Decision No. C 90 /2001

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of an appeal pursuant to section 120 of the Act
BETWEEN	**PHANTOM OUTDOOR ADVERTISING LIMITED**
	(RMA 680/99)
	Appellant
AND	**CHRISTCHURCH CITY COUNCIL**
	Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge J A Smith
Environment Commissioner F Easdale
Environment Commissioner N J Johnson

HEARING at **CHRISTCHURCH** on 27th and 28th days of March 2001

APPEARANCES

Messrs H C Matthews and H J Tapper for the appellant
Ms C E Robinson for the respondent

DECISION

Introduction

[1] This is an appeal by Phantom Outdoor Advertising Limited ("**Phantom**") against a decision of the Christchurch City Council ("the **Council**") refusing consent to erect a freestanding double-sided 6 metre x 3 metre billboard 12.07 metres in height and 3.2 metres from the Waltham overbridge boundary. The sign was to be illuminated at night by external lights ("the **sign**").

[2] The application for consent was heard on 25 May 1999 and on 28 June 1999 it was declined on the basis of adverse effects on visual amenity (including visual clutter), and also that the application was contrary to the policies and objectives of both the transitional and proposed district plans.

[3] An appeal was filed on 19 July 1999. There are no section 271A parties or section 274 parties.

Background

[4] It became clear in the course of the evidence for Phantom, particularly from Mr M A Gray, a director for that company, that the Council had dealt with one other application for signage in the same area as this application, at around the same time. That had been processed on a non-notified basis in respect of the same site and granted consent to a competitor in the industry for 220m^2 of advertising. That signage is attached to a building but the building parapets have been significantly extended upwards to incorporate the signage. The area of this application signage taking into account both sides of the sign is some 36m^2 compared with the 220m^2 granted by the non-notified decision of the Council at the same time.

[5] Subsequent to the filing of this appeal, in mid-2000 the Council again processed an application for resource consent for a freestanding sign on the opposite side of the road at 27 Iversen Terrace very close to the position of this proposed sign, again on a non-notified basis. Both of these cases involved a single operator who is quite clearly, from the nature of Mr Gray's evidence, a competitor in the billboard market. Similarly, the Council also granted another freestanding sign close to the position of this property on the opposite side of the road at 240 Waltham Road to another company, Look Outdoor Limited. In each of those cases the Council reports record that the environment is an industrial area and has a low level of amenity, and that the plans identify this as being less sensitive to effects. In all three cases, including the 220m^2, the effects were considered no more than minor and the consent process was non-notified. In addition, it was held that the applications were not contrary to the objectives and policies of either the transitional or proposed plans.

[6] In light of the position of the Council adhering to this appeal and refusing to mediate, Mr Gray expressed some chagrin at what he saw as differential treatment. We recite this background at some length because, in our view, it constitutes an important element of this case to which we shall return later in this decision.

Issues

[7] The parties have identified the critical issue in this case to be the question of adverse effect on visual amenity in the area of the signage. It is quite clearly a factual matter for determination by this Court in its discretion. Having heard the evidence however, we believe there are two further issues which arise in this case having regard to the process adopted by the Council in considering applications on a non-notified basis. These are:

(a) Whether this activity in this area is contrary to the objectives and policies of either the transitional plan or the proposed plan; and
(b) Issues arising as to equivalence of treatment of parties on applications for consent.

In particular in this case it is clear that reports made by certain officers to the Council on non-notified applications is directly contrary to evidence given to this Court by different officers on this application. This relates to both the question of visual effect and also as to whether the application is contrary to the objectives and policies of either the transitional or proposed plans.

Methodology to be adopted

[8] We intend to consider this matter by firstly identifying those elements of section 104 which are relevant to a consideration of this application. The activity is non-complying under the transitional plan and a restricted discretionary activity under the proposed plan. Under the latter this Court's discretion is limited to any infringement of development standards applicable to signage. These relate to the height of the sign and the area and number of signs permitted on the site. The application must be considered under both the transitional and proposed plans. To the extent that weight should be given to one plan over the other it was agreed by the parties that greater weight should be given to the proposed plan. Having identified the matters under section 104 we will then turn to a consideration of the application under the Transitional Plan under section 105(2A) in respect of the **"threshold test"**. It is clear in terms of section 105(2A) that the application need only meet one of the two threshold tests proposed, namely that the effects are no more than minor or, in the alternative, it is not contrary to the objectives and policies of the plan. In this case as there is both a transitional and proposed plan the application to the extent it is a non-complying activity need only meet this test in respect of one of the plans. Use of the words *"**either** ... the relevant plan **or** the relevant proposed plan"* in section 105(2A)(b)(iii) provides this result. We refer to this Court's decisions C71/2001 ***Boons Neighbourhood v Christchurch City Council***[1] dated 04/05/01 and the Environment Court decision ***Stokes v Christchurch City Council***[2]***; Baker Boys v Christchurch City Council***[3].

[9] Finally, in the event that the Court concludes that the application under the transitional plan meets the threshold test it needs to exercise its discretion under section 105(1)(c) and to balance the various elements identified under section 104 with a view to concluding whether the application should be granted. This will involve consideration of both the transitional and proposed plan as they affect any such granting of consent and also the inter-relationship of those two plans as part of the balancing and weighing process under section 105(1)(c). A similar balancing exercise is also required under section 105(1)(b) in respect of the application considered under the proposed plan.

Effects

[10] The parties were clear that the effect identified in terms of this case related to visual amenity, and in particular visual clutter. Having heard all the evidence we agree that this appears to be the only effect identified, although it manifests itself in several ways:

(a) The height of the sign and its impact not only in the surrounding environment but in terms of distant views towards the Port Hills;
(b) The addition of further signage into this area;
(c) This signage compared with other signage in the immediate vicinity in terms of position, dominance and relationship of nearby structures;
(d) Impact, if any, on the amenity on the nearby Washington Reserve (an area established by the City for skateboarders);

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1 ***Boons Neighbourhood Action Group (Incorporated) and Ors v Christchurch City Council*** C71/2001 dated 4/5/2001.
2 ***Stokes v Christchurch City Council*** C108/99.
3 ***Baker Boys v Christchurch City Council*** C60/98.

(e) The impact on various viewing audiences, namely:
  (i) Persons working in the area;
  (ii) Persons utilising Washington Reserve;
  (iii) Persons in transit, particularly on Wa[illegible] Avenue.

[11] For Phantom, Mr D McMahon, a resource management consultant gave planning evidence. He emphasised the inner city industrial nature of the area, and particularly the elements of the rail corridor, the overbridge, arterial road, container storage area and the extensive existing signage as the principal visual elements. He summarised the area as high density industrial buildings in a busy traffic environment (both local and arterial roads).

[12] Mr C R Glasson, landscape architect for Phantom, described the railway marshalling storage yards abutting the site. He referred to the containers, goods storage buildings, railway track and towers in the vicinity. He noted the utilitarian industrial buildings lining the streets with signage generally on those buildings. He noted the high reflectivity occurring off buildings in the area, car yards and moving vehicles. He also said that there was a lack of trees and open space other than Washington Reserve. He summarised the existing environment in the following way:

> *Signage, large and small, bold and timid is a very real feature within these environs. It is a harsh urban environment with little softening.*

[13] The evidence of the Council on the other hand emphasised several elements in the local environment which indicated higher levels of amenity. In particular:

(a) Washington Reserve; and
(b) New development in Washington Way.

[14] Mr R N Carrie is a planner in urban design and heritage, and an architect. He gave evidence emphasising the impact of both these features on the amenity of the area and this was reinforced by evidence from another former Council planner, Ms L E V Simpson. Both these witnesses, although not denying the elements that have been identified by Phantom's witnesses, emphasised the beneficial impact on amenity values of Washington Reserve, being some 7,655m^2 of open space. In addition, they identified the redevelopment of Washington Way and the landscaping features including setbacks, tree and other plantings, which in their view generated higher amenity. Photographic evidence was produced by all parties supporting their various positions.

[15] The Court has had the opportunity of undertaking an inspection of the area, and has concluded as follows:

(a) The area to the south of the railway line, including the site on which the sign is intended to be constructed, has been correctly categorised by Phantom's witnesses as of low visual amenity and built industrial in nature.
(b) There is a transition over the Waltham Road overpass bridge with the introduction to the immediate north of the railway line of several planted elements. This includes some mature established trees on the corner of Waltham Road and Moorhouse Avenue, and the extended open space of Washington Reserve with plantings which are now established.

[16] These planted elements connect this area visually with more treed areas to the north of Moorhouse Avenue. The development of the Washington Way area forms a further link in visual terms between the established trees to the north of Moorhouse Avenue; those on the southern corner of Moorhouse Avenue and Waltham Road; and Washington Reserve. We agree that the Washington Way developments have been undertaken to a different standard to that on the south of the railway and that the amenity levels for commercial/industrial areas there are at a higher level. As the substantial trees and the landscaping mature they will form a further visual link to Washington Reserve and the other trees to the north. We have concluded that there is a strong possibility that an improved landscape and amenity value will be generated in the land between the railway and Moorhouse Avenue in time. The development of the Washington Way area is encouraging in this regard.

[17] It is clear that the signage constructed on Phantom's site and at 27 Iversen Terrace addresses audiences towards Moorhouse Avenue, i.e. to the north of the railway line. The billboard approved by the Council mid-2000 at 27 Iversen Terrace is physically the closest to the strip between the railway and Moorhouse Avenue and is addressed only towards Moorhouse Avenue. The signage at 240 Waltham Road is beyond the overbridge and is not visible from Washington Reserve or Washington Way. This cannot be said of the signage on the side of the building at 65 Carlisle Street (on the site) which is directly addressed to both Washington Way and in our view towards the viewing audience, particularly on Moorhouse Avenue.

[18] In defining the amenity values of the area there was a tendency by some witnesses to suggest that amenity values were only to be identified as positive values. Amenity values is defined in the Resource Management Act (the **RMA**) as *those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence and cultural and recreational attributes*. We do not understand the words *"pleasantness, aesthetic coherence and cultural and recreational attributes"* to be some form of combined absolute value which members of the public appreciate to a greater or lesser extent. In our view the definition is embracing a wide range of elements and experiences. Appreciation of amenity may change, depending on the audience. In this particular case we have identified three separate audiences. It was agreed by witnesses that the experience of each audience may be different in each case.

<u>The people working in the area</u>

[19] It was agreed that there are no residents in the area, and the question was whether or not further signage was likely to impact on those persons working in the area. All relevant witnesses on visual matters accepted that this sign was unlikely to have any significant impact on those persons. Having viewed the site we consider that it would be simply part of the background to workers in the area, much as are the railway yards.

[20] In our view however, we have a reservation relating to the height of the sign. We shall deal with this issue shortly.

Persons using Washington Reserve

[21] At the time of our inspection all the people using the Washington Reserve were pre-teens or teenagers. We understand from the evidence that this would be the typical user of the Washington Reserve. The skateboarding park is already partly developed, with future plans to extend this further. Washington Reserve itself is focussed around this type of activity and none of the witnesses suggested that users of the park were likely to be significantly influenced by the surrounding environment as it exists. In particular, the large signage (of 220m^2), which looks directly over the reserve forms part of the background as much as the overbridge structure, containers, towers and other elements of the local environment. We cannot conclude that one further sign in that area would significantly impact upon the visual amenity to users of the reserve, particularly in comparison to the two much larger signs looking directly over the park and the more oblique view towards the proposed sign.

People transiting through the area

[22] In this category there are likely to be three classes of persons that might be affected by such signage. These would be:

(a) Persons using the Waltham Road overbridge either in vehicles or on foot;
(b) People approaching the intersection of Waltham Road and Moorhouse Avenue from the north;
(c) People travelling along Moorhouse Avenue.

[23] It is this category of persons that the Council witnesses suggest would be most impacted upon by this sign. It was suggested that for persons using Waltham Road overbridge there is already significant visual clutter from the existing signage which has been approved by the Council and other signage on buildings as of right, to the extent that the area has reached its saturation point for signage. Certainly the two large signs (total 220m^2) approved by the Council contemporaneously with this application comprises the dominant element in the local landscape for transitory users. They are designed to be seen not only by users of the Waltham Road overbridge but also by persons approaching the intersection of Moorhouse Avenue and Waltham Road from the north down Barbadoes Street, and persons using Moorhouse Avenue in both directions. We conclude that if there is an adverse effect on the environment it is to a considerable extent the result of the existing signage erected on that building, in part by using a façade on the roof to project the sign some 3 metres above the roof line. Other signage, including this current proposal (with some reservations) pales by comparison.

[24] The question then arises whether the introduction of further signage would exacerbate or worsen the effect caused by the existing 220m^2 sign. The granting of a non-notified consent by the Council to the erection of the sign on 27 Iversen Terrace (after declining this application) constitutes in this context a significant concern, particularly as to whether it now comprises part of the existing environment having *"jumped the queue"* by being granted on a non-notified basis. We have concluded the impact of freestanding signs is significantly mitigated by being contained either within the frame of a building or against a building backdrop. An example of the latter category is the sign at 240 Waltham Road which while freestanding and visible in both directions, is framed against the industrial buildings or railway containers.

[25] We conclude that the impact of such freestanding signs will depend on the height of the sign against the surrounding backdrop and the extent to which the signage seeks to stand out from the existing background. The entire purpose of a sign is to stand out against its background. Therefore we must assume that it will seek to use colours and lettering which distinguish it from other signs or objects in the neighbourhood. If the present application had been constructed within the frame of the existing building, then no doubt the Council would have taken a very different approach to the matter as it would not have significantly impacted upon transient viewers. To illustrate this, the sign so located would be unable to be seen from Barbadoes Street. It would have limited, if any, visibility from Moorhouse Avenue. It would only be visible, in those circumstances, by a person going across the Waltham Road overbridge and, depending on its placement, possibly only for a brief period or in one direction. As the height of the sign is raised, its impact is not only to potential viewing audiences on Barbadoes Street and Moorhouse Avenue, but it would have the potential to impose an incongruous element upon the distant view to the Port Hills and be visible to persons using Washington Way and Washington Reserve.

Height

[26] Originally Phantom sought to have the height of the sign at 12.07 metres. By the time of the hearing this was reduced to 11 metres. Mr Matthews for Phantom in closing advised that although Phantom believed the evidence supported the 11 metre height, such a height was not fundamental to its application and in the event that the Court took a different view conditions could be imposed as to height by the Court. The Court is unanimous that at 11 metres in height the sign would constitute an incongruous element in the local landscape. It would project above the surrounding buildings and would be seeking to obtain not only a large viewing audience but visual dominance by virtue of its height. We have concluded having heard all the evidence that the only purpose for the 11 metre height sought by Phantom is to include within its viewing audience vehicles travelling down Barbadoes Street straight to the intersection with Moorhouse Avenue who maybe turning either left or right at those lights and not travelling over the overbridge. It was suggested to the Court by the witnesses that the reason for the height was to obtain clearance from the handrail to the bridge. As far as we are able to ascertain the underside of the sign would be approximately 2.64 metres above the overpass footpath, and approximately 1.5 metres above the top of the handrail.

[27] By way of comparison the signage at 27 Iversen Terrace appears to be a total of 9 metres in height and still manages to appear clear of the bridge to approaching traffic. There is no doubt that traffic approaching from the south would be able to clearly see the sign as they have a largely unimpeded view. Even if lowered some 3 or 4 metres there would still be an unimpeded view of the sign for vehicles travelling to the north. We accept that a reduction of that degree would significantly affect visibility of the sign for vehicles travelling south.

[28] The Court was unanimous in the view that at 12.07 metres or even 11 metres in total height the sign represents a significant visual intrusion and constituted an incongruous element by seeking to *"climb above the clutter"* and draw in an audience from Barbadoes Street. The Court initially did not have a unanimous view however, at heights lower than 11 metres, with Commissioners Johnson and Easdale forming the view that even at 9 metres the sign constituted a visual intrusion on the views of the Port

Hills. This view was influenced particularly by the long distance views towards the Port Hills which were occasioned from both Barbadoes Street and as vehicles travelled up Waltham Road overbridge to the southern side of the city. Although the sign would "*skied*" to traffic travelling from the south, the impact in this case is less pronounced because of the other elements in the skyline, including the lighting towers for the railway yards and the inner city buildings.

The transitional plan

[29] The property on which this sign would be erected is in the Business 3 zone under the transitional plan. The Business 3 zone allows for a wide range of uses which includes commercial, warehouse and industrial uses, and a limited range of retail shops which involve bulky or heavy items such as plumbing and bathroom supplies, kitchen furniture and fittings, and hardware and home decorating supplies. The content of the sign does not necessarily have any relationship to activities on the site and accordingly would be defined as a hoarding under the transitional plan (Part II, Definitions, Ordinance page 64):

> *Hoarding means any structure, wall, building, erection, part or all of which is let for the display of any advertisement or advertising device not associated with the property or building on which it is displayed.*

Hoardings are specifically excluded from the definition of sign. However, the sign section of the code of ordinances (page 152, clause 75) does provide for hoardings in certain circumstances (e.g. in the immediately adjoining I3 zone where they are a discretionary activity). Objectives and policies within the scheme statement come under the heading of signs and advertising but do not refer separately to hoardings. Hoardings are not specifically provided for as either a permitted or conditional use in the Business 3 zone. Therefore, under section 374 of the RMA the proposal is deemed a non-complying activity in terms of the transitional plan.

[30] The relevant objectives of the transitional plan are as follows:

> *General planning objectives 9.2 Amenity* (page 7)
> *To promote a standard of amenity and public health which will improve the "garden city" image and further establish the reputation of the city as a good place to live.*
> *50(6) Amenities objective* (page 51)
> *To ensure a high standard of design for advertising signs in order to protect public amenity and safety.*
> *55.1 Amenities Objective* (page 54)
> *To ensure that signs are not displayed in a manner that would be detrimental to the visual amenities of an area or would create a traffic hazard.*
> *Industry Objectives 35(4)* (page 33)
> *To improve the appearance of industrial areas and to encourage appropriate forms of industrial development.*

Proposed plan

[31] The area is zoned Business 3 under the proposed plan which represents the older industrial areas near the central city. These are dominated by industries, warehousing and service industries including a range of long-established industries often on small sites. The zone description states that:

> *The purpose of this zone is to maintain existing industrial employment opportunities while progressively enhancing amenity standards.* [Volume 3, section 3, page 6].

Objectives and policies (Volume 2)

City Identity : (Section 4)
Objective: Amenity

> *4.2 A pleasant and attractive City*
> *Policy: Public space*
> *4.2.4 To ensure the development and protection of the quality of public open spaces:* (page 4/9)
>
> *Policy: Outdoor advertising*
> *4.2.6 To facilitate the display of outdoor advertisements that do not significantly detract from amenity values, nor cause potential danger to public safety.* (page 4/10)

Industrial Areas : (section 12)
Objective: Amenity and effects of industrial areas

> *12.7 A standard of amenity in industrial areas recognising their location and function whilst avoiding, remedying or mitigating the adverse effects resulting from activity and development in these areas.* (page 12/34)

Policy: Amenity - Improvement

> *12.7.1 To improve the visual amenity and street environment in industrial areas.* (page 12/35)

Policy: Adverse Effects

> *12.7.3 To control the adverse effects of hazardous substances, glare, noise, shadowing and visual detraction arising from activities and development within industrial areas, having regard to the nature of environments within and adjoining such areas.* (page 12/36)

Transport (section 7)
Transport Objective: Transport Safety

> *7.7 The maintenance and improvement of transport safety throughout the City.* (page 7/19)

Policy: Outdoor Advertising

> *7.7.10 To avoid remedy or mitigate the potential for adverse effects from the display of outdoor advertising on, and [illegible] (page 7/20)*

In the objectives and policies in the Explanation and Reasons for policy 4.26 Volume 2, Part 4, page 10, relating to outdoor advertisements the document states:

> *Outdoor advertisements are often a positive and necessary feature of the "cityscape", but their design and appearance, including their size, shape, colour, lettering, content (if offensive) and location in some cases can have a detrimental effect on the amenity values of an area...*

In the reasons for objective 12.7 Volume 2, Part 12, page 35 the plan recognises that people are less concerned with the amenities in industrial areas, but still encourages some improvement in the visual amenities of all parts of the city. The reasons go on to state:

> *The amenity values that will potentially provide the greatest benefit to the wider community are those that can be obtained from the street.*

Transport : In the Explanation for policy (Volume 2, Part 7) page 20 the plan states at 7.7.10:

> *The purposes of outdoor advertising are to inform the public of the availability of goods or services, the identification of a particular site or premises, or to provide direction for traffic, or pedestrian movement. All of these can have some bearing on transport safety...*

[32] In terms of the proposed plan any outdoor advertisement in compliance with all the development standards and all the critical standards shall be a permitted activity (Vol. 3, p.10/14, 3.3.1). Any outdoor advertisement in compliance with all critical standards but failing to comply with one or more development standards is a discretionary activity. We understand the parties agree that this is the standing of the present application. In terms of the rule a freestanding double-sided sign is only measured for calculation of area purposes on one face of the sign. Counsel seem to have interpreted this as applying to all double-sided signs even where those faces are actually cantilevered at an angle to one another and present two separate faces. For our part we cannot read that interpretation into the rule and consider that the sign in this application being angled at some 30° one face to the other constitutes two signs. Therefore it does not comply with the development standard relating to total area of outdoor advertisements on any particular sign being no more than $18m^2$. Where the sign is back to back and the signs are not placed at an angle we accept that the Council's intention was that only one face be measured. Where, however, as with this sign, the faces are at some 30° angle to one another, we do not consider that they can be regarded as a single sign. Development standards also require that the sign be no higher than 9 metres and that it shall not constitute more than 10% of the site frontage area. The application of the rule is that the road frontage is multiplied by 5, and 10% calculated on this figure. The road frontage in this particular case is only 6 metres and accordingly it would only

have entitlement to $3m^2$. In light of the fact that there is already some $220m^2$ on site, this rule cannot be complied with. In terms of critical standards, non-site related signs are specifically provided for in the B3 zone. Therefore, there is no element of non-compliance with critical standards.

[33] In terms of the proposed plan the application would therefore constitute a restricted discretionary activity and Volume 3 Chapter 10 pages 10/14 to 10/21 are of particular relevance. In Volume 3, 10/18, 3.6.2 various assessment matters are set out, including:

> *(a) Area and number*
> *(i) The visual amenities and characteristics of the locality ... and whether the proposed display would be obtrusively visible beyond 50 metres ...*
> *(ix) The likely visual prominence of the proposed display in comparison to what it may have looked like in compliance with the area.*
> *(b) Size of lettering, symbols or other graphics*
> *(i) Any adverse visual effects on amenities in the vicinity.*
> *(c) Height*
> *(i) The height relative to the area of the proposed display, and the extent to which it may project from the face of any building or other structure so as to be visible from the street.*
> *(ii) The location of the proposed display on any building in relation to its architectural features and to the line of any eaves or parapet.*
> *(iii) The number, location and scale of any other outdoor advertisement displayed on the building or site concerned or in the immediate vicinity.*
> *(iv) The likely visual prominence of the proposed display by reference to its scale, colour, content, construction or illumination, in relation to the building or site on which it is to be displayed, adjoining buildings or sites and the visual amenities of the street scene generally.*
> ...
> *(f) Support structure visibility*
> *(i) Whether any support structure is likely to be obtrusively visible in relation to the architectural features of the building to which it is attached or in the content of the street scene generally.*
> ...
> *(i) Architectural features and visual appearance ...*
> *(vi) The height of the proposed display above ground level, and its impacts on the quality of the building façade and skyline. ...*
> *(viii) Whether the style and appearance of the proposed sign is likely to conflict with the amenity values of the building, character group or public open space.*

[34] In the reasons for rules commencing at Volume 3, 10/20 3.7.1, it notes in part:

Much more generous sizes are permitted in business and special purpose zones and in the central city recognising that outdoor advertising is a significant and essential part of the built environment in these zones.

3.7.3 Height

> *The provisions on height limitation complement those on size, and again relate primarily to visual effects. This rule has the same general basis as that on size. The height of the outdoor advertisements is limited ... to ensure signage does not unduly dominate the skyline ...*

And in *3.7.9 Architectural Features*:

> *The effect of incompatible advertising can extend not only to architectural features but to the character of street scapes and environments as well.*

Other matters

[35] Section 104(1)(i) provides that the Court may consider taking into account other matters that it considers relevant and reasonably necessary to determine the application. In this case we have concluded that there are two matters arising which also require consideration. These are:

(a) Cumulative effects; and
(b) Equivalence in treatment of applicants.

Cumulative effect

[36] One of the core issues raised in terms of the visual amenity issue is the contention by the Council counsel and witnesses that the area is already visually saturated by signage. The contention of Ms Simpson was that no matter what the sensitivity of an area to visual intrusion, all areas reach a saturation point. Ms Simpson conceded that it was the large wall signage which the Council consented to which has already saturated this environment. On this basis she was unable to explain why the Council would have granted a further application for consent for the signage at 27 Iversen Terrace on a non-notified basis. The non-notified application by its very nature indicates that there are no adverse effects. As discussed shortly, both Ms Simpson and Mr Carrie did not believe either of these other applications should have been granted by the Council. Having regard to the fact that the wall signage at 65 Carlisle Street already exists with the other signage in the area, then it could properly be said that another 18m^2 which would be visible to the north of the site would add cumulatively to that total.

[37] We conclude that there would be no additional cumulative effect for vehicles travelling from the south along Waltham Road. For vehicles or persons situated to the north of the railway bridge, we believe any further cumulative effect with the addition of this sign would be de minimis. However, we agree with the Council officers that the area has already reached saturation point by the existing 220m^2 sign and therefore the proper question is whether the Court should consent to still further signage being added in a situation which has already significantly exceeded its reasonable absorption capacity. That is a matter that we will consider more properly as part of the weighing process.

Equivalent treatment

[38] It was clear from the evidence given to us by both Council witnesses, Ms Simpson and Mr Carrie, that they did not believe that the applications for consent for the 220m^2 at Carlisle Street or the sign at 27 Iversen Terrace should have been granted. They seemed at a loss to explain how the Council could have proceeded on a non-notified basis in this situation when clearly their own evidence indicated that there were adverse effects. Neither officer had been involved in either of these earlier applications. The Council officers also accepted that their evidence as to the application being contrary to the objectives and policies of the transitional and proposed plans is in opposition to the decisions of the Council in respect of at least three applications for consent granted subsequent to this refusal.

[39] Mr Gray raised with the Court his concern that he should obtain equivalent treatment to others and that he was being treated unfairly. The Council were able to suggest a number of distinctions between the present case and those other cases. In respect of the 220m^2 sign there was no issue of height of the sign and the non-compliance related to the failure to meet the frontage 10% x 5 criteria. In respect of the Iversen Terrace site, this was in the I3 zone under the transitional plan and therefore such signs were provided for as a discretionary activity in those zones. This appears to also be the case in respect of the sign at 240 Waltham Road. They also noted in this case the applicant had sought to breach the height requirement whereas all other applications had complied with this criteria. None of these explanations however, assist the Court in understanding how the Council would have concluded that there were no adverse effects requiring notification or that the other applications were not contrary to the transitional and proposed plans, whereas that is the Council's current evidence.

[40] We accept that in terms of the proposed plan the question of whether an application is contrary, turns upon whether or not it is concluded that there is a breach of the cascade model. In this case, that is:- whether there is compliance or not with visual amenity requirements. We conclude that there is an issue in this case to ensure that this applicant is treated on an equivalent basis to other parties and any distinctions between the cases leading to different conclusions are fully and appropriately spelt out.

Section 105(2)(a) – The threshold tests on Transitional Plan

[41] As was noted in ***Stokes v Christchurch City Council*** the Court, in considering the threshold tests for whether an effect is more than minor, can take into account the activity as mitigated. As proposed, we have concluded that the adverse effects of an 11 metre sign would be more than minor. Although we are concerned at adding to the existing visual clutter we conclude that at 9 metres the sign would be at the same height as that at 27 Iversen Terrace. In that context the overall and cumulative effects are no more than minor.

[42] We conclude that the application considered under the transitional plan would also pass the threshold test under the second limb of section 105(2A), namely that it is not contrary to either the transitional plan or the proposed plan. To that extent the Court adopts the further reasoning from ***Boons Neighbourhood v Christchurch City Council***

and ***Stokes v Christchurch City Council***[4] that the test to be applied relates to the application being not contrary to either the transitional plan or the proposed plan in the alternative. We conclude that the application is not contrary to the objectives and policies of the proposed plan and that the issues arising as to the effect on visual amenities can properly be addressed in the exercise of the discretion of the Court under section 105(1)(c) and balancing the various section 104 factors. We conclude that that is the intention of the structure of the rules under the criteria provided. This is reflected in the policies and objectives of the plan. Therefore it can't be said that the application is contrary, in the sense of opposed to, the proposed plan which recognises that the application should be assessed in terms of effects. Also, the policies and objectives are permissive in nature. As we conclude that it need only pass the threshold test under one of the plans this test is met under the proposed plan.

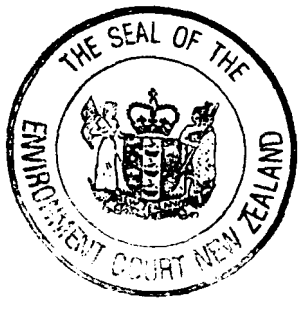
[43] In case we are wrong in our interpretation as to the meaning of section 105(2A)(b)(iii) we have concluded that the application is not contrary, in the sense of opposed to, the policies and objectives of the transitional plan. In particular, the policies and objectives do not appear to be directly applicable and objective 50 *"to ensure a high standard of design for advertising signs in order to protect public amenity and safety"* does not appear to advance matters at all. There are no objectives and policies which are opposed to the question of signage or hoardings. There is also implicit acceptance of signage or hoardings in the objectives already mentioned. This leads us to the view that it could not be said that the application is contrary to the objectives and policies of the transitional plan. Accordingly the application would pass the threshold test on this basis also.

Balancing of criteria under section 105(1)

[44] Part II of the Act has been described as the lodestar of the RMA and has as its objective sustainable management. It enables people to provide for the social, economic and cultural wellbeing while avoiding, remedying or mitigating adverse effects of those activities on the environment. Consideration of the balancing tests under section 105(1)(b) and 105(1)(c) and under section 104 itself must be subject to Part II considerations, and in particular the question of sustainable management in terms of the Act. We have held that the effects of an 11 metre freestanding sign in this area are more than minor. Against this must be measured the plan provisions and particularly the transitional and proposed plans.

[45] We conclude that in considering the application under the transitional or the proposed plan the Court is required to consider both the transitional and the proposed plan to the extent they are relevant. In this way we consider that the questions of weight in respect of the plans arise. On consideration of either the application of the transitional plan or the proposed plan, the Court can take into account the other plan and its weight in achieving a balancing exercise under section 105(1).

[46] The parties have agreed, and we concur, that greater weight should be given to the proposed plan in this case. Although there are references outstanding against the proposed plan, both parties agree that those seek a liberalisation of the advertising provisions and that there are no references seeking further restrictions in respect of those



[4] Supra.

provisions. Furthermore, the proposed plan represents a document which has gone through an extensive consultative hearings process and is now undergoing hearings on references. This needs to be compared with the transitional plan, a document which had its genesis some two decades ago under previous legislation.

[47] We conclude that this is an appropriate case where the Court should take into account the proposed plan and give significantly greater weight to that document. On this basis we conclude that the proposed plan provides for a wide range of matters to be taken into account in assessing this application, including questions of appropriate height, placement, etc. In our view this enables the Court to consider imposing conditions on the consent which would mitigate the adverse effects recognised to such an extent that it is satisfied that it is appropriate to grant consent. The Court is influenced in its consideration by its concern at ensuring what is seen to be equivalent treatment of applications before the Court and the Council. This Court has not been faced with the granting of the consent at 65 Carlisle Street for 220m^2 of signage and the Iversen Terrace consent in mid-2000 for a further 18m^2. Different considerations would have applied as to the extent of visual clutter, consistency with the plan rules and whether consent was appropriate in this consent if these consents had not been granted. Significantly greater areas for signage has already been permitted in the area contemporaneously and afterwards.

[48] We are agreed that at 9 metres height the adverse effects of the proposal would be sufficiently mitigated to conclude that consent should be granted. The applicant indicated in summing up that the application could be subject to restrictions if considered necessary by the Court. We conclude that at 9 metres total height the balance weighs in favour of the application. At 9 metres in height the effect is reduced to a level which in our view is appropriate given the countervailing considerations.

[49] We conclude that consent should be granted to a more constrained application with a reduction in height to that set out in the proposed rules of 9 metres. We note that the current lease held by the applicant is for a period of ten years and we conclude that it is appropriate that there be a time limit upon the grant of this consent to ten years. We also believe that other standards and appropriate conditions should be imposed, including the requirement to enclose the edges of the sign so that the internal workings are not visible. It should also include conditions relating to height levels on the sign.

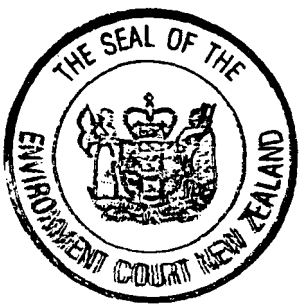
[50] We also consider that lighting levels should comply with the district plan provisions. It appears from evidence before us that many existing signs may not comply with the city plan rules.

[51] We grant consent on the following terms:

Consent is granted to erect a 6 x 3 metre sign with 2 faces not more than 30° apart at 65 Carlisle Street pursuant to section 105 of the RMA 1991 subject to the following conditions:

(1) The total height of the sign shall not exceed 9 metres.

(2) That signage on the billboard must not include any flashing or red, green or amber lights nor have any moving parts or messages that may distract motorists.



(3) The sign shall not be internally illuminated and any night time lights shall comply with the city plan glare and lightspill rules.
(4) The internal workings of the sign shall not be visible
(5) The proposal shall otherwise proceed in accordance with the application and plans submitted to the Environment Court
(6) The term of consent shall be limited to ten years.

Costs

[52] If any party wishes to make application for costs they are to file within twenty (20) working days, with ten (10) working days for reply. Any final reply by the applicant five (5) working days thereafter.

DATED at CHRISTCHURCH this 7th day of June 2001

J A Smith
Environment Judge

IN THE COURT OF APPEAL OF NEW ZEALAND

CA45/05

BETWEEN	QUEENSTOWN-LAKES DISTRICT COUNCIL Appellant
AND	HAWTHORN ESTATE LIMITED First Respondent
AND	T BAILEY AND OTHERS Second Respondents

Hearing: 14 March 2006

Court: William Young P, Robertson and Cooper JJ

Counsel: E D Wylie QC and N S Marquet for Appellant
N H Soper and J R Castiglione for First Respondent
No appearance for Second Respondents

Judgment: 12 June 2006

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant is to pay costs to the first respondent in the sum of $6,000 together with usual disbursements. We certify for two counsel.

REASONS

(Given by Cooper J)

[1] This is an appeal from a judgment of Fogarty J pursuant to leave granted by this Court under s 308 of the Resource Management Act 1991 ("the Act").

