IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

CIV-2013-425-95
[2013] NZHC 1712

BETWEEN	SHOTOVER PARK LIMITED AND REMARKABLES PARK LIMITED Appellant
AND	QUEENSTOWN LAKES DISTRICT COUNCIL Respondent

CIV-2013-425-94

BETWEEN	FOODSTUFFS (SOUTH ISLAND) LIMITED Appellant
AND	QUEENSTOWN LAKES DISTRICT COUNCIL Respondent

Hearing:	24, 25 and 26 June 2013
Appearances:	R Somerville QC and S Schaepfer for Shotover Park Limited I Gordon and J B Orpin for Queenstown Central Limited N H Soper and A C Ritchie for Foodstuffs (South Island) Limited R S Cunliffe and J E MacDonald for Queenstown Lakes District Council
Judgment:	5 July 2013

JUDGMENT OF FOGARTY J

Table of Contents

Summary of judgment

[1] The appellants allege that one Environment Court failed to consider reasoning of another Environment Court on the same, or sufficiently similar, facts and issues. Justice requires that like cases should be decided the same way. That this was an error of justice and law, so that the Court who failed to consider the other should have its decision set aside.

[2] At the heart of these appeals is criticism of Judge Borthwick's division's decision to disregard the fact and merit of Judge Jackson's division's grant of resource consents to the Pak'nSave and Mitre 10 Mega proposals.

[3] The Court could have considered the reasoning of the other Court, allowing for the differences in the issues. The questions each Court were examining, however, were materially different. So different that in this case there was no duty of one to consider the reasoning of the other.

[4] The Court was not obliged to assume that the environment within PC19 contained the Pak'nSave supermarket and Mitre 10 Mega. This is because when deciding the content of a plan for the future, as distinct from the grant of a particular resource consent, the Court is not obliged to confine "environment" to the "existing environment", as defined in [84] of *Hawthorn*.[1]

[5] The appeals are dismissed.

Introduction

The objective of the operative plan

[6] The Queenstown Lakes District Council plan became fully operative in 2009. Approximately 69 hectares of rural land, zoned rural general, on the Frankton Flats adjacent to the airport is the last remaining greenfields site within the urban growth boundary of Queenstown. The operative plan has an objective:

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1 *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA).

Objective 6 – Frankton

> ***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 natural landscape approach to Frankton along State Highway No. 6.***

[7] By Plan Change 19 (PC19), the Council proposes that this last remaining area of rural zoned land on the Frankton Flats yet to be rezoned for urban zoning be rezoned for urban development.

A brief chronology

YEAR	EVENT
2007	PC19 was first notified by the Council.
2009	In October 2009, hearing commissioners appointed by the Council released a decision recommending that PC19 be approved. In the same year, appeals were lodged, including by Foodstuffs.
2010	Foodstuffs also applied to the Council for resource consent for a Pak'nSave supermarket within the area of PC19.
2011	Foodstuffs' application for resource consent was declined. Cross Roads applied for resource consent for a Mitre 10 Mega adjacent to the proposed Pak'nSave supermarket.
2012	February - a division of the Environment Court, chaired by Judge Borthwick, began hearing the appeal against PC19. March – A month later, Cross Roads applied for direct referral of its resource consent to the Environment Court. 3 May - (After four sittings over four separate weeks, 19 days in all), Judge Borthwick's division reserved its decision on PC19. Later in May, another division of the Environment Court, chaired by Judge Jackson, began hearing the Foodstuffs 2010 appeal against the refusal of resource consent for the Pak'nSave supermarket, and Cross Roads' 2011 direct referral to the Environment Court for consent to a Mitre 10 Mega.

	July - Judge Jackson's division granted resource consent for the Pak'nSave supermarket,[2] and in August for the Mitre 10 Mega.[3] November - Judge Borthwick's division resumed hearing the PC19 appeal in order to hear oral argument on the relevance, if any, of Judge Jackson's division's decisions on Foodstuffs and Cross Roads. By this time both of those decisions were themselves the subject of appeal to the High Court.
2013	February - Judge Borthwick's division issued its judgment on PC19.[4] In this judgment, Judge Borthwick's division placed no weight on these consents. (This judgment is called the *PC19* decision.) On the same day that Judge Borthwick's division delivered its judgment on PC19 this High Court began hearing the appeals against the grant of the Pak'nSave and Mitre 10 Mega resource consents by Judge Jackson's division. Those appeals were successful. March - Foodstuffs, Shotover Park Limited and Remarkables Park Limited appeal Judge Borthwick's division's decision in PC19. In PC19, and so in this decision, both parties are referred to as SPL. April – The High Court allows the appeals against Judge Jackson's division's decisions, and remits the resource consent applications back to the Court, to be reconsidered against the current state of PC19.[5] June - This Court grants leave to Foodstuffs and Cross Roads to appeal the decision of this Court on the resource consents to the Court of Appeal.[6] On the same day, this Court starts hearing the appeals against Judge Borthwick's division's decision.

The allegations of error of law

[8] As already noted, there are two appeals; one by Shotover Park Limited and Remarkables Park Limited, together referred to as SPL, and the other by Foodstuffs. They take different, but complementary grounds of appeal.

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2 *Foodstuffs (South Island) Limited v Queenstown Lakes District Council* [2012] NZEnvC 135 (*Foodstuffs).*

3 *Cross Roads Properties Limited v Queenstown Lakes District Council* [2012] NZEnvC 177 (*Cross Roads*).

4 *Queenstown Airport Corporation v Queenstown Lakes District Council* [2013] NZEnvC 14 (*PC19*).

5 *Queenstown Central Limited v Queenstown Lakes District Council* [2013] NZHC 815; *Queenstown Central Limited v Queenstown Lakes District Council* [2013] NZHC 817.

6 *Foodstuffs (South Island) Limited & Anor v Queenstown Central Limited* [2013] NZHC 1552.

SPL's contention of error of law

[9] SPL contends that Judge Borthwick's division erred in concluding that the considerations in ss 31 and 32 of the Resource Management Act 1991 (the RMA) do not support significant weight being given to Judge Jackson's division's findings in the *Foodstuffs*[7] and *Cross Roads*[8] decisions. SPL relies on the following particular grounds:

(a) Judge Borthwick's division failed to act consistently with Judge Jackson's division in terms of relevant findings of fact and law concerning the proposed activities in activity areas E1, E2 and E3.

(b) It acted on the basis that before doing so the above decisions needed to be determinative of the PC19 proceedings (not pursued in oral argument).

(c) It failed to place weight on the findings of fact and law in terms of ss 5, 7, 31, 32 and 74 of the RMA (as found in Judge Jackson's division's decisions).

(d) It failed to put weight on Judge Jackson's division's decisions in *Foodstuffs* and *Cross Roads* in respect of the decisions version of PC19 (PC19 (DV)). This being the version of PC19 as it was when the Queenstown Lakes District Council adopted the commissioners' decision on the submissions to PC19.

(e) Judge Borthwick's division failed to consider the planning implications of the area of land being used by the activities covered by the Environment Court's decisions in *Foodstuffs* and *Cross Roads* when proposing objectives for that land.

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7 *Foodstuffs (South Island) Limited v Queenstown Lakes District Council* [2012] NZEnvC 135 (*Foodstuffs).*

8 *Cross Roads Properties Limited v Queenstown Lakes District Council* [2012] NZEnvC 177 (*Cross Roads*).

(f) Judge Borthwick's decision made factual findings that conflict with factual findings in the *Foodstuffs* and *Cross Roads* decisions, but did not explain the reasons for these conflicting findings.

(g) Judge Borthwick's division relied on the fact that some of the experts that appeared in *Foodstuffs* and *Cross Roads* did not appear before the Court, but did not acknowledge that there were many common witnesses, particularly in relation to matters of urban design and amenity.

(h) Judge Borthwick's decision failed to consider the implications of the Mitre 10 Mega and Pak'nSave decisions to its assessment under ss 31 and 32.

[10] SPL posed the question of law to be answered as:

> Did Judge Borthwick's division err in concluding that the considerations in ss 31 and 32 of the Act did not support significant weight being given to Judge Jackson's division's finding in the *Foodstuffs* and the *Cross Roads* decisions?

Activity areas E1, E2 and E3, the Eastern Access Road (EAR) and Road 2

[11] To understand the alleged error of law it is essential to explain at this point the above terms, as part of an explanation of the factual setting of this dispute within the 69 hectares of PC19.

[12] This dispute is over an area of approximately 10 hectares. This 10 hectare site is located at the intersection of two to be built roads. One is called the Eastern Access Road (EAR), which will run off State Highway 6 (SH6). In time the EAR will give access to the land south of the airport via this area.[9] SH6 is the main highway into Queenstown from Cromwell. Of its nature that state highway has few intersections in order to maintain its high level of traffic service. The EAR will itself have arterial road status. That means that the traffic engineers will have high expectations as to the quality of traffic flow along this road, and so will be inclined

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9 *PC19* at [26](d).

to take steps to minimise right hand turning on the road and the number of intersections on the road, and maybe, parking on the side(s) of the road.

[13] One planned intersection of the EAR is with Road 2. Road 2 is an important road. It is the proposed main road from the western end of PC19 to the east, to link up with the Glenda Drive industrial area to the east. It is expected to have significant traffic. Road 2 is the first intersection on the EAR after you leave SH6. As you come down the EAR you will come to the intersection with Road 2 and EAR. At that intersection, on your left and on the south side of Road 2, would be a large development containing a Pak'nSave, a Mitre 10 Mega and a significant car park in front of the two retail and trade retail businesses.

