintained. ...

[5-24] Fish and Game, preferred that Objective 6.1, Policy 6.1 and Policy 6.7 require that water bodies be managed in a manner that safeguards their life-supporting capacity and ... *recognises and provides for* the values in Schedule AB, rather than *advances the achievement* of those values.

[5-25] Fish and Game said that it had agreed at mediation that it might accept ... *safeguard the life supporting capacity and advance the achievement* if all other matters (and in particular the rule stream) were resolved. However, as the hearing had progressed and other parties argued any advance (no matter how small or slow) towards achieving the values would be meeting the objectives, Fish and Game's discomfort with the term increased.

[5-26] Fish and Game submitted that *recognise and provide for* is a term used in the Act, with a readily understood meaning which has been the subject of judicial interpretation, and should be used. Also the Objectives and Policies of the plan should be to recognise and provide for the values the Plan has identified as important and should say so. We agree.

[5-27] The individual Values and their associated management objectives are set out in the Schedule AB Surface Water Management Values Key and repeated in Table 6.2. The Schedule AB Surface Water Management Values were at issue in only one area, with Hort NZ seeking the inclusion of Food Production. The Schedule AB Values are:

- Zone-wide values (except for LSC)

- Life-supporting Capacity (LSC) Value
- Natural State (NS) Value
- Sites of Significance – Aquatic (SOS-A) Value
- Sites of Significance – Riparian (SOS-R) Value
- Inanga Spawning (IS) Value
- Whitebait Migration (WM) Value
- Sites of Significance – Cultural (SOS-C) Value
- Trout Fishery (TF) Value
- Trout Spawning (TS) Value
- Water Supply (WS) Value
- Flood Control and Drainage (FC/D) Value.

[5-28] Dr Olivier Ausseil, an expert witness for Fish and Game and DOC, who had been involved in their development, gave evidence on the derivation of these Values. He said the Values had been informed by the Schedule 3 Water quality classes in the RMA, with its different classes for water managed for the following purposes: aquatic ecosystems; fishery; fish spawning; the gathering or cultivating of shellfish; contact recreation; water supply; irrigation; industrial abstraction; natural state; aesthetic, and cultural. Section 69 RMA allows regional councils some latitude in including standards that are more stringent or specific and to include new classes and standards about the quality of water. It also requires that standards are not to be set which may result in a reduction in the existing quality of the water unless it is consistent with the purpose of the Act to do so.

[5-29] The catchments in the Region have been divided into Water Management Zones and Water Management Sub-zones for the purposes of managing water quality (among other things). Schedule D contains water quality *numerics* (recognising there is argument about the terminology) relating to the Schedule AB Values that apply to all rivers (region-wide quality *targets*) and additionally *targets* for rivers in a Water Management Sub-Zone, as well as for certain types of lakes. Table D.5A (D-17) contains the Key: Definition of abbreviations and full wording of the *targets*. (The RPS has a footnote stating: *Schedule D is not a component of Part 1 – the RPS. It is a component of Part II- the Regional Plan.* However, RPS policies refer to Schedule D and so we deal with it under the heading of the RPS.)

[5-30] For rivers the region-wide quantitative water quality *targets* are for:

- Escherichia coli (*E.coli*)
- Periphyton filamentous cover
- Diatom or cyanobacterial cover
- Quantitative Macroinvertebrate Community Index (QMCI).

[5-31] For specific rivers in water management sub-zones the quantitative *targets* are for (and may vary):

- pH
- Temperature
- Dissolved Oxygen (D)
- Soluble carbonaceous chemical oxygen demand ($sCBOD^5$)
- Particulate organic matter (POM)
- Periphyton
- Dissolved reactive phosphorus (DRP)
- Soluble inorganic nitrogen (SIN)
- Macroinvertebrate Community Index (MCI)
- Ammoniacal Nitrogen
- Toxicants (Tox)
- Visual clarity.

Lakes have:

- Algal biomass
- Total phosphorus (TP)
- Total nitrogen (TN)
- Ammoniacal Nitrogen
- Toxicants (Tox)
- Visual clarity
- Euphotic depth
- Escherichia coli (*E.coli*)

[5-32] The evidence was that many of the above measures are referred to in the water quality classes of Schedule 3 RMA as quantitative standards and others provide quantitative measures for narrative standards: eg visual clarity. There was also reference to standards and guidelines on which these standards were based and

reasons for any departure from them in the evidence from the Council's water quality witnesses. Mostly this evidence was uncontested. However, there were some issues raised about Schedule D and we deal with these later - see paras [5-44] to [5-46].

[5-33] Policy 6-2 Water quality targets (replaced by the word *numeric*) states:

> In Schedule D, water quality targets [replaced by the word *numerics*] relating to the Schedule AB Values (repeated in Table 6.2) are identified for each Water Management Sub-zone. Other than where they are incorporated into permitted activity rules as conditions to be met, the water quality targets [*numerics*] in Schedule D must be used to inform the management of surface water quality in the manner set out in Policies 6-3, 6-4 and 6-5.

(We question whether that statement is correct particularly given the other rule categories have similar conditions to *permitted* activities. However, we return to the question of the use of the word *numerics* later.)

[5-34] The three policies differentiate between situations where the water quality *numerics*, replacing the word *targets*, are met, not met and where existing water quality is unknown. (During the course of the hearings the parties agreed that the Schedule D *numeric* for sediment would only fall into the *state of the environment* monitoring category.)

[5-35] In summary:

- Policy 6-3 requires water quality to be managed to ensure the water quality *numerics* in Schedule D continue to be met beyond the zone of reasonable mixing within a WMSZ.
- Policy 6-4 requires where the existing water quality does not meet the Schedule D water quality numerics within a Water Management Sub-zone, water quality within that sub-zone must be managed in a manner that enhances existing water quality so that there is progress towards: the water quality *numeric* for the Water Management Sub-Zone in Schedule D; and/or the Schedule AB Values and management objectives that the water quality numeric is designed to achieve.
- Policy 6-5, covering a situation where there is insufficient data for a comparison with the Schedule D water quality *numerics,* requires management of water quality in a manner which maintains or enhances the existing water quality, has regard to the likely effect of the activity on the Schedule AB Values that the water quality *numeric* is designed to safeguard, and has regard to any information on the water quality in upstream or downstream WMSZs.

[5-36] Under the heading of 6.4.2.3 *Discharges and Land use Activities Affecting Water Quality* there are policies in contention under the following headings:

- Policy 6-7 Dairy Farming Land use activities affecting groundwater and surface water quality
- Policy 6-7A Rural land use activities other than dairy farming affecting groundwater and surface water quality in Water Management Sub-zones listed in Table 13.1
- Policy 6-7B Existing dairy farming and other rural land use activities in WMSZs not listed in Table 13-1 (i.e. not the targeted sub-zones).

The parties are a long way apart on the content of all policies except Policy 6-7B. That policy refers to identifying certain sub-zones as priority catchments for monitoring and assessment and a recognition of a Plan Change process to add other WMSZs where the Schedule D water quality *numerics* are not met and/or the relevant Schedule AB values are compromised and all the contributing land use activities will be effectively managed. The fundamental differences in the approaches before us are reflected, as would be expected, in the policy alternatives advanced by the various parties. For example, the Council's policies refer to setting cumulative nitrogen leaching rates for each LUC class of land which must not be exceeded and provides for a three year step-down approach to achieving compliance. The policies proposed by Fish and Game and the Minister include all intensive land uses, whereas the Council's refer to a review of the adequacy of the approach in the One Plan as further monitoring data is available and no later than 30 June 2017. The Council's proposal mentions assessing progress on achieving the water quality numerics in Schedule D and whether extending regulatory control over all rural land use activities is justified. This includes amending the cumulative nitrogen leaching maxima and potentially the mechanisms to provide for nitrogen trading. Where parties oppose the Council's LUC approach there are other policy amendment proposals. It is not helpful to deal with the detailed wording of the policy alternatives without considering their foundation in the different policy regimes in front of us.

[5-37] Table 13-1 in the Regional Plan lists several Water Management Sub-zones (WMSZs) where existing dairy farming land use activities are to be regulated. Some parties are seeking the inclusion and re-inclusion (from the NV POP) of additional

Water Management Sub-zones and the addition of other activities to be specifically regulated.

Secondly, the Regional Plan

[5-38] Objective 13-1 Management of discharges to land and water in the Regional Plan reflects the presented version of the RPS (as amended to align with our decision on Objective 6-1) stating:

> The management of discharges onto or into land (including those that enter water) or directly into water [and land use activities affecting groundwater and surface water quality] in a manner that:
>
> (a) Safeguards the life supporting capacity of water and recognises and provides for the Values and management objectives in Schedule AB,
>
> (b) provides for the objectives and policies of Chapter 6 as they relate to surface water and groundwater quality, and
>
> (c) where a discharge is onto or into land, avoids, remedies or mitigates adverse effects on surface water or groundwater.

[5-39] We do not understand other parties to object to the proposal from Fish and Game and the Minister to add the reference to *land use*, given the Regional Council is giving both land use consents and discharge permits for the activities involved. We agree that should be done, and note that this is also likely to be appropriate in other places in the Plan.

[5-40] Policy 13-1 Consent decision-making for discharges to water states:

> When making decisions on resource consent applications, and setting consent conditions, for discharges of water, or contaminants into water, the Regional Council must specifically consider:
>
> (a) the objectives and policies 6-1 to 6-8 of Chapter 6 (among other matters).

[5-41] Policy 13-2C Management of new and existing dairy farming land uses: - is another area of contention. As drafted by the Council, this policy refers to making decisions on resource consent conditions and setting consent conditions for existing dairy farming that meets the CNL (Cumulative Nitrogen Leaching) limits set for the LUC classes, within a three year step down period. Fish and Game and the Minister wish it to be amended to cover intensive farming and to cover all dairy farming,

commercial vegetation production, cropping, and intensive sheep and beef farming without a three year *compliance* period for existing activities and having reducing limits in years 5, 10, and 20. Fish and Game also supports Mr Day's wish for it to go further and to cover extensive sheep and beef farming. We shall return to that last point later.

[5-42] The LUC class (and Table 13.2) as reflected in the policy is also in contention for the pastoral industry interests. Federated Farmers and Ravensdown also seek specific policy provisions that would allow a different rule regime from the one based on CNL limits set by LUC class for all existing and new dairy farms, with Fonterra confining itself to seeking a similar outcome for existing dairy farms.

[5-43] We are being asked to consider major competing positions on both the policy and the associated rule regime. We will deal with the issues about a management regime generally and then consider the policy and rule regime changes needed to implement our decisions.

Suspended and deposited sediment in Schedule D

[5-44] There were two matters in Schedule D that were in contention – suspended and deposited sediment. Associate Professor Death, called by Fish and Game, said this about sediment in surface waterbodies:

> Land use, primarily agriculture, results in increased levels of deposited fine sediment in surface waterbodies (up to 2000% more) that smothers plants and animals, buries habitats and changes the composition of fish and invertebrate communities, in turn reducing ecological health. The Proposed One Plan (POP) does not provide any guidance on acceptable levels of deposited sediment. The proposed addition to Schedule D (presented in Appendix 1) should go some way to correcting this.

We did not understand any other witness to dispute his opinion. The addition to Schedule D he mentioned is a set of Deposited Sediment percentages for each of the WMSZs, which range between 15% and 25%, except for Specified Sites/Reaches of Rivers with a Trout Spawning (TS) Value, in which case he proposes 10%. However, it was agreed between the parties that this Schedule D matter would only apply to

State of the Environment Monitoring and compliance with it would not be a threshold condition for activity status.[2]

[5-45] The Associate Professor goes on to say that imposing a limit on allowable water clarity reduction is necessary to reduce the risk of increasing deposited sediment levels – and is important in its own right to protect recreational, aesthetic and fishery values. He considers that a maximum clarity change of 20% to 30% dependent on the geology of the river is appropriate: with those figures being the equivalent of the ... *any conspicuous change in the colour or visual clarity* ... standards in s70 and s107 of the RMA. (We dealt with the Schedule D treatment of visual clarity in Decision 4 but cover it here for completeness.) We heard nothing to seriously dispute that, and we agree that this appears to be an appropriate step to take. We ask the Council to settle the appropriate percentage figure in accordance with para [1-23].

Schedule D standards for shallow lakes

[5-46] Dr David Kelly, an expert on aquatic ecology, for the Minister and Mr Max Gibbs for the Council agreed that the nutrient standard for shallow lakes in Schedule D, which was relaxed in the DV-POP, is inappropriate and recommended a new figure (490mg/m^3 TN, 30mg/ m^3 TP, 8mg/ m^3 chlorophyll-a). However, this amendment is outside the scope of these appeals and unless the Court is minded to use the discretion under s293 of the Act will require a later plan change. The Minister submitted that s293 would be appropriate because it is supported by the expert technical evidence, relevant parties are represented in the proceedings and no party would be prejudiced as the change to Schedule D would not affect the Table 13-2 leaching rates that would apply in the relevant water management subzones. After some reflection, we have come to agree with that view, and invite the Council to consider invoking that process.

Coastal Rangitikei catchment

[5-47] The NV POP included in Rule 13.2 (Agricultural Activities Table 13.1 Water Management Sub-zones) the area known as the *Coastal Rangitikei* catchment as a targeted WMSZ, but it was removed from the Chapter in the DV POP. Fish and

[2] There is a footnote to Schedule D: The Deposited Sediment Cover (%) numeric only applies for State of the Environment monitoring purposes to determine if the percentage cover of deposited sediment on the bed of the river will provide for and maintain the values in each WMSZ.

Game, and the Minister of Conservation, are among those who wish to see it reinstated.

[5-48] It seems to be accepted by the expert witnesses that the lower Rangitikei River water quality is deteriorating in quality to the point (*on the cusp*, as one witness put it) of unacceptability. For reasons which do not reconcile with the evidence we heard, the Hearings Panel seemed to be saying that because its water quality had not got to the point of being critically bad, the evidence did not support retaining the Catchment in a management regime. We could not agree with that view of things. Such a view cannot be reconciled with the purpose and principles of the Act as expressed in, eg s5(2)(b), s6(a) and (c) and s7(aa), (d), (f), (g) and (h), or the objectives and policies of the POP.

[5-49] The Panel was also of the view that the loadings of pollutants in the lower River come largely from point source discharges – in the shape of sewage treatment plants and perhaps abattoirs. But the evidence was that 94.7% of the nitrogen in the river and its tributaries come from non-point sources. Similarly, the Panel said that the catchment has a .. *low number of dairy farming uses*. But the evidence was that some 20% of the catchment's land area is in dairying compared, for instance, to the 16-17% of the Upper Manawatu and the 18% of the Mangapapa, both of which are included in Chapter 13 of the DV POP. Further, given the high proportion of LUC Class I to III land in the catchment, and an ample quantity of non-allocated water, there is high potential for the expansion of dairying and the establishment of horticulture.

[5-50] Overwhelmingly, the evidence we heard is in favour of the Coastal Rangitikei Catchment being included as a targeted WMSZ, and in the leachate management regime.

Lake Horowhenua, coastal lakes, and related sub-zones

[5-51] The Minister of Conservation, supported by Fish and Game, wishes to see the West_4 and 5 (Kaitoke Lakes and Southern Wanganui Lakes), and Hoki_1 (Lake Horowhenua) water management subzones reinstated in Table 13-1 of POP. That would result in them being *specified* catchments and some land use activities would be

regulated to control discharges of contaminants, with the intention of raising the quality of surface water. Those zones were included in NV POP but not in DV POP.

[5-52] There are 17 lakes and one wetland in the West_4 and 5 zones. Hoki_1a and 1b contain Lake Horowhenua, which is the largest dune lake in the country.

[5-53] In respect of Lake Horowhenua, the Hearings Panel noted that it ... *is subject to extremely elevated total and dissolved nitrogen and phosphorus concentrations. Ammoniacal nitrogen is also occasionally elevated to levels that are toxic to aquatic life.* It went on to note that Levin's sewage was discharged into the lake until the mid 1980s, and that it continues to receive stormwater from the town. The Panel concluded that there is an evidential basis for including the Lake's catchment in Table 13-1 ... *provided cropping and horticulture are retained as intensive land uses to be regulated.* It went on to conclude that those intensive land uses should not be regulated, and so the Lake was withdrawn from the Table.

[5-54] For the lakes in West_4 and 5, the Hearing Panel came to the view that there was not an evidential basis for including them in Table 13-1. For those lakes, there was no, or limited, water quality monitoring data, and such as there was indicated relatively low concentrations of SIN. Further, for the Kaitoke Lakes (West_4) intensive land uses comprise only 5% of the catchment, and for Southern Wanganui (West_5) only some 9%.

[5-55] In passing, we note that one of the items of relief sought in Federated Farmers' appeal was the removal of the Northern Manawatu Lakes (Management Zone West_6) from Table 13-1. That is not now being pursued.

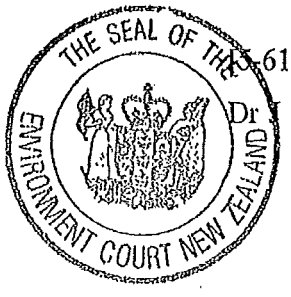
[5-56] The case made by the Minister and Fish and Game placed considerable reliance on the evidence of Dr David Kelly, presently a senior scientist with the Cawthron Institute in its Coastal and Freshwater Section. He, in turn, discussed the coastal lakes analysis undertaken by Mrs Kathryn McArthur and contained in her s42A Report, and a National Coastal Lake Survey, reported on in 2009 and 2011. Dr Kelly told us that dune lakes are an internationally rare environment class, known only in New Zealand, Australia, Madagascar and south-eastern coastal USA.

[5-57] In short, it is his conclusion that notwithstanding the lack of, or limited, monitoring of these lake systems it can be reliably said that 13 of these lakes are ... *nearly all predicted to presently exceed the POP standards for [total nitrogen] concentrations. This suggests that management within the lake catchments necessitates reductions in nutrient loadings to achieve POP standards, and future landuse development needs to be managed to limit nutrient losses.* He goes on to say that the figures for the five lakes within these management zones, for which there are available water quality data, support such a finding and that catchment nitrogen loading would need to be reduced by an average of 47% to meet POP standards for total nitrogen, and further reduced if a more protective nutrient standard was considered.

[5-58] As did other witnesses, Dr Kelly recognised that there is no one cure for Lake Horowhenua in particular. Its problems and its sources of N are complex, and may require a range of riparian and in-lake measures, such as sediment capping and dredging. Nevertheless its diffuse N sources still require management if the lake is to be brought within nutrient limits.

[5-59] The Council's present position on not including at least Lake Horowhenua and the northern Manawatu Lakes is that it considers that there has not been sufficient modelling of the impact of CNLs on them, but that there has been sufficient modelling in the case of the Coastal Rangitikei. That said, we understand the Council's position to be that, at worst, no harm could come from doing so, and Ms Barton agreed that in the case of Coastal Rangitikei it could be a precaution against deterioration to the point of total quality failure.

[5-60] That the problems of these lakes, with Lake Horowhenua as the worst case, are complex and remedies may extend beyond limitations of non-point source discharges, is absolutely not a reason to say ... *it's too hard* ... and do nothing about something that unquestionably must be contributing to the problem.



[5-61] Looking to the joint witness statement on this topic – recording the views of Dr K F Roygard, Ms M E Clark, Dr Brent Clothier, Mrs Kate McArthur, Mr Max

Gibbs (all Horizons witnesses), Dr M R Scarsbrook (Fonterra), Ms Corinna Jordan (Fish and Game), Dr R G Death (Fish and Game), Dr O M N Ausseil (Fish and Game), Dr Lindsay Fung (Hort NZ), and Dr Kelly, we find a large measure of agreement with those views. For instance:

> All parties agree that from the ecological point of view the concern is with the management of water management zones or sub zones rather than their inclusion in Table 13.1 leaving 13.1 to be a matter for the planners.
>
> All parties agree that the actual measured state is likely to be as bad, if not worse, than the modelled state based on TN [total nitrogen] (ref D Kelly p.28 para 67 table 3).
>
> All parties agree that Dr Kelly's modelling is informative and sound for these lake catchments.
>
> Kaitoke Lakes (West_4)
>
> - All parties agree that the current state does not meet Schedule D limits.
> - All parties agree that the current state of the lakes are hypertrophic/supertrophic (with the exception of Kohata for which we do not have measurements) (ref D Kelly table 3 and fig 3 2012).
> - All parties agree that the Kaitoke Lakes zone requires management action.
>
> Southern Wanganui Lakes (West_5)
>
> - All parties agree that lakes in this zone require management action.
> - All parties agree that the modelling by Dr Kelly indicates the current state of total nitrogen does not meet Schedule D limits.
> - Anecdotal observations suggest the state of the lakes are degraded and they have algal blooms (ref TEB v9 p4400).
> - Modelling predictions show that 7 out of the 7 largest lakes within this zone are supertrophic to hypertrophic.
> - All parties agree that further monitoring of the lakes would be valuable in determining the current state.
>
> Lake Horowhenua (Hoki 1a and 1b)
>
> - All parties agree that the current state does not meet Schedule D limits.
> - All parties agree that the current state of the lake is hypertrophic (highest of the lot) and requires management action (ref D Kelly table 3 and fig 3 2012).

[5-62] Given that degree of unanimity from a group of people pre-eminent in their field, the case for bringing these lakes and management zones into a management regime so that their situation can be improved (even if not completely cured) is, again, overwhelming.

Chapter 13 – all intensive farming, or only dairying?

[5-63] As we have said, the Hearing Panel dropped intensive sheep and beef farming, cropping, and commercial vegetable growing from the regime regulating N leaching leaving only new (and existing, within *targeted water management sub-zones*) dairy farming within it.

[5-64] We take this summary of their reasons from para 8.6.9.3 of the Panel's decision, discussing the types of intensive farming to be included in Rule 13-1:

> ... The range of leaching rates [for cropping] is therefore 6 to 35 kgN/ha/year, with most results being 24 kgN/ha/year or more. On that basis, it would seem appropriate to include cropping in Rule 13-1.
>
> However, we also heard compelling evidence that the farmed areas used for cropping varied on a paddock by paddock basis annually. In some areas, the land was typically involved in a ten year rotation whereby it would be cropped two years in a row and then left fallow (in pasture) for 5 to 10 years. The cropped paddocks were generally leased from farmers on a "hand shake" contractual basis. We find that it would be extremely problematic to include such a transient land use in a regulatory framework. For that reason, as well as the small areas of cropping noted below and the lack of information we had about the ability for cropping to meet the Rule 13-1 limits and the consequences for the farmers, we have decided that cropping should not be included in Rule 13-1.
>
> We are also mindful that, of the target catchments that we have decided should be retained in Table 13.1, only the Lake Horowhenua catchment (3%) has any area in cropping. In that catchment, the cropping area is very small compared to dairy and sheep and beef farming and so its overall contribution to nitrogen leaching will be commensurately small.
>
> In their End of Hearing Report in April 2010 the officers recommended that "market gardening" be deleted from the Glossary and from Rule 13-1 and the alternative term "commercial vegetable growing" be used instead. They recommended a definition of "commercial vegetable growing" as follows:

Commercial vegetable growing means using an area of land greater than 4 hectares for vegetable growing, on an annual basis, for human consumption. Fruit crops and vegetables that are perennial are not included.

We were provided with evidence on the nitrogen leaching rates for commercial vegetables by the officers and submitters. Dr Clothier told us that for a large commercial vegetable enterprise near Levin his calculations using the SPASMO meta-model had predicted 431 kgN/ha/year of leaching over a two year period, or around 215 kgN/ha/year. We note, however, that the Levin enterprise had crop failures so it seems to us that those estimates should be used with care. Dr Shepherd used Overseer Version 5.4.3 to predict nitrogen losses from a potato crop at 10 kgN/ha/year. Dr Whiteman, appearing for Horticulture NZ, advised us of a "Fictitious Farm Strategy" prepared by LandVision for 400ha of crops comprising potatoes, carrots and brussel sprouts. This study also used Overseer Version 5.4.3. The vegetable crops and their predicted nitrogen leaching rates were potatoes at 58 kgN/ha/year, carrots at 18 and 19 kgN/ha/year and brussel sprouts at 30 kgN/ha/year.

We find that the latter Overseer predictions are more reliable than the earlier SPASMO results as they use more recent modelling software developed specifically for cropping situations. The range of predicted leaching rates is therefore 10 to 58 kgN/ha/year, with most results being 18 kgN/ha/year or more. On that basis alone, it would seem appropriate to include commercial vegetable growing in Rule 13-1.

However, commercial vegetable growing also occurs on a mix of leased and farmer-owned land. For example, Ms du Fresne told us that for her 200 ha enterprise "40% of the land is owned and 60% is leased. The nature of the leases varies, with some being renewable annually and some longer term, usually on a 3yrs basis with a right of renewal. The area of land that we grow on could change a number of times a year depending on when leases become available or cease." As with cropping, we find it would be extremely problematic to include such a transient land use in a regulatory framework. That is one reason why we have decided that commercial vegetable growing should not be included in Rule 13-1.

We also have very little evidence about the ability of commercial vegetable growers to meet the limits in Rule 13-1 or the consequences for them.

We are also mindful that of the target catchments or Sub-zones that we have decided should remain in Table 13.1, only the Managapapa (2%) and Lake Horowhenua (3.5%) have any areas in horticulture (which includes commercial vegetable growing). These are very small areas compared to the areas in dairy and sheep and beef farming and so their overall contribution to nitrogen leaching will be commensurately very small.

In their End of Hearing Report in April 2010 the officers recommended that "intensive sheep and beef farming" be defined as:

Intensive sheep and beef farming means using land for sheep, beef and mixed sheep/beef farming on properties greater than 4 ha where irrigation is used in the farming activity.

We were provided with very little evidence on the nitrogen leaching rates of intensive sheep and beef farming by the officers and submitters. None of the 25 case study farms discussed in the evidence of Mr Taylor comprised irrigated sheep and beef farms. Dr Shepherd provided information on an irrigated beef unit in Dannevirke. He predicted a nitrogen leaching rate of 19 kgN/ha/year. That is a relatively high leaching rate but it does not relate to a sheep or sheep/beef enterprise. We received no evidence on the actual area of land within the Table 13.1 Sub-zones currently comprising irrigated sheep and beef farming. None of the tables in Mrs McArthur's evidence showing "proportional land use" for those catchments contained any data relating to irrigated sheep and beef farming. We accordingly find that there is no evidential basis for including intensive sheep and beef farming in Rule 13-1.

We find that only dairy farming should be retained as an "intensive farming land use" to be regulated under Rule 13-1. We accept that the term "dairy farming" must be defined. We have amended the definition of that term in the Glossary based in part on the recommendations of the officers.

Returning to our earlier findings regarding the target catchments to be retained in Table 13.1, this means that Lake Horowhenua should be deleted from that table as its retention depended upon market gardening (horticulture) being regulated under Rule 13-1.

The conclusions we have underlined are those that we particularly discuss in this and other sections of this Part of the decision.

[5-65] We record that there was no dispute among the galaxy of scientists who gave evidence that even with leaching from sources as diffuse as a paddock containing livestock or growing carrots, the amount of leachate can be calculated with acceptable margins of accuracy by using a tool such as OVERSEER. For nitrogen (N) for instance, the production of leachate is expressed as kilograms of N, per hectare, per year (XkgN/ha/yr).

[5-66] We pause to explain the OVERSEER® *tool*. It is a nutrient budget model from which farmers and their advisers can calculate both the inputs of nutrients by

way of fertilisers, supplements and so on, and outputs by way of produce, nutrient transfers, gas emissions, leaching etc. It has been through several iterations since first developed – we were told that the sixth version is due for release very soon. It is a long-term equilibrium model which can predict nitrogen leaching, given a set of farming practices and average long-term rainfall. Its use in similar situations has been the subject of approving comment in earlier decisions of the Court – see eg *Carter Holt Harvey Ltd v Waikato RC* (A123/2008). We acknowledge that the horticulture industry expresses reservations about the workability of past and current versions of OVERSEER for horticulture. As Ms Atkins put it in opening, if the pending latest version – OVERSEER 6 - is not ... *everything we are hoping it to be* ... an alternative means of calculating leachate may need to be found. Without relitigating the principles, we would be prepared to consider an interim solution pending the outcome of trialling OVERSEER 6 in the context of horticulture, if the affected parties think it necessary.

[5-67] Nor is there any substantive dispute that the intensive land uses already mentioned – dairying, intensive sheep and beef, cropping, and commercial vegetable growing (ie horticulture) – each produce N leachate. While dairying is the land use most commonly criticised for the production of N pollutants, it is by no means solely to blame.

[5-68] We also note here that Dr Stewart Ledgard was engaged by Regional Council to analyse the use of the OVERSEER tool for the first instance hearing, and did so, but was then engaged by Fonterra on other issues. One study of 3300 dairy farms nationwide (including 143 in the Manawatu-Wanganui Region) gave an average N leaching figure of 22kgNha/yr in the region, compared to 34kgN/ha/yr nationally. The region's 75th percentile was 27kgN/ha/yr. The overall results indicate that much of the variability is management dependent, so many farms should be capable of reducing their leaching. That and other information indicates that there is a wide range of N leaching from dairy farms in the region – from 8 to 47kgN/ha/yr, as modelled using OVERSEER.

[5-69] In terms of N leachate currently being produced by the different land uses, there seemed to be a good measure of agreement that, as outlined by Dr Dewes, the

result of the 2007 Clothier et al study into the Upper Manawatu catchment probably holds good for the region as a whole. In that study it was found that more than 90% of the total N in the river came from dairying and (extensive) sheep and beef farming. Of that, dairying contributed some 50%, while occupying some 17% of the catchment land area. Sheep and beef occupied some 77.3% of the land area and contributed the other 50%.

[5-70] Logically, three conclusions can be drawn from that. First, for the land area it occupies, dairying contributes a disproportionately high percentage of N leaching. Secondly, that unless, somewhere along the line, extensive sheep and beef farming can be brought into a N leaching reduction and management regime, one half of the problem will never be addressed. Thirdly, the dairy industry could rightly feel unfairly done by in being expected to spend money and effort to address its leachates, while their sheep and beef farming colleagues may carry on as they always have.

[5-71] The convincing case for including all of intensive land uses in a leachate management regime is summarised in the Joint Witness Statement produced on 23 March 2012 by these expert witnesses: Dr D C Edmeades (Federated Farmers); Dr A M Dewes (Fish and Game); Dr A H C Roberts (Ravensdown); Dr J K F Roygard (Horizons); Dr A D Mackay (Horizons); Dr R W Tillman (Federated Farmers); Dr L A Waldron (Fish and Game); Mr P H Taylor (Horizons); Mr I L Grant (Horizons); Dr B E Clothier (Horizons); Dr L E Fung (Hort NZ). They expressed their collective views in this way:

> All parties agree that all land use activities contribute to the water quality issue. There is evidence that sheep and beef farming, and dairy farming (including all cropping activities), are significant contributors to the N loadings in rivers and lakes in the Horizons Region. In some specific catchments there may be other significant sources of N.
>
> All parties recognise that all uses contribute, they also recognise that dairy farming results in high N loss per hectare relative to other pastoral land use activities and represents the greatest opportunity for making reductions to N loading.
>
> In some catchments, other land uses may present significant opportunities to make improvements to water quality. For example, commercial vegetable production, cropping.

Sheep and beef farms have a low N loss per hectare relative to other farming activity but make up a large proportion of most catchments, and therefore contribute a significant amount of the non-point source N load.

Due to the large land area of sheep and beef a relatively small increase in N loss per hectare could cause a significant increase in diffuse N loss (Aussiel Table 18 & 19). Any intensification of land use on those units could result in a significant increase in N load.

All parties agree there are fewer opportunities on sheep and beef farms to reduce N loss through mitigation.

All parties agree that the contribution of sheep and beef farming, including cropping activities, to the in-river N loading should not be ignored by the One Plan.

All parties agree there is a three-to six-fold increase in leaching losses from extensive sheep farming to dairy farming on a per hectare basis (Clothier et al., 2007).

All parties agree that all land users in the catchment should contribute to solving the problems of water quality/in-river N levels. This is because there is a significant risk that the regulated land users will shift their load to unregulated land users.

All parties agree that there will be a need to set a N load goal per catchment. Once this has been established, all farmers must know the targets they are required to achieve.

All parties agree that <u>if</u> an allocation mechanism is instigated, it should be directed to all land uses in the catchment.

Little more need be said. The case is plainly made out for including the intensive land uses of dairying, cropping, horticulture and intensive sheep and beef farming within a leachate management regime. Issues of equity also arise if only dairy farming is subject to controls, while other land use activities which also leach nitrogen are not, a point repeatedly made by Mr Day. All intensive land uses need to be brought into the mix in order for the regulatory regime to be efficient and effective.

Scope to include extensive sheep and beef farming in the regulatory regime

[5-72] *Scope* in this context means the ability, as a matter of law, to consider and decide upon a particular issue. In turn, that depends on whether, at an appropriate stage in the proceeding, that issue has been raised by one or more of the parties in a way that makes it clear to all parties that the issue is *up for discussion.* Discussion of the point almost always involves a citation of the decision in *Re an application by Vivid Holdings Ltd* [1999] NZRMA 467 and the view expressed in that decision that to be within scope, the relief sought has to be ... *reasonably and fairly raised in the*

course of submissions ... and whether it was raised ... *should be approached in a realistic workable fashion rather than from the perspective of legal nicety.*

[5-73] *Extensive sheep and beef farming* means the farming of cattle for meat and by-products, and of sheep for meat and wool, in the traditional way – without the use of processes such as irrigation. Mr Day submits that his original submission to the Council about NV POP was broad enough to capture extensive sheep and beef farming. In his submission he expressed the view that all land in the targeted catchments should be allocated an N loss figure. In that, he is supported by Fish and Game. Federated Farmers though point out that the Hearing Panel thought that there was not scope. The Panel said:

> ... there is no scope within submissions to include non-intensive sheep and beef farms within Rule 13-1. Even if submissions had sought that as an outcome, given the number of farms that would be potentially affected, that would be a matter more appropriately considered under a Plan variation or change.

[5-74] The Council's submission on the point also points to the decisions such as *Royal Forest and Bird Protection Soc v Southland DC* [1997] NZRMA 408 (HC) and *Estate Homes Ltd v Waitakere CC* [2006] NZRMA 308 (CA). It also identifies the actual language used by Mr Day in his submission (Exhibit MW10) – and indeed Mr Day quotes the extract himself. The language is quite tentative - ... *If by chance this model is correct and isn't economically prohibitive then more areas of land use should be included than those targeted to date.* In its summary of submissions on NV POP the Council certainly did not record Mr Day (or anyone else) as advocating the inclusion of extensive sheep and beef in the regime.

[5-75] We agree with the Hearing Panel on the point – there is no scope to bring extensive sheep and beef into the regime at present.

Section 293 process

[5-76] We also agree with the Council's submission that the use of s293 in these circumstances would be quite inappropriate. A move to include extensive sheep and beef farming would be one of great consequence throughout the region, and should be approached in an orderly and measured way. Given the number of persons and

organisations who would have a vital interest, to use s293 to try to accomplish that within the present proceedings would be to create an administrative nightmare and would be very dubious procedurally.

[5-77] That is not to say that we are dismissive of the possibility on its merits. Given that extensive sheep and beef farming appears to produce about half of the N leachate in the region's waterbodies - see para [5-69] - the comprehensive and integrated sustainable management of resources would unquestionably be enhanced by the eventual inclusion of such a land use in a management regime. In the interests of equity among land users and in the interests of sustainable management we think the Council should promote a Plan Change as soon as it is able.

Practicality and costs of obtaining consents and permits for horticulture

[5-78] This issue arose in the context of commercial vegetable growing in the region. As part of avoiding risks to plant health for at least some varieties of vegetables, growers have a strategy of not growing some crops in the same ground in successive years. Sometimes the interval is longer than that. For instance, in the case of seed potatoes, a lapse of at least five years between crops in the same ground is required.

[5-79] Frequently, the crops will be grown on land not owned by the grower, but leased from another farmer who may, in other years, lease it to other growers where the successive crops are not incompatible, or may use it in his or her own farming operations for pasture or some other purpose. We understand that these lease arrangements are frequently quite informal, arranged at short notice, and settled on a handshake.

[5-80] It was argued that such casual and short-term arrangements could not reasonably be accommodated within a resource consent regime. It was said that the delay involved in preparing, lodging and negotiating a consent with the territorial authority could be incompatible with the ad hoc nature of the use, and that the costs of doing so, perhaps running into some thousands of dollars in each case, would be unsupportable for growers, who may have a number of such arrangements in place in any given year.

[5-81] We have come to agree with Ms Helen Marr, the planner called by Fish and Game, that this concern has become overstated. If it was only to be the individual growers who could or would be required to seek the consents, we could see the basis for that argument. But, as was discussed at the hearing, it seems to us that it would make far more sense for a landowner, who knew or hoped that some of his or her holding might be attractive for such a purpose, to make a *whole of farm* application for a resource consent, with leachate and other factors being assessed at the high but plausible end of the range. The application would be presented on the basis that only a finite portion of the farm would be so used at any one time, and thus be leaching at up to the defined rate, in any one year. Depending on the exact nature of the consent required, its term could be indefinite or for a finite but still ample period of years, and the cost of the consent could be amortised over that time.

[5-82] We note too that, at present, (and there was no suggestion of changing them) to fall within the definitions of *cropping* and *commercial vegetable growing* in POP the areas occupied by those activities at any one time would have to exceed 40ha and 4 ha respectively. That, we imagine, may move many such casual and short-term uses outside the requirements for resource consents. If a consent was required, we assume it would be treated the same as other land uses.

[5-83] This argument appears to be the principal reason why the Hearings Panel did not include horticulture in the management regime, but on the evidence we heard we do not find it a sound and influential point, and we put it aside.

The Alternative Regulatory Regimes in front of us

[5-84] We now deal with the alternative regulatory regimes sought by the different parties – on the one hand the LUC based regime, and on the other, the possibilities offered by the pastoral industry bodies.

Land Use Capability Based Regimes

[5-85] We deal first with the common elements in the land use capability based approaches which Fish and Game/the Minister and the Council support. Then we move to considering the differences between the NV-POP with its Year 1, 5, 10 and 20 nitrogen leaching limits (supported by Fish and Game/the Minister) and the

Council's proposal for only Year 1 nitrogen leaching limits for dairy-farming (with a three year step-down for existing dairy farming) which differs from the DV-POP. When we refer to *limits* the word is here used as indicating threshold limits for a *controlled* activity given the *restricted discretionary* activity default category allows consideration of greater leaching maxima under either of the proposed regimes. We recognise that the threshold limits for a *controlled* activity are the desired lower levels of nitrogen leaching, with that more favourable consent status set to encourage their adoption.

- *Land Use Capability (LUC) classifications*

[5-86] This system of classifying land is described as ... *a systematic arrangement of different kinds of land according to those properties that determine its capacity for long-term sustained production. Capability is used in the sense of suitability for productive use or uses after taking into account the physical limitations of the land.* It takes account of characteristics such as soil and rock types, landform and slopes, erosion susceptibility and history, vegetation cover, climate, and flood risk. There are eight classes. Classes 1 to 4 are suitable for arable cropping (including vegetable cropping), horticultural (including vineyards and berry fields), pastoral grazing, tree crop or production forestry use. Classes 5 to 7 are not suitable for arable cropping but are suitable for pastoral grazing, tree crop or production forestry use and, in some cases, vineyards and berry fields. The limitations on use reach a maximum with LUC Class 8. Class 8 land is unsuitable for grazing or production forestry, and is best managed for catchment protection and/or conservation or biodiversity.

[5-87] The NV POP adopted the LUC approach to leachate management because it was seen as focussed on the potential productivity of a given piece of land, rather than its current type and level of use. It also focuses on outputs, rather than inputs, and thus it allowed flexibility of choice of what can be produced on the land, and in the method of leachate management. It had a scheme of reducing N loss targets over a period of 20 years. The Hearing Panel did not retain the NV POP approach. Rather, it applied the LUC based N Loss target only to new dairy farms throughout the region, and with no reduction over time. The Minister, Fish and Game, Mr Day and the Council seek to have the NV POP approach restored.

[5-88] Dr Ledgard regards the LUC based prescribing of N loss *limits* as having merit for future uses because it directs higher intensity farming uses onto land which has fewer limitations on its productive potential. He is not so supportive of it for existing uses because he believes that it does not recognise that the existing technologies in use have changed the productivity of the land, and that existing farms may thus be required to make major changes to meet what he describes as a relatively low N loss requirement.

[5-89] The proposal for an LUC based regime has its critics, some sternly so. Dr Edmeades, called by Federated Farmers regards it as a ... *fatally flawed* ... concept and thinks it most unfortunate that it was introduced into the debate. Dr Roberts, the Chief Scientific Officer for Ravensdown, is equally uncompromising, regarding it as having ... *no valid scientific basis.*

- *The basis of the LUC approach*

[5-90] The case for a natural capital/LUC approach begins with the premise that land available for primary production is a finite resource and that land based industries are the basis for the region's economic wellbeing. The allocation of an N loss limit based on the natural capital of the soils was identified in the report by *Clothier et al* (2007) as the best option to meet the dual requirements for continued economic growth and ongoing flexibility in land use in the region, while meeting water quality targets.

[5-91] The reasons why the Council selected the LUC approach was described by Mr. Maassen in these terms:

> NV-POP sought to identify those intensive food production systems that were the major contributors to non-point source nutrient leaching now and foreseeably in the future through growth as well as regulating those activities on a whole farm basis through annualised N output based leaching limits in kg/ha/year set at a level that achieves progress towards the water quality objectives while allowing maximum flexibility in land use recognising the different productive efficiencies of different soil types. This on-farm limit is expressed as a 'cumulative nitrogen leaching maximum' defined in the glossary of POP as:
>
> > Cumulative nitrogen leaching maximum means the total kilograms of nitrogen leached per hectare per year for the total area of a farm (including any land not

used for grazing) and is calculated using the values for each land use capability class specified in Table 13.2.

Establishing limits requires a regime. A regime means a control methodology applied to a complex dynamic system in a coherent and reasoned fashion. Hallmarks of the regime had to be:

(a) Transferability – the ability to apply the regime to other water management zones where trends for non-point source contributions justified regulatory intervention;

(b) Scalability – the ability to apply the regime over a wider range of land uses contributing to poor water quality as required;

(c) Flexibility – allowing land owners to make decisions on resource use rather than being tied to existing patterns of activity;

(d) Output based – focussed on the effect and contaminant output of concern with individual farmers deciding how to achieve that at an operational level;

(e) Efficient – recognise the differences in finite soil resources and their relative productive efficiencies;

(f) Measurable – the mechanism had to be measureable through the application of current technology such as OVERSEER and enable calculation of the consequential outcomes of the regime for surface water quality.

[5-92] Dr Mackay, a Soil Scientist, currently Principal of Science and Programme Leader in the Climate, Land and Environment Group of Ag Research based on the Grasslands Campus in Palmerston North, was called by the Council. His evidence explains that in the absence of a method for calculating the soil's natural capital, a proxy that serves as a useful alternative is the ability of the soil to sustain a legume-based pasture that fixes nitrogen biologically under optimum management and before the introduction of additional technologies. Dr Mackay stated:

> A legume-based pasture is a self-regulating biological system with an upper limit of the amount of N that can be fixed, retained, cycled and made available for plant growth. Legume pasture dry matter base provides one indicator of the underlying productive capacity of the soil, taking into account the influence of new plant germplasm and the use of phosphorous, sulphur, potassium fertilisers, lime input, trace elements and technology to control pests and weeds. It reflects the underlying capacity of soil to retain and supply nutrients and water, and the capacity of the soil

> to provide an environment to sustain legume and grass growth under the pressure of grazing animals.
>
> Estimates of the potential productive capacity of a legume-based pasture fixing N biologically under a *typical sheep and beef farming system* for each Land Use Capability (LUC) unit in New Zealand are listed under *obtainable potential carrying capacity* in the extended legend of the Land Use Capability worksheets, which are based on the capability for long-term sheep and beef livestock production.
>
> Using productivity indices (ie attainable potential carrying capacity) listed in the extended legend of the LUC worksheets for calculating the natural capital of soils is a new application of the information in the extended legend.

[5-93] We understand the criticisms of the LUC approach by Dr Edmeades, Dr Tillman and Dr Roberts, to fall generally under the following headings:

- LUC classes per se do not determine the actual or predicted amounts of N leached from dairy soils.
- The use of LUC in setting and managing nitrate leaching levels is not logical.
- The application of LUC to manage nitrate leaching in this case could *trap* future generations of farmers into a 1980's *time warp.*
- The LUC approach is inequitable.

We will consider those criticisms in turn.

- *LUC Classes Do Not Determine Actual or Predicted Amounts of N Leaching from Soils*

[5-94] It has never been suggested by the Council that LUC determined the actual or predicted amount of N to be leached. The actual N leached will be primarily determined by the land use and intensity of production. The LUC is a proven method of determining inherent soil productivity. The Council intends it to be used to allocate N leaching maxima across the various soil types and to encourage intensive farming towards higher quality soils. N leaching maxima will be allocated according to inherent soil productivity – irrespective of current land use or intensity.

[5-95] LUC Class I and II soils will produce more and require less input for output at a given level of production. The cost of technology inputs generally increases, as does the production. Soils on which production technologies have their biggest impact on production levels will also be those land types that provide the greatest challenge in

mitigating N losses. Further, the number of options for mitigating N loss decreases as the producer moves from soils in LUC Classes I and II to those in Classes III and greater.

- *The Use of LUC in Setting and Managing Nitrate Levels is Not Logical*

[5-96] Dr Edmeades asserts that the LUC based approach is arbitrary and essentially meaningless because the anticipated effects on N loading relative to the current situation, when expressed as percentages, are within the margin of error associated with OVERSEER. In any case they are not dissimilar to the water quality differences anticipated to be achieved from the application of a single number limit advocated by Federated Farmers and other parties.

[5-97] It is our understanding that, (with the exception of Horticulture NZ, as discussed elsewhere) all the parties accepted OVERSEER as the best tool for measuring N loss from a farm. OVERSEER would be used in any of the regimes before us, with whatever inherent margin of error.

[5-98] In terms of the anticipated water quality results it is simply inaccurate to suggest that the *single figure* limits proposed by the appellants will achieve similar results to the LUC approach put forward as NV POP. We discuss this further elsewhere in our decision.

[5-99] We accept the evidence of Dr Mackay when he states:

> The major strength of this approach is that in calculating the N leaching loss limit, it considers the whole catchment and is not prescriptive. It is not linked to current land use, but rather linked to the underlying land resource in the catchment. The approach does not target the land use or intensity of use and it does not place limits on outputs; rather it allocated N leaching loss limits to each LUC unit based on the biophysical potential of the natural capital of the soil. It treats farms with the same resources in the same manner, regardless of current use. It disadvantages high input, highly productive farms on soils with little inherent natural capital (eg sand country, gravels and steep land soil) to limit N leaching, even when BMPs have been followed.

He goes on to say that to achieve the most efficient use of resources with the least environmental impact, N leaching loss limits should be weighted towards those soils with the greatest natural capital, and continues:

> The LUC natural capital approach is also portable beyond the priority catchments and sends important messages (it does not reward the biggest polluters, does not penalise conservative behaviour and does not disadvantage owners of undeveloped land) and timely signals (eg establishes a target for mitigation practice and to find a threshold above which the capital investment in increasing production must be extended to mitigation technologies, including significant modifications to farm design).

[5-100] Dr Roberts' criticism of the LUC followed a similar theme to that of Dr Edmeades. He insisted that using a *1970s Land Classification* as a proxy for the natural capital of the soil resource is itself arbitrary. He argues that the white clover /grass system (on which LUC is based) is not natural and has in fact been created by input. We do not disagree. However, in our view that does not stop the LUC reflecting the inherent productivity of a particular soil resource and Dr Roberts conceded this in answers to questions from the Court – although he thinks there are better ways of doing it. He also agreed that under the proposed LUC regime the more intensive land uses will be *directed or encouraged* towards soils of higher quality. We see this as one of the major advantages of the LUC regime over those proposed by Federated Farmers, Fonterra and Ravensdown, and better providing for the efficient use of resources.

- *The Application of LUC Could Trap Future Generations of Farmers into a 1980s Time Warp*

[5-101] Dr Edmeades' point here is that there are a number of existing management practices (which he lists) and in the future there will be more developed that control nitrate leaching. He appears to be suggesting that an LUC based policy does not allow for the implementation of such technologies and for this reason dairy farming will be trapped into a 1980s *time warp*.

[5-102] We have difficulty with the logic of this argument. The LUC simply informs an allocation regime. The use of technologies such as those Dr Edmeades lists are

available to anyone to assist in achieving the N cap for any particular LUC class, as they would be for any of the N loss management regimes before us. It is, however, acknowledged, as we have already stated, that as the LUC class/natural capital of soil declines, the available options to reduce N loss become fewer, and become more expensive.

- *The LUC Approach is Inequitable*

[5-103] Dr Edmeades argues that those farmers on lower quality soils: - Class III and beyond, who have invested in technologies such as irrigation, supplements, modern pasture species, and management are being disadvantaged. He states that dairy farming on this land will now be less profitable and for some may become uneconomic.

[5-104] The evidence did not support this argument. And the LUC classification for soils in sand country on the West Coast of the region, where irrigation and recontouring to create dairy farms has occurred on a large scale, has been refined to recognise the investment to overcome some of the production limitations of the soils – although Dr Roberts argues that the adjustment did not go far enough.

[5-105] In terms of such technologies as nutrient inputs, we agree with Ms Barton when she states:

> With regard to technologies such as nutrient inputs, these technologies, where applied, have had impacts on the levels of nutrient leaching from the farming operations. These inputs are hard to mitigate on lower quality soils and produce lower levels of production compared with elite soils. The requirement to manage this situation and provide mitigation is not unreasonable. It is more inequitable to fail to distinguish such farming operations from existing operators that do not generate the same effects or to fail to recognise the inherent capacity for greater production and mitigation on superior soils where they exist.

[5-106] Dr Edmeades also posits the scenario of intensive agricultural production on high quality soils where a farmer has a generous allocation for N leaching. It could well be possible for a farmer to employ current technologies in farm management practices to reduce the actual nitrate leaching below the limit required by the LUC, thereby contributing to even better water quality. He considers that the LUC regime

will not encourage such activity. But neither will any of the other regimes, including the Fonterra approach which grandparents the N leaching level below 27kgN/ha/yr to the 2007-2010 leaching of an existing farm.

[5-107] An N trading regime would address this issue and we refer to the possibility of such a scheme elsewhere in the decision.

[5-108] Those opposed to the LUC approach stated that the *reasonably practicable* farm practices or *Best Practicable Option* (BPO's) would also address this issue. However we have reservations regarding the definition, practicalities and enforceability of any provisions related to *reasonably practicable* farm practices or BPO's. Further, we see no reason why many of those management options listed as BPO's should not form part of any farm management regime irrespective of what N leaching regime is adopted.

[5-109] Other approaches to managing N loss including *grandparenting* tend to penalise those farming superior soils and results in sub optimal utilisation of the finite soil resource. Farmers on high quality soils may be prevented from taking advantage of the productive potential of their soils if they have been *grandparented* to a production level below the soil's inherent productive capacity. It favours greater utilisation of inferior soils with associated increases in inputs necessary to sustain production.