[2] Fogarty J had dismissed an appeal by the council and the second respondents against a decision of the Environment Court. The Environment Court had set aside a decision of the Council declining a resource consent application made by the first respondent ("Hawthorn").

[3] As a result of the Environment Court decision, Hawthorn was authorised to proceed to subdivide and carry out subdivision works on a property near Queenstown. Some 32 residential lots were proposed to be created.

[4] This Court gave leave for the following questions to be pursued on appeal:

> 1. Whether His Honour Justice Fogarty erred in law when he determined (either expressly or by implication):
>
> (a) that the receiving environment should be understood as including not only the environment as it exists but also the reasonably foreseeable environment;
>
> (b) that it was not speculation for the Environment Court to take into account approved building platforms in the triangle and on the outside of the roads that formed it;
>
> (c) that the Environment Court had given adequate and appropriate consideration to the application of the permitted baseline.
>
> 2. Whether His Honour Justice Fogarty erred in law when he determined that the Environment Court had not erred in law in concluding that the landscape category it was required to consider was an "Other Rural Landscape".
>
> 3. Whether His Honour Justice Fogarty erred in law when he held that the Environment Court had not erred in law when it considered the minimum subdivision standards in the Rural Residential zone in addressing the first respondent's proposal which is in a Rural General zone.

[5] As was observed by the Court in granting leave, the questions are inter-related, and the answers to the second and third questions are in large part dependent on the answer to the constituent parts of the first. The main issue that underlies the appeal is whether a consent authority considering whether or not to grant a resource consent under the Act must restrict its consideration of effects to effects on the environment as it exists at the time of the decision, or whether it is legitimate to consider the future state of the environment.

[6] It was common ground that the three questions fall to be considered under the Act in the form in which it stood prior to the coming into force of the Resource Management Amendment Act 2003.

Background

[7] Hawthorn applied to the Council for both subdivision and land use activity consent in respect of land in the Wakatipu Basin. The land comprises 33.9 hectares, and is situated near the junction of Lower Shotover and Domain Roads, with frontage to both of those roads. It is part of a triangle of land bounded by them and Speargrass Flat Road, known locally as "the triangle".

[8] Hawthorn's development would subdivide the land into 32 separate lots, containing between 0.63 and 1.30 hectares, together with access lots, and a central communal lot containing 12.36 hectares. The application also sought consent to the erection of a residential unit on each of the 32 residential sites, within nominated building platforms that were shown on plans submitted with the application. The proposal required consent as a non-complying activity under the operative district plan, and as a discretionary activity under the proposed district plan.

[9] There was an existing resource consent which allowed subdivision of the land into eight blocks of approximately four hectares in each case. Those approved allotments contained identified building platforms.

[10] The Environment Court recorded that the whole of the land proposed to be subdivided is flat, apart from a small rocky outcrop. The Court observed that "the triangle" had been the subject of considerable development pressure over the past decade, and that within the 166 hectare area so described, 24 houses had been erected, with a further 28 consented to, but not yet built. Outside of the roads that physically form the triangle were a further 35 approved building platforms. It is unclear from the Environment Court's decision whether any of those had been built on.

[11] In assessing the effects of the proposal on the environment for the purposes of s 104(1)(a) of the Act, a key question that arose was whether the consent authority ought to take into account the receiving environment as it might be in the future and, in particular, if existing resource consents that had been granted but not yet implemented, were implemented in the future. The council had declined consent to the application and on the appeal by Hawthorn to the Environment Court argued that that Court's consideration should be limited to the environment as it existed at the time that the appeal was considered. That proposition was rejected by the Environment Court, and also by Fogarty J.

[12] Before we confront the questions that have been asked directly, we briefly summarise the reasoning in the decisions respectively of the Environment Court and the High Court.

The Environment Court decision

[13] The Environment Court held that the dwellings, and the approved building platforms yet to be developed by the erection of buildings, both within and outside the triangle, were part of the receiving environment. As to the undeveloped sites, that conclusion was founded on evidence that the Court accepted that it was "practically certain that approved building sites in the Wakatipu Basin will be built on." That conclusion, not able to be challenged on appeal, is critical to the arguments advanced in the High Court and in this Court.

[14] The Environment Court held that the eight dwellings for which resource consent had already been granted on the subject site were appropriately considered as part of the "permitted baseline", a concept explained in the decisions of this Court in *Bayley v Manukau City Council* [1999] NZLR 568, *Smith Chilcott Limited v Auckland City Council* [2001] 3 NZLR 473 and *Arrigato Investments Limited v Auckland Regional Council* [2002] 1 NZLR 323. However, it rejected an argument by Hawthorn that landowners in the area could have a reasonable expectation that the Council would grant consent to subdivisions that matched the intensity of three other subdivisions in the triangle, for which the Council had recently granted consent. Those subdivisions had an average area of two hectares per allotment.

Hawthorn had argued that the present development should be considered in the light of a future environment in which subdivision of that intensity would occur throughout the triangle.

[15] The Court rejected that proposition as being too speculative. Noting that all subdivision in the zone required discretionary activity consent, the Court observed that:

> [25] We have no way of knowing whether existing or future allotment holders will apply for consent to subdivide to the extent of two hectare allotments, nor whether they can replicate the conditions which led the Council to grant consent in the cases referred to by Mr Brown, nor at what point the consent authority will consider that policies requiring avoidance of over-domestication of the landscape have been breached. In general terms we do not consider that reasonable expectations of landowners can go beyond what is permitted by the relevant planning documents or existing consents.

[16] At the time that the appeal was heard before the Environment Court, there was both an operative and a proposed district plan. The Court's focus was properly on the proposed district plan, however, because the relevant provisions in it had passed the stage where they might be further modified by the submission and reference process under the Act. Under the proposed district plan (which we will call simply the "district plan", or "the plan" from this point), it was necessary for the Court to classify the landscape setting of the proposed development. The Court found that the appropriate landscape category was "Other Rural Landscape". In doing so the Court rejected the arguments that had been put to it by the Council and by parties appearing under s 271A of the Act that the proper classification was "Visual Amenity Landscape". Both are terms used and described in the district plan.

[17] Once again, the Court's reasoning was based on what it thought would happen in the future. It held that the "central question in landscape classification" was whether the landscape "when developed to the extent permitted by existing consents" would retain the essential qualities of a Visual Amenity Landscape. That would not be the case here, because of the extent of existing and likely future development of "lifestyle" or "estate" lots both in the triangle and outside it.

[18] The Environment Court then discussed the effects of the development on the environment. It found that the subdivision works would introduce an unnatural element to the landforms in the triangle, but that they would be largely imperceptible, and the landform was not one of the best examples of its type. In terms of visual effects, the Court concluded that, although the development could be seen from positions beyond the site, it would not intrude into significant views, nor dominate natural elements in the landscape. As to the effects on "rural amenity" the Court held that the position was "finely balanced", but after it identified and considered relevant district plan objectives and policies dealing with rural amenity, concluded that the development was marginally compatible with them.

[19] The Court also considered the proposal against relevant assessment criteria in the district plan. It found that the proposal would satisfy most of them. This part of the Court's decision required it to revisit under s 104(1)(d) of the Act matters already dealt with in the inquiry into effects on the environment under s 104(1)(a).

[20] One of the assessment criteria raised as an issue whether the proposed development would be complementary or sympathetic to the character of adjoining or surrounding visual amenity landscape. Another required consideration of whether the proposal would adversely affect the naturalness and rural quality of the landscape through inappropriate landscaping. The Court was able to repeat here conclusions that it had already arrived at earlier in its decision. In particular, it said that although the effects of the proposal on the retention of the rural qualities of the landscape were "on the cusp":

> …in the context of consented development on this and other sites in the vicinity the proposal is just compatible with the level of rural development likely to arise in the area.

[21] Having considered the objectives and policies of the district plan as a whole, the Court concluded that while the proposal was marginal in respect of some significant policies, it was supported by others. Consequently, it was "not contrary to the policies and objectives taken as a whole".

[22] In the balance of its decision the Court rejected an argument of the Council that the decision would create an undesirable precedent. It considered the proposal

against the higher level considerations flowing from Part II of the Act, expressed a conclusion that the effects on the environment of allowing the activity would be minor, provided that there was a condition proscribing any further subdivision of the land, and then moved to the exercise of its discretion to grant consent under s 105(1)(c) of the Act. For present purposes it should be noted that the Court's conclusion that there would not be an undesirable precedent set by the grant of consent was expressly justified on the basis that the proposal had been comprehensively designed, and would provide facilities for the public that would link to other facilities in the triangle. The Court considered that it was difficult to imagine that another such comprehensive proposal could be designed for another location, given the "level of subdivision and building that has already occurred within the triangle". Further, the Court's conclusion that adverse effects on the environment would be minor was reached:

> [h]aving considered carefully the changes that will occur on the surrounding environment as a result of consents already granted and the "baseline" set by existing resource consents on the land…

[23] So it can be seen that, in respect of the main issues that the Court had to decide, its reasoning in each case was predicated on the ability to assess the development against the future conditions likely to be present in the area.

The High Court decision

[24] The questions earlier set out particularise the challenged conclusions of Fogarty J. On the first issue, as to whether the receiving environment should be understood as including not only the environment as it exists, but also the reasonably foreseeable environment, Fogarty J essentially adhered to his own reasoning in *Wilson v Selwyn District Council* [2005] NZRMA 76. He held in that case that "environment" in s 104 includes potential use and development in the receiving environment.

[25] Accordingly, the Environment Court had not erred when it took into account the approved building platforms both within and outside of the triangle. In [74] of the judgment Fogarty J said:

> In my view the reason why the baseline analysis is abrupt is that the Court had no doubt at all that advantage would be taken of approved building platforms in this very valuable location. Mr Goldsmith's view was not challenged in cross-examination. Ms Kidson, the landscape witness for the Council, took into account that more houses would be built as a result of a number of consents.

[26] Fogarty J went on to observe that the Environment Court's approach did not involve speculation, and that the Court had rejected an argument that it should take into account the possibility of further subdivision as a result of possible future applications for discretionary activity consent. He observed that in that respect, the approach of the Environment Court was more cautious than that which he himself had taken in *Wilson v Selwyn District Council*.

[27] One of the questions that has been raised on the appeal concerns the adequacy of the Environment Court's consideration of the application of what has come to be known as the "permitted baseline". Although that expression was used by Fogarty J in [74], we doubt that he was using the term in the sense that it is normally used, that is with reference to developments that might lawfully occur on the site subject to the resource consent application itself. Rather, Fogarty J appears to have used the expression to refer to the likely developments that would take place beyond the boundary of the subject site, utilising existing resource consents. Nothing turns on the label that the Judge used to refer to lawfully authorised environmental change beyond the subject site. However, it would be prudent to avoid the confusion that might result from using the term other than in its normal sense, addressed in *Bayley v Manukau City Council, Smith Chilcott Ltd v Auckland City Council* and *Arrigato Investments Ltd v Auckland Regional Council*. As we will emphasise later in this judgment the "permitted baseline" is simply an analytical tool that excludes from consideration certain effects of developments on the site that is subject to a resource consent application. It is not to be applied for the purpose of ascertaining the future state of the environment beyond the site.

[28] The second and third questions raised on the appeal have their genesis in particular provisions in the Council's proposed district plan. Under the landscape classification employed by that plan, the Environment Court held that the receiving environment of the subject application should be regarded as an "Other Rural

Landscape". In a passage which again uses the expression "baseline" in an unusual context, Fogarty J said at [76]:

> Mr Wylie argued that, although there was evidence before the Court on which it could conclude the landscape was Other Rural Landscape that it reached that decision after taking into account, irrelevantly, that the landscape would be developed to the extent permitted by existing consents. So he was arguing that the much earlier finding of Other Rural Landscape was affected by this same area of baseline analysis. As I do not think that there is any error of baseline analysis, this point cannot be sustained. It is, however, appropriate to comment on one detail in Mr Wylie's argument in case it be thought I have overlooked it.

[29] The Judge accepted Mr Wylie's argument that the Environment Court had considered their judgment regarding the effect of the proposal on rural amenity as finely balanced. Having observed that the Environment Court was an expert Court, was thoroughly familiar with the Queenstown area and skilled in the assessment of landscape values, Fogarty J said at [79]:

> In my view Mr Wylie's argument has to depend on the point he has reserved, namely that a consent authority applying s 104 in these circumstances must consider the receiving environment as it exists, and ignore any potential development: whether it be imminent pursuant to existing building consents; or allowed as permitted uses; or potentially allowable as discretionary activity, controlled activity, or non-complying activity. If that is the law, then the judgment by the Environment Court on other rural landscape may be infected with an error of law, in a material way.

[30] The Judge had already decided that there was no such error of law, because it was proper for the Environment Court to consider the future state of the environment.

[31] Fogarty J also held that the Environment Court had not erred in assessing the proposed development by reference to the lot sizes permitted in the rural-residential zone. Essentially, he held that this was a legitimate course to follow, because the site was located in an Other Rural Landscape, which is the least sensitive of the landscape categories provided for in the district plan. Using terms that appear in the district plan itself, Fogarty J said at [87]:

> Obviously different levels of protection of landscape value will depend on whether the proposed developments impact on romantic landscape, Arcadian landscape or other landscape. Reading the [plan] as a whole one would expect quite significant protection of romantic and Arcadian landscape. The

> degree of protection of other landscape, including Other Rural Landscape from any further development is less certain.

[32] He noted there were no minimum subdivisional allotment sizes for the rural general zone. It was a zone that contemplated consents being granted for a wide range of activities provided they did not compromise the landscape and other rural amenities. The proposal had been designed to have a park-like appearance and would incorporate planting that would to some extent screen the development from neighbouring land use. He concluded at [90]:

> Had the Court been proceeding on the basis of a classification of the landscape as Arcadian, considering Rural Residential Standards could well have been taking into account an irrelevant consideration. But where the Court considers that the Arcadian character of the landscape has gone and is dealing with a rural landscape already showing some kind of residential character, I do not think it can be said that an expert Court has fallen into error of law by looking at the standards in the rural living area zones, when exercising a judgment as to how to address a proposal which is a discretionary activity in the rural general zone of the [plan].

[33] Mr Wylie contends that in respect of all these determinations Fogarty J's decision was incorrect in law. We discuss the reasons that he advanced for that contention in the context of the questions that we have to answer.

Question 1(a) – The environment

[34] Mr Wylie's principal submission was that Fogarty J erred in holding that the word "environment" includes not only the environment as it exists, but also the reasonably foreseeable environment after allowing for potential use and development. The Council contended that such an approach is not required by the definition of the word "environment" in s 2 of the Act, and that to read the word in that way would be inconsistent with Part II of the Act, in particular with s 7(f).

[35] Mr Wylie further submitted that a purposive approach to the relevant statutory provision would lead to a conclusion that the "environment" must be confined to the environment as it exists. He submitted that the reference to "maintenance and enhancement of the quality of the environment" in s 7(f) of the Act was strongly suggestive that it is the environment as it exists at the date of the

exercise of the relevant function or power under the Act which must be relevant. He contended that it would be difficult, perhaps impossible, to have particular regard to the maintenance and enhancement of the quality of a speculative future environment.

[36] Further, referring to the importance of district plans made under the Act and the process of submission in which members of the public may formally participate in the plan preparation process, Mr Wylie argued that when a plan becomes operative, it represents a community consensus as to how development should proceed in the Council's district. Such plans, he submitted, focus on existing environments and put in place a framework for future development. But they do not, as he put it, "assume future putative environments degraded by potential use or development".

[37] In addition, Mr Wylie pointed to practical difficulties that he said would make the approach that found favour with the Environment Court and Fogarty J unworkable. There was, in addition, the potential for "environmental creep" if applicants having secured one resource consent were then able to treat the effects of implementing that consent as something which would alter the future state of the environment whilst returning to the Council on successive occasions to seek further consents "starting with the most benign, but heading towards the most damaging".

[38] Mr Wylie also argued that to uphold Fogarty J's view on the meaning of the word "environment" would be to run counter to authorities which have established rules for priority between applicants, authorities dealing with issues of precedent and cumulative effect as well as the authorities already mentioned on the "permitted baseline".

[39] Both parties have argued the matter as if the word "environment" in s 2 of the Act ought to be seen as neutral on the issue of whether it requires the future, and future conditions to be taken into account. We think that that is true only in the superficial sense that none of the words used specifically refers to the future.

[40] The definition reads as follows:

> "Environment" includes –

(a) Ecosystems and their constituent parts, including people and communities; and

(b) All natural and physical resources; and

(c) Amenity values; and

(d) The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters:

[41] This provision must be construed on the basis prescribed by s 5(1) of the Interpretation Act 1999; the meaning of the provision is to be ascertained from its text and in the light of its purpose.

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

[43] These views are reinforced by consideration of the various provisions in the Act in which the word "environment" is used, or in which there is reference to the elements that are set out in the four paragraphs of its definition. The starting point should be s 5, which states and explains the fundamental purpose of the Act in the following terms:

5. Purpose -

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

(2) In this Act, "sustainable management" means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide

> for their social, economic, and cultural wellbeing and for their health and safety while –
>
> (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
>
> (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[44] "Natural and physical resources" are, of course, part of the environment as defined in s 2. The purpose of the Act is to promote their sustainable management. The idea of management plainly connotes action that is on-going, and will continue into the future. Further, such management is to be sustainable, that is to say, natural and physical resources are to be managed in the way explained in s 5(2). Again, it seems plain that provision by communities for their social, economic and cultural well-being, and for their health and safety, is an idea that embraces an on-going state of affairs.

[45] Section 5(2)(a) then makes an express reference to the "reasonably foreseeable needs of future generations". What to this point has been implicit, becomes explicit in the use of this language. There is a plain direction to consider the needs of future generations. Paragraph (b)'s reference to safeguarding the life-supporting capacity of air, water, soil, and ecosystems also points not only to the present, but also the future. The idea of safeguarding capacity necessarily involves consideration of what might happen at a later time.

[46] The same approach is requisite under paragraph (c). "Avoiding" naturally connotes an on-going process, as do "remedying" and "mitigating". The latter two words, in addition, imply alteration to an existing state of affairs, something that can only occur in the future.

[47] Each of the components of s 5(2) is, therefore, directed both to the present and the future state of affairs. An analysis of the concepts contained in ss 6 and 7 leads inevitably to the same conclusion. That is partly because the particular directions in each section are all said to exist for the purpose of achieving the

purpose of the Act. But in part also, the future is embraced by the words "protection", "maintenance" and "enhancement" that appear frequently in each section. We do not agree with Mr Wylie's argument based on s 7(f). "Maintenance" and "enhancement" are words that inevitably extend beyond the date upon which a particular application for resource consent is being considered.

[48] The requirements of ss 5, 6 and 7 must be complied with by all who exercise functions and powers under the Act. Regional authorities must do so, when carrying out their functions in relation to regional policy statements (s 61) and the purposes of the preparation, implementation and administration of regional plans is to assist regional councils to carry out their functions "in order to achieve the purpose of this Act". Further, the functions of regional councils are all conferred for the purpose of giving effect to the Act (s 30(1)). Consistently with this, s 66 obliges regional councils to prepare and change regional plans in accordance with Part II.

[49] The same obligations must be met by territorial authorities, in relation to district plans. The purpose of the preparation, implementation and administration of district plans is, again, to assist territorial authorities to carry out their functions in order to achieve the purpose of the Act. Similarly, the functions of territorial authorities are conferred only for the purpose of giving effect to the Act (s 31) and district plans are to be prepared and changed in accordance with the provisions of Part II. There is then a direct linkage of the powers and duties of regional and territorial authorities to the provisions of Part II with the necessary consequence that those bodies are in fact planning for the future. The same forward looking stance is required of central government and its delegates when exercising powers in relation to national policy statements (s 45) and New Zealand coastal policy statements (s 56). The drafting shows a consistent pattern.

[50] In the case of an application for resource consent, Part II of the Act is, again, central to the process. This follows directly from the statement of purpose in s 5 and the way in which the drafting of each of ss 6 to 8 requires their observance by all functionaries in the exercise of powers under the Act. Self-evidently, that includes the power to decide an application for resource consent under s 105 of the Act.

Moreover, s 104 which sets out the matters to be considered in the case of resource consent applications, began, at the time relevant to this appeal:

> (1) Subject to Part II, when considering an application for a resource consent and any submissions received, the consent authority shall have regard to ….

[51] The pervasiveness of Part II is once again apparent. In the case of resource consent applications, reference must also be made to the list of relevant considerations spelled out in paragraphs (a) to (i) of s 104(1). These include: "any actual and potential effects on the environment of allowing the activity" (paragraph (a)), the objectives, policies, rules and other provisions of the various planning instruments made under the Act (paragraphs (c) to (f)) and "any other matters that a consent authority considers relevant and reasonably necessary to determine the application" (paragraph (i)).

[52] Each of these provisions is likely to require a consent authority, in appropriate cases, to have regard to the future environment. Insofar as ss 104(1)(c) to (f) are concerned, that will be necessary where the instruments considered require that approach. If the precedent effects of granting an application are to be considered as envisaged by *Dye v Auckland Regional Council* [2002] 1 NZLR 337 then the future will need to be considered, whether under s 104(1)(d) or s 104(1)(i). As to s 104(1)(a), its reference to potential effects is sufficiently broad to include effects that may or may not occur depending on the occurrence of some future event. It must certainly embrace future events.

[53] Future potential effects cannot be considered unless there is a genuine attempt, at the same time, to envisage the environment in which such future effects, or effects arising over time, will be operating. The environment inevitably changes, and in many cases future effects will not be effects on the environment as it exists on the day that the Council or the Environment Court on appeal makes its decision on the resource consent application.

[54] That must be the case when district plans permit activities to establish without resource consents, where resource consents are granted and put into effect and where existing uses continue as authorised by the Act. It is not just the erection

of buildings that alters the environment: other activities by human beings, the effects of agriculture and pastoral land uses, and natural forces all have roles as agents of environmental change. It would be surprising if the Act, and in particular s 104(1)(a) were to be construed as requiring such ongoing change to be left out of account. Indeed, we think such an approach would militate against achievement of the Act's purpose.

[55] A further consideration based in particular on the provisions concerning applications leads to the same conclusion. When an application for resource consent is granted, the Act envisages that a period of time may elapse within which the resource consent may be implemented. At the time relevant to this appeal, the statutory period was two years or such shorter or longer period as might be provided for in the resource consent (s 125). Consequently, the effects of a resource consent might not be operative for an appreciable period after the consent had been granted. Mr Wylie's argument would prevent the consent authority considering the environment in which those effects would be felt for the first time. Rather, the consent authority would have to consider the effects on an environment which, at the time the effects are actually occurring, may well be different to the environment at the time that the application for consent was considered. That would not be sensible.

[56] Similarly, it is relevant that many resource consents are granted for an unlimited time. That is certainly the case for most land use and subdivision consents (see s 123(b)). Yet it could not be assumed that the effects of implementing the consent would be the same one year after it had been granted, as they would be in twenty years' time.

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

[58] We have not been persuaded to a different view by any of Mr Wylie's arguments based on practical considerations and conflict with other lines of authority. It was his submission that the practical difficulties arising from Fogarty J's judgment would be significant. He contended that to require those administering district plans, and applicants for resource consents, to take account of the potential or notional future environment would be unduly burdensome, and would require them to speculate about what might or might not occur in any particular receiving environment, about what future economic conditions might be, and, possibly about how such future economic conditions might affect future people and communities. He submitted that this would require a degree of prescience on the part of consent authorities that was inappropriate.

[59] In support of those propositions he referred to *O'Connell v Christchurch City Council* [2003] NZRMA 216, and in particular to what was said by Panckhurst J at [73]:

> I also agree with the submission of Mr Chapman for AMI/AMP that an extension of the rule to include potential activities on sites other than the application site would place an intolerable burden on the consent authority when assessing resource consent applications.

[60] The concerns expressed by Mr Wylie about practical difficulties were overstated. It will not be every case where it is necessary to consider the future environment, or where doing so will be at all complicated. Suppose, for example, an application for resource consent to establish a new activity in a built up area of a city. There will be rules which provide for permitted activities and in the vast majority of cases it would be likely that the foreseeable future development of surrounding sites would be similar to that which existed at the time the application was being considered. In such a case, it might be a safe assumption that the environment would, in its principal attributes, be very much like it presently is, but perhaps more intensively developed if there are district plan objectives and policies designed to secure that end. At the other end of the spectrum, if one supposed an application to carry out some new activity involving development in an area which was rural in nature and which was intended to remain so in accordance with the policy framework established by the district plan, then once again it ought not be difficult to postulate the future state of that environment.

[61] Difficulties might be encountered in areas that were undergoing significant change, or where such change was planned to occur. However, even those areas would have an applicable policy framework in the district plan that, together with the rules, would give considerable guidance as to the nature and intensity of future activities likely to be established on surrounding land. In cases such as the present, where there are a significant number of outstanding resource consents yet to be implemented, and uncontested evidence of pressure for development, the task of predicting the likely future state of the environment is not difficult.

[62] The observations made by Panckhurst J in *O'Connell v Christchurch City Council* must be read in context. He was dealing with an appeal from an Environment Court decision overturning a decision by the City Council to grant consent to establish a tyre retail outlet. AMI and AMP occupied multi-storey office premises adjoining the subject site and had appealed to the Environment Court against the Council's decision. When the Environment Court set aside the Council's decision, the applicant for resource consent appealed to the High Court. One of the issues raised on the appeal was a contention that the Environment Court had misapplied the "permitted baseline test" in as much as it had considered the effects of permitted activities on only the subject site and had not considered the effects of permitted activities on adjacent sites as well. At [70] Panckhurst J said:

> [70] I accept that the Court did apply the baseline test with reference only to the subject site. That is it compared the proposed activity against other hypothetical activities that could be established on this site as of right in terms of the transitional and proposed plans. Regard was not had to the impact of the establishment of hypothetical activities on a closely adjacent site. Was such an approach in error?
>
> [71] I am not persuaded that it was. This conclusion I think follows from a reading of various decisions where the permitted baseline assessment has been considered in a number of contexts.

[63] The Judge referred to *Bayley v Manukau City Council, Smith Chilcott Ltd v Auckland City Council and Arrigato Investments Ltd v Auckland Regional Council*, and concluded that the required comparison for purposes of permitted baseline analysis is one that is restricted to the site in question. There was nothing in those cases which was consistent with the extension of the test for which the appellant had contended. We have earlier expressed our view that the "permitted baseline" has in

the previous decisions of this Court been limited to a comparison of the effects of the activity which is the subject of the application for resource consent with the effects of other activities that might be permitted on the subject land, whether by way of right as a permitted activity under the district plan, or whether pursuant to the grant of a resource consent. In the latter case, it is only the effects of activities which have been the subject of resource consents already granted that may be considered, and the consent authority must decide whether or not to do so: *Arrigato Investments Ltd v Auckland Regional Council*, at [30] and [34]-[35].

[64] We agree with Panckhurst J's observations about the limits of the "permitted baseline" concept, and we also agree with him that the decisions of this Court have not suggested that it can be applied other than in relation to the site that is the subject of the resource consent application. However, it is a far step from there to contend that *Bayley v Manukau City* and the decisions that followed it, dictate the answer on the principal issues to be determined in this appeal. The question whether the "environment" could embrace the future state of the environment was not directly addressed in those cases, nor was an argument in those terms apparently put to Panckhurst J.

[65] It is as well to remember what the "permitted baseline" concept is designed to achieve. In essence, its purpose is to isolate, and make irrelevant, effects of activities on the environment that are permitted by a district plan, or have already been consented to. Such effects cannot then be taken into account when assessing the effects of a particular resource consent application. As Tipping J said in *Arrigato* at [29]:

> Thus, if the activity permitted by the plan will create some adverse effect on the environment, that adverse effect does not count in the ss 104 and 105 assessments. It is part of the permitted baseline in the sense that it is deemed to be already affecting the environment or, if you like, it is not a relevant adverse effect. The consequence is that only other or further adverse effects emanating from the proposal under consideration are brought to account.

[66] Where it applies, therefore, the permitted baseline analysis removes certain effects from consideration under s 104(1)(a) of the Act. That idea is very different, conceptually, from the issue of whether the receiving environment (beyond the

subject site) to be considered under s 104(1)(a), can include the future environment. The previous decisions of this Court do not decide or even comment on that issue.

[67] We do not overlook what was said in *Bayley v Manukau City Council* at p 577, where the Court referred to what Salmon J had said in *Aley v North Shore City Council* [1998] NZRMA 361 at 377:

> On this basis a consideration of the effect on the environment of the activity for which consent is sought requires an assessment to be made of the effects of the proposal on the environment as it exists.

The Court said that it would add to that sentence the words:

> …or as it would exist if the land were used in a manner permitted as of right by the plan.

[68] However, it must be remembered first, that *Bayley* was the case in which the permitted baseline concept was formally recognised, and as we have explained did not deal with the issue which has to be decided in this case. Secondly, it was a case about notification of resource consent applications. The issue that arose concerned the proper application of s 94 of the Act, and the provisions it contained allowing non-notification in cases where the adverse effect on the environment of the activity for which consent was sought would be minor. In that context there could be no need to consider the future environment, because if the effects on the existing environment were not able to be described as minor, there would be no need to look any further.

[69] Mr Wylie referred to other practical difficulties which he illustrated by reference to Fogarty J's decision in *Wilson v Selwyn District Council*. In that case, as in this, Fogarty J held that the term "environment" could include the future environment where the word is used in s 104(1)(a) of the Act. He held further that, to ascertain the future state of the environment it was appropriate to ask, amongst other things, whether it was "not fanciful" that surrounding land should be developed, and to have regard in that connection to what was permitted in a proposed district plan. Because the district plan contemplated the subdivision of neighbouring land as a controlled activity, His Honour held that it was plain that the District Council did not regard it as fanciful that the land in the locality might be

subdivided down into smaller sites with increased dwellings. Mr Wylie pointed out that although subdivision was a controlled activity under the proposed plan relevant in that case, and there were no submissions challenging that, there were, however, submissions challenging the right to erect dwellings, as Fogarty J himself had recorded in [38] of the judgment. Mr Wylie criticised the decision on the basis that it had effectively "pre-empted" the submission process in relation to the district plan. It would also, in his submission, lead to considerable uncertainty.

[70] Mr Wylie further argued that in the present case, some of the remarks made by Fogarty J suggested that the possibility of development pursuant to resource consents for discretionary or even non-complying activities should be taken into account to ascertain the future state of the environment, in advance of such consents being granted.

[71] That is an inference which can arise from what the Judge said at [79]:

> In my view Mr Wylie's argument has to depend on the point he has reserved, namely that a consent authority applying s 104 in these circumstances must consider the receiving environment as it exists, and ignore any potential development: whether it be imminent pursuant to existing building consents; or allowed as permitted uses; or potentially allowable as discretionary activity, controlled activity, or non-complying activity. If that is the law, then the judgment by the Environment Court on Other Rural Landscape may be infected with an error of law, in a material way.

[72] Fogarty J noted that the decision of the Environment Court in the present case had rejected an argument that it should take into account the likelihood of future successful applications for discretionary activity consent. At [74] he said:

> As noted, the Court did go on to reject taking into account the further subdivision and thus even more houses resulting from successful applications for discretionary activities. It may be noted that that is a more cautious approach than I took in *Wilson and Rickerby*, see [62] and [81].

[73] The reference here to *Wilson and Rickerby* was a reference to the case now reported as *Wilson v Selwyn District Council*.

[74] These observations by the Judge express too broadly the ambit of a consent authority's ability to consider future events. There is no justification for borrowing the "fanciful" criterion from the permitted baseline cases and applying it in this

different context. The word "fanciful" first appeared in *Smith Chilcott Ltd v Auckland City Council* at [26], where it was used to rule out of consideration, for the purposes of the permitted baseline test, activities that the plan would permit on a subject site because although permitted it would be "fanciful" to suppose that they might in fact take place. In that context, when the "fanciful" criterion is applied, it will be in the setting of known or ascertainable information about the development site (its area, topography, orientation and so on). Such an approach would be a much less certain guide when consideration is being given to whether or not future resource consent applications might be made, and if so granted, in a particular area. It would be too speculative to consider whether or not such consents might be granted and to then proceed to make decisions about the future environment as if those resource consents had already been implemented.

[75] It was not necessary to cast the net so widely in the present case. The Environment Court took into account the fact that there were numerous resource consents that had been granted in and near the triangle. It accepted Mr Goldsmith's evidence that those consents were likely to be implemented. There was ample justification for the Court to conclude that the future environment would be altered by the implementation of those consents and the erection of dwellings in the surrounding area.

[76] Limited in this way, the approach taken to ascertain the future state of the environment is not so uncertain as to be unworkable or unduly speculative, as Mr Wylie contended.

[77] Another concern that was raised by Mr Wylie was the possibility of "environmental creep". This is the possibility that someone who has obtained one resource consent might seek a further resource consent in respect of the same site, but for a more intensive activity. It would be argued that the deemed adverse effects of the first application should be discounted from those of the second when the latter was considered under s 104(1)(a). Mr Wylie submitted that if s 104(1)(a) requires that consideration be given to potential use and development, there would be nothing to stop developers from making a number of applications for resource consent, starting with the most benign, and heading towards the most damaging. On each

successive application, they would be able to argue that the receiving environment had already been notionally degraded by its potential development under the unimplemented consents.

[78] This fear can be given the same answer as was given in *Arrigato* where the Court had to determine whether unimplemented resource consents should be included within the "permitted baseline". At [35] the Court said:

> [35] Resource consents are capable of being granted on a non-notified as well as a notified basis. Furthermore, they relate to activities of differing kinds. There may be circumstances when it would be appropriate to regard the activity involved in an unimplemented resource consent as being part of the permitted baseline, but equally there may be circumstances in which it would not be appropriate to do so. For example, implementation of an earlier resource consent may on the one hand be an inevitable or necessary precursor of the activity envisaged by the new proposal. On the other hand the unimplemented consent may be inconsistent with the new proposal and thus be superseded by it. We do not think it would be in accordance with the policy and purposes of the Act for this topic to be the subject of a prescriptive rule one way or the other. Flexibility should be preserved so as to allow the consent authority to exercise its judgment as to what bearing the unimplemented resource consent should have on the question of the effects of the instant proposal on the environment.

[79] The Environment Court dealt with the implications of the existing resource consents in the present case in a manner that was consistent with that approach. It will always be a question of fact as to whether or not an existing resource consent is going to implemented. If it appeared that a developer was simply seeking successively more intensive resource consents for the same site there would inevitably come a point when a particular proposal was properly to be viewed as replacing previous proposals. That would have the consequence that all of the adverse effects of the later proposal should be taken into account, with no "discount" given for consents previously granted. We are not persuaded that the prospect of "creep" should lead to the conclusion that the consequences of the subsequent implementation of existing resource consents cannot be considered as part of the future environment.