[14] From a commercial point of view, this site is an ideal location for a large supermarket and a very large hardware, outdoor supplies and garden centre business. Easily found, straight off main roads. The site is also proximate to the intended residential development immediately to the east, on the other side of the EAR. It is readily reached by the main roads from other parts of Frankton Flats and from Queenstown. It is quite understandable, to this Court, why the landowner (SPL), Foodstuffs and Cross Roads (the developer of Mitre 10 Mega) are vigorously litigating in support of this project.

[15] The location of this project does not fit the content of PC19 as released by the Council (PC19 (DV)). The Pak'nSave part of the project straddles two zones, E2 and E1. E2 is a zone which itself straddles the EAR. E2 is intended to be a "sleeve" on either side of the road. It would contain two-storey buildings, the ground floor being showroom trade related type retail, for example, a plumber merchant, with the upper floor available for residential use. Remember that to the west (closer to Queenstown) is an intended residential and commercial area. The E1 zone is a zone more dedicated to industrial activities. That is deliberately a vague sentence because the planning has not yet reached the state where the activities allowed within the zone can be set out with any great certainty. The Mitre 10 Mega is in the E1 zone, but abutting the Pak'nSave. The car parks, which customers of both businesses would share, straddle both the E1 and E2 zones.

[16] An immediate consequence of the Pak'nSave proposal is that it would eliminate part of the E2 sleeve, as the Pak'nSave operation will go right up to the boundary of the EAR. So it is, in part at least, a direct challenge to the E2 zone. This is partly because it is of a size (approximately 6,000 m^2 ground floor area (gfa)) much greater than the range of 500 to 1,000 m^2 ground floor area gfa preferred by Judge Borthwick's division.

[17] The Mitre 10 Mega, functioning as a major retail activity, presents a challenge to the notion of the E1 zone having a dominance of industrial activity. Before Judge Borthwick's division, Shotover Park Limited was recommending a new zone, E3. E3 was a zone containing the whole of the SPL property of about 40 hectares or so. In other words, four times the size of the Foodstuffs' and Mitre 10 Mega projects. This block includes those two, but is generally running on the east side of the EAR, being the side away from the direction of Queenstown and towards the Glenda Drive industrial area.

Refinement of SPL's error of law

[18] Mr Somerville QC for SPL argued that the effects on the environment of the future development of the urban form, amenity and function of the EAR and Road 2 (the proposed main road to the Glenda Drive industrial area) were critical issues for both divisions of the Environment Court, and that both divisions heard from some of the same witnesses on those issues.

[19] In this context, he argued that the deliberations of Judge Jackson's division, as revealed in its two decisions granting the resource consents for the Pak'nSave and Mitre 10 Mega, ought to have been considered by Judge Borthwick's division when it reconvened to hear argument after delivery of Judge Jackson's division's decisions, and particularly in the reasoning of its decision. I heard his contended error of law to break out into three propositions:

(1) That the reasoning and views of Judge Jackson's division on the merit of the Pak'nSave and Mitre 10 Mega projects and their associated impact/qualification of the E2 zone sleeve and the functioning of the EAR were relevant considerations which Judge Borthwick's division

was obliged by law to have regard to before it reached its decision on PC19.

(2) Either as an aspect of the first proposition or as a separate ground, the common law principle that like cases should be treated alike, required Judge Borthwick's division to consider with some care the reasoning of Judge Jackson's division, and only differ from it for good reasons.

(3) That Judge Borthwick's division failed to do this.

The response by Queenstown Lakes District Council and Queenstown Central Limited to SPL's error of law

[20] Queenstown Central Limited (QCL) is the other major property owner in the PC19 area. Its land is on the other side of the EAR, where a mix of residential and commercial uses are proposed to be located. It can be readily appreciated (the motivations are not part of the evidence) that QCL views the development of another retail centre on the other side of the road to the east as inimicable to its commercial interests to the west.

[21] Counsel for QCL and QLDC's essential response to the contended error of law by SPL was that:

(1) Judge Borthwick's division had a different function under the RMA from Judge Jackson's division. It was applying different sections of the Act, particularly ss 31, 32 and 33, so that it was asking different questions and applying different criteria than those being examined by Judge Jackson's division, which was applying ss 104 and 104D. This is notwithstanding that, as a common element to both statutory functions, Part 2 of the RMA (ss 5, 6 and 7) applied.

(2) That by the time Judge Jackson's division gave its decision the hearing on PC19 had been completed. The decision was reserved. Many of the witnesses were different. The task of Judge Borthwick's division was to resolve the conflicting evidence of the witnesses it

heard, and that it could not do this in natural justice to the parties before it by taking into account and giving weight to a different contest that took place before Judge Jackson's division, albeit over similar merit considerations of the Pak'nSave and Mitre 10 Mega proposals.

(3) While as a matter of law like for like considerations are desirable, in this case, for reasons (1) and (2) combined, Judge Borthwick's division's refusal to undertake a like for like analysis was not an error of law.

Foodstuffs' contended error of law

[22] Foodstuffs supports SPL's argument, but adds a separate point. This point relies on [84] of the Court of Appeal's decision in *Queenstown Lakes District Council v Hawthorn Estate Ltd*,[10] which provides:

> [84] In summary, we have not found, in any of the difficulties Mr Wylie has referred to, any reason to depart from the conclusion which we have reached by considering the meaning of the words used in s 104(1)(a) in their context. In our view, the word "environment" embraces the future state of the environment as it might be modified by the utilisation of rights to carry out permitted activity under a district plan. It also includes the environment as it might be modified by the implementation of resource consents which have been granted at the time a particular application is considered, where it appears likely that those resource consents will be implemented. We think Fogarty J erred when he suggested that the effects of resource consents that might in future be made should be brought to account in considering the likely future state of the environment. We think the legitimate considerations should be limited to those that we have just expressed. In short, we endorse the Environment Court's approach.
>
> (Emphasis added)

[23] Counsel for Foodstuffs argued that Judge Borthwick's division erred by declining to consider the Foodstuffs resource consent as forming part of the environment, being (with the Mitre 10 Mega) resource consents which are likely to be implemented. Foodstuffs' counsel argued that [84] applies equally to consideration of applications for resource consents and consideration as to the future content of plans in an environment.

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[10] *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA).

[24] Mr Soper for Foodstuffs argued that the fact that the resource consents were under appeal was irrelevant to the application of [84] of *Hawthorn*. As at the time Judge Borthwick's division reached its decision the appeals were pending only before the High Court, the resource consents were still afoot, they had not been stayed, they were likely to be implemented. Therefore, according to law, Judge Borthwick's division had no alternative but to face the reality of these consents as altering the future environment and thus being facts that had to be taken into account in the analysis of the future content of PC19. They were not, and so that is error of law.

[25] The submissions in reply from QLDC and QCL were predictably that, as a matter of fact, the appeals against those decisions had rendered it impossible to make a finding that the resource consents were likely to be implemented, and that that judgment (which was the judgment by Judge Borthwick's division) was vindicated by the appeals being allowed and the applications being sent back to Judge Jackson's division for reconsideration.

The reasoning of Judge Borthwick's division

[26] Judge Borthwick's division's decision addresses the two decisions of Judge Jackson's division under the heading:[11]

> **Part 3 Weighting to be given to recent Environment Court decisions**

[27] The reasoning opens by recording that, given the grant of the two resource consents and the fact that both decisions had been appealed, the Court had released a minute expressing the tentative view that, while the decisions were relevant and a matter to which the Court could have regard, as they were under appeal little or no weight should be attached to them.[12]

[28] Judge Borthwick's division's decision went on to note that apart from the appeal the consents could not be exercised until a third consent was available to subdivide SPL's land, and that a subdivision application had been lodged with the

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[11] *Queenstown Airport Corporation v Queenstown Lakes District Council* [2013] NZEnvC 14 (*PC19*).

[12] At [103].

Council in 2009. The Court did not regard this aspect and other consents contingent upon the upgrading of QLDC's potable water supply, storm and wastewater systems as a serious barrier to the likelihood of the consents being implemented.

[29] Judge Borthwick's division recorded Foodstuffs' submission that there was a commonality of issues, and that for this reason Judge Borthwick's division should give significant weight to the factual findings, particularly in *Foodstuffs*, concerning (a) landscape, (b) industrial land supply, (c) the amenity of the neighbourhood – particularly on the EAR and Road 2, and (d) urban structure. It recorded the submission by Foodstuffs that these same issues are to be considered by this Court under ss 5, 7, 31 and 74 of the RMA.

[30] It is then appropriate to set out a number of paragraphs of Judge Borthwick's division's Part 3 reasoning in full:

> [114] Further, SPL and Foodstuffs submit decisions made on the following topics should be accorded significant weight:
>
> (a) the court's findings in *Foodstuffs v QLDC* at [193, 194, 224, 254 and 283] in relation to AA-C2, assuming this Activity Area were to extend to the EAR as proposed by SPL in the PC19 proceedings and opposed by QLDC/QCL;
>
> (b) the court's findings in *Foodstuffs v QLDC* at [192] concerning the sleeving of retail activity along the EAR if car-parking is not allowed as proposed by SPL in the PC19 proceedings and opposed by QLDC/QCL; and.
>
> (c) the court's findings in *Cross Roads Properties Ltd v QLDC* at [176] in relation to a "trade retail centre" south of Road 2.
>
> [115] SPL, citing a line of case authority, submits that while this court is not bound by decisions of other Environment Court divisions, and is free to consider each case on its own facts and merits, the court is entitled to take into account decisions made in *Foodstuffs v QLDC* and *Cross Roads Properties Ltd v QLDC* on similar facts. When deciding whether to consider the decision of another division, and the weight to be given to the findings made therein, this court must act reasonably and rationally. Failure to do so may be regarded as giving rise or contributing to irrationality in the result of the process. If this court were to come to contrary findings of fact or law than *Foodstuffs v QLDC* and *Cross Roads Properties Ltd v QLDC* then we should give reasons for our contrary decisions.
>
> [116] Disputing the District Council's submission that an appeal or direct referral of a resource consent application is more narrowly focused than these plan change proceedings, SPL submits the Environment Court in

Foodstuffs v QLDC and *Cross Roads Properties Ltd v QLDC* addressed the "very issues" to be determined on the plan change appeals including sections 31(l)(a), 32(3) and (4), 74(2) and Part 2 of the Act; there are no gaps in the analysis or evaluation of the relevant evidence; the Environment Court's decisions address the relevant potential adverse effects of land and the objectives and policies of the operative District Plan and PC19(DV).