[5-110] A further criticism of the LUC approach was contained in the findings of the Hearings Panel when they held that assigned N leaching maxima allocated across the LUC classes to be arbitrary. They found that the only scientifically robust figures were those of Dr Mackay before they were *adjusted* by the council officers to form Table 13.2 NV POP. For this reason the Panel rejected the LUC approach for existing dairy farms in favour of *reasonably practicable farm management practices.*

[5-111] The reasons given by the Council for the adjustment of Dr Mackay's original figures were to ... *recognise the likely distribution of existing leaching values particularly in the case of class IV and V soils. There were also social considerations and practical considerations applying to dairy farms in those situations that perhaps*

warranted higher values than the natural productivity values. The Council argued that making such adjustments to address the needs of existing users and equity issues is a much more transparent and appropriate approach than jettisoning the LUC approach entirely. We agree.

[5-112] Interestingly, the Hearings Panel retained the LUC approach for new dairy farms (an approach supported by Dr Ledgard). The reasons given for the rejection of LUC approach for existing dairy farms was that it was inequitable and did not recognise the investment in technologies to improve production particularly on soils of LUC III and beyond. There would be a fiscal impact on these farms. We agree and think that outcome (to some extent) is inevitable. It is in our opinion an intended consequence of the proposed regime to encourage more intensive land use on the higher quality soils where fewer inputs such as N fertiliser are required. These soils provide more options for production and more options for mitigating N loss.

- *Conclusion on LUC*

[5-113] We find the evidence strongly supports the use of the LUC approach as a tool for allocating N limits for all the land uses contemplated by the Council for N loss management.

- *Setting the Nitrogen Leaching Maxima*

[5-114] We had evidence about the NV POP maxima for N leaching for Years 1, 5, 10, and 20 from several Council witnesses. For each target catchment, a calculation was made on what the annual load of SIN would be in the rivers if all land in the catchment leached at the allowable Table 13.2 maximum leaching rates. The Council then calculated what the load of SIN would need to be in those rivers if the standards in Schedule D are to be achieved.

[5-115] The Council provided evidence of the existing loads, the improvements required, and the attenuation factor from land to water. We did not understand any of that to be in dispute and we accept that to be an appropriate basis for settling the rules regime.

- *LUC based limits at years 1, 5, 10 and 20 (the Fish and Game/Minister) Option*

[5-116] The NV POP at Table 13.2 set reducing N loss targets or values, based on LUC calculations, for years 1, 5, 10 and 20 for all new farms and for existing farms in target water management sub-zones.

[5-117] The Minister, and Fish and Game, seek a return to the NV POP regime, with years 5, 10 and 20 in Table 13.2 to read:

Table 13.2 Cumulative nitrogen leaching maximum by Land Use Capability Class (kgN/ha/yr)

Period (from the year that rule becomes operative)	*LUC* I*	*LUC* II*	*LUC* III*	*LUC* IV*	*LUC* V*	*LUC* VI*	*LUC* VII*	*LUC* VIII*
Year 1	30	27	24	18	16	15	8	2
Year 5	27	25	21	16	13	10	6	2
Year 10	26	22	19	14	13	10	6	2
Year 20	25	21	18	13	12	10	6	2

[5-118] Two reasons given by the Hearing Panel for deleting the reducing loss targets for existing dairy farming are:

- The year 5, 10 and 20 nitrogen leaching reduction values were derived arbitrarily and do not relate to the achievement of the Schedule D water quality standards;
- The achievement of the year 20 leaching values will not resolve the actual environmental issues of concern (namely the high soluble inorganic nitrogen levels and levels of periphyton in the affected rivers) for those few rivers where Council has been able to assess the effect of Rule 13-1. In some of the target catchments which we have decided should remain in Table 13.1, we have no idea how effective the rule will be.

[5-119] The Hearing Panel's decision refers to the concern of submitters about the reducing leaching rates in Table 13.2 as being overly restrictive. It said:

> Given the concern about the year 5 and beyond leaching rates in Table 13.2, we next considered whether or not the achievement of the recommended year 20 leaching values would solve the actual environmental problem of concern, namely excessive soluble inorganic nitrogen (SIN) levels in rivers contributing to periphyton proliferation.
>
> A key conclusion we reach is that the effect of applying the Table 13.2 nitrogen leaching reductions is negated by allowing ongoing dairy conversions to occur (which

> Rule 13-1 does[3]), such that after 20 years the river water quality and periphyton biomass will be no better in 20 years time than it is now. We accept that it will stop the situation from getting worse, but see little sense in such an approach.

The Hearing Panel went on to refer to around 20% of targeted dairy farms not being able to meet the year 20 leaching values in a practicable and affordable manner and the significant cost of imposing Rule 13-1 on existing dairy farms: these are matters we return to later.

[5-120] We had evidence that explained the rationale for the nitrogen leaching reduction values as being a uniform percentage decrease for the better LUC classes and a lesser percentage decrease for the LUC classes which would present a greater challenge for existing dairy farming. We are satisfied that they are useful in achieving the purpose of the One Plan regime. We also had different evidence, including the results of modelling, on the water quality outcomes that would be achieved in front of us than the Hearing Panel. In discussing the merits of reducing targets, Ms Marr, a consultant planner called by Fish and Game, summarises the position in this way:

> The environmental benefits of some of the options are set out in the evidence in chief of Dr Roygard et al, Dr Ausseil, Dr Dewes, and Associate Professor Death. These are modelled in the evidence of Dr Ausseil and Dr Roygard. The evidence is complex, but is helpfully summarised and agreed to by all experts at the expert conferencing. The experts agree that of the scenarios modelled, the NV POP year 20 numbers will lead to the greatest reduction in nitrogen pollution in the targeted catchments.

We look further at the modelling in considering the different regimes.

[5-121] When questioned, Mr Rhodes, an economics witness for the Council, said there are benefits to the 20 year regime, the time frame in the NV-POP, in the certainty it would create for investment decisions, such as on the life of infrastructure. It would signal the position a long way out and allow people to be aware of and take responsibility for the externalities of their farming activities within the framework of the One Plan. We see that as an advantage over the *single figure* and a reliance on a future Plan change or review. If resource consents are granted for a term of, say, 20 years (which was indicated as the likely term), it will be all but impossible to effectively reduce leaching, even if there is a rule change within that period. It also

[3] We presume the Hearing Panel was referring to Rule 13-1B, having new dairy farming land use activities as a *controlled* activity.

better aligns with what Mr Maassen referred to as a *journey in time* and the need for a credible plan that provides a definitive pathway to the long term improvement in water quality particularly in the specified catchments.

[5-122] We address the other reasons given by the Hearing Panel for deleting the reducing loss targets for existing dairy farms elsewhere in this Decision.

The Year 1 limit (the Council approach)

[5-123] The DV POP at Table 13.2 set a single cumulative nitrogen leaching maximum by Land Use Capability Class. The table is this:

Table 13.2 Cumulative nitrogen leaching maximum by Land Use Capability Class (LUC) (kgN/ha/yr)

LUCI	LUCII	LUCIII	LUCIV	LUCV	LUCVI	LUCVII	LUCVIII
30	27	24	18	16	15	8	2

[5-124] The Hearing Panel considered that these limits (the Year 1 limits) should not apply to existing dairy farming in the targeted WMSZs but only to dairy conversions everywhere in the region. Among other reasons it concluded that firstly Dr Mackay's *natural capital* approach is not based on technological changes that have enabled farmers to lift productivity levels since the 1980s, and secondly ignores existing land use and existing levels of farm production which is inequitable and impracticable. The Panel also said that the officers have taken Dr Mackay's scientifically derived values and arbitrarily amended them to address the second point which has resulted in Table 13.2 lacking scientific robustness.

[5-125] However, subsequently the Council proposed that the Year 1 limits should apply to existing dairying in the targeted WMSZs, but that the maximum only needed to be achieved after three years. That involved requiring farm N loss to be estimated, using OVERSEER, and if that is higher than the CNL maximum measured as kgN/ha/yr, a 33% reduction in that amount, or 2kgN/ha/yr, whichever is greater, would then be required in each year over the ensuing three years. Further, the Council is proposing that Rule 13-1 should come into force in different years for different WMSZs; eg 1 July 2013 for Mangatainoka, 1 July 2014 for Upper Manawatu above Hopelands, etc – see Table 13.1.

The Pastoral Industry Alternatives

[5-126] Before looking at the individual positions of the pastoral industry parties for dairying we summarise the rule regime sought, drawing on the helpful analysis and table provided by the Council in closing.

[5-127] The regimes for existing dairying were all based on management thresholds for on-farm average cumulative N leaching values:

Average cumulative leaching in kgN/ha/yr	<24	≥ 24 but ≤ 27	>27
Fonterra	Controlled up to N leaching to 2007-2010 years No power to require N leaching mitigation	As with <24	Controlled up to N leaching to 2007-2010 years Power to require reasonably practicable Tier 1 N leaching mitigations
Ravensdown	Permitted	Controlled No power to require N leaching mitigations	Controlled Power to require reasonably practicable Tier 1 N leaching mitigations
Federated Farmers	Permitted	Controlled Power to require reasonably practicable N leaching mitigations	Controlled Power to require reasonably practicable N leaching mitigations

Common features were:

- The management threshold based on an average N leaching value kilograms N/ha/year
- Below the management threshold the farming operation is grandparented to that number. In the Fonterra proposal, the capping or grandparenting of existing farmers at their current leaching rate was also to levels determined on the basis of N-leaching from the 2007-2010 years.
- The management threshold interventions are based on reasonably practicable measures requiring consideration of at least the following factors: present

infrastructure, present farming system, capital structure of the farming business, cost.

- In the case of Fonterra and Ravensdown mitigations were limited to those classified as Tier 1.

[5-128] *Grandparenting*, taken literally in the RMA context, means allowing existing operators to carry on producing current levels of effects, particularly adverse effects, and imposing restrictions only upon new entrants to whatever activity is being dealt with. It hardly need be said that it is a concept usually favoured by existing operators, who rationalise it by pointing to the investment they have made in the activity, and claiming that it would be unfair to require them to change, (or cease, in extreme cases) the way they do things.

[5-129] The Fonterra regime for existing farms differed from the regimes proposed by Federated Farmers and Ravensdown in an important particular. The Fonterra regime, with its requirement that ... *the annual nitrogen leaching shall not exceed the maximum nitrogen leaching loss that occurred from the land over the period 2007-2010 (or such shorter period for which there is available information)* also involved *restricted discretionary* activity status for those farms wishing to exceed that level.

[5-130] Fonterra did not appear to take a position on new dairying in its opening or closing submissions, but confined its attention to existing dairying. However, positions different to the Council's were taken by Ravensdown and Federated Farmers on new dairying. Ravensdown took a similar position to the one taken on existing dairying. That is, up to 24 kg N/ha/yr would be a *permitted activity*, and above that a *controlled activity*. Between 24 and 27kg, there would be no power to require N leaching mitigations but above 27kg there would be power to require Tier 1 N leaching mitigation. Federated Farmers took a different position and proposed an average cumulative leaching in kg N/ha/yr of up to 24 as a *permitted activity,* but between 24 and 45 as a *controlled* activity with the power to require *reasonably practicable* leaching mitigation. In closing Federated Farmers ultimately proposed *restricted discretionary* activity status for over 27kg, submitting that in practice it was likely to be little different from a *controlled* activity.

[5-131] New dairy farming anywhere in the region that does not meet the cumulative nitrogen leaching maximum would be a *restricted discretionary* activity under the Council's proposal, but not under the Ravensdown approach, or that of Federated Farmers, which proposed 45kg as the threshold for *non-complying* activity status. In summary, for new dairying:

Average cumulative leaching in kgN/ha/yr	<24	≥ 24 but ≤ 27	>27
Ravensdown	Permitted	Controlled No power to require N leaching mitigations	Controlled Power to require reasonably practicable Tier 1 N leaching mitigations
Federated Farmers	Permitted	Controlled Power to require reasonably practicable N leaching mitigations	Restricted Discretionary but >45 Non-complying

The Fonterra Option

[5-132] Dr Ledgard supports the requirement of DV POP that existing dairy farms in *targeted* catchments should be required to:

a) Prepare and comply with annual Nutrient Management Plans (Rule 13-1)
b) Exclude cows from waterways (Rule 13-1)
c) Avoid direct runoff from farm lanes to waterways (Rule 13-1)
d) Manage the use of fertilisers (Rule 13-2)
e) Comply with stock feed and feedpad use rules (Rule 13-3), biosolids discharge requirements (Rule 13-4), and farm effluent discharge requirements (Rule 13-6)

For existing dairy farms Dr Ledgard believes that the focus of reducing N leaching should be on the quartile of farms (assessed on a regional basis) leaching the greatest quantity of N and should require the adoption of *Tier 1* – (see para [5-136]) mitigation options.

[5-133] Mr Sean Newland did not give evidence in an expert capacity, but rather as Fonterra's Manager, Sustainable Dairying Policy. He said that Fonterra accepts the principle of all dairy farms in targeted catchments being regulated through a resource

consent process, however he lodges a considerable caveat in the case of existing operations, and says, as did Dr Ledgard, that it is the *bad performers* who should be the main target of rules. Unlike Dr Ledgard though, he does not support a regime based on LUC classes. Through him, Fonterra proposes what he described as ... *a hybrid form of grandparenting*. His evidence is that Fonterra regards some of the Council's modifications to the DV POP as outlined by Ms Clare Barton, as:

- Relatively arbitrary in its time limits for farmers to meet N loss limits.
- Providing insufficient time to raise land manager awareness of the need to manage N loss from pastures and to up-skill and educate farmers on the available techniques to reduce N loss.
- Providing inadequate time to implement management tools on farms, particularly those likely to find it difficult to adapt without significant economic hardship.

We have touched on some aspects of this point in discussing Voluntary (and the like) approaches – see eg para [5-9]. We need to say here though that we were more than a little surprised to hear the country's largest dairy farming-related organisation, which champions the *Dairying and Clean Streams Accord* of May 2003 as a model of voluntary environmental best practice, telling us that: a) up to 20 years (from now) is a *relatively arbitrary* period within which to achieve quite modest N loss targets; and b) there are land managers out there who are unaware of the need to manage N loss from pastures, and who are unaware of available techniques to do so. We particularly note this extract from the *Priorities for action and performance targets* section of the *Accord*:

- Nutrients are managed effectively to minimise losses to ground and surface waters
  Performance target
  100% of dairy farms to have in place systems to manage nutrient inputs and outputs by 2007

We can only assume that if these *unaware land managers* do exist, they have been farming in some form of information vacuum for the last 20 years, and certainly for the nine years since the *Accord* was signed.

[5-134] The version of Policy 13-2C now advanced by the Council as an acceptable formula is this:

> Policy 13-2C: Management of new and existing dairy farming land uses
> When making decisions on resource consent applications, and setting consent conditions for dairy farming as a land use, the Regional Council must: ...

(b) seek to exclude cattle from the following waterbodies within the water management sub-zones listed in Table 13.1:

(i) a wetland or lake that is a rare habitat, threatened habitat or at risk habitat.

(ii) a river that is permanently flowing, or is intermittently flowing with an active bed width greater than 1 metre at any time the bed contains water.

For the purposes of this policy "exclude" means stock access must be restricted to the waterbody by any permanent or temporary fence or barrier or any natural barrier. Where there are more than 1350 stock movements per week across a river identified in (b)(ii) then a culvert or bridge shall be installed.

We note that Fish and Game and the Minister propose replacing the word *seek* with a requirement to exclude cattle.

[5-135] We have considerable reservations about this provision. First, a policy that requires the Council to ... *seek to exclude cattle from ... water bodies* ... imposes no measurable standard at all. Keeping stock out of waterways is such a basic step in protecting waterways from effluent pollution that it must be regarded as an absolute requirement. *Seeking* to do so is simply not good enough. Secondly, we had no convincing explanation for the number of 1350 stock movements per week as the policy trigger for requiring a culvert or bridge which is reflected in the condition for *controlled* activity status. If, for instance, such a river is crossed by the race leading to and from the milking shed then, assuming twice per day milking, it will be crossed four times per day by each cow, so only 48 cows or fewer could be accommodated without a culvert or bridge. If the river is not bridged and these 48 cows crossed the river for milking twice each day, if only 10% of them defecate and/or urinate while doing so, this still means that on 19 occasions on each and every day, the waterbody will be polluted with directly deposited sewage. That cannot be acceptable in the present era. Again, we particularly note two parts of the *Priorities for action and performance targets* section of the *Dairying and Clean Streams Accord*:

- Dairy cattle are excluded from streams, rivers and lakes and their banks.

  Performance Target

  Dairy cattle excluded from 50% of streams, rivers and lakes by 2007, 90% by 2012.

- Farm races include bridges or culverts where stock regularly (more than twice a week) cross a watercourse.

  Performance Target

  50% of regular crossing points have bridges or culverts by 2007, 90% by 2012.

We do of course hesitate before deciding not to accept an outcome agreed to by parties between themselves. But on occasions the Court feels compelled to do so. As outlined in *Halswater Holdings Ltd v Selwyn DC* (1999) 5 ELRNZ 192 notwithstanding what the parties may agree ... *there is still a proceeding to be determined as the Court still has a discretion (to be exercised judicially of course) to grant or refuse consent* ... (or, in this case, to settle upon RPS or Plan provisions which best accord with the purpose of the Act). On this topic, we cannot imagine any reason why the POP, a document being brought into existence nine years after the *Accord*, when both knowledge and management techniques are so much more sophisticated, should have less exacting standards than that document contains, and to allow it to do so would be to fail to give effect to the purpose of the Act.

[5-136] Thirdly, the restriction of ... *reasonably practicable measures* ... to those defined as *Tier 1* measures is not acceptable. As ultimately advanced by Mr Gerard Willis, Fonterra's consultant planner, with the purpose of reducing the subjectivity of interpreting ... *reasonably practicable measures* ... Tier 1 mitigation measures were defined as:

> *N fertiliser use:*
>
> -Application of N fertiliser according to FertResearch fertiliser Code of practice
>
> -Avoidance of winter N applications
>
> -Use of frequent low N rates (eg ≤30kgN/ha during slower growth and ≤50kgN/ha at other times
>
> -Reduction in N fertiliser use and replace lost production by low protein brought-in feed
>
> *Dairy farm [ie dairy shed] effluent*
>
> -Use of land application rather than two-pond discharge systems
>
> -Ensure application area is sufficient to achieve ≤150kgN/ha/yr (and reduce fertiliser N accordingly)
>
> -Use of storage (sealed for leakage), deferred application and low rate application methods as required according to soil risk
>
> *Brought-in feed*
>
> -Use of low-protein feed sources rather than brought-in pasture silage
>
> -Reduction in N fertiliser use and replace lost production by low-protein brought-in feed
>
> *Winter forage crops*
>
> -Minimisation of use of forage crops (particularly winter forage crops)

-Minimal or nil cultivation for crop establishment

-Minimisation of N fertiliser use by soil N testing to define requirements

Soil management

-Apply DCD according to industry specifications

Farm management options

-Winter cows off-farm (preferably in low-N-sensitive catchment)

Tier 2 mitigation measures are:

... one of the following nitrogen leaching mitigation measures:

-Installing constructed or artificial wetlands

-Create riparian or buffer strips beside stream margins

-Cease use of N fertiliser

-Use stand-off pads or animal shelters (lined for effluent collection) during autumn/winter with effluent storage system and optimised land-application system for effluent use in low-risk periods

-Introducing ungrazed pasture or treed areas

Mr Willis acknowledges the Tier 1 measures to be ... *nil-low cost* ... . We would go further and classify them as generally being no more than the responsible farm management practices we would expect any farmer to follow, even if confident that his or her N leaching was satisfactory. If there is any question that a given farm may not meet a required leaching standard, it is self-apparent that more than stock-standard ... *nil-low cost* ... efforts and measures are required.

Some Other Considerations

[5-137] The Council, in closing, submitted that Fonterra's proposal had other weaknesses. These included the arbitrary nature of the nitrogen leaching limit of 27 kgN/ha/year, derived as the leaching from the 75th percentile of all dairy farms in the Manawatu Region, with the remaining 25% presented by Fonterra as targeting of farms where the most environmental gains are likely to be made as the primary purpose and targeting the laggards as the secondary purpose. This did not reflect the position across different catchments, such as the 49% across the Upper Manawatu Catchment. Also the Council was concerned, that the regime would unfairly grandparent existing dairy farms operating below the management threshold. The Council was of the view that there is no reason why those below the management threshold cannot, and should not, make a contribution to improving water quality. The evidence is plain that they can, and at a reasonable cost. Dr Tillman, a witness for

Federated Farmers, said precisely that. The Council also criticised the assumptions in Dr Ledgard's modelling of the water quality improvements which we shall return to. Finally, and most importantly, the Council questioned how effective the rule regime would be in practice.

[5-138] We accept the point made by Mr Willis that the Fonterra approach does not focus on reducing N leaching from only the worst 25% when applied to the *specified water management zones*. But even though 49% of farms in the Upper Manawatu for example would exceed the 27 kgN/ha/year threshold and be caught under the more stringent *controlled* activity regime, that regime would allow leaching up to the level of the 2007-2010 years with consideration only of Tier 1 mitigations.

The Ravensdown Option

[5-139] As we said earlier, Ravensdown proposes a regime requiring ... *improvement towards* ... target loads over a five year period; non regulatory methods such as good practice and education; investigation of links between intensive farming and actual effects, aiming towards an agreed criteria or standard for each WMSZ to be introduced by way of a Plan Change. In the meantime it proposes that both new and existing dairy farms emitting less that 24kgN/ha/yr be *permitted* activities; those exceeding 24kg being *controlled* activities with those exceeding 27kg being required to adopt ... *reasonably practicable farm management practices* defined as Tier 1 mitigations.

[5-140] The Council also had a major concern about the suggestion from Ravensdown that the regime should only last five years, emphasising that it had already spent a considerable sum getting the One Plan to this point.

Federated Farmers' Option

[5-141] We have also mentioned that Federated Farmers agrees that it would be appropriate to include intensive (ie irrigated) sheep and beef farming within the Rule regime. As we said earlier it does not agree that cropping (for fodder) should be an included activity and, apart from agreeing with the view that the casual basis on which land is used for cash cropping makes management of a resource consent regime *too hard*, it has no view about vegetable production. It submits that low risk dairying

should be a *permitted* activity. The Federation opposes the use of the LUC classification system as the basis for such a regime and supports a so-called single figure N leaching regime of 24 kgN/ha/yr above which existing dairy farms should be required to do what is ... *reasonably practicable* ... to reduce N leaching as a *controlled* activity. New dairy farms assessed as leaching not more than 24kgN/ha/yr would be a *permitted* activity; those between 24 and 27kg would be a *controlled* activity, and those assessed at more than 27 and up to 45 kgN/ha/yr would require a resource consent as a *restricted discretionary* activity. Beyond that, a *non-complying* consent would be required.

[5-142] The Council considered the Ravensdown and Federated Farmers regimes together because of their family likeness and considered them to have many of the same problems as the Fonterra approach. Importantly, the planning goals which they sought to implement were only to *maintain* water quality. Their planning witnesses acknowledged that they had to rely on the experts as to what the appropriate N leaching threshold figure should be for the various consent categories – so did Mr Willis, Fonterra's planner.

What the modelling tells us

[5-143] Extensive modelling of the different scenarios was done, including modelling over the course of the hearing as the *single figure* regimes proposed by some parties gradually emerged. The modelling tended to focus on the Manawatu and Mangatainoka Rivers, perhaps unsurprisingly because of their water quality problems.

[5-144] Fonterra submitted that the modelling work can only be used as a guide to rank the various proposals. We are well aware of the nature of modelling as a tool and of the need to take care in considering whether the modelling represents reality.

[5-145] While there was some questioning of the assumptions built into the models, they all show the most positive trend towards water quality improvement is the re-adoption of the NV-POP N cumulative N leaching maximums (with year 1-20 LUC based maximums) sought by Fish and Game (recognising that there will still be the ability to apply to exceed those maximums by way of successful resource consent application – just as there is under any of the scenarios modelled).

[5-146] There is no doubt that the regime which is likely to deliver the best water quality outcome is the Fish and Game and Minister's one (with year 1-20 LUC-based limits), as confirmed by all the modelling (both the initial and further modelling) undertaken by Dr Roygard, Ms Clark, Dr Ausseil and Dr Ledgard. The yet further modelling carried out by Dr Roygard confirmed that. The Fish and Game/Minister regime is likely to achieve the desired water quality improvements more often, and for longer periods, especially during times of low flow which, as Dr Scarsbrook, an ecology witness for Fonterra, acknowledged is the most important time for maintaining aquatic values. The other approaches result in no, or very limited, improvement in water quality.

[5-147] While Dr Ledgard's modelling results came in quite late in the piece, we are satisfied that there was sufficient opportunity to adequately consider them, and prepare evidence about them.

[5-148] There were several issues raised about the assumptions and approach used in the modelling undertaken by Dr Ledgard (which mirror issues raised with the Fonterra's rule regime approach). We mention them for completeness. One concern was the limitations of the 10 year time horizon (as opposed to the 20 year) used in other modelling.

[5-149] A significant concern was that the Ledgard modelling did not factor in that fodder cropping could be undertaken on non-intensive sheep and beef farms to support the dairy industry (for example in the Coastal-Rangitikei Catchment) rather than on the dairy farms themselves. This would transfer nitrogen from one part of a catchment to another, but would not necessarily reduce it or improve water quality within the catchment (particularly if fodder cropping is not included within the rules regime). Also, the wintering-off of dairy cows on non-intensive sheep and beef farms could have the same effect.

[5-150] The modelling by Dr Roygard and Dr Ausseil was based on intensification scenarios (increase in dairying of 11% and 18%, and an increase in leaching from non-intensive sheep and beef farms from 10 to 12 kgN/h/year over the next 20 years) and an increase in cropping on non-intensive sheep and beef farms to support the dairy

industry. These scenarios were accepted as realistic by the agricultural experts in conferencing (and by Dr Ledgard in his reply evidence).

[5-151] Dr Ledgard did not model an 18% intensification, or an increase in leaching on non-intensive sheep and beef farms, or an increase in cropping on non-intensive sheep and beef farms to support the dairy industry. However, in cross examination, Dr Ledgard accepted that intensification on non-intensive sheep and beef farms in the region could occur with an increase in nitrogen leaching by as much as *+22% on sheep and beef farms* over the next 10 years. Dr Ledgard accepted this on the basis of the evidence he presented to the Environment Court when it heard the Waikato Plan Variation 5 appeals. Dr Ausseil had modelled a 20% increase in nitrogen leaching over 20 years – a much more conservative figure.

[5-152] A yet further concern was the reality of assumptions about the lifting of the performance of existing dairy farmers and the likely ensuing reductions in N leaching. These included questions about whether existing dairy farmers, *grandparented* at the rate of 27 kgN/ha/year, would consider this to be an entitlement. The point was made that there would be no requirement or incentive for them to voluntarily reduce their leaching rate by implementing *Tier 1* mitigation practices and, perversely, there would be an economic incentive to leach up to this entitlement.

[5-153] In the end even Dr Ledgard accepted that there were a number of issues with the modelling he had undertaken and that Dr Roygard's modelling was more reliable.

[5-154] The regimes proposed by Ravensdown and Federated Farmers were not modelled by their proponents. This is not surprising given their late appearance during the course of the hearing. It is also hard to see how the concept of *reasonably practicable* farm management practices could be effectively modelled given the concept necessarily implies a judgment call. However we had sufficient modelling of different scenarios from Dr Roygard and Dr Ausseil so that taking even the most positive view of what the regimes might achieve, the results would be a long way short of meeting the objectives and policies and Part 2 of the Act.

[5-155] Fonterra raised concerns that economic considerations were not factored into the development of the Schedule D limits and that the nutrient parameters in particular are overly conservative and largely unachievable. However, the evidence of witnesses for the Council, and particularly Associate Professor Death, satisfied us that the Schedule D limits were set in a pragmatic way, and represent a good, rather than excellent or perfect level of protection for water quality values. We accept that the nutrient limits were established recognising the need for trade-offs between what would be an ideal ecological outcome and social, practical and economic considerations. We recognise that no regime proposes meeting the Schedule D limits at all flows.

[5-156] We are satisfied that the Schedule D limits represent environmental bottom lines, which are intended to achieve the objectives of the Plan.

[5-157] We now turn to considering the social and economic effects of the different regimes in front of us.

Social and economic effects

[5-158] The primary industries submitted that the LUC regime would impose social and economic costs on existing dairy farmers, as well as on the community, and there needed to be robust and conclusive cost and benefit evidence to justify this. This is reinforced by the POP's recognition of the importance of farming to the social, cultural and economic wellbeing of the region and its people.

[5-159] In opening, the Council's position, which was described as aligned to Fish and Game and the Minister on existing farming, was described as:[4]

> Water quality improvements cannot be achieved while completely protecting the balance sheets of farmers or those who are capital constrained;
>
> Those farms that can meet the specified targets should be a controlled activity providing them with an easy consenting pathway that sets conditions to control the contaminant pathways for nutrients through a whole of farm consenting regime;

[4] Council's opening legal submissions, paragraphs 10(f) – (k).

The rate of change expected of farmers significantly beyond the cumulative nitrogen leaching values must be reasonable and a consenting pathway must exist (through a restricted discretionary classification) for those intensive food production systems (in about the 90th percentile) that cannot meet the targets. No farm should be rendered uneconomic because the available array of mitigation measures will be insufficient over the life of the plan to achieve the specified nitrogen targets;

A full suite of mitigations must be considered by those farms that cannot meet the specified cumulative nitrogen leaching values including what Fonterra NZ Limited calls 'Tier 2' mitigations;

The choices as to the mitigation measures to be adopted and the rate of the implementation is primarily for the individual farmer to choose with the regulatory agency concerned with whether the targets are met and if not the sufficiency and pace of improvement and its overall reasonableness;

Those farmers in lower quality soils will be more challenged than others. A proper analysis by a farmer of the proper structure of the farming platform must include the farmer's mitigation responsibilities.

[5-160] Mr Jeremy Neild and Mr Anthony Rhodes were engaged by the Council to prepare a report on the economic impacts of the proposed N leaching values (ie the implementing of Rule 13.1 and Table 13.2) for the hearing before the Panel. Both are well-qualified to do so and gave evidence at the hearing. Their material is drawn from case studies supplied to them, and from data from MAF Farm Monitoring for the years 2007/08 to 2010/11, from which they draw what they describe as ... *an indication of the relative affordability of N loss mitigation costs.*

[5-161] They summarised the position in this way:

Overall, the average cost of N-loss mitigation is equivalent to less than 5% of annual cash farm expenses. This does not appear to be an excessive cost to pay to mitigate off-farm impacts. Clearly, at 16.6%, the cost of mitigation for Group 1 farms is much more significant. For Group 2 farms, an additional cost equivalent to 7.5% of cash farm expenses may be significant in periods of low product returns or lower-than-average production.

As has been previously discussed, individual farm modelling and optimisation may indicate a range of less costly solutions, especially for the more capable farm managers. Another method for assessing the affordability of these costs is to consider them in relation to the level of discretionary cash available in the business (also referred to as

farm surplus for reinvestment). A useful index of affordability or resilience is the number of times the amount of discretionary cash can cover the proposed cost, Table 4. Across the period 2007/08 – 2010/11, the average level of discretionary cash was $117,794.

Depending on the Group within which a given farm falls, the cost of N loss mitigation will be covered by that discretionary cash figure between 1.62 and 21.54 times, with a figure for all Groups of 6.20 times.

[5-162] At the expert witness conferencing on this topic (LUC/Best Practice) - the witnesses recorded their view that: *All parties agree that the costs are hugely variable and farm specific, and depend on the magnitude of reduction of N loss required.*

[5-163] We note that the farms in Group 1 (higher rainfall and soils of lower quality than the average across the region) that will be financially impacted to the greatest extent number 48 out of a total of 428 farms in the target WMSZs.

[5-164] We do not underestimate an increase of 16.6% to their annual farm running costs. However, the work of Messrs Neild and Rhodes indicate that this Group across the period 2007/8 – 2010/11 generated on average $117,794 (discretionary cash or farm surplus for reinvestment) or 1.62 times the average cost of implementing NV POP Rules 13.1 and 13.6. We accept that this work involves the use of averages – something of a *blunt instrument* according to Mr Hassan. However, this is the only quantative evidence we have on this subject, there was no credible challenge to it and it reflects the range of debt profiles in the rural sector.

[5-165] With these figures in mind and the relatively small number of farms in Group 1, we are sceptical of Mr Hassan's submission that the NV POP (or similar) regime would put farmers out of business – and the social and economic costs that would follow.

[5-166] Mr Hassan went on to submit that the *POP regime seeks to provide growth opportunities for future land uses (eg, dairy conversions). To allow yet-to-be business to benefit from this growth potential at the cost of existing farmers who are put out of business is grossly inequitable and therefore highly undesirable.*

[5-167] We cannot agree with this submission. Allowing existing dairy farmers to be excluded from the proposed LUC regime would itself be inequitable and inefficient. Existing farmers would have no requirement or incentive to improve their N losses and new entrants would bear the cost of any improvement in water quality. There would be no encouragement for intensive land uses to operate on higher quality soils nor would the desired water quality improvements be achieved.

[5-168] While we accept a small number of farmers will find the financial costs of compliance difficult under the *controlled* regime, taking an alternative regulatory pathway may well make the transition more financially palatable.

[5-169] It needs to be recognised too that there is good evidence supporting the view that depending on land class and management techniques being employed, significant N loss reductions can be made while at the same time improving farm profitability. Dr Alison Dewes, called by Fish and Game, is involved in developing farm systems for optimal profit while minimising the farm's environmental footprint. She notes that many farms are already within the proposed year 1 and year 20 LUC based limits. She agrees with Dr Ledgard and Mr Smeaton that a 10% reduction in leaching can be made without affecting profitability in most cases, and indeed concludes that reductions of 30% to 40% are possible while maintaining or improving farm profitability.

[5-170] Mr Peter Taylor, the Council's Manager – Rural Advice, has been involved in assisting farmers undertaking new dairy conversions in various parts of the region, implementing Rule 13-1B of DV POP which controls that process. For the 18 farms discussed in his evidence, he advises that eight would immediately comply. Of the ten needing to reduce N leaching, three would achieve compliance by the end of year one, and two by the end of year two. Of the remaining five, it would be possible for two, with some difficulty, and it would be very difficult for the remaining three, the greatest difficulty being financial rather than technical.

[5-171] Ms Marr would have qualified exceptions in Policy 13-2D – applicable to Policy 13-2C - for resource consent decision making for existing intensive farming land uses, to read:

> (i) where land has 50% or higher of LUC Classes IV to VIII and annual average rainfall of 1500mm or greater; or
>
> (ii) where uses cannot meet year 1 N leaching maximums in year 1 they shall be managed through consent conditions to ensure year 1 maximums are met within 4 years.

Ms Barton was inclined to recommend a similar approach to the treatment of land with challenging LUC classes and rainfall at first, but moved away from it, because she believed it may lead to inequities. Ms Marr continued to support it, although in a somewhat narrower form. Her rationale was that:

> ... it is appropriate to provide an exception or policy pathway for those small minority of properties that, because of their location, will find it difficult to meet the nitrogen loss maximums that are achievable elsewhere.

[5-172] We see Ms Marr's exceptions in Policy 13-2D as a reasonable concession to existing farmers who may otherwise genuinely struggle with the new regime, and believe them to be appropriate additions to the Plan's policies. But we cannot accept Ms Marr's qualification to exception (i) which she proposed as:

> That the nitrogen leaching from the activity does not exceed the nitrogen leaching demonstrated for the property from 1 July 2010 to 31 June 2011.

That might imply the potential to *grandparent* existing leaching. We consider that the *restricted discretionary* status would allow adequate consideration of all these matters.

[5-173] Later in this decision, we set out our reasons for not accepting the Council's approach which would allow an automatic three year step down to reach the CNL maximum, within a *controlled* activity status.

[5-174] On the basis of those figures and provisions, we conclude that the economic costs for a majority of farms will be manageable across a span of years, and thoroughly justified by the desired outcome.

[5-175] There was no specific evidence before us on the costs and benefits of the planning regimes proposed by Fonterra, Ravensdown or Federated Farmers that would

lead us to the conclusion that those regimes should be preferred, particularly given our conclusion that other intensive land uses should be included in the regime. None of the regimes put forward by pastoral interests dealt with their suitability for other intensive land uses.

Putting farmers out of business

[5-176] Somewhat related to the issues both of economic costs and of *grandparenting* is our surprise at finding, in the closing submissions for Fonterra, the assertion that:

> The Court has questioned several witnesses throughout the hearing, on the topic of whether the POP regime should be used to put some existing farmers out of business.

If what that assertion means is that the Court was advancing the view that there should be some such purpose in whatever regime is settled upon, that simply is not so. What the questions were attempting to elicit was the opinion of expert witnesses about the possible outcome of a *situation* where, say, N loss limits are put in place and a given farm/farmer simply cannot meet them. Should that farmer be given some sort of exemption from a regime that his or her colleagues can comply with? Or, at the other end of the spectrum, should he or she be told that the category of farming, or the management regime, or the intensity of the operation being conducted on that particular type or class of land, is simply unsustainable because of the quantity of apparently irreducible nutrient loss? If the latter, the farmer will have decisions to make: - to seek a resource consent for a more stringent activity status; to change the category of farming or the management regime or intensity; or to move somewhere else. Those are the same options that might face the operator of any business in a changing rules regime, and there is nothing that gives farmers a privileged place in the scheme of things.

[5-177] Whether the *Grandparenting* be a pure or hybrid version, we regard it as an unattractive option. Quite apart from its inherent disadvantages of failing to provide an incentive to reduce leaching, such a process would be administratively inefficient. Ms Barton's evidence is that there are over 500 landowners in 35 water management zones, and each would need to be assessed to confirm the property's history, and thus its entitlements.

Should there be a reference to reasonably practicable farm management practices?

[5-178] That phrase (or variations of it) appears at several places in the policy as well as the rules in the various versions of the One Plan. The DV POP contained it, such as in the controlled activity status for existing dairy farming land use activities (rule 13-1), with control reserved over the implementation of such practices. There was a lot of evidence as to what *reasonably practicable farm management practices* might involve. To be fair, the proposals put before us by all parties recognised its limitations, and sought to better define what it might include in policies as well as rules.

[5-179] Fish and Game submitted that such a phrase (or a variation of it) should not be used in the plan because:

- Farmers would seek to argue that any measure that increases costs is not practicable.
- For the default rules for intensive farming activities that do not comply with year 1 to 20 limits, it is better to reserve discretion over compliance with the nitrogen leaching maximums specified in Table 13.2 or maximum leaching limits.
- Implementation of *reasonably practicable farm management practices* will not necessarily reduce nitrogen leaching.
- It is not possible to quantify an amount of nitrogen leaching reduction that would be achieved by implementation of *reasonably practicable farm management practices*.
- It lacks certainty and would not prevent the transfer of nitrogen leaching from one part of a specified zone/catchment to another.

[5-180] We also accept that it is likely that new farm management practices to reduce nitrogen leaching will be available in the future - so a list of *reasonably practicable farm management practices* (in policy or rules) which decision-makers could refer too, even as a guide (as had been proposed by some parties), may become outdated. We also consider that including a hierarchy with *Tier 1* and *Tier 2* mitigation measures, as proposed by some witnesses, to not have utility or integrity in dealing with these issues. For example, there are some existing dairy farmers who farm on land less (or even not at all) suitable for dairy farming, resulting in high amounts of N leaching, and with little ability to reduce leaching. Implementing Tier 1 mitigation

measures as far as *reasonably practicable* is not consistent with the principle of internalising adverse effects to an acceptable level. *Tier 2* mitigation practices may be necessary, or if the situation is serious enough, certain types of land should not be used for dairy farming at all.

[5-181] For those reasons, the phrase *reasonably practicable farm management practices* (or variations on the theme) should not appear in the surface water quality objectives, policies or the rules of the One Plan.

Trading of leaching 'rights' - scope and merits

[5-182] Some witnesses, particularly those of an economics bent, saw virtue in having, as part of the POP and presumably administered by the Council, a scheme through which farmers or growers who find themselves able to reduce leachates at a reasonable cost could sell the *rights* to leach N (being the difference between what they do leach and the maximum figure for their particular LUC) to those who are unable to reduce theirs to the maximum allowed level. Those who favour such an adjunct to the regulatory regime see it as a logical extension of the regulatory approach, providing an incentive to reduce leachates as far as can be done at reasonable cost, and a means for those who are unable to get below allowed levels to nevertheless continue their operations. Mr Phillip Percy, a consultant planner called on this topic by Mr Day, supported the introduction of such a scheme, and Mr Day regarded a trading scheme as most important in the modifications to the POP that he supported. Mr John Ballingall, an economist called by Fonterra, says that a trading scheme warrants and requires further analysis, but that to introduce it now would cause confusion and uncertainty.

[5-183] As was acknowledged by Mr Percy, the incentives of such a scheme will not necessarily all pull in the desired direction. While recognising that it may be profitable in net terms for one operation to reduce leachates and sell the rights, depending on the profit margins of another operation, one could speculate that it may be easier for that operation to simply buy in rights rather than reduce its emissions, so that the net quantum of leachates will remain as it began – which is not the desirable outcome for the receiving environment. Mr Percy did temper that concern a little by

suggesting that the cap, within which trading could take place, should be fixed from the outset at the reduced 20 year level.

[5-184] Whether or not that might be so, we agree with witnesses such as Dr Daniel Marsh, the Chair of the Department of Economics at Waikato University, and called by Fish and Game, that the possibility of a trading scheme is insufficiently thought through and developed, both as to principles and as to practicalities, to be seriously considered as part of POP at present. Indeed the joint statement produced by the Economics witnesses, Mr J Ballingall (Fonterra); Mr Rhodes (Horizons); Mr Neild (Horizons) and Dr Marsh (Fish and Game) agreed that an ... *appropriately designed nitrogen trading scheme could improve the efficiency of achieving the desired outcomes.* They also agreed that such a scheme would be more efficient ... *when a wider range of land uses and a higher proportion of the catchment are included.* They were unanimous too in considering that the features or criteria outlined by Mr Ballingall at para 111 of his evidence would need to be considered in designing such a scheme. As we understand the evidence, that has not been done.

[5-185] The evidence is though that the concept has merit as an extension of the regulatory regime and, if it can be developed as such, a future Plan Change could bring it to fruition. We would encourage that further work, but we do not think that we can responsibly take it further now. That being our clear view, we do not need to embark on a discussion of whether Mr Day's Notice of Appeal was sufficiently broadly worded to provide scope for a trading scheme to be brought into POP.

National Policy Statement Freshwater Management

[5-186] The RMA provisions about National Policy Statements are not entirely easy to interpret or apply. Both as it stood between 2005 and 2009, and currently, s55 of the Act requires both operative and proposed regional policy statements and regional plans to be amended so as to *give effect to* a national policy statement. That is to be done:

- as soon as practicable; or
- within the time specified in the national policy statement

The National Policy Statement Freshwater Management 2011 (NPSFM) was issued by notice in the Gazette on 12 May 2011 and is expressed to be effective from 1 July 2011. Policy E1 contains the timeframes within which the NPS is to be implemented:

> a) This policy applies to the implementation by a regional council of a policy of this national policy statement.
>
> b) Every regional council is to implement the policy as promptly as is reasonable in the circumstances, and so it is fully completed by no later than 31 December 2030.
>
> c) Where a regional council is satisfied that it is impracticable for it to complete implementation of a policy fully by 31 December 2014, the council may implement it by a programme of defined time-limited stages by which it is to be fully implemented by 31 December 2030.
>
> d) Any programme of time-limited stages is to be formally adopted by the council within 18 months of the date of gazetting of this national policy statement, and publicly notified.
>
> e) Where a regional council has adopted a programme of staged implementation, it is to publicly report, in every year, on the extent to which the programme has been implemented.

There is also what might be termed an interim policy provision, expressed to be made under s55, in Policy A4:

> By every regional council amending regional plans (without using the process in Schedule 1) to the extent needed to ensure the plans include the following policy to apply until any changes under Schedule 1 to give effect to Policy A1 and Policy A2 (freshwater quality limits and targets) have become operative:
>
> *"1. When considering any application for a discharge the consent authority must have regard to the following matters:*
>
> > *a) the extent to which the discharge would avoid contamination that will have an adverse effect on the life-supporting capacity of fresh water including on any ecosystem associated with fresh water and*
> >
> > *b) the extent to which it is feasible and dependable that any more than minor adverse effect on fresh water, and on any ecosystem associated with fresh water, resulting from the discharge would be avoided.*
>
> *2. This policy applies to the following discharges (including a diffuse discharge by any person or animal):*
>
> > *a) a new discharge or*
> >
> > *b) a change or increase in any discharge –*

of any contaminant into fresh water, or onto or into land in circumstances that may result in that contaminant (or, as a result of any natural process from the discharge of that contaminant, any other contaminant) entering fresh water.

3. This policy does not apply to any application for consent first lodged before the National Policy Statement for Freshwater Management takes effect on 1 July 2011."

Notably, the interim policy makes no specific reference to *proposed* regional plans, which presumably means that the definitions of *plan* and *proposed plan* in both the pre-2009 (see s2) version and s43AA and s43AAC of the post-2009 version will apply.

[5-187] Those definitions distinguish between proposed and operative plans – the term *plan* is not inclusive of both. We must take it then that the legislative intention was to make the interim regime applicable only to operative regional plans.

[5-188] So far as we are aware, the Horizons Council has not taken any decisions, formal or informal, under Policy E1. In terms of para d) it has until 12 November 2012 to adopt time-limited stages of implementation of the NPSFM, if it decides that full implementation by 31 December 2014 is impracticable and opts instead for a staged programme to be completed by 31 December 2030.

[5-189] All of which rather begs the question of what effect should be given to, or what account taken of, the NPSFM now - in the course of considering the appeals about the POP with the purpose of it becoming operative. That it must be given some status appears clear from the direct and mandatory command of s62(3) in respect of regional policy statements:

A regional policy statement ... must give effect to a national policy statement ...

And the matching provision of s67(3) in respect of regional plans:

A regional plan must give effect to -

(a) any national policy statement

[5-190] That may mean that unless steps are taken to modify them sooner, when these documents become operative at the end of the appeal process, they will not comply with s62 and s67 because so far, in the Schedule 1 process for the POP, no effort has been made to address the NPSFM. This is a matter the Council will need to turn its

mind to. While we had evidence about the extent to which different versions of the provisions met the policy directives of the NPSFM we cannot give this any weight. That is not intended as a criticism - the NPSFM (as noted above) only came into force long after the POP was well advanced.

[5-191] We have given effect to the New Zealand Coastal Policy Statement 2010, particularly in including areas of the coastal environment in the targeted water management sub-zones.

The Policies

[5-192] We now come to our conclusions on the policy approaches required in both the RPS and Regional Plan to implement the objectives and our decisions, working off the various annotated versions provided to us at the beginning of the hearing by Ms Barton.

[5-193] We have already concluded that Objective 6-1, and Policies 6-1 and 6-7 of the RPS and Objective 13-1 of the Regional Plan need amending: - see paragraphs [5-23] to [5-26] and [5-38] and [5-39]. There may be other places in both the RPS and Regional Plan where an objective, policy, method or other material needs amending to be consistent with our decision. RPS policy provisions along the lines of the new Policy 6-X and the revisions to Policy 6-7 generally proposed by Fish and Game/Minister are appropriate to deal with the resource management issues and implement our decision. We accept that there may be a need to refine some of these provisions in the light of the Court's decision.

[5-194] Similarly the Fish and Game/Minister Regional Plan revision of the policy provisions in Policy 13-2C are generally suitable, with the exception of the item providing for 1350 cattle movements a week as the trigger for requiring culverts and bridges to accommodate cattle movements:- see paragraph [5-135]. Most of the Fish and Game/Minister version of a new Policy 13-2D is acceptable. However, the policy provision that could imply the potential for grandparenting of existing nitrogen leaching for existing intensive farming activity on land with 50% or higher of LUC Classes IV to VIII and has an average annual rainfall of 1500mm is not accepted. We note that the Council has already modified the LUC leaching allocation maxima for

these classes and in any case we do not accept that there is any possibility of farming on Class VIII. Again, some fine tuning might be necessary.

Rule Regime

[5-195] We have already discussed the objectives and policies and now consider the details of the rule regime to implement them.

Additional activities to be subject to rules

[5-196] In line with our decision and the changes sought by Fish and Game and the Minister, Rules 13-1 and 13-1B will need to be amended to refer to existing *intensive farming* land use activities, with the activity described as for *any of the following types of intensive farming:*

(a) dairy farming

(b) commercial vegetable growing

(c) cropping

(d) intensive sheep and beef farming

... and associated with that *intensive farming.*

Similar changes are needed to Rules 13-1A and 13-1C which deal with new *intensive farming* in line with our decision and the changes sought by Fish and Game and the Minister.

Intensive farming – controlled or permitted status

[5-197] Mr Christopher Hansen, a consultant planner called by Ravensdown, has the view that there is no reason why both existing and new dairy farming could not have *permitted* activity status, and that such an outcome would represent good planning practice. Mr Hansen considered that everything that needed to be could be achieved through the *permitted* activity status:- conditions/standards/terms could be crafted to be certain and enforceable and that this would be more efficient.

[5-198] Ms Barton discusses this issue at some length in her evidence. She says that with the exception of Mr Hansen and Mr Hartley, the planner called by Federated Farmers, the planners agreed in their conference that a *permitted* activity status was inappropriate, a view she continues to hold. In summary, the reasons for her view are, first, that it is difficult to impartially and consistently demonstrate compliance with the

OVERSEER model under a *permitted* regime, because it requires a good degree of technical knowledge to run accurately. Secondly, without the accountability inherent in a resource consent regime, there will be very little interaction between the farmer and the Council about addressing nutrient management. Thirdly, a *controlled* activity allocates the cost of monitoring and compliance to the farmer, whereas under a *permitted* regime it would be borne entirely by the Council. Fourthly, the discharge of farm animal effluent onto or into land is a controlled activity under Rule 13-6 and it makes sense to align the two activities to streamline and integrate the consenting process. Fifthly, under the operative Land and Water Regional Plan (Rule 4 page 21) the discharges of agricultural effluent require a resource consent as a *controlled* activity. This establishes an expectation with respect to the management of nutrient leaching effects associated with dairy farming. The effects of the discharge of farm animal effluent (as controlled through Rule 13-6) are similar to the effects associated with dairy farming land uses (covered by Rule 13-1 and 13-1B). The integrity of the POP would come into question if one activity with similar effects requires consent and the other does not.

[5-199] We accept these reasons arising from all of the material – evidence, joint statements and submissions - for not supporting a *permitted* activity rule:

- Rule 13-1 proposes a one farm consent to manage all contaminant vectors (not just N) based on a systems approach to farm management commended by the Parliamentary Commissioner for the Environment.
- Managing N leaching (effectively) would require significantly more interaction between a local authority and farmer than a *permitted* activity would allow.
- There is limited transactional efficiency given the consent needed for discharges of effluent (an activity caught by Rule 13-1 as ancillary to dairy farming).
- The *permitted* activity rules proposed would only really work on a fixed and not a graduated step-down in N leaching.
- A consent provides much greater certainty for a farmer than *permitted* activity status (which could be changed at any time).
- Control of land use to achieve water quality outcomes of *the commons* is best achieved by a consent identifying the metes and bounds of the farming activity, with explicit conditions, available for inspection as a public record, and with monitoring (at the expense of the consent holder) and enforcement.