[80] Three other issues, raised by Mr Wylie in support of his argument that "environment" should be confined to what exists at the time the resource consent application is considered by the consent authority, can be briefly mentioned. First,

he suggested that the contrary approach would have the effect of negating the result of cases that have decided that priority as between applicants should be established in accordance with the time when applications are made to a consent authority (*Fleetwing Farms Ltd v Marlborough District Council* [1997] 3 NZLR 257 and *Geotherm Group Ltd v Waikato Regional Council* [2004] NZRMA 1). That argument would only be legitimate if we were to endorse Fogarty J's decision that resource consent applications not yet made but which conceivably might be made, could be taken into account. That is not our view.

[81] Secondly, Mr Wylie contended that to hold that the word "environment" included potential use or development would undermine the decision of this Court in *Dye v Auckland Regional Council* where it had been decided that the grant of a resource consent had no precedent effect in the "strict sense". It is apparent from [32] of that decision, that what was meant by use of the expression "the strict sense" was that one consent authority is not bound by its own decisions or those of any other consent authority. We do not agree that a decision that the "environment" can include the future state of the environment has any implications for what was decided in *Dye*.

[82] Finally, Mr Wylie contended that if unimplemented resource consents are taken into account, then consent applications will fall to be decided on the basis of the environment as potentially affected by other consents. He submitted that this was to all intents and purposes "precedent by another route". We do not agree. To grant consent to an application for the reason that some other application has been granted consent is one thing. To decide to grant a resource consent application on the basis that resource consents already granted will alter the existing environment when implemented, and that those consents are likely to be implemented is quite a different matter.

[83] There is nothing in the High Court's decision in *Rodney District Council v Gould* [2006] NZRMA 217 on the question of cumulative effects which has any implications for the current issue. That decision simply explained what was already apparent from what this Court had decided in relation to cumulative effects in *Dye v*

Auckland Regional Council that is, that the cumulative effects of a particular application are effects which arise from that application, and not from others.

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

Question 1(b) - Speculation

[85] The foregoing discussion means this and the subsequent questions can be answered more briefly. The issue raised by this question is whether taking into account the approved building platforms in and near the triangle, was speculative. The process adopted by the Environment Court cannot properly be characterised as having involved speculation. The Court accepted Mr Goldsmith's evidence that it was "practically certain" that the approved building sites in and near the triangle would be built on. Mr Wylie confirmed that there was no issue with the Environment Court's finding of fact on the likelihood of future houses being erected.

[86] However, Mr Wylie argued that the environment against which the application fell to be assessed comprised only the existing environment. If that assertion were correct, he submitted that it followed that the potential effects of unimplemented resource consents were irrelevant.

[87] We have already rejected his contention that the relevant environment was confined to the existing environment. It follows that there is no basis upon which we could find error of law in relation to Question 1(b).

Question 1(c) – Consideration of the permitted baseline

[88] The issue raised by this question is whether the Environment Court had given adequate and appropriate consideration to the application of the permitted baseline. Mr Wylie's argument on this issue proceeded as if the Environment Court had been making a decision about the permitted baseline when it allowed itself to be influenced by its conclusion that the building sites in and around the triangle would be developed. For reasons that we have already given, we do not consider that the receiving environment was properly to be approached on the basis of a "permitted baseline" analysis, as that term has normally been used.

[89] Whatever label is put upon the exercise, Mr Wylie's main contention in this part of his argument was that there was nothing in the Environment Court's decision to show that it had a discretion of the kind that had been explained by this Court in the decision in *Arrigato Investments Ltd v Auckland Regional Council*, in particular the passage at [35] that we have earlier set out. Mr Wylie submitted that properly understood, the decision in *Arrigato* meant that there was a discretion when it came to the consideration of unimplemented resource consents. Mr Wylie also contended that it was not obvious from the Environment Court's judgment that it was aware that it had that discretion, let alone that it had exercised it.

[90] We do not consider that it is appropriate to describe what is simply an evaluative factual assessment as the exercise of a discretion. Further, we agree with Mr Castiglione that the Council's argument wrongly conflates the "permitted baseline" and the essentially factual exercise of ascertaining the likely state of the future environment. We have previously stated our reasons for limiting the permitted baseline to the effects of developments on the site that is the subject of a resource consent application. On the relevant issue of fact, the Environment Court relied on the evidence of Mr Goldsmith about the virtual certainty of development

occurring on the approved building platforms in and around the triangle. There was no error in that approach.

[91] In reality the present question simply raises, in a different guise, the central complaint that the Council makes about the acceptance by both the Environment Court and the High Court that the receiving environment can include the future environment. That issue is not to be approached by invoking the permitted baseline, so the question posed does not strictly arise. We simply answer the question by saying that the issues raised by the Council in this part of the appeal do not establish any error of law by the Environment Court, nor by Fogarty J.

Question 2 – Landscape Category

[92] The Council argued that the Environment Court had wrongly concluded that the landscape category it was required to consider was an "Other Rural Landscape" under the district plan. It was contended that Fogarty J had erred by approving the Environment Court's approach.

[93] The district plan defines and classifies landscapes into three broad categories, "Outstanding Natural Landscapes and Features", "Visual Amenity Landscapes" and "Other Rural". The classification of a particular landscape can be important to the consideration of resource consent applications, because different policies, objectives and assessment criteria apply to land within the different categories.

[94] Landscapes in the "outstanding" category are described in the district plan as "romantic landscapes – the mountains and the lakes – landscapes to which s 6 of the Act applies". The important resource management issues are identified as being the protection of these landscapes from inappropriate subdivision, use and development, particularly where activity might threaten the openness and naturalness of the landscape. With respect to "Visual Amenity Landscapes", the district plan describes them in the following way:

> They are landscapes which wear a cloak of human activity much more obviously – pastoral (in the poetic and picturesque sense rather than the functional sense) or Arcadian landscapes with more houses and trees,

> greener (introduced) grasses and tend to be on the district's downlands, flats and terraces.

The district plan seeks to enhance their natural character and enable alternative forms of development where there are direct environmental benefits of doing so. This leaves a residual category of "other rural landscapes", to which the district plan assigns "lesser landscape values (but not necessarily insignificant ones)".

[95] There was a contest in the Environment Court as to whether the landscape to be considered in the present case was properly categorised as "Visual Amenity" or "Other Rural". In making its assessment as to which classification should apply, the Environment Court plainly had regard to what the landscape would be like when resource consents already granted were utilised. At [32], it said:

> We consider that the landscape architects called by the Council and the section 271A parties have been too concerned with the Court's discussion of the scale of landscapes and have not sufficiently addressed the central question in landscape classification, namely whether the landscape, when developed to the extent permitted by existing consents, will retain the essential qualities of a VAL, which are pastoral or Arcadian characteristics. We noted (in paragraph 3) that development of "lifestyle" or "estate" lots for rural-residential living is not confined to the triangle itself.

[96] It then made reference to existing developments in the area finding some to be highly visible and detracting significantly from any "arcadian" qualities of the wider setting. It concluded that the landscape category was Other Rural.

[97] We accept, as Mr Wylie submitted, that in large part that conclusion of the Environment Court was apparently based on the view that it had formed about what the landscape would be like when modified by the implementation of as yet unimplemented resource consents.

[98] In the High Court, Fogarty J recorded the submission that had been made to him by Mr Wylie that, although there was evidence before that Court on which it could have concluded that the landscape was "Other Rural", nevertheless it had reached that conclusion after taking into account, irrelevantly, that the landscape would be developed to the extent permitted by existing consents. Fogarty J held first that this was in effect a repetition of the arguments previously made about faulty baseline analysis. As he did not consider that the Environment Court had made any

error in that respect, Mr Wylie's argument could not be sustained. A little later in the judgment, Fogarty J confirmed his view that a landscape categorisation decision could only be criticised if the Court was obliged to ignore future potential developments in the area ([79] of his decision, set out in [29] above).

[99] Mr Wylie repeated in this context his argument that the Court had been obliged to consider the environment as it existed at the time that it made its decision. That argument must fail for the reasons that we have already given. However, in this Court Mr Wylie developed another argument based not on the relevant statutory provisions, but on provisions of the district plan itself. Mr Wylie's argument was based on Rule 5.4.2.1 of the district plan.

[100] Rule 5.4.2 contains "assessment matters" which are to be considered when the Council decides whether or not to grant consent to, or impose conditions on, resource consent applications made in respect of land in the rural zones. As we have previously noted those assessment criteria vary according to the categorisation of the landscape. Before the actual assessment matters are stated, however, Rule 5.4.2.1 sets out a three-step process to be followed in applying the assessment criteria. It provides as follows:

> 5.4.2.1 **Landscape Assessment Criteria – Process**
> **There are three steps in applying these assessment criteria.** First, the analysis of the site and surrounding landscape; secondly determination of the appropriate landscape category; thirdly the application of the assessment matters. For the purpose of these assessment criteria, the term "proposed development" includes any subdivision, identification of building platforms, any building and associated activities such as roading, earthworks, landscaping, planting and boundaries.
>
> **Step 1 – Analysis of the Site and Surrounding Landscape**
> An analysis of the site and surrounding landscape is necessary for two reasons. Firstly it will provide the necessary information for determining a sites ability to absorb development including the basis for determining the compatibility of the proposed development with both the site and the surrounding landscape. Secondly it is an important step in the determination of a landscape category – i.e. whether the proposed site falls within an outstanding natural, visual amenity or other rural landscape.
>
> An analysis of the site must include a description of those existing qualities and characteristics (both negative and positive), such as vegetation, topography, aspect, visibility, natural features, relevant ecological systems and land use.

An analysis of the surrounding landscape must include natural science factors (the geological, topographical, ecological and dynamic components in [sic] of the landscape), aesthetic values (including memorability and naturalness), expressiveness and legibility (how obviously the landscape demonstrates the formative processes leading to it), transient values (such as the occasional presence of wildlife; or its values at certain times of the day or of the year), value of the landscape to Tangata Whenua and its historical associations.

Step 2 – Determination of Landscape Category
This step is important as it determines which district wide objectives, policies, definitions and assessment matters are given weight in making a decision on a resource consent application.

The Council shall consider the matters referred to in Step 1 above, and any other relevant matter, in the context of the broad description of the three landscape categories in Part 4.2.4. of this Plan, and shall determine what category of landscape applies to the site subject to the application.

In making this determination the Council, shall consider:
(a) to the extent appropriate under the circumstances, both the land subject to the consent application and the wider landscape within which that land is situated; and
(b) the landscape maps in Appendix 8.

Step 3 – Application of the Assessment Matters
Once the Council has determined which landscape category the proposed development falls within, each resource consent application will then be considered:
First, with respect to the prescribed assessment criteria set out in Rule 5.4.2.2 of this section;
Secondly, recognising and providing for the reasons for making the activity discretionary (see para 1.5.3(iii) of the plan [p1/3]) and a general assessment of the frequency with which appropriate sites for development will be found in the locality.

[101] Mr Wylie argued, that even if his argument confining "environment" to the current environment failed, nevertheless in accordance with these district plan provisions it could not be relevant to consider the future environment other than at Step 3. He submitted that for the purposes of Step 1 and Step 2, attention should be focused solely on the current state of the environment.

[102] Mr Castiglione argued to the contrary, suggesting that the words used in Step 1, "…the basis for determining the compatibility of the proposed development with both the site and the surrounding landscape" were apt to refer to proposed development generally within the landscape. We reject that submission. In context,

the reference to "the proposed development" must be the development which is the subject of a particular application for resource consent.

[103] But the wording of Steps 1 and 2 does not exclude a consideration of the environment as it would be after the implementation of existing resource consents. Although the second paragraph in Step 1 refers to "existing qualities and characteristics", the words used are inclusive, and there is nothing to suggest that they are exhaustive. The same applies in respect to the last paragraph in Step 1. We do not read the words in either paragraph as ruling out consideration of the future environment. Even if that conclusion were wrong it would be legitimate for the Council to consider the future environment as part of "any other relevant matter", the words used in the second paragraph within Step 2. Further, the second part of Step 2 authorises a broadly based inquiry when it requires the Council to "consider…the wider landscape" within which a development site is situated. There is no reason to read into these words, or any of the other language in Step 2, a limitation of the consideration to the present state of the landscape.

[104] It follows that the future state of the environment can properly be considered at Steps 1 and 2, before the landscape classification decision is made. Neither the Environment Court nor Fogarty J erred and Question 2 should be answered no.

Question 3 – Reliance on Minimum Subdivision Standards in the Rural-Residential zone

[105] In the High Court, the Council had argued that the Environment Court had misconstrued the relevant district plan provisions, and taken into account an irrelevant consideration by referring to the subdivision standards contained in the district plan for the rural-residential zone. The subject site is zoned rural general.

[106] Mr Wylie pointed to three separate paragraphs in the Environment Court's decision where there had been references to the rural-residential provisions of the plan. In [74] of its decision the Environment Court had discussed evidence that had been given about the desire of the developer to create a "park-like" environment. A landscape architect whose evidence had been called by the Council expressed the

opinion that although the proposal would not introduce urban densities, it was not rural in nature. The Court referred to the fact that in the rural-residential zone a minimum lot size of 4,000 square metres and an associated building platform was permitted. It will be remembered that the subject development would comprise allotments varying in size between 0.6 and 1.3 hectares. No doubt with that comparison in mind, the Environment Court expressed the view that the development would provide more than the level of "ruralness" of rural-residential amenity.

[107] The next reference to the rural-residential rules was in [78]. The Environment Court was there dealing with the issue of whether the development would result in the "over-domestication" of the landscape. The Court expressed its view that the proposal could co-exist with policies seeking to retain rural amenity and that while it would add to the level of domestication of the environment, the result would not reach the point of over-domestication. That was so, because the site was in an "other rural landscape", and the district plan considered that rural-residential allotments down to 4,000 square metres retained an appropriate amenity for rural living.

[108] Finally, Mr Wylie referred to the fact that at [92], where the Environment Court was dealing with a proposition that the proposal would be contrary to the district plan's overall settlement strategy, the Court made a reference to the reluctance that it had expressed in a previous decision to set minimum allotment sizes in the rural-residential zone. Mr Castiglione suggested that the Environment Court had made a mistake, and that it had meant to refer to the rural general zone in that paragraph, not the rural-residential zone. We do not need to decide whether or not that was the case.

[109] Having reviewed the various references to the rural-residential in context, Fogarty J held that the Environment Court had not considered an irrelevant matter or committed any error of law in its references to the rural-residential zones. We cannot see any basis to disturb that conclusion. In this Court Mr Wylie contended that Fogarty J's reasoning had been based on the fact that the Environment Court had considered that any "arcadian" character of the landscape had gone. He then

repeated the point that that conclusion had turned on the fact that the Court had considered the likely future environment as opposed to confining its consideration to the existing environment. He submitted that the decision was wrong for that reason. We have already rejected that argument.

[110] We do not consider that there was any error of law in the approach of either the Environment Court or the High Court on this issue. Question 3 should also be answered no.

Result

[111] For the reasons that we have given, each of the questions raised on the appeal is answered in the negative. That answer in respect of Question 1(c) must be read in the context that the Environment Court's analysis of the relevant environment was not a "permitted baseline" analysis.

[112] The respondent is entitled to costs in this Court of $6,000 plus disbursements, including the reasonable travel and accommodation expenses of both counsel to be fixed, if necessary by the Registrar.

Solicitors:
Ross Dowling Marquet Griffin, Dunedin for Appellant
Anderson Lloyd Caudwell, Queenstown for First Respondent

IN THE 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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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2014-409-000054
[2014] NZHC 1362

BETWEEN	SIMONS HILL STATION LIMITED AND SIMONS PASS STATION LIMITED Appellants
AND	ROYAL FOREST & BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED First Respondent
	CANTERBURY REGIONAL COUNCIL Second respondent

Hearing:	12 and 13 May 2014
Appearances:	M E Casey QC and K G Reid for the Appellants S Gepp and P Anderson for the First Respondent M Dysart for the Second Respondent
Judgment:	17 June 2014

JUDGMENT OF GENDALL J

Introduction

[1] This is an appeal against a decision of the Environment Court refusing to partially strike out an appeal by the first respondent ("RFB").[1] RFB's substantive appeal is against the decision of commissioners appointed by the second respondent ("Council") by which the appellants ("Simons") were granted consent pursuant to the Resource Management Act 1991 ("the RMA") to take and use water for irrigation from Lake Pukaki or the Pukaki Canal for their farm properties Simons Hill Station and Simons Pass Station. These consent applications were publicly notified at the same time as 159 other applications for similar activities in the

[1] *Royal Forest and Bird Protection Society of New Zealand Inc v Canterbury Regional Council* [2013] NZEnvC 301.

Upper Waitaki area. RFB's substantive appeal against the decision of the Commissioners cited adverse effects on landscape, terrestrial ecology and water quality.

[2] RFB has additionally filed a cross-appeal relating to the Environment Court's interpretation of s 120 of the RMA.

[3] Simons' strike out application sought to bring an end to RFB's appeals so far as they raise issues which Simons' claim are outside the scope of RFB's submission on the consent applications, dated 28 September 2007 ("the 2007 submission"). Simons say that the 2007 submission was solely confined to issues related to compliance with the Waitaki Catchment Water Allocation Plan ("the Waitaki Plan") relating to the area in question and the effects of the taking of water. The Waitaki Plan, and the 2007 submission, it is said relate only to water *allocation*, whereas any issue relating to water allocation Simons contends has now been abandoned by RFB.

[4] Simons maintains that the matters now proposed to be raised by RFB on its appeal relate only to the effects of the use and application of the water on terrestrial ecology and the landscape. These are matters with which the Waitaki Plan did not deal, and which are, Simons says, outside the scope of the 2007 submission.

[5] The substantive appeal is yet to be heard before the Environment Court as the outcome of the present appeal has the potential to influence the scope of that appeal.

The appeal

[6] The application by Simons for partial strike out of RFB's substantive appeal in the Environment Court was two-pronged:

(a) an appeal against the grant of a resource consent is constrained as to scope by the appealing party's original submission lodged with the consenting authority.

(b) the matters raised by RFB on its appeal to the Environment Court were not, as a matter of interpretation, within the scope of its 2007 submission to the consent authority.

[7] As to the former, the Environment Court agreed with Simons' argument. As to the latter, the Environment Court determined that the matters raised on appeal to the Environment Court fell within the purview of RFB's 2007 submission, therefore circumventing the invocation of the former finding. It was on this basis that the application for partial strike out failed, which in turn led to this appeal. The grounds on which Simons now appeal are that:

(a) the Environment Court incorrectly interpreted RFB's 2007 submission as raising issues as to the effects on terrestrial ecology of Simons' proposed use of the water.

(b) the Environment Court wrongly interpreted the objectives and policies of the Waitaki Plan and reached incorrect conclusions as a result.

(c) the Environment Court wrongly interpreted Policy 12 of the Waitaki Plan and therefore incorrectly concluded it was relevant.

(d) the Environment Court was wrong to consider the adequacy or otherwise of an applicant's AEE and its responses to s 92 requests as a consideration relevant to the scope of submissions made on the application for resource consent.

(e) the Environment Court was wrong to hold that RFB's statement of issues did not qualify its notice of appeal.

[8] In response RFB submits:

(a) the grounds of appeal disclosed by Simons are seeking to relitigate the findings of the Environment Court appeal under the guise of a question of law. Accordingly, this appeal ought to fail as appeals to the High Court may only be on questions of law.

(b) even if the grounds of appeal do legitimately disclose questions of law, these are immaterial when considered in the context of the factual findings of the Environment Court in its entirety.

[9] The Council supports, to a greater or lesser extent, the position of Simons with respect to the appeal. This judgment will therefore concentrate primarily on the submissions of Simons and RFB.

The cross-appeal

[10] RFB cross-appeals against the decision of the Environment Court on the basis that it was wrong to interpret s 120 of the RMA as constraining the scope of an appellant's grounds of appeal to matters raised in its own original submission to the consenting authority.

[11] In response, Simons and the Council submit that the cross appeal should fail on the basis that the interpretation of the Environment Court was correct.

Issues for resolution

[12] Despite the apparent complexity of this case, there are ultimately only two issues which this Court is required to resolve:

(a) Did the Environment Court err *in law* in finding that RFB's original 2007 submission was sufficiently wide to encompass the grounds on which it appealed the granting of the resource consent to the Environment Court?

(b) Was the Environment Court wrong to interpret s 120 of the RMA as meaning that an appeal to the Environment Court is constrained in scope by the original submission of the appellant to the consenting authority?

The Environment Court decision

The application

[13] As previously stated, the application before the Environment Court was an application by Simons to partially strike out three of RFB's appeals on the following grounds:[2]

> (a) the Court has no jurisdiction to entertain the appeals filed by Forest & Bird;
>
> (b) Forest & Bird's submission on the notified applications for resource consent concern non-compliance with the Waitaki Catchment Water Allocation Plan … This matter is no longer in contention;
>
> (c) the court has no jurisdiction to consider the issues identified by Forest & Bird in its memorandum dated 8 March 2013;
>
> (d) Forest & Bird has failed to particularise its appeals so as to ensure that the matters to be raised in evidence are within jurisdiction; and
>
> (e) Forest & Bird has failed to clearly and unambiguously identify the matters that it wishes to raise as part of its appeal "in a way that excludes mattes not being raised".

[14] RFB opposed the application for strike out on the following basis:[3]

> (a) the matters pursued on appeal are within the scope of its submission on the resource consent applications;
>
> (b) if there is any doubt as to scope, this should be resolved in Forest & Bird's favour; and
>
> (c) Forest & Bird's appeals raise issues about water quality and quantity that have yet to settle and therefore remain in contention.

Simons' arguments

[15] In support of its application in the Environment Court, Simons submitted:

> (a) an appeal cannot widen the scope of the original submission put before the consenting authority; this position is consistent with principles of fairness and natural justice.[4]

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2 At [3].
3 At [5].
4 At [35] – [36].

(b) the scope of a submission concerns not only the grounds on which the submission is made, but also the relief sought. Here, the relief sought by RFB is referable to the applications only to the extent that they were contrary to the Waitaki Plan. Therefore, RFB was seeking only to decline non-complying activities, whereas the Simons' activities were discretionary.[5]

(c) Part 2 of the RMA cannot be used to widen the scope of the appeal beyond the scope of the original submission made by RFB. The relevance of Part 2 matters is quite different from the question of whether the Environment Court had any jurisdiction to hear them.[6]

(d) the statement of issues which the Court directed RFB to file is analogous to "further particulars" which qualifies, though does not formally amend, the notice of appeal. To the extent the appeal originally dealt with water quality issues these are no longer in issue as a result of the statement of issues.[7]

(e) RFB cannot lead evidence on the effects of dairying, including the effects of dairying on water quality.[8]

RFB's arguments

[16] In response by way of opposition in the Environment Court, RFB contended:

(a) the meaning of s 120 is clear from its context and is not limited to matters raised by the submitter in their original submission.[9]

(b) in any event, the very broad nature of the submission was sufficient to import relevant concepts from the Waitaki Plan so as to give RFB standing to appeal.[10]

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5 At [38] – [39].
6 At [40].
7 At [41].
8 At [42].
9 At [28].

(c) the Regional Council, by requesting further information pursuant to s 92, acknowledged that Lake Pukaki was considered under the Waitaki Plan to have high natural character and high landscape and visual amenity values. A submitter viewing the correspondence should be entitled to rely on statements that these values are provided for under the Waitaki Plan.[11]

(d) permitting RFB to call evidence on landscape and terrestrial ecology would result in no prejudice to Simons.[12]

(e) the Environment Court either has a discretion or is obliged to consider evidence on Part 2 matters as pursuant to s 6 any person exercising functions and powers under the Act (here the Environment Court) is obliged to so consider.[13]

(f) RFB's submission includes all of Simons' proposed activities, if only for the reason that all consent applications are listed in attachment A to the submission.[14]

(g) while RFB anticipates that the general topic of water quality will be settled, RFB has not withdrawn or abandoned its appeals on this topic, and will remain in issue if the use of water is to support a dairying activity.[15]

Decision of the Environment Court

[17] Rather helpfully, the Environment Court expressly set out the five issues which it was required to determine, and provided findings on each issue in turn. Relevant excerpts from the Environment Court judgment are replicated below:

> [43] From the foregoing the following issues arise for determination:

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10 At [29].
11 At [30].
12 At [31].
13 At [32].
14 At [33].
15 At [34].

(a) is the scope of an appeal under s 120 constrained by the notice of appeal or by the original submission on a resource application or both?

- Sub-issue: does s 40 and s 274(B) or clause 14(1) of the First Schedule RMA assist Forest & Bird's interpretation of s 120?

(b) did Forest & Bird's submission on the applications address the matters raised in the notice of appeal?

- Sub-issue: if it did not, does the absence of prejudice confer standing to introduce new grounds for appeal?

(c) does the Environment Court have a discretion to direct, or indeed is the Court required to direct, the parties produce evidence on matters pertaining to s 6 of the Act?

(d) did the Environment Court's decision on preliminary issues determine the ground of appeal that the Commissioners modified the consent application?

(e) has Forest & Bird partially withdrawn its appeal on water quality?

…

Issue: **Is the scope of an appeal under s 120 constrained by the notice of appeal or by the original submission on a resource consent application, or both?**

Sub-Issue: *Does s 40 and s 274(B) or clause 14(1) of the First Schedule RMA assist Forest & Bird's interpretation of s 120?*

…

[59] If a submitter is able to appeal on grounds not raised in his or her submission on the application, then the appeal would not be against the decision of the consent authority. That is because in accordance with s 104 and s 104B the consent authority makes its decision having considered both the application and any submissions received.

[60] On Forest & Bird's interpretation s 290 would be rendered ineffective as the court would be deciding the application on a different basis to that considered by the consent authority. Thus the court would not be in a position to confirm, amend or cancel the consent authority's decision as it is required to do under s 290. Section 113 requires the consent authority to provide written reasons for its decision, including the main findings of fact. Again, on appeal if a submitter is not constrained by its submission on the application there would be no relevant decision for the court to have regard to under s 290A.

…

[65] Given the fundamental role of the written submission in the consenting process, as recorded in the decision of *Butel Park Homeowners Association v Queenstown Lakes District Council* and *Rowe v Transit New Zealand*, we consider our interpretation to be consistent with the principle that there is finality in litigation.

…

Outcome

[73] We hold that on appeal a submitter is constrained by the subject matter and relief contained in his or her submission on a resource consent application.

Issue: **Did Forest & Bird's submission on the applications address the matters raised in the notice of appeal?**

Sub-issue: *If it did not, does the absence of prejudice confer standing to introduce new grounds for appeal?*

Introduction

[74] Simons' overall submission is that reference to non-complying activities in the Forest & Bird submission, particularises their concern as relating to the non-compliance with the flow and level regime and with the water allocations.

[75] There is no doubt that Forest & Bird could have squarely and clearly set out in the submission its concerns about the landscape and terrestrial ecology effects of the use of the water. Despite the submission having been signed by legal counsel, it is poorly constructed and at times difficult to follow. That said, the submission is to be considered against the context in which it was made, including the backdrop of the Waitaki Plan (and other relevant Plans) and the applications themselves.

…

Consideration and findings

…

[99] At the time the submission was made Forest & Bird did not know whether the Simons' applications were for non-complying activities and therefore it was not in a position to assess the applications in the context of a Plan that envisages change through the allocation and use of water. If Forest & Bird could not assess the effects of the proposal in the broader policy context of the Waitaki Plan's allocation framework- then it would be difficult, if not impossible, to form a view on the individual effects of the proposal on the environment.

[100] We agree with Forest & Bird that anyone reading the consultant's response would reasonably have assumed landscape is a matter addressed under the Waitaki Plan. Indeed, the request for information by the Regional Council also assumed this to be the case. It may be that the Regional Council and Simons had in mind that the Waitaki Plan policy applied to the

applications or that the Waitaki Plan applied because of its stated assumption that the effects related to the taking and use of water are to be addressed under other statutory plans. The writers do not shed any light on their understanding.

[101] Forest & Bird could have front footed its concerns about the landscape and terrestrial ecology effects of the use of the water. However, in this case we find that it would be wrong to alight upon individual words and phrases or to consider the submission in isolation from or with little weight being given to the fact that the submission is on 161 consent applications. Standing back and having regard to the whole of the submission we apprehend that Forest & Bird was generally concerned with the effects on the environment of all of the applications for resource consent. Secondly, it was concerned to uphold the integrity of the Waitaki Plan and to ensure that decision making under that Plan was in accordance with the purpose and principles of the Act. Thirdly, we consider it unsound to particularise or read down the submission as being confined to non-complying activities.

[102] Finally, we do not infer - as we were invited to do so by Simons - that the Assessment of Environmental Effects was adequate because the Regional Council did not determine that the application was incomplete and it to the applicant (s 88A(3)). We observe that s 88A(3) confers a discretion upon the consent authority to deal with the application in this way. It was open to the consent authority to request further information under s 92 of the Act either before or after notification (which it did). Ms Dysart referred us to the affidavit of Ms B Sullivan filed in relation to the jurisdictional hearing, where the Council's practice that applied at the time the application was lodged is discussed. 63 At paragraph [24] Ms Sullivan deposes "[w]hat would now be considered deficient applications were often then receipted, with section 92 of the RMA used to obtain the necessary information for the application to be considered notifiable".

Outcome

[103] Forest & Bird's submission on the notified application does confer scope to appeal the decision to grant resource consents to Simons on the grounds that the effects on landscape and terrestrial ecology are such that the purpose of the Act may not be achieved.

[104] Given this, we do not need to decide the issue whether an absence of prejudice confers standing to introduce new grounds for appeal.

(citations omitted)

The Resource Management Act 1991 appeals regime

[18] This appeal is governed by s 299 of the RMA, which provides:

> **299 Appeal to High Court on question of law**
>
> (1) A party to a proceeding before the Environment Court under this Act or any other enactment may appeal on a question of law to the High Court against any decision, report, or recommendation of the Environment Court made in the proceeding.

(2) The appeal must be made in accordance with the High Court Rules, except to any extent that those rules are inconsistent with sections 300 to 307.

[19] Therefore, if an appeal discloses no discernible question of law, it is not to be entertained by this Court. The principles applicable to RMA appeals can be summarised as follows:

(a) Appeals to this Court from the Environment Court under s 299 are limited to questions of law.

(b) The onus of establishing that the Environment Court erred in law rests on the appellant: *Smith v Takapuna CC* (1988) 13 NZTPA 156 (HC).

(c) In *Countdown Properties (Northland) Ltd v Dunedin City Council* it was said that there will be an error of law justifying interference with the decision of the Environment Court if it can be established that the Environment Court:[16]

(i) applied a wrong legal test;

(ii) came to a conclusion without evidence or one to which, on evidence, it could not reasonably have come;

(iii) took into account matters which it should not have taken into account; or

(iv) failed to take into account matters which it should have taken into account.

(d) The weight to be afforded to relevant considerations is a question for the Environment Court and is not a matter available for

[16] *Countdown Properties (Northland) Ltd v Dunedin City Council* [1994] NZRMA 145 at 153. See also *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153 at [50] – [55]; *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [24] – [28].

reconsideration by the High Court as a question of law: *Moriarty v North Shore City Council* [1994] NZRMA 433 (HC).

(e) The Court will not engage in a re-examination of the merits of the case under the guise of a question of law: *Sean Investments Pty Ltd v Mackellar* (1981) 38 ALR 363; *Murphy v Takapuna CC* HC Auckland M456/88, 7 August 1989.

(f) This Court will not grant relief where there has been an error of law unless it has been established that the error materially affected the result of the Environment Court's decision: *Royal Forest & Bird Protection Society Inc v W A Habgood Ltd* (1987) 12 NZTPA 76 (HC) at 81 – 82; *BP Oil NZ Ltd v Waitakere City Council* [1996] NZRMA 67 (HC).

[20] In the context of these general principles, I now turn to consider the appeal and cross appeal. It is useful here to consider the cross-appeal first.

The cross-appeal against the interpretation of s 120

Introduction

[21] A claim that a lower Court or Tribunal has erred in the interpretation of a statute is a clear example of an alleged error of law. This therefore deserves to be afforded consideration in some detail, particularly given the potential implications it might have for the wider consenting process under the RMA. Section 120 provides as follows:

> **120 Right to appeal**
>
> (1) Any one or more of the following persons may appeal to the Environment Court in accordance with section 121 against the whole or any part of a decision of a consent authority on an application for a resource consent, or an application for a change of consent conditions, or on a review of consent conditions:
>
> (a) The applicant or consent holder:
>
> (b) Any person who made a submission on the application or review of consent conditions.

(c) in relation to a coastal permit for a restricted coastal activity, the Minister of Conservation.

(2) This section is in addition to the rights provided for in sections 357A, 357C, and 357D (which provide for objections to the consent authority).

Previous relevant decisions

[22] I was referred by counsel for all parties to a number of decisions as to the proper interpretation of s 120. In this respect an appropriate starting point is the decision of the Supreme Court in *Waitakere City Council v Estate Homes Ltd*.[17] That decision concerned an application by Estate Homes for a land use consent which included, inter alia, a request for compensation for constructing a road wider than was necessary for the subdivision in question.[18] One of the issues was whether *an applicant* could be granted compensation on appeal *greater* than that claimed before the originating tribunal. There the Supreme Court stated:

> [27] The applicant had a right of appeal to the Environment Court, under s 120 of the Act, against the decision of a consent authority. Notice of appeal must be given in the prescribed form under s 121. The notice must state the reasons for the appeal and the relief sought. Under s 290(1), the Environment Court has "the same power, duty, and discretion" in dealing with the appeal as the consent authority. Under s 290(2) it may confirm, amend or cancel the decision to which the appeal relates.
>
> [28] These statutory provisions confer an appellate jurisdiction that is not uncommon in relation to administrative appeals in specialist jurisdictions. As Mr Neutze submitted, they contemplate that the hearing of the appellate tribunal will be "de novo", meaning that it will involve a fresh consideration of the matter that was before the body whose decision is the subject of appeal, with the parties having the right to a full new hearing of evidence. When the legislation provides for a de novo hearing it is the duty of the Environment Court to determine for itself, independently, the matter that was before the body appealed from insofar as it is in issue on appeal. The parties may, however, to the extent that is practicable, instead confine the appellate hearing to specific issues raised by the appeal.
>
> [29] *We accept that in the course of its hearing the Environment Court may permit the party which applied for planning permission to amend its application, but we do not accept that it may do so to an extent that the matter before it becomes in substance a different application. The legislation envisages that the Environment Court will consider the matter that was before the Council and its decision*

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17 *Waitakere City Council v Estate Homes Limited* [2006] NZSC 112, [2007] 2 NZLR 149.

18 At [2] – [10].

> *to the extent that it is in issue on appeal. Legislation providing for de novo appeals has never been read as permitting the appellate tribunal to ignore the opinion of the tribunal whose decision is the subject of appeal. In the planning context, the decision of the local authority will almost always be relevant because of the authority's general knowledge of the local context in which the issues arise.*

(Citations omitted and emphasis added)

[23] In my view however, *Estate Homes* is distinguishable from the present type of case on the simple basis that a decision on appeal granting compensation greater than that claimed in the original application falls outside the ambit of the original decision. To the extent that the compensation was greater than the applicant sought, it had not been considered by the originating tribunal and could not form part of its decision. In the present case RFB is merely seeking that it not be constrained by its own submissions, and for it to be able to appeal the decision in its entirety; not to go beyond that decision as was the case in *Estate Homes*.

