BEFORE THE ENVIRONMENT COURT

Decision No. [2014] NZEnvC 260

IN THE MATTER	of an appeal under Section 120 of the Resource Management Act 1991 (**the Act**)
BETWEEN	MAN O' WAR STATION LTD (ENV-2009-AKL-000176)
	AUCKLAND COUNCIL (formerly AUCKLAND CITY COUNCIL) (ENV-2009-AKL-000187)
	Appellants
AND	AUCKLAND COUNCIL (formerly AUCKLAND REGIONAL COUNCIL)
	Respondent

Decision:	Issued on the papers
Court:	Principal Environment Judge LJ Newhook Environment Commissioner R M Dunlop Environment Commissioner K Prime
Counsel:	MJE Williams for Man O'War Station Limited J A Burns for Auckland Council

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FINAL DECISION OF THE ENVIRONMENT COURT GRANTING CONSENT SUBJECT TO CONDITIONS

A. The resource consent it granted, subject to the conditions attached to this decision and marked "A", together with the plans attached as B, C, D1, D2, and E.

B. The appeal is otherwise dismissed.

C. Any application for costs is to be filed with the Court within 20 working days of the date of this decision. Any response is to be filed within 15 working days following that and any final reply filed within 10 working days thereafter.

REASONS FOR DECISION

Introduction

[1] On 30 September 2013 this Court issued an "Interim Decision of Environment Court Indicating Consent to Construction of a Small Dwelling after Reference Back from the High Court Concerning a Larger Proposal".[1] This decision was issued after a long and complex history which included an original decision[2], High Court appeal[3], an interlocutory decision regarding the extent of matters remitted to this Court and the effect of the substantial changes to the proposal sought since that decision was issued,[4] and then the rehearing itself, which produced the interim decision. In that decision this Court described the task before it as:[5]

> ...an exercise of reconsidering the two matters referred back to us by the High Court, and weighing them with the few remaining relevant factors from the first hearing. Notably, the proposal has been altered very significantly (substantially reduced in terms of its effects on the environment and the way in which it must be assessed having regard to relevant statutory instruments)...

[2] In considering the revised proposal in light of the High Court decision and the changes made to it since the original decision was made, we determined the following:[6]

> "[The] proposal would meet the purpose of the Act when the following relatively minor matters are tidied up to the satisfaction of the Court:

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[1] Man O War Station & Auckland Council (formerly Auckland City Council) v Auckland Council (formerly Auckland Regional Council) [2013] NZEnvC 233.
[2] Man O 'War Station Limited v Auckland Regional Council & Anor, [2010] NZEnvC248.
[3] Man O 'War Station Limited v Auckland Regional Council, HC AK CIV -2010-404-005288 (11 May 2011) Venning J.
[4] Man O 'War Station Limited & Anor v Aucklal1d Council, [2012] NZEnvC 084.
[5] Man O War Station & Auckland Council (formerly Auckland City Council) v Auckland Council (formerly Auckland Regional Council) , above n 1, at [53].
[6] Man O War Station & Auckland Council (formerly Auckland City Council) v Auckland Council (formerly Auckland Regional Council) , above n 1, at [61]

a. "... Attachment 1: Appendix 2 requires amendment to include the outdoor utility storage area described .... Further, we consider that it would be desirable for there to be a condition that recreational equipment, domestic appurtenances, and possibly some types of vehicles when not in active use, be stored in the area to avoid or mitigate adverse cumulative visual effects.

b. "... Attachment 5: Condition (1), the Application Materials/Plans second bullet, cites a landscape and visual assessment prepared by Ms Gilbert ... more particularly, Appendix 1 "Landscaping Plan" and Appendix 2 "Restoration, Implementation, Maintenance and Management Plan". The landscape and visual assessment is Attachment 1: Appendix 4, but does not appear to contain an Appendix 1 (and there is no reference to one in the Contents list). Appendix 2 at pl04 and following does not appear to contain plans illustrating the extent of re-vegetation planting described in Section 2. These should be supplied and found acceptable by us, and referred to in conditions.

c. "Attachment 5: Condition (1) - Application Materials/Plans 11th bullet, cites the Westergaard Gill revised plans at Attachment: Appendix 2. The condition appears to omit elevation drawing A-CD-12 8/8/12 in Appendix 2 from the 11th bullet and to omit the listed bridge section drawing from Appendix 2.

d. "Appendix 5: Condition (1) - Application Materials/Plans 12th bullet, cites a GWE drawing dated 24.10.12 which postdates the GWE Wastewater Assessment in Attachment 1: Appendix 8. The latter has a drawing GWE-OI dated 3/9/12 at p270 that shows a proposed primary disposal area. Is the reference to Condition 1 accurate? Might the 12th bullet be better juxtaposed with the seventh bullet on the same subject?

e. "Attachment 5: Condition (19)(ii) - Desirably there should be quantified metrics for the transparency and reflectivity of the glass. The metrics referred to are "visible light transmission" and "visible light reflection" respectively. Low transmission and reflectivity ratings should be aimed for.

f. "Mr Clough, at para 31 of his evidence-in-chief commented on proposed consent conditions about protection of an area of intact midden, to be secured by temporary fencing for the whole of the beachfront area shown in his Attachment 1: Figure 3 at p439. We do not consider that any of the archaeology conditions 9, 10, and 16-18, have this effect unless achieved indirectly through the Archaeological Investigation and Monitoring Plan (February 2013) and related NZHPT Authority required by Condition 9 (and now obtained). Clarification if needed. Proposed Condition 10 appears to require protection of a markedly smaller area during construction (refer Attachment 1: Appendix 6: Figure 8, which is a photograph with extent of site not delineated - p 166).

g. "NZCPS Policy 11(a)(i) might be potentially relevant to the possible presence of dotterels. A condition would appear desirable, rather than the simple Advice Note 7, noting that Condition 3 appears to apply only to the pre-development phase. Signs to alert visitors to the bach as they arrive at the beach, and members of the public landing on shore from boats, would appear to be desirable."

[3] The parties then consulted and made changes to the conditions to address the Court's concerns. These changes were presented to the Court, along with a joint memorandum in support, on 10 October 2013. From the wording at paragraph 26 of that joint memorandum it was unclear as to whether or not these were intended to be absolute, but a subsequent memorandum dated 27 March 2014 confirmed that the draft conditions submitted last October represented the parties' final positions. A "clean" version of the conditions submitted by the parties last October is attached hereto and marked as Annexure **A**.

[4] Meanwhile, between November 2013 and April 2014, the Supreme Court undertook the hearing of an important appeal from a decision of the High Court in the notable "King Salmon" litigation originally heard by a Board of Inquiry. Of relevance in the present case, the Supreme Court decision[7] considered whether the long-standing "overall broad judgment" approach[8] was to prevail, or whether certain provisions of the 2010 NZ Coastal Policy Statement evidenced the presence of environmental bottom lines, and whether said provisions were considered to provide a veto. Of interest, our Interim Decision after Reference Back was discussed by the Supreme Court, along with numbers of other decisions of the Environment Court and higher Courts.

[5] While the Supreme Court discussed various passages of our Interim Decision in a manner from which it is possible to infer approval, there were no express findings one way or the other. We regret the time that it has taken to produce this decision, but we wished to deliberate carefully about two features of the present situation in particular, first as to whether the findings of the Supreme Court relating to the approach to be taken by decision-makers to proposed changes to Policy Statements and Plans, apply as well to resource consent activity under s104 RMA; secondly some phrases in landscape evidence on the reference back, noted with approval by us in our Interim Decision, needed to be re-considered in light of the Supreme Court decision.

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[7] Environmental Defence Society Inc v The New Zealand King Salmon Company Limited SC 82/2013; [2014] NZSC 38; [2014] NZRMA 195.

[8] Recorded as having derived from the often-cited High Court decision in *New Zealand Rail v Marlborough District Council* [1994] NZRMA 70.

[6] In light of the Supreme Court decision, a question that we had required the parties to address prior to issuing our Interim Decision, would appear to remain pertinent. That is:

> Whether as a matter of law, the NZCPS can take a harder line than the Act? Put another way, should the seemingly strong words in Policy 15(a) be qualified by way of an interpretive approach that reflects s6(b) RMA.

[7] We had concluded that the provisions of the NZCPS could be interpreted as taking a more stringent approach. In the context of a Plan Change, we infer approval for our approach in the Supreme Court's decision, with elements of Policies 13 and 15 being held to amount to something in the nature of a "bottom line." We note that in our Interim Decision we did, however, qualify our conclusion with a proviso "*as long as it is ultimately to achieve the purpose of the Act and is consistent with ss56-58A.* It would appear,[9] with some exceptions, the Supreme Court essentially found that the NZCPS is to be considered necessarily as being in accordance with Part 2.

[8] Another aspect of our Interim Decision to be considered by the Supreme Court was our finding that no one provision of the NZCPS can be read as imposing a "*veto.*" The Supreme Court appeared to accept our finding that there are tensions within Policies of the NZCPS in the sense of them pulling in different directions, but appears to have read down the extent of conflict, at least in the circumstances of the decision before it. In particular, it said:[10]

> 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 and 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.

And further:[11]

> Only if the conflict remains after 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 s5. As we have said, s5 should not be treated as the primary operative decision-making provision.

And again:[12]

[9] From paragraphs [85] and [88] of the Supreme Court decision
[10] At paragraph [129]
[11] At paragraph [130]
[12] At paragraph [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 over another, rather than making a thoroughgoing attempt to find a way to reconcile them...

[9] We turn now to consider the meaning of the word "avoid". Once again, we note that the Supreme Court specifically referred to our finding in the Interim Decision that the word "avoid" does not mean to "prohibit", possibly by inference, with approval. It discussed as well findings of another division of the Environment Court in ***Wairoa River Canal Partnership v Auckland Regional Council.***[13] The Supreme Court said:[14]

> Our concern is with the interpretation of "avoid" as it is used in s5(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 s5(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, "to 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 them from such activities."

[10] The Supreme Court then compared and contrasted the consequences of two alternative approaches to ensuring "prevent[ion of] occurrence" depending on whether an overall judgement approach is taken, or one involving environmental bottom lines.

[11] After extensive discussion it held[15] that while a policy in the NZCPS cannot be a "rule" as defined in the RMA, it might nevertheless have the effect of such in ordinary speech. The discussion proceeded with a heavy emphasis on provisions of the RMA about plan making, particularly s58. At the conclusion of its detailed discussion, the Supreme Court found comprehensively against the "overall judgement" approach.

[12] The Supreme Court then noted that in the ***NZ Rail*** case previously cited, the High Court had expressed the view that Part 2 of the RMA should not be subjected to "*strict rules and principles of statutory interpretation which aim to extract a precise and unique meaning from the words used*", stressing instead a "*deliberate openness about the language, its meanings and its connotations which... is intended to allow*

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[13] [2010] NZEnvC 309, [2010] 16ELRNZ 152.
[14] At paragraph [96]
[15] At paragraph [116]

the application of policy in a broad and general way". The Supreme Court held in contrast that the 2010 NZCPS had undergone a thoroughgoing process of development and that its language did not have the same openness as the language of Part 2.[16]

[13] It was apparently argued by counsel there in support of the "overall broad judgment approach," that to deny such would be to make the reach of Policies 13(1)(a) and 15(a) "over-broad." The argument was that, because the wide definition of "effect" in s3 RMA would carry over to the NZCPS, any activity with an adverse effect, no matter how minor or transitory, would have to be subject to complete avoidance. Taking account of the precise wording of Policies 13(1)(a) and (15)(a), the Supreme Court nevertheless held:[17]

> It is improbable that it would be necessary to prohibit any 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 development may enhance the natural character of an area.

[14] We consider that the passage just quoted is of importance. It has caused us to reconsider certain findings in our Interim Decision, and the evidence on which they were based, to ascertain whether we should resile from the findings.

[15] Having conducted that exercise, we have decided that we need not embark on a careful inquiry as to whether the decision of the Supreme Court applies in consideration of applications under s104, first because an answer in the present case is presented in another way, and secondly because it does not seem appropriate to attempt to answer such legal question where argument has been brief at best, and the decision is being made "on the papers."

[16] The following are our reasons.

[17] The re-examination of findings in our Interim Decision has been to see whether they might fit within the evidently narrow compass of "minor or transitory adverse effects."

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[16] It is not apparent to us whether it was argued before the Supreme Court that the NZCPS should be considered as having been promulgated in light of the long-standing "overall broad judgement" approach originally ordained in ***NZ Rail***, but it is not necessary for us to consider the point further as we are bound by the findings of the Supreme Court.

[17] At paragraph [145].

[18] We were concerned about our findings that the revised proposal had "*largely avoided*" adverse effects,[18] or "*essentially avoided*" them.[19]

[19] A fairly significant cause of delay in issuing this Final Decision has been that in revisiting those findings, we needed to trawl through the evidence of the appellant's planning witness Ms BM Gilbert and its planning witness Ms WS Baverstock, to see whether our findings could meet the test. This is because "*largely avoided*," or "*essentially avoided*," could on the one hand connote a collection of effects none of which are more than minor in any respect, or on the other a collection of adverse effects, some of which are minor but some of which might individually rank as something greater.

[20] The phraseology in question had been taken from various paragraphs in the evidence of Ms Gilbert concerning the new reduced proposal. In addition, she drew our attention to a summary in an earlier report in which she opined that:

> **On balance**, the proposal will preserve the existing natural character values of Owhiti Bay and not generate adverse effects with respect to natural character. [emphasis supplied by us]

Once again we were concerned to know whether there were any individual elements that could be described as significant, amongst a collection of elements generally no more than minor.

[21] The answer to these questions was ultimately found by a careful re-reading of Ms Gilbert's report referred to, exhibited as an attachment to Ms Baverstock's evidence. This was an extraordinarily long and complex document. Having noted Ms Gilbert's methodology, in particular her rankings for visual effects and landscape values, we have re-read and analysed her assessment of each of these. By doing this we have ultimately been able to satisfy ourselves that there are no "outliers" amongst the collection of potentially adverse effects which are all assessed variously to either be low or negligible, where "low" is recorded as being where a proposed development is unlikely to comprise an adverse effect, and "negligible" is a situation where the proposed development is barely discernible and will not comprise an adverse effect.

[22] We have therefore ultimately been able to satisfy ourselves that the phrases "*on balance*," "*largely avoided*," and "*essentially avoided*," have been employed by Ms Gilbert out of a conservative approach to her analysis. We have therefore been able to satisfy ourselves that any adverse effects, whether individually or collectively,

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[18] See paragraph [55] of the Interim Decision.
[19] See paragraphs [57] and [58] of the Interim Decision.

will satisfy the wording cited from paragraph [145] of the Supreme Court decision. It therefore becomes unnecessary for us to rule whether the key findings in the Supreme Court decision are as applicable to the RMA consenting regime as they are to plan making. If they are so applicable, they are met.

[23] We can proceed in this decision to confirm the granting of consent on conditions, and will turn now to discuss the detail of that.

Amendments to Plans & Conditions

[24] We now consider each of the matters raised in paragraph [61] of the Interim Decision and the changes made to the conditions in turn.

Outdoor Utility Storage Area

[25] The Court required that a plan showing the Outdoor Utility Storage Area be included in the conditions, as well as a condition "that recreational equipment, domestic appurtenances, and possibly some types of vehicles when not in active use, be stored in the area to avoid or mitigate adverse cumulative visual effects."[20]

[26] An additional plan has been drafted (A-CD-06, dated 7/14/2013) which shows the Outdoor Utility Storage Area and retaining wall at the rear of the bach. This is now referred to in the list of plans at Condition 1. A copy of that plan is attached hereto and marked as Annexure **B**.

[27] A further condition 34 has been also been added which specifies the use of this area:

> 34. The consent holder shall ensure that recreational equipment, domestic appurtenances (such as portable outdoor furniture) and any vehicles (for example quad bikes) used to access the dwelling, shall be stored in the 'outdoor utility storage area', as shown on plan A-CD-06 – Site Layout (dated 7-14-2013) when not in active use.

[20] Man O War Station & Auckland Council (formerly Auckland City Council) v Auckland Council (formerly Auckland Regional Council) , above n 1, at [61]a.

Landscaping Plan & Restoration, Implementation, Maintenance and Management Plan

[28] In reference to the Landscaping Plan, the Interim Decision stated that "[t]he landscape and visual assessment ... does not appear to contain an Appendix 1 (and there is no reference to one in the contents list)."[21] Regarding the Restoration, Maintenance and Management Plan, the Interim Decision states that it "does not appear to contain plans illustrating the extent of re-vegetation planting described in Section 2."[22]

[29] Although it was not referred to separately on the contents list, the Landscape Plan was included in the Expert Witness Evidence bundle at page 103. For clarity is it attached hereto as Annexure **C**. That plan shows the extent of the re-vegetation area described in the Landscape and Visual Effects Assessment as "active re-vegetation of the steep eroding escarpment enclosing the bay to the south..."[23] The Plan and Assessment are both referred to in the 2nd bullet point of condition 1.

Omission of elevation drawing A-CD-12 and the listed bridge section drawing

[30] While these two plans were attached to the submissions of counsel for Man O'War Station Ltd at the rehearing, an earlier version was included in the bundle of evidence, but not included in the the list of plans at the 12th bullet point of condition 1 of the draft Resource Consent conditions presented at the hearing.

[31] The parties have agreed to amend the list at the 12th bullet point to include the following:

(a) A-CD-12A – Elevations (7-14-2013)[24]

(b) A-CD-13 – (24-10-12)[25]

[32] The drawing A-CD-12 referred to in the Expert Evidence Witness bundle and the Interim Decision has been superseded by A-CD-12A now referred to in the conditions and attached hereto as Annexure **D1**. The only material difference

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[21] Ibid., at [61]b.
[22] Ibid.
[23] Statement of Evidence of Wendy Sharee Baverstock on Behalf of Man O'War Station Limited (28 March 2013) attachment 1, appendix 4, p.104.
[24] Attached hereto as D1
[25] Attached hereto as D2

between these two plans is that the latter includes details of specific timber stains. Plan A-CD-13, the bridge section, is attached hereto as Annexure **D2**.

Drawing dated 24.10.12 postdates the GWE Wastewater Assessment

[33] In the interim decision the Court drew the parties' attention to the fact that the plan referred to in the then 12th bullet point of condition 1 post-dated the Wastewater Assessment. This was thought to be an error. The Court also suggested that this reference might be better included as part of the then 7th (now 8th) bullet point, which refers to "*Onsite Wastewater Disposal Site Evaluation Investigation Owhiti Bay Batch, Waiheke Island*".

[34] The parties have explained that the plan post-dates the report because it was produced following a request by the Council for further information regarding the revised proposal, so the October date is correct. The parties have agreed to delete the then 12th bullet and to include reference to the October "*Proposed Wastewater Disposal Area, Treatment Plant Location and Water Supply Details*" in what is now the 8th bullet point.

Quantified metrics for the transparency and reflectivity of the glass

[35] In the Interim Decision we directed parties to include specific metrics regarding building material transparency and reflectivity and specified that "[l]ow transmission and reflectivity ratings should be aimed for."[26]

[36] The parties have pointed out that the intention would be to aim for low reflectivity and high transmittance as the two metrics are the converse of one another. The parties have amended condition 19 to include metrics not only for glass as set out in the Interim Decision, but also to include maximum LRV values for roofing and joinery materials. As referred to above, plan A-CD-12A includes reference to specific timber stains and reference to it has also been included in condition 19.

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[26] Man O War Station & Auckland Council (formerly Auckland City Council) v Auckland Council (formerly Auckland Regional Council) , above n 1, at [61]e.

Protection of intact midden by temporary fencing

[37] In the Interim Decision we did not agree with Mr Clough as to the effect of the conditions proposed regarding matters of archaeology, and directed the parties to clarify certain matters.[27]

[38] The Parties have now presented a revised condition 10 which refers to Mr Clough's plan. It now expressly requires protection of the full extent of the area shown in his "*Archaeological Monitoring Plan for Planting and Re-vegetation & Temporary Fencing (Figure1a)*". For ease of reference that plan is attached hereto and marked as **E**. The parties have also included reference to Owhiti Bay: Archaeological Investigation and Monitoring Plan in what is now the 6th bullet point of Condition 1.

"NZCPS Policy 11(a)(i) might be potentially relevant to the possible presence of dotterels. A condition would appear desirable, rather than the simple Advice Note 7

[39] It was suggested in the interim decision that dotterels might be present in the area, and given the increased traffic through the area because of the bach, signage alerting users and visitors to the fact should be included in the conditions.

[40] Amendments have been made to condition 32 regarding signage and a 35th condition has been included also to address this issue. These amendments address the recommendations made by Dr Keesing in his evidence.

[41] The amended conditions satisfy all concerns raised in the Interim Decision and the Resource Consent is therefore granted in the terms set out in Annexure A, and by reference to the plans annexed as B, C, D1, D2, and E.

[42] The parties' memorandum of 10 October does not address the issue of costs, possibly because it does not arise in the context of the quite convoluted history of the proceeding and the ultimately negotiated solution. Nevertheless, out of caution, the Court directs that any application for costs is to be filed with the Court within 20 working days of the date of this decision. Any response is to be filed within 15 working days following that and any final reply filed within 10 working days thereafter.

[27] Ibid, at [61]f

[43] The appeal is otherwise dismissed.

SIGNED at AUCKLAND this 19th day of December 2014

For the Court:

Principal Judge LJ Newhook
Environment Court Judge

List of Annexures

A. "Clean" version of the conditions.

B. Plan A-CD-06 (dated 7/14/2013) , showing outdoor utility storage area.

C. Boffa Miskell Landscaping Plan (dated 10/9/2012) showing Revegetation Planting.

D1. A-CD-12A – Elevations (7/14/2013)

D2. A-CD-13 – (24/10/12)

E. Archaeological Monitoring Plan for Planting and re-vegetation & Temporary Fencing

CONDITIONS ON RESOURCE CONSENT APPLICATION A 725 MAN O'WAR BAY ROAD, OWHITI BAY, WAIHEKE ISLAND

Pursuant to section 108 of the Resource Management Act 1991, this consent is subject to the following conditions:

Staging of Conditions

(A) Stage 1 Conditions: Pre-development – Conditions required to be met prior to works commencing on site;

(B) Stage 2 Conditions: Development in progress – Conditions required to be met throughout the period of works on the site;

(C) Stage 3 Conditions: Post-development – Conditions required to be met following site works and including conditions that relate to the implementation and operation of the activity for which consent has been granted;

(D) Other – Conditions that relate to the development in its entirety.

Application Material/Plans

(1) The proposed activity shall be carried out in accordance with the plans and all information submitted as part of the application, subject to modifications required by the condions set out below, being:

- Assessment of Effects entitled *"Revised Application for Land Use Consent for A Residential Dwelling at Owhiti Bay, Waiheke Island, 725 Man O' War Bay Road"* prepared by Isle Land Ltd and dated September 2012;
- Report entitled *"Owhiti Bay Man-O-War Farm, Waiheke Island, Landscape and Visual Assessment"* prepared by Bridget Gilbert and dated September 2012 and accompanying appendices referenced as –
  - Appendix 1*: Landscaping Plan* (dated 10 September 2012); and
  - Appendix 2: *Appendix 2: Restoration, Implementation, Maintenance and Management Plan.*
- Report entitled "*Proposed Owhiti Bay Bach, Waiheke Island – Additional Geotechnical, Stormwater and Flooding Comments"* prepared by URS Limited dated 7 September 2012[1];
- Report entitled *"Owhiti West Stormwater & Flooding Assessment"* prepared by URS Limited dated 7 September 2012;
- Report entitled "*Owhiti Bay Revised Residential Development – Spencer Property: Archaeological Assessment"*, prepared by Clough & Associates Limited and dated September 2012;
- Report entitled "*Owhiti Bay: Archaeological Investigation and Monitoring Plan"*, prepared by Clough & Associates Limited and dated February 2013;
- Ecological Report entitled "*Proposed New Dwelling/Holiday Bach at Owhiti Bay"* prepared by Boffa Miskell dated 7 September 2012;

[1] Please note: this report should be read in conjunction with the Geotechnical report referenced as *"Geotechnical Appraisal Proposed Man O War Retreat, Owhiti Bay, Waiheke Island – Revision 2"* dated 4 October 2007

- Report entitled *"On Site Wastewater Disposal Site Evaluation Investigation Owhiti Bay Bach, Waiheke Island"* prepared by GWE Consulting Ltd dated September 2012 and plan referenced as *"Proposed Wastewater Disposal Area, Treatment Plant Location and Water Supply Details"* referenced as GWE-01 dated 24-10-2012;
- Report entitled "*Coastal Hazard Review Proposed Development, Owhiti Bay"* prepared by Riley Consultants Ltd dated 7 September 2012
- Report entitled *"An Arboricultural Implication Report on the Proposed Construction of a Beach House at Man O' War Farm, Owhiti Bay, Waiheke Island"* prepared by The Specimen Tree Company Ltd dated September 2012;
- Sediment Control Plan prepared by Isle Land Ltd referenced as *"Sediment Control Plan, 725 Man O' War Bay Road, Owhiti Bay, Waiheke Island"* dated September 2012;
- Plans prepared by plans prepared by Westergaard Gill Architecture Ltd referenced as *"001 Owhiti beach house"* sheet references as follows:
  - *A-CD-01 Location Plan (*dated 24-8-2012)
  - *A-CD-02 – Site and Roof Plan (*dated 8-8-2012)
  - *A-CD-03 – Earthworks Plan (*dated 15-8-2012)
  - *A-CD-05 – Level O Plan (*dated 8-8-2012)
  - *A-CD-06 – Site Layout (dated 7-14-2013)*
  - *A-CD-10 – Cross Sections (*dated 8-8-2012)
  - *A-CD -11 – Long Section* (dated 8-8-2012)
  - *A-CD-12A – Elevations (dated 7-14-2013)*
  - *A-CD-13 – Bridge Section* (dated 24-10-12)

STAGE 1 CONDITIONS: PRE-DEVELOPMENT

Construction Management

(2) Prior to the commencement of any works on site (apart from the construction and completion of the stock proof fence required by condition 7), the consent holder shall submit a Construction Management Plan (CMP) which shall be to the satisfaction and approval of the Council's Compliance Monitoring Officer. The Construction Management Plan shall include specific details relating to avoiding, remedying or mitigating adverse effects on the environment of the management of earthworks, vegetation protection and management, construction and management of all works associated with this development as follows including, but not limited to:

i. The site address to which the consent relates.

ii. Details of the site manager, including their contact details (phone, email address, postal address); A cellphone number for after hours emergencies shall also be supplied.

iii. Any means, such as a restriction on the size and method of construction vehicles and machinery accessing the site, required to ensure that no damage occurs to adjoining dune systems and adjacent vegetation throughout the construction period

iv. Identification of archaeological sites, including the methodology for the protection and the discovery of any site/features during construction,

which shall be in accordance with the New Zealand Historic Places Trust's consent to modify the site under the New Zealand Historic Places act 1993.

v. Location and methods of vehicle and construction machinery access throughout the complete construction period, including all site works.

vi. Location of vehicle parking for site workers and sub-contractors to be provided on site.

vii. Location of workers' conveniences (e.g. portaloos).

viii. Proposed hours of work on the site (NB hours shall correspond with any other condition in this consent relating to working hours);

ix. Measures to be adopted to maintain the site in a tidy condition in terms of disposal/storage of rubbish, storage and unloading of building materials and similar construction activities

x. Procedures for controlling sediment runoff, dust and the removal of soil, debris and construction materials.

xi. Construction management techniques in accordance with the recommendations contained in the ecological report referenced in condition 1.

The above details shall be shown on a site plan and supporting documentation as appropriate. The approved Construction Management Plan shall be implemented and maintained throughout the entire construction period to the satisfaction of the Council's Compliance Monitoring Officer.

Pre-Work Dotterel Survey

(3) The consent holder shall undertake a pre-work survey of all the Owhiti Bay dune system, and surrounding areas to determine the presence of any breeding Dotterels. If any nesting areas are found during this survey, the appropriate protection measures are to be implemented under the guidance of the consent holder's ecologist to the satisfaction and approval of Council's Compliance Monitoring Officer before any construction work can be undertaken. The results of the survey shall be made available to the Council.

Tree Protection

(4) A suitably experienced, Council-approved arborist ('nominated arborist') shall be employed, at the consent holder's expense, to monitor, supervise and direct all works within the drip line or in the vicinity of protected trees, for the duration of the works related to this consent.

(5) Protective fencing consisting of –

- 1.5 metre high steel waratahs;
- orange mesh; and
- three strands of tensioned fencing wire

shall be erected outside and around the dripline of the protected Pohutukawa trees situated in proximity to the proposed dwelling in accordance with the recommendations of the appointed arborist as outlined in the report referenced in condition 1. The consent holder is responsible for maintaining the condition of the temporary protective fencing and the condition, repair and location of the temporary protective fencing should be regularly inspected as part of the routine tree-monitoring programme.

(6) The area within the protective fencing and dripline of all protected trees shall be considered total exclusion zones as follows:

(a) No storage of diesel, cement, building materials, site huts, spoil etc within the delineated area.

(b) No washing of equipment or machinery shall occur. Special attention shall be paid to concrete and petrol/diesel operated machinery to avoid contaminating the soil within the dripline of any protected tree.

(c) No spillages of substances likely to be injurious to tree health within seepage distance of the delineated area.

(d) No access into or works within the delineated area without the prior approval of the appointed arborist.

(e) No alteration to the dimensions of the delineated area without prior consultation and agreement from the appointed arborist.

(f) No machinery or vehicles ~~(unless they can be kept within the bounds~~ of ~~an existing sealed impermeable surface i.e. carriageway, footpath).~~

Stock Proof Fence

(7) The consent holder shall complete, to the satisfaction and approval of the Council's Compliance Monitoring Officer, all of the stock proof fence enclosing Owhiti Bay as shown on the Owhiti Bay Landscape and Visual Assessment *Appendix 1 Landscape Plan* by Boffa Miskell (dated 10 September 2012, Revision 0) before any works can be undertaken related to this consent. The fence shall be maintained as a stock proof fence at all times[2].

Pre-Construction Meeting

(8) A minimum of 7 days prior to the commencement of any works on site including earthworks and/or construction works (apart from the requirements set out in this condition), the consent holder or its agent responsible for the development shall arrange an on-site meeting with the Council's Compliance Monitoring Officer with all the contractors responsible for undertaking works to ensure that all parties involved are aware of what is required of them during the construction process. The following requirements will need to be checked and signed off by the Compliance Officer prior to the commencement of construction and/or site works are undertaken:

- Tree and archaeological protective fencing has been erected in the correct position (refer to conditions 4, 5 and 6;
- The completion of the stock proof fence (refer to condition 7)
- Sediment control measures are in place (refer to condition 2);
- Pre-construction requirements identified in the approved CMP required by Condition 2 are implemented;
- Results of the pre-work dotterel survey is documented along with any

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[2] *Please note: the plan referenced is appended to the report entitled "Owhiti Bay Man-O-War Farm, Waiheke Island, Landscape and Visual Assessment" prepared by Bridget Gilbert and dated September 2012*

protection measures put in place as required by Condition 3; and

- Conditions 9 and 10 have been met.
-

Archaeological

(9) The consent holder shall have the appropriate approvals from the New Zealand Historic Places Trust required under the Historic Places Act 1993 for the modifications of archaeological sites before any works related to this consent, apart from requirements set out in conditions 4, 5, 6 and 7 can be undertaken. A copy of this approval shall be provided to the Council's Compliance Monitoring Officer prior or at the pre-construction meeting.

(10) The consent holder shall install temporary protective fencing as shown on the plan referenced as *"Archaeological Monitoring Plan for Planting and Re-Vegetation & Temporary Fencing (Figure 1a)"* sourced from the *Owhiti Bay: Archaeological Investigation and Monitoring Plan*, prepared by Clough & Associates Limited and dated February 2013 referred to in condition 1. The area shown shall be marked off during construction and in no way disturbed by machinery or any construction activity throughout the whole construction period.

Monitoring and access

(11) The consent holder shall pay the Council a consent compliance monitoring charge, plus any further monitoring charge or charges to recover the actual and reasonable costs that have been incurred to ensure compliance with the conditions attached to this consent (This charge is to cover the cost of inspecting the site, carrying out tests, reviewing conditions, updating files, etc, all being work to ensure compliance with the resource consent).

The compliance monitoring charge shall be paid as part of the resource consent fee and the consent holder will be advised of the further monitoring charge or charges as they fall due. Such further charges are to be paid within one month of the date of invoice.

(12) The servants or agents of the Auckland Council shall be permitted to have access to the relevant parts of the property at all reasonable times for the purpose of carrying out inspections, surveys, investigations, tests, measurements and/or take samples and view the records of any measurements that the consent holder is obliged to record under this consent.

STAGE 2 CONDITIONS: DEVELOPMENT IN PROGRESS

Geotechnical/Stormwater

(13) The development shall be undertaken in accordance with the recommendations of the geotechnical/stormwater and flood reports prepared by URS New Zealand Limited dated September 2012, noted in Condition 1[3]. A qualified registered engineer shall be engaged to monitor the construction works and at the conclusion of the works, a completion report shall be

[3] Please note: the report referenced should be read in conjunction with the Geotechnical report referenced as *"Geotechnical Appraisal Proposed Man O War Retreat, Owhiti Bay, Waiheke Island – Revision 2"* dated 4 October 2007

submitted by this engineer for the satisfaction and approval of the Council's Compliance Monitoring Officer.

Earthworks

(14) The consent holder shall implement suitable sediment control measures during all earthworks to ensure that all stormwater runoff from the site is managed and controlled to ensure that no silt, sediment or water containing silt or sediment is discharged to Owhiti Bay or watercourses and in accordance with standards and controls described in Auckland Regional Council's Technical Publication 90 (TP90) and the plan prepared by Isle Land Ltd dated September 2012 and referenced as "*Sediment Control Plan – 725 Man O' War Bay Road, Owhiti Bay, Waiheke Island*". The sediment control measures shall be to the satisfaction and approval of the Council's Compliance Monitoring Officer

(15) To prevent contamination of natural watercourses or Owhiti Bay with water containing soil sediment, there shall be no stock piling of excavated material on the site. Any surplus excavated material (except where this is to be reused on the site) shall be removed from the site and placed in a legally permitted disposal site. Any excavated material to be held temporarily on site is to be contained within a bunded area or enclosed by an approved sediment control fence until utilised on site. Any exposed areas are to be protected from surface water erosion by either top soiling or grass seeding or covered by erosion control cloth material as described in Auckland Regional Council Technical Publication 90 (TP90).

(16) All earthworks undertaken on site shall be supervised by an archaeologist appointed by the consent holder. The archaeologist shall provide to the Council's Compliance Monitoring Officer a report at the completion of earthworks which outlines any findings during the earthworks.

(17) If any archaeological or cultural heritage sites, including artefacts or human remains, are exposed during site works the following procedures shall apply:

a. Immediately that it becomes apparent that an archaeological or traditional site has been exposed, all site works shall cease;

b. The site supervisor shall immediately secure the area in a way that ensures that any artefacts or remains are untouched;

c. The project archaeologist shall notify tangata whenua, the New Zealand Historic Places Trust, the Heritage Team of the Auckland City Council, and in the case of human remains the Police, that an archaeological or traditional site has been exposed so soon as possible so that appropriate action can be taken. This includes such persons being given reasonable time as determined by the Council to record and recover archaeological features discovered before work may recommence on the site.

(18) In addition to condition 17 the consent holder must ensure any works are monitored by a suitably qualified archaeologist and should any archaeological evidence be uncovered all works shall cease and the archaeology be recorded in accordance with standard archaeological best practice.

The consent holder shall also invite a representative of Ngati Paoa to attend such works for monitoring and supervision purposes. The archaeologist shall prepare report on the supervised works which details what if any archaeological remains are identified during earthworks, with the report to be

submitted to the Council's Compliance Monitoring Officer – Hauraki Gulf Islands within one (1) month of the completion of earthworks

Colours and Materials

(19) The development shall be finished in the colours and materials as described on the plans prepared by Westergaard Gill Architecture Ltd and specifically sheet A-CD-12A as follows:

i.	Roofing:	Dark grey/black membrane roofing, maximum LRV 20%
ii.	Glass:	Clear and non reflective. Double Glazing: Reflectance 16% Transmittance 73% OR Single Glazing: Reflectance 11% Transmittance 82%
iii.	Joinery:	Gun metal grey, maximum LRV 40%
iv.	Cladding:	Dark finished timber -refer Westergaard Gill Architecture Ltd *A-CD-12A – Elevations (dated 7-14-2013)*
v.	Bridge:	Natural timber

Any change to the colours outlined above shall be complementary to the natural surrounding environment. Such change shall be to the satisfaction and approval of the Team Leader, Planning - Hauraki Gulf Islands.

Tree Protection

(20) The consent holder shall ensure that all contractors, sub-contractors and work site supervisory staff who are carrying out any works within the root zones of any protected trees(s)/vegetation covered by this consent are advised of the conditions of consent and act in accordance with the conditions.

(21) A copy of the Conditions of Consent shall be available at all times on the work site.

(22) The nominated arborist shall document the inspections during construction, to monitor compliance with the conditions of the consent and to evaluate general tree health. A copy of the monitoring report following each visit shall be retained on site by the Project Manager, while a further copy is to be retained by the nominated arborist.

(23) All excavations associated with the development and access way, that are within the root zones of any retained protected tree(s)s or vegetation shall, where within the root zones of retained protected trees(s)/vegetation, be dug by hand, using hand tools only (i.e. hand held spade) to a minimum depth of 500mm below ground level.

All excavation works within the root zones of protected vegetation shall be undertaken under the supervision and direction of the Appointed Arborist.

(24) No washing of equipment, vehicles, concrete trucks, tools or materials shall occur in any areas where the surface is permeable (e.g. grassed areas) or where the run-off is directed towards permeable areas.

At no time is any soil or fill to be deposited within the drip line of any protected tree or group of trees, or the dune system sounding this the site.

(25) No vehicles, machinery, equipment or materials shall be operated, manoeuvred, temporarily parked or stored within the dripline of any protected trees or on the dune system.

Landscaping and Weed Control

(26) Landscaping on site shall be undertaken on the site in accordance with the landscape plan prepared by Bridget Gilbert Landscape Architect referenced as *"Appendix 1 Landscape Plan"* dated 10 September 2012. The landscaping shall be implemented in accordance with the recommendations contained in *"Appendix 2: Restoration, Implementation, Maintenance and Management Plan"* dated September 2012.

The planting shall be undertaken within the planting season (autumn – spring) immediately following the ~~occupation~~ issuing of the dwelling.

The landscaping shall be maintained by the consent holder for a minimum period of five (5) years to the satisfaction of the Council's Compliance Officer. After five (5) years a suitably qualified arborist shall confirm to the Council in writing the plantings have been established in a manner that at least 80% can be expected to survive on the basis of a 10 year average annual weather cycle. Should dieback have occurred, replacement planting is to be undertaken in accordance with the landscaping plan to the satisfaction of the Planning Team Leader – Hauraki Gulf Island.

(27) In order to allow the successful establishment of the planting on site along with the maintenance of the adjoining dune system, the consent holder shall undertake a thorough weed eradication programme to remove all noxious pest plants listed in the 'ARC National Surveillance Plant Pest' contained within the "*Regional Pest Strategy Management Strategy 2007-2012"* from the site, a compliance report prepared by the Appointed Arborist shall be supplied to the Council within 10 working days following the removal of the identified weed species. Weed management options are referenced in *"Appendix 2: Restoration, Implementation, Maintenance and Management Plan"* dated September 2012. This report shall also detail the scope of the ongoing weed eradication programme that is to be undertaken by the consent holder.

(28) Pursuant to section 108(1)(b) and 108A of the Resource Management Act 1991, compliance with Condition (26) (landscaping) shall be secured by way of a bond to the value of $50,000. The bond shall be prepared at the consent holder's expense and to the satisfaction of the Council's solicitor and shall include the following terms (without limiting any other terms which may be included):

1. Performance of the bond shall be guaranteed by a guarantor acceptable to the Council. A recognised bank trading in New Zealand shall be deemed as an acceptable guarantor. A guarantor of a bond may be substituted with a cash bond.
2. The bond shall be released when the vegetation plan (required by condition 26) has been implemented in full and has been established in a manner that at least 80% of the plantings can be expected, in the opinion of a suitably qualified independent specialist appointed by agreement between the parties at the cost of the consent holder, to survive on the basis of a 10 year average annual weather cycle.

Footbridge

(29) The proposed bridge shall be constructed of natural timber. The structure shall be no greater than 2.2 metres wide and have a maximum height of 999mm above the low water level of the stream over which it passes (or as otherwise required to avoid the need for any balustrade under the Building Act 2004).

Registered Surveyors Certificate

(30) A Licensed Cadastral Surveyor shall certify to Council in writing prior to work progressing beyond the foundation stage and roof framing stage that the dwelling is set out as specified on the approval plans.

In addition, a Licensed Cadastral Surveyor shall certify to Council in writing prior to work progressing beyond the foundation stage and roof framing stage that the dwelling is set out as specificed on the approved plans.

No work shall proceed beyond this stage until receipt of such certification, to the satisfaction of Council's Compliance Officer.

OTHER:

Grazing

(31) No grazing of land shall occur within the area seaward of the stock proof fenceline referred to in Conditions 7 and 26. The fence shall be maintained as a stock proof fence at all times.

Signage

(32) The consent holder shall install discreet signage advising the public of the sensitive dune environment particularly with regard to archaeological features situated within the dune systems of Owhiti Bay and the likely presence of dotterels. The final wording detail, size and position of signs, and number of signs shall be determined in consultation with the Council's Compliance Monitoring Officer.

Review Condition

(33) Pursuant to Section 128 of the Resource Management Act 1991, the Council may serve notice on the consent holder of its intention to review conditions 7 and 26 of this consent at bi-annual intervals for 5 years following the commencement of this consent.

The purpose of the review is to deal with any adverse effects on the surrounding area which may become apparent to the Council resulting from the protective measures taken in respect of the landscape and ecological features of the site. The review will encompass conditions relating to these matters and other appropriate conditions in order to avoid, remedy or mitigate any significant adverse effects, and may include the provision by the consent holder of an updated Implementation, Maintenance and Management Plan to the Planning Team Leader – Hauraki Gulf Islands.

The consent holder shall meet all costs associated with the review of the conditions, including any required independent testing or reporting.

Outdoor Utility Storage

(34) The consent holder shall ensure that recreational equipment, domestic appurtenances (such as portable outdoor furniture) and any vehicles (for example quad bikes) used to access the dwelling, shall be stored in the '*outdoor utility storage area'*, as shown on on plan A-CD-06 – Site Layout (dated 7-14-2013) when not in active use.

Ecological Protection

(35) The consent holder shall ensure that the recommendations contained in the Ecological assessment prepared by Boffa Miskell Ltd, dated 7 September 2012 are adhered to. Specifically including:

- The need to protect the dotterel breeding grounds from dogs; and
- Planting in and around the dwelling being restricted to that which is recommended in the landscape plan referenced in condition 1. This is to reduce the potential threat of weed infestations from 'garden weeds'.

ADVICE NOTES

1. *The consent holder needs to obtain all other necessary consents and permits, including those under the Building Act 2004, and comply with all relevant Council Bylaws. If a building permit application is already lodged with the Council or a building permit has already been obtained you are advised that unless otherwise stated, the use to which the permit relates shall not commence until conditions of this resource consent have been met. If this consent and its conditions alter or affect a previously approved building permit for the same project you are advised that a new building permit may need to be applied for*
2. *Pursuant to Section 125 of the Resource Management Act 1991, this resource consent will expire 5 years after the date of commencement of this consent unless, before the consent lapses;*

   a. *the consent is given effect to; or*

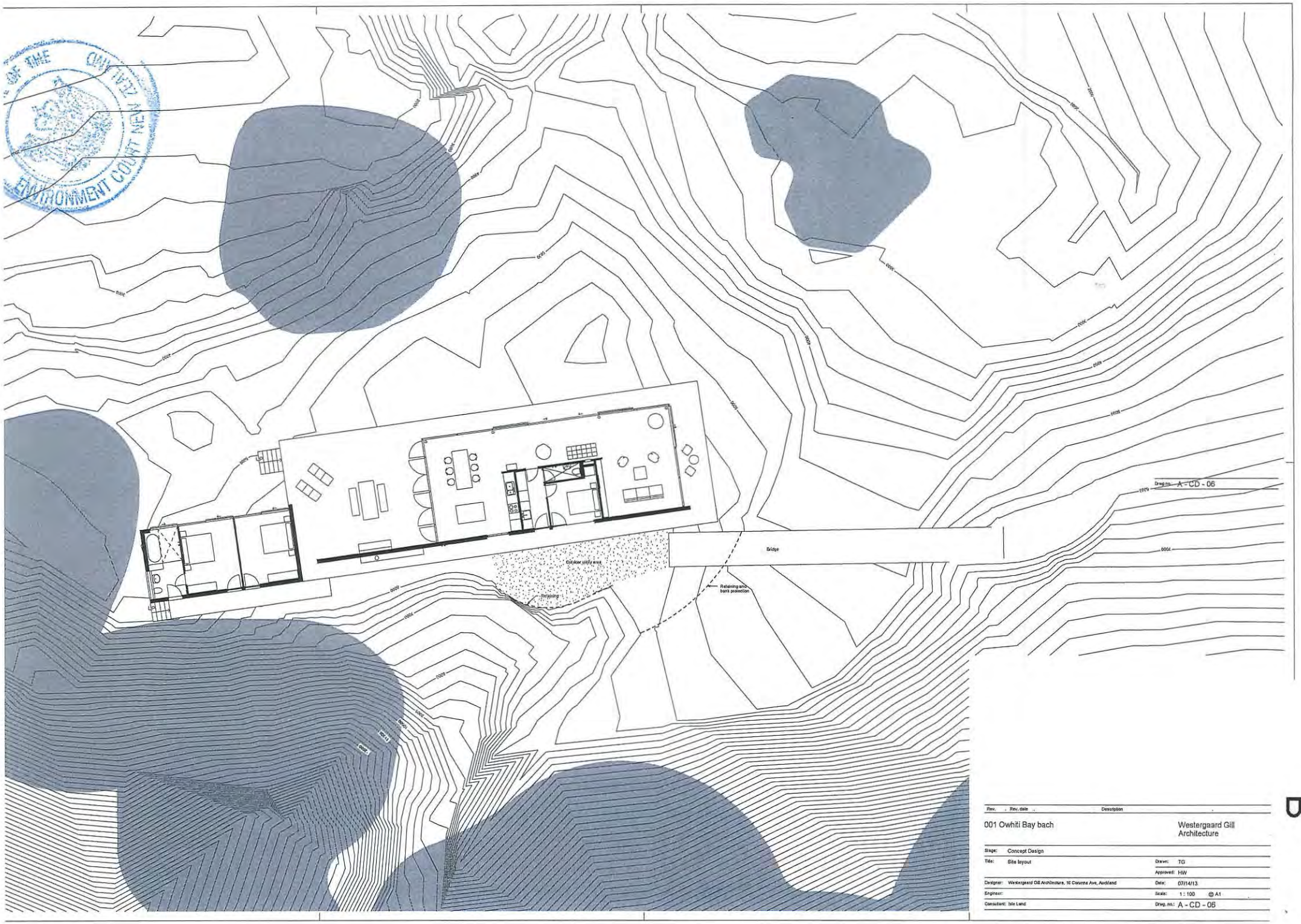
   b. *an application is made to the consent authority to extend the period of the consent, and the consent authority decides to grant an extension after taking into account the statutory considerations, set out in section 125(1)(b) of the Resource Management Act 1991.*

3. *The consent holder is requested to notify the Council, in writing, of its intention to begin works, a minimum of seven days prior to commencement. Such notification should be sent to the Compliance Monitoring Officer and include the following details:*
   - *name and telephone number of the project manager and site owner*
   - *site address to which the consent relates*
   - *activity to which the consent relates*
   - *expected duration of works.*

4. *If you disagree with any of the above conditions or with any additional charges relating to the processing of the application, you have a right of objection pursuant to Section 357 of the Resource Management Act 1991, which shall be made in writing to the Council within 15 working days of notification of the decision. As soon as practicable the Council will consider the objection at a hearing.*

5. *If this consent and its conditions alter or affect a previously approved building consent for the same project you are advised that a new building consent may need to be applied for.*

6. *Appropriate building consent approval shall be obtained for all the drainage works required for the wastewater treatment and disposal system, including treatment plant facilities and for the stormwater drain facilities, prior to work commencing on site.*



B

Rev.	Rev. date	Description

001 Owhiti Bay bach

Westergaard Gill Architecture

Stage:	Concept Design		
Title:	Site layout	Drawn:	TG
		Approved:	HW
Designer:	Westergaard Gill Architecture, 16 Corinna Ave, Auckland	Date:	07/14/13
Engineer:		Scale:	1 : 100 @ A1
Consultant:	Isle Land	Drwg. no.:	A - CD - 06

File Ref: A12166_Owhiti_Bay_Landscape_Plan.mxd

Boffa Miskell
www.boffamiskell.co.nz

0 100 Meters
1:3,500 @ A3

Data Sources: Auckland Council (Aerials 2008), Boffa Miskell

Legend

- Proposed Building
- Proposed Footbridge
- Retaining Walls
- Farm Track Access
- Fencing
- Revegetation Planting
- Native Riparian Planting
- Astelia fragrans Plantings
- Muehlenbeckia complexa Plantings
- Area Managed for Weeds and Pests
- Contours 5m
- Pohutukawa Driplines
- Vineyards
- Archaeology Intact Remains
- Archaeology Sites AC

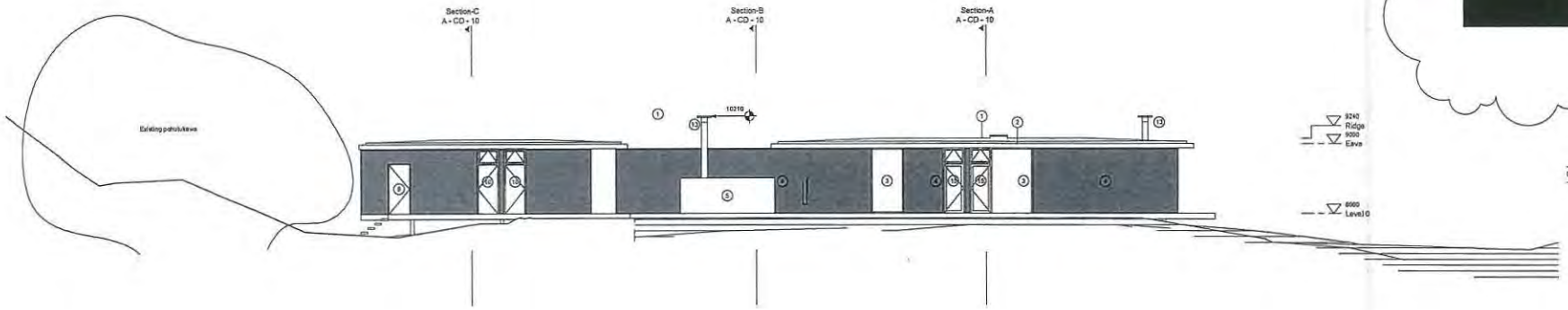
Owhiti Bay
Landscape and Visual Effects Assessment

Appendix 1 Landscape Plan

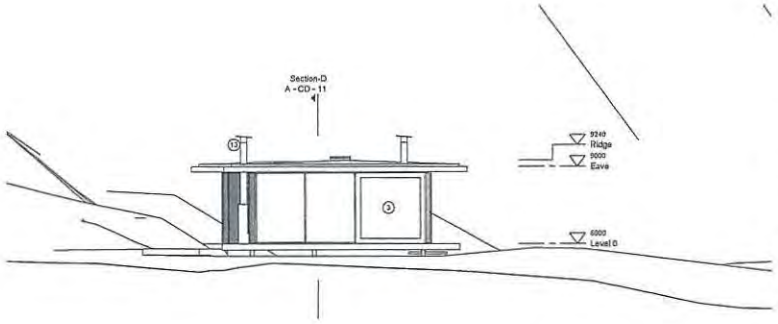
Date: 10 September 2012 | Revision: 0

Plan Prepared for Man O'War Farm by Boffa Miskell Limited
Author: matt.daniels@boffamiskell.co.nz | *Checked:* BGI

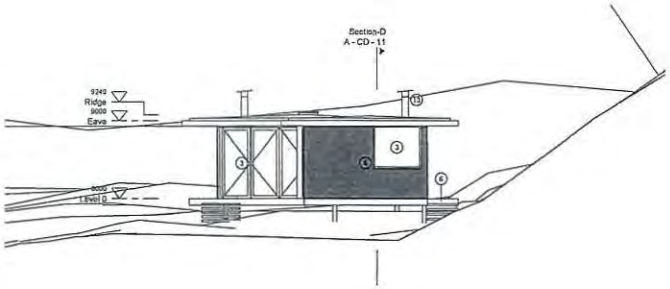
North
1 : 100



South
1 : 100



East
1 : 100



West
1 : 100

Drwg no.: A - CD - 12 A

KEY

1 Dark greyblack membrane roofing
2 Roof edge, dark pre-patinated copper
3 Gun metal grey metal joinery, clear glass
4 External cladding, dark-finished timber
5 Outdoor fireplace, concrete
6 Access walkway and steps, natural timber
7 Bridge, natural timber
8 Steps, concrete
9 Solid door
10 Solid door with clear glazed toplight
13 Chimney, black-finished metal
14
15 Clear glazed door with clear glazed toplight

A 07/04/13 Clarifications

Rev. - Rev. date - Description -

001 Owhiti Bay bach

Westergaard Gill Architecture

Stage: Concept Design

Title: Elevations

Drawn: TG

Approved: HW

Designer: Westergaard Gill Architecture, 15 Corunna Ave, Auckland

Date: 07/04/13

Engineer:

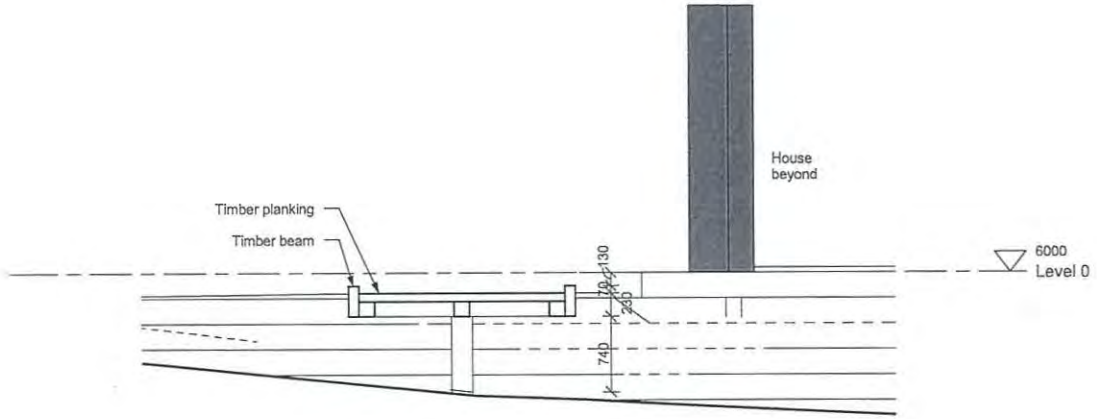
Scale: 1 : 100 @ A1

Consultant: Isle Land

Drwg no.: A - CD - 12 A

D1

Drwg no.: A - CD - 13



Bridge section
1 : 50

0.2 0.5 1 m
1:50

Rev.	Rev. date	Description

001 Owiti Bay bach

Westergaard Gill
Architecture

Stage:	Concept Design		
Title:	Bridge section	Drawn:	TG
		Approved:	HW
Designer:	Westergaard Gill Architecture, 16 Corunna Ave, Auckland	Date:	10/24/12
Engineer:		Scale:	1 : 50 @ A3
Consultant:	Isle Land	Drwg. no.:	A - CD - 13

D2

File Ref: A12166_Owhiti_Bay_Archaeological_Monitoring_Plan.mxd

Boffa Miskell
www.boffamiskell.co.nz

0 100 Meters
1:3,500 @ A3

Data Sources: Auckland Council (Aerials 2008), Boffa Miskell

Legend

- Proposed Building
- Proposed Footbridge
- Retaining Walls
- Farm Track Access
- Fencing
- Revegetation Planting
- Native Riparian Planting
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- Area Managed for Weeds and Pests
- Contours 5m
- Pohutukawa Driplines
- Vineyards
- Archaeology Intact Remains
- Archaeology Sites AC

Owhiti Bay

Archaeological Monitoring Plan for Planting and Re-Vegetation & Temporary Fencing (Figure 1a)

Date: 4 April 2014 | Revision: 0

Plan Prepared for Man O'War Farm by Boffa Miskell Limited

Author: sandeep.gangar@boffamiskell.co.nz | *Checked:* BGi

Decision No: C///97

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of two references under clause 14 of the First Schedule to the Act

BETWEEN **MARLBOROUGH RIDGE LIMITED**

Appeals : RMA 449/96 and 602/97

Referrer

AND **MARLBOROUGH DISTRICT COUNCIL**

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge J.R. Jackson (presiding)
Ms J. Rowan
Mr J.R. Dart

HEARING at BLENHEIM on 21, 22 and 23 July 1997

COUNSEL

Messrs A. Hearn QC, R.D. Crosby and M. Hunt for referrer
Mr B. Dwyer for respondent

INTERIM DECISION

0. Synopsis

1. Introduction
2. The Tourist Development (Marlborough Ridge) Resort

1. *Introduction*

The "Marlborough Ridge" is the eponymous referrer's name for an outlier ridge running north-north-east from the Wither Hills and protruding into the broad plain of the Wairau Valley approximately five kilometres from Blenheim. The north-eastern toe of the ridge is a small pine-covered knoll two kilometres directly south of the Woodbourne Airfield. Closer to, the ridge is surrounded by vineyards (with famous names such as "Brancott" and "Fairhall") to the west and north, and by a golf course and farmland to the east along Paynters Road. To the south the ridge runs up into the Wither Hills against a starkly handsome backdrop of higher hills and receding small mountains.

The referrer (called "the appellant") owns the eastern half of the ridge to a few metres short of a high point (and trig) called Goulter Hill which is 116 m above sea level. The land proposed to be covered by the zone as notified contained 102.3694 ha. Its legal description was Part Lot 2 DP 570 Marlborough Land Registry). The appellant wished to build an 'integrated' resort on the land. In September 1995 it made a request to the Marlborough District Council (called "the Council") for a plan change whereby the zoning of the land was changed from Rural 1 under the transitional district plan to a special zone (with specific rules) to be called "the Tourist Development (Marlborough Ridge Resort) Zone" (called the "TD zone") in the transitional district plan. This request was approved by the Council and plan change 40 ("the plan change") to give effect to it was notified.

The concept of the plan change was to allow a resort hotel to be built on the north-eastern toe of the ridge and to subdivide and develop the rest of the land in two stages. The first stage, on the lower end of the land and in a rough semicircle around the eastern and southern sides of the hotel, was to be a "cluster of hamlets" each containing a group of houses. The second stage was to be subdivision and development for "rural-residential" purposes of the balance of the land further south-west along the ridge.

The Council adopted the plan change (subject to some amendments) in part on 24 May 1996 as an "interim" decision (the subject of the first reference) and essentially the same decision as a final decision on 26 July 1996 (the subject of the second reference). We say "in part" because while the Council approved the TD zone and its rules for land to be covered by the hotel, and most of the original Stage 1 residential development, (together called "the approved Stage I") it refused to approve the plan for the rest of the land. It is the southern one-half (by distance, not area) of the land containing about 40ha (called "the site") which is the subject of the reference under the Resource Management Act 1991 ("the RMA") in this case: the appellant wishes the plan change introducing the TD zone to apply to this site. The Council opposes that. No other person appeared at the hearing either in support or opposition to the proposal.

There are three uncontested aspects of the matter. The first is that the site, if rezoned and subdivided, would provide sections with spectacular views across the Wairau plains in all directions, but especially out towards Cloudy Bay, beyond which the North Island can be plainly seen. Secondly, there is no issue as to provision of services to the site if subdivided since all those costs have been internalised: the appellant has agreed to install and pay for them. Thirdly, the development has already started to the extent allowed by the Council decision. We now set out briefly how that came about.

The plan change is deemed to have been amended by the Council's decision on the date that the Council gave public notice of its decision [RMA First Schedule clause 10(3)]. We were not given that date but assume it was about 26 July 1996. But thereafter the process for plan change 40 became decidedly complicated. The usual procedure of course is that if there is a reference to the Environment Court under clause 14 of the First Schedule then the plan (change) does not become operative.

However, clause 17(2) provides that a local authority may, with the consent of the Environment Court, approve part of a plan (change) if all submissions or appeals relating to that part have been disposed of. In this case the parties apparently took the view that "part" of the plan change had been disposed of viz

- the wording of the plan change was agreed and
- there was no dispute that the plan change should apply to "the approved Stage I".

The Council formally applied to the Court for approval under clause 7(2) and on 21 February 1997 Judge Kenderdine made an order in these proceedings in these terms (called "the clause 17 consent"):

> *"The part of the Tourist Development (Marlborough Ridge Resort) Zone attached to this order marked Appendix A has not been subject to any appeals as to the extent to which it has been approved by the Marlborough District Council. Accordingly, to that extent, it is approved in part and may be made operative by the Marlborough District Council with the consent of this Court.*

An appeal to the Environment Court (RMA 602/96) remains outstanding by the zone requester, Marlborough Ridge Limited, seeking an extension of the area to be incorporated within the Tourist Development (Marlborough Ridge Resort) Zone. The Zone Statement, Concept Plans and Rules are notated where the appeal may lead to them being increased in terms of boundaries, if that appeal is allowed." (our emphasis)

The notations in plan change 40 (as consented to by the Court) are important because they suggest that the transitional district plan, although approved by the Council under clause 17, can still be amended by subsequently changing, inter alia, the number of sections and the concept plan. We have some doubts about the legality of that, and in the event that this appeal is successful, we would need to hear further submissions as to how to give effect to the rezoning of the site.

2. *The Tourist Development (Marlborough Ridge Resort) zone*

2.1 It needs to be borne in mind that although we refer throughout this decision to the "plan change", that is for convenience only, because the plan change is now part of the transitional district plan as a result of the clause 17 consent. Because the proposal is that the site join the TD zone we need to set out the relevant objectives and policies of the zone. As we do so we will identify matters which may need to be amended if the appeal is successful.

2.2 The TD zone statement explains that:

"The zone is formulated to accommodate tourist development which can build upon, and enhance recreational, cultural and commercial opportunities in the region. It adjoins a golf club, and will provide a considerable range of outdoor and indoor sporting and recreational opportunities. It will include viticultural activity and other rural based

attractions. The zone is well located close to the airport, to Blenheim and to major tourist attractions and clear of land of high value for food production. In addition, the zone will provide for opportunities to live in a rural environment in a variety of property sizes and thus remove pressure from more valuable productive land" [plan change p.1] (our emphasis).

Further on, it enlarges on the theme of residential development which is of course the important aspect of the TD zone for this appeal:

"There is a continuing demand for people to live or to have a holiday home in a non-urban environment close to recreation and amenity space and within reasonable commuting distance. This zone provides an opportunity to accommodate demand for low density residential development in a sensitive manner and at the same time preserving natural habitats and visual amenity, and high value productive land.