- A *permitted* activity rule would allow some farmers to leach up to the relevant threshold number without any control on management practices (with undesirable results).
- Mr Hansen acknowledged the benefits that having better on-farm information would have for future plan change decisions. Fonterra considered a *controlled* activity regime would deliver that information directly to the Council, allowing them to check and verify it within a resource consent process and a better approach.
- Section 70 requires that before a rule that allows, as a *permitted* activity, a discharge of a contaminant into water, or onto land in circumstances where it may enter water, can be included in a regional plan, the Court must be satisfied that, after reasonable mixing, certain adverse effects are unlikely to arise. Those effects include, under s70(1)(g), ... *any significant adverse effects on aquatic life.* There was no evidential basis on which we could conclude that the requirements of s70 would be met.
- The application of the OVERSEER model means there will be a level of discretion and uncertainty which is not appropriate for a *permitted* activity rule.
- It would not allow an iterative process between farmers and the Council, including the careful record keeping and auditing of the OVERSEER inputs and assumptions needed to ensure sound environmental outcomes.
- While the Council may have powers to impose a targeted rate under other legislation, that does not substitute for the direct recovery of the Council's actual and reasonable costs under the RMA from those parties carrying out an activity with actual and potential effects on the environment.

[5-200] We find the logic of that line of thought compelling and agree that a *controlled* activity status would better give effect to the purpose of the Act. We do not accept the *permitted* activity rule put forward by Horticulture NZ in closing for similar reasons. We note that Fish and Game submitted that we have no *scope* to impose *permitted* activity status in any event, but we do not need to decide the point, given our decision that *permitted* activity status is not justified.

Controlled activity conditions/standards/terms

[5-201] We do not accept the distinction between *Tier 1* and *Tier 2* mitigation measures proposed by some parties – see para [5-136].

[5-202] For existing farms and conversion to new farming uses, the Council version had conditions/standards/terms as follows:

(a) A *nutrient management plan* must be prepared from the date specified in Table 13.1 and provided annually to the Council. The activity must be operated in accordance with the *nutrient management plan*.

(b) The *nutrient management plan* referred to in condition (a) above, must demonstrate that the nitrogen leaching loss will not exceed the *cumulative nitrogen leaching maximum* as set out in Table 13.2.

We agree with the version proposed by Fish and Game and the Minister with the conditions/standards/terms to be amended to read:

(a) A *nutrient management plan* must be prepared for the land and provided annually to the Regional Council.

(aa)The activity must be operated in accordance with the *nutrient management plan* prepared under (a).

(b) The *nutrient management plan* prepared under (a) must demonstrate that the nitrogen leaching loss will not exceed the *cumulative nitrogen leaching maximum* specified in Table 13.2.

[5-203] For existing and new uses the Council version had control reserved over:

(a) the implementation of the *nutrient management plan*.

Fish and Game and the Minister sought the addition of:

(aa) compliance with the nitrogen leaching maximums specified in Table 13-2.

We agree that the version provided by Fish and Game and the Minister is a better option for both existing operations and conversions to new types of farming – the Council version is too narrow and will not achieve the policies of the Plan.

Should the 'step down' require a separate consent category?

[5-204] The Council built a 3 year step-down or period of grace to the N leaching limit into the *controlled* activity rule. Fish and Game (and Ms Marr) did not support the proposed 4 year delay until existing dairy farms have to meet the Year 1 LUC numbers under Table 13.2. Ms Marr proposed that a failure to meet the N leaching limit in Year 1 (or any successive year) should require consent for a *restricted discretionary* activity.

[5-205] Fish and Game submitted that the POP has already been so many years in preparation that no party could claim to be taken by surprise, and that the imperative for water quality improvement is becoming urgent. It submitted that the requirements of Table 13.2 should take effect once the plan becomes operative. We agree, and also observe that the Plan's provisions will not take immediate effect, nor will they simultaneously do so. Table 13-1 specifies the date Rule 13-1 comes into effect for individual water management sub-zones. However, some of those dates will need revision, depending on progress with making the Plan operative

Restricted discretionary activity rule

[5-206] The Council's approach to *restricted discretionary* activity status as the default category for existing dairying and conversion to different farming uses that would not comply with the *controlled* activity requirements, involving the restriction of discretion to (most relevantly):

(a) preparation of a *nutrient management plan* for the land

(b) the implementation of reasonably practicable farm management practices for minimising nutrient leaching, faecal contamination and sediment losses from the land.

[5-207] Fish and Game and the Minister opposed these provisions and sought their replacement with:

(a) preparation of and compliance with a *nutrient management plan* for the land

(aa) compliance with the nitrogen leaching maximums specified in Table 13.2

(b) measures to avoid, remedy or mitigate nutrient leaching, faecal contamination and sediment losses from the land.

We agree that the versions provided by Fish and Game and the Minister are a better option for both existing operations and conversions to new types of farming, given the uncertain and changing face of *reasonably practicable farm management practices.*

Should there be a discretionary or non-complying activity rule?

[5-208] No party suggested a *discretionary* activity status for existing farming was warranted as a default category (although that is the agreed position for new farming activities). At the hearing, Federated Farmers floated, as part of a package, the possibility of a *non-complying* activity rule for existing dairying - as a default rule. Given our decision on the substantive approach, and in the absence of evidence

supporting another approach, we leave the default status categories to those proposed by the Council and otherwise agreed by the parties.

The term 'numerics'

[5-209] Ms Barton explained that the term *numerics* was developed by the participants in the mediation process to avoid deadlocks arising from the connotations of using terms such as *standards*, *targets* and *limits*. From there, the term found its way into the DV POP. We are very sympathetic to the use of the term as a way of getting people talking without becoming bogged down in shades of meaning. But when it comes to writing subordinate legislation which, after all, is what a statutory planning document is, accuracy of language is greatly to be desired. Without it, understanding, compliance and enforcement become difficult, if not impossible. The Shorter Oxford defines *numeric* as: *any number, proper or improper fraction or incommensurable ratio*. In the context of, for instance, Policies 6-3 to 6-5, using a term with that meaning conveys nothing – in fact it is nonsense. For instance, as proposed by Fonterra, Policy 6-4 would read:

> Where the existing water quality does not meet the relevant Schedule D water quality numerics within a Water Management Sub-zone, water quality within that sub-zone must be managed in a manner that enhances water quality in order to meet (in a manner consistent with Policy 6-7, and 6-8):
>
> (ii) the water quality numeric for the water management Zone in Schedule D; and/or
>
> (iia) the relevant Schedule AB values and management objectives that the water quality numeric is designed to safeguard.

What that must mean is that the figure specified in Schedule D for water quality in a particular WMZ is a *standard*, to be met, and if it is not met certain action must be taken. Ms Barton concludes her discussion of how the term arose by saying:

> 36. The numerics are applied as absolute standards in the context of permitted activities and are threshold limits for assessment through the resource consent process.

Without wishing to return to discussions involving ducks, we have a very clear view that if that is what a *numeric* is, then it should, for the avoidance of confusion and argument when these provisions come to be used in the real world, be given its real name. For what it is worth, we note that the Act's definition of *Conditions* is ... *in relation to plans and resource consents, includes terms, standards, restrictions, and prohibitions.* Also to fall into a particular consent category *the activity must comply with the requirements, conditions, and permissions ... specified in the ... plan* (s87A).

[5-210] As additional matters to be thought of in addressing this point, we mention that the Shorter Oxford defines *limit* as *...a point beyond which something does not or may not pass* ... or ... *a restriction on the size or amount of something. Standard* is defined as ... *a required or agreed level of quality or attainment.* A *target* is ...*an objective or result towards which efforts are directed.*

[5-211] The NPSFM defines the term *target* as: - *A limit which must be met at a defined time in the future. This meaning applies only in the context of over-allocation.* In turn, *limit* is defined as:

> ... the maximum amount of resource use available, which allows a freshwater objective to be met ... and ... over-allocation is defined as being ... the situation where the resource:
>
> a) has been allocated to users beyond a limit or
>
> b) is being used to a point where a freshwater objective is no longer being met.
>
> This applies to both water quantity and quality.

[5-212] If a given numeric is a *limit*, it should be called that. If it is a *standard* or a *target*, then that is what it should be called. We have not lost sight of the concern expressed by Palmerston North City Council, and recognised by Mr Burns in his closing submissions for Fish and Game, that the term *numeric* as used in Schedule D should not be considered a *standard* for the purposes of s69. We have to say that we are not convinced about the concerns of the City Council, but if they cause difficulties in redrafting the affected provisions we are prepared to receive further submissions on the point.

Part 2 – sections 7, 6 and 5

[5-213] Of the 11 facets of s7 RMA, at least eight are engaged by this issue of surface water quality. The relevant parts of the section are:

> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—
>
> (a) Kaitiakitanga:
>
> (aa) The ethic of stewardship:
>
> (b) The efficient use and development of natural and physical resources:
>
> (c) The maintenance and enhancement of amenity values:
>
> (d) Intrinsic values of ecosystems:

(f) Maintenance and enhancement of the quality of the environment:

(g) Any finite characteristics of natural and physical resources:

(h) The protection of the habitat of trout and salmon:

Kaitiakitanga and the ethic of stewardship both embrace the concept that the present generation should husband natural and physical resources both for their own sake and for the sake of future generations – a concept that re-emerges in s5. Allowing water resources to deteriorate to the point of being unusable and even toxic is the antithesis of that. Nor is it efficient to use and develop the land and water resource in such a way that one's usefulness is destroyed by management practices, or the lack of them, on the other. Amenity values and the quality of the environment will not be maintained, and certainly not enhanced, by such profligate use. The capacity of the region's water to withstand such treatment is finite, and the overloading of waterways with nutrients lost from farming activities will eventually destroy the habitat of trout in many of them.

[5-214] In terms of s6 – matters of national importance to be recognised and provided for – these parts are particularly relevant:

> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
>
> (a) The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:
>
> (c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:

It could plausibly be argued that at least some of subparas (b) and (d) to (g) could be relevant also, but for present purposes we shall confine ourselves to these two. The natural character of wetlands, lakes and rivers will certainly not be preserved from inappropriate use if they are made to decline in quality to the point of unusability and even toxicity by inadequate management of activities on the surrounding land. Nor will the indigenous vegetation, and particularly the indigenous fauna which have their habaitats in that water, be protected.

[5-215] All of the discussion leads to the purpose of the Act, as contained in s5:

> (1)The purpose of this Act is to promote the sustainable management of natural and physical resources.

> (2) In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while—
>
> (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
>
> (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

There can be no doubt of course that enabling ... *people and communities to provide for their ... economic ... wellbeing ...* includes so enabling the farmers and communities of the region. But that part of the purpose is not absolute, or necessarily even predominant. It must be able to coexist with the purposes in subparas a), b) and c). For the reasons already traversed, unless effective and thorough steps are taken to manage N leaching from the region's farms, none of those three purposes will be met.

[5-216] We have considered the theme throughout the POP of the importance of farming to the region. We are satisfied that our decision properly recognises and deals with the tensions between the social and economic wellbeing of the affected people and communities and slowing the decline of, and progressively improving the region's water quality.

Section 32

[5-217] In discussing the ranges of options presented by the parties, we have dealt with what we see as the most appropriate ways of achieving the purpose of the Act, and with whether the options for policies, rules and methods are, in our view, the most appropriate for achieving the objectives of the Plan. In so doing we have considered what we see as the costs and benefits of the alternatives presented. In this Part of the decision, we are particularly mindful of s32(4)(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

As we mention – see, eg para [5-8] – we are conscious that there are things we do not know about the relationships between water quality and ecological health, and there are issues about which those expert in the field hold different views. But we are convinced by the evidence we heard and accept that decisive action on the planning front is necessary now to minimise the risk of serious damage to the ecosystems which

support plant, animal and human life, which contribute greatly to the economic, social and cultural wellbeing of the region and its communities.

Summary of conclusions for Part 5

A. RPS Objective 6-1 and Policies 6-1 and 6-7 and Plan Objective 13-1 should be drafted as ... *recognises and provides for ... the values in Schedule AB.* Paragraphs [5-23] to [5-26] and [5-38].

B. A reference to *land use* should be added in Objective 13-1 of the Plan and in other appropriate places. Paragraph [5-39].

C. Schedule D should contain deposited sediment (for State of the Environment monitoring) and visual clarity standards. Paragraph [5-45].

D. We consider that s293 could be an appropriate means of setting a nutrient standard for shallow lakes in Schedule D. Paragraph [5-46].

E. The Coastal Rangitikei Catchment should be brought within the policy and rules regime as a targeted sub-zone. Paragraph [5-50].

F. Lake Horowhenua, the coastal lakes and their related subzones should all be brought within the rules regime. Paragraphs [5-51] to [5-62].

G. All intensive land uses – dairying, cropping, horticulture and intensive sheep and beef - should be brought within the policy and rules regime. Paragraph [5-63] to [5-71].

H. Pending the proving of OVERSEER 6, possibly an interim tool for assessing N loss for horticulture may need to be considered. Paragraph [5-66].

I. Presently, there is not scope to include extensive sheep and beef farming in the rules regime. Paragraph [5-72] to [5-75].

J. The Council should consider a Plan Change to bring extensive sheep and beef within an N leaching regime. Paragraph [5-77].

K. It is practicable to obtain resource consents for horticulture. Paragraphs [5-78] to [5-83].

L. The LUC classification system should be used as a basis for leaching limits. Paragraph [5-85] to [5-113].

M. Reducing LUC based limits at years 1, 5 10 and 20 should be the basis of the policy and rules regime. Paragraphs [5-114] and [5-115].

N. In Policy 13-C(b) a requirement that the Council should *seek to exclude cattle* should be replaced with must *require the exclusion of cattle.* Paragraph [5-135].

O. In Policy 13-C the reference to *1350 stock movements* should be replaced with *stock movements.* Paragraph [5-135].

P. There may be an exception to Policy 13-2D for existing farming operations with defined limitations. Paragraphs [5-171] and [5-172].

Q. *Grandparenting* in the sense of allowing existing operations to continue to leach nutrients at rates based on their own historic performance should not form part of the rules regime. Paragraph [5-177].

R. *Reasonably practicable farm management practices* should not be included in any of the policy and rules regime. Paragraph [5-136] and [5-178] to [5-181].

S. A trading scheme has potential merit and should be further investigated with a view to a possible later plan change. Paragraph [5-182] to [5-185].

T. RPS and Plan policy provisions as suggested by the Minister and Fish and Game, with amendments, are appropriate. Paragraphs [5-193] and [5-194].

U. Intensive farming should be given *controlled* (and not *permitted*) activity status. Paragraph [5-197] to [5-200].

V. A 3 year period of grace to meet year 1 limits for existing farming operations in the *controlled* activity rule is not satisfactory but a policy can allow its consideration during consent applications for a *restricted discretionary* activity. Paragraph [5-173] and [5-204] and [5-207].

W. A revision of the Table 13.1 dates for various target water management sub-zones to come into effect is required. Paragraph [205].

X. The term *numerics* should be replaced with terms such as *target, standard* or *limit* as appropriate. Paragraph [5-209] to [5-212].

Dated at Wellington the 30th day of August 2012

For the Court

C J Thompson
Environment Judge

Appendix 1 - sections 69 and 70 RMA

69 Rules relating to water quality

(1) Where a regional council—

(a) Provides in a plan that certain waters are to be managed for any purpose described in respect of any of the classes specified in Schedule 3; and

(b) Includes rules in the plan about the quality of water in those waters,—

the rules shall require the observance of the standards specified in that Schedule in respect of the appropriate class or classes unless, in the council's opinion, those standards are not adequate or appropriate in respect of those waters in which case the rules may state standards that are more stringent or specific.

(2) Where a regional council provides in a plan that certain waters are to be managed for any purpose for which the classes specified in Schedule 3 are not adequate or appropriate, the council may state in the plan new classes and standards about the quality of water in those waters.

(3) Subject to the need to allow for reasonable mixing of a discharged contaminant or water, a regional council shall not set standards in a plan which result, or may result, in a reduction of the quality of the water in any waters at the time of the public notification of the proposed plan unless it is consistent with the purpose of this Act to do so

70 Rules about discharges

(1) Before a regional council includes in a regional plan a rule that allows as a permitted activity—

(a) A discharge of a contaminant or water into water; or

(b) A discharge of a contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water,—

the regional council shall be satisfied that none of the following effects are likely to arise in the receiving waters, after reasonable mixing, as a result of the discharge of the contaminant (either by itself or in combination with the same, similar, or other contaminants):

(c) The production of conspicuous oil or grease films, scums or foams, or floatable or suspended materials:

(d) Any conspicuous change in the colour or visual clarity:

(e) Any emission of objectionable odour:

(f) The rendering of fresh water unsuitable for consumption by farm animals:

(g) Any significant adverse effects on aquatic life.

(2) Before a regional council includes in a regional plan a rule requiring the adoption of the best practicable option to prevent or minimise any actual or likely adverse effect on the environment of any discharge of a contaminant, the regional council shall be satisfied that, having regard to—

(a) The nature of the discharge and the receiving environment; and

(b) Other alternatives, including a rule requiring the observance of minimum standards of quality of the environment,—

the inclusion of that rule in the plan is the most efficient and effective means of preventing or minimising those adverse effects on the environment.

BEFORE THE ENVIRONMENT COURT

Decision No. [2014] NZEnvC 070

IN THE MATTER	of four appeals under Clause 14(1) of Schedule 1 of the Resource Management Act 1991 (**the Act**)
BETWEEN	ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED (ENV-2012-AKL000069)
	FEDERATED FARMERS OF NEW ZEALAND INCORPORATED (ENV-2012-AKL000072)
	KAWHIA HARBOUR PROTECTION SOCIETY INCORPORATED (ENV-2012-AKL000073)
	GOWER & OTHERS (ENV-2012-AKL000076)
	Appellants
AND	OTOROHANGA DISTRICT COUNCIL
	Respondent

Court: Environment Judge DA Kirkpatrick (sitting alone under s279 Resource Management Act)

Date of Decision: 27 March 2014

DECISION ON JURISDICTION TO MAKE CONSENT ORDER

A. **The Otorohanga District Council as respondent is to revise the draft consent order by amending the map of the Landscape Policy Area so that it no longer shows new areas of outstanding natural landscapes or outstanding natural features or landscapes of high amenity value that were outside the areas shown in the decisions version of the proposed District Plan.**

B. **The parties may then submit such a revised draft consent order with any supporting memorandum of consent for the Court's consideration.**

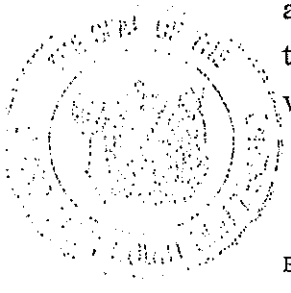
REASONS FOR DECISION

Introduction

[1] These four appeals relate to the treatment of natural landscape in the Otorohanga proposed District Plan ("**PDP**") and are being dealt with together. This decision addresses a contested jurisdictional issue concerning the scope of a draft consent order which has been submitted to the Court.

[2] The PDP records that the district of Otorohanga contains outstanding natural landscapes, outstanding natural features and high natural character areas. These are identified as "**Outstanding Landscapes**" on the planning maps. The objectives, policies and rules in the PDP seek to protect these from inappropriate subdivision, use and development, consistent with the obligations imposed by section 6(a) and (b) of the Act of the Otorohanga District Council ("**the Council**"). The Council recorded in the PDP that the district also contains a number of areas where the landscape elements and natural features combine to create "**Landscapes of High Amenity Value**" as identified on the planning maps. All these areas are contained within the Landscape Policy Area established in terms of section 2 of the Landscape chapter in the PDP.

[3] As a result of Court-assisted mediation on 25 November 2013 and a self-facilitated "without prejudice" meeting of the parties to these appeals on 28 November 2013, the parties reached an agreement as to a basis for amendments to certain provisions of the PDP, including both its text and its maps, on which all four appeals could be settled. A memorandum of consent to resolve the natural landscape topic in the PDP dated 20 December 2013, with a draft consent order, has been filed with the Court. All parties have signed that memorandum except for the appellant



Federated Farmers of New Zealand Incorporated ("**Federated Farmers**") and two parties under s274: Devune Enterprises and Te Koraha Farms Limited.

[4] Federated Farmers has raised a jurisdictional issue as to the scope of the agreement reached among the parties. As part of the process in reaching agreement to settle the appeals, the Council got its consultant planning expert and its landscape expert to do additional mapping. This mapping shows extensions of areas of Outstanding Landscapes and Landscapes of High Amenity Value onto parts of the district which were not mapped as such in the PDP either as publicly notified or as amended by the Council's decisions on submissions. Federated Farmers questions whether these amendments can properly be made. The Council contends that they can on the basis of the submission made by Federated Farmers on the PDP and the relief sought in its appeal.

[5] Both Federated Farmers and the Council have filed submissions in support of their respective positions. The other appellants in relation to this topic (Environmental Defence Society Inc, Kawhia Harbour Protection Society Inc and Gower & Ors) have stated that they support the Council's position. Devune Enterprises has stated that it supports the position of Federated Farmers. There has been no statement of position by or on behalf of Te Koraha Farms Ltd.

[6] Federated Farmers has also confirmed that, should the Court determine that the proposed settlement is within the scope of its submission and appeal, then Federated Farmers will confirm its support for the draft consent order, as lodged, to be made.

Relevant Law

[7] The central question to be determined is whether the proposed outcome agreed on by the parties to these appeals and expressed in the draft consent order is within the scope of the PDP as publicly notified or as sought to be amended by an appellant's submission on it. The jurisdictional issue that the parties have raised before the Court is an essential one in the process for preparing or changing a District Plan.

[8] The starting point is that a District Plan must be prepared by the relevant territorial authority "*in the manner set out in Schedule 1*"to the Act.[1] Schedule 1 is a code for this process,[2] although important glosses have been added by case law.

[1] Section 73(1) RMA.
[2] ***Re Vivid Holdings Ltd*** [1999] NZRMA 467 at para (16).

[9] In accordance with Schedule 1: [3]

(a) a proposed plan must be evaluated in accordance with section 32 of the Act and publicly notified, with a copy of the public notice being sent to every ratepayer who is likely to be directly affected by the proposed plan (clause 5 (1) and (1A));

(b) any person (with certain restrictions on trade competitors) may make a submission on the publicly notified proposed plan which must be in the prescribed form (clause 6);

(c) the prescribed form requires a submitter to give details of the specific provisions of the proposed plan that the submission relates to, and to give precise details of the decision which the submitter seeks from the local authority (form 5, Schedule 1 to Resource Management (Forms, Fees, and Procedure) Regulations 2003);

(d) the local authority must prepare and give public notice of the availability of a summary of decisions requested by persons making submissions on a proposed plan (clause 7);

(e) any person representing a relevant aspect of the public interest, or any person that has an interest in the proposed plan greater than the interest that the general public has, or the local authority itself, may make a further submission in support or in opposition to any submission made under clause 6 (clause 8);

(f) the local authority must give decisions on the provisions and matters raised in submissions, which must include reasons and may include matters relating to any consequential alterations necessary to the proposed plan arising from the submissions (clause 10);

(g) a person who made a submission on a proposed plan may appeal to the Environment Court in respect of:

i. a provision included in the proposed plan; or

ii. a matter excluded from the proposed plan; or

[3] As it stands since the latest amendments which came into force on 1 October 2009, prior to notification of the PDP.

iii. a provision that the decision on submissions proposes to include in or exclude from a plan;

but only if the appellant referred to the provision or the matter in the appellant's submission on the proposed plan, and the appeal does not seek the withdrawal of the proposed plan as a whole (clause 14); and

(h) the Environment Court must hold a public hearing into any provision or matter referred to it (clause 15).

[10] The Environment Court has the same power, duty and discretion in regard to an appeal made under clause 14 in respect of the decision appealed against as the local authority had under clause 10, and may confirm, amend or cancel the decision to which the appeal relates.[4] Although not directly applicable to my present consideration of the jurisdiction to make a particular order by consent, it is pertinent to this review of the relevant legislation to refer to the Court's powers:

(a) In section 292 of the Act, to direct a local authority to amend a plan to which proceedings relate for the purpose of remedying any mistake, defect or uncertainty or giving full effect to the plan; and

(b) In section 293, to direct a local authority to prepare changes to a proposed plan to address any matters identified by the Court (such as, for example, that a proposed plan departs from a higher-order statutory planning document to which it must give effect or with which it is inconsistent).

[11] A careful reading of the text of the relevant clauses in Schedule 1 shows how the submission and appeal process in relation to a proposed plan is confined in scope.[5] Submissions must be on the proposed plan and cannot raise matters unrelated to what is proposed. If a submitter seeks changes to the proposed plan, then the submission should set out the specific amendments sought. The publicly notified summary of submissions is an important document, as it enables others who may be affected by the amendments sought in submissions to participate either by opposing or supporting those amendments, but such further submissions cannot introduce additional matters. The Council's decisions must be in relation to the provisions and matters raised in submissions, and any appeal from a decision of a council must be in respect of

[4] Section 290 RMA.
[5] See also the more extensive discussion of these provisions and their legislative history in ***Federated Farmers of New Zealand (Inc) MacKenzie Branch v MacKenzie District Council*** Decision No. [2013] NZEnvC 257 at [24]-[51].

identified provisions or matters. The Environment Court's role then is to hold a hearing into the provision or matter referred to it and make its own decision on that.

[12] The rigour of these constraints is tempered appropriately by considerations of fairness and reasonableness. In the leading case of ***Countdown Properties (Northlands) Ltd v Dunedin City Council***[6] a full court of the High Court considered a number of issues arising out of the plan change process under the Act, including the decision-making process in relation to submissions.[7] The High Court confirmed that the paramount test is whether or not the amendments are ones which are raised by and within the ambit of what is reasonably and fairly raised in submissions on the plan change. It acknowledged that this will usually be a question of degree to be judged by the terms of the proposed change and the content of the submissions.[8]

[13] In analysing such amendments, the High Court approved of the Planning Tribunal's categorisation[9] of them into five groups, the first four of which are permissible:

(a) Those sought in written submissions;

(b) Those that corresponded to grounds stated in submissions;

(c) Those that addressed cases presented at the hearing of submissions;

(d) Amendments to wording not altering meaning or fact;

(e) Other amendments not in groups (a) to (d).

[14] The High Court rejected the submission that the scope of the local authority's decision-making under clause 10 is limited to no more than accepting or rejecting a submission, holding that the word "regarding" in clause 10 conveys no restriction on the kind of decision that could be given. The Court observed that councils need scope to deal with the realities of the situation where there may be multiple and often conflicting submissions prepared by persons without professional help. In such circumstances, to take a legalistic view that a council could only accept or reject the relief sought would be unreal.[10]

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[6] [1994] NZRMA 145.
[7] *Ibid.* at 164-168.
[8] *Ibid.* at 166.
[9] ***Foodstuffs (Otago Southland) Properties Ltd v Dunedin City Council*** (1993) 2 NZRMA 497 at 524-529.
[10] ***Countdown Properties (Northlands) Ltd (supra)***at 165.

[15] The High Court also considered other possible tests, including what an informed and reasonable owner of affected land should have appreciated might result from a decision on a submission. While not rejecting that approach, the Court held that it should not be elevated to an independent or isolated test, given the danger of substituting a test which relies solely on the Court endeavouring to ascertain the mind or appreciation of a hypothetical person.[11]

[16] While clause 10 has been amended several times since 1994 and no longer uses the word "regarding" in relation to decisions on submissions, the current language does not alter the substance of the provision or otherwise render inappropriate the High Court's approach in ***Countdown Properties (Northlands)*** to the application of this provision.

[17] In summary, as Panckhurst J observed in an oft-repeated dictum in Royal Forest & Bird Protection Society Inc v Southland District Council:[12]

> ... it is important that the assessment of whether any amendment was reasonably and fairly raised in the course of submissions, should be approached in a realistic workable fashion rather than from the perspective of legal nicety.

[18] A review of the relevant subsequent case law shows that the circumstances of particular cases have led to the identification of two fundamental principles:

(i) The Court cannot permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected;[13] and

(ii) Care must be exercised on appeal to ensure that the objectives of the legislature in limiting appeal rights to those fairly raised by the appeal are not subverted by an unduly narrow approach.[14]

[19] There is obvious potential for tension between these two principles. As observed by Fisher J in ***Westfield (NZ) Ltd v Hamilton City Council,***[15] the resolution

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[11] *Ibid.* at 166-167.
[12] [1997] NZRMA 408 at 413.
[13] ***Clearwater Resort Ltd v Christchurch City Council*** (unreported: High Court, Christchurch, AP34/02, 14 March 2003, William Young J) at para [66].
[14] ***Power v Whakatane District Council & Ors*** (unreported: High Court, Tauranga, CIV-2008-470-456, 30 October 2009, Allan J) at para [30].
[15] [2004] NZRMA 556 at 574-575.

of that tension depends on ensuring that the process for dealing with amendments is fair, not only to the parties but also to the public:

> [72] I agree that the Environment Court cannot make changes to a plan where the changes would fall outside the scope of a relevant reference and cannot fit within the criteria specified in ss292 and 293 of the Act: see ***Applefields, Williams and Purvis,*** and ***Vivid.***[16]
>
> [73] On the other hand I think it implicit in the legislation that the jurisdiction to change a plan conferred by a reference is not limited to the express words of the reference. In my view it is sufficient if the changes directed by the Environment Court can fairly be said to be foreseeable consequences of any changes directly proposed in the reference.
>
> [74] Ultimately, it is a question of procedural fairness. Procedural fairness extends to the public as well as to the submitter and the territorial authority. Adequate notice must be given to those who might seek to take an active part in the hearing before the Environment Court if they know or ought to foresee what the Environment Court may do as a result of the reference. This is implicit in ss292 and 293. The effect of those provisions is to provide an opportunity for others to join the hearing if proposed changes would not have been within the reasonable contemplation of those who saw the scope of the original reference.

[20] The consideration of procedural fairness was discussed in some detail by the High Court in ***Palmerston North City Council v Motor Machinists Limited*** [2013] NZHC 1290. That case was principally concerned with the related issue of whether a submission was "on" a plan change, but Kós J examined that question in its context of the scope for amendments to plan changes as a result of submissions by reference to the bipartite approach taken in ***Clearwater***:[17]

(i) Whether the submission addresses the change to the status quo advanced by the proposed plan change; and

(ii) Whether 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.

[21] Laying stress on the procedures under the Act for the notification of proposals to directly affected people, and the requirement in s32 for a substantive assessment of the effects or merits of a proposal, Kós J observed that the Schedule 1 process lacks those safeguards for changes to proposed plans as sought in submissions. The lack of

[16] ***Applefields Ltd v Christchurch City Council*** [2003] NZRMA 1; ***Williams and Purvis v Dunedin City Council*** (Environment Court, CO22/C002, 21 February 2002, Judge Smith); and ***Re Vivid Holdings Ltd*** [1999] NZRMA 467.
[17] *Supra*, fn 13.

formal notification of submissions to affected persons means that their participatory rights are dependent on seeing the summary of submissions, apprehending the significance of a submission that may affect their land, and lodging a further submission within the prescribed timeframe.

[22] In particular, his Honour noted that a core purpose of the statutory plan change process is to ensure that persons potentially affected by the proposed plan change are adequately informed of what is proposed. He observed:[18]

> 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 clause 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.

The present case

[23] In the present case, the Council notified the PDP including planning maps which identified outstanding landscapes and landscapes of high amenity value.

[24] Federated Farmers lodged a substantial submission in relation to numerous provisions in the PDP. The first provision it addressed was "*Identification of outstanding landscapes*". Because of its central importance to the present issue, I set out the whole of the relevant part of the submission by Federated Farmers:

> Federated Farmers supports the Otorohanga District Council's approach of identifying outstanding landscapes on the planning maps. Their identification of outstanding landscapes provides resource users with certainty as to where the provisions will apply, and does not extend unnecessary protection to landscapes that are not considered outstanding.
>
> Federated Farmers considers that the proposed District Plan needs to be consistent with terminology used in the RMA. Section 6(b) of the RMA discusses *Outstanding Natural Features and Landscapes*, and that only landscapes and features that are considered to have a high level of naturalness and outstanding qualities are to be protected. The terminology used in the proposed District Plan needs to be changed from outstanding landscapes, to outstanding natural landscapes.
>
> The methods for identifying, assessing and classifying landscape types at a territorial level are well defined in case law. During an assessment of the District's landscapes the Federation encourages the use of existing methods in order to provide certainty and clarity. In addition, the Federation strongly urges Council to consult with landowners, both collectively and individually, on this matter.

[18] At [77].

> Federated Farmers considers that it is vital that only landscapes with true outstanding qualities and naturalness are identified, so that land used for primary production and normal farming activities do not become unreasonably captured by the provisions.
>
> **Relief sought**
>
> - That only natural features and natural landscapes that have demonstrable outstanding and natural qualities are identified and mapped;
> - That correct RMA terminology is used throughout the Plan, and that the term Outstanding Landscapes is replaced with Outstanding Natural Landscapes.

[25] The second item in Federated Farmers' submission related to landscapes of high amenity value, and sought that areas identified as such be deleted from the planning maps and that any rules pertaining to those areas be deleted from the PDP. Similar relief was sought by Gower and others in their appeal.

[26] The draft consent order filed by the parties would alter the text of the PDP in relation to both outstanding landscapes and landscapes of high amenity value. It would not delete the provisions relating to the latter, but would split the areas of landscape of high amenity value in the district into two: hinterland and coastal, with different provisions in relation to each. There would be some consequential amendments to the controls on earthworks. There does not appear to be any issue as to the Court's jurisdiction to make those changes to the text of the PDP.

[27] Also lodged with the draft consent order is a map of the whole district stated to be at a scale of 1:125,000 at A1, but provided to me at A3 and so effectively 1:250,000, or 1cm = 2.5 km. It shows a line to denote the "Coastal/Hinterland Divide" and has various areas shown in different colours to identify:

(a) "Landscape of High Amenity Value (Coastal)" in green;

(b) "Landscape of High Amenity Value (Hinterland)" in yellow;

(c) "Outstanding Natural Features" in orange;

(d) "Outstanding Natural Landscapes" in red; and

(e) "LHAV Removed through Mediation" in blue.

[28] This map also shows some of these areas with a hatched shading to denote "New ONFL/LHAVS (Outside Decisions Version)." The presently contested issue arises in relation to the shaded areas of Outstanding Landscapes. There is no issue in

relation to the shaded areas of Landscapes with High Amenity Value because the Council acknowledges in the memorandum of consent to resolve the landscape topic dated 20 December 2013 that "*[t]hose entirely new areas of LHAV which are cross-hatched* (sic) *on the map attached . . . and which had no Landscape Policy Area overlay in either the notified or the decisions version . . . are not within scope of the appeals on the topic of Natural Landscape*".

[29] In relation to the new shaded areas of Outstanding Landscapes, the Council relies on the content of the notice of appeal by Federated Farmers to establish jurisdiction for the changes sought to the planning maps. The relevant relief sought in Federated Farmers' notice of appeal is set out in the memorandum of consent to resolve the landscape topic dated 20 December 2013. I do not need to repeat it here, as in all material respects it accurately reflects the content of Federated Farmers' original submission quoted above. As identified above in the discussion of the relevant statutory provisions relating to the jurisdiction of the Environment Court, the ultimate source of jurisdiction for resolving appeals before the Court is either the content of the PDP as notified or the content of a submission seeking to amend it, or somewhere in between.[19]

[30] The memorandum dated 20 December 2013 also refers to the relief sought by other appellants, but other than an appellant in the Gower & Ors appeal named Chick, who seeks removal in its entirety of the landscape policy area overlay from the Chick properties, all of the other appeals appear to be focussed on the text of the PDP rather than its maps. None of the four appeals in relation to the landscape topic expressly seek the inclusion of additional areas identified as Outstanding Landscapes.

Federated Farmers' argument

[31] Federated Farmers submits that there is no jurisdiction for further areas of outstanding natural landscape now to be included in the planning maps of the PDP, for they were not so mapped in the notified version of the PDP. The position in relation to these Outstanding Landscapes is, it argues, the same as for the new areas of Landscapes of High Amenity Value, which were identified outside the scope of any Outstanding Landscapes or Landscapes of High Amenity Value identified in the PDP as notified. Federated Farmers and Gower & Ors sought in their appeals that these Landscapes of High Amenity Value all be removed, and in the memorandum dated 20 December 2013 the Council accepts that any Landscapes of High Amenity Value

[19] ***Re Vivid Holdings Ltd*** [1999] NZRMA 467 at para (19)

which is entirely new would require either a variation to the PDP or a future plan change in order to be included.

[32] Having traversed the relevant clauses of Schedule 1 and the relevant case law, Federated Farmers says that its submission and notice of appeal were limited to outstanding landscapes as already identified in the PDP as notified. However, counsel acknowledges that the documents do not include any particular limitation on scope, so that if "taken at face value" they might apply to areas not previously identified in the PDP as notified.

[33] Emphasis is laid on the principle identified in ***Countdown Properties (Northland)***[20] that the Council cannot grant relief beyond the scope of the submission lodged in relation to the PDP, and the focus must be on the submission rather than on the notice of appeal. Federated Farmers submits that there is a danger in going too far, as identified in ***Clearwater***.[21]

[34] Federated Farmers also submits that it would be unreasonable to read its submission as extending areas of protection for landscapes because that is not normally the position taken by it in these matters. I do not think I can rely on this point as having much determinative value. As observed by the High Court in ***Countdown Properties (Northland)***[22], there is a danger in endeavouring to ascertain the mind or appreciation of a hypothetical person. While Federated Farmers is far from hypothetical, I would prefer to discern any relevant intention of a person from the text of their submission rather than from the person's reputation or some inference drawn from knowledge of past events. Assumptions based on impressions of that sort are likely to lead the Court into error.

Otorohanga District Council's argument

[35] At the outset, the Council seems to place some weight on the fact that Federated Farmers entered into mediation and an agreement arising out of mediation. In my view, any such agreement is not relevant to the issue before the Court. The jurisdiction of the Court to make an order authorising changes to a statutory planning document cannot be conferred by agreement. The Court's jurisdiction is established by the Act, and the boundaries of that jurisdiction are established by the relevant

[20] *Supra*, fn 11.
[21] *Supra*, fn 13.
[22] *Supra*, fn 11

statutory provisions referred to above. No agreement reached between the parties can confer additional jurisdiction and nor can it overcome any lack of jurisdiction in a matter such as this.

[36] The Council bases its argument that there is scope to include additional areas of Outstanding Landscapes on the submission by Federated Farmers set out at [21] above. The Council notes that the submission is broadly framed and did not specify any areas of Outstanding Landscapes (as distinct from Landscapes of High Amenity Value) to be removed. In making such a submission on the PDP, the Council submits that Federated Farmers left open the possibility that other areas may be mapped if the new landscape assessment methodology required it.

[37] The Council stresses the issue of workability in dealing with the process of reassessment of landscapes undertaken by the Council as part of its mediation and negotiations with the appellants. It notes the real possibility in that process that the Outstanding Landscapes would change, including the identification of additional areas. It argues that to expect only a reduction in the areas of Outstanding Landscapes would be to impose a "sinking lid" approach which was not sought by Federated Farmers and cannot be implied from its submission.

Further argument

[38] In reply, Federated Farmers expresses some concern about the disclosure of a mediated agreement, but it does not appear necessary for the Court to enter into that issue to resolve the question of jurisdiction. In any event, as noted above, Federated Farmers confirms that it will support the negotiated draft consent order if the making of such an order is within the scope of its appeal.

[39] Federated Farmers denies that it is pursuing a "sinking lid" approach, and submits that any additional ONL areas should proceed through the Schedule 1 process rather than be added at this stage.

[40] No additional matters are raised by the other appellants.

Discussion

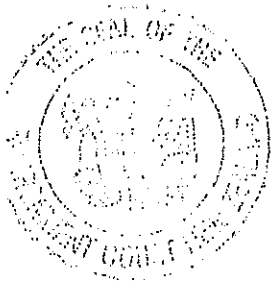
[41] The material before the Court includes a map of the district attached to the draft consent order showing the agreed mediated outcome for the landscape policy

area. The new Outstanding Landscapes and Landscapes of High Amenity Value which are outside the decisions' version of the PDP are shown on the map with hatched shading. At the scale of the map, I can do little more than observe that there are some substantial areas of Outstanding Landscapes that have been added. I do not know anything about those particular areas, including who may own or occupy them, or what they may be used for. I have not been presented with any information about the direct effects on persons with an interest in those areas or whether those persons may support or oppose the identification of their land on the map as Outstanding Landscapes. But it may not matter greatly that I do not have such information.

[42] The essential issue that I must determine is whether those hatched areas are within the scope of the submission by Federated Farmers on the PDP. Fundamentally, in determining a matter of jurisdiction, this is an objective assessment based on the text of the relevant documents rather than on the personalities of any participant or the circumstances of tenure or use of the land. While it might be thought possible to seek the agreement of affected persons at a later stage to address the issue of effects, such an *ad hoc* approach would not respond to the jurisdictional issue of the scope of amendments to a proposed plan which are permitted under Schedule 1.

[43] An objective approach, however, must yet allow a degree of latitude in its application so as to be realistic and workable rather than a matter of legal nicety. If it were obviously the case that the additional areas were of a scale and extent that could reasonably be considered to be incidental and consequential extensions, not requiring further substantial analysis of their likely effects or comparative merits, then that could be within the scope of amendments permissible in terms of the tests identified in ***Countdown Properties (Northland)*** and ***Clearwater*** and referred to above at [12] and [20].

[44] I do not consider it useful to assess this in terms of whether it is a "sinking lid" approach, with the apparent pejorative connotation attached to those words. Even with the latitude identified in relevant case law for the purpose of realistic workability, the Act imposes limits which have the effect of containing how far amendments may be made to a statutory planning document while it proceeds through the Schedule 1 process. If the result of that containment may be characterised as a "sinking lid", then it is a consequence of the boundaries set by the law rather than the approach of any party to these proceedings.



[45] As for the timing of the raising of this issue, while one may understand the sense of frustration that could develop when a jurisdictional point is raised at a late stage in proceedings which appear to be on course for settlement, that is irrelevant to the Court's consideration. Even if the point had not been raised by one of the parties, it could well have been raised by the Court itself in its review of the draft consent order to ensure, notwithstanding the agreement of the parties, that the order may properly be made in accordance with all relevant legal requirements and for the purpose of the Act. All officers of the Court have a duty to act in accordance with the law, including within the jurisdiction set by the law, at all times.

[46] So against that background, the question is whether the submission by Federated Farmers seeks, or otherwise creates scope for, the inclusion of additional Outstanding Landscapes in the landscape policy area of the Otorohanga PDP?

[47] I have set out the relevant text of the submission in full above at [21]. It is clearly a submission on the provisions of the PDP in relation to issues concerning landscape, so that no issue arises in terms of the first limb of the test as expressed in ***Clearwater***.[23] The submission commences by supporting the Council's approach of identifying outstanding landscapes on its planning maps, noting that clear identification provides users with certainty. The submission supports methods for identifying landscape types which are well defined in order to provide certainty and clarity. The submission also supports consultation with landowners. The relief sought is "*that only natural features and natural landscapes that have demonstrable outstanding and natural qualities are identified and mapped.*"

[48] It is notable that the text of the submission supports a methodology in terms of the whole district and does not refer to any particular areas or locations. The principal concern expressed in the submission is to achieve the clear and certain identification, by mapping, of natural landscapes and natural areas that are demonstrably outstanding. In abstract terms it is clearly possible that a submission that seeks an amended or new method for dealing with a resource management issue in a proposed plan could consequentially require other changes to the proposed plan resulting from the application of that method to the circumstances in the district. Where such consequential changes are foreseeable to the parties and do not extend to affect those who may have no notice of them, the case law discussed above indicates that incidental extensions are permissible. But on the face of the material before me, the extensions sought in this case are not within those limited bounds.

[23] *Supra*, fn 13.

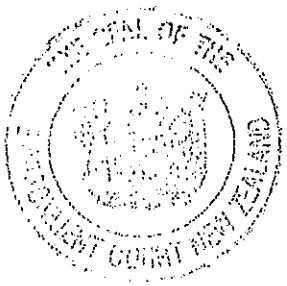
[49] It is not apparent that the submission by Federated Farmers required a full reassessment of the landscapes of the entire district, with all areas able to be considered for inclusion in what was to be identified on the maps as "outstanding." In terms of the relief sought, the use of the word "only" indicates a submission that the maps as notified may have included areas that did not warrant such identification rather than that there were areas that should have been so identified and were not. While the reassessment of the landscape within the district could obviously result in additional areas being identified, it is not explicit and, in my opinion, nor is it implicit that the submission sought to have any such areas included in the planning maps. The emphasis laid on consultation with landowners, at least, indicates that the submission sought a further process before additional areas could be included on the planning maps as Outstanding Landscapes.

[50] In my opinion, adding areas of outstanding landscapes that have not previously been shown either on the planning maps as notified nor identified or otherwise referred to in submissions is not within the scope of the submission by Federated Farmers. The approach taken by the Council to the treatment of the entirely new areas now mapped as Landscapes of High Amenity Value, being to require a variation to the PDP or a plan change once the PDP is made operational, is the correct approach and must also apply in relation to areas now identified as Outstanding Landscapes.

[51] For those reasons, I conclude that the Court does not have jurisdiction to approve any consent order seeking to include new areas of outstanding natural landscapes or outstanding natural features beyond those shown on the planning maps in the decisions version of the Otorohanga proposed District Plan.

Directions

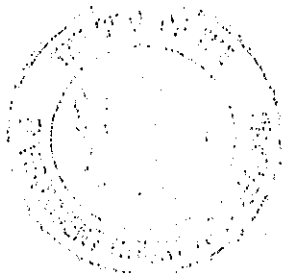
[52] I direct the Otorohanga District Council as respondent to revise the draft consent order by amending the map of the Landscape Policy Area so that it no longer shows new areas of outstanding natural landscapes or outstanding natural features or landscapes of high amenity value that were outside the areas shown in the decisions version of the proposed District Plan.



[53] The parties may then submit such a revised draft consent order with any supporting memorandum of consent for the Court's consideration.

SIGNED at AUCKLAND this 27th day of March 2014

DA Kirkpatrick
Environment Judge



IN THE COURT OF APPEAL OF NEW ZEALAND

CA705/2011
[2013] NZCA 221

BETWEEN	FAR NORTH DISTRICT COUNCIL Appellant
AND	TE RŪNANGA-Ā-IWI O NGĀTI KAHU First Respondent
AND	CARRINGTON FARMS LIMITED Second Respondent
AND	CARRINGTON ESTATE LIMITED Third Respondent
AND	CARRINGTON RESORT LIMITED Fourth Respondent

CA706/2011

AND BETWEEN	CARRINGTON FARMS LIMITED Appellant
AND	CARRINGTON ESTATE LIMITED Second Appellant
AND	CARRINGTON RESORT LIMITED Third Appellant
AND	TE RŪNANGA-Ā-IWI O NGĀTI KAHU First Respondent
AND	FAR NORTH DISTRICT COUNCIL Second Respondent

CA54/2012

AND BETWEEN	FAR NORTH DISTRICT COUNCIL Appellant

	AND	TE RŪNANGA-Ā-IWI O NGĀTI KAHU First Respondent
	AND	CARRINGTON FARMS LIMITED Second Respondent

CA56/2012

	AND BETWEEN	CARRINGTON FARMS LIMITED Appellant
	AND	TE RUNANGA-A-IWI O NGATI KAHU First Respondent
	AND	FAR NORTH DISTRICT COUNCIL Second Respondent

Hearing:	26 and 27 March 2013
Court:	O'Regan P, Harrison and French JJ
Counsel:	J S Baguley and J G A Day for Far North District Council J D Gardner-Hopkins and M Wikaira for Te Runanga-a-Iwi o Ngati Kahu R A Brabant, I M Gault and A M Glenie for Carrington Farms Ltd, Carrington Estate Ltd and Carrington Resoort Ltd
Judgment:	11 June 2013 at 2.30 pm
Reissued:	19 July 2013: see minute of 19 July 2013
Effective date of Judgment:	11 July 2013

JUDGMENT OF THE COURT

CA705/2011 and CA706/2011

A The appeals by Far North District Council (FNDC or Council) and Carrington are allowed against the High Court:

(a) declaration that under cl 4 of the settlement agreement Carrington agreed not to expand its accommodation on to land

including the site which is the subject of its amended land use application dated 30 September 2008;

(b) order quashing FNDC's decision relating to the land use consent, and direction referring the consent back to Council for reconsideration on terms, and reserving leave to apply further; and

(c) order for costs.

B The judgment of the High Court is set aside and the land use consent is reinstated.

C Ngāti Kahu is to pay one set of costs each to Carrington and FNDC for a standard appeal on a band A basis and usual disbursements.

CA54/2012 and CA56/2012

D The appeals by FNDC and Carrington are allowed against the judgment of the High Court setting aside the decision of the Environment Court.

E The judgment of the High Court is set aside and the decision of the Environment Court is reinstated subject to the terms of para [157](d) of the High Court judgment.

REASONS OF THE COURT

(Given by Harrison J)

Table of Contents

Introduction

[1] Carrington Farms Ltd owns a large tract of what was originally farm land on the Karikari Peninsula in Northland within an area of considerable natural beauty and cultural importance to the local rūnanga, Te Rūnanga-ā-Iwi o Ngāti Kahu.

[2] Carrington has already developed part of its land. About 10 years ago, the local authority, the Far North District Council (FNDC or Council), granted the company resource consents under the Resource Management Act 1991 (the RMA) to develop a golf course, country club and winery complex. Ngāti Kahu challenged the lawfulness of the consent process by seeking judicial review in the High Court. The proceeding was later settled and the development project was completed.

[3] More recently, Carrington decided to develop another part of its land as a residential complex. The company applied sequentially for resource consents – initially, a dwelling or land use consent for 12 residential units and later a subdivision consent for the same land. Council publicly notified the latter but not the former before separately granting both consents.

[4] The two appeals before this Court arise from the separate consents. In chronological sequence, Ngāti Kahu first appealed unsuccessfully to the Environment Court against the subdivision consent[1] and then to the High Court. In the interim, the Rūnanga challenged the lawfulness of the land use consent in an application for judicial review in the High Court. White J heard Ngāti Kahu's appeal against the Environment Court's decision and its judicial review application together. In the result both the appeal and the application were allowed. In judgments issued separately on 29 September 2011 White J quashed the land use[2] and subdivision[3] consents.

[5] Carrington and FNDC appeal against both judgments. For ease of reference our decisions on the two appeals will be included in a composite judgment, starting with the judicial review proceeding.

Facts

[6] The undisputed facts are set out in comprehensive detail in the Environment Court's decision and in both of White J's judgments. We are able to summarise the facts relevant to these appeals more briefly as follows.

[7] Carrington owns between 800 and 1000 hectares of land on the Karikari Peninsula either bordering or in close proximity to Karikari Beach – a long, open and crescent shaped foreshore facing the Pacific Ocean and backed by semi-consolidated sand dunes. Incorporated within this judgment is a map showing the boundaries of Carrington's property, its configuration and the separate areas of the golf course, country club and residential developments.

[8] In March 1999 Carrington applied to FNDC for three resource consents: (a) a land use consent for the country club development consisting of 384 proposed accommodation units and a lodge/golf club complex; (b) a subdivision consent for the same development to create 384 separate titles; and (c) a land use consent to establish a vineyard. FNDC processed all three applications on a non-notified basis

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1 *Te Rūnanga-ā-Iwi o Ngāti Kahu v Far North District Council* [2010] NZEnvC 372 [Environment Court decision].

2 *Te Rūnanga-ā-Iwi o Ngāti Kahu v Carrington Farms Ltd* (2011) 16 ELRNZ 664 (HC).

3 *Te Rūnanga-ā-Iwi o Ngāti Kahu v Far North District Council* (2011) 16 ELRNZ 708 (HC).

– that is, notice was not given to the general public. All consents were granted in May 1999.