[24] There are also a number of authorities which outline statements of principle regarding the scope of appeals under s 120 and similar sections. In the decision of Judge Skelton in *Morris v Marlborough District Council* it was stated:[19]

> … it also has to be noticed that section 120 provides for a right of appeal "against the whole or any part of a decision of a consent authority …" and that seems to me to indicate an intention on the part of the Legislature to allow a person who has made a submission to advance matters by way of appeal that arise out of the decision, even though they may not arise directly out of that persons' original submission.

[25] The decision in *Challenger Scallop Enhancement Company Ltd v Marlborough District Council* evinces a similar, if not broader, interpretation of s 120:[20]

> … It was submitted that to raise an issue for the first time at a *de novo* hearing when such issues could and should have been raised at earlier proceedings is an abuse of process…
>
> I reject this submission on the basis that the Environment Court hears the appeal *de novo*, and is able to receive evidence and submissions not put forward at the first instance hearing before the local authority. Indeed

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19 *Morris v Marlborough District Council* (1993) 2 NZRMA 396, (1993) 1A ELRNZ 294 (PT).

20 *Challenger Scallop Enhancement Company Ltd v Marlborough District Council* [1998] NZRMA 342 (EC).

> without such a power the s 274 provisions, which allow certain non-parties to appear and present evidence, would be of little effect.

[26] The Environment Court in *Hinton v Otago Regional Council* sought to set out the Court's jurisdiction when deciding s 120 appeals:[21]

> The Court's jurisdiction when deciding an appeal under section 120 of the RMA is limited by Part II of the Act and also by:
>
> (a) the application for resource consent – a local authority (an on appeal, the Court) cannot give more than was applied for: *Clevedon Protection Society Inc v Warren Fowler Quarries & Manukau District Council*;
>
> (b) any relevant submissions; and
>
> (c) the notice of appeal.
>
> Generally, each successive document can limit the preceding ones but cannot widen them. That seems to be the effect of the High Court's decision in *Transit NZ v Pearson and Dunedin City Council*.
>
> (Citations omitted)

[27] A further relevant decision is *Avon Hotel Ltd v Christchurch City Council* where it was stated:[22]

> [18] It is axiomatic that an appeal cannot ask for more than the submission on which it is based. I can find no direct authority for that proposition. However, I think the point is made in *Countdown Properties (Northlands) Limited v Dunedin City Council* where the Full Court stated that '… the jurisdiction to amend [the plan, plan change or variation] must have some foundation in submissions'.
>
> (Citations omitted)

[28] Similarly, in a more recent case dealing with a similar issue, *Environmental Defence Society Incorporated v Otorohanga District Council* it was stated:[23]

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21 *Hinton v Otago Regional Council* EC Christchurch C5/2004, 27 January 2004 at [17].

22 *Avon Hotel Ltd v Christchurch City Council* [2007] NZRMA 373 at [18].

23 *Environmental Defence Society Incorporated v Otorohanga District Council* [2014] NZEnvC 70.

> [12] …the paramount test is whether or not the amendments are ones which are raised by and within the ambit of what is reasonably and fairly raised in submissions on the plan change. It acknowledged that this will usually be a question of degree to be judged in terms of the proposed change and the content of the submissions.
>
> (Citations omitted)

[29] Finally, counsel for RFB referred me to the decision in *Transit New Zealand v Pearson* which concerned the appeal regime under s 174, which is similar in structure to s 120.[24] In that case the High Court agreed with the reasoning of the Environment Court that:[25]

> … appeals are constrained only by the scope of the notice of appeal filed under section 120 and in this case under section 174. As an original appellant the Council was required to state the reasons for the appeal and the relief sought and any matters required to be stated by regulations and to be lodged and served within 15 working days as provided under section 174(2). This is equivalent to the provisions under section 121(1). To the extent that Clause 14(1) limits the scope of a reference to an original submission that constraint is not contained within s 174. In this case Mr Pearson's original submission is wide enough to encompass withdrawal of the requirement. He therefore meets the threshold test of Clause 14(1) if he has an appeal in his own right. In this way Clause 14(1) and section 174 are complementary.

Discussion

[30] It seems to me that the plain words of the section, in conjunction with the lack of any real conflict in the authorities, lead to the conclusion that the Environment Court erred here in its interpretation of s 120. To my mind all that must be satisfied on appeal is that the matter in issue was before the originating tribunal. This, of course, does not necessarily mean that the matter in issue must have been put before that tribunal by the appellant submitter; the requirement exists so as to ensure that the matter being appealed was one considered by the originating tribunal. What is important is that the applicant is put on notice, by the submissions in their entirety, of the issues sought to be raised, so that they can be confronted by that consenting authority. In such situations I am satisfied there is no derogation from principles of natural justice by making all of those issues the subject of further consideration on appeal.

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24 *Transit New Zealand v Pearson* [2002] NZRMA 318 (HC).
25 At [38] and [41].

[31] By this analysis the plain meaning of s 120 is given full effect, without unnecessary constraint or reading down. This is not a case in which any rigid principles of statutory interpretation need be resorted to. The words are clear on their face. An appellant, which itself must have standing, is able to appeal "against the whole or any part of a decision of a consent authority on an application for a resource consent". This does not mean "the whole or any part of a decision of a consent authority [on which the appellant made submissions]".

[32] It would be anathema to the purpose of the RMA that a submitter was required at the outset to specify all the minutiae of its submissions in support or opposition. The originating tribunal would be inundated with material if this were the case. So long as a broad submission puts in issue before the originating tribunal the matters on which an appellant seeks to appeal, the appellate Court or Tribunal of first instance should entertain that appeal. Thus, I reach a different interpretation of the scope and operation of s 120 to that of the Environment Court. RFB as a submitter, who appealed the decision of the Commissioners on Simons' resource consent application under s 120 of the RMA, is not constrained by the subject matter of its original submission and is able to appeal the whole or any part of that original decision. As such, RFB's cross-appeal here must succeed.

[33] The position regarding s 120 can therefore be summarised as follows:

(a) An appealing party must have made submissions to the consenting authority if it is to have standing to appeal that decision.

(b) The Court's jurisdiction on appeal is limited by:

(i) Part 2 of the Act;

(ii) The resource consent itself (the Court cannot give more than was applied for);

(iii) The whole of the decision of the consenting authority which includes <u>all</u> relevant submissions put before it, and not just those submissions advanced initially by the appellant;

(iv) The notice of appeal.

(c) Successive documents can limit the preceding ones, but are unable to widen them.

(d) On appeal, arguments not raised in submissions to the originating tribunal may, with leave of the Court, be advanced by the appellant where there is no prejudice to the other party.

The appeal against refusal to partially strike out

[34] With respect to Simons' present appeal itself, I am required to reach a conclusion as to whether the Environment Court erred in law in refusing to partially strike out three of RFB's appeals. For the reasons set out below I am satisfied that this appeal must fail.

[35] First, this is not a final determination of the issues to be heard on appeal. Rather, it is a strike out application, the purpose of which is to address Simons' intention that certain grounds should never be heard substantively. The statutory foundation of the strike out jurisdiction and procedure is provided for in s 279 of the RMA. It relevantly provides:

> **279 Powers of Environment Judge sitting alone**
>
> …
>
> (4) An Environment Judge sitting alone may, at any stage of the proceedings and on such terms as the Judge thinks fit, order that the whole or any part of that person's case be struck out if the Judge considers —
>
> (a) That it is frivolous or vexatious; or
>
> (b) That it discloses no reasonable or relevant case in respect of the proceedings; or
>
> (c) That it would otherwise be an abuse of the process of the Environment Court to allow the case to be taken further.

[36] As a preliminary matter I note that s 279 expressly refers to the powers of an Environment Court Judge sitting alone. Of course in this case Judge Borthwick was

sitting with Commissioner Edmonds. Nothing turns on this point and this judgment proceeds accordingly.

[37] The threshold for an applicant or appellant to pass in strike out applications is, understandably, very high. If such an application is successful it effectively denies a respondent the right to put its arguments before the Court in substantive proceedings. The applicable principles were considered generally by the Court of Appeal in *Attorney-General v Prince and Gardner* where it was stated:[26]

> A striking-out application proceeds on the assumption that the facts pleaded in the statement of claim are true. That is so even although they are not or may not be admitted. It is well settled that before the Court may strike out proceedings the causes of action must be so clearly untenable that they cannot possibly succeed (*R Lucas and Son (Nelson Mail) Ltd v O'Brien* [1978] 2 NZLR 289, 294-295; *Takaro Properties Ltd (in receivership) v Rowling* [1978] 2 NZLR 314, 316-317); the jurisdiction is one to be exercised sparingly, and only in a clear case where the Court is satisfied it has the requisite material (*Gartside v Sheffield, Young & Ellis* [1983] NZLR 37, 45; *Electricity Corp Ltd v Geotherm Energy Ltd* [1992] 2 NZLR 641; but the fact that applications to strike out raise difficult questions of law, and require extensive argument, does not exclude jurisdiction (*Gartside v Sheffield, Young & Ellis*).

[38] In the RMA context, the decision of the Environment Court in *Hern v Aickin* is relevant.[27] In that case, it was stated:

> 6. The authority to strike-out proceedings is to be exercised sparingly and only in cases where the Court is satisfied that it has the requisite material before it to reach a certain and definite conclusion. The authority is only to be used where the claim is beyond repair and so unobtainable that it could not possibly succeed. In considering striking out applications the Court does not consider material beyond the proceedings and uncontested material and affidavits.
>
> (citations omitted)

[39] In addition, there are at least three further considerations relevant to a strike out application in the RMA context:[28]

> a) The RMA encourages public participation in the resource management process which should not be bound by undue formality:

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[26] *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 at 267 (CA).
[27] *Hern v Aickin* [2000] NZRMA 475 at [6].
[28] *Hauraki Maori Trust Board v Waikato Regional Council* HC Auckland CIV-2003-485-999, 4 March 2004 at [18].

Countdown Properties (Northland) Ltd v Dunedin City Council [1994] NZRMA 145 at 167;

b) Where there is a reference on appeal to the Environment Court, the appellant is not in a position to start again due to statutory time limits; and

c) There are restrictions upon the power to amend. In particular an amendment which would broaden the scope of a reference or appeal is not ordinarily permitted.

[40] On the ground alone that the strike out application fails to meet the high threshold required, I would dismiss the appeal. Patently the Environment Court decision makes it apparent that this is not a case in which RFB's appeal is inevitably destined to fail. The Environment Court was therefore entitled to make a factual finding, having regard to all the evidence before it, that the grounds on which RFB now appeals were sufficiently disclosed in original submissions to warrant the substantive appeal being heard. The Environment Court found that the submissions from RFB were:[29]

(a) generally concerned about effects on the environment of all of the 161 applications for resource consent;

(b) concerned to uphold the integrity of the Waitaki Plan and to ensure that decision-making under the plan was in accordance with the purpose and principles of the RMA; and

(c) was not limited to non-complying activities.

[41] And, with regard to the issue of upholding the integrity of the Waitaki Plan, in my view certain principles, policies and objectives of the Plan clearly are relevant here and would tend to assist RFB's position:

(a) 6. Objectives

Objective 3…in allocating water, to recognise beneficial and adverse effects on the environment and both the national and local costs and benefits (environmental, social, cultural and economic).

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[29] Royal Forest and Bird, above n 1 at [101].

(b) 7. Policies

> Policy 1 By recognising the importance of connectedness between all parts of the catchment from the mountains to the sea and between all parts of fresh water systems of the Waitaki River…
>
> Explanation
>
> The Waitaki catchment is large and complex. This policy recognises the importance of taking a whole catchment approach "mountains to the sea" approach to water allocation in the catchment – an approach that recognises the physical, ecological, cultural and social connections throughout the catchment.
>
> Policy 12 To establish an allocation to each of the activities listed in Objective 2 (which includes agricultural and horticultural activities) by:
>
> (a) Having regard to the likely national and local effects of those activities; …
>
> (f) Considering the relative environmental effects of the activities including effects on landscape, water quality, Mauri…

9. Anticipated environmental results

> 1. There is a high level of awareness and recognition of the connectedness of the water bodies in the catchment – between the mountains and the sea…
>
> 6. The landscape and amenity values of water bodies within the catchment are maintained or enhanced.

(Emphasis added)

[42] In the Plan, "Waitaki Catchment" is widely defined as set out in s 4(1) Resource Management (Waitaki Catchment) Amendment Act 2004:

> (a) means the area of land bounded by watersheds draining into the Waitaki River; and
>
> (b) includes aquifers draining wholly or partially within that area of land.

[43] I am also mindful of the fact that this Court is to exercise the discretion to strike out a case or part of a case sparingly. In *Everton Farm Limited v Manawatu - Wanganui RC*[30] the Court said that an emphasis on efficiency should not detract from the importance of not depriving a person of their "day in court". I agree.

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[30] *Everton Farm Limited v Manawatu - Wanganui RC* EnvC Wellington, W008/02, 22 March 2002.

[44] I am also cognisant of the fact that my conclusion reached above with respect to s 120 has the result of rendering the application for strike out more unlikely than it was in the Environment Court as it broadens the evidential foundation of RFB's substantive appeal. Nor in my judgment can it be properly suggested here that RFB's appeal grounds are frivolous or vexatious or that they constitute an abuse of process.

[45] I am reinforced in these views by the ordinary principle that an appellate Court ought generally to defer to a specialist tribunal. This principle was applied in the RMA context in *Guardians of Paku Bay Association Incorporated v Waikato Regional Council* where Wylie J stated:[31]

> [33] The High Court has been ready to acknowledge the expertise of the Environment Court. It has accepted that the Environment Court's decisions will often depend on planning, logic and experience, and not necessarily evidence. *As a result this Court will be slow to determine what are really planning questions, involving the application of planning principles to the factual circumstances of the case.* No question of law arises from the expression by the Environment Court of its view on a matter of opinion within its specialist expertise, and the weight to be attached to a particular planning policy will generally be for the Environment Court.
>
> (Citations omitted and emphasis added)

[46] I appreciate the grounds of appeal raised by Simons purport to disclose appealable errors of law. However, there is a reasonable argument here that the conclusions reached by the Environment Court are fundamentally findings of fact. It is trite law, as noted above, that this Court, on appeal from the Environment Court, will not permit an appeal against the merits of a decision under the guise of an error of law. Though I need not reach a firm conclusion on this point, it does seem that Simons is simply unhappy with a decision and is now seeking to have those findings reconsidered. Those are matters to be properly addressed in the substantive appeal.

[47] For all these reasons, Simons' appeal against the Environment Court decision refusing to partially strike out RFB's appeal must fail.

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[31] *Guardians of Paku Bay Association Incorporated v Waikato Regional Council* [2012] 1 NZLR 271 (HC) at [33].

Costs

[48] RFB has been successful both in its cross-appeal and in resisting Simons' appeal. Costs should follow the event in the usual way.

[49] I have a reasonable expectation here that the question of costs ought to be the subject of agreement between the parties without the need to involve the Court. If however agreement cannot be reached and I am required to make a decision as to an award of costs, then RFB is to file submissions within 15 working days with submissions from Simons and the Council 10 working days thereafter.

.....
Gendall J

Solicitors:
Matthew Casey QC, Auckland
Kelvin Reid, Christchurch
Canterbury Regional Council, Christchurch
Wilding Law, Christchurch
Royal Forest and Bird Society, Christchurch

IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

CIV-2007-463-000606

UNDER	the Judicature Amendment Act 1972
IN THE MATTER OF	the Local Government Act 2002
BETWEEN	WHAKATANE DISTRICT COUNCIL Applicant
AND	THE BAY OF PLENTY REGIONAL COUNCIL Respondent

Hearing: 17-21 March and 4-6 June 2008

Appearances: D J Neutze and V T Bruton for the Applicant
J G Miles QC and K J Catran for the Respondent

Judgment: 9 April 2009

JUDGMENT OF DUFFY J

This judgment was delivered by Justice Duffy
on 9 April 2009 at 3.00 pm, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Counsel: J G Miles QC P O Box 4338 Auckland for the Respondent

Solicitors: Brookfields P O Box 240 Auckland for the Applicant
Cooney Lees Morgan P O Box 143 Tauranga for the Respondent

[1] The applicant challenges, by way of judicial review, a decision of the respondent to relocate its headquarters and 100 staff positions from Whakatane to Tauranga. Both parties are territorial authorities whose status and authority are derived from the Local Government Act 2002. The applicant's challenge has the support of the Rotorua and Opotiki District Councils, as well as the Te Arawa Lakes Trust, which represents 60 Iwi and Hapu in the Te Arawa Lakes area.

[2] The respondent's decision-making powers are derived from and subject to the Local Government Act. It follows that the respondent's decision to relocate its headquarters from Whakatane to Tauranga (the relocation decision) must comply with the relevant provisions of the Act, as well as any requirements that the common law imposes on decisions of this type.

[3] As with most judicial review claims, there is an overlap between some of the grounds of review. There is a challenge to the lawfulness of the decision-making process, which the respondent followed. The allegations in this regard are that:

a) The respondent failed to follow the required statutory process and, therefore, exceeded its jurisdiction;

b) The unlawful process the respondent adopted meant that it failed to take into account relevant mandatory statutory considerations; and

c) In the course of reaching its decision, the respondent breached legitimate expectations contained in the Triennial Agreement between it and various territorial authorities of which the applicant is one.

[4] There are also allegations of a breach of the duty to consult, which is a duty imposed under s 83 of the Local Government Act. This breach is alleged to stem from distinct flaws within the decision-making process. The respondent is alleged to have failed to provide a reasonable opportunity to be heard to those persons who sought to make submissions in person, which is allegedly due to certain councillors having closed minds on the topic and others being absent during the public consultation hearings.

[5] Furthermore, it is alleged that the respondent's relocation decision was the result of bias and predetermination on the part of a number of the respondent's councillors. And finally, there is an allegation the relocation decision was unreasonable.

[6] In this case the hearing was spread over two separate periods of time. By the commencement of the second period, the key issues between the parties had become more refined. The applicant helpfully provided a summary of the key issues. The findings on these issues will determine the outcome of the proceeding. I propose, therefore, to list the issues now and later to deal with each in turn. The issues are:

a) Whether compliance with ss 76 to 79 of the Local Government Act requires the express and conscious exercise of the discretion under s 79, or whether this can be done by accident;

b) Whether stage one of the decision-making process – the identification of the problems and objectives – was always focused on relocating the respondent's headquarters or whether it was for the respondent to assess what options might be open to it to carry out the new functions it was proposing to undertake;

c) Whether the end point of stage two of the decision-making process – the seeking to identify all reasonably practicable options – was reached on 7 December 2006 when the respondent made an "in principle" decision to relocate its headquarters to Tauranga, or whether the end point was reached later on 15 March 2007 when the respondent resolved to adopt amendments to its 10 year plan to provide for the relocation. Within this issue is the sub-issue of whether or not the "in principle" decision of 7 December 2006 was in fact a decision at all in terms of the Act;

d) Whether the respondent gave any consideration at all during the stage one and stage two part of the decision-making process to community views on the location of its head office;

e) Whether the councillors who did not attend all or substantial parts of the hearings should have voted on the relocation decision and, if not, what effect did their voting have on the decision;

f) Whether some of the respondent's councillors came to the hearings and deliberations in May and June 2007 with closed minds;

g) The application of the Triennial Agreement to the decisions at issue and whether that agreement gave the applicant a justifiable legitimate expectation of early notification of, and input into, the relocation decision, as well as the review leading up to the decision.

Facts

[7] Since the establishment of the respondent in 1989 (under s 41 of the Local Government Amendment Act 1989 (No 2)), its headquarters have been located in Whakatane. The location was an historical accident resulting from the local government reforms of that time. Since then, from time to time the respondent has questioned the appropriateness of this location. On 21 June 2007 a decision was made to amend the Long Term Community Plan to provide for the relocation of the respondent's headquarters to Tauranga, together with the relocation of 100 of 160 staff positions.

[8] Over the years, the possibility of relocating the respondent's headquarters has come under consideration. There were accommodation reviews in 1993, 2000, 2002 and 2003. None of these resulted in any changes. Then in 2005 the respondent considered looking at the issue again but deferred doing so until its new Chief Executive, Mr Bayfield, commenced work in the New Year (2006).

[9] At the beginning of 2006 the respondent was faced with an issue regarding the use of land it had purchased at Sulphur Point, Tauranga, from the Tauranga District Council. The respondent had intended building on the site but the independent commissioner responsible for the consent decision refused consent. An appeal to the Environment Court was lodged. This was later abandoned and the land

was sold back to the Tauranga District Council. The inability to use the Sulphur Point site for the respondent's operations in Tauranga increased the accommodation pressures the respondent was experiencing. The respondent's statutory responsibilities had increased as a result of a change in legislation. The conflux of a new Chief Executive, new expanded statutory role, and the loss of the site for some expansion in Tauranga caused the respondent to re-evaluate its performance and how it might best deliver its responsibilities in the region. Its accommodation arrangements were critical to this evaluation as they had a significant practical effect on the respondent's performance.

[10] The relevant actions the respondent took are fully described in the affidavits of its Chairperson, John Cronin, and its Chief Executive, William Bayfield. The first step was on 30 March 2006 when the respondent's Finance and Corporate Services Committee agreed to undertake an accommodation and location review using external advisers. The report the Committee had received from Miles Conway, Group Manager of the respondent's Human Resources and Corporate Services, recorded that the brief to the external advisers was to be developed in consultation with the Chairman and was to investigate "all aspects of our present and future accommodation needs, including where we would be best located to deliver our services and the estimated tangible and intangible costs and benefits associated with any recommendations".

[11] In April 2006 potential external advisers were approached. As part of this process, on 13 April 2006 a briefing letter was sent to Deloitte New Zealand (Deloitte). The briefing letter makes it clear that the respondent was seeking "a comprehensive report analysing where [it] as a corporate organisation could best be located and what [were] the tangible and intangible costs, benefits, drawbacks and hurdles".

[12] In June 2006 Deloitte responded with a proposal. Whilst the proposal referred to the task as an accommodation needs and location review, the content of the proposal reveals that Deloitte understood the wider and more comprehensive scope of the exercise. The proposal noted that:

> Environment Bay of Plenty is currently facing capacity issues in relation to its current office space in all its present locations and wishes to take this opportunity to determine a long term plan for the location of the various functions that the organisation performs now and will perform in the future.

[13] The Deloitte proposal was subsequently accepted by the respondent. In short, the proposal recommended that the respondent relocate its headquarters to Tauranga. The key findings were that there had been a significant increase in population in Tauranga, with a corresponding increase in what Deloitte described as "leadership functions in various organisations located there". The report recognised that the respondent needed to have a "presence" in Whakatane, Rotorua and Tauranga. The current offices were near to full capacity and additional space was required in all locations. It was seen as inevitable that the respondent would have a bigger presence in the Western Bay of Plenty due to the population growth in that part of the region.

[14] The issues the briefing letter required Deloitte to cover seems to me to extend beyond simple accommodation concerns. The respondent was seeking to find information on how it could best be located in terms of the impact on its functions, present and future, its leadership functions and role in the region, the extent to which its functions were location biased when it came to service delivery, and how it could efficiently deliver its functions in terms of its location. Deloitte was also asked to consider the recommendations on these issues in terms of cost and impact on human resources, property acquisition and disposal, socio-economic costs on communities affected, ongoing benefits and pay back periods of recommendations, and the implementation of the identified changes. Enclosed with the briefing letter were the draft 10 year plan, volumes one and two, the Regional Policy Statement, a guide to the Regional Council, Smart Growth Strategy, Bay Trends 2004, a map of the region showing the various locations of the respondent's offices, the human resources quarterly report and the respondent's corporate structure.

[15] A steering group was set up comprising the Chairman, Mr Cronin, Councillors Riesterer and Cleghorn, the Chief Executive, Mr Bayfield, and two senior staff members, Mr Conway and Bruce Fraser. The group met regularly, including with Deloitte. Mr Bayfield's evidence was that during this stage it became apparent from the discussions with Deloitte that there was no financial imperative to

relocate the respondent's headquarters, but that relocation continued to make sense for strategic reasons.

[16] In October 2006 Deloitte undertook interviews with the respondent's councillors and with the Mayors and Chief Executives of local territorial authorities within the respondent's region.

[17] From October 2006 onwards the steering group received drafts of Deloitte's report. These drafts were discussed with Deloitte. Although, the applicant has criticised the interaction between the steering group and Deloitte during this time, I see no reason to be critical of what occurred. It was important for the respondent to ensure that Deloitte was adhering to the project's terms of reference, and these discussions were a way of achieving that.

[18] Then, in November 2006, Deloitte's issued its report. It recommended shifting the respondent's headquarters to Tauranga. The report is a comprehensive and relatively in-depth response to the terms of reference set out in the briefing letter of 13 April 2006.

[19] In the report Deloitte had concluded that there was a significant increase in the population in the western area of the respondent's region, particularly in Tauranga, whereas the population in the eastern areas was either static or in decline. Tauranga was recognised as the natural centre of the region and Deloitte considered that the respondent should have its headquarters located in the region's leading urban centre. Deloitte also considered that the success of the respondent's future performance, including it assuming a leadership role in the region, necessitated the establishment of a more significant presence in the major population centres. The need for a more significant presence in the western area of the region was seen as inevitable. The result of these conclusions was that the continuation of headquarters located in Whakatane came to be seen as an impediment to the respondent's ability to perform its newly expanded role in the region.

[20] Whilst some increase in presence in Rotorua was recognised as necessary, the location choices seen as warranting serious consideration were to remain in

Whakatane or move to Tauranga. It is clear from the report that no other centre in the region was realistically in contention. If a move was to be made, the sensible and realistic option was to move to the largest and ever expanding urban centre in the region.

[21] In December 2006, Mr Bayfield reported to the respondent recommending it make an "in principle" decision to relocate (the Bayfield report). This report contained comprehensive comment on the Deloitte report and set out a proposed plan of action, including the "in principle" adoption of the Deloitte report.

[22] The Bayfield report makes it clear that the Deloitte report was not a "blueprint for any relocation or retention project and should not be construed as setting out what changes will occur".

[23] On 7 December 2006, the respondent resolved that it supported the key recommendations in the Deloitte report and agreed in principle that the head office should be relocated to Tauranga, subject to further detailed investigative work on costs and accommodation. The Deloitte report, as well as the report Mr Bayfield prepared for the 7 December 2006 meeting, were subsequently published on the respondent's website.

[24] On 31 January 2007, the respondent had a workshop with Whakatane District Council representatives at which a formal presentation of the relocation question was presented. The respondent requested its staff to provide information on the effect of relocating the headquarters or the respondent's ability to perform its function.

[25] In February 2007 a separate independent market economics report was obtained on the potential positive and negative economic impacts likely to result from the relocation of the headquarters. Then later that month Deloitte conducted socio-economic interviews with representatives from various interest groups in Whakatane. Also during February, councillors of the respondent met with members of the community and local authority members to discuss the issues raised in the

Deloitte report. These discussions included the respondent's councillors meeting with local Iwi.

[26] On 8 March 2007, Deloitte released a social impact report. Then on 15 March 2007, there was a public release of a statement of proposal and proposed amendments to the respondent's 10 year plan. The proposal recommended moving the headquarters to Tauranga, including 130 staff positions. This action was taken because by then the respondent had realised that a decision to move its headquarters away from Whakatane was a decision that needed to be potentially provided for in the respondent's 10 year plan.

[27] Between 15 March 2007 to 2 May 2007, persons having an interest in making submissions on the question of the location of the respondent's headquarters were given the opportunity to make submissions in writing. From 21 May to 24 May and on 31 May and 1 June 2007 there were meetings at which the respondent heard and deliberated on submissions in relation to the decision on whether or not to relocate its headquarters. The decision to relocate was effectively taken on 1 June 2007 when the respondent decided to amend its 10 year plan to provide for the relocation of its headquarters. Then on 14 June 2007, the actual decision to relocate was made.

[28] The conduct of the hearings between 21 May and 1 June 2007 has generated some controversy. Two councillors who voted in favour of relocation on 1 June 2007, Councillors Eru and Sherry, were absent for 3.5 days of the hearings. Another who also voted in favour of relocation, Councillor von Dadelszen, was absent from the hearings for periods of time.

[29] On 30 May 2007, the respondent received email legal advice that it would be preferable for councillors who had not been present at the consultation hearings (21 May to 24 May 2007) not to vote on the relocation decision. However, the advice was not followed. Chair Cronin has subsequently explained that he believed he had no authority to prevent those councillors who had not attended the public hearings and all the deliberation hearings from voting on the decision. On 30 May 2007, Chair Cronin circulated a memorandum to absentee councillors requiring them

to read submissions which they had been unable to hear presented and to read the minutes of the presentation hearing before voting.

[30] The resolution to relocate the headquarters ultimately arrived at was a modified version of the recommendation. The original recommendation had been to relocate its head office to Tauranga on the basis that 130 staff positions were transferred. The decision that was actually made involved relocation of the headquarters with approximately 100 staff positions to Tauranga by 30 June 2010.

Legislative scheme

[31] The respondent's decision to relocate its headquarters to Tauranga is a statutory power of decision that had to be exercised in accordance with the empowering legislation. An understanding of the legislative scheme is, therefore, the starting point for determining whether there are any judicially reviewable flaws in the decision process of the respondent.

[32] The preliminary provisions in Part 1 set out the Act's purposes. Whereas Part 6 of the Act deals specifically with planning, decision-making, and accountability.

[33] Section 3 of Part 1 states that the purpose of the Act is to provide for democratic and effective local government. Included within this stated purpose is a recognition of the need for accountability of local authorities to their communities and the importance of the role local authorities play in promoting the social, economic, environmental and cultural well-being of their communities. Section 4 expressly addresses the Treaty of Waitangi and recognises the need for local authorities to facilitate Mäori participation in local authority decision-making processes. I consider that the more specific provisions of Part 6 need to be understood in the context of the general purposes expressed in Part 1.

[34] Part 6 commences at s 75. This section outlines the purpose of Part 6 and is of a general explanatory nature. What follows afterwards is a series of provisions

that, because they do not operate in a stand-alone fashion, are best understood when viewed collectively.

[35] Section 76(1) sets out certain decision-making requirements that local authorities must meet. Their decisions must be made in accordance with such of the provisions of ss 77, 78, 80, 81, and 82 as are applicable. However, the decision on the applicability of those considerations is left to the local authority (s 76(2)). As will be seen later, this is a discretionary exercise that in the case of ss 77 and 78 has a process that is set out in s 79. In the case of ss 80, 81 and 82, there is no process and so here the decision on applicability is subject to the general administrative law requirement of reasonableness.

[36] Section 77 sets out certain specific requirements for decision-making. Section 78 imposes a requirement to consider community views and prescribes the process for doing so. Section 80 requires local authorities to identify inconsistent decisions. Section 81 covers contributions by Mäori to the decision-making. Section 82 sets out the principles of consultation to be applied to the decision-making process. Thus far, the statutory regime applying to decision-making by local authorities has the appearance of a comprehensive prescriptive regime.

[37] However, there are some unusual aspects to this regime that make it different from the usual prescriptive regime. The language in many of the parts of s 76, s 77 and s 78 has a prescriptive tone. However, this is contrasted by more discretionary language used in other parts. The obligation in s 76(1) to make decisions in accordance with ss 77, 78, 80, 81, and 82 rests on the local authority's decision on whether or not those sections are applicable to the decision to be made. In addition, s 76(2) makes the obligations derived from s 76(1) subject to s 79. The obligations to take into account the considerations in ss 77 and 78 are also dependent on a discretionary judgment made under s 79. Sections 77(2) and 78(4) expressly provide for this.

[38] Section 78(3) expressly provides that the consideration it requires to be given to community views does not require any process or procedure of consultation to be followed. Nor do any of the provisions in s 76 or s 77 expressly require consultation

processes to be followed. Furthermore, s 82(3) provides that subject to subss (4) and (5), the consultation principles in s 82(1) are to be applied at the discretion of the local authority. Section 82(4) sets out the criteria to which a local authority must have regard when making its discretionary judgment on the applicability of the s 82 consultation principles to the decision at hand. Section 82(5) provides that where other consultation requirements are imposed as well, they take precedence over the consultation principles in s 82. Hence, the applicability of the s 82 consultation principles to decisions that are subject to ss 76 to 79 turns on the discretionary choice of the decision-maker. Unless the particular decision is also subject to other separate statutory provisions expressly requiring consultation, there is no obligation to follow a consultation process when making decisions subject to ss 76 to 79.

[39] Section 79(1) gives a local authority the power to decide (in its discretion) whether the considerations in s 77 and s 78 are applicable to the decision at hand and extent to which this is so. A local authority must turn its mind to this question but it is then free to determine for itself the very nature of the s 77 and s 78 obligations. Though this freedom is not unfettered, s 79 sets out a process for how this is to be exercised.

[40] The practical result is as follows.

i) Under s 76(1) a local authority must first decide on the applicability of the provisions in ss 77, 78, 80, 81, and 82 to the particular decision to be made.

ii) Once it has identified which of those provisions are applicable, it must then determine under s 79 how it will achieve compliance with the requirements of the those provisions. Thus, if a local authority finds that s 77(1)(a) is applicable to making a particular decision, that section will require the local authority to seek to identify all reasonably practicable options for achievement of the decision's objective. But this will be so only once the local authority has reached a judgment under s 79(1) on how it will achieve compliance with s 77(1)(a),

including the extent to which it will identify and assess different options.

iii) How many reasonably practicable options are identified and how they are then assessed is for the local authority to decide. There are always going to be at least two options, since a decision not to act is also subject to Part 6 (s 76(4)). Consequently, there will always be a choice to be made between doing nothing and doing something. Provided the conclusion on the number of different options is reasonable and is exercised in accordance with the required process (s 79), it will stand.

iv) Any person wanting to challenge the substantive decision on the ground the local authority has failed to consider all reasonably practicable options will only be able to do so successfully if he or she can establish that the s 79(1) decision on the identification of the different options is flawed. Provided the s 79(1) decision is well founded, it will not be open to someone later on to contend that the substantive decision is flawed because there was no consideration of some other reasonably practicable option.

[41] Similarly, the extent to which the identified options must be assessed in terms of the requirements of s 77(1)(b)(i)-(iv) depends entirely on the judgment a local authority has reached under s 79(1)(b) as to the extent of this assessment. Once a local authority has in its discretion reached a conclusion under s 79(1)(b) on the extent of this assessment, no one can challenge the assessment that is undertaken on the ground it fails to meet the requirements of s 77(1)(b).

[42] The same goes for s 78. The obligation this section imposes, to consider the views and preferences of persons likely to be affected by, or to have an interest in the substantive decision, is subject to a balancing exercise under s 79(1)(a). This provision allows a local authority to balance compliance with s 78 against the

significance of the matters affected by the decision. Hence, the nature and extent of the consideration to be given to the community's views will depend on the judgment a local authority makes under s 79. There can be no complaint about a local authority's failure to comply with s 78 if what has been done accords with the local authority's s 79 judgment on how compliance with s 78 is to be achieved.