[117] Foodstuffs submits that this court has two options, either:

> (a) give "adequate" weight to [the] Environment Court's decision to grant consent to Foodstuffs; or
>
> (b) await the outcome of the High Court proceedings.

...

The issues

[121] While submitting that the decisions of *Foodstuffs v QLDC* and *Cross Roads Properties Ltd v QLDC* are relevant (and we agree that they are), SPL and Foodstuffs gave scant regard to the *relevance* of the decisions to these proceedings. In the end two themes emerged:

> (a) whether the grants of consent are relevant to an assessment of the environment?
>
> (b) is the implementation of the consents relevant to an evaluation under section 31(1)(a) and section 32(3) generally and in particular, the efficiency and effectiveness of policies, rules and other methods which may anticipate a different environmental outcome?

Issue: Whether the grants of consent are relevant to an assessment of the environment?

[122] In a plan change proceeding, a grant of consent may be relevant to an assessment of the environment, which we find would include the future environment as it may be modified by the implementation of resource consents held at the time the plan change request is determined and in circumstances where those consents are likely to be implemented. Unlike *Hawthorn Estate Ltd* (cited to us by SPL and Foodstuffs) this court is not concerned with how the environment may be modified by the utilisation of rights to carry out permitted activities under the District Plan. Indeed the proposed modification of the existing environment is the subject matter of these plan change proceedings. *Hawthorn Estate Ltd* is therefore distinguishable on its facts.

[123] The likelihood of the consents being implemented is a question of fact and this is difficult to determine, but not because these particular consents are contingent upon the gaining of other consents and approvals. (While this will take time we were told of no compelling reason why these would not ultimately be forthcoming).

[124] Rather, the question is difficult because it involves speculation as to the outcome of the High Court appeals. Subject to the High Court's

decisions, it may be open to the other division of the Environment Court to confirm the grants of consent with or without modification or (possibly) to reject the applications. Given this, we are not in a position to determine the likelihood that these consents will be implemented.

[125] But even if we are wrong in finding this, any consent granted to the Foodstuffs and Cross Roads Properties Ltd may be exercised. This is so notwithstanding that the underlying zoning does not permit the activities authorised (and after all it was on this basis that they were granted). While Foodstuffs (South Island) Ltd and Cross Roads Properties Ltd may consider it preferable that the underlying zoning is enabling of the consents held, this would not preclude the exercise of their consents (see section 9 of the Act).

Issue: Is the implementation of the consents relevant to an evaluation under section 31(l)(a) and section 32(3) generally, and in particular the efficiency and effectiveness of policies, rules and other methods which may anticipate a different environmental outcome?

[126] The consideration of unimplemented resource consents as forming part of the future environment is important when we come to consider the integrated management of the effects of use, development or protection of land. Section 31(l)(a) provides:

> Every territorial authority shall have the following functions for the purpose of giving effect to this Act in its district:
>
> (a) The establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district.

The resource consents are also relevant under section 32 (which we summarised earlier).

[127] However, for the following reasons we reject Foodstuffs and SPL submission that the Environment Court findings (and obiter) are either relevant to issues for determination before this court and secondly, are matters to which significant weight attaches:

(a) the court in *Foodstuffs v QLDC* and *Cross Roads Properties Ltd v QLDC* does not purport to determine any issue in these proceedings;

(b) the "factual findings" relied upon by SPL and Foodstuffs are conclusions given in their own policy context; namely PC19(DV);

(c) in contrast with *Foodstuffs v QLDC* and *Cross Roads Properties Ltd v QLDC*, the evidence before this court, from largely different witnesses, sought different policy outcomes from PC19(DV);

(d) the issues considered and factual findings made in *Foodstuffs v QLDC* and *Cross Roads Properties Ltd v QLDC* are not the same as in these proceedings albeit that they may

be grouped under the same topic headings with reference to sections 5, 7, 31 and 74; and

(e) to the extent that the matters at [114] above address relief sought by the parties in these proceedings, and are not provisions in PC19(DV), the comments are obiter.

[128] We find that there is nothing *inevitable* (as suggested) about the grant of consents to Foodstuffs and Cross Road Properties Ltd and the consequential approval of AA-E3 in these proceedings. The AA-E3 zone is enabling of a wide range of activities, including a supermarket and trade retailing. The Environment Court in *Foodstuffs v QLDC* and *Cross Roads Properties Ltd v QLDC* did not consider SPL's proposed AA-E3 zone.

[129] We have concluded that sections 31 and 32 considerations, in particular the efficiency and effectiveness of policies, rules and methods, do not (in this case) support a submission that significant weight should be given to the Environment Court's findings. Firstly, and for reasons that we give later, we have determined that the land east and west of the EAR should be subject to its own ODP process. Secondly, while there are differences in the range of activities provided for within the different sub-zones supported by QCL/QLDC and by SPL, and differences also in the road frontage controls proposed by these parties, not dissimilar outcomes in terms of achieving an acceptable urban design response would potentially arise on the balance of the AA-E2 (being the land not subject to Foodstuffs' consent application).

[130] The artifice in the SPL and Foodstuffs submission is this; in *Cross Roads Properties Ltd v QLDC* the court also found, for urban design and landscape reasons, large format trade related retail should be confined to the south of Road 2, whereas SPL in these proceedings sought a zoning enabling of these activities both north and south of the Road. We are not prepared to alter the weight given to different findings (obiter) of the Environment Court in *Foodstuffs v QLDC* and *Cross Roads Properties Ltd v QLDC* to suit SPL and Foodstuffs. If we are to give significant weight to the factual findings made in *Cross Roads Properties Ltd v QLDC* then we would partially reject AA-E3 (and reject AA-E4) as they provide for these activities north of Road 2. That is not an outcome SPL or Foodstuffs would support.

Outcome

[131] While we find that the Environment Court decisions *Foodstuffs (South Island) Ltd v QLDC* and *Cross Roads Properties Ltd v QLDC* are relevant, we are unable to assess whether the consents (if upheld) will be implemented and therefore decline to consider the consents as forming part of the environment.

[132] We decline to defer our Interim Decision pending the release of the High Court's decisions on the consent appeals as the High Court decisions are not, in our view, determinative of PC 19.

SPL's criticism of Judge Borthwick's division's reasoning

[31] Mr Somerville QC noted that Judge Borthwick's division's summary of his client's argument, at [115], is accurate. He then went on to argue that the Court did not identify any findings in either the *Foodstuffs* or the *Cross Roads* decisions as being of relevance. Despite having listed the topics in [114]. Rather, Mr Somerville QC submitted that Chapter 3 of the decision focuses almost exclusively on the *Hawthorn* [84] considerations, not on the decision-making process, the findings or the reasoning in the *Foodstuffs* and *Cross Roads* decisions.

[32] Judge Borthwick's division heard from five expert witnesses who had also given evidence in the Foodstuffs and Cross Roads proceedings. Mr Barrett-Boyes gave urban design evidence in both the Foodstuffs and Cross Roads hearings. Mr Brewer gave urban design evidence in the Cross Roads hearing. Mr Heath gave retail evidence in the Cross Roads hearing. Mr Penny gave transport evidence in the Foodstuffs hearing; and Mr Dewe gave planning evidence in the Foodstuffs hearing. All of these witnesses gave evidence at the PC19 hearing.

[33] Mr Somerville QC submitted that notwithstanding the observation of Judge Borthwick's division, that the witnesses were largely different,[13] in terms of urban design issues and traffic evidence there were issues common to both the PC19 decision and the *Foodstuffs* and *Cross Roads* decisions. During the Foodstuffs and Cross Roads hearings, Judge Jackson's division heard from two urban design witnesses who gave evidence at the PC19 hearing (Messrs Barrett-Boyes and Brewer) and two who did not (Messrs Teesdale and Williams). In terms of traffic experts, the Court in the Foodstuffs and Cross Roads hearings had evidence from Mr Penny and comments from Dr Turner, both of whom gave evidence at the PC19 hearing.

[34] In the *Foodstuffs* decision the issue of street frontage controls along the EAR was considered by the Court, which found that the proposed Pak'nSave development

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13 *PC19* at [127].

was "complementary and sympathetic to Road 2 to the north, the EAR to the west, and the proposed Mega Mitre 10 to the east".[14]

[35] Mr Cunliffe for QLDC pointed out immediately that this finding was under the heading "Conclusions as to effects on landscape".

[36] Under the heading of "*Street frontage, presence and amenity*", after detailed consideration of evidence of Mr Teesdale and Mr Barrett-Boyes, and having noted that the location of the EAR is not settled, Judge Jackson's division commented with apparent approval of Mr Teesdale's opinion:[15]

> ... it is likely that the carparking and main entrances to these commercial buildings [in the sleeves alongside each side of the EAR] will either be behind or at the side because of the nature of the road.

The Court went on:[16]

> ... That is important evidence because it means that the "sleeve" concept behind the E2 activity area is unlikely to work in practice – the road is the wrong design for the concept and the activity in it is mainly vehicular, as Mr Barrett-Boyes agreed when the court put that to him. The EAR is, after all, proposed to be an arterial road.