[9] In February 2000 Ngāti Kahu applied to the High Court for orders judicially reviewing FNDC's decision not to notify Carrington's consent applications. Carrington was also joined as a party. On 5 March 2001 the parties signed a written agreement to settle the application for judicial review (the settlement agreement). As a result of the settlement, Carrington's development was able to proceed.[4]

[10] In April 2000 Council publicly notified its proposed district plan. In July 2000 Carrington lodged a submission seeking to include a zone known as the Carrington Estate Special Zone: its boundaries were roughly aligned to and bordered the proposed development site. A consent order made in the Environment Court in August 2004 incorporated the zone into the district plan.

[11] In June 2008 Carrington applied for a land use consent to construct 12 single residential units within a relatively small section of a 490 hectare area in the north eastern part of its property, physically separate from the country club development. The land was within the Rural Production Zone in FNDC's Operative District Plan. Ms Baguley advises that the zone is relatively permissive. Its boundaries and the mix of zoning of coastal and rural activities were determined through a public process. The Department of Conservation and the Environmental Defence Society (the EDS) had appealed against the zone's original inclusion in the draft district plan but Ngāti Kahu did not. In November 2006 the zone's boundaries were settled by a consent order made in the Environment Court after the appeals were withdrawn.

[12] Construction of residential units on the sites proposed by Carrington is a permitted activity within the Rural Production Zone. However, the company's proposal exceeded two permitted activity standards. One governed traffic intensity levels; the other regulated the number of lots permissibly served by a single access way. Carrington's proposal was thus a restricted discretionary activity under the

[4] On 16 May 2002, the parties signed an amendment to the settlement agreement but its terms do not bear upon the discrete issue of construction which we must decide.

Operative District Plan. In December 2008 Council decided that Carrington's land use application did not require public notification and granted a resource consent.

[13] In March 2009 Carrington applied for a subdivision consent to create 12 separate allotments for the 12 residential units for which the land use consent was granted together with three additional lots (which are not at issue). Consent was required because the proposed subdivision was a non-complying activity within the Rural Production Zone in that the 12 lots did not meet the minimum lot size specification in the district plan. On this occasion Council publicly notified Carrington's application. In October 2009, against Ngāti Kahu's objection, Council granted consent.

[14] Ngāti Kahu immediately appealed to the Environment Court against FNDC's grant of the subdivision consent. The appeal was dismissed in an extensive interim decision given on 3 November 2010.[5]

CA705/2011 and CA706/2011

Land use consent: judicial review

(a) Settlement agreement

(i) High Court

[15] Ngāti Kahu's application for judicial review of Council's decision to grant the land use consent sought two different remedies. The first remedy was a declaration that by cl 4 of the settlement agreement Carrington had agreed not to expand its accommodation on its land – including the site which was the subject of its land use consent application – to construct 12 single residential units. Carrington challenges the Judge's finding that cl 4 had that meaning and effect when granting the Rūnanga's application. Counsel agree that the question of whether the Judge erred is the threshold issue for determination on this appeal.

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5 Environment Court decision, above n 1.

[16] White J set out the terms of the settlement agreement in full.[6] Those which are directly relevant to Carrington's appeal are as follows:

> 1. Carrington Farms agrees to consult in good faith with EDS and Te Rūnanga concerning resource management matters of mutual interest relating to any part of the development site (including the parts referred to in the following paragraphs and the streams) which may arise in future. This commitment is to be incorporated, on a prospective basis, into the conditions of the consent granted by the FNDC.
>
> 2. Furthermore, Carrington Farms agrees not to develop the beach (including the dunes) and wetland areas of its property as identified on the attached plan, and to use its best endeavours to preserve and enhance those areas for the purpose of restoring the natural state of the wetland. The parties agree that this commitment is to be incorporated, on a prospective basis, into the conditions of consent granted by the FNDC.
>
> ...
>
> 4. Carrington Farms agrees not to seek to expand the currently consented provision for accommodation (including hotel, villas or any other form of accommodation), subject to any "as of right" development that may be able to take place without the need for a resource consent at the time of this agreement and any re-siting of elements within the development site. Such re-siting shall not without the consent of the plaintiffs:
>
> (a) involve the relocation of any building covered by the consents to a position closer to the coast than the nearest building permitted in terms of the resource consents which are the subject of this proceeding; and
>
> (b) have any adverse effects on the environment having regard to what is contemplated by those resource consents.
>
> Carrington Farms agrees that Te Rūnanga and EDS would be affected parties for the purposes of section 94(2) of the RMA in respect of any further development of the site subject to these proceedings.
>
> ...
>
> 6. Without limiting its statutory duties and obligations the FNDC agrees that Te Rūnanga and EDS would be affected parties for the purposes of s 94(2) of the Resource Management Act in respect of any further development of the site subject to these proceedings.
>
> ...
>
> 8. The FNDC acknowledges the particular interest of EDS in significant developments affecting the coast and of Te Rūnanga and local marae in significant developments affecting the coast within the rohe of Ngāti Kahu.

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6 At [16].

...

12. The parties will issue a joint media statement in which the parties indicate a win-win settlement using a tone of co-operation with the stated objective of achieving a culturally and environmentally sensitive development. The agreed statement shall include a statement attributed to Dr Mutu to the effect that Te Rūnanga was acting on behalf of Te Whanau Moana of Karikari. The parties agree that no other public statement will be made which is inconsistent with the spirit of the agreed statement, or if no agreed statement is reached, which is inconsistent with this agreement.

13. The parties will use best endeavours to agree to the terms of the joint media statement for issue within 14 days of concluding this agreement.

Conclusion

14. All parties to this Settlement Agreement confirm that they shall in implementing the terms of this Settlement Agreement in all respects act in good faith including using best endeavours to achieve the alteration to the conditions of consent contemplated by this agreement within a reasonable time.

15. The parties agree that this Settlement Agreement settles all issues, concerns and disputes however arising out of the grant or exercise of all existing resource consents obtained for the development provided such exercise is in accordance with the conditions of the consents, including the conditions referred to in this agreement.

[17] The settlement agreement annexed a plan, as referred to in cl 2, identifying "... the beach (including the dunes) and wetland areas" of Carrington's property. All areas were within the "Outstanding Natural Landscape" zone in the Council's plan.

[18] Clause 4 is at the heart of this dispute. White J was in no doubt as to its meaning and effect, expressing his conclusion succinctly in these terms:

> [66] ... Carrington's agreement in clause 4 of the settlement agreement "not to seek to expand the currently consented provision for accommodation (including hotel, villas or any other form of accommodation)" was clear and, subject to the express exceptions, was unequivocal. Carrington had agreed not to expand its accommodation on the Karikari Peninsula at all unless one of the exceptions applied.

[19] The Judge then examined whether Carrington's land use application fell within either of the exceptions provided by cl 4,[7] concluding that:

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[7] At [67]–[69].

> [70] On this basis neither exception to Carrington's non-expansion agreement in clause 4 of the settlement agreement applied. As there was no dispute that Carrington's 12 residential dwellings were within the expression "any other form of accommodation" in clause 4, Carrington was seeking to expand its accommodation contrary to its non-expansion agreement in clause 4 of the settlement agreement.

[20] White J was satisfied also that the plain and contextual meanings were consistent in that (a) Ngāti Kahu had an acknowledged interest in and concern for the cultural significance of the whole of the Karikari Peninsula including Carrington's land; (b) the agreement was executed in settlement of a proceeding which challenged the validity of the three consents, and Carrington's agreement not to expand any form of accommodation on any of its property was in apparent consideration for Ngāti Kahu's agreement to the existing consents; (c) the proceeding raised issues about whether Council had taken proper regard of matters of national importance as required by the RMA but the effect of the settlement was that that critical issue was not determined by the Court; and (d) subject to amendments made to their terms, the three consents were accepted as valid.

(ii) Decision

[21] The question is whether White J was correct that by cl 4 of the settlement agreement Carrington agreed in 2001 not to expand its provision of accommodation on its Karikari property at any future time unless one of the two stated exceptions applied. While cl 4 lacks precision, its terms were designed to settle Ngāti Kahu's application to review FNDC's decision to grant consent for the proposed country club development on a non-notified basis. The plan incorporated within the agreement delineated the area of the development, referred to throughout the document as "the development site".

[22] In exchange for the Rūnanga's withdrawal of its opposition, Carrington accepted in the settlement agreement two express restrictions on its rights as owner. One restriction (cl 2) was an absolute prohibition on Carrington's right to develop a large and obviously valuable part of its land outside the development site – the beach and wetland areas – coupled with a positive undertaking to preserve and enhance the areas.

[23] The other restriction (cl 4) was an agreement "... not to *seek to expand the currently consented provision for accommodation* ..." (emphasis added). Carrington's then current consent for accommodation allowed construction of 384 units and ancillary buildings within the country club development together with travellers' accommodation and a manager's unit within the winery complex. The operative part of cl 4 was the only contractual limitation imposed on the company's consent rights; the parties plainly contemplated, for example in the concluding sentence of cl 4, that components of the development site might be further developed.

[24] The meaning of "expand" where used in cl 4 is of central importance. The word means "to increase in size or bulk or importance".[8] Something can only be expanded or increased in size if it is already in existence. In terms of cl 4, what was in existence was the currently consented land use for accommodation granted in May 1999. Clause 4 could not be construed to apply to a "provision for accommodation" which was not then in existence and was not then by definition capable of expansion. As Mr Gault observes, without this express restriction Carrington could have applied at any time to vary the existing consent by increasing, for example, the number of hotel rooms within the development or the size of rooms, possibly without notice.

[25] Carrington had no statutory or contractual right to use the existing consent as a legal platform for developing another part of its property for residential purposes. The company's future pursuit of that objective would always require a new application on different terms for a new consent. We are satisfied that, when considered in light of this context, Carrington's agreement not to seek to expand its existing consent for accommodation was limited to a prohibition on increasing the size of what was permitted according to the 1999 consent. This restriction cannot be construed to prohibit the company from applying at any time in the future for a land use consent to develop another part of its property for residential purposes.

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[8] Tony Deverson and Graeme Kennedy (eds) *The New Zealand Oxford Dictionary* (Oxford University Press, Oxford, 2005).

[26] Also, as Mr Gault points out, if cl 4 bore the contrary meaning, cl 2 for example would be superfluous.

[27] Other provisions in the settlement agreement support this conclusion, in particular:

(a) Carrington's agreement to consult in good faith with Ngāti Kahu and the EDS was expressly limited to matters of mutual interest "relating to any part of the development site (including the parts referred to in the following paragraphs and the streams) which may arise in future ...". This reference is consistent with the parties' limitation on the scope of the agreement to the development site – that is, a country club, golf course, lodge and associated accommodation units and vineyards (cl 1).

(b) The exceptions to Carrington's right to develop the accommodation area again related to "the development site" with an acknowledgement that "this site" may be the subject of applications for consent for further development in which case Ngāti Kahu and the EDS were to be notified (cls 4 and 6).

(c) The agreement was specifically in settlement of all issues, concerns and disputes "arising out of the grant or exercise of all existing resource consents obtained for the development ..." (cl 15).

[28] In our judgment White J erred in declaring that cl 4 of the settlement agreement operated as a contractual bar to Carrington's application in 2008 for a land use consent.

(b) Non-notification of resource consents

(i) Ngāti Kahu's application

[29] The second remedy sought by Ngāti Kahu was an order quashing Council's decision to grant Carrington's application for a land use consent on terms requiring

its reconsideration, with a direction that the application should proceed on a notified basis to be considered contemporaneously with the application for subdivision consent on the same site. White J's decision to grant this remedy is challenged by both Council and Carrington.

[30] The primary issues to emerge in argument in the High Court, and as identified on appeal, are whether the Judge was wrong to conclude that (a) special circumstances existed which required public notification of Carrington's application and (b) as a consequence Council's decision not to notify was unreasonable.[9]

(ii) Statutory provisions

[31] Sections 93–94D and 104 of the RMA then in force governed Council's notification obligations when processing Carrington's land use consent. Those provisions relevantly stated:

> **93 When public notification of consent applications is required**
>
> (1) A consent authority must notify an application for a resource consent unless—
>
> (a) the application is for a controlled activity; or
>
> (b) *the consent authority is satisfied that the adverse effects of the activity on the environment will be minor.*
>
> ...
>
> **94 When public notification of consent applications is not required**
>
> (1) If notification is not required under section 93(1), the consent authority must serve notice of the application on all persons who, in the opinion of the consent authority, may be adversely affected by the activity, even if some of those persons have given their written approval to the activity.
>
> (2) However, a consent authority is not required to serve notice of the application under subsection (1) if all persons who, in the opinion of the consent authority, may be adversely affected by the activity have given their written approval to the activity.

[9] At [83]–[84].

94A Forming opinion as to whether adverse effects are minor or more than minor

When forming an opinion, for the purpose of section 93, as to whether the adverse effects of an activity on the environment will be minor or more than minor, a consent authority—

(a) may disregard an adverse effect of the activity on the environment if the plan permits an activity with that effect; and

(b) *for a restricted discretionary activity, must disregard an adverse effect of the activity on the environment that does not relate to a matter specified in the plan or proposed plan as a matter for which discretion is restricted for the activity; and*

(c) must disregard any effect on a person who has given written approval to the application.

94B Forming opinion as to who may be adversely affected

(1) Subsections (2) to (4) apply when a consent authority is forming an opinion, for the purpose of section 94(1), as to who may be adversely affected by the activity.

(2) The consent authority must have regard to every relevant statutory acknowledgement, within the meaning of an Act specified in Schedule 11, made in accordance with the provisions of that Act.

(3) A person—

(a) may be treated as not being adversely affected if, in relation to the adverse effects of the activity on the person, the plan permits an activity with that effect; or

(b) in relation to a controlled or restricted discretionary activity, must not be treated as being adversely affected if the adverse effects of the activity on the environment do not relate to a matter specified in the plan or proposed plan as a matter for which—

(i) control is reserved for the activity; or

(ii) discretion is restricted for the activity; or

(c) must not be treated as being adversely affected if it is unreasonable in the circumstances to seek the written approval of that person.

...

94C Public notification if applicant requests or if special circumstances exist

(1) If an applicant requests, a consent authority must notify an application for a resource consent by—

(a) publicly notifying it in the prescribed form; and

(b) serving notice of it on every person prescribed in regulations.

(2) *If a consent authority considers that special circumstances exist, a consent authority may notify an application* for a resource consent by—

(a) *publicly notifying it* in the prescribed form; and

(b) serving notice of it on every person prescribed in regulations.

94D When public notification and service requirements may be varied

(1) Despite section 93(1)(a), a consent authority must notify an application for a resource consent for a controlled activity in accordance with section 93(2) if a rule in a plan or proposed plan expressly provides that such an application must be notified.

(2) *Despite section 93(1)(b), a consent authority is not required to notify an application for a resource consent for a restricted discretionary activity if a rule in a plan or proposed plan expressly provides that such an application does not need to be notified.*

(3) Despite section 94(1), a consent authority is not required to serve notice of an application for a resource consent for a controlled or restricted discretionary activity if a rule in a plan or proposed plan expressly provides that notice of such applications does not need to be served.

…

104 Consideration of applications

(1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to—

(a) any actual and potential effects on the environment of allowing the activity; and

(b) any relevant provisions of—

(i) a national policy statement:

(ii) a New Zealand coastal policy statement:

(iii) a regional policy statement or proposed regional policy statement:

(iv) a plan or proposed plan; and

(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

…

(Our emphasis.)

[32] These provisions when read together constituted a discrete regime for determining whether Council was obliged to publicly notify Carrington's application for a land use consent. That was for a restricted discretionary activity. As Ms Baguley emphasises, s 94D(2) applied because the Operative District Plan provided that such an application would not be notified where Council was satisfied that the adverse effects on the environment were minor. By contrast, while the same plan rule provided that controlled activity applications would not be notified, that provision was expressly subject to s 94C(2).

(iii) Carrington's application

[33] It is common ground that Carrington's application for a land use consent fell within the scope of s 93(1)(b); and that Council had a discretion on whether to notify. White J set out fully the terms of Council's decision to proceed on a non-notified basis.[10] He was satisfied that it correctly (a) inquired into and found that Carrington's application for the land use consent did not have any adverse effects when considered against the relevant criteria in the district plan; (b) noted its obligation under s 94A to disregard any adverse effects which did not relate to the matters specified in the plan for which the discretion had been restricted; and (c) concluded accordingly that its statutory discretion was limited solely to traffic intensity and access issues.

[34] Council also noted there were no affected persons within the meaning of s 94B and concluded: "The proposal does not offend the matters over which Council has reserved its discretion and as such merits approval."

[35] On their face, the remaining provisions of ss 93 and 94 were not engaged. In terms of s 94A Ngāti Kahu accepted that it could not challenge FNDC's decision that

[10] At [37].

the adverse effects of the application – that is exceeding traffic and access way intensity standards – were minor. Similarly, s 94B was not engaged.

(iv) Special circumstances

[36] The only question then was whether "special circumstances exist[ed]" in terms of s 94C(2) sufficient to invoke Council's discretion on whether to notify Carrington's application.[11] A "special circumstance" is something, as White J accepted, outside the common run of things which is exceptional, abnormal or unusual but less than extraordinary or unique.[12] A special circumstance would be one which makes notification desirable despite the general provisions excluding the need for notification.[13] As Elias J noted in *Murray v Whakatane District Council*:[14]

> ... the policy evident in those subsections seems to be based upon an assumption that the consent authority does not require the additional information which notification may provide because the principles to be applied in the decision are clear and non-contentious (as they will generally be if settled by district plan) or the adverse effects are minor. Where a consent does not fit within that general policy, it may be seen to be unusual.

[37] In order to invoke s 94C(2), the special circumstance must relate to the subject application. The local authority has to be satisfied that public notification, as opposed to limited notification to a party or parties, may elicit additional information bearing upon the non-complying aspects of the application. We repeat that Carrington's application to construct and use dwelling houses was, as White J accepted, a permitted activity in the Rural Production Zone. FNDC's discretion when determining the application was accordingly restricted by s 94B to those aspects of the activity which specifically remained for its consideration – compliance with the traffic intensity and vehicle access standards.

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11 At [84].

12 At [104] applying *Peninsula Watchdog Group (Inc) v Minister of Energy* [1996] 2 NZLR 529 (CA) at 536.

13 *Murray v Whakatane District Council* [1999] 3 NZLR 276 (HC) at 310; aff'd [1999] 3 NZLR 325 (CA).

14 At 310–311.

(v) High Court

[38] White J held that "special circumstances" existed, sufficient to take Council's decision out of the ordinary relating to notification of decision making.[15] He found that Council erred in reaching a contrary conclusion. The grounds for the Judge's conclusion are interlinked and can be addressed together. In summary, they are that:

(a) Carrington's land use application was unlikely to be able to be implemented without a subdivision application as well, and in terms of s 91 Council should have considered whether Carrington was required to make applications for both consents;

(b) Carrington intended when lodging the land use application to make a subdivision application as well and its decision to make two different applications, with the land use preceding the subdivision application, was contrary to principles of good resource management practice;

(c) Carrington's application to subdivide was non-complying and contrary to the overall thrust of the relevant objectives and policies of the district plan and in particular the site was within both the "coastal environment" and was "an outstanding natural ... landscape" in terms of s 6(a) and (b) of the RMA;

(d) Carrington was acting in breach of its agreement not to expand its application for consent to use its land for accommodation purposes and contrary to its good faith consultation obligation; and

(e) Council had itself acknowledged under cl 8 of the settlement agreement Ngāti Kahu's "particular interest" in significant developments affecting the coast within Ngāti Kahu's rohe.

[39] White J was satisfied that FNDC knew or ought to have known of these "special circumstances" when making its non-notification decision in

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15 At [115].

December 2008.[16] In particular, he relied on a passage from the Environment Court's decision on the subdivision consent issued in November 2010.[17] He was satisfied that there was no evidence Council made the enquiry of Carrington which it ought to have made. Nor was there any evidence that it turned its mind to the "special circumstances" of the case taking it out of the ordinary and making notification desirable. As a result FNDC had failed to exercise properly its discretion under s 94C(2).[18] For the same reasons, its decision was unreasonable in administrative law terms, and its narrow approach to the issue of notification was unjustified.[19]

(vi) Decision

[40] The first two grounds relied on by the Judge suggest that he gave primary weight to the effect of s 91. That section relevantly provides:

> (1) A consent authority *may determine not to proceed with the notification or hearing* of an application for a resource consent if it considers on reasonable grounds that –
>
> (a) other resource consents under this Act will also be *required in respect of the proposal* to which the application relates; and
>
> (b) it is appropriate *for the purpose of better understanding the nature of the proposal*, that applications for any 1 or more of those other resource consents be made before proceeding further.
>
> (Emphasis added.)

[41] The Judge's reliance on s 91 presents problems. Ngāti Kahu never pleaded that Council's decision not to notify was reviewable for failing to comply with s 91 or that Carrington's conduct in lodging a land use application for consent with the prospect or likelihood that an application for subdivision consent would follow itself constituted a special circumstance justifying public notification. Thus, the application of s 91 was not identified by the pleadings as a contestable issue on review and no evidence was led on it in the High Court.

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16 At [116].
17 Environment Court decision, above n 1, at [139].
18 At [117].
19 At [118].

[42] Also, as Mr Gardner-Hopkins accepts, White J erred in placing primary reliance on what he understood was a finding by the Environment Court[20] that Carrington's land use consent was unlikely to be implemented without a subdivision consent as well. In fact, the Court found to the contrary.[21] The Judge made a consequential finding, again in reliance on the Court's decision, that Council should have considered whether Carrington was required to make applications for both consents together. However, with respect, the Environment Court's observations made in its decision on an appeal against granting a subdivision consent, some years after the land use consent was granted, were not relevant to the validity of the land use consent. The latter consent was not directly in issue before the Environment Court.

[43] In support of White J's conclusion, Mr Gardner-Hopkins submits that in terms of s 91 (a) Carrington's proposal was in reality to develop freehold residential lots in a location close to the beach; (b) given the potential for the subdivision application to follow the land use application Council could reasonably have been expected to make further inquiry; (c) further inquiry would have yielded an affirmative answer from Carrington that a subdivision application would follow; (d) the subdivision application was non-complying and all relevant considerations would arise (not limited to the land use discretion); and (e) the separation or unbundling of the two consent applications was therefore contrary to the concept of integrated resource management and good practice – that is, according to the rule derived from the Planning Tribunal's decision in *Affco New Zealand Ltd v Far North District Council (No 2),*[22] that all resource consents for a project should be carefully identified from the outset and made together so they can be considered jointly. Mr Gardner-Hopkins refers to the company's obligation to lay its "cards on the table", emphasising that the subdivision consent was partially notified.

[44] In answer Mr Gault and Ms Baguley emphasise the distinction between Carrington's two applications and the principle of good resource management practice relied on by Mr Gardner-Hopkins. Counsel point out that each of

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20 At [115](a).
21 Environment Court decision, at [114].
22 *Affco New Zealand Ltd v Far North District Council (No 2)* [1994] NZRMA 224.

Carrington's applications were of a stand alone nature whereas in *Affco* further consents were required to effect the proposal (in that case to establish an abattoir). We agree with this distinction. Section 91 applies where "other resource consents ... will also be required in respect of the proposal". An example is where one local authority is satisfied that an application for subdivision consents will require an additional consent for stormwater discharge from another authority before the proposal can be implemented.[23]

[45] By contrast, Carrington's proposal was for a land use consent to construct 12 dwellings. The RMA creates separate regimes for imposing conditions on land use and subdivision consents although there can be a degree of overlap.[24] This proposal was stand alone and no further consents were necessary to allow its implementation by constructing 12 residential units. Mr Brabant advised us that the only reason why the units had not been constructed was the existence of Ngāti Kahu's application for judicial review and the High Court's decision to quash the consent.

[46] Moreover, in order for s 91 to apply Council had to be satisfied that any other applications be made if appropriate to better understand "the nature of *the proposal*". It could not have lawfully relied on s 91 to defer notification or hearing of Carrington's land use application where the only issue was whether it should exercise its discretion relating to the two activity standards. Council's contemporaneous consideration of a subdivision application would not have assisted it in that respect.

[47] In our judgment Mr Gardner-Hopkins' submission faces a more fundamental hurdle. While it is common ground that Council did not consider s 91 when deciding not to notify Carrington's land use consent, we are satisfied that the provision does not apply in any event. Section 91 is an enabling provision of negative effect; it

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23 *Waitakere City Council v Kitewaho Bush Reserve Co Ltd* [2005] 1 NZLR 208 (HC).

24 *Meadow 3 Ltd v Van Brandenburg* HC Christchurch CIV-2007-409-1695, 30 May 2008.

simply empowers a consent authority "not to proceed with a notification or hearing" if it is satisfied on reasonable grounds that two express factors concurrently exist.[25] These words suggest that the power allows a local authority to defer notification where it has made an underlying decision to notify. The power cannot arise for consideration where in a case like this Council has made a decision not to notify.

[48] A decision by FNDC on whether to exercise the s 91 power could only have related to the separate act of hearing Carrington's application. However, its decision to hear and determine the application was never at issue in this proceeding. The subsidiary question of whether the company followed good resource management practice by filing sequential rather than conjoint applications could only have fallen for consideration in that context, if at all. Public notification of the land use application on the ground that a subdivision application would follow could not have assisted Council in exercising a discretion which related solely to the non-complying aspects of the application. Compliance or otherwise with s 91 or good resource management practice could not have constituted a special circumstance in terms of s 94C(2).

[49] The third ground for White J's decision was that Carrington's subdivision application was non-complying and contrary to the district plan as well as the objectives of the RMA. In this regard also the Judge relied on the Environment Court's findings. However, with respect, this factor was not material. As Mr Gault submits, the contingent status of a possible future application by Carrington relating to the same development was an irrelevant factor for FNDC when considering whether to publicly notify the land use application.

[50] In any event the underlying activity – using the land for residential purposes – was permitted when Carrington made its land use application. Only the traffic and access aspects of its proposal allowed Council to exercise a degree of discretion. Provided Council was satisfied that the effects of both were minor, as Ngāti Kahu accepts, the land use consent would necessarily follow. Public notification could not have changed the result.

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[25] Section 142 of the Resource Management Act 1991 (in force at the relevant time and contained in the part of the Act which deals with decisions on proposals of national significance) contains a cross-reference to s 91 and uses the same language.

[51] The fourth and fifth grounds for White J's decision related to findings of breach of the settlement agreement. As explained, we differ from the Judge on his finding of breach by Carrington. Also, with respect, we disagree with the Judge that FNDC's acknowledgement in cl 8 of the agreement that Ngāti Kahu had a "particular interest" in significant developments affecting the coast was relevant to notification.

[52] Here the Rūnanga had disclaimed any interest in the non-complying aspects of the application. As Mr Gardner-Hopkins accepts, FNDC only agreed under cl 6 that Ngāti Kahu was an affected person for discretionary and non-complying activities. And we agree with Mr Gault that on its plain meaning cl 6 applied only to the site of the original development, not to a proposal to develop elsewhere. In these circumstances cl 8, to which the Judge briefly referred, could not constitute a special circumstance justifying notification.

[53] Counsel also addressed argument before us on the issue of whether White J applied the correct legal approach to judicial review of Council's non-notification decision. That was because of the Judge's emphasis[26] upon Blanchard J's statement in *Discount Brands Ltd v Westfield (New Zealand) Ltd* that:[27]

> [116] Because the consequence of a decision not to notify an application is to shut out from participation in the process those who might have sought to oppose it, the Court will upon a judicial review application carefully scrutinise the material on which the consent authority's non-notification decision was based in order to determine whether the authority could reasonably have been satisfied that in the circumstances the information was adequate in the various respects discussed above.

[54] Both Mr Gault and Ms Baguley criticise the Judge's reliance on Blanchard J's judgment in *Discount Brands*, pointing to this passage from the judgment of Elias CJ in the same case:

> [22] Non-complying and discretionary activities are subject to the same test for non-notification: the consent authority must be "satisfied" that the adverse effects on the environment are minor; and must obtain written approval from every person whom the consent authority is satisfied may be adversely affected (unless obtaining such consent in the circumstances is unreasonable). These requirements are to be compared with those provided for controlled and limited discretionary activities. In the case of controlled and limited discretionary activities the express provisions of the district plan

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[26] At [102]–[103].

[27] *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597.

> have established the scope of what is acceptable after a public process, subject to appeal opportunities. By contrast, applications for discretionary activities where the discretion is not a restricted one and non-complying activities have to be discretely weighed against the general policies and standards of the district plan. They have the potential to undermine expectations based on it.

Keith J made comments to the same effect.[28]

[55] It is unclear whether and to what extent White J ultimately relied on Blanchard J's statement in *Discount Brands*. However, we reject Mr Gardner-Hopkins' submission that in this context the statement can be construed as supporting what has been labelled the "hard look" approach to judicial review and this non-notification decision in particular.

[56] In our judgment the aims and purposes of the RMA cannot be construed as justifying a more intensive standard of review of a non-notification decision than would otherwise be appropriate for a Court when exercising its powers.[29] The judicial inquiry is required to determine whether the decision maker has complied with its statutory powers or duties. The construction or application of the relevant provisions remain objectively constant, and there can be no justification for adopting a sliding scale of review of decisions under the RMA according to a judicial perception of relative importance based upon subject matter.[30]

[57] We are satisfied that Blanchard J was doing no more than noting that in the then statutory context and the circumstances prevailing in *Discount Brands* – where the application was for a non-complying discretionary activity – the High Court on review must carefully scrutinise all the material submitted in support where Council's decision not to notify is challenged. In *Palmerston North City Council v Dury*,[31] cited by Mr Gardner-Hopkins, this Court affirmed Blanchard J's "careful scrutiny" observation when upholding a local authority's decision not to notify an

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28 At [48].

29 *Gordon v Auckland City Council* HC Auckland CIV-2006-404-4417, 29 November 2006 at [11]; *Auckland Regional Council v Rodney District Council* [2007] NZRMA 535 (HC) at [41]–[43]; and *Isak v Refugee Status Appeals Authority* [2010] NZAR 535 (HC) at [28]–[29].

30 *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 at [379].

31 *Palmerston North City Council v Dury* [2007] NZCA 521, [2008] NZRMA 519 at [53]–[54].

application for consent to a restricted discretionary activity where the adequacy of supporting information was in issue. However, Ngāti Kahu did not question the adequacy or otherwise of the information supplied by Carrington to FNDC in support of the land use consent relating to the two activity standards at issue. The distinction in approach towards notification drawn by Elias CJ in *Discount Brands* between non-complying activities on the one hand and restricted discretionary activities on the other – where the district plan has already established by a public process what is acceptable – is directly apposite.

(c) Result

[58] In the result, we allow the appeals by Council and Carrington against:

(a) the declaration made in the High Court that under cl 4 of the settlement agreement Carrington agreed not to expand its accommodation on to land including the site which is the subject of its amended land use application dated 30 September 2008;

(b) the orders and directions made in the High Court quashing Council's decision relating to the land use consent, referring the consent back to Council for reconsideration on terms, and reserving leave to apply further; and

(c) the order for costs made in the High Court.

[59] The judgment of the High Court is set aside and the land use consent is reinstated.

[60] Costs must follow the event. Ngāti Kahu brought its proceeding separately against Carrington and Council. Each had separate interests which justified separate appearances in this Court. Ngāti Kahu is to pay one set of costs to Carrington and one set of costs to Council for a standard appeal on a band A basis and usual disbursements.

CA54/2012 and CA56/2012

Subdivision consent

(a) Environment Court

[61] Ngāti Kahu's challenge to Council's decision to grant Carrington a subdivision resource consent was based upon the Rūnanga's belief that the development would have an adverse effect on its relationship with a waahi tapu known as Te Ana o Taite/Taitehe, a burial cave situated on Carrington's land.

[62] The Environment Court was not satisfied on the evidence that the burial cave Te Ana extended underneath the subdivision site. Even if it had found otherwise, the Court was satisfied that any adverse affects on Te Ana or the wider environment would be caused by Carrington giving effect to its existing land use consent and related permitted activity works. In reaching that conclusion the Court adopted this test:

> [98] We consider that it is clear from *Hawthorn*[32] that we are required to make a factual determination as to whether or not it is *likely* that effect will be given to an unimplemented resource consent [the land use consent]. If we determine that it is likely then the environment against which we assess the effects of a proposal will include the environment as it might be modified by implementation of the unimplemented resource consent in question. We do not consider that we have a discretion to ignore that factual finding as to the future state of the environment.

[63] The Environment Court found that Carrington was likely to give effect to the land use consent. Thus the residential unit construction and related authorised works would form part of the future environment against which it must assess the potential effects of the subdivision proposal. In the result the Court was not satisfied that the adverse effects on the environment would be more than minor.

[64] However, the Environment Court recorded that but for that threshold factual finding it would have allowed the appeal if the application for subdivision consent had been considered on its own in the context of the existing environment without the prospective addition of 12 residential units. In that event the proposal would

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[32] *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424, (2006) 12 ELRNZ 299 (CA).

have been contrary to the relevant statutory objectives and policies.[33] But, once the future environment was considered with the additional 12 residential units, a different result followed.

[65] It is thus clear that the Environment Court's decision was shaped by its formulation and adoption of the relevant legal test, and Ngāti Kahu's appeal to the High Court was based upon it.

[66] Before examining whether the Environment Court did err materially in law, it is appropriate to give a little more factual context to Carrington's application. The company applied to subdivide within the Rural Production Zone[34] lots on which construction of residential units was a permitted activity.[35] As Ms Baguley and Mr Brabant point out, the application to subdivide met all the permitted standards except for the lot dimensions. The proposal exceeded a residential intensity rule requiring development of one lot to every 12 hectares of land. The lots would have been permitted if each had at least 3000 square metres for surrounding exclusive use plus a minimum of 11.7 hectares elsewhere. But for the fact that they were clustered together rather than divided into lots of equal sizes, subdivision would have been a controlled activity.

[67] Also, as the Environment Court acknowledged, the subdivision simply enabled the issue of freehold titles to reflect what was already approved and likely to be implemented under the land use consent.[36]

(b) Statutory provisions

[68] Carrington's obligation to obtain a subdivision resource consent was governed by s 77B of the RMA which provided:

> **77B Types of activities**
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> ...

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33 Environment Court decision, above n 1, at [157]–[158].
34 At [11] above.
35 At [12] above.
36 At [146].

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

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

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

(6) Particular restrictions for non-complying activities are in section 104D.

...

[69] The application fell for determination according to ss 104, 104B and 104D of the RMA,[37] which in March 2009 provided:

104 Consideration of applications

(1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to—

(a) any actual and potential effects on the environment of allowing the activity; and

(b) any relevant provisions of—

(i) a national policy statement:

(ii) a New Zealand coastal policy statement:

(iii) a regional policy statement or proposed regional policy statement:

(iv) a plan or proposed plan; and

(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

(2) *When forming an opinion for the purposes of subsection (1)(a), a consent authority may disregard an adverse effect of the activity on the environment if the plan permits an activity with that effect.*

...

(5) A consent authority may grant a resource consent on the basis that the activity is a controlled activity, a restricted discretionary activity, a discretionary activity, or a non-complying activity, regardless of what type of activity the application was expressed to be for.

...

[37] *Te Rūnanga-ā-Iwi o Ngāti Kahu v Far North District Council*, above n 3, at [71].

104B Determination of applications for discretionary or non-complying activities

After considering an application for a resource consent for a discretionary activity or non-complying activity, a consent authority—

(a) may grant or refuse the application; and

(b) if it grants the application, may impose conditions under section 108.

...

104D Particular restrictions for non-complying activities

(1) Despite any decision made for the purpose of section 93 in relation to minor effects, a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either—

(a) the adverse effects of the activity on the environment (other than any effect to which section 104(3)(b) applies) will be minor; or

(b) the application is for an activity that will not be contrary to the objectives and policies of—

(i) the relevant plan, if there is a plan but no proposed plan in respect of the activity; or

(ii) the relevant proposed plan, if there is a proposed plan but no relevant plan in respect of the activity; or

(iii) both the relevant plan and the relevant proposed plan, if there is both a plan and a proposed plan in respect of the activity.

(2) To avoid doubt, section 104(2) applies to the determination of an application for a non-complying activity.

(Our emphasis.)

(c) High Court

[70] White J emphasised that the High Court's jurisdiction on appeal was limited to determinations of questions of law;[38] and that his answers to the four questions then identified had to be given in the light of the Environment Court's findings of fact, which were not open to challenge on appeal.[39] In particular the Court had found that (a) Carrington was likely to implement the land use consent regardless of whether the subdivision consent was granted; (b) the area of Carrington's proposed

[38] At [56].
[39] At [57].

subdivision was not situated above Te Ana; and (c) the land to be subdivided was within both "the coastal environment" and was an "outstanding natural ... landscape" in terms of s 6(a) and (b).

[71] In setting aside the decisions to grant the subdivision consent, White J correctly noted that his contemporaneous decision in the judicial review proceeding to quash the land use consent had the effect of removing the factual basis for the Environment Court's decision.[40] However, as the Judge also recognised, that decision was not material to his decision to allow Ngāti Kahu's appeal. That was because he was independently satisfied that the Environment Court erred in law.[41]

[72] White J noted that:

> [56] In the present case the parties agreed that in terms of ss 299 and 305 of the RMA the four questions of law raised by the two appeals were:
>
> 1. Was the Environment Court obliged to include the residential units consented under RC 2080553 within the future environment upon being satisfied that the consent was likely to be implemented when determining whether the subdivision consent should be upheld or cancelled having regard to the matters in s 6(a) and (b) of the RMA?
>
> 2. Even if the Court was obliged to include the consented units in the future environment, was the Environment Court able to decline to grant consent?
>
> 3. Was the Environment Court in error when considering whether subdivision consent should be refused by reference to s 6(a) and (b) of the RMA to take into account only the environment including the 12 residential units already consented under RC 2080553, but have no regard to the permitted baseline in relation to the potential for development of seven residential units on the subdivision site as a permitted activity?
>
> 4. In relation to the proposed revised conditions of subdivision consent, was the Environment Court within its powers in directing a condition of consent must be added to the effect that the subdivision cannot be completed until construction of the residential units authorised by RC 2080553 has been completed?

[73] White J was satisfied that the first two questions were related or sequential. The third is of academic importance. And the fourth, relating to a condition imposed by the Environment Court on Carrington's subdivision consent, was determined in

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[40] At [155].
[41] At [112].

the company's favour and is not the subject of a cross-appeal. In granting leave to appeal on 13 December 2011 White J did not identify a question or questions of law for our determination.[42]

[74] Our decision focuses on the Judge's answers to the first two questions, recognising that this Court's jurisdiction on appeal from the High Court is also confined to questions of law.[43] In advance of the hearing in this Court counsel filed a list of five discrete issues. However, their argument focussed primarily on the first two questions determined by White J, which are of decisive importance to this appeal.

[75] On the first question, White J determined that:

> [110] In light of the preceding analysis of the decisions of the Court of Appeal in *Arrigato*[44] and *Hawthorn* and the 2003 amendments, it is apparent that:
>
> (a) In terms of the "permitted baseline" concept, which applied to the subject site, the Council and the Environment Court had a discretion whether to take into account and give weight to the unimplemented construction consent (RC 2080553) when considering the effects of Carrington's application for the subdivision consent, a non-complying activity contrary to both ss 6(a) and (b) of the RMA and the provisions of the District Plan.
>
> (b) Unimplemented RC 2080553, which related to the subject site, was not a relevant consideration when the Council and the Environment Court were considering the future state of the environment beyond the subject site.
>
> (c) The Environment Court therefore erred in deciding otherwise and in not exercising the required discretion (although it is clear that it would otherwise have declined the application).

[76] On the second question, the Judge determined that the Environment Court erred in failing to exercise its discretionary power to decline consent even if it was obliged to include the unimplemented land use consent in the future environment.[45]

[77] We shall address each of these two determinations in the same sequence.

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42 *Te Rūnanga-ā-Iwi o Ngāti Kahu v Far North District Council* HC Whangarei CIV-2010-488-766, 13 December 2011 (Minute No 2).

43 Resource Management Act, s 308.

44 *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323 (CA).

45 At [115]–[127].

(d) Decision

(i) Environment

[78] The first question is whether the Environment Court erred in law by holding that it was bound to include Carrington's unimplemented resource consent in the environment against which the effects of the subdivision proposal was to be assessed if it was satisfied that the consent would in fact be implemented.[46]

[79] For this purpose, it is appropriate to summarise more fully the essential steps in the Environment Court's reasoning. After its disputed conclusion on the legal test, the Court followed this approach:

(a) An assessment of the future state of the environment is a determination of the form it might take having regard to activities that are permitted by district or regional plans (s 104(2)) or, as in this case, if the existing resource consents are implemented.[47]

(b) This assessment requires a factual determination as to whether it is likely that effect will be given to the land use consent.[48]

(c) It had no discretion to ignore its factual finding as to the future state of the environment.[49]

(d) It was satisfied, as a matter of fact, that the future environment would include construction of the 12 consented dwellings.[50]

(e) In considering the merits in the context of the future environment including 12 residential units the subdivision consent was not contrary to the district plan's objectives or policies (s 104D(1)(b)(i)).[51]

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46 At [98].
47 At [95].
48 At [96] and [98].
49 At [98].
50 At [114], [130] and [131].
51 At [158].

(f) Any adverse effects of Carrington's development would be a consequence of implementing the land use consent arising out of its development of the 12 unit residential development and its associated earthworks, infrastructure works and vegetation clearance and not the subdivision consent.[52]

[80] The Environment Court's construction of the words "the environment" where used in s 104(1)(a) was central to its decision. "The environment" is not a static concept in RMA terms, as its broad definition in s 2 illustrates.[53] It is constantly changing, often as a result of implementation of resource consents for other activities in and around the site and cannot be viewed in isolation from all operative extraneous factors. As this Court noted in *Queenstown Lakes District Council v Hawthorn Estate Ltd*[54] the consent authority will frequently be aware that the environment existing on the date a consent is granted is likely to be significantly affected by another event before its implementation. In its plain meaning and in its context, we are satisfied that "the environment" necessarily imports a degree of futurity. The consent authority is required to consider the state of the environment at the time when it may reasonably expect the activity – that is, the subdivision – will be completed.[55]

[81] The question then is whether the Environment Court's construction of s 104(1)(a) to the effect that it was bound to take into account the effect of an unimplemented resource consent if satisfied that it would be implemented is consistent with this Court's decision in *Hawthorn.*[56] In *Hawthorn* an application was made for subdivision and land use consents to develop 32 residential units on 34 hectares of land near Queenstown. The activity was non-complying under the operative district scheme but discretionary under the proposed district scheme. The

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52 At [174] and [183].

53 Section 2 of the Resource Management Act provides: **environment** includes:
(a) Ecosystems and their constituent parts, including people and communities; and
(b) All natural and physical resources; and
(c) Amenity values; and
(d) The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters.

54 *Hawthorn*, above n 32, at [52]–[56].

55 *Hawthorn*, above n 32, at [52]–[56].

56 *Hawthorn*, above n 32.

area was within a wider triangle of land of 166 hectares where 24 houses had already been erected with unimplemented consents to construct another 28.

[82] In assessing the effects of the proposal on the environment for the purposes of s 104(1)(a) the Court in *Hawthorn* identified the central question as:

> [11] ... whether the consent authority ought to take into account the receiving environment as it might be in the future and, in particular, if existing resource consents that had been granted but not implemented, were implemented in the future. ...

[83] In answering that question affirmatively this Court conducted a careful and informed survey of the relevant statutory provisions[57] before concluding:

> [57] In summary, all of the provisions of the Act to which we have referred lead to the conclusion that when considering the actual and potential effects on the environment of allowing an activity, it is permissible and will often be desirable or even necessary, for the consent authority to consider the future state of the environment, on which such effects will occur.

[84] Later, in a passage cited by White J,[58] this Court said in *Hawthorn*, that:

> [84] … It [the environment] also includes the environment as it might be modified by the implementation of resource consents which have been granted at the time a particular application is considered, where it appears likely that those resource consents will be implemented. …

[85] White J summarised his analysis of the effect of *Hawthorn* and this Court's decision in *Arrigato*[59] as follows:

> [103] From this analysis of the decision of the Court of Appeal in *Hawthorn*, it is apparent that the Court was making it clear that when a consent authority is having regard to "any actual and potential effects on the environment of allowing the activity" it was permissible and desirable or even necessary for the consent authority to consider the future state of the environment on which such effects would occur and that in doing so resource consents, both implemented and likely to be implemented, **beyond the subject site** were part of the future environment. The Court of Appeal did not, however, "overrule" its earlier decision in *Arrigato*. In *Hawthorn* the Court of Appeal accepted that the "permitted baseline", which recognised both implemented and likely to be implemented consents **for the subject site**, remained relevant for the purpose of assessing the significance of effects of a particular resource application in the context of s 105(2A)(a), the predecessor to s 104D(1)(a) of the RMA.

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57 At [39]–[56].
58 At [101].
59 *Arrigato*, above n 44.

(White J's emphasis.)

[86] The Judge distinguished *Hawthorn* on the ground that the Environment Court's decision in this case was not concerned with the implementation of resource consents beyond the subject site.[60] As a result, the "permitted baseline" test embodied in s 104(2) was relevant to the Environment Court's consideration of Carrington's application.[61] The Judge held that the Court was thus required to exercise its judgment[62] and was not required to consider the unimplemented consent for the subject site when considering the receiving environment beyond it.[63]

[87] White J particularly emphasised the distinction drawn in *Hawthorn* between developments on the site on one hand and beyond the site on the other. He imported the permitted baseline test to justify this distinction. Mr Gardner-Hopkins did likewise. In the former case, he says, the local authority had a discretion to take into account the permitted plan baseline (as codified by s 104(2)); by contrast, in the latter case it was mandatory to take account of activities permitted by the plan or unimplemented consents where they are likely to be implemented.

[88] We do not accept this distinction. The qualification noted by this Court in *Hawthorn* was in the context of pointing out the limitation of the permitted baseline test to the site itself where the appellant had attempted to give it a more expansive application. What is decisive is the exclusionary nature of the permitted baseline test. In essence, as this Court observed in *Arrigato*:[64]

> [29] Thus the permitted baseline ... is the existing environment overlaid with such relevant activity ... as is permitted by the plan. Thus, if the activity permitted by the plan will create some adverse effect on the environment, that adverse effect does not count in the ss 104 and 105 assessments. It is part of the permitted baseline in the sense that it is deemed to be already affecting the environment or, if you like, it is not a relevant adverse effect. The consequence is that only other or further adverse effects emanating from the proposal under consideration are brought to account.

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60 At [103] and [105](a).
61 At [105](b).
62 At [105], applying *Arrigato*, above n 44, at [35].
63 At [105](b).
64 *Arrigato*, above n 44.

[89] As Mr Brabant submits, the permitted baseline was irrelevant to the Environment Court's decision. The current codification of the concept[65] in s 104(2) allows a consent authority when forming its threshold opinion under s 104(1)(a) to "... disregard an adverse effect of the activity on the environment if the *plan* permits an activity with that effect" (emphasis added). The statutory purpose is to vest a consent authority with a discretion to ignore the permitted baseline where previously it had been a mandatory consideration.

[90] The Environment Court was alive to the existence of this discretionary power.[66] That was because Ngāti Kahu's counsel had contended before it, as Mr Gardner-Hopkins did in the High Court, that the consent authority had a discretion as to whether it considered the unimplemented land use consent to be part of the permitted baseline or existing environment.[67] However, as the Environment Court pointed out, Ngāti Kahu's argument conflated the concepts of the permitted baseline and the environment as recognised in ss 104(2) and 104(1)(a) respectively. In *Hawthorn* this Court was satisfied that the appellant made the same error although in a different context.[68]

[91] In the RMA context, the environment and the permitted baseline concepts are critically different. Both are discrete statutory considerations. The environment refers to a state of affairs which a consent authority must determine and take into account when assessing the effects of allowing an activity; by contrast, the permitted baseline provides the authority with an optional means of measuring – or more appropriately excluding – adverse effects of that activity which would otherwise be inherent in the proposal.

[92] As this Court pointed out in *Hawthorn*:[69]

> [27] ... the "permitted baseline" is simply an analytical tool that excludes from consideration certain effects of developments on the site that is subject to resource consent application. It is not to be applied for the purpose of ascertaining the future state of the environment beyond the site.

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65 In the Resource Management Amendment Act 2003, which came into effect after the consent under consideration in *Hawthorn*, above n 32.

66 At [94].

67 At [92].

68 At [90].

69 *Hawthorn*, above n 32.

[93] In this case the Environment Court was not required to undertake a comparative enquiry of the type contemplated by the permitted baseline test. That was because Carrington did not seek to invoke the test in its favour to argue that the district plan permitted an activity having an adverse effect on the environment of the same nature as the proposed subdivision. The Court's enquiry was not into whether the plan permitted an activity with the same or similar adverse effect on the environment as would arise from the subdivision proposal. Its enquiry was focussed instead on the meaning of the "environment", taking proper account of its future state if it found as a fact that Carrington's land use consent would be implemented. Acting within those parameters, it was open to the Court to find as a matter of fact that the potential effects on the environment of implementing the resource consent would be minor when viewed in the context of a future environment that would include the 12 dwellings permitted as a result of the land use consent.

[94] In this respect we note this Court's statement in *Hawthorn*[70] to the effect that it is permissible and will often be desirable or even necessary for the consent authority to consider the future state of the environment. However, that observation does not affect our conclusion. The Court was simply recognising that a consent authority will not always be required to consider the future state of the environment. But, as the Court expressly recognised, it would be contrary to s 104(1)(a) for the consent authority not to take account of the future state of the environment where it is satisfied that other resource consents will be put into effect.[71] This is such a case.

[95] It follows that we must respectfully disagree with White J. In our judgment the Environment Court did not err in determining that it was required to take into account the likely future state of the environment as including the unimplemented land use consent for the purposes of s 104(1)(a) if it was satisfied that Carrington was likely to give effect to that consent.

(ii) Discretion

[96] The second question is whether the Environment Court erred in failing to consider whether to exercise its statutory discretion to decline Carrington's

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70 At [57], cited above at [83].
71 *Hawthorn*, at [54].

application even if it was obliged to include the unimplemented land use consent in the future environment.

[97] In summary White J found that the Environment Court erred because:

(a) The statutory scheme establishes that the decision on whether to grant an application is essentially discretionary in character.[72]

(b) Despite the fact that the land use consent had already been granted to Carrington, the Environment Court was entitled to take into account such factors as national importance, that subdivision was not a permitted activity under the district plan, its view of good resource management factors and its reservations about Carrington proceeding with the construction without obtaining freehold titles.[73]

(c) The fact that the second gateway test was met (s 104D(1)(b)(i)) did not of itself extinguish the need for the Environment Court to consider whether to exercise a discretion.[74]

(d) The Environment Court had an overriding discretion to take account of other relevant factors including that Carrington followed a deliberate strategy prior to maximising what was called "the permitted baseline/existing environment" prior to seeking subdivision consent which failed to meet the requirement of integrated resource management embodied in the RMA and Council's corresponding failure to enquire of Carrington whether it anticipated that subdivision would follow the land use application and whether it was required as part of the overall consent package.[75] In this respect, the Judge gave weight to the provisions of s 91.[76]

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72 At [116].
73 At [117].
74 At [118]–[119].
75 At [121].
76 At [126]–[126].