[43] Section 79(1)(b) prescribes relevant procedural considerations to take into account when making the necessary judgments under this section. To exercise the s 79 discretion properly, a local authority must identify matters it thinks will be affected by the substantive decision and their significance; then a local authority must identify the degree of compliance with ss 77 and 78 that is largely in proportion to those matters (s 79(1)(a)). The s 79 discretion must also be exercised in a way that has regard to the extent to which different options are to be identified and assessed (s 79(1)(b)(i)). A judgment also has to be made on the degree to which benefits and costs are to be quantified (s 79(1)(b)(ii)), the extent and detail of the information to be considered (s 79(1)(b)(iii)), and the extent and nature of any written record to be kept of the manner in which compliance with ss 77 and 78 is attained (s 79(1)(b)(iv)).

[44] When it comes to making a judgment under s 79(1), a local authority must have regard to the significance of all "relevant matters" (s 79(2)), as well as considering the principles set out in s 14 (s 79(2)(a)), the extent of the local authority's resources (s 79(2)(b)), and the extent to which the nature of a decision, or the circumstances in which a decision is taken, allow the local authority scope and opportunity to consider a range of options or the views and preferences of other persons (s 79(2)(c)). Section 14 sets out eight principles, some of which have sub-principles, which describe the role of local authorities and the expectations attendant on that role. Section 79(3) requires consideration to be given to other enactments, as well as the matters outlined in s 79(1) and (2).

[45] Section 76(3) identifies two classes of decisions. In the case of the first class, subject to the discretionary judgments made under s 79 on what form a particular decision-making process will take, the chosen process must promote compliance with s 76(1). That is, the chosen form must promote decision-making that accords

with such of the provisions of ss 77, 78, 80, 81, and 82 as the local authority has found to be applicable when exercising its discretion under s 79. The second class of decisions are those that are considered to be "significant" in terms of the Local Government Act. For those decisions, the chosen process (again subject to the discretionary choices in s 79 on compliance) must ensure that s 76(1) has been appropriately observed. That is, the chosen form must ensure there has been appropriate observation of those provisions of ss 77, 78, 80, 81, and 82 that the local authority has found to be applicable when exercising its discretion under s 79. This must be done before the decision is made.

Discussion

[46] In essence, the combined effect of ss 76, 77, 78 and 79 is to empower and require a local authority to create a procedural template for the substantive decision to be made. That the Act had this effect is alluded to in *Reid v Tararua District Council* HC WN CIV2003-454-615 8 November 2004, Ellen France J at [135]. The local authority is obliged to create the procedural template, but the form it takes is left to the local authority's discretion. The discretionary decision as to how the template is fashioned must be carried out in a way that ensures that the design of the procedural template is largely in proportion to the significance of the matters affected by the substantive decision. There is no express obligation to record the template separately in writing. Section 79(1)(a)(iv) authorises a local authority to decide the extent and nature of any written record it might choose to make. Whilst not obligatory, a written record of how a local authority discharged its s 79 obligations would be helpful for any subsequent assessment of that topic.

[47] This is a completely new approach to local authority decision-making. It departs from the usual ways in which statutory powers of decision are vested in decision-makers. In general, statutory powers of decision either prescribe the process to be followed or empower the decision-maker with discretion as to how the power is to be exercised. In the latter case, unless specific considerations are identified as relevant to the exercise of the discretionary power, its exercise is subject only to common law constraints of legality, reasonableness and procedural fairness. With this Act, the actual process for making a particular substantive decision is

partly prescribed. For the remainder, the Act obliges a local authority to determine its own process. But in doing so, the local authority must have regard to a series of prescriptive requirements.

[48] Once the appropriate procedural template is developed, a local authority can then turn to making its substantive decision. But in making its substantive decision, a local authority must adhere to the self-determined procedural template (s 76(1)).

[49] The statutory scheme I have outlined applies to local authority decisions in general. There is also a special category of decisions that trigger what is termed the "special consultative procedure". The requirements relating to this category of decisions are set out in ss 83 to 90. Sections 91 to 97 require the making of annual and long-term plans, which are a further specialised form of local authority decision-making. In addition to the specific requirements that apply to these special categories of decision, they must also meet the requirements ss 76, 77, 78, and 79 impose on general decision-making.

[50] The purpose of, and policy behind, this new legislative approach was to improve local authority decision-making and to ensure transparency in how local authority decision-making was carried out. The approach results in what becomes in effect performance standards for each decision, in that a local authority has to express its thoughts on how it will make its substantive decision before proceeding to do so.

[51] However, a consequence of the new approach is that the discretionary judgments a local authority makes on the procedural template to adopt for any substantive decision will themselves be statutory powers of decision that are susceptible to judicial review. As with the exercise of any other statutory discretion, those judgments will be subject to the usual requirements the common law imposes on such decisions. There is also the statutory requirement of proportionality that s 79(1)(a) introduces, as well as the relevant considerations expressed in s 79(1)(b), s 79(2) and s 79(3). It follows that any flaws at this level, either through having a poorly developed procedural template or through failing to develop one at all, will flow through to and affect the substantive decision.

[52] There are some things that the Act does not expressly provide for. First, the Act does not expressly set out how compliance with s 76 and its associated provisions is to be achieved. Secondly, the Act does not expressly provide for what will be the consequences of failure to comply with s 76 and its associated provisions. Consequently, it is left to the Court to decide whether or not what has been done in any given case is sufficient to constitute compliance, as well as the consequences of non-compliance.

[53] In terms of achieving compliance with s 76 and its associated provisions, the Act does not expressly require there to be a written record of the development of the procedural template (s 79(1)(iv)). Nonetheless, the applicant contended that the Act requires a local authority to specify in an express and transparent manner the judgments it has made under s 79 as to how it will comply with s 77 and s 78. I understand the submission to include the contention that the same applies for the judgments a local authority has made under s 76(1) on the applicability of the provisions in ss 77, 78, 80, 81, and 82 to the decision at hand. The respondent contended that those provisions require no expression of a procedural template for the substantive decision. It submitted that it is enough if compliance is manifest from the process followed in making the substantive decision.

[54] Section 79(1)(b)(iv) empowers a local authority to determine the extent and nature of any written record of its procedural template. This suggests to me that this provision gives a local authority the power to choose what it does in this regard. There are likely to be simple decisions for which the ss 76 and 79 judgments on the procedural template will be identifiable from the reasoning of the substantive decision. For example, a simple decision to sell or not to sell a block of land may not necessitate separate s 76 and s 79 judgments. An example of this type of decision is to be found in *Reid v Tararua District Council* (supra [46]). However, a more complex decision may benefit from the procedural template being separately articulated. There are so many considerations to take into account when reaching judgments under s 79 that, in the case of a complex substantive decision, the development of the procedural template and compliance with it may not be readily apparent from the reasons given for reaching the substantive decision.

[55] I do not accept the applicant's` submission that the Act requires a local authority to expressly record judgments it has made under s 79 on the application of ss 77 and 78. If Parliament had required this to be done, I consider it would have expressly so provided. The decisions a local authority is called on to make are so variable that there will be many occasions when it would be a nonsense to require a record of judgments made under s 79. A local authority's decision to sell some minor item of property is quite capable of manifesting the s 79 judgments on the application (if at all) of ss 77 and 78. But with some other decisions, their nature and complexity may obscure judgments that have been made under s 79 on the application of ss 77 and 78. For those decisions, it would be sensible to ensure a written record of the s 79 judgments, on the decision-making process to adopt, was kept. Without such a record, a local authority places its substantive decision-making at risk.

[56] Section 76(4) states that s 76(1) applies to every decision made by or on behalf of a local authority. Read literally, that would cover the embryonic thoughts that can lead to a decision affecting others. But I do not think that would be consistent with the scheme and purpose of the Act. It would be a nonsense if the Act was so far reaching. For a start it would inhibit exploratory discussions at the conceptual stage. It would be hard to imagine how any decision-making could be accomplished under such a regime. The new approach created in Part 6 was for the purpose of improving the quality and transparency of local authority decision-making. It was not to create a mire in which decision-making became bogged down with preliminary requirements that impeded good decision-making.

[57] The scheme and purpose of the Act suggests to me that the new approach introduced by Part 6 was intended to apply to decisions resulting in outcomes which may potentially affect the communities of a local authority. It would be consistent with this view if s 76 and its associated provisions were understood to engage at a time when the question to be answered by the substantive decision was being formalised. Since the nature and scope of a question can influence and even invite its answer, to exclude this stage from the Act's provisions would weaken its force. However, I cannot see why Parliament would intend that antecedent stages,

encompassing preliminary attempts at framing questions to be answered, should also be subject to the Act. To do so would not serve the Act's purpose.

[58] This view of when s 76 and its associated provisions take effect fits with the first stage consideration of s 78(2)(a): to consider the community's views at the time when the problems and objectives related to the matter are defined. This view also fits with the fact that all the other considerations in ss 77 and 78 relate to later stages in the decision-making process than those that are covered in s 78(2)(a). If Parliament had intended that the stages leading up to formalising the question to be answered by the substantive decision should also be subject to s 76 and its associated provisions, I would have expected to find some indication to that effect in the Act. However, there is none to be found. I conclude, therefore, that those provisions take effect from the time the question for decision is formalised.

[59] In the course of the hearing, the applicant narrowed the focus of its complaint about non-compliance with the required statutory process to what it referred to as the first two stages of the decision-making process. These correlated with the stages identified in s 78(2)(a) and (b); that is the stage at which the problems and objectives related to the matter are defined and the stage at which the options that may be reasonably practicable options of achieving an objective are identified. The applicant accepted that in terms of the first category of its grounds of review (failure to follow required statutory process and failure to take into account relevant mandatory considerations), the evidence showed there could be no complaint about the latter stages of the process, which included the use of the special consultative procedure in ss 83 to 89, as well as an amendment to the respondent's long term plan.

[60] As I understand the applicant's submission, the failure was twofold: first a failure to take the steps required of it for the first and second stage of the decision-making process; and secondly, a failure to record having done so. The failure to follow the proper process being evidenced from the absence of any record.

[61] The failures at the first and second stage of the substantive decision-making process were said to be incapable of cure through proper compliance with the latter

stages of this process. By then, the applicant contended, the dye was caste and the scope of the matter to be decided had become unduly narrowed by the earlier procedural failure.

[62] The respondent rejected the need for a written record and maintained that provided the evidence revealed, either expressly or by implication, there was appropriate compliance with the Act's requirements, (which need be no more than accidental), that was enough. In this regard, the respondent relied upon *Reid* for support. At [148] of *Reid*, Ellen France J accepted that accidental compliance with s 77, s 78 and s 79 would suffice. Furthermore, the respondent did not accept that the decision-making process necessarily followed sequential stages. It considered that process could operate as a matrix, which I take to mean that certain stages could occur at the same time or overlap each other.

[63] I have already found that the Act imposes no legal requirement to record in writing the manner in which compliance with ss 76, 77, 78, and 79 is achieved. I will, therefore, concentrate on the question of the type of compliance the Act requires and whether there was the necessary compliance in this case.

[64] The evidence shows that during March 2006 and April 2006, the respondent was investigating its present and future accommodation needs in the context of how best it could deliver its services to the region in the light of its newly expanded role. This entailed it embarking on an information gathering exercise for the purpose of seeing if there was a question to be answered. To do so adequately, it decided to engage private consultants. The respondent's actions from March 2006 through to April 2006, including the engagement of Deloitte to prepare a report, can be viewed as being actions taken to assist the respondent to determine if there was a question to be answered. I do not find, therefore, that this activity was subject to the Act's requirements. I also find that the respondent's actions between April 2006 and up to November 2006, when the Deloitte report was published, can be similarly characterised. During this period the respondent was doing no more than to gather information. Until it was fully informed, it was unable to be sure there was a question to be decided, yet alone know how best to frame it.

[65] On 7 December 2006, with receipt of the Deloitte report, as well as the Bayfield report, the respondent was equipped to frame the question for it to answer. Only then could it proceed with defining the problems and objectives it faced in relation to its accommodation. Once the question was framed, it was then for the respondent to decide the procedural template it would follow to answer the question and then to proceed to do so in accordance with the template it had developed.

[66] The question could have taken a variety of forms. It could have been an open question of where the headquarters were best located. Alternatively, it could have been confined to questioning whether the respondent should remain in its existing headquarters or move to another specified location. Provided it followed the required process and made appropriate judgments under s 79, as well as considered the other matters required by s 76 and its associated provisions, the shape the question took was a matter for the respondent to determine.

[67] The applicant contends that the respondent's 7 December 2006 decision to accept the Deloitte recommendation in principle was premature and not in accordance with the statutory process. The applicant argues that by 7 December 2006, the defendant's decision-making process was at the end of the stage at which the respondent was obliged to identify all reasonably practicable options. Furthermore, that instead of ensuring all reasonably practicable options were identified and giving consideration to community views, the respondent jumped ahead to a later stage of the statutory processes when it made its "in principle" decision to accept the Deloitte recommendation. The result, the applicant contends, is that flaws in what the applicant asserts to be the first two stages of the decision-making process have rendered the final outcome invalid.

[68] The respondent contends that what is described in its records as an "in principle" decision is not a decision in terms of s 78 at all. It says the adoption of an "in principle" view that relocation of the headquarters was the best thing to do signified no more than this being a "work in progress", which did not come to a conclusion until March 2007. Hence, according to the respondent, it was not until March 2007 that it was obliged to identify the reasonably practical options available to it.

[69] I consider that the respondent's receipt of the Deloitte report and the Bayfield report on 7 December 2006, with its suggestion that a move to Tauranga would best enable the respondent to carry out its statutory role, coincides with the time at which the respondent, in terms of s 78(2)(a), should have been defining the problems and objectives related to the ultimate decision to be made. However, the applicant argues that by 7 December 2006, the process had reached the end of s 78(2)(b). I do not accept that view. On 7 December 2006 the respondent's decision-making process had crystallised stage one (s 78(2)(a)) only, and from there on forward began to move into stage two (s 78(2)(b)) of the process. It was the receipt of the Deloitte report and the Bayfield report which left the respondent well equipped to reach a view on what were the problems and objectives surrounding the relocation of its headquarters. Until those reports were received, the respondent did not have sufficient information to be able to identify the problems and objectives related to the question of where its headquarters should be located to ensure best delivery of services to the region. It did not even know if the location of its headquarters had any bearing on its service delivery. It might have thought that was so but, until the Deloitte and Bayfield reports were received, it could not have known there was a proper foundation for thinking that. This is why I do not accept the applicant's argument that 7 December 2006 signifies the end of the stage at which the respondent should have been identifying the reasonably practicable options or considering the views of the community in relation to its choice of such options.

[70] Since I see 7 December 2006 as a point in time signifying the end of stage one in terms of s 78(2), this was also the time to give consideration to the community's views in accordance with s 78(2)(a).

[71] As at 7 December 2006, there is no evidence that the respondent expressly formed a decision-making template. However, provided the existence of some such template can be inferred from what occurred, I see no reason why that should not be sufficient to comply with the requirements of s 76 and its associated provisions. There is nothing in the legislation to suggest otherwise. Moreover, the express provision in s 79(1)(b)(iv) for any written record of the decision-making process to be at the discretion of a local authority suggests to me that Parliament recognised

there would be occasions when the decision-making template would be implicitly present in a decision, rather than separately expressed.

[72] The view I have taken of s 76 and its associated provisions accords with that applied in *Reid v Tararua District Council* (supra [46]).

[73] Section 79 empowered the respondent to determine that at stage one of the decision-making process, it was unnecessary to consider community views, or that the consideration of such views could be achieved through the information gathering process Deloitte and Mr Bayfield had carried out as part of the preparation of their reports. Part of the brief to Deloitte was to provide recommendations on cost and impact on human resources, property acquisition and disposal, socio-economic costs on communities affected, ongoing benefits and pay back periods of recommendations, and the implementation of the identified changes. This information, coupled with the knowledge the respondent's councillors would have of the community they represented, could have provided them with sufficient information on the community's views. The type of consideration s 78(2)(a) requires is not to be equated with consultation. Section 78(3) expressly provides that the section does not require consultation. How consideration of community views was to be achieved, if at all, was a matter for the respondents to determine.

[74] It is implicit from the instructions given to Deloitte that the respondent had determined that the consideration it would give to the views and preferences of the community was to be achieved through the enquiries Deloitte would make for the purpose of making the abovementioned recommendations, coupled with the knowledge of the respondent's councillors.

[75] The very purpose of instructing Deloitte to gather information on the impact on cost on human resources, property acquisition and disposal, socio-economic costs on communities affected, ongoing benefits and pay back periods of recommendations seems to me to be in part to enable the respondent to give some consideration to the community's views. As part of the preparation of the report in mid-October 2006, Deloitte interviewed the Mayors and Chief Executives of the territorial authorities in the respondent's region. Those interviews would have

enabled Deloitte to obtain a view on the impact of the location of the respondent's headquarters on the community, as well as an opportunity to assess the view the community held on the topic.

[76] I see no reason why the respondent's consideration of community views at this early stage of the decision-making process could not be done as a matter of inference from the reports it received. The choice of performing the s 78(2)(a) consideration in this way was open to the respondent. There is nothing to suggest that this approach was out of proportion to the task at hand.

[77] The applicant drew my attention to a document of the respondent titled "Checklist For Decision-Making Under the Local Government Act 2002" dated 28 November 2006. The document was created at the time the Deloitte report was received and about to be presented to the respondent. The document notes at page 2, item 11 that the respondent does not hold information about the community's views on the matter. The applicant contends that this is an acknowledgement of the respondent that it did not have information of the community's views and, therefore, it could not discharge it obligations under s 78(2). The report has been prepared by an officer of the respondent and approved by the Chief Executive.

[78] The respondent contends that the section, in the form in which the statement is made, relates to assessing the significance of the decision in terms of the Act's requirements for "significant" decisions and that the import of the statement should not be taken to extend beyond any such assessment.

[79] The checklist is perplexing. The officer who completed the form has filled in the check boxes with the result the location decision is seen as having medium significance; not being controversial and having only a minor or no impact on residents and ratepayers. These are mistaken assessments. The decision was later recognised as a significant decision which entailed it being approached as a significant decision in terms of the Act's requirements for decisions of that type.

[80] The decision to move the respondent's headquarters would have a considerable impact on residents and ratepayers as it was driven by the respondent's

concern to ensure it was performing well. How well the respondent delivered its services to the region was a major concern for residents and ratepayers.

[81] When it comes to assessing what information the respondent had about the community's views as at 7 December 2006, there was information in the Deloitte report that would assist the respondent's councillors to form a view on this topic. This report would have included Deloitte's distillation of the information it received when it interviewed the Mayors and Chief Executives of the local territorial authorities. Furthermore, the Bayfield report of 1 December 2006 specifically drew attention to the need to engage with "stakeholders" in the region in regard to considering the proposed move. The recognition of the need to engage with stakeholders was a form of consideration of the community's views. It needs to be remembered that this was very early on in the decision-making process. Part of considering the community views must entail the recognition of the need for engagement with the community. Until the engagement takes place, community views can only be inferred. Furthermore, until the decision takes some shape and form, it is difficult to see how engagement with the stakeholders, to obtain their views, can occur. It seems, therefore, that some of the answers in the checklist are at odds with other evidence. I do not find the checklist a reliable indicator of what was known to the respondent at that time.

[82] It is for the applicant to show on the balance of probabilities that, at the stage when the problems and objectives of the matter in issue are defined (s 78(2)(a)), the respondent has failed to comply with ss 78 and 79. Certainly there is no evidence of the respondent expressly deciding (under s 79) on whether or not to comply with s 78(2)(a) and, if so, how that compliance would be achieved. But when the conduct of the respondent at this stage of the decision-making process is considered, there is nothing about it that is at odds with the requirements in ss 78 and 79.

[83] Once the Deloitte and Bayfield reports were received, the adoption in principle of the recommendation to move the headquarters fits with the commencement of the stage when the respondent could begin identifying the reasonably practicable options that would enable the identified problems and objectives to be achieved. This stage raises issues regarding s 78(2)(b) and s 77.

The view I have taken of the "in principle" decision to adopt the Deloitte recommendation means that I regard this conduct as signifying a work in progress, rather than a finite decision which represents a particular stage in the decision-making process.

[84] Section 78(2)(b) required the respondent to give consideration to the views of the community. This of course was subject to judgments made under s 79 on the extent to which, if at all, there would be compliance with s 78(2)(b) at this stage of the overall decision-making process. Section 77 required the respondent to seek to identify all reasonably practicable options for the achievement of the objective of the decision it was to make. This section was also subject to s 79 judgments on whether there should be compliance with s 77 and, if so, how that would be achieved.

[85] The respondent contends that the process of identifying the reasonably practicable options to achieve the identified objectives ran until 15 March 2007. This is because it took until 15 March 2007 to obtain all the necessary and relevant information for the respondent to be able to complete stage two of the process and to embark on stage three, stage three being the stage at which the reasonably practicable options are assessed and proposals developed. Until 15 March 2007, the respondent argues that there was insufficient information to enable a proper assessment of the merits of the "in principle" view that a move to Tauranga was best.

[86] I have already rejected the applicant's contention that 7 December 2006 heralded the end of the stage at which the reasonably practicable options were to be identified (s 78(2)(b)). The evidence suggests to me that until March 2007, the respondent was in the process of gathering information that would enable it to reach a decision on where its headquarters should be located. I consider that regard to the requirements of ss 77 and 78 would have been an implicit part of this decision-making process.

[87] The evidence shows that from 7 December 2006 to March 2007, the defendant took significant steps to equip itself with further information to enable it to determine if the "in principle" decision to move its headquarters to Tauranga should be carried out. This culminated with a decision on 15 March 2007 to amend the

respondent's long-term plan to include a proposal to move the headquarters to Tauranga. This step was taken as the respondent had belatedly realised that a decision of this magnitude required inclusion in the long-term annual plan.

[88] The degree of engagement with the community between January 2007 and March 2007 demonstrates consideration was being given to the community's views. The affidavit evidence of Chair Cronin, Councillor Bennett and Chief Executive Mr Bayfield recounts numerous meetings the respondent had with members of the community, members and officials of local authorities within its region and local Iwi. The purpose of these meetings was to inform the community on the matter under consideration and to receive comments from the community on this topic. Whilst there is no evidence of the respondent expressly determining a template for this stage of its decision-making process, there is ample evidence to suggest to me that, in terms of s 78(2)(b), consideration was being given to the community's views.

[89] I now turn to consider if the decision-making process being followed at this time reveals that implicit or accidental consideration was given to the reasonably practicable options available to the respondent for its choice of the location of its headquarters. The choice of the reasonably practicable options available was for the respondent to make. Provided its choice accorded with s 79, it is not for the applicant to point to what it considers to be additional reasonably practicable options and assert that the respondent has omitted to consider them.

[90] Following receipt of the Deloitte report and the Bayfield report, the respondent's focus was on two possible locations for its headquarters: the existing location in Whakatane or Tauranga. None of the specialist reports the respondent had received from December 2006 onwards suggested that any other location in the region was tenable. In such circumstances, I consider that the respondent has implicitly determined that the only reasonably practicable options available for it to consider for its headquarters location were Whakatane or Tauranga. The information the respondent was gathering between December 2006 and March 2007 was sufficient to inform it of the matters set out in s 77(1)(b). I also consider that the evidence is consistent with the respondent seeking to reach a decision in a manner that took account of the matters in s 77(1)(b). The entire purpose of considering the

move of the headquarters was to enable the respondent to perform its functions and responsibilities better. The achievement of that aim would encompass the matters set out in s 77(1)(b).

[91] It follows that I find the respondent's decision to move its headquarters to Tauranga is a decision that complies with s 76 and its associated provisions. The applicant's challenge on the ground there was no compliance with the required statutory processes has failed. As regards the issues for determination in this case, the finding I have reached means that:

a) As regards the first issue, I consider that it is enough if compliance with s 76 and its associated provisions is achieved by implication or accidentally.

b) As regards the second issue, I consider that at the point when the identification of problems and objectives was undertaken, the initial approach was to consider how the respondent was to carry out the new functions it was to undertake but that after 7 December 2006, the respondent moved to the second stage of identifying the reasonably practicable options to enable it to achieve its objectives, and these became focused on the location of the respondent's headquarters.

c) As regards the third issue, I consider the end point of what may be described as stage two of the decision-making process (s 78(2)(b)) was not reached until March 2007.

d) As regards the fourth issue, I consider the respondent gave proper consideration at stage one and stage two of the decision-making process to community views on the location of its head office.

[92] Before turning to the next ground of review, I propose, as an alternative to the conclusions I have reached, to consider the legal consequences of the respondent's decision not complying with s 76 and its associated provisions.

[93] In relation to the consequences of non-compliance with the statutory scheme, the concepts of mandatory and directory effect can provide some assistance on how to interpret this legislation. In *Petch v Gurney (Inspector of Taxes)* [1994] 3 All ER 731 at 736, Millet LJ said:

> The difficulty (in deciding whether a statutory requirement is mandatory or directory) arises from the common practice of the legislature of stating that something "shall" be done (which means it "must" be done) without stating what are to be the consequences if it is not done.

Bennion On Statutory Interpretation at 46 states that:

> [I]t would be draconian to hold that in every case failure to comply with the relevant requirement invalidates the thing to be done. So the courts' answer, where the consequences of breach are not spelt out in the statute, has been to devise a distinction between mandatory and directory duties.

[94] The unusual nature of s 76 and its associated provisions make it difficult to determine the consequences of non-compliance. The general principle is that non-compliance with mandatory considerations will invalidate a decision: see *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 at 183. But statutory considerations with that legal effect are truly mandatory in that Parliament prescribes them and intends that decision-makers have no choice but to take them into account. The considerations in s 76 and its associated provisions have the appearance of being mandatory but in many respects Parliament has given the decision-maker a choice as to their application in any particular case. The inclusion of a discretionary choice of this nature undermines the considerations' otherwise mandatory character.

[95] When the language of s 76, and its associated provisions, is contrasted with the latter parts of Part 6, which apply to the special category of decisions affected by ss 83 to 97, it is notable that those subsequent sections do not permit a decision-maker any choice over when they will apply and, if so, how they will be applied. The prescriptive language in ss 83 to 97 is not tempered by other expressions that resemble the discretionary authority which is also to be found in ss 76 or 79.

[96] Section 76(3)(a) enjoins a local authority to "ensure" its decision-making processes "promote compliance" with s 76(1). Being required to promote compliance is not the same as being compelled to achieve it. Section 79(1) makes it

the "responsibility" of local authorities to make discretionary judgments on how to achieve compliance with ss 77 and 78. Being made responsible for achieving compliance is also not the same as being compelled to achieve it. The use of such expressions is a departure from the usual expressions that are recognised to result in decisions being set aside for non-compliance. The language of s 76(1)(a) and s 79(1) suggests to me that the purpose of those sections is to set performance standards for achievement, rather than to impose mandatory requirements with invalidation being the consequence of non-compliance.

[97] In the case of "significant decisions", s 76(3)(b) states that a local authority must ensure that before the decision is made, s 76(1) has been "appropriately observed". The use of the words "must ensure", "before the decision is made" and "appropriately observed" is stronger language than in subs 3(a) of s 76. These words have the ring of mandatory requirements. That Parliament has chosen to use different language for "significant" and "non-significant" decisions suggests to me that Parliament was setting a stricter standard for non-compliance with s 76(3) in the case of significant decisions. Nonetheless, it is not clear to me that Parliament intended decisions that fall within the scope of s 76(3)(b) to be subject to mandatory requirements which will cause them to be invalidated if there is non compliance with the statutory scheme.

[98] The words "must ensure" suggest to me a directive to local authorities which requires them to make certain or to make sure their significant decisions comply with s 76(3). However, Parliament then uses the words "appropriately observed". The difference here is the use of the word "appropriate". This has the meaning of "right" or "suitable" [Collins Dictionary] or "fitting" [New Shorter Oxford Dictionary]. The New Shorter Oxford Dictionary defines "appropriately" as "fittingly". Whether something is appropriately observed requires a value judgment. Unlike a requirement for observation s*impliciter*, a requirement for appropriate observation is not an absolute. Its presence or absence cannot be measured in black and white terms. Any objective assessment of whether or not something has been appropriately observed will involve an element of reasonableness. Something may be appropriately observed in one context but not in another. Once this degree of relativity is introduced into s 76(3)(b), it becomes difficult to read the provision as

imposing the type of consequences that administrative law has traditionally attached to a failure to follow statutory provisions having a mandatory character. For the consequences of non-compliance to have the effect of invalidating a decision, I consider the statutory language must be expressed in clear terms. This is because such consequences carry serious repercussions. I am not able, therefore, to read s 76(3)(b) as having the effect of imposing mandatory compliance requirements on local authority decision-making under s 76 and its associated provisions. It follows that if I am wrong on finding that the respondent has implicitly complied with s 76 and its associated provisions, or that implicit compliance is sufficient to meet the provisions' requirements, nonetheless, I do not consider non-compliance will invalidate the decision.

[99] When the decision in this case is looked at overall, it is apparent that in terms of compliance with s 76 and its associated provisions (ss 77 to 82), the steps taken after 17 March 2007 can be treated as beyond criticism as there has been no challenge to those steps. This part of the decision-making process coincides with ss 78(2)(c) and (d). From 7 December 2006 to 17 March 2007 (being a period that fits with s 78(2)(b)), there is clear evidence to show there were a number of occasions on which the respondent, through its members and officials, engaged with the community for the purpose of obtaining community views on the appropriate location for its headquarters. All the expert advice and information the respondent received showed there to be only two viable choices for the location of its headquarters. This in my view demonstrates that it was reasonable for the respondent to approach the question on the basis there were only two reasonably practicable options available for it to choose from. Such an approach cannot be said to be unreasonable in the sense that term is understood in administrative law. On the information available, there is nothing to support the view that no reasonable decision-maker would have approached the location question as a choice between staying at the existing location or moving to the largest and growing urban centre in the region. Nor can taking such an approach be said to be out of proportion to the significance of the decision to be made. I do not consider, therefore, that what occurred over this period was inconsistent with the requirements of s 77.

[100] On 7 December 2006 when the respondent received the Deloitte and Bayfield reports and decided to accept the Deloitte report's recommendations in principle (being a time that fits with s 78(2)(a)), there was no reason why the respondent could not consider the community's views through inferences drawn from the information it received in the Deloitte and Bayfield reports and from the knowledge its members held, as elected representatives of the community. At this early stage of the decision-making process, that type of regard to the community's view can be viewed as being in proportion to the matter then under consideration. The discretion in s 79 contemplates that different types of consideration may be given to community views at different stages of the decision-making process. There is nothing in s 78 to suggest that the consideration to be given to community views must be of the same value throughout the decision-making process. Moreover, s 79 would permit a decision to be made that no such consideration was necessary at this stage of the decision-making process.

[101] It follows that, even if the failure to articulate the decision-making template for the first two stages of the decision does not mean there has been non-compliance with ss 77 and 78(2)(a) and (b), I consider that, in terms of s 76(3)(b), when looked at overall, the actions the respondent took in the lead up to the final decision in June 2007 were enough to ensure that s 76(1) had been appropriately observed.

[102] I will now deal separately with the allegation that there has been a failure under ss 4, 14(1)(d) and 81 to discharge properly the obligations those provisions impose in relation to Mäori. In this regard, it is alleged that Mäori were given no opportunity to contribute to stages one and two of the decision-making process. It is also alleged that at all stages of the decision-making process, the respondent failed to comply with its policy in its "LTCCP on Development of Mäori capacity to contribute to the decision-making process". The applicant contends that at stages one and two of the decision-making process, there were no discussions with Mäori. This view of events turns on the applicant's view of when these two stages in the decision-making process came to an end. I have found that stage one of the process (s 78(2)(a)) ended on 7 December 2006. At this time there had been no discussions with Mäori. However, there is nothing in ss 4, 14 or 81 of the Act that would require

discussions to have been carried out with Mäori at stage one of the decision-making process.

[103] By stage two of that process (from 7 December 2006 to 17 March 2007), there were discussions with Mäori taking place. The evidence of Councillor Bennett, Councillor Eru and Bruce Murray (the respondent's Group Manager, People and Partnerships) outlines the steps the respondent took to involve Mäori in the decision-making process. That evidence shows that during stage two (7 December 2006 to 17 March 2007), the respondent actively sought to engage with Mäori to obtain their views on the relocation decision.

[104] For completeness, I have considered s 77(1)(c) and whether that provision has any application to the respondent's decision. I do not consider that this provision impacts on a decision of the type that the respondent was making.

[105] Sections 4, 14 and 81 do not require separate consideration to be given to Mäori at a series of different stages in the decision-making process. When considering all the steps the respondent took to reach its decision on the re-location of its headquarters, I consider that it discharged those obligations to Mäori which the Act has imposed on the respondent.

Breach of legitimate expectations

[106] The next ground of review is the allegation that the respondent has breached legitimate expectations contained in the Bay of Plenty Local Government Triennial Agreement. The parties to this agreement are the applicant, the respondent, Kawerau District Council, Opotiki District Council, Rotorua District Council, Taupo District Council, Tauranga District Council and Western Bay of Plenty District Council. The agreement was entered into in fulfilment of the obligations s 15 of the Local Government Act imposes on local and territorial authorities. There are statements in the agreement to the effect that:

> The parties would, where practicable, communicate and consult openly, honestly and respectfully and proactively (no surprises).

Also, that the parties would ensure each had early notification of and participation in significant decisions that may affect them and their communities. The applicant contends that the respondent's actions have breached the legitimate expectations inherent in this agreement. The alleged failure lies in the respondent not placing the possible relocation of its head office to Tauranga on the agenda of a "Mayors and Chairs" meeting until 19 April 2007, which was after the respondent had released its statement of proposal of 15 March 2007.

[107] My reading of the agreement is that it sets out protocols the signatories will follow during its currency. Those protocols are designed to provide a means by which the signatories can work together for the betterment of the Bay of Plenty region. The agreement envisages some consultation before significant decisions are made by any one of the signatories. Its intent seems to me to be to encourage the signatories to work collaboratively where possible for the good of their region. The agreement contains statements of intent and of best practice. I consider it is akin to a policy statement providing no more than administrative reassurance to the signatories and the communities they serve. There is nothing that I can see in the agreement that could amount to an enforceable legitimate expectation that adds to the legislative requirements imposed on the respondent. In particular, I see nothing in the agreement that would require notice to be given at a Mayors and Chairs meeting prior to public notice of a proposed change as provided for in the 15 March 2007 statement of proposal. My understanding of the agreement's references to consultation is that they do no more than to recognise the statutory consultation requirements the Act imposes on the signatories.