The zone provides for rural-residential activities and subdivisions for small rural lots with an average area of approximately one hectare, although no land has been zoned specifically for these purposes." [p.1 - From here all unascribed page references in Part 2 of this decision are to the plan change as approved by the Council in its decision].

2.3 Given that background and while the principal objectives deal with the proposed resort, one of the objectives of the TD zone is:

"To provide for limited comprehensive and co-ordinated medium to low density residential development to give a variety of residential and rural opportunities, lifestyle options and land uses." [Plan Change, Objective 1.2 (p.2)]

We note that the **explanation** of that objective has been restated by the Council as a result of its decision so that it now explains that:

> *"The scale of the development will be limited to a maximum of 103 household units and 20 self contained units associated with the resort (in addition to the hotel development) to ensure that the zone remains in scale with its rural surroundings."* (p.2)

This was not in the original Plan Change as notified. Because it is now in the operative transitional district plan, (but subject to a 'notation' "Number of units affected by RMA 602/96") if this appeal is successful as to the rezoning, that explanation will no longer be accurate. It may be that a second "TD zone" will be necessary for the appeal site.

Another objective of the TD zone is:

> *"To ensure that all development is carried out in a comprehensive manner in terms of an appropriate and agreed strategy"* [1.4 Objective, p.2].

The explanation of this objective then states:

> *"In order to facilitate the orderly staged development within the zone, development will be in accordance with an overall and comprehensive development concept which recognises the character and amenities of the zone and the area within which it is located and provides for a staged programme of development of residences, hotel and landscaping. The philosophy outlined within the Concept Plan provides for and enhances the amenities of the area and ameliorates any adverse effects of development."* (p.3)

So if the appeal site is to be developed in accordance with the plan change a "concept plan" is necessary, and it should outline a landscaping philosophy.

More specifically, targeted towards residential development there is an objective:

> *"To ensure that buildings and other structures erected within the Tourist Development Zone are appropriate to the area in which they are located, with regard to external appearance, design and colour."* [1.5 Objective (p.3)]

The explanation then states:

> *"Three types of homes have been provided for to cater for the permanent or semi-permanent resident and resort visitor:*
>
> *(i) **Dwellings** arranged in clusters within maximum specified densities.*
>
> *(ii) **Dwelling units** in duplex or single configuration, single or two storeyed, with private driveway and garage facilities and private courtyard areas.*
>
> *(iii) **Rural dwellings** on sites of approximately 1 hectare in areas specified."* (p.3)

The explanation of that objective continues with its plan - again notated - as to location and design:

"Location of Dwellings

Areas appropriate for the location of residences are shown on the Concept Plan. No dwellings will be permitted outside of these areas, unless otherwise approved by the Council.

Covenants and Controls

All buildings within each particular residential area will follow a unified design theme based on the pitched roofed form and they will be sited to ensure each has a view and is closely related to the rural environment. Tree planting to integrate these buildings into their landscape setting is to be undertaken in advance of building construction. Building design will be controlled by the developer through covenants to ensure a high standard of development." (p.4)

The sensitivity (or "reverse sensitivity") of the surrounding rural activities is recognised, and it is an objective of the plan change:

"To recognise the establishment and management of activities in the zone, in that the zone is located within a rural environment, and that there are legitimate rural activities which should not thereby be restricted." [1.8 Objective (p.5)]

2.4 Turning to the rules we consider the following are relevant.

(1) The relevant permitted activities are described in this way:

"The following activities are listed as permitted within the zone, provided that they conform with the Concept Plan and the development staging

prescribed in Rule 2.5.1 for the Tourist Development Zone and the permitted activity standards specified:

(a) Single unit dwellings (1 per lot) in residential and rural residential areas defined in the Concept Plan, provided that they are constructed in accordance with the staging prescribed in the Concept Plan and Rule 2.5.1 ... " [Rule 2.1 (p.5)]

The concept plan is clearly of some importance, yet no satisfactory plan was produced to us. Further the notation in the approved plan change states:

"Boundaries of concept plan subject to appeal RMA 602/96".

This cannot mean that we are restricted on this appeal to consider only the boundaries shown in the concept plan. But if not, how are any other amendments to the concept plan to be given effect to?

(2) Another potential difficulty arises out of a rule [Rule 2.4 (p.8)] which makes all activities not defined as permitted, controlled or limited discretionary activities into non-complying activities. Consequently, there is some inconsistency between the rules and the explanation to objective 1.5 which contemplated "clusters" and dwelling units in duplex configurations, yet since they are not permitted activities, they appear to be non-complying.

(3) Subdivision is a controlled activity (but again only for "single unit dwellings") and the relevant rule gives a list of matters for the Council to consider on any subsequent application for subdivision under the TD zone rules. These are:

"• *The topography of the site, its vegetative cover, slope stability, gully erosion and the opportunity to minimise the impacts of any buildings or structures.*

- *Any effects on existing vegetation or trees.*

- *Proposals to integrate such buildings and structures into their landscape setting.*

- *The appropriateness of materials used in construction and other structures to the locality, taking into account the design criteria set out in Rule 2.5.7."* [Rule 2.2 (p.7)]

This rule is significant for us in assessing whether the rules of the plan change will be adequate (on any application for subdivision of the site) to protect the amenities values of the surrounding area.

(4) There are some limited discretionary activities, including:

"(b) Subdivisions which will provide lots of less than one hectare in the Rural Residential Areas, providing that Council restricts the exercise of its discretion to the location and size of the lots.

(c) Any subdivision or building development which is not in accordance with specified staging programme, as described in 2.5.1

The Council restricts the exercise of its discretion to the staging of subdivision and development." [Rule 2.3 (p.7)]

There may be concerns here also in respect of (to anticipate) protecting landscape amenities, because by limiting its discretion in this way the Council cannot consider, and if necessary impose conditions dealing with the matters listed in rule 2.2 for controlled activities - see (3) above.

(5) Rule 2.5.2 as to landscaping is important. It provides:

"A landscaping Concept Plan is included as part of the zone's provisions. This zone landscaping will be undertaken as part of the zone development in association with roading and services development. Individual site planting does not form part of this and will be undertaken by the site owners. The zone landscaping shall be undertaken in accordance with layout and residential staging shown in the Concept Plan, and shall be completed prior to the issue, by Council, of a completion certificate under s.224(c) of the Resource Management Act for the subdivision of each stage." [Plan Change p.8]

Its importance is enhanced by the earlier references to a "concept plan". Under the existing transitional district plan (as amended by the consent order adding the TD zone) the "concept plan" and the landscape plan for the hotel and Stage I of the subdivision are already set out. As we have said a mechanism may need to be found to substitute a larger replacement concept plan covering the site as well, especially if we find that the appeal should succeed but we accept Mr Hearn's invitation to request an amended concept plan.

(6) Rule 2.5.3 (the third "permitted activity" standard) relates to subdivision (a controlled activity). It appears to provide certain

standards but how they relate to the controlled activity standards and therefore whether they are unenforceable is uncertain.

(7) Rule 2.5.6 is another important "permitted activity" standard - it relates to open space on the site. It states:

"All subdivisions shall be planned, designed, constructed and maintained in accordance with the Concept Plan and prescribed standards. The specification of building site separation will provide great flexibility in the location of boundaries and in individual lot sizes. There will be many opportunities for the establishment of common open space or public open space systems, especially where opportunities are taken to group building sites. The common open space may include such areas as natural resource areas, recreation areas and farmed areas. The subdivision shall indicate the means that will be used to assure the proper permanent administration and maintenance of the common open space. Such means may include:

- *Vesting of open space in the Council if the Council is willing to accept such vesting.*

- *The provisions of easements, covenants and deed restrictions binding on all purchasers of lots in the subdivision.*

- *The creation of a homeowners' association or other appropriate entity to which such common open space land shall be conveyed and which will have an ample source of funds, such as annual assessments on lot owners that are liens on such lots to maintain such open space.*

- *Any other means approved by the Council that will accomplish the requirements of this rule."* [Rule 2.5.6 (p.10)]

While we encourage the methods suggested by this rule we consider it sits uneasily in the rules, because the methods it suggests are not in fact **rules** [c.f. sections 32(1) and 74(1)(d)].

3. *The Evidence*

We were given the written evidence of ten witnesses for the appellant. Much of it related to the overall concept of the zone and the value of the hotel/conference centre to the Marlborough region, rather than to the specific site subject to the references. The wider evidence was useful to have as background, and indeed Mr Hearn argued that it was relevant because the hotel and conference centre depends on subdivision of the appeal site both to assist the appellants to finance the resort, and also to provide a larger customer base (in the form of residents on the appeal site) for the shops and other facilities at the resort once it is operating.

Evidence of the benefits and costs of developing Marlborough Ridge was given by Mr R.P. Donnelly, a self-employed economic consultant. His evidence, while of the kind to be encouraged because it assists the Court with its assessment under section 32 RMA, was rather misdirected in that it referred to the benefits and costs of the Marlborough Ridge development as a whole (i.e. both the site and the approved Stage 1 resort and residential development) and compared those with the benefits and costs of 'leaving' all the land under farming use. So while the detail of his evidence established that there were synergies by allowing fuller development of Marlborough Ridge, it was not specific enough to show what the benefits and costs of developing the site would be.

However parts of Mr Donnelly's evidence are of some use and we return to them later.

Mr J. Hudson, a landscape architect with 17 years experience, for the appellants produced a "concept plan" for the appeal site (and surrounds). He believed that with appropriate landscaping, especially by tree-planting, the amenities of the surrounding countryside could be protected. In cross-examination, Mr Dwyer for the Council asked Mr Hudson whether the development proposed for the site would not be integrated into the landscape but instead a ribbon of houses along the ridge. Mr Hudson's answer was that the ridge as a landform dictates a stop, and that it would be artificial to stop development halfway along it. He qualified that by saying that landscape conditions would need to be imposed. We agree with that assessment.

However, we do not believe that Mr Hudson's concept plan tacked on, as it appears to be, to the surveyor's unimaginative two-dimensional design, is adequate to satisfy the requirements of the plan change as to landscaping. If the appeal succeeds it would have to be on terms as to the filing of a new concept plan.

Finally for the appellant, Mr R. Stroud, a planner, gave evidence as to the desirability of the plan change in respect of the appeal site. He could see no reason to exclude the appeal site from the TD zone. One of the most significant parts of Mr Stroud's evidence was when he said that he had concerns with the concept that development on a ridgetop is inherently bad. To show us that was not so, he produced three photographs of hilltop development in southern Europe. One was of old villas interspersed with Lombardy poplars along a ridgetop road in Tuscany with a foreground of pasture. The second was of a Tuscan hilltop town (unidentified) with campaniles and other buildings clustered along the skyline. The third was of a similar hilltop town in Provence. We accept that it is

easy to be seduced by touristic photographs, but nevertheless we think Mr Stroud's point is well made that development on a low ridge such as this - set as it is against a backdrop of much higher hills and receding ranges - is not inherently harmful in its effect on visual or landscape amenities. Having said that we do bear in mind that those European landscapes are the product of slow, integrated growth over many centuries. In this case we are confronted with the prospect of mushrooming housing in contemporary New Zealand idiom.

For the Council we read and heard evidence from Mr Seed, an economist, Mr A.M. Rackham, a landscape architect, and two planners Messrs M.N. Baily and A.A. Aburn.

Mr Rackham who has 24 years experience concluded that:

> *"6.4 The proposed residential development would result in 96 dwellings being constructed on, or close to, the prominent ridge. Housing would stretch along the skyline for 1.25 kilometres and would inevitably be highly visible from extensive areas to the east and north. Views from the west would be less extensive because of intervening ridges. However, where views occur, housing would be very prominent and introduce new elements into an otherwise attractive rural scene.*
>
> *6.5 In my opinion the scale and extent of this proposal is such that it will inevitably have significant adverse effects on the rural character of the area. The present rural simplicity of a prominent downland ridge will be compromised. Housing and associated developments will be very visible and reduce the aesthetic coherence of this landscape. It will be a major departure from previous settlement patterns in the Wairau Valley and will*

introduce a new element into an otherwise pleasant rural landscape. The Marlborough Ridge Resort to the north will have a lesser visual impact as it relates more closely to the developed country at the toe of the dry hills."

Mr Rackham conceded that the site would not be particularly visible from State Highway 6 (Middle Renwick Road) between Blenheim and Renwick. He seemed to be mainly concerned with the views of the ridge from the rural land on either side of New Renwick Road. However, our site inspection showed that the further away from the site that viewpoints are (along New Renwick Road towards Blenheim), the more that shelterbelts and other trees increasingly intervene so that the Marlborough Ridge is less and less visible. It is significant to us that his photographs were taken from only 2 kilometres from the toe of the ridge. Mr Rackham conceded, in cross-examination, that judgment of aesthetic coherence was a highly subjective matter; that there was no community concern being expressed at the hearing about the effects on landscape; that landscape effects were only one consideration for the Court, and that they could be mitigated by appropriate tree planting.

Mr Rackham also supplemented his evidence-in-chief by commenting on Mr Stroud's European photographs. He said that there was no relationship between a Tuscan hilltop town and the Marlborough landscape, and continued "the ability to re-create that is beyond our abilities". In our view, those comments miss the point that Mr Stroud was trying to make - that urban development on a ridge-line is not inherently unattractive. In fact 'landscaping' is often a re-creation of another landscape. We know both from the evidence and our own experience that Highfield Winery some 2-3 kilometres to the west of the site has located a close replica of a Tuscan tower (the tower of Cafaggiuolo) on the toe of the next outlying ridge from the Wither Hills.

In a subtle way Mr Rackham's own evidence confirms the subjective nature of response to landscape (and the role of remembered metaphors which shape that response) when, in the passage quoted above he refers to the compromising of a prominent "downland ridge". However, there is nothing unique about a ridge covered in introduced grasses. To compare it with the "Sussex" or any other "Downs" is no more valid (or less) than Mr Stroud's comparison with a Tuscan landscape.

Mr Seed, an economist, questioned the need for funding of the resort from selling sections on the appeal site. He considered that on the figures he had (which derived from cash-flows earlier given to the Council by the appellant) the hotel/resort as a stand-alone concept (that is, without any attached subdivision) would be a viable financial venture based on a "net present value" analysis. That evidence is relevant to an issue raised in section 5(2) as to the enabling of people to provide for their economic wellbeing and we return to that issue in our evaluation later. His evidence also related to a point that is important for the appellant company - if no-one else. The directors of the company (Messrs Lofts and Bradbury) made it clear in their evidence that the more their company could make out of the subdivision, the more the appellant (rather than someone else) could invest in relation to the resort development. We infer that they will be able to retain a larger share of the equity in the resort proposal.

The appellant's witnesses had also emphasised the synergistic aspects of residential development on the appeal site. Mr Baily criticised this, saying that patronage of restaurants and bars at the resort "would be unlikely to be sufficient to support the hotel and conference centre". That overstates the point which is not that residential use will "sufficiently" support the resort, but that residential use will be one of a number of sources of cashflow (and income) for the resort.

However, Mr Baily did make a useful point when he said with houses closer to the top of the ridge or subsidiary spurs, much of the lower land will be difficult to use and offers no mitigation for density. The unfortunate consequences of allowing thin rectangular sections down steeper slopes for ridgetop roads can be seen in many towns and cities around New Zealand. The lots are usually too thin to allow ready further subdivision and so the land beyond the house is often undeveloped. To us that suggests that some early planning of sections and building sites would be useful so that further subdivision could take place if that was what the owners wanted (and the current owners had not stopped it by deed of covenant and the Council found it appropriate). We also find that at least on the eastern side of the ridge the land at the bottom of the ridge or on the flats especially if planted densely along the creek may be a useful buffer between the adjacent rural zone and the tourist resort zone. It will enhance the character of and provide protection for the creek's catchment.

Mr Baily, as had Mr Stroud, also dealt with the relevant policies in the Council's regional policy statement. We will refer to those in our assessment later.

The main focus of Mr Aburn, the Council's second planner, was on subdivision and residential development activity in the wider Blenheim/Wairau Plains sub-region. He stated that the Blenheim section of the (transitional) district plan provides for "substantial areas that are being ... subdivided" and he identified over 400 lots in the process of being subdivided in various areas on the northwest to southwest side of Blenheim, with the potential for another 1,200 lots southwest of the present built-up area. He also drew our attention to other localities on the Wairau Plains where subdivisions have been approved and not all lots sold. Based on this excess of sections Mr Aburn considered that, read together, clause 22 (of the First Schedule) and clause 1(b) of the Fourth Schedule direct that an Assessment of Effects on the Environment should have considered

"possible alternative locations". As will be seen we consider that issue can be considered more directly by the Court under section 32.

Mr Aburn continued by saying that because "substantial investment has been, and is continuing to be made in subdivisions in these locations" and "given that sustainable management means managing the use and development of natural and physical resources etc then the additional residential lots [on the appeal site] cannot be justified on resource management grounds".

4. *Section 74: The relationship between the matters to be considered*

4.1. Under section 74 of the Resource Management Act when deciding whether to confirm, modify or refuse the plan change we have to consider:

- the functions of a territorial authority under section 31
- the provisions of Part II
- the Council's duty under section 32 [section 74(1)]

We note both that the other matters identified in section 74(1) and (2) are not relevant in this case and that this list of matters is not exclusive: ***Foodstuffs (Otago Southland) Properties Ltd -v- Dunedin City Council*** (1993) 2 NZRMA 497 at 534. For example, other relevant matters are the regional policy statement [section 72(2)] and (in relation to a plan change) the other unamended objectives, policies and methods of the relevant plan.

As a preliminary, jurisdictional point it is clear that the rezoning and proposed uses of the land come within the Council's functions under section 31.

4.2 Early in the hearing we became aware that this was not a case where there were sustaining or safeguarding issues under section 5(2)(a) and (b); nor were there matters of national importance under section 6 (nor Treaty of Waitangi issues under section 8). So section 7 became relatively more important to our deliberations. We saw the relationship between 'efficiency' as a substantive requirement in Part II (section 7(b)) and as a formal requirement in section 32 as potentially relevant. We asked counsel about the relationship between the use of 'enabling' in section 5, 'efficiency' in section 7 and the language of section 32, but they were unable to assist in any detail, so the following analysis is without the benefit of full submissions and therefore as tentative as a judicial decision can be.

4.3 We start with a few remarks about the role of economics in the RMA. There is a distinct thread in the RMA which takes an 'economic' approach to sustainable management of natural and physical resources. This approach derives from:

- section 5(2) - the references to 'enabling' and 'economic wellbeing';
- section 7(b) - reference to 'efficient use';
- sections 9, 13(2), 14(2) and 15(2) where the default option is that activities are allowed as of right unless a rule in a plan states otherwise; (and contrast these with
- sections 11, 12, 13(1), 14(1) and 15(1) with their 'default' requirements in which activities are unlawful unless a rule in a plan or a resource consent states otherwise)
- section 32(1)(b) - benefits and costs;
- section 32(1)(c)(ii) - effectiveness and efficiency.

Referring to some of those sections the High Court in ***Machinery Movers Ltd v Auckland Regional Council*** [1994] 1 NZLR 492 stated:

"The RMA explicitly recognises the importance of having environmental laws which are economically efficient" [at p.502]

In fact our isolation of the economic jargon in the RMA may lead to incorrect confinement of economic issues and principles and misunderstanding of their relevance to the RMA. If, as we understand it, economics is about the use of resources generally, [see R.A. Posner ***Economic Analysis of Law*** 4th Edition (1992) p.7] then resource management can be seen as a subset of economics. Bearing that in mind will prevent unnecessary debates as to whether the use of the word 'efficiency' in the RMA is about 'economic' efficiencies or some other kind. All aspects of efficiency are 'economic' by definition.

5. *Part II of the Act*

5.1 As we have said, in this case the most relevant part of Part II (other than section 5) is section 7. Section 7(b) requires the Court to consider 'the efficient use of natural and physical resources'.

The Concise Oxford Dictionary (Eighth Edition) states:

"efficient ..." means "productive with minimum waste or effort."

This basic definition of 'efficient' is certainly consistent with the purpose of the Act. Its difficulty is that it does not give any guidance as to what is 'waste'. Nor as to how to quantify the waste so that we can ascertain what is 'minimum' (which introduces an interesting quantitative element to the definition). In particular many people would not recognise that the costs imposed by the RMA and plans under it are themselves 'waste' -

economists call them 'transaction costs' - and should be taken into account in assessing efficiency. On the other hand the general definition does show why efficiency is a qualitative goal that has been included in the RMA - most people prefer to avoid 'waste'.

5.2 The issue of efficiency and economic wellbeing was an issue in the ***Marlborough Rail*** cases (which related to appeals on resource consents, not a plan change). In the High Court (***NZ Rail v Marlborough District Council*** [1994] NZRMA 70, 88) Greig J stated:

> *"That economic considerations are involved is clear enough. They arise directly out of the purpose of promotion of sustainable management. Economic well-being is a factor in the definition of sustainable management in s.5(2). Economic considerations are also involved in the consideration of the efficient use and development of natural resources in s.7(b). They would also be likely considerations in regard to actual and potential effects of allowing an activity under s.104(1). But in any of these considerations it is the broad aspects of economics rather than the narrower consideration of financial viability which involves the consideration of the profitability or otherwise of a venture and the means by which it is to be accomplished. Those are matters for the applicant developer and, as the Tribunal appropriately said, for the boardroom."*

But the High Court raised, with respect, a slightly inconsistent note when it continued (p.88):

> *"In this case plainly there was a considerable body of evidence given on each side as to the costs and as to the economics and the potential viability of the proposal for the reclamation and construction of all works and buildings required.*

The contention that the Tribunal was dismissive of this economic evidence is, I think, to misunderstand what the Tribunal was doing. Clearly it considered all the evidence that was put before it but in the end it dismissed the contentions and opinions of Dr Allan and set them aside. It was not satisfied, on the evidence before it, that the apprehensions of that witness and thereby of New Zealand Rail would be realised. This was a judgment on the facts, on the weight of the evidence before it. The Tribunal took into account economic questions, as it was bound to do, in a broad sense and in a narrower sense upon the projected development itself. In the result they came to the conclusion that evidence was not 'sufficiently persuasive to justify refusing consent on economic grounds.'" (Our emphasis).

The decision is unclear as to whether it is the broad economic aspects which are relevant, or the narrower (including viability of a project and/or the benefits to a developer). We consider both are relevant and that economic analysis may show why.

In ***Imrie Family Trust v Whangarei District Council*** [1994] NZRMA 453 the Planning Tribunal (as it was) stated:

"We accept that the efficient use and development of natural and physical resources (referred to in s.7(b)) is an element of the statutory purpose of sustainable management. However we have not found language in the Act to indicate that Parliament intended territorial authorities to attempt quantitative allocation of retailing opportunities in their district plans according to an assessment of potential customer support, so as to avoid duplication of shopping, or under-utilisation of land and buildings intended for retailing. That would be approaching

retail licensing which, in our understanding, is not authorised by the Resource Management Act." (p.463).

Earlier on the same page in ***Imrie*** the Tribunal accepted that:

"...although we need to consider the economic effects of the proposal on the environment, it is only to the extent that they affect the community at large, not the effects on the expectation of individual investors." (p.463).

With respect, we agree with that clear articulation of the planning principles. We raise the issue whether application of microeconomic principles would, as we believe, lead to the same conclusion. This is of more than academic interest since there is a suggestion in some cases that sectoral interests may be protected.

In ***Woolworths NZ Ltd v Christchurch City*** [1994] NZRMA 310 the Planning Tribunal stated (at p.321):

"that the retail commercial sector having made investment decisions on the basis of the [city] plan is entitled to rely on those provisions."

That appears, with respect, to be letting in effects on trade competitors through the back door, although as the Tribunal had earlier reminded itself (p.317) those effects are irrelevant on resource consent applications (section 104(3) RMA).

Where, as in this case, there is a plan change, and section 104(3) does not apply, but section 7 and section 32 (in part) do, further examination of the

aspects of efficiency may possibly enable a simpler and more certain approach to some of these issues.

5.3 In an effort to achieve better definition of 'efficient use' we found that the High Court in a case under the Commerce Act 1986 (***Telecom Corporation of NZ Ltd v Commerce Commission*** (1991) 3 NZBLQ 102, 340) has discussed 'efficiency'. It stated that:

> *"We bear in mind that efficiency has three dimensions commonly referred to as allocative efficiency, production efficiency and dynamic efficiency."* (at 102, 383)

Unfortunately the decision does not define those. However in an article "Meat, Competition and Efficiency..." (1996) NZBLC 216 (also about a case under the Commerce Act 1986) Dr A.W. Maughan describes these types as follows:

> *"(a) Productive efficiency - where the existing, or a higher, output of the economy is produced at a lower cost, or where a better quality good is produced at the same or lower cost.*
>
> *(b) Allocative efficiency - in which resources are allocated to the production of goods and services that society values the most.*
>
> *(c) Dynamic or innovative efficiency - where technological change is encouraged and productivity gains retained rather than frittered away in slackness and 'rent seeking' activities."* (p.221).

Tentatively we find these descriptions may be useful because [as (c) suggests] they also imply that activities or conduct which is the opposite of

each of those descriptions is inefficient. (We will really only be able to consider (b) in this case, because we did not hear evidence as to the others).

5.4 The potential advantages of examining 'efficiencies' at a slightly more technical level under section 7(b) are:

- the approach is relatively value free;
- in some cases it may allow for an objective, quantitative approach;
- it allows for an overall perspective, provided of course, that all aspects of efficiency are examined;
- it provides a useful technique for assessing objectives, policies and particularly methods under the Act; and
- it appears to be required under section 32 (see part 6 of this decision).

The potential disadvantages are that:

- it encourages expert evidence from economists - with an attendant increase in another sort of jargon;
- it produces solutions that sometimes appear counter-intuitive and therefore require considerable explanation; and
- full-blown mathematical analyses of benefits and costs are both expensive and complex.

But at least this division of the Court would, in other cases, encourage fuller evidence from economists identifying the microeconomic principles that are relevant in their opinion, and then applying them to the particular facts of the cases.

5.5 In introducing section 7(b) Parliament must be taken as considering that the advantages of 'efficient use' should be considered. It is the role of section 7(b) in assessing methods under the RMA which might make it a

particularly powerful tool. We add that its inclusion in section 7 (which is otherwise mainly a section dealing with substantive matters to be considered) shows that Parliament recognised (inter alia) that the substance/form distinction has a blurred edge, and wished to ensure that efficiency was recognised as a normative goal as well as a technique. As the High Court stated in ***Telecom*** of different legislation (the Commerce Act):

> *"The more efficient use of society's resources in itself is a benefit to the public to which some weight should be given."* (p.102,386).

Curiously, the RMA by including section 7(b) is more explicit than the Commerce Act 1986 about the social desirability of the efficient use of resources.

One consequence of this regard to efficient use is, to paraphrase and adopt a Ministry of Commerce review approved in ***Telecom*** (at p.102, 386), that economic efficiencies are real and promote sustainable management *"even if little or none of the benefit directly accrues to others than the owners of the business"*.

It is for this reason that we have some doubts about whether it is impermissible or irrelevant to have regard to the benefits of a proposal for its promoter, [cf ***Port Marlborough, Imrie***] but that issue does not need to be decided here. Equally the effects on and of trade competitors need to be considered in respect of all dimensions of efficiency.

We now turn to consideration of the formal use of efficiency in our discussion of section 32.

6. *Section 32*

6.1. Role of the Environment Court under Section 32

The section 32 duty applies to the Court by virtue of section 290 which imposes the same duty on the Environment Court that the Council has: ***Countdown Properties Limited v Dunedin City Council*** [1994] NZRMA 145 at 176-197 (Full Court).

Some of the wording in section 32 is difficult. First, the various tests are not altogether consistent with each other, especially the alternation between 'economic' and 'planning' language. Nor do the paragraphs appear to be in the most logical order. And finally, the wording does not fit particularly comfortably with the role of the Environment Court. We turn to the tests next, but as for the Court's functions under section 32 it is clear from existing authorities that there are limitations on how the Court can approach its tasks. These are:

(a) the Court is an appellate body which deals with (and only with) the matters referred to it under clause 14 of the First Schedule ***Fletcher Forests v Taumarunui County Council*** (1983) 11 NZTPA 233 applied in ***Leith v Auckland City Council*** [1995] NZRMA 400;

(b) in particular, any issue under section 32(1) must be raised in a submission on the proposed plan (change): section 32(3) as applied in ***Hodge v Christchurch City*** [1996] NZRMA 127; [but see ***Financial Systems Ltd v Auckland City Council*** A11/97 as to whether the same result cannot be achieved by reference to Part II of the Act (in particular, we assume, section 7(b))] and

(c) as far as the evaluating function in section 32(1)(b) is concerned: "[T]he Tribunal is not itself a planning authority with executive functions..." ***Waimea Residents Association v Chelsea Investments*** [High Court, Wellington, M616/81 Davison CJ, 16/12/81].

We consider that while section 32(3) precludes any challenge to a plan or plan change on the grounds that *"subsection (1) of this section has not been complied with"* the reference to compliance applies to the various procedures in section 32(1)(a) and (b) rather than to the test in section 32(1)(c). A different interpretation would mean that the section 32(1)(c) test was never applied to a requested plan change. We cannot accept that Parliament intended that privately requested plan changes should not be subject to the discipline of section 32(1)(c). Our interpretation is consistent with the scheme of the Act - that the Environment Court should decide the same matters as the Council, and (so far as possible) apply the same tests as to the appropriate methods (and objectives and policies).

6.2 Section 32(1) Analysis

We consider that the effect of the Full Court's interpretation in ***Countdown Properties Ltd v Dunedin City Council*** [1994] NZRMA 145 (the appeal from ***Foodstuffs***) of the relationship between sections 32 and 74 of the Act is that section 32 provides:

(1) methods for resolving the various matters to be considered under section 74; and

(2) a threshold which a proposed plan or plan change or any relevant 'challenged' provisions in the plan must pass (this latter point tends to be overlooked).

The High Court in ***Countdown*** found that there are two tests for a plan change (or a new plan) under section 74: first the "rigorous" test of section 32(1)(c) and then "the broader and ultimate issue of whether it should action the change or direct the council to modify delete or insert any provision which had been referred to it." [***Countdown*** p.179]. That ultimate test merely needs to be satisfied "on balance" as opposed to the rigor of the section 32(1)(c) test.

Because there has been no challenge to the section 32(1) procedures in this case we do not have to consider section 32(1)(a) and (b), only (c).

6.3 Section 32(1)(c): The threshold test

Section 32(1)(c) requires Councils (and, on appeal, this Court) to be satisfied that any plan or plan change can cross a two-step threshold:

(i) that the proposed rules are 'necessary' to achieve the purpose of the Act; and

(ii) that the proposed rules in the plan (change) are the most appropriate having regard to efficiency and effectiveness "relative to other means".

It may be more useful in the context of a plan change to start with subparagraph (ii) since it is useful first to consider what the "alternative means" are in such a case. Really the options are: the plan change, or the existing plan, or some compromise between the two. That follows from both the wording of section 32 and the numerous decisions on jurisdictional limits [the leading case is ***Countdown***].

In our view both the necessity for and the appropriateness of a plan change need to be weighed against the existing plan (especially where the latter is a transitional plan) because necessity is a relative concept in this situation. A plan change only needs to be preferable in resource management terms to the existing plan to be 'necessary' and most appropriate for the purpose of the Act and thus pass the threshold test.

7. *Application of Section 74 in this case*

7.1 Part II - Section 7(b)

As we have said, there are no relevant matters in section 5(2)(a) or (b); nor are there matters of national importance under section 6. The most relevant parts of Part II from the Council's perspective are section 7(b) (efficient use etc) and section 7(c) (maintenance and enhancement of amenity values).

On section 7(b) Mr Dwyer for the Council, submitted:

> *"In this instance it is the Council's view that the referrer's proposal had adverse effects pertaining to the following issues:*
>
> *(i) the efficient use and development of natural and physical resources (section 7(b)).*"
>
> *"Notwithstanding the evidence of Mr Donnelly that this is purely a question of economics and best left to the market it is submitted that it is not an efficient use of the land resource of the district to allow the establishment of a satellite residential enclave of the size proposed in a situation where there is a substantial existing residential land resource available.*"

...

There is no unmet need for residential land which the applicant's proposal is intended to satisfy".

Counsel quite rightly acknowledged that some residential development had already been allowed by the Council when it approved the TD zone for the lower end of Marlborough Ridge, a decision which weakens the Council's case. We see a further difficulty with the Council's position in the evidence of Mr Donnelly which was uncontested on these general issues. He wrote in his evidence-in-chief:

"The economic response to these planning issues is the Council does not understand the concept of efficiency and how to promote section 7(b) and/or the enabling aspects of section 5(2). If it did it would not be so naive to think it could determine what is efficient allocation of resource use including land or that it had the ability to plan sustainable development.

Market forces encourage efficiency and sustainable management by encouraging resources to gravitate to their most productive use. If the Marlborough Ridge development can out bid rival uses it is indicative of it being the most productive economic use of the land and the most efficient use of natural resources as a whole. The Council's role is defining justifiable environmental standards not allocating resources. If there is no market failure there is no economic or resource management basis for encouraging sub-optimal production decisions and/or second best consumer choice.

In the absence of adverse environmental effects that require avoiding, remedying or mitigating, the market should decide which is the preferred

economic use of land both now and in the future. Where relevant to their functions resource managers should encourage the market to determine allocation issues as it is better equipped to determine the most efficient and sustainable use of land."

We do not accept his views on what the RMA requires - that is a legal issue for us to decide, but otherwise we accept his (uncontroverted) evidence as to the operation of markets on natural and physical resources.

His answers to Mr Dwyer in cross-examination were consistent. Mr Dwyer put to him the proposition that it is not an efficient use of land to allow residential development of land when there is a body of appropriately zoned land elsewhere. He replied:

"No, efficiency has many aspects, and we must have regard to consumer needs".

And we infer that those "needs" do not have to be specifically identified but generally enabled from his subsequent answer:

"From an economist's perspective I see section 7(b) as a key to achieving the enabling aspects of section 5."

To the extent that there is a conflict between counsel's submissions and an expert witness' opinion on a matter of economic fact or principle we must prefer the latter's opinion.

As for the effect on the landscape amenity and the application of section 7(c), we deal with those next.

7.2 The threshold test: is the plan change necessary and appropriate? [section 32(1)(c)]

The arguments as to the **necessity** for the plan change between the parties really come down to the meaning of and weight to the matters in section 7 to which we are to have particular regard, viz:

> " *(b) the efficient use and development of resources*
> *(c) the maintenance and enhancement of amenity values*
> *(d) the maintenance and enhancement of the quality of the environment"*

We start by *"having particular regard"* to the matters raised in section 7. We give the phrase *"have regard to"* the meaning discussed in ***New Zealand Fishing Association v Ministry of Agriculture and Fisheries*** [1988] 1 NZLR 544 (C.A.) Cooke P, quoting McGechan J in the High Court, said:

> *"The phrase is 'have regard to' not 'give effect to'. They may in the end be rejected, or accepted only in part. They are not, however, to be rebuffed at outset by a closed mind so as to make the statutory process some idle exercise."* [p.551]

As to what efficiency under section 7(b) requires in this case, we accept Mr Donnelly's evidence so far as it goes.

Paragraphs (c) and (d) in this context both come down to the effect on views and landscape. We find these issues are easy to dispose of in this particular case. It was common ground first that the smaller-scale landscape in which Marlborough Ridge will be seen is not an outstanding landscape

(under section 6(b) of the Act), and secondly that there was no expressed public concern (other than through the Council) about effect on amenities. We also take into account that the ridge has already been compromised by Stage I of the subdivision which is well underway. We are satisfied that, provided sufficient landscaping is planned and carried out, any adverse effects would be sufficiently mitigated subject to consistency with the Regional Policy Statement. The practical difficulties are how that can be done, and how it is translated into the "concept plan' contemplated by the zone rules.

As to whether rezoning the site is the most appropriate way of exercising the function of integrated management of the effects of the use and development of the land we hold that it is for the reasons set out in paragraph 7.4.

Overall we consider that the plan change passes the section 32(1)(c) threshold test as follows:

(a) As far as the proposed residential land use is concerned, the plan change is both necessary and efficient because the possible adverse effects on the landscape can be sufficiently avoided or mitigated.

(b) As far as the proposed subdivision rules are concerned, there are obvious advantages in the new rules. The alternative - keeping the rural subdivision rules - is less efficient than the new rules so long as all externalities (traffic, sewage, stormwater etc) issues are internalised, that is paid by the developer - which they will be under the TD rules.

7.3 The Regional Policy Statement

The policies in the regional policy statement broadly support the proposal. "Objective 7.1.7 - Economic Benefits" refers, under "Methods", to:

"...enabling appropriate type, scale and location of activities by: clustering activities with similar effects; ensuring activities reflect the character and facilities available in the communities in which they locate; promoting the creation and maintenance of buffer zones (such as stream banks and greenbelts)." [Marlborough RPS p.59]

While we consider that the plan change does enable an appropriate type, scale and location of activities by clustering the various residential uses on the Marlborough Ridge, we are less certain that adequate buffer zones are created. We return to this issue later.

And in the section on "Protection of Visual Features" the objective expressed is:

"8.1.2 Objective - Visual Character

The maintenance and enhancement of the visual character of indigenous, working and built landscapes." [Marlborough RPS p.80]

The anticipated environmental result of that objective is expressed as:

"There is clear differentiation between landscape types shown by protection of outstanding landscaping features, and the maintenance of those criteria which define the nature and character of indigenous, working, and built landscapes.

The features which make the landscape special need to be recognised and protected to ensure that what we enjoy now is available for future generations to also enjoy. The diversity between and within landscapes is important to the values which we place on those landscapes. Outstanding landscapes need to be protected in a form similar to their present form, while the working and built landscapes need to accommodate and reflect the dynamics of their use and development." [Marlborough RPS para 8.1.8 (p.82)]

As we have said, the Council did not argue that Marlborough Ridge was in itself an 'outstanding landscape', and so the development of the ridge, if carefully planned with a landscape perspective, may enrich the wider landscape by adding to its diversity.

On that assumption we consider that inclusion of the deleted area is not contrary to the objective expressed (and we did not understand the Council to argue otherwise).

7.4 Conclusion

We now turn to the ultimate test (***Countdown***) that on balance we must be satisfied that the plan change (rezoning) achieves the purpose of the RMA.

Section 5(1) states:

"(1) The purpose of this Act is to promote the sustainable management of natural and physical resources."

and then section 5(2) gives the definition:

"(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)

(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." (Our emphasis).

Both parties relied on the definition in section 5(2) and especially the underlined words. The appellant argued that allowing the rezoning would enable

- the appellant to provide for its economic welfare; and
- potential residents to provide for their social, economic and cultural wellbeing

The Court accepts that the development, given its proximity to the resort complex and golf course, may enable significant social and economic (even cultural) benefit to the community.

For its part the Council's position was that community social and economic wellbeing would not be enabled because of:

- the effect on landscape and views;
- the effect on the Blenheim urban growth strategy and in particular the "oversupply" of sections on the fringes of Blenheim.

The Council's witness Mr Baily said that "any perceived benefits from the hotel and conference facility ... are not a confirmed outcome". Quite apart from the fact that that issue is only indirectly raised by this case about residential subdivision, we question whether it is the role of this Court to make judgments about social, economic or cultural wellbeing (as opposed to creating circumstances which enable that wellbeing to be created by people and communities) except possibly in the clearest cases (cf see ***Countdown Properties (Northlands) Ltd v Ashburton District Council*** [1996] NZRMA 337 which was more a case about not disenabling the community's centre by the grant of a resource consent). Our role as we perceive it under section 5 is to enable people to provide for that wellbeing. In other words, the scheme of the Act is to provide the 'environment' or conditions in which people can provide for their wellbeing.

We are satisfied on balance and having regard to all the relevant factors referred to in section 74 that the plan change should be allowed (applying ***Elderslie Park Ltd v Timaru District Council*** [1995] NZRMA 433).

8. Determination

The issue then arises as to how to give effect to the decision since we find:

(a) that the zone statement and rules as they stand are inadequate to control development on the appeal site for the reasons stated earlier. It may even be desirable to amend the rules to provide for a "No. 2 TD zone".

(b) that it might be fairer on the appellant if its financial contributions under the Act were in the form of land to be vested as reserve (for

example - without determining the issue - in the head of the valley leading down to the lake on Stage 1 land).

(c) that a fuller landscape concept plan will need to be drawn up, and attached to the amended set of rules.

(d) that the amended concept plan should deal with the matters referred to in the zone's rule 2.5.3(b) (so as not to be inconsistent with the Regional Policy Statement), specifically and by way of illustration:

- It should, to preserve natural topography, make the boundaries for allotments (especially those south of the road branch on the site) reflect and be sensitive to the contours rather than the present rectangular grid.

- It may be useful to sketch in all lots and building platforms. Some further infill could usefully be sketched in (even though that will require a discretionary consent later) so that potential problems with access are anticipated.

- At least some plantings on berms should be on the ridgetop - not less than 50% of the ridge line south of the road branch saddle.

- At least two clumps of plantings should be planned for on the eastern face of the zone in prominent places.

- Consideration should be given to placing a further woodlot on the site's high point adjacent to Goulter Hill.

- Plans should be shown for Long Paddock so that landscaping is coordinated with the lake in Stage I (outside the appeal site).

- There is a farm track at the northern end of the appeal site (it may in fact start on the Stage I land not subject to the site). It may be appropriate to form that as a right-of-way (easement in gross) down to and then along the eastern boundary of the land. The slopes both up and downhill could be planted (and protected by restrictive covenant) on subdivision. This would achieve various advantages:
  (a) an interesting tree line
  (b) a pedestrian footpath
  (c) a useful buffer between zones along the eastern boundary.

- Two further rights-of-way for the public should be shown (and required on any subdivision plan):
  (a) a footpath from the cul-de-sac to the paper road at the southern end of the site
  (b) a footpath down the long paddock to the Stage I land and a (dead-end) connection to the boundary of the adjacent land to the west.

- Consideration should be given to dropping the road down the east side of the last hump in the ridge before the road branch saddle so that a more intensive residential development can be sited (if that is what a purchaser wants) on that knoll.

- That so far as possible within the parameters of Plan Change 40 it would be desirable to allow greater intensity of development on some sites and again, if possible, fewer or at least better bulk and location controls to maximise opportunities for imaginative residential design

(some of the material in the rules might be left to the owners to impose by restrictive covenant).

Accordingly we further adjourn the case and invite:

(1) Preparation of an amended concept plan and amended rules (if necessary) for the TD zone as it applies to the site.

(2) Submissions from counsel as to the appropriate machinery for rezoning the site if the parties cannot agree on (1).

DATED at CHRISTCHURCH this 16th day of **October** 1997.

J.R. Jackson
Environment Judge

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

DOUBLE SIDED

Decision No. C 179 /2003

IN THE MATTER of the Resource Management Act 1991 (**the Act**)

AND

IN THE MATTER of an appeal under section 120 of the Act

BETWEEN **PIGEON BAY AQUACULTURE LIMITED**

(RMA 528/02)

Appellant

AND **CANTERBURY REGIONAL COUNCIL**

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge J A Smith (presiding)
Environment Commissioner W R Howie

HEARING at **CHRISTCHURCH** on 3 to 6 March 2003 and 11, 12 March 2003

APPEARANCES

Mr D J Clark for Pigeon Bay Aquaculture Limited **(the applicant)**
Ms M Perpick and Ms A M Douglas for the Canterbury Regional Council **(CRC)**
Mr P G Rogers and F D Brunton for Earthsea Double Bay Limited **(Earthsea)**
Mr E T Alty for the Department of Conservation **(the DOC)**

DECISION

[1] The applicant seeks a resource consent to establish a mussel farm at Big Bay on the northern side of Banks Peninsula.

[2] That application was refused by the CRC and appealed to this Court. Both Earthsea and the DOC support the CRC decision at first instance.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

[3] The essential task for this Court relates to whether a consent should be granted for the discretionary activity and the application of the various criteria under section 104 and Part II of the Act.

[4] The proposed marine farm would farm green lipped mussels, using the long line method. The original application sought some 11 hectares but four alternative configurations were proposed to this Court on appeal. In closing the applicant has abandoned the original application area with the three other options promoted being between some 5.65 hectares and 6.16 hectares or a little over half the original application size.

[5] The application is opposed by CRC, Earthsea and DOC. Concerns are wide ranging but include natural character and visual issues in particular.

Resource consents

[6] Section 12(1) and 12(2) set out four types of consents which are required, namely:

(a) To construct and place structures. In this case this would consist of anchors, anchor lines, backbone ropes, droppers and floats (section 12(1)(b) of the Act);
(b) To occupy the area (or part thereof) with structures (section 12(2)(a) of the Act);
(c) To disturb the sea bed (section 12(1)(c) or (e) of the Act); and
(d) To provide for the deposition of shell and other by-products of the marine farming on the seabed of the site (section 12(1)(e) of the Act).

The status of the application

[7] Parties are agreed that the proposed regional coastal environment plan (**PRCEP**) has now progressed through the planning process to a stage where decisions have been made on submissions and references filed. Variations have been introduced affecting relevant portions of this plan, but those too have reached the point where references

have been filed. Any references that were relevant to this appeal are now resolved and the relevant aspects of the plan are beyond reference. The parties are agreed that it can be treated as being operative for the purposes of this hearing.

[8] The application does not involve restricted coastal activities because:

(a) Pursuant to section 372(3)(c) of the Act the proposed plan has been notified and any prior notices from the minister of conservation cease to have effect;
(b) Under section 68(4) of the Act the activity would be a restricted coastal activity only if the plan required it to be restricted and that provision had the concurrence of the Minister of Conservation on certain stated grounds. In this case the issue does not arise as the plan does not state the activities the subject of this application to be restricted coastal activities. Section 68(A) does not apply as there are no aquacultural management areas under the PRCEP at this time.

[9] The plan does have differing activity status for the various activities which we have previously identified, although none are identified as restricted coastal activity. They are as follows:

(a) In respect of structures these are discretionary pursuant to clause 8.3 of the PRCEP;
(b) In respect of occupation this is a permitted activity if a consent is granted for the structures (paragraph 8.23 of the PRCEP);
(c) Disturbance or removal is permitted if directly related to a structure consent (clause 8.7(c)(i));
(d) Deposition is permitted if it is contemporaneous with the exercise of construction of the structures (clause 8.12(a)(i)) or is discretionary in relation to the use of structures under 8.13.

[10] As we understand it the activities of occupation and disturbance of the seabed would therefore constitute activities which are allowed as that word is used both in section 12(1) and (2). We repeat the concern of the Environment Court in ***Pigeon Bay***

Aquacultural Limited v Canterbury Regional Council[1] where the Court in that case noted that the CRC's use of such a mechanism is fraught with difficulties. The basic problem arising, which we will discuss in some more detail a little latter in this decision, is that it is difficult to see how the effects of occupation and/or disturbance of the sea bed can be taken into account where that activity becomes a permitted activity if the consent to the structures and deposition from shellfish is granted. Can the occupation by the structures of the water area properly be a consideration for the Court if the occupation itself is a permitted activity? In short the classification of these activities as permitted does not appear to be based upon the exercise of any of the Council's direct powers under section 30 but rather on the exercise by the Council of a discretion in respect of other resource consent decisions relating to the same site. We have a continuing concern as to this bundling and out of caution consider that we should examine the effects of all four activities (under section 104(1)(i) at least).

[11] This leads us to the conclusion that we should consider the grant of consents for all four activities. It was suggested by one expert that there may also be a question as to whether a consent is required for discharge to water, particularly of the shell and pseudofaeces during the normal farm operation and at harvesting. Tentatively we see that such permissions must be included within the discharges already sought i.e. deposition on the seabed can only occur by the medium of the water. However the matter was not fully argued before us and we reach no final view on this issue.

[12] We also note that although the status of these activities was agreed between the parties, marine farms are not dealt with separately within the plan and are dealt with as general structures. Accordingly the PRCEP does not provide explicitly for the areas in which marine farming may occur or provide any specific criteria for marine farms. We note that to fulfill the requirements of chapter 3.2 of the New Zealand Coastal Policy Statement policy 3.2.1:

> *Policy statements and plans should define what form of subdivision,* ***use and development*** *would be appropriate in the coastal environment, and where it would be appropriate.*

[1] [1999] NZRMA 211 at 217, para 15

We have concluded that to meet this mandatory requirement we must read the PRCEP as indicating that marine farming is generally not inappropriate in the areas in which it is provided for as a discretionary activity as to the structure. If it is not provided for in this zone, there is no other zone suggested to us by any witness in which such provision could be made. Similarly it cannot be argued that on reasonable reading of the PRCEP it does not provide for marine farms as an appropriate development in the coastal environment as we shall discuss in more detail in due course.

The Context of the PRCEP

[13] Much of the argument put to this Court related to how the provisions of sections 6 and 7 of the Act and the New Zealand Coastal Policy Statement (**NZCPS**) bore upon this application. This appeal does not relate to a reference under the plan and the provisions of the PRCEP are not in dispute. No party suggested to this Court that the relevant provisions of the PRCEP are inconsistent with either Part II of the Act or the NZCPS or the Regional Policy Statement (**RPS**). To that extent we assume that for the purpose of this appeal hearing those provisions are subsumed within the PRCEP which has been explicitly prepared in accordance with all three of those superior documents. The Court is explicitly required under section 104 to consider part II of the Act and the NZCPS and RPS: Accordingly that assumption could be rebutted. However we did not understand the CRC case to be that the PRCEP did not meet the obligations under any of those superior documents nor did we understand that to be the position of any witnesses who gave evidence to this Court.

[14] The expert witnesses accepted that the provision for this activity as discretionary in this area meant that the activity was generally appropriate within that area but not at every site. The importance of this issue will become clearer as we begin to examine the relevant plan and provisions of the superior documents.

[15] In particular the parties are agreed the PRCEP provides for structures as non-complying activities at most bays around Banks Peninsula between Lyttelton and Akaroa Harbours. This site is one of very few bays including relevantly Double Bay, Little Pigeon Bay, Scrubby Bay, Manuka Bay, Squally Bay and Raupo Bay which are

not included within the non-complying zone. The relevance of the CRC granting a resource consent recently for a mussel farm in Squally Bay will also need to be considered in due course.

The Proposal

[16] The applicant Pigeon Bay Aquaculture has two existing farms in Pigeon Bay subject of a previous decision of the Environment Court[2]. There has also been an application for extension to those farms, the subject of appeal to this Court, which has been resolved by consent order. Mr Aitken is a director in the applicant company and owns the land to the eastern side of Double Bay through to Pigeon Bay.

[17] The applicant seeks to establish a Mussel Farm for the growth of green lipped mussels parallel to the eastern coast of Double Bay approximately 60 metres offshore from mean low water mark near the eastern headland to that Bay. The size of the farm varies from the original proposal of around 11 hectares. The three proposals now currently before the Court are between 5.625 hectares and 6.16 hectares. The three options being pursued are attached to this decision as **Appendices 3**, **4** and **5**. For the sake of clarity, Appendix 3 is also sometimes referred to as the Rackham option and on each of the diagrams the original application site is shown by a dotted outline.

[18] It is intended that there will be long lines (back bones) anchored to the seabed by virtue of ropes (warps) attached to end buoys which line will run parallel to the coast. The anchor warps will be some 32 metres long with a ratio (scope) to the seabed of 5:1.

[19] Screw anchors will be used to fix the warps to the seabed. The warps will attach to the backbone rope which will then run parallel to the Coast to the next end buoy and anchor warp. Depending on the configuration these will be either a single line or two lines. From the backbone are suspended the droppers in a continuous line tethered at intervals to the backbone to form a snake like line when viewed horizontally. Mussel spat is attached to the droppers originally in stockings and eventually by the attachment action of the mussels themselves. As the crop grows on the dropper lines there is a need

[2] [1999] NZRMA 211

for more floats increases. The floats to be used are around two-thirds of the size of the industry standard and are intended to be semi submerged at all times. The maximum number of floats will be required just prior to harvesting when there is the densest concentration of mussels. At this stage the floats will be no closer than 6 metres spacing on the backbone. The dropper lines are tethered to the backbone by a line (usually made of rope).

[20] We are not aware that there is any proposal for there to be buoy tether areas (spare buoys). We understand all servicing of the farm will be from barge with no land-based activities or materials at Double Bay.

[21] Navigation lights are required on each corner of the farm and navigational buoys which are usually orange in colour. All harvesting is to be by barge and boat with no shore based activities at Double Bay. We also understand that the farm will be maintained in tidy condition at all times with no spare buoys, lines or other items attached to the farm.

[22] For harvesting the tethers attaching the dropper to the backbone are cut and a harvesting barge strips the mussels from the line and droppers. These are sorted by staff into sacks with breakage etc being put over the side. As the mussels are stripped from the droppers there is a release of detritus to the water. Harvesting occurs approximately once very 18 months.

[23] The evidence for the applicant was that this farm is significantly over designed compared with Pigeon Bay in recognition that it will be subject to greater forces than the Pigeon Bay site. The site is subject to heavy seas particularly in northerly or northwesterly conditions. In part the small buoys are utilised to allow waves to pass more freely through the farms giving less resistance to wave action. It is accepted by the applicant that only recently does the industry believe that the technology is now available to build farms in these more exposed sites. This site is more protected than the so called mid bay or open sea sites which are proposed elsewhere in New Zealand and in the middle of Pegasus Bay.

The application's relationship to Double Bay

[24] The proposed options Appendices 3, 4 and 5 are all near the eastern headland but inside Double Bay. All proposals are also outside the inner headland between Big Bay and Blind Bay and finish well before the east west parallel line which touches the tip of the inner headland between Big Bay to the east and Blind Bay to the west.

[25] There are three properties touching on Double Bay. These are the Chamberlain property which owns the western part of Blind Bay, the Earthsea property which occupies the inner headland and most of Big Bay and the Aitken property which occupies the western side of Big Bay and the hinterland behind Big Bay.

[26] Within Double Bay there is only one house situated at Big Bay around 200 to 300 metres from Big Bay beach. This property is over 1 kilometre from nearest of the three continuing options (Appendix 4).

[27] There are a number of macrocarpa trees on the beach which Earthsea are in the process of removing. There is a wool shed approximately 100 metres from the beach, a boat shed just behind the shoreline of the beach and a remnant jetty in the eastern inner part of the harbour of Big Bay. There is some tracking around the eastern side of Big Bay which terminates prior to the jetty.

[28] Double Bay is surrounded by steep land forms, similar to that around the balance of Banks Peninsula. Ms Lucas for the CRC indicated that the geological formation of this area is distinctive from either the Lyttelton or Akaroa caldera. From our site inspection we accept that upon careful examination one can see slightly softer land forms at Double Bay. The difference however is not so pronounced that it would be noticeable to anyone other than an expert. Nor is the experience dissimilar from that of the coastal area between Lyttelton Harbour and Pigeon Bay.

[29] There was clear evidence of cut over stumps during our site visit which satisfied us that the ridge line area has previously been in podocarp forest and has been cleared since European occupation. Earlier forestation is not so clear in respect of the shoreline areas round Big Bay and Blind Bay and on the fingers extending into the ocean. We

accept however that there is likely to have been a cover of tussock grasses, at least on the lowest portion of these areas, for a considerable period of time.

[30] We think that the general nature of this area is encapsulated in the comment of the Environment Court in ***Rutherford Family Trust v Christchurch City Council***[3]. Although commenting on the Port Hills the comment is equally as apposite for the area of Double Bay:

> *[12] We find that the Port Hills of Christchurch are the outer slopes of one of the two main drowned volcanoes - Lyttelton and Akaroa Harbours – which make up Banks Peninsula. The radial nature of the ridges – solidified lava flows – falling away from the craters is clearly visible in aerial photographs. Other volcanic materials deposited on the volcanoes' sides were ash and scoria. Much of the Port Hills basaltic base-rock is now covered both by soils derived from these rocks, and by a thick layer of loess –fine glacial dust blown from the Southern Alps.*
>
> *[13] Prior to human arrival much of the Port Hills, and indeed of Banks Peninsula, was covered with podocarp forest. However, after the arrival of Maori, burning converted significant areas to tussock grasslands, and successional forest.*

This particular area is largely the result of volcanic action of Mt Herbert but otherwise fits within the general description given.

[31] At the current time the Aitken property both on the eastern side of Big Bay and in the hinterland behind it is farmed for cattle and sheep. The areas higher on the ridges have more intensive exotic pasture with the areas on the fingers to the headland consisting of more of a mix of tussock, some underlying native scrub and exotic pastures.

[3] C26/2003 at paragraphs [12] and [13]

[32] The area occupied by Earthsea has tussock and exotic pasture grasses with some native scrub and planted exotic areas. There is a plantation of pinus radiata on the western side of the Earthsea Double Bay part of Big Bay and a small macrocarpa lot to the east of the house and behind it. There is also some exotic and native planting throughout the Big Bay area itself of relatively recent origin. There appears to be tussock and pastoral grass available for grazing although the exact limits of that were not clear from our site inspection. On the Chamberlain property the area again seems to be largely in tussock and pastoral grass with grazing of both sheep and cattle evident. On the ridges behind Double Bay there is evidence of cut over forest with a small remnant of podocarp or sucessional forest on the ridge behind Blind Bay (the Chamberlian property). This is, we understand, a voluntary reserve. The experts were unable to tell us, nor could we ascertain, whether there had ever been forestry to the sea edge at Blind or Big Bay.

[33] Along the coast between Double Bay and Port Levy are rugged headlands showing clear wave cut action and caves. To the east of Double Bay towards Pigeon Bay there are similarly areas of wave cut headlands. Within Double Bay itself it can generally be said that the western side of Double Bay exhibits more evidence of wave cut action, rock, bird life and the like than the eastern side which has little evidence of such features. From our observation of the other bays in the area this can generally be said of areas which are oriented in a north south direction when comparing the western side of the bay with the eastern side.

The Court's approach

[34] The parties have agreed the status of the activity is discretionary and this leads to the application of section 104 and section 105(1)(b) of the Act. The determination of the Court under section 105(1)(b) of the Act turns on the application of the principles of Part II and in particular section 5. In informing that decision section 104 directs our attention to a number of criteria. It is our intention to deal with the criteria in the following manner:

(a) Part II matters particularly section 6(a) natural character of coastal environment;

(b) Whether this is an outstanding natural landscape under section 6(b) of the Act and the effect of this;

(c) Amenity issues under section 7(c). This will include not only views from Earthsea but also boating visitors, kayaks, walking visitors, general effects under section 104 to the extent not already addressed. This will particularly identify visual matters mostly covered under section 7(c);

(d) Access, navigational and public space issues under section 60 of the Act;

(e) Ecological matters including benthic and hectors dolphin;

(f) Cumulative effects, positive effects and precedent effects;

(g) Policy statements particularly the New Zealand Coastal Policy Statement and Canterbury Regional Policy Statement;

(h) The objectives, policies and rules of the PRCEP and relevant district plans;

(i) Other matters under section 104(1)(i) particularly precedent, common operation with farms in Pigeon Bay, and open bay farms.

(j) The Court will then turn to exercise its discretion under section 105(1)(b) and section 5 of the Act.

Preservation of the natural character of the coastal environment - section 6(a)

[35] Section 6 of the Act provides relevantly

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) ... and the protection of them from inappropriate subdivision, use, and development ...; and

(b) the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development;

...

(d) the maintenance and enhancement of public access to and along the coastal marine area, lakes and rivers.

[36] Mr A M Rackham a landscape architect was called on summons by the applicant. Mr Rackham provided the original section 42 report to the Council. Mr Rackham's report had been favourable to the application whereas the decision of the CRC committee had been to decline the application. Mr Rackham was therefore called to produce his original report provided to the Council and gave further evidence to the Court in respect of this matter.

[37] Four expert witnesses were called on landscape and visual matters and these were Mr A M Rackham, Mr P Rough for the applicant, Ms D J Lucas instructed for this appeal by the CRC, and Mr C R Glasson for Earthsea. A large measure of agreement existed between the experts.

[38] Mr Rackham's firm, Boffa Miskell, has been involved and retained by the CRC over a number of years and undertaken both regional and specific assessments for the CRC. Furthermore they prepared the background document relied on to differing degrees by all of the experts dated March 2001 which is entitled *Assessment of Coastal Suitability for Marine Farms on Banks Peninsula* which report is subtitled *Natural Character, Natural Features/Landscape and Amenity Values.* Furthermore we are satisfied that Mr Rackham in preparing his report to the Council for this case assessed this site in the context of that report and accordingly in the context of the whole of Banks Peninsula.

[39] In respect of the natural character of the coastal environment Mr Rackham put to us a definition developed recently by a consultative group with the Ministry of the Environment as follows:

> *Natural character is the term used to describe the natural elements of all coastal environments. The degree or level within an area depends on:*
>
> *(1) The extent which natural elements, patterns and processes occur;*
> *(2) The nature, and extent of modifications to the eco systems and landscape/seascape;*

(3) The highest degree of natural character (greatest naturalness) occurs where there is least modification;

(4) The effect of different types of modification upon natural character varies with context and may be perceived differently by different parts of the community.

[40] Mr Rackham adopted this as a definition of natural character for the purposes of this case. We have reached a similar conclusion as to the meaning of section 6(a) namely:

1. All coastal environments have natural elements;
2. It is important to identify those natural elements, patterns and processes;
3. That section 6(a) seeks to preserve those natural elements to protect them from:
   (i) inappropriate development; but
   (ii) subject to the overriding constraints of section 5.

[41] In short we have concluded that the preservation envisaged in the first part of section 6(a) is subject to the qualification as to inappropriate development in the latter part of that subsection. In ***New Zealand Rail v Marlborough District Council***[4] the High Court discussed section 6(a) in some detail. Because of the centrality of this argument in this case it is worth quoting at some length from this case. The Court discussed the question of 'inappropriate' under section 6(a) and noted[5]:

"Inappropriate" subdivision use and development has, I think, a wider connotation than the former adjective 'unnecessary'. ... "Inappropriate" has a wider connotation in the sense that in the overall scale there is likely to be a broader range of things, including developments which can be said to be inappropriate, compared to those which are said to be reasonably necessary. It is, however, a question of inappropriateness to be decided on a case by case basis in the circumstances of the particular case. It is "inappropriate" from the point of view of the preservation of natural character in order to achieve the

4 NZRMA 70 at 85
5 70 at 85

promotion of sustainable management if the matter is 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 that 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 Act expresses in ordinary words of wide meaning the overall purpose and principles of the Act. It is not, I think, a part of the Act 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 meanings 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 promote the objectives and policies and the principles under the Act.

In the end I believe that the tenor of the appellant's submissions was to restrict the application of this principle of national importance, with 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 necessary or essential to depart from it. That is not the wording of the Act 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 Act and had regard to the various matters to which it is directed. It is the Tribunal which is entrusted to construe and to apply those principles, given the weight that it thinks appropriate.

Furthermore the Court discussed section 6(a) in relation to section 5 and said:

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 principal purpose.