[98] As a result, White J was satisfied that the Environment Court erred in its reliance on *Hawthorn* in determining that the state of the future environment excluded from account other relevant factors and failed to carry out the required weighing or balancing exercise at all.[77]

[99] We accept that the Environment Court had an overall discretion in determining whether the resource consent should be granted.[78] But that discretion had to be exercised by reference to the relevant statutory criteria. Because this application was for consent to a non-complying activity, the Court first had to find that either of what are known as the gateway tests provided by s 104D was satisfied. This was the starting point for its enquiry into the merits. After consideration, the Court concluded that the application satisfied the second of the gateway tests – that is, it was for an activity that will not be contrary to the objectives and policies of the relevant plan.[79]

[100] However, the Court's enquiry did not end there; it did not treat satisfaction of the gateway test as determining its decision. Instead, the Court concluded after consideration of the evidence that any adverse effects on the environment would have been brought about by Carrington's implementation of the land use consent, not by the subdivision proposal.[80] As noted, the Court was satisfied that the company would build the residential units even if subdivision consent was not granted. This critical evaluative finding inevitably shaped the Court's exercise of its discretion, which had to be related to the merits of the application for subdivision consent. In this respect the Court noted that its decision was based not just on its factual findings but on its consideration of the relevant statutory provisions – ss 104 and 104D.

[101] With respect, we are unable to agree with White J that the Environment Court should have taken into account the factors he identified within its overall discretionary power. It appears that the Judge gave particular weight to the Court's trenchant criticism of Carrington for filing successive consent applications: the Court

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77 At [122].
78 *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA) at [5], see also ss 77B(5)(b) and 104B(a).
79 At [158].
80 At [181] and [213].

observed at one stage that it must have been "blindingly obvious" to FNDC when the land use consent was filed that a subdivision consent application would follow.[81]

[102] It is difficult to follow the statutory basis for the Environment Court's criticism. On appeal counsel addressed detailed argument on what was called the bundling or hybrid planning status of applications when considering whether the consents ought to have been determined together or separately on the merits. We have determined a similar argument in our related decision on the judicial review appeal.

[103] Citing *Bayley v Manukau City Council*,[82] Mr Gardner-Hopkins reverts to his central line of argument that when determining whether bundling should occur the question is whether the relevant consent lies at the heart of the proposal;[83] and that this proposal was to secure freehold residential lots in a location close to the beach to which subdivision was integral. Therefore the most restrictive consent category, being non-complying status for the subdivision consent, should have been applied to both applications (if Carrington had applied for both contemporaneously as the High Court concluded). In this argument, as on the judicial review appeal he relies on s 91.

[104] However, Mr Gardner-Hopkins submissions are beyond the scope of this appeal. The Environment Court did not consider s 91. Instead, it made a decisive factual finding: after criticising Carrington's practice of filing successive applications and Council's alleged failure to act, it enquired into whether these acts or omissions had any material affect. The Court concluded that what it called the "the issue of environmental creep"[84] was not determinative given that the decisive

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81 At [139].

82 *Bayley v Manukau City Council* [1999] 1 NZLR 568 (CA) at 579–580.

83 *Tairua Marine Ltd v Waikato Regional Council* HC Auckland CIV-2005-485-1490, 29 June 2006 at [31].

84 As defined by this Court in *Hawthorn* (and cited in the Environment Court decision, above n 1, at [134]):

> [77] This is the possibility that someone who has obtained one resource consent might seek a further resource consent in respect of the same site, but for a more intensive activity. It would be argued that the deemed adverse effects of the first application should be discounted from those of the second when the latter was considered under s 104(1)(b).

step in terms of environmental effects was Council's decision to grant the land use consent.[85]

[105] In any event, as Mr Brabant points out, the concept of "environmental creep" could not have had relevance here. That is because the concept is limited to cases where a party obtains one resource consent and then applies for another on the same site but for a more intensive activity.[86] In this case, the subdivision consent did not enable a more intensive use of the site than is allowed by the land use consent. It simply enabled titles to be issued for the 12 units which Carrington has a right to construct.

[106] Furthermore, for the reasons which we have given in the judicial review appeal, Council would have had no option but to determine the subdivision consent discretely. It could not have refused, in reliance on s 91 or a precept of good resource management practice, to deal with the subdivision application because a land use consent had been granted previously. With respect, White J's conclusion to the contrary,[87] cannot be sustained because even if Carrington had filed both applications together, FNDC was bound to deal with each separately on its merits. *Bayley* is distinguishable for that reason. In that case the consent authority was considering multiple consent applications: the issue was whether it correctly dispensed with notification of one of those applications.

[107] In any event, the question of whether Carrington followed a deliberate strategy of filing sequential applications could not have been relevant to a decision on whether the subdivision consent was lawfully granted. The company had not acted unlawfully and its conduct could never constitute a disqualifying factor. With respect, we disagree with White J's endorsement of Mr Gardner-Hopkins' submission that by allowing Carrington's application the Environment Court was permitting the company to take advantage of its own wrong doing.[88] Similarly, FNDC's alleged failure at an earlier date when determining the land use consent to

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85 Environment Court decision, at [146].
86 *Hawthorn*, at [79].
87 At [125]–[127].
88 At [124].

identify that a subdivision consent would be required was irrelevant to the merits of the subdivision application itself.

[108] It follows that we disagree with White J's conclusion that the Environment Court simply failed to carry out the requisite weighing exercise at all. In the context of this application its discretion was of a residual or limited character, tightly confined by the statutory criteria and the factual finding that Carrington was likely to implement the land use consent. We do not consider the Environment Court was bound, or even entitled, to take into account the factors identified by the Judge. Accordingly, we are satisfied that the High Court incorrectly found that the Environment Court erred in law when dismissing Ngāti Kahu's appeal against Council's decision to grant Carrington's application for a subdivision consent.

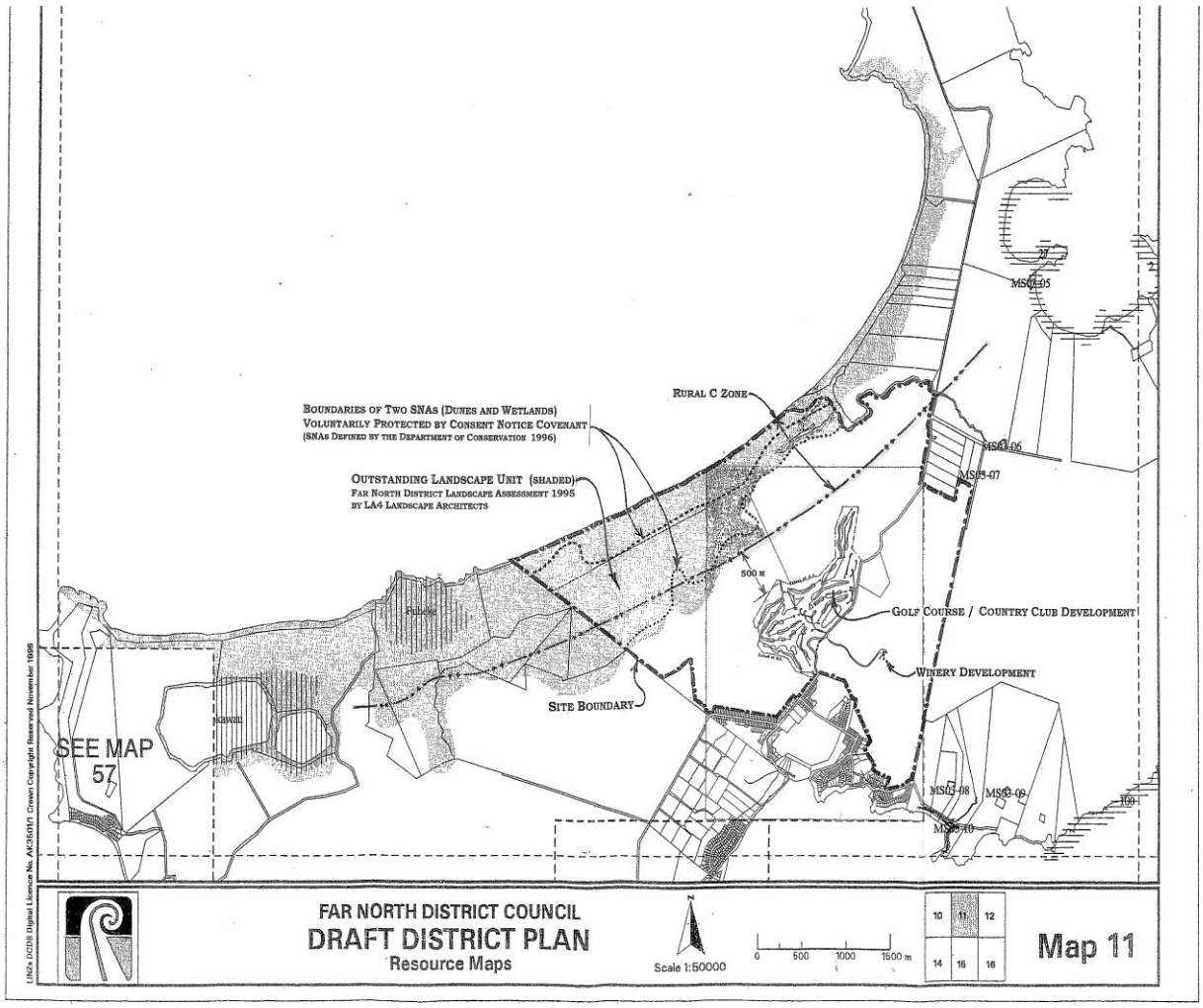
Result

[109] In the result we allow the appeals by FNDC and Carrington against the judgment of the High Court answering the first and second questions of law in Ngāti Kahu's favour, ordering costs and setting aside the decision of the Environment Court.

[110] The judgment of the High Court is set aside and the decision of the Environment Court is reinstated subject to the terms of para [157](d) of the High Court judgment.

[111] In the normal course costs would follow the event. However, while we heard appeals against two separate judgments, we heard both together because they were interlinked and some issues overlapped. That connection is reflected in the composite nature of this judgment. In the circumstances we are satisfied that the award of costs against Ngāti Kahu in CA705/2011 and CA706/2011 will be sufficient to meet the interests of justice on both appeals. There will be no award of costs on this appeal.

Solicitors:
Law North Ltd, Kerikeri for Far North District Council
Russell McVeagh, Wellington for Te Rūnanga-ā-Iwi o Ngāti Kahu
Bell Gully, Auckland for Carrington Farms Ltd, Carrington Estate Ltd and Carrington Resort Ltd


BOUNDARIES OF TWO SNAS (DUNES AND WETLANDS)
VOLUNTARILY PROTECTED BY CONSENT NOTICE COVENANT
(SNAS DEFINED BY THE DEPARTMENT OF CONSERVATION 1996)
OUTSTANDING LANDSCAPE UNIT (SHADED)
FAR NORTH DISTRICT LANDSCAPE ASSESSMENT 1995
BY LA4 LANDSCAPE ARCHITECTS
RURAL C ZONE
500 m
GOLF COURSE / COUNTRY CLUB DEVELOPMENT
WINERY DEVELOPMENT
SITE BOUNDARY
SEE MAP 57
MS05-05
MS05-06
MS05-07
MS05-08
MS05-09
MS05-10
109
FAR NORTH DISTRICT COUNCIL
DRAFT DISTRICT PLAN
Resource Maps
Scale 1:50000
0 500 1000 1500 m
10 11 12
14 15 16
Map 11
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IN THE COURT OF APPEAL OF NEW ZEALAND

CA45/05

BETWEEN	QUEENSTOWN-LAKES DISTRICT COUNCIL Appellant
AND	HAWTHORN ESTATE LIMITED First Respondent
AND	T BAILEY AND OTHERS Second Respondents

Hearing: 14 March 2006

Court: William Young P, Robertson and Cooper JJ

Counsel: E D Wylie QC and N S Marquet for Appellant
N H Soper and J R Castiglione for First Respondent
No appearance for Second Respondents

Judgment: 12 June 2006

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant is to pay costs to the first respondent in the sum of $6,000 together with usual disbursements. We certify for two counsel.

REASONS

(Given by Cooper J)

[1] This is an appeal from a judgment of Fogarty J pursuant to leave granted by this Court under s 308 of the Resource Management Act 1991 ("the Act").

[2] Fogarty J had dismissed an appeal by the council and the second respondents against a decision of the Environment Court. The Environment Court had set aside a decision of the Council declining a resource consent application made by the first respondent ("Hawthorn").

[3] As a result of the Environment Court decision, Hawthorn was authorised to proceed to subdivide and carry out subdivision works on a property near Queenstown. Some 32 residential lots were proposed to be created.

[4] This Court gave leave for the following questions to be pursued on appeal:

> 1. Whether His Honour Justice Fogarty erred in law when he determined (either expressly or by implication):
>
> (a) that the receiving environment should be understood as including not only the environment as it exists but also the reasonably foreseeable environment;
>
> (b) that it was not speculation for the Environment Court to take into account approved building platforms in the triangle and on the outside of the roads that formed it;
>
> (c) that the Environment Court had given adequate and appropriate consideration to the application of the permitted baseline.
>
> 2. Whether His Honour Justice Fogarty erred in law when he determined that the Environment Court had not erred in law in concluding that the landscape category it was required to consider was an "Other Rural Landscape".
>
> 3. Whether His Honour Justice Fogarty erred in law when he held that the Environment Court had not erred in law when it considered the minimum subdivision standards in the Rural Residential zone in addressing the first respondent's proposal which is in a Rural General zone.

[5] As was observed by the Court in granting leave, the questions are inter-related, and the answers to the second and third questions are in large part dependent on the answer to the constituent parts of the first. The main issue that underlies the appeal is whether a consent authority considering whether or not to grant a resource consent under the Act must restrict its consideration of effects to effects on the environment as it exists at the time of the decision, or whether it is legitimate to consider the future state of the environment.

[6] It was common ground that the three questions fall to be considered under the Act in the form in which it stood prior to the coming into force of the Resource Management Amendment Act 2003.

Background

[7] Hawthorn applied to the Council for both subdivision and land use activity consent in respect of land in the Wakatipu Basin. The land comprises 33.9 hectares, and is situated near the junction of Lower Shotover and Domain Roads, with frontage to both of those roads. It is part of a triangle of land bounded by them and Speargrass Flat Road, known locally as "the triangle".

[8] Hawthorn's development would subdivide the land into 32 separate lots, containing between 0.63 and 1.30 hectares, together with access lots, and a central communal lot containing 12.36 hectares. The application also sought consent to the erection of a residential unit on each of the 32 residential sites, within nominated building platforms that were shown on plans submitted with the application. The proposal required consent as a non-complying activity under the operative district plan, and as a discretionary activity under the proposed district plan.

[9] There was an existing resource consent which allowed subdivision of the land into eight blocks of approximately four hectares in each case. Those approved allotments contained identified building platforms.

[10] The Environment Court recorded that the whole of the land proposed to be subdivided is flat, apart from a small rocky outcrop. The Court observed that "the triangle" had been the subject of considerable development pressure over the past decade, and that within the 166 hectare area so described, 24 houses had been erected, with a further 28 consented to, but not yet built. Outside of the roads that physically form the triangle were a further 35 approved building platforms. It is unclear from the Environment Court's decision whether any of those had been built on.

[11] In assessing the effects of the proposal on the environment for the purposes of s 104(1)(a) of the Act, a key question that arose was whether the consent authority ought to take into account the receiving environment as it might be in the future and, in particular, if existing resource consents that had been granted but not yet implemented, were implemented in the future. The council had declined consent to the application and on the appeal by Hawthorn to the Environment Court argued that that Court's consideration should be limited to the environment as it existed at the time that the appeal was considered. That proposition was rejected by the Environment Court, and also by Fogarty J.

[12] Before we confront the questions that have been asked directly, we briefly summarise the reasoning in the decisions respectively of the Environment Court and the High Court.

The Environment Court decision

[13] The Environment Court held that the dwellings, and the approved building platforms yet to be developed by the erection of buildings, both within and outside the triangle, were part of the receiving environment. As to the undeveloped sites, that conclusion was founded on evidence that the Court accepted that it was "practically certain that approved building sites in the Wakatipu Basin will be built on." That conclusion, not able to be challenged on appeal, is critical to the arguments advanced in the High Court and in this Court.

[14] The Environment Court held that the eight dwellings for which resource consent had already been granted on the subject site were appropriately considered as part of the "permitted baseline", a concept explained in the decisions of this Court in *Bayley v Manukau City Council* [1999] NZLR 568, *Smith Chilcott Limited v Auckland City Council* [2001] 3 NZLR 473 and *Arrigato Investments Limited v Auckland Regional Council* [2002] 1 NZLR 323. However, it rejected an argument by Hawthorn that landowners in the area could have a reasonable expectation that the Council would grant consent to subdivisions that matched the intensity of three other subdivisions in the triangle, for which the Council had recently granted consent. Those subdivisions had an average area of two hectares per allotment.

Hawthorn had argued that the present development should be considered in the light of a future environment in which subdivision of that intensity would occur throughout the triangle.

[15] The Court rejected that proposition as being too speculative. Noting that all subdivision in the zone required discretionary activity consent, the Court observed that:

> [25] We have no way of knowing whether existing or future allotment holders will apply for consent to subdivide to the extent of two hectare allotments, nor whether they can replicate the conditions which led the Council to grant consent in the cases referred to by Mr Brown, nor at what point the consent authority will consider that policies requiring avoidance of over-domestication of the landscape have been breached. In general terms we do not consider that reasonable expectations of landowners can go beyond what is permitted by the relevant planning documents or existing consents.

[16] At the time that the appeal was heard before the Environment Court, there was both an operative and a proposed district plan. The Court's focus was properly on the proposed district plan, however, because the relevant provisions in it had passed the stage where they might be further modified by the submission and reference process under the Act. Under the proposed district plan (which we will call simply the "district plan", or "the plan" from this point), it was necessary for the Court to classify the landscape setting of the proposed development. The Court found that the appropriate landscape category was "Other Rural Landscape". In doing so the Court rejected the arguments that had been put to it by the Council and by parties appearing under s 271A of the Act that the proper classification was "Visual Amenity Landscape". Both are terms used and described in the district plan.

[17] Once again, the Court's reasoning was based on what it thought would happen in the future. It held that the "central question in landscape classification" was whether the landscape "when developed to the extent permitted by existing consents" would retain the essential qualities of a Visual Amenity Landscape. That would not be the case here, because of the extent of existing and likely future development of "lifestyle" or "estate" lots both in the triangle and outside it.

[18] The Environment Court then discussed the effects of the development on the environment. It found that the subdivision works would introduce an unnatural element to the landforms in the triangle, but that they would be largely imperceptible, and the landform was not one of the best examples of its type. In terms of visual effects, the Court concluded that, although the development could be seen from positions beyond the site, it would not intrude into significant views, nor dominate natural elements in the landscape. As to the effects on "rural amenity" the Court held that the position was "finely balanced", but after it identified and considered relevant district plan objectives and policies dealing with rural amenity, concluded that the development was marginally compatible with them.

[19] The Court also considered the proposal against relevant assessment criteria in the district plan. It found that the proposal would satisfy most of them. This part of the Court's decision required it to revisit under s 104(1)(d) of the Act matters already dealt with in the inquiry into effects on the environment under s 104(1)(a).

[20] One of the assessment criteria raised as an issue whether the proposed development would be complementary or sympathetic to the character of adjoining or surrounding visual amenity landscape. Another required consideration of whether the proposal would adversely affect the naturalness and rural quality of the landscape through inappropriate landscaping. The Court was able to repeat here conclusions that it had already arrived at earlier in its decision. In particular, it said that although the effects of the proposal on the retention of the rural qualities of the landscape were "on the cusp":

> …in the context of consented development on this and other sites in the vicinity the proposal is just compatible with the level of rural development likely to arise in the area.

[21] Having considered the objectives and policies of the district plan as a whole, the Court concluded that while the proposal was marginal in respect of some significant policies, it was supported by others. Consequently, it was "not contrary to the policies and objectives taken as a whole".

[22] In the balance of its decision the Court rejected an argument of the Council that the decision would create an undesirable precedent. It considered the proposal

against the higher level considerations flowing from Part II of the Act, expressed a conclusion that the effects on the environment of allowing the activity would be minor, provided that there was a condition proscribing any further subdivision of the land, and then moved to the exercise of its discretion to grant consent under s 105(1)(c) of the Act. For present purposes it should be noted that the Court's conclusion that there would not be an undesirable precedent set by the grant of consent was expressly justified on the basis that the proposal had been comprehensively designed, and would provide facilities for the public that would link to other facilities in the triangle. The Court considered that it was difficult to imagine that another such comprehensive proposal could be designed for another location, given the "level of subdivision and building that has already occurred within the triangle". Further, the Court's conclusion that adverse effects on the environment would be minor was reached:

> [h]aving considered carefully the changes that will occur on the surrounding environment as a result of consents already granted and the "baseline" set by existing resource consents on the land…

[23] So it can be seen that, in respect of the main issues that the Court had to decide, its reasoning in each case was predicated on the ability to assess the development against the future conditions likely to be present in the area.

The High Court decision

[24] The questions earlier set out particularise the challenged conclusions of Fogarty J. On the first issue, as to whether the receiving environment should be understood as including not only the environment as it exists, but also the reasonably foreseeable environment, Fogarty J essentially adhered to his own reasoning in *Wilson v Selwyn District Council* [2005] NZRMA 76. He held in that case that "environment" in s 104 includes potential use and development in the receiving environment.

[25] Accordingly, the Environment Court had not erred when it took into account the approved building platforms both within and outside of the triangle. In [74] of the judgment Fogarty J said:

> In my view the reason why the baseline analysis is abrupt is that the Court had no doubt at all that advantage would be taken of approved building platforms in this very valuable location. Mr Goldsmith's view was not challenged in cross-examination. Ms Kidson, the landscape witness for the Council, took into account that more houses would be built as a result of a number of consents.

[26] Fogarty J went on to observe that the Environment Court's approach did not involve speculation, and that the Court had rejected an argument that it should take into account the possibility of further subdivision as a result of possible future applications for discretionary activity consent. He observed that in that respect, the approach of the Environment Court was more cautious than that which he himself had taken in *Wilson v Selwyn District Council*.

[27] One of the questions that has been raised on the appeal concerns the adequacy of the Environment Court's consideration of the application of what has come to be known as the "permitted baseline". Although that expression was used by Fogarty J in [74], we doubt that he was using the term in the sense that it is normally used, that is with reference to developments that might lawfully occur on the site subject to the resource consent application itself. Rather, Fogarty J appears to have used the expression to refer to the likely developments that would take place beyond the boundary of the subject site, utilising existing resource consents. Nothing turns on the label that the Judge used to refer to lawfully authorised environmental change beyond the subject site. However, it would be prudent to avoid the confusion that might result from using the term other than in its normal sense, addressed in *Bayley v Manukau City Council, Smith Chilcott Ltd v Auckland City Council* and *Arrigato Investments Ltd v Auckland Regional Council*. As we will emphasise later in this judgment the "permitted baseline" is simply an analytical tool that excludes from consideration certain effects of developments on the site that is subject to a resource consent application. It is not to be applied for the purpose of ascertaining the future state of the environment beyond the site.

[28] The second and third questions raised on the appeal have their genesis in particular provisions in the Council's proposed district plan. Under the landscape classification employed by that plan, the Environment Court held that the receiving environment of the subject application should be regarded as an "Other Rural

Landscape". In a passage which again uses the expression "baseline" in an unusual context, Fogarty J said at [76]:

> Mr Wylie argued that, although there was evidence before the Court on which it could conclude the landscape was Other Rural Landscape that it reached that decision after taking into account, irrelevantly, that the landscape would be developed to the extent permitted by existing consents. So he was arguing that the much earlier finding of Other Rural Landscape was affected by this same area of baseline analysis. As I do not think that there is any error of baseline analysis, this point cannot be sustained. It is, however, appropriate to comment on one detail in Mr Wylie's argument in case it be thought I have overlooked it.

[29] The Judge accepted Mr Wylie's argument that the Environment Court had considered their judgment regarding the effect of the proposal on rural amenity as finely balanced. Having observed that the Environment Court was an expert Court, was thoroughly familiar with the Queenstown area and skilled in the assessment of landscape values, Fogarty J said at [79]:

> In my view Mr Wylie's argument has to depend on the point he has reserved, namely that a consent authority applying s 104 in these circumstances must consider the receiving environment as it exists, and ignore any potential development: whether it be imminent pursuant to existing building consents; or allowed as permitted uses; or potentially allowable as discretionary activity, controlled activity, or non-complying activity. If that is the law, then the judgment by the Environment Court on other rural landscape may be infected with an error of law, in a material way.

[30] The Judge had already decided that there was no such error of law, because it was proper for the Environment Court to consider the future state of the environment.

[31] Fogarty J also held that the Environment Court had not erred in assessing the proposed development by reference to the lot sizes permitted in the rural-residential zone. Essentially, he held that this was a legitimate course to follow, because the site was located in an Other Rural Landscape, which is the least sensitive of the landscape categories provided for in the district plan. Using terms that appear in the district plan itself, Fogarty J said at [87]:

> Obviously different levels of protection of landscape value will depend on whether the proposed developments impact on romantic landscape, Arcadian landscape or other landscape. Reading the [plan] as a whole one would expect quite significant protection of romantic and Arcadian landscape. The

> degree of protection of other landscape, including Other Rural Landscape from any further development is less certain.

[32] He noted there were no minimum subdivisional allotment sizes for the rural general zone. It was a zone that contemplated consents being granted for a wide range of activities provided they did not compromise the landscape and other rural amenities. The proposal had been designed to have a park-like appearance and would incorporate planting that would to some extent screen the development from neighbouring land use. He concluded at [90]:

> Had the Court been proceeding on the basis of a classification of the landscape as Arcadian, considering Rural Residential Standards could well have been taking into account an irrelevant consideration. But where the Court considers that the Arcadian character of the landscape has gone and is dealing with a rural landscape already showing some kind of residential character, I do not think it can be said that an expert Court has fallen into error of law by looking at the standards in the rural living area zones, when exercising a judgment as to how to address a proposal which is a discretionary activity in the rural general zone of the [plan].

[33] Mr Wylie contends that in respect of all these determinations Fogarty J's decision was incorrect in law. We discuss the reasons that he advanced for that contention in the context of the questions that we have to answer.

Question 1(a) – The environment

[34] Mr Wylie's principal submission was that Fogarty J erred in holding that the word "environment" includes not only the environment as it exists, but also the reasonably foreseeable environment after allowing for potential use and development. The Council contended that such an approach is not required by the definition of the word "environment" in s 2 of the Act, and that to read the word in that way would be inconsistent with Part II of the Act, in particular with s 7(f).

[35] Mr Wylie further submitted that a purposive approach to the relevant statutory provision would lead to a conclusion that the "environment" must be confined to the environment as it exists. He submitted that the reference to "maintenance and enhancement of the quality of the environment" in s 7(f) of the Act was strongly suggestive that it is the environment as it exists at the date of the

exercise of the relevant function or power under the Act which must be relevant. He contended that it would be difficult, perhaps impossible, to have particular regard to the maintenance and enhancement of the quality of a speculative future environment.

[36] Further, referring to the importance of district plans made under the Act and the process of submission in which members of the public may formally participate in the plan preparation process, Mr Wylie argued that when a plan becomes operative, it represents a community consensus as to how development should proceed in the Council's district. Such plans, he submitted, focus on existing environments and put in place a framework for future development. But they do not, as he put it, "assume future putative environments degraded by potential use or development".

[37] In addition, Mr Wylie pointed to practical difficulties that he said would make the approach that found favour with the Environment Court and Fogarty J unworkable. There was, in addition, the potential for "environmental creep" if applicants having secured one resource consent were then able to treat the effects of implementing that consent as something which would alter the future state of the environment whilst returning to the Council on successive occasions to seek further consents "starting with the most benign, but heading towards the most damaging".

[38] Mr Wylie also argued that to uphold Fogarty J's view on the meaning of the word "environment" would be to run counter to authorities which have established rules for priority between applicants, authorities dealing with issues of precedent and cumulative effect as well as the authorities already mentioned on the "permitted baseline".

[39] Both parties have argued the matter as if the word "environment" in s 2 of the Act ought to be seen as neutral on the issue of whether it requires the future, and future conditions to be taken into account. We think that that is true only in the superficial sense that none of the words used specifically refers to the future.

[40] The definition reads as follows:

> "Environment" includes –

(a) Ecosystems and their constituent parts, including people and communities; and

(b) All natural and physical resources; and

(c) Amenity values; and

(d) The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters:

[41] This provision must be construed on the basis prescribed by s 5(1) of the Interpretation Act 1999; the meaning of the provision is to be ascertained from its text and in the light of its purpose.

[42] Although there is no express reference in the definition to the future, in a sense that is not surprising. Most of the words used would, in their ordinary usage, connote the future. It would be strange, for example, to construe "ecosystems" in a way which focused on the state of an ecosystem at any one point in time. Apart from any other consideration, it would be difficult to attempt such a definition. In the natural course of events ecosystems and their constituent parts are in a constant state of change. Equally, it is unlikely that the legislature intended that the enquiry should be limited to a fixed point in time when considering "the economic conditions which affect people and communities", a matter referred to in paragraph (d) of the definition. The nature of the concepts involved would make that approach artificial.

[43] These views are reinforced by consideration of the various provisions in the Act in which the word "environment" is used, or in which there is reference to the elements that are set out in the four paragraphs of its definition. The starting point should be s 5, which states and explains the fundamental purpose of the Act in the following terms:

5. Purpose -

(1) The purpose of this Act is to promote the sustainable management of natural and physical resources.

(2) In this Act, "sustainable management" means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide

> for their social, economic, and cultural wellbeing and for their health and safety while –
>
> (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
>
> (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[44] "Natural and physical resources" are, of course, part of the environment as defined in s 2. The purpose of the Act is to promote their sustainable management. The idea of management plainly connotes action that is on-going, and will continue into the future. Further, such management is to be sustainable, that is to say, natural and physical resources are to be managed in the way explained in s 5(2). Again, it seems plain that provision by communities for their social, economic and cultural well-being, and for their health and safety, is an idea that embraces an on-going state of affairs.

[45] Section 5(2)(a) then makes an express reference to the "reasonably foreseeable needs of future generations". What to this point has been implicit, becomes explicit in the use of this language. There is a plain direction to consider the needs of future generations. Paragraph (b)'s reference to safeguarding the life-supporting capacity of air, water, soil, and ecosystems also points not only to the present, but also the future. The idea of safeguarding capacity necessarily involves consideration of what might happen at a later time.

[46] The same approach is requisite under paragraph (c). "Avoiding" naturally connotes an on-going process, as do "remedying" and "mitigating". The latter two words, in addition, imply alteration to an existing state of affairs, something that can only occur in the future.

[47] Each of the components of s 5(2) is, therefore, directed both to the present and the future state of affairs. An analysis of the concepts contained in ss 6 and 7 leads inevitably to the same conclusion. That is partly because the particular directions in each section are all said to exist for the purpose of achieving the

purpose of the Act. But in part also, the future is embraced by the words "protection", "maintenance" and "enhancement" that appear frequently in each section. We do not agree with Mr Wylie's argument based on s 7(f). "Maintenance" and "enhancement" are words that inevitably extend beyond the date upon which a particular application for resource consent is being considered.

[48] The requirements of ss 5, 6 and 7 must be complied with by all who exercise functions and powers under the Act. Regional authorities must do so, when carrying out their functions in relation to regional policy statements (s 61) and the purposes of the preparation, implementation and administration of regional plans is to assist regional councils to carry out their functions "in order to achieve the purpose of this Act". Further, the functions of regional councils are all conferred for the purpose of giving effect to the Act (s 30(1)). Consistently with this, s 66 obliges regional councils to prepare and change regional plans in accordance with Part II.

[49] The same obligations must be met by territorial authorities, in relation to district plans. The purpose of the preparation, implementation and administration of district plans is, again, to assist territorial authorities to carry out their functions in order to achieve the purpose of the Act. Similarly, the functions of territorial authorities are conferred only for the purpose of giving effect to the Act (s 31) and district plans are to be prepared and changed in accordance with the provisions of Part II. There is then a direct linkage of the powers and duties of regional and territorial authorities to the provisions of Part II with the necessary consequence that those bodies are in fact planning for the future. The same forward looking stance is required of central government and its delegates when exercising powers in relation to national policy statements (s 45) and New Zealand coastal policy statements (s 56). The drafting shows a consistent pattern.

[50] In the case of an application for resource consent, Part II of the Act is, again, central to the process. This follows directly from the statement of purpose in s 5 and the way in which the drafting of each of ss 6 to 8 requires their observance by all functionaries in the exercise of powers under the Act. Self-evidently, that includes the power to decide an application for resource consent under s 105 of the Act.

Moreover, s 104 which sets out the matters to be considered in the case of resource consent applications, began, at the time relevant to this appeal:

> (1) Subject to Part II, when considering an application for a resource consent and any submissions received, the consent authority shall have regard to ….

[51] The pervasiveness of Part II is once again apparent. In the case of resource consent applications, reference must also be made to the list of relevant considerations spelled out in paragraphs (a) to (i) of s 104(1). These include: "any actual and potential effects on the environment of allowing the activity" (paragraph (a)), the objectives, policies, rules and other provisions of the various planning instruments made under the Act (paragraphs (c) to (f)) and "any other matters that a consent authority considers relevant and reasonably necessary to determine the application" (paragraph (i)).

[52] Each of these provisions is likely to require a consent authority, in appropriate cases, to have regard to the future environment. Insofar as ss 104(1)(c) to (f) are concerned, that will be necessary where the instruments considered require that approach. If the precedent effects of granting an application are to be considered as envisaged by *Dye v Auckland Regional Council* [2002] 1 NZLR 337 then the future will need to be considered, whether under s 104(1)(d) or s 104(1)(i). As to s 104(1)(a), its reference to potential effects is sufficiently broad to include effects that may or may not occur depending on the occurrence of some future event. It must certainly embrace future events.

[53] Future potential effects cannot be considered unless there is a genuine attempt, at the same time, to envisage the environment in which such future effects, or effects arising over time, will be operating. The environment inevitably changes, and in many cases future effects will not be effects on the environment as it exists on the day that the Council or the Environment Court on appeal makes its decision on the resource consent application.

[54] That must be the case when district plans permit activities to establish without resource consents, where resource consents are granted and put into effect and where existing uses continue as authorised by the Act. It is not just the erection

of buildings that alters the environment: other activities by human beings, the effects of agriculture and pastoral land uses, and natural forces all have roles as agents of environmental change. It would be surprising if the Act, and in particular s 104(1)(a) were to be construed as requiring such ongoing change to be left out of account. Indeed, we think such an approach would militate against achievement of the Act's purpose.

[55] A further consideration based in particular on the provisions concerning applications leads to the same conclusion. When an application for resource consent is granted, the Act envisages that a period of time may elapse within which the resource consent may be implemented. At the time relevant to this appeal, the statutory period was two years or such shorter or longer period as might be provided for in the resource consent (s 125). Consequently, the effects of a resource consent might not be operative for an appreciable period after the consent had been granted. Mr Wylie's argument would prevent the consent authority considering the environment in which those effects would be felt for the first time. Rather, the consent authority would have to consider the effects on an environment which, at the time the effects are actually occurring, may well be different to the environment at the time that the application for consent was considered. That would not be sensible.

[56] Similarly, it is relevant that many resource consents are granted for an unlimited time. That is certainly the case for most land use and subdivision consents (see s 123(b)). Yet it could not be assumed that the effects of implementing the consent would be the same one year after it had been granted, as they would be in twenty years' time.

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

[58] We have not been persuaded to a different view by any of Mr Wylie's arguments based on practical considerations and conflict with other lines of authority. It was his submission that the practical difficulties arising from Fogarty J's judgment would be significant. He contended that to require those administering district plans, and applicants for resource consents, to take account of the potential or notional future environment would be unduly burdensome, and would require them to speculate about what might or might not occur in any particular receiving environment, about what future economic conditions might be, and, possibly about how such future economic conditions might affect future people and communities. He submitted that this would require a degree of prescience on the part of consent authorities that was inappropriate.

[59] In support of those propositions he referred to *O'Connell v Christchurch City Council* [2003] NZRMA 216, and in particular to what was said by Panckhurst J at [73]:

> I also agree with the submission of Mr Chapman for AMI/AMP that an extension of the rule to include potential activities on sites other than the application site would place an intolerable burden on the consent authority when assessing resource consent applications.

[60] The concerns expressed by Mr Wylie about practical difficulties were overstated. It will not be every case where it is necessary to consider the future environment, or where doing so will be at all complicated. Suppose, for example, an application for resource consent to establish a new activity in a built up area of a city. There will be rules which provide for permitted activities and in the vast majority of cases it would be likely that the foreseeable future development of surrounding sites would be similar to that which existed at the time the application was being considered. In such a case, it might be a safe assumption that the environment would, in its principal attributes, be very much like it presently is, but perhaps more intensively developed if there are district plan objectives and policies designed to secure that end. At the other end of the spectrum, if one supposed an application to carry out some new activity involving development in an area which was rural in nature and which was intended to remain so in accordance with the policy framework established by the district plan, then once again it ought not be difficult to postulate the future state of that environment.

[61] Difficulties might be encountered in areas that were undergoing significant change, or where such change was planned to occur. However, even those areas would have an applicable policy framework in the district plan that, together with the rules, would give considerable guidance as to the nature and intensity of future activities likely to be established on surrounding land. In cases such as the present, where there are a significant number of outstanding resource consents yet to be implemented, and uncontested evidence of pressure for development, the task of predicting the likely future state of the environment is not difficult.

[62] The observations made by Panckhurst J in *O'Connell v Christchurch City Council* must be read in context. He was dealing with an appeal from an Environment Court decision overturning a decision by the City Council to grant consent to establish a tyre retail outlet. AMI and AMP occupied multi-storey office premises adjoining the subject site and had appealed to the Environment Court against the Council's decision. When the Environment Court set aside the Council's decision, the applicant for resource consent appealed to the High Court. One of the issues raised on the appeal was a contention that the Environment Court had misapplied the "permitted baseline test" in as much as it had considered the effects of permitted activities on only the subject site and had not considered the effects of permitted activities on adjacent sites as well. At [70] Panckhurst J said:

> [70] I accept that the Court did apply the baseline test with reference only to the subject site. That is it compared the proposed activity against other hypothetical activities that could be established on this site as of right in terms of the transitional and proposed plans. Regard was not had to the impact of the establishment of hypothetical activities on a closely adjacent site. Was such an approach in error?
>
> [71] I am not persuaded that it was. This conclusion I think follows from a reading of various decisions where the permitted baseline assessment has been considered in a number of contexts.

[63] The Judge referred to *Bayley v Manukau City Council, Smith Chilcott Ltd v Auckland City Council and Arrigato Investments Ltd v Auckland Regional Council*, and concluded that the required comparison for purposes of permitted baseline analysis is one that is restricted to the site in question. There was nothing in those cases which was consistent with the extension of the test for which the appellant had contended. We have earlier expressed our view that the "permitted baseline" has in

the previous decisions of this Court been limited to a comparison of the effects of the activity which is the subject of the application for resource consent with the effects of other activities that might be permitted on the subject land, whether by way of right as a permitted activity under the district plan, or whether pursuant to the grant of a resource consent. In the latter case, it is only the effects of activities which have been the subject of resource consents already granted that may be considered, and the consent authority must decide whether or not to do so: *Arrigato Investments Ltd v Auckland Regional Council*, at [30] and [34]-[35].

[64] We agree with Panckhurst J's observations about the limits of the "permitted baseline" concept, and we also agree with him that the decisions of this Court have not suggested that it can be applied other than in relation to the site that is the subject of the resource consent application. However, it is a far step from there to contend that *Bayley v Manukau City* and the decisions that followed it, dictate the answer on the principal issues to be determined in this appeal. The question whether the "environment" could embrace the future state of the environment was not directly addressed in those cases, nor was an argument in those terms apparently put to Panckhurst J.

[65] It is as well to remember what the "permitted baseline" concept is designed to achieve. In essence, its purpose is to isolate, and make irrelevant, effects of activities on the environment that are permitted by a district plan, or have already been consented to. Such effects cannot then be taken into account when assessing the effects of a particular resource consent application. As Tipping J said in *Arrigato* at [29]:

> Thus, if the activity permitted by the plan will create some adverse effect on the environment, that adverse effect does not count in the ss 104 and 105 assessments. It is part of the permitted baseline in the sense that it is deemed to be already affecting the environment or, if you like, it is not a relevant adverse effect. The consequence is that only other or further adverse effects emanating from the proposal under consideration are brought to account.

[66] Where it applies, therefore, the permitted baseline analysis removes certain effects from consideration under s 104(1)(a) of the Act. That idea is very different, conceptually, from the issue of whether the receiving environment (beyond the

subject site) to be considered under s 104(1)(a), can include the future environment. The previous decisions of this Court do not decide or even comment on that issue.

[67] We do not overlook what was said in *Bayley v Manukau City Council* at p 577, where the Court referred to what Salmon J had said in *Aley v North Shore City Council* [1998] NZRMA 361 at 377:

> On this basis a consideration of the effect on the environment of the activity for which consent is sought requires an assessment to be made of the effects of the proposal on the environment as it exists.

The Court said that it would add to that sentence the words:

> …or as it would exist if the land were used in a manner permitted as of right by the plan.

[68] However, it must be remembered first, that *Bayley* was the case in which the permitted baseline concept was formally recognised, and as we have explained did not deal with the issue which has to be decided in this case. Secondly, it was a case about notification of resource consent applications. The issue that arose concerned the proper application of s 94 of the Act, and the provisions it contained allowing non-notification in cases where the adverse effect on the environment of the activity for which consent was sought would be minor. In that context there could be no need to consider the future environment, because if the effects on the existing environment were not able to be described as minor, there would be no need to look any further.

[69] Mr Wylie referred to other practical difficulties which he illustrated by reference to Fogarty J's decision in *Wilson v Selwyn District Council*. In that case, as in this, Fogarty J held that the term "environment" could include the future environment where the word is used in s 104(1)(a) of the Act. He held further that, to ascertain the future state of the environment it was appropriate to ask, amongst other things, whether it was "not fanciful" that surrounding land should be developed, and to have regard in that connection to what was permitted in a proposed district plan. Because the district plan contemplated the subdivision of neighbouring land as a controlled activity, His Honour held that it was plain that the District Council did not regard it as fanciful that the land in the locality might be

subdivided down into smaller sites with increased dwellings. Mr Wylie pointed out that although subdivision was a controlled activity under the proposed plan relevant in that case, and there were no submissions challenging that, there were, however, submissions challenging the right to erect dwellings, as Fogarty J himself had recorded in [38] of the judgment. Mr Wylie criticised the decision on the basis that it had effectively "pre-empted" the submission process in relation to the district plan. It would also, in his submission, lead to considerable uncertainty.

[70] Mr Wylie further argued that in the present case, some of the remarks made by Fogarty J suggested that the possibility of development pursuant to resource consents for discretionary or even non-complying activities should be taken into account to ascertain the future state of the environment, in advance of such consents being granted.

[71] That is an inference which can arise from what the Judge said at [79]:

> In my view Mr Wylie's argument has to depend on the point he has reserved, namely that a consent authority applying s 104 in these circumstances must consider the receiving environment as it exists, and ignore any potential development: whether it be imminent pursuant to existing building consents; or allowed as permitted uses; or potentially allowable as discretionary activity, controlled activity, or non-complying activity. If that is the law, then the judgment by the Environment Court on Other Rural Landscape may be infected with an error of law, in a material way.

[72] Fogarty J noted that the decision of the Environment Court in the present case had rejected an argument that it should take into account the likelihood of future successful applications for discretionary activity consent. At [74] he said:

> As noted, the Court did go on to reject taking into account the further subdivision and thus even more houses resulting from successful applications for discretionary activities. It may be noted that that is a more cautious approach than I took in *Wilson and Rickerby*, see [62] and [81].

[73] The reference here to *Wilson and Rickerby* was a reference to the case now reported as *Wilson v Selwyn District Council*.

[74] These observations by the Judge express too broadly the ambit of a consent authority's ability to consider future events. There is no justification for borrowing the "fanciful" criterion from the permitted baseline cases and applying it in this

different context. The word "fanciful" first appeared in *Smith Chilcott Ltd v Auckland City Council* at [26], where it was used to rule out of consideration, for the purposes of the permitted baseline test, activities that the plan would permit on a subject site because although permitted it would be "fanciful" to suppose that they might in fact take place. In that context, when the "fanciful" criterion is applied, it will be in the setting of known or ascertainable information about the development site (its area, topography, orientation and so on). Such an approach would be a much less certain guide when consideration is being given to whether or not future resource consent applications might be made, and if so granted, in a particular area. It would be too speculative to consider whether or not such consents might be granted and to then proceed to make decisions about the future environment as if those resource consents had already been implemented.

[75] It was not necessary to cast the net so widely in the present case. The Environment Court took into account the fact that there were numerous resource consents that had been granted in and near the triangle. It accepted Mr Goldsmith's evidence that those consents were likely to be implemented. There was ample justification for the Court to conclude that the future environment would be altered by the implementation of those consents and the erection of dwellings in the surrounding area.

[76] Limited in this way, the approach taken to ascertain the future state of the environment is not so uncertain as to be unworkable or unduly speculative, as Mr Wylie contended.

[77] Another concern that was raised by Mr Wylie was the possibility of "environmental creep". This is the possibility that someone who has obtained one resource consent might seek a further resource consent in respect of the same site, but for a more intensive activity. It would be argued that the deemed adverse effects of the first application should be discounted from those of the second when the latter was considered under s 104(1)(a). Mr Wylie submitted that if s 104(1)(a) requires that consideration be given to potential use and development, there would be nothing to stop developers from making a number of applications for resource consent, starting with the most benign, and heading towards the most damaging. On each

successive application, they would be able to argue that the receiving environment had already been notionally degraded by its potential development under the unimplemented consents.

[78] This fear can be given the same answer as was given in *Arrigato* where the Court had to determine whether unimplemented resource consents should be included within the "permitted baseline". At [35] the Court said:

> [35] Resource consents are capable of being granted on a non-notified as well as a notified basis. Furthermore, they relate to activities of differing kinds. There may be circumstances when it would be appropriate to regard the activity involved in an unimplemented resource consent as being part of the permitted baseline, but equally there may be circumstances in which it would not be appropriate to do so. For example, implementation of an earlier resource consent may on the one hand be an inevitable or necessary precursor of the activity envisaged by the new proposal. On the other hand the unimplemented consent may be inconsistent with the new proposal and thus be superseded by it. We do not think it would be in accordance with the policy and purposes of the Act for this topic to be the subject of a prescriptive rule one way or the other. Flexibility should be preserved so as to allow the consent authority to exercise its judgment as to what bearing the unimplemented resource consent should have on the question of the effects of the instant proposal on the environment.

[79] The Environment Court dealt with the implications of the existing resource consents in the present case in a manner that was consistent with that approach. It will always be a question of fact as to whether or not an existing resource consent is going to implemented. If it appeared that a developer was simply seeking successively more intensive resource consents for the same site there would inevitably come a point when a particular proposal was properly to be viewed as replacing previous proposals. That would have the consequence that all of the adverse effects of the later proposal should be taken into account, with no "discount" given for consents previously granted. We are not persuaded that the prospect of "creep" should lead to the conclusion that the consequences of the subsequent implementation of existing resource consents cannot be considered as part of the future environment.

[80] Three other issues, raised by Mr Wylie in support of his argument that "environment" should be confined to what exists at the time the resource consent application is considered by the consent authority, can be briefly mentioned. First,

he suggested that the contrary approach would have the effect of negating the result of cases that have decided that priority as between applicants should be established in accordance with the time when applications are made to a consent authority (*Fleetwing Farms Ltd v Marlborough District Council* [1997] 3 NZLR 257 and *Geotherm Group Ltd v Waikato Regional Council* [2004] NZRMA 1). That argument would only be legitimate if we were to endorse Fogarty J's decision that resource consent applications not yet made but which conceivably might be made, could be taken into account. That is not our view.

[81] Secondly, Mr Wylie contended that to hold that the word "environment" included potential use or development would undermine the decision of this Court in *Dye v Auckland Regional Council* where it had been decided that the grant of a resource consent had no precedent effect in the "strict sense". It is apparent from [32] of that decision, that what was meant by use of the expression "the strict sense" was that one consent authority is not bound by its own decisions or those of any other consent authority. We do not agree that a decision that the "environment" can include the future state of the environment has any implications for what was decided in *Dye*.

[82] Finally, Mr Wylie contended that if unimplemented resource consents are taken into account, then consent applications will fall to be decided on the basis of the environment as potentially affected by other consents. He submitted that this was to all intents and purposes "precedent by another route". We do not agree. To grant consent to an application for the reason that some other application has been granted consent is one thing. To decide to grant a resource consent application on the basis that resource consents already granted will alter the existing environment when implemented, and that those consents are likely to be implemented is quite a different matter.

[83] There is nothing in the High Court's decision in *Rodney District Council v Gould* [2006] NZRMA 217 on the question of cumulative effects which has any implications for the current issue. That decision simply explained what was already apparent from what this Court had decided in relation to cumulative effects in *Dye v*

Auckland Regional Council that is, that the cumulative effects of a particular application are effects which arise from that application, and not from others.

[84] In summary, we have not found, in any of the difficulties Mr Wylie has referred to, any reason to depart from the conclusion which we have reached by considering the meaning of the words used in s 104(1)(a) in their context. In our view, the word "environment" embraces the future state of the environment as it might be modified by the utilisation of rights to carry out permitted activity under a district plan. It also includes the environment as it might be modified by the implementation of resource consents which have been granted at the time a particular application is considered, where it appears likely that those resource consents will be implemented. We think Fogarty J erred when he suggested that the effects of resource consents that might in future be made should be brought to account in considering the likely future state of the environment. We think the legitimate considerations should be limited to those that we have just expressed. In short, we endorse the Environment Court's approach. Subject to that reservation, we would answer question 1(a) in the negative.

Question 1(b) - Speculation

[85] The foregoing discussion means this and the subsequent questions can be answered more briefly. The issue raised by this question is whether taking into account the approved building platforms in and near the triangle, was speculative. The process adopted by the Environment Court cannot properly be characterised as having involved speculation. The Court accepted Mr Goldsmith's evidence that it was "practically certain" that the approved building sites in and near the triangle would be built on. Mr Wylie confirmed that there was no issue with the Environment Court's finding of fact on the likelihood of future houses being erected.

[86] However, Mr Wylie argued that the environment against which the application fell to be assessed comprised only the existing environment. If that assertion were correct, he submitted that it followed that the potential effects of unimplemented resource consents were irrelevant.

[87] We have already rejected his contention that the relevant environment was confined to the existing environment. It follows that there is no basis upon which we could find error of law in relation to Question 1(b).

Question 1(c) – Consideration of the permitted baseline

[88] The issue raised by this question is whether the Environment Court had given adequate and appropriate consideration to the application of the permitted baseline. Mr Wylie's argument on this issue proceeded as if the Environment Court had been making a decision about the permitted baseline when it allowed itself to be influenced by its conclusion that the building sites in and around the triangle would be developed. For reasons that we have already given, we do not consider that the receiving environment was properly to be approached on the basis of a "permitted baseline" analysis, as that term has normally been used.

[89] Whatever label is put upon the exercise, Mr Wylie's main contention in this part of his argument was that there was nothing in the Environment Court's decision to show that it had a discretion of the kind that had been explained by this Court in the decision in *Arrigato Investments Ltd v Auckland Regional Council*, in particular the passage at [35] that we have earlier set out. Mr Wylie submitted that properly understood, the decision in *Arrigato* meant that there was a discretion when it came to the consideration of unimplemented resource consents. Mr Wylie also contended that it was not obvious from the Environment Court's judgment that it was aware that it had that discretion, let alone that it had exercised it.