[37] Mr Somerville QC argued that this was a very important piece of evidence and conclusion, both of which should have been taken into account by Judge Borthwick's division when they reconvened.

[38] Mr Somerville QC also relied upon findings by the Court in the *Foodstuffs* judgment that the proposed land use achieved integration and met the purpose of the Act. He relied on three paragraphs from the *Foodstuffs* decision:

> **4.5 Integrated management/comprehensive development**
>
> <u>Integration with surrounding land uses and zones</u>
>
> [239] The first important aspect of integrated management is identified by objective 12. It is to ensure that the Frankton Flats B zone is integrated with the surrounding uses and other Queenstown urban areas. There was little or no evidence to suggest that was not being achieved, as the joint statement of

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14 *Foodstuffs* at [91].
15 At [192].
16 At [192].

the traffic engineers/transportation managers (already referred to) establishes.

[240] Greater emphasis was placed by QCL and the council on an alleged failure to "comprehensively" develop Lot 20 in conjunction with surrounding land. However, analysis of the evidence of Foodstuffs' witnesses does not bear that out. For example, the joint statement of the transportation engineers records their agreement:

- ... that the Glenda Drive driveway upgrade project including the Eastern Access Road and Road 2, will be able to proceed as programmed during the 2012-13 construction season without requiring a decision on Plan Change 19.

- ... that the pedestrian facilities provided for access into and within the proposed sites will provide a good level of service. It is agreed that the pedestrian crossings of the right-of-way are adequate and do not provide the "dead end" suggested by Mr Denney.

- it does not interfere with the location and layout of the EAR and Road 2, thus connecting streets efficiently;

- it enables mixed uses within the Frankton Flats B zone while providing for travel demand management;

- it ensures that land use and public access and transport is integrated

...

5. Outcome

5.1 Under the operative district plan

[280] We have no difficulty with granting a resource consent under the operative district plan. Despite the fact that the area is zoned Rural General, we have found that it is surrounded by urban activities and falls into the third (lowest) of the district's landscape categories. Further, the rural objectives in Chapter 5 of the operative district plan are replaced by a specific urban growth objective in Chapter 4. The site is in an area (Frankton Flats) which is clearly marked for urban development under objective (4.9.3)6 of that plan. All potential adverse effects have been sufficiently mitigated so that the important district-wide objectives as to landscape and protection of airport functioning (by avoiding reverse sensitivity effects) are met. In regard to the latter, we note that the Queenstown Airport Corporation was not even a party to the proceedings. The proposal is integrated into the roading network (specifically the EAR and Road 2) as required by the first policy. Space for industrial activities in any expansion of the Glenda Drive zone is left to the east and south of the site and the proposal will help buffer those activities from the residential area also aimed for in the Frankton Flats objective. There would be a greater benefit under section 5 of the Act by granting consent, than there would from refusing it.

[39] In the *Cross Roads* judgment, Judge Jackson's division found large format retail (LFR) (known more colloquially as "big box retail") south of Road 2 is probably desirable in urban design terms and for landscape reasons.[17] As to integration, the same Court found:[18]

> [77] The residential growth objective seeks residential growth sufficient to meet the district's needs. The first implementing policy is to enable "... urban consolidation ... where appropriate", and the second is to encourage new commercial development (*inter alia*) which " ... is imaginative ... urban design and ... integrat[es] different activities". The first is met because, as we shall see shortly, the later objective 6 expressly contemplates urban development of the Frankton Flats. As for the second policy, while nobody could claim that the trade retail store building is particularly imaginative, the policy is merely encouraging, not directive. Further, the proposal does integrate different activities in several ways: it contains several different types of activities (as defined in the district plan and discussed earlier) on the site itself; as a trade retail operation it will supply to local industry; and it would integrate car parking with the proposed Pak 'N Save on the adjacent land to the west; and finally (but importantly) it fits into the now nearly fixed road network (the EAR and Road 2) in this corner of the Frankton Flats...

[40] Judge Jackson's division was comfortable about inserting trade retail uses over the E2 and E1 zones, because it knew that the QLDC then appeared to support (though QCL opposed) the introduction of a "trade related retail overlay" diametrically opposite from the proposed Pak'nSave and Mitre 10 Mega, on land enclosed by the EAR, SH6 and Road 2.[19]

[41] So Judge Jackson's division in *Cross Roads* saw themselves as resolving an issue as to whether trade related retail should be placed north or south of Road 2, and concluded:

> [175] ...This decision would determine that large format trade retail is south of Road 2 rather than north. As it happens, we have cogent evidence that is probably desirable in urban design terms, and for landscape reasons.
>
> [176] However, in the bigger picture for Frankton Flats (or at least the "B" zone) introduction of a trade retail centre either side of Road 2 (if that occurs) will not relevantly interfere with the development of a village/town centre further west. That is because "Town Centres are pedestrian orientated, and it is necessary to ensure these attractive environments are not degraded by retail activities that are incompatible with their amenities."

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17 *Cross Roads* at [175].
18 At [77].
19 *Cross Roads* at [175].

[42] As I will discuss further, one of the criticisms of this reasoning is that Judge Jackson's Court was embarking on planning, rather than resolving a resource consent application.

[43] Earlier in the *Foodstuffs'* decision the Court appeared to remind itself that it was not engaged in planning:

> [45] We remind ourselves here that while we heard some evidence about possible outcomes of the hearing on PC19(DV) we must strictly apply the objectives, policies and rules in the decisions version itself. We must not speculate on any witness' (in this proceeding) improvements on PC19(DV) and/or with one possible exception - when predicting the reasonably foreseeable future environment - whether this is likely to be accepted by the (other division of) the Environment Court. We were also advised by the parties that, apart from the location of the EAR, all issues about PC19(DV) are still open for the court that heard the appeals on it to decide. Obviously that will affect the weight to be given to PC19(DV) if the proposal passes the gateway tests and we get to consider the substantive merits of the proposal (and if questions of weight arise).

[44] In *Cross Roads*, it is apparent that Judge Jackson's division was aware that its rulings in [175] and [176] were intruding into planning issues as to the content of PC19, because in the next paragraph they explain why they are doing this:[20]

> [177] A further factor, which did not apply in the Foodstuffs case, is that this is a direct referral to the Environment Court. One of the principal points of the procedure is to have a speedy determination of the matter brought before the court. That would not be achieved if we adjourned this matter until 2013 while the appeals on PC19 are resolved. Further, we bear in mind that if the council had not agreed to the referral of CRPL' s application to the Environment Court, it would have had strict time limits within which to hear and notify the decision. Given that the direct referral was introduced in 2009 to streamline processes, it would be unusual if Parliament intended applicants or the Environment Court to wait until a plan change is resolved, when the consent authority would have been obliged to proceed. We consider this is a strong indicator that we should decide now rather than wait.

[45] Mr Somerville QC submitted that Judge Borthwick's division's decision, rejecting the location of the Pak'nSave and Mitre 10 Mega, was directly contrary to the findings in Judge Jackson's division's *Foodstuffs* decision that the proposed development was:[21]

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[20] At [177].

[21] *Foodstuffs* at [91].

> ... complementary and sympathetic to Road 2 to the north, the EAR to the west, and the proposed Mega Mitre 10 to the east.

Further, that the finding in the *PC19* decision, Judge Borthwick's division, that larger retail units are unlikely to give rise to a high quality landscape was contrary to the findings in the *Foodstuffs* and *Cross Roads* decisions, that the proposals achieve integration and meet the purpose of the RMA. The *PC19* decision is also inconsistent with the findings in the *Cross Roads* decision, that large format retail south of Road 2 is probably desirable in urban terms and for landscape reasons.

[46] I agree. The *PC19* decision favoured leaving the EAR in place. That finding is directly contrary to the finding in *Foodstuffs,* that the sleeving concept would not work in practice. Judge Borthwick's division found the activity area E2 (the sleeve) was:[22]

> ... the most appropriate way to achieve the purpose of the Act.

[47] It might also be noted that Judge Borthwick's division had at least two other reasons why it did not favour the Pak'nSave and the Mitre 10 Mega. They were: first, that they did not want to have another "town centre" in the PC19 area:

> [555] We conclude that AA-E3 would most likely develop as a fourth commercial centre and that its policies are strongly enabling of this result. However, there is nothing in its provisions that would ensure a mix of uses eventuates. At this location the Activity Area would be inconsistent with the District Council's policies which seek to keep the urban area compact (Section: District Wide Issues, clause 4.5.3, objective 1 and policies 1.1 and 1.2). We also find that the unmet growth demand in retail activities (such that there is) should be located in AA-E2 and in a manner that complements and (reinforces the form and function of AA-Cl and that this would be the most appropriate way to. achieve the purpose of the Act.
>
> [556] And we find the QLDC's Trade Retail Overlay would have the same result.

[48] The context needs to be kept in mind. On the west side of the EAR there was proposed to be a village with a mix of residence, retail and commercial uses. Judge Borthwick's division did not want a fourth commercial centre. Nearby, already established, is the Remarkables Park town centre. A second town centre was planned in PC19, west of the EAR. This Court is not sure what counts as the fourth – it could

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[22] *PC19* at [524].

be the existing commercial activities at Frankton, at the major intersection on SH6, accessing the airport and the Frankton suburb, the extension of the Remarkables centre in PC35, or the main town centre, downtown. It appears to this Court that Judge Borthwick's division was taking judicial notice that a large supermarket and a Mitre 10 Mega, east of the EAR, whether north or south of Road 2, would inevitably attract a very large number of shoppers, which fact would in turn attract efforts by other retail businesses to locate in the same area, and thus put pressure to create by way of a series of resource consents another town centre of retail activity.