[42] In this case marine farming is only provided for as a discretionary activity in certain coastal areas. That includes the subject site. It could therefore be argued that the activity is not inappropriate because it is provided for in this area in the PRCEP. In ***Golden Bay Marine Farmers and Ors v Tasman District Council***[6] the Court was particularly concerned with references in respect of a coastal plan. Accordingly, in that case the Court was concerned as to what content the plan should have to reflect the various elements of the Act and policy statements. At paragraph 727 of that decision the Court noted:

> *Mr Rackham considered that the closer the development is to the non-modified coastal margins the more weight should be given to s.6(a) values. He considered that the more one moves landwards in that assessment, the greater will be the dilution of the natural character of the CMA. He was not prepared to discuss natural character issues for offshore locations - because that was not his brief. But Mr Rackham also said this:*
>
> > *In my opinion the major concern falls back on the appearance of natural character as determined by the nature and scale of modification.*
> >
> > *A surface marine farm will introduce a significant modification in the water surface wherever it occurs in the bay (apart from alongside existing farms) ... There is some justification in favouring sites adjacent to a more modified coastline ...*

And later, in relation to modified areas, the Court noted at paragraph 730:

> *In doing so, we note the natural character of the coastal environment is not required to be preserved or protected at all costs: NZ Rail Ltd v Marlborough District Council [1994] NZRMA 70 at 85 and Trio Holdings Ltd v Marlborough District Council [1997] NZRMA 97 at 116. Just because an area contains a natural character worth preserving does not mean the development is automatically inappropriate. No party sought to prevent additional marine*

[6] W42/2001.

farms in these references, so they may be considered "appropriate" in terms of s.6(a). Their location and scale will determine whether the development in both bays is inappropriate or otherwise.

And in the decision ***Kuku Mara Partnership v Marlborough District Council***[7] the Court said at paragraph 570:

The location and scale of the development in the CMA will assist in determining the appropriateness or otherwise of a development on any given site because marine farming is an activity which may only be carried out in that location.

[43] The issues are:

- Is the area in question already affected by the loss of natural character?
- Is the natural character of the environment preserved and protected in terms of section 6(a) notwithstanding the development?
- Is the location and scale of the proposal on this site inappropriate?

[44] We conclude that section 6(a) envisages that regional coastal plans may indicate an activity is not inappropriate by providing for it as either a permitted or a controlled activity or, depending on the site and location, as a discretionary activity. In this case we accept that marine farms are generally not inappropriate within this area as they are provided for as a discretionary activity. However, this does not mean that every site within the area and every farm proposed will not be inappropriate. Inappropriateness in respect of an individual marine farm will depend on a number of factors, including particularly location and scale of the marine farm in question.

[45] We accept Mr Rackham's evidence to us that inappropriateness in this case must be context sensitive. In other words, a farm which might not be inappropriate in respect of the natural character of Pigeon Bay may be inappropriate elsewhere around Banks Peninsula. We also recognise that in assessing the natural character of the coastal environment we are very much concerned with the particular catchment area that we are

7 W25/02.

including for the purposes of assessing that coastal environment. For example, the actual area covered by mussel lines represents a significant change to the natural coastal environment for that particular area and/or water column occupied by the structure. On the other hand, in the context of a large coastal environment catchment (for example Pigeon Bay), the degree of change of that natural character may be minimal.

[46] We have concluded that the major parties opposing this application have conflated the provisions of section 6(a) and 6(b). The consideration of natural character of the coastal environment by the opponents' witnesses has been combined with the case law relating to outstanding natural landscapes to constitute an argument very close to that identified in the ***NZ Rail*** case. In other words it appears that we were being faced with an argument that, taken together, sections 6(a) and 6(b) dominate the consideration under section 5 militating only one outcome.

[47] However, counsel accepted that section 6(a) and (b) either separately or combined cannot create a veto over an application being considered under section 5, but merely inform the essential decision making process required under section 5. That position must be further strengthened by the Privy Council decision in ***McGuire v Hastings District Council***[8] which has clarified that the Act has a single broad purpose as defined under section 5. Accordingly the primary task of the Court must be (in a discretionary application) to take into account the various matters under section 104 and integrate these in a decision under section 5. Each case may require a different application of the various elements of sections 6, 7 and 8 and the other provisions of section 104 depending on the evidence before the Court and its assessment of the many legal and value judgments which are required as a result. The weight to be given to each element will contribute to the integrated assessment for each case required by section 5.

Outstanding natural landscapes – section 6(b)

[48] The Court was faced with a considerable amount of evidence that this site constituted part of an outstanding natural landscape. The argument followed that

[8] [2002] 2 NZLR 577.

because the Regional Plan had identified the whole of Banks Peninsula as a regionally outstanding landscape, then each element, including Double Bay must be outstanding.

In the ***Rutherford*** case which we have just mentioned there does not appear to be any dispute that the Port Hills are identified as outstanding. The Christchurch City plan in that case said so and this was confirmed by the Court.

[49] In this case the parties did not point to any provisions of either the district or the PRCEP which provided for this area or Double Bay as an outstanding landscape. Rather, they referred to an assessment undertaken some time ago (1993) and the provisions of the regional policy statement in relation to Banks Peninsula as a whole. This very issue was discussed by the Court in the ***Rutherford*** decision and in particular the limits of the outstanding natural landscape in built up areas. Mr Rackham himself said the grain of the study which identified Banks Peninsula as an outstanding regional landscape was particularly coarse. He accepts that such an assessment does not mean that every element of Banks Peninsula is an outstanding natural landscape. There are significant built areas throughout Banks Peninsula, including a major port. There are structures and elements both within the coastal environment and on land which are the antithesis of an outstanding natural landscape.

[50] If the intention was that every element of the landscape was outstanding then this argument would mean that the PRCEP is inconsistent with the regional policy statement because it does not provide for every coastal area as outstanding. On the contrary, the PRCEP does identify a number of outstanding landscapes around the coastline. We conclude that this must constitute CRC's compliance with its obligations in terms of the regional policy statement and section 6(b) in the preparation of this regional coastal plan.

[51] Accordingly the fact that this site was not identified as being an outstanding natural landscape means that the Council has concluded in preparing the plan that the obligations under section 6(b) do not apply to this site. To fail to do so would breach their obligations to recognise and provide for outstanding natural landscapes under section 6(b) of the Act.

[52] Further, our discussion in relation to the word **inappropriate** in the context of section 6(a) is equally applicable to section 6(b). In short, there is no evidence before us to establish that there is a fault in the PRCEP in identifying outstanding natural landscapes in this area or that Double Bay is an outstanding natural landscape.

[53] Mr Rackham repeatedly said, in answer to cross-examination, this does not mean that the area does not have high natural values. We conclude that high natural values are recognised and provided for in terms of section 6(a). In ***Wakatipu Environmental Society Inc v Queenstown Lakes District Council***[9] the Court noted that outstanding natural landscapes would be obvious in general terms. Here the PRCEP has recognised and provided for natural character and outstanding natural landscapes through a comprehensive set of provisions. It has excluded certain bays from discretionary consents for man made structures and made that activity a non-complying one in those areas. It has not identified Double Bay as an area where such restrictions generally apply or where there are outstanding natural landscapes.

[54] In terms of the application of sections 6(a) and (b) to the circumstances of this case, the major impact identified by the parties was the potential for the man-made structures (essentially the floats) to interfere with the visual or aesthetic elements of the coastal environment and/or landscape. There was some evidence that there may be a modification of the benthic elements in this area. It was suggested that there may be mussel reefs established below the mussel farm, or that there may be an alteration to the phytoplankton and therefore benthic communities in the area. We found this evidence less than compelling. Green-lipped mussels are endemic in this area, although sea conditions may be such that the area is particularly sparsely populated. The area under the site is mud bottomed as is much of the surrounding area. There seems to be relatively low levels of benthic community or fish life. The growth of green-lipped mussels is in itself an entirely natural process and does not require any inputs, excepting the structures themselves and the regular harvesting.

[55] Accordingly the only derogation from the natural character of the coastal environment that we are able to see is the intrusion of man-made structures (essentially

9 [2000] NZRMA 59 at pp 95 and 96.

floats) where there are currently none. It therefore does not amount to a derogation of any natural elements or processes but does intrude into an entirely natural pattern. Again we can only conclude that the level of derogation is a factor of location and size. Such an assessment is best made as part of the overall assessment under section 5.

Amenity issues – section 7(c)

[56] The Court clearly needs to take into account the potential visual effect of this activity, both in terms of the coastal environment and in respect of its context. This in itself involves a series of value judgments. This case is a clear example of how experienced and well informed experts may still not be able to agree in respect of the value judgments to be exercised in such cases. Mr Rackham and Mr Rough concluded that, although there was a significant visual effect both within the farm and up to 500 metres from it, in the context of the bay as a whole and the potential viewing audiences the effects were less than minor. Mr Glasson and Ms Lucas reached contrary conclusions. To some degree we accept this was influenced by three factors:

(a) A difference between the parties as to whether or not the viewing audience included people standing on the coastline adjacent to the Aitken property to the east of Big Bay;
(b) The catchment area for significant visual effect of the farm. In particular whether this was 500 metres or some greater measure, say over 1 kilometre; and
(c) The qualitative assessment of the natural character of the coastal environment and the hinterland (visual catchment area).

[57] The conclusions of the parties were significantly different. We prefer the evidence of Mr Rackham for the following reasons:

(1) Mr Rackham was independent of the parties' position in this matter;
(2) His firm had undertaken a large number of assessments for the CRC;
(3) That they had specifically prepared a report in March 2001 on the subject of marine farms around Banks Peninsula;

(4) That Mr Rackham's evidence looked at this site in the context of Banks Peninsula as a whole and in the context of various elements which made up the PRCEP and its provisions for this activity as discretionary;

(5) The Court's site inspection reached similar conclusions to these of Mr Rackham in respect of visibility of the marine farm, the likelihood of a viewing audience on the eastern headland, and the qualities of the visual catchment.

[58] Essentially those conclusions were:

(1) That the coast in this area is still predominantly natural;

(2) That the adjacent land retains a natural character, though it is far from pristine;

(3) That an area of open water in the outer bay will lose a large measure of its present naturalness;

(4) The proposed modifications to marine processes are unlikely to affect the shoreline or land based ecology;

(5) Where the proposed farm is adjacent to the shore the existing natural character of the coastline will be adversely affected to some extent;

(6) That much of Double Bay, and particularly Big Bay, with its less impressive cliffs and coastline does not match the very high quality of several other parts of the outer north-eastern coast;

(7) That there would be significant potential visual landscape effects up to 500 metres;

(8) That there will be an impact on views from the headland between Big and Blind Bay. This view will now be something over 1 kilometre distant.

[59] We agree largely with the conclusion Mr Rackham reached in this regard. Mr Rackham concluded that the Rackham option, Appendix 4, would be such that:

There will be no significant adverse effects, beyond the immediate area of the farm, on natural character, landscape or amenity values, so long as the farm is reduced to its northern block with dimensions of 300 x 200 metres.

[60] We go further and conclude that any of the three options would be such that there is no significant adverse effect on natural character, landscape or amenity values. What is clear from this is that we accept that there is some effect and the question then turns upon the core evaluation that must be undertaken by the Court in integrating all of the various elements identified.

Access - section 6(d)

[61] We have dealt with the issue of amenity under section 7(c) because of its linkage with items under section 6(a) and section 6(b)). The access issue is separately raised and in turn this has three sub-elements in the context of this case:

(a) Navigation issues;
(b) Access to and along the foreshore of the eastern side of Big Bay;
(c) Issues of alienation of public space.

[62] These issues are addressed in the New Zealand Coastal Policy Statement, particularly policies 3.5.1, 3.5.2, 3.5.3, the Regional Policy Statement Chapter 11, Issue 2, Objective 2, policy 3 and of course in terms of the PRCEP. Again it was not argued before us that the PRCEP failed to provide for the matters under each of the superior documents, namely the RPS, and the NZCPS. Evidence was given by Master Mariner Captain W W Wood, that the siting of this marine farm (in the original larger configuration) did not impose any impediment to shipping or vessels travelling around Banks Peninsula. Even in respect of sailing and motor vessels within Double Bay, Captain Wood was of the view that there was no impediment to the safe passage of vessels. He was further of the view that this area of coast was only likely to be subject to passage by recreational vessels in times of fine weather when the marine farm would impose no impediment whatsoever and vessels at that time could safely travel between the 20 metre spacing of the lines. His view was that there was minimal restriction on vessel movements within the Bay.

[63] In respect of smaller vessels, such as kayaks, his view was that the farm may provide some attenuation of wave action and it would impose no navigational or access impediments. Although there were various suggestions by counsel in cross-examination

that there may be some impediment to yachts in particular, we conclude that Captain Wood's evidence is uncontroverted, at least so far as motor vessels and yachts are concerned.

[64] In respect of kayaks, Mr A Kirk-Anderson gave evidence on behalf of the Kayak Association. Mr Kirk-Anderson is one of the most frequent users of this area of northern Banks Peninsula for kayaking purposes and is familiar with Double Bay. We did not understand it to be disputed that kayaks are able to travel closer to the coast and there is the potential for them to travel within the area of the site. Mr Kirk-Anderson himself accepted that there was little to particularly attract kayakers in the area of this site. We have concluded that there is likely to be no navigational or access impediment to kayakers on the reduced site for the following reasons:

(a) There is little of attraction on the foreshore or on the site itself to attract or retain the interest of kayakers;

(b) There is adequate room between the foreshore and the marine farms for kayakers to travel safely in lighter swells;

(c) In slightly heavier swells we conclude that kayakers would be likely to travel either between the lines in the marine farm or seaward to avoid risk of wave rebound off the cliffs and the potential benefits of wave attenuation through the farm;

(d) There is no impediment to kayakers using the western side of the bay, which is of significantly higher natural interest, in accessing both Blind and Big Bay in the more reasonable weather conditions that would be suitable for a kayaker.

[65] Finally, in respect of recreational fishing we accept that there is the potential for recreational boating to utilise the marine farm as a line to moor their vessels while they are fishing. We have concluded that there is little of interest to attract recreational fishers to this part of the bay and we conclude that recreational fishermen are either likely to fish within the inner bays (to avoid wave swell from the more open coast) or fish off the open coast in lighter conditions.

[66] We have concluded that there is adequate room between the shore and the farm to permit ready access to the foreshore. In practical terms such access is unlikely because of swell and lack of benthic or fish life. However at its reduced scale the impediment to boat access would be minimal.

[67] This leaves the issue of alienation of public space. It is quite clear that the application does not involve the exclusive occupation of the entire site area. As a matter of practicality it must involve the exclusive occupation of the water column occupied by the anchors, warps, backbone, droppers and floats. In our view the extent of that occupation does not significantly impact upon the occupation and use of the area by any other persons likely to use it. Recreational set netting is already not permitted within the mammal sanctuary of Banks Peninsula and fishing would not be prevented by the existence of the marine farm.

[68] The more real concern raised by the witnesses was the apparent occupation of the area and the reluctance of members of the public to use the area. We accept from the evidence that has been given to us that there is a general reluctance by members of the public to go into marine farms. The uncertainty as to what lies beneath the water and the apparent occupation of the area by the delineated lines is sufficient to dissuade many people from entering marine farms. That effect is inevitable with a marine farm wherever it is placed. In the context of this case the question is what level of alienation is likely to occur as a result of this marine farm being put in place. We conclude that the prospect of this area displacing recreational users is far lower than that on the Pigeon Bay sites.

[69] However, for both of these sites the recreational use of the area is at such a low level that it could be regarded as minimal, certainly in comparison with areas such as Pelorus Sounds. Again, the question becomes one of balance. We recognise the national importance of maintaining and enhancing public access to the coastal marine area. That of course is a question of degree which must be reached as a result of integrating the various criteria under section 5 of the Act.

[70] Having regard to the three remaining site areas shown in Appendices 3, 4 and 5, we are satisfied that there is minimal interference with navigation, access or recreation use.

Effects – section 104(1)(a)

[71] Some of the issues relating to visual effects have already been raised in our consideration of the Part II matters and we will not repeat that discussion. Further effects not already identified include:

(a) Positive effects;
(b) General visual effects – there is clear overlap with the discussion under section 7(c);
(c) Ecological effects;
(d) Potential effects on Hectors dolphins;
(e) Cumulative effects; and
(f) Precedent effect – although we consider this matter is better dealt with under section 104(1)(i) and we will leave discussion until that stage of our decision.

Positive effects

[72] It is acknowledged that there are economic benefits from the operation of the marine farm, not only in terms of employment and potential employment in both the farm and processing, but also in terms of export income. Another positive benefit identified by Mr Aitken is that marine farming does not require any inputs to achieve the outputs. In his view marine farming is a sustainable activity and natural, in that it exploits a natural product (green-lipped mussels) from their natural environment (the coastal waters of New Zealand). We understand that Mr Aitken was suggesting that a movement to marine farming may be more sustainable for the New Zealand ecology and economy than the reliance on traditional land-based farming. In part Mr Aitken indicated that his ability to diversify into marine farming may make farming generally on the Banks Peninsula more sustainable in the long-term and avoid the need to sell the property for other purposes such as lifestyle blocks or subdivision.

[73] On the other hand Ms Perpick for the CRC pointed out that the private benefit in this case came at the cost of alienation of a public resource, namely coastal waters. We also recognise that in terms of the proposed reduction in the farm size the economic benefits are less from a 6 hectare farm than they are from an 11 hectare farm but so is the degree of reduction of public space.

[74] We have concluded that one of the important benefits of marine farming is that it is not a permanent alteration of the environment, at least in terms of the man-made structures. The licence period sought in this case is some 15 years and at the end of this period all structures could be removed. Although there may be some ecological changes which are irreversible (which we will discuss later), the major visible effects of the activity are non-permanent. We see this as a positive benefit of this activity.

Visual

[75] There is no doubt that there is some visual effect from the structures intended as a result of this marine farm. We accept Mr Aitken's evidence that the major dominant effect would be to persons either at or immediately adjacent to the farm to a distance of 500 metres. We accept that the effect would be significant for people on the water up to a distance at the most of 500 metres, although we are unable to conclude that it would be a dominant visual element. In our view the vertical scale of the hills and Peninsula significantly detracts from any horizontal elements and would dominate the view even at this relatively short range.

[76] We accept that to any persons who may be on the eastern headland within 500 metres the farm may dominate the near view. As Mr Aitken owns most of this land and has provided a written consent under section 104(6) we are unable to take any potential effect of views from his property into account. We reject Ms Perpick's suggestion that such a consent only applies for the owner personally and not for any persons who may be on his property by permission or licence. We accept that if there were persons holding legal occupation of the property at this time then the comments in ***Queenstown***

Property Holdings Ltd v Queenstown Lakes District Council[10] may apply. However, that is not so here.

[77] We accept that there is a very limited potential for persons to use the public unformed road (paper road) around the coastline. This road is in common with most of Canterbury, large portions of which are nearly impassable. In a practical sense, we doubt that it is possible for a person to easily come within 500 metres of the proposed mussel farm in terms of its reduced configurations. For a walker to do so they would be aware of the mussel farm and would be walking towards it deliberately. In our view the prospect of that being an adverse effect is minimal.

[78] There is also a potential wider viewing audience beyond 500 metres, including recreational boaters, shipping, people standing on the inner headland between Blind Bay and Big Bay, and of course any users of the house or environs of Big Bay itself. We prefer Mr Rackham's evidence that the effect at this distance (around 1 kilometre) is not significant. In fact, from our site inspection and our viewing of the Pigeon Bay site, we doubt that the existence of the farm would be immediately noticeable to persons in Big Bay.

[79] We accept that it would be clearly visible to people on the headland. However, this headland is owned by Earthsea and the best visibility of the farm would occur to persons who were travelling to the house at Big Bay. The road is particularly perilous and steep, and a vehicle would need to be stopped safely before any person would be particularly concerned with the outlook. There are better positions for a general overview seawards further up the ridge towards the public road, and closer to the Big Bay house. On this basis we see that there is little realistic prospect of any substantial impact visually of the marine farm. Beyond 1 kilometre we have concluded that the overall scale of Banks Peninsula and the three seaward headlands in Double Bay would make the marine farm inconsequential.

[80] In respect of vessels that may be transiting either around Banks Peninsula or to sea (in the shipping lane), we doubt that the marine farm would be noticeable at all or

[10] [1998] NZRMA 145 at 170.

would be clearly distinguishable from the general coastline. We accept however, that the larger the farm the more that impact may be. In our view that impact is largely the result of how far from the shoreline the farm protrudes rather than its length along that shoreline. This would be particularly so for vessels that may be travelling to the west towards Port Levy and Lyttelton which would only have an oblique view into Double Bay until past the entrance.

[81] We have concluded that the visual effects of this are very much a result of scale and the positioning of the marine farm and will need to be assessed as part of the exercise of the Court's discretion.

Ecological matters

[82] There was some suggestion of an adverse effect on the benthic community. We have concluded that the benthic community in this area is in common with much of Banks Peninsula, which is muddy bottomed with sparse communities. There is nothing we were able to note about this case which would differentiate it from much of Banks Peninsula, at least between Port Levy and Pigeon Bay. We recognise the concerns, particularly of Dr M S Barker, that there is the potential for mussel drop and the establishment of reefs beneath the lines which will not only change the benthic communities but may smother those existing and create adverse effects. Having regard to the significant wave action in this area we accept that there is the potential for mussel drop from the lines. We also accept in the course of harvesting a significant amount of mussels and pseudofaeces would be deposited to the bottom of the site. Dr Barker also suggested that based on studies in the Sounds there may be the potential for build-up of faeces and psudo-faeces and the creation of anaerobic activity beneath the site.

[83] We have concluded there is little prospect of these types of effects in this area. In our view the significant swells around Banks Peninsula and the wave rebound from the rock faces and apparent currents are sufficient to avoid the type of negative activities that Dr Barker has identified. However, we consider that there is some merit in considering whether a further benthic survey should be undertaken several years after the establishment to establish what effects the activity is having on the benthic

community and whether there should be a revision of the conditions of consent accordingly.

[84] In short, to the extent that there is a potential effect, it is our view that this could properly be dealt with by a condition of consent if the activity is otherwise appropriate.

Hector's Dolphins

[85] Evidence was given by Dr Slooten for the CRC about the potential effect of mussel farming on Hector's dolphins. The concern appears to be that this marine farm may decrease the area available for Hector's dolphin and impose a risk to them.

[86] There is no doubt that Hector's dolphins are an important element of Banks Peninsula and that significant steps need to be taken to ensure that the species is sustainable. At the current time Dr Slooten says that notwithstanding the ban on set netting, there is still a loss of dolphins in this area greater than their replacement rate. Those risks are unrelated to mussel farms at the present time and comprise essentially netting, commercial fishing offshore, general recreational fishing, and boats (particularly propeller strike). Dr Slooten was also cautious about the effect of tourism and accepted that that too may pose a low risk to dolphins.

[87] It was difficult for the Court to understand from Dr Slooten's evidence what particular risks she saw mussel farms as posing for dolphins. Under direct questioning from the Court she indicated it would need to be some form of knotted noose of a size sufficient to ensnare and drown a dolphin. A dolphin is not able to swim backwards and, once caught, often further entangles and drowns itself. She accepted that dolphins were particularly sleek and not easily ensnared and the examples she gave when dolphins had been caught related to gillnetting or set nets. She also indicated that dolphins' detection systems were sufficiently sophisticated that they generally were aware of nets, could "see" nets in the water, so that mussel lines, backbones and buoys themselves were unlikely to cause an obstruction to a dolphin.

[88] In the Squally Bay decision the Commissioners appointed by the CRC considered evidence from Dr Slooten. That referred to a report prepared in November

2000 on the potential effects of mussel farming on Hector's dolphin and Banks Peninsula. That report was also produced to us and indicated that mussel farming could, as a compromise option, be considered only on the northern side of Banks Peninsula. It identified the area between Sumner and Little Akaloa Bay as being appropriate. Dr Slooten was concerned that at Squally Bay there was a farm of some 35 hectares more offshore than she had previously considered.

[89] It is difficult for this Court to see how Dr Slooten differentiates this site from the contents of her report in November 2000. There does not appear to be any new evidence on which Dr Slooten based her current opinion, although she did produce further sighting evidence (which had not been circulated to the parties) at the hearing itself. The recent sighting information indicated one sighting in the western part of Double Bay (around the western heads) but no sightings on the eastern side of Double Bay. Because these sightings are taken over a relatively short period, this is not to say that the eastern side of Double Bay does not form part of the Hector's dolphins range. We are able to conclude that the eastern side of Big Bay is not a critical part of the Hector's dolphin range and that a marine farm at 6 hectares would have an inconsequential effect on their habitat.

[90] The only question that remains to be considered is whether in fact there is any potential danger to Hector's dolphins from this marine farm. Dr Slooten urged on the Court that we should adopt a precautionary approach on the basis that although there was a very small risk, it could have very large effects on the dolphin population.

[91] We have concluded however, that there must be some evidence of risk on which to base such an assertion. It must be a risk capable of measurement in scientific terms and assessment. We find the prospect of a loose rope floating adjacent to a marine farm in such a way that it can ensnare a dolphin to be so remote as to be fanciful. Quite simply, there should be no such ropes on a marine farm and if necessary the Court can impose a condition to require this to be the case.

[92] None of the other expert witnesses were even able to understand how such a circumstance could arise. We must confess, with deference to Dr Slooten, neither can we. In our view the everyday transit of vessels around Banks Peninsula poses an

exponentially greater threat to dolphins than does the existence of a 6 hectare marine farm. This particular farm has backbone lines lying parallel with the shore which would be the natural direction in which any pod of dolphins would be moving in any event, with large fairways between the lines.

[93] In conclusion we find the risk of the type of incident described by Dr Slooten is minimal. Furthermore, it is our view that any potential impact can be addressed by a general condition in the consents requiring that there be no loose lines in relation to the marine farm (at any time) or words to that effect. In our view, this would obviate any such risk in the event that the Court otherwise concluded that consent should be granted.

Cumulative effects

[94] It is clear from the evidence of the CRC witnesses, including Dr Slooten, that the major concern is the prospect of proliferation of marine farms, not only through the few remaining bays on the Banks Peninsula, but also offshore. In our view that concern is simply addressed by the fact that the Government has imposed a moratorium on the grant of further marine farm licences and given the CRC the opportunity to consider appropriate marine farm management for the Banks Peninsula. In particular, section 68A of the Act now provides for the use of aquaculture management areas which approach is, essentially, an area allocation device.

[95] The issue is whether the grant of an application in this case would create a cumulative effect, together with the farms already existing. Concern over marine farm proliferation are issues of precedent and future effects, rather than cumulative effects as a result of granting this application.

[96] Although we acknowledge that the grant of consent for Squally Bay is not insignificant at 35 hectares, that consent has been granted by the CRC after a full consideration of evidence. We are not satisfied that the number of marine farms at this stage is such that either individually or cumulatively the addition of a 6 hectare farm at Double Bay would change the level of effects. Again this would depend entirely upon size and location of the farm. There is a significant distance between this site and the nearest marine farm site and there is no visual connection between the two. We accept

that with the addition of any new farm, the prospect of cumulative effect grows. In our view the PRCEP has particularly sought to avoid potential cumulative effect on bays around Banks Peninsula by making the activity non-complying in most bays. Any cumulative effect as a result of this application is minimal.

Policy statements - section 104(1)(b)

[97] There are two relevant policy statements, namely the NZCPS and the RPS. We will consider each of these in turn.

The New Zealand Coastal Policy Statement

[98] That is explicitly prepared in order to achieve the purpose of the Resource Management Act in relation to the coastal environment of New Zealand. We have concluded, having regard to the introduction to the Coastal Policy Statement, that it is subservient to, and intended to inform, the criteria of Part II of the Act and particularly section 5. In addition, the Coastal Policy Statement states a number of other further general principles and in our view those having particular relevance are:

> *(1) Some uses and developments which depend upon the use of natural and physical resources in the coastal environment are important to 'the social, economic and cultural well-being' of 'people and communities'. Functionally, certain activities can only be located on the coast or in the coastal marine area.*
>
> *(2) The protection of the values of the coastal environment need not preclude appropriate use and development in appropriate places.*
>
> ...
>
> *(5) People and communities expect that lands of the Crown in the coastal marine area shall generally be available for free public use and enjoyment.*
>
> ...
>
> *(10) It is important to maintain biological and physical processes in the coastal environment in as natural a condition as possible, and to recognise their dynamic, complex and interdependent nature.*
>
> ...

(12) The ability to manage activities in the coastal environment sustainably is hindered by the lack of understanding about coastal processes and the effects of activities. Therefore, an approach which is precautionary but responsive to increased knowledge is required for coastal management.

(13) A function of sustainable management of the coastal environment is to identify the parameters within which persons and communities are free to exercise choices.

[99] Chapter 1 Policy 1.1.1 adds to section 6(a) in discussing the natural character of the coastal environment. In particular it states:

It is a national priority to preserve the natural character of the coastal environment by:

(a) encouraging appropriate subdivision, use or development in areas where the natural character has already been compromised and avoiding sprawling or sporadic subdivision, use or development in the coastal environment;

(b) taking into account the potential effects of subdivision, use, or development on the values relating to the natural character of the coastal environment, both within and outside the immediate location; and

(c) avoiding cumulative adverse effects of subdivision, use and development in the coastal environment.

[100] Chapter 1 Policy 1.1.3 discusses elements of the natural character of the coastal environment:

It is a national priority to protect the following features, which in themselves or in combination, are essential or important elements of the natural character of the coastal environment:

(a) landscapes, seascapes and landforms, including:

(i) significant representative examples of each landform which provide the variety in each region;

(ii) visually or scientifically significant geological features; and

(iii) the collective characteristics which give the coastal environment its natural character including wild and scenic areas;

(b) characteristics of special spiritual, historical or cultural significance to Maori identified in accordance with tikanga Maori; and

(c) significant places or areas of historic or cultural significance.

[101] Chapter 1 Policy 1.1.4 identifies further elements of the coastal environment as follows:

> *It is a national priority for the preservation of natural character of the coastal environment to protect the integrity, functioning, and resilience of the coastal environment in terms of:*
>
> *(a) the dynamic processes and features arising from the natural movement of sediments, water and air;*
> *(b) natural movement of biota;*
> *(c) natural substrate composition;*
> *(d) natural water and air quality;*
> *(e) natural bio diversity, productivity and biotic patterns; and*
> *(f) intrinsic values of ecosytems.*

[102] Chapter 1 Policy 1.1.5 states:

> *It is a national priority to restore and rehabilitate the natural character of the coastal environment where appropriate.*

[103] The national priority discussed, to preserve and protect identified elements by adopting particular methods must be subject to the general requirements of the RMA and Part II.

[104] We have concluded that all of these policies can be seen as repeating and, to some extent, amplifying the criteria of Part II of the Act. As such, we have discussed these general criteria. We conclude that Double Bay is not a significant representative example of landform or significant geological feature. As was mentioned by a number

of witnesses it reflects landscape and features which are in common with much of Banks Peninsula. Although the site has natural character this is in common with most Banks Peninsula coastlines. It has no distinguishing or remarkable features and is viewed in the context of a working landscape.

[105] Chapter 3 of the NZCPS particularly deals with subdivision use or development of the coastal environment. We note in particular that policy 3.1.2 requires that a policy statement and plans should identify:

> *scenic, recreational and historic areas, ... scientific and landscape features, which are important to the region or district and which should therefore be given special protection; and that policy statements and plans should give them appropriate protection.*

[106] This appears to be a directory requirement and accordingly both the RPS and the PRCEP should properly identify and take steps to protect aspects which require such special protection. Similarly, policy 3.1.3 requires policy statements and plans to maintain and enhance open space values by appropriate protection.

[107] Finally, 3.2.1 requires policy statements and plans to define subdivision use and development that is appropriate in the coastal environment and where it is appropriate.

[108] Similarly, 3.2.4 requires provision should be made to ensure that cumulative effects of activities collectively in the coastal environment are not adverse to a significant degree.

[109] In short, all of the requirements of 3.1 and 3.2 relate to the content of policy statements and plans. The policy statement and plan as prepared, if not inconsistent with the NZCPS, should reflect those elements. Importantly in this case no party suggested that either the PRCEP or the RPS did not achieve the objectives of these NZCPS policies.

[110] Policy 3.3.1 provides:

Because there is a relative lack of understanding about coastal processes and the effects of activities on coastal processes, a precautionary approach should be adopted towards proposed activities, particularly those whose effects are as yet unknown or little understood. The provisions of the Act which authorise the classification of activities into those that are permitted, controlled, discretionary, noncomplying or prohibited allow for that approach.

[111] We can but conclude that this policy is also directed to Councils in the preparation of their various plans (or to the Court on a reference from those plans). In this case the CRC has adopted the classification approach to make the activity discretionary. We conclude this approach fulfills policy 3.3.1.

[112] Policy 3.5 particularly addresses the question of public access and notes that a restriction depriving the public of such access should only be imposed in limited circumstances. This policy contemplates exclusive occupation of an entire area, rather than some limits upon the scope of activities that can occur within an area. We do not understand the provision for a marine farm as either a permitted, controlled or discretionary activity would offend against this policy.

The Canterbury Regional Policy Statement

[113] This RPS is expressed in general terms. On its face it appears to encapsulate the provisions of Part II of the Act and the New Zealand Coastal Policy Statement, among other matters. Chapter 11 of the plan does not explicitly discuss marine farms as the subject of any of its issues, objectives or policies. Under 11.2(b) it appears that Banks Peninsula as a whole is recognised as an outstanding landscape and/or natural feature. It appears indirectly that Issue 1(viii) structures may include marine farms, although the example given is jetties. Objective 1 however, states: .

Provide for appropriate use and development of the coastal environment while protecting and where appropriate enhancing:

(a) life-supporting capacity of coastal ecosystems including:

...

(b) outstanding landscapes and natural features including:

...

(ii) coastal landforms and landscapes, submerged platforms and seascapes that are regionally, nationally or internationally representative or unique;

...

(d) areas of significant amenity value, including recreational attributes;

(e) natural character (including associated natural processes) of the coastal environment;

...

[114] Policy 1 reads:

To avoid, remedy or mitigate, to an extent not inconsistent with the New Zealand Coastal Policy Statement, the direct and indirect adverse effects of land uses or activities and new or additional uses, development or protection inland of or within the coastal marine area where, either singly or cumulatively they would significantly affect:

(a) the life-supporting capacity of coastal ecosystems and the natural processes which sustain them;

...

(c) natural character (including associated natural processes), outstanding natural features and landscapes;

(d) amenity and recreational attributes;

...

[115] In the explanation it notes in particular:

... Activities such as marine farming and ports can have direct effects by occupying a specific area and reducing recreation opportunities and access to sheltered waters. They can also adversely affect areas of high conservation and cultural values (e.g. marine farming can reduce mahinga kai by restricting access). Adverse effects within the coastal environment may also arise from the following:

(i) discharges of contaminants or waste;

(ii) siltation;

(iii) alterations to water flows or levels or sediment supply;

(iv) activities generating odour or noise;

(v) recreational activities on land and water;

(vi) modification of landform or clearance, modification or disturbance of indigenous vegetation or habitat ...

[116] Methods to policy 1, page 174, are listed as:

1. The methods used or to be used by the Regional Council are:

(a) Regional Coastal Environment Plan

(b) Other Regional plans

(c) Encourage the preparation of iwi management plans

(d) Resource consents

(sic)

(f) Information provision

(g) Investigations

2. District/city councils in the preparation, variation, change or review of their district plans, through the exercise of their functions outside the coastal marine area should consider:

(a) including provisions in their district plans to give effect to Policy 1.

[117] On this basis it appears clear to us that the RPS requires a regional coastal environment plan and other regional plans to achieve policy 1, whereas it requires district and city councils merely to take the policy into account. That being the case, it appears that the RPS anticipates that the PRCEP will avoid, remedy or mitigate direct and indirect adverse effects of marine farms within the coastal marine area. Again it was not suggested by any party, particularly by the CRC, that the PRCEP failed to do this.

[118] Under Issue 2, Objective 2, Policy 3 the CRC addresses the issue of access. Interestingly Issue 2(c) notes adverse effects caused by the public on ecological values, sites of cultural significance, sand dune stability, amenity value, other recreationalists and natural character. Again, the methods to this issue appear to be mandatory in respect of the CRC, particularly the PRCEP, while requiring district and city councils to

consider them only. 11.3 Methods 1(a) recognises the PRCEP as including provisions for:

> *(a) The identification of:*
>
> ...
>
> *(ii) parts of the coastal marine area including heritage areas, for protection and use.*

[119] We conclude the RPS is consistent with the superior documents. It also is directory to the CRC in the preparation of its PRCEP, to provide for the control of marine farming and to identify parts of the coastal marine area for protection and use. In this regard, as can be seen shortly, we must conclude that the plan anticipates that the PRCEP will identify areas for marine farming and areas for protection from marine farming.

The PRCEP, objectives, policies and rules

[120] The PRCEP contains several chapters of interest in respect of this application. Chapter 6 relates to the natural character and appropriate use of the coastal environment. Chapter 7 relates to coastal water quality. Chapter 8 to activities and occupation in the coastal marine area, with two particular schedules of interest being S5.5 – Areas of Significant Natural Value – and the schedule to 5.13 – Areas of Banks Peninsula to be maintained in their present natural states free of additional structures. Double Bay is not listed as an area of significant natural value in Schedule 1 to objective 6.1 but is included under Schedule 2 as an area of high natural physical heritage or cultural value because of its inclusion within the Banks Peninsula Marine Mammal Sanctuary. That sanctuary covers most of Banks Peninsula.

[121] Policy 6.1 provides:

> *(a) Within the coastal marine area, the Canterbury Regional Council, and the Minister of Conservation in relation to restricted coastal activities, will:*
>
> *(i) control activities which have or are likely to have an adverse affect on the identified values of Areas of Significant Natural Value and areas of high natural, physical, heritage or cultural value;*

(ii) *adopt a precautionary approach when considering applications for resource consents where the effects are as yet unknown or little understood or where the functioning of marine ecosystems is poorly understood;*

(b) *The Canterbury Regional Council will undertake a process of investigation and public consultation to:*

(i) *identify additional areas of high natural, physical, heritage, or cultural value, including wahi tapu, urupa, tauranga waka and mahinga kai; and*

(ii) *identify areas of where access to and along the Coastal Marine Area needs to be enhanced or controlled.*

[122] Objective 6.2 seeks to enable people to undertake commercial and recreational activities in the coastal environment and provides:

> *Enable people to undertake commercial and recreational activities in the coastal environment while:*
>
> *(a) avoiding conflicts between those activities; and*
>
> *(b) avoiding, remedying or mitigating the adverse effects of those activities on the natural character of the coastal environment.*

[123] Policy 6.3 assigns priority to existing commercial and recreational uses within the CMA. It also accepts that the CRC will undertake a process of identifying areas of the CMA for development of commercial or recreational activities.

[124] The explanation adds:

> *The principal areas for commercial and recreational activities such as those involving port operation, marine farming, swing and pile moorings, boat launching and storage facilities* ***are to be identified****. The activities associated with such areas are to be protected from the adverse effects of other activities that could preclude the appropriate use of the area to make the use efficient. Provision is to be made for appropriate transfer and network utility infrastructure.* [emphasis added]

[125] What is not clear from the words *to be identified* is whether the plan is accepting it has not undertaken the process of identifying suitable areas for marine farms or that it recognises that this policy is fulfilled later in the rules. Because of the direct nature of the requirement under the RPS and under the NZCPS we have concluded that the latter interpretation must be correct, namely that the rules should achieve and implement the requirement to identify suitable places for marine farming.

[126] In this context the relevant portion of the plan is Chapter 8 which relates to activities and occupation of the marine coastal area. Issues, objectives and policies are contained in 8.1 – 8.3 with rules following in 8.4. Objective 8.1 reads:

> *To enable people to use the coastal marine area and its resources while avoiding, remedying or mitigating the adverse effects of that use on the environment, including avoiding, remedying or mitigating the adverse effects:*
>
> *(a) Of conflict between these uses and people's wellbeing, health, safety and amenity; and*
>
> *(b) On natural character, and other (natural), ecological, amenity, tangata whenua, historic and cultural (values of the coastal environment).*

[127] Policy 8.1 reflects this allowing for permitted activities including certain structures. 8.2 includes the regulation of activities. 8.3 sets out various criteria in considering applications for resource consent.

Policy 8.5 is attached as part of **Appendix 6**. The explanation adds the following:

> ...
>
> *Activities that require the allocation of space, such as marine farms, compete with other uses of the area. Consideration should be given to the effects of occupation on existing uses and values for the area, including effects on the local community and the cumulative effects of displacing existing uses and values.*

This provision is in itself somewhat curious, as we shall see in a moment, when it is compared with 8.2.3 which provides for occupation as a permitted activity where the structure, i.e. marine farm, obtains a resource consent.

[128] Policy 8.15 identifies there are areas of Banks Peninsula that should be maintained in their present natural states. This establishes the schedule that we have discussed, and essentially requires that an activity in those areas the structures and their use will have no more than minor adverse affects on:

(a) The natural character of the area including its overall landscape and seascape;
(b) The marine foreshore and seabed ecology;
(c) The water quality;
(d) The use or enjoyment of the area by recreational tourists or other users in a marine environment who do not require authorisations for exclusive occupancy; and
(e) The habitat of Hector's dolphins.

[129] Policy 8.15.2(c) provides an explicit exception for marine farm operations which were in existence at a set date. That date has been changed as a result of references to the plan. In Chapter 8.4, rule 8.1 provides for permitted activities. This does not apply to this application.

[130] Rule 8.3, page 8-32 provides:

> *Except as provided for by Rules 8.1, 8.2, 8.4, 8.5, or 8.6; the erection, reconstruction, placement, alteration, extension, removal or demolition of any structure, or part of any structure, fixed in, on, under, or over any foreshore or seabed; is a Discretionary Activity.*

[131] 8.5 provides for non-complying activities. As already indicated, this includes any structure within the area listed in Schedule 5.13.

[132] Rule 8.7 provides for permitted activities in respect of the disturbance of the foreshore seabed – (c)(1) provides:

> *The disturbance or removal [is permitted provided] it occurs contemporaneously with and is directly associated with the erection, reconstruction, placement, alteration, extension, removal or demolition of a structure authorised as a Permitted Activity in accordance with Rule 8.1; or by a resource consent in accordance with Rules 8.2, 8.3, 8.4, 8.5 or 8.6; and*
> *[a series of conditions which appear to be met in this application]*

[133] Chapter 8.6, rule 8.12, deals with deposition and again provides for such deposition to be a permitted activity if it occurs contemporaneously with and is directly associated with any disturbance of the foreshore or seabed which is occurring as a result of implementing a resource consent – see 8.12(a)(i). Otherwise, the application is discretionary under 8.13 which reads:

> *Except as provided for in Rules 8.12, 8.14, 8.15 or 8.16; the deposition by any person of any substance on the foreshore or seabed in a manner that has, or is likely to have, an adverse effect on the foreshore or seabed is a Discretionary Activity.*

[134] Chapter 8.10 deals with occupation of the coastal marine area, and rule 8.23 defining permitted activities provides:

> *(a) The occupation of the Coastal Marine Area that occurs contemporaneously with and is directly associated with any erection, reconstruction, placement, alteration, extension, removal or demolition of a structure that is authorised as a Permitted Activity in accordance with Rule 8.1, or by a resource consent; provided that Environment Canterbury is informed in writing of the nature of the structure and its occupation at least ten working days before the occupation of the Coastal Marine Area by any new structure commences.*

We have already identified the existing use and development. We conclude that the site has a natural character within a working landscape. The second link is more problematical. It restates the NZCPS Chapter 1 as an absolute requirement to preserve a more restrictive requirement than that expressly used in section 6(a) RMA which requires preservation and protection from inappropriate use and development. On its face this might give rise to a vires issue as to policy 8.3. By specifically referring to the NZCPS we have concluded that Policy 8.3(a) is not intending to add to the NZCPS but refer to it. The extent to which NZCPS 1.1.1, 1.1.3 and 1.1.4 are met in the case is a core issue under S5. It will be influenced by the scale of the activity, its siting and the context of the effects.

(b) ...

(c) Effects on the public use and enjoyment of the coast.

We have identified this as being particularly limited in the circumstances of this case, there being no special features of the eastern coast of this bay to warrant special attention of a limited number of recreational users. The public can only access the coast with some difficulty by paper road, along the coastline or by water.

(d) Cumulative effects.

We have addressed this issue already and conclude there is minimal effect.

(a) Existing agriculture and other use.

We have identified this but have not sought to give any particular consideration to the impacts of the application on such uses. The land in the vicinity of the property is working pastoral land, although still retaining natural character and with more tussock and natural features than farm land further inland. On the other hand Big Bay itself has been subject to extensive modification over the years with buildings, planting and installation of the road. Overall, these issues balance one another and are relatively neutral in terms of the existing agriculture and other use. It is difficult to see any way in which the marine farm could impact on the existing agricultural use. An effect on the home in Big Bay is possible primarily in a visual sense but also from flotsom and jetsam from the farm.

[139] In respect of policy 8.5 we have already considered questions of navigational channels and public recreation. There is no existing commercial use of the area. Accordingly sub-paragraph 8.5(d) does not apply. In relation to Policy 8.5(e) we have discussed the question of adverse effects on the natural character. This case raises the issue of what is *within and outside the immediate location*. Again we reiterate that the catchment is particularly important in this case to understanding the influence of this marine farm. In the context of its wider catchment, the adverse effects on the values of the natural character relate mainly to visual effects and are minimal. In the context of the site and its immediate catchment, say up to 500 metres, the effect is more significant.

[140] 8.5(g) raises the question of available alternative sites. In this regard we accept Mr Rackham's evidence that there are few alternative sites available within bays which are:

(a) not covered by Schedule 5.13;
(b) suitable for marine farms;
(c) have sufficient weather protection for marine farms.

This is limited to a few bays on the northern side of Banks Peninsula. The reasons that the applicants have chosen this site relates to the shelter and positioning, the proximity to the Aitken property, and their conclusion that it will not impose an unreasonable impact in terms of the criteria under the plan and the Act.

[141] Policy 8.5(h) has regard to the existing use and development of the area, and the extent to which the natural character has already been compromised. There was a great deal of evidence given by the landscape witnesses as to whether or not the natural character of this area had already been significantly compromised. This in turn turned on arguments as to whether or not the land was pastoral and whether 'natural' meant 'unmodified by the hand of man'. This led to arguments as to whether or not the natural character was that which existed prior to the arrival of Maori, or prior to the arrival of the Europeans, and whether exotic forestry and grasses etc were part of the natural character. It also led to issues as to whether or not the waters of the bay were pristine in general, and finely grained arguments as to the natural state of the various elements within the bay and its environs.

[142] We have concluded that the term 'natural character' is not used with this degree of precision. There is no doubt that the catchment has natural character, as indeed in our view do all coastal environments. The question is whether the application will adversely affect its natural character, and if so to what extent. It appears to us that 8.5(h) is an attempt to link into the New Zealand Coastal Policy Statement Policy 1.1.1 in relation to preference for development in areas that have already been subject to modification. There is no doubt there has been some modification of this environment. The jetty remnant and the buildings are clear examples of that. There are also less obvious examples in the exotic plantings, macrocarpas and pine trees. However, the argument becomes more difficult to assess when one comes to assess the natural character relating to the exotic plant elements as opposed to the man-made elements.

[143] We have concluded that the discussion we have already had about natural character in the context of 6(a) better approaches this matter than does the wording of 8.5(h). It is intended that the period of occupation, as we have indicated, is for some 15 years and the farm will occupy only the water column which is necessary for the purposes of the structure of the farm itself. All Counsel in this case accepted that the provision for this activity as discretionary led to the conclusion that it was generally acceptable within the zone but not at every site or at every scale. Overall we have concluded that the plan provides for the general approach we have taken under section 104 with consideration of specific criteria under the plan as relevant.

District plans

[144] There are some three relevant district plans, being the transitional Mt Herbert district plan, the transitional Akaroa district plan and the proposed Banks Peninsula district plan. That proposed plan is subject to variation no. 2 as to the Rural zone. It would be fair to say that no witness or counsel to this Court was able to be authoritative as to the effect of these various plans. However, the following appears to be clear:

(1) That there is no outstanding natural area in Double Bay;

(2) That variation 2 has reduced the coastal protection area around Double Bay to approximately a 40 metre wide strip of land above the mean high water springs.

[145] This variation has just closed for submissions and has not been heard yet by Council. The parties have subsequently agreed the permitted activities within this area under the various plans. This is annexed and marked as **Appendix 7**. It seems to be accepted that the variation 2 policies relating to the coastal environment are reflective of section 6(b) of the RMA, the NZCPS and the RPS and the PRCEP. It would be fair to say that whether or not these provisions achieve the purposes of the Act has yet to be addressed, and at this stage little particular weight can be given to the variation because of its early stage in the process.

[146] Big Bay is the division point for the transitional district plan between the Akaroa section and the Mt Herbert section. The Akaroa section takes in the eastern part of Big Bay and covers the land adjacent to the proposed marine farm. Under the Akaroa section of the transitional district plan, the land is zoned Rural 1. This permits farming and woodlot forestry. The placement of existing dwellings is permitted but all new dwellings are a discretionary activity. There are some design and colour criteria applying except to accessory buildings. Clearance of bush remnants are also a discretionary activity. There is an objective relating to the outer bays, of which Double Bay forms part:

> *To preserve and enhance features of the outer bay area which make an attractive place to live and to visit.*

[147] Policy 1 discourages development that would detract from the dominance of natural landscape features, open pastoral ridges and tops and wooded gullies. Policy 8 seeks to preserve the coast and land immediately behind it from private development. Policy 7 deals with management of water and seeks to manage the water so it remains available and attractive for a whole range of uses, for enjoyment of views of water and protection of wildlife habitat, through to commercial fishing. There is an express recognition that this involves balancing the uses which compete for space, controlling the erection of structures in or on the water, ensuring safe navigation and maintaining

water quality. We accept Mr Dewe's summation of this that, when considered overall, the transitional district plan encourages farming on land and permits structures accessory to farming, but when it comes to the coastal environment discourages sporadic visually dominant development of other buildings and structures along the coast.

[148] The permitted baseline as a result is one which would allow continuing modification of the land based activities for farming purposes even in the coastal protection area. Buildings are permitted on a limited basis beyond the coastal protection area and discrete wood lots setback over 100 metres inland.

[149] One could therefore anticipate the erection of new homes in the area as is proposed on the Earthsea and Chamberlain properties. One could also envisage the renewal or oversowing of the headlands with higher productive grasses. Our inspection revealed good pasture land for cattle and sheep. We therefore conclude that higher pastoral production is not fanciful in this area. It seems to be argued that the jetty could be restored as of right but we are unclear as to whether this will occur.

[150] Overall these changes represent the sort of continuum of change that is part of this environment. The continual adaptation and reuse of the land is an essential feature of a working landscape and Big Bay is no exception. The recent planting of both exotic and native trees, the removal of the macrocarpas and the plan for a new home all fit within this context of continuous change.

Other matters - section 104(1)(i)

[151] Both the applicant and the CRC raised issues of precedent but in different contexts. The CRC was concerned that the granting of this application may lead to a plethora of further applications to develop the remaining bays and even applications for non-complying activities within the bays covered under 5.13. We understood Ms Perpick to subsequently accept that the granting of a discretionary activity consent outside the scheduled areas could not be a precedent for granting a non-complying consent in those areas.

[152] It was clearly at the heart of the concerns of the CRC witnesses that there was the potential for further farms to be erected, not only in the bays not listed under the Schedule 5.13 but also off the various headlands and offshore. The concern arose from the fact that at the time the plan was prepared it was not contemplated that such offshore marine farms would be technically feasible. We repeat again that we believe the answer to this concern is clearly recognised in the current moratorium over processing applications for consent in this area and the provisions of section 68(A) which allow regional coastal plans to provide for aquaculture and management areas (as well as the other methods which are already available to the Council). It is clearly important that the Council proceed with that process as expeditiously as possible if they are concerned at the potential for further applications.

[153] We gathered from several witnesses giving evidence before the Court that there were in fact a significant number of applications which had been filed but were caught by the current moratorium. We are unable to see how the processing of this application can create a precedent in respect of these other matters which are caught by the current legislation and potentially by any variation or changes introduced to the coastal plan.

[154] Mr Clark for the applicant raised with the Court the argument that the granting by the CRC of the consent for Squally Bay at 35 hectares is inconsistent with their decision in this case. Again we find it difficult to accept that in respect of the wide range of criteria that must be taken into account in an application it is possible to draw an exact parallel between Squally Bay and Double Bay:

- The site envisaged at Squally Bay stands offshore;
- It is not enclosed within the headlands of a bay;
- It is significantly larger and more open;
- There are potentially different viewing audiences and different recreational audiences in this area. An example is that without evidence we would not know what level of kayak use there might be in Squally Bay or whether there is an owner having a bach within proximity of the marine farm.

[155] Overall, in the context of Banks Peninsula, we consider that it is not logical and is inappropriate for the Court to start extrapolating that the granting of a consent at either Pigeon Bay or Squally Bay establishes that a consent should be granted at Double Bay. It is clear that in the context of this plan each site must be considered on its own merits in the context of the relevant criterion and the provisions of the superior documents and the Act.

[156] There are other matters under section 104(1)(i) which we should mention briefly. One is that it was intended that the applicant would service this farm in conjunction with their farm at Pigeon Bay. As the farms are serviced from Lyttelton, Double Bay is en route to Pigeon Bay. On this basis there is likely to be no significant increase in vessel movements, at least pre-harvesting. There are economies of scale that are in favour of such an application. We do not believe that significant attention should be given to this aspect of the matter but we do recognise that it is a benefit of the application. However, there is no guarantee these farms will stay in common ownership for the foreseeable future.

[157] Finally under section 104(1)(i), it seemed to underlie certain of the CRC witnesses and some of the questions of counsel that there was now a desire by the CRC to move marine farms offshore to avoid potential conflicts with the natural character of the coastal environment. We make the point clearly that there is nothing in the policy or rules that indicates that preference. If it is intended to be included in a variation to the plan it is certainly not explicit within the plan at the current time. Secondly, this preference (if one exists by the CRC) relies on technology as yet untried. Mr Acton-Adams, a director of the applicant company is a person with considerable experience in marine farming issues. He suggested that he would rather *"them than me"*. We suspect that the success or otherwise of the farms on Banks Peninsula and at slightly more exposed sites (such as Squally Bay) may be indicative of the ability of sites further offshore to endure open sea wave action productively.

[158] We comment that we have not heard any argument as to the merits of the offshore option and this is not before us in the context of this hearing. Accordingly, it is not possible for this Court to conclude whether offshore marine farms represents a viable or realistic alternative at Banks Peninsula. We have simply heard no evidence

[135] As already indicated, Banks Peninsula Marine Mammal Sanctuary is listed under Schedule 2. The following bays are listed under 5.13, making the erection or placement of certain structures within those areas non-complying. These are:

> Port Levy, Pigeon Bay, Menzies Bay, Decanter Bay and Little Akaloa Bay, Okains Bay, Lavericks Bay, Le Bons Bay, Hickory Bay, Goughs Bay, Fishermans Bay, Shell Bay and Red Bay, and Otanerito Bay and Sleepy Bay, Stony Bay, Akaroa Harbour, Island Bay, Long Bay, Peraki Bay, Robin Hood Bay, Te Oka Bay, Tumbledown Bay, Tokoroa Bay and Hikuraki Bay.

[136] In general terms we conclude that the plan has provided for marine farms in two ways. Firstly, by providing for them as discretionary activities offshore and in a limited number of bays. Secondly, it has indicated areas where marine farms (and other structures) are non-complying activities by identifying a series of bays in 5.13. The general discretion under section 104 does not appear to be limited but policies 8.3 and 8.5 provide further criteria. The criteria under 8.5 are dependant on whether or not one can say that the permitted activity of occupation still falls to be considered as part of the application to install structures.

[137] Policy 8.3 sets out criteria on consideration of all resource consents. No particular distinction is drawn between discretionary and non complying applications. We conclude that the application of each criteria will turn on the classification of the activity and the extent to which the plan has dealt with each issue.

[138] We deal with each relevant criteria as it appears in Policy 8.3 set out in Appendix 6:

(a) Existing level of use and development and natural character. This criteria has two links:
   (i) identifying the existing level of use and development.
   (ii) considering the national priority of the NZCPS to preserve the natural character of the coastal environment.

that would enable us to reach such a conclusion. Nor, in the context of this case, is it appropriate for us to reach such a conclusion.

Exercise of the Court's discretion

[159] Section 105(1)(b) gives the Court a general discretion to grant or refuse consent and to impose such consent conditions as it sees fit. We assume that generally speaking the conditions intended are in the form proposed by Mr Loe for the CRC consent hearing and/or imposed on the Squally Bay decision. We have already indicated that we consider that there is cause for including conditions if the consent is granted relating to:

(a) A benthic survey after a set period of time, say 2 to 3 years to ascertain what affect the marine farm has had on the sea floor;
(b) Conditions requiring the proper management of the marine farm to avoid excess floats, lose lines and the like and shore debris.

[160] Accordingly we shall assume that the application is intended to proceed in this way.

Section 5

[161] We conclude the determination as to whether this application should be granted turns on an integration of the various factors we have identified and a decision as to sustainable management under the Act. The Act is enabling in nature, seeking to enable people and communities while sustaining the potential of natural and physical resources, the life-supporting capacity of air water and soil and eco-systems, and avoiding remedying or mitigating adverse effects.

[162] From our discussion as to the various elements that impact upon this discretion it is clear to us that size and location are key factors in whether a marine farm should be established at the site. In respect of the location we have concluded that if a marine farm is sited near to the eastern headland then it will represent a reasonable balance between the various factors under section 5. In our view it is critical to avoid any impact on access to the inner bays, and minimise the effect on access to the shoreline.

To that extent we would have had considerable concerns with the original proposal having regard to the length of foreshore which would be affected and the level of intrusion into the bay.

[163] In respect of the issue of size, again the extent to which the farm extends out from the shore and the overall area involved in relation to the total area of the bay are, in our view, critical factors. We have concluded that farms in the range suggested in Appendices 3, 4 and 5 are at such a size that impact on the entire bay is not significant. Furthermore we have concluded that if the farm is located near the headlands, then any of the three options proposed would achieve the Court's approach under section 5 in respect of location.

[164] We accept Mr Rackham's evidence that the proposed site is one of the very few places around Banks Peninsula which is suitable for the establishment of marine farms. In support of this conclusion we take into account:

(a) The lack of natural features on the eastern coast of Double Bay;
(b) The fact that a marine farm would be indented behind the headlands but not into Big Bay or Blind Bay themselves;
(c) The area is not covered by Schedule 5.13 or Policy 8.15 of the PRCEP;
(d) That the site would give some protection, particularly from southerlies;
(e) That the proposed site would leave the inner bays free and easily accessible for both land based and boating activities;
(f) That either option (3), (4) or (5) would not generally interfere with access to the coastline in this area.

[165] In respect of size we have concluded that 11 hectares would have been too large in that it would occupy nearly some 10% of the bay area. All of the three options in our view are suitable in terms of size. In particular each would :

(a) Reduce the amenity impact to negligible levels to most (if not all) of the viewing audiences;
(b) Occupy a reasonable area at the head of the bay;
(c) Provide a clear access to Double Bay and to inner bays.

[166] We have concluded in respect of configuration that Appendix 4 represents the best option because:

(a) There is less distance from the shore occupied, just over 200 metres;
(b) That it is within the line of the headlands so there are no navigational issues.

[167] In our view such a siting and configuration would have a minimal impact on the natural character of Double Bay. The mussels themselves are natural as is the growth process. The structures represent an acceptable intrusion into the Bay at this scale. The harvesting is only once per 18 months and servicing is little different to other boating activities.

[168] Overall we conclude that the Act's purpose is best met by allowing the activity subject to appropriate conditions. To do so is consistent with PRCEP, NZCPS, RPS and Part II of the Act.

[169] The parties have indicated that if the Court is minded to grant consent then the final conditions will need to be approved by the Court. We anticipate that the conditions will be similar to those for the Pigeon Bay and Squally Bay sites, and generally in accord with those suggested by Mr Loe. We have also suggested at least two additional conditions.

Directions

[170] We have concluded that resource consents to operate a marine farm for green lipped mussels at Double Bay should be granted in accordance with terms and conditions which will be set. The actual wording of the grant of consents and the final conditions are to be circulated by the applicant to the Council and other parties within 20 working days. Comments are to be forwarded by them to the applicant within 10 working days thereafter.

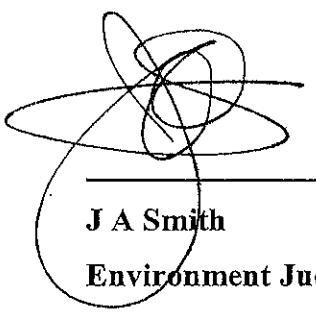
[171] Subsequently the applicant is directed to file the draft consents and conditions, with any amendments agreed and with any comments from the parties and/or the applicant, with the Court 10 days thereafter. If the final terms and conditions cannot be agreed, then the Court will consider the same and issue either directions or a memorandum as to final conditions. The configuration should follow the form proposed in Appendix 4.

Costs

[172] This case is finely balanced. Although the applicant has been successful on appeal, the area consented to is significantly less than that originally applied for. We are of the tentative view that this is not an appropriate case for the award of costs. If any party seeks costs, then such application must be filed within 20 working days, replies 10 days thereafter, and final reply 5 working days thereafter.

DATED at CHRISTCHURCH this 17th day of **June** 2003.