[90] We do not consider that it is appropriate to describe what is simply an evaluative factual assessment as the exercise of a discretion. Further, we agree with Mr Castiglione that the Council's argument wrongly conflates the "permitted baseline" and the essentially factual exercise of ascertaining the likely state of the future environment. We have previously stated our reasons for limiting the permitted baseline to the effects of developments on the site that is the subject of a resource consent application. On the relevant issue of fact, the Environment Court relied on the evidence of Mr Goldsmith about the virtual certainty of development

occurring on the approved building platforms in and around the triangle. There was no error in that approach.

[91] In reality the present question simply raises, in a different guise, the central complaint that the Council makes about the acceptance by both the Environment Court and the High Court that the receiving environment can include the future environment. That issue is not to be approached by invoking the permitted baseline, so the question posed does not strictly arise. We simply answer the question by saying that the issues raised by the Council in this part of the appeal do not establish any error of law by the Environment Court, nor by Fogarty J.

Question 2 – Landscape Category

[92] The Council argued that the Environment Court had wrongly concluded that the landscape category it was required to consider was an "Other Rural Landscape" under the district plan. It was contended that Fogarty J had erred by approving the Environment Court's approach.

[93] The district plan defines and classifies landscapes into three broad categories, "Outstanding Natural Landscapes and Features", "Visual Amenity Landscapes" and "Other Rural". The classification of a particular landscape can be important to the consideration of resource consent applications, because different policies, objectives and assessment criteria apply to land within the different categories.

[94] Landscapes in the "outstanding" category are described in the district plan as "romantic landscapes – the mountains and the lakes – landscapes to which s 6 of the Act applies". The important resource management issues are identified as being the protection of these landscapes from inappropriate subdivision, use and development, particularly where activity might threaten the openness and naturalness of the landscape. With respect to "Visual Amenity Landscapes", the district plan describes them in the following way:

> They are landscapes which wear a cloak of human activity much more obviously – pastoral (in the poetic and picturesque sense rather than the functional sense) or Arcadian landscapes with more houses and trees,

> greener (introduced) grasses and tend to be on the district's downlands, flats and terraces.

The district plan seeks to enhance their natural character and enable alternative forms of development where there are direct environmental benefits of doing so. This leaves a residual category of "other rural landscapes", to which the district plan assigns "lesser landscape values (but not necessarily insignificant ones)".

[95] There was a contest in the Environment Court as to whether the landscape to be considered in the present case was properly categorised as "Visual Amenity" or "Other Rural". In making its assessment as to which classification should apply, the Environment Court plainly had regard to what the landscape would be like when resource consents already granted were utilised. At [32], it said:

> We consider that the landscape architects called by the Council and the section 271A parties have been too concerned with the Court's discussion of the scale of landscapes and have not sufficiently addressed the central question in landscape classification, namely whether the landscape, when developed to the extent permitted by existing consents, will retain the essential qualities of a VAL, which are pastoral or Arcadian characteristics. We noted (in paragraph 3) that development of "lifestyle" or "estate" lots for rural-residential living is not confined to the triangle itself.

[96] It then made reference to existing developments in the area finding some to be highly visible and detracting significantly from any "arcadian" qualities of the wider setting. It concluded that the landscape category was Other Rural.

[97] We accept, as Mr Wylie submitted, that in large part that conclusion of the Environment Court was apparently based on the view that it had formed about what the landscape would be like when modified by the implementation of as yet unimplemented resource consents.

[98] In the High Court, Fogarty J recorded the submission that had been made to him by Mr Wylie that, although there was evidence before that Court on which it could have concluded that the landscape was "Other Rural", nevertheless it had reached that conclusion after taking into account, irrelevantly, that the landscape would be developed to the extent permitted by existing consents. Fogarty J held first that this was in effect a repetition of the arguments previously made about faulty baseline analysis. As he did not consider that the Environment Court had made any

error in that respect, Mr Wylie's argument could not be sustained. A little later in the judgment, Fogarty J confirmed his view that a landscape categorisation decision could only be criticised if the Court was obliged to ignore future potential developments in the area ([79] of his decision, set out in [29] above).

[99] Mr Wylie repeated in this context his argument that the Court had been obliged to consider the environment as it existed at the time that it made its decision. That argument must fail for the reasons that we have already given. However, in this Court Mr Wylie developed another argument based not on the relevant statutory provisions, but on provisions of the district plan itself. Mr Wylie's argument was based on Rule 5.4.2.1 of the district plan.

[100] Rule 5.4.2 contains "assessment matters" which are to be considered when the Council decides whether or not to grant consent to, or impose conditions on, resource consent applications made in respect of land in the rural zones. As we have previously noted those assessment criteria vary according to the categorisation of the landscape. Before the actual assessment matters are stated, however, Rule 5.4.2.1 sets out a three-step process to be followed in applying the assessment criteria. It provides as follows:

> 5.4.2.1 **Landscape Assessment Criteria – Process**
> **There are three steps in applying these assessment criteria.** First, the analysis of the site and surrounding landscape; secondly determination of the appropriate landscape category; thirdly the application of the assessment matters. For the purpose of these assessment criteria, the term "proposed development" includes any subdivision, identification of building platforms, any building and associated activities such as roading, earthworks, landscaping, planting and boundaries.
>
> **Step 1 – Analysis of the Site and Surrounding Landscape**
> An analysis of the site and surrounding landscape is necessary for two reasons. Firstly it will provide the necessary information for determining a sites ability to absorb development including the basis for determining the compatibility of the proposed development with both the site and the surrounding landscape. Secondly it is an important step in the determination of a landscape category – i.e. whether the proposed site falls within an outstanding natural, visual amenity or other rural landscape.
>
> An analysis of the site must include a description of those existing qualities and characteristics (both negative and positive), such as vegetation, topography, aspect, visibility, natural features, relevant ecological systems and land use.

An analysis of the surrounding landscape must include natural science factors (the geological, topographical, ecological and dynamic components in [sic] of the landscape), aesthetic values (including memorability and naturalness), expressiveness and legibility (how obviously the landscape demonstrates the formative processes leading to it), transient values (such as the occasional presence of wildlife; or its values at certain times of the day or of the year), value of the landscape to Tangata Whenua and its historical associations.

Step 2 – Determination of Landscape Category
This step is important as it determines which district wide objectives, policies, definitions and assessment matters are given weight in making a decision on a resource consent application.

The Council shall consider the matters referred to in Step 1 above, and any other relevant matter, in the context of the broad description of the three landscape categories in Part 4.2.4. of this Plan, and shall determine what category of landscape applies to the site subject to the application.

In making this determination the Council, shall consider:
(a) to the extent appropriate under the circumstances, both the land subject to the consent application and the wider landscape within which that land is situated; and
(b) the landscape maps in Appendix 8.

Step 3 – Application of the Assessment Matters
Once the Council has determined which landscape category the proposed development falls within, each resource consent application will then be considered:
First, with respect to the prescribed assessment criteria set out in Rule 5.4.2.2 of this section;
Secondly, recognising and providing for the reasons for making the activity discretionary (see para 1.5.3(iii) of the plan [p1/3]) and a general assessment of the frequency with which appropriate sites for development will be found in the locality.

[101] Mr Wylie argued, that even if his argument confining "environment" to the current environment failed, nevertheless in accordance with these district plan provisions it could not be relevant to consider the future environment other than at Step 3. He submitted that for the purposes of Step 1 and Step 2, attention should be focused solely on the current state of the environment.

[102] Mr Castiglione argued to the contrary, suggesting that the words used in Step 1, "…the basis for determining the compatibility of the proposed development with both the site and the surrounding landscape" were apt to refer to proposed development generally within the landscape. We reject that submission. In context,

the reference to "the proposed development" must be the development which is the subject of a particular application for resource consent.

[103] But the wording of Steps 1 and 2 does not exclude a consideration of the environment as it would be after the implementation of existing resource consents. Although the second paragraph in Step 1 refers to "existing qualities and characteristics", the words used are inclusive, and there is nothing to suggest that they are exhaustive. The same applies in respect to the last paragraph in Step 1. We do not read the words in either paragraph as ruling out consideration of the future environment. Even if that conclusion were wrong it would be legitimate for the Council to consider the future environment as part of "any other relevant matter", the words used in the second paragraph within Step 2. Further, the second part of Step 2 authorises a broadly based inquiry when it requires the Council to "consider…the wider landscape" within which a development site is situated. There is no reason to read into these words, or any of the other language in Step 2, a limitation of the consideration to the present state of the landscape.

[104] It follows that the future state of the environment can properly be considered at Steps 1 and 2, before the landscape classification decision is made. Neither the Environment Court nor Fogarty J erred and Question 2 should be answered no.

Question 3 – Reliance on Minimum Subdivision Standards in the Rural-Residential zone

[105] In the High Court, the Council had argued that the Environment Court had misconstrued the relevant district plan provisions, and taken into account an irrelevant consideration by referring to the subdivision standards contained in the district plan for the rural-residential zone. The subject site is zoned rural general.

[106] Mr Wylie pointed to three separate paragraphs in the Environment Court's decision where there had been references to the rural-residential provisions of the plan. In [74] of its decision the Environment Court had discussed evidence that had been given about the desire of the developer to create a "park-like" environment. A landscape architect whose evidence had been called by the Council expressed the

opinion that although the proposal would not introduce urban densities, it was not rural in nature. The Court referred to the fact that in the rural-residential zone a minimum lot size of 4,000 square metres and an associated building platform was permitted. It will be remembered that the subject development would comprise allotments varying in size between 0.6 and 1.3 hectares. No doubt with that comparison in mind, the Environment Court expressed the view that the development would provide more than the level of "ruralness" of rural-residential amenity.

[107] The next reference to the rural-residential rules was in [78]. The Environment Court was there dealing with the issue of whether the development would result in the "over-domestication" of the landscape. The Court expressed its view that the proposal could co-exist with policies seeking to retain rural amenity and that while it would add to the level of domestication of the environment, the result would not reach the point of over-domestication. That was so, because the site was in an "other rural landscape", and the district plan considered that rural-residential allotments down to 4,000 square metres retained an appropriate amenity for rural living.

[108] Finally, Mr Wylie referred to the fact that at [92], where the Environment Court was dealing with a proposition that the proposal would be contrary to the district plan's overall settlement strategy, the Court made a reference to the reluctance that it had expressed in a previous decision to set minimum allotment sizes in the rural-residential zone. Mr Castiglione suggested that the Environment Court had made a mistake, and that it had meant to refer to the rural general zone in that paragraph, not the rural-residential zone. We do not need to decide whether or not that was the case.

[109] Having reviewed the various references to the rural-residential in context, Fogarty J held that the Environment Court had not considered an irrelevant matter or committed any error of law in its references to the rural-residential zones. We cannot see any basis to disturb that conclusion. In this Court Mr Wylie contended that Fogarty J's reasoning had been based on the fact that the Environment Court had considered that any "arcadian" character of the landscape had gone. He then

repeated the point that that conclusion had turned on the fact that the Court had considered the likely future environment as opposed to confining its consideration to the existing environment. He submitted that the decision was wrong for that reason. We have already rejected that argument.

[110] We do not consider that there was any error of law in the approach of either the Environment Court or the High Court on this issue. Question 3 should also be answered no.

Result

[111] For the reasons that we have given, each of the questions raised on the appeal is answered in the negative. That answer in respect of Question 1(c) must be read in the context that the Environment Court's analysis of the relevant environment was not a "permitted baseline" analysis.

[112] The respondent is entitled to costs in this Court of $6,000 plus disbursements, including the reasonable travel and accommodation expenses of both counsel to be fixed, if necessary by the Registrar.

Solicitors:
Ross Dowling Marquet Griffin, Dunedin for Appellant
Anderson Lloyd Caudwell, Queenstown for First Respondent

IN THE SUPREME COURT OF NEW ZEALAND

SC 82/2013
[2014] NZSC 38

BETWEEN	ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED Appellant
AND	THE NEW ZEALAND KING SALMON COMPANY LIMITED First Respondent
	SUSTAIN OUR SOUNDS INCORPORATED Second Respondent
	MARLBOROUGH DISTRICT COUNCIL Third Respondent
	MINISTER OF CONSERVATION AND DIRECTOR-GENERAL OF MINISTRY FOR PRIMARY INDUSTRIES Fourth Respondents

Hearing:	19, 20, 21 and 22 November 2013
Court:	Elias CJ, McGrath, William Young, Glazebrook and Arnold JJ
Counsel:	D A Kirkpatrick, R B Enright and N M de Wit for Appellant D A Nolan, J D K Gardner-Hopkins, D J Minhinnick and A S Butler for First Respondent M S R Palmer and K R M Littlejohn for Second Respondent C R Gwyn and E M Jamieson for Fourth Respondents P T Beverley and D G Allen for the Board of Inquiry
Judgment:	17 April 2014

JUDGMENT OF THE COURT

A The appeal is allowed.

B The plan change in relation to Papatua at Port Gore did not comply with s 67(3)(b) of the Resource Management Act 1991 as it did not give effect

to policies 13(1)(a) and 15(a) of the New Zealand Coastal Policy Statement.

C Costs are reserved.

REASONS

ELIAS CJ, MCGRATH, GLAZEBROOK AND ARNOLD JJ

(Given by Arnold J)

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Para No

Introduction

[1] In October 2011, the first respondent, New Zealand King Salmon Co Ltd (King Salmon), applied for changes to the Marlborough Sounds Resource

Management Plan[1] (the Sounds Plan) so that salmon farming would be changed from a prohibited to a discretionary activity in eight locations. At the same time, King Salmon applied for resource consents to enable it to undertake salmon farming at these locations, and at one other, for a term of 35 years.[2]

[2] King Salmon's application was made shortly after the Resource Management Act 1991 (the RMA) was amended in 2011 to streamline planning and consenting processes in relation to, among other things, aquaculture applications.[3] The Minister of Conservation,[4] acting on the recommendation of the Environmental Protection Agency, determined that King Salmon's proposals involved matters of national significance and should be determined by a board of inquiry, rather than by the relevant local authority, the Marlborough District Council.[5] On 3 November 2011, the Minister referred the applications to a five member board chaired by retired Environment Court Judge Gordon Whiting (the Board). After hearing extensive evidence and submissions, the Board determined that it would grant plan changes in relation to four of the proposed sites, so that salmon farming became a discretionary rather than prohibited activity at those sites.[6] The Board granted King Salmon resource consents in relation to these four sites, subject to detailed conditions of consent.[7]

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1 Marlborough District Council *Marlborough Sounds Resource Management Plan* (2003) [Sounds Plan].

2 The proposed farms were grouped in three distinct geographic locations – five at Waitata Reach in the outer Pelorus Sound, three in the area of Tory Channel/Queen Charlotte Sound and one at Papatua in Port Gore. The farm to be located at White Horse Rock did not require a plan change, simply a resource consent. For further detail, see *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2013] NZHC 1992, [2013] NZRMA 371 [*King Salmon* (HC)] at [21].

3 Resource Management Amendment Act (No 2) 2011. For a full description of the background to this legislation, see Derek Nolan (ed) *Environmental and Resource Management Law* (looseleaf ed, LexisNexis) at [5.71] and following.

4 The Minister of Conservation deals with applications relating to the coastal marine area, the Minister of the Environment with other applications: see Resource Management Act 1991 [RMA], s 148.

5 The Marlborough District Council is a unitary authority with the powers, functions and responsibilities of both a regional and a district council. The Board of Inquiry acted in place of the Council: see *King Salmon* (HC), above n 2, at [10]–[18].

6 Board of Inquiry, *New Zealand King Salmon Requests for Plan Changes and Applications for Resource Consents*, 22 February 2013 [*King Salmon* (Board)].

7 At [1341].

[3] An appeal from a board of inquiry to the High Court is available as of right, but only on a question of law.[8] The appellant, the Environmental Defence Society (EDS), took an appeal to the High Court as did Sustain Our Sounds Inc (SOS), the appellant in SC84/2013. Their appeals were dismissed by Dobson J.[9] EDS and SOS then sought leave to appeal to this Court under s 149V of the RMA. Leave was granted.[10] We are delivering contemporaneously a separate judgment in which we will outline our approach to s 149V and give our reasons for granting leave.[11]

[4] The EDS and SOS appeals were heard together. They raise issues going to the heart of the approach mandated by the RMA. The particular focus of the appeals was rather different, however. In this Court EDS's appeal related to one of the plan changes only, at Papatua in Port Gore. By contrast, SOS challenged all four plan changes. While the SOS appeal was based principally on issues going to water quality, the EDS appeal went to the protection of areas of outstanding natural character and outstanding natural landscape in the coastal environment. In this judgment, we address the EDS appeal. The SOS appeal is dealt with in a separate judgment, which is being delivered contemporaneously.[12]

[5] King Salmon's plan change application in relation to Papatua covered an area that was significantly greater than the areas involved in its other successful plan change applications because it proposed to rotate the farm around the area on a three year cycle. In considering whether to grant the application, the Board was required to "give effect to" the New Zealand Coastal Policy Statement (NZCPS).[13] The Board accepted that Papatua was an area of outstanding natural character and an outstanding natural landscape and that the proposed salmon farm would have significant adverse effects on that natural character and landscape. As a consequence, policies 13(1)(a) and 15(a) of the NZCPS would not be complied with

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8 RMA, s 149V.

9 *King Salmon* (HC), above n 2.

10 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2013] NZSC 101 [*King Salmon* (Leave)].

11 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 41.

12 *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 40.

13 Department of Conservation *New Zealand Coastal Policy Statement 2010* (issued by notice in the New Zealand Gazette on 4 November 2010 and taking effect on 3 December 2010) [NZCPS].

if the plan change was granted.[14] Despite this, the Board granted the plan change. Although it accepted that policies 13(1)(a) and 15(a) in the NZCPS had to be given considerable weight, it said that they were not determinative and that it was required to give effect to the NZCPS "as a whole". The Board said that it was required to reach an "overall judgment" on King Salmon's application in light of the principles contained in pt 2 of the RMA, and s 5 in particular. EDS argued that this analysis was incorrect and that the Board's finding that policies 13(1)(a) and 15(a) would not be given effect if the plan change was granted meant that King Salmon's application in relation to Papatua had to be refused. EDS said that the Board had erred in law.

[6] Although the Board was not named as a party to the appeals, it sought leave to make submissions, both in writing and orally, to assist the Court and deal with the questions of law raised in the appeals (including any practical implications) on a non-adversarial basis. The Court issued a minute dated 11 November 2013 noting some difficulties with this, and leaving the application to be resolved at the hearing. In the event, we declined to hear oral submissions from the Board. Further, we have taken no account of the written submissions filed on its behalf. We will give our reasons for this in the separate judgment that we are delivering contemporaneously in relation to the application for leave to appeal.[15]

[7] Before we address the matters at issue in the EDS appeal, we will provide a brief overview of the RMA. This is not intended to be a comprehensive overview but rather to identify aspects that will provide context for the more detailed discussion which follows.

The RMA: a (very) brief overview

[8] The enactment of the RMA in 1991 was the culmination of a lengthy law reform process, which began in 1988 when the Fourth Labour Government was in power. Until the election of the National Government in October 1990, the Hon Geoffrey Palmer MP was the responsible Minister. He introduced the Resource Management Bill into the House in December 1989. Following the change of Government, the Hon Simon Upton MP became the responsible Minister and it was

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14 *King Salmon* (Board), above n 6, at [1235]–[1236].

15 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*, above n 11.

he who moved that the Bill be read for a third time. In his speech, he said that in formulating the key guiding principle, sustainable management of natural and physical resources,[16] "the Government has moved to underscore the shift in focus from planning for activities to regulating their effects …".[17]

[9] The RMA replaced a number of different Acts, most notably the Water and Soil Conservation Act 1967 and the Town and Country Planning Act 1977. In place of rules that had become fragmented, overlapping, inconsistent and complicated, the RMA attempted to introduce a coherent, integrated and structured scheme. It identified a specific overall objective (sustainable management of natural and physical resources) and established structures and processes designed to promote that objective. Sustainable management is addressed in pt 2 of the RMA, headed "Purpose and principles". We will return to it shortly.

[10] Under the RMA, there is a three tiered management system – national, regional and district. A "hierarchy" of planning documents is established. Those planning documents deal, variously, with objectives, policies, methods and rules. Broadly speaking, policies implement objectives and methods and rules implement policies. It is important to note that the word "rule" has a specialised meaning in the RMA , being defined to mean "a district rule or a regional rule".[18]

[11] The hierarchy of planning documents is as follows:

(a) First, there are documents which are the responsibility of central government, specifically national environmental standards,[19] national policy statements[20] and New Zealand coastal policy statements.[21] Although there is no obligation to prepare national environmental standards or national policy statements, there must be at least one New Zealand coastal policy statement.[22] Policy statements of

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16 As contained in s 5 of the RMA.
17 (4 July 1991) 516 NZPD 3019.
18 RMA, s 43AA.
19 Sections 43–44A.
20 Sections 45–55.
21 Sections 56–58A.
22 Section 57(1).

whatever type state objectives and policies,[23] which must be given effect to in lower order planning documents.[24] In light of the special definition of the term, policy statements do not contain "rules".

(b) Second, there are documents which are the responsibility of regional councils, namely regional policy statements and regional plans. There must be at least one regional policy statement for each region,[25] which is to achieve the RMA's purpose "by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region".[26] Besides identifying significant resource management issues for the region, and stating objectives and policies, a regional policy statement may identify methods to implement policies, although not rules.[27] Although a regional council is not always required to prepare a regional plan, it must prepare at least one regional coastal plan, approved by the Minister of Conservation, for the marine coastal area in its region.[28] Regional plans must state the objectives for the region, the policies to implement the objectives and the rules (if any) to implement the policies.[29] They may also contain methods other than rules.[30]

(c) Third, there are documents which are the responsibility of territorial authorities, specifically district plans.[31] There must be one district plan for each district.[32] A district plan must state the objectives for the district, the policies to implement the objectives and the rules (if any)

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23 Sections 45(1) and 58.
24 See further [31] and [75]–[91] below.
25 RMA, s 60(1).
26 Section 59.
27 Section 62(1).
28 Section 64(1).
29 Section 67(1).
30 Section 67(2)(b).
31 Sections 73–77D.
32 Section 73(1).

to implement the policies.[33] It may also contain methods (not being rules) for implementing the policies.[34]

[12] New Zealand coastal policy statements and regional policy statements cover the coastal environment above and below the line of mean high water springs.[35] Regional coastal plans operate below that line out to the limit of the territorial sea (that is, in the coastal marine area, as defined in s 2),[36] whereas regional and district plans operate above the line.[37]

[13] For present purposes we emphasise three features of this scheme. First, the Minister of Conservation plays a key role in the management of the coastal environment. In particular, he or she is responsible for the preparation and recommendation of New Zealand coastal policy statements, for monitoring their effect and implementation and must also approve regional coastal plans.[38] Further, the Minster shares with regional councils responsibility for the coastal marine area in the various regions.[39]

[14] Second, the scheme moves from the general to the specific. Part 2 sets out and amplifies the core principle, sustainable management of natural and physical resources, as we will later explain. Next, national policy statements and New Zealand coastal policy statements set out objectives, and identify policies to achieve those objectives, from a national perspective. Against the background of those documents, regional policy statements identify objectives, policies and (perhaps) methods in relation to particular regions. "Rules" are, by definition, found in regional and district plans (which must also identify objectives and policies and may identify methods). The effect is that as one goes down the hierarchy of documents, greater specificity is provided both as to substantive content and to locality – the

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33 Section 75(1).
34 Section 75(2)(b).
35 Sections 56 (which uses the term "coastal environment") and 60(1) (which refers to a regional council's "region": under the Local Government Act 2002, where the boundary of a regional council's region is the sea, the region extends to the outer limit of the territorial sea: see s 21(3) and pt 3 of sch 2). The full extent of the landward side of the coastal environment is unclear as that term is not defined in the RMA: see Nolan, above n 3, at [5.7].
36 RMA, ss 63(2) and 64(1).
37 Section 73(1) and the definition of "district" in s 2.
38 Section 28.
39 Section 30(1)(d).

general is made increasingly specific. The planning documents also move from the general to the specific in the sense that, viewed overall, they begin with objectives, then move to policies, then to methods and "rules".

[15] Third, the RMA requires that the various planning documents be prepared through structured processes that provide considerable opportunities for public consultation. Open processes and opportunities for public input were obviously seen as important values by the RMA's framers.

[16] In relation to resource consents, the RMA creates six categories of activity, from least to most restricted.[40] The least restricted category is permitted activities, which do not require a resource consent provided they are compliant with any relevant terms of the RMA, any regulations and any plan or proposed plan. Controlled activities, restricted discretionary activities, discretionary and non-complying activities require resource consents, the difference between them being the extent of the consenting authority's power to withhold consent. The final category is prohibited activities. These are forbidden and no consent may be granted for them.

Questions for decision

[17] In granting EDS leave to appeal, this Court identified two questions of law, as follows:[41]

> (a) Was the Board of Inquiry's approval of the Papatua plan change one made contrary to ss 66 and 67 of the Act through misinterpretation and misapplication of Policies 8, 13, and 15 of the New Zealand Coastal Policy Statement? This turns on:
>
> (i) Whether, on its proper interpretation, the New Zealand Coastal Policy Statement has standards which must be complied with in relation to outstanding coastal landscape and natural character areas and, if so, whether the Papatua Plan Change complied with s 67(3)(b) of the Act because it did not give effect to Policies 13 and 15 of the New Zealand Coastal Policy Statement.
>
> (ii) Whether the Board properly applied the provisions of the Act and the need to give effect to the New Zealand Coastal

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40 See s 87A.

41 *King Salmon* (Leave), above n 10, at [1].

Policy Statement under s 67(3)(b) of the Act in coming to a "balanced judgment" or assessment "in the round" in considering conflicting policies.

(b) Was the Board obliged to consider alternative sites or methods when determining a private plan change that is located in, or results in significant adverse effects on, an outstanding natural landscape or feature or outstanding natural character area within the coastal environment? This question raises the correctness of the approach taken by the High Court in *Brown v Dunedin City Council* [2003] NZRMA 420 and whether, if sound, the present case should properly have been treated as an exception to the general approach. Whether any error in approach was material to the decision made will need to be addressed if necessary.

We will focus initially on question (a).

First question: proper approach

[18] Before we describe those aspects of the statutory framework relevant to the first question in more detail, we will briefly set out the Board's critical findings in relation to the Papatua plan change. This will provide context for the discussion of the statutory framework that follows.

[19] The Board did not consider that there would be any ecological or biological impacts from the proposed farm at Papatua. The Board's focus was on the adverse effects to outstanding natural character and landscape. The Board said:

> [1235] Port Gore, and in particular Pig Bay, is the site of the proposed Papatua farm. Port Gore, in the overall context of the Sounds, is a relatively remote bay. The land adjoining the proposed farm has three areas of different ecological naturalness ranked low, medium and high, within the Cape Lambert Scenic Reserve. All the landscape experts identified part of Pig Bay adjoining the proposed farm as an area of Outstanding Natural Landscape.
>
> [1236] We have found that the effects on natural character at a site level would be high, particularly on the Cape Lambert Reserve, which is recognised as an Area of Outstanding Natural Character. We have also found that there would be high to very high adverse visual effects on an Outstanding Natural Landscape. Thus the directions in Policy 13(1)(a) and Policy 15(1)(a) of the [New Zealand] Coastal Policy Statement would not be given effect to.
>
> …
>
> [1241] We have, also, to balance the adverse effects against the benefits for economic and social well-being, and, importantly, the integrated management of the region's natural and physical resources.

> [1242] In this regard, we have already described the bio-secure approach, using three separate groupings. The Papatua site is particularly important, as King Salmon could operate a separate supply and processing chain from the North Island. Management of the biosecurity risks is critical to the success of aquaculture and the provision of three "biosecure" areas through the Plan Change is a significant benefit.
>
> [1243] While the outstanding natural character and landscape values of outer Port Gore count against the granting of this site the advantages for risk management and the ability to isolate this area from the rest of the Sounds is a compelling factor. In this sense the appropriateness for aquaculture, specifically for salmon farming, [weighs] heavily in favour. We find that the proposed Papatua Zone would be appropriate.

[20] As will be apparent from this extract, some of the features which made the site outstanding from a natural character and landscape perspective also made it attractive as a salmon farming site. In particular the remoteness of the site and its location close to the Cook Strait made it attractive from a biosecurity perspective. King Salmon had grouped its nine proposed salmon farms into three distinct geographic areas, the objective being to ensure that if disease occurred in the farms in one area, it could be contained to those farms. This approach had particular relevance to the Papatua site because, in the event of an outbreak of disease elsewhere, King Salmon could operate a separate salmon supply and processing chain from the southern end of the North Island.

Statutory background – Pt 2 of the RMA

[21] Part 2 of the RMA is headed "Purpose and principles" and contains four sections, beginning with s 5. Section 5(1) identifies the RMA's purpose as being to *promote* sustainable management of natural and physical resources. The use of the word "promote" reflects the RMA's forward looking and management focus. While the use of "promote" may indicate that the RMA seeks to foster or further the implementation of sustainable management of natural and physical resources rather than requiring its achievement in every instance,[42] the obligation of those who perform functions under the RMA to comply with the statutory objective is clear. At issue in the present case is the nature of that obligation.

[22] Section 5(2) defines "sustainable management" as follows:

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[42] BV Harris "Sustainable Management as an Express Purpose of Environmental Legislation: The New Zealand Attempt" (1993) 8 Otago L Rev 51 at 59.

> In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—
>
> (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
>
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[23] There are two important definitions of words used in s 5(2). First, the word "effect" is broadly defined to include any positive or adverse effect, any temporary or permanent effect, any past, present or future effect and any cumulative effect.[43] Second, the word "environment" is defined, also broadly, to include:[44]

> (a) ecosystems and their constituent parts, including people and communities; and
>
> (b) all natural and physical resources; and
>
> (c) amenity values; and
>
> (d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters …

The term "amenity values" in (c) of this definition is itself widely defined to mean "those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes".[45] Accordingly, aesthetic considerations constitute an element of the environment.

[24] We make four points about the definition of "sustainable management":

(a) First, the definition is broadly framed. Given that it states the objective which is sought to be achieved, the definition's language is

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43 RMA, s 3.
44 Section 2.
45 Section 2.

necessarily general and flexible. Section 5 states a guiding principle which is intended to be applied by those performing functions under the RMA rather than a specifically worded purpose intended more as an aid to interpretation.

(b) Second, as we explain in more detail at [92] to [97] below, in the sequence "avoiding, remedying, or mitigating" in sub-para (c), "avoiding" has its ordinary meaning of "not allowing" or "preventing the occurrence of".[46] The words "remedying" and "mitigating" indicate that the framers contemplated that developments might have adverse effects on particular sites, which could be permitted if they were mitigated and/or remedied (assuming, of course, they were not avoided).

(c) Third, there has been some controversy concerning the effect of the word "while" in the definition.[47] The definition is sometimes viewed as having two distinct parts linked by the word "while". That may offer some analytical assistance but it carries the risk that the first part of the definition will be seen as addressing one set of interests (essentially developmental interests) and the second part another set (essentially intergenerational and environmental interests). We do not consider that the definition should be read in that way. Rather, it should be read as an integrated whole. This reflects the fact that elements of the intergenerational and environmental interests referred to in sub-paras (a), (b) and (c) appear in the opening part of the definition as well (that is, the part preceding "while"). That part talks of managing the use, development *and protection* of natural and physical resources so as to meet the stated interests – social, economic

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[46] The Environment Court has held on several occasions, albeit in the context of planning documents made under the RMA, that avoiding something is a step short of prohibiting it: see *Wairoa River Canal Partnership v Auckland Regional Council* [2010] 16 ELRNZ 152 (EnvC) at [15]; *Man O'War Station Ltd v Auckland Council* [2013] NZEnvC 233 at [48]. We return to this below.

[47] See Nolan, above n 3, at [3.24]; see also Harris, above n 42, at 60–61. Harris concludes that the importance of competing views has been overstated, because the flexibility of the language of ss 5(2)(a), (b) and (c) provides ample scope for decision makers to trade off environmental interests against development benefits and vice versa.

and cultural well-being as well as health and safety. The use of the word "protection" links particularly to sub-para (c). In addition, the opening part uses the words "in a way, or at a rate". These words link particularly to the intergenerational interests in sub-paras (a) and (b). As we see it, the use of the word "while" before sub-paras (a), (b) and (c) means that those paragraphs must be observed in the course of the management referred to in the opening part of the definition. That is, "while" means "at the same time as".

(d) Fourth, the use of the word "protection" in the phrase "use, development and protection of natural and physical resources" and the use of the word "avoiding" in sub-para (c) indicate that s 5(2) contemplates that particular environments may need to be protected from the adverse effects of activities in order to implement the policy of sustainable management; that is, sustainable management of natural and physical resources involves protection of the environment as well as its use and development. The definition indicates that environmental protection is a core element of sustainable management, so that a policy of preventing the adverse effects of development on particular areas is consistent with sustainable management. This accords with what was said in the explanatory note when the Resource Management Bill was introduced:[48]

> The central concept of sustainable management in this Bill encompasses the themes of use, development and protection.

[25] Section 5 is a carefully formulated statement of principle intended to guide those who make decisions under the RMA. It is given further elaboration by the remaining sections in pt 2, ss 6, 7 and 8:

(a) Section 6, headed "Matters of national importance", provides that in achieving the purpose of the RMA, all persons exercising powers and functions under it in relation to managing the use, development and protection of natural and physical resources "shall recognise and

[48] Resource Management Bill 1989 (224-1), explanatory note at i.

provide for" seven matters of national importance. Most relevantly, these include:

(i) in s 6(a), the preservation of the natural character of the coastal environment (including the coastal marine area) and its protection from inappropriate subdivision, use and development; and

(ii) in s 6(b), the protection of outstanding natural features and landscapes from inappropriate subdivision, use and development.

Also included in ss 6(c) to (g) are:

(iii) the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna;

(iv) the maintenance and enhancement of public access to and along the coastal marine area;

(v) the relationship of Maori and their culture and traditions with, among other things, water;

(vi) the protection of historical heritage from inappropriate subdivision use and development; and

(vii) the protection of protected customary rights.

(b) Section 7 provides that in achieving the purpose of the RMA, all persons excising powers and functions under it in relation to managing the use, development and protection of natural and physical resources "shall have particular regard to" certain specified matters, including (relevantly):

(i) kaitiakitanga and the ethic of stewardship;[49]

(ii) the efficient use and development of physical and natural resources;[50] and

(iii) the maintenance and enhancement of the quality of the environment.[51]

(c) Section 8 provides that in achieving the purpose of the RMA, all persons exercising powers and functions under it in relation to managing the use, development and protection of natural and physical resources "shall take into account" the principles of the Treaty of Waitangi.

[26] Section 5 sets out the core purpose of the RMA – the promotion of sustainable management of natural and physical resources. Sections 6, 7 and 8 supplement that by stating the particular obligations of those administering the RMA in relation to the various matters identified. As between ss 6 and 7, the stronger direction is given by s 6 – decision-makers "shall recognise and provide for" what are described as "matters of national importance", whereas s 7 requires decision-makers to "have particular regard to" the specified matters. The matters set out in s 6 fall naturally within the concept of sustainable management in a New Zealand context. The requirement to "recognise and provide for" the specified matters as "matters of national importance" identifies the nature of the obligation that decision-makers have in relation to those matters when implementing the principle of sustainable management. The matters referred to in s 7 tend to be more abstract and more evaluative than the matters set out in s 6. This may explain why the requirement in s 7 is to "have particular regard to" them (rather than being in similar terms to s 6).

[27] Under s 8 decision-makers are required to "take into account" the principles of the Treaty of Waitangi. Section 8 is a different type of provision again, in the

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49 RMA, ss 7(a) and (aa).
50 Section 7(b).
51 Section 7(f).

sense that the principles of the Treaty may have an additional relevance to decision-makers. For example, the Treaty principles may be relevant to matters of process, such as the nature of consultations that a local body must carry out when performing its functions under the RMA. The wider scope of s 8 reflects the fact that among the matters of national importance identified in s 6 are "the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga" and protections for historic heritage and protected customary rights and that s 7 addresses kaitiakitanga.

[28] It is significant that three of the seven matters of national importance identified in s 6 relate to the preservation or protection of certain areas, either absolutely or from "inappropriate" subdivision, use and development (that is, ss 6(a), (b) and (c)). Like the use of the words "protection" and "avoiding" in s 5, the language of ss 6(a), (b) and (c) suggests that, within the concept of sustainable management, the RMA envisages that there will be areas the natural characteristics or natural features of which require protection from the adverse effects of development. In this way, s 6 underscores the point made earlier that protection of the environment is a core element of sustainable management.

[29] The use of the phrase "inappropriate subdivision, use or development" in s 6 raises three points:

(a) First, s 6(a) replaced s 3(c) of the Town and Country Planning Act, which made "the preservation of the natural character of the coastal environment, and the margins of lakes and rivers, and the protection of them from *unnecessary* subdivision and development" a matter of national importance.[52] In s 6(a), the word "inappropriate" replaced the word "unnecessary". There is a question of the significance of this change in wording, to which we will return.[53]

(b) Second, a protection against "inappropriate" development is not necessarily a protection against *any* development. Rather, it allows

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[52] Emphasis added.
[53] See [40] below.

for the possibility that there may be some forms of "appropriate" development.

(c) Third, there is an issue as to the precise meaning of "inappropriate" in this context, in particular whether it is to be assessed against the particular features of the environment that require protection or preservation or against some other standard. This is also an issue to which we will return.[54]

[30] As we have said, the RMA envisages the formulation and promulgation of a cascade of planning documents, each intended, ultimately, to give effect to s 5, and to pt 2 more generally. These documents form an integral part of the legislative framework of the RMA and give substance to its purpose by identifying objectives, policies, methods and rules with increasing particularity both as to substantive content and locality. Three of these documents are of particular importance in this case – the NZCPS, the Marlborough Regional Policy Statement[55] and the Sounds Plan.

New Zealand Coastal Policy Statement

(i) General observations

[31] As we have said, the planning documents contemplated by the RMA are part of the legislative framework. This point can be illustrated by reference to the NZCPS, the current version of which was promulgated in 2010.[56] Section 56 identifies the NZCPS's purpose as being "to achieve the purpose of [the RMA] in relation to the coastal environment of New Zealand". Other subordinate planning documents – regional policy statements,[57] regional plans[58] and district plans[59] – must "give effect to" the NZCPS. Moreover, under s 32, the Minister was obliged to carry

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54 See [98]–[105] below.
55 Marlborough District Council *Marlborough Regional Policy Statement* (1995).
56 The 2010 version of the NZCPS replaced an earlier 1994 version: see [45] below.
57 RMA, s 62(3).
58 Section 67(3)(b).
59 Section 75(3)(b).

out an evaluation of the proposed coastal policy statement before it was notified under s 48 for public consultation. That evaluation was required to examine:[60]

> (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 way for achieving the objectives*.
>
> …

[32] In developing and promulgating a New Zealand coastal policy statement, the Minister is required to use either the board of inquiry process set out in ss 47 to 52 or something similar, albeit less formal.[61] Whatever process is used, there must be a sufficient opportunity for public submissions. The NZCPS was promulgated after a board of inquiry had considered the draft, received public submissions and reported to the Minister.

[33] Because the purpose of the NZCPS is "to state policies in order to achieve the purpose of the [RMA] in relation to the coastal environment of New Zealand"[62] and any plan change must give effect to it, the NZCPS must be the immediate focus of consideration. Given the central role played by the NZCPS in the statutory framework, and because no party has challenged it, we will proceed on the basis that the NZCPS conforms with the RMA's requirements, and with pt 2 in particular. Consistently with s 32(3), we will treat its objectives as being the most appropriate way to achieve the purpose of the RMA and its policies as the most appropriate way to achieve its objectives.

[34] We pause at this point to note one feature of the Board's decision, namely that having considered various aspects of the NZCPS in relation to the proposed plan changes, the Board went back to pt 2 when reaching its final determination. The Board set the scene for this approach in the early part of its decision in the following way:[63]

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60 Section 32(3) (emphasis added), as it was until 2 December 2013. Section 32 as quoted was replaced with a new section by s 70 of the Resource Management Act Amendment Act 2013.

61 Section 46A.

62 NZCPS, above n 13, at 5.

63 *King Salmon* (Board), above n 6. Emphasis in original, citations omitted.

> [76] Part II is a framework against which all the functions, powers, and duties under the RMA are to be exercised for the purposes of giving effect to the RMA. There are no qualifications or exceptions. Any exercise of discretionary judgment is impliedly to be done for the statutory purpose. The provisions for the various planning instruments required under the RMA also confirm the priority of Part II, by making all considerations *subject to Part II* – see for example Sections 51, 61, 66 and 74. The consideration of applications for resource consents is guided by Sections 104 and 105.
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> …
>
> [79] We discuss, where necessary, the Part II provisions when we discuss the contested issues that particular provisions apply to. When considering both Plan Change provisions and resource consent applications, the purpose of the RMA as defined in Section 5 is not the starting point, but the finishing point to be considered in the overall exercise of discretion.
>
> [80] It is well accepted that applying Section 5 involves an overall broad judgment of whether a proposal would promote the sustainable management of natural and physical resources. The RMA has a single purpose. It also allows for the balancing of conflicting considerations in terms of their relative significance or proportion in the final outcome.

[35] The Board returned to the point when expressing its final view:

> [1227] We are to apply the relevant Part II matters when balancing the findings we have made on the many contested issues. Many of those findings relate to different and sometimes competing principles enunciated in Part II of the RMA. We are required to make an overall broad judgment as to whether the Plan Change would promote the single purpose of the RMA – the sustainable management of natural and physical resources. As we have said earlier, Part II is not just the starting point but also the finishing point to be considered in the overall exercise of our discretion.

[36] We will discuss the Board's reliance on pt 2 rather than the NZCPS in reaching its final determination later in this judgment. It sufficient at this stage to note that there is a question as to whether its reliance on pt 2 was justified in the circumstances.

[37] There is one other noteworthy feature of the Board's approach as set out in these extracts. It is that the principles enunciated in pt 2 are described as "sometimes competing".[64] The Board expressed the same view about the NZCPS, namely that

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64 *King Salmon* (Board), above n 6, at [1227].

the various objectives and policies it articulates compete or "pull in different directions".[65] One consequence is that an "overall broad judgment" is required to reach a decision about sustainable management under s 5(2) and, in relation to the NZCPS, as to "whether the instrument as a whole is generally given effect to".[66]

[38] Two different approaches to s 5 have been identified in the early jurisprudence under the RMA, the first described as the "environmental bottom line" approach and the second as the "overall judgment" approach.[67] A series of early cases in the Planning Tribunal set out the "environmental bottom line" approach.[68] In *Shell Oil New Zealand Ltd v Auckland City Council*, the Tribunal said that ss 5(2)(a), (b) and (c):[69]

> … may be considered cumulative safeguards which enure (or exist at the same time) whilst the resource … is managed in such a way or rate which enables the people of the community to provide for various aspects of their wellbeing and for their health and safety. These safeguards or qualifications for the purpose of the [RMA] must all be met before the purpose is fulfilled. The promotion of sustainable management has to be determined therefore, in the context of these qualifications which are to be accorded the same weight.
>
> In this case there is no great issue with s 5(2)(a) and (b). If we find however, that the effects of the service station on the environment cannot be avoided, remedied or mitigated, one of the purposes of the [RMA] is not achieved.

In *Campbell v Southland District Council*, the Tribunal said:[70]

> Section 5 is not about achieving a balance between benefits occurring from an activity and its adverse effects. … [T]he definition in s 5(2) requires adverse effects to be avoided, remedied or mitigated, irrespective of the benefits which may accrue … .

[39] The "overall judgment" approach seems to have its origin in the judgment of Grieg J in *New Zealand Rail Ltd v Marlborough District Council*, in the context of an appeal relating to a number of resource consents for the development of a port at

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65 At [1180], adopting the language of Ms Sarah Dawson, a planning consultant for King Salmon. This paragraph of the Board's determination, along with others, is quoted at [81] below.

66 At [1180].

67 See Jim Milne "Sustainable Management" in *DSL Environmental Handbook* (Brookers, Wellington, 2004) vol 1.

68 *Shell Oil New Zealand Ltd v Auckland City Council* W8/94, 2 February 1994 (PT); *Foxley Engineering Ltd v Wellington City Council* W12/94, 16 March 1994 (PT); *Plastic and Leathergoods Co Ltd v The Horowhenua District Council* W26/94, 19 April 1994 (PT); and *Campbell v Southland District Council* W114/94, 14 December 1994 (PT).

69 *Shell Oil New Zealand Ltd v Auckland City Council*, above n 68, at 10.

70 *Campbell v Southland District Council*, above n 68, at 66.

Shakespeare Bay.[71] The Judge rejected the contention that the requirement in s 6(a) to preserve the natural character of a particular environment was absolute.[72] Rather, Grieg J considered that the preservation of natural character was subordinate to s 5's primary purpose, to promote sustainable management. The Judge described the protection of natural character as "not an end or an objective on its own" but an "accessory to the principal purpose" of sustainable management.[73]

[40] Greig J pointed to the fact that under previous legislation there was protection of natural character against "unnecessary" subdivision and development. This, the Judge said, was stronger than the protection in s 6(a) against "inappropriate" subdivision, use and development:[74] the word "inappropriate" had a wider connotation than "unnecessary".[75] The question of inappropriateness had to be determined on a case-by-case basis in the particular circumstances. The Judge said:[76]

> It is "inappropriate" from the point of view of the preservation of natural character in order to achieve the promotion of sustainable management as a matter of national importance. It is, however, only one of the matters of national importance, and indeed other matters have to be taken into account. It is certainly not the case that preservation of the natural character is to be achieved at all costs. The achievement which is to be promoted is sustainable management and questions of national importance, national value and benefit, and national needs, must all play their part in the overall consideration and decision.
>
> This Part of the [RMA] expresses in ordinary words of wide meaning the overall purpose and principles of the [RMA]. It is not, I think, a part of the [RMA] which should be subjected to strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used. There is a deliberate openness about the language, its meaning and its connotations which I think is intended to allow the application of policy in a general and broad way. Indeed, it is for that purpose that the Planning Tribunal, with special expertise and skills, is established and appointed to oversee and to promote the objectives and the policies and the principles under the [RMA].
>
> In the end I believe the tenor of the appellant's submissions was to restrict the application of this principle of national importance, to put the absolute preservation of the natural character of a particular environment at the forefront and, if necessary, at the expense of everything except where it was

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71 *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC).
72 At 86.
73 At 85.
74 Town and Country Planning Act 1977, s 3(1).
75 *New Zealand Rail Ltd*, above n 71, at 85.
76 At 85–86.

> necessary or essential to depart from it. That is not the wording of the [RMA] or its intention. I do not think that the Tribunal erred as a matter of law. In the end it correctly applied the principles of the [RMA] and had regard to the various matters to which it was directed. It is the Tribunal which is entrusted to construe and apply those principles, giving the weight that it thinks appropriate. It did so in this case and its decision is not subject to appeal as a point of law.

[41] In *North Shore City Council v Auckland Regional Council*, the Environment Court discussed *New Zealand Rail* and said that none of the ss 5(2)(a), (b) or (c) considerations necessarily trumped the others – decision makers were required to balance all relevant considerations in the particular case.[77] The Court said:[78]

> We have considered in light of those remarks [in *New Zealand Rail*] the method to be used in applying s 5 to a case where on some issues a proposal is found to promote one or more of the aspects of sustainable management, and on others is found not to attain, or fully attain, one or more of the aspects described in paragraphs (a), (b) and (c). To conclude that the latter necessarily overrides the former, with no judgment of scale or proportion, would be to subject s 5(2) to the strict rules and proposal of statutory construction which are not applicable to the broad description of the statutory purpose. To do so would not allow room for exercise of the kind of judgment by decision-makers (including this Court — formerly the Planning Tribunal) alluded to in the [*New Zealand Rail*] case.
>
> …
>
> *The method of applying s 5 then involves an overall broad judgment of whether a proposal would promote the sustainable management of natural and physical resources. That recognises that the [RMA] has a single purpose. Such a judgment allows for comparison of conflicting considerations and the scale or degree of them, and their relative significance or proportion in the final outcome.*

[42] The Environment Court has said that the NZCPS is to be approached in the same way.[79] The NZCPS "is an attempt to more explicitly state the tensions which are inherent within Part 2 of the [RMA]".[80] Particular policies in the NZCPS may be

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77 *North Shore City Council v Auckland Regional Council* (1996) 2 ELRNZ 305 (EnvC) at 345–347; aff'd *Green & McCahill Properties Ltd v Auckland Regional Council* [1997] NZRMA 519 (HC).

78 *North Shore City Council v Auckland Regional Council*, above n 77, at 347 (emphasis added). One commentator expresses the view that the effect of the overall judgment approach in relation to s 5(2) is "to render the concept of sustainable management virtually meaningless outside the facts, circumstances and nuances of a particular case": see IH Williams "The Resource Management Act 1991: Well Meant But Hardly Done" (2000) 9 Otago L R 673 at 682.

79 See, for example, *Te Runanga O Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council* [2011] NZEnvC 402 and *Man O'War Station*, above n 46.

80 *Ngai Te Rangi Iwi Trust*, above n 79, at [257].

irreconcilable in the context of a particular case.[81] No individual objective or policy from the NZCPS should be interpreted as imposing a veto.[82] Rather, where relevant provisions from the NZCPS are in conflict, the court's role is to reach an "overall judgment" having considered all relevant factors.[83]

[43] The fundamental issue raised by the EDS appeal is whether the "overall judgment" approach as the Board applied it is consistent with the legislative framework generally and the NZCPS in particular. In essence, the position of EDS is that, once the Board had determined that the proposed salmon farm at Papatua would have high adverse effects on the outstanding natural character of the area and its outstanding natural landscape, so that policies 13(1)(a) and 15(a) of the NZCPS would not be given effect to, it should have refused the application. EDS argued, then, that there is an "environmental bottom line" in this case, as a result of the language of policies 13(1)(a) and 15(a).

[44] The EDS appeal raises a number of particular issues – the nature of the obligation to "give effect to" the NZCPS, the meaning of "avoid" and the meaning of "inappropriate". As will become apparent, all are affected by the resolution of the fundamental issue just identified.

(ii) Objectives and policies in the NZCPS

[45] Section 57(1) of the RMA requires that there must "at all times" be at least one New Zealand coastal policy statement prepared and recommended by the Minister of Conservation following a statutorily-mandated consultative process. The first New Zealand coastal policy statement was issued in May 1994.[84] In 2003 a lengthy review process was initiated. The process involved: an independent review of the policy statement, which was provided to the Minster in 2004; the release of an issues and options paper in 2006; the preparation of the proposed new policy statement in 2007; public submissions and board of inquiry hearings on the proposed

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81 At [258].
82 *Man O'War Station*, above n 46, at [41]–[43].
83 *Ngai Te Rangi Iwi Trust*, above n 79, at [258].
84 "Notice of the Issue of the New Zealand Coastal Policy Statement" (5 May 1994) 42 *New Zealand Gazette* 1563.

statement in 2008; and a report from the board of inquiry to the Minister in 2009. All this culminated in the NZCPS, which came into effect in December 2010.