[49] Second, that the QLDC plan already provides for large format retail, and specifically provides for it nearby in the Remarkables Park Scheme enabled by Plan Change 34:[23]

> [26] By way of further context it is relevant to note the following, additional features in the wider environment:
>
> ...
>
> (e) the approximately 150 hectares Remarkables Park Special Zone (RPZ)located on the southern side of Queenstown Airport adjoining the Kawarau River. RPZ is being developed progressively for a mix of urban activities including residential, visitor accommodation, recreational, community, education, commercial and retail activities in accordance with a structure plan. The RPZ contains the largest shopping centre outside the Queenstown central business district (CBD) with a further 30,000m2 retail development enabled by the recently operative PC34.

How Judge Borthwick's division could have responded

[50] In addition to the reasoning of Judge Borthwick's division's decision in Part 3, I agree that Judge Borthwick's division could have more directly engaged upon the reasoning of Judge Jackson's division. But it did not. In this respect it did decline the opportunity to directly consider whether or not to adopt the analysis and the conclusions of Judge Jackson's division as to the practicality of "sleeving", and the suitability of the proposed Pak'nSave and Mitre 10 Mega to the road network, to resolve the introduction of trade related retail east of the EAR, in the PC19, and either north or south of Road 2.

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[23] At [26](e).

[51] Before turning to a closer examination as to whether this failure was an error of law, it is important to note, before we leave the findings of the respective Courts, some of the phrasing of the conclusions of the Courts.

[52] The finding in [91] of *Foodstuffs* is that:

> ...the proposed development is complementary and sympathetic to Road 2 to the north, the EAR to the west, and the proposed Mega Mitre 10 to the east. (Emphasis added)

The finding as to the sleeve is that:[24]

> The "sleeve" concept behind the E2 activity area is unlikely to work in practice... (Emphasis added)

The finding as to amenities was:[25]

> ...there is not much in it aesthetically.

And:[26]

> ...the effects on the amenities of the likely future environment in general and street amenities in particular will not be adverse.

As to urban design, it was:[27]

> We are satisfied that overall a high standard of urban design has been achieved...

[53] This can be contrasted with the phrasing in the *PC19* decision, where Judge Borthwick's division's reasoning found that the E2 zone was:[28]

> ... the most appropriate way to achieve the purpose of the Act.
>
> (Emphasis added)

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24 *Foodstuffs* at [192].
25 At [194].
26 At [195].
27 At [202].
28 *PC19* at [524].

Resolution of the SPL appeal issues

Judge Borthwick's division's statutory task

[54] Judge Borthwick's division was exercising functions given to territorial authorities under the Act in ss 31 and 32, particularly ss 31(1)(a) and 32(3) which provide:

> **31 Functions of territorial authorities under this Act**
>
> (1) Every territorial authority shall have the following functions for the purpose of giving effect to this Act in its district:
>
> (a) the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district:
>
> **32 Consideration of alternatives, benefits, and costs**
>
> ...
>
> (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.
>
> (Emphasis added)

[55] Judge Borthwick's division was addressing the content of a scheme change in respect of the Frankton Flats, which change itself had to be fitted into the goal of achieving integrated management of the natural and physical resources of the QLDC's district. See s 31(a). This means that this division of the Environment Court was obliged by law to have a district-wide perspective addressing the function of PC19 in meeting the needs of the whole of the district, as well as a narrower focus of a good utilisation of the land within the bounds of PC19, undeveloped rural land to be urbanised.

[56] The RMA provisions do not provide only one right answer as to how to do that. Any number of solutions might achieve appropriate integrated management.

[57] The RMA objective is "the most appropriate way" to achieve the purposes of this Act. See above, ss 32(3)(a) and (b). The phrase "the most appropriate" acknowledges that there can be more than one appropriate way to achieve the purpose of the Act. The task of the territorial authority is to select the most appropriate way, the one it considers to be the best. That is inherently a decision, upon which reasonable persons can differ, known to lawyers as a question of degree. That task passed to Judge Borthwick's division on appeal. That task was never within the jurisdiction of Judge Jackson's division.

[58] This task of the territorial authority is taken on by the Environment Court because the statute gives a right of appeal to the Environment Court from judgments by the territorial authorities as to this matter. The Environment Court is not given the power to initiate any new plan change.

[59] That is why we read Judge Borthwick's division applying the standard "the most appropriate way" in its deliberations. It is also why we do not see Judge Jackson's division applying that standard.

Judge Jackson's division's statutory task

[60] Judge Jackson's division was applying two different sections of the RMA, ss 104D and 104. It is part of the scheme of the RMA that resource consents are not required if activities are permitted. They are only required for activities which are not permitted. This distinction between permitted activities and then a range of activities which have varying difficulties of being approved is a policy which dates back to the predecessor Act, the Town and Country Planning Act 1977, and before that to the Town and Country Planning Act 1953. Under the 1977 Act, one had permitted uses, controlled uses, conditional uses and specified departures.

[61] Under the RMA there is a broader range: permitted activities, controlled activities, restricted discretionary activities, discretionary activities and non-complying activities and prohibited activities.[29]

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[29] Section 77A(2).

[62] In common with all of the statutes, and particularly under the RMA, different tests apply depending on the classification of the activity under the operative and any proposed applicable plans.[30]

[63] All applications for resource consent have to be examined against the state of the plans as they are at the time the application is being considered. As Judge Jackson's division reminded itself in [45] of the *Foodstuffs* decision, set out above.

[64] But as we have seen, in the exigencies of the long delays in the *Cross Roads* decision, at [177], Judge Jackson's division consciously went beyond the normal bounds of restraint into resolving what were really planning issues as to whether there should be any trade related retail activity east of the EAR, and, if so, where? These being live issues before another division of the Environment Court, as Judge Jackson's division knew at the time they were considering the resource consent.

[65] In this regard, counsel for QLDC submitted that Judge Jackson's division was taking into account irrelevant considerations under s 104 when it took into account submissions to amend proposed plan PC19 (DV), which were a matter for evaluation and judgment by the territorial authority under ss 31 and 32, and on appeal to the Environment Court, but which were completely outside the jurisdiction given to a consent authority under s 104, or on appeal therefrom to the Environment Court.

[66] This context is not directly relevant to the question of whether there is any error of law on the part of Judge Borthwick's division. But is, in my view, a partial explanation of the reaction of Judge Borthwick's division to Judge Jackson's division's evaluations of planning issues that were placed before Judge Borthwick's division, where it called those views "obiter".[31]

The law - like for like – a relevant/mandatory consideration

[67] The critical issue in this appeal is whether or not Judge Borthwick's division was obliged by law to take into account Judge Jackson's division's examination of these common issues.

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30 Sections 104, 104A-D.

31 See *PC19* at [127] and [130].

[68] Whether or not Judge Borthwick's division had to take into account these common issues is a novel question. Counsel before me agreed that nothing like this set of circumstances has arisen before in New Zealand in any of the authorities. Counsel were not able to find authorities from any other jurisdiction which might assist the Court. The problem appears to be a consequence of two different divisions of the one Court addressing the same subject matter contemporaneously.

[69] It is necessary then to go back to first principles to place Mr Somerville QC's argument, that Judge Borthwick's division was obliged to consider the analysis and conclusions of Judge Jackson's division.

[70] Judge Borthwick's division was exercising a statutory discretion, given in ss 31 and 32, as to the content of PC19, albeit on appeal from the territorial authority's exercise of a statutory discretion. Its decision is now on appeal, limited to error of law. The principles guiding the exercise of statutory discretion do not differ depending on whether the exercise is being judicially reviewed, or heard on appeal.[32]

[71] The classic statement as to what considerations are relevant and mandatory is in the judgment of Lord Greene, Master of the Rolls, in *Wednesbury*[33] as set out by the Privy Council in the case of *Mercury Energy Limited v Electricity Corporation of New Zealand Ltd*.[34] Lord Greene MR in the *Wednesbury* case said at 228-230 that the Courts:

> ... can only interfere with an act of executive authority if it be shown that the authority has contravened the law. It is for those who assert that the local authority has contravened the law to establish that proposition. .. It is not to be assumed prima facie that responsible bodies like the local authority in this case will exceed their powers; but the court, whenever it is alleged that the local authority have contravened the law, must not substitute itself for that authority. It is only concerned with seeing whether or not the proposition is made good. When an executive discretion is entrusted by Parliament to a body such as the local authority in this case, what appears to be an exercise of that discretion can only be challenged

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32 *Peters v Davison* [1999] 2 NZLR 164 (CA) at [181].

33 *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223 (the *Wednesbury* case).

34 *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385 at 389. The same passage is cited by Cooke J in *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 181-182. *Countdown Properties (Northlands) Ltd v Dunedin City* [1994] NZRMA 145 (HC) at 153 is to the same effect and draws obviously from *Wednesbury*.

> in the courts in a strictly limited class of case. ... it must always be remembered that the court is not a court of appeal. ... the law recognizes certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion ... is an absolute one and cannot be questioned in any court of law.
>
> What then are those principles? They are well understood. ... The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters. ...

[72] These principles are extended in New Zealand by the judgment of Cooke J, as he was, in *CREEDNZ Inc v Governor-General*.[35] In that decision, Cooke J distinguished between mandatory considerations that have to be taken into account, and a consideration which can be taken into account but which is not mandatory. The context of that case was judicial review of an administrative order, called the National Development Order, applying the National Development Act 1979 to give approval to the construction of the aluminium smelter at Aramoana. One of the arguments before the Court was that the Government was determined to give authority for the go-ahead for the Aramoana smelter, even though the project would have dire effects on the New Zealand economy. When analysing what considerations were taken into account by the Ministers (and there was scant material), Cooke J said:[36]

> A point about the legal principle invoked by the plaintiffs should be underlined. It is a familiar principle, commonly accompanied by citation of a passage in the judgment of Lord Greene MR in [Wednesbury Corporation]: "If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters."