For the Court:



J A Smith
Environment Judge

Issued[11]: 18 JUN 2003

[11] SmithjeVud_Rule\d\RMA 528-02

There is no Appendix 1 or Appendix 2

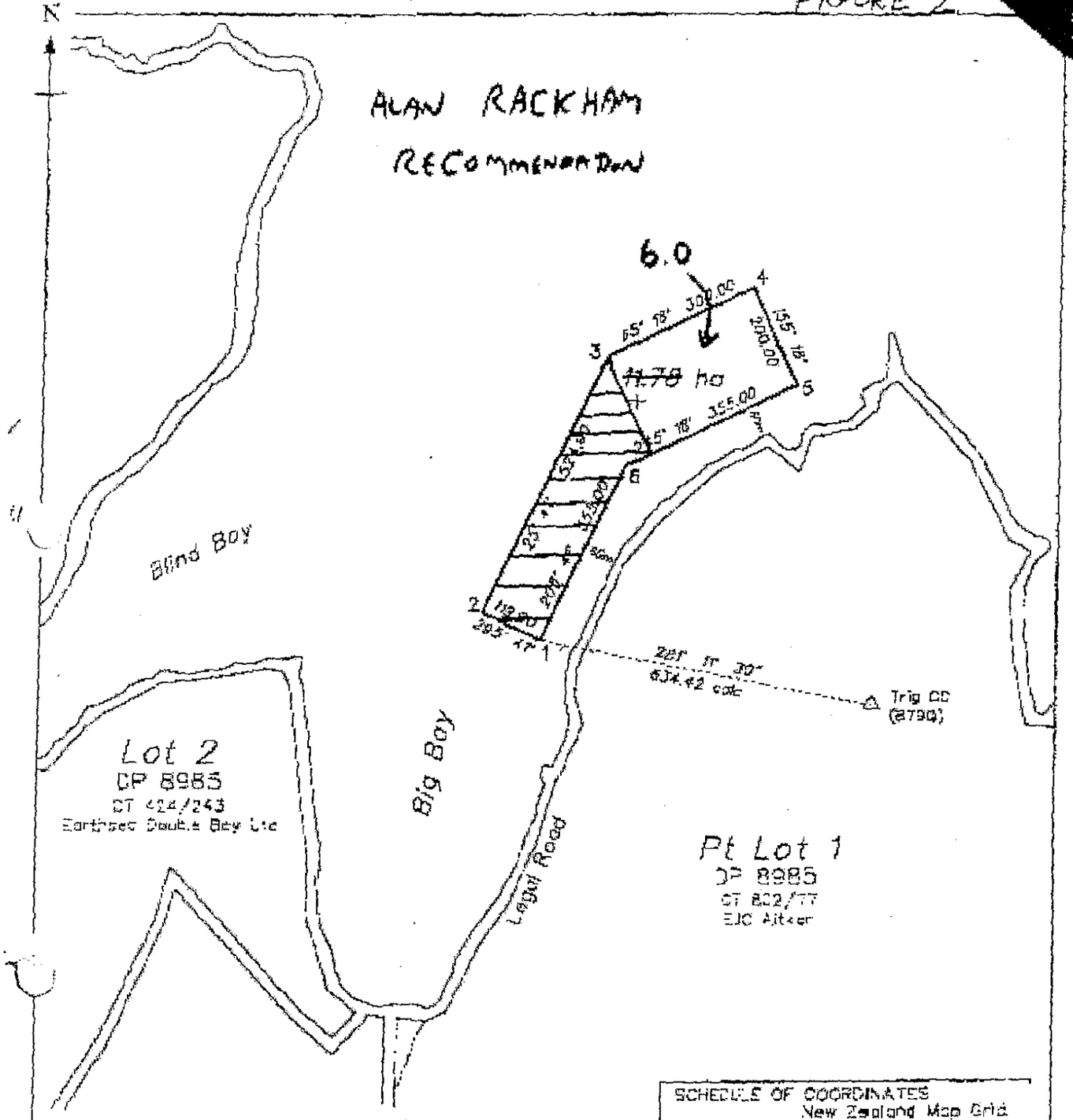
The next page is Appendix 3

Appendix 3

FIGURE 2

ALAN RACKHAM

RECOMMENDATION



Proposed Coastal Permit

Pigeon Bay Aquaculture LTD

SCHEDULE OF COORDINATES	New Zealand Map Grid	
Point	East	North
1	2500717.2	5732083.7
2	2500610.0	5732135.2
3	2500837.5	5732508.3
4	2501110.0	5732733.6
5	2501193.6	5732584.9
6	2500871.1	5732403.3
Centroid	2500891.2	5732522.9
Trig CC	2501339.6	5731960.5

NOTE: The position of this application has not been surveyed. Baseline from Land Information NZ Cadastral Data

BANKS PENINSULA DISTRICT

SCALE 1:10,000

0 100 200 300 400 500 600 700 800m

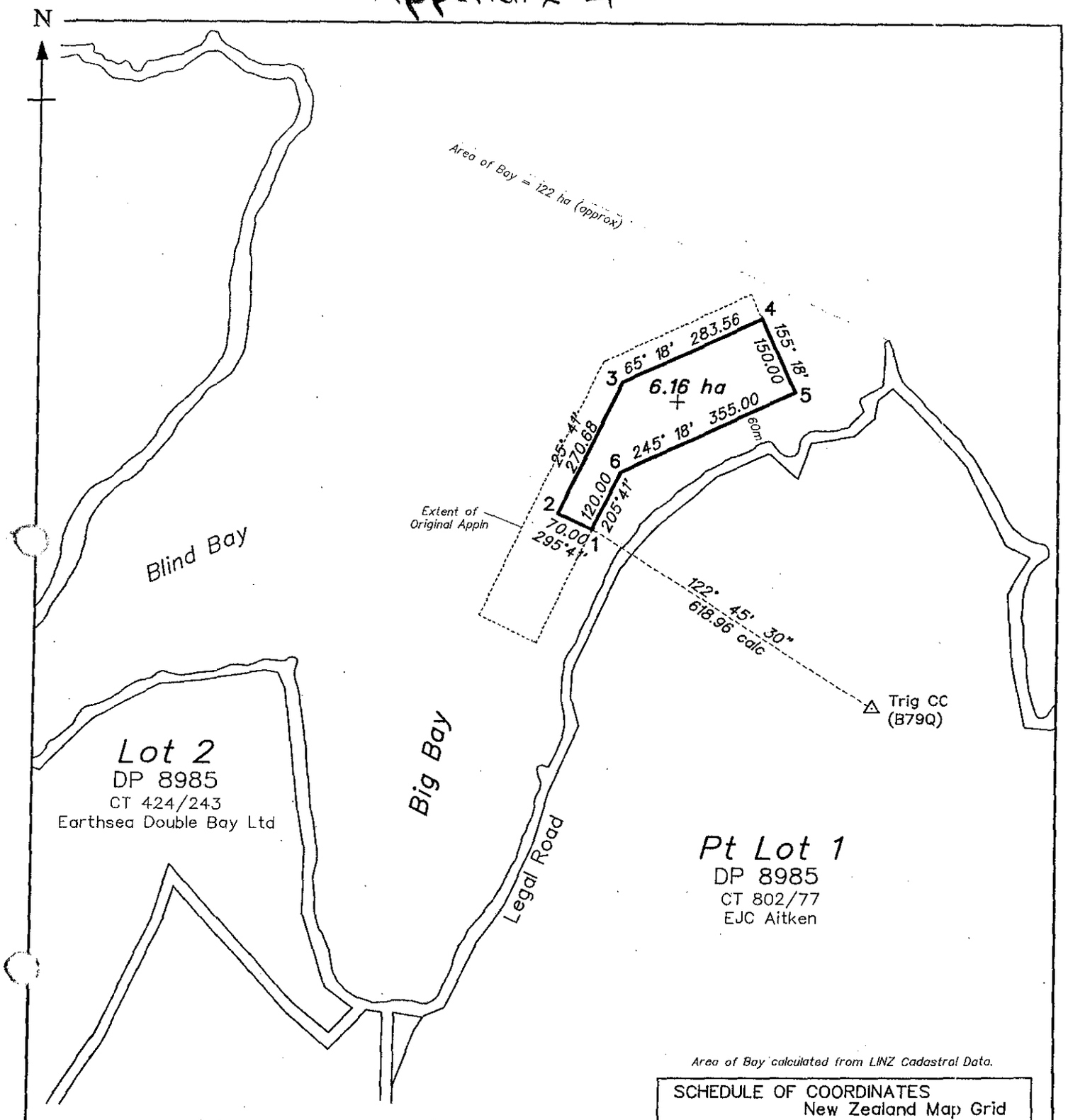
Datum: New Zealand Map Grid

Prepared by: Date 24/07/01

DRAUGHTING Files MF_134a.gcd

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

Appendix 4



Area of Bay calculated from LINZ Cadastral Data.

SCHEDULE OF COORDINATES

Point	New Zealand Map Grid East	North
1	2500819.1	5732295.4
2	2500756.0	5732325.8
3	2500837.3	5732569.7
4	2501130.9	5732688.2
5	2501193.6	5732551.9
6	2500871.1	5732403.6
Centroid	2500974.1	5732533.5
Trig CC	2501339.6	5731960.5

Proposed Coastal Permit

Area Amended September 2002

Pigeon Bay Aquaculture Ltd

Note: The position of this application has not been surveyed. Coastline from Land Information NZ Cadastral Data

BANKS PENINSULA DISTRICT

SCALE 1:10,000

100 200 300 400 500 600 700 800m

Datum: New Zealand Map Grid

Prepared by; DRAUGHTING *Plus*

Date 26/09/02

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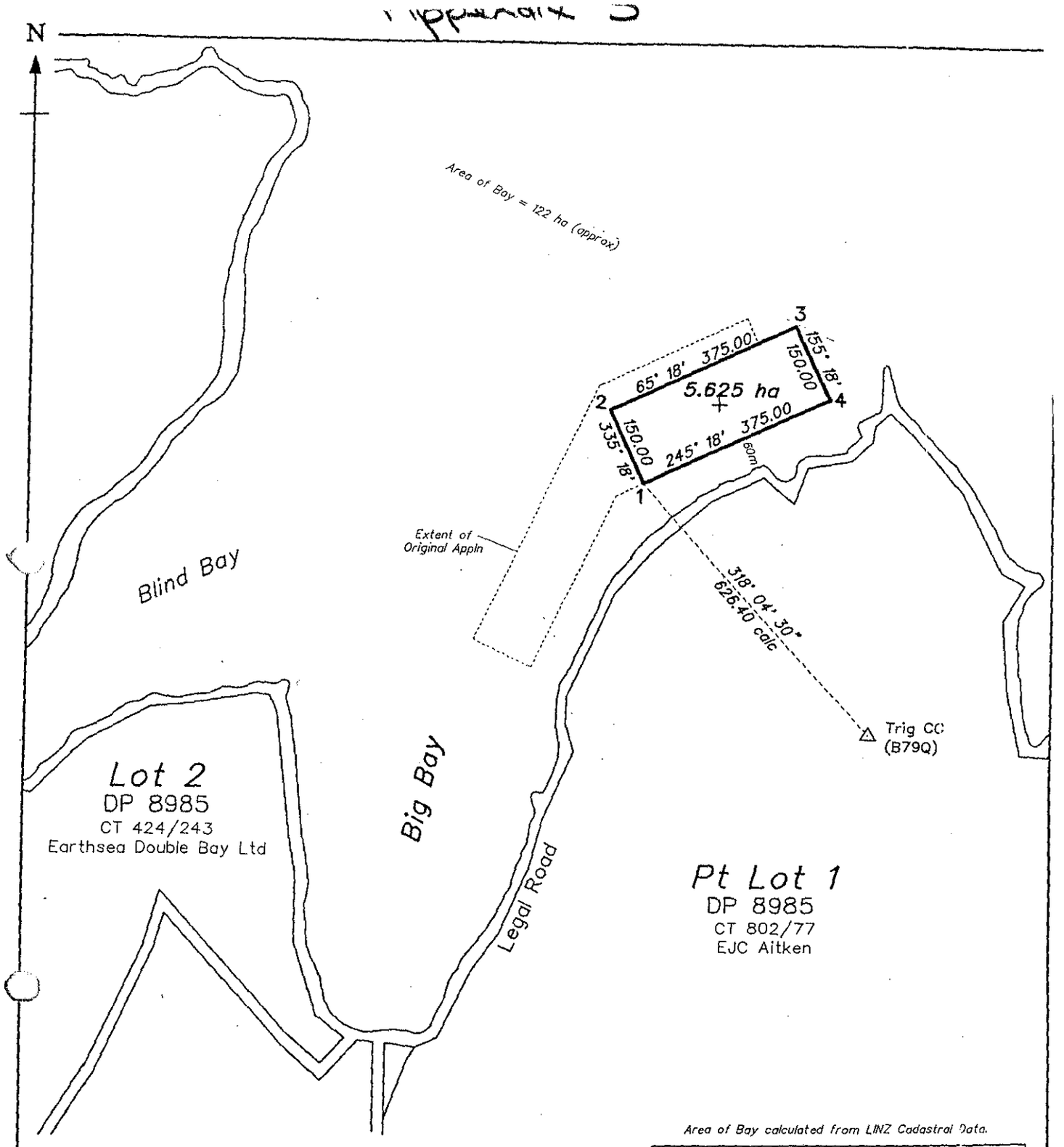
THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

Appendix 5



Area of Bay calculated from LINZ Cadastral Data.

SCHEDULE OF COORDINATES	New Zealand Map Grid	
Point	East	North
1	2500921.1	5732426.6
2	2500858.4	5732562.8
3	2501199.1	5732719.5
4	2501261.8	5732583.3
Centroid	2501060.1	5732573.1
Trig CC	2501339.6	5731960.5

Proposed Coastal Permit

Area Amended November 2002

Pigeon Bay Aquaculture Ltd

NOTE: The position of this application has not been surveyed.
Coastline from Land Information NZ Cadastral Data

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

SCALE 1:10,000

200 100 0 100 200 300 400 500 600 700 800m

BANKS PENINSULA DISTRICT

Datum: New Zealand Map Grid

Prepared by; DRAUGHTING *Plus*

Date 06/11/02

MF_1134c.gcd

Appendix 6

Principal Reason

Control of activities is needed to resolve conflict between recreational uses, to protect the coastal environment and to deal with the adverse environmental effects of activities in the Coastal Marine Area.

Methods

The Methods used or to be used by Environment Canterbury are;

Co-ordination and facilitation

Other legislation

Regional rules

Policy 8.3

In considering applications for resource consents to undertake activities in the Coastal Marine Area, Environment Canterbury, and the Minister of Conservation in relation to Restricted Coastal Activities, will have regard to:

(a) the existing level of use and development in the area and the national priority in the New Zealand Coastal Policy Statement to preserve the natural character of the coastal environment; and

(b) the need to protect characteristics of the coastal environment of special value to Tangata Whenua; and

(c) effects on the public use and enjoyment of the coast, including public access to and along the Coastal Marine Area, and the contribution of open space to the amenity value of the coast; and

(d) cumulative effects of such activities on the coastal environment both within and outside the immediate location; and

(e) existing agricultural and other use and development of the adjacent land area, and any adverse effects on that activity; and

(f) the status of any lands or areas administered by the Department of Conservation that are affected; and

(g) the publicly notified purpose of any proposal for protected status, if the application affects an area proposed for protection under a statute administered by the Department of Conservation; and

(h) the possibility of natural features migrating inland as the result of dynamic coastal processes, including sea level rise, and the ability of natural features to protect subdivision, use and development from erosion and inundation; and

(i) the need to protect existing network utility infrastructure where such infrastructure is located adjacent to or within the Coastal Marine Area.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

Explanation

The New Zealand Coastal Policy Statement requires this plan to provide for a number of matters, including those listed above. Chapter 1 of the New Zealand Coastal Policy Statement provides for the preservation of the natural character of the coastal environment. Chapter 2 of the New Zealand Coastal Policy Statement provides for protection of characteristics of the coastal environment of special significance to Tangata Whenua. Chapter 3 of the New Zealand Coastal Policy Statement provides for other matters in relation to the subdivision, use or development of areas of the coastal environment.

Much of the Coastal Marine Area of Canterbury abuts agricultural land. There is a need to ensure that any activities allowed in the Coastal Marine Area can satisfactorily co-exist with agricultural use. Developments in the Coastal Marine Area may have adverse effects on residents who live adjacent to the Coastal Marine Area, including a loss of amenity, dust or noise.

These matters apply in addition to the matters listed in Policies 8.4, 8.5 and 8.7, and the matters that the Act requires a consent authority to consider.

A consent authority is subject to the purpose of the Act to promote sustainable management which includes enabling people to provide for their social, economic and cultural wellbeing. In addition to the listed possible adverse effects of the activity, the benefits of the proposed activity to people and communities is an important consideration.

Land and areas referenced under the Conservation Act 1987 and other land and areas administered by the Department of Conservation are listed in the Canterbury and Nelson-Marlborough Conservation Management Strategies. The areas are also identified for the Canterbury Conservancy as a layer on Environment Canterbury's computerised Geographic Information Services database. Reference to these sources should be made so that the status of any land or area can be taken into account when deciding resource consents. (See NZCPS Policies 4.1.1 and 4.1.2.)

Principal Reason

To provide for matters of national significance that are set out in the New Zealand Coastal Policy Statement.

Methods

The Methods used or to be used by Environment Canterbury are:

Investigations;
Co-ordination and Facilitation; and
Regional rules
Other legislation

Policy 8.5

In considering applications for resource consents to occupy the Coastal Marine Area, Environment Canterbury, and the Minister of Conservation in relation to Restricted Coastal Activities, should:

(a) give priority to maintaining safe anchorages for vessels; and

(b) avoid impeding navigational channels and access to wharves, slipways and jetties; and

(c) avoid displacing existing public recreational use of the area where there are no safe adjacent alternative areas available; and

(d) have regard to existing commercial use of the area and any adverse effects on that activity[, including recognition of the designated Port Operational Areas]; and

(e) have regard to any adverse effects on the values relating to the natural character of the coastal environment, both within and outside the immediate location; and

(f) have regard to any adverse effects on the cultural, historic, scenic, amenity, Tangata Whenua, and natural values of the area; and

(g) have regard to available alternative sites and the reasons for the applicant's choice of site; and

(h) have regard to existing use and development of the area and the extent to which the natural character of the area has already been compromised; and

(i) only provide for the period or periods of occupation that are reasonably necessary to meet the purposes for which occupation is sought.

Explanation

There are limited areas of sheltered coastal water in the Coastal Marine Area of Canterbury. The waters are largely restricted to Banks Peninsula. The proximity of Christchurch means that there is considerable recreational fishing and boating in this area. [The established operations of the two commercial ports are protected by ensuring that access to the ports, and appropriate use of the operational areas is maintained.]

Activities that require the allocation of space, such as marine farms, compete with other uses of the area. Consideration should be given to the effects of occupation on existing uses and values for the area, including effects on the local community and the cumulative effects of displacing existing uses and values.

These matters apply in addition to the matters listed in Policy 8.3, and the matters that the Act requires a consent authority to consider.

Principal Reason

To give priority to maintaining public and vessel safety, the use of existing infrastructure, and to take account of existing public and commercial use of the Coastal Marine Area and the adverse effects of the proposed occupation.

Chapter 1 of the New Zealand Coastal Policy Statement makes it a national priority to preserve the natural character of the coastal environment. Policy 4.1.6 of the New Zealand Coastal Policy statement also requires consideration of alternatives and the reasons for the choice of site.

Methods

The Methods used or to be used by Environment Canterbury are:

Appendix 7

PERMITTED ACTIVITIES IN THE TRANSITIONAL AND PROPOSED BANKS PENINSULA DISTRICT PLANS

Within the former Mt Herbert county area of the Banks Peninsula District, the following activities are permitted activities in both the Transitional and Proposed District Plans:

Within the Coastal Protection Area (CPA) :
- Farming
- Creation and maintenance of reserves
- Outdoor recreation
- Conservation activities

Between the CPA and 100m inland of MHWS: As above, plus:
- Farm accessory buildings and structures
- Home enterprises
- Erection of a dwelling on 40 ha or more (provided it has legal access to a formed public road).

In the area > 100m inland of MHWS: As above, plus:
- Discrete woodlot (up to 2ha and no more than 50% of site), except that no exotic forestry may be planted within an area of significant indigenous vegetation (which includes threatened indigenous species and short tussock land where the tussock accounts for 70% or more of canopy cover or 35% or more of ground cover).

Within the former Akaroa County area of the Banks Peninsula District, the following activities are permitted activities in both the Transitional and Proposed District Plans

Within the CPA:
- Farming
- Creation and maintenance of reserves
- Outdoor recreation
- Conservation activities

Between the CPA and 100m inland of MHWS: As above, plus:
- Farm accessory buildings and structures
- Home enterprises

In the area > 100m inland of MHWS: As above, plus:
- Discrete woodlot (up to 2ha and no more than 50% of site), except that no exotic forestry may be planted within an area of significant indigenous vegetation (includes threatened indigenous species and short tussock land where the tussock accounts for 70% or more of canopy cover or 35% or more of ground cover).

The principle difference between the Mt Herbert and Akaroa County areas is that, in the former, dwellings are permitted on sites greater than 40ha, and in the latter they are not permitted as of right on sites of any size.

Note: In the Proposed Banks Peninsula Plan, if an activity is not listed as permitted, controlled or discretionary, it is a non-complying activity (Rule 9.2 in Chapter 19).

Comparison between the Transitional and Proposed District Plans

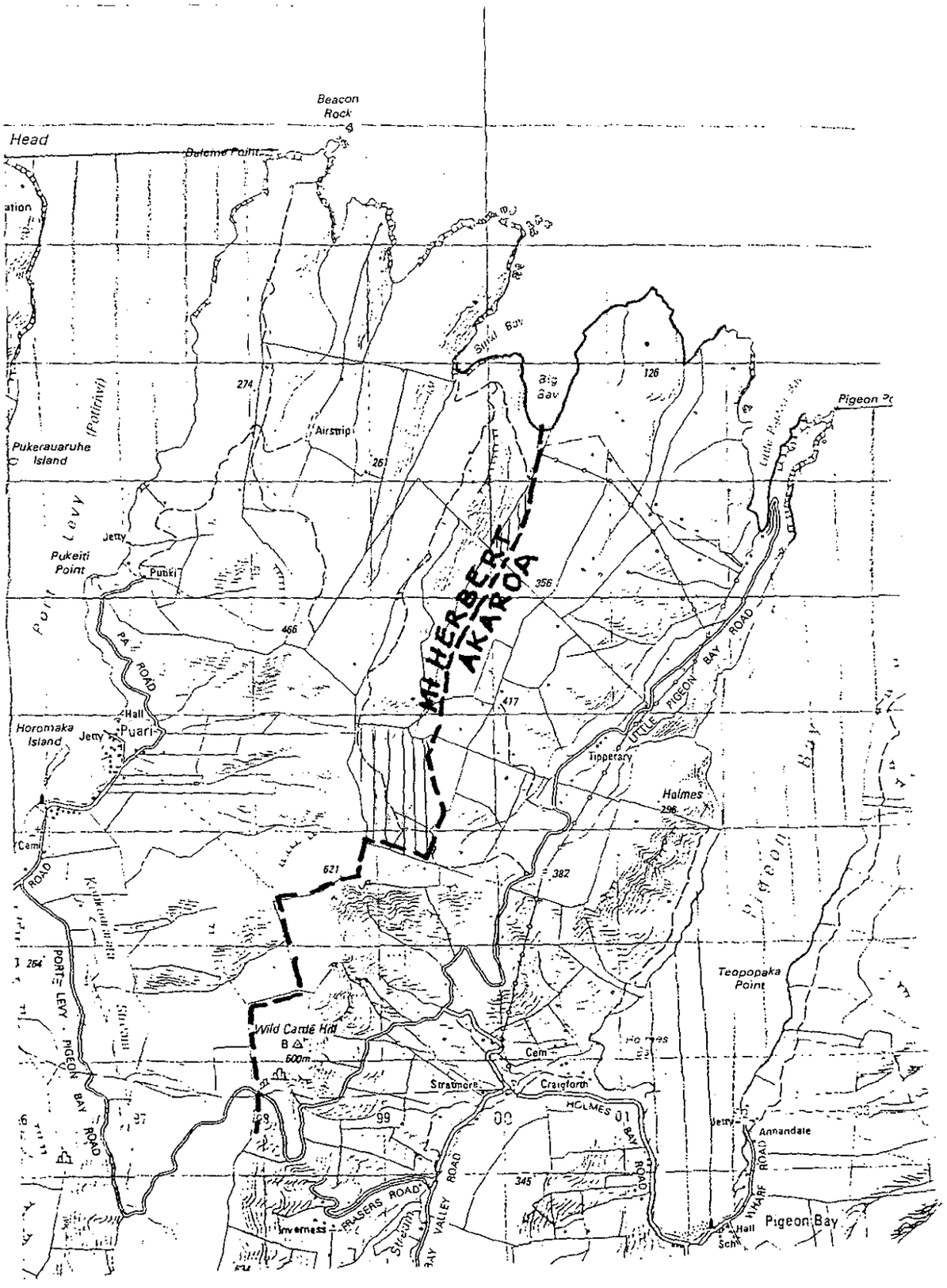
Transitional Plan – Mt Herbert Section – Permitted Activities
Agricultural, horticultural, and pastoral farming, boarding kennels, veterinary hospitals and clinics, racing stables, beekeeping, apiaries and stockyards.
Factory farming (conditions apply)
Forestry in accordance with Part 9 (conditions apply): (1) Shelterbelts under 2ha (2) Mixed woodlot and woodlot forestry (see definitions – mixed woodlot is <5ha, woodlot is <2ha) (3) The planting and tending of indigenous tree species for the purpose of soil conservation or beautification.
Public and private parks, reserves, and recreation grounds; golf courses, walkways and public halls
A dwelling on a land area of 40ha or more.
Home occupations and craft activities accessory to existing dwelling units (conditions apply)
Repair, modification, or improvement of any existing dwelling
Family flat accessory to an existing dwelling unit (conditions apply)
Farm workers' accommodation (which means accommodation provided on a farm for persons employed full time on the property)
Public Utilities
Farm accessory buildings, accessory buildings for predominant uses and for existing approved conditional uses
River protection, flood control, drainage, erosion control and soil conservation works and shelter planting (except major works involving land purchase) by and under the control of the Regional Water Board

Transitional Plan – Akaroa Section – Permitted Activities
Agricultural, horticultural, and pastoral farming
Factory farming
Woodlot forestry (see definition, <3ha) Planting and tending of native bush
Reserves, parks and passive recreation areas, public walkways
Replacement of existing dwellings Family flats associated with existing dwellings
Home occupations (not including selling to the general public).
Guest accommodation associated with existing farmhouses
Small public utility structures
Accessory buildings and structures (excluding dwellings)
Water and soil conservation works

Proposed Plan – Permitted Activities
Within Coastal Protection Area (no erection of any building or structure, or earthworks permitted except for fencing, water storage and reticulation, troughs and pipes for farming purposes): - Farming - Creation and maintenance of reserves - Outdoor recreation which does not involved the commercial use of motor vehicles - Conservation activities - Maintenance and repair of roading infrastructure undertaken by Council
Within area between CPA and 100 m inland of MHWS: As above, plus: - Farm accessory buildings and structures - Home enterprises - The erection of dwellings and accessory buildings (no more than 1 on any site between 10ha and 20 ha, or on sites greater than 20 ha, one dwelling per 20 ha) - Earthworks where the maximum uphill cut is 2m and the maximum downhill vertical spill is 2.4 metres.
In the area > 100 m inland of MHWS: As above, plus: - Woodlot forestry (which means a discrete plantation of trees of no more than 2 ha in area and covering no more than 50% of a site) Except that no exotic forestry may be planted within an area of significant indigenous vegetation (includes threatened indigenous species and short tussock land where the tussock accounts for 70% or more of canopy cover or 35% or more of ground cover).

MP2242-MP

Annexure 1



Position of Old County Boundary

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

IN THE COURT OF APPEAL OF NEW ZEALAND

CA157/03

	BETWEEN	S C POWELL AND W M POWELL First Appellants
	AND	D M COULTER AND E A D COULTER Second Appellants
	AND	W B FINNIE AND J H FINNIE Third Appellants
	AND	DUNEDIN CITY COUNCIL First Respondent
	AND	OBSIDIAN ROCKS LIMITED Second Respondent

Hearing: 18 March 2004

Coram: William Young J
Chambers J
O'Regan J

Appearances: L A Andersen and T J Shiels for Appellants
P J Page for First Respondent
A J P More and J N Rankilor for Second Respondent

Judgment: 1 July 2004

JUDGMENT OF THE COURT DELIVERED BY O'REGAN J

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[1] This is an appeal against a decision of John Hansen J (HC DUN Civ 2003-412-81 22 July 2003). In that decision, John Hansen J dismissed the application for judicial review by the appellants of certain decisions made by the first respondent, the Dunedin City Council in relation to an application for resource consent by the second respondent, Obsidian Rocks Limited. The decisions of the Council which the appellants sought to review were a decision to process a resource

consent application by Obsidian on a non-notified basis, and a decision to grant the resource consent sought by Obsidian.

Facts

[2] Obsidian owns a large site at 279 Highgate, Dunedin. This site is at the southern end of the Roslyn Village, which is a small shopping centre and the site of the Roslyn New World Supermarket owned by one of the appellants, Mr Powell. Obsidian's site has frontages onto Highgate and also onto Ann Street which runs parallel to Highgate. The appellants are residents of Highgate. Their properties have frontages and accesses onto Highgate just south of, and opposite, the Highgate frontage of Obsidian's site.

[3] Obsidian's site was previously occupied by a bakery. It was divided into six titles but, because the bakery buildings straddled the lot boundaries, five of the six titles were subject to a certificate under s643(2) of the Local Government Act 1974, which prevented them from being dealt with separately. At the time of the resource consent application the site was in six separate titles, but it was clear that Obsidian intended to amalgamate the titles into one title.

[4] Obsidian wished to develop this site for a supermarket (we will call it the supermarket site). It was proposed that the supermarket would be built on the northern boundary of the supermarket site and that the rest of the site would be used for carparking and access. Obsidian was to undertake the development and then lease the supermarket and carpark to a major supermarket operator.

[5] Initially Obsidian sought a certificate of compliance from the Council under s139 of the Resource Management Act (RMA). Obsidian believed that the proposed activity was a permitted activity which could be lawfully carried out without a resource consent. One of the six lots was zoned "Residential A" under the plan and the remaining five certificates of title were located in the "Commercial C" zone. Under the proposed District Plan (the plan) all six lots were zoned "Local Activity". A supermarket was a permitted use in that zone subject to issues of access and site coverage, which were governed by rules.

[6] The Council official dealing with the application for a certificate of compliance determined that there was a site coverage issue because the land was in separate titles. He determined that a certificate of compliance could not be issued until the amalgamation of the titles. Amalgamation of the titles would have delayed things so an application for resource consent was made. It appears that the Council official was wrong about the site coverage issue but nothing turns on that now, because it is common ground that there is no breach of the site coverage requirements. Accordingly the only issue before the High Court and before us is the issue of access. However, it is notable that, on the basis of the Council's interpretation of the rules relating to access, a certificate of compliance would have been issued if the Council official had not been mistaken in his interpretation of the site coverage rules.

[7] The Council official determined that the site coverage issue could be dealt with by a condition that the resource consent would not come into effect until the six titles had been amalgamated into one, at which point the site coverage requirements would not be exceeded. He did not consider there to be any breach of the rules relating to access and therefore no need for any consent in that regard. Accordingly he determined that the application should be dealt with on a non-notified basis and that resource consent should be granted, subject to a condition that it would not come into force until the amalgamation of the sites was completed.

[8] The appellants found out about the proposed development. They took the view that the Council ought to have notified the resource consent application. They said they would be affected particularly by the proposed access for traffic entering and exiting the supermarket site onto Highgate, which would affect their properties.

[9] In particular, the appellants argued that Obsidian required a resource consent for the vehicular access from the supermarket site to Highgate because it breached Rule 20.5.6 of the plan in that it was located within 70 metres of the intersection of Highgate and City Road. (We will refer to Rule 20.5.6 as the access rule.) Whether the appellants are right about that depends on the interpretation of the access rule, which is at the heart of this case.

[10] It is common ground that if the respondents' interpretation of the access rule is correct, then no resource consent would be required for the supermarket development at all, so that the issue of non-notification and granting of consent would be moot. On the other hand, if the appellants' interpretation of the access rule is correct, then a resource consent is required. It would then be necessary to determine whether the failure of the Council official to take into account a breach of the access rule is such that the decisions not to notify the resource consent application and to grant the resource consent sought should be quashed.

Issues

[11] The issues now before the Court are:

(a) Does the siting of the access from the supermarket site to Highgate contravene the access rule and therefore make it necessary that Obsidian obtain a resource consent for the supermarket development?

(b) If so, could the Council properly determine that the resource consent application be dealt with on a non-notified basis and grant resource consent, applying the "permitted baseline" test? and

(c) If not, should this Court in the exercise of its discretion decline relief on the basis that, even if the resource consent application were notified, it is highly likely that a resource consent would have been granted in any event?

The High Court judgment

[12] In the High Court, John Hansen J concluded that the access from the supermarket site to Highgate did not breach the access rule and that, accordingly, no resource consent was required for the supermarket development. In doing so he undertook an extensive review of cases relating to the correct approach to the

interpretation of planning documents and concluded that the appropriate approach was as follows:

> (a) The words of the document are to be given their ordinary meaning unless this is clearly contrary to the statutory purpose or social policy behind the plan in the rules or otherwise produces some injustice, absurdity, anomaly or contradiction;
>
> (b) The planning document should affect common law rights only where there is express provision to this end or it follows as a matter of necessary implication;
>
> (c) There is a need for certainty in the description of permitted activities and the operative parts of the plan. But the language used in the plan must be given its plain ordinary meaning, the test being "what would an ordinary reasonable member of the public examining the plan, have taken from" the planning document;
>
> (d) The interpretation should not prevent the plan from achieving its purpose;
>
> (e) If there is an element of doubt, the matter is to be looked at in context and it is appropriate to examine the composite planning document. [Paragraph [35] of the judgment]

[13] He then considered the access rule. Having considered the terms of the rule and the objectives, policies and methods set out in the plan, he concluded that the interpretation of the plan contended for by the Council and Obsidian was correct and that there was therefore no breach of the access rule. He drew support for that conclusion from the fact that this was in accord with a frontager's common law right of access, as articulated in this Court in *Fuller v MacLeod* [1981] 1 NZLR 390.

[14] The conclusion reached by John Hansen J differed from the conclusion of Panckhurst J who considered a very similar rule in the Christchurch City Council

Plan in *O'Connell Construction Ltd v Christchurch City Council* [2003] NZRMA 216. John Hansen J was satisfied that differences in the objectives of the Christchurch Plan, when compared to those in the Dunedin Plan, justified a different interpretation being reached in relation to the access rule in the Dunedin Plan. In particular, he was influenced by the inclusion in the Dunedin Plan of a "roading hierarchy", to which we will refer in more detail later.

[15] Although his conclusion on the interpretation of the access rule meant that no resource consent was required, John Hansen J went onto consider whether, on the basis that the access rule were breached and that resource consent was therefore required, notification of the application for resource consent would have been required. This involved consideration of the permitted baseline for the purposes of the test articulated by this Court in *Bayley v Manukau City Council* [1999] 1 NZLR 568 and *Smith Chilcott Ltd v Auckland City Council* [2001] 3 NZLR 473. The Judge concluded that the permitted baseline included six separate developments, one on each of the six separate sites which existed prior to the amalgamation of the titles, two of which would have rights of access onto Highgate, with the other four having rights of access onto Ann Street. Thus he considered that the impact of the access from the proposed supermarket development to Highgate, when measured against the permitted baseline, would be minimal and that non-notification would have been appropriate.

[16] In view of those conclusions there was no discussion in the High Court judgment on the issue as to whether, in the event that the appellants had succeeded in establishing that the access rule was breached and that the resource consent application should have been notified, relief should be withheld in the exercise of the Court's discretion.

The access rule

[17] The access rule provides as follows:

> **Rule 20.5.6 Vehicle Access Performance Standards**
>
> Note: This rule does not apply to farm paddock access tracks.

(i) Maximum number of vehicle accesses

The maximum number of vehicle accesses permitted on each road frontage of any site or comprehensive development shall be in accordance with Table 20.2.

Frontage Length (m)	Local Road	Collector Road	National, Regional or District Road
0 – 18	1	1	1
18 – 60	2	1	1
60 – 100	3	2	1
100 or greater	3	3	2

Table 20.2: Maximum number of vehicle accesses per road frontage

…

(iii) Distances of vehicle accesses from intersections

Any part of any vehicle accesses shall not be located closer to the intersection of any roads than the distances specified in Table 20.4.

Roads where the speed limit is less than 100 km per hour					
Frontage Road	**Intersecting road type (distance in metres)**				
	National	Regional	District	Collector	Local
National	70	70	70	55	35
Regional	70	70	70	55	36
District	70	70	70	55	35
Collector	40	40	40	40	20
Local	25	25	25	25	20
Roads where the speed limit is 100 km per hour					
Frontage Road	**Intersecting road type (distance in metres)**				
	National	Regional	District	Collector	Local
National	275	275	180	180	180
Regional	180	180	180	180	90
District	180	180	180	90	90
Collector	90	90	90	60	60
Local	90	90	90	60	60

Table 20.4: Minimum distances of vehicle accesses from intersections

Clarification of, and exemptions to, Table 20.4

(a) Distances shall be measured along the boundary parallel to the centre line of the roadway of the frontage road from the kerb line, or formed hard surface edge of the intersecting road. Where the roadway is median divided, the edge of the median nearest to the vehicle access shall, for the purposes of this clause, be deemed the centre line.

(b) For proposals not involving application for subdivision consent, where the boundaries of a site do not allow the provision of any vehicle access whatsoever in conformity with the above distances, a single vehicle access may be constructed in the position furthest from the intersection.

(c) For proposals involving applications for subdivision consent, where the boundaries of a site do not allow the provision of any vehicle access whatsoever in conformity with the above distances, this shall be a matter that Council retains discretion over.

(d) National, regional, district and collector roads are identified on District Plan Maps 73 and 74. Local roads are all other roads.

…

(Paragraphs (ii), (iv) and (v) are not relevant for present purposes.)

[18] The attention of the present case is focused on paragraph (b) of the clarifications of, and exemptions to, Table 20.4 which appears in paragraph (iii) of the access rule. The supermarket site has frontages onto both Ann Street, which is a local road, and Highgate, which is a district road. The Ann Street access conforms with Table 20.4 but the access onto Highgate does not because the access is less than 70 metres from the intersection of Highgate and another district road, City Road.

[19] Because the Highgate access does not conform to Table 20.4, it is necessary to consider whether the proposed access onto Highgate is exempted by virtue of paragraph (b). The appellants say it is not because paragraph (b) comes into play only where a site is left with no vehicle access whatsoever. In this case the supermarket site has another access onto Ann Street and therefore does not come within the terms of the exemption in paragraph (b). On the other hand, the Council and Obsidian say that paragraph (b) is directed to accesses on each frontage, so it permits Obsidian to place an access from the supermarket site to Highgate in the position furthest from the intersection of Highgate and City Road. That is what Obsidian has proposed for the purposes of the supermarket development.

[20] If the appellants' interpretation of the access rule is correct, and the proposed access from the supermarket site to Highgate is not saved by exemption (b), then the proposed supermarket development will not comply with the plan and a resource consent will be required. On the other hand, if the respondents' interpretation is correct then the access from the supermarket site to Highgate will conform to the plan and no resource consent will be required. In that case it would not be necessary to determine the merits of the application for review of the decisions not to notify the resource consent application and to grant the resource consent because the supermarket development would comply with the plan and would not require a resource consent.

The context of the access rule

[21] Section 20 of the plan is headed "Transportation". It is broken into subsections, which deal with transportation issues with increasing degrees of particularity.

[22] Section 20.1 deals with "Significant Resource Management Issues". One of these is Issue 20.1.2, which states that traffic generating activities can cause adverse effects on, among other things, traffic safety, the function of roads, including their through-route function, and the efficient operation of intersections and roads.

[23] Section 20.2 then deals with the Objectives of section 20. One of these objectives (Objective 20.2.2) is to ensure that land use activities are undertaken in a manner which avoids, remedies or mitigates adverse effects on the transportation network. Objectives 20.2.3 and 20.2.4 are directed towards achieving integrated management of the roading network and maintaining a safe, efficient and effective transportation network.

[24] Section 20.3 then deals with the Policies of section 20 at a slightly more specific level. Of particular relevance are Policy 20.3.4, which is to "ensure traffic generating activities do not adversely affect the safe, efficient and effective operation of the roading network", and Policy 20.3.5 which is to "ensure safe standards for vehicle access".

[25] Section 20.4 deals with Methods of Implementation. This section begins as follows:

> In addition to the rules found both in this section and in the relevant zone provisions, the methods to be used to achieve the objectives and policies identified in this section include the following:

[26] It is notable that, while the methods can be seen as having a higher ranking than the rules which appear in section 20.5, the methods are stated to apply "in addition to the rules".

[27] In the High Court, particular emphasis was placed on Method 20.4.2, which sets out the road hierarchy identified in the plan. This hierarchy is as follows:

(a) National roads (State Highways) including limited access roads.

(b) Regional roads.

(c) District roads.

(d) Collector roads.

(e) Local roads.

[28] As already indicated, Highgate is a district road and Ann Street is a local road. Method 20.4.2 says that district roads provide connections between regional roads and connect major rural, suburban, commercial and industrial areas, whereas the primary function of local roads is "to provide access to properties, rather than to act as through-routes."

Approach to interpretation of the plan

[29] We have set out the relevant parts of the significant resource management issues, objectives, plans and methods, in addition to rule 20.5.6, because the respondents argued that reference to the objectives, policies and methods, in particular, was necessary in order to determine the meaning of the access rule. On the other hand, the appellants argued that the meaning of the access rule and, in particular, exemption (b) of paragraph (iii), was plain and unambiguous. This gave rise to considerable debate both in this Court and in the High Court as to the approach to be taken to the interpretation of plans.

[30] The starting point for a discussion as to the approach to be taken to the interpretation of plans is the decision of this Court in *J Rattray & Son Ltd v Christchurch City Council* (1984) 10 NZTPA 59 at 61. In that case, the Court was considering the interpretation of predominant uses in a plan subject to the Town and Country Planning Act 1977. The Court said:

> We would accept that language used to describe predominant uses within a particular zone will have an immediate significance and must be given its intended

> effect when that is unmistakable and can be clearly ascertained within the same close environment. But words take flavour and colour from their general context and can carry so many shades of meaning that it is frequently impossible to be dogmatic about any single normal or everyday meaning. So that where there is any uncertainty, or doubts arise, it would put at risk or even stultify the process of construction if an answer were to be given that itself was uncertain, or if doubt had to be left unresolved simply because it was thought necessary to cut away the language of the ordinance from the other parts of the same instrument. … For those general reasons we are satisfied, … that assistance not only may but ought to be sought from the composite planning document taken as a whole whenever obscurities or ambiguities might seem to arise.

[31] That approach was adopted by the High Court in relation to the interpretation of a plan under the RMA in *Beach Road Preservation Society Inc v Whangarei District Council* [2001] NZRMA 176. That case concerned an application to the District Council for resource consent to build a house and boatshed on property which fell within the Marina zone under the local district plan. The application was considered on the basis that the house and boatshed came within the term "residential accommodation" and was therefore a controlled activity.

[32] Chambers J determined that the term "residential accommodation" was ambiguous but said that, quite apart from that ambiguity, it would make no sense to interpret the term "residential accommodation" divorced from its immediate context, particularly the objectives and policies of the Marina zone. He rejected a submission from the applicant for resource consent that, on the basis of the *Rattray* decision to which we have referred earlier, the term "residential accommodation" had to be interpreted in isolation. After considering *Rattray* and other authorities such as *Foodtown Supermarkets Ltd v Auckland City Council* (1984) 10 NZTPA 262 and *K B Furniture Ltd v Tauranga District Council* [1993] 3 NZLR 197, he concluded at para [33]:

> In light of those authorities, with all of which I respectfully concur, it seems to me obvious that at the very least regard must be had to the zone statement, objective and policies and the rest of Part 14.4 when interpreting the words "Residential Accommodation". These cases provide authority for looking far beyond Part 14.4. In this particular case, one does not need to go further.

[33] Chambers J then referred to s76 of the RMA, and in particular s76(2) which says that rules appearing in district plans have the effect of regulations. He noted that this meant the Interpretation Act 1999 applied to the interpretation of such rules. Section 5(1) of that Act requires that the meaning of an enactment (in this case, rule)

must be ascertained from its text and in the light of its purpose. He noted that "purpose" in the context of a district plan would be the purpose prescribed by s76(1)(b) of the RMA, namely the objectives and policies of the relevant plan. Accordingly he said it was mandatory to consider the objectives and policies of the Marina zone as set out in the relevant part of the Whangarei district plan.

[34] Chambers J also noted that the purposive approach to interpretation was consistent with the approach taken in relation to interpreting contracts as set out by this Court in *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74.

[35] In this case, the appellants argued that the Court should look to the plain meaning of the access rule and, having found that there is no ambiguity, interpret that rule without looking beyond the rule to the objectives, plans and methods referred to in the earlier parts of section 20 of the plan. While we accept it is appropriate to seek the plain meaning of a rule from the words themselves, it is not appropriate to undertake that exercise in a vacuum. As this Court made clear in *Rattray*, regard must be had to the immediate context (which in this case would include the objectives and policies and methods set out in section 20) and, where any obscurity or ambiguity arises, it may be necessary to refer to the other sections of the plan and the objectives and policies of the plan itself. Interpreting a rule by a rigid adherence to the wording of the particular rule itself would not, in our view, be consistent with a judgment of this Court in *Rattray* or with the requirements of the Interpretation Act.

[36] The respondents placed great emphasis on the *Beach Road* decision, because they said that this approach supported the interpretation adopted by the High Court Judge in this case. In that regard they placed particular emphasis on the roading hierarchy (section 20.4.2 of the plan) in the light of the finding by the High Court Judge that, if the rule required that traffic from the supermarket be directed onto a local road such as Ann Street, this would be inconsistent with the roading hierarchy.

[37] While we accept the submission made on behalf of both respondents that the approach to interpretation outlined in *Beach Road* is the appropriate approach in this case, we do not accept that it yields the result contended for by the respondents. In

our view the meaning of exemption (b) to rule 20.5.6(iii) is clear whether one looks only at the words themselves, or to the whole of rule 20.5.6, or to the broader objectives, policies and methods outlined in section 20 of the plan.

[38] If one starts with the words of paragraph (b) itself, there appears to us to be no escape from the conclusion that, when the provision refers to "any vehicle access whatsoever", it means exactly what it says. The respondents argued that "any vehicle access whatsoever" means "any vehicle access whatsoever on the relevant frontage", and that paragraph (b) should be seen as directed to each particular frontage of a section, rather than to the section itself. We can see no justification for including additional words which do not appear in the provision itself.

[39] On behalf of Obsidian, Mr More said that when regard is had to paragraph (i) of rule 20.5.6, it is clear that individual road frontages are being addressed. We accept that that provision deals with the maximum number of vehicle accesses on each road frontage, but that is because the term "on each road frontage" is specifically used in that rule. It is conspicuous by its absence from paragraph (iii), and paragraph (iii) can be sensibly interpreted as applying a rule which is of the general application rather than one which applies to each individual frontage.

[40] The respondents also suggested that paragraph (i) created an entitlement to an access on the Highgate frontage, because under the terms of that rule one frontage on the particular road is specified in table 20.2. In our view that overstates the significance of paragraph (i), which sets out a maximum number, rather than guaranteeing a minimum number, of accesses on a particular frontage.

[41] The respondents then referred to the method set out in section 20.4.2 and said that it would be anomalous if the supermarket had only one access and that access was onto a local road when traffic heading towards or away from the supermarket should be using a district road in preference to a local road. We are unable to accept that the roading hierarchy assists interpretation of paragraph (iii) in the manner contended for by the respondents.

[42] In essence, the respondents' argument is that, because the application of the access rule to the situation facing Obsidian in this case would mean that the only permitted access (ie permitted without obtaining a resource consent) would be to Ann Street, this would offend against the roading hierarchy. In our view that confuses the result of the application of the access rule to a particular situation with the interpretation of the access rule itself. The argument is predicated on the basis that it would be an absurd outcome for all traffic to the proposed supermarket to be required to use a local road such as Ann Street. But the rule does not require that outcome: rather, it requires that a resource consent be obtained for an access way which contravenes the access rule. In any event, the roading hierarchy refers to the primary function of local roads as being to provide access to properties, as Ann Street would provide for the supermarket site in this case if the rule were applied as the appellant contends it should be. So the roading hierarchy provides support for both interpretations.

[43] Consideration of the broader objectives and principles of section 20 does not assist with the interpretation of the access rule in this case. This case differs from the *Beach Road* case, where the meaning of the term "residential accommodation" in the particular context became clear only after consideration of the objectives and policies of the Marina Zone in the district plan. In this case, both the meanings contended for by the parties are able to be reconciled with the general issues, objectives, policies and methods set out in section 20 of the plan, and the immediate context (the access rule itself) does not drive the reader to an interpretation which cannot be gleaned from paragraph (b) itself.

[44] The respondents argued that an interpretation of the rule in a way which limited the exemption in paragraph (b) to situations where a site has no access whatsoever could yield an anomalous result in some situations. Mr More gave as an example a situation where streets are laid out in a grid fashion and a site has frontages to two roads, neither of which meet the 70 metre requirement set out in table 20.4. He said that in this situation there would be no access at all if the rule were interpreted as the appellant contends it should be. We accept that, in that situation, the words "the intersection" at the end of paragraph (b) would need to be interpreted as "an intersection" in order to yield a sensible result. That situation

illustrates that the drafting of rule could be improved, but it does not lead us to determine that a strained interpretation of the rule is justified. In our view the interpretation contended for by the respondents requires the reader to ignore the term "whatsoever" and to add additional wording referring to each frontage. We see no justification for doing that.

[45] Mr Page, for the Council, submitted that paragraph (b) should be read so as to minimise the restriction on a frontager's right of access to a street from any part of the boundary. Mr Page referred to *Fuller v MacLeod*. We do not accept that that case does have any bearing on the proper interpretation of section 20 of the plan and, in particular, the interpretation of the access rule. There is no challenge by any party to the validity of section 20 or to the validity of the access rule. There can be no doubt that the access rule is a substantial restriction on what would have been a frontager's rights at common law. The common law rules were developed at a time when modern traffic conditions were unheard of. The focus in *Fuller* was quite different from the focus in the present case. *Fuller* was primarily a dispute between two neighbours in a situation where the activities of one in attempting to improve access to his property gravely affected the other's access to his. Further, the Court stressed in that case that common law rights must yield to statutory limitations (see, for instance, at 395). The access rule, having the effect of a regulation, is a statutory limitation. The fact that the access rule, like the RMA generally, affects a land owner's common law rights does not call for any special rules of interpretation.

[46] John Hansen J accepted that the interpretation which found favour with him was at odds with the interpretation of a very similar rule in the Christchurch City district plan by Panckhurst J in *O'Connell Construction Ltd v Christchurch City Council*. In *O'Connell*, the provision under consideration was essentially the same as exemption (b) in paragraph (iii). Panckhurst J rejected the argument that the rule should be interpreted as applying to individual frontages and saw the provision as creating an exemption for a site where otherwise there would not be any vehicle crossing whatsoever to the boundaries of the site. He believed that was clear and unambiguous, and also rejected the argument that it was contrary to the policy underpinning the rule. John Hansen J attributed the different interpretation in this case on the basis that the *O'Connell* situation was different and that the objectives

considered by Panckhurst J in *O'Connell* differed from those in the Dunedin Plan. In particular, he noted that the interpretation adopted by Panckhurst J in *O'Connell* did not conflict with the planning document, whereas the interpretation in this case would conflict with the roading hierarchy. As we have already said, we do not accept that contention because the interpretations put forward by both the appellants and the respondents could be seen to be consistent with the roading hierarchy.

[47] In our view there was no basis for distinguishing this case from *O'Connell*. We find ourselves in agreement with the approach adopted by Panckhurst J and the result it yielded and we believe that the same interpretation should be adopted in this case.

[48] We acknowledge that the Christchurch provision under consideration by Panckhurst J dealt more effectively with the anomaly raised by Mr More (see para [44] above). In the situation where no access whatsoever could be obtained to a site in conformity with the relevant rule, the Christchurch provision provided that a single access was permitted "in the position which most nearly complies with the provisions of [the relevant table]" (in contrast to the Dunedin provision which refers to "the position furthest from the intersection"). We accept that there is the potential for an anomalous outcome in relation to the Dunedin provision which would not be present in the Christchurch provision. But the fact that the access rule does not deal adequately with one potential fact scenario does not, in our view, justify adopting a strained interpretation to avoid the possibility that the anomaly may arise in the future.

Conclusion: interpretation

[49] We conclude that the access rule requires that, in the present case, no access be located closer than 70 metres from the intersection of Highgate and City Road. As it is not possible to meet that requirement, exemption (b) comes into play. However, that exemption does not apply in the present case because the supermarket site is not a site which has no vehicle access whatsoever conforming with the access rule – it does have such an access, albeit in a local road, Ann Street. Thus it is not possible to provide an access way from the supermarket site to Highgate in

conformity with the rule. For that reason it would be necessary to obtain a resource consent for a development proposal which requires such an access.

Non-notification : the permitted baseline

[50] As we have found that a resource consent is required for the supermarket development, it is now necessary to determine whether, in view of our interpretation of the access rule, the resource consent application ought to have been notified. In the High Court, John Hansen J considered this issue (although his conclusion in relation to the access rule did not make it strictly necessary to do so), and concluded that non-notification was appropriate. The appellants argued that his finding on that issue was wrong.

[51] The starting point is the relevant statutory provision, s94(2) of the RMA. Section 94 has recently been amended, but at the relevant time s94(2) provided:

> 2) An application for a resource consent need not be notified in accordance with section 93, if the application relates to a discretionary activity or a non-complying activity and—
>
> (a) The consent authority is satisfied that the adverse effect on the environment of the activity for which consent is sought will be minor; and
>
> (b) Written approval has been obtained from every person whom the consent authority is satisfied may be adversely affected by the granting of the resource consent unless the authority considers it is unreasonable in the circumstances to require the obtaining of every such approval.

[52] There was no real dispute about the test to be applied in relation to decisions under s94. In *Bayley* (at 576) this Court said:

> Before s 94 authorises the processing of an application for a resource consent on a non-notified basis the consent authority must satisfy itself, first, that the activity for which consent is sought will not have any adverse effect on the environment which is more than a minor effect. The appropriate comparison of the activity for which the consent is sought is with what either is being lawfully done on the land or could be done there as of right. In the present case the starting point is that business activities are permitted. Then, at the second stage of its consideration, the authority must consider whether there is *any* adverse effect, including any minor effect, which *may* affect any person. It can disregard only such adverse effects as will certainly be de minimis, of which the minimal intrusion of the closets into the yard space may be an example, and those whose occurrence is merely a remote possibility. With no more than that very limited tolerance, the consent authority must require the applicant to produce a written consent from every person who may be adversely affected. It

> should not be overlooked also that "effect" in s 3 includes a temporary effect, which requires the authority to consider adverse effects which may be created by the carrying out of construction work.

[53] The test set out in *Bayley* was further explained by this Court in *Smith Chilcott*. In particular, the Court explained the approach which should be taken to determining what could be done "as of right" (to use the words of *Bayley*) on a particular site. The Court said at paras 25-26:

> [25] In the part of its decision concerned with the s105(2A) threshold the Environment Court used a number of expressions which the High Court thought had stated the wrong test in terms of *Bayley* (para [7] above). We agree that it is not enough for the developer to point to a very remote possibility and to treat it as something that could be done as of right: a one-unit building of the permitted maximum height and width on the present site, but with only one very narrow room per floor, for instance. But we also agree with the High Court that comparative tests – for instance, which development is the more likely? – or tests which rely on assessments of financial viability stray from what is called for.
>
> [26] We begin with what is allowed under the relevant plan. In accordance with the purpose of the legislation anything that is permitted but fanciful does not provide a realistic indication of what is permitted and a proper point of comparison. There must be a practical fact specific assessment. The test is perhaps best captured in a single expression as the discussion at the hearing indicated. Of the various phrases used in *Barrett* and elsewhere, "not fanciful" appears to us to set the standard appropriately. It follows that any permissible use qualifies under the permitted baseline test unless in all the circumstances it is a fanciful use.

[54] The components of the permitted baseline test as set out in *Bayley* and *Smith Chilcott* were drawn together by this Court in *Arrigato Investments Limited v Auckland Regional Council & Ors* [2002] 1 NZLR 323 at para [29], as follows:

> [29] Thus the permitted baseline in terms of *Bayley*, as supplemented by *Smith Chilcott Ltd*, is the existing environment overlaid with such relevant activity (not being a fanciful 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.

[55] The essence of the dispute between the parties in this case was how the supermarket site should be classified for the purposes of establishing the permitted baseline. The appellants argued, both in this Court and in the High Court, that the Court had to focus on the supermarket site as one lot, and determine what was permissible as of right on that site as a single lot. On the other hand both respondents argued that the supermarket site should be considered as six separate

sites, each of which was available for development and two of which had frontages onto Highgate.

[56] For the appellants, Mr Andersen argued that, since amalgamation of the six lots comprising the site was necessary to make the supermarket development a permitted use on the site, any assessment of the baseline should be confined to determining what could be done as a right on the site as a single lot. He said that comparing the supermarket development (which requires the site to be amalgamated) with the permitted use of the site as six separate lots is like comparing apples with oranges.

[57] We are unable to accept Mr Andersen's submission on this point. The Court has to consider what could be done on the supermarket site as of right i.e. without the need to obtain a resource consent. Obsidian could have demolished the bakery and used the six separate sites for any number of permitted activities, without the need for resource consents. The sites were being amalgamated solely for the purpose of the supermarket development. The possibility of retaining the land as separate sites could certainly not be dismissed as fanciful.

[58] We therefore conclude that John Hansen J was correct to take into consideration the potential uses of the supermarket site if it were subdivided into six (or a smaller number) lots. The significance of that finding is that developments could occur on the supermarket site with one or possibly two frontages onto Highgate as of right. That is a major difference from the position which would apply if the permitted baseline were determined by reference to the supermarket site as one lot only, in which case the only road frontage available as of right would be onto Ann Street.

[59] Having determined that the permitted uses of the site as six lots could be considered, John Hansen J determined that the effects of the supermarket proposal, when measured against the permitted baseline, would be minimal. As the Council did not need to notify the proposal if its adverse effects would be minor, he found non-notification would have been appropriate. We agree with the Judge's conclusion and reasoning on this issue. There was little that the appellants could

argue against it, which is why the argument in this Court on the notification issue was focussed on whether the baseline was one amalgamated lot or six separate lots.

[60] The Judge had before him evidence from a planner engaged by Obsidian, Mr Constantine, who put forward three hypothetical proposals for development of the supermarket site, all of which would comply with the requirements for commercial activity as permitted in a local activity zone.

[61] The first of these scenarios involved six separate permitted activities on the six separate sites. It was postulated that these could include a gymnasium, a takeaway outlet, a video store, a dairy or a bar and café. Additionally, community support facilities could also be located within the local activity zone, and these could include a day care facility for children, the elderly or the disabled, a place of worship, a hall or a language school. If such a development occurred there would be two separate frontages onto Highgate, both of which would be permitted without resource consent.

[62] The expert traffic engineer called by Obsidian, Mr Gamble, calculated the likely traffic movements if there were two developments fronting Highgate, one of which was a video store with five parking spaces, and the other which had similar traffic demands. He calculated that these two developments would generate 420 traffic movements during week day peaks compared with 256 movements onto Highgate from the proposed development (i.e. 64% higher). He said the other permitted activities would generate significant traffic numbers on Ann Street – he calculated there would be a 550% increase in traffic on Ann and Hereford Streets, both of which would then be faced with traffic movements which were more than twice their capacity.

[63] The second scenario put forward by Mr Constantine involved a larger scale development such as a McDonalds or KFC fast food outlet occupying both of the Highgate frontage sites. Mr Constantine said such a facility could include a drive-through facility. The traffic impact of this type of development was not assessed by Mr Gamble.

[64] A further scenario put forward by Mr Constantine was the establishment of an activity of a greater floor area on three or more of the lots of the supermarket site. He postulated the possibility of a small supermarket, a bar/restaurant or a place of worship which would leave sufficient space for parking. Mr Gamble assessed that the traffic impact of this type of development would be similar to Mr Constantine's first scenario.

[65] Mr Andersen criticised these scenarios as being unrealistic, and said that they should have been dismissed as fanciful. In particular he noted that the scenarios postulated by Mr Constantine involved substantial developments fronting onto Ann Street, which would mean that both Ann Street and Hereford Street would have twice as much traffic as they were capable of carrying. He said that this should be considered fanciful because no developer would undertake a development if it had that impact on the surrounding streets. We do not accept that submission. In our view the scenarios postulated by Mr Constantine were realistic possibilities, and certainly not fanciful.

[66] In the alternative Mr Andersen said that, since the Council had considered the non-notification decision on a flawed basis (because of its incorrect interpretation of the access rule), the matter should be remitted to the Council so that it can determine the issue afresh, and make its own assessment of the extent to which the proposed alternative uses of the supermarket site are fanciful.

[67] We accept that, in an ideal world, the matter should be determined by the consent authority rather than by the Court, since normal notification decisions are decisions which are left in the hands of consent authorities by the legislation, and come before the Courts only in circumstances of judicial review applications. Mr Page and Mr More strongly urged us against that course.

[68] Mr More pointed out that the supermarket development had to be stopped in March 2003, when funding was withdrawn, and said that it would lead to further costly delays for Obsidian if the Court did not determine the matter itself. He pointed out that the Court had before it significant evidence on the impact of the supermarket development and the impact of the alternatives which would be within

the permitted baseline, and indeed had before it far greater information than a consent authority would typically have when making a non-notification decision.

[69] We accept Mr More's submission that, in the unusual circumstances of this case, it is appropriate for the Court to determine the non-notification issue. In particular, we note that the only matter which needs to be assessed in this case is traffic/access, because in all other respects the supermarket development proposal complies with the plan. We agree with the approach taken by John Hansen J. For reasons similar to those adopted in the High Court, we conclude that, in the present case, the only available conclusion from an application of the permitted baseline test is that the effects of the supermarket development proposal would be not more than minor, and that the test in s94(2)(a) is therefore satisfied. That meant that the Council did not need to notify the proposal, and there is therefore no justification for the Court to interfere with the Council's decision not to notify the proposal. For similar reasons we are satisfied that the Council's decision to grant resource consent for the proposal should stand.

Discretion

[70] Our conclusions on the non-notification issue mean that it is unnecessary for us to consider the discretion argument.

Result

[71] We dismiss the appeal. Each respondent is entitled to costs of $6,000 together with reasonable disbursements (including the travelling and accommodation costs of counsel where appropriate) to be agreed by counsel or failing agreement to be fixed by the Registrar. The appellants are jointly and severally liable for those costs and disbursements.

Solicitors:
Wilkinson Adams, Dunedin for Appellants
Gallaway Cook Allan, Dunedin for First Respondent
Woodhouse Partner, Dunedin for Second Respondent

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2014-409-000054
[2014] NZHC 1362

BETWEEN	SIMONS HILL STATION LIMITED AND SIMONS PASS STATION LIMITED Appellants
AND	ROYAL FOREST & BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED First Respondent
	CANTERBURY REGIONAL COUNCIL Second respondent

Hearing:	12 and 13 May 2014
Appearances:	M E Casey QC and K G Reid for the Appellants S Gepp and P Anderson for the First Respondent M Dysart for the Second Respondent
Judgment:	17 June 2014

JUDGMENT OF GENDALL J

Introduction

[1] This is an appeal against a decision of the Environment Court refusing to partially strike out an appeal by the first respondent ("RFB").[1] RFB's substantive appeal is against the decision of commissioners appointed by the second respondent ("Council") by which the appellants ("Simons") were granted consent pursuant to the Resource Management Act 1991 ("the RMA") to take and use water for irrigation from Lake Pukaki or the Pukaki Canal for their farm properties Simons Hill Station and Simons Pass Station. These consent applications were publicly notified at the same time as 159 other applications for similar activities in the

[1] *Royal Forest and Bird Protection Society of New Zealand Inc v Canterbury Regional Council* [2013] NZEnvC 301.

Upper Waitaki area. RFB's substantive appeal against the decision of the Commissioners cited adverse effects on landscape, terrestrial ecology and water quality.

[2] RFB has additionally filed a cross-appeal relating to the Environment Court's interpretation of s 120 of the RMA.