[46] Under s 58, a New Zealand coastal policy statement may state objectives and policies about any one or more of certain specified matters. Because they are not mentioned in s 58, it appears that such a statement was not intended to include "methods", nor can it contain "rules" (given the special statutory definition of "rules").[85]

[47] As we discuss in more detail later in this judgment, Mr Kirkpatrick for EDS argued that s 58(a) is significant in the present context because it contemplates that a New Zealand coastal policy statement may contain "national priorities for the preservation of the natural character of the coastal environment of New Zealand, including protection from inappropriate subdivision, use and development". While counsel were agreed that the current NZCPS does not contain national priorities in terms of s 58(a),[86] this provision may be important because the use of the words "priorities", "preservation" and "protection" (together with "inappropriate") suggests that the RMA contemplates what might be described as "environmental bottom lines". As in s 6, the word "inappropriate" appears to relate back to the preservation of the natural character of the coastal environment: it is preservation of natural character that provides the standard for assessing whether particular subdivisions, uses or developments are "inappropriate".

[48] The NZCPS contains seven objectives and 29 policies. The policies support the objectives. Two objectives are of particular importance in the present context, namely objectives 2 and 6.[87]

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85 In contrast, s 62(e) of the RMA provides that a regional policy statement must state "the methods (excluding rules) used, or to be used, to implement the policies". Sections 67(1)(a) to (c) and 75(1)(a) to (c) provide that regional and district plans must state the objectives for the region/district, the policies to implement the objectives and the rules (if any) to implement the policies. Section 43AA provides that rule means "a district or regional rule" Section 43AAB defines regional rule as meaning "a rule made as part of a regional plan or proposed regional plan in accordance with section 68".

86 The 1994 version of the New Zealand coastal policy statement did contain a number of national priorities.

87 It should be noted that the NZCPS provides that the numbering of objectives and policies is for convenience and is not to be interpreted as an indication of relative importance: see NZCPS, above n 13, at 8.

[49] Objective 2 provides:

> **Objective 2**
>
> To preserve the natural character of the coastal environment and protect natural features and landscape values through:
>
> - recognising the characteristics and qualities that contribute to natural character, natural features and landscape values and their location and distribution;
>
> - identifying those areas where various forms of subdivision, use, and development would be inappropriate and protecting them from such activities; and
>
> - encouraging restoration of the coastal environment.

Three aspects of objective 2 are significant. First, it is concerned with preservation and protection of natural character, features and landscapes. Second, it contemplates that this will be achieved by articulating the elements of natural character and features and identifying areas which possess such character or features. Third, it contemplates that some of the areas identified may require protection from "inappropriate" subdivision, use and development.

[50] Objective 6 provides:

> **Objective 6**
>
> To enable people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through subdivision, use, and development, recognising that:
>
> - the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits;
>
> - some uses and developments which depend upon the use of natural and physical resources in the coastal environment are important to the social, economic and cultural wellbeing of people and communities;
>
> - functionally some uses and developments can only be located on the coast or in the coastal marine area;
>
> - the coastal environment contains renewable energy resources of significant value;

- the protection of habitats of living marine resources contributes to the social, economic and cultural wellbeing of people and communities;

- the potential to protect, use, and develop natural and physical resources in the coastal marine area should not be compromised by activities on land;

- the proportion of the coastal marine area under any formal protection is small and therefore management under the [RMA] is an important means by which the natural resources of the coastal marine area can be protected; and

- historic heritage in the coastal environment is extensive but not fully known, and vulnerable to loss or damage from inappropriate subdivision, use, and development.

[51] Objective 6 is noteworthy for three reasons:

(a) First, it recognises that some developments which are important to people's social, economic and cultural well-being can only occur in coastal environments.

(b) Second, it refers to use and development not being precluded "in appropriate places and forms" and "within appropriate limits". Accordingly, it is envisaged that there will be places that are "appropriate" for development and others that are not.

(c) Third, it emphasises management under the RMA as an important means by which the natural resources of the coastal marine area can be protected. This reinforces the point previously made, that one of the components of sustainable management is the protection and/or preservation of deserving areas.

[52] As we have said, in the NZCPS there are 29 policies that support the seven objectives. Four policies are particularly relevant to the issues in the EDS appeal: policy 7, which deals with strategic planning; policy 8, which deals with aquaculture; policy 13, which deals with preservation of natural character; and policy 15, which deals with natural features and natural landscapes.

[53] Policy 7 provides:

> **Strategic planning**
>
> (1) In preparing regional policy statements, and plans:
>
> (a) consider where, how and when to provide for future residential, rural residential, settlement, urban development and other activities in the coastal environment at a regional and district level; and
>
> (b) identify areas of the coastal environment where particular activities and forms of subdivision, use and development:
>
> (i) are inappropriate; and
>
> (ii) may be inappropriate without the consideration of effects through a resource consent application, notice of requirement for designation or Schedule 1 of the [RMA] process;
>
> and provide protection from inappropriate subdivision, use, and development in these areas through objectives, policies and rules.
>
> (2) Identify in regional policy statements, and plans, coastal processes, resources or values that are under threat or at significant risk from adverse cumulative effects. Include provisions in plans to manage these effects. Where practicable, in plans, set thresholds (including zones, standards or targets), or specify acceptable limits to change, to assist in determining when activities causing adverse cumulative effects are to be avoided.

[54] Policy 7 is important because of its focus on strategic planning. It requires the relevant regional authority to look at its region as a whole in formulating a regional policy statement or plan. As part of that overall assessment, the regional authority must identify areas where particular forms of subdivision, use or development "are" inappropriate, or "may be" inappropriate without consideration of effects through resource consents or other processes, and must protect them from inappropriate activities through objectives, policies and rules. Policy 7 also requires the regional authority to consider adverse cumulative effects.

[55] There are two points to be made about the use of "inappropriate" in policy 7. First, if "inappropriate", development is not permitted, although this does not necessarily rule out any development. Second, what is "inappropriate" is to be

assessed against the nature of the particular area under consideration in the context of the region as a whole.

[56] Policy 8 provides:

> **Aquaculture**
>
> Recognise the significant existing and potential contribution of aquaculture to the social, economic and cultural well-being of people and communities by:
>
> (a) including in regional policy statements and regional coastal plans provision for aquaculture activities in appropriate places in the coastal environment, recognising that relevant considerations may include:
>
> (i) the need for high water quality for aquaculture activities; and
>
> (ii) the need for land-based facilities associated with marine farming;
>
> (b) taking account of the social and economic benefits of aquaculture, including any available assessments of national and regional economic benefits; and
>
> (c) ensuring that development in the coastal environment does not make water quality unfit for aquaculture activities in areas approved for that purpose.

[57] The importance of policy 8 will be obvious. Local authorities are to recognise aquaculture's potential by including in regional policy statements and regional plans provision for aquaculture "in appropriate places" in the coastal environment. Obviously, there is an issue as to the meaning of "appropriate" in this context.

[58] Finally, there are policies 13 and 15. Their most relevant feature is that, in order to advance the specified overall policies, they state policies of avoiding adverse effects of activities on natural character in areas of outstanding natural character and on outstanding natural features and outstanding natural landscapes in the coastal environment.

[59] Policy 13 provides:

Preservation of natural character

(1) To preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development:

(a) avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character; and

(b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on natural character in all other areas of the coastal environment;

including by:

(c) assessing the natural character of the coastal environment of the region or district, by mapping or otherwise identifying at least areas of high natural character; and

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

(2) Recognise that natural character is not the same as natural features and landscapes or amenity values and may include matters such as:

(a) natural elements, processes and patterns;

(b) biophysical, ecological, geological and geomorphological aspects;

(c) natural landforms such as headlands, peninsulas, cliffs, dunes, wetlands, reefs, freshwater springs and surf breaks;

(d) the natural movement of water and sediment;

(e) the natural darkness of the night sky;

(f) places or areas that are wild or scenic;

(g) a range of natural character from pristine to modified; and

(h) experiential attributes, including the sounds and smell of the sea; and their context or setting.

[60] Policy 15 provides:

Natural features and natural landscapes

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

(a) avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment; and

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

including by:

(c) identifying and assessing the natural features and natural landscapes of the coastal environment of the region or district, at minimum by land typing, soil characterisation and landscape characterisation and having regard to:

(i) natural science factors, including geological, topographical, ecological and dynamic components;

(ii) the presence of water including in seas, lakes, rivers and streams;

(iii) legibility or expressiveness – how obviously the feature or landscape demonstrates its formative processes;

(iv) aesthetic values including memorability and naturalness;

(v) vegetation (native and exotic);

(vi) transient values, including presence of wildlife or other values at certain times of the day or year;

(v) whether the values are shared and recognised;

(vi) cultural and spiritual values for tangata whenua, identified by working, as far as practicable, in accordance with tikanga Māori; including their expression as cultural landscapes and features;

(vii) historical and heritage associations; and

(viii) wild or scenic values;

(d) ensuring that regional policy statements, and plans, map or otherwise identify areas where the protection of natural features and natural landscapes requires objectives, policies and rules; and

(e) including the objectives, policies and rules required by (d) in plans.

[61] As can be seen, policies 13(1)(a) and (b) and 15(a) and (b) are to similar effect. Local authorities are directed to avoid adverse effects of activities on natural character in areas of outstanding natural character (policy 13(1)(a)), or on outstanding natural features and outstanding natural landscapes (policy 15(a)). In

other contexts, they are to avoid "significant" adverse effects and to "avoid, remedy or mitigate" other adverse effects of activities (policies 13(1)(b) and 15(b)).

[62] The overall purpose of these directions is to preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use and development (policy 13) or to protect the natural features and natural landscapes (including seascapes) from inappropriate subdivision, use and development (policy 15). Accordingly, then, the local authority's obligations vary depending on the nature of the area at issue. Areas which are "outstanding" receive the greatest protection: the requirement is to "avoid adverse effects". Areas that are not "outstanding" receive less protection: the requirement is to avoid significant adverse effects and avoid, remedy or mitigate other adverse effects.[88] In this context, "avoid" appears to mean "not allow" or "prevent the occurrence of", but that is an issue to which we return at [92] below.

[63] Further, policies 13 and 15 reinforce the strategic and comprehensive approach required by policy 7. Policy 13(1)(c) and (d) require local authorities to assess the natural character of the relevant region by identifying "at least areas of high natural character" and to ensure that regional policy statements and plans include objectives, policies and rules where they are required to preserve the natural character of particular areas. Policy 15(d) and (e) have similar requirements in respect of natural features and natural landscapes requiring protection.

Regional policy statement

[64] As we have said, regional policy statements are intended to achieve the purpose of the RMA "by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the

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[88] The Department of Conservation explains that the reason for the distinction between "outstanding" character/features/landscapes and character/features/landscapes more generally is to "provide the greatest protection for areas of the coastal environment with the highest natural character": Department of Conservation *NZCPS 2010 Guidance Note – Policy 13: Preservation of Natural Character* (September 2013) at 14; and Department of Conservation *NZCPS 2010 Guidance Note – Policy 15: Natural Features and Natural Landscapes* (September 2013) at 15.

natural and physical resources of the whole region".[89] They must address a range of issues[90] and must "give effect to" the NZCPS.[91]

[65] The Marlborough Regional Policy Statement became operative on 28 August 1995, when the 1994 version of the New Zealand coastal policy statement was in effect. We understand that it is undergoing revision in light of the NZCPS. Accordingly, it is of limited value in the present context. That said, the Marlborough Regional Policy Statement does form part of the relevant context in relation to the development and protection of areas of natural character in the Marlborough Sounds.

[66] The Marlborough Regional Policy Statement contains a section on subdivision, use and development of the coastal environment and another on visual character, which includes a policy on outstanding landscapes. The policy dealing with subdivision, use and development of the coastal environment is framed around the concepts of "appropriate" and "inappropriate" subdivision, use and development. It reads:[92]

> **7.2.8 POLICY - COASTAL ENVIRONMENT**
>
> Ensure the appropriate subdivision, use and development of the coastal environment.
>
> *Subdivision, use and development will be encouraged in areas where the natural character of the coastal environment has already been compromised. Inappropriate subdivision, use and development will be avoided. The cumulative adverse effects of subdivision, use or development will also be avoided, remedied or mitigated.*
>
> *Appropriate subdivision, use and development of the coastal environment enables the community to provide for its social, economic and cultural wellbeing.*

[67] The methods to implement this policy are then addressed, as follows:

> **7.2.9 METHODS**
>
> (a) Resource management plans will identify criteria to indicate where subdivision, use and development will be appropriate.

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89 RMA, s 59.
90 Section 62(1).
91 Section 62(3).
92 Italics in original.

The [RMA] requires as a matter of national importance that the coastal environment be protected from inappropriate subdivision, use and development. Criteria to indicate where subdivision, use or development is inappropriate may include water quality; landscape features; special habitat; natural character; and risk of natural hazards, including areas threatened by erosion, inundation or sea level rise.

(b) Resource management plans will contain controls to manage subdivision, use and development of the coastal environment to avoid, remedy or mitigate any adverse environmental effects.

Controls which allow the subdivision, use and development of the coastal environment enable the community to provide for their social, economic and cultural wellbeing. These controls may include financial contributions to assist remediation or mitigation of adverse environmental effects.

Such development may be allowed where there will be no adverse effects on the natural character of the coastal environment, and in areas where the natural character has already been compromised. Cumulative effects of subdivision, use and development will also be avoided, remedied or mitigated.

[68] As to the outstanding landscapes policy, and the method to achieve it, the commentary indicates that the effect of any proposed development will be assessed against the criteria that make the relevant landscape outstanding; that is, the standard of "appropriateness". Policy 8.1.3 reads in full:[93]

8.1.3 POLICY — OUTSTANDING LANDSCAPES

Avoid, remedy or mitigate the damage of identified outstanding landscape features arising from the effects of excavation, disturbance of vegetation, or erection of structures.

The Resource Management Act requires the protection of outstanding landscape features as a matter of national importance. Further, the New Zealand Coastal Policy Statement [1994] requires this protection for the coastal environment. Features which satisfy the criteria for recognition as having national and international status will be identified in the resource management plans for protection. Any activities or proposals within these areas will be considered on the basis of their effects on the criteria which were used to identify the landscape features.

The wellbeing of the Marlborough community is linked to the quality of our landscape. Outstanding landscape features need to be retained without degradation from the effects of land and water based activities, for the enjoyment of the community and visitors.

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93 Italics in original.

Regional and district plans

[69] Section 64 of the RMA requires that there be a regional coastal plan for the Marlborough Sounds. One of the things that a regional council must do in developing a regional coastal plan is act in accordance with its duty under s 32 (which, among other things, required an evaluation of the risks of acting or not acting in circumstances of uncertainty or insufficient information).[94] A regional coastal plan must state the objectives for the region, policies to implement the objectives and rules (if any) to implement the policies[95] and must "give effect to" the NZCPS and to any regional policy statement.[96] It is important to emphasise that the plan is a *regional* one, which raises the question of how spot zoning applications such as that relating to Papatua are to be considered. It is obviously important that the regional integrity of a regional coastal plan not be undermined.

[70] We have observed that policies 7, 13 and 15 in the NZCPS require a strategic and comprehensive approach to regional planning documents. To reiterate, policy 7(1)(b) requires that, in developing regional plans, entities such as the Marlborough District Council:

> identify areas of the coastal environment where particular activities and forms of subdivision, use, and development:
>
> (i) are inappropriate; and
>
> (ii) may be inappropriate without the consideration of effects through a resource consent application, notice of requirement for designation or Schedule 1 of the [RMA] process;
>
> and provide protection from inappropriate subdivision, use, and development in these areas through objectives, policies and rules.

Policies 13(1)(d) and 15(d) require that regional plans identify areas where preserving natural character or protecting natural features and natural landscapes require objectives, policies and rules. Besides highlighting the need for a region-wide approach, these provisions again raise the issue of the meaning of "inappropriate".

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94 RMA, s 32(4)(b) as it was at the relevant time (see above n 60 for the legislative history).
95 Section 67(1).
96 Section 67(3)(b).

[71] The Marlborough District Council is a unitary authority with the powers, functions and responsibilities of both a regional and district council.[97] It is responsible for the Sounds Plan, which is a combined regional, regional coastal and district plan for the Marlborough Sounds. The current version of the Sounds Plan became operative on 25 August 2011. It comprises three volumes, the first containing objectives, policies and methods, the second containing rules and the third maps. The Sounds Plan identifies certain areas within the coastal marine area of the Marlborough Sounds as Coastal Marine Zone One (CMZ1), where aquaculture is a prohibited activity, and others as Coastal Marine Zone Two (CMZ2), where aquaculture is either a controlled or a discretionary activity. It describes areas designated CMZ1 as areas "where marine farming will have a significant adverse effect on navigational safety, recreational opportunities, natural character, ecological systems, or cultural, residential or amenity values".[98] The Board created a new zoning classification, Coastal Marine Zone Three (CMZ3), to apply to the four areas (previously zoned CMZ1) in respect of which it granted plan changes to permit salmon farming.

[72] In developing the Sounds Plan the Council classified and mapped the Marlborough Sounds into management areas known as Natural Character Areas. These classifications were based on a range of factors which went to the distinctiveness of the natural character within each area.[99] The Council described the purpose of this as follows:[100]

> *This natural character information is a relevant tool for management in helping to identify and protect those values that contribute to people's experience of the Sounds area. Preserving natural character in the Marlborough Sounds as a whole depends both on the overall pattern of use, development and protection, as well as maintaining the natural character of particular areas. The Plan therefore recognises that preservation of the natural character of the constituent natural character areas is important in achieving preservation of the natural character of the Marlborough Sounds as a whole.*
>
> The Plan requires that plan change and resource consent applications be assessed with regard to the natural character of the Sounds as a whole as well as each natural character area, or areas where appropriate. …

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97 Sounds Plan, above n 1, at [1.0].
98 At [9.2.2].
99 At Appendix 2.
100 At [2.1.6]. Italics in original.

[73] In addition, the Council assessed the landscapes in the Marlborough Sounds for the purpose of identifying those that could be described as outstanding. It noted that, as a whole, the Marlborough Sounds has outstanding visual values and identified the factors that contribute to that. Within the overall Marlborough Sounds landscape, however, the Council identified particular landscapes as "outstanding". The Sounds Plan describes the criteria against which the Council made the assessment[101] and contains maps that identify the areas of outstanding landscape value, which are relatively modest given the size of the region.[102] It seems clear from the Sounds Plan that the exercise was a thoroughgoing one.

[74] In 2009, the Council completed a landscape and natural character review of the Marlborough Sounds, which confirmed the outstanding natural character and outstanding natural landscape of the Port Gore area.[103]

Requirement to "give effect to" the NZCPS

[75] For the purpose of this discussion, it is important to bear two statutory provisions in mind. The first is s 66(1), which provides that a regional council shall prepare and change any regional plan[104] in accordance with its functions under s 30, the provisions of Part 2, a direction given under section 25A(1), its duty under s 32, and any regulations. The second is s 67(3), which provides that a regional plan must "give effect to" any national policy statement, any New Zealand coastal policy statement and any regional policy statement. There is a question as to the interrelationship of these provisions.

[76] As we have seen, the RMA requires an extensive process prior to the issuance of a New Zealand coastal policy statement – an evaluation under s 32, then a board of inquiry or similar process with the opportunity for public input. This is one indication of such a policy statement's importance in the statutory scheme. A further indication is found in the requirement that the NZCPS must be given effect to in subordinate planning documents, including regional policy statements and

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101 At ch 5 and Appendix 1.
102 At vol 3.
103 *King Salmon* (Board), above n 6, at [555] and following.
104 The term "regional plan" includes a regional coastal plan: see RMA, s 43AA.

regional and district plans.[105] We are concerned with a regional coastal plan, the Sounds Plan. Up until August 2003, s 67 provided that such a regional plan should "not be inconsistent with" any New Zealand coastal policy statement. Since then, s 67 has stated the regional council's obligation as being to "give effect to" any New Zealand coastal policy statement. We consider that this change in language has, as the Board acknowledged,[106] resulted in a strengthening of the regional council's obligation.

[77] The Board was required to "give effect to" the NZCPS in considering King Salmon's plan change applications. "Give effect to" simply means "implement". On the face of it, it is a strong directive, creating a firm obligation on the part of those subject to it. As the Environment Court said in *Clevedon Cares Inc v Manukau City Council*:[107]

> [51] The phrase "*give effect to*" is a strong direction. This is understandably so for two reasons:
>
> [a] The hierarchy of plans makes it important that objectives and policies at the regional level are given effect to at the district level; and
>
> [b] The Regional Policy Statement, having passed through the [RMA] process, is deemed to give effect to Part 2 matters.

[78] Further, the RMA provides mechanisms whereby the implementation of the NZCPS by regional authorities can be monitored. One of the functions of the Minister of Conservation under s 28 of the RMA is to monitor the effect and implementation of the NZCPS. In addition, s 293 empowers the Environment Court to monitor whether a proposed policy statement or plan gives effect to the NZCPS; it may allow departures from the NZCPS only if they are of minor significance and do not affect the general intent and purpose of the proposed policy statement or plan.[108] The existence of such mechanisms underscores the strength of the "give effect to" direction.

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105 See [31] above.
106 *King Salmon* (Board), above n 6, at [1179].
107 *Clevedon Cares Inc v Manukau City Council* [2010] NZEnvC 211.
108 RMA, ss 293(3)–(5).

[79] The requirement to "give effect to" the NZCPS gives the Minister a measure of control over what regional authorities do: the Minister sets objectives and policies in the NZPCS and relevant authorities are obliged to implement those objectives and policies in their regional coastal plans, developing methods and rules to give effect to them. To that extent, the authorities fill in the details in their particular localities.

[80] We have said that the "give effect to" requirement is a strong directive, particularly when viewed against the background that it replaced the previous "not inconsistent with" requirement. There is a caveat, however. The implementation of such a directive will be affected by what it relates to, that is, what must be given effect to. A requirement to give effect to a policy which is framed in a specific and unqualified way may, in a practical sense, be more prescriptive than a requirement to give effect to a policy which is worded at a higher level of abstraction.

[81] The Board developed this point in its discussion of the requirement that it give effect to the NZCPS and the Marlborough Regional Policy Statement (in the course of which it also affirmed the primacy of s 5 over the NZCPS and the perceived need for the "overall judgment" approach). It said:[109]

> [1180] It [that is, the requirement to give effect to the NZCPS] is a strong direction and requires positive implementation of the instrument. However, both the instruments contain higher order overarching objectives and policies, that create tension between them or, as [counsel] says, "pull in different directions", and thus a judgment has to be made as to whether the instrument as a whole is generally given effect to.
>
> [1181] Planning instruments, particularly of a higher order, nearly always contain a wide range of provisions. Provisions which are sometimes in conflict. The direction "to give effect to" does not enjoin that every policy be met. It is not a simple check-box exercise. Requiring that every single policy must be given full effect to would otherwise set an impossibly high threshold for any type of activity to occur within the coastal marine area.
>
> [1182] Moreover, there is no "hierarchy" or ranking of provisions in the [NZCPS]. The objective seeking ecological integrity has the same standing as that enabling subdivision, use and development within the coastal environment. Where there are competing values in a proposal, one does not automatically prevail over the other. It is a matter of judgement on the facts of a particular proposal and no one factor is afforded the right to veto all other considerations. It comes down to a matter of weight in the particular circumstances.

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[109] *King Salmon* (Board), above n 6 (citations omitted).

> [1183] In any case, the directions in both policy statements are subservient to the Section 5 purpose of sustainable management, as Section 66 of the RMA requires a council to change its plan in accordance, among other things, the provisions of Part II. Section 68(1) of the RMA requires that rules in a regional plan may be included for the purpose of carrying out the functions of the regional council and achieving the objectives and policies of the Plan.
>
> [1184] Thus, we are required [to] "give effect to" the provisions of the [NZCPS] and the Regional Policy Statement having regard to the provisions of those documents as a whole. We are also required to ensure that the rules assist the Regional Council in carrying out its functions under the RMA and achieve the objective and policies of the Regional Plan.

[82] Mr Kirkpatrick argued that there were two errors in this extract:

(a) It asserted that there was a state of tension or conflict in the policies of the NZCPS without analysing the relevant provisions to see whether such a state actually existed; and

(b) It assumed that "generally" giving effect to the NZCPS "as a whole" was compliant with s 67(3)(b).

[83] On the Board's approach, whether the NZCPS has been given effect to in determining a regional plan change application depends on an "overall judgment" reached after consideration of all relevant circumstances. The direction to "give effect to" the NZCPS is, then, essentially a requirement that the decision-maker consider the factors that are relevant in the particular case (given the objectives and policies stated in the NZCPS) before making a decision. While the weight given to particular factors may vary, no one factor has the capacity to create a veto – there is no bottom line, environmental or otherwise. The effect of the Board's view is that the NZCPS is essentially a listing of potentially relevant considerations, which will have varying weight in different fact situations. We discuss at [106] to [148] below whether this approach is correct.

[84] Moreover, as we indicated at [34] to [36] above, and as [1183] in the extract just quoted demonstrates, the Board ultimately determined King Salmon's applications not by reference to the NZCPS but by reference to pt 2 of the RMA. It did so because it considered that the language of s 66(1) required that approach. Ms Gwyn for the Minister supported the Board's approach. We do not accept that it is correct.

[85] First, while we acknowledge that a regional council is directed by s 66(1) to prepare and change any regional plan "in accordance with" (among other things) pt 2, it is also directed by s 67(3) to "give effect to" the NZCPS. As we have said, the purpose of the NZCPS is to state policies in order to achieve the RMA's purpose in relation to New Zealand's coastal environment. That is, the NZCPS gives substance to pt 2's provisions in relation to the coastal environment. In principle, by giving effect to the NZCPS, a regional council is necessarily acting "in accordance with" pt 2 and there is no need to refer back to the part when determining a plan change. There are several caveats to this, however, which we will mention shortly.

[86] Second, there are contextual considerations supporting this interpretation:

(a) As will be apparent from what we have said above, there is a reasonably elaborate process to be gone through before the Minister is able to issue a New Zealand coastal policy statement, involving an evaluation under s 32 and a board of inquiry or similar process with opportunity for public input. Given that process, we think it implausible that Parliament intended that the ultimate determinant of an application such as the present would be pt 2 and not the NZCPS. The more plausible view is that Parliament considered that pt 2 would be implemented if effect was given to the NZCPS.

(b) National policy statements such as the NZCPS allow Ministers a measure of control over decisions by regional and district councils. Accordingly, it is difficult to see why the RMA would require regional councils, as a matter of course, to go beyond the NZCPS, and back to pt 2, when formulating or changing a regional coastal plan which must give effect to the NZCPS. The danger of such an approach is that pt 2 may be seen as "trumping" the NZCPS rather than the NZCPS being the mechanism by which pt 2 is given effect in relation to the coastal environment.[110]

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[110] Indeed, counsel in at least one case has submitted that pt 2 "trumps" the NZCPS: see *Port Gore Marine Farms v Marlborough District Council* [2012] NZEnvC 72 at [197].

[87] Mr Nolan for King Salmon advanced a related argument as to the relevance of pt 2. He submitted that the purpose of the RMA as expressed in pt 2 had a role in the interpretation of the NZCPS and its policies because the NZCPS was drafted solely to achieve the purpose of the RMA; so, the NZCPS and its policies could not be interpreted in a way that would fail to achieve the purpose of the RMA.

[88] Before addressing this submission, we should identify three caveats to the "in principle" answer we have just given. First, no party challenged the validity of the NZCPS or any part of it. Obviously, if there was an allegation going to the lawfulness of the NZCPS, that would have to be resolved before it could be determined whether a decision-maker who gave effect to the NZCPS as it stood was necessarily acting in accordance with pt 2. Second, there may be instances where the NZCPS does not "cover the field" and a decision-maker will have to consider whether pt 2 provides assistance in dealing with the matter(s) not covered. Moreover, the obligation in s 8 to have regard to the principles of the Treaty of Waitangi will have procedural as well as substantive implications, which decision-makers must always have in mind, including when giving effect to the NZCPS. Third, if there is uncertainty as to the meaning of particular policies in the NZCPS, reference to pt 2 may well be justified to assist in a purposive interpretation. However, this is against the background that the policies in the NZCPS are intended to implement the six objectives it sets out, so that reference to one or more of those objectives may well be sufficient to enable a purposive interpretation of particular policies.

[89] We do not see Mr Nolan's argument as falling within the third of these caveats. Rather, his argument is broader in its effect, as it seeks to justify reference back to pt 2 as a matter of course when a decision-maker is required to give effect to the NZCPS.

[90] The difficulty with the argument is that, as we have said, the NZCPS was intended to give substance to the principles in pt 2 in respect of the coastal environment by stating objectives and policies which apply those principles to that environment: the NZCPS translates the general principles to more specific or focussed objectives and policies. The NZCPS is a carefully expressed document

whose contents are the result of a rigorous process of formulation and evaluation. It is a document which reflects particular choices. To illustrate, s 5(2)(c) of the RMA talks about "avoiding, remedying or mitigating any adverse effects of activities on the environment" and s 6(a) identifies "the preservation of the natural character of the coastal environment (including the coastal marine area) … and the protection of [it] from inappropriate subdivision, use and development" as a matter of national importance to be recognised and provided for. The NZCPS builds on those principles, particularly in policies 13 and 15. Those two policies provide a graduated scheme of protection and preservation based on the features of particular coastal localities, requiring avoidance of adverse effects in outstanding areas but allowing for avoidance, mitigation or remedying in others. For these reasons, it is difficult to see that resort to pt 2 is either necessary or helpful in order to interpret the policies, or the NZCPS more generally, absent any allegation of invalidity, incomplete coverage or uncertainty of meaning. The notion that decision-makers are entitled to decline to implement aspects of the NZCPS if they consider that appropriate in the circumstances does not fit readily into the hierarchical scheme of the RMA.

[91] We acknowledge that the scheme of the RMA does give subordinate decision-makers considerable flexibility and scope for choice. This is reflected in the NZCPS, which is formulated in a way that allows regional councils flexibility in implementing its objectives and policies in their regional coastal policy statements and plans. Many of the policies are framed in terms that provide flexibility and, apart from that, the specific methods and rules to implement the objectives and policies of the NZCPS in particular regions must be determined by regional councils. But the fact that the RMA and the NZCPS allow regional and district councils scope for choice does not mean, of course, that the scope is infinite. The requirement to "give effect to" the NZCPS is intended to constrain decision-makers.

Meaning of "avoid"

[92] The word "avoid" occurs in a number of relevant contexts. In particular:

(a) Section 5(c) refers to "avoiding, remedying, or mitigating any adverse effects of activities on the environment".

(b) Policy 13(1)(a) provides that decision-makers should "avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character"; policy 15 contains the same language in relation to outstanding natural features and outstanding natural landscapes in the coastal environment.

(c) Policies 13(1)(b) and 15(b) refer to avoiding significant adverse effects, and to avoiding, remedying or mitigating other adverse effects, in particular areas.

[93] What does "avoid" mean in these contexts? As we have said, given the juxtaposition of "mitigate" and remedy", the most obvious meaning is "not allow" or "prevent the occurrence of". But the meaning of "avoid" must be considered against the background that:

(a) the word "effect" is defined broadly in s 3;

(b) objective 6 recognises that the protection of the values of the coastal environment does not preclude use and development "in appropriate places and forms and within appropriate limits"; and

(c) both policies 13(1)(a) and (b) and 15(a) and (b) are means for achieving particular goals – in the case of policy 13(1)(a) and (b), preserving the natural character of the coastal environment and protecting it from "inappropriate" subdivision, use and development and, in the case of policy 15(a) and (b), protecting the natural features and natural landscapes of the coastal environment from "inappropriate" subdivision, use and development.

[94] In *Man O'War Station*, the Environment Court said that the word "avoid" in policy 15(a) did not mean "prohibit",[111] expressing its agreement with the view of the Court in *Wairoa River Canal Partnership v Auckland Regional Council*.[112] The Court accepted that policy 15 should not be interpreted as imposing a blanket

[111] *Man O'War Station*, above n 46, at [48].
[112] *Wairoa River Canal Partnership*, above n 46.

prohibition on development in any area of the coastal environment that comprises an outstanding natural landscape as that would undermine the purpose of the RMA, including consideration of factors such as social and economic wellbeing.[113]

[95] In the *Wairoa River Canal Partnership* case, an issue arose concerning a policy (referred to as policy 3) proposed to be included in the Auckland Regional Policy Statement. It provided that countryside living (ie, low density residential development on rural land) "avoids development in those areas … identified … as having significant, ecological, heritage or landscape value or high natural character" and possessing certain characteristics. The question was whether the word "inappropriate" should be inserted between "avoids" and "development", as sought by Wairoa River Canal Partnership. In the course of addressing that, the Environment Court said that policy 3 did "not attempt to impose a prohibition on development – to avoid is a step short of to prohibit".[114] The Court went on to say that the use of "avoid" "sets a presumption (or a direction to an outcome) that development in those areas will be inappropriate …".[115]

[96] We express no view on the merits of the Court's analysis in the *Wairoa River Canal Partnership* case, which was focussed on the meaning of "avoid", standing alone, in a particular policy proposed for the Auckland Regional Policy Statement. Our concern is with the interpretation of "avoid" as it is used in s 5(2)(c) and in relevant provisions of the NZCPS. In that context, we consider that "avoid" has its ordinary meaning of "not allow" or "prevent the occurrence of". In the sequence "avoiding, remedying, or mitigating any adverse effects of activities on the environment" in s 5(2)(c), for example, it is difficult to see that "avoid" could sensibly bear any other meaning. Similarly in relation to policies 13(1)(a) and (b) and 15(a) and (b), which also juxtapose the words "avoid", "remedy" and "mitigate". This interpretation is consistent with objective 2 of the NZCPS, which is, in part, "[t]o preserve the natural character of the coastal environment and protect natural features and landscape values through … identifying those areas where various forms of subdivision, use, and development would be inappropriate and protecting

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113 *Man O'War Station*, above n 46, at [43].
114 *Wairoa River Canal Partnership*, above n 46, at [15].
115 At [16].

them from such activities". It is also consistent with objective 6's recognition that protection of the values of the coastal environment does not preclude use and development "in appropriate places and forms, and within appropriate limits". The "does not preclude" formulation emphasises protection by allowing use or development only where appropriate, as opposed to allowing use or development unless protection is required.

[97] However, taking that meaning may not advance matters greatly: whether "avoid" (in the sense of "not allow" or "prevent the occurrence of") bites depends upon whether the "overall judgment" approach or the "environmental bottom line" approach is adopted. Under the "overall judgment" approach, a policy direction to "avoid" adverse effects is simply one of a number of relevant factors to be considered by the decision maker, albeit that it may be entitled to great weight; under the "environmental bottom line" approach, it has greater force.

Meaning of "inappropriate"

[98] Both pt 2 of the RMA and provisions in the NZCPS refer to protecting areas such as outstanding natural landscapes from "inappropriate" development – they do not refer to protecting them from *any* development.[116] This suggests that the framers contemplated that there might be "appropriate" developments in such areas, and raises the question of the standard against which "inappropriateness" is to be assessed.

[99] Moreover, objective 6 and policies 6 and 8 of the NZCPS invoke the standard of "appropriateness". To reiterate, objective 6 provides in part:

> To enable people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through subdivision, use, and development, recognising that:
>
> - the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits;

[116] RMA, s 6(a) and (b); NZCPS, above n 13, objective 6 and policies 13(1)(a) and 15(a).

This is echoed in policy 6 which deals with activities in the coastal environment. Policy 6(2)(c) reads: "recognise that there are activities that have a functional need to be located in the coastal marine area, and provide for those activities in appropriate places". Policy 8 indicates that regional policy statements and plans should make provision for aquaculture activities:

> … in appropriate places in the coastal environment, recognising that relevant considerations may include:
>
> (i) the need for high water quality for aquaculture activities; and
>
> (ii) the need for land-based facilities associated with marine farming;

[100] The scope of the words "appropriate" and "inappropriate" is, of course, heavily affected by context. For example, where policy 8 refers to making provision for aquaculture activities "in appropriate places in the coastal environment", the context suggests that "appropriate" is referring to suitability for the needs of aquaculture (for example, water quality) rather than to some broader notion. That is, it is referring to suitability in a technical sense. By contrast, where objective 6 says that the protection of the values of the coastal environment does not preclude use and development "in appropriate places and forms, and within appropriate limits", the context suggests that "appropriate" is not concerned simply with technical suitability for the particular activity but with a broader concept that encompasses other considerations, including environmental ones.

[101] We consider that where the term "inappropriate" is used in the context of protecting areas from inappropriate subdivision, use or development, the natural meaning is that "inappropriateness" should be assessed by reference to what it is that is sought to be protected. It will be recalled that s 6(b) of the RMA provides:

> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
>
> …
>
> (b) the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:
>
> …

A planning instrument which provides that any subdivision, use or development that adversely affects an area of outstanding natural attributes is inappropriate is consistent with this provision.

[102] The meaning of "inappropriate" in the NZCPS emerges from the way in which particular objectives and policies are expressed. Objective 2 deals with preserving the natural character of the coastal environment and protecting natural features and landscape values through, among other things, "identifying those areas where various forms of subdivision, use, and development would be inappropriate and protecting them from such activities". This requirement to identify particular areas, in the context of an overall objective of preservation and protection, makes it clear that the standard for inappropriateness relates back to the natural character and other attributes that are to be preserved or protected, and also emphasises that the NZCPS requires a strategic, region-wide approach. The word "inappropriate" in policies 13(1)(a) and (b) and 15(a) and (b) of the NZCPS bears the same meaning. To illustrate, the effect of policy 13(1)(a) is that there is a policy to preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development *by avoiding the adverse effects on natural character in areas of the coastal environment with outstanding natural character*. The italicised words indicate the meaning to be given to "inappropriate" in the context of policy 13.

[103] If "inappropriate" is interpreted in the way just described, it might be thought to provide something in the nature of an "environmental bottom line". However, that will not necessarily be so if policies 13 and 15 and similarly worded provisions are regarded simply as relevant considerations which may be outweighed in particular situations by other considerations favouring development, as the "overall judgment" approach contemplates.

[104] An alternative approach is to treat "inappropriate" (and "appropriate" in objective 6 and policies 6(2)(c) and 8) as the mechanism by which an overall judgment is to be made about a particular development proposal. On that approach, a decision-maker must reach an evaluation of whether a particular development proposal is, in all the circumstances, "appropriate" or "inappropriate". So, an

aquaculture development that will have serious adverse effects on an area of outstanding natural character may nevertheless be deemed not to be "inappropriate" if other considerations (such as suitability for aquaculture and economic benefits) are considered to outweigh those adverse effects: the particular site will be seen as an "appropriate" place for aquaculture in terms of policy 8 despite the adverse effects.

[105] We consider that "inappropriate" should be interpreted in s 6(a), (b) and (f) against the backdrop of what is sought to be protected or preserved. That is, in our view, the natural meaning. The same applies to objective 2 and policies 13 and 15 in the NZCPS. Again, however, that does not resolve the fundamental issue in the case, namely whether the "overall judgment" approach adopted by the Board is the correct approach. We now turn to that.

Was the Board correct to utilise the "overall judgment" approach?

[106] In the extracts from its decision which we have quoted at [34] to [35] and [81] above, the Board emphasised that in determining whether or not it should grant the plan changes, it had to make an "overall judgment" on the facts of the particular proposal and in light of pt 2 of the RMA.

[107] We noted at [38] above that several early decisions of the Planning Tribunal adopted what has been described as the "environmental bottom line" approach to s 5. That approach finds some support in the speeches of responsible Ministers in the House. In the debate on the second reading of the Resource Management Bill, the Rt Hon Geoffrey Palmer said:[117]

> The Bill as reported back does not reflect a wish list of any one set of views. Instead, it continues to reflect the balancing of the range of views that society holds about the use of land, air, water and minerals, while recognising that there is an ecological bottom line to all of those questions.

In introducing the Bill for its third reading, the Hon Simon Upton said:[118]

> The Bill provides us with a framework to establish objectives by a physical bottom line that must not be compromised. Provided that those objectives are met, what people get up to is their affair. As such, the Bill provides a

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[117] (28 August 1990) 510 NZPD 3950.
[118] (4 July 1991) 516 NZPD 3019.

> more liberal regime for developers. On the other hand, activities will have to be compatible with hard environmental standards, and society will set those standards. Clause 4 [now s 5] sets out the biophysical bottom line. Clauses 5 and 6 [now ss 6 and 7] set out further specific matters that expand on the issue. The Bill has a clear and rigorous procedure for the setting of environmental standards – and the debate will be concentrating on just where we set those standards. They are established by public process.

[108] In the plan change context under consideration, the "overall judgment" approach does not recognise any such bottom lines, as Dobson J accepted. The Judge rejected the view that some coastal environments could be excluded from marine farming activities absolutely as a result of their natural attributes. That approach, he said, "would be inconsistent with the evaluative tenor of the NZCPS, when assessed in the round".[119] Later, the Judge said:[120]

> The essence of EDS's concern is to question the rationale, in resource management terms, for designating coastal areas as having outstanding natural character or features, if that designation does not protect the area from an economic use that will have adverse effects. An answer to that valid concern is that such designations do not afford absolute protection. Rather, they require a materially higher level of justification for relegating that outstanding natural character or feature, when authorising an economic use of that coastal area, than would be needed in other coastal areas.

Accordingly, Dobson J upheld the "overall judgment" approach as the approach to be adopted.

[109] One noteworthy feature of the extract just quoted is the requirement for "a materially higher level of justification" where an area of outstanding natural character will be adversely affected by a proposed development. The Board made an observation to similar effect when it said:[121]

> [1240] The placement of any salmon farm into this dramatic landscape with its distinctive landforms, vegetation and seascape, would be an abrupt incursion. This together with the Policy directions of the Sounds Plan as indicated by its CMZ1 classification of Port Gore, weighs heavily against the Proposed Plan Change.

We consider these to be significant acknowledgements and will return to them shortly.

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119 *King Salmon* (HC), above n 2, at [149].
120 At [151].
121 *King Salmon* (Board), above n 6.

[110] Mr Kirkpatrick argued that the Board and the Judge were wrong to adopt the "overall judgment" approach, submitting in particular that it:

(a) is inconsistent with the Minister's statutory power to set national priorities "for the preservation of the natural character of the coastal environment of New Zealand, including protection from inappropriate subdivision, use, and development";[122] and

(b) does not reflect the language of the relevant policies of the NZCPS, in particular policies 8, 13 and 15.

[111] In response, Ms Gwyn emphasised that the policies in the NZCPS were policies, not standards or rules. She argued that the NZCPS provides direction for decision-makers (including boards of inquiry) but leaves them with discretion as to how to give effect to the NZCPS. Although she acknowledged that policies 13 and 15 give a strong direction, Ms Gwyn submitted that they cannot and do not prohibit activities that adversely affect coastal areas with outstanding features. Where particular policies are in conflict, the decision-maker is required to exercise its own judgment, as required by pt 2. Mr Nolan's submissions were to similar effect. While he accepted that some objectives or policies provided more guidance than others, they were not "standards or vetos". Mr Nolan submitted that this was "the only tenable, workable approach that would achieve the RMA's purpose". The approach urged by EDS would, he submitted, undermine the RMA's purpose by allowing particular considerations to trump others whatever the consequences.

(i) The NZCPS: policies and rules

[112] We begin with Ms Gwyn's point that the NZCPS contains objectives and policies rather than methods or rules. As Ms Gwyn noted, the Full Court of the Court of Appeal dealt with a similar issue in *Auckland Regional Council v North Shore City Council*.[123] The Auckland Regional Council was in the process of hearing and determining submissions in respect of its proposed regional policy statement. That proposed policy statement included provisions which were designed

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122 RMA, s 58(a).

123 *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18 (CA).

to limit urban development to particular areas (including demarking areas by lines on maps). These provisions were to have a restrictive effect on the power of the relevant territorial authorities to permit further urbanisation in particular areas; the urban limits were to be absolutely restrictive.[124]

[113] The Council's power to impose such restrictions was challenged. The contentions of those challenging these limits were summarised by Cooke P, delivering the judgment of the Court, as follows:[125]

> The defendants contend that the challenged provisions would give the proposed regional policy statement a master plan role, interfering with the proper exercise of the responsibilities of territorial authorities; that it would be "coercive" and that "The drawing of a line on a map is the ultimate rule. There is no scope for further debate or discretion. No further provision can be made in a regional plan or a district plan".

The defendants' essential point was that the Council was proposing to go beyond a policy-making role to a rule-making role, which it was not empowered to do under the RMA.

[114] The Court considered, however, that the defendants' contention placed too limited a meaning on the scope of the words "policy" and "policies" in ss 59 and 62 of the RMA (which deal with, respectively, the purpose and content of regional policy statements). The Court held that "policy" should be given its ordinary and natural meaning and that a definition such as "course of action" was apposite. The Court said:[126]

> It is obvious that in ordinary present-day speech a policy may be either flexible or inflexible, either broad or narrow. Honesty is said to be the best policy. Most people would prefer to take some discretion in implementing it, but if applied remorselessly it would not cease to be a policy. Counsel for the defendants are on unsound ground in suggesting that, in everyday New Zealand speech or in parliamentary drafting or in etymology, policy cannot include something highly specific. …

[115] As to the argument that a regional policy statement could not contain what were in effect rules, Cooke P said:[127]

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124 At 19.
125 At 22.
126 At 23.
127 At 23.

> A well-meant sophistry was advanced to bolster the argument. It was said that the [RMA] in s 2(1) defines "rule" as a district rule or a regional rule, and that the scheme of the [RMA] is that "rules" may be included in regional plans (s 68) or district plans (s 76) but not in regional policy statements. That is true. But it cannot limit the scope of a regional policy statement. The scheme of the [RMA] does not include direct enforcement of regional policy statements against members of the public. As far as now relevant, the authorised contravention procedures relate to breaches of the rules in district plans or proposed district plans (s 9 and Part XII generally). Regional policy statements may contain rules in the ordinary sense of that term, but they are not rules within the special statutory definition directly binding on individual citizens. Mainly they derive their impact from the stipulation of Parliament that district plans may not be inconsistent with them.

[116] In short, then, although a policy in a New Zealand coastal policy statement cannot be a "rule" within the special definition in the RMA, it may nevertheless have the effect of what in ordinary speech would be a rule. Policy 29 in the NZCPS is an obvious example.

(ii) Section 58 and other statutory indicators

[117] We turn next to s 58. It contains provisions which are, in our view, inconsistent with the notion that the NZCPS is, properly interpreted, no more than a statement of relevant considerations, to which a decision-maker is entitled to give greater or lesser weight in the context of determining particular matters. Rather, these provisions indicate that it was intended that a New Zealand coastal policy statement might contain policies that were not discretionary but would have to be implemented if relevant. The relevant provisions provide for a New Zealand coastal policy statement to contain objectives and policies concerning:

(a) national priorities for specified matters (ss 58(a) and (ga));

(b) the Crown's interests in the coastal marine area (s 58(d));

(c) matters to be included in regional coastal plans in regard to the preservation of the natural character of the coastal environment (s 58(e));

(d) the implementation of New Zealand's international obligations affecting the coastal environment (s 58(f));

(e) the procedures and methods to be used to review the policies and monitor their effectiveness (s 58(g)); and

(f) the protection of protected customary rights (s 58 (gb)).

[118] We begin with s 58(a), the language of which is set out at [110](a) above. It deals with the Minister's ability (by means of the NZCPS) to set national priorities in relation to the preservation of the natural character of the coastal environment. This provision contemplates the possibility of objectives and policies the effect of which is to provide absolute protection from the adverse effects of development in relation to particular areas of the coastal environment. The power of the Minister to set objectives and policies containing national priorities for the preservation of natural character is not consistent with the "overall judgment" approach. This is because, on the "overall judgment" approach, the Minister's assessment of national priorities as reflected in a New Zealand coastal policy statement would not be binding on decision-makers but would simply be a relevant consideration, albeit (presumably) a weighty one. If the Minister did include objectives or policies which had the effect of protecting areas of the coastal environment against the adverse effects of development as national priorities, it is inconceivable that regional councils would be free to act inconsistently with those priorities on the basis that, although entitled to great weight, they were ultimately no more than relevant considerations. The same is true of s 58(ga), which relates to national priorities for maintaining and enhancing public access to and along the coastal marine area (that is, below the line of mean high water springs).

[119] A similar analysis applies in respect of ss 58(d), (f) and (gb). These enable the Minister to include in a New Zealand coastal policy statement objectives and policies concerning first, the Crown's interests in the coastal marine area, second, the implementation of New Zealand's international obligations affecting the coastal environment and third, the protection of protected rights. We consider that the Minister is entitled to include in such a statement relevant objectives and policies that are intended, where relevant, to be binding on decision-makers. If policies concerning the Crown's interests, New Zealand's international obligations or the protection of protected rights were to be stated in binding terms, it is difficult to see

what justification there could be for interpreting them simply as relevant considerations which a decision-maker would be free to apply or not as it saw appropriate in particular circumstances. The Crown's interests in the coastal marine area, New Zealand's relevant international obligations and the protection of protected rights are all matters about which it is to be expected that the Minister would have authority to make policies that are binding if he or she considered such policies were necessary.

[120] Next we come to s 58(g), which permits objectives and policies concerning "the procedures and methods to be used to review the policies and to monitor their effectiveness". It will be recalled that one of the responsibilities of the Minister under s 28(d) of the RMA is to monitor the effect and implementation of New Zealand coastal policy statements. The Minister would be entitled, in our view, to set out policies in a New Zealand coastal policy statement that were designed to impose obligations on local authorities so as to facilitate that review and monitoring function. It is improbable that any such policies were intended to be discretionary as far as local authorities were concerned.

[121] Finally, there is s 58(e). It provides that a New Zealand coastal policy statement may state objectives or policies about:

> the matters to be included in 1 or more regional coastal plans in regard to the preservation of the natural character of the coastal environment, including the activities that are required to be specified as restricted coastal activities because the activities—
>
> (i) have or are likely to have significant or irreversible adverse effects on the coastal marine area; or
>
> (ii) relate to areas in the coastal marine area that have significant conservation value: …

The term "restricted coastal activity" is defined in s 2 to mean "any discretionary activity or non-complying activity that, in accordance with section 68, is stated by a regional coastal plan to be a restricted coastal activity". Section 68 allows a regional council to include rules in regional plans. Section 68(4) provides that a rule may specify an activity as a restricted coastal activity only if the rule is in a regional coastal plan and the Minister of Conservation has required the activity to be so

specified on one of the two grounds contained in s 58(e). The obvious mechanism by which the Minister may require the activity to be specified as a restricted coastal activity is a New Zealand coastal policy statement. Accordingly, although the matters covered by s 58(e) are to be stated as objectives or policies in a New Zealand coastal policy statement, the intention must be that any such requirement will be binding on the relevant regional councils. Given the language and the statutory context, a policy under s 58(e) cannot simply be a factor that a regional council must consider or about which it has discretion.

[122] This view is confirmed by policy 29 in the NZCPS, which states that the Minister does not require any activity to be specified as a restricted coastal activity in a regional coastal plan and directs local authorities that they must amend documents in the ways specified to give effect to this policy as soon as practicable. Policy 29 is highly prescriptive and illustrates that a policy in a New Zealand coastal policy statement may have the effect of what, in ordinary speech, might be described as a rule (because it must be observed), even though it would not be a "rule" under the RMA definition.

[123] In addition to these provisions in s 58, we consider that s 58A offers assistance. It provides that a New Zealand coastal policy statement may incorporate material by reference under sch 1AA of the RMA. Clause 1 of sch 1AA relevantly provides:

> **1 Incorporation of documents by reference**
>
> (1) The following written material may be incorporated by reference in a national environmental standard, national policy statement, or New Zealand coastal policy statement:
>
> (a) standards, requirements, or recommended practices of international or national organisations:
>
> (b) standards, requirements, or recommended practices prescribed in any country or jurisdiction:
>
> …
>
> (3) Material incorporated by reference in a national environmental standard, national policy statement, or New Zealand coastal policy statement has legal effect as part of the standard or statement.