[108] The law of legitimate expectations is derived from the duty to act fairly. It developed as a requirement that assurances given, or regular practices followed, would not be departed from without affording persons adversely affected an opportunity to be heard. In this form the law of legitimate expectation has created a common law foundation for a duty to consult. Failure to follow the assurances given, or changes of practice without providing those affected with an opportunity to be heard, could result in the decision reached being set aside. Generally, the persons claiming that they were adversely affected had to establish the decision affecting them had deprived them of a right, interest or expectation of a benefit. The law of

legitimate expectations recognised that such persons were entitled to be consulted before being deprived in that way.

[109] In this case the only benefit which the applicant claims deprivation of is the benefit of early consultation, early meaning some time before the statement of proposal was issued in March 2007. However, the respondent's consultation obligations are imposed by legislation. In order for the agreement to impose justifiable consultation obligations that were additional to those imposed under the Act, very clear language to that effect would be required. The terms of the agreement do not have that effect. I find, therefore, that in terms of issue (f) of the issues for determination, the Triennial Agreement did not give the applicant a justifiable legitimate expectation of consultation that extended beyond the statutory duties of consultation which the Act imposed. It follows that the applicant has not made out this ground of review.

"Closed minds"/failure to consult properly

[110] The grounds of review under this category are focused on what occurred in the later stages of the decision-making process (after 17 March 2007) when the respondent's members and Chair attended the public consultation meetings that were held and subsequently when the respondent came to make its final decision.

[111] The allegations in relation to a breach of the duty to consult are that the absence of certain members of the respondent from the public hearings for the purpose of consultation means that the respondent did not properly discharge its obligations to consult. The issue here being whether their absences have precluded proper consultation. Flowing from this is the secondary issue of whether those persons who were absent from the public consultation hearings should have voted on the final decision. The same absences are also relied upon as evidence to prove certain members of the respondent had already closed their minds to the outcome, with the result the respondent's final decision on where its headquarters should be located is tainted with predetermination and bias and is, therefore, invalid. There is also the wider issue of whether those members of the respondent who voted to move the headquarters to Tauranga did so as a result of predetermination and bias. Finally

there is the issue of whether those members of the respondent who were absent from part of the deliberation hearings should have voted on the final decision. The determination of these issues involves the application of similar legal principles and so there is a degree of overlap among them.

[112] I will deal first with the allegations of bias and predetermination. This type of challenge to the decisions of local authorities under the previous legislation required a plaintiff to show actual predetermination or bias, rather than apparent predetermination or bias. A helpful authority on this point is *Travis Holdings Ltd v Christchurch City Council* [1993] 3 NZLR 32 at 47. Tipping J said:

> What in my judgment is required is no more and no less than this. The full council must come to the meeting at which the s 230 resolution is to be considered with an open mind as to whether the land in question should be sold. The councillors must be prepared to give a fair and open-minded hearing to anyone who appears at the meeting and submits for whatever reason that the land should not be sold. If it could be shown that the council had not approached the meeting on that basis, then the resolution to sell would prima facie be invalid and, subject to any relevant discretionary matters, liable to review. What I am saying is that in my judgment, in the particular statutory and factual setting with which this case is concerned, anyone challenging a s 230 resolution on the basis of predetermination or fettering of discretion is required to show actual predetermination or fettering rather than the appearance of the same.

Tipping J drew support for the conclusion he reached from a consideration of earlier cases on local government and the legal position with Ministers of the Crown and central government. In that regard Tipping J at p 47 adopted a test applied by Richardson J in *CREEDNZ Inc v Governor-General* (supra [95)] which equated predetermination with being "irretrievably committed" to a particular position. This approach sets a high threshold for proving predetermination or bias in relation to decisions of the executive or local authorities. There is nothing in the current legislation that would cause me to think that the legal test for predetermination and bias has been altered. Accordingly, I propose to approach this case on the same basis as was done in *Travis Holdings*.

[113] I propose to make some general comments on the evidence before dealing with specific allegations of bias and predetermination made against individual

members of the respondent. In June 2007 Chair Cronin and eight of the respondent's councillors voted for moving the headquarters to Tauranga. Five councillors voted against the move.

[114] In their affidavit evidence, Chair Cronin and the eight councillors who voted in favour of moving the headquarters to Tauranga denied they were biased or had predetermined their decision. Each of them contended that during the deliberations on 31 May and 1 June 2007, they had approached the relocation decision with an open mind, prepared to consider every sensible option, but, having done so, each of them concluded that moving the respondent's headquarters to Tauranga was the best decision.

[115] The report of the meeting on 31 May 2007 records Chair Cronin addressing the councillors and on the need to approach the decision they were about to undertake with an open mind and without bias. He directed them to be prepared to listen and to consider all the submissions that had been made to the respondent with an open mind. The deliberations ran over from 31 May 2007 to 1 June 2007. Because of the factual allegations of bias made against certain councillors, limited cross-examination was permitted. When under cross-examination, none of the persons who had voted in favour of the move retreated from the assertions in their evidence in chief of having had a fair and open-minded approach to the relocation decision. There was nothing in the evidence which I heard and read that would cause me to conclude that the persons who voted in favour of the relocation of the headquarters did so simply because they were "irretrievably committed" to the idea of relocating the headquarters.

[116] The evidence the applicant relied upon to prove predetermination or bias was provided by the councillors who had opposed the relocation decision or other persons in the community opposed to that decision. Their evidence, either referred to passing comments from the persons alleged to be predetermined, or offered what was in essence opinion evidence to prove the presence of predetermination or bias. Their evidence also reveals an assumption that Councillors Eru, Sherry and von Dadelszen, who were absent for part of the public consultation hearings (in the case of Councillors Eru and Sherry their absences were for 3.5 of the 4 days of

hearings), had already reached a predetermined view and should not, therefore, have participated in the deliberations. There were other comments, which in essence debated the wisdom of the decision to relocate and which suggested alternative ways in which the decision could have been approached.

[117] Proof of actual predetermination requires evidence capable of objective assessment. The opinions or value judgments of persons who have participated in the decision-making process but who have taken a different view from those alleged to have pre-determined their decision are not helpful. This type of evidence is not reliable. I have no doubt that the applicant's witnesses firmly believe their assessment of what occurred is correct. But the account they give does not go far enough to provide evidence that those who voted for relocation were irretrievably committed to that certain outcome. With decisions of this type, it is to be expected that members of regional councils will hold certain views and express those views from time to time. There is nothing objectionable about councillors holding preliminary or in principle views on decisions, provided when it comes to making the actual decision, they do so with a mind open to other alternatives. Indeed it is always likely to be the case that members of local authorities will hold particular views on certain issues. The effect of local body democracy is that persons are voted into office holding certain views. What is important is that when they come to make decisions, they follow a thought process that recognises a change of mind may eventuate. I have seen no evidence that would suggest to me that those who voted for relocation of the headquarters failed to have this recognition.

[118] In *Travis Holdings Ltd* there was evidence that, prior to reaching their final decision, councillors had adopted stances that could be taken to suggest they favoured a particular course of action. Nonetheless, the Court accepted that preliminary steps taken towards passing a particular resolution, whilst perhaps problematic under an appearance of bias test, would not be for an actual bias test. The Court recognised that constraint on a council conducting preliminary steps towards passing a resolution on the ground those steps could indicate bias would make life "extremely difficult for council staff and sub-committees". The Court was of the view that:

> There will have been some exploratory discussions as to potential purchasers, what they may wish to do with the land and so on, and I am very mindful of the fact that endless difficulties, both legal and administrative, could ensue if the threshold for intervention was set at the level of an appearance of predetermination. In my judgment when requiring a local body to pass a resolution under s 230, Parliament cannot have intended the sort of delicate footwork that would be necessary if the test were appearance of predetermination.

I think the same comments can be applied to what has occurred in this case.

[119] Having made these general comments on the evidence, I will deal with evidence of predetermination as it relates to individual members of the respondent.

[120] There was evidence from the applicant's witnesses of occasions where Chair Cronin is alleged to have made remarks which, the applicant contends, evidence of predetermination on the part of Chair Cronin. Before the 2004 elections, Chair Cronin is alleged to have said he had the numbers to move. Shortly after the election in 2004, Chair Cronin is alleged to have held a meeting at his home with the newly elected councillors and to have presented them with a number of actions he wanted to see achieved in the three year term, one of these being relocation of the headquarters. Chair Cronin rejected having any such discussion with Mr Oppatt about his intention to move headquarters. At a meeting with a regional focus group in January 2007, Chair Cronin is alleged to have said words to the effect that his driving to meetings in Whakatane would soon be history. After the first day of deliberations on 31 May 2007 when the members of the respondent went to a restaurant in Whakatane, as they left the restaurant and were walking past the regional council building in Whakatane, Chair Cronin is alleged to have said:

> If they had sold us the land, the headquarters would be staying in Whakatane.

[121] When under cross-examination, Chair Cronin was challenged about a conversation he was alleged to have had with John Forbes, who is the Mayor of the Opotiki District Council. It was put to Chair Cronin that at a Christmas social event in 2006, Chair Cronin had essentially given Mayor Forbes a:

> Heads up from yourself that the headquarters was moving and he took the heads up to be a fait accompli this was going to happen.

Chair Cronin rejected this suggestion. Chair Cronin was then challenged on his alleged failure as chair of the regional council to direct councillors who had not been present during the consultation hearings to desist from voting. His response was that he had no authority to stop councillors who were entitled to vote on the issue from voting. He said that he had been in local authorities for the best part of 20 years and that, to his knowledge, there has never been a councillor excluded from annual plan, deliberations and submissions in that time, with the exception where there was a conflict of interest. His view was that he had no authority to prevent the councillors who had not fully participated by attending all the submission hearings and deliberations from participating in the decision. It was suggested to Chair Cronin that his mind was not open to persuasion and that he was determined to see the relocation of head office to Tauranga. His response was that he rejected that suggestion entirely and that when it came to making the decision, he had addressed the councillors, stating to them:

> It is important that within the process that the issues be with an open mind and without bias. It is important that councillors be prepared to listen and consider all the submissions with an open mind, however, that does not mean councillors may not have a working plan or views but that they are prepared to listen and consider the submissions with an open mind.

Further on, he said he addressed the council to the effect:

> As we move in to the debate deliberations, I will ask you if there are any other issues for consideration so as to ensure that the deliberations are both robust and within correct procedures.

Chair Cronin said he also attempted to ask all the councillors individually did they approach the process in that position.

[122] I have no reason to doubt Chair Cronin's evidence. The overall impression I have of all the allegations of predetermination, said to be supported by evidence of comments made prior to the final decision being made, which could suggest a particular view, do not take the matter far enough to establish the presence of actual predetermination.

[123] Councillor Eru attended a public consultation meeting in Rotorua. He did not attend the meetings in Tauranga or Whakatane. He had suffered a serious car

accident at the beginning of April 2007. He also had a cataract operation at Rotorua Hospital. In addition, his wife was ill. For these reasons, he did not attend three and a half days of the four days of consultation hearings. However, Councillor Eru said that he had the opportunity to read the submissions presented at those hearings and that Councillor Bennett had come to Rotorua to go over the oral submissions with him. He did not, however, listen to the audio record of any of the oral submissions. Councillor Eru was adamant under cross-examination that he had gone through all the written submissions and, with the help of Councillor Bennett, had gone through the oral submissions and council summaries of the submissions. Councillor Eru was unable to say what exactly had been sent to him, but he said that he had read everything that had been sent to him. In this regard Chair Cronin has said that he directed that all the relevant material be sent to the respondent's councillors.

[124] Councillor Eru accepted, when cross-examined, that the volume of material and the personal difficulties he was experiencing at the time through the health problems of himself and his wife would have made his role in the deliberation process difficult. It was put to him in cross-examination that at the council meeting in June, his mind was not open to consider anything other than a shift of head office to Tauranga. He rejected that. The reasons for Councillor Eru not attending all the meetings are acceptable. Furthermore, as will be explained later in the judgment, I do not consider the Act requires councillors who participate in decisions to have personally attended all the public consultation meetings, nor, where deliberation hearings go over a number of days, do I consider they need to attend every sitting. I am satisfied, therefore, that the absences of Councillor Eru have neither affected the quality of the public consultation, nor do I think show his participation in the final decision to be affected by predetermination or bias.

[125] At a meeting with the regional focus group at the Rotorua Airport, Councillor Eru is alleged to have made it clear he supported the move and could not be persuaded otherwise. The applicant relies on an affidavit of Lorraine Brill. In her affidavit, Ms Brill said that when Mr Eru was questioned at this meeting, he made a comment to the effect he would not support doing anything that would help Ngati Awa as they had tried to take the Kaingaroa Forest away from them

(Te Arawa). Councillor Eru denied that he would have said anything to that effect. Councillor Eru's response to what Ms Brill said was, "she has got that totally wrong". Councillor Eru's view was that Ms Brill was mistaken because, in his words, "the issue with Te Arawa and Ngati Awa is totally out of kilter". His evidence was that on the basis of his knowledge of history, he would not have said something like that. When asked whether there was a view within Te Arawa that Ngati Awa tried to take the forest at Kaingaroa, he said, "no, there was not".

[126] Ms Brill's affidavit provided on 29 November 2007 records something which occurred at a meeting on 19 February 2007. Councillor Eru rejects the suggestion he would have made the statement concerned and, to support his rejection, he says that, in effect, there has never been an issue between Ngati Awa and Te Arawa regarding Ngati Awa trying to take Kaingaroa Forest with them, so that the comment is not only incorrect in terms of Councillor Eru not having made it, but it does not fit with the historic position. I note in her affidavit at paragraph 21 that Ms Brill says that Mr Eru made a comment to the effect that moving was the right decision and his mind was made up. She does not say what his words were. The statement seems simply Ms Brill's interpretation of what Councillor Eru said. Without having his actual words expressed, it is not possible to assess objectively whether or not the effect of those words could amount to a statement evidencing predetermination. An allegation of bias and predetermination is serious. To prove actual bias requires reliable evidence. I am not satisfied that the evidence from Ms Brill is sufficiently reliable to persuade me on the balance of probabilities that Councillor Eru had made what had amounted to an admission of having a predetermined view as at February 2007.

[127] Councillor Sherry only attended the public consultation meeting in Tauranga. He did not attend the meetings in Rotorua or Whakatane. He has sworn an affidavit in which he asserts that while he did not attend all the public consultation meetings, he did fully inform himself by reading all the written material from those meetings. He said he was open to persuasion and ready to be persuaded as to a different outcome from that for which he ultimately voted for. Under cross-examination he provided explanations for why he did not attend all the consultation meetings. The records of the deliberation meeting record that he addressed the meeting and gave an

assurance that he had read all the submissions and that he was approaching the decision with an open mind. I see no reason not to accept his evidence.

[128] At a Christmas function in December 2006, Councillor von Dadelszen is alleged to have said the move was "a done deal and we have the numbers". The applicant relied upon these remarks to prove predetermination on the part of Councillor von Dadelszen. Councillor von Dadelszen was cross-examined about the comments he was alleged to have made. Councillor von Dadelszen's recall was that he had started to say the respondent had voted in favour of an "in principle" decision, which would be to accept the Deloitte recommendation to move the headquarters, when Colin Hammond (a retired local body politician and member of the Regional Focus Group which opposed the relocation) aggressively attacked him about the statement. Councillor von Dadelszen refuted the suggestion that he had said the decision to move was a "done deal" and he said he would never use the words "you easties have got to live with it". His evidence was this was not the sort of language he would use. He conceded he was angered by Mr Hammond's comments and he may have said "we have the numbers", but he knew at that stage that a final decision was at least six months away.

[129] The applicant is inviting the Court to draw the inference from words said at a Christmas party in December 2006 that Councillor von Dadelszen had such a closed mind that his decision in June 2007 to vote in favour of the headquarters' move can be said to be predetermined. There was a significant time gap between the Christmas party in December 2006 and the June meeting. In view of Councillor von Dadelszen's denials of predetermination and his assertions of approaching the June 2007 decision with an open mind, which I have no reason to disbelieve, I am not prepared to rely on comments made six months earlier to find that Councillor von Dadelszen had a closed mind in June 2007.

[130] Councillor von Dadelszen was also cross-examined about him being absent on the last day of the consultation hearings in Whakatane on 24 May 2007. It was put to him that by that time he had made his mind up to vote in favour of relocation. He rejected any suggestion. He rejected the suggestion that by the time of the respondent's deliberations, he was not open to persuasion.

Councillor von Dadelszen said that although he had been absent for one day of the public consultation hearings, he had taken it upon himself to read all the submissions thoroughly to ensure that he was fully informed when it came to the time of making his decision. Again I see no reason to disbelieve him.

[131] Councillor Raewyn Bennett, in a meeting with Ngati Awa in February 2007, is alleged to have made it clear she supported the move and that it was time for Western Bay of Plenty Mäori to have the head office located in their district. In her affidavit evidence, Councillor Bennett rejected any suggestion her decision to support the headquarters move was affected by predetermination or bias. It was put to her in cross-examination that she had favoured the move because she thought it best for the Iwi which she represented (namely, Western Bay of Plenty Mäori) and that she thought they would be better served by having the regional council headquarters in Tauranga. She accepted that her concern about "the urbanisation of Iwi" was one of the factors that she took into account in her decision-making but rejected the suggestion this was entirely what had motivated her decision. She agreed that she had been at a meeting on 26 February 2007 of local Iwi that was attended by Jeremy Gardiner. Mr Gardiner's recall of the meeting was that Ms Bennett had represented to the meeting that the relocation was to go ahead and that she had told him she would be voting for it. Under cross-examination, Ms Bennett denied that she had a conversation to this effect with Mr Gardiner. She said that at the meeting she gave reasons for supporting the "in principle decision" of 7 December 2006.

[132] Ms Bennett's understanding of the communications she had at the meeting of 26 February 2007 was for her to outline why she had decided to support the Deloitte recommendation. She denied that the effect of what she said at the meeting was to promote the headquarters relocation. An email was put to her, which she had written to Bruce Fraser on 18 February 2007, in which she had said the words "at Fisheries forum tomorrow (promoting HQ)". It was put to her that the statement in the email reflected what she would actually have been doing at the meeting. She rejected that idea and said that all she was doing was to raise awareness among Iwi in the various areas. When it was suggested to her that as at February 2007 she was going out to

the community trying to sell the relocation decision, she rejected that on the basis that at that point in time no decision had been made.

[133] Mr Gardiner had sworn in his affidavit that Councillor Bennett had said it was "Ngati Rangi's turn to have the regional council located near them and that Ngati Awa had their turn". Councillor Bennett said she did not make the statement and never would make such a statement. I have no reason to reject Councillor Bennett's evidence on the points where there is a conflict with Mr Gardiner's evidence. Statements made in the context of meetings to discuss the issue of the headquarters relocation are now being lifted out of their context. In addition, it may be that certain glosses are being placed on those statements, which may not have been intended at the time the statements were made.

[134] With decisions of this type, it is to be expected that councillors will have discussions with members of the community. In the course of those discussions, councillors may make comments that may suggest they hold a particular view. It is difficult to see how councillors could engage effectively and explain why they have taken a certain stance without perhaps creating an impression of holding particular views. That is very different from having a predetermined view. It follows that I am not satisfied on the balance of probabilities that Councillor Bennett made the comments now alleged to demonstrate bias and, in any event, even if she did, I do not interpret those comments or words to such effect as amounting to actual bias.

[135] On 25 April 2007, Councillor Pringle wrote a letter to the editor of the *Whakatane Beacon* in which he stated:

> While I sympathise with the effects to what this change means to any people in Whakatane;

and

> This will happen but at the same time we do not intend to leave Whakatane in the lurch.

[136] Councillor Pringle was cross-examined about bias as revealed through the letter he had written to the editor of the *Whakatane Beacon* on 25 April 2007. It was put to him that the way in which he had expressed himself in the letter revealed he

was treating the relocation as a foregone conclusion, rather than as a possibility. He accepted that the letter could be read in that way, but said that was not his intent because the decision on the relocation was still to be made. He explained the letter on the basis that he was responding to letters that had been published earlier on and he was putting matters in context. He rejected the suggestion that at the time he wrote the letter, he had made his mind up about the relocation of headquarters. It was suggested to him that he had written the letter using references to relocation, rather than possible relocation, because, in his mind, the relocation was going to happen. He rejected this suggestion.

[137] I consider that when local body politicians write letters to local newspapers regarding issues that have become contentious within the community for the purpose of explaining the benefits of the move, the language used may be stronger and less precise than that which a lawyer would use. I am not prepared to infer from the words Mr Pringle wrote in a letter to the editor designed to answer earlier letters that this amounts to sound, reliable evidence of actual bias on his part. He has rejected that suggestion, and I have no reason to disbelieve him.

[138] The applicant has also alleged that the respondent's decisions were made with undue haste and did not allow for any or sufficient time for proper consultation and input and consideration of the community views, particularly at stage one and stage two of the decision-making process. This allegation depends on the view being taken that stage one and two of the decision-making process had reached an end by 7 December 2006. I have already rejected this view on the facts, which disposes of this allegation.

[139] Another allegation made against those who voted for relocation of the headquarters was that none of those who did so were willing to engage in any meaningful debate as to the pros and cons during the deliberation hearings on 31 May 2007 and 1 June 2007. To counter this allegation, the respondent pointed to the minutes made of the deliberation hearings. In my view, those minutes support the respondent’s view of what occurred. A perusal of the minutes reveals that a number of those who voted for the relocation actively participated in the deliberation process. It follows that I do not find the applicant has established this allegation.

[140] As regards the failure of Councillors Eru, Sherry and von Dadelszen to attend all of the submissions and deliberations hearings, I do not see their absence as undermining the quality of the consultation process. The applicant has not directed me to any authority which establishes that the members of a local authority who vote on a decision must have attended all the public consultation hearings. The applicant relied on s 83 of the Act to support its assertion that the requirement in that provision to give submitters an "opportunity to be heard" could not be met without the respondent's members attending all the consultation meetings.

[141] Like Tipping J in *Travis Holdings*, I think that parallels can be drawn between local authority decisions and those of the executive. When Ministers of the Crown come to make decisions that require consultation, there is generally no requirement that a Minister will individually attend and participate in any consultation process. That is left to the officials who then have the responsibility of preparing reports for the minister outlining the thrust of the matters consulted on and the submissions received. If the officials do a poor job of summarising the submissions produced during the consultation process, that can leave a Minister open to the accusation he or she has not properly consulted. Although decided on another ground of review, the judgment in *Air Nelson v Minister of Transport* CA279/06 5 May 2008 is relevant to understanding the consequences of decision-makers being poorly informed by their officials.

[142] I do not understand the applicant in this case to be critical of the materials that went to the respondent's members for the purpose of recording for them and informing them on the consultation submissions received. Provided the written material the respondent's officials produced provided a fair and accurate account of the submissions received during the consultation hearings and the respondent's members read this material, I can see no reason for finding the consultation process was flawed.

[143] Furthermore, when the votes of councillors whose absences from the submissions hearings are put to the side, of the remaining votes, those who voted for relocation are still in the majority. The outcome was not a closely balanced decision which hinged on the votes of those who did not attend all the submissions hearings.

Even if they had abstained, the numbers were still against those who voted against relocation. The applicant contended that as that would have resulted in a six to five split for relocation, it may well have been that some of the six may have changed their minds. I find this to be speculative. There is no foundation for it. In circumstances where the three councillors who were absent from the consultation meetings gave proper consideration to the consultation materials, and when those who voted for relocation outnumbered those against, with or without the abstention of the three councillors, I cannot see how their absences from some of the consultation meetings can have any impact on the respondent's performance of its obligations to consult under s 83.

[144] The applicant attempted to make something out of the fact the respondent's legal advisers had advised against those who had missed part of the submissions' hearings from voting on the decision. That advice may have been given out of an abundance of caution. Whilst adherence to it would have avoided one of the grounds of challenge to the decision to relocate, the departure from the advice was not wrong in law.

[145] The applicant also challenged the absences of Councillors von Dadelszen and Bennett from part of the deliberation hearings. However, at all times the necessary numbers to make up the required quorum were present. It is not as if these councillors absented themselves for most of the two days of deliberations and did no more than to arrive at the time when the vote was to be taken. It is in the nature of local body work that members of local authorities will need to absent themselves from deliberation hearings from time to time. Provided those persons ensure they are well informed and approach the decisions to be taken with an open mind, I can see no reason for being critical of them being absent for part of the deliberation process.

[146] It follows that the applicant has not made out the grounds of review of predetermination and bias, or of failure to consult. The failure to consult also came under the heading of unfairness and procedural impropriety in that the applicant contended that a breach of the duty to consult under ss 82 and 83 was also a procedural impropriety and unfair. The applicant's failure to establish there has been

a breach of the statutory duty to consult means it has failed on the ground of procedural impropriety and unfairness as well.

Unreasonableness

[147] The applicant contends that the decision to move the applicant's headquarters from Whakatane to Tauranga was unreasonable. *Wellington City Council v Woolworths New Zealand Limited (No 2)* [1996] 2 NZLR 537 is a leading case on challenges on the ground of unreasonableness in relation to local government decisions. That case involved the setting of rates and earlier legislation. The Court of Appeal concluded that the setting of rates was essentially a matter for decision by elected representatives following the statutory process and exercising the choices available to them. The Court was not prepared to interfere with what was essentially a policy decision. It recognised that the setting of rates required the exercise of political judgment by elected representatives of the community. In that regard, economic, social and political assessments involved were complex. The test for unreasonableness applied in *Wellington City Council* was that given by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410, where it was said:

> It (unreasonableness) applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

[148] When I apply that test to the present decision under review, it seems to me that the decision cannot be so described. The councillors of the respondent who voted in favour of a move of the headquarters had sufficient material before them in the form of the Deloitte report, the Bayfield report and other material gained following those reports which supported the headquarters move. It is for the applicant to establish that the decision to move the headquarters was one that no sensible person could have arrived at in terms of the test set out by Lord Diplock. On my reading of the reports on which the respondent relied, they outlined the long-term wisdom in moving the headquarters to the most populace centre in the region for which the respondent was responsible. The benefits of having the headquarters sited in the most populated and growing centre of the respondent's region are set out in the reports on which the respondent relied to inform itself. These reports make

sense. It was open to the councillors to decide that it was in the region's long-term benefit for the headquarters to be sited in Tauranga. The evidence revealed that most regional authorities have their headquarters sited in the most populated centre of the region they serve. While it seems that the respondent has managed to carry out its role to date, the idea that, with the increased responsibilities legislative change has placed upon it, it would better perform its role if sited in Tauranga is a tenable one. There is nothing about the decision which would suggest to me it was unreasonable in terms of the test applied by Lord Diplock and approved of in *Wellington City Council*. I do not find the decision to be an unreasonable one.

[149] The applicant elected not to pursue the ground of review based on the taking into account of irrelevant considerations and mistake of fact. The ground of review based on failure to take into account relevant considerations is largely covered by the findings made on s 76 and its associated provisions. In regard to those additional considerations the applicant has pleaded as being relevant considerations which were not taken into account, the applicant has not identified how they have the mandatory character necessary to support this ground of review. For this reason, the applicant fails on this ground of review.

[150] After this proceeding was heard, the judgment in *Council of Social Services in Christchurch/Outautahi Inc v Christchurch City Council* HC CHCH CIV 2008-409-1385 25 November 2008 was issued. The Court in this judgment has interpreted the effect of s 76 and its associated provisions differently from the interpretation contained herein. I have considered the judgment but must respectfully disagree with the interpretation it expresses.

Result

[151] The applicant has failed to establish the grounds of judicial review on which it relied to support its claim that the respondent's decision was unlawful and invalid.

[152] Leave is reserved to the parties to file memoranda on costs.

Duffy J

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of references under clause 14 of the First Schedule to the Act
BETWEEN	WAKATIPU ENVIRONMENTAL SOCIETY INC
	RMA 1043/98, 1394A/98, 1165/98
AND	TELECOM NEW ZEALAND LIMITED
	RMA 1030/98
AND	CENTRAL ELECTRIC LTD (now DELTA ELECTRIC LTD)
	RMA 1290/98
AND	CLARK FORTUNE McDONALD
	RMA 1405/98
AND	TRANSPOWER NEW ZEALAND LIMITED
	RMA 1260/98
AND	CONTACT ENERGY LIMITED
	RMA 1401/98
AND	MINISTER FOR THE ENVIRONMENT
	RMA 1194/98
	Referrers
AND	THE QUEENSTOWN-LAKES DISTRICT COUNCIL
	Respondent

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

ERRATUM

1. The decision contains two errors on page 5 of Chapter 1 : Introduction:

   (a) At the head of page 5 the first two lines of paragraph 4 are repeated and should be deleted.

   (b) The paragraph number "6" and the following first three lines of paragraph 6 have been omitted. They read (with the rest of the paragraph in square brackets):

   6. The hearing took place over ten working days and, at the suggestion of the parties, we have carried out site inspections since. To date we have only been able to visit the Lake Wakatipu area, and not Lakes Wanaka [and Hawea and the rivers that flow into or out of them. To that extent this decision is geographically limited[6] although many of the policies we establish may prove to be applicable on a district-wide basis].

   and should be inserted at the foot of page 5 (above the footnotes).

2. In addition the decision [p.84 [fn 113]] refers to the policies we have decided as being 'shaded'. The Court's signed and sealed copy is indeed so shaded, but we are advised by the Registrar that the photocopying has not reproduced the shading. We are at a loss to understand why. We apologise to the parties for any inconvenience. The objectives and policies as corrected by the Court should be discernible from the text of the decision; and in any event they are reproduced together in Appendix III.

DATED at CHRISTCHURCH this 2nd day of **November** 1999.

J R Jackson
Environment Judge

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

DOUBLE SIDED ORIGINAL

Decision No: C180/99

IN THE MATTER of the Resource Management Act 1991

AND

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

BETWEEN **WAKATIPU ENVIRONMENTAL SOCIETY INC**

RMA 1043/98, 1394A/98, 1165/98

AND **TELECOM NEW ZEALAND LIMITED**

RMA 1030/98

AND **CENTRAL ELECTRIC LTD (now DELTA ELECTRIC LTD)**

RMA 1290/98

AND **CLARK FORTUNE McDONALD**

RMA 1405/98

AND **TRANSPOWER NEW ZEALAND LIMITED**

RMA 1260/98

AND **CONTACT ENERGY LIMITED**

RMA 1401/98

AND **MINISTER FOR THE ENVIRONMENT**

RMA 1194/98

Referrers

AND **THE QUEENSTOWN-LAKES DISTRICT COUNCIL**

BEFORE THE ENVIRONMENT COURT

Environment Judge J R Jackson
Environment Commissioner R Grigg
Environment Commissioner R S Tasker

HEARING at **QUEENSTOWN** on 20-23 and 26-29 July and 6-7 September 1999
(Final submissions received 23 September 1999)

APPEARANCES

Mr B Lawrence for the Wakatipu Environmental Society Inc
Mr J Haworth for the Upper Clutha Environment Society Inc in respect of RMA 1394/98
Mr P J Page and Mr G M Todd for Telecom NZ Ltd and Mr and Mrs R S Mills
Mr W J Fletcher for Central Electric Ltd (now Delta Electric Ltd)
Mr M Parker for Clark Fortune McDonald and J F Investments Ltd, Mount Field Ltd, Quail Point Ltd
Mr K G Smith for Contact Energy Ltd
Mr A F J Gallen and Ms S Ongley for the Minister for the Environment in relation to RMA 1043/98 (WESI) and RMA 1194/98
Mr N S Marquet for the Queenstown-Lakes District Council
Mr W J Goldsmith and Mr A More for Terrace Towers (NZ) Pty Ltd
Mr G M Todd for the persons listed in Appendix 1
Mr J K Guthrie, Mr W J Goldsmith and Mrs J Simpson for Crosshill Farm Ltd, Pisidia Holdings Ltd, Queenstown Safari Co Ltd, Carolina Developments Ltd, Mr D and Mrs J Jardine and Mr A S Farry
Mr D Masterton for Lake Hayes Holdings Ltd
Mr M V Smith for Federated Farmers NZ Inc
Mr M M Hasselman on behalf of the Community Association, Glenorchy, (on Thursday 29 July 1999)
Mr A More for Terrace Towers Proprietary Ltd (in relation to RMA 1043/98 and 1194/98)
Mr J Reid for Gibbston Valley Estate Ltd

INTERIM DECISION

Index

Chapter 1 : Introduction

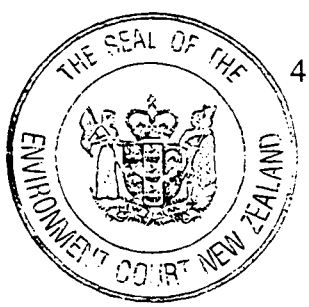
1. These references are about the district-wide issues of the Queenstown-Lakes District ("the district"). Their main focus is on the landscapes of the district – this "country crumpled like an unmade bed"[1] and how they are to be sustainably managed. It was common ground that there are

[1] The Search from Arawata Bill Denis Glover ("Selected Poems", Penguin 1981).

outstanding natural features and landscapes within the district, and indeed that all landscapes of the district are important. The difficulties are first, that most of the parties did not attempt to inform the Court precisely where the outstanding natural features and landscapes end and the important landscapes begin; and secondly, that there are development pressures in the district which could have major adverse effects on the landscapes within the district. The resident population of 10,000 (approximately) is expected to double within the next 16 years, and it is hoped that visitor numbers will increase also.

2. The references arise out of Parts 4 and 15 of the proposed plan of the Queenstown-Lakes District Council ("the Council"). The Council notified a proposed plan in 1995 ("the notified plan") and after hearings issued its decision and a revised proposed plan ("the revised plan") in 1998. Part 4 of both plans relates to, and is headed, "District-Wide Issues". We shall refer to the document which will result as the outcome of this and other decisions as "the district plan".

3. Part 4 of the revised plan is much shorter than, and very different to, Part 4 of the notified plan. Broadly the referrers of Part 4 fall into two groups depending on whether they basically agreed with the notified plan or with the revised plan. The Wakatipu Environment Society Inc ("WESI") largely supported the notified plan and wanted reinstatement of its objectives and policies (with some amendments). The other referrers opposed part of WESI's approach but conceded at the hearing that Part 4 of the revised plan needed changes. For its part the Council, at the hearing before us, supported further changes to Part 4 of the revised plan.



4. At the start of the hearing two parties and one interested person under section 274 of the Resource Management Act 1991 ("the Act" or "the

4. At the start of the hearing two parties and one interested person under section 274 of the Resource Management Act 1991 ("the Act" or "the RMA") agreed to abide by the decision of the Court in respect of the issues they were concerned with:

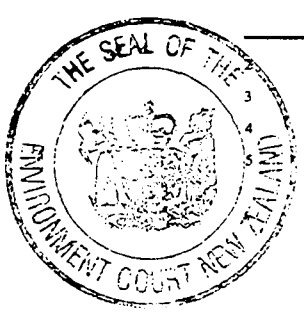
   - Transpower New Zealand Ltd (RMA 1260/98);
   - Contact Energy Ltd (RMA 1401/98); and
   - Gibbston Valley Estate Ltd[2].

   During the hearing Central Electric Limited (now Delta Electric Ltd) - the referrer in RMA 1290/98 - withdrew its reference with regard to Part 4 of the revised plan. Thus the only utility company that took an active part in the hearing was Telecom NZ Ltd ("Telecom").