[3] Simons' strike out application sought to bring an end to RFB's appeals so far as they raise issues which Simons' claim are outside the scope of RFB's submission on the consent applications, dated 28 September 2007 ("the 2007 submission"). Simons say that the 2007 submission was solely confined to issues related to compliance with the Waitaki Catchment Water Allocation Plan ("the Waitaki Plan") relating to the area in question and the effects of the taking of water. The Waitaki Plan, and the 2007 submission, it is said relate only to water *allocation*, whereas any issue relating to water allocation Simons contends has now been abandoned by RFB.

[4] Simons maintains that the matters now proposed to be raised by RFB on its appeal relate only to the effects of the use and application of the water on terrestrial ecology and the landscape. These are matters with which the Waitaki Plan did not deal, and which are, Simons says, outside the scope of the 2007 submission.

[5] The substantive appeal is yet to be heard before the Environment Court as the outcome of the present appeal has the potential to influence the scope of that appeal.

The appeal

[6] The application by Simons for partial strike out of RFB's substantive appeal in the Environment Court was two-pronged:

(a) an appeal against the grant of a resource consent is constrained as to scope by the appealing party's original submission lodged with the consenting authority.

(b) the matters raised by RFB on its appeal to the Environment Court were not, as a matter of interpretation, within the scope of its 2007 submission to the consent authority.

[7] As to the former, the Environment Court agreed with Simons' argument. As to the latter, the Environment Court determined that the matters raised on appeal to the Environment Court fell within the purview of RFB's 2007 submission, therefore circumventing the invocation of the former finding. It was on this basis that the application for partial strike out failed, which in turn led to this appeal. The grounds on which Simons now appeal are that:

(a) the Environment Court incorrectly interpreted RFB's 2007 submission as raising issues as to the effects on terrestrial ecology of Simons' proposed use of the water.

(b) the Environment Court wrongly interpreted the objectives and policies of the Waitaki Plan and reached incorrect conclusions as a result.

(c) the Environment Court wrongly interpreted Policy 12 of the Waitaki Plan and therefore incorrectly concluded it was relevant.

(d) the Environment Court was wrong to consider the adequacy or otherwise of an applicant's AEE and its responses to s 92 requests as a consideration relevant to the scope of submissions made on the application for resource consent.

(e) the Environment Court was wrong to hold that RFB's statement of issues did not qualify its notice of appeal.

[8] In response RFB submits:

(a) the grounds of appeal disclosed by Simons are seeking to relitigate the findings of the Environment Court appeal under the guise of a question of law. Accordingly, this appeal ought to fail as appeals to the High Court may only be on questions of law.

(b) even if the grounds of appeal do legitimately disclose questions of law, these are immaterial when considered in the context of the factual findings of the Environment Court in its entirety.

[9] The Council supports, to a greater or lesser extent, the position of Simons with respect to the appeal. This judgment will therefore concentrate primarily on the submissions of Simons and RFB.

The cross-appeal

[10] RFB cross-appeals against the decision of the Environment Court on the basis that it was wrong to interpret s 120 of the RMA as constraining the scope of an appellant's grounds of appeal to matters raised in its own original submission to the consenting authority.

[11] In response, Simons and the Council submit that the cross appeal should fail on the basis that the interpretation of the Environment Court was correct.

Issues for resolution

[12] Despite the apparent complexity of this case, there are ultimately only two issues which this Court is required to resolve:

(a) Did the Environment Court err *in law* in finding that RFB's original 2007 submission was sufficiently wide to encompass the grounds on which it appealed the granting of the resource consent to the Environment Court?

(b) Was the Environment Court wrong to interpret s 120 of the RMA as meaning that an appeal to the Environment Court is constrained in scope by the original submission of the appellant to the consenting authority?

The Environment Court decision

The application

[13] As previously stated, the application before the Environment Court was an application by Simons to partially strike out three of RFB's appeals on the following grounds:[2]

> (a) the Court has no jurisdiction to entertain the appeals filed by Forest & Bird;
>
> (b) Forest & Bird's submission on the notified applications for resource consent concern non-compliance with the Waitaki Catchment Water Allocation Plan … This matter is no longer in contention;
>
> (c) the court has no jurisdiction to consider the issues identified by Forest & Bird in its memorandum dated 8 March 2013;
>
> (d) Forest & Bird has failed to particularise its appeals so as to ensure that the matters to be raised in evidence are within jurisdiction; and
>
> (e) Forest & Bird has failed to clearly and unambiguously identify the matters that it wishes to raise as part of its appeal "in a way that excludes mattes not being raised".

[14] RFB opposed the application for strike out on the following basis:[3]

> (a) the matters pursued on appeal are within the scope of its submission on the resource consent applications;
>
> (b) if there is any doubt as to scope, this should be resolved in Forest & Bird's favour; and
>
> (c) Forest & Bird's appeals raise issues about water quality and quantity that have yet to settle and therefore remain in contention.

Simons' arguments

[15] In support of its application in the Environment Court, Simons submitted:

> (a) an appeal cannot widen the scope of the original submission put before the consenting authority; this position is consistent with principles of fairness and natural justice.[4]

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2 At [3].
3 At [5].
4 At [35] – [36].

(b) the scope of a submission concerns not only the grounds on which the submission is made, but also the relief sought. Here, the relief sought by RFB is referable to the applications only to the extent that they were contrary to the Waitaki Plan. Therefore, RFB was seeking only to decline non-complying activities, whereas the Simons' activities were discretionary.[5]

(c) Part 2 of the RMA cannot be used to widen the scope of the appeal beyond the scope of the original submission made by RFB. The relevance of Part 2 matters is quite different from the question of whether the Environment Court had any jurisdiction to hear them.[6]

(d) the statement of issues which the Court directed RFB to file is analogous to "further particulars" which qualifies, though does not formally amend, the notice of appeal. To the extent the appeal originally dealt with water quality issues these are no longer in issue as a result of the statement of issues.[7]

(e) RFB cannot lead evidence on the effects of dairying, including the effects of dairying on water quality.[8]

RFB's arguments

[16] In response by way of opposition in the Environment Court, RFB contended:

(a) the meaning of s 120 is clear from its context and is not limited to matters raised by the submitter in their original submission.[9]

(b) in any event, the very broad nature of the submission was sufficient to import relevant concepts from the Waitaki Plan so as to give RFB standing to appeal.[10]

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5 At [38] – [39].
6 At [40].
7 At [41].
8 At [42].
9 At [28].

(c) the Regional Council, by requesting further information pursuant to s 92, acknowledged that Lake Pukaki was considered under the Waitaki Plan to have high natural character and high landscape and visual amenity values. A submitter viewing the correspondence should be entitled to rely on statements that these values are provided for under the Waitaki Plan.[11]

(d) permitting RFB to call evidence on landscape and terrestrial ecology would result in no prejudice to Simons.[12]

(e) the Environment Court either has a discretion or is obliged to consider evidence on Part 2 matters as pursuant to s 6 any person exercising functions and powers under the Act (here the Environment Court) is obliged to so consider.[13]

(f) RFB's submission includes all of Simons' proposed activities, if only for the reason that all consent applications are listed in attachment A to the submission.[14]

(g) while RFB anticipates that the general topic of water quality will be settled, RFB has not withdrawn or abandoned its appeals on this topic, and will remain in issue if the use of water is to support a dairying activity.[15]

Decision of the Environment Court

[17] Rather helpfully, the Environment Court expressly set out the five issues which it was required to determine, and provided findings on each issue in turn. Relevant excerpts from the Environment Court judgment are replicated below:

> [43] From the foregoing the following issues arise for determination:

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10 At [29].
11 At [30].
12 At [31].
13 At [32].
14 At [33].
15 At [34].

(a) is the scope of an appeal under s 120 constrained by the notice of appeal or by the original submission on a resource application or both?

- Sub-issue: does s 40 and s 274(B) or clause 14(1) of the First Schedule RMA assist Forest & Bird's interpretation of s 120?

(b) did Forest & Bird's submission on the applications address the matters raised in the notice of appeal?

- Sub-issue: if it did not, does the absence of prejudice confer standing to introduce new grounds for appeal?

(c) does the Environment Court have a discretion to direct, or indeed is the Court required to direct, the parties produce evidence on matters pertaining to s 6 of the Act?

(d) did the Environment Court's decision on preliminary issues determine the ground of appeal that the Commissioners modified the consent application?

(e) has Forest & Bird partially withdrawn its appeal on water quality?

…

Issue: **Is the scope of an appeal under s 120 constrained by the notice of appeal or by the original submission on a resource consent application, or both?**

Sub-Issue: *Does s 40 and s 274(B) or clause 14(1) of the First Schedule RMA assist Forest & Bird's interpretation of s 120?*

…

[59] If a submitter is able to appeal on grounds not raised in his or her submission on the application, then the appeal would not be against the decision of the consent authority. That is because in accordance with s 104 and s 104B the consent authority makes its decision having considered both the application and any submissions received.

[60] On Forest & Bird's interpretation s 290 would be rendered ineffective as the court would be deciding the application on a different basis to that considered by the consent authority. Thus the court would not be in a position to confirm, amend or cancel the consent authority's decision as it is required to do under s 290. Section 113 requires the consent authority to provide written reasons for its decision, including the main findings of fact. Again, on appeal if a submitter is not constrained by its submission on the application there would be no relevant decision for the court to have regard to under s 290A.

…

[65] Given the fundamental role of the written submission in the consenting process, as recorded in the decision of *Butel Park Homeowners Association v Queenstown Lakes District Council* and *Rowe v Transit New Zealand*, we consider our interpretation to be consistent with the principle that there is finality in litigation.

…

Outcome

[73] We hold that on appeal a submitter is constrained by the subject matter and relief contained in his or her submission on a resource consent application.

Issue: **Did Forest & Bird's submission on the applications address the matters raised in the notice of appeal?**

Sub-issue: *If it did not, does the absence of prejudice confer standing to introduce new grounds for appeal?*

Introduction

[74] Simons' overall submission is that reference to non-complying activities in the Forest & Bird submission, particularises their concern as relating to the non-compliance with the flow and level regime and with the water allocations.

[75] There is no doubt that Forest & Bird could have squarely and clearly set out in the submission its concerns about the landscape and terrestrial ecology effects of the use of the water. Despite the submission having been signed by legal counsel, it is poorly constructed and at times difficult to follow. That said, the submission is to be considered against the context in which it was made, including the backdrop of the Waitaki Plan (and other relevant Plans) and the applications themselves.

…

Consideration and findings

…

[99] At the time the submission was made Forest & Bird did not know whether the Simons' applications were for non-complying activities and therefore it was not in a position to assess the applications in the context of a Plan that envisages change through the allocation and use of water. If Forest & Bird could not assess the effects of the proposal in the broader policy context of the Waitaki Plan's allocation framework- then it would be difficult, if not impossible, to form a view on the individual effects of the proposal on the environment.

[100] We agree with Forest & Bird that anyone reading the consultant's response would reasonably have assumed landscape is a matter addressed under the Waitaki Plan. Indeed, the request for information by the Regional Council also assumed this to be the case. It may be that the Regional Council and Simons had in mind that the Waitaki Plan policy applied to the

applications or that the Waitaki Plan applied because of its stated assumption that the effects related to the taking and use of water are to be addressed under other statutory plans. The writers do not shed any light on their understanding.

[101] Forest & Bird could have front footed its concerns about the landscape and terrestrial ecology effects of the use of the water. However, in this case we find that it would be wrong to alight upon individual words and phrases or to consider the submission in isolation from or with little weight being given to the fact that the submission is on 161 consent applications. Standing back and having regard to the whole of the submission we apprehend that Forest & Bird was generally concerned with the effects on the environment of all of the applications for resource consent. Secondly, it was concerned to uphold the integrity of the Waitaki Plan and to ensure that decision making under that Plan was in accordance with the purpose and principles of the Act. Thirdly, we consider it unsound to particularise or read down the submission as being confined to non-complying activities.

[102] Finally, we do not infer - as we were invited to do so by Simons - that the Assessment of Environmental Effects was adequate because the Regional Council did not determine that the application was incomplete and it to the applicant (s 88A(3)). We observe that s 88A(3) confers a discretion upon the consent authority to deal with the application in this way. It was open to the consent authority to request further information under s 92 of the Act either before or after notification (which it did). Ms Dysart referred us to the affidavit of Ms B Sullivan filed in relation to the jurisdictional hearing, where the Council's practice that applied at the time the application was lodged is discussed. 63 At paragraph [24] Ms Sullivan deposes "[w]hat would now be considered deficient applications were often then receipted, with section 92 of the RMA used to obtain the necessary information for the application to be considered notifiable".

Outcome

[103] Forest & Bird's submission on the notified application does confer scope to appeal the decision to grant resource consents to Simons on the grounds that the effects on landscape and terrestrial ecology are such that the purpose of the Act may not be achieved.

[104] Given this, we do not need to decide the issue whether an absence of prejudice confers standing to introduce new grounds for appeal.

(citations omitted)

The Resource Management Act 1991 appeals regime

[18] This appeal is governed by s 299 of the RMA, which provides:

299 Appeal to High Court on question of law

(1) A party to a proceeding before the Environment Court under this Act or any other enactment may appeal on a question of law to the High Court against any decision, report, or recommendation of the Environment Court made in the proceeding.

(2) The appeal must be made in accordance with the High Court Rules, except to any extent that those rules are inconsistent with sections 300 to 307.

[19] Therefore, if an appeal discloses no discernible question of law, it is not to be entertained by this Court. The principles applicable to RMA appeals can be summarised as follows:

(a) Appeals to this Court from the Environment Court under s 299 are limited to questions of law.

(b) The onus of establishing that the Environment Court erred in law rests on the appellant: *Smith v Takapuna CC* (1988) 13 NZTPA 156 (HC).

(c) In *Countdown Properties (Northland) Ltd v Dunedin City Council* it was said that there will be an error of law justifying interference with the decision of the Environment Court if it can be established that the Environment Court:[16]

(i) applied a wrong legal test;

(ii) came to a conclusion without evidence or one to which, on evidence, it could not reasonably have come;

(iii) took into account matters which it should not have taken into account; or

(iv) failed to take into account matters which it should have taken into account.

(d) The weight to be afforded to relevant considerations is a question for the Environment Court and is not a matter available for

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[16] *Countdown Properties (Northland) Ltd v Dunedin City Council* [1994] NZRMA 145 at 153. See also *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153 at [50] – [55]; *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [24] – [28].

reconsideration by the High Court as a question of law: *Moriarty v North Shore City Council* [1994] NZRMA 433 (HC).

(e) The Court will not engage in a re-examination of the merits of the case under the guise of a question of law: *Sean Investments Pty Ltd v Mackellar* (1981) 38 ALR 363; *Murphy v Takapuna CC* HC Auckland M456/88, 7 August 1989.

(f) This Court will not grant relief where there has been an error of law unless it has been established that the error materially affected the result of the Environment Court's decision: *Royal Forest & Bird Protection Society Inc v W A Habgood Ltd* (1987) 12 NZTPA 76 (HC) at 81 – 82; *BP Oil NZ Ltd v Waitakere City Council* [1996] NZRMA 67 (HC).

[20] In the context of these general principles, I now turn to consider the appeal and cross appeal. It is useful here to consider the cross-appeal first.

The cross-appeal against the interpretation of s 120

Introduction

[21] A claim that a lower Court or Tribunal has erred in the interpretation of a statute is a clear example of an alleged error of law. This therefore deserves to be afforded consideration in some detail, particularly given the potential implications it might have for the wider consenting process under the RMA. Section 120 provides as follows:

> **120 Right to appeal**
>
> (1) Any one or more of the following persons may appeal to the Environment Court in accordance with section 121 against the whole or any part of a decision of a consent authority on an application for a resource consent, or an application for a change of consent conditions, or on a review of consent conditions:
>
> (a) The applicant or consent holder:
>
> (b) Any person who made a submission on the application or review of consent conditions.

(c) in relation to a coastal permit for a restricted coastal activity, the Minister of Conservation.

(2) This section is in addition to the rights provided for in sections 357A, 357C, and 357D (which provide for objections to the consent authority).

Previous relevant decisions

[22] I was referred by counsel for all parties to a number of decisions as to the proper interpretation of s 120. In this respect an appropriate starting point is the decision of the Supreme Court in *Waitakere City Council v Estate Homes Ltd*.[17] That decision concerned an application by Estate Homes for a land use consent which included, inter alia, a request for compensation for constructing a road wider than was necessary for the subdivision in question.[18] One of the issues was whether *an applicant* could be granted compensation on appeal *greater* than that claimed before the originating tribunal. There the Supreme Court stated:

> [27] The applicant had a right of appeal to the Environment Court, under s 120 of the Act, against the decision of a consent authority. Notice of appeal must be given in the prescribed form under s 121. The notice must state the reasons for the appeal and the relief sought. Under s 290(1), the Environment Court has "the same power, duty, and discretion" in dealing with the appeal as the consent authority. Under s 290(2) it may confirm, amend or cancel the decision to which the appeal relates.
>
> [28] These statutory provisions confer an appellate jurisdiction that is not uncommon in relation to administrative appeals in specialist jurisdictions. As Mr Neutze submitted, they contemplate that the hearing of the appellate tribunal will be "de novo", meaning that it will involve a fresh consideration of the matter that was before the body whose decision is the subject of appeal, with the parties having the right to a full new hearing of evidence. When the legislation provides for a de novo hearing it is the duty of the Environment Court to determine for itself, independently, the matter that was before the body appealed from insofar as it is in issue on appeal. The parties may, however, to the extent that is practicable, instead confine the appellate hearing to specific issues raised by the appeal.
>
> [29] *We accept that in the course of its hearing the Environment Court may permit the party which applied for planning permission to amend its application, but we do not accept that it may do so to an extent that the matter before it becomes in substance a different application. The legislation envisages that the Environment Court will consider the matter that was before the Council and its decision*

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17 *Waitakere City Council v Estate Homes Limited* [2006] NZSC 112, [2007] 2 NZLR 149.

18 At [2] – [10].

> *to the extent that it is in issue on appeal. Legislation providing for de novo appeals has never been read as permitting the appellate tribunal to ignore the opinion of the tribunal whose decision is the subject of appeal. In the planning context, the decision of the local authority will almost always be relevant because of the authority's general knowledge of the local context in which the issues arise.*

(Citations omitted and emphasis added)

[23] In my view however, *Estate Homes* is distinguishable from the present type of case on the simple basis that a decision on appeal granting compensation greater than that claimed in the original application falls outside the ambit of the original decision. To the extent that the compensation was greater than the applicant sought, it had not been considered by the originating tribunal and could not form part of its decision. In the present case RFB is merely seeking that it not be constrained by its own submissions, and for it to be able to appeal the decision in its entirety; not to go beyond that decision as was the case in *Estate Homes*.

[24] There are also a number of authorities which outline statements of principle regarding the scope of appeals under s 120 and similar sections. In the decision of Judge Skelton in *Morris v Marlborough District Council* it was stated:[19]

> … it also has to be noticed that section 120 provides for a right of appeal "against the whole or any part of a decision of a consent authority …" and that seems to me to indicate an intention on the part of the Legislature to allow a person who has made a submission to advance matters by way of appeal that arise out of the decision, even though they may not arise directly out of that persons' original submission.

[25] The decision in *Challenger Scallop Enhancement Company Ltd v Marlborough District Council* evinces a similar, if not broader, interpretation of s 120:[20]

> … It was submitted that to raise an issue for the first time at a *de novo* hearing when such issues could and should have been raised at earlier proceedings is an abuse of process…
>
> I reject this submission on the basis that the Environment Court hears the appeal *de novo*, and is able to receive evidence and submissions not put forward at the first instance hearing before the local authority. Indeed

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19 *Morris v Marlborough District Council* (1993) 2 NZRMA 396, (1993) 1A ELRNZ 294 (PT).

20 *Challenger Scallop Enhancement Company Ltd v Marlborough District Council* [1998] NZRMA 342 (EC).

> without such a power the s 274 provisions, which allow certain non-parties to appear and present evidence, would be of little effect.

[26] The Environment Court in *Hinton v Otago Regional Council* sought to set out the Court's jurisdiction when deciding s 120 appeals:[21]

> The Court's jurisdiction when deciding an appeal under section 120 of the RMA is limited by Part II of the Act and also by:
>
> (a) the application for resource consent – a local authority (an on appeal, the Court) cannot give more than was applied for: *Clevedon Protection Society Inc v Warren Fowler Quarries & Manukau District Council*;
>
> (b) any relevant submissions; and
>
> (c) the notice of appeal.
>
> Generally, each successive document can limit the preceding ones but cannot widen them. That seems to be the effect of the High Court's decision in *Transit NZ v Pearson and Dunedin City Council*.
>
> (Citations omitted)

[27] A further relevant decision is *Avon Hotel Ltd v Christchurch City Council* where it was stated:[22]

> [18] It is axiomatic that an appeal cannot ask for more than the submission on which it is based. I can find no direct authority for that proposition. However, I think the point is made in *Countdown Properties (Northlands) Limited v Dunedin City Council* where the Full Court stated that '… the jurisdiction to amend [the plan, plan change or variation] must have some foundation in submissions'.
>
> (Citations omitted)

[28] Similarly, in a more recent case dealing with a similar issue, *Environmental Defence Society Incorporated v Otorohanga District Council* it was stated:[23]

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21 *Hinton v Otago Regional Council* EC Christchurch C5/2004, 27 January 2004 at [17].

22 *Avon Hotel Ltd v Christchurch City Council* [2007] NZRMA 373 at [18].

23 *Environmental Defence Society Incorporated v Otorohanga District Council* [2014] NZEnvC 70.

> [12] …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 in terms of the proposed change and the content of the submissions.
>
> (Citations omitted)

[29] Finally, counsel for RFB referred me to the decision in *Transit New Zealand v Pearson* which concerned the appeal regime under s 174, which is similar in structure to s 120.[24] In that case the High Court agreed with the reasoning of the Environment Court that:[25]

> … appeals are constrained only by the scope of the notice of appeal filed under section 120 and in this case under section 174. As an original appellant the Council was required to state the reasons for the appeal and the relief sought and any matters required to be stated by regulations and to be lodged and served within 15 working days as provided under section 174(2). This is equivalent to the provisions under section 121(1). To the extent that Clause 14(1) limits the scope of a reference to an original submission that constraint is not contained within s 174. In this case Mr Pearson's original submission is wide enough to encompass withdrawal of the requirement. He therefore meets the threshold test of Clause 14(1) if he has an appeal in his own right. In this way Clause 14(1) and section 174 are complementary.

Discussion

[30] It seems to me that the plain words of the section, in conjunction with the lack of any real conflict in the authorities, lead to the conclusion that the Environment Court erred here in its interpretation of s 120. To my mind all that must be satisfied on appeal is that the matter in issue was before the originating tribunal. This, of course, does not necessarily mean that the matter in issue must have been put before that tribunal by the appellant submitter; the requirement exists so as to ensure that the matter being appealed was one considered by the originating tribunal. What is important is that the applicant is put on notice, by the submissions in their entirety, of the issues sought to be raised, so that they can be confronted by that consenting authority. In such situations I am satisfied there is no derogation from principles of natural justice by making all of those issues the subject of further consideration on appeal.

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24 *Transit New Zealand v Pearson* [2002] NZRMA 318 (HC).
25 At [38] and [41].

[31] By this analysis the plain meaning of s 120 is given full effect, without unnecessary constraint or reading down. This is not a case in which any rigid principles of statutory interpretation need be resorted to. The words are clear on their face. An appellant, which itself must have standing, is able to appeal "against the whole or any part of a decision of a consent authority on an application for a resource consent". This does not mean "the whole or any part of a decision of a consent authority [on which the appellant made submissions]".

[32] It would be anathema to the purpose of the RMA that a submitter was required at the outset to specify all the minutiae of its submissions in support or opposition. The originating tribunal would be inundated with material if this were the case. So long as a broad submission puts in issue before the originating tribunal the matters on which an appellant seeks to appeal, the appellate Court or Tribunal of first instance should entertain that appeal. Thus, I reach a different interpretation of the scope and operation of s 120 to that of the Environment Court. RFB as a submitter, who appealed the decision of the Commissioners on Simons' resource consent application under s 120 of the RMA, is not constrained by the subject matter of its original submission and is able to appeal the whole or any part of that original decision. As such, RFB's cross-appeal here must succeed.

[33] The position regarding s 120 can therefore be summarised as follows:

(a) An appealing party must have made submissions to the consenting authority if it is to have standing to appeal that decision.

(b) The Court's jurisdiction on appeal is limited by:

(i) Part 2 of the Act;

(ii) The resource consent itself (the Court cannot give more than was applied for);

(iii) The whole of the decision of the consenting authority which includes <u>all</u> relevant submissions put before it, and not just those submissions advanced initially by the appellant;

(iv) The notice of appeal.

(c) Successive documents can limit the preceding ones, but are unable to widen them.

(d) On appeal, arguments not raised in submissions to the originating tribunal may, with leave of the Court, be advanced by the appellant where there is no prejudice to the other party.

The appeal against refusal to partially strike out

[34] With respect to Simons' present appeal itself, I am required to reach a conclusion as to whether the Environment Court erred in law in refusing to partially strike out three of RFB's appeals. For the reasons set out below I am satisfied that this appeal must fail.

[35] First, this is not a final determination of the issues to be heard on appeal. Rather, it is a strike out application, the purpose of which is to address Simons' intention that certain grounds should never be heard substantively. The statutory foundation of the strike out jurisdiction and procedure is provided for in s 279 of the RMA. It relevantly provides:

> **279 Powers of Environment Judge sitting alone**
>
> …
>
> (4) An Environment Judge sitting alone may, at any stage of the proceedings and on such terms as the Judge thinks fit, order that the whole or any part of that person's case be struck out if the Judge considers —
>
> (a) That it is frivolous or vexatious; or
>
> (b) That it discloses no reasonable or relevant case in respect of the proceedings; or
>
> (c) That it would otherwise be an abuse of the process of the Environment Court to allow the case to be taken further.

[36] As a preliminary matter I note that s 279 expressly refers to the powers of an Environment Court Judge sitting alone. Of course in this case Judge Borthwick was

sitting with Commissioner Edmonds. Nothing turns on this point and this judgment proceeds accordingly.

[37] The threshold for an applicant or appellant to pass in strike out applications is, understandably, very high. If such an application is successful it effectively denies a respondent the right to put its arguments before the Court in substantive proceedings. The applicable principles were considered generally by the Court of Appeal in *Attorney-General v Prince and Gardner* where it was stated:[26]

> A striking-out application proceeds on the assumption that the facts pleaded in the statement of claim are true. That is so even although they are not or may not be admitted. It is well settled that before the Court may strike out proceedings the causes of action must be so clearly untenable that they cannot possibly succeed (*R Lucas and Son (Nelson Mail) Ltd v O'Brien* [1978] 2 NZLR 289, 294-295; *Takaro Properties Ltd (in receivership) v Rowling* [1978] 2 NZLR 314, 316-317); the jurisdiction is one to be exercised sparingly, and only in a clear case where the Court is satisfied it has the requisite material (*Gartside v Sheffield, Young & Ellis* [1983] NZLR 37, 45; *Electricity Corp Ltd v Geotherm Energy Ltd* [1992] 2 NZLR 641; but the fact that applications to strike out raise difficult questions of law, and require extensive argument, does not exclude jurisdiction (*Gartside v Sheffield, Young & Ellis*).

[38] In the RMA context, the decision of the Environment Court in *Hern v Aickin* is relevant.[27] In that case, it was stated:

> 6. The authority to strike-out proceedings is to be exercised sparingly and only in cases where the Court is satisfied that it has the requisite material before it to reach a certain and definite conclusion. The authority is only to be used where the claim is beyond repair and so unobtainable that it could not possibly succeed. In considering striking out applications the Court does not consider material beyond the proceedings and uncontested material and affidavits.
>
> (citations omitted)

[39] In addition, there are at least three further considerations relevant to a strike out application in the RMA context:[28]

> a) The RMA encourages public participation in the resource management process which should not be bound by undue formality:

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[26] *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 at 267 (CA).
[27] *Hern v Aickin* [2000] NZRMA 475 at [6].
[28] *Hauraki Maori Trust Board v Waikato Regional Council* HC Auckland CIV-2003-485-999, 4 March 2004 at [18].

Countdown Properties (Northland) Ltd v Dunedin City Council [1994] NZRMA 145 at 167;

b) Where there is a reference on appeal to the Environment Court, the appellant is not in a position to start again due to statutory time limits; and

c) There are restrictions upon the power to amend. In particular an amendment which would broaden the scope of a reference or appeal is not ordinarily permitted.

[40] On the ground alone that the strike out application fails to meet the high threshold required, I would dismiss the appeal. Patently the Environment Court decision makes it apparent that this is not a case in which RFB's appeal is inevitably destined to fail. The Environment Court was therefore entitled to make a factual finding, having regard to all the evidence before it, that the grounds on which RFB now appeals were sufficiently disclosed in original submissions to warrant the substantive appeal being heard. The Environment Court found that the submissions from RFB were:[29]

(a) generally concerned about effects on the environment of all of the 161 applications for resource consent;

(b) concerned to uphold the integrity of the Waitaki Plan and to ensure that decision-making under the plan was in accordance with the purpose and principles of the RMA; and

(c) was not limited to non-complying activities.

[41] And, with regard to the issue of upholding the integrity of the Waitaki Plan, in my view certain principles, policies and objectives of the Plan clearly are relevant here and would tend to assist RFB's position:

(a) 6. Objectives

Objective 3…in allocating water, to recognise beneficial and adverse effects on the environment and both the national and local costs and benefits (environmental, social, cultural and economic).

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[29] Royal Forest and Bird, above n 1 at [101].

(b) 7. Policies

> Policy 1 By recognising the importance of connectedness between all parts of the catchment from the mountains to the sea and between all parts of fresh water systems of the Waitaki River…
>
> Explanation
>
> The Waitaki catchment is large and complex. This policy recognises the importance of taking a whole catchment approach "mountains to the sea" approach to water allocation in the catchment – an approach that recognises the physical, ecological, cultural and social connections throughout the catchment.
>
> Policy 12 To establish an allocation to each of the activities listed in Objective 2 (which includes agricultural and horticultural activities) by:
>
> (a) Having regard to the likely national and local effects of those activities; …
>
> (f) Considering the relative environmental effects of the activities including effects on landscape, water quality, Mauri…

9. Anticipated environmental results

> 1. There is a high level of awareness and recognition of the connectedness of the water bodies in the catchment – between the mountains and the sea…
>
> 6. The landscape and amenity values of water bodies within the catchment are maintained or enhanced.

(Emphasis added)

[42] In the Plan, "Waitaki Catchment" is widely defined as set out in s 4(1) Resource Management (Waitaki Catchment) Amendment Act 2004:

> (a) means the area of land bounded by watersheds draining into the Waitaki River; and
>
> (b) includes aquifers draining wholly or partially within that area of land.

[43] I am also mindful of the fact that this Court is to exercise the discretion to strike out a case or part of a case sparingly. In *Everton Farm Limited v Manawatu - Wanganui RC*[30] the Court said that an emphasis on efficiency should not detract from the importance of not depriving a person of their "day in court". I agree.

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[30] *Everton Farm Limited v Manawatu - Wanganui RC* EnvC Wellington, W008/02, 22 March 2002.

[44] I am also cognisant of the fact that my conclusion reached above with respect to s 120 has the result of rendering the application for strike out more unlikely than it was in the Environment Court as it broadens the evidential foundation of RFB's substantive appeal. Nor in my judgment can it be properly suggested here that RFB's appeal grounds are frivolous or vexatious or that they constitute an abuse of process.

[45] I am reinforced in these views by the ordinary principle that an appellate Court ought generally to defer to a specialist tribunal. This principle was applied in the RMA context in *Guardians of Paku Bay Association Incorporated v Waikato Regional Council* where Wylie J stated:[31]

> [33] The High Court has been ready to acknowledge the expertise of the Environment Court. It has accepted that the Environment Court's decisions will often depend on planning, logic and experience, and not necessarily evidence. *As a result this Court will be slow to determine what are really planning questions, involving the application of planning principles to the factual circumstances of the case.* No question of law arises from the expression by the Environment Court of its view on a matter of opinion within its specialist expertise, and the weight to be attached to a particular planning policy will generally be for the Environment Court.
>
> (Citations omitted and emphasis added)

[46] I appreciate the grounds of appeal raised by Simons purport to disclose appealable errors of law. However, there is a reasonable argument here that the conclusions reached by the Environment Court are fundamentally findings of fact. It is trite law, as noted above, that this Court, on appeal from the Environment Court, will not permit an appeal against the merits of a decision under the guise of an error of law. Though I need not reach a firm conclusion on this point, it does seem that Simons is simply unhappy with a decision and is now seeking to have those findings reconsidered. Those are matters to be properly addressed in the substantive appeal.

[47] For all these reasons, Simons' appeal against the Environment Court decision refusing to partially strike out RFB's appeal must fail.

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[31] *Guardians of Paku Bay Association Incorporated v Waikato Regional Council* [2012] 1 NZLR 271 (HC) at [33].

Costs

[48] RFB has been successful both in its cross-appeal and in resisting Simons' appeal. Costs should follow the event in the usual way.

[49] I have a reasonable expectation here that the question of costs ought to be the subject of agreement between the parties without the need to involve the Court. If however agreement cannot be reached and I am required to make a decision as to an award of costs, then RFB is to file submissions within 15 working days with submissions from Simons and the Council 10 working days thereafter.

.....
Gendall J

Solicitors:
Matthew Casey QC, Auckland
Kelvin Reid, Christchurch
Canterbury Regional Council, Christchurch
Wilding Law, Christchurch
Royal Forest and Bird Society, Christchurch

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-002294
[2015] NZHC 1035

UNDER	the Resource Management Act 1991
AND	
IN THE MATTER	of an appeal against a decision of the Environment Court under section 299 of the Act
BETWEEN	THUMB POINT STATION LTD Appellant
AND	AUCKLAND COUNCIL Respondent

Hearing: 26 March 2015

Appearances: M Williams for Appellant
G Lanning and A Smith for Respondent

Judgment: 18 May 2015

(RESERVED) JUDGMENT OF ANDREWS J

This judgment is delivered by me on 18 May 2015 at 2.30 pm pursuant to r 11.5 of the High Court Rules.

.....
Registrar / Deputy Registrar

Introduction

[1] Thumb Point Station Ltd and associated entities[1] own the Man O'War farm on Waiheke Island. Thumb Point appealed to the Environment Court in relation to subdivision rules set out in the Proposed Auckland Council District Plan - Hauraki Gulf Islands ("the HGI Plan"), notified in September 2006 (Decisions Version issued in May 2009).

[2] In its decision delivered on 13 August 2014, the Environment Court rejected Thumb Point's submission that more liberal rules should be made in the HGI Plan for subdivision of those parts of the Man O'War farm designated as "Landform 5" (productive land).[2] The subdivision issue was one of five issues determined by the Court. Only the subdivision issue was subject to the present appeal.

[3] Thumb Point has appealed to this Court pursuant to s 299 of the Resource Management Act 1991 ("the Act") on the grounds that the Environment Court made errors of law in its consideration of proposed amendments to the subdivision rules for Landform 5.

Relevant statutory provisions

[4] Sections 72–76 of the Act relate to district plans. Section 72 sets out the purpose of a district plan as being "to assist territorial authorities to carry out their functions in order to achieve the purpose of the Act". The purpose of the Act is set out in s 5: "to promote the sustainable management of natural and physical resources".

[5] Sections 73–75 set out provisions as to the preparation and change of district plans (s 73), matters to be considered by a territorial authority when preparing and changing its district plan (s 74), and the contents of a district plan (s 75). Section 76 provides that a territorial authority may include rules in a district plan, for the

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1 Huruhe Station Ltd, Man O'War Farm Ltd, Man O'War Station Ltd and South Coast Station Ltd, collectively referred to in this judgment as "Thumb Point".

2 *Thumb Point Station Ltd v Auckland Council* [2014] NZEnvC 175 ("the Environment Court decision").

purpose of carrying out its function under the Act and achieving the objectives and policies of the plan.

[6] The Environment Court has set out tests to be applied when considering proposed district plan provisions as being whether the provisions:[3]

(a) accord with and assist the Council in carrying out its functions under Part 2 of the Act;

(b) take account of effects on the environment;

(c) are consistent with and give effect to applicable national, regional and local planning documents; and

(d) meet the requirements of s 32 of the Act, including whether the policies and rules are the most appropriate for achieving the objectives of the plan.

[7] Section 32 of the Act, as at the time the HGI plan was notified,[4] provided:

> **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)
> (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.

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3 See e.g. *Long Bay-Okura Great Park Society Inc v North Shore City Council* Environment Court A78/2008, 16 July 2008 at [34] and *Fairley v North Shore City Council* [2010] NZEnvC 208 at [7].

4 As at 10 August 2005 to 30 September 2009.

(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 cross-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.

[8] Relevant to the HGI plan are the New Zealand Coastal Policy Statement 2010 ("NZCPS 2010") and the Auckland Regional Policy Statement ("ARPS"). The ARPS contains provisions which must be given effect to in the HGI plan. Of particular relevance is policy 2.6.17, which seeks to manage the use, development and protection of natural and physical resources and the subdivision of land in rural areas in an integrated manner.

[9] Objective 6.3.5 of the ARPS is "to maintain the overall quality and diversity of character and sense of place of the landscapes in the Auckland region" and objective 7.3 relates to the preservation of the coastal environment and its protection from inappropriate subdivision, use and development. Related policies include policy 6.4.22.3, which relates to the management of landscapes immediately adjoining areas identified as "outstanding natural landscapes" ("ONLs")[5] so that they protect the visual and biophysical linkage between the two areas, and policy

[5] See *Man O'War Station Ltd v Auckland Council* [2015] NZHC 767; this Court's judgment on the appeal by Man O'War Station Ltd against the identification of ONL 78 on Man O'War farm on Waiheke Island in Proposed Change 8 to the ARPS.

6.4.22(7) which provides that subdivision incentives associated with the restoration and enhancement initiatives may be appropriate in certain circumstances.

[10] The HGI plan sets out strategic objectives for resource management issues across the gulf islands. Particularly relevant in the present case are:

> **A** **Objective 2.5.4.3**. To limit the intensity of land use and subdivision to a level which is appropriate to the natural character of the coastal environments.
>
> **B** **Objective 2.5.4.1**. To ensure that buildings and structures in areas of high natural character and/or significant landscape value are sited and designed in a manner that maintains the dominance of the natural environment.
>
> **C** **Objective 2.5.5.3** To encourage retention, management and enhancement of existing indigenous vegetation and the rehabilitation and enhancement of degraded areas of existing indigenous vegetation.
>
> **D** **Objective 2.5.5.4**. To achieve positive environmental benefits from subdivision and development including planting and protection of significant environmental features, heritage features, and other notable landscape features.

[11] Also relevant are the following objectives and policies in s 3 of the HGI Plan: "strategic management areas":

> **A** **Objective 3.3.4**. To provide for the economic, social and cultural well-being of the Waiheke community while ensuring the protection of the historic heritage, landscape character, the natural features, eco sytems and visual amenity of the Island.
>
> **B** **Policy 3.3.4.2**. By providing for larger scale, rural activities to occur in eastern Waiheke, while ensuring that such development does not detract from the natural landscape and natural features of the Island.
>
> **C** **Policy 3.3.4.4**. By protecting the landscape character of the Island, including its elements and patterns, particularly outstanding natural landscapes, coastal and rural landscapes and landscapes with regenerating bush.
>
> **D** **Policy 3.3.4.5**. By protecting and, where appropriate, enhancing natural features and associated processes, such as wetland systems, indigenous vegetation, wild life habitats and coastal and other eco systems.

[12] This appeal concerns, in particular, the minimum site area for restrictive activity subdivisions in "Landform 5" (productive land). Landform 5 has specific

objectives and policies which are set out in s 10(a).6 of the HGI plan. Of particular relevance are:

> **A** **Objective** 10(a).6.3. To provide for productive activities and to ensure that the open pattern and rural character of the landscape is maintained.
>
> **B** **Policy** 10(a).6.3.1. By providing for productive activities such as pastoral farming, viticulture and horticulture to establish and operate within the land unit.
>
> **C** **Policy** 10(a).6.3.2. By limiting the non-productive activities that can occur so that the rural use and character of the landscape is maintained.
>
> **D** **Policy** 10(a).6.3.3. By requiring new sites to be of a size and nature which ensures that moderate to large scale productive activities can occur and which protects the open pattern and rural character of the landscape.

[13] Part 12 of the plan deals with subdivisions. Under restricted discretion activity r 12.8.2, the minimum site size in Landform 5 is 25 ha.

The Environment Court decision

[14] The Court noted that Thumb Point sought to have the rules as to the minimum lot sizes for Landform 5 to be amended by reducing the minimum from 25 ha to 15 ha. The Court also noted that the 15 ha minimum was sought to apply to only those parts of the Waiheke property which were not part of the area identified as ONL 78. The Court recorded that Thumb Point proposed that the subdivision rules be amended so that the minimum restricted discretionary activity lot size within the ONL would be maintained at 25 ha, while in the remaining areas of Landform 5, the minimum lot size would be 15 ha, with an expanded assessment criteria which allowed for active re-vegetation.[6] Thumb Point argued that this represented the most appropriate method for achieving the objectives and policies of the HGI Plan.

[15] The Court summarised the respective submissions for Thumb Point and the Council. The Court noted Thumb Point's submission that an "arbitrary" minimum lot size for Landform 5 of 25 ha would neither achieve the purpose of the Act, nor be the most appropriate (efficient or effective) way of achieving the objectives and policies of the HGI plan. The Court noted that it was Thumb Point's case that a

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6 Environment Court decision, above n 2 at [20]–[23].

minimum lot size of 25 ha is too small for pastoral farming and too large for horticulture, and consequently inefficient in terms of s 32 of the Act.[7]

[16] The Court then recorded Thumb Point's submission that the (unspecified) revised rule framework it sought would give better effect to objectives and policies of the NZCPS 2010, operative regional policy statement policies for the coastal environment, protection of areas identified as ONL, provisions of the HGI plan, and specific Landform 5 objectives.[8]

[17] The Court noted the submission for the Council that a relatively straight-forward rule framework should be retained, with a 25 ha minimum site area for all Landform 5 areas. The Court also noted the submission for the Council that a 25 ha minimum was the most appropriate, as it would meet the subdivision objectives of the HGI Plan and the objectives and policies of Landform 5, and would not reduce the productive capacity of the land. The Council had also submitted that reducing the minimum from 25 to 15 ha would potentially change the nature of the landscape from one with an open pattern and rural character to one of greater diversity, reduced land use scale and openness, and increased presence of built form.[9]

[18] The Court then summarised the evidence given for Thumb Point and the Council.[10]

[19] In its "evaluation and findings", the Court first noted that Thumb Point had not proffered a specific rule change, but had set out its understanding of what amendments would be required.[11] The Court then stated:[12]

> This part of the case being concerned with an inquiry under s 32(3), we confine our attention to the objectives. That is, we cannot for the present purpose bring to account methods, or policies in the HGI plan, or indeed higher-order planning imperatives … as urged by [Thumb Point] as well.

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7 At [25]–[26].
8 At [27].
9 At [30]–[31].
10 At [37]–[66].
11 At [67]-[69].
12 At [71].

[20] Having referred to the HGI objectives put forward by Thumb Point, the Court noted that "the difficulty" for Thumb Point was that most of the objectives referred to could be discounted from the equation by reason of their focus on protection, preservation, retention, management, avoidance, and reference to existing features. The Court considered that objective 2.5.5.4 in the HGI Plan (to achieve positive environmental benefits from subdivision and development including planting and protection of significant environmental features, heritage features, and other notable features) was the most relevant. However, the Court said:[13]

> … We are faced with the wording of the provision that focuses on features. The provisions (indeed the relevant parts of the HGI plan) are notably deficient in encouraging re-vegetation for enhancement or even remediation of natural landscapes.
>
> (underlining as in original)

[21] The Court accepted as correct the submission for the Council that "this lacuna" was explained by the fact that Landform 5 "is essentially concerned with an area providing for productive activities, and that is why 2.5.5.4 goes no further than the protection or enhancement of features".[14]

[22] The Court concluded:[15]

> Section 32 RMA is constructed in imperative terms ("must"). [Thumb Point] has drawn too long a bow in its submissions on the point. It is questionable whether the evaluations required by the section have been undertaken, but even if they have, we cannot be satisfied that the provisions advanced by [Thumb Point] are the most appropriate way to achieve the plan objectives as analysed by us above.
>
> We cannot find in favour of [Thumb Point] on issue 1. We simply observe that if in future there are to be proposals to loosen density controls in this part of Waiheke, it might be desirable if they take the form of a comprehensive suite of objectives, policies and methods. Naturally, we can make no prediction about the likelihood of such proposals.

Appeal issues

[23] Thumb Point appeals against the Environment Court's decision on the following grounds:

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13 At [73].
14 At [74].
15 At [75]–[76].

(a) The Court was wrong to apply s 32 of the Act as a limit to the Court's jurisdiction. Thumb Point argues that the Court declined to determine the appeal on the basis that it was unable to do so, because s 32 had not been complied with.

(b) In any event, the Court misapplied the objectives of the HGI Plan in rejecting Thumb Point's proposal.

[24] The Council contends in response:

(a) The Court did not apply s 32 as a limit to its jurisdiction, but did in fact determine the substance of the appeal directly.

(b) The Court applied the objectives of the HGI Plan correctly. Re-vegetation is not consistent with the objectives of the HGI Plan.

(c) Thumb Point's appeal is not on a question of law; rather it involves revisiting the merits of the matter, which should not be countenanced.

(d) Even if this Court were to re-examine the merits, it should not differ from the Environment Court's conclusion. In particular, Thumb Point's proposal was insufficiently certain to be applied.

Approach on appeal

[25] In my earlier judgment in *Man O'War Station Ltd v Auckland Council*,[16] I set out the agreed approach to be taken in an appeal to the High Court under s 299 of the Act. It suffices to summarise the approach as follows:[17]

(a) An appeal to this Court under s 299 of the Act is an appeal limited to questions of law, and appellate intervention is therefore only justified if the Environment Court can be shown to have:

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16 *Man O'War Station Ltd v Auckland Council*, above n 5 at [25]–[27].

17 See *Ayrburn Farm Estates Ltd v Queenstown Lakes District Council* [2012] NZHC 735, [2013] NZRMA 126 at [33]–[36]; *Young v Queenstown Lakes District Council* [2014] NZHC 414, at [19]; and *Guardians of Paku Bay Association Inc v Waikato Regional Council* (2011) 16 ELRNZ 544 (HC) at [33].

i) applied a wrong legal test; or

ii) come to a conclusion without evidence or one to which on the evidence it could not reasonably have come; or

iii) taken into account matters which it should not have taken into account; or

iv) failed to take into account matters which it should have taken into account.

(b) The Court will not engage in a re-examination of the merits of the case under the guise of a question of law, and the question of the weight to be given relevant considerations is for the Environment Court alone and is not for reconsideration by the High Court as a point of law.

(c) Further, not only must there have been an error of law, the error must have been a 'material' error, in the sense that it materially affected the result of the Environment Court's decision.

(d) The High Court acknowledges the expertise of the Environment Court, and will be slow to determine what are really planning questions, involving the application of planning principles to the circumstances of the case.

The HGI Plan "anomaly"

Submissions

[26] Before addressing the specific appeal issues, Mr Williams referred in his submissions to the "anomaly" or "lacuna" in the HGI Plan. This was that in an "unrestricted" discretionary activity application for a subdivision consent the Council considers (under r 12.11.13 of the HGI Plan):

> The extent to which the subdivision provides for ecological restoration and enhancement where appropriate. Ecological enhancement may include enhancement of existing indigenous vegetation, replanting, and weed and pest control.

[27] However, in r 12.8.2 of the HGI Plan, which sets out the matters the Council may in the exercise of its discretion consider in relation to an application for a restricted discretionary activity, "ecological restoration and enhancement" is not included; nor are any of the other matters set out in r.12.11.13 (the extent of adverse effect on natural features, patterns and landscape character, the extent to which the size and shape of sites maximises protection of indigenous vegetation, and the extent to which the proposed subdivision maximises the use of areas already cleared for vehicle access and building sites). Thus active re-vegetation could not be required as part of a subdivision complying with the 25 ha minimum lot size in Landform 5.

[28] Mr Williams submitted that in its decision the Environment Court had noted the deficiency in the HGI Plan, but had rejected submissions that it could, and should, move to correct the anomaly by including additional assessment criteria. He submitted that the Court had done so on a "technicality" that was wrong in law. He submitted that this was the principal motivating factor behind the appeal.

[29] Mr Williams submitted that the Environment Court had erred in law in that, notwithstanding its finding that the HGI Plan provisions (including the Plan's objectives) were notably deficient, the Court treated those objectives as determinative, precluding any further consideration of Thumb Point's proposed amendments, once it had found that those amendments did not meet the HGI Plan objectives. Referring to the Environment Court's decision in *Eldamos Investments Ltd v Gisborne District Council*,[18] and the Supreme Court's judgment in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*,[19] he submitted that the deficiencies in the HGI Plan required the Court to consider Thumb Point's proposed amendments against Part 2 of the Act and other relevant higher-order planning documents such as the NZCPS 2010 and Change 8 to the ARPS.

[30] On the other hand, Mr Lanning submitted that there was no anomaly, and that while the Environment Court had recorded its initial concern with the plan, this concern had been addressed and resolved during argument in that Court. He

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[18] *Eldamos Investments Ltd v Gisborne District Council*, NZ Env Ct W47/2005, 22 May 2005 at [131].

[19] *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593.

submitted that the Environment Court had correctly accepted that the HGI Plan objectives are consistent with the Act. The HGI Plan objectives do not encourage re-vegetation of Landform 5 land so as to enable subdivision, because Landform 5 is intended to provide for large-scale productive farm use. This is shown by the emphasis on maintaining the "open pattern and rural character" of Landform 5 land.

Discussion

[31] 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.[20] 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. As such, it is necessary to assess whether the highlighted anomaly required the Court to have regard to the wider context of the Act.

[32] At [72] of its decision, the Environment Court directly addressed this issue, and recorded the Council's submission that the objectives in relation to Landform 5 were directed at the purposes of protecting a particular feature and so were narrower than the general purposes of the Act. The Court concluded that the Council was correct, and that the HGI Plan was properly able to select purposes for particular areas that reflected the needs of that area, rather than treating all areas with the uniform brush of the principles and purposes of the Act.

[33] I am not persuaded that the Environment Court was wrong to conclude that the Council, in settling the HGI Plan, was entitled to prioritise certain objectives over others in particular areas. Indeed, one of the major reasons why councils are given the power to settle regional plans is to allow them to identify where and how objectives of the Act should be given effect.

[34] It follows that the Environment Court was entitled to rely on the HGI Plan as giving effect to the higher directives contained in the Act and elsewhere. As the Council identified, the purpose of protecting Landform 5 was to protect its current

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[20] *Eldamos Investments Ltd v Gisborne District Council*, above n 18; *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*, above n 19.

character as productive land – that is, working farms. This is the basis on which the provisions relating to Landform 5 were included in the HGI Plan. Where re-vegetation is normally a benefit in terms of the objectives of the Act, that may not be the case where a council wished to protect the current character of an area, without re-vegetation. There is no inconsistency between this and the higher objectives.

[35] I therefore conclude that there is no anomaly, and the Environment Court was not in error in applying the objectives of the HGI Plan.

Appeal submissions

[36] Mr Williams submitted that s 32 of the Act (as applicable to the present case) requires "an evaluation" of a proposed plan before it is publicly notified (s 32(1)), then "a further evaluation" before a local authority makes a decision on submissions on the proposed plan (s 32(2)). He submitted that on an appeal, the Environment Court steps into the shoes of the territorial authority, by virtue of s 290 of the Act (which provides that the Court has the same powers, duty and discretion as the person against whose decision the appeal is brought). Section 32(3) sets out what the evaluation must examine.

[37] Mr Williams then submitted that the Environment Court had confined its consideration to "objectives" then, having found that Thumb Point's proposed amendments to the subdivision rules for Landform 5 did not meet the objectives of the HGI Plan, did not go on to consider, for example, Part 2 of the Act ("Purpose and Principles"), the NZCPS 2010, and Change 8 to the ARPS. In doing so, the Court had wrongly interpreted s 32 as a constraint on its jurisdiction to consider the proposed rules further, when an adverse finding under s 32 does not preclude consideration of other matters.

[38] In support of his submissions, Mr Williams referred to the judgments of the Court of Appeal in *Kirkland v Dunedin City Council*,[21] and of Chisholm J in *Shaw v Selwyn District Council*,[22] He submitted that these authorities supported his

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21 *Kirkland v Dunedin City Council* CA 121/01, 29 August 2001.
22 *Shaw v Selwyn District Council* [2001] NZRMA 399.

submission that s 32 is of a procedural nature, and the Environment Court should not have take an overly rigid "jurisdictional" approach to s 32 which precluded it from properly evaluating Thumb Point's proposed amendments. He also pointed to the way that the Court had responded to the alleged anomaly in the HGI Plan, and had declined to consider the NZCPS 2010 and Change 8 to the ARPS, as being errors in the way the Court had approached the HGI Plan and s 32.

[39] As a result of the above errors, Mr Williams submitted, the Environment Court had failed to consider evidence regarding the social and economic implications of Thumb Point's proposed amendments, and had failed to consider a substantial purpose of the proposed amendments, which was to confine the proposed amended rules to land outside the ONL 78 area. Further, the court did not consider Thumb Point's submission that its amendments were aimed at ensuring that regard was had to the provisions of s 6(a) and (b) of the Act (which provides that the preservation of the natural character of the coastal environment and outstanding natural features and landscapes from inappropriate subdivision, use and development are "matters of national importance".

[40] For the Council, Mr Lanning submitted that the Environment Court did not approach s 32 as a limit on its jurisdiction. Rather, the Court identified the key issue as being the extent to which Thumb Point's (unspecified) amendments would achieve the objectives and policies of the HGI Plan. Those objectives and policies had been recently settled and encapsulated the purposes of the Act. Therefore, the Court did not need to undertake an evaluation of other matters under the Act.

[41] Further, he submitted that it cannot be concluded that the Court was making statements as to a limit on its jurisdiction when it said that it "cannot be satisfied" that Thumb Point's proposed amendments were the most appropriate way to achieve the objectives of the HGI Plan, and that "we cannot find in favour of Thumb Point". Rather, it was simply stating its finding as to which of the options before it was more appropriate to achieve the objectives and policies of the Plan.

[42] Mr Lanning also submitted that the Court did not misinterpret the relevant HGI Plan objectives and policies. It heard extensive argument as to the

identification and interpretation of, and relationship between, the relevant objectives and policies.

[43] Mr Lanning submitted that no question of law is raised by Thumb Point's submission that the Environment Court failed to place sufficient emphasis on other objectives and policies. In any event, the Court correctly interpreted the hierarchy of HGI plan provisions and focussed on Landform 5 objectives and policies, as the issue was what subdivision rules would most appropriately deliver the environmental outcome for Landform 5.

[44] He also submitted that Thumb Point had not presented a sufficiently detailed and certain rule proposal for either the Council, or the Environment Court, to consider. In particular, there was no certainty as to the nature and scope of the re-vegetation requirements Thumb Point agreed would be necessary to justify a smaller lot size and achieve the objectives and policies Thumb Point said would be achieved. Thus, even if the Court had been required to undertake the type of assessment contended for by Thumb Point, it could not have done so.

[45] Mr Lanning submitted that the Environment Court had heard, and discussed in its decision, extensive landscape, ecological, economic and planning evidence. The Court's discussion touched on the broad range of resource management matters at issue. He submitted that it is reasonable to assume that the Court took all of this evidence into account when evaluating Thumb Point's proposed amendments.

[46] Mr Lanning submitted that the Environment Court was assessing the options of Thumb Point's "unspecified and (relatively) complex 15 ha rule framework", and the Council's "(relatively) clear and simple 25 ha rule framework". The Court properly concluded that there was no deficiency in the HGI Plan in the context of the present case, as the absence of provisions requiring re-vegetation in Landform 5 is explained by Landform 5's focus on retaining its capacity for productive use, and maintaining an open rural landscape. Thus it made sense that there was no requirement for re-vegetation on subdivision in Landform 5, and that it was not encouraged.

Discussion

[47] Thumb Point's appeal raises three main questions:

(a) Did the Environment Court have jurisdiction to consider Thumb Point's proposal as to subdivision in areas designated as Landform 5?

(b) If the Court had jurisdiction, did it refuse to exercise that jurisdiction and consider Thumb Point's proposal?

(c) Did the Court err in the way it decided Thumb Point's appeal?

Did the Environment Court have jurisdiction to consider Thumb Point's proposal?

[48] It is appropriate to begin by considering the extent of the Environment Court's jurisdiction on the appeal before it. Pursuant to s 290(1) of the Act, the Court "has the same power, duty, and discretion in respect of a decision appealed against … as the person against whose decision the appeal … is brought". Thus, the Court must have the power to determine the most appropriate method of achieving the objectives of the HGI Plan. Thumb Point argued that s 32 sets out a process which the Council is required to follow, but does not limit the jurisdiction of the Court to determine the overarching question if that process has not been followed. This is not disputed by the Council, which went on to argue that the Court did not apply s 32(3) as a limit to its jurisdiction.

[49] I accept as correct Thumb Point's submission that the Environment Court could determine this appeal, regardless of whether the s 32 process had been complied with. This is necessarily the case, in order to give effect to the Court's power under s 290(1), and has been recognised in, for example, *Kirkland v Dunedin City Council*.[23] Further, as said by Chisholm J in *Shaw v Selwyn County Council*, the Environment Court should not take an overly jurisdictional approach to an appeal, but should consider the merits of an appeal.[24] I am satisfied that the Environment Court had jurisdiction to determine Thumb Point's appeal.

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[23] *Kirkland v Dunedin City Council*, above n 21.
[24] *Shaw v Selwyn County Council*, above n 22.

Did the Environment Court consider Thumb Point's proposal?

[50] This question turns on what the Environment Court meant when it said:[25]

> *We cannot find in favour of [Thumb Point] on issue 1*. We simply observe that if in future there are to be proposals to loosen density controls in this part of Waiheke, it might be desirable if they take the form of a comprehensive suite of objectives, policies and methods. Naturally, we can make no prediction about the likelihood of such proposals.
>
> (emphasis added)

[51] Thumb Point submits that in saying "cannot" in this paragraph, the Environment Court was making a finding that it was barred by s 32 of the Act from considering the real issue under appeal – namely whether Thumb Point's proposal was the most appropriate way to achieve the objectives of the HGI Plan.

[52] I do not accept that submission. The words used, while perhaps awkward phraseology, are commonplace in a situation where a court's conclusion is that a test has not been satisfied. In this case, in saying that it "cannot find in favour of" Thumb Point, the Environment Court was saying that it was not finding in favour of Thumb Point, because it was not satisfied that its proposal met the objectives of the HGI Plan.

[53] This conclusion is supported by reference to the Court's preceding comments:[26]

> Counsel for the Council explained [the lacuna or anomaly referred to at [26]-[30] above] by reminding us that Landform 5 is essentially concerned with an area providing for productive activities, and that is why 2.5.5.4 goes no further than the protection or enhancement of features, counsel stressed that the rather general provisions listed in [Thumb Point's] December 2013 memorandum are relatively high level provisions that apply across the plan, and must be read subject to the more specific objectives relating to Landform 5. Further that, with reference to 2.5.5.4, planting will not necessarily achieve a "positive environmental benefit" where it would displace otherwise productive land, unless intended for protection or enhancement of a <u>feature.</u> We consider that the council is correct in these submissions. The context of the structure of the general and the specific objectives explains the lacuna and underlines the limitations in objective 2.5.5.4. It might well be that in light of advancements in [outstanding

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25 Environment Court decision, above n 2 at [76].

26 At [74]–[75].

> natural landscape] protections at a regional level some strengthening of the district objectives would be desirable. But that is for the future and does not help [Thumb Point's] situation vis-à-vis s 32(3) at this time.
>
> Section 32 RMA is constructed in imperative terms ("must"). [Thumb Point] has drawn too long a bow in its submissions on this point. It is questionable whether the evaluations required by the section have been undertaken, but even if they have, we cannot be satisfied that the provisions advanced by [Thumb Point] are the most appropriate way to achieve the plan objectives as analysed by us above.
>
> (emphasis as in original)

[54] It is clear from these paragraphs that the Environment Court directly considered s 32(3), and applied it to the situation before it. In accepting the Council's submissions, the Court rejected the arguments for Thumb Point, and concluded that its proposal was not the most appropriate way to achieve the objectives of the HGI Plan.

[55] Accordingly, I am not persuaded that the Environment Court treated s 32(3) as being a limit on its jurisdiction. It considered Thumb Point's proposal and concluded that it was not the most appropriate way to achieve the objectives of the HGI Plan.

Did the Environment Court make an error of law in rejecting Thumb Point's proposal?

[56] Thumb Point further submitted that the Environment Court had committed an error of law when determining the appeal, in that it incorrectly assessed the relationships between the different objectives of the HGI Plan. It submitted, in particular, that the Court wrongly interpreted objective 2.5.5.4 as applying only to existing vegetation. The Council contends that Thumb Point is in fact (wrongly) arguing questions of weight, which are not matters that can be raised on appeal. The Council further contends that the Court correctly identified and applied the relevant objectives, and appropriately balanced the competing interests which these represented.

[57] Despite the detail and nuance with which these arguments were advanced, this aspect of Thumb Point's appeal effectively reduces to one issue. The Environment Court concluded that the objectives of the HGI Plan related to

protecting the landscapes on Waiheke as they are at present. Thumb Point submits that the objectives should instead be interpreted as intending to preserve and improve the naturalness of the landscape in every case.

[58] The protection of the areas designated as Landform 5 is intended to preserve the unique character of those areas as productive – that is, working – farms. The intent of the objective is to preserve an environment which, while not entirely natural, is used for a particular purpose, in a certain way, and has a certain character. In order to give effect to the objective, development which undermines the particular character of Landform 5 has been limited. While Thumb Point's proposal may lead to a landscape which has more vegetation (and may be closer to the historical nature of the land), it is not consistent with the objectives of the HGI Plan.

[59] I am not persuaded that the Environment Court was wrong to reject Thumb Point's interpretation, or to approach the issue in the manner in which it did.

Result

[60] For the reasons set out above, Thumb Point's appeal is dismissed.

Andrews J

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of references under clause 14 of the First Schedule to the Act
BETWEEN	WAKATIPU ENVIRONMENTAL SOCIETY INC
	RMA 1043/98, 1394A/98, 1165/98
AND	TELECOM NEW ZEALAND LIMITED
	RMA 1030/98
AND	CENTRAL ELECTRIC LTD (now DELTA ELECTRIC LTD)
	RMA 1290/98
AND	CLARK FORTUNE McDONALD
	RMA 1405/98
AND	TRANSPOWER NEW ZEALAND LIMITED
	RMA 1260/98
AND	CONTACT ENERGY LIMITED
	RMA 1401/98
AND	MINISTER FOR THE ENVIRONMENT
	RMA 1194/98
	Referrers
AND	THE QUEENSTOWN-LAKES DISTRICT COUNCIL
	Respondent

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

ERRATUM

1. The decision contains two errors on page 5 of Chapter 1 : Introduction:

   (a) At the head of page 5 the first two lines of paragraph 4 are repeated and should be deleted.