[124] As can be seen, cl 1 envisages that a New Zealand coastal statement may contain objectives or policies that refer to standards, requirements or recommended practices of international and national organisations. This also suggests that Parliament contemplated that the Minister might include in a New Zealand coastal policy statement policies that, in effect, require adherence to standards or impose requirements, that is, policies that are prescriptive and are expected to be followed. If this is so, a New Zealand coastal policy statement cannot properly be viewed as simply a document which identifies a range of potentially relevant policies, to be given effect in subordinate planning documents as decision-makers consider appropriate in particular circumstances.

[125] Finally in this context, we mention ss 55 and 57. Section 55(2) relevantly provides that, if a national policy statement so directs, a regional council[128] must amend a regional policy statement or regional plan to include specific objectives or policies or so that objectives or policies in the regional policy statement or regional plan "give effect to objectives and policies specified in the [national policy] statement". Section 55(3) provides that a regional council "must also take any other action that is specified in the national policy statement". Under s 57(2), s 55 applies to a New Zealand coastal policy statement as if it were a national policy statement "with all necessary modifications". Under s 43AA the term "regional plan" includes a regional coastal plan. These provisions underscore the significance of the regional council's (and therefore the Board's) obligation to "give effect to" the NZCPS and the role of the NZCPS as an mechanism for Ministerial control. They contemplate that a New Zealand coastal policy statement may be directive in nature.

(iii) Interpreting the NZCPS

[126] We agree with Mr Kirkpatrick that the language of the relevant policies in the NZCPS is significant and that the various policies are not inevitably in conflict or pulling in different directions. Beginning with language, we have said that "avoid" in policies 13(1)(a) and 15(a) is a strong word, meaning "not allow" or "prevent the occurrence of", and that what is "inappropriate" is to be assessed against the

[128] Section 55 of the RMA uses the term "local authority", which is defined in s 2 to include a regional council.

characteristics of the environment that policies 13 and 15 seek to preserve. While we acknowledge that the most likely meaning of "appropriate" in policy 8(a) is that it relates to suitability for salmon farming, the policy does not suggest that provision must be made for salmon farming in *all* places that might be appropriate for it in a particular coastal region.

[127] Moreover, when other provisions in the NZCPS are considered, it is apparent that the various objectives and policies are expressed in deliberately different ways. Some policies give decision-makers more flexibility or are less prescriptive than others. They identify matters that councils should "take account of" or "take into account",[129] "have (particular) regard to",[130] "consider",[131] "recognise",[132] "promote"[133] or "encourage";[134] use expressions such as "as far as practicable",[135] "where practicable",[136] and "where practicable and reasonable";[137] refer to taking "all practicable steps"[138] or to there being "no practicable alternative methods".[139] Policy 3 requires councils to adopt the precautionary approach, but naturally enough the implementation of that approach is addressed only generally; policy 27 suggests a range of strategies. Obviously policies formulated along these lines leave councils with considerable flexibility and scope for choice. By contrast, other policies are expressed in more specific and directive terms, such as policies 13, 15, 23 (dealing with the discharge of contaminants) and 29. These differences matter. One of the dangers of the "overall judgment" approach is that it is likely to minimise their significance.

[128] Both the Board and Dobson J acknowledged that the language in which particular policies were expressed did matter: the Board said that the concern underpinning policies 13 and 15 "weighs heavily against" granting the plan change and the Judge said that departing from those policies required "a materially higher

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129 NZCPS, above n 13, policies 2(e) and 6(g).
130 Policy 10; see also policy 5(2).
131 Policies 6(1) and 7(1)(a).
132 Policies 1, 6, 9, 12(2) and 26(2).
133 Policies 6(2)(e) and 14.
134 Policies 6(c) and 25(c) and (d).
135 Policies 2(c) and (g) and 12(1).
136 Policies 14 (c), 17(h), 19(4), 21(c) and 23(4)(a).
137 Policy 6(1)(i).
138 Policy 23(5)(a).
139 Policy 10(1)(c).

level of justification".[140] This view that policies 13 and 15 should not be applied in the terms in which they are drafted but simply as very important considerations was based on the perception that to apply them in accordance with their terms would be contrary to the purpose of the RMA and unworkable. Both Ms Gwyn and Mr Nolan supported this position in argument; they accepted that policies such as policies 13 and 15 provided "more guidance" than other policies or constituted "starting points", but argued that they were not standards, nor did they operate as vetoes. Although this view of the NZCPS as a document containing guidance or relevant considerations of differing weight has significant support in the authorities, it is not one with which we agree.

[129] When dealing with a plan change application, the decision-maker must first identify those policies that are relevant, paying careful attention to the way in which they are expressed. Those expressed in more directive terms will carry greater weight than those expressed in less directive terms. Moreover, it may be that a policy is stated in such directive terms that the decision-maker has no option but to implement it. So, "avoid" is a stronger direction than "take account of ". That said however, we accept that there may be instances where particular policies in the NZCPS "pull in different directions". But we consider that this is likely to occur infrequently, given the way that the various policies are expressed and the conclusions that can be drawn from those differences in wording. It may be that an apparent conflict between particular policies will dissolve if close attention is paid to the way in which the policies are expressed.

[130] Only if the conflict remains after this analysis has been undertaken is there any justification for reaching a determination which has one policy prevailing over another. The area of conflict should be kept as narrow as possible. The necessary analysis should be undertaken on the basis of the NZCPS, albeit informed by s 5. As we have said, s 5 should not be treated as the primary operative decision-making provision.

[131] A danger of the "overall judgment" approach is that decision-makers may conclude too readily that there is a conflict between particular policies and prefer one

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[140] *King Salmon* (Board), above n 6, at [1240]; and *King Salmon* (HC), above n 2, at [151].

over another, rather than making a thoroughgoing attempt to find a way to reconcile them. In the present case, we do not see any insurmountable conflict between policy 8 on the one hand and policies 13(1)(a) and 15(a) on the other. Policies 13(1)(a) and 15(a) provide protections against adverse effects of development in particular limited areas of the coastal region – areas of *outstanding* natural character, of *outstanding* natural features and of *outstanding* natural landscapes (which, as the use of the word "outstanding" indicates, will not be the norm). Policy 8 recognises the need for sufficient provision for salmon farming in areas suitable for salmon farming, but this is against the background that salmon farming cannot occur in one of the outstanding areas if it will have an adverse effect on the outstanding qualities of the area. So interpreted, the policies do not conflict.

[132] Policies 13(1)(a) and (b) and 15(a) and (b) do, in our view, provide something in the nature of a bottom line. We consider that this is consistent with the definition of sustainable management in s 5(2), which, as we have said, contemplates protection as well as use and development. It is also consistent with classification of activities set out in s 87A of the RMA, the last of which is activities that are prohibited.[141] The RMA contemplates that district plans may prohibit particular activities, either absolutely or in particular localities. If that is so, there is no obvious reason why a planning document which is higher in the hierarchy of planning documents should not contain policies which contemplate the prohibition of particular activities in certain localities.

[133] The contrast between the 1994 New Zealand Coastal Policy Statement (the 1994 Statement) and the NZCPS supports the interpretation set out above. Chapter 1 of the 1994 Statement sets out national priorities for the preservation of the natural character of the coastal environment. Policy 1.1.3 provides that it is a national priority to protect (among other things) "landscapes, seascapes and landforms" which either alone or in combination are essential or important elements of the natural character of the coastal environment. Chapter 3 deals with activities involving subdivision, use or development of areas of the coastal environment. Policy 3.2.1 provides that policy statements and plans "should define what form of

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[141] See [16] above.

subdivision, use or development would be appropriate in the coastal environment, and where it would be appropriate". Policy 3.2.2 provides:

> Adverse effects of subdivision, use or development in the coastal environment should as far as practicable be avoided. Where complete avoidance is not practicable, the adverse effects should be mitigated and provision made for remedying those effects, to the extent practicable.

[134] Overall, the language of the 1994 Statement is, in relevant respects, less directive and allows greater flexibility for decision-makers than the language of the NZCPS. The greater direction given by the NZCPS was a feature emphasised by Minister of Conservation, Hon Kate Wilkinson, when she released the NZCPS. The Minister described the NZCPS as giving councils "clearer direction on protecting and managing New Zealand's coastal environment" and as reflecting the Government's commitment "to deliver more national guidance on the implementation of the [RMA]".[142] The Minister said that the NZCPS was more specific than the 1994 Statement "about how some matters of national importance under the RMA should be protected from inappropriate use and development". Among the key differences the Minister identified was the direction on protection of natural character and outstanding landscapes. The emphasis was "on local councils to produce plans that more clearly identify where development will need to be constrained to protect special areas of the coast". The Minister also noted that the NZCPS made provision for aquaculture "in appropriate places".

[135] The RMA does, of course, provide for applications for private plan changes. However, we do not see this as requiring or even supporting the adoption of the "overall judgment" approach (or undermining the approach which we consider is required). We make two points:

(a) First, where there is an application for a private plan change to a regional coastal plan, we accept that the focus will be on the relevant locality and that the decision-maker may grant the application on a basis which means the decision has little or no significance beyond that locality. But the decision-maker must nevertheless always have

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[142] Office of the Minister of Conservation "New Coastal Policy Statement Released" (28 October 2010).

regard to the region-wide perspective that the NZCPS requires to be taken. It will be necessary to put the application in its overall context.

(b) Second, Papatua at Port Gore was identified as an area of outstanding natural attributes by the Marlborough District Council. An applicant for a private plan change in relation to such an area is, of course, entitled to challenge that designation. If the decision-maker is persuaded that the area is not properly characterised as outstanding, policies 13 and 15 allow for adverse effects to be remedied or mitigated rather than simply avoided, provided those adverse effects are not "significant". But if the coastal area deserves the description "outstanding", giving effect to the NZCPS requires that it be protected from development that will adversely affect its outstanding natural attributes.

[136] There are additional factors that support rejection of the "overall judgment" approach in relation to the implementation of the NZCPS. First, it seems inconsistent with the elaborate process required before a national coastal policy statement can be issued. It is difficult to understand why the RMA requires such an elaborate process if the NZCPS is essentially simply a list of relevant factors. The requirement for an evaluation to be prepared, the requirement for public consultation and the requirement for a board of inquiry process or an equivalent all suggest that a New Zealand coastal policy statement has a greater purpose than merely identifying relevant considerations.

[137] Second, the "overall judgment" approach creates uncertainty. The notion of giving effect to the NZCPS "in the round" or "as a whole" is not one that is easy either to understand or to apply. If there is no bottom line and development is possible in any coastal area no matter how outstanding, there is no certainty of outcome, one result being complex and protracted decision-making processes in relation to plan change applications that affect coastal areas with outstanding natural attributes. In this context, we note that historically there have been three mussel farms at Port Gore, despite its CMZ1 classification. The relevant permits came up

for renewal.[143] On various appeals from the decisions of the Marlborough District Council on the renewal applications, the Environment Court determined, in a decision issued on 26 April 2012, that renewals for all three should be declined. The Court said:[144]

> [238] In the end, after weighing all the evidence in respect of each mussel farm individually in the light of the relevant policy directions in the various statutory instruments and the RMA itself, we consider that achieving the purpose of the [RMA] requires that each application for a mussel farm should be declined.

[138] While the Court conducted an overall analysis, it was heavily influenced by the directives in policies 13 and 15 of the NZCPS, as given effect in this locality by the Marlborough District Council's CMZ1 zoning. This was despite the fact that the applicants had suggested mechanisms whereby the visual impact of the mussel farms could be reduced. There is no necessary inconsistency between the Board's decision in the present case and that of the Environment Court,[145] given that different considerations may arise on a salmon farm application than on a mussel farm application. But a comparison of the outcomes of the two cases does illustrate the uncertainty that arises from the "overall judgment" approach: although the mussel farms would have had an effect on the natural character and landscape attributes of the area that was less adverse than that arising from a salmon farm, the mussel farm applications were declined whereas the salmon farm application was granted.

[139] Further, the "overall judgment" approach has the potential, at least in the case of spot zoning plan change applications relating to coastal areas with outstanding natural attributes, to undermine the strategic, region-wide approach that the NZCPS requires regional councils to take to planning. We refer here to policies 7, 13(1)(c) and (d) and 15(d) and (e).[146] Also significant in this context is objective 6, which provides in part that "the proportion of the coastal marine area under any formal protection is small and therefore management under the [RMA] is an important

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143 Although the farms were in a CMZ1 zone, mussel farming at the three locations was treated as a discretionary activity.

144 *Port Gore Marine Farms v Marlborough District Council*, above n 110.

145 The Board was aware of the Court's decision because it cited it for a particular proposition: see *King Salmon* (Board), above n 6, at [595].

146 See [63] above.

means by which the natural resources of the coastal marine area can be protected". This also requires a "whole of region" perspective.

[140] We think it significant that the Board did not discuss policy 7 (although it did refer to it in its overview of the NZCPS), nor did it discuss the implications of policies 13(1)(c) and (d) and 15(d) and (e). As applied, the "overall judgment" approach allows the possibility that developments having adverse effects on outstanding coastal landscapes will be permitted on a piecemeal basis, without a full assessment of the overall effect of the various developments on the outstanding areas within the region as a whole. At its most extreme, such an approach could result in there being few outstanding areas of the coastal environment left, at least in some regions.

[141] A number of objections have been raised to the interpretation of the NZCPS that we have accepted, which we now address. First, we acknowledge that the opening section of the NZCPS contains the following:

> [N]umbering of objectives and policies is solely for convenience and is not to be interpreted as an indication of relative importance.

But the statement is limited to the impact of numbering; it does not suggest that the differences in wording as between various objectives and policies are immaterial to the question of relative importance in particular contexts. Indeed, both the Board and the Judge effectively accepted that policies 13 and 15 did carry additional weight. Ms Gwyn and Mr Nolan each accepted that this was appropriate. The contested issue is, then, not whether policies 13 and 15 have greater weight than other policies in relevant contexts, but rather how much additional weight.

[142] Second, in the *New Zealand Rail* case, Grieg J expressed the view that pt 2 of the RMA should not be subjected to "strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used".[147] He went on to say that there is "a deliberate openness about the language, its meanings and its connotations which … is intended to allow the application of

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147 *New Zealand Rail Ltd*, above n 71, at 86.

policy in a general and broad way."[148] The same might be said of the NZCPS. The NZCPS is, of course, a statement of objectives and policies and, to that extent at least, does differ from an enactment. But the NZCPS is an important part of a carefully structured legislative scheme: Parliament required that there be such a policy statement, required that regional councils "give effect to" it in the regional coastal plans they were required to promulgate, and established processes for review of its implementation. The NZCPS underwent a thoroughgoing process of development; the language it uses does not have the same "openness" as the language of pt 2 and must be treated as having been carefully chosen. The interpretation of the NZCPS must be approached against this background. For example, if the intention was that the NZCPS would be essentially a statement of potentially relevant considerations, to be given varying weight in particular contexts based on the decision-maker's assessment, it is difficult to see how the statutory review mechanisms could sensibly work.

[143] The Minister might, of course, have said in the NZCPS that the objectives and policies contained in it are simply factors that regional councils and others must consider in appropriate contexts and give such weight as they think necessary. That is not, however, how the NZCPS is framed.

[144] Third, it is suggested that this approach to policies 13(1)(a) and 15(a) will make their reach over-broad. The argument is that, because the word "effect" is widely defined in s 3 of the RMA and that definition carries over to the NZCPS, any activity which has an adverse effect, no matter how minor or transitory, will have to be avoided in an outstanding area falling within policies 13 or 15. This, it is said, would be unworkable. We do not accept this.

[145] The definition of "effect" in s 3 is broad. It applies "unless the context otherwise requires". So the question becomes, what is meant by the words "avoid adverse effects" in policies 13(1)(a) and 15(a)? This must be assessed against the opening words of each policy. Taking policy 13 by way of example, its opening words are: "To preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development". Policy 13(1)(a)

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148 At 86.

("avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character") relates back to the overall policy stated in the opening words. It is improbable that it would be necessary to prohibit an activity that has a minor or transitory adverse effect in order to preserve the natural character of the coastal environment, even where that natural character is outstanding. Moreover, some uses or developments may enhance the natural character of an area.

[146] Finally, Ms Gwyn and Mr Nolan both submitted, in support of the views of the Board and the High Court, that to give effect to policies 13(1)(a) and 15(a) in accordance with their terms would be inconsistent with the purpose of the RMA. We do not accept that submission. As we have emphasised, s 5(2) of the RMA contemplates environmental preservation and protection as an element of sustainable management of natural and physical resources. This is reinforced by the terms of s 6(a) and (b). It is further reinforced by the provision of a "prohibited activity" classification in s 87A, albeit that it applies to documents lower in the hierarchy of planning documents than the NZCPS. It seems to us plain that the NZCPS contains policies that are intended to, and do, have binding effect, policy 29 being the most obvious example. Policies 13(1)(a) and 15(a) are clear in their terms: they seek to protect areas of the coastal environment with outstanding natural features from the adverse effects of development. As we see it, that falls squarely within the concept of sustainable management and there is no justification for reading down or otherwise undermining the clear terms in which those two policies have been expressed.

[147] We should make explicit a point that is implicit in what we have just said. In *New Zealand Rail*, Grieg J said:[149]

> The recognition and provision for the preservation of the natural character of the coastal environment in the words of s 6(a) is to achieve the purpose of the [RMA], that is to say to promote the sustainable management of natural and physical resources. That means that the preservation of natural character is subordinate to the primary purpose of the promotion of sustainable management. It is not an end or an objective on its own but is accessory to the principle purpose.

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149 At 85.

This passage may be interpreted in a way that does not accurately reflect the proper relationship between s 6, in particular ss 6(a) and (b), and s 5.

[148] At the risk of repetition, s 5(2) defines sustainable management in a way that makes it clear that protecting the environment from the adverse effects of use or development is an aspect of sustainable management – not the only aspect, of course, but an aspect. Through ss 6(a) and (b), those implementing the RMA are directed, "in relation to managing the use, development, and protection of natural and physical resources", to provide for the preservation of the natural character of the coastal environment and its protection, as well as the protection of outstanding natural features and landscapes, from inappropriate development, these being two of seven matters of national importance. They are directed to make such provision in the context of "achieving the purpose of [the RMA]". We see this language as underscoring the point that preservation and protection of the environment is an element of sustainable management of natural and physical resources. Sections 6(a) and (b) are intended to make it clear that those implementing the RMA must take steps to implement that protective element of sustainable management.

[149] Section 6 does not, we agree, give primacy to preservation or protection; it simply means that provision must be made for preservation and protection as part of the concept of sustainable management. The fact that ss 6(a) and (b) do not give primacy to preservation or protection within the concept of sustainable management does not mean, however, that a particular planning document may not give primacy to preservation or protection in particular circumstances. This is what policies 13(1)(a) and 15(a) in the NZCPS do. Those policies are, as we have interpreted them, entirely consistent with the principle of sustainable management as expressed in s 5(2) and elaborated in s 6.

Conclusion on first question

[150] To summarise, both the Board and Dobson J expressed the view that the "overall judgment" approach was necessary to make the RMA workable and to give effect to its purpose of sustainable management. Underlying this is the perception, emphasised by Grieg J in *New Zealand Rail*, that the Environment Court, a specialist

body, has been entrusted by Parliament to construe and apply the principles contained in pt 2 of the RMA, giving whatever weight to relevant principles that it considers appropriate in the particular case.[150] We agree that the definition of sustainable management in s 5(2) is general in nature, and that, standing alone, its application in particular contexts will often, perhaps generally, be uncertain and difficult. What is clear about the definition, however, is that environmental protection by way of avoiding the adverse effects of use or development falls within the concept of sustainable management and is a response legitimately available to those performing functions under the RMA in terms of pt 2.

[151] Section 5 was not intended to be an operative provision, in the sense that it is not a section under which particular planning decisions are made; rather, it sets out the RMA's overall objective. Reflecting the open-textured nature of pt 2, Parliament has provided for a hierarchy of planning documents the purpose of which is to flesh out the principles in s 5 and the remainder of pt 2 in a manner that is increasingly detailed both as to content and location. It is these documents that provide the basis for decision-making, even though pt 2 remains relevant. It does not follow from the statutory scheme that because pt 2 is open-textured, all or some of the planning documents that sit under it must be interpreted as being open-textured.

[152] The NZCPS is an instrument at the top of the hierarchy. It contains objectives and policies that, while necessarily generally worded, are intended to give substance to the principles in pt 2 in relation to the coastal environment. Those objectives and policies reflect considered choices that have been made on a variety of topics. As their wording indicates, particular policies leave those who must give effect to them greater or lesser flexibility or scope for choice. Given that environmental protection is an element of the concept of sustainable management, we consider that the Minister was fully entitled to require in the NZCPS that particular parts of the coastal environment be protected from the adverse effects of development. That is what she did in policies 13(1)(a) and 15(a), in relation to coastal areas with features designated as "outstanding". As we have said, no party challenged the validity of the NZCPS.

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150 At 86.

[153] The Board accepted that the proposed plan change in relation to Papatua at Port Gore would have significant adverse effects on an area of outstanding natural character and landscape, so that the directions in policies 13(1)(a) and 15(a) of the NZCPS would not be given effect to if the plan change were to be granted. Despite this, the Board granted the plan change. It considered that it was entitled, by reference to the principles in pt 2, to carry out a balancing of all relevant interests in order to reach a decision. We consider, however, that the Board was obliged to deal with the application in terms of the NZCPS. We accept the submission on behalf of EDS that, given the Board's findings in relation to policies 13(1)(a) and 15(a), the plan change should not have been granted. These are strongly worded directives in policies that have been carefully crafted and which have undergone an intensive process of evaluation and public consultation. The NZCPS requires a "whole of region" approach and recognises that, because the proportion of the coastal marine area under formal protection is small, management under the RMA is an important means by which the natural resources of the coastal marine area can be protected. The policies give effect to the protective element of sustainable management.

[154] Accordingly, we find that the plan change in relation to Papatua at Port Gore did not comply with s 67(3)(b) of the RMA in that it did not give effect to the NZCPS.

Second question: consideration of alternatives

[155] The second question on which leave was granted raises the question of alternatives. This Court's leave judgment identified the question as:[151]

> Was the Board obliged to consider alternative sites or methods when determining a private plan change that is located in, or results in significant adverse effects on, an outstanding natural landscape or feature or outstanding natural character area within the coastal environment?

The Court went on to say:[152]

> This question raises the correctness of the approach taken by the High Court in *Brown v Dunedin City Council* [2003] NZRMA 420 and whether, if sound, the present case should properly have been treated as an exception to

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151 *King Salmon* (Leave), above n 10, at [1].
152 At [1].

> the general approach. Whether any error in approach was material to the decision made will need to be addressed if necessary.

[156] At the hearing of the appeal, Mr Kirkpatrick suggested modifications to the question, so that it read:

> Was the Board obliged to consider alternative sites when determining a site specific plan change that is located in, or does not avoid significant adverse effects on, an outstanding natural landscape or feature or outstanding natural character area within the coastal environment?

We will address the question in that form.

[157] We should make a preliminary point. We have concluded that the Board, having found that the proposed salmon farm at Papatua would have had significant adverse effects on the area's outstanding natural attributes, should have declined King Salmon's application in accordance with policies 13(1)(a) and 15(a) of the NZCPS. Accordingly, no consideration of alternatives would have been necessary. Moreover, although it did not consider that it was legally obliged to do so, the Board did in fact consider alternatives in some detail.[153] For these reasons, the second question is of reduced significance in the present case. Nevertheless, because it was fully argued, we will address it, albeit briefly.

[158] Section 32 is important in this context. Although we have referred to it previously, we set out the relevant portions of it for ease of reference:

> **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—
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> …
>
> (b) the Minister of Conservation, for the New Zealand coastal policy statement; or
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> …
>
> (2) A further evaluation must also be made by—

[153] *King Salmon* (Board), above n 6, at [121]–[172].

(a) a local authority before making a decision under clause 10 or clause 29(4) of Schedule 1; and

(b) the relevant Minister before issuing a national policy statement or New Zealand coastal policy statement.

(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 (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.

…

[159] A number of those who made submissions to the Board on King Salmon's plan change application raised the issue of alternatives to the plan changes sought, for example, conversion of mussel farms to salmon farms and expansion of King Salmon's existing farms. As we have said, despite its view that it was not legally obliged to do so, the Board did consider the various alternatives raised and concluded that none was suitable.

[160] The Board noted that it has been held consistently that there is no requirement for consideration of alternatives when dealing with a site specific plan change application.[154] The Board cited, as the principal authority for this proposition, the decision of the High Court in *Brown v Dunedin City Council*.[155] Mr Brown owned some land on the outskirts of Mosgiel that was zoned as "rural". He sought to have the zoning changed to residential. The matter came before the Environment Court on a reference. Mr Brown was unsuccessful in his application

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154 At [124].

155 *Brown v Dunedin City Council* [2003] NZRMA 420 (HC).

and appealed to the High Court, on the basis that the Environment Court had committed a number of errors of law, one of which was that it had allowed itself to be influenced by the potential of alternative sites to accommodate residential expansion. Chisholm J upheld this ground of appeal. Having discussed several decisions of the Environment Court, the Judge said:

> [16] I am satisfied that the theme running through the Environment Court decisions is legally correct: s 32(1) does not contemplate that determination of a site-specific proposed plan change will involve a comparison with alternative sites. As indicated in *Hodge*,[156] when the wording of s 32(1)(a)(ii) (and, it might be added, the expression "principal alternative means" in s 32(1)(b)) is compared with the wording of s 171(1)(a) and clause 1(b) of the Fourth Schedule it appears that such a comparison was not contemplated by Parliament. It is also logical that the assessment should be confined to the subject site. Other sites would not be before the Court and the Court would not have the ability to control the zoning of those sites. Under those circumstances it would be unrealistic and unfair to expect those supporting a site-specific plan change to undertake the mammoth task of eliminating all other potential alternative sites within the district. In this respect a site specific plan change can be contrasted with a full district-wide review of a plan pursuant to s 79(2) of the [RMA]. It might be added that in a situation where for some reason a comparison with alternative sites is unavoidable the Court might have to utilise the powers conferred by s 293 of the [RMA] so that other interested parties have an opportunity to be heard. However, it is unnecessary to determine that point.
>
> [17] It should not be implied from the foregoing that the Court is constrained in its ability to assess the effects of a proposed plan change on other properties, or on the district as a whole, in terms of the [RMA]. Such an assessment involves consideration of effects radiating from the existing or proposed zoning (or something in between) of the subject site. This is, of course, well removed from a comparison of alternative sites.

(Chisholm J's observations were directed at s 32 as it was prior to its repeal and replacement by the version at issue in this appeal, which has, in turn, been repealed and replaced.)

[161] The Board also noted the observation of the Environment Court in *Director-General of Conservation (Nelson-Marlborough Conservancy) v Marlborough District Council*:[157]

> It seems to us that whether alternatives should be considered depends firstly on a finding of fact as to whether or not there are significant adverse effects on the environment. If there are significant adverse effects on the

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156 *Hodge v Christchurch City Council* [1996] NZRMA 127 (PT) (citation added).

157 *Director-General of Conservation (Nelson-Marlborough Conservancy) v Marlborough District Council* [2010] NZEnvC 403 at [690] (quoted in *King Salmon* (Board), above n 6, at [126]).

> environment, particularly if they involve matters of national importance, it is a question of fact in each case as to whether or not an applicant should be required to look at alternatives, and the extent to which such an enquiry, including the undertaking of a cost/benefit analysis, should be carried out.

[162] In the High Court Dobson J held that the Board did not commit an error of law in rejecting a requirement to consider alternative locations.[158] The Judge adopted the approach taken by the Full Court of the High Court in *Meridian Energy Ltd v Central Otago District Council*.[159] There, in a resource consent context, the Court contrasted the absence of a specific requirement to consider alternatives with express requirements for such consideration elsewhere in the RMA.[160] The Court accepted that alternatives could be looked at, but rejected the proposition that they must be looked at.[161] Referring to *Brown*, Dobson J said:[162]

> Although the context is relevantly different from that in *Brown*, the same practical concerns arise in imposing an obligation on an applicant for a plan change to canvass all alternative locations. 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.

[163] For EDS, Mr Kirkpatrick's essential point was that, in a case such as the present, it is mandatory to consider alternatives. He submitted that the terms of policies 13(1)(a) and 15(a) required consideration of alternatives in circumstances where the proposed development will have an adverse effect on an area of the coastal environment with outstanding natural attributes. Given that these policies appear alongside policy 8, the Board's obligation was to consider alternative sites in order to determine whether, if it granted the plan change sought, it would "give effect to" the NZCPS. Further, Mr Kirkpatrick argued that *Brown* had been interpreted too widely. He noted in particular the different context – *Brown* concerned a landowner seeking a zoning change in respect of his own land; the present case involves an application for a plan change that will result in the exclusive use of a resource that is in the public domain. Mr Kirkpatrick emphasised that, in considering the plan change, the

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158 *King Salmon* (HC), above n 2, at [174].
159 *Meridian Energy Ltd v Central Otago District Council* [2011] 1 NZLR 482 (HC).
160 At [77]–[81].
161 At [86]–[87].
162 *King Salmon* (HC), above n 2, at [171].

Board had to comply with s 32. That, he argued, required that the Board consider the "efficiency and effectiveness" of the proposed plan change, its benefits and costs and the risk of acting or not acting in conditions of uncertainty. He emphasised that, although this was an application in relation to a particular locality, it engaged the Sounds Plan as a whole.

[164] In response, Mr Nolan argued that s 32 should not be read as requiring consideration of alternative sites. He supported the findings of the Board and the High Court that there was no mandatory requirement to consider alternative *sites*, as opposed to alternative *methods*, which were the focus of s 32: that is, whether the proposed provisions were the most appropriate way to achieve the RMA's purpose. He relied on the *Meridian Energy* case. Mr Nolan accepted that there is nothing to preclude consideration of an alternative raised in the context of an application for a private plan change but said it was not a mandatory requirement. He noted that the decision in *Brown* has been widely adopted and applied and submitted that the distinction drawn by Mr Kirkpatrick between the use of private land and the use of public space for private purposes was unsustainable: s 32 applied equally in both situations. Mr Nolan submitted that to require applicants for a plan change such as that at issue to canvass all possible alternatives would impose too high a burden on them. In an application for a site-specific plan change, the focus should be on the merits of the proposed planning provisions for that site and whether they satisfy s 32 and achieve the RMA's purpose. Mr Nolan noted that there was nothing in policies 13 or 15 which required the consideration of alternative sites.

[165] We do not propose to address these arguments in detail, given the issue of alternatives has reduced significance in this case. Rather, we will make three points.

[166] First, as we have said, Mr Nolan submitted that consideration of alternative sites on a plan change application was not required but neither was it precluded. As he neatly put it, consideration of alternative sites was permissible but not mandatory. But that raises the question, when is consideration of alternative sites permissible? The answer cannot depend simply on the inclination of the decision-maker: such an approach would be unprincipled and would undermine rational decision-making. If consideration of alternatives is permissible, there must surely be something about the

circumstances of particular cases that make it so. Indeed, those circumstances may make consideration of alternatives not simply permissible but necessary. Mr Kirkpatrick submitted that what made consideration of alternatives necessary in this case was the Board's conclusion that the proposed salmon farm would have significant adverse effects on an area of outstanding natural character and landscape.

[167] Second, *Brown* concerned an application for a zoning change in relation to the applicant's own land. We agree with Chisholm J that the RMA does not *require* consideration of alternative sites as a matter of course in that context, and accept also that the practical difficulties which the Judge identified are real. However, we note that the Judge accepted that there may be instances where a consideration of alternative sites was required and suggested a way in which that might be dealt with.[163]

[168] We agree with Chisholm J that there may be instances where a decision-maker must consider the possibility of alternative sites when determining a plan change application in relation to the applicant's own land. We note that where a person requests a change to a district or regional plan, the relevant local authority may (if the request warrants it) require the applicant to provide "further information necessary to enable the local authority to better understand … the benefits and costs, the efficiency and effectiveness, and *any possible alternatives to the request*".[164] The words "alternatives to the request" refer to alternatives to the plan change sought, which must bring into play the issue of alternative sites. The ability to seek further information on alternatives to the requested change is understandable, given the requirement for a "whole of region" perspective in plans. At the very least, the ability of a local authority to require provision of this information supports the view that consideration of alternative sites may be relevant to the determination of a plan change application.

[169] Third, we agree with Mr Kirkpatrick that the question of alternative sites may have even greater relevance where an application for a plan change involves not the use of the applicant's own land, but the use of part of the public domain for a private

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163 *Brown v Dunedin City Council*, above n 155, at [16].
164 RMA, sch 1 cl 23(1)(c) (emphasis added).

commercial purpose, as here. It is true, as Mr Nolan argued, that the focus of s 32 is on the appropriateness of policies, methods or rules – the section does not mention individual sites. That said, an evaluation under s 32(3)(b) must address whether the policies, methods or rules proposed are the "most appropriate" way of achieving the relevant objectives, which requires consideration of alternative policies, methods or rules in relation to the particular site. Further, the fact that a local authority receiving an application for a plan change may require the applicant to provide further information concerning "any possible alternatives to the request" indicates that Parliament considered that alternative sites may be relevant to the local authority's determination of the application. We do not accept that the phrase "any possible alternatives to the request" refers simply to alternative outcomes of the application, that is, granting it, granting it on terms or refusing it.

[170] This brings us back to the question when consideration of alternative sites may be necessary. This will be determined by the nature and circumstances of the particular site-specific plan change application. For example, an applicant may claim that that a particular activity needs to occur in part of the coastal environment. If that activity would adversely affect the preservation of natural character in the coastal environment, the decision-maker ought to consider whether the activity does in fact need to occur in the coastal environment. Almost inevitably, this will involve the consideration of alternative localities. Similarly, even where it is clear that an activity must occur in the coastal environment, if the applicant claims that a particular site has features that make it uniquely, or even especially, suitable for the activity, the decision-maker will be obliged to test that claim; that may well involve consideration of alternative sites, particularly where the decision-maker considers that the activity will have significant adverse effects on the natural attributes of the proposed site. In short, the need to consider alternatives will be determined by the nature and circumstances of the particular application relating to the coastal environment, and the justifications advanced in support of it, as Mr Nolan went some way to accepting in oral argument.

[171] Also relevant in the context of a site specific plan change application such as the present is the requirement of the NZCPS that regional councils take a regional approach to planning. While, as Mr Nolan submitted, a site-specific application

focuses on the suitability of the planning provisions for the proposed site, the site will sit within a region, in respect of which there must be a regional coastal plan. Because that regional coastal plan must reflect a regional perspective, the decision-maker must have regard to that regional perspective when determining a site-specific plan change application. That may, at least in some instances, require some consideration of alternative sites.

[172] We see the obligation to consider alternative sites in these situations as arising at least as much from the requirements of the NZCPS and of sound decision-making as from s 32.

[173] Dobson J considered that imposing an obligation on all site-specific plan change applicants to canvass all alternative locations raised the same practical concerns as were canvassed by Chisholm J in *Brown*.[165] We accept that. But given that the need to consider alternative sites is not an invariable requirement but rather a contextual one, we do not consider that this will create an undue burden for applicants. The need for consideration of alternatives will arise from the nature and circumstances of the application and the reasons advanced in support of it. Particularly where the applicant for the plan change is seeking exclusive use of a public resource for private gain and the proposed use will have significant adverse effects on the natural attributes of the relevant coastal area, this does not seem an unfairly onerous requirement.

Decision

[174] The appeal is allowed. The plan change in relation to Papatua at Port Gore did not comply with s 67(3)(b) of the Resource Management Act 1991 as it did not give effect to policies 13(1)(a) and 15(a) of the New Zealand Coastal Policy Statement. If the parties are unable to agree as to costs, they may file memoranda on or before 2 June 2014.

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[165] *King Salmon* (HC), above n 2, at [171].

WILLIAM YOUNG J

A preliminary comment

[175] The plan change to permit the Papatua salmon farm in Port Gore would permit activities with adverse effects on (a) "areas of the coastal environment with outstanding natural character" and (b) "outstanding natural features and outstanding natural landscapes in the coastal environment" (to which, for ease of discussion, I will refer collectively as "areas of outstanding natural character"). The majority conclude that the protection of areas of outstanding natural character from adverse effects is an "environmental bottom line" by reason of the New Zealand Coastal Policy Statement (NZCPS)[166] to which the Board of Inquiry was required to give effect under s 67(3)(b) of the Resource Management Act 1991. For this reason, the majority is of the view that the plan change should have been refused.

[176] I do not agree with this approach and for this reason disagree with the conclusion of the majority on the first of the two issues identified in their reasons.[167] As to the second issue, I agree with the approach of the majority[168] to *Brown v Dunedin City Council*[169] but, as I am in dissent, see no point in further analysis of the Board's decision as to what consideration was given to alternative sites. I will, however, explain, as briefly as possible, why I differ from the majority on the first issue.

The majority's approach on the first issue – in summary

[177] Section 6(a) and (b) of the Resource Management Act 1991 provide:

> **6 Matters of national importance**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:

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166 Department of Conversation *New Zealand Coastal Policy Statement 2010* (issued by notice in the New Zealand Gazette on 4 November 2010 and taking effect on 3 December 2010) [NZCPS].

167 At [17] of the majority's reasons.

168 At [165]–[173] of the majority's reasons.

169 *Brown v Dunedin City Council* [2003] NZRMA 420 (HC).

(a) the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate … use, and development:

(b) the protection of outstanding natural features and landscapes from inappropriate … use, and development:

…

The majority consider that these subsections, and particularly s 6(b), contemplate planning on the basis that a "use" or "development" which has adverse effects on areas of outstanding natural character is, for that reason alone, "inappropriate". They are also of the view that this is the effect of the NZCPS given policies 13 and 15 which provide:

13 Preservation of natural character

(1) To preserve the natural character of the coastal environment and to protect it from inappropriate … use, and development:

(a) avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character; and

(b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on natural character in all other areas of the coastal environment;

…

15 Natural features and natural landscapes

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

(a) avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment; and

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

…

[178] The majority interpret policies 13 and 15 as requiring regional and territorial authorities to prevent, by specifying as prohibited, any activities which will have adverse effects on areas of outstanding natural character. Section 67(3)(b) of the

RMA thus requires salmon farming to be a prohibited activity in Port Gore with the result that the requested plan change ought to have been refused.

Section 6(a) and (b)

[179] As a matter of logic, areas of outstanding natural character do not require protection from activities which will have no adverse effects. To put this in a different way, the drafting of ss 6(a) and (b) seems to me to leave open the possibility that a use or development might be appropriate despite having adverse effects on areas of outstanding natural character.

[180] Whether a particular use is "inappropriate" or, alternatively, "appropriate" for the purposes of ss 6(a) and (b) may be considered in light of the purpose of the RMA. and thus in terms of s 5. It thus follows that the NZCPS must have been prepared so as to be consistent with, and give effect to, s 5. For this reason, I consider that those charged with the interpretation or application of the NZCPS are entitled to have regard to s 5.

The meaning of the NZCPS

Section 58 of the Resource Management Act

[181] Section 58 of the RMA provides for the contents of New Zealand coastal policy statements:

> **58 Contents of New Zealand coastal policy statements**
>
> A New Zealand coastal policy statement may state objectives and policies about any 1 or more of the following matters:
>
> (a) national priorities for the preservation of the natural character of the coastal environment of New Zealand, including protection from inappropriate … use, and development:
>
> …
>
> (c) activities involving the … use, or development of areas of the coastal environment:
>
> …
>
> (e) the matters to be included in 1 or more regional coastal plans in regard to the preservation of the natural character of the coastal

> environment, including the activities that are required to be specified as restricted coastal activities because the activities—
>
> (i) have or are likely to have significant or irreversible adverse effects on the coastal marine area; or
>
> (ii) relate to areas in the coastal marine area that have significant conservation value:
>
> …

[182] I acknowledge that a "policy" may be narrow and inflexible (as the Court of Appeal held in *Auckland Regional Council v North Shore City Council*[170]) and I thus agree with the conclusion of the majority that a policy may have such a controlling effect on the content of regional plans as to make it a rule "in ordinary speech".[171] Most particularly, I accept that policies stipulated under s 58(e) may have the character of rules.

[183] Under s 58(e), the NZCPS might have stipulated what was required to be included in a regional coastal plan to preserve the natural character of the coastal environment. The example given in the subsection is confined to the specification of activities as restricted coastal activities. This leaves me with at least a doubt as to whether s 58, read as a whole, contemplates policies which require particular activities to be specified as prohibited. I am, however, prepared to assume for present purposes that s 58, and in particular s 58(e), might authorise a policy which required that activities with adverse effects on areas of outstanding natural character be specified as prohibited.

[184] As it happens, the Minister of Conservation made use of s 58(e) but only in a negative sense, as policy 29(1) of the NZCPS provides that the Minister:

> … does not require any activity to be specified as a restricted coastal activity in a regional coastal plan.

[185] Given this explicit statement, it seems plausible to assume that if the Minister's purpose was that some activities (namely those with adverse effects on areas of outstanding natural character) were to be specified as prohibited, this would

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170 *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18 (CA).
171 At [116] of the majority's reasons.

have been "specified" in a similarly explicit way. At the very least, policy 29 makes it clear that the Minister was not relying on s 58(e) to impose such a requirement. I see this as important. Putting myself in the shoes of a Minister who wished to ensure that some activities were to be specified in regional plans as prohibited, I would have attempted to do so under the s 58(e) requiring power rather than in the form of generally stated policies.

The scheme of the NZCPS

[186] Objective 2 of the NZCPS is material to the preservation of the coastal environment. It is relevantly in these terms:

> To preserve the natural character of the coastal environment and protect natural features and landscape values through:
>
> …
>
> - identifying those areas where various forms of … use, and development would be inappropriate and protecting them from such activities; and
>
> …

[187] It is implicit in this language that the identification of the areas in question is for regional councils. I think it is also implicit, but still very clear, that the identification of the "forms of … use, and development" which are inappropriate is also for regional councils.

[188] To the same effect is policy 7:

> **7 Strategic planning**
>
> (1) In preparing regional policy statements, and plans:
>
> …
>
> (b) identify areas of the coastal environment where particular activities and forms of … use, and development:
>
> (i) are inappropriate; and
>
> (ii) may be inappropriate without the consideration of effects through a resource consent application, notice of requirement for designation or Schedule 1 of the [RMA] process;

> and provide protection from inappropriate … use, and development in these areas through objectives, policies and rules.
>
> …

It is again clear – but this time as a result of explicit language – that it is for regional councils to decide as to both (a) the relevant areas of the coastal environment and (b) what "forms of … use, and development" are inappropriate in such areas. There is no suggestion in this language that such determinations have in any way been pre-determined by the NZCPS.

[189] The majority consider that all activities with adverse effects on areas of outstanding natural character must be prevented. Since there is no reason for concern about activities with no adverse effects, the NZCPS, on the majority approach, has pre-empted the exercise of the function which it, by policy 7, has required regional councils to perform. Decisions as to areas of the coastal environment which require protection should be made by the same body as determines the particular "forms of … use, and development" which are inappropriate in such areas. On the majority approach, decisions in the first category are made by regional councils whereas decisions as to the latter have already been made in the NZCPS. This result is too incoherent to be plausibly within the purpose of the NZCPS.

[190] The point I have just made is reinforced by a consideration of the NZCPS's development-focused objectives and policies.

[191] Objective 6 of the NZCPS provides:

> **Objective 6**
>
> To enable people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through … use, and development, recognising that:
>
> - the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits;
>
> - some uses and developments which depend upon the use of natural and physical resources in the coastal environment are important to

the social, economic and cultural wellbeing of people and communities;

- functionally some uses and developments can only be located on the coast or in the coastal marine area;

…

- the protection of habitats of living marine resources contributes to the social, economic and cultural wellbeing of people and communities;

…

- the proportion of the coastal marine area under any formal protection is small and therefore management under the [RMA] is an important means by which the natural resources of the coastal marine area can be protected; and

…

[192] Policy 8 provides:

Aquaculture

Recognise the significant existing and potential contribution of aquaculture to the social, economic and cultural well-being of people and communities by:

(a) including in regional policy statements and regional coastal plans provision for aquaculture activities in appropriate places in the coastal environment, recognising that relevant considerations may include:

(i) the need for high water quality for aquaculture activities; and

(ii) the need for land-based facilities associated with marine farming;

(b) taking account of the social and economic benefits of aquaculture, including any available assessments of national and regional economic benefits; and

(c) ensuring that development in the coastal environment does not make water quality unfit for aquaculture activities in areas approved for that purpose.

[193] Policy 8 gives effect to objective 6, just as policies 13 and 15 give effect to objective 2. There is no suggestion in the NZCPS that objective 2 is to take precedence over objective 6, and there is likewise no indication that policies 13 and 15 take precedence over policy 8. Viewed solely through the lens of policy 8

and on the findings of the Board, Port Gore is an appropriate location for a salmon farm. On the other hand, viewed solely through the lens of policies 13 and 15, it is inappropriate. On the approach of the majority, the standards for determining what is "appropriate" under policy 8 are not the same as those applicable to determining what is "inappropriate" in policies 13 and 15.[172]

[194] I disagree with this approach. The concept of "inappropriate … use [or] development" in the NZCPS is taken directly from ss 6(a) and (b) of the RMA. The concept of a "use" or "development" which is or may be "appropriate" is necessarily implicit in those subsections. There was no point in the NZCPS providing that certain uses or developments would be "appropriate" other than to signify that such developments might therefore not be "inappropriate" for the purposes of other policies. So I simply do not accept that there is one standard for determining whether aquaculture is "appropriate" for the purposes of policy 8 and another standard for determining whether it is "inappropriate" for the purposes of policies 13 and 15. Rather, I prefer to resolve the apparent tension between policy 8 and policies 13 and 15 on the basis of a single concept – informed by the NZCPS as a whole and construed generally in light of ss 6(a) and (b) and also s 5 – of what is appropriate and inappropriate. On the basis of this approach, the approval of the salmon farm turned on whether it was appropriate (or not inappropriate) having regard to policies 8, 13 and 15 of the NZCPS, with ss 5 and 6(a) and (b) of the RMA being material to the interpretation and application of those policies.

[195] I accept that this approach requires policies 13 and 15 to be construed by reading into the first two bullets points of each policy the word "such" to make it clear that the polices are directed to the adverse effects of "inappropriate … use, and development". By way of illustration, I consider that policy 13 should be construed as if it provided:

> **13 Preservation of natural character**
>
> (1) To preserve the natural character of the coastal environment and to protect it from inappropriate … use, and development:

[172] At [98]–[105] of the majority's reasons.

> (a) avoid adverse effects of *such* activities on natural character in areas of the coastal environment with outstanding natural character; and
>
> (b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of *such* activities on natural character in all other areas of the coastal environment; …

[196] The necessity to add words in this way shows that my interpretation of the policies is not literal. That said, I do not think it is difficult to construe these policies on the basis that given the stated purpose – protection from "inappropriate … use, and development" – what follows should read as confined to activities which are associated with "inappropriate … use, and development". Otherwise, the policies would go beyond their purpose.

[197] The majority avoid the problem of the policies going beyond their purpose by concluding that any use or development which would produce adverse effects on areas of outstanding natural character is, for this reason, "inappropriate". That, however, is not spelt out explicitly in the policies. As I have noted, if it was the purpose of the Minister to require that activities with such effects be specified as prohibited, that would have been provided for directly and pursuant to s 58(e). So I do not see their approach as entirely literal either (because it assumes a determination that adverse effects equates to "inappropriate", which is not explicit). It is also inconsistent with the scheme of the NZCPS under which decisions as to what is "appropriate" or "inappropriate" in particular cases (that is, by reference to specific locations and activities) is left to regional councils. The approach taken throughout the relevant objectives and policies of the NZCPS is one of shaping regional coastal plans but not dictating their content.

[198] We are dealing with a policy statement and not an ordinary legislative instrument. There seems to me to be flexibility given that (a) the requirement is to "give effect" to the NZCPS rather than individual policies, (b) the language of the policies, which require certain effects to be avoided and not prohibited,[173] and (c) the context provided by policy 8. Against this background, I think it is wrong to

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[173] Compare the discussion and cases cited in [92]–[97] of the majority's reasons.

construe the NZCPS and, more particularly, certain of its policies, with the rigour customary in respect of statutory interpretation.

Overbroad consequences

[199] I think it is useful to consider the consequences of the majority's approach, which I see as overbroad.

[200] "Adverse effects" and "effects" are not defined in the NZCPS save by general reference to the RMA definitions.[174] This plainly incorporates into the NZCPS the definition in s 3 of the RMA:

> **3 Meaning of effect**
>
> In this Act, unless the context otherwise requires, the term **effect** includes—
>
> (a) any positive or adverse effect; and
>
> (b) any temporary or permanent effect; and
>
> (c) any past, present, or future effect; and
>
> (d) any cumulative effect which arises over time or in combination with other effects—
>
> regardless of the scale, intensity, duration, or frequency of the effect, and also includes—
>
> (e) any potential effect of high probability; and
>
> (f) any potential effect of low probability which has a high potential impact.

[201] On the basis that the s 3 definition applies, I consider that a corollary of the approach of the majority is that regional councils must promulgate rules which specify as prohibited any activities having any perceptible adverse effect, even temporary, on areas of outstanding natural character. I think that this would preclude some navigation aids and it would impose severe restrictions on privately-owned land in areas of outstanding natural character. It would also have the potential generally to be entirely disproportionate in its operation as any perceptible adverse effect would be controlling irrespective of whatever benefits, public or private, there

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[174] The NZCPS, above n 166, at 8 records that "[d]efinitions contained in the Act are not repeated in the Glossary".

might be if an activity were permitted. I see these consequences as being so broad as to render implausible the construction of policies 13 and 15 proposed by the majority.

[202] The majority suggest that such consequences can be avoided.[175] They point out that the s 3 definition of "effect" does not apply if the context otherwise requires. They also, rather as I have done, suggest that the literal words in which the policies are expressed can be read down in light of the purposes stated in each policy (in essence to the protection of areas of outstanding natural character). There is the suggestion of a de minimis approach. They also point out that a development might enhance an area of outstanding character (presumably contemplating that beneficial effects might outweigh any adverse effects).

[203] I would like to think that a sensible approach will be taken to the future application of the NZCPS in light of the conclusions of the majority as to the meaning of policies 13 and 15 and I accept that for reasons of pragmatism, such an approach might be founded on reasoning of the kind provided by the majority. But I confess to finding it not very convincing. In particular:

(a) I think it clear that the NZCPS uses "effects" in its s 3 sense.

(b) While I agree that the policies should be read down so as not to go beyond their purposes,[176] I think it important to recognise that those purposes are confined to protection only from "inappropriate" uses or developments.

(c) Finally, given the breadth of the s 3 definition and the distinction it draws between "positive" and "adverse" effects, I do not see much scope for either a de minimis approach or a balancing of positive and adverse effects.

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[175] At [144] of the majority's reasons.
[176] See above at [195].

My conclusion as to the first issue

[204] On my approach, policies 13 and 15 on the one hand and policy 8 on the other are not inconsistent. Rather, they required an assessment as to whether a salmon farm at Papatua was appropriate. Such assessment required the Board to take into account and balance the conflicting considerations – in other words, to form a broad judgment. A decision that the salmon farm at Papatua was appropriate was not inconsistent with policies 13 and 15 as I construe them and, on this basis, the s 67(3)(b) requirement to give effect to the NZCPS was not infringed.

[205] This approach is not precisely the same as that adopted by the Board. It is, however, sufficiently close for me to be content with the overall judgment of the Board on this issue.

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