He then also cites in support Lord Diplock in *Secretary of State for Education and Science v Tameside Borough Council*.[37] Then Cooke J goes on:[38]

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35 *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA).

36 At 182.

37 *Secretary of State for Education and Science v Tameside Borough Council* [1977] AC 1014 at 1065.

38 *CREEDNZ Inc v Governor- General* [1981] 1 NZLR 172 (CA) at 182-183.

> What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation that the Court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the Court itself, would have taken into account if they had to make the decision. And when the tests are whether a work is likely to be in the national interest and is essential for one or more of the purposes specified in s 3(3), it is not easy to assert of a particular consideration that the Ministers were legally bound to have regard to it.

[73] It is important in this context that review for error of law is confined to requiring the decision-maker to consider matters which expressly or by implication the decision-maker "ought to have regard to", or conversely "would not be germane".

[74] Refining the point, the issue becomes whether the reluctance of Judge Borthwick's division to engage with the analysis of Judge Jackson's division is a failure to take into account a mandatory relevant consideration?

The authorities on like for like

[75] The High Court has previously held that the Town and Country Planning Appeal Boards are

> ... not bound by its previous decisions, and is free to consider each case on its own facts and merits...[39]

[76] Mr Somerville QC argued that where two divisions of the same Court are examining the same issue, then, in principle, both Courts should strive to agree.

[77] Mr Somerville QC submitted that a failure to act consistently gives rise to a ground of review on these *Wednesbury* administrative law principles. In *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd* Blanchard J said: [40]

> Inconsistency can be regarded as simply an element which may give rise or contribute to irrationality in the result of the process.

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39 *Raceway Motors Ltd and Others v Canterbury Regional Planning Authority* [1976] 1 NZLR 605 at 607.

40 *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd* [1998] NZAR 58 (CA) at 67.

[78] In the same case, Thomas J, in his dissenting decision, agreed with the majority view in this respect, saying:[41]

> ...the notion that like should be treated alike has been an essential tenet in the theory of law.

Thomas J went on to say that he did:[42]

> ... not doubt ... for a moment that it is an established principle of administrative law that a statutory body must act consistently towards those in the same situation unless the unequal or different treatment can be justified on a rational basis.

Thomas J then went on to say:[43]

> ... that the principle in issue derives from the fundamental notion inherent in the rule of law that like is to be treated alike. In essence, a statutory body which fails to carry out its power or exercise its discretion even-handedly where there is no justification for acting otherwise abuses its powers or exercises its discretion wrongly.

[79] Mr Somerville QC cited the Privy Council in *Matadeen v Pointu*,[44] where the Privy Council were discussing the notion of even-handedness as one of the building blocks of democracy, and said:

> ...treating like cases alike and unlike cases differently is a general axiom of rational behaviour. It is, for example, frequently invoked by the courts in proceedings for judicial review as a ground for holding some administrative act to have been irrational.

[80] Mr Somerville QC's argument is also reflected by the practice of common law Courts of "coordinate jurisdiction", not to differ one from the other.[45] In the case of *In re Howard's Will Trusts*,[46] a Mr Howard had devised valuable properties to his trustees, on trust for his wife for life, and after her death, for his daughter, his only child, with remainders over his grandchildren. Mr Howard wanted to retain the surname and arms of Howard over generations. The trust had a complicated clause

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41 At 72.
42 At 92.
43 At 93.
44 *Matadeen v Pointu* [1998] 3 WLR 18 (PC) at 26.
45 *Halsbury's Laws of England* (4th ed, 2001) vol 37 Practice and Procedure at [1244], entitled "Decisions of Co-ordinate Courts".
46 *In re Howard's Will Trusts* [1961] Ch 507. Co-ordinate means at the same level, as the divisions were here.

which essentially required the grandchildren acquiring these estates to change their surname if necessary to Howard. At least one of the grandchildren had refused to do that, and the question was whether or not they had forfeited their entitlement to the property. This raised an argument that it was against public policy, to force a name onto a person, so these provisions were ineffectual. Wilberforce J, sitting at first instance, later to become Lord Wilberforce, said as an observation:[47]

> ...it is evidently undesirable that on a subject so much a matter of appreciation different judges of the same Division should speak with different voices.

[81] Wilberforce J did not have to explain what was "evidently undesirable". It goes to the question of public confidence. Two Courts of equal standing should not speak with different voices.

[82] In *Murphy v Rodney District Council*,[48] one of the issues was whether another resource consent application would be more likely to be granted, out of consistency with a decision consenting to the proposal before the Court – that is to say, the precedent effect. Baragwanath J said:[49]

> [39] It does not follow from the fact that rigid precedent is unattainable that no regard may lawfully be had to broadly similar decisions. To say that is not to import into environmental decision making the rigid doctrine of precedent... that would be impossible and indeed undesirable given the wide variety of facts, the number and range of decision makers, and the cost and delay of marshalling precedents. But "justice involves two factors – things, and the persons to whom the things are assigned – and it considers that persons who are equal should have assigned to them equal things" (Aristotle, *Politics* (1952), p 129). Human experience is that not to treat similar cases alike will give rise to suspicion and a deep sense of injustice which it is the duty of the Courts, as well as others who make decisions on behalf of the public, to avoid.

[83] There is no doubt that in this case Foodstuffs and Cross Roads have, in a broad sense, a right to have a sense of grievance after they have been granted resource consents for their proposals only to see that these proposals are not adopted and provided for in PC19. They are seeing, in a broad sense, one division of the

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47 At 523.
48 *Murphy v Rodney District Council* [2004] 3 NZLR 421 (HC).
49 At [39].

Environment Court supporting their proposals and another division being hostile to them. This does not encourage confidence in the judicial system.

[84] One of the central issues for judgment in this case is whether the distinction between ss 104 and 104D on the one hand (Foodstuffs and Cross Roads), and by ss 31 and 32 on the other (PC19), is sufficient to justify different merit judgments on the Pak'nSave and Mitre 10 Mega proposals.

Resolution of like for like issue

[85] As is apparent from the dicta cited above, like for like is a common law principle. It can be, and is, correctly applicable to the application of statutes. This is because all statutes are enacted into a common law legal system. The Courts bring to the interpretation of statutes the basic principles of justice which lie at the heart of the common law system, and will apply those subject only to directions from the contrary from Parliament.

[86] All Judges are very alive to the importance of maintaining public confidence in adjudication, both of common law and statutory cases. Much of the reasoning of Judges in cases compares previous decisions for their similarity to assist guiding the adjudication to the just solution of the problem.

[87] The issue in this case was to what extent the issues were so common as to make it relevant for Judge Borthwick's division to consider the reasoning and conclusions of Judge Jackson's decision.

[88] There is an aphorism used by practitioners of regulatory law, that *"the answer you get depends on the question you ask"*. It is critical when one applies a regulatory statute to apply the test set in the statute. Regulatory statutes are very carefully drafted with that in mind. They are drafted, of course, on political direction by the relevant Ministers of the Crown, but by professionals who understand the subject matter and choose language which sets very carefully the test to be applied.

[89] The RMA is a very complex statute. Significantly more complex than its predecessors, the Town and Country Planning Act 1977 and the Water and Soil Conservation Act 1967.

[90] The RMA, as enacted and amended, like its predecessors, reveals a compromise between regulating activities according to plans, and allowing departures from plans. As originally enacted, consent authorities were given an obligation to have regard to all planning instruments, whether operative or proposed.[50] As already noted in the RMA, activities are set on a graduating scale for ease of implementation, with or without regulatory consent, from permitted onto controlled activities (the first does not need consent and the second will get consent) and thereafter to a rising scale of restricted discretionary, discretionary, non-complying until prohibited activities.[51] The task of granting resource consents is treated as a separate task under the RMA, via s 104, than the task of determining the content of plans, ss 31 and 32. This distinction is material in this case, for the reasons which follow. Coupled with the particular context of this case, the distinction between these sections means that Judge Borthwick's division was not obliged by law to consider Judge Jackson's division's reasoning.

[91] In some contexts, when large scale proposals are pursued by way of resource consent, granting them consent can have enduring consequences for the content of plans. This is essentially the contextual setting in this case, because the establishment of a Pak'nSave and Mitre 10 Mega complex and associated car parking, east of the EAR, has to be seen in a wider framework, where PC19 is already proposing a town centre to the west of the EAR, and beyond Glenda Drive, on the other side of the airport, there is another town centre, the Remarkables Park. Now, of itself, of course, a Mitre 10 Mega and Pak'nSave would not be of itself a commercial or town centre, but, as already noted in [555], Judge Borthwick's division was concerned that allowing these retail activities to locate at the intersection of the EAR and proposed Road 2 could generate another commercial centre, indeed a "fourth".

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50 Section 104.
51 Sections 104A-D.

[92] Reading Judge Jackson's division's decision, there is no sense that it is deciding whether or not to grant the resource consent in a wider framework, embracing considerations as to the number of commercial centres to be seen as appropriate for Queenstown. Rather, Judge Jackson's division's decision focuses upon the objectives and policies of PC19, but does not address the function of PC19 relative to other parts of the Queenstown district. This is natural enough, as resource consent applications tend to be examined in the context of the immediate environment into which the proposed activity is to be placed.

[93] The sleeve of the EAR, and the associated traffic issues, was a common issue nonetheless that the two divisions had to examine. Integrated design, and particularly the bulk and location of buildings was another common issue. It was probably inevitable that Judge Jackson's division had to comment on the proposal of a Trade Retail Overlay nearby, in the PC19 issues.