   (b) The paragraph number "6" and the following first three lines of paragraph 6 have been omitted. They read (with the rest of the paragraph in square brackets):

   6. The hearing took place over ten working days and, at the suggestion of the parties, we have carried out site inspections since. To date we have only been able to visit the Lake Wakatipu area, and not Lakes Wanaka [and Hawea and the rivers that flow into or out of them. To that extent this decision is geographically limited[6] although many of the policies we establish may prove to be applicable on a district-wide basis].

   and should be inserted at the foot of page 5 (above the footnotes).

2. In addition the decision [p.84 [fn 113]] refers to the policies we have decided as being 'shaded'. The Court's signed and sealed copy is indeed so shaded, but we are advised by the Registrar that the photocopying has not reproduced the shading. We are at a loss to understand why. We apologise to the parties for any inconvenience. The objectives and policies as corrected by the Court should be discernible from the text of the decision; and in any event they are reproduced together in Appendix III.

DATED at CHRISTCHURCH this 2nd day of **November** 1999.

J R Jackson
Environment Judge

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

DOUBLE SIDED ORIGINAL

Decision No: C180/99

IN THE MATTER of the Resource Management Act 1991

AND

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

BETWEEN **WAKATIPU ENVIRONMENTAL SOCIETY INC**

RMA 1043/98, 1394A/98, 1165/98

AND **TELECOM NEW ZEALAND LIMITED**

RMA 1030/98

AND **CENTRAL ELECTRIC LTD (now DELTA ELECTRIC LTD)**

RMA 1290/98

AND **CLARK FORTUNE McDONALD**

RMA 1405/98

AND **TRANSPOWER NEW ZEALAND LIMITED**

RMA 1260/98

AND **CONTACT ENERGY LIMITED**

RMA 1401/98

AND **MINISTER FOR THE ENVIRONMENT**

RMA 1194/98

Referrers

AND **THE QUEENSTOWN-LAKES DISTRICT COUNCIL**

BEFORE THE ENVIRONMENT COURT

Environment Judge J R Jackson
Environment Commissioner R Grigg
Environment Commissioner R S Tasker

HEARING at **QUEENSTOWN** on 20-23 and 26-29 July and 6-7 September 1999
(Final submissions received 23 September 1999)

APPEARANCES

Mr B Lawrence for the Wakatipu Environmental Society Inc
Mr J Haworth for the Upper Clutha Environment Society Inc in respect of RMA 1394/98
Mr P J Page and Mr G M Todd for Telecom NZ Ltd and Mr and Mrs R S Mills
Mr W J Fletcher for Central Electric Ltd (now Delta Electric Ltd)
Mr M Parker for Clark Fortune McDonald and J F Investments Ltd, Mount Field Ltd, Quail Point Ltd
Mr K G Smith for Contact Energy Ltd
Mr A F J Gallen and Ms S Ongley for the Minister for the Environment in relation to RMA 1043/98 (WESI) and RMA 1194/98
Mr N S Marquet for the Queenstown-Lakes District Council
Mr W J Goldsmith and Mr A More for Terrace Towers (NZ) Pty Ltd
Mr G M Todd for the persons listed in Appendix 1
Mr J K Guthrie, Mr W J Goldsmith and Mrs J Simpson for Crosshill Farm Ltd, Pisidia Holdings Ltd, Queenstown Safari Co Ltd, Carolina Developments Ltd, Mr D and Mrs J Jardine and Mr A S Farry
Mr D Masterton for Lake Hayes Holdings Ltd
Mr M V Smith for Federated Farmers NZ Inc
Mr M M Hasselman on behalf of the Community Association, Glenorchy, (on Thursday 29 July 1999)
Mr A More for Terrace Towers Proprietary Ltd (in relation to RMA 1043/98 and 1194/98)
Mr J Reid for Gibbston Valley Estate Ltd

INTERIM DECISION

Index

Chapter 1 : Introduction

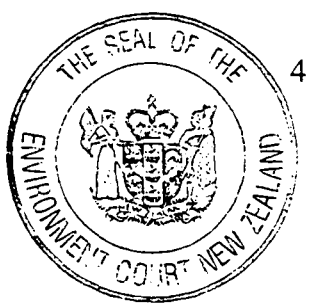
1. These references are about the district-wide issues of the Queenstown-Lakes District ("the district"). Their main focus is on the landscapes of the district – this "country crumpled like an unmade bed"[1] and how they are to be sustainably managed. It was common ground that there are

[1] The Search from Arawata Bill Denis Glover ("Selected Poems", Penguin 1981).

outstanding natural features and landscapes within the district, and indeed that all landscapes of the district are important. The difficulties are first, that most of the parties did not attempt to inform the Court precisely where the outstanding natural features and landscapes end and the important landscapes begin; and secondly, that there are development pressures in the district which could have major adverse effects on the landscapes within the district. The resident population of 10,000 (approximately) is expected to double within the next 16 years, and it is hoped that visitor numbers will increase also.

2. The references arise out of Parts 4 and 15 of the proposed plan of the Queenstown-Lakes District Council ("the Council"). The Council notified a proposed plan in 1995 ("the notified plan") and after hearings issued its decision and a revised proposed plan ("the revised plan") in 1998. Part 4 of both plans relates to, and is headed, "District-Wide Issues". We shall refer to the document which will result as the outcome of this and other decisions as "the district plan".

3. Part 4 of the revised plan is much shorter than, and very different to, Part 4 of the notified plan. Broadly the referrers of Part 4 fall into two groups depending on whether they basically agreed with the notified plan or with the revised plan. The Wakatipu Environment Society Inc ("WESI") largely supported the notified plan and wanted reinstatement of its objectives and policies (with some amendments). The other referrers opposed part of WESI's approach but conceded at the hearing that Part 4 of the revised plan needed changes. For its part the Council, at the hearing before us, supported further changes to Part 4 of the revised plan.



4. At the start of the hearing two parties and one interested person under section 274 of the Resource Management Act 1991 ("the Act" or "the

4. At the start of the hearing two parties and one interested person under section 274 of the Resource Management Act 1991 ("the Act" or "the RMA") agreed to abide by the decision of the Court in respect of the issues they were concerned with:

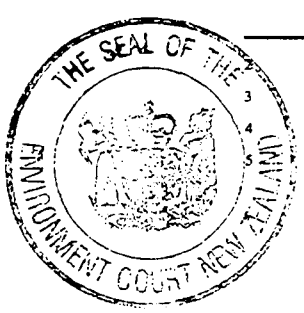
   - Transpower New Zealand Ltd (RMA 1260/98);
   - Contact Energy Ltd (RMA 1401/98); and
   - Gibbston Valley Estate Ltd[2].

   During the hearing Central Electric Limited (now Delta Electric Ltd) - the referrer in RMA 1290/98 - withdrew its reference with regard to Part 4 of the revised plan. Thus the only utility company that took an active part in the hearing was Telecom NZ Ltd ("Telecom").

5. In addition to the referrers there were other parties[3] and interested persons[4] to WESI's three references. We need not identify them individually here[5]. They are (with two exceptions) landowners as individuals or groups in the district who are concerned with (and oppose) the changes sought by WESI. The exceptions are:

   (a) The Upper Clutha Environment Society Inc ("UCES") which supports WESI but with a particular interest in the Wanaka/Hawea/Makarora area;

   (b) The Community Association of Glenorchy which appeared on Thursday 29 July 1999 (having earlier been confused about the venue) to make a general submission on the 'extreme importance' of the landscape in its area.



Under section 274 RMA.
Under section 271A RMA.
Under section 274 RMA.
They are listed under 'Appearances' at the start of this decision.

and Hawea and the rivers that flow into or out of them. To that extent this decision is geographically limited[6] although many of the policies we establish may prove to be applicable on a district-wide basis.

[6] Under section 73(3) a district plan may be prepared in territorial sections.

Chapter 2 : Background

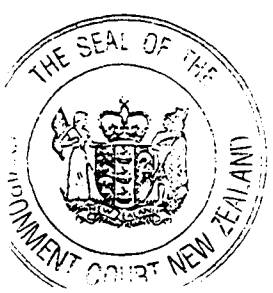
The scope of the hearing

7. Part 4 of the revised plan identifies the district-wide issues under these headings:

   (1) Natural Environment
   (2) Landscape and Visual Amenity
   (3) Takata Whenua
   (4) Open Space and Recreation
   (5) Energy
   (6) Surface of Lakes and Rivers
   (7) Solid and Hazardous Waste Management
   (8) Natural Hazards
   (9) Urban Growth
   (10) Monitoring, Review and Enforcement

   These ten issues are numbered consecutively as sections 4.1 to 4.10 of Part 4 of the revised plan. The revised plan[7] was unclear about these, listing some headings but not others at the start of Part 4. We will use our powers, under section 292(1)(a) of the RMA, to remedy the defects and/or uncertainty by listing all subjects in order in the amended Part 4 of the district plan.

8. There are outstanding references to this Court in relation to section (1) but those mostly relate to specific areas, mainly in the high country, and so it is unnecessary for us to resolve them in the meantime. The exceptions are dealt with briefly later in this decision[8]. There are no



[7] Paragraph 4.1.2 [p4/1].
[8] See Chapter 5 of this decision: The Natural Environment of the District.

references in relation to section (3) of Part 4, and only limited references in relation to sections (4) and (6) which we do not deal with here. Finally there are no references in relation to issues (7), (8) or (10).

9. Pre-hearing conferences on the references had been carried out to identify as many of the genuinely district wide issues as possible and to hear the disputed issues as soon as possible. From the list, issues set down for hearing were therefore:

(1) Nature Conservation Values (in part)

(2) Landscape and Visual Amenity

(5) Energy

(9) Urban Growth

- together with two further issues. A new issue (11) "Social and Economic Wellbeing" was sought by WESI in its reference RMA 1043/98. Confusingly this was identified by WESI as Part 4.9 of the revised plan, but in fact it did not seek to amend the existing Part 4.9 - "Urban Growth" - of the revised plan at all. Finally there is a district-wide issue arising out of Part 15 (subdivision, development and financial contributions) of the revised plan through the reference by Messrs Clark Fortune McDonald. Even in relation to the subject issues heard we should record that our decision only relates to identification of issues and stating objectives and policies. In particular the decision does not identify zone boundaries nor set out any changes to the rules in the revised plan.

10. Because, prior to the hearing, there was some doubt over the scope of the WESI references, the Court issued a minute dated 18 June 1999 to the parties. This described the substantive issues as including:

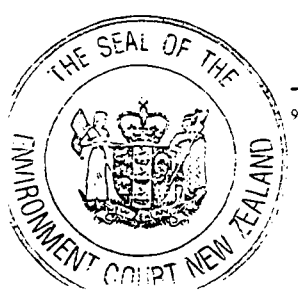
(a) What, if any, areas of the district are outstanding landscapes for the purposes of section 6?

(b) Whether there are other issues under section 5(2) of the RMA and/or other paragraphs of section 6.

11. After we had heard evidence from WESI concerning new urban development, counsel for the Minister for the Environment ("the MFE") drew our attention to the fact that the MFE had filed a reference[9] on the issue of new urban development but that was not yet set down for hearing. Accordingly we adjourned parts of the hearing to Monday 6 September 1999 so that the MFE's reference could be set down and heard at the same time. The matters adjourned were part of section 4.2.7 policies and 8 dealing with 'New urban development' and 'Established Urban Areas'. On 6 September 1999 we reconvened the hearing to deal with those policies, and in effect added the MFE's reference to those already being heard. Since the policy of concern to the MFE - on "new urban development" - is an integral part of Part 4 we have decided to release our decisions on all of the matters in Part 4.2 together (with some geographical restrictions), to avoid fragmentation of the issues and the policies that arise from them.

"Areas of Landscape Importance"

12. There is one further way in which we are limiting the scope of this decision. To explain that we need to give a little more background. The methods of implementation in Part 4 of the notified plan stated that areas of landscape importance should be identified as such and that all new buildings should be a discretionary activity in any Area of Landscape Importance. The notified plan then identified areas on the planning maps as "Areas of Landscape Importance". There were consequential rules in other parts of the district plan e.g. making



[9] RMA 1194/98.

subdivisions a non-complying activity[10] in an Area of Landscape Importance.

13. The revised plan dropped all reference to the Areas of Landscape Importance; and these areas were not shown on the revised planning maps either. As part of its reference WESI sought reinstatement of the implementation methods to Part 4 of the district plan and consequential amendment to the planning maps. After the close of WESI's case it was quite clear:

    (a) that the Areas of Landscape Importance were not identical with areas that qualified as nationally important under section 6(b) of the RMA;

    (b) that certain areas which are nationally important were excluded, and areas that are not so important were included;

    (c) even WESI and its witnesses openly acknowledged that the methodology was flawed in that there were areas included in the Areas of Landscape Importance which should not have been.

14. At the end of the first week we received a rather unusual application from most of the other parties. It was that part of WESI's reference which sought the reintroduction of the 'Areas of Landscape Importance' should be struck out without further evidence having to be called on grounds including (a) to (c) in the preceding paragraph. We declined to strike out WESI's reference on two grounds: first that the questions to be resolved were substantially of fact and degree; and secondly because, while the "Areas of Landscape Importance" method might be flawed it was at least an attempt to protect areas of national importance under section 6 of the Act. Subsequently the other parties (including the Council) argued that we would be able to achieve the necessary protection under section 6 of the Act - especially for "outstanding

[10] Notified Plan, Rule 15.2.3.4, p.15/12.

natural features and landscapes" - simply by statements in writing in an amended Part 4 to the district plan.

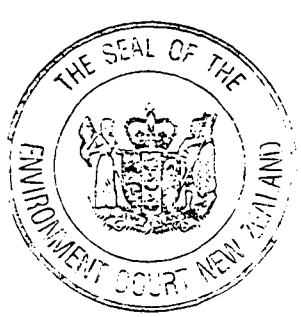
15. We have some doubts about their approach - as indeed did some witnesses - but we consider (as we stated at the hearing without any objection by any of the parties) that we can approach the issues in this way:

    (1) by stating the issues, objectives and policies for the relevant sections of Part 4 of the district plan in this decision;

    (2) by subsequently – not in this decision - deciding the relevant methods of implementation especially in Parts 5 (Rural issues) and 15 (Subdivisional issues) of the district plan;

    (3) while reserving the issue as to whether the district plan requires an extra zone called "Areas of Landscape Importance" over the district in order to protect either areas of national importance under section 6(b) or areas of amenity or other environmental values under section 7.

16. If WESI is satisfied (and it will have to make an election later) as to the adequacy of steps (1) and (2) we might never have to give a considered view on (3) and how the policies and rules on Areas of Landscape Importance could be improved so that they would work practicably. In the meantime we can only decide the objectives and policies and suggested method of implementation since the related rules come under references to be heard later. Only if the rural zone boundaries and the relevant rules are clearly stated will we be able to be sure that the purpose of the RMA is being met in relation to the landscapes of the district.



Chapter 3 : Cases for the Parties

17. Mr Lawrence, in his submissions on behalf of WESI stated the revised plan contains a 'vision' of community aspirations which states that

> *Community aspirations for the District involves (sic) ... basic elements [including]:*
>
> ....
>
> *(iii) identifying and enhancing those values or resources, both natural and physical, which provide the community character and image of the District and which in turn allows both individuals and communities to provide for their social and economic well being, both now and in the future.*
>
> *(iv) ensuring that growth and development does not compromise those resources and amenities which are the reasons why people choose to live in and visit the District*[11].

18. WESI's case was that the 'vision' was not carried through into the rest of the revised plan. Mr Lawrence submitted that there are insufficient objectives and policies, to result in landscape protection and the retention of cohesive urban form and character to which people can identify.

19. Mr Lawrence further submitted that WESI is in an awkward situation having to argue for a tool for landscape protection (Areas of Landscape Importance – "ALI") which it considers the best of a range of bad options. He said that WESI agrees with almost all the criticisms of ALI

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[11] Section 3.6 [revised plan p3/3]. We record the vision here simply as part of WESI's submissions. Visions are not valid parts of plans: ***St Columba's Environmental House Group v Hawkes Bay Regional Council*** [1994] NZRMA 560.

and agrees that ALI is not good enough, but it is now really the only method which will afford the District's landscape some real protection. He said there is near unanimous agreement among professional witnesses, even from the Council's own staff, that the revised plan is not adequate to protect the District's landscape.

20. He further submitted that the ALI are a total package containing rules e.g. residential activities being non-complying. Mr Lawrence said that assessment matters are critical to an evaluation of whether a policy will or will not afford protection. WESI believes that the revised plan lacks rules or assessment matters that give the Council discretion to refuse a 20 hectare (or even 4 hectare) subdivision with attendant residential activity on grounds of landscape. Mr Lawrence said that WESI agrees with witnesses that the entire rural area is of landscape importance under section 6(b) of the Act.

21. WESI agrees that a discretionary regime across all of the Rural General Zone is preferable to the non-complying safeguard of the ALI. Mr Lawrence submitted that the Court may like to consider requesting that the Council reconsider the issue ***Kaitiaki Tarawera Inc v Rotorua District Council***[12]. He said that protection of the landscape resource (in a section 5 sense) is especially important given the stated intention of the Council to cope with residential growth by rural residential developments.

[12] A7/98; 4 ELRNZ 181.

22. Mr Lawrence submitted that to exercise a discretion on all activities in the Rural General Zone with respect to landscape requires the following:

> *"(a) Rules that provide for a discretion. ...*
>
> *(b) ... A clear definition of the meaning of landscape values.*
>
> *(c) That the extent of the phrase "outstanding landscape" is made clear. The Society is of the view that all of the landscapes in the District are important. Should there be or can there be a difference between "important" and "outstanding" landscapes.*
>
> *(d) That the meaning of the term "landscape feature" is clear and the relationship to the wider landscape is understood. It must be remembered that councillors exercising discretion will not have the benefit of all the expert landscape evidence provided to this Court to aid them.*
>
> *(e) ... Landscape value is made up of several elements. All ... need to be part of the assessment matters, so council can exercise its discretion in respect of each one. ...*
>
> *(f) ... To evaluate the ecological, sensual [sic] and cultural groups of landscape values some "across the district measure" is required. [WESI] believe[s] that this can be achieved by the mapping of values which when overlaid provide the basis for assessment. ... Without such tools the assessment becomes the subjective whim of those exercising the discretion. ..."*

23. If the above prerequisites cannot be met then WESI wants ALI "warts and all" to be used. The rules with the ALI make new residential activity a non-complying use, make all other buildings (accessory to a

permitted or controlled use) discretionary, and allow limited earthworks and tree planting under site standards. Mr Lawrence said that WESI does not believe the notified plan implies that areas outside the ALI have no landscape values. WESI accepts that ALI should be extended at Lake Hayes and that the higher terraces at Gibbston could be excluded from the ALI.

24. One final but significant issue identified by Mr Lawrence is that over the management period[13], the process of tenure review of land held under the Land Act 1948 may freehold much of the land held in Crown leases that has not been developed, involving many of the districts prominent landscapes, particularly on higher ground. He produced a letter (without objection from other parties) from the Department of Conservation to WESI advising that it will only be in exceptional circumstances that the Department of Conservation will consider the Crown retaining land in the low to mid altitude range (less than 900 metres) for landscape reasons alone. Mr Lawrence submitted that therefore in the near future freehold land available for subdivision in the District, in highly visible places, will dramatically increase.

25. Mr Ralf Kruger, a qualified landscape architect with a tertiary qualification from Germany, was called by WESI to give evidence. He has been a self employed landscape architect and planner since 1992 and has been based in Queenstown since 1994. Mr Kruger was of the view that the revised plan has a weakened philosophy compared to the notified plan. He said that while the revised plan sets itself the task of protecting the district's landscape, it is devoid of any background, tools

[13] 10 years: section 79(2) RMA.

and mechanisms to fulfil this task. He was of the opinion that whilst the Council has not to date undertaken a comprehensive, objective and defensible study of the District's landscape ecology, it has in the notified plan created tools, although arbitrary and incomplete, that can achieve the purpose of interim protection and can avoid the irreplaceable loss of a precious resource under immense development pressure. He said that the reasons given for removing the interim protection in the revised plan were:

(1) *Available studies were not undertaken to identify such areas.*

(2) *The Council can still decline any land use applications that will have an adverse effect on the landscape based on the objectives and policies of the district Plan and Part II of the RMA.*

(3) *Areas of landscape importance are an unnecessary layer of regulation.*

(4) *The whole district is considered to be important*[14].

Mr Kruger was of the view that the deletion of policies 2 and 3 in the notified plan and the amendment of policy 1, is contradictory to that set out in (2) above. He stated that the Council has failed to comply with section 6 of the Act.

26. Mr Kruger, in acknowledging the confusion relating to outstanding natural features and landscapes, quoted from a paper of Mr Alan Rackham (who later gave evidence to us at this hearing) given at the 1999 New Zealand Institute of Landscape Architects Conference[15] where the latter said:

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14 QLD proposed district plan, Hearings Panel Decision, Issue 51 - Landscape and Visual Amenity, pp26-27 (abridged).

15 Rackham, A, *A Current Practice: Comparative Case Studies, Paper to the NZLIA Conference, March 1999, p17.*

The Queenstown Lakes District Plan does not identify the Remarkables as an outstanding landscape. Under the same Act an area of suburban Langs Beach in Whangarei District is identified as an outstanding landscape. I have the greatest difficulty in believing that the Remarkables in fact are unremarkable, and equally, I have the most serious doubts about whether an area of suburbia should be identified as an outstanding natural landscape under the RMA.

27. Mr Kruger went on to say that he has great difficulty with the often practised reduction of the landscape to its visual quality. He said that the Wakatipu landscape is unique in its richness of landforms, geological features, microclimates, vegetation patterns, and habitats for indigenous (and exotic) flora and fauna. It is a diverse and special landscape and a holistic approach to landscape assessment and evaluation has to reflect that. It was his opinion that the whole of the Queenstown Lakes District is an outstanding landscape in terms of section 6(b) of the Act.

28. Mr Kruger presented a map to the Court that identified what he said were the outstanding landscapes and natural features in the Wakatipu Basin. He said that the distances between the boundaries of these outstanding landscapes and natural features are very short, being 3 to 4 kilometres at the most. In addition, he told the Court that even within the zones that do not fit within outstanding landscapes, there are small scale outstanding natural features, such as Mill Creek and waterfall, the Hawthorn hedgerows, between Lake Hayes and the lower slopes of Coronet Peak, and the wetlands to the west of Hunter Road. Based on this he said that no point in the Wakatipu Basin is any further than 1.5 to 2 kilometres from an outstanding natural feature or landscape. In Mr

Kruger's opinion the size and the density of outstanding natural features and landscapes is justification enough to describe the entire area as an outstanding landscape. He suggested to the Court that the whole of the district should be accepted as an outstanding landscape on an interim basis for the purpose of reaching a decision on this case.

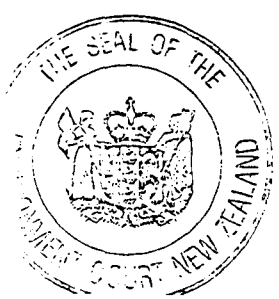
29. Mr Kruger said that the landscape, its scenic values in particular, have always been the one and only resource for Queenstown, being a national and international destination of high repute. He quoted a decision of this Court presided over by Judge Kenderdine where it stated:

> *...allowing the quality of the landscape to be reduced little by little, by allowing unsympathetic development ... will reduce, in the long term, the overall attractiveness of an area which is already so important for the economic future of the Queenstown district ...*[16].

Mr Kruger discussed the threats to landscape. He explained how in his view subdivision into small rural residential lots will produce:

> *...alien rows of quite frequently totally alien plants [which will] carve up the landscape into arbitrary compartments governed by lot sizes and surveyor's practice.*

30. He also noted that in his experience little consideration is given by the Council to the impact of roads, driveways and earthworks on the



16 ***Crichton v Queenstown Lakes District Council*** W12/99, p12.

landscape. He said cuts made into the land for driveways and building platforms create visual problems and due to the steepness, result in continuous erosion and difficulty in revegetating the area. Weed problems usually follow, which with poor land management, results in the invasion of weeds into neighbouring properties.

31. With respect to buildings Mr Kruger said that there are two aspects that need to be considered when looking at buildings in rural areas. Firstly, would any structure (no matter the size, shape and design) have a negative effect on the particular landform and land unit? Secondly, can appropriate design mitigate an adverse effect? He said that at present the reality of residential development in Queenstown is that buildings do not have a functional part in farming operations, but are instead extremely large and ostentatious, which in his view the landscape is not capable of absorbing.

32. Mr Kruger stated that forestry can alter an existing landscape dramatically due to the monotonous use of a single species and the shape and size of the planting. He gave as an example the forestry block on the lower slopes of the Coronet Peak Range, where the formerly cohesive tussock grassland slopes are now overtaken by a monoculture Douglas Fir forestry plantation, in his view showing no regard to landforms at all. He said the impact is enormous with the block being visible from many parts of the Basin. He was of the view that in time it will create a seed source for the spread of the species to formerly unthreatened valleys and mountain slopes and will have a major negative impact on the biosecurity of the district.

33. Mr Kruger was of the view that a lot of the activities in the district give very little consideration to ecosystems. He said that the main reason for this is the absence of significant knowledge about ecosystems,

particularly on a smaller scale. In his view there are few good habitats left in the Wakatipu and some are under direct threat at the moment with land being up for sale, an example being the wetland contained between Malaghan Road, Littles Road and the steep cliffs. In addition he said there is little acceptance of the conservation of historic open spaces such as parks, gardens, trees and other man-made features using vegetation. He said the best examples in the Wakatipu Basin are the Hawthorn hedgerows, especially in Speargrass Flat Road and Lower Shotover Road, created in the early 19th and 20th century. He said that there is a process of "nibbling" away at these and the loss of these would reduce or remove the microclimatic qualities created by the plantings and would alter the cultural significance of the relevant areas. Mr Kruger listed other threats to the area as including sewerage, utilities such as power lines and the Council not enforcing existing District Plan rules and monitoring conditions in the course of development.

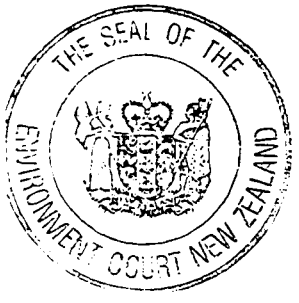
34. The only party supporting WESI was the Upper Clutha Environmental Society Incorporated. Mr J Haworth, the secretary of UCES and a qualified accountant gave evidence that he has lived in Wanaka for nine years working as owner/operator of a backpacker lodge. He said that the UCES is opposed to the deletion of the ALIs because visual aspects and amenity values of the icon landscapes in the District will be significantly and adversely affected by buildings, and other structures associated with the buildings.

35. Mr Haworth said that the zones in the revised plan offer the District's more vulnerable landscapes little more protection than any other rural zone in the district plan; the flat paddocks of Hawea Flat being zoned identically to Roy's Peninsula at West Wanaka. He submitted that to permit development in ALIs is to give these landscapes no more value than any other rural areas in New Zealand, when in reality these

landscapes are of national and international importance. Mr Haworth suggested that it is better to take the precautionary approach and zone the Areas of Landscape Importance now, possibly redefining the boundaries at a later date after studies have been done. He said that UCES acknowledges that the rules in the notified plan for ALIs may have been too restrictive with respect to some issues, but he said that in fact the rules permitted farming to continue much as it always has in the ALIs.

36. Mr Haworth gave the Court an illustration of the difference between the two plans in relation to an area on the south-western shoreline of Lake Wanaka, going north-westwards between Larch Hill and the Ironside Trig and bounded to the west by Mt Aspiring Rd. In summary he said that under the notified plan one extra house would be permitted, and under the revised plan 75 extra houses would be permitted. He then cited a case where the Environment Court[17] granted a resource consent in this area. The Court noted the issue of urban creep and said that it trusted that the small exception being granted would be the last residential extension around this side of the lakeshore under current policies. Mr Haworth stated that if the revised plan is approved in its current form then it will be contrary to the spirit of this decision.

37. He said that as an accountant and working in the tourist industry in Queenstown for nine years he has talked to thousands of visitors to the Upper Clutha and the overwhelming impression imparted to him is that the landscapes of Queenstown are wonderful and of national and international significance. He said that it is clear that the District's



[17] *Upper Clutha Environment Society Inc v Queenstown Lakes District Council* C12/98.

economy largely depends on the tourist industry and this in turn depends on the District's landscapes. Mr Haworth also submitted that it is interesting to note that Wanaka's recent economic success has been achieved without the need, by and large, to encroach on the icon landscapes in the area. The transitional plan mostly restricts development, other than farming, in key landscape areas and rural zones in general.

38. Mr Haworth finished his evidence by noting that the Minister of Conservation and the New Zealand Tourism Board accept the principle of zoning by ALIs. He also noted that the Consulting Surveyors of New Zealand in their submission to the notified plan said:

> *recognition and protection of significant natural features should not be left until such time that the process of land subdivision and development occurs. Such recognition and protection should be identified on planning maps or references in the district plan.*

39. The Council, the section 271A parties and the section 274 interested persons opposed WESI's reference in at least two fundamental ways. First, as we have said, they opposed the re-introduction of the areas of landscape importance. That issue has been adjourned in the hope it does not have to be resolved at all, although ultimately WESI will have to state whether it wishes to pursue that issue. Secondly, they opposed WESI's proposed amendments to the revised plan. No party expressly argued that the proposed plan should stay as it is; indeed every person who gave more detailed evidence about the objectives and policies conceded in their evidence-in-chief that various changes needed to be made to sections (1) and (2) of Part 4 of the revised plan.

40. Counsel for the parties opposing WESI's reference gave detailed submissions as to the interpretation of section 6(b) of the RMA. We refer to the most relevant parts of those submissions in the succeeding parts of this decision, and so do not need to say more here. Generally, the evidence opposing WESI's reference was either broad landscape and/or resource management evidence, or focused observations on conditions. We will concentrate on the former here since the latter are more conveniently referred to in the context of objectives and policies in Part 4 of the district plan[18].

41. The expert general landscape/resource management evidence for the parties opposing WESI was from:

- Ms R Lucas a landscape architect (called for the council)
- Mr P Rough, a landscape architect with 25 years experience (called for the council);
- Ms C Munro, a resource manager (called by the council);
- Mr A M Rackham, a landscape architect with extensive (and international) experience over the last 30 years (called for Crosshill and others);
- Ms S M Dawson, a resource manager with 20 years experience (called for Crosshill and others); and
- Mr J A Brown, a resource manager with 11 years experience (for Mr Todd's clients).

We also read the evidence of Mr P Baxter, a landscape architect, which was on the record by consent since no party sought to cross-examine

[18] See Chapters 9-12 below.

him. We do not overlook the other evidence we heard: we have considered it, but are of the view that the evidence of the witnesses above is most relevant to the general issues.

42. All the experts (and indeed counsel) accepted that the landscapes of the district are important, so we need not refer to extensive parts of their evidence in any detail. It was also common ground that many natural features of the district are outstanding within the meaning of section 6(b). Where the expert witnesses opposing WESI's case all struggled was in relation to the bounds of the landscapes which actually qualify under section 6(b).

43. Despite the fact that our directions[19] from the pre-hearing conference had expressly stated that the identification of areas of outstanding natural landscape was an issue in the references, none of the experts called for the parties opposing WESI directly dealt with the issue, until Ms L J Woudberg in her evidence for the MFE in the third week of the hearing – when we heard the cases on "urban growth".

44. Although we raised the issue with counsel again, at the end of the first week of the hearing, none of them dealt with the issue in their submissions except for Mr More in the last two days of the hearing. In fact, it was witnesses for the parties other than WESI who identified procedural problems arising out of not identifying the section 6(b) landscapes. For example, the Council's landscape consultant Mr Rough admitted in his summary:

[19] See paragraph 10 above.

Both the 1995 and 1998 Proposed Plans made reference to the outstanding landscapes in Environmental Results Anticipated yet neither plan particularly identified what are the outstanding landscapes in the District. In terms of Section 6 of the Resource Management Act 1991 this would seem to be a deficiency in both plans. It is my opinion that this deficiency could be overcome by including a list in the Proposed Plan of outstanding natural features and landscapes as identified in the Otago regional landscape study and add to that list other obvious highly recognised features and landscapes or examples of what is deemed to be, within the District, outstanding natural features and landscapes. Such a list would include those natural features and landscapes which are widely accepted by the community as being outstanding. It is my opinion that such a list need not be exhaustive but it would need to be explicit so that the list established a threshold as to what the Council regarded to be an outstanding natural feature or landscape.

In further oral evidence-in-chief he suggested that the district plan should contain a list of criteria by which the quality of a landscape could be assessed. The other landscape witnesses and resource managers who gave evidence after him all agreed with that suggestion. The criteria he suggested were not clearly articulated but roughly follow the factors referred to in the ***Pigeon Bay***[20] case to which we shall refer later. Similar factors were referred to by Mr Rackham.

45. Ms R Lucas' evidence was primarily designed to show various inconsistencies with the 'Areas of Landscape Importance' identified in

[20] ***Pigeon Bay Aquaculture Ltd v Canterbury Regional Council*** [1999] NZRMA 209.

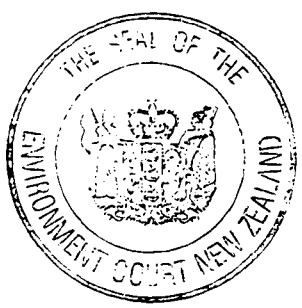
the notified plan. Her evidence largely succeeded in that, but we do not need to consider it further at this stage since we hope it will not be necessary to re-introduce (and correct) such a flawed method. The particular relevance of Ms Lucas' evidence was that she produced wide-angle photographs she had taken in July 1999 of three panoramas:

- the head of Lake Wakatipu looking past Glenorchy, and up the Rees and Dart Valleys;
- Lake Hayes looking west past Slope Hill, with vineyards in the foreground; and
- a view over grasslands towards Lake Wanaka (invisible in the photograph).

These were the subject of considerable cross-examination for a number of witnesses.

46. In the witness box Mr Rackham was a careful and thoughtful witness, although his written evidence did not go into the specifics. It was clear from his evidence that he has given a good deal of general consideration as to how to apply a landscaper's assessments to plans under the RMA. He stated:

> *My work with a wide range of Districts has led me to the view that in most instances, to be effective, a very thorough landscape investigation is necessary when the District Plan is to contain landscape maps and related rules. It is not adequate to patch together past studies and reinterpret past findings. Consequently, in the ... [district] my view is that if policies and rules are to be spatially defined (mapped), then a new and detailed landscape study would be required. This would be a major exercise and would be likely to result in a very detailed and complex set of*



landscape findings (given the complexity of the landscape). To be meaningful the scale at which landscape boundaries were defined would need to be very fine grained.

I have discussed with Ms Dawson the feasibility of preparing plan provisions based on such an exercise. She has impressed upon me the difficulties that a Plan drafter, and potentially the district Plan users, would be likely to encounter. I accept that this might well be the case in this District and that the usefulness of such a study could not be guaranteed.

In the circumstances (that the ALI are inappropriate and that the findings of a comprehensive landscape study would have serious difficulties in terms of the district Plan's preparation and functions), I have discussed with Ms Dawson the acceptability of relying on well-crafted objectives, policies and rules without reference to maps. I understand that these mechanisms could be used to protect landscape values and could enable development to be located in appropriate locations and with adequate design controls. I have reviewed Ms Dawson's evidence and consider the changes she has recommended to the policies would be a substantial improvement on both the current Proposed Plan and the district Plan were it to be amended to meet the reliefs sought by the Wakatipu Environmental Protection Society. I remain of the view that the district Plan should provide for the appropriate protection of Outstanding Natural Features and Landscapes. It should specify the characteristics and qualities that make them outstanding and it should have adequate provisions to ensure their protection.

47. Two aspects of that evidence concern us. The first is his concern about the use of landscape maps, and his conclusion that, in such maps, landscape boundaries would need to be shown at a large scale. It appears to us that, especially in rural areas, most maps in plans use a zoning technique. Zones are a mapping technique. If in this district zoning maps, for example showing the extent of the Rural zone, are to be used, then that is at first sight an even cruder tool than the ALI for protecting areas of national importance under section 6(b) of the Act. The rural zones appear to be defined by elimination – they are not urban or commercial zones. Mr Rackhams's way of looking at the issues suggests either very detailed mapping, or a case-by-case assessment are the only two proper methods of assessing landscapes under the RMA. We are not sure that is correct, and return to this issue in Chapters 6 and 7.

48. That leads to our second, major, concern which is Mr Rackham's reservation:

> *I remain of the view that the [p]lan should provide for the appropriate protection of outstanding natural features and landscapes. It should specify the characteristics and qualities that make them outstanding ...*

We take from this that, even with Ms Dawson's changes, the revised plan does <u>not</u> provide for the appropriate protection of section 6(b) landscapes. Our understanding seems to be confirmed by the statement in his conclusion:

> *I strongly recommend that the ... plan should address the issue of outstanding natural features and landscapes.*

Even if we misunderstand what he was saying, it is clear that neither the revised plan nor Mr Rackham identifies the outstanding natural landscapes. He suggests some relevant general criteria but that is as far as he goes.

49. We did find useful Mr Rackham's answers when being cross-examined by Mr Lawrence, and questioned by the Court. To the former he recognised the importance of foregrounds to views (as one component of landscape) and to us he suggested:

> *... that we have a three level landscape in terms of:*
> - *outstanding landscape*
> - *the special but not outstanding landscape; and*
> - *specific places that clearly don't raise landscape issues and those third areas ... are ... within the Wakatipu Basin and within the area described as the Dalefield area.*

50. Mr Baxter's evidence was largely directed at establishing the inadequacies of the ALI's. We note however, the strength of his statement of what he identifies as a fundamental issue in respect of protection of the landscape character of the Wakatipu Basin:

> *... there are highly visible and outstanding landscapes within the valley that would be unable to absorb change and the maintenance of those landscapes is critical to the landscape character of the area.*

51. The evidence of other witnesses we will refer to as we need to in our consideration of the issues.

Chapter 4 : Preparation of the district plan under the RMA

52. A district plan must provide[21] for the management of the use, development and protection of land and associated natural and physical resources. It must identify and then state[22] (inter alia) the significant[23] resource management issues, objectives, policies and proposed implementation methods for the district. In providing for those matters the territorial authority (and on any reference[24] the Environment Court) shall[25] prepare its district plan in accordance with:

- its functions under section 31,
- the provisions of Part II,
- section 32,
- any regulations

and must have regard to[26] various statutory instruments.

53. In this case there are no relevant regulations. The only statutory instrument of relevance is the Otago Regional Council's Regional Policy Statement, and that is of limited assistance to the issues we have to decide in these proceedings because it expresses good intentions, but goes little further. Therefore the key matters for us to consider in the appropriate way in this case are:

(a) the integrated management of the effects of land use in the district[27];

(b) the control of subdivision of land[28];

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21 Section 75(1) and Part II of the Second Schedule to the RMA.
22 Section 75(1)(a) – (d).
23 Section 75(1).
24 Under clause 14 of the First Schedule to the RMA.
25 Section 74(1): See ***Nugent Consultants Ltd v Auckland City Council*** [1996] NZRMA 481.
26 Section 74(2).
27 Section 31(a).
28 Section 31(c).

(c) the necessity for, and efficiency and effectiveness of, any particular objective and policy[29];

(d) Part II of the Act.

54. Broadly speaking there are three substantive stages (ignoring procedural steps in getting to, and at, a hearing) in deciding the contents of a district plan in accordance with the matters identified above. They are:

(1) Identification of the facts, the significant issues[30] for the district arising out of those facts and then sequentially, the other contents of the district plan[31];

(2) The section 32 analysis[32] of the proposed objectives, policies and rules generated by (1); and

(3) The 'broader and ultimate issue'[33] as to whether *"on balance, we are satisfied that implementing the proposal[s] would more fully serve the statutory purpose than would cancelling [them] ..."*: ***Countdown Properties (Northlands) Ltd v Dunedin City Council***[34].

55. The second and third stages identified above are effectively the two 'tests' identified by the High Court in ***Countdown,*** and expanded as a general recipe. The present case highlights the obvious fact that even proposed objectives and policies (and rules) do not come out of

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29 Section 32(1).

30 Section 75(1)(a) and section 74.

31 Section 75.

32 See ***Countdown Properties (Northlands) Ltd v Dunedin City Council*** [1994] NZRMA 145 (HC) at 179; ***Marlborough Ridge Ltd v Marlborough District Council*** [1998] NZRMA 73.

33 ***Countdown*** at 179.

34 [1994] NZRMA 145 at 179.

nowhere. There is a prior stage[35] which is the identification of the facts and of the significant resource management issues of the district. When facts are contested it is a fundamental part of the quasi-judicial process of a local authority to make findings of fact. Then the requirement to identify the 'significant issues' is an express requirement in section 75(1)(a) of the Act. Stating the issues can only be achieved if the relevant facts or most of them are ascertained at least to the point where issues can be formulated. On appeal, the Environment Court does not have to determine all the facts and/or issues: many will already be stated in a proposed plan and may be unchallenged by reference. Others may need to be determined on the evidence if they are contested, or if, for some other reason, they have not been adequately defined. Of course determining the 'facts' may be a broad issue in a case under the RMA especially when it relates to landscapes.

56. In respect of a district council's functions, including integrated management of land, the starting point for the first stage must be to identify the facts and the appropriate matters[36] to be considered. In particular it is fundamental to consider Part II of the Act. That means it is mandatory[37] to identify the matters of national importance[38]. We do not see how that can be achieved without identifying (necessarily with a broad pencil, but with as much accuracy as possible) the boundaries of the areas concerned. Once the coastal environment, wetlands, lakes, rivers, outstanding natural features or landscapes, areas of significant vegetation, significant habitats of indigenous fauna, or Maori ancestral

35 Stage 1 in the preceding paragraph.
36 Section 75(1).
37 Section 74(1).
38 Section 6.

lands, water, sites, waahi tapu, and other taonga[39] have been identified the general issues tend to be self-generating: how can those resources be protected from inappropriate use or development or have access to them maintained and enhanced, or be recognised and provided for, as the case may be? In practice, it may assist to focus the issues by posing more specific questions. Only then should the Council turn to the next sub-stages in the process: considering the appropriate objectives, policies and methods of implementation.

57. In this particular district – renowned for the quality of its scenery on which, it is common ground, a huge part of its economy depends – we hold that the Council should, as part of stage (1) in preparing its plan, have identified the outstanding natural landscapes and any other landscapes to which particular regard should be had. It needed to identify the landscapes that qualify under section 6(b) and/or section 7(c) and 7(f) of the RMA so that it could identify the issues relating to the management of effects on landscapes (amongst other values)[40].

58. In this case, in the revised plan, and in its evidence to us, the Council has failed to carry out an essential step in the process – the fact finding. None of the parties opposing WESI – Federated Farmers of NZ (Inc) ("Federated Farmers") excepted – have given the Court evidence as to the extent of the outstanding natural landscapes of the district. On the other hand, WESI has given such evidence (as has the UCES in a limited way) and we shall consider that in due course.

39 Section 6.
40 Clause 2(c) of Part II, Second Schedule to the RMA.

Chapter 5 : The Natural Environment of the District

Nature Conservation Values

59. There are several matters under the general heading of 'Natural Environment'[41] which we need to determine here in addition to those which are the subject of references by the Royal Forest and Bird Protection Society Inc and others[42] which are to be heard separately.

60. The list of nature conservation values in Objective 1[43] includes:

> *The protection of outstanding natural features.*

That wording raises the point why *"outstanding natural landscapes"* are not included in the list. Logically, it seems to us, both landscapes and features should be in; or both should be out on the ground they are dealt with in Part 4.2 (Landscape and Visual Amenity). The argument for having them both in is that outstanding natural landscapes (and features) may well have 'nature conservation' values as well as 'landscape and visual amenity' values. Arguably the natural values are a very important part of what makes an outstanding natural landscape or feature. We reserve leave to any party and interested person in this case to make an application (either way) under section 293 of the Act.

61. The Council's main resource management witness Ms Hume was concerned that there should be a link (in the district plan reflecting reality) between the values of landscape and their intrinsic values as ecosystems[44]. She considered that we should add two further policies

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41 Part 4.1 [Revised plan pp4/1 – 4/5].
42 RMA Nos: 1225/98; 1398/98; 1395/98; 1753/98.
43 Para 4.1.4 [revised plan p4/2].
44 Section 6(d).

1.18 and 1.19[45]. We agree that policies which emphasize the link are appropriate but again do not insert them until we have heard further argument on our jurisdiction to do so, or until we receive an application under section 293. In any event the policies as worded seem to be simply landscape policies, rather than linking areas.

62. WESI seeks two changes to the implementation methods[46] in respect of nature conservation values. These are the addition of:

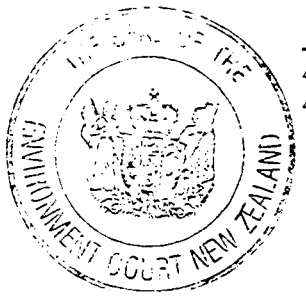
- *The provision of rules to control the clearance or felling of identified hedgerows*

...

- *In relation to geological and geomorphological features of scientific importance:*
  to control, by way of resource consents, activities which involve earthworks, vegetation clearance and plantings and have the potential to adversely affect these sites.

63. As for the hedgerows, these were identified by Mr Kruger as being hawthorn hedges along Speargrass Flat Road (amongst others). The evidence of Mr A D George – a policy planner giving evidence for the Council - was that WESI's amendment was inconsistent with the earlier policy:

> *1.5 To avoid the establishment of, or ensure the appropriate location, design and management of, introduced vegetation with the potential to spread and naturalise; and to*



45 To the revised plan on p4/3.
46 Part 4.1.4 [Revised plan pp4/3 and 4/4].

encourage the removal or management of existing vegetation with this potential and prevent its further spread. [47]

Further, hawthorn[48] is banned from sale, distribution and propagation under the Otago Pest Management Strategy. For both reasons we agree with Mr George that WESI's suggested method should not be inserted in the district plan. WESI's proposed amendments to Part 4.1.4's suggested site standards and assessment matters are, in consequence, not accepted.

64. This issue of wilding plants leads us to mention an inconsistency in the policies of the revised plan which seek to control the spread of introduced plants. In addition to the policy quoted above, there is a further objective and policy in Part 4 which state respectively:

- ***Wilding Trees***
  To minimise the adverse effect of wilding trees on the landscape by:
  - *supporting and encouraging co-ordinated action to control existing wilding trees and prevent further spread*[49].

- *The limitation of the spread of weeds, such as wilding trees*[50].

All the above seem inconsistent with the nature conservation policy which states:

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47 Part 4.1.4 Objectives and Policies [Revised plan p4/3].
48 *Crategus manogyna.*
49 Part 4.2: Landscape and Visual Amenity Policy 4.2.5(10) [Revised plan p4/8].
Part 4.3 Takata Whenua Objective 4(2) [Revised plan p4/13].

1.17 To encourage the retention and planting of trees, and their appropriate maintenance.[51]

65. It seems to us this would be an appropriate place to exercise our powers under section 292(1) of the RMA and insert the word *"native"* before *"trees"* in policy 1.17 since that seems the intention of part 4.1. But, in case we misunderstand the Council's intentions, we reserve leave for further submissions on that issue.

66. As for the second change to the methods of implementation of policies on nature conservation values, it does seem anomalous that there are various references in policies 1.1, 1.4 and 1.12 to geological and geomorphological features but no methods of implementation in respect of the general objective which is *"[t]he protection of outstanding natural features"*[52]. However, we see no need to have a separate method of implementation. The answer is to amend existing method (i)[53] by adding the words:

or in areas containing geological and/or geomorphological features of scientific interest.

Air Quality

67. WESI sought a new policy 2.2[54] reading:

To support reduced air emissions from transport through consolidation of urban activities.

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51 Part 4.1.4 Policy 1.17 [Revised plan 4/3].
52 Part 4.1.4 Objective 1 [Revised plan p4/2].
53 Part 4.1.4 Implementation method (i) [Revised plan p4/3].
54 To be added after policy 2.1 [revised plan 4/4].

We accept Ms Hume's evidence for the Council that there is no evidence that consolidation of urban activities will maintain or improve air quality. She even suggested the opposite might be true. We do not accept that this policy should be added. There are also difficulties with this policy under section 32 and we return to that in the penultimate chapter.

Chapter 6 : Landscape in the RMA

Introduction

68. New Zealand's landscapes are natural and physical resources which are required to be managed sustainably under the RMA. We now set out the important provisions in the Act dealing with landscapes. First, when preparing a plan a territorial authority has to consider the actual or potential effects of any use, development or protection on[55]:

> *natural, physical, or cultural heritage sites and values, including landscape, land forms, historic places and waahi tapu.*

It appears from that grammatically confusing clause that landscapes may have natural, physical and cultural values and are themselves resources. We infer that the three-way distinction is not intended to be hard edged for two reasons:

(a) the language of the clause is too loose for that; and

(b) in describing landscapes we recognize that they may contain all three qualities[56] simultaneously.

69. Secondly, the territorial authority is to recognise and provide for[57] (amongst other things):

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55 Second Schedule : Part II para 2(c).

56 Academic landscape experts almost regard as a truism the idea that 'nature' is a 'cultural construct'. Such statements are of some value in so far as they remind us of the cultural sensitivity of, and differences about, the issues (and even about what the issues are), but in the end they are not of much assistance in coming to practical decisions within the field of discourse constituted by specific legislation such as, in this case, the RMA.

57 Section 6.

(a) The preservation of the natural character of ... 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 ...

Both section 6(a) and 6(b) are relevant in this case. We note that they do not entail that the natural character of lakes and rivers or nationally important features and landscapes are to be preserved or protected at all costs: ***Trio Holdings Ltd v Marlborough District Council***[58] and ***New Zealand Rail Ltd v Marlborough District Council***[59]. Further it is only "inappropriate subdivision, use and development" from which they are to be protected. Finally, while only section 6(b) refers to 'landscape;' section 6(a) makes it clear at least by inference that lakes and rivers have a special place in landscape, in that even if the natural values of surrounding land have been compromised, they and their margins are still to be protected anyway.

70. Thirdly the territorial authority is also to have particular regard to[60] (relevantly):

(c) The maintenance and enhancement of amenity values:

(d) ...

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

58 2 ELRNZ 532 [1997] NZRMA 97, 116.
59 [1994] NZRMA 70,85.
60 Section 7.

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

We have already commented that landscapes are themselves resources, or groups of natural and physical resources. We discuss shortly the link between landscapes and the environment (including amenity values).

71. The legal issues raised in submissions and/or the evidence are:

(1) What is a "natural feature" and a "landscape"?

(2) If one assumes that "landscape" is a holistic concept how does one avoid taking relevant factors into account twice if they already occur somewhere else in Part II of the Act?

(3) Are the section 6(b) landscapes

(a) any landscape; or

(b) any outstanding landscape; or

(c) any outstanding natural landscape?

(4) Is a section 6(b) landscape assessed on a district, regional or national basis?

(5) If the correct interpretation of section 6(b)[61] refers to "outstanding natural landscapes" then are other important landscapes entitled to any consideration under the RMA[62]?

What is landscape?

72. In ***Pigeon Bay Aquaculture Ltd v Canterbury Regional Council***[63] the

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61 See question (3) above.

62 For example under section 7(c), 7(f) and/or 7(g).

63 [1999] NZRMA 209 at 231-232 (para 56) – based on a series of Marlborough aquaculture decisions by Environment Judge Kenderdine's division of the Court including: ***Trio Holdings Ltd*** 2 ELRNZ 353 (W103A/96); ***Browning*** W20/97; ***NZ Marine Hatcheries (Marlborough) Ltd*** W129/97; ***Kaikaiawaro Fishing Co Ltd*** 5 ELRNZ 417 (W84/99).

Court identified the following aspects as relevant to assessment of the significance of landscape:

(a) *the natural science factors – the geological, topographical and dynamic aspects of the landscape;*

(b) *its aesthetic values including memorability and naturalness;*

(c) *its expressiveness - how obviously the landscape demonstrates the formative processes leading to it;*

(d) *transient values - occasional presence of wildlife; or its values at certain times of the day or of the year;*

(e) *whether the values are shared and recognised;*

(f) *its value to tangata whenua;*

(g) *its historical associations.*

Roughly (a) and (d) correspond to what is seen or perceived; and (b), (c) and (e) to (g) to how people perceive it[64].

73. During the hearing of these references we raised with the parties the question whether some of those matters should correctly be omitted as aspects of landscape for the purpose of the RMA, for two reasons:

(a) at least some of the aspects identified are not 'natural';

(b) some aspects are expressly to be considered elsewhere in sections 6 and 7 of the Act.

Basically all counsel (but not Mr Lawrence) appeared to agree that the ***Pigeon Bay*** criteria were too widely framed because:

- aesthetic values fall to be considered when having particular regard to the maintenance and enhancement of amenity values[65];

64 See ***Browning v Marlborough District Council*** W20/97.

65 Section 7(c).

- value to tangata whenua is expressly stated to be of national importance elsewhere[66];
- historical associations are also recognised and provided for[67] as heritage values.

However, upon reflection, we consider that such an approach is over-simplistic for reasons we will endeavour to state shortly. In the light of counsel's submissions (not agreed to by Mr Lawrence for WESI) we have decided to look at what the RMA requires in respect of landscape.

74. The dictionaries define a landscape as:

- *1. natural or imaginary scenery, as seen in a broad view.*
- *2. a picture representing this ...*[68]

- *A portion of land which the eye can comprehend in a single view; a country scene*[69]*;*

We do not consider the dictionary definitions are determinative, especially since they are not consistent in themselves. Further, even if one considers landscapes in the loose sense of 'views of scenery' the first question that arises is as to where the view is from. One cannot separate the view from the viewer and their viewpoint. We also bear in mind that the word 'landscape' does not necessarily require a precise definition:

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66 Section 6(e) and this relationship is also relevant under section 7(h) and section 8 of the Act.

67 Section 7(e).

68 The Concise Oxford Dictionary Eighth edition (1990).

69 University English Dictionary cited by Mr Goldsmith.

> *[T]he very act of identifying ... [a] place presupposes our presence, and along with us all the heavy cultural backpacks that we lug with us on the trail*[70].

Discounting for a moment the undoubted existence of differing cultural viewpoints, it is obviously not practical or even possible to enumerate all views from all viewpoints. Fortunately the RMA does not require all landscapes to be taken into account as matters of national importance since there are some qualifying words in section 6(b). However, whilst a precise definition of 'landscape' cannot be given, some working definition might be useful.

75. In addition to the dictionary definitions, and the other use of the word 'landscape' in the RMA[71], we also have to bear in mind the broader context of the RMA. The word 'landscape' is used in Part II of the Act, of which Greig J. stated in ***NZ Rail Ltd v Marlborough District Council***[72]***:***

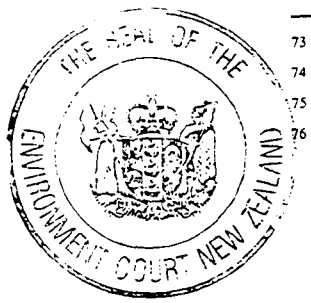
> *This Part of the Act expresses in ordinary words of wide meaning the overall purpose and principles of the Act. It is not, I think, a part of the Act which should be subjected to strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used. There is a deliberate openness about the language, its meanings and its connotations which I think is intended to allow the application of policy in a general and broad way.*

70 ***Landscape and Memory*** Schama S, (Fontana 1996).
71 Second Schedule quoted in para 68 above.
72 [1994] NZRMA 70,86 (HC).

76. The definition of 'environment' – including the sub-definition of 'amenity values' states[73]:

> *'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.*
>
> *'Amenity values' means 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.*

77. The most important aspects of these definitions in this context, is their comprehensiveness and their cross-referencing quality. We consider it is useful to consider 'landscape' as a large subset of the 'environment'. We have already observed that 'landscape' involves both natural and physical resources themselves[74] and also various factors relating to the viewer and their perception of the resources. These aspects seem to fit within 'amenity values'[75] and into the category of *"social ... and cultural conditions which affect the matters in paragraphs (a) to (c) ... or which are affected by those matters*[76]*."*



73 In section 2 of the RMA.
74 Which fall into categories (a) and (b) of the definition of 'environment'.
75 Para (c) of the definition of 'environment': section 2 RMA.
76 Para (d) of the definition of 'environment': section 2 RMA.

78. We also regard 'landscape' as a link between individual (natural and physical) resources and the environment as a whole. It is a link in two ways: first in that it considers a group of natural and physical resources together, perhaps in an arbitrary cultural lumping as a 'landscape' rather than in any ecologically significant way; and secondly it emphasizes that our attitudes to those resources are affected by social, economic, aesthetic and cultural conditions.

79. It is wrong, in the end, to be overly concerned with 'double-counting', that is, whether the values identified in section 7 should also be taken into account under section 6. That is to adopt an over-schematic approach to sections 5 to 8 which is not justified. Those sections do not deal with issues once and once only, but raise issues in different forms or more aptly in this context, from different perspectives, and in different combinations. In the end all aspects go into the evaluation as to whether any issue being considered achieves the purpose of the Act.

80. Consequently, we have no reason to change the criteria stated in ***Pigeon Bay*** in any major way. We list them here for three reasons: first, in (a) to add 'ecological' components and to delete 'aspects' and substitute 'components', and secondly to correct the grammar in (c) and (d); and thirdly in (c) to give an alternative for 'expressiveness'. The corrected list of aspects or criteria for assessing a landscape includes:

> *(a) the natural science factors – the geological, topographical, ecological and dynamic components of the landscape;*
>
> *(b) its aesthetic values including memorability and naturalness;*
>
> *(c) its expressiveness (legibility): how obviously the landscape demonstrates the formative processes leading to it;*
>
> *(d) transient values: occasional presence of wildlife; or its values at certain times of the day or of the year;*

(e) whether the values are shared and recognised;

(f) its value to tangata whenua;

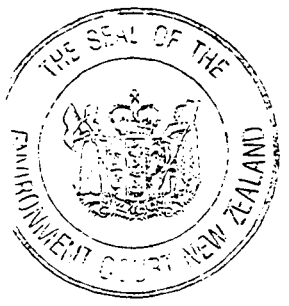
(g) its historical associations.

We should add that we do not regard this list as frozen – it may be improved with further use and understanding, especially of some of the issues we now explore. One aspect that troubles us in particular is that the dictionary senses of landscape as a view of scenery or, perhaps, a collection of views – while included in (b), is given less emphasis than we consider the RMA might suggest. Another matter that needs further consideration is whether (b) might be better expressed in terms of all the amenity values[77] rather than just one quality – aesthetic coherence.

Outstanding natural landscapes

81. We now turn to consider how landscapes come within section 6(b) of the Act. Section 6(b) refers to 'outstanding natural features and landscapes'. As a preliminary point, it was common ground between counsel that the words 'outstanding (and) natural' qualify 'landscapes' as well as 'features'. That is consistent with the way qualifying adjectives have been applied in the Act. For example:

(1) In both section 6(a) and 6(b) the phrase 'inappropriate subdivision, use, and development' occurs. That has always been interpreted to mean 'inappropriate subdivision, inappropriate use, and inappropriate development'.



[77] See definition in section 2 RMA.

(2) In section 6(e) the word 'ancestral' qualifies each of 'lands, water, sites, waahi tapu, and other taonga': ***Haddon v Auckland Regional Council***[78].

(3) In section 6(c) where the phrase 'significant indigenous vegetation' occurs, Parliament has made it clear that 'indigenous' does not qualify the following 'habitat' whereas 'significant' does, by repeating the word 'significant'. So 6(c) refers to:

> *(c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna.*

The meaning of 'outstanding'

82. The word 'outstanding' means:

- "conspicuous, eminent, especially because of excellence"
- "remarkable in"[79].

As Mr Marquet pointed out, the Remarkables (mountains) are, by definition, outstanding. The Court observed in ***Munro v Waitaki District Council***[80] that a landscape may be magnificent without being outstanding. New Zealand is full of beautiful or picturesque landscapes which are not necessarily outstanding natural landscapes.

83. A subsidiary issue is whether an outstanding natural landscape has to be assessed on a district, regional or national basis. Mr Goldsmith referred

78 [1994] 2 NZRMA 49.
79 Concise Oxford Dictionary (1990) p.485.
80 C98/97.

to a number of inquiries the Court has held into various Draft National Water Conservation Orders. These inquiries related to section 199(1) of the Act which involves the word "outstanding". In ***Re an inquiry into the draft National Water Conservation (Buller River) Order***[81] the Court accepted that the test as to what is outstanding is a reasonably rigorous one. The Court also referred to the Mohaka River case[82] in which a differently composed Tribunal agreed that the test is reasonably rigorous and went on to accept the submission that before a characteristic or feature could qualify as outstanding it would need to be quite out of the ordinary on a national basis. This test was upheld by the Planning Tribunal in the ***Inquiry into the Water Conservation Order for the Kawarau River***[83].

84. However, as we understand Mr Goldsmith's argument, the use of the word 'outstanding' in section 6(b) depends on what authority is considering it. Thus if section 6(b) is being considered by a regional council then that authority has to consider section 6(b) on a regional basis. Similarly a district council must consider what is outstanding within its district. By contrast a water conservation order is made under Part IX of the Act which is really a self-contained code within the RMA: it contains its own purpose and procedures including public notification on a national basis.

85. We agree: what is outstanding can in our view only be assessed – in relation to a district plan – on a district-wide basis because the sum of the district's landscapes are the only immediate comparison that the territorial authority has. In the end of course, this is an ill-defined

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81 C32/96.
82 ***Re Draft Water Conservation (Mohaka River) Order*** W20/92.
83 C33/96.

restriction, since our 'mental' view of landscapes is conditioned by our memories of other real and imaginary landscapes in the district and elsewhere, and by pictures and photographs and verbal descriptions of them and other landscapes.

86. The local approach is consistent with an identification of particular places: the unique landscapes of the given district. There are districts without the vertical dimensions of the Queenstown-Lakes district, but that does not lead to the result they do not have outstanding (natural) landscapes. Flatter landscapes may qualify, even though the test is still a rigorous one. A district may have no outstanding natural landscapes or features.

The meaning of 'natural'

87. To qualify under section 6(b) a landscape must not only be outstanding, it must also be 'natural'. The dictionary definition of 'natural' is:

(a) *existing in or caused by nature; not artificial (natural landscape)*
(b) *uncultivated; wild (existing in its natural state)*[84]

That definition is a little simplistic in our view: much more landscape has been affected by human activity than is commonly understood. The revised plan itself recognises that:

...[T]he downland lake basins have undergone more extensive modification. Maori settlement did occur around the inland lake

[84] Concise Oxford Dictionary (1990) p. 906

basin areas and also during this time much of the original podocarp and beech forests in the basins were destroyed by fire. The arrival of European settlers and the introduction of sheep in the 1860's led to major burning of native vegetation and scrub to enable stock to graze ... [85]

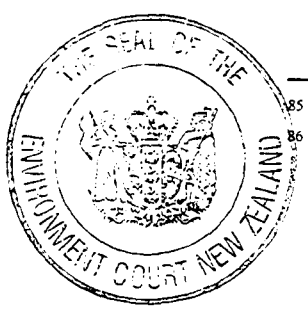
88. It is wrong to equate 'natural' with 'endemic'. In the context of section 6(a) the Planning Tribunal stated, in ***Harrison v Tasman District Council***[86]***:***

> *The word 'natural' does not necessarily equate with the word 'pristine' except in so far as landscape in a pristine state is probably rarer and of more value than landscape in a natural state. The word 'natural' is a word indicating a product of nature and can include such things as pasture, exotic tree species (pine), wildlife ... and many other things of that ilk as opposed to man-made structures, roads, machinery.*

We respectfully agree with that passage.