5. In addition to the referrers there were other parties[3] and interested persons[4] to WESI's three references. We need not identify them individually here[5]. They are (with two exceptions) landowners as individuals or groups in the district who are concerned with (and oppose) the changes sought by WESI. The exceptions are:

   (a) The Upper Clutha Environment Society Inc ("UCES") which supports WESI but with a particular interest in the Wanaka/Hawea/Makarora area;

   (b) The Community Association of Glenorchy which appeared on Thursday 29 July 1999 (having earlier been confused about the venue) to make a general submission on the 'extreme importance' of the landscape in its area.



Under section 274 RMA.
Under section 271A RMA.
Under section 274 RMA.
They are listed under 'Appearances' at the start of this decision.

and Hawea and the rivers that flow into or out of them. To that extent this decision is geographically limited[6] although many of the policies we establish may prove to be applicable on a district-wide basis.

[6] Under section 73(3) a district plan may be prepared in territorial sections.

Chapter 2 : Background

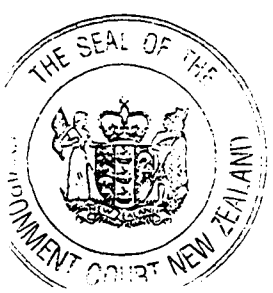
The scope of the hearing

7. Part 4 of the revised plan identifies the district-wide issues under these headings:

   (1) Natural Environment
   (2) Landscape and Visual Amenity
   (3) Takata Whenua
   (4) Open Space and Recreation
   (5) Energy
   (6) Surface of Lakes and Rivers
   (7) Solid and Hazardous Waste Management
   (8) Natural Hazards
   (9) Urban Growth
   (10) Monitoring, Review and Enforcement

   These ten issues are numbered consecutively as sections 4.1 to 4.10 of Part 4 of the revised plan. The revised plan[7] was unclear about these, listing some headings but not others at the start of Part 4. We will use our powers, under section 292(1)(a) of the RMA, to remedy the defects and/or uncertainty by listing all subjects in order in the amended Part 4 of the district plan.

8. There are outstanding references to this Court in relation to section (1) but those mostly relate to specific areas, mainly in the high country, and so it is unnecessary for us to resolve them in the meantime. The exceptions are dealt with briefly later in this decision[8]. There are no



[7] Paragraph 4.1.2 [p4/1].
[8] See Chapter 5 of this decision: The Natural Environment of the District.

references in relation to section (3) of Part 4, and only limited references in relation to sections (4) and (6) which we do not deal with here. Finally there are no references in relation to issues (7), (8) or (10).

9. Pre-hearing conferences on the references had been carried out to identify as many of the genuinely district wide issues as possible and to hear the disputed issues as soon as possible. From the list, issues set down for hearing were therefore:

(1) Nature Conservation Values (in part)

(2) Landscape and Visual Amenity

(5) Energy

(9) Urban Growth

- together with two further issues. A new issue (11) "Social and Economic Wellbeing" was sought by WESI in its reference RMA 1043/98. Confusingly this was identified by WESI as Part 4.9 of the revised plan, but in fact it did not seek to amend the existing Part 4.9 - "Urban Growth" - of the revised plan at all. Finally there is a district-wide issue arising out of Part 15 (subdivision, development and financial contributions) of the revised plan through the reference by Messrs Clark Fortune McDonald. Even in relation to the subject issues heard we should record that our decision only relates to identification of issues and stating objectives and policies. In particular the decision does not identify zone boundaries nor set out any changes to the rules in the revised plan.

10. Because, prior to the hearing, there was some doubt over the scope of the WESI references, the Court issued a minute dated 18 June 1999 to the parties. This described the substantive issues as including:

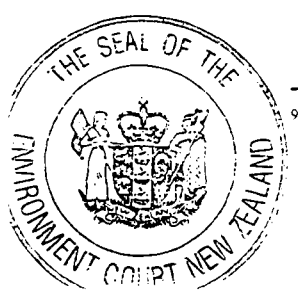
(a) What, if any, areas of the district are outstanding landscapes for the purposes of section 6?

(b) Whether there are other issues under section 5(2) of the RMA and/or other paragraphs of section 6.

11. After we had heard evidence from WESI concerning new urban development, counsel for the Minister for the Environment ("the MFE") drew our attention to the fact that the MFE had filed a reference[9] on the issue of new urban development but that was not yet set down for hearing. Accordingly we adjourned parts of the hearing to Monday 6 September 1999 so that the MFE's reference could be set down and heard at the same time. The matters adjourned were part of section 4.2.7 policies and 8 dealing with 'New urban development' and 'Established Urban Areas'. On 6 September 1999 we reconvened the hearing to deal with those policies, and in effect added the MFE's reference to those already being heard. Since the policy of concern to the MFE - on "new urban development" - is an integral part of Part 4 we have decided to release our decisions on all of the matters in Part 4.2 together (with some geographical restrictions), to avoid fragmentation of the issues and the policies that arise from them.

"Areas of Landscape Importance"

12. There is one further way in which we are limiting the scope of this decision. To explain that we need to give a little more background. The methods of implementation in Part 4 of the notified plan stated that areas of landscape importance should be identified as such and that all new buildings should be a discretionary activity in any Area of Landscape Importance. The notified plan then identified areas on the planning maps as "Areas of Landscape Importance". There were consequential rules in other parts of the district plan e.g. making



[9] RMA 1194/98.

subdivisions a non-complying activity[10] in an Area of Landscape Importance.

13. The revised plan dropped all reference to the Areas of Landscape Importance; and these areas were not shown on the revised planning maps either. As part of its reference WESI sought reinstatement of the implementation methods to Part 4 of the district plan and consequential amendment to the planning maps. After the close of WESI's case it was quite clear:

    (a) that the Areas of Landscape Importance were not identical with areas that qualified as nationally important under section 6(b) of the RMA;

    (b) that certain areas which are nationally important were excluded, and areas that are not so important were included;

    (c) even WESI and its witnesses openly acknowledged that the methodology was flawed in that there were areas included in the Areas of Landscape Importance which should not have been.

14. At the end of the first week we received a rather unusual application from most of the other parties. It was that part of WESI's reference which sought the reintroduction of the 'Areas of Landscape Importance' should be struck out without further evidence having to be called on grounds including (a) to (c) in the preceding paragraph. We declined to strike out WESI's reference on two grounds: first that the questions to be resolved were substantially of fact and degree; and secondly because, while the "Areas of Landscape Importance" method might be flawed it was at least an attempt to protect areas of national importance under section 6 of the Act. Subsequently the other parties (including the Council) argued that we would be able to achieve the necessary protection under section 6 of the Act - especially for "outstanding

[10] Notified Plan, Rule 15.2.3.4, p.15/12.

natural features and landscapes" - simply by statements in writing in an amended Part 4 to the district plan.

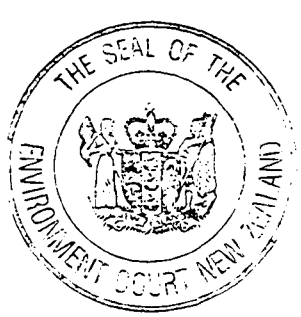
15. We have some doubts about their approach - as indeed did some witnesses - but we consider (as we stated at the hearing without any objection by any of the parties) that we can approach the issues in this way:

    (1) by stating the issues, objectives and policies for the relevant sections of Part 4 of the district plan in this decision;

    (2) by subsequently – not in this decision - deciding the relevant methods of implementation especially in Parts 5 (Rural issues) and 15 (Subdivisional issues) of the district plan;

    (3) while reserving the issue as to whether the district plan requires an extra zone called "Areas of Landscape Importance" over the district in order to protect either areas of national importance under section 6(b) or areas of amenity or other environmental values under section 7.

16. If WESI is satisfied (and it will have to make an election later) as to the adequacy of steps (1) and (2) we might never have to give a considered view on (3) and how the policies and rules on Areas of Landscape Importance could be improved so that they would work practicably. In the meantime we can only decide the objectives and policies and suggested method of implementation since the related rules come under references to be heard later. Only if the rural zone boundaries and the relevant rules are clearly stated will we be able to be sure that the purpose of the RMA is being met in relation to the landscapes of the district.



Chapter 3 : Cases for the Parties

17. Mr Lawrence, in his submissions on behalf of WESI stated the revised plan contains a 'vision' of community aspirations which states that

> *Community aspirations for the District involves (sic) ... basic elements [including]:*
>
> ....
>
> *(iii) identifying and enhancing those values or resources, both natural and physical, which provide the community character and image of the District and which in turn allows both individuals and communities to provide for their social and economic well being, both now and in the future.*
>
> *(iv) ensuring that growth and development does not compromise those resources and amenities which are the reasons why people choose to live in and visit the District*[11].

18. WESI's case was that the 'vision' was not carried through into the rest of the revised plan. Mr Lawrence submitted that there are insufficient objectives and policies, to result in landscape protection and the retention of cohesive urban form and character to which people can identify.

19. Mr Lawrence further submitted that WESI is in an awkward situation having to argue for a tool for landscape protection (Areas of Landscape Importance – "ALI") which it considers the best of a range of bad options. He said that WESI agrees with almost all the criticisms of ALI

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[11] Section 3.6 [revised plan p3/3]. We record the vision here simply as part of WESI's submissions. Visions are not valid parts of plans: ***St Columba's Environmental House Group v Hawkes Bay Regional Council*** [1994] NZRMA 560.

and agrees that ALI is not good enough, but it is now really the only method which will afford the District's landscape some real protection. He said there is near unanimous agreement among professional witnesses, even from the Council's own staff, that the revised plan is not adequate to protect the District's landscape.

20. He further submitted that the ALI are a total package containing rules e.g. residential activities being non-complying. Mr Lawrence said that assessment matters are critical to an evaluation of whether a policy will or will not afford protection. WESI believes that the revised plan lacks rules or assessment matters that give the Council discretion to refuse a 20 hectare (or even 4 hectare) subdivision with attendant residential activity on grounds of landscape. Mr Lawrence said that WESI agrees with witnesses that the entire rural area is of landscape importance under section 6(b) of the Act.

21. WESI agrees that a discretionary regime across all of the Rural General Zone is preferable to the non-complying safeguard of the ALI. Mr Lawrence submitted that the Court may like to consider requesting that the Council reconsider the issue ***Kaitiaki Tarawera Inc v Rotorua District Council***[12]. He said that protection of the landscape resource (in a section 5 sense) is especially important given the stated intention of the Council to cope with residential growth by rural residential developments.

[12] A7/98; 4 ELRNZ 181.

22. Mr Lawrence submitted that to exercise a discretion on all activities in the Rural General Zone with respect to landscape requires the following:

> *"(a) Rules that provide for a discretion. ...*
>
> *(b) ... A clear definition of the meaning of landscape values.*
>
> *(c) That the extent of the phrase "outstanding landscape" is made clear. The Society is of the view that all of the landscapes in the District are important. Should there be or can there be a difference between "important" and "outstanding" landscapes.*
>
> *(d) That the meaning of the term "landscape feature" is clear and the relationship to the wider landscape is understood. It must be remembered that councillors exercising discretion will not have the benefit of all the expert landscape evidence provided to this Court to aid them.*
>
> *(e) ... Landscape value is made up of several elements. All ... need to be part of the assessment matters, so council can exercise its discretion in respect of each one. ...*
>
> *(f) ... To evaluate the ecological, sensual [sic] and cultural groups of landscape values some "across the district measure" is required. [WESI] believe[s] that this can be achieved by the mapping of values which when overlaid provide the basis for assessment. ... Without such tools the assessment becomes the subjective whim of those exercising the discretion. ..."*

23. If the above prerequisites cannot be met then WESI wants ALI "warts and all" to be used. The rules with the ALI make new residential activity a non-complying use, make all other buildings (accessory to a

permitted or controlled use) discretionary, and allow limited earthworks and tree planting under site standards. Mr Lawrence said that WESI does not believe the notified plan implies that areas outside the ALI have no landscape values. WESI accepts that ALI should be extended at Lake Hayes and that the higher terraces at Gibbston could be excluded from the ALI.

24. One final but significant issue identified by Mr Lawrence is that over the management period[13], the process of tenure review of land held under the Land Act 1948 may freehold much of the land held in Crown leases that has not been developed, involving many of the districts prominent landscapes, particularly on higher ground. He produced a letter (without objection from other parties) from the Department of Conservation to WESI advising that it will only be in exceptional circumstances that the Department of Conservation will consider the Crown retaining land in the low to mid altitude range (less than 900 metres) for landscape reasons alone. Mr Lawrence submitted that therefore in the near future freehold land available for subdivision in the District, in highly visible places, will dramatically increase.

25. Mr Ralf Kruger, a qualified landscape architect with a tertiary qualification from Germany, was called by WESI to give evidence. He has been a self employed landscape architect and planner since 1992 and has been based in Queenstown since 1994. Mr Kruger was of the view that the revised plan has a weakened philosophy compared to the notified plan. He said that while the revised plan sets itself the task of protecting the district's landscape, it is devoid of any background, tools

[13] 10 years: section 79(2) RMA.

and mechanisms to fulfil this task. He was of the opinion that whilst the Council has not to date undertaken a comprehensive, objective and defensible study of the District's landscape ecology, it has in the notified plan created tools, although arbitrary and incomplete, that can achieve the purpose of interim protection and can avoid the irreplaceable loss of a precious resource under immense development pressure. He said that the reasons given for removing the interim protection in the revised plan were:

(1) *Available studies were not undertaken to identify such areas.*

(2) *The Council can still decline any land use applications that will have an adverse effect on the landscape based on the objectives and policies of the district Plan and Part II of the RMA.*

(3) *Areas of landscape importance are an unnecessary layer of regulation.*

(4) *The whole district is considered to be important*[14].

Mr Kruger was of the view that the deletion of policies 2 and 3 in the notified plan and the amendment of policy 1, is contradictory to that set out in (2) above. He stated that the Council has failed to comply with section 6 of the Act.

26. Mr Kruger, in acknowledging the confusion relating to outstanding natural features and landscapes, quoted from a paper of Mr Alan Rackham (who later gave evidence to us at this hearing) given at the 1999 New Zealand Institute of Landscape Architects Conference[15] where the latter said:

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14 QLD proposed district plan, Hearings Panel Decision, Issue 51 - Landscape and Visual Amenity, pp26-27 (abridged).

15 Rackham, A, *A Current Practice: Comparative Case Studies, Paper to the NZLIA Conference, March 1999, p17.*

The Queenstown Lakes District Plan does not identify the Remarkables as an outstanding landscape. Under the same Act an area of suburban Langs Beach in Whangarei District is identified as an outstanding landscape. I have the greatest difficulty in believing that the Remarkables in fact are unremarkable, and equally, I have the most serious doubts about whether an area of suburbia should be identified as an outstanding natural landscape under the RMA.

27. Mr Kruger went on to say that he has great difficulty with the often practised reduction of the landscape to its visual quality. He said that the Wakatipu landscape is unique in its richness of landforms, geological features, microclimates, vegetation patterns, and habitats for indigenous (and exotic) flora and fauna. It is a diverse and special landscape and a holistic approach to landscape assessment and evaluation has to reflect that. It was his opinion that the whole of the Queenstown Lakes District is an outstanding landscape in terms of section 6(b) of the Act.

28. Mr Kruger presented a map to the Court that identified what he said were the outstanding landscapes and natural features in the Wakatipu Basin. He said that the distances between the boundaries of these outstanding landscapes and natural features are very short, being 3 to 4 kilometres at the most. In addition, he told the Court that even within the zones that do not fit within outstanding landscapes, there are small scale outstanding natural features, such as Mill Creek and waterfall, the Hawthorn hedgerows, between Lake Hayes and the lower slopes of Coronet Peak, and the wetlands to the west of Hunter Road. Based on this he said that no point in the Wakatipu Basin is any further than 1.5 to 2 kilometres from an outstanding natural feature or landscape. In Mr

Kruger's opinion the size and the density of outstanding natural features and landscapes is justification enough to describe the entire area as an outstanding landscape. He suggested to the Court that the whole of the district should be accepted as an outstanding landscape on an interim basis for the purpose of reaching a decision on this case.

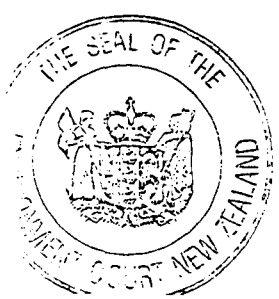
29. Mr Kruger said that the landscape, its scenic values in particular, have always been the one and only resource for Queenstown, being a national and international destination of high repute. He quoted a decision of this Court presided over by Judge Kenderdine where it stated:

> *...allowing the quality of the landscape to be reduced little by little, by allowing unsympathetic development ... will reduce, in the long term, the overall attractiveness of an area which is already so important for the economic future of the Queenstown district ...*[16].

Mr Kruger discussed the threats to landscape. He explained how in his view subdivision into small rural residential lots will produce:

> *...alien rows of quite frequently totally alien plants [which will] carve up the landscape into arbitrary compartments governed by lot sizes and surveyor's practice.*

30. He also noted that in his experience little consideration is given by the Council to the impact of roads, driveways and earthworks on the



16 ***Crichton v Queenstown Lakes District Council*** W12/99, p12.

landscape. He said cuts made into the land for driveways and building platforms create visual problems and due to the steepness, result in continuous erosion and difficulty in revegetating the area. Weed problems usually follow, which with poor land management, results in the invasion of weeds into neighbouring properties.

31. With respect to buildings Mr Kruger said that there are two aspects that need to be considered when looking at buildings in rural areas. Firstly, would any structure (no matter the size, shape and design) have a negative effect on the particular landform and land unit? Secondly, can appropriate design mitigate an adverse effect? He said that at present the reality of residential development in Queenstown is that buildings do not have a functional part in farming operations, but are instead extremely large and ostentatious, which in his view the landscape is not capable of absorbing.

32. Mr Kruger stated that forestry can alter an existing landscape dramatically due to the monotonous use of a single species and the shape and size of the planting. He gave as an example the forestry block on the lower slopes of the Coronet Peak Range, where the formerly cohesive tussock grassland slopes are now overtaken by a monoculture Douglas Fir forestry plantation, in his view showing no regard to landforms at all. He said the impact is enormous with the block being visible from many parts of the Basin. He was of the view that in time it will create a seed source for the spread of the species to formerly unthreatened valleys and mountain slopes and will have a major negative impact on the biosecurity of the district.

33. Mr Kruger was of the view that a lot of the activities in the district give very little consideration to ecosystems. He said that the main reason for this is the absence of significant knowledge about ecosystems,

particularly on a smaller scale. In his view there are few good habitats left in the Wakatipu and some are under direct threat at the moment with land being up for sale, an example being the wetland contained between Malaghan Road, Littles Road and the steep cliffs. In addition he said there is little acceptance of the conservation of historic open spaces such as parks, gardens, trees and other man-made features using vegetation. He said the best examples in the Wakatipu Basin are the Hawthorn hedgerows, especially in Speargrass Flat Road and Lower Shotover Road, created in the early 19th and 20th century. He said that there is a process of "nibbling" away at these and the loss of these would reduce or remove the microclimatic qualities created by the plantings and would alter the cultural significance of the relevant areas. Mr Kruger listed other threats to the area as including sewerage, utilities such as power lines and the Council not enforcing existing District Plan rules and monitoring conditions in the course of development.

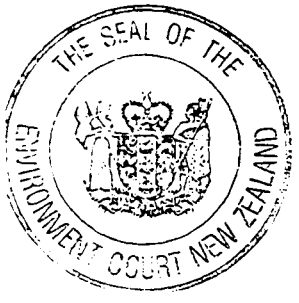
34. The only party supporting WESI was the Upper Clutha Environmental Society Incorporated. Mr J Haworth, the secretary of UCES and a qualified accountant gave evidence that he has lived in Wanaka for nine years working as owner/operator of a backpacker lodge. He said that the UCES is opposed to the deletion of the ALIs because visual aspects and amenity values of the icon landscapes in the District will be significantly and adversely affected by buildings, and other structures associated with the buildings.

35. Mr Haworth said that the zones in the revised plan offer the District's more vulnerable landscapes little more protection than any other rural zone in the district plan; the flat paddocks of Hawea Flat being zoned identically to Roy's Peninsula at West Wanaka. He submitted that to permit development in ALIs is to give these landscapes no more value than any other rural areas in New Zealand, when in reality these

landscapes are of national and international importance. Mr Haworth suggested that it is better to take the precautionary approach and zone the Areas of Landscape Importance now, possibly redefining the boundaries at a later date after studies have been done. He said that UCES acknowledges that the rules in the notified plan for ALIs may have been too restrictive with respect to some issues, but he said that in fact the rules permitted farming to continue much as it always has in the ALIs.

36. Mr Haworth gave the Court an illustration of the difference between the two plans in relation to an area on the south-western shoreline of Lake Wanaka, going north-westwards between Larch Hill and the Ironside Trig and bounded to the west by Mt Aspiring Rd. In summary he said that under the notified plan one extra house would be permitted, and under the revised plan 75 extra houses would be permitted. He then cited a case where the Environment Court[17] granted a resource consent in this area. The Court noted the issue of urban creep and said that it trusted that the small exception being granted would be the last residential extension around this side of the lakeshore under current policies. Mr Haworth stated that if the revised plan is approved in its current form then it will be contrary to the spirit of this decision.

37. He said that as an accountant and working in the tourist industry in Queenstown for nine years he has talked to thousands of visitors to the Upper Clutha and the overwhelming impression imparted to him is that the landscapes of Queenstown are wonderful and of national and international significance. He said that it is clear that the District's



[17] *Upper Clutha Environment Society Inc v Queenstown Lakes District Council* C12/98.

economy largely depends on the tourist industry and this in turn depends on the District's landscapes. Mr Haworth also submitted that it is interesting to note that Wanaka's recent economic success has been achieved without the need, by and large, to encroach on the icon landscapes in the area. The transitional plan mostly restricts development, other than farming, in key landscape areas and rural zones in general.

38. Mr Haworth finished his evidence by noting that the Minister of Conservation and the New Zealand Tourism Board accept the principle of zoning by ALIs. He also noted that the Consulting Surveyors of New Zealand in their submission to the notified plan said:

> *recognition and protection of significant natural features should not be left until such time that the process of land subdivision and development occurs. Such recognition and protection should be identified on planning maps or references in the district plan.*

39. The Council, the section 271A parties and the section 274 interested persons opposed WESI's reference in at least two fundamental ways. First, as we have said, they opposed the re-introduction of the areas of landscape importance. That issue has been adjourned in the hope it does not have to be resolved at all, although ultimately WESI will have to state whether it wishes to pursue that issue. Secondly, they opposed WESI's proposed amendments to the revised plan. No party expressly argued that the proposed plan should stay as it is; indeed every person who gave more detailed evidence about the objectives and policies conceded in their evidence-in-chief that various changes needed to be made to sections (1) and (2) of Part 4 of the revised plan.

40. Counsel for the parties opposing WESI's reference gave detailed submissions as to the interpretation of section 6(b) of the RMA. We refer to the most relevant parts of those submissions in the succeeding parts of this decision, and so do not need to say more here. Generally, the evidence opposing WESI's reference was either broad landscape and/or resource management evidence, or focused observations on conditions. We will concentrate on the former here since the latter are more conveniently referred to in the context of objectives and policies in Part 4 of the district plan[18].

41. The expert general landscape/resource management evidence for the parties opposing WESI was from:

- Ms R Lucas a landscape architect (called for the council)
- Mr P Rough, a landscape architect with 25 years experience (called for the council);
- Ms C Munro, a resource manager (called by the council);
- Mr A M Rackham, a landscape architect with extensive (and international) experience over the last 30 years (called for Crosshill and others);
- Ms S M Dawson, a resource manager with 20 years experience (called for Crosshill and others); and
- Mr J A Brown, a resource manager with 11 years experience (for Mr Todd's clients).

We also read the evidence of Mr P Baxter, a landscape architect, which was on the record by consent since no party sought to cross-examine

[18] See Chapters 9-12 below.

him. We do not overlook the other evidence we heard: we have considered it, but are of the view that the evidence of the witnesses above is most relevant to the general issues.

42. All the experts (and indeed counsel) accepted that the landscapes of the district are important, so we need not refer to extensive parts of their evidence in any detail. It was also common ground that many natural features of the district are outstanding within the meaning of section 6(b). Where the expert witnesses opposing WESI's case all struggled was in relation to the bounds of the landscapes which actually qualify under section 6(b).

43. Despite the fact that our directions[19] from the pre-hearing conference had expressly stated that the identification of areas of outstanding natural landscape was an issue in the references, none of the experts called for the parties opposing WESI directly dealt with the issue, until Ms L J Woudberg in her evidence for the MFE in the third week of the hearing – when we heard the cases on "urban growth".

44. Although we raised the issue with counsel again, at the end of the first week of the hearing, none of them dealt with the issue in their submissions except for Mr More in the last two days of the hearing. In fact, it was witnesses for the parties other than WESI who identified procedural problems arising out of not identifying the section 6(b) landscapes. For example, the Council's landscape consultant Mr Rough admitted in his summary:

[19] See paragraph 10 above.

Both the 1995 and 1998 Proposed Plans made reference to the outstanding landscapes in Environmental Results Anticipated yet neither plan particularly identified what are the outstanding landscapes in the District. In terms of Section 6 of the Resource Management Act 1991 this would seem to be a deficiency in both plans. It is my opinion that this deficiency could be overcome by including a list in the Proposed Plan of outstanding natural features and landscapes as identified in the Otago regional landscape study and add to that list other obvious highly recognised features and landscapes or examples of what is deemed to be, within the District, outstanding natural features and landscapes. Such a list would include those natural features and landscapes which are widely accepted by the community as being outstanding. It is my opinion that such a list need not be exhaustive but it would need to be explicit so that the list established a threshold as to what the Council regarded to be an outstanding natural feature or landscape.

In further oral evidence-in-chief he suggested that the district plan should contain a list of criteria by which the quality of a landscape could be assessed. The other landscape witnesses and resource managers who gave evidence after him all agreed with that suggestion. The criteria he suggested were not clearly articulated but roughly follow the factors referred to in the ***Pigeon Bay***[20] case to which we shall refer later. Similar factors were referred to by Mr Rackham.

45. Ms R Lucas' evidence was primarily designed to show various inconsistencies with the 'Areas of Landscape Importance' identified in

[20] ***Pigeon Bay Aquaculture Ltd v Canterbury Regional Council*** [1999] NZRMA 209.

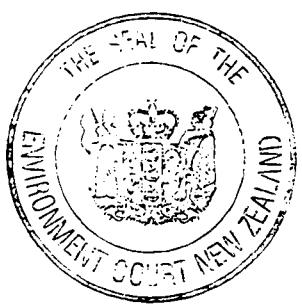
the notified plan. Her evidence largely succeeded in that, but we do not need to consider it further at this stage since we hope it will not be necessary to re-introduce (and correct) such a flawed method. The particular relevance of Ms Lucas' evidence was that she produced wide-angle photographs she had taken in July 1999 of three panoramas:

- the head of Lake Wakatipu looking past Glenorchy, and up the Rees and Dart Valleys;
- Lake Hayes looking west past Slope Hill, with vineyards in the foreground; and
- a view over grasslands towards Lake Wanaka (invisible in the photograph).

These were the subject of considerable cross-examination for a number of witnesses.

46. In the witness box Mr Rackham was a careful and thoughtful witness, although his written evidence did not go into the specifics. It was clear from his evidence that he has given a good deal of general consideration as to how to apply a landscaper's assessments to plans under the RMA. He stated:

> *My work with a wide range of Districts has led me to the view that in most instances, to be effective, a very thorough landscape investigation is necessary when the District Plan is to contain landscape maps and related rules. It is not adequate to patch together past studies and reinterpret past findings. Consequently, in the ... [district] my view is that if policies and rules are to be spatially defined (mapped), then a new and detailed landscape study would be required. This would be a major exercise and would be likely to result in a very detailed and complex set of*



landscape findings (given the complexity of the landscape). To be meaningful the scale at which landscape boundaries were defined would need to be very fine grained.

I have discussed with Ms Dawson the feasibility of preparing plan provisions based on such an exercise. She has impressed upon me the difficulties that a Plan drafter, and potentially the district Plan users, would be likely to encounter. I accept that this might well be the case in this District and that the usefulness of such a study could not be guaranteed.

In the circumstances (that the ALI are inappropriate and that the findings of a comprehensive landscape study would have serious difficulties in terms of the district Plan's preparation and functions), I have discussed with Ms Dawson the acceptability of relying on well-crafted objectives, policies and rules without reference to maps. I understand that these mechanisms could be used to protect landscape values and could enable development to be located in appropriate locations and with adequate design controls. I have reviewed Ms Dawson's evidence and consider the changes she has recommended to the policies would be a substantial improvement on both the current Proposed Plan and the district Plan were it to be amended to meet the reliefs sought by the Wakatipu Environmental Protection Society. I remain of the view that the district Plan should provide for the appropriate protection of Outstanding Natural Features and Landscapes. It should specify the characteristics and qualities that make them outstanding and it should have adequate provisions to ensure their protection.

47. Two aspects of that evidence concern us. The first is his concern about the use of landscape maps, and his conclusion that, in such maps, landscape boundaries would need to be shown at a large scale. It appears to us that, especially in rural areas, most maps in plans use a zoning technique. Zones are a mapping technique. If in this district zoning maps, for example showing the extent of the Rural zone, are to be used, then that is at first sight an even cruder tool than the ALI for protecting areas of national importance under section 6(b) of the Act. The rural zones appear to be defined by elimination – they are not urban or commercial zones. Mr Rackhams's way of looking at the issues suggests either very detailed mapping, or a case-by-case assessment are the only two proper methods of assessing landscapes under the RMA. We are not sure that is correct, and return to this issue in Chapters 6 and 7.

48. That leads to our second, major, concern which is Mr Rackham's reservation:

> *I remain of the view that the [p]lan should provide for the appropriate protection of outstanding natural features and landscapes. It should specify the characteristics and qualities that make them outstanding ...*

We take from this that, even with Ms Dawson's changes, the revised plan does <u>not</u> provide for the appropriate protection of section 6(b) landscapes. Our understanding seems to be confirmed by the statement in his conclusion:

> *I strongly recommend that the ... plan should address the issue of outstanding natural features and landscapes.*

Even if we misunderstand what he was saying, it is clear that neither the revised plan nor Mr Rackham identifies the outstanding natural landscapes. He suggests some relevant general criteria but that is as far as he goes.

49. We did find useful Mr Rackham's answers when being cross-examined by Mr Lawrence, and questioned by the Court. To the former he recognised the importance of foregrounds to views (as one component of landscape) and to us he suggested:

> *... that we have a three level landscape in terms of:*
> - *outstanding landscape*
> - *the special but not outstanding landscape; and*
> - *specific places that clearly don't raise landscape issues and those third areas ... are ... within the Wakatipu Basin and within the area described as the Dalefield area.*

50. Mr Baxter's evidence was largely directed at establishing the inadequacies of the ALI's. We note however, the strength of his statement of what he identifies as a fundamental issue in respect of protection of the landscape character of the Wakatipu Basin:

> *... there are highly visible and outstanding landscapes within the valley that would be unable to absorb change and the maintenance of those landscapes is critical to the landscape character of the area.*

51. The evidence of other witnesses we will refer to as we need to in our consideration of the issues.

Chapter 4 : Preparation of the district plan under the RMA

52. A district plan must provide[21] for the management of the use, development and protection of land and associated natural and physical resources. It must identify and then state[22] (inter alia) the significant[23] resource management issues, objectives, policies and proposed implementation methods for the district. In providing for those matters the territorial authority (and on any reference[24] the Environment Court) shall[25] prepare its district plan in accordance with:

- its functions under section 31,
- the provisions of Part II,
- section 32,
- any regulations

and must have regard to[26] various statutory instruments.

53. In this case there are no relevant regulations. The only statutory instrument of relevance is the Otago Regional Council's Regional Policy Statement, and that is of limited assistance to the issues we have to decide in these proceedings because it expresses good intentions, but goes little further. Therefore the key matters for us to consider in the appropriate way in this case are:

(a) the integrated management of the effects of land use in the district[27];

(b) the control of subdivision of land[28];

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21 Section 75(1) and Part II of the Second Schedule to the RMA.
22 Section 75(1)(a) – (d).
23 Section 75(1).
24 Under clause 14 of the First Schedule to the RMA.
25 Section 74(1): See ***Nugent Consultants Ltd v Auckland City Council*** [1996] NZRMA 481.
26 Section 74(2).
27 Section 31(a).
28 Section 31(c).

(c) the necessity for, and efficiency and effectiveness of, any particular objective and policy[29];

(d) Part II of the Act.

54. Broadly speaking there are three substantive stages (ignoring procedural steps in getting to, and at, a hearing) in deciding the contents of a district plan in accordance with the matters identified above. They are:

(1) Identification of the facts, the significant issues[30] for the district arising out of those facts and then sequentially, the other contents of the district plan[31];

(2) The section 32 analysis[32] of the proposed objectives, policies and rules generated by (1); and

(3) The 'broader and ultimate issue'[33] as to whether *"on balance, we are satisfied that implementing the proposal[s] would more fully serve the statutory purpose than would cancelling [them] ..."*: ***Countdown Properties (Northlands) Ltd v Dunedin City Council***[34].

55. The second and third stages identified above are effectively the two 'tests' identified by the High Court in ***Countdown,*** and expanded as a general recipe. The present case highlights the obvious fact that even proposed objectives and policies (and rules) do not come out of

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29 Section 32(1).

30 Section 75(1)(a) and section 74.

31 Section 75.

32 See ***Countdown Properties (Northlands) Ltd v Dunedin City Council*** [1994] NZRMA 145 (HC) at 179; ***Marlborough Ridge Ltd v Marlborough District Council*** [1998] NZRMA 73.

33 ***Countdown*** at 179.

34 [1994] NZRMA 145 at 179.

nowhere. There is a prior stage[35] which is the identification of the facts and of the significant resource management issues of the district. When facts are contested it is a fundamental part of the quasi-judicial process of a local authority to make findings of fact. Then the requirement to identify the 'significant issues' is an express requirement in section 75(1)(a) of the Act. Stating the issues can only be achieved if the relevant facts or most of them are ascertained at least to the point where issues can be formulated. On appeal, the Environment Court does not have to determine all the facts and/or issues: many will already be stated in a proposed plan and may be unchallenged by reference. Others may need to be determined on the evidence if they are contested, or if, for some other reason, they have not been adequately defined. Of course determining the 'facts' may be a broad issue in a case under the RMA especially when it relates to landscapes.