[94] Judge Borthwick's division could have discussed Judge Jackson's division's reasoning and conclusions in regard to those two sub-topics of the sleeve and integrated design more expansively than it did.

[95] Paragraph [127] of Judge Borthwick's division does read as essentially dismissive. It includes implicitly a criticism that some of Judge Jackson's findings went beyond the proper scope of an enquiry as to the merit of a resource application. That is how I read the phrase "(and obiter)". But I think [127] should be read with the following paragraphs, [128], [129] and [130], which I think contain more reasons why Judge Borthwick's division did not find anything helpful in Judge Jackson's division's decision. The rejection is further explained by Judge Borthwick's division rejecting the proposal of a trade retail overlay zone, anywhere east of the EAR, that is on the same side of the EAR as the Pak'nSave and Mitre 10 Mega proposals. Judge Borthwick's division's decision was concerned about the proposed activity area E3 (which would absorb both the Pak'nSave and the Mitre 10 Mega and QLDC's proposed area for yard-based retail) as accommodating large format retail (LFR) activities in a non-town centre arrangement.[52] Judge Borthwick's division was satisfied that the growth demand for hardware, building and garden supplies

[52] *PC19* at [536].

could be accommodated within the existing zones or consented development.[53] The Court was concerned that if E3 was intended to accommodate activities of this sort, then it would provide floor space supply which would exceed the unmet growth demand for all sectors of retail activity.[54] That led to important later conclusions, which I have been explaining are relevant ultimately to understanding [127] through to [132]; these conclusions are [557] to [560]:

> **Outcome**
>
> [557] On the evidence provided we are not satisfied that AA-E3 or the proposed Trade Retail Overlay would give effect to the objectives and policies of the operative District Plan, and if a fourth commercial centre node emerges then it is likely to be inconsistent with those provisions. In short, we conclude that the AA-E3 objective is not the most appropriate way to achieve the purpose of the Act.
>
> [558] We may have reached a different view on whether there should be provision for a Trade Retail Overlay had Remarkables Park Ltd (supported by SPL) not successfully applied for a private plan change enabling up to 30,000m^2 additional retail floorspace at the Remarkables Park Zone located near the periphery of its existing centre. PC34 (now operative) is to enable future expansion of the commercial centre, including large format retail activities. In making our determination on all activities areas we have taken into consideration that there is zoned land to accommodate large format retail activities in the Remarkables Park Zone.
>
> [559] It follows from all our findings that we reject SPL's relief to zone its land AA-E3.
>
> [560] And we reject the Trade Retail Overlay.

[96] I think there is no doubt that Judge Borthwick's division was very alive to the reasoning of Judge Jackson's division as to the merits of a Pak'nSave and Mitre 10 Mega, but did not agree, principally because of its reluctance to introduce trade retail activity on SPL's land, the subject of E3, which proposed zone includes the Pak'nSave and Mitre 10 Mega proposal. That judgment was made looking at a bigger picture than the naturally limited focus of Judge Jackson's division.

[97] In this context then, I think the correct classification is that it was permissible, but not mandatory, for Judge Borthwick's division to engage in the reasoning and resolution of Judge Jackson's division when examining these two resource consent applications. The extent of their engagement and the reasons they

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53 At [538].
54 At [539].

gave are a sufficient response, and do not amount to a refusal to take into account mandatory relevant considerations, and so are not an error of law.

[98] As a precaution, I turn to treat the like for like obligation as potentially separate from an identification of relevant considerations. If it is not already clear, the like for like obligation can in some contexts make relevant considerations mandatory. I have found that they are not mandatory. But if I am wrong, and there is a separate and independent like for like obligation, I am now considering that separately. In this context, I am putting *CREEDNZ* to one side, the *Wednesbury* dictum to one side, and focussing solely on the common law principle that a Court should not differ with the views of a peer Court (co-ordinate Court).

[99] For reasons I have already canvassed, the tasks set the two different divisions are, to an RMA lawyer, two quite distinct tasks. I readily acknowledge, however, that to non RMA specialists that has to be explained.

[100] Quite independently of the common law principle, depending on the context, there can be reasons within the scheme and structure of the RMA which would encourage, where the context makes it possible, and desirable, for common decision-making when a proposal is the subject both for consideration under a proposed plan change and consideration as a resource consent. I have found above that Judge Borthwick's division could have considered Judge Jackson's division's views on the "sleeve" of the EAR, and the reasonableness of a trade retail overlay east of the EAR. The issue is whether that is possible and useful in this context, and unilaterally mandatory.

[101] It is possible to draw a meaningful distinction between the architecture of the RMA and the detail. Like many regulatory statutes, the RMA has had a lot of detail poured into it since its enactment, which has to a degree obscured its architecture. But its architecture does essentially remain via ss 31, 32, 74 and 104.

[102] The hierarchy of the statutory instruments running off the RMA, are set out in sequence in s 104(1)(b):

> **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–
>
> ...
>
> (b) any relevant provisions of—
>
> (i) a national environmental standard:
>
> (ii) other regulations:
>
> (iii) a national policy statement:
>
> (iv) a New Zealand coastal policy statement:
>
> (v) a regional policy statement or proposed regional policy statement:
>
> (vi) a plan or proposed plan; and

[103] Just looking at s 104(1)(b), one can see at a glance that those are all standards, regulations, policies and plans for which there is political accountability.

[104] Political accountability is not only intended by the RMA, it is inevitable. For there is no coherent set of ethics or values which dictates when resources are to be developed, for what purpose, and how, or whether or not they should be left alone. The values collected in Part 2 conflict with each other. For example, there is no necessary or best resolution of the inevitable tension between conservation and development. It is the context which drives the weight given to one value over the other. All communities have to provide for activities which many people do not want in their back yard (NIMBY). The RMA does not leave development to market forces. It is no accident then that the question of granting consents or not is required by s 104 to be judged only after having had regard to the contents of all relevant plans, operative or proposed.

[105] Of course the contents of plans can reflect the origins of plan changes which might be private plan changes. And they can reflect provisions amended or inserted by the Environment Court on appeal. But, as I have already occasioned to mention, the Environment Court's jurisdiction is that of the territorial authority.

[106] It is in this context that there is normally a deference given by the Environment Court to the responsibilities of the territorial authorities, and where appropriate Central Government, to the policy decision reflected in the plans, operative or proposed.[55]

[107] In this case, one of the reasons why Judge Borthwick's division did not engage with Judge Jackson's division's decision is that it considered that Judge Jackson's division had gone too far beyond having regard under s 104, into expressing views on the desirable content of the proposed plan PC19 planning issues. That is the context of the use of the term "obiter". For example, whether or not there should be a sleeve concept on both sides of the EAR is fundamentally a planning issue. It extends well beyond the site of the Pak'nSave, which occupies only part of the proposed sleeve. Judge Borthwick's division regarded that as a concept which is still a work in progress.

[108] I think in the context of this case, Judge Borthwick's division was entitled to be essentially dismissive in [127] of the relevance of the reasoning of Judge Jackson's division, on the sleeve, on trade retail activity east of the EAR, and on the design management of the EAR neighbourhood – all being matters in issue as to the content of PC19. Second, to engage on these issues would be to be bedevilled by the complication of no clear overlap of witnesses, but most importantly by the different question asked by s 32 analysis from s 104 analysis.

Conclusion on SPL's appeal

[109] For these reasons, I find that SPL's appeal fails. There is no error of law by reason of a failure to have regard to a similar decision.

Foodstuffs' appeal

[110] Foodstuffs argue that [84] of *Hawthorn* required Judge Borthwick's decision to include in the environment of PC19 a supermarket and hardware retail activities on the proposed site. This is because resource consent had been granted to them, and the consents were likely to be implemented. Section 104(1)(a) expressly provides

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55 *Canterbury Regional Council v Apple Fields Ltd* [2003] NZRMA 508 (HC) at [45].

that a consent authority must have regard to the environment before allowing any activity.

[111] The purpose of district plans is to assist territorial authorities to carry out their functions in order to achieve the purpose of the Act.[56]

[112] The purpose of a territorial authority's plan is to "establish and implement objectives, policies and methods to achieve integrated management... of the land and associated natural and physical resources of the district."[57] Where some of that land is already the subject of resource consents likely to be implemented, and the plan has not yet been made for that locality, it is natural enough that the territorial authority has to write a plan which accommodates the presence of that activity.

[113] For this reason, it is a very significant decision whether or not Judge Borthwick's division's decision settles the provisions of PC19, accommodating the Pak'nSave and Mitre 10 Mega activities as proposed by SPL and Foodstuffs, or not. Judge Borthwick's division declined to take these resource consents into account at all. It distinguished [84] of *Hawthorn* as having no application to its situation.

[114] There was some difference between counsel as to whether or not Judge Borthwick's division had found as a fact that the two resource consents were not likely to be implemented. Or rather had found that it was not possible to find it a fact whether or not they were not likely to be implemented, by reason of the uncertainty of the appeals.

[115] In my view, the Court of Appeal in *Hawthorn* intended [84] to be a real world analysis in respect of resource consent applications. The setting of the case was of application for resource consents, under s 104, not the application of ss 31 and 32. [58] That is also reflected in [84], "at the time a particular application is considered". The Court of Appeal in *Far North District Council v Te Runanga-O-Iwi O Ngati*

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56 Section 72.

57 Section 31(1).

58 Not so in the case of allowing for permitted uses, for as the Court of Appeal explained, both in the *Hawthorn* and the recent *Carrington* decision, the assumption that permitted uses will be taken advantage of is not a likelihood assumption.