89. We consider that the criteria of naturalness under the RMA include:

- the physical landform and relief
- the landscape being uncluttered by structures and/or 'obvious' human influence
- the presence of water (lakes, rivers, sea)
- the vegetation (especially native vegetation) and other ecological patterns.



85 Para 4.1.3(i) [revised plan pp. 4/1].
86 [1994] NZRMA 193 at 197.

The absence or compromised presence of one or more of these criteria does not mean that the landscape is non-natural, just that it is less natural. There is a spectrum of naturalness from a pristine natural landscape to a cityscape.

Other important landscapes

90. Finally we should make it clear that while section 6(b) only protects outstanding natural landscapes that does not mean that lesser landscapes should not be considered and in some cases maintained. To the contrary, all landscapes need to be considered under sections 5(2) and 7(b), (c), (d), (f) and (g). Whether any resulting objectives, policies and methods pass the refining fires of section 32 is another issue.

91. An important point in respect of section 7 landscapes is that the Act does not necessarily protect the status quo. There is no automatic preference for introduced grasses over pine forest. Nor should it be assumed (on landscape grounds) that existing rural uses are preferable in sustainable management terms to subdivision for lifestyle blocks which could include restoration[87] of indigenous bush, grasses or wetlands, especially if predator controls are introduced. Just to show how careful one has to be not to be inflexible about these issues we raise the question whether it is possible that a degree of subdivision into lifestyle blocks might significantly increase the overall naturalness of a landscape (and incidentally reduce non-point-source pollution of waters from faecal coliforms, giardia etc). Logically there is a limit: the law of diminishing returns where too much subdivision leads to over-domestication of the landscape.

[87] See ***Di Andre Estates Ltd v Rodney District Council*** W36/97.

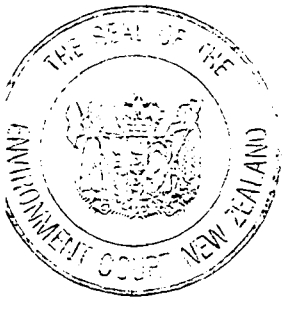
Chapter 7 : Landscapes of the District

92. In very broad terms we make a tripartite distinction in the landscapes of the district: outstanding natural landscapes and features; what we shall call visual amenity landscapes, to which particular regard is to be had under section 7, and landscapes in respect of which there is no significant resource management issue. We must always bear in mind that such a categorisation is a very crude way of dealing with the richness and variety of most of New Zealand's landscapes let alone those of the Queenstown Lakes District.

93. The outstanding natural landscapes of the district are Romantic landscapes - the mountains and lakes. Each landscape in the second category of visual amenity landscapes wears a cloak of human activity much more obviously - these are pastoral[88] or Arcadian landscapes with more houses and trees, greener (introduced) grasses and tend to be on the district's downlands, flats and terraces. The extra quality they possess that brings them into the category of 'visual amenity landscape' is their prominence because they are:

- adjacent to outstanding natural features or landscapes; or
- on ridges or hills; or
- because they are adjacent to important scenic roads; or
- a combination of the above.

These aspects mean they require particular regard under section 7. The third category is all other landscapes. Of course such landscapes may

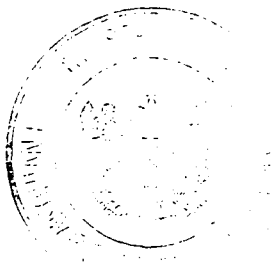


[88] Using 'pastoral' in the poetic and picturesque senses rather than in the functional ('pastoral lease') sense.

have other qualities that make their protection a matter to which regard is to be had[89] or even a matter of national importance[90].

94. It must always be borne in mind that all landscapes form a continuum physically and ecologically in the many ways they are perceived. Consequently we cannot over-emphasize the crudeness of our three way division - derived from Mr Rackham's evidence - but it is the only way we can make findings of 'fact' sufficient to identify the resource management issues.

95. We also consider it worth stating that landscapes outside the first two (section 6 and section 7) categories are not necessarily unimportant. The parties in this case are not just being chauvinistic when they state that all landscapes of the district are important. However it is important to realise that very often the best managers of landscape are landowners. It is difficult to manage landscape by committee - and most positive, imaginative landscaping comes from individuals left to work in their ways and with their own landscape architects. However retention of existing 'open space' qualities, especially those enjoyed passively by the public rather than landowners, are not so simply protected by the market, and hence the possible need for management under the RMA. Given that qualification the first stage in deciding these references is to find which landscapes of the district are outstanding natural landscapes and which deserve particular regard under section 7 as visual amenity landscapes.



89 Under section 7 RMA.
90 Under section 6 RMA.

Outstanding natural landscapes and features

96. We start our assessment by returning to the problem we identified briefly in the introduction to this decision. While almost everyone agrees that there are outstanding natural landscapes in the district, none of the parties other than WESI and Federated Farmers is prepared to say where they finish. Thus while the Remarkables mountains were on the whole agreed to be an outstanding natural landscape none of the witnesses for the other parties was prepared to say where the outstanding natural landscape terminated.

97. We consider that unwillingness has lead to a basic flaw in the case for all parties (other than WESI) in respect of landscape values. The RMA requires us to evaluate, as one relevant factor, the outstanding natural landscapes of the district so that appropriate objectives and policies (and implementation methods) can be stated for them. If the areas of outstanding natural landscape cannot be identified then how can objectives and policies (and methods) be properly stated for them?

98. Although we raised that issue with counsel at the end of the first week none of them dealt with it in their submissions at that time. Later[91] Mr More raised the same question. In fact it was witnesses for the parties other than WESI who identified the procedural problems we face. For example the Council's landscape consultant, Mr Rough, admitted in his summary:

[91] In the third week – he had not been present earlier.

Both the 1995 and 1998 Proposed Plans made reference to the outstanding landscapes in Environmental Results Anticipated yet neither plan particularly identified what are the outstanding landscapes in the District. In terms of Section 6 of the Resource Management Act 1991 this would seem to be a deficiency in both plans. It is my opinion that this deficiency could be overcome by including a list in the Proposed Plan of outstanding natural features and landscapes as identified in the Otago regional landscape study and add to that list other obvious highly recognised features and landscapes or examples of what is deemed to be, within the District, outstanding natural features and landscapes. Such a list would include those natural features and landscapes which are widely accepted by the community as being outstanding. It is my opinion that such a list need not be exhaustive but it would need to be explicit so that the list established a threshold as to what the Council regarded to be an outstanding natural feature or landscape.

99. One course for us to take would be to request further evidence from the parties. However, most take the view that what they see as the necessary studies would take months, perhaps years, and a great deal of money to carry out. In the meantime in our view the district needs a plan - especially for the Wakatipu basin - as a matter of urgency. Further, it seems to us that the attitude of the parties opposing WESI demonstrates a lack of understanding of what the RMA requires: ascertaining an area of outstanding natural landscape should not

(normally) require experts[92]. Usually an outstanding natural landscape should be so obvious (in general terms) that there is no need for expert analysis. The question of what is appropriate development is another issue, and one which might require an expert's opinion. Just because an area is or contains an outstanding natural landscape does not mean that development is automatically inappropriate[93].

100. The simplest evidence on this issue came from Mr J H Aspinall who was a witness for Federated Farmers (NZ) Inc. He did not qualify himself as an expert; he is a farmer in the district (at Mt Aspiring station). On the other hand we do not consider that we should be precluded from considering his view since we do not consider that the question of whether there are outstanding natural landscapes in the district should be left solely to experts. In Mr Aspinall's view the district's truly outstanding landscapes are in the Upper Rees, Upper Dart, Upper Matukituki and Wilkin Valleys and thus are managed under the National Parks Act 1980.

101. In coming to our conclusions below, we generally prefer the evidence of Mr Kruger over those of the other landscape witnesses. That is not because we accept all of Mr Kruger's evidence – we do not – but because he at least was prepared to state where, in his opinion, some of the district's landscapes begin and end. His evidence related more to the general Wakatipu area, and the Wakatipu basin in particular. Even there he had some difficulties – he did not know, as Mr Marquet's cross-examination of him revealed, where the southern boundary of the district was.

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92 There may be exceptions where a landscape is flatter or such a large geological unit that an uninformed observer may have difficulty conceiving of it as outstanding, in the first case, or as a single landscape in the second.

93 Section 6(b).

102. The other landscape witnesses had a rather more sophisticated approach than Mr Kruger, and in theory we prefer the subtlety and richness of their approach to landscape assessment. However, in this case, all the landscape evidence other than Mr Kruger's and Ms R Lucas' (which was very limited in scope) was weakened by two problems:

(a) A failure to make findings of fact which were essential for the statement of issues, and resulting objectives and policies;

(b) The suggestion that no such findings could be made unless the plan first stated the criteria by which landscapes were to be assessed.

The difficulty with the latter point is that the suggested criteria were in essence some of the component aspects of 'landscape' identified in ***Pigeon Bay***[94]. Such a list is so general that we cannot see that it would assist much to have it specified in the plan. The real need is to apply those criteria to the landscapes and features of the district.

103. We do not consider WESI is correct in its assertion that the whole of the district is an outstanding natural landscape but neither do we consider that Mr Aspinall is correct in confining outstanding natural landscapes to the Mt Aspiring National Park.

104. We will shortly set out our findings in respect of outstanding natural landscape and features. Before we do, we record:

(1) that while we identify areas as landscapes of outstanding natural value or as important under section 7, these areas are <u>not</u> zones;

94 [1999] NZRMA 209 at 231-232; discussed in Chapter 6 above.

(2) that just because findings are made about the national importance or section 7 importance of some landscapes does not mean that development in those areas is inappropriate;

(3) that our decision only covers parts of the district[95];

(4) in respect of the areas not referred to in this decision we will need to hear further submissions and/or evidence, and make site inspections.

105. When considering the issue of outstanding natural landscapes we must bear in mind that some hillsides, faces and foregrounds are not in themselves outstanding natural features or landscapes, but looked at as a whole together with other features that are, they become part of a whole that is greater than the sum of its parts. To individual landowners who look at their house, pasture, shelterbelts and sheds and cannot believe that their land is an outstanding natural landscape we point out that the land is part of an outstanding natural landscape and questions of the wider context and of scale need to be considered. The answer to the question where the outstanding natural landscapes and features end is not a technical one. It is a robust practical decision based on the importance of foregrounds in (views of) landscape. We do not consider this over-emphasises the pictorial aspects of landscape, merely uses them as a determinative tool.

106. The district can be roughly split up into territorial sections:

(1) Mt Aspiring National Park

(2) Lake Wakatipu

(3) The Wakatipu Basin comprising a circle with Queenstown and Arrowtown on its circumference

(4) The Kawarau River east of the Kawarau Bridge

[95] Section 73(3) allows a district plan to be prepared in territorial sections.

(5) The mountains east of Lake Wakatipu across the Shotover, Arrow and Cardrona catchments to the eastern boundary of the district on the Pisa Range

(6) Lakes Wanaka and Hawea and the valleys of the rivers running into them

(7) The Clutha Flats below Lakes Wanaka and Hawea.

This interim decision does not deal with areas (5), (6) and (7) because of time constraints in issuing this decision, a lack of evidence, and a lack of opportunity to inspect the areas. We consider it is more important in the meantime to identify the obvious outstanding natural landscapes around Lake Wakatipu and those in the pressured Wakatipu Basin.

107. We find as facts that:

(1) Mt Aspiring National Park is an outstanding natural landscape;

(2) Lake Wakatipu, all its islands, and the surrounding mountains are an outstanding natural landscape. This area comprises all the land in the district south and west of the lake (planning maps 6, 10, 12, 13 in the revised plan) excluding Glenorchy, Kinloch, and Kingston;

(3) The Kawarau valley east of the Kawarau Bridge is not an outstanding natural landscape. Viticulture may be turning it into an outstanding landscape (but not a natural landscape). It is certainly an increasingly important landscape and its visual amenities require careful consideration;

(4) The Wakatipu Basin is dealt with below.

108. The Wakatipu basin:

(a) excludes all land zoned residential, industrial, or commercial in Queenstown, Arthurs Point and Arrowtown;

(b) excludes any ski area sub-zones;

(c) excludes the Crown terraces east of and above Arrowtown;

(d) is bounded on the outside by a rough circle (travelling clockwise):

- From Sunshine Bay north/northwest to Point 1335 in the south ridge of Ben Lomond;
- north to Ben Lomond (along the ridge);
- north east to Bowen Peak;
- north-north east down the leading ridge to the Moonlight Creek-Shotover River junction;
- north east up the ridge to Mt Dewar;
- down to Skippers Saddle
- north east along the ridge running north-east to Coronet Peak
- along the crest of the range through Brow Peak, Big Hill
- straight line across to Mt Sale
- south along the Crown Range to Mt Scott
- south in a straight line across the Kawarau River to Cowcliff Hill (557m)
- up the crest of the ridge to Ben Cruachen
- southwest to Double Cone (the Remarkables)
- south along the Remarkables to Wye Creek
- down Wye Creek to Lake Wakatipu
- north around the shore of Lake Wakatipu to Kelvin Golf course
- across to Sunshine Bay

109. Within the Wakatipu Basin there is an outer ring which we find to be an outstanding natural landscape. The outer edge of that ring is given in the previous paragraph and we consider is relatively uncontroversial since the land on the outside of the ring is probably mostly outstanding natural landscape also. Indeed in this chapter we have already found

some of the surrounding landscapes to be outstanding natural landscapes.

110. In terms of the amended ***Pigeon Bay*** factors, the criteria we consider as most significant in the exercise to establish the inside of the ring are:

(a) natural science factors - topographically the basin is bounded by a ring of mountains and Lake Wakatipu; and ecological factors - the mountains have a large component of rock and tussock grasslands. The lower or inner margin of the outstanding natural landscapes is constituted variously by:

(i) the change of slope from glacially cut hillside to terraces;

(ii) foregrounds (from roads) over land not excessively subdivided and domesticated;

(iii) the change from more 'natural' to pastoral vegetation patterns;

(iv) by linking the ecologically or topographical boundaries with practical defined lines.

(b) aesthetic values

The aesthetic qualities of the basin are well-known, although we note that the foreground of the chocolate-box and calendar views around Lake Hayes and Arrowtown (for example of willows, poplars, vineyards or larches) are less strongly natural. The views, which are part of the aesthetic/amenity values, are a strong determinant of inner margins, because public views and their foregrounds need protecting in the context of the basin as a whole.

(c) expressiveness (legibility)

It was WESI's case that the whole landscape (especially the glacially sculpted hills) shows the forces that created it. That was not challenged and we readily accept it.

(d) transient values

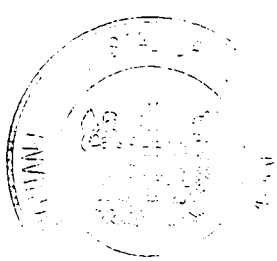
These are not relevant to our findings as to the inner edge of the outstanding natural landscapes.

(e) shared and recognized values

As we have repeatedly said, all parties recognized that the district's landscapes are important, but for unclear reasons most were unwilling to state where the nationally important landscapes ended. We find we can make determinations on factors (a) to (c) above. Factors (e) to (g) of the Pigeon Bay criteria are of little assistance here.

111. Applying those criteria as we have found them in this case, we hold that the inner edge of the ring - inside which the landscape is not an outstanding natural landscape but is at least in part visual amenity landscape – is the area inside the black lines marked on the attached Appendix II[96]. The edge runs approximately:

- Starting at Sunshine Bay, clockwise around Queenstown (as zoned) to Frankton
- doubling back around Ferry Hill to the north at the change of slope, and then
- west to Queenstown Hill Station (so that Queenstown Hill, Sugar Loaf, Lake Johnson, and Ferry Hill are included in the outstanding natural landscape)
- across the Shotover River immediately west of Queenstown Hill homestead
- up the Shotover River at the edge of the terrace to the next marked stream and up the stream to Littles Road
- west along Littles Road to the edge of the escarpment



[96] A copy of part Infomap Series 260 Maps E1 and F41. The dotted lines are:
(a) either where the boundary follows a zone boundary in the revised plan; or
(b) where we have some uncertainty as to where precisely to draw the line.

- north to Point 558m and then north east through Trig J (596m) to the formed end of Mountain View Road
- north to Malaghan Road
- along Malaghan Road to the point south of the tank at Map Reference[97] 768795
- north to the water race
- northeast around the water race to Bush Creek
- down Bush Creek to the Arrow River confluence and then downstream to the Arrow Bridge on SH6 (excluding the Whitechapel Flats)
- southeast along the Kawarau Gorge Road to approximately 300 m short of the Swift Burn
- southwest across the Arrow River and across the flats to the power lines
- west along the line of pylons past Trig T to the first 400m contour on Map F41
- northwest to the 400m contour on the eastern side of Morven Hill
- north round Morven Hill along SH6 (excluding existing residential land) to Hayes Creek
- west across Hayes Creek south of the side road
- south west (and up the Kawarau River and then the Shotover River) at the top of the lowest terrace on the northern bank of the Kawarau River (inside trig M above the existing homes)
- across the Shotover River at the power lines around the sewerage ponds and up to and south along the top edge of the Frankton Flats
- and up the Kawarau River to Riverside Road
- across and downstream to the 400m contour

[97] Map F41.

- south along the 400m contour to Remarkables Station homestead
- around three sides of the homestead - up to the tank and back down to the power lines
- south along the power lines until due east of Trig B
- due west to Lake Wakatipu
- inside Trig E (east of Jack's Point) to the two tanks and around the base of Peninsula Hill to SH6
- around Peninsula Hill excluding urban zoned land in Frankton
- then back to Sunshine Bay around the lake edge as shown on Appendix II

A separate area on Crown Terrace is excluded from the outstanding natural landscape and thus comprises an enclave of visual amenities landscape.

112. There are also three separate outstanding natural features in the Wakatipu Basin and marked "ONF" on Appendix II:
    (a) Trig 12391 at Arrowtown
    (b) Lake Hayes
    (c) Slope Hill

Morven Hill and Queenstown Hill (and its satellites), and Kelvin Peninsula's are also outstanding natural features, but since they are all contiguous to an outstanding natural landscape we only need include them in the latter. The area between Slope Hill and trig D (506m) to the north is of some concern to us because of its visual prominence from a distance. We reserve leave for any party to argue that area should be included in the outstanding natural features of the district. We should also state that our line defining the inner edge of the outstanding natural landscape in the basin is obviously not a surveyed boundary. We are

prepared to move the edge at some points (other than the dotted lines on Appendix II) if any party:

(a) can show us why it is necessary to do so as a matter of law (since zone boundaries will be the real issue); and

(b) calls cogent evidence on the matter

Visual amenity landscapes

113. We now consider the landscapes of the district which are not outstanding natural landscapes but which are visual amenity landscapes either because they are important in respect of visual amenities, or outstanding but insufficiently natural. There may be other reasons for significance, but the evidence did not identify any.

114. Landscapes may be important under section 7 of the RMA for a large variety of reasons. For example we find that the land to the south of Malaghan Road up to the crest of the ridge running parallel with the road is important both in respect of the maintenance of amenity values, and more generally of the quality of the local environment. Similarly, the land to the south of State Highway 6 along the Ladies Mile, and on the Frankton Flats is important as part of the approach to Queenstown[98].

115. We have also already identified an example of a landscape that is at least potentially outstanding but is not an outstanding natural landscape nor likely to be one: the Kawarau Gorge below the bungy bridge. Its landscape has been greatly modified over the last 1000 or so years, and at an exponentially increasing rate - first burning, followed by

[98] See revised plan part 4.9 "Urban Growth" to which we refer later.

goldmining, grazing, more burning, introduction of exotic grasses, trees, and weeds (elder, thistles, sweet briar, hawthorn are the larger species) and animals (sheep, rabbits, mustelids), farm houses and buildings, and fences. All these have occurred in a handsome gorge that when pristine may have been an outstanding natural landscape. Largely within the last decade the flats in the gorge have sprouted grape vines and lines - and it is the latters' posts, wires and tubular plastic shelters which reduce the naturalness of this landscape. Yet the meticulous orderliness of the vineyards makes (to some eyes) a most attractive landscape when contrasted with the wildness of the backdrop of sweet briar, shrubland and tussock. The vineyards are a useful example of the way human intervention through operation of the market can achieve largely beneficial environmental outcomes.

116. Looking at the Wakatipu Basin as a whole, we consider that there is a second ring of visual amenity landscapes inside the first ring of outstanding natural landscapes. Inside the inner (second) ring of visual amenity landscapes there is a core around four roads in which we consider there are lesser landscape values (but not insignificant ones) which may not be visual amenity landscapes.

It is the area around:

- Lower Shotover Road - Hunter Road
- Speargrass Flat Road
- Slope Hill Roads (west and east)
- Arrowtown - Lake Hayes Road

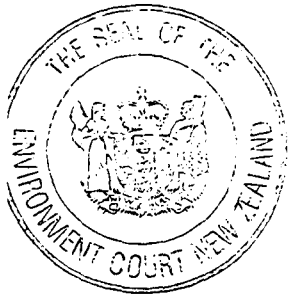
The area is rather larger than that description suggests, because it is roughly the land below the 400m above sea level contour (on Appendix II). We do not make findings on these matters because neither the category of 'visual amenity' landscapes nor the third category was described by any witness in detail - although both were identified by Mr

Rackham. We will need to hear further evidence and submissions before deciding where the visual amenity landscapes end, and what is sustainable management of the third category of landscapes.

117. Lastly the scenic rural roads as they were identified in the notified proposed plan[99] are (with our numbering):

(1) All state highways
(2) Queenstown-Glenorchy Road
(3) Glenorchy-Routeburn Road
(4) Hunter Road
(5) Lower Shotover Road
(6) Speargrass Flat Road
(7) Malaghan Road to Arrowtown
(8) Lake Hayes-Arrowtown Road
(9) Crown Range Road
(10) Mt Aspiring Road
(11) Hawea-Luggate Road
(12) Skippers Canyon Road
(13) Littles Road
(14) Centennial Avenue to Arrow Junction

We hold that numbers (4), (5), (6), (8) and (13) cannot be scenic rural roads since they are not in outstanding natural landscapes, nor on the edge of such landscapes or features. We return to the status of the others later, if we decide such a status should be reinstated in the district plan.



[99] Notified plan Appendix [pp.8/4-8/5].

Chapter 8 : Issues relating to landscapes

118. Having identified the outstanding natural landscapes, features and other important landscapes of some areas within the district we now have to identify the significant issues[100] in respect of those areas. As an aside in respect of drafting plans we can state here that our technique for identifying issues is to phrase them as questions. That may assist in guarding against them being simply objectives or policies in disguise.

119. For its part, the Council, in the revised plan identifies only two relevant issues. They are:

> ***4.2.4 Issues***
>
> *The District's landscapes are of significant value to the people who live, work or visit the District, and need to be protected. Increasing development and activity makes the District's landscape particularly vulnerable to change.*
>
> *Land use and development activities in the District are varied and intensive. The following significant resource management issues in respect of the landscape have been identified:*
>
> ***i Potential detraction of landscape and visual amenity of the District***
>
> - ***Development and activities may detract from the landscape***
>
> *The landscape provides both a backdrop to development as well as the economic base for much activity. Because of the quality of the landscape and*

[100] Section 75(1)(a).

the important role it plays in the District's economy it is necessary to ensure that buildings and developments are managed to mitigate any adverse effects resulting from location, siting and appearance.

ii ***Potential detraction of the Open Character of the Rural Landscape***

- ***A significant part of the District's visual character comes from the open expanse of its landscapes and the views these afford***

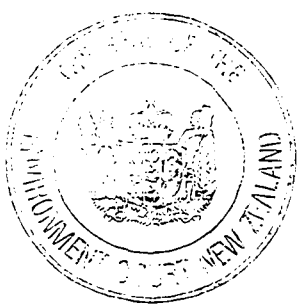
  Visual impact may be increased when the form and colour of structures contrast with the surroundings and when they are located in visually sensitive areas. The demand for housing and other developments in the rural area is growing and poor location, siting and appearance of these developments threatens to increase the level of modification in the rural landscape and to reduce its open character. The hill and mountain slopes surrounding the lakes assume greater importance because of their role in providing a setting for the lakes[101].

120. WESI sought a fuller statement of issues under the headings:

(i) General degradation of and detraction from the landscape and visual amenity of the district

(ii) Degradation of landscapes which have special characteristics and are highly visible

(iii) Degradation of special landscape features



101 Revised plan p.4/7.

(iv) Degradation of the visual and landscape amenity of the shorelines and adjoining hillslopes.

Fairly detailed descriptions of specific landscapes and features accompanied that statement of issues.

121. The Council did not support the addition of any of the new 'policies' sought by WESI. Ms C O Hume's written evidence for the Council, usually clear and accurate, is slightly confusing at this point because she refers to policies in part 4.2.4 when she is clearly referring to the issues.

122. On balance because its landscapes are a very significant issue for the district - as the introductory words for the issues in the revised plan state expressly - we consider that the brevity of the revised plan, recommended by Ms Hume and Ms Dawson is too skeletal. No expert resource manager gave evidence opposing the opinions of Ms Hume and Ms Dawson. However their suggestions for appropriate issues have two problems:

(a) they do not follow from a clear statement of the facts - in particular they have not identified the outstanding natural landscapes - they have simply identified all the landscapes of the district as important. As already explained we consider that approach is wrong, and even the landscape experts on whom they relied expressed a sense of unease about the approach in the revised plan.

(b) the brief issue statements they approve in part 4.2 - basically those in the revised plan - do not follow from either the facts or from the more general statements in part 4.1.

123. On the other hand we consider WESI's statement of issues is far too long to be useful. Further, many of their issues are, in effect, objectives

and policies. There is a happy medium. We consider that some more focused issues can be stated in respect to landscape and visual amenity. It might be useful to add the following subordinate issues to the statement of issues in paragraph 4.2.4 of the revised plan. However since none of the parties sought similar issues be added we will not do so, unless we receive an application to do so. It is appropriate for us to state that these are the sub-issues we have considered when deciding the appropriate objectives and policies. They are:

Issues

(1) What is inappropriate subdivision and development of the outstanding natural landscapes of the district?

(2) How far should the domestication and/or commercialisation/industrialisation of outstanding natural landscapes visual amenity landscapes and other rural landscapes be allowed to continue?

(3) How far should urban sprawl be allowed to run?

(4) Should foregrounds be protected?

(5) How far should farming, forestry and other rural activities be managed to maintain values of outstanding natural landscapes?

(6) Should there be landscape objectives, policies, methods (including rules) in rural areas (other than outstanding natural landscapes/neighbouring landscapes, rural scenic roads) e.g. in outstanding landscapes (but not outstanding ***natural*** *landscapes)?*

(7) To what extent do the activities identified in part 4.2.3 (Activities) need to be managed?

(8) Is there any need to define urban edges on landscape grounds?

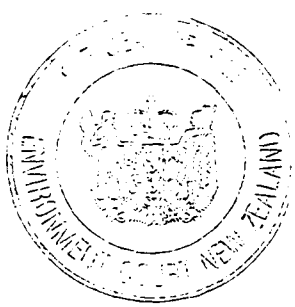
(9) Whether there is a need to maintain the open character of outstanding natural landscapes and of visual amenity landscapes?

124. We have considered whether, in the light of WESI's case and Mr Kruger's evidence in particular, we should state that one of the significant issues for the district is the freeholding of 'pastoral lease' land held under the Land Act 1948 and its companion the Crown Pastoral Land Act 1998. It is interesting to speculate how many of the open landscapes valued by the citizens of and visitors to the district have been retained in that largely unsubdivided and relatively indigenous ('unimproved') state just because they are subject to pastoral leases, rather than to any provisions or practice under district schemes under the Town and Country Planning Act 1977. In the end the form of land tenure is irrelevant. If land held under a pastoral lease is nationally important because it is contained within an outstanding natural landscape then that is a matter that the lessee should take into account when and if they freehold. If they subsequently find their options for use and subdivision limited, then section 85 of the RMA may come into play. In that case, a former lessee's knowledge (or imputed knowledge) that the land was in an outstanding natural landscape before freeholding may be of some relevance to the Environment Court in deciding whether the interest in land is incapable of reasonable use, or whether there is an unfair and unreasonable burden[102] on the freehold subdivider.

125. Ms Munro, for the Council, suggested some extra explanatory statements relating inter alia to land held under pastoral leases. We do not consider them necessary as such, but in a shortened amended form

[102] Section 85(3) RMA.

one will alert readers of the district plan to the issue, and so we add it as issue (iii) in Part 4.2 of the district plan.



126. This is the appropriate point to remember that we are to achieve the integrated management of the effects of the use, development or protection of land[103] in the district. That is particularly important in respect of such an uncertain and complex concept as landscape. Our conclusions below are a suite of interlinked policies which are connected to each other and to the existing district-wide policies in the revised plan that are unchallenged by references. The policies are stated in (roughly) greater degree of specificity, so specific policies over-ride general ones if they conflict: ***NZ Rail Ltd v Marlborough District Council***[104]. For example in this case the later specific policy on 'utilities' over-rides an earlier one on 'structures'.

127. Some general explanation of how we arrived at the policies we are setting may assist here. First we observe that there was a significant gap between what WESI sought on the one hand, and what the other parties considered appropriate on the other hand. None of the witnesses was unshaken in cross-examination, nor was anybody's evidence in chief wholly satisfactory. Consequently, we had to frame policies not sought by either party, but somewhere in between. As a further consequence our decision on these will only be final as to their spirit and intentions. We will reserve leave to the parties to improve our drafting.

128. Secondly, the guiding objective for Part 4.2 of the district plan refers to "subdivision and development". However only once do WESI's references refer to subdivision in respect of policies, so far as we can see. Consequently we have referred to subdivision in most of the

103 Section 31(a).
104 [1993] 2 NZRMA 449 at 460.

policies even though it was not expressly referred to. Our justifications for proceeding in that way are the two mentions of subdivision referred to above – especially in the guiding objective. Further, we accept as a matter of mixed fact, degree and law that subdivision can have an effect on the environment. That view was expressly opposed by Messrs Clark, Fortune & McDonald ("CFM"), a firm of surveyors opposing WESI and with their own reference in Part 15 of the plan. However it runs counter to ***Yates v Selwyn District Council***[105] to which CFM's counsel did not refer. That case stated:

> *Section 11 of the [RMA] recognises that allotments which are usually (but certainly not always) contained in one certificate of title are fundamental units in terms of the creation of property rights which of course include (from an economic point of view) rights in resource consents or certificates of compliance under the Act .... The smaller an allotment the greater the chances there are of causing external effects (or not being able to internalize effects) and of course this case is a classic example of that. Subdivision down to 2 hectares might mean that externalities in the form of sewage, pollution plumes or reverse sensitivity effects (such as complaints from what are, in effect, lifestyle units on the two hectare blocks about noise or spray or the other incidents of rural use) increase. In summary: subdivision of land tends to cause multiplication of complaints about effects.*

129. ***Yates*** was not particularly concerned with landscape issues. However we consider the principle it states is correct and does apply when landscapes are in contention. Subdivisions draw lines across the landscape, and in fact those lines tend to be marked by fences or trees or other changes in vegetation patterns. All those demarcations have

105 Decision C44/99 at p.21.

effects on the visual quality of the landscape and thus need to be taken into account.

130. Even Mr N T McDonald, one of the referrers, appears to recognize this. His written evidence states:

> *I acknowledge that Part 4 of the [revised plan] dealing with district wide issues does not adequately deal with section 6(b) issues as they relate to subdivision.*

His view was that, provided the Part II matters relating to subdivision were "adequately provided for" in Part 15 of the district plan there would be no need to deal with them in Part 4. However we are by no means satisfied that the agreed proposals by CFM and the Council begin to satisfactorily state subdivision policies in the light of Part II of the Act. We return to the subdivisional issues and that agreement in Chapter 11.

The parties' proposals

131. In the revised plan the general **objective** in Part 4.2 of the plan (dealing with landscape and visual amenity) read:

> *Subdivision, use and development being undertaken in the District in a manner which avoids potential adverse effects on landscape values*[106].

[106] Objective 4.2.5 [Revised plan p.4/7].

The only issues raised by the parties were:

(a) whether the words "remedies or mitigates" should be added after "avoids"; and

(b) the words "and visual amenity" should be added after "landscape" and before "values".

Everybody supported these changes except Mr Lawrence who was silent on the issue. We consider the changes are appropriate if rather vapid since, in effect, they merely co-ordinate and repeat parts of the requirements of Part II of the Act. There was little disagreement that the general objective should read instead:

> ***Objective:***
>
> ***Subdivision, use and development being undertaken in the District in a manner which avoids, remedies or mitigates potential adverse effects on landscape and visual amenity values.***

132. Nobody sought to retain, without amendment, the first three **policies**[107] of the revised plan which deals with future development, structures and new urban development. In the light of the concession by all parties that all of the landscapes of the district are important, we find that those policies are completely inadequate. Instead Ms Dawson, after considering Ms Hume's recommendations suggested the four policies which, after some further amendment in the course of cross-examination by Mr Todd, read:

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[107] Revised plan p.4/7.

Policies:

1. Future Development

To avoid, remedy or mitigate the adverse effects of new development in those areas of the District where the landscape and visual amenity values are vulnerable to potential detraction.

To encourage new development to occur in those areas of the District with greater potential to absorb change without detraction from landscape and visual amenity values.

2. Outstanding Landscapes

To avoid (remedy or mitigate) any adverse effects of development on the character and quality of the outstanding landscapes of the District.

3. Highly Visible Landscape Areas

To avoid, remedy or mitigate the adverse effects of development on the landscape and visual amenity values of those parts of the landscape which are highly visible from public places and other places which are frequented by members of the public generally.

4. Structures

To preserve the visual coherence of the landscape by:

- *encouraging structures which are in harmony with the line and form of the landscape.*
- *avoiding, remedying or mitigating the adverse effects of structures on the skyline, ridges and prominent slopes and hilltops.*
- *encouraging the colour of buildings and structures to complement the dominant colours in the landscape.*
- *encouraging placement of structures in locations where they are in harmony with landscape.*
- *promoting the use of local, natural materials in construction.*
- *providing for a minimum lot size for subdivision.*
- *limiting the size of corporate images and logos.*

133. In answer to a question from the Court she stated that the words 'remedy or mitigate' in her policy 2 might be removed. She deleted any policy for new urban development. For her part Ms Hume did recommend an amended policy for new urban development as follows:

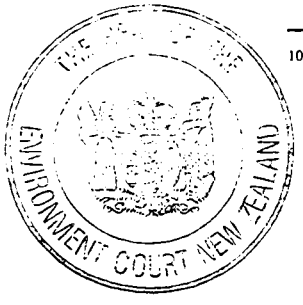
> *5. New Urban Development*
>
> *To maintain the open character of, and minimise the level of modification in the landscape, by avoiding sprawling or sporadic subdivision for residential or commercial activities outside of the areas already occupied or zoned for such use.*

134. For its part WESI sought more detailed policies to replace the three policies in the revised plan. It suggested policies for:

- *Future development (separately for*
  (a) Wanaka-Makarora-Hawea
  (b) Wakatipu Basin
  (c) Upper Wakatipu - Glenorchy area)
- *Highly Visible Landscape Areas*
- *Special Landscape Features*

Future development and landscapes

135. We consider that outstanding natural landscapes and features should be dealt with in (at least) two parts: the Wakatipu Basin and the rest of the district[108]. The residual policy is largely as the experts agreed in respect of the 'outstanding landscapes' of the district. We also agree with Ms



[108] We say 'at least' because this decision comes to no conclusions as to the outstanding natural landscapes outside the Mt Aspiring National Park and the greater Wakatipu basin.

Dawson and Ms Hume that there should be a general policy of avoiding, remedying or mitigating adverse effects of subdivision and/or development on outstanding natural landscapes. We consider that the words 'remedy or mitigate' should be added because there may be places in which some development could be allowed if some substantial remedial work enhancing the naturalness (e.g. by removal of fences or a house and planting of native tussock or grasses) was carried out.

136. The Wakatipu Basin is more difficult to manage sustainably. The outstanding natural landscapes and features of the basin differ from most of the other outstanding natural landscapes of the district in that they are more visible from more viewpoints by more people. The scale of the basin is also important as Mr Kruger pointed out. People in the basin are never more than 2-3 kilometres from an outstanding natural feature or landscape. Consequently, we find that it is generally inappropriate to allow any development for residential, industrial or commercial activities on the outstanding natural landscape or features. We accept Mr Kruger's evidence (and Mr Rough said something similar) that, for these reasons, the Wakatipu Basin needs to be treated as a special case and as a coherent whole. We find that there has been inappropriate urban sprawl in the basin - in particular on Centennial Road in the vicinity of Arrow Junction and again along parts of Malaghan Road on its south side. It is arguable from observation that the housing along McDonnell Road (on the top of a prominent terrace) is also inappropriate although we heard no evidence on that issue[109].

[109] This is not the first time this Court or its predecessor, the Planning Tribunal, has commented on this issue: ***Design 4 Ltd v Queenstown Lakes District*** (1992) 2 NZRMA 161 at 169.

We consider the cumulative effects have already gone further than is desirable. In the outstanding natural landscape[110] of the Wakatipu Basin, and on the outstanding natural features in it, any further structures are undesirable – they should be avoided. In the visual amenity landscape (inside the outstanding natural landscape) structures can be built, with appropriate remedial work[111] or mitigation down to some kind of density limit that avoids inappropriate domestication.

137. On this issue we prefer the evidence of Mr Kruger to that of Mr Rackham and the other landscape experts. The latters' argument that the capacity of the landscape to absorb development should be assessed on a case by case basis does not impress us. While there are dangers in managing subjective matters rather than letting the market determine how the landscape should be developed and altered, those factors are outweighed when the appropriate management is the status quo and there is statutory sanction for the protection of the outstanding natural landscape from inappropriate subdivision and development. Management under a plan may avoid inconsistent decisions, and cumulative deterioration of the sort that has already occurred.

Visual amenity landscapes

138. It is the middle tier landscapes – the visual amenity landscapes - which are difficult to define. These include both areas which border outstanding natural landscapes and other landscapes which are insufficiently 'natural' although they may still be outstanding. They are loosely the 'highly visible areas' described by WESI in its case. Mr Rackham in his evidence said of these:

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110 In paragraph 108 we defined this to exclude the skifield areas (Coronet and The Remarkables).

111 e.g. removing inappropriate houses in the adjacent outstanding natural landscape or elsewhere in the visual amenity landscapes.

> *The WESI requests for changes to Policy 4 relate to visibility. In my opinion visibility, particularly from public viewpoints, does make a significant contribution to the appropriateness of a development in a particular location. However, visibility in itself is not the issue. A highly modified area may be eminently suited to development despite being highly visible. Conversely, a secluded location may be unsuited to development due to its other landscape qualities.* ***Consequently it is important that any such policy should convey the point that valued landscapes may become less suitable for development because of their high visibility. It is not correct to suggest that all highly visible areas are inevitably unsuited to development.***

139. Unfortunately he gave no examples of 'highly modified areas ... eminently suitable for development despite being highly visible'. We can think of no such areas on the perimeter of the Wakatipu basin although there may be some at its core. So while we agree with Mr Rackham in general terms - see ***Marlborough Ridge Ltd v Marlborough District Council***[112] - we disagree where there are modified areas adjacent to outstanding natural features or landscapes. Some kind of sensitive transition must be desirable. The question is whether the first policy suggested - "future development" - is enough. Our answer is that it is insufficient; and to have effective sustainable management more specific policies are necessary.

140. In this district we consider there are two further appropriate and complementary policies for visual amenity areas:

[112] 3 ELRNZ 483; [1998] NZRMA 73.

(a) specific policies for the visual amenity landscapes as 'highly visible landscapes';

(b) the scenic rural road concept (of course these run through outstanding natural and possibly other landscapes also).

Both issues relate in large part but not exclusively to the issue of urban sprawl so we deal with these issues in Chapter 10.

141. We find that the appropriate general landscape policies are 1-4 stated below:

Policies[113]:

1. Future Development

(a) To avoid, remedy or mitigate the adverse effects of development and/or subdivision in those areas of the District where the landscape and visual amenity values are vulnerable to degradation.

(b) To encourage development and/or subdivision to occur in those areas of the District with greater potential to absorb change without detraction from landscape and visual amenity values.

(c) To ensure subdivision and/or development harmonises with local topography and ecological systems and other nature conservation values as far as possible.

2. Outstanding Natural Landscapes (District-Wide/Greater Wakatipu)[114]

(a) To maintain the openness of those outstanding natural landscapes and features which have an open character at present.

(b) To avoid subdivision and development in those parts of the outstanding natural landscapes with little or no capacity to absorb change.

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113 We have shaded all the policies which we decide are necessary in the district plan (and differ from the revised plan).

114 Whether this is "District-Wide" or confined to the "Greater Wakatipu" area (other than the Wakatipu basin) depends on the outcome of the adjourned hearing.

(c) To allow limited subdivision and development in those areas with higher potential to absorb change.

3. Outstanding Natural Landscapes (Wakatipu Basin)

(a) To avoid subdivision and development on the outstanding natural landscapes and features of the Wakatipu basin.
(b) To maintain the openness of those outstanding natural landscapes and features which have an open character at present.
(c) To remedy or mitigate the continuing effects of past inappropriate subdivision and/or development.

4. Visual Amenity Landscapes

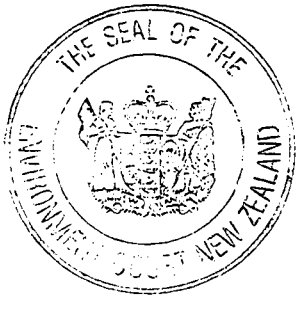
(a) To avoid, remedy or mitigate the adverse effects of subdivision and development on the visual amenity landscapes which are:
- highly visible from public places and other places which are frequented by members of the public generally; and
- visible from scenic rural roads.

(b) To mitigate loss of or enhance natural character by appropriate planting and landscaping.

142. Policy 1(c) was not specifically sought by any party but we consider it derives from the compromise we are imposing on what WESI sought which was:

> *To avoid the adverse visual effect of development on the landscapes and visual values of ...*

By adding the words "remedy or mitigate" to 1(a) we give scope for further development, and in that case some guidance as to the remedial work or mitigation appropriate and we achieve that by adding policy 1(c). The policy also attempts to link the landscape policies back to the nature conservation policies. In relation to our policy 3 some counsel submitted that a policy should refer to effects of activities (or, by implication, buildings) rather than seek to control activities (or buildings) themselves. In general terms we agree it is often preferable to do so, but buildings may be a special case, especially when considering landscape issues. In such a case it is often the building



itself which is the adverse effect. To speak of the adverse effects of buildings is to make life (and causation) unnecessarily complicated.

143. We also hold that it would be useful to have a specific policy in respect of outstanding natural features, to emphasize their uniqueness. We consider WESI's policy is appropriate and thus we add:

> 5. Outstanding Natural Features
>
> **To avoid subdivision and/or development on and in the vicinity of distinctive landforms and landscape features, including:**
>
> - **in Wanaka/Hawea/Makarora; [....yet to be resolved by further hearing]**
> - **in Wakatipu; the Kawarau, Arrow and Shotover Gorges; Peninsula, Queenstown, Ferry, Morven and Slope hills; Lake Hayes; the Hillocks; Camp Hill; Mt Alfred; Pig, Pigeon and Tree Islands.**

Structures

144. As for structures we do not consider it appropriate to have general aesthetic criteria for all landscapes of the district, indeed we are reluctant to impose any at all. However we accept there is a case for such criteria in respect of the first two categories of landscape we have identified:

- outstanding natural landscape and features[115]
- 'visual amenity' landscapes[116].

115 Section 6(b).
116 Section 7.

However before we can come to any conclusions about structures we need to examine the issue of urban sprawl which is one subject in the next chapter.

Chapter 10 : Policies - Urban Growth

The parties' proposals

145. References by WESI[117] and the Minister for the Environment ("the MFE")[118] raised questions about policies on "new urban development" and "established urban areas". The policies challenged by WESI, MFE and various section 271A parties represented by Messrs More, Todd and Goldsmith stated[119]:

> ***(3) New urban development***
>
> *To maintain the open character of, and to minimise the level of modification in the landscape, by:*
>
> - *avoiding sprawling or sporadic subdivision for residential or commercial activities outside of the area already occupied or zoned for such use.*
>
> ***(4) Established urban areas***
>
> *To retain and enhance the distinctive identity of existing urban areas.*

146. For reasons explained earlier, much of the evidence to be called on this issue was actually heard in respect of the general references on Part 4 at the earlier part of the hearing. As stated earlier it was only part way through that hearing that counsel for the Minister for the Environment advised us that the MFE case should have been heard at the same time. Consequently these urban development issues were adjourned so that they could be heard at the same time as the MFE's reference. That had

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117 RMA 1043/98.
118 RMA 1194/98.
119 Paragraph 4.2.5 Objective and Policies [Revised plan p.4/7].

the result that the evidence of the following witnesses was carried forward:

- Mr Wild
- Mr Kruger
- Ms Dawson.

Also, with the consent of all other interested parties the evidence of Ms Buckland and Mr Glasson was carried forward from a Terrace Towers hearing[120] which relates to the Frankton Flats. At the reconvened hearing none of the parties sought to cross-examine any of the witnesses who had already given evidence. We then heard evidence from two further witnesses: Ms L J Woudberg (a policy analyst for the MFE) and Ms C O Hume for the Council and submissions from those parties' representatives.

147. For his part the Minister for the Environment wished policy (3) to be deleted and called Ms Woudberg. After cross-examination by Mr Todd she considered the appropriate wording for a policy on new urban developments would state:

> ***New urban development***
> *To maintain the open character of the landscape by avoiding, remedying, or mitigating any adverse effects of subdivision and development in rural areas.*

This was rather weakened by her concessions to Mr More that that policy could be subsumed within the general future development policy (1) so that her new policy is redundant.

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120 RMA 1028/98.

148. On the other hand WESI wanted to amend the wording of the policies so they read:

> ***New urban development***
>
> *To maintain the open character of, and minimise the level of modification in the landscape, by:*
>
> - *restricting major new residential development outside of areas identified on the plan*
> - *requiring the preparation of detailed structure plans which identify major activity areas and building development form for new residential areas*
> - *restricting housing development within the semi-enclosed rural valleys to help maintain the natural setting*
> - *avoiding sprawling or sporadic subdivision for residential or commercial activities outside ... the areas already occupied or zoned for such use.*
>
> ***Established urban areas***
>
> *To retain and enhance the distinctive identity of existing urban areas by:*
>
> - *strongly identifying the edges of the existing urban areas*
> - *retaining and enhancing the rural landscape approaches to the towns and urban areas along the main approach roads.*

149. WESI was opposed to the reductionist approach to the suggested 'new urban development' policy whereby it was subsumed in the general "future development" policy. Mr Lawrence submitted that:

> *under the guise of 'enabling', policy is being reduced to general platitudes and repetition of phrases from the Act. Our view is that the Plan is to articulate the RMA in this district, not just repeat the*

Act ... Under the guise of improving words (or lines on maps) which pose problems of definition, the suggested alternatives are so general they need no definition. Our submission is that several of the options being offered to you pretend to solve problems but are in reality ignoring them.

150. We have some sympathy for that submission. There is an observable trend from the notified plan to the revised plan, increased in suggested solutions to us, which is to adopt a standard policy formula, parroting section 5(2)(c) of the RMA: to "avoid, remedy or mitigate the adverse effects of ...". We consider that policies with more detail may be of more assistance in both determining the relative methods of implementation, and in applying the policies when the district plan is operating.

151. Before we assess the contrasting approaches to new urban development in respect of landscape, we agree with Mr More that we must first consider what the issue is that these policies are intended to address. This is especially so since there is a separate section of Part 4 - Part 4.9[121] - which deals expressly with urban growth so the issues we are now considering relate mainly to the effects of urban growth and 'urban sprawl' on landscape. We add that some of the unchallenged policies in section 4.9 of the revised plan are protective of outstanding landscapes, and we consider that any new policies should be consistent in respect of landscape as it relates to urban growth in section 4.9.

152. The landscape issue as stated in the revised plan is:

[121] Revised plan pp4/39 - 4/43.

(ii) Potential detraction of the open character of the rural landscape

- *a significant part of the District's visual character comes from the open expanse of its landscapes and the views these afford.*[122]

We record that no party sought in any reference to have that issue deleted. WESI's reference simply sought to add further, more specific issues.

153. The key parts of the stated issue are its references to:
- 'open character'
- 'open expanse of ... landscapes and the views these afford'.

While it is correct that large parts of the district are relatively open in that they are not covered by forest or towns it is important to recognize that situation is:

(a) not completely natural - there has been considerable human influence first by Maori burning, and latterly and with more impact, by pastoral and other European practices;

(b) dynamic and changing.

The evidence was that there are many more trees and much more conscious landscaping now than there were in the Wakatipu Basin 100 years ago. We conclude that open character is a quality that needs only be protected if it relates to important matters, otherwise it should be left to individual landowners (subject to not creating 'nuisances' or other unacceptable adverse effects to neighbours) to decide whether their land

[122] Paragraph 4.2.4. Issues (Revised Plan) [p.4/7].

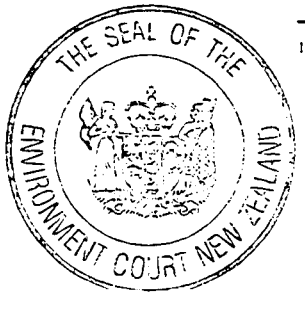
should be open or not. Of course in relation to section 6(b) landscapes which are outstanding simply because they are open, there is little difficulty in establishing need for protection. Similarly section 7(b) landscapes which are important because they give foregrounds to views of outstanding landscapes may also need protection.

154. While the open character of outstanding natural landscapes can be justifiably maintained, we do not see that it is appropriate to maintain the open character of all other landscapes. They may after all be improved:

- in an aesthetic sense by the addition of trees and vegetation; and/or
- in an ecological sense by the planting of native trees, shrubs, or grasses recreating an endemic habitat.

We consider that the protection of open character of landscapes should be limited to areas of outstanding natural landscape and features (and rural scenic roads).

155. Even in more closed-in landscapes there can be problems – and we agree with WESI's case about this – with what is loosely but understandably called 'urban sprawl'. We have stated that one issue is 'How far should urban sprawl be allowed to run?' Several counsel opposed the term 'sprawl' because of its emotive connotations. We think they overstate the difficulties: the words "urban sprawl" are a term referring to undesirable domestication[123] of a landscape. We also accept, as agreed by Ms Hume, under cross-examination by Mr Lawrence, that sprawl is 'development without an edge'.



[123] To extend the metaphor in ***Crichton v Queenstown Lakes District Council*** Decision W12/99 where the term was used of the chattels or fixtures (e.g. clotheslines/trampolines) that accumulate around dwellinghouses.

156. As far as new urban development is concerned we consider three landscape policies are needed - one for each of the general rural landscape categories:

(1) To maintain the open character of outstanding natural landscapes.

(2) To maintain and enhance the natural character of visual amenity landscapes.

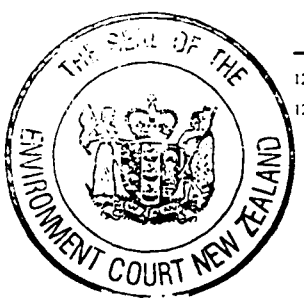
(3) We suggest, but do not decide, that an appropriate policy for other rural landscapes is to maintain rural character and capacity by providing 50m buffer strips (appropriately planted and landscaped) between any subdivision with lot sizes of less than 4ha and the adjacent land.

157. The distinction between (1) and (2) above is to encourage the planting of trees[124] as a way of maintaining natural character. This cannot be encouraged on most of the outstanding natural landscapes of the district because of the policy to maintain their 'openness'[125]. The justification for (3) in the preceding paragraph is only partly on grounds of protecting visual amenities. It also serves:

(a) to internalise the reverse sensitivity (to farming activities such as noise, smells, sprays etc) created by establishing residential activities in rural areas;

(b) to encourage efficient use of land by subdividing larger blocks (perhaps in more than one title or ownership) in a co-ordinated way rather than occasionally lopping pieces off single titles; and

(c) to encourage subdivisions to be self-contained in respect of services etc.



124 See policy 4.1.4 Policy 1.17 [revised plan p.4/3]
125 See our discussion of "Forestry" in Chapter 11 below.

158. We are also concerned that having density limits for subdivision in the third category of rural area, at least in the centre of the Wakatipu basin, sends the wrong signals. This is because a minimum lot size is inherently wasteful and needs to be justified, and secondly such a policy removes choices for landowners for no apparent environmental gain. Further, the character of this kind of landscape can be largely protected by private property rights e.g. by not subdividing, or by imposing restrictive covenants in respect of landscaping, or against further subdivision. Covenants can internalise 'nimby'[126] reactions at the time of subdivision. In such cases there may be no need for policies (let alone rules) specifying how to manage land on landscape grounds. There may, of course, be other issues as to services or ecological factors justifying restraints on subdivision.

159. At the same time we are mindful of the amenities of neighbours who might consider the qualities of naturalness and peace which they enjoy are ruined by what is in effect urban development next door. That is our reason for earlier suggesting 50m buffer strips between these subdivisions and rural neighbours. Also, without deciding issues under references we still have to hear, we consider there may be some merit in the Residential New Development sections contained in the notified plan[127] but dropped from the revised plan, and ask the parties to reconsider that in preparing for the relevant hearing.

160. We hold that the appropriate policies are a reworded compromise between the positions of the parties, as follows:

126 Nimby = not in my backyard.

127 Part 7.10 [notified plan p.7/69].

6. Urban Development

(a) To avoid new urban development in the outstanding natural landscapes of Wakatipu basin.

(b) To discourage urban subdivision and development in the other outstanding natural landscapes (and features) and in the visual amenity landscapes of the district.

(c) To avoid remedy and mitigate the adverse effects of urban subdivision and development where it does occur in the other outstanding natural landscapes of the district by:

- maintaining the open character of those outstanding natural landscapes which are open at the date this plan becomes operative;
- ensuring that the subdivision and development does not sprawl along roads.

(d) To avoid, remedy and mitigate the adverse effects of urban subdivision and development in visual amenity landscapes by avoiding sprawling subdivision and development along roads.

7. Urban Edges

To identify clearly the edges of:

(a) Existing urban areas;

(b) Any extensions to them; and

(c) Any new urban areas

- by design solutions and to avoid sprawling development along the roads of the district..

8. Avoiding Cumulative Degradation

In applying the policies above the Council's policy is:

(a) to ensure that the density of subdivision and development does not increase to a point where the benefits of further planting and building are outweighed by the adverse effect on landscape values of over domestication of the landscape.

(b) to encourage comprehensive and sympathetic development of rural areas.

(c) To adopt minimum lot sizes for subdivision in outstanding natural landscapes and visual amenities [except if a residential new development has been accepted by the Council].

Policy 8 is another policy not specifically sought, but because we are not adopting the rigorous relief sought by WESI and since we accept Mr Kruger's evidence about the dangers of cumulative adverse effects, we consider a policy in respect of avoiding cumulative degradation is important. The exception to policy 8(c) as to residential new development is a suggestion only since, as we have said, there are unheard references on whether that concept should be reintroduced to the district plan. If it is not then the exception will need to be deleted.

Frankton Flats

161. At the beginning of Chapter 9 we referred to relevant district-wide policies in the revised plan that are unchallenged. Some of these relate to urban growth – but more from the perspective of being in the urban areas looking out rather than, as in Chapters 9-10 to this point, being in the countryside gazing in to an urban area. We refer to section 4.9[128] which is headed "Urban Growth". The place where the urban growth issue meets from both directions (i.e. urban/rural and vice versa) most clearly is the Frankton Flats which is the site of the Queenstown airport, amongst other developments. Much of the land on the north side of the airport – between the airport and State Highway 6 – is zoned rural. We have already found as a fact that the rural land and the airport at Frankton are included in the visual amenity landscapes under section 7 of the Act. The Council obviously considers there are separate issues of

[128] Revised plan p.4/39.

importance in relation to Frankton because the revised plan states a specific "District-wide' objective and related policies as follows[129]:

> ***Integrated and attractive development of the Frankton Flats locality providing for airport operations, in association with residential, recreation, retail and industrial activity while retaining and enhancing the rural open landscape approach to Frankton along State Highway No. 6.***
>
> ***Policies***
>
> *6.1 To provide for the efficient operation of the Queenstown airport and related activities in the Airport Mixed Use Zone.*
>
> *6.2 To provide for expansion of the Industrial Zone at Frankton, away from State Highway No. 6 so protecting and enhancing the open space and rural landscape approach to Frankton and Queenstown.*

162. Mr More appeared for Terrace Towers NZ Pty Ltd ("Terrace Towers") in respect of future development of that part of the Frankton Flats which is owned by his client. Terrace Towers wishes to build a retail shopping complex between State Highway 6 and the airport. That aim is complicated by the objective and policy above. Mr More submitted that the 'open character' of Frankton has to be questioned as a matter of fact since:

- the western side and half the southern (Kawarau River) side are residential;
- the airport buildings and adjacent supermarket are larger complexes in the middle;

[129] Section 4.9, Objective 6 [p.4/43].

- there is Council's own recreation centre of the western end of State Highway 6;
- there is an industrial zone – to be enlarged significantly in the revised plan at the eastern end above the Shotover Terraces;
- various minor intrusions – a garden centre and several residences.

We agree: on the evidence we find that the Frankton Flats are not an outstanding natural landscape, and they are not particularly open. However, they are a visual amenities landscape and an important one because the objective and policies quoted above give it special emphasis.

163. There is no reference to this Court, of Objective 6 in Part 4.9 of the revised plan. Mr More submitted that we could rely on section 293 RMA to amend it although he did not go so far as to make such an application. In case it assists the parties we can state that while - consistent with our approach to visual amenities landscapes generally – we consider the openness of the Frankton Flats has been significantly compromised, we should not allow any further detraction from the amenities of the approach to Frankton. Our preliminary view is that 'openness' can be further compromised, but only if the naturalness can be maintained, or preferably enhanced. A landscape compromise that would allow Terrace Towers some use of its land, but improve the approaches to Frankton might be to use mounding and especially evergreen trees to screen any development (commercial or residential) behind. The trees might have to be set back up to 100 metres from the highway if State Highway 6 is to be a scenic rural road. These issues can be decided at the hearing of the Terrace Towers' reference which is to be reconvened at the end of November 1999.

Structures Revisited

164. Returning to the position of structures in the landscape, we consider the necessary policy is:

> 9. <u>Structures</u>
>
> **To preserve the visual coherence of**
>
> **(a) outstanding natural landscapes and features (subject to (b)) and visual amenity landscapes by:**
> - **encouraging structures which are in harmony with the line and form of the landscape;**
> - **avoiding, remedying or mitigating any adverse effects of structures on the skyline, ridges and prominent slopes and hilltops;**
> - **encouraging the colour of buildings and structures to complement the dominant colours in the landscape;**
> - **encouraging placement of structures in locations where they are in harmony with the landscape;**
> - **promoting the use of local, natural materials in construction;**
> - **providing for a minimum lot size for subdivision; and**
>
> **(b) outstanding natural landscapes and features of the Wakatipu Basin by avoiding construction of new structures for:**
> - **residential activities and/or**
> - **industrial and commercial activities; and**
>
> **(c) visual amenity landscapes**
> - **by screening structures from roads and other public places by vegetation whenever possible to maintain and enhance the naturalness of the environment; and**
>
> **(d) all rural landscapes by**
> - **limiting the size of corporate images and logos**
> - **providing for greater development setbacks from scenic rural roads.**

The wording in (a) is largely derived from Mr A D George's evidence for the Council. The policy in (b) reflects our decision that the outstanding natural landscapes and features of the Wakatipu basin are a special case requiring extra protection since almost all development is inappropriate. Policy (c) results from the matters discussed in Chapter

10 and results from our recognition that the visual amenity landscapes are no longer 'open' landscapes. Thus they can be developed to a degree but preferably in a way that potentially increases the 'naturalness' of the landscape. We reject WESI's other suggestions as to colour palette as too prescriptive. Mr George's wording on that issue seems more appropriate.

Scenic Rural Roads

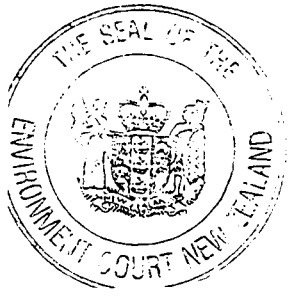
165. The main witness opposing the concept of scenic rural roads was Mr George who stated that the policy for structures preserving visual coherence of the landscape by:

> *- providing for greater development setbacks from scenic rural roads in order to retain their rural character*

- was flawed. He gave two reasons. First he said that:

> *there is little justification why particular roads have been given this status, other than that they are high usage roads, while others have not. [That] ... is contrary to the philosophy that the [revised p]lan has adopted; that being [that] the entire district is important in terms of landscape values.*

Secondly he stated that the Council has reserved controls over building platforms in its rules on subdivision[130]. In cross-examination by Mr Lawrence, Mr George conceded that development on flat land in the foreground could compromise landscape in the background, and that there was no specific policy dealing with this issue if WESI's suggestion was not reinstated.



130 Part 15: Zone subdivision standard 15.2.6.3.(iii) [revised plan p.15/17].

166. Mr George's first and general point is, in our view, another example of the fudging caused by the statement that all the landscapes of the district are important. The delusion caused by the statement is that it suggests general policies which in fact:

- do not protect what really needs protecting;
- cause policies and (potentially) methods of implementation to be set out when none are necessary.

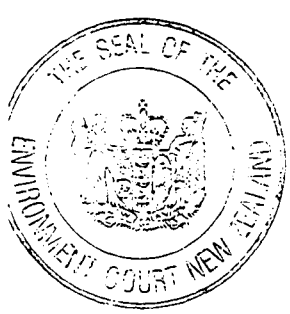
167. Mr George's second and specific point may not work either. If in some rural areas, subdivision is allowed as a controlled activity down to 4000m^2, then even a long thin section, say a 40m x 100m, must obviously necessarily entail a building on a platform within 100m of a road.

168. Nor do we think it is necessarily inconsistent resource management to isolate some roads as being scenic rural roads. There is admittedly a degree of arbitrariness, but we have to make a pragmatic decision. We consider the concept of protecting scenic rural roads should be reintroduced as WESI suggests, but limiting it to the following roads:

- **All state highways**
- **Queenstown Glenorchy Road**
- **Glenorchy Routeburn Road**
- **Malaghan Road to Arrowtown**
- **Centennial Avenue to Arrow Junction**
- **Crown Range Road**
- **Mt Aspiring Road**
- **Skippers Canyon Road**

[Any further roads in the Wanaka/Hawea/Makarora area that we are satisfied, after further hearing, should be added to the list].

We consider a reasonable case has been made to reinstate Appendix 8, as stated in the proposed plan[131], duly amended, in the district plan, under section 293 of the Act.



131 Appendix 8: Roading Hierarchy [notified plan p.8/1-8/5].

Chapter 11 : Policies - Utilities and Other Issues

[A] Utilities

169. There are issues as to how much control, if any, there should be over utilities (power and telephone lines, transmitters etc) in the district's landscapes. Transpower and Contact Energy each sought that the description of the 'activities' covered by 'utilities' include a statement recognising that the Council should when considering controls *tak[e] ... into account the needs of users and economics of providing for demands.* We consider such a statement is unnecessary in describing the activity and the issue it generates. Those matters are always relevant in terms of section 32, and, when considering resource consents, section 7(b) of the RMA.

170. For its part WESI wished to change the utilities policy by adding the underlined words in the following policy (and deleting those in brackets):

Utilities

To protect the visual coherence provided by the natural resources and open rural character by:

- *requiring utilities to be sited [where practicable] away from skylines, ridgelines, prominent locations, and landscape features*
- *encouraging utilities to be located along the edges of landforms and vegetation patterns*
- *encouraging utilities to be co-located wherever possible*

- *encouraging or requiring the alignment and/or location of utilities to be based on the dominant lines in the landscape.*
- *Requiring that structures be as unobtrusive as is practicable with forms appropriate for the landscape and finished in low reflective colours of dull grey, green or brown or derived from the background landscape.*
- *requiring that transmission lines [where technically and economically feasible] in the large towns, settlements and areas of landscape importance be placed underground.*

171. Telecom appeared and eventually filed a memorandum recording an agreed position with the Council. It sought to change policy 5 in the revised plan:[130]

- By deleting the words *"to protect"* in the phrase: *"To protect the visual coherence provided by the natural resources and open rural character ..."*
- And substituting

  "To avoid, remedy or mitigate ..."

That change makes no sense as it stands, and so we will not adopt it but modify the policy to achieve what we think the parties intended. We accept that this is a case where the policy should refer to the full panoply of section 5(2)(c) options.

172. The fundamental point in considering the siting of utilities in outstanding natural landscapes (at least in this district) is that it should not be as of right. A policy that states:

Siting, where practicable, utilities away from skylines etc ...

130 Policy 4.2.5 [revised plan 4/8].

always leaves the door open for a utility operator to argue that it is not practicable to site a utility anywhere else. That is not a correct approach. The policy should be one that gives the Council the final say on location within outstanding natural landscapes.

173. We consider there should be at least two different policies, one for landscapes and features in the Wakatipu basin and for outstanding natural features everywhere in the district, and the other for 'other' landscapes. This includes the rest of the district's outstanding natural landscape (subject to further submissions requesting different policies in the general Wanaka area). We consider that WESI's co-location policy has some merit – especially on Slope Hill – which should be an exception to the general policy on outstanding natural landscape. However, its colour palette policy is again unduly restrictive.

174. Therefore we decide the policy should <u>delete</u> the introductory words and the first bullet point and <u>substitute</u>:

10. <u>Utilities</u>

To avoid, remedy or mitigate the adverse effects of utilities on the landscapes of the district by:

- **Avoiding siting utilities in outstanding natural landscapes or features in the Wakatipu Basin (except on Slope Hill in the vicinity of current utilities).**
- **Encouraging utilities to be sited away from skylines, ridgelines, prominent locations, and landscape features**
- **Encouraging utilities to be co-located wherever possible.**

... [otherwise as in the revised plan]

In other respects we agree with Mr George's evidence that the policies in the revised plan under 'Utilities' are appropriate.

[B] Forestry and Amenity Planting

175. WESI seeks the reinstatement of the following Part 4 provisions for forestry and tree planting (as contained in the notified plan[131]):

4.2.5 Policies

Forestry

To maintain the open character of the landscape and avoid increasing its apparent level of modification by:

- encouraging forestry to be located on the outside edges of valley floors and that it be linked to an existing landform or vegetation edge.

- discouraging forestry on or around prominent ice sculptured ridges and features.

- encouraging planting to be located so that mature trees will not obstruct views from main roads and viewpoints.

- encouraging a limited range of species in each stand.

- encouraging interest be created by varying the density and spacing of the forestry trees rather than by the addition of ornamental planting.

131 Paragraph 4.2.5 policies 12 and 13 [notified plan p.4/24].

13 Amenity Planting

To protect the existing boldness and clarity of the natural landscape by:

- promoting the location of amenity planting only near settlements and in the immediate vicinity of structures in the rural environment,

- discouraging amenity planting in isolated stands away from urban or settlement areas.

176. Both those policies and Mr George's suggested improvements of the forestry policy (he opposed any amenity planting policy) suffer from their generality. They both refer to the 'open character' of the landscape, but as we have already discussed, some areas of the district are not 'open'. In particular, the lower areas of the Wakatipu basin are increasingly becoming a treed landscape. We do not see that there should be any policy against forestry in that area. Consequently, we consider the policy should state:

11. <u>Forestry and Amenity Planting</u>

Subject to policy 16, to maintain the existing character of openness in the relevant outstanding natural landscapes and features of the district by:

(a) encouraging forestry and amenity planting to be consistent with the patterns, topography and ecology of the immediate landscape.

(b) encouraging planting to be located so that mature trees will not obstruct views from scenic rural roads.

We exclude the policy from applying to visual amenity landscapes since these are landscapes which may benefit from the presence of trees. We do not consider there is any need for a separate amenity policy if amenity planting is included in the policy as stated above.

[C] Transport Infrastructure

177. WESI also sought to introduce a policy in respect of transport infrastructure which required that carparks in rural and natural areas be depressed below existing ground level and screened. We agree with Mr George that depressed car parks could cause ponding problems and that the existing policy of screening is adequate. The policy on transport infrastructure should remain unchanged.

[D] Subdivision

178. District-wide subdivisional issues were raised by Messrs Clark, Fortune & McDonald ("CFM") in respect of Part 15 (Subdivision etc) of the district plan. At the hearing we were handed a memorandum signed by their counsel and by Mr Marquet for the Council. The changes to the revised plan as agreed by those two parties were as follows:

Part 15.1.3 Policies 4.1 and 4.3

CFM and Council agree to the substitution of the words in Policy 4.1 with the following:

> ***"protect outstanding natural features and landscapes and nature conservation values from inappropriate subdivision"***

CFM and Council agree that in place of Policy 4.3 should be substituted the following:

> ***"To avoid, remedy or mitigate any potential adverse effect on the landscape and visual amenity values as a result of land subdivision."***

179. The policies are now rather too vague to be wholly desirable, especially since they do not sit easily with the policies in Part 4 of the district plan. We consider that it might be desirable to qualify those policies by adding introductory words to each:

> ***Subject to the landscape and visual amenity policies in Part 4.2 of the plan.***

We reserve leave for the parties to make submissions (and/or call evidence) on our suggestion.

Chapter 12 : Policies - Wellbeing and Energy

180. WESI and Central Electric Ltd also sought changes to other sections of Part 4 in their references. We now turn to these.

Social and Economic Wellbeing

181. First WESI requests a completely new section 4.9 on 'social and economic wellbeing'[132]. In the statement of 'resources and activities' at the beginning of its proposed section 4.9 WESI seeks a statement in the district plan stating:

> *Within [the Queenstown-Lakes District] environment recognition needs to be given to ensuring development and activities do not adversely effect (sic) community's economic and social wellbeing."*

Mr Lawrence made a similar submission:

> *The Society believes the purpose of the Act is the social and economic wellbeing of people and communities* ***while*** *looking after the environment and using resources with care.*

As Mr Goldsmith and Ms Ongley pointed out in their respective submissions, WESI's approach is misconceived. The purpose of the Act[133] is to promote the sustainable management of resources not the environment. We agree with Ms Ongley that the role of councils under the RMA in relation to social, economic and cultural activities is

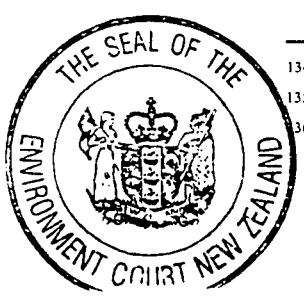
132 See paragraph 9 of this decision.
133 Section 5 RMA.

essentially a passive one. It is to enable[134] people and communities to provide for their wellbeing, not to direct how that is to be achieved. Consequently we do not have to consider the objectives and policies sought by WESI, or the evidence of its witness Mr M Wild in any detail on its proposed section 4.9 especially since, as we shall see, these proposals on wellbeing fail to pass the section 32 RMA tests in any event. WESI's failure to convince us on this section is not as damaging to it as it first appears, because the important policies it sought in its new section 4.9 related to landscape and we have been persuaded by its case (in parts) on some landscape issues.

Energy

182. WESI seeks to add explanatory statements to the energy issue[135]. Its first paragraph relating to consumption of fossil fuel is not a matter the RMA seeks to manage sustainably because minerals are expressly excluded: ***Winter and Clark v Taranaki Regional Council***[136]. As for the second policy this encourages new options of energy use, but we consider that the statement is too long to assist in the identification of the issue. It is unnecessary.

183. Central Electric Ltd in its reference sought a change seeking that on any plan change or resource consent application relating to hydro-electricity developments, the council should take into account, in addition to other listed factors: "the social and economic needs of the community". We do not consider that is appropriate for these reasons:



134 See ***Marlborough Ridge*** [1998] NZRMA 73 at 94-95.
135 Policy 4.5.2 [revised plan p.4/21].
136 (1998) 4 ELRNZ 506 at 512-513 referring to section 5(2)(a) of the RMA.

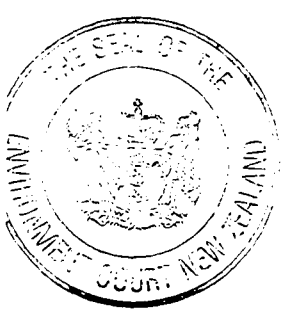
(a) this referrer seems to suffer from the same misconception as does WESI, that the Council has an active role in respect of social and economic needs;

(b) in any event efficiency must be had particular regard to[137];

(c) although the difficulties of assessing these matters should not be under estimated[138].

Summary

184. None of the changes requested and referred to in this chapter should be inserted on the district plan. On these matters the revised plan should stand without change.



137 Section 7(b) RMA.

138 ***Baker Boys Ltd v Christchurch City Council*** [1998] 10 NZRMA 433 at para 57.

Chapter 13 : Section 32 Analysis

185. Section 32 of the RMA imposes various duties to consider alternatives and assess benefits and costs of the proposals. These matters were put in issue by Mr Goldsmith's parties. Section 32 states:

> *(1) In achieving the purpose of this Act, before adopting any objective, policy, rule, or other method in relation to any function described in subsection (2), any person described in that subsection shall -*
>
> *(a) Have regard to -*
>
> *(i) The extent (if any) to which any such objective, policy, rule, or other method is necessary in achieving the purpose of this Act; and*
>
> *(ii) Other means in addition to or in place of such objective, policy, rule, or other method which, under this Act or any other enactment, may be used in achieving the purpose of this Act, including the provision of information, services, or incentives, and the levying of charges (including rates); and*
>
> *(iii) The reasons for and against adopting the proposed objective, policy, rule, or other method and the principal alternative means available, or of taking no action where this Act does not require otherwise; and*
>
> *(b) Carry out an evaluation, which that person is satisfied is appropriate to the circumstances, of the likely benefits and costs of the principal alternative means including, in the case of any rule or other method, the extent to which it is likely to be effective in achieving the objective or policy and the likely implementation and compliance costs; and*

(c) *Be satisfied that any such objective, policy, rule, or other method (or any combination thereof) -*

(i) Is necessary in achieving the purpose of this Act; and

(ii) Is the most appropriate means of exercising the function, having regard to its efficiency and effectiveness relative to other means.

186. We have considered the matters in section 32(1)(a) earlier in our discussion of the need for the various policies. We add that we agree with Mr Goldsmith's submission that section 9 of the Act, and its underlying policy direction that landowners are free to use land as they wish unless the district plan imposes controls, is important. However, he went on to submit that the debate at the heart of this proceeding is the "enabling" regime promoted by the revised plan as compared to a "prescriptive" and "regulatory" regime being promoted by WESI. We do not consider that is entirely fair to WESI's case since at least in respect of section 6 matters it is a matter of national importance to consider the imposition of controls. For the reasons earlier stated we consider some objectives and policies are dictated by the issues and our findings of fact.

187. As for section 32(1)(b), in this case we totally lack any evidence that would allow us to carry out a cost/benefit analysis in monetary terms. Until recently we were unclear as to whether it was ever possible to carry out such a monetary analysis meaningfully under the RMA in respect of such a diffuse subject as landscape. However we now learn from our research that methodologies are being developed (admittedly with some heroic assumptions) that might be able to be applied in New Zealand. In particular we draw attention to a paper on 'The Welfare

Economics of Land Use Regulation'[139]. The introduction to that paper - which is concerned with the British Town and Country Planning system - and in particular policies for the provision of 'open space' - states:

> *The question of interest is not whether these public policies generate benefits, but rather what is the value of the benefit and how do these benefits compare with the costs associated with the policies. In this paper we develop and test an approach for such an evaluation of land use planning.*

188. Our reasons for accepting an absence of any rigorous benefit/cost analysis is first that the analysis are only required to be 'appropriate to the circumstances'[140]. In these proceedings where there are issues concerning 'open space' in the most general sense and matters of national importance the need for analysis is greatly reduced. That is especially so since the revised plan expressly recognises the importance of the district's landscapes to its economy[141]. Secondly, the costs/benefits we are to evaluate include non-monetary benefits and costs[142]. In the circumstances of this district, with landscape being such an important issue, we consider there is no need to consider a monetary evaluation of the landscapes and can rely on the non-monetary evaluations given to us by the expert witnesses.

189. However, that is not to say that a much more detailed monetary evaluation could not be undertaken even for this district. We consider an evaluation could be carried out. Even if it did not exhaust the values of the landscapes, such a study, if well designed and tested, might be

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139 Research Papers in Environmental and Spatial Analyses No. 42 (Department of Geography, London School of Economics) Cheshire, P and Sheppard, S (1997).

140 Section 32(1)(b).

141 Part 4.2.1 [Revised plan p4/5].

142 See Section 2 RMA: definition of 'benefits and costs'.

helpful for similar reasons to the utility of the English study we have already referred to. The authors concluded of their study that:

> *The results also reinforce the often repeated advice of economists that the provision of public goods by regulation has the additional disadvantage from a liberal viewpoint: the real costs are not directly visible, but require some effort and ingenuity even to approximate. That they are not visible, however, does not mean that they are not real nor ... that they cannot be substantial*[143].

190. As for section 32(1)(c) we consider:

(a) There is no need for the district plan to state policies for **all** the landscapes of the district;

(b) The corollary to (a) is that some landscapes (as landscapes) can be cared for by their owners, especially having regard to the presumption in section 9 of the RMA - see ***Marlborough Ridge Ltd v Marlborough District Council***[144]***;***

(c) Only outstanding natural landscapes and visual amenity landscapes require some kind of policies and methods of implementation in respect of, and on, landscape grounds alone. These are situations where WESI's evidence persuades us that some landscape policies are efficient and effective because market transactions fail to protect these landscapes sufficiently.

191. There are, however, other objectives and policies requested by WESI in its reference which we do not think can meet the tests in section 32. As we explained in earlier chapters of this decision WESI sought to add:

(a) a policy in air quality in section 4.1;

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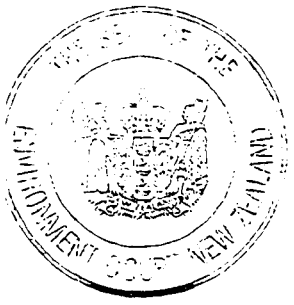
143 Research Papers in Environmental and Spatial Analyses No. 43 (Department of Geography, London School of Economics) Cheshire, P and Sheppard, S (1997).

144 (1997) 3 ELRNZ 483; [1998] NZRMA 73 at 90.



(b) a policy on energy to section 4.5; and

(c) an entirely new section 4.9 on "Social and Economic Wellbeing".

WESI did not attempt to justify its changes under section 32 and we accept in general terms and in the absence of argument to the contrary, Mr Goldsmith's argument that there was an obligation on WESI to produce evidence on the efficiency and effectiveness of its proposals including some kind of benefit/cost analysis.

Chapter 14 : Orders

192. We are satisfied that on the broad ultimate issue, the purpose of the Act will be met if we substitute in the district plan the proposals stated earlier in this decision. Accordingly, we make the following orders:

(1) Under section 292(1) of the Act

(a) we delete paragraph 4.1.2 of the revised plan and substitute a new paragraph 4.1.2 in the district plan as follows:

4.1.2 Resources, Activities and Values

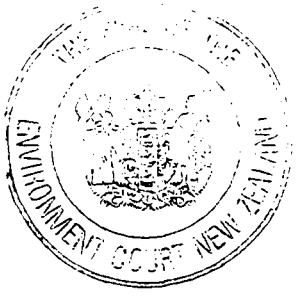
The resources and values of the natural environment of the District and the activities that interact with those resources and values are described in various sections of this Part of the District Plan, namely:

- **Section 2 Landscape and Visual Amenity**
- **Section 3 Takata Whenua**
- **Section 4 Open Space and Recreation**
- **Section 5 Energy**
- **Section 6 Surface of Lakes and Rivers**
- **Section 7 Waste Management**
- **Section 8 Natural Hazards**
- **Section 9 Urban Growth**

In addition Section 10 deals with Monitoring, Review and Enforcement.

(b) We add to Objective 1 - Nature Conservation Values - of Part 4.1.4 the words emphasized below in the following sub-objective:

The protection of outstanding natural features and outstanding natural landscapes.



(2) Under section 293(1) and clause 15 of the First Schedule to the Act the Council is directed to change Parts 4.1, 4.2, and 15 of the revised plan as follows:

(a) **Part 4.1: Nature Conservation Values**

By adding the words: *"or containing geological and/or geomorphological features of scientific interest"*
to method (i) on p.4/3 of the revised plan.

(b) **Part 4.2.4: Issues for Landscape**

By adding a third issue as follows:

iii The Department of Conservation also administers large areas of ex-State forests and retired pastoral leases within the Conservation Estate. In addition, the District contains vast areas of Crown land held under pastoral lease. Much of the land in these reserves and conservation areas, as well as land within the pastoral leases and private ownership, is used and enjoyed by residents and visitors to the District, both actively and passively. Some of the areas are intensively used and are a focus for many visitors to the District.

(c) **Part 4.2.5: Landscape and Visual Amenity**

By deleting Objectives and Policies 4.2.5 in part 4.2 of the revised plan in its entirety and substituting Objectives and Policies 4.2.5 as stated in Appendix III.

(3) **Part 15: Subdivision, Development and Financial Contributions**

These issues are adjourned for further hearing about how to reconcile them with Part 4.2.

(4) This decision is interim in respect of the following matters:

(a) It is limited territorially in that all persons appearing may make further submissions (and call further evidence) on the district plan as it relates to these areas of the district not in the catchment of Lake Wakatipu and the Kawarau River (other than the Arrow and Shotover rivers above the Wakatipu basin).

(b) We have made only very limited decisions as to the appropriate methods of implementation that might flow from the objectives and policies settled by this decision. Except where expressly decided all methods are open for argument.

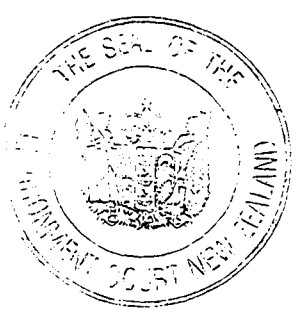
(c) We have adjourned the hearing in respect of "areas of landscape importance", and note that in due course WESI will have to elect whether it wishes to pursue the reinstatement of ALI's. Currently we do not favour that course.

(5) Leave is reserved to any party or interested person to apply to the Court in respect of Part 4 of the district plan:

(a) To correct any omissions or errors (both generally and in respect of outstanding natural landscapes or features);

(b) To make any necessary changes necessary to meet the spirit and intentions of our decision if the suggested changes do not achieve the same.

(c) To apply under sections 292 and/or 293 of the Act in respect of any matters on which leave has been expressly reserved



(including the matters in paragraphs 60, 61, 65 and 168 of this decision).

(6) All these proceedings (apart from those where the referrers have withdrawn) are adjourned to a further conference of the parties at Queenstown on **Monday 29 November 1999 at 2.00 p.m.** on the issues of:

(a) Whether there are any errors arising or other matters under order (5) above in respect of the amendments to part 4.

(b) Whether there are any outstanding matters under sections 1, 2 and 9 of Part 4 of the district plan.

(c) Whether a further hearing is needed in respect of
(i) the general Wanaka/Hawea area;
(ii) zone boundaries.

(d) Appropriate methods of implementation of the relevant district-wide issues.

(7) Costs are reserved. We note, without making any final determination as to relevance:

(a) That WESI made out its claim that the revised plan was completely inadequate in respect of landscape issues; and

(b) That without the involvement of WESI, that issue could not have come before the Court.

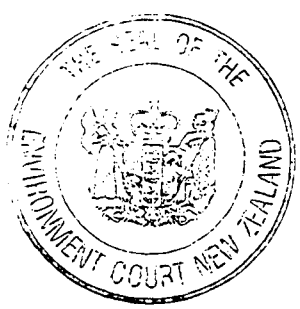
193. Although the question of zoning boundaries is as much a matter of policy as methods we have not in fact decided any zone boundaries as a result of this hearing. We hope the parties will be able to consider our three-way division of rural landscapes and suggest appropriate zone boundaries by agreement. Naturally if agreement cannot be reached we

will set those issues down for further hearing. We comment that we have tried to draw the lines for the outstanding natural landscapes so that they should be able to be defined with reasonable certainty without too much extra effort.

194. As far as the visual amenity landscapes of Wakatipu basin are concerned we remind the parties of Chapter 7 of this decision. It contains suggestions for defining the inner boundaries of the section 7 landscapes.

DATED at CHRISTCHURCH this 29th day of **October** 1999.

J R Jackson
Environment Judge



[redacted]

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV 2004-485-000720

BETWEEN	GR AND RW WILSON MJ AND DT RICKERBY Appellants
AND	SELWYN DISTRICT COUNCIL First Respondent
AND	CANTEBURY REGIONAL COUNCIL Second Respondent

Hearing: 14 and 15 July 2004

Appearances: P A Steven for GR and RW Wilson
CS Fowler and JE Ferguson for MJ & DT Rickerby
RM Dunningham for Selwyn District Council
AM Douglas and JM van der Wal for Canterbury Regional Council

Judgment: 24 August 2004

JUDGMENT OF FOGARTY J

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[1] This is an appeal against a decision of the Environment Court which upheld the decision of the Selwyn District Council and the Canterbury Regional Council to grant consent to a resource consent application by MJ and DT Rickerby to expand an existing broiler chicken farm on Weedons Ross Road, West Melton.

[2] The poultry farm is situated on a 10.5 hectare property. On the land there are two poultry sheds to the north west corner of the site. Elsewhere on the site there is a house and garden.

[3] At present approximately 45,000 chickens are reared in the existing poultry sheds over a six week period from day old chicks to broiler chickens. There are

approximately six cycles per year. Between each batch of chickens there is a mandatory ten day stand-down period. During this time it is necessary that the sheds are completely emptied out, cleaned, sanitised and made ready for the next batch of chickens.

[4] While the chickens are growing air circulation is carefully managed to maintain appropriate air temperatures. At the early stages of the growing period the sheds are closed off to outside air. More air is progressively introduced as the chickens grow larger. To achieve this the sheds are designed to provide ventilation with fans in various positions around the shed operating to assist air circulation by expelling air. These fans generate noise. The parties accept that the current northern boundary noise level was 62 dBA L_{10}.

[5] At the end of the six week growing cycle a contractor cleans the poultry shed and places the litter on concrete pads at one end of the shed where it is loaded by another contractor, with specialised loaders, onto covered trucks.

[6] The air expelled by the fans is odorous, so is the litter. The parties agreed that the significant level of odour concentration for the purpose of nuisance effects is the predicted one hour average 99.5% odour concentration (OUc\M3) at the level of 5 units.

[7] At the present time the 5 unit level is exceeded at the immediate boundaries of the Rickerby property to the north west and part of the east boundary. It does not reach any dwelling at that level.

[8] The proposed expansion is to extend one of the sheds on the property by adding 488 M^2. This shed would house an additional 10,000 chickens. It is also intended to have a new shed of 1379 M^2 to house approximately 29,000 more chickens. With these expansions the total number of chickens on the site would increase from approximately 45,000 birds to 85,000 birds. The existing shed to be extended would be converted to a tunnel ventilation system while shed 3 would be constructed with tunnel ventilation. The fan system will also be altered in the shed which is unaffected by these expansions.

[9] With these alterations the noise level does not appear to be significantly affected due to improved technology in the new shed and changes to the existing sheds.

[10] In the case of odour the 5 unit contour extends further out from the sheds.

[11] The Rickerbys' property is located in the district of the Selwyn District Council. That Council has a transitional plan, being the land use plan made originally under the Town and Country Planning Act 1977 and continuing in existence for the purposes of the RMA pending the making of a new plan under the RMA. The Environment Court analysed the status of the activity under the Transitional District Plan as follows:-

> [21] The site is zoned Rural 3 under the Paparua section of the Transitional Selwyn District Council Plan (**the Transitional Plan**). Factory farming is listed as a discretionary activity in the Rural 3 zone subject to several conditions. The parties are in agreement that the activity falls within the definition of factory farming. Chapter 3 Rural 3 Zone of the Transitional Plan at page 103 contains the following provision in relation to its [discretionary] status:
>
> > 5. *Factory farming, limited to a maximum of 3% of any holding used for other agricultural, horticultural or pastoral farming; or factory farming involving more than 3% of any holding where it can be shown that the land concerned is not of high actual or potential value for the production of food. (Note; see Appendix D); provided that the factory farming activity is not located within 600 m of a residential zone; and in considering any application the Council shall have regard to whether;*
> >
> > *(a) to c) **[not in issue]**;*
> >
> > *(d) the factory farming operation is likely to result in excessive noise or reduction in air quality (eg. smell, dust) causing a nuisance to any dwelling located near the proposed factory farming operation.*
> >
> > *(e) to (f) **[not directly relevant.]***

[12] The applicants' extended intensive operation would occupy over 4% of the land with the new shed and is therefore not within the 3% requirement.

[13] The Environment Court concluded for this and other factors the application is for a discretionary activity within the transitional plan. For that reason alone it

requires a resource consent under s9(1) of the Resource Management Act, (the RMA).

[14] The Council is preparing a plan under the RMA which has been proposed. The noise standard is 60 dBA L and it will be noted that in this case the noise at the boundary is assessed at 62.

[15] Accordingly the Rickerbys applied for consent for the expansion of the sheds under the RMA to the Selwyn District Council.

[16] Section 15 of the RMA provides:-

> **15 Discharge of contaminants into environment**
>
> (1) No person may discharge any—
>
> (a) Contaminant or water into water; or
>
> (b) 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; or
>
> (c) Contaminant from any industrial or trade premises into air; or
>
> (d) Contaminant from any industrial or trade premises onto or into land—
>
> unless the discharge is expressly allowed by a rule in a regional plan and in any relevant proposed regional plan, a resource consent, or regulations.
>
> (2) No person may discharge any contaminant into the air, or into or onto land, from—
>
> (a) Any place; or
>
> (b) Any other source, whether moveable or not,—
>
> in a manner that contravenes a rule in a regional plan or proposed regional plan unless the discharge is expressly allowed by a resource consent, or regulations, or allowed by section 20A (certain existing lawful activities allowed).
>
> (3) This section shall not apply to anything to which section 15A or section 15B applies.

[17] There is no operative rule in any plan of the Canterbury Regional Council which expressly allows the discharge of the odour into the air from the Rickerbys' premises. Contaminant in s2 of the Act is to defined to include odorous compounds.

[18] Accordingly, the Rickerbys also applied to the Canterbury Regional Council for a consent.

[19] Under the language of the RMA a consent to do something that would otherwise contravene s9 of the Act is called a land use consent. A consent to do something that would otherwise contravene s15 is called a discharge permit.

[20] Both applications were opposed by G R and R W Wilson, the owners of an adjoining property of about 10 hectares. This property does not have any dwelling on it.

[21] The application for land use consent fell to be considered pursuant to s104 of the Act, as it was before it was repealed and substituted on 1 August 2003.

[22] The repealed section 104(1) is as follows:-

> **"104 Matters to be considered**
>
> "(1) Subject to Part 2, when considering an application for a resource consent and any submissions received, the consent authority shall have regard to—
>
> "(a) Any actual and potential effects on the environment of allowing the activity; and
>
> "(b) Any relevant regulations; and
>
> "(c) Any relevant national policy statement, New Zealand coastal policy statement, regional policy statement, and proposed regional policy statement; and
>
> "(d) Any relevant objectives, policies, rules, or other provisions of a plan or proposed plan; and
>
> "(e) Any relevant district plan or proposed district plan, where the application is made in accordance with a regional plan; and
>
> "(f) Any relevant regional plan or proposed regional plan, where the application is made in accordance with a district plan; and
>
> "(g) Any relevant water conservation order or draft water conservation order; and
>
> "(h) Any relevant designations or heritage orders or relevant requirements for designations or heritage orders; and

"(i) Any other matters the consent authority considers relevant and reasonably necessary to determine the application.

[23] The application for a discharge permit fell to be considered under s104(1) and (2), as it now is:-

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.

[24] For the purpose of these hearings there is no substantial difference between the new subsection (1) and old subsection (1) subparagraphs (a), (c), (d), (e), (f) and (i).

[25] In the new section, subsection (1) has been amended in a number of respects. Relevantly, it no longer begins "Subject to Part 2". That phrase is shifted further into the sentence. Secondly, four paragraphs, (c) – (f), have been reorganised and simplified. Subsection (2) is new. It addresses some case law jurisprudence interpreting the RMA, known as permitted baseline analysis.

Decision of the Environment Court

[26] In its introduction, the Environment Court set the case as the one where the Rickerbys were applying to expand their successful and well managed broiler chicken farm against the opposition of the Wilsons who owned the adjoining land which is in pastoral and/or agricultural use. The Court noted that the Wilsons are currently seeking alterations to the proposed plan to allow them to subdivide this property for rural/residential uses. The Court said that the case clearly highlighted the tension between the use of the land as a resource for subdivision and housing development and its use for intensive farming activities.

[27] The Court went on to expand on the proposition that the existing broiler farm is successful and well managed. It then addressed factually the activities on nearby sites; the closest home from the Rickerby sheds being the Webb property some 270 metres distant.

[28] The Court said it would describe the wider environment as one that has been subject to incremental creep of lifestyle activity, notwithstanding that it is zoned as rural land. In the proposed plan the site is zoned Inner Plains under the rural section. The proposal to extend an existing livestock farming activity is a discretionary activity (restricted). When considering whether to allow the expansion, proposed Rule 9.3 requires the consent authority to consider any nuisance effects from odour and noise, *inter alia*.

[29] The Court then turned to a factual description of the proposed expansion and identified that the sole major issue in the case relates to odour. It considered it necessary to examine the transitional and proposed district plans to establish the permitted baseline on the Rickerbys' site. To that end it examined in more detail the status of the factory farming activity under the transitional and proposed plans.

[30] When considering whether the proposal was contrary to the transitional plan the Court did make some general comment to the permitted activities within the rural zone as including agriculture, horticultural and pastoral farming with one dwelling on one certificate of title of a minimum of 20 hectares. Plan change 25 (to the

transitional plan) indicates that the Wilsons could subdivide their property into two lots as a controlled activity with dwellings permitted as of right on those two lots. The Court noted that while change 25 was not yet operative the issue on change 25 to be resolved is quite site specific (and not related to these sites).

[31] Turning to the proposed plan the Court noted immediately that there were objectives and policies in the plan that directly related to reverse sensitivity but which did not appear to be borne out in any rules in the plan. Reverse sensitivity as defined in the proposed plan is from activities with incompatible effects located too close to each other. The decision identified objective 1 of Part 3 chapter 1.3 of the plan as being "*Good air quality in the rural area is maintained*". Policy 2 to that objective states:-

> Ensure nuisance effects from activities with potentially strong and consistent odour, dust or other discharges are avoided or mitigated.

[32] As an example Policy 2 later states:-

> ... Nuisance effects can occur if:-
>
> i. The activity does not have a site large enough to contain the effects; or
>
> ii. The activity becomes surrounded by people through subdivision and residential development.

[33] Policy 3 states:-

> Allow existing activities with potential odour, dust or other nuisance effects on surrounding properties to expand, provided there is no increase in the effects on surrounding properties.

[34] Policy 4 is headed "Land Use Patterns" and provides:-

> Allow the co-location of residential and business activities and the location of business activities in the Rural Zone, unless activities need to be separated to mitigate adverse effects.

[35] The Court went on then to identify other policies in chapter 3.4 particularly Policy 1 which recognises that the rural zone is principally a business area. In that regard the plan provides:-

... The Plan provisions, coupled with the distance between houses and activities in the rural zone, should combine to maintain a pleasant living environment. However, the rules will not be as stringent as those in Living Zones and residents can expect to tolerate mild effects associated with "day to day" farming activities and temporary effects associated with seasonal activities.

[36] It identified as critical three policies in paragraphs [56] – [59] of its decision:-

[56] The critical policies are contained in Policies 18, 19 and 20 which are cited in full:

Policy 18 *Ensure new or expanding activities, which may have adverse effects on surrounding properties, are located and managed to mitigate these potential effects.*

Policy 19 *Protecting existing lawfully established activities in the Rural Zone from potential for reverse sensitivity effects with other effects which establish in close proximity.*

Policy 20 *Where an activity has become surrounded by potentially incompatible activities, allow that activity to expand or alter, provided the potential adverse effects of the activity do not increase.*

[37] The decision continued:-

[57] In the discussion on Policy 19, the Plan comments:

... The most common tool to mitigate reverse sensitivity effects is to maintain appropriate buffers or separation distances between activities. However there may be other methods which can be used to avoid reverse sensitivity effects.

[58] Environmental results include:

- *Nuisance effects may occur from time to time from temporary or seasonal activities, but these effects should be mild and typical of the rural environment.*

- *Buffer zones are maintained between residential activities and activities with which they may be incompatible.*

[59] There is significant explicit discussion in the Proposed Plan of reverse sensitivity effects. From our reading of the whole Proposed Plan, including those provisions cited, we are satisfied that one of the reasons for the restricted discretionary status of this activity is that these very effects are able to be considered on a case by case basis. It was clearly in the Council's mind that separation distances (discussed in Policy 19, and under Environmental Results) may be appropriate but that there may be other methods which can avoid reverse sensitivity effects.

[38] However, beyond that the Court did not examine the provisions in the proposed plan which allowed for further subdivision of the Wilson property down to 4 hectares as a controlled activity. On an allotment of such a size dwellings become a permitted activity. There was evidence before the Court on the state of this proposal. The evidence was that there appeared to be no submissions challenging subdivision down to 4 hectares. However Tegel and the Canterbury Poultry Meat Producers Association have filed submissions seeking to alter the status of dwellings across the rural zones to be controlled activities, on the basis that the presence of existing activities may mean that dwellings need to be sited to recognise such lawfully established activities. There is also a submission by the Association that seeks the minimum land area for the erection of a dwelling across the rural area to be increased, although no new areas have been suggested. There have also been submissions on the matter of separation distances between dwellings and intensive farming operations. One is by the Rickerbys. They have also submitted that subdivision should be a restricted discretionary activity where any allotment created is within 500m of an intensive farming operation. A council officer has assessed the submissions and recommended that a 300m setback be required between sensitive activities including dwellings and for the creation of new allotments and existing farm allotments.

[39] The Court then turned to s104(1)(a). After analysing the case law it rejected the proposition of the neighbours, the Wilsons, that the Court should take into account those activities that are permitted and which could be established on their land when assessing adverse effects from the proposals of the Rickerbys to extend their poultry farming activity.

[40] Plainly the interpretation of the law taken by the Court was that the purpose of baseline analysis is to take into account permitted activities on the site of the applicant, and discount those when measuring the adverse effects of allowing the expansion on the neighbouring environment as it exists. The Court regarded it as going into imponderables to seek to assess the potential adverse effect of a proposed activity upon a potential development that might occur elsewhere. Indeed it considered that to do so would be contrary to a decision of the High Court *O'Connell*

Construction v Christchurch City Council [2003] NZRMA 216, paragraph [68]-[73]. It concluded:-

> On this basis we have concluded that both as a matter of principle and law we should have regard only to that which is currently existing on the Wilson property.
>
> [See paragraph [72]]

[41] Thereafter in its analysis when referring to the Wilson property the Environment Court referred to it as having no-one living on the land and thus incapable of being affected by the odour. For that reason, implicitly, it regarded as irrelevant those provisions of the transitional plan, change 25, and the proposed plan, which addressed what could be done and established on the Wilsons' land.

[42] Proceeding on this analysis the Court concluded inevitably that the potential for further adverse effects by extending the poultry unit above those already existing is minimal.

[43] The judgment concluded with a Part 2 analysis. This analysis continues to build on the factual finding of no adverse effects, which in turn depends upon treating the Wilson property as it exists without any dwellings on the site. For example:-

> [120] We are not prepared to read into ***the environment*** [bold in the original] the introduction of potential future incompatible activities, and thereby exact some form of residential standard in this rural area. There are clear issues under both the Proposed Selwyn District Plan and the Regional Plan and the Councils need to consider the expansion of existing activities and the potential for reverse sensitivity effects. Both plans are only in a proposed stage and to that extent we give greater weight to the general provisions of the Act than any of the plans at this point in time. However, all approaches lead to the same outcome.
>
> ...
>
> [122] .... In our view the question of the maintenance and enhancement of amenity values (s7(c)) and maintenance and enhancement of the quality of the environment s7(f) relate firstly to the existing environment and secondly to the environment as is perceived in terms of the appropriate plans. We are not satisfied there would be any more than minimal derivation from either the amenity values or the quality of the environment as a result of granting this consent.

The appeal

[44] The submissions of Ms Steven for the appellant simplified the notice of appeal, contending the following five errors of law:-

1. By its interpretation and application of the permitted baseline assessment as preventing consideration of potential development of the Wilson property.

2. When ignoring the evidence relating to the adverse odour and noise effects on the Wilsons' land.

3. By failing to consider the cumulative adverse odour and/or noise effects.

4. By its identification of the status of the activity in terms of the Proposed District Plan.

5. By misconstruing the applicable objectives and policies of the relevant planning documents.

[45] In the course of oral argument it became plain that the principal ground of appeal was the contention that the decision of the Environment Court was materially affected by an error of law by refusing to consider the potential of the Wilson property to have dwellings erected on it, on the ground that it should consider only the receiving environment as it exists.

[46] Ms Steven submitted that if she succeeds on establishing an error of law in this respect her remaining grounds of appeal flow. On the other hand, if she fails then she would not expect this Court to reverse the decision of the Environment Court.

[47] For the Rickerbys, Mr Fowler attacked this proposition head on and argued for a number of reasons it will unnecessarily complicate s104 analysis if consent authorities are obliged to examine potential activities on sites other than the application site. He argued with respect to s104(1)(a) that decisions of the Environment Court, with rare exception, see *Stalker v Queenstown Lakes District Council* (decision No. C40/2004) 2 April 2004, and the High Court and Court of Appeal have consistently held that the wider receiving environment should be assessed as it currently exists.

[48] Quite properly counsel for the Selwyn District Council and the Canterbury Regional Council confined their submissions to assisting the Court, particularly as to the meaning of their respective plans.

Analysis

[49] At the outset I note, in fairness to the Environment Court, that the "baseline" authorities speak always of the environment as it exists, except for the applicant's sites. It follows that this Environment Court was entitled to be cautious at the least to embrace the proposition that the receiving environment could be approached more broadly. Therefore it is appropriate that this proposition be tested in this Court.

[50] As noted the Environment Court considered that it was bound by the authority of *O'Connell Construction v Christchurch City Council & Ors* from considering that activities are permitted on the Wilson land when assessing the adverse effects of the Rickerbys' proposal. But that kind of issue was not before the High Court in *O'Connell*. The applicant in *O'Connell* was seeking to set up a tyre repair business on a site which was not permitted in the plan and near a busy intersection. Counsel for the applicant wanted to argue that the same adverse effects would occur if the proposed activity was undertaken further down the road as a permissible activity. See paragraph [69]. Panckhurst J emphasised that the permitted baseline test in the cases decided is one which compares the adverse effects of the activity being proposed with effects that could arise anyway by undertaking permitted activities on the land i.e. on the subject site. See paragraph [71] and the underlining the Judge has added to the *Bayley* dictum. No issue arose in *O'Connell* as to the actual or potential effects of the proposed activity on the development of neighbouring land permitted by plans. The dictum in paragraph [73] is broad and obiter.

[51] Mr Fowler agreed that none of the Court of Appeal baseline cases have addressed this point of the relevance of the potential for change of neighbouring activities. They are: *Bayley v Manukau City Council* [1999] 1 NZLR 568; *Smith Chilcott Ltd v Auckland City Council* [2001] 3 NZLR 473; and *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323.

[52] The proposition that "environment" as used in s104 refers to existing environment, except for permitted activities on the applicant's land, derives from the judgment of Salmon J in *Aley v North Shore City Council* [1999] 1 NZLR 365. The setting of this case was Browns Bay, a maritime suburb in North Shore City. It has a commercial area which extends down to the beachfront reserve. Existing development within the commercial area is substantially low rise – one or two levels. The proposal was a building with five levels, one mixed commercial and parking, one of parking and three levels of residential use. The height and bulk of the building created concern among a number of residents. The case was an application for judicial review against a decision of the North Shore City Council not to publicly notify the application. The Court was not applying s104.

[53] The Judge had to consider the language in, at that time, s94(2)(a):-

> The consent authority is satisfied that the adverse effect on the environment of the activity for which consent is sought will be minor.

[54] Salmon J concluded that in context the phrase "effects on the environment" must refer to the existing environment. As will become apparent in this analysis the Judge construed "environment", to be as it exists, as proper for this section, to increase the chance of neighbours being notified.

[55] The definition of environment in the RMA is 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:

[56] Salmon J laid emphasis on subparagraph (c) amenity values. Amenity values is defined in the statute as:-

> **amenity values** means 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:

He noted the emphasis of the definition of amenity values as being on existing conditions. He went on to say at page 380-381:-

> ... Clearly, the environment will change as an area undergoes development and redevelopment. Just because a plan allows the construction of buildings to a certain maximum height and bulk does not mean that advantage will necessarily be taken of those rights. ...

[57] That latter remark is made in the context of the amenity values of Browns Bay as a neighbourhood. The Judge was saying that just because the plan in respect of Browns Bay might allow the buildings up to a certain maximum height does not mean that the character of the neighbourhood would in fact change from being substantially low rise. That such a context is intended by the Judge is confirmed in a latter concluding paragraph, at page 382-383.

> I have concluded that a proper application of s 94(2)(a) requires the consent authority to consider all aspects of the activity proposed and the effects of that activity on the existing environment. Such an approach is consistent with not limiting rights of objection to any greater an extent than is justified by the words of the Act and to giving effect to the intent of the Act which as Barker J said in *Ports of Auckland Ltd v Auckland Regional Council* [1995] 2 NZLR 613 at p 618 favours interested persons having an input into the decision-making process.

[58] The Court of Appeal in *Bayley* had as its subject matter a proposal to build a 57 unit terraced house complex on a former supermarket site in Papatoetoe. The neighbours whose homes were immediately adjacent to the site wanted the application to be publicly notified. The argument before the Court as to merit of notification or not was focussing on what could be done on the applicant's site. It was in that context where the Court added the words "*or as it would exist if the land were used in a manner permitted as of right by the plan*" to the phrase "*on the environment as it exists*". The additional qualification read in context is referring to the environment as it exists on the applicant's site.

[59] *Bayley* was affirmed in a s104 context in *Smith Chilcott Ltd.* The question there was a comparison between what was being proposed, eight apartments to be

built on a vacant site and what could be permitted as of right on that site (three units).

[60] In *Arrigato* again the issue was to what extent under the RMA, applying s104, it was possible to take into account an unimplemented consent to subdivide the subject site of the application into nine lots when the particular application was to divide the same property into 14 lots.

[61] The Environment Court in this judgment under appeal was aware of these limitations on the authorities. It fell back on the proposition that it would be a difficult task to consider the effects on anything except the neighbourhood as it exists. The logic of the Court seems to be to the effect that to consider possible developments elsewhere in the environment (ie on sites other than the subject site) it is necessary to consider potential developments, but that this is a fictional new environment. See paragraphs [66] and [72] of its reasoning.

[62] No-one could suggest that the possibility of the Wilson land being further subdivided is fanciful. I adopt as a threshold for consideration the standard of "not fanciful" used for the applicant's property in *Smith Chilcott Ltd*, at paragraphs [26] and [27]. The Environment Court has recorded the changing character of the area to incremental creep of lifestyle activity. It is plain from its proposed plan that the Selwyn District Council does not regard it as fanciful that the land in this locality might be subdivided down into smaller sites with increased dwellings. The very exercise which the Environment Court considers to be difficult and against principle has been commenced by the Selwyn District Council in its proposed plan. While being quite aware of the potential of nuisance effects, it proposes allowing co-location of residential and business activities in the rural zone. The Environment Court did refer to Policy 4. See [34] above. But, as noted, the Court did not refer to the proposals allowing subdivision down to 4 hectares, with dwellings as a permitted use. Such subdivision typically leads to residential activity in rural zones. The failure to have regard to these provisions led the Court to the false conclusion that it was being invited by the Wilsons to somehow unilaterally "exact some form of residential standard", see paragraph [120] of its decision, set out above in paragraph [43]. The Wilsons are currently seeking to subdivide for rural/residential purposes.

[63] The definition of environment in the statute is not exhaustive. The definition makes it clear that it is not intended to be some kind of static snapshot of natural and physical resources in the locality of the application for resource consent. It obviously requires having regard to the use to which natural and physical resources are put. Natural and physical resources are only one item (b) in the definition. As well as including eco-systems, environment includes people and communities (see paragraph (a)). They are always using natural and physical resources. People can change the use of the land they own or lease from time to time. That is a core incident of their property rights. Communities have different expectations from time to time as to the amenity values they expect in different parts of the environment. Communities are referred to in subparagraph (a) and amenity values in subparagraph (c). The conditions referred to in (d) can and will include activities, including investment for the future, plans and proposals.

[64] "Environment" is an important concept in the RMA. It should be interpreted consistent with the purpose of the Act. Section 5 provides:-

> **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.
>
> (bold in original)

[65] Section 5(2) makes it plain that the Act requires a forward looking perspective. It embraces the concept of the use development and protection of

natural and physical resources in a way which enables people and communities to provide for their social, economic and cultural wellbeing.

[66] There is no RMA purpose or policy to allow individuals to pursue use of their private property without regard to the costs that their private activities may impose on neighbours. It has long been recognised by the common law and Parliament that private ordering of land use can impose costs upon neighbouring properties, called by economists externalities. As a result it is necessary for the law, be it the common law or statute, to impose restraints on the use of activities on one parcel of land in order for different parcels of land to be enjoyed in the same neighbourhood.

[67] At common law the essence of nuisance is a condition or activity which unduly interferes with use and enjoyment of neighbouring land. When considering the reasonableness of such activity the character of the neighbourhood is taken into account. See *Sturges v Bridgman* (1879) 11 ChD 852 at 856. Planning instruments can be treated as changing the character of the neighbourhood by which the standard of reasonable user falls to be judged. See *Hunter v Canary Wharf Limited* [1997] AC 655, at 721E and 722 F-G, per Lord Cooke of Thorndon .

[68] Since at least the enactment of the Town Planning Act 1926 Parliament has intervened, by making provision for plans in both the urban and rural areas, effectively supplanting the need for property owners to rely on the remedy of nuisance at common law. From then and continuously through the statutory reforms down to the RMA, one of the purposes of plans is to promote amenity. That requires taking into account and endeavouring to harmonise a variety of uses of property within the same neighbourhood. It is a consequential aspect of plans that their content will affect the judgment of consent authorities as to the co-location of uses and matters of reverse sensitivity.

[69] Any doubt as to whether or not part of the purpose of the RMA is to ameliorate or eliminate nuisance can be resolved by simply noting that s7 of the Act requires particular regard to be had to the maintenance and enhancement of amenity values (s7(c)). As already noted amenity values are defined in s2 as:-

> **amenity values** means 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:

[70] Recently the Environment Court in *Stalker v Queenstown Lakes District Council* has interpreted environment in a similar way. In that case the Court laid emphasis on subparagraph (d) of the definition of environment and said:-

> [8] ...
>
> It is important that the definition of environment in section 2 includes not only the "existing (environment)" in paragraphs (a) – (c) but also the social, economic and cultural conditions – such as district plans (which manage future activities) affecting the existing environment. In my view paragraph (d) suggests that at least the activities permitted on nearby land under the plan should, if they are realistic be taken into account as part of the "environment". Conversely, because the definition of "environment" is inclusive that also suggests the concept should not always be confined to the existing factual situation on the ground.

[71] My interpretation of the definition of environment does not confine subparagraphs (a) and (c) to existing conditions. In that respect I differ from that Court's analysis. I note that elsewhere in its reasoning the Court stresses the concept of futurity as at the heart of the definition of sustainable management in s5(2) of the RMA. I agree with that aspect of the reasoning. In short the reasoning in that decision comes to the same conclusion that I come to, by a slightly different route.

[72] It may be thought that this forward looking construction of environment has to be wrong because the Court of Appeal has held twice, that the objectives, policies or other provisions of a plan or proposed plan are relevant in the application of s104 only if they are relevant to the effect on the environment of allowing the activity in question. See *Smith Chilcott* at paragraph [31] and *Arrigato* at paragraph [6].

[73] It needs to be kept in mind that it is of the character of s104 analysis that the focus of analysis is dependent upon the nature of the application for consent. That said it is difficult to envisage an application for a land use consent or a discharge permit which does not make some provisions of the plans relevant to the effect on the environment of allowing the activity in question. This is because the need for a resource consent is dictated by the fact that the proposed activity contravenes a rule in a district plan or a regional plan (see s9(1)(3)), or, in the case of contaminants, not

permitted by a rule in a regional or proposed regional plan (see s15). That means usually that the proposed activity has already been examined in a plan. Such examination is likely to have been undertaken because of perceived adverse effects on the environment from the activity.

[74] When the RMA was a gleam in the reformer's eye there were people in the community who envisaged a world without plans. But plans have always been provided for in the RM legislation from the time the Resource Management Bill was introduced into the House of Representatives. I note two comments from the Explanatory Note:-

> "The central concept of sustainable management in this Bill encompasses the themes of use, development and protection. The Bill sets up a system of policy and plan preparation and administration which allows the balancing of a wide range of interests and values."
>
> (page (i))

> "Plans and regional policy statements will be required to achieve the purpose set out in Part II of the Bill. The Bill requires these statements and plans to focus on the effects of development, rather than the arbitrary regulation of activities."
>
> (page vii)

[75] The notion that plans are likely to be irrelevant to the application of s104 has persisted over the years. That notion may have had some potential application to transitional plans made under the Town and Country Planning Act 1977, but see *Batchelor v Tauranga District Council (No. 2)* [1993] 2 NZLR 84, 89. The notion has been encouraged by the fact that s104(1) has until recently begun with the words: "*Subject to part 2*". If s104 is read in isolation and literally, the reader could be forgiven for thinking that potentially any relevant objectives, policies, rules or other provisions of a plan or proposed plan could well be inconsistent with Part 2.

[76] That is an erroneous starting point, for RMA plans have only been brought into being by a Part 2 analysis. Section 66(1) requires Regional Councils to prepare any plan in accordance with s30, and the provisions of Part 2, and its duty under s32. Section 74(1) is to like effect for territorial authorities. See also ss 30(1)(a) and 31(1)(a).

[77] During the preparation of a plan, Part 2 analysis will inevitably examine the impact of activities on the environment. Sections 5, 6 and 7 are each directed to sustainable management of natural and physical resources. Natural and physical resources are at the core of the definition of environment. Within the core provisions s5(2) is the requirement of providing:-

> ... for the use, development and protection of natural and physical resources ... while avoiding remedying or mitigating any adverse effects of activities on the environment.

[78] In sum the typical circumstance of an application for any consent under the RMA is that the proposed activity will generate some effects on the environment which are potentially adverse. Whether or not they are adverse is likely already to have been examined generically by the regional and local territorial authorities when preparing plans. It would be only in an exceptional case that any application for consent under s104 would be launched into a planning vacuum over the affected neighbourhood.

[79] Where a provision in a plan or proposed plan is relevant, the consent authority is obliged, subject to Part 2, to have regard to it, "shall have regard". The qualifier "subject to Part 2", enables the consent authority to form a reasoned opinion that upon scrutiny the relevant provision does not pursue the purpose of one or more of the provisions in Part 2, in the context of the application for this resource consent.

[80] The correct perspective then is that in the case of RMA plans the consent authority should approach plans and proposed plans as an outcome of Part 2 analysis. The authority may be in a position in the circumstances to question the quality of that Part 2 analysis as it is currently reflected in the proposed plan. This may be because the consent authority can see that the content of the proposed plan does not adequately address the merits of the proposed activity before it. It may be because the consent authority is aware of submissions in opposition to the content of the proposed plan having been lodged and not yet heard, and can form a judgment as to their merit, or consider it appropriate to allow for the possibility the challenge will succeed. More generally the consent authority may form an expert opinion that the proposed provision is simply not going to survive the process towards the plan becoming operative. These alternatives are not intended to be exhaustive. These

sort of considerations have been discussed in a number of cases albeit not explicitly connecting plans to Part 2 analysis. See e.g. *Hanton v Auckland City Council* [1994] NZRMA 289, 305 (Environment Court) and *Burton v Auckland City Council* [1994] NZRMA 544, at 553 (High Court).

[81] By examining the neighbouring Wilson property as it exists the Environment Court proceeded upon an error of law as to the application of the term "environment" in s104. This error led it to disregard relevant provisions in the plans allowing further subdivision of the Wilson land and the erection of dwellings. The error persisted into its Part 2 analysis. As a consequence the Court took an unduly simplified approach to the impact of adverse odour, and perhaps noise, on the Wilson land. It looked only at the current state of the Wilson land, and ignored the effect of the proposed expansion on the potential for development of that land. Ms Steven's "errors of law" numbers 2 and 4 are consequences of this error of law and do not need further discussion.

[82] The third contention of error was that the Court had failed to consider the cumulative adverse odour and/or noise effect. The Court said:-

> [116] To the extent that there are any cumulative effects from odour or noise, these are to be expected within the Rural zone, particularly in close location to this existing activity. People who have built homes in this area have done so knowing that there is a poultry farm in the area. We have noted that owners appear to have located their buildings accordingly on their own sites. In our view it is not appropriate that they now impose a residential standard on the rural activities in a rural zone.
>
> [117] We have concluded that the cumulative effects from this activity are no more than anticipated in terms of the District Plan or the Regional Plan. In fact, the Regional Plan goes further and particularly seeks to protect existing activities from reverse sensitivity of residential activities. It notes expressly that it seeks that poor land use planning shall not diminish the value of the investment of the existing industrial or trade activities.

[83] I consider that the above reasoning is consequential upon the error of law in treating the receiving environment as it exists.

[84] However, counsel did raise with me whether or not it is possible to take into account cumulative effects in s104 analysis since the dicta of the Court of Appeal in *Dye v Auckland Regional Council* [2002] 1 NZLR 337. That was a judgment

delivered at the same time as *Arrigato*. In *Dye* the Court was considering whether or not a consent to subdivide rural land into smaller lots would be an adverse precedent and in that respect have a cumulative effect. The factual circumstance is a long way from the problem posed by this case. The Court held that the reference in s104(1)(a) on any actual or potential effects displaced the full definition in s3 of effect for the purpose of this section. However, the Court did not hold that under s104(1)(a) the question of cumulative effects could not be taken into account. Cumulative effects are a form of actual effect. This was emphasised by the Court of Appeal in paragraph [38]. In paragraph [41] the Court of Appeal said:-

> ... Everything points to a deliberate intention here to address only effects which are "actual" and "potential"; albeit putting the matter that way is in any case inherently very wide and capable of capturing some, if not all, of the subtleties of the s 3 definition. So far therefore, in spite of the seemingly deliberate decision not to rest on the defined term "effect", it is not easy to see what confining purpose the legislature may have had.

[85] Contrary to some decisions of the Environment Court I do not read *Dye* as excluding considerations of effect, which if classified according to s3 would be classified as cumulative effects. Those effects are relevant under s104(1)(a) because they are "actual".

[86] I do not read the Environment Court here as thinking it could not take into account the cumulative effects of the Rickerby proposal. The error was the way in which it took into account the cumulative effects. It did so disregarding the potential for dwellings in this area, closer than the existing dwellings.

[87] In sum the Environment Court disregarded some relevant considerations when exercising its discretion under s104. It is not the function of this Court on appeal to then examine whether the Environment Court's decision would be any different had it taken these relevant matters into account. It is sufficient to find the error materially affected the way the Court framed the case.

The interpretation of AQL5

[88] Ms Steven's 5th question turns upon the interpretation by the Environment Court of Policy AQL5 of the Proposed Canterbury Natural Resources Regional Plan, Chapter 3, Air Quality, (Proposed Air Quality Plan or PAQP).

[89] The PAQP was promulgated during the processing of the appeal before the Environment Court and was obviously directly relevant to the consideration of the air discharge consent. As the appeal was filed after 1 August 2003 the Court followed s104 as amended, but nothing turns on that.

[90] Policy AQL5 reads as follows:-

> *Policy AQL5 Avoid odour nuisance*
>
> *(a) Prevent any discharge of odour from new activities that discharge contaminants into air, such that it does not cause offensive or objectionable effects beyond the boundary of any site where it originates. Where a new activity is unable to do this then that activity shall:*
>
> *(i) locate away from sensitive areas and activities; or*
>
> *(ii) locate in areas where odour emissions beyond the boundary do not cause offensive or objectionable effects.*
>
> *(b) Promote the adoption of the best practicable option to prevent or minimise offensive or objectionable effects of odour from existing activities that discharge contaminants into air, such that it does not cause offensive or objectionable effects beyond the boundary of any site where it originates.*
>
> *(c) Avoid encroachment of sensitive activities on existing activities discharging odorous contaminants into air, unless adverse effects of the odour can be avoided or mitigated by the encroaching activity.*
>
> *For the purposes of this policy: <u>new activities</u> are those activities which are established after the date of notification of the Proposed NRRP or not lawfully established before the date of notification of the Proposed NRRP; and <u>existing activities</u> are those activities which are lawfully established at the date of notification of the Proposed NRRP.*

[91] The Environment Court reasoned:-

> [98] We have concluded that this wording is problematic, particularly the definitions at the end. On its face this would seem to suggest that no expansion of an existing activity in a sensitive environment can occur: Policy (a) essentially requires a complete internalisation of offensive or objectionable effects or a relocation to avoid effects on sensitive activities. The Proposed Plan is at a very early stage. No decisions of Council on submissions or cross-submissions have yet been made. We conclude Policy AQL5 has overlooked expansion of existing activities. The policy is focussed on new activities only. To that end the application is for neither a new nor existing activity and does not fit easily within Policy AQL5.

[92] Naturally enough this interpretation was supported by the Rickerbys but it was not supported by the appellants or by the Canterbury Regional Council.

[93] Recently the Court of Appeal in *Powell and Ors v Dunedin City Council*, CA157/03 1 July 2004, restated the interpretation principles to be applied. The Court said:-

> [35] In this case, the appellants argued that the Court should look to the plain meaning of the access rule and, having found that there is no ambiguity, interpret that rule without looking beyond the rule to the objectives, plans and methods referred to in the earlier parts of section 20 of the plan. While we accept it is appropriate to seek the plain meaning of a rule from the words themselves, it is not appropriate to undertake that exercise in a vacuum. As this Court made clear in *Rattray*, regard must be had to the immediate context (which in this case would include the objectives and policies and methods set out in section 20) and, where any obscurity or ambiguity arises, it may be necessary to refer to the other sections of the plan and the objectives and policies of the plan itself. Interpreting a rule by a rigid adherence to the wording of the particular rule itself would not, in our view, be consistent with a judgment of this Court in *Rattray* or with the requirements of the Interpretation Act.

[94] The Proposed Air Quality Plan is a substantial document. Technically it is Chapter 3 of the proposed Canterbury Natural Resources Regional Plan. It numbers 224 pages, not counting the air quality zoning maps, of which there are 24. It would be surprising if such a plan omitted to address air quality issues arising when existing activities are expanded. For it is apparent immediately to the reader that the Proposed Air Quality Plan is intended to be comprehensive.

[95] Starting with "Air quality issues" the PAQP divides them into three, the first being:-

> 3.1.1
>
> (a) Localised air quality issues associated with odours, dust, smoke, agrichemical spray and other discharges to air from the domestic, transport, commercial, agriculture, horticulture, manufacturing and industrial sectors.

That becomes the first issue (AQL1) from which is derived the first objective. The relevant part of the first objective is as follows:-

> Objective AQL1 – Objective for localised air quality
>
> Localised contaminant discharges into air do not, either on their own or in combination with other discharges, result in significant adverse effects on the environment, including:-
>
> (c) Offensive or objectionable odours.

[96] Policy AQL5 follows upon the identification of objective AQL1. I am quite satisfied so far that Policy AQL5 is intended to be a comprehensive policy addressing odour nuisance in the area of the region. That conclusion is reinforced by the explanation and principal reasons discussion which follows Policy AQL5.

[97] Further, Part 3.5.9 of Chapter 3 provides regional rules for the discharge of contaminants into air from intensive farming. It permits small scale poultry farming of layer poultry under certain conditions. Rule AQL60 permits poultry farming of broilers up to 30,000 units under certain conditions. The Environment Court interpreted this rule as not permitting an existing broiler farm to simply expand incrementally by adding up to 30,000 chickens at one time. See para [96]. By Rule AQL62, intensive farming not complying with Rule AQL60 becomes a discretionary activity, thus requiring a resource consent.

[98] Because of AQL60, and AQL62, the Rickerbys' proposed addition of more than 30,000 units is an activity which is not permitted under the PAQP. It seems to me natural to conclude that that proposed expansion is "not lawfully established" as that phrase is used in the definition of "new activities" in Policy AQL5.

[99] I conclude that the Court is in error in its interpretation of Policy AQL5. New activity in that policy includes expansion of existing activities, at least of sufficient scale to trigger the application of rule AQL62.

[100] For the purpose of s104 analysis, that still leaves the weight to be attached to that policy. The Court noted that there had been no decisions on submissions or cross-submissions. It is open to the Court to consider the likelihood of Policy AQL5 surviving the review process of the proposed plan.

General conclusion

[101] I have concluded that in essentially two respects the Environment Court has erred as a matter of law, in the course of s104 analysis. The decision of the Court is set aside and the proceedings remitted back to the Environment Court for further consideration and determination in the light of these findings.

Fogarty J

Signed at 4.15 pm on 24 August 2004

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