Kahu recently applied *Hawthorn* [84], but again in the context of the application for resource consents, not in the planning context of ss 31 and 32.[59]

[116] When a territorial authority is deciding the plan for the future, there is nothing in the Act intended to constrain a forward-looking thinking. A similar point was made by Judge Borthwick's division, when distinguishing [84]. (See [122] of their reasoning set out above). Within that paragraph they said:

> [122] ...Unlike *Hawthorn Estate Ltd* (cited to us by SPL and Foodstuffs) this court is not concerned with how the environment may be modified by the utilisation of rights to carry out permitted activities under the District Plan. Indeed the proposed modification of the existing environment is the subject matter of these plan change proceedings. *Hawthorn Estate Ltd* is therefore distinguishable on its facts.

[117] In any event, if I am wrong on that point, the likely to be implemented test in [84] was intended to be a real world analysis, as is confirmed by [42] of the *Hawthorn* decision which ends with the word "artificial":

> [42] Although there is no express reference in the definition to the future, in a sense that is not surprising. Most of the words used would, in their ordinary usage, connote the future. It would be strange, for example, to construe "ecosystems" in a way which focused on the state of an ecosystem at any one point in time. Apart from any other consideration, it would be difficult to attempt such a definition. In the natural course of events ecosystems and their constituent parts are in a constant state of change. Equally, it is unlikely that the legislature intended that the inquiry should be limited to a fixed point in time when considering the economic conditions which affect people and communities, a matter referred to in para (d) of the definition. The nature of the concepts involved would make that approach artificial.

[118] Treated as a wholly practical issue, which is what I think Judge Borthwick's division did, the Court was faced with a very uncertain situation. It knew the resource consents were under appeal. As a result, it found that they could not assess likelihood. This is clear from [131], set out above, being the conclusion, because it involves speculation as to the High Court appeals ([124], set out above).

[119] Recognising this, Mr Soper argued that the law requires the fact of the appeal to be ignored. He relied on s 116(1) which provides:

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[59] *Far North District Council v Te Runanga-O-Iwi O Ngati Kahu* [2013] NZCA 221 *(Carrington).*

> **116 When a resource consent commences**
>
> (1) Except as provided in subsections (1A), (2), (4), and (5), or section 116A, every resource consent that has been granted commences—
>
> (a) when the time for lodging appeals against the grant of the consent expires and no appeals have been lodged; or
>
> (b) when the Environment Court determines the appeals or all appellants withdraw their appeals—
>
> unless the resource consent states a later date or a determination of the Environment Court states otherwise.

And on r 20.10(1)(a) of the High Court Rules, which provides:

> **20.10 Stay of proceedings**
>
> (1) An appeal does not operate as a stay—
>
> (a) of the proceedings appealed against; or
>
> (b) of enforcement of any judgment or order appealed against.

[120] He argued that *Hawthorn's* analysis extended to the obligations being met by a territorial authority in relation to district plans, as well as to considering whether to grant resource consents. He relied on [48] and [49] in *Hawthorn*:

> [48] The requirements of ss 5, 6 and 7 must be complied with by all who exercise functions and powers under the Act. Regional authorities must do so, when carrying out their functions in relation to regional policy statements (s 61) and the purpose of the preparation, implementation and administration of regional plans is to assist regional councils to carry out their functions "in order to achieve the purpose of this Act". Further, the functions of regional councils are all conferred for the purpose of giving effect to the Act (s 30(1)). Consistently with this, s 66 obliges regional councils to prepare and change regional plans in accordance with Part II.
>
> [49] The same obligations must be met by territorial authorities, in relation to district plans. The purpose of the preparation, implementation and administration of district plans is, again, to assist territorial authorities to carry out their functions in order to achieve the purpose of the Act. Similarly, the functions of territorial authorities are conferred only for the purpose of giving effect to the Act (s 31) and district plans are to be prepared and changed in accordance with the provisions of Part II. There is then a direct linkage of the powers and duties of regional and territorial authorities to the provisions of Part II with the necessary consequence that those bodies are in fact planning for the future. The same forward-looking stance is required of central government and its delegates when exercising powers in relation to national policy statements (s 45) and New Zealand coastal policy statements (s 56). The drafting shows a consistent pattern.

He also relied upon the decision of *GUS Properties Ltd v Marlborough District Council*,[60] where the High Court held:

> ... unless there is some good basis upon which a stay should be granted then it should be refused as the appeal of the appellant is from a decision of an experienced Tribunal which should be given effect to unless the appellant will lose the benefit of its appeal unless a stay is granted.

[121] For these reasons, Mr Soper submitted that Judge Borthwick's division was required to consider the likelihood of whether consents would be implemented on the basis of the factual evidence before the Court. The Court had already found there was no compelling reason why the other associated resource consents would not be obtained. In the absence of a stay there was no basis for the Environment Court to decline to determine whether consents would be implemented, and therefore exclude them from its consideration as to what constituted the relevant environment for PC19 purposes.

Analysis

[122] There was no suggestion that the holders of the resource consents were seeking to implement them pending the appeals. Judge Borthwick's division was in a very difficult position. If it did treat the environment the subject of the plan change as including a large supermarket and trade retail in that location, on the southeast side of the intersection of the EAR and proposed Road 2, then it would have had to adjust to all the ramifications of that. It would not make particular sense and was likely to be incoherent to have incompatible plan change provisions applicable to the land.

[123] It also took into account that, if the resource consents were upheld on appeal, they could be utilised, notwithstanding that the underlying zoning would not provide for the activity. They did this when considering whether their preferred E1 and E2 zoning rendered the SPL land incapable of reasonable use, an argument addressed to it under s 85 of the Act (not pursued on this appeal). In [864], they said:

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[60] *GUS Properties Ltd v Marlborough District Council* HC Wellington AP 230/94, 12 September 1994 at 5-6.

> [864] ... It is our understanding that, if upheld on appeal, the land use consents granted by the Environment Court may be exercised notwithstanding that the underlying zoning would not provide for this activity.

[124] It was suggested in argument that one of the options of Judge Borthwick's division would have been to delay completing its decisions on PC19 until it knew the outcome of the appeal in the High Court. But discussion on this point rapidly indicated that such an approach would also require allowing time for the Court of Appeal and the prospect that the issue might go through to the Supreme Court. Years could pass. All this has to be set against the context where PC19 started its life in 2007, nearly seven years ago.

[125] There are suggestions in Judge Jackson's division that this delay is already a concern and embarrassment.[61] It must be. Parliament could never have intended that a territorial authority having designed a plan change and publicly notified it would then take seven years to receive submissions and form a judgment as to the most appropriate way to achieve the purpose of this Act. It was not envisaged that appeals would unduly extend the process. On the contrary, there are a number of sections intended to achieve speedy resolution of appeals. Section 121(1)(c) provides:

> **121 Procedure for appeal**
>
> (1) Notice of an appeal under section 120 shall be in the prescribed form and shall—
>
> ...
>
> (c) be lodged with the Environment Court and served on the consent authority whose decision is appealed within 15 working days of notice of the decision being received in accordance with this Act

[126] This means that within three weeks any appeals from the territorial authority's decision should be lodged with the Environment Court. That presupposes efficient analysis of the issues arising by the appellant's advisers.

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[61] *Foodstuffs* at [267]-[269].

[127] Section 269 of the RMA gives the Environment Court the power to regulate proceedings in such manner as it thinks fit, and has a goal of a fair and efficient determination of the proceedings.[62]

[128] Section 272(1) provides:

> **272 Hearing of proceedings**
>
> (1) The Environment Court shall hear and determine all proceedings as soon as practicable after the date on which the proceedings are lodged with it unless, in the circumstances of a particular case, it is not considered appropriate to do so.
>
> (Emphasis added)

[129] Counsel before the Court partially explained the long delay. The Court knows it was significantly affected by airport issues. See *Foodstuffs* at [267]-[269]. Whatever the explanation as to why this PC19 was not resolved soon after October 2009, when the commissioners released a decision recommending PC19 be approved, and why it took until February 2012 before the appeal against the commissioners' decision was heard, the predicament facing both divisions of the Court is manifest come the end of 2012.

[130] It would be very hard for Judge Borthwick to have to justify in the public interest, let alone against the efficient policy of the RMA, abandoning delivering a decision on PC19 while awaiting appeals on the Foodstuffs and Cross Roads resource consents through the appellate Courts. She did not.

[131] On the other hand, if she was going to go ahead and assume that the resource consents were granted, and write a plan change, the provisions of which would adopt the logic and reasons of the grant of the resource consent, this could have nullified the outcome of the appeal process. For if, as a result of the appeal process and the referral back, the resource consents were not granted, the parties favouring that outcome would be thwarted by the adoption of the challenged outcome in PC19.

[132] I consider that Judge Borthwick's division had in fact no choice but to keep going.

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[62] See s 269(1) and (4).

[133] It also needs to be kept in mind that the decision under appeal is an interim "higher order" decision. There is still a lot of work left to be done, and a further hearing.

[134] This next stage may be able to continue consistent with the contingencies that follow upon the now Court of Appeal litigation. If the Court of Appeal reinstates the resource consents, then there may still be time for Judge Borthwick's division to take them into account as likely to be implemented. If the Court of Appeal dismisses the appeals, there may still be time for Judge Jackson's division to reconsider the matter in the light of directions from the High Court. If the Court of Appeal issues the decision between these two options, with further directions to Judge Jackson's Court, there may likewise still be time for an urgent hearing by Judge Jackson's division to accommodate that, before Judge Borthwick's division completes the lower order matters.

Conclusion on Foodstuffs' appeal

[135] There was no error of law on the part of the Environment Court declining to treat the resource consents as likely to be implemented. For these reasons, the *Foodstuffs* appeal fails.

General conclusion

[136] Both appeals are dismissed. Costs reserved.

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