56. In respect of a district council's functions, including integrated management of land, the starting point for the first stage must be to identify the facts and the appropriate matters[36] to be considered. In particular it is fundamental to consider Part II of the Act. That means it is mandatory[37] to identify the matters of national importance[38]. We do not see how that can be achieved without identifying (necessarily with a broad pencil, but with as much accuracy as possible) the boundaries of the areas concerned. Once the coastal environment, wetlands, lakes, rivers, outstanding natural features or landscapes, areas of significant vegetation, significant habitats of indigenous fauna, or Maori ancestral

35 Stage 1 in the preceding paragraph.
36 Section 75(1).
37 Section 74(1).
38 Section 6.

lands, water, sites, waahi tapu, and other taonga[39] have been identified the general issues tend to be self-generating: how can those resources be protected from inappropriate use or development or have access to them maintained and enhanced, or be recognised and provided for, as the case may be? In practice, it may assist to focus the issues by posing more specific questions. Only then should the Council turn to the next sub-stages in the process: considering the appropriate objectives, policies and methods of implementation.

57. In this particular district – renowned for the quality of its scenery on which, it is common ground, a huge part of its economy depends – we hold that the Council should, as part of stage (1) in preparing its plan, have identified the outstanding natural landscapes and any other landscapes to which particular regard should be had. It needed to identify the landscapes that qualify under section 6(b) and/or section 7(c) and 7(f) of the RMA so that it could identify the issues relating to the management of effects on landscapes (amongst other values)[40].

58. In this case, in the revised plan, and in its evidence to us, the Council has failed to carry out an essential step in the process – the fact finding. None of the parties opposing WESI – Federated Farmers of NZ (Inc) ("Federated Farmers") excepted – have given the Court evidence as to the extent of the outstanding natural landscapes of the district. On the other hand, WESI has given such evidence (as has the UCES in a limited way) and we shall consider that in due course.

39 Section 6.
40 Clause 2(c) of Part II, Second Schedule to the RMA.

Chapter 5 : The Natural Environment of the District

Nature Conservation Values

59. There are several matters under the general heading of 'Natural Environment'[41] which we need to determine here in addition to those which are the subject of references by the Royal Forest and Bird Protection Society Inc and others[42] which are to be heard separately.

60. The list of nature conservation values in Objective 1[43] includes:

> *The protection of outstanding natural features.*

That wording raises the point why *"outstanding natural landscapes"* are not included in the list. Logically, it seems to us, both landscapes and features should be in; or both should be out on the ground they are dealt with in Part 4.2 (Landscape and Visual Amenity). The argument for having them both in is that outstanding natural landscapes (and features) may well have 'nature conservation' values as well as 'landscape and visual amenity' values. Arguably the natural values are a very important part of what makes an outstanding natural landscape or feature. We reserve leave to any party and interested person in this case to make an application (either way) under section 293 of the Act.

61. The Council's main resource management witness Ms Hume was concerned that there should be a link (in the district plan reflecting reality) between the values of landscape and their intrinsic values as ecosystems[44]. She considered that we should add two further policies

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41 Part 4.1 [Revised plan pp4/1 – 4/5].
42 RMA Nos: 1225/98; 1398/98; 1395/98; 1753/98.
43 Para 4.1.4 [revised plan p4/2].
44 Section 6(d).

1.18 and 1.19[45]. We agree that policies which emphasize the link are appropriate but again do not insert them until we have heard further argument on our jurisdiction to do so, or until we receive an application under section 293. In any event the policies as worded seem to be simply landscape policies, rather than linking areas.

62. WESI seeks two changes to the implementation methods[46] in respect of nature conservation values. These are the addition of:

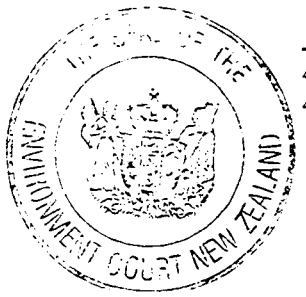
- *The provision of rules to control the clearance or felling of identified hedgerows*

...

- *In relation to geological and geomorphological features of scientific importance:*
  to control, by way of resource consents, activities which involve earthworks, vegetation clearance and plantings and have the potential to adversely affect these sites.

63. As for the hedgerows, these were identified by Mr Kruger as being hawthorn hedges along Speargrass Flat Road (amongst others). The evidence of Mr A D George – a policy planner giving evidence for the Council - was that WESI's amendment was inconsistent with the earlier policy:

> *1.5 To avoid the establishment of, or ensure the appropriate location, design and management of, introduced vegetation with the potential to spread and naturalise; and to*



45 To the revised plan on p4/3.
46 Part 4.1.4 [Revised plan pp4/3 and 4/4].

encourage the removal or management of existing vegetation with this potential and prevent its further spread. [47]

Further, hawthorn[48] is banned from sale, distribution and propagation under the Otago Pest Management Strategy. For both reasons we agree with Mr George that WESI's suggested method should not be inserted in the district plan. WESI's proposed amendments to Part 4.1.4's suggested site standards and assessment matters are, in consequence, not accepted.

64. This issue of wilding plants leads us to mention an inconsistency in the policies of the revised plan which seek to control the spread of introduced plants. In addition to the policy quoted above, there is a further objective and policy in Part 4 which state respectively:

- ***Wilding Trees***
  To minimise the adverse effect of wilding trees on the landscape by:
  - *supporting and encouraging co-ordinated action to control existing wilding trees and prevent further spread*[49].

- *The limitation of the spread of weeds, such as wilding trees*[50].

All the above seem inconsistent with the nature conservation policy which states:

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47 Part 4.1.4 Objectives and Policies [Revised plan p4/3].
48 *Crategus manogyna.*
49 Part 4.2: Landscape and Visual Amenity Policy 4.2.5(10) [Revised plan p4/8].
Part 4.3 Takata Whenua Objective 4(2) [Revised plan p4/13].

1.17 To encourage the retention and planting of trees, and their appropriate maintenance.[51]

65. It seems to us this would be an appropriate place to exercise our powers under section 292(1) of the RMA and insert the word *"native"* before *"trees"* in policy 1.17 since that seems the intention of part 4.1. But, in case we misunderstand the Council's intentions, we reserve leave for further submissions on that issue.

66. As for the second change to the methods of implementation of policies on nature conservation values, it does seem anomalous that there are various references in policies 1.1, 1.4 and 1.12 to geological and geomorphological features but no methods of implementation in respect of the general objective which is *"[t]he protection of outstanding natural features"*[52]. However, we see no need to have a separate method of implementation. The answer is to amend existing method (i)[53] by adding the words:

or in areas containing geological and/or geomorphological features of scientific interest.

Air Quality

67. WESI sought a new policy 2.2[54] reading:

To support reduced air emissions from transport through consolidation of urban activities.

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51 Part 4.1.4 Policy 1.17 [Revised plan 4/3].
52 Part 4.1.4 Objective 1 [Revised plan p4/2].
53 Part 4.1.4 Implementation method (i) [Revised plan p4/3].
54 To be added after policy 2.1 [revised plan 4/4].

We accept Ms Hume's evidence for the Council that there is no evidence that consolidation of urban activities will maintain or improve air quality. She even suggested the opposite might be true. We do not accept that this policy should be added. There are also difficulties with this policy under section 32 and we return to that in the penultimate chapter.

Chapter 6 : Landscape in the RMA

Introduction

68. New Zealand's landscapes are natural and physical resources which are required to be managed sustainably under the RMA. We now set out the important provisions in the Act dealing with landscapes. First, when preparing a plan a territorial authority has to consider the actual or potential effects of any use, development or protection on[55]:

> *natural, physical, or cultural heritage sites and values, including landscape, land forms, historic places and waahi tapu.*

It appears from that grammatically confusing clause that landscapes may have natural, physical and cultural values and are themselves resources. We infer that the three-way distinction is not intended to be hard edged for two reasons:

(a) the language of the clause is too loose for that; and

(b) in describing landscapes we recognize that they may contain all three qualities[56] simultaneously.

69. Secondly, the territorial authority is to recognise and provide for[57] (amongst other things):

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55 Second Schedule : Part II para 2(c).

56 Academic landscape experts almost regard as a truism the idea that 'nature' is a 'cultural construct'. Such statements are of some value in so far as they remind us of the cultural sensitivity of, and differences about, the issues (and even about what the issues are), but in the end they are not of much assistance in coming to practical decisions within the field of discourse constituted by specific legislation such as, in this case, the RMA.

57 Section 6.

(a) The preservation of the natural character of ... lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use and development:

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

Both section 6(a) and 6(b) are relevant in this case. We note that they do not entail that the natural character of lakes and rivers or nationally important features and landscapes are to be preserved or protected at all costs: ***Trio Holdings Ltd v Marlborough District Council***[58] and ***New Zealand Rail Ltd v Marlborough District Council***[59]. Further it is only "inappropriate subdivision, use and development" from which they are to be protected. Finally, while only section 6(b) refers to 'landscape;' section 6(a) makes it clear at least by inference that lakes and rivers have a special place in landscape, in that even if the natural values of surrounding land have been compromised, they and their margins are still to be protected anyway.

70. Thirdly the territorial authority is also to have particular regard to[60] (relevantly):

(c) The maintenance and enhancement of amenity values:

(d) ...

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

58 2 ELRNZ 532 [1997] NZRMA 97, 116.
59 [1994] NZRMA 70,85.
60 Section 7.

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

We have already commented that landscapes are themselves resources, or groups of natural and physical resources. We discuss shortly the link between landscapes and the environment (including amenity values).

71. The legal issues raised in submissions and/or the evidence are:

(1) What is a "natural feature" and a "landscape"?

(2) If one assumes that "landscape" is a holistic concept how does one avoid taking relevant factors into account twice if they already occur somewhere else in Part II of the Act?

(3) Are the section 6(b) landscapes

(a) any landscape; or

(b) any outstanding landscape; or

(c) any outstanding natural landscape?

(4) Is a section 6(b) landscape assessed on a district, regional or national basis?

(5) If the correct interpretation of section 6(b)[61] refers to "outstanding natural landscapes" then are other important landscapes entitled to any consideration under the RMA[62]?

What is landscape?

72. In ***Pigeon Bay Aquaculture Ltd v Canterbury Regional Council***[63] the

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61 See question (3) above.

62 For example under section 7(c), 7(f) and/or 7(g).

63 [1999] NZRMA 209 at 231-232 (para 56) – based on a series of Marlborough aquaculture decisions by Environment Judge Kenderdine's division of the Court including: ***Trio Holdings Ltd*** 2 ELRNZ 353 (W103A/96); ***Browning*** W20/97; ***NZ Marine Hatcheries (Marlborough) Ltd*** W129/97; ***Kaikaiawaro Fishing Co Ltd*** 5 ELRNZ 417 (W84/99).

Court identified the following aspects as relevant to assessment of the significance of landscape:

(a) *the natural science factors – the geological, topographical and dynamic aspects of the landscape;*

(b) *its aesthetic values including memorability and naturalness;*

(c) *its expressiveness - how obviously the landscape demonstrates the formative processes leading to it;*

(d) *transient values - occasional presence of wildlife; or its values at certain times of the day or of the year;*

(e) *whether the values are shared and recognised;*

(f) *its value to tangata whenua;*

(g) *its historical associations.*

Roughly (a) and (d) correspond to what is seen or perceived; and (b), (c) and (e) to (g) to how people perceive it[64].

73. During the hearing of these references we raised with the parties the question whether some of those matters should correctly be omitted as aspects of landscape for the purpose of the RMA, for two reasons:

(a) at least some of the aspects identified are not 'natural';

(b) some aspects are expressly to be considered elsewhere in sections 6 and 7 of the Act.

Basically all counsel (but not Mr Lawrence) appeared to agree that the ***Pigeon Bay*** criteria were too widely framed because:

- aesthetic values fall to be considered when having particular regard to the maintenance and enhancement of amenity values[65];

64 See ***Browning v Marlborough District Council*** W20/97.

65 Section 7(c).

- value to tangata whenua is expressly stated to be of national importance elsewhere[66];
- historical associations are also recognised and provided for[67] as heritage values.

However, upon reflection, we consider that such an approach is over-simplistic for reasons we will endeavour to state shortly. In the light of counsel's submissions (not agreed to by Mr Lawrence for WESI) we have decided to look at what the RMA requires in respect of landscape.

74. The dictionaries define a landscape as:

- *1. natural or imaginary scenery, as seen in a broad view.*
- *2. a picture representing this ...*[68]

- *A portion of land which the eye can comprehend in a single view; a country scene*[69]*;*

We do not consider the dictionary definitions are determinative, especially since they are not consistent in themselves. Further, even if one considers landscapes in the loose sense of 'views of scenery' the first question that arises is as to where the view is from. One cannot separate the view from the viewer and their viewpoint. We also bear in mind that the word 'landscape' does not necessarily require a precise definition:

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66 Section 6(e) and this relationship is also relevant under section 7(h) and section 8 of the Act.

67 Section 7(e).

68 The Concise Oxford Dictionary Eighth edition (1990).

69 University English Dictionary cited by Mr Goldsmith.

> *[T]he very act of identifying ... [a] place presupposes our presence, and along with us all the heavy cultural backpacks that we lug with us on the trail*[70].

Discounting for a moment the undoubted existence of differing cultural viewpoints, it is obviously not practical or even possible to enumerate all views from all viewpoints. Fortunately the RMA does not require all landscapes to be taken into account as matters of national importance since there are some qualifying words in section 6(b). However, whilst a precise definition of 'landscape' cannot be given, some working definition might be useful.

75. In addition to the dictionary definitions, and the other use of the word 'landscape' in the RMA[71], we also have to bear in mind the broader context of the RMA. The word 'landscape' is used in Part II of the Act, of which Greig J. stated in ***NZ Rail Ltd v Marlborough District Council***[72]***:***

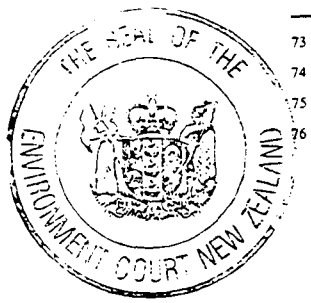
> *This Part of the Act expresses in ordinary words of wide meaning the overall purpose and principles of the Act. It is not, I think, a part of the Act which should be subjected to strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used. There is a deliberate openness about the language, its meanings and its connotations which I think is intended to allow the application of policy in a general and broad way.*

70 ***Landscape and Memory*** Schama S, (Fontana 1996).
71 Second Schedule quoted in para 68 above.
72 [1994] NZRMA 70,86 (HC).

76. The definition of 'environment' – including the sub-definition of 'amenity values' states[73]:

> *'Environment' includes-*
>
> *(a) Ecosystems and their constituent parts, including people and communities; and*
>
> *(b) All natural and physical resources; and*
>
> *(c) Amenity values; and*
>
> *(d) The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters.*
>
> *'Amenity values' means those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes.*

77. The most important aspects of these definitions in this context, is their comprehensiveness and their cross-referencing quality. We consider it is useful to consider 'landscape' as a large subset of the 'environment'. We have already observed that 'landscape' involves both natural and physical resources themselves[74] and also various factors relating to the viewer and their perception of the resources. These aspects seem to fit within 'amenity values'[75] and into the category of *"social ... and cultural conditions which affect the matters in paragraphs (a) to (c) ... or which are affected by those matters*[76]*."*



73 In section 2 of the RMA.
74 Which fall into categories (a) and (b) of the definition of 'environment'.
75 Para (c) of the definition of 'environment': section 2 RMA.
76 Para (d) of the definition of 'environment': section 2 RMA.

78. We also regard 'landscape' as a link between individual (natural and physical) resources and the environment as a whole. It is a link in two ways: first in that it considers a group of natural and physical resources together, perhaps in an arbitrary cultural lumping as a 'landscape' rather than in any ecologically significant way; and secondly it emphasizes that our attitudes to those resources are affected by social, economic, aesthetic and cultural conditions.

79. It is wrong, in the end, to be overly concerned with 'double-counting', that is, whether the values identified in section 7 should also be taken into account under section 6. That is to adopt an over-schematic approach to sections 5 to 8 which is not justified. Those sections do not deal with issues once and once only, but raise issues in different forms or more aptly in this context, from different perspectives, and in different combinations. In the end all aspects go into the evaluation as to whether any issue being considered achieves the purpose of the Act.

80. Consequently, we have no reason to change the criteria stated in ***Pigeon Bay*** in any major way. We list them here for three reasons: first, in (a) to add 'ecological' components and to delete 'aspects' and substitute 'components', and secondly to correct the grammar in (c) and (d); and thirdly in (c) to give an alternative for 'expressiveness'. The corrected list of aspects or criteria for assessing a landscape includes:

> *(a) the natural science factors – the geological, topographical, ecological and dynamic components of the landscape;*
>
> *(b) its aesthetic values including memorability and naturalness;*
>
> *(c) its expressiveness (legibility): how obviously the landscape demonstrates the formative processes leading to it;*
>
> *(d) transient values: occasional presence of wildlife; or its values at certain times of the day or of the year;*

(e) whether the values are shared and recognised;

(f) its value to tangata whenua;

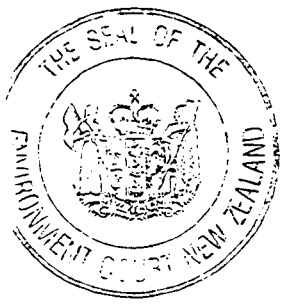
(g) its historical associations.

We should add that we do not regard this list as frozen – it may be improved with further use and understanding, especially of some of the issues we now explore. One aspect that troubles us in particular is that the dictionary senses of landscape as a view of scenery or, perhaps, a collection of views – while included in (b), is given less emphasis than we consider the RMA might suggest. Another matter that needs further consideration is whether (b) might be better expressed in terms of all the amenity values[77] rather than just one quality – aesthetic coherence.

Outstanding natural landscapes

81. We now turn to consider how landscapes come within section 6(b) of the Act. Section 6(b) refers to 'outstanding natural features and landscapes'. As a preliminary point, it was common ground between counsel that the words 'outstanding (and) natural' qualify 'landscapes' as well as 'features'. That is consistent with the way qualifying adjectives have been applied in the Act. For example:

(1) In both section 6(a) and 6(b) the phrase 'inappropriate subdivision, use, and development' occurs. That has always been interpreted to mean 'inappropriate subdivision, inappropriate use, and inappropriate development'.



[77] See definition in section 2 RMA.

(2) In section 6(e) the word 'ancestral' qualifies each of 'lands, water, sites, waahi tapu, and other taonga': ***Haddon v Auckland Regional Council***[78].

(3) In section 6(c) where the phrase 'significant indigenous vegetation' occurs, Parliament has made it clear that 'indigenous' does not qualify the following 'habitat' whereas 'significant' does, by repeating the word 'significant'. So 6(c) refers to:

> *(c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna.*

The meaning of 'outstanding'

82. The word 'outstanding' means:

- "conspicuous, eminent, especially because of excellence"
- "remarkable in"[79].

As Mr Marquet pointed out, the Remarkables (mountains) are, by definition, outstanding. The Court observed in ***Munro v Waitaki District Council***[80] that a landscape may be magnificent without being outstanding. New Zealand is full of beautiful or picturesque landscapes which are not necessarily outstanding natural landscapes.

83. A subsidiary issue is whether an outstanding natural landscape has to be assessed on a district, regional or national basis. Mr Goldsmith referred

78 [1994] 2 NZRMA 49.
79 Concise Oxford Dictionary (1990) p.485.
80 C98/97.

to a number of inquiries the Court has held into various Draft National Water Conservation Orders. These inquiries related to section 199(1) of the Act which involves the word "outstanding". In ***Re an inquiry into the draft National Water Conservation (Buller River) Order***[81] the Court accepted that the test as to what is outstanding is a reasonably rigorous one. The Court also referred to the Mohaka River case[82] in which a differently composed Tribunal agreed that the test is reasonably rigorous and went on to accept the submission that before a characteristic or feature could qualify as outstanding it would need to be quite out of the ordinary on a national basis. This test was upheld by the Planning Tribunal in the ***Inquiry into the Water Conservation Order for the Kawarau River***[83].

84. However, as we understand Mr Goldsmith's argument, the use of the word 'outstanding' in section 6(b) depends on what authority is considering it. Thus if section 6(b) is being considered by a regional council then that authority has to consider section 6(b) on a regional basis. Similarly a district council must consider what is outstanding within its district. By contrast a water conservation order is made under Part IX of the Act which is really a self-contained code within the RMA: it contains its own purpose and procedures including public notification on a national basis.

85. We agree: what is outstanding can in our view only be assessed – in relation to a district plan – on a district-wide basis because the sum of the district's landscapes are the only immediate comparison that the territorial authority has. In the end of course, this is an ill-defined

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81 C32/96.
82 ***Re Draft Water Conservation (Mohaka River) Order*** W20/92.
83 C33/96.

restriction, since our 'mental' view of landscapes is conditioned by our memories of other real and imaginary landscapes in the district and elsewhere, and by pictures and photographs and verbal descriptions of them and other landscapes.

86. The local approach is consistent with an identification of particular places: the unique landscapes of the given district. There are districts without the vertical dimensions of the Queenstown-Lakes district, but that does not lead to the result they do not have outstanding (natural) landscapes. Flatter landscapes may qualify, even though the test is still a rigorous one. A district may have no outstanding natural landscapes or features.

The meaning of 'natural'

87. To qualify under section 6(b) a landscape must not only be outstanding, it must also be 'natural'. The dictionary definition of 'natural' is:

(a) *existing in or caused by nature; not artificial (natural landscape)*
(b) *uncultivated; wild (existing in its natural state)*[84]

That definition is a little simplistic in our view: much more landscape has been affected by human activity than is commonly understood. The revised plan itself recognises that:

...[T]he downland lake basins have undergone more extensive modification. Maori settlement did occur around the inland lake

[84] Concise Oxford Dictionary (1990) p. 906

basin areas and also during this time much of the original podocarp and beech forests in the basins were destroyed by fire. The arrival of European settlers and the introduction of sheep in the 1860's led to major burning of native vegetation and scrub to enable stock to graze ... [85]

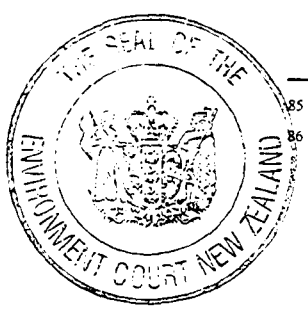
88. It is wrong to equate 'natural' with 'endemic'. In the context of section 6(a) the Planning Tribunal stated, in ***Harrison v Tasman District Council***[86]***:***

> *The word 'natural' does not necessarily equate with the word 'pristine' except in so far as landscape in a pristine state is probably rarer and of more value than landscape in a natural state. The word 'natural' is a word indicating a product of nature and can include such things as pasture, exotic tree species (pine), wildlife ... and many other things of that ilk as opposed to man-made structures, roads, machinery.*

We respectfully agree with that passage.

89. We consider that the criteria of naturalness under the RMA include:

- the physical landform and relief
- the landscape being uncluttered by structures and/or 'obvious' human influence
- the presence of water (lakes, rivers, sea)
- the vegetation (especially native vegetation) and other ecological patterns.



85 Para 4.1.3(i) [revised plan pp. 4/1].
86 [1994] NZRMA 193 at 197.

The absence or compromised presence of one or more of these criteria does not mean that the landscape is non-natural, just that it is less natural. There is a spectrum of naturalness from a pristine natural landscape to a cityscape.

Other important landscapes

90. Finally we should make it clear that while section 6(b) only protects outstanding natural landscapes that does not mean that lesser landscapes should not be considered and in some cases maintained. To the contrary, all landscapes need to be considered under sections 5(2) and 7(b), (c), (d), (f) and (g). Whether any resulting objectives, policies and methods pass the refining fires of section 32 is another issue.

91. An important point in respect of section 7 landscapes is that the Act does not necessarily protect the status quo. There is no automatic preference for introduced grasses over pine forest. Nor should it be assumed (on landscape grounds) that existing rural uses are preferable in sustainable management terms to subdivision for lifestyle blocks which could include restoration[87] of indigenous bush, grasses or wetlands, especially if predator controls are introduced. Just to show how careful one has to be not to be inflexible about these issues we raise the question whether it is possible that a degree of subdivision into lifestyle blocks might significantly increase the overall naturalness of a landscape (and incidentally reduce non-point-source pollution of waters from faecal coliforms, giardia etc). Logically there is a limit: the law of diminishing returns where too much subdivision leads to over-domestication of the landscape.

[87] See ***Di Andre Estates Ltd v Rodney District Council*** W36/97.

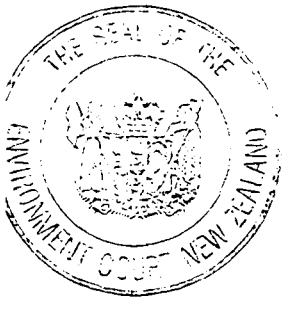
Chapter 7 : Landscapes of the District

92. In very broad terms we make a tripartite distinction in the landscapes of the district: outstanding natural landscapes and features; what we shall call visual amenity landscapes, to which particular regard is to be had under section 7, and landscapes in respect of which there is no significant resource management issue. We must always bear in mind that such a categorisation is a very crude way of dealing with the richness and variety of most of New Zealand's landscapes let alone those of the Queenstown Lakes District.

93. The outstanding natural landscapes of the district are Romantic landscapes - the mountains and lakes. Each landscape in the second category of visual amenity landscapes wears a cloak of human activity much more obviously - these are pastoral[88] or Arcadian landscapes with more houses and trees, greener (introduced) grasses and tend to be on the district's downlands, flats and terraces. The extra quality they possess that brings them into the category of 'visual amenity landscape' is their prominence because they are:

- adjacent to outstanding natural features or landscapes; or
- on ridges or hills; or
- because they are adjacent to important scenic roads; or
- a combination of the above.

These aspects mean they require particular regard under section 7. The third category is all other landscapes. Of course such landscapes may

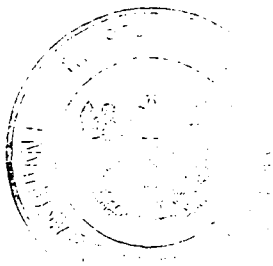


[88] Using 'pastoral' in the poetic and picturesque senses rather than in the functional ('pastoral lease') sense.

have other qualities that make their protection a matter to which regard is to be had[89] or even a matter of national importance[90].

94. It must always be borne in mind that all landscapes form a continuum physically and ecologically in the many ways they are perceived. Consequently we cannot over-emphasize the crudeness of our three way division - derived from Mr Rackham's evidence - but it is the only way we can make findings of 'fact' sufficient to identify the resource management issues.

95. We also consider it worth stating that landscapes outside the first two (section 6 and section 7) categories are not necessarily unimportant. The parties in this case are not just being chauvinistic when they state that all landscapes of the district are important. However it is important to realise that very often the best managers of landscape are landowners. It is difficult to manage landscape by committee - and most positive, imaginative landscaping comes from individuals left to work in their ways and with their own landscape architects. However retention of existing 'open space' qualities, especially those enjoyed passively by the public rather than landowners, are not so simply protected by the market, and hence the possible need for management under the RMA. Given that qualification the first stage in deciding these references is to find which landscapes of the district are outstanding natural landscapes and which deserve particular regard under section 7 as visual amenity landscapes.



89 Under section 7 RMA.
90 Under section 6 RMA.

Outstanding natural landscapes and features

96. We start our assessment by returning to the problem we identified briefly in the introduction to this decision. While almost everyone agrees that there are outstanding natural landscapes in the district, none of the parties other than WESI and Federated Farmers is prepared to say where they finish. Thus while the Remarkables mountains were on the whole agreed to be an outstanding natural landscape none of the witnesses for the other parties was prepared to say where the outstanding natural landscape terminated.

97. We consider that unwillingness has lead to a basic flaw in the case for all parties (other than WESI) in respect of landscape values. The RMA requires us to evaluate, as one relevant factor, the outstanding natural landscapes of the district so that appropriate objectives and policies (and implementation methods) can be stated for them. If the areas of outstanding natural landscape cannot be identified then how can objectives and policies (and methods) be properly stated for them?

98. Although we raised that issue with counsel at the end of the first week none of them dealt with it in their submissions at that time. Later[91] Mr More raised the same question. In fact it was witnesses for the parties other than WESI who identified the procedural problems we face. For example the Council's landscape consultant, Mr Rough, admitted in his summary:

[91] In the third week – he had not been present earlier.

Both the 1995 and 1998 Proposed Plans made reference to the outstanding landscapes in Environmental Results Anticipated yet neither plan particularly identified what are the outstanding landscapes in the District. In terms of Section 6 of the Resource Management Act 1991 this would seem to be a deficiency in both plans. It is my opinion that this deficiency could be overcome by including a list in the Proposed Plan of outstanding natural features and landscapes as identified in the Otago regional landscape study and add to that list other obvious highly recognised features and landscapes or examples of what is deemed to be, within the District, outstanding natural features and landscapes. Such a list would include those natural features and landscapes which are widely accepted by the community as being outstanding. It is my opinion that such a list need not be exhaustive but it would need to be explicit so that the list established a threshold as to what the Council regarded to be an outstanding natural feature or landscape.

99. One course for us to take would be to request further evidence from the parties. However, most take the view that what they see as the necessary studies would take months, perhaps years, and a great deal of money to carry out. In the meantime in our view the district needs a plan - especially for the Wakatipu basin - as a matter of urgency. Further, it seems to us that the attitude of the parties opposing WESI demonstrates a lack of understanding of what the RMA requires: ascertaining an area of outstanding natural landscape should not

(normally) require experts[92]. Usually an outstanding natural landscape should be so obvious (in general terms) that there is no need for expert analysis. The question of what is appropriate development is another issue, and one which might require an expert's opinion. Just because an area is or contains an outstanding natural landscape does not mean that development is automatically inappropriate[93].

100. The simplest evidence on this issue came from Mr J H Aspinall who was a witness for Federated Farmers (NZ) Inc. He did not qualify himself as an expert; he is a farmer in the district (at Mt Aspiring station). On the other hand we do not consider that we should be precluded from considering his view since we do not consider that the question of whether there are outstanding natural landscapes in the district should be left solely to experts. In Mr Aspinall's view the district's truly outstanding landscapes are in the Upper Rees, Upper Dart, Upper Matukituki and Wilkin Valleys and thus are managed under the National Parks Act 1980.

101. In coming to our conclusions below, we generally prefer the evidence of Mr Kruger over those of the other landscape witnesses. That is not because we accept all of Mr Kruger's evidence – we do not – but because he at least was prepared to state where, in his opinion, some of the district's landscapes begin and end. His evidence related more to the general Wakatipu area, and the Wakatipu basin in particular. Even there he had some difficulties – he did not know, as Mr Marquet's cross-examination of him revealed, where the southern boundary of the district was.

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92 There may be exceptions where a landscape is flatter or such a large geological unit that an uninformed observer may have difficulty conceiving of it as outstanding, in the first case, or as a single landscape in the second.

93 Section 6(b).

102. The other landscape witnesses had a rather more sophisticated approach than Mr Kruger, and in theory we prefer the subtlety and richness of their approach to landscape assessment. However, in this case, all the landscape evidence other than Mr Kruger's and Ms R Lucas' (which was very limited in scope) was weakened by two problems:

(a) A failure to make findings of fact which were essential for the statement of issues, and resulting objectives and policies;

(b) The suggestion that no such findings could be made unless the plan first stated the criteria by which landscapes were to be assessed.

The difficulty with the latter point is that the suggested criteria were in essence some of the component aspects of 'landscape' identified in ***Pigeon Bay***[94]. Such a list is so general that we cannot see that it would assist much to have it specified in the plan. The real need is to apply those criteria to the landscapes and features of the district.

103. We do not consider WESI is correct in its assertion that the whole of the district is an outstanding natural landscape but neither do we consider that Mr Aspinall is correct in confining outstanding natural landscapes to the Mt Aspiring National Park.

104. We will shortly set out our findings in respect of outstanding natural landscape and features. Before we do, we record:

(1) that while we identify areas as landscapes of outstanding natural value or as important under section 7, these areas are <u>not</u> zones;

94 [1999] NZRMA 209 at 231-232; discussed in Chapter 6 above.

(2) that just because findings are made about the national importance or section 7 importance of some landscapes does not mean that development in those areas is inappropriate;

(3) that our decision only covers parts of the district[95];

(4) in respect of the areas not referred to in this decision we will need to hear further submissions and/or evidence, and make site inspections.

105. When considering the issue of outstanding natural landscapes we must bear in mind that some hillsides, faces and foregrounds are not in themselves outstanding natural features or landscapes, but looked at as a whole together with other features that are, they become part of a whole that is greater than the sum of its parts. To individual landowners who look at their house, pasture, shelterbelts and sheds and cannot believe that their land is an outstanding natural landscape we point out that the land is part of an outstanding natural landscape and questions of the wider context and of scale need to be considered. The answer to the question where the outstanding natural landscapes and features end is not a technical one. It is a robust practical decision based on the importance of foregrounds in (views of) landscape. We do not consider this over-emphasises the pictorial aspects of landscape, merely uses them as a determinative tool.

106. The district can be roughly split up into territorial sections:

(1) Mt Aspiring National Park

(2) Lake Wakatipu

(3) The Wakatipu Basin comprising a circle with Queenstown and Arrowtown on its circumference

(4) The Kawarau River east of the Kawarau Bridge

[95] Section 73(3) allows a district plan to be prepared in territorial sections.

(5) The mountains east of Lake Wakatipu across the Shotover, Arrow and Cardrona catchments to the eastern boundary of the district on the Pisa Range

(6) Lakes Wanaka and Hawea and the valleys of the rivers running into them

(7) The Clutha Flats below Lakes Wanaka and Hawea.

This interim decision does not deal with areas (5), (6) and (7) because of time constraints in issuing this decision, a lack of evidence, and a lack of opportunity to inspect the areas. We consider it is more important in the meantime to identify the obvious outstanding natural landscapes around Lake Wakatipu and those in the pressured Wakatipu Basin.

107. We find as facts that:

(1) Mt Aspiring National Park is an outstanding natural landscape;

(2) Lake Wakatipu, all its islands, and the surrounding mountains are an outstanding natural landscape. This area comprises all the land in the district south and west of the lake (planning maps 6, 10, 12, 13 in the revised plan) excluding Glenorchy, Kinloch, and Kingston;

(3) The Kawarau valley east of the Kawarau Bridge is not an outstanding natural landscape. Viticulture may be turning it into an outstanding landscape (but not a natural landscape). It is certainly an increasingly important landscape and its visual amenities require careful consideration;

(4) The Wakatipu Basin is dealt with below.

108. The Wakatipu basin:

(a) excludes all land zoned residential, industrial, or commercial in Queenstown, Arthurs Point and Arrowtown;

(b) excludes any ski area sub-zones;

(c) excludes the Crown terraces east of and above Arrowtown;

(d) is bounded on the outside by a rough circle (travelling clockwise):

- From Sunshine Bay north/northwest to Point 1335 in the south ridge of Ben Lomond;
- north to Ben Lomond (along the ridge);
- north east to Bowen Peak;
- north-north east down the leading ridge to the Moonlight Creek-Shotover River junction;
- north east up the ridge to Mt Dewar;
- down to Skippers Saddle
- north east along the ridge running north-east to Coronet Peak
- along the crest of the range through Brow Peak, Big Hill
- straight line across to Mt Sale
- south along the Crown Range to Mt Scott
- south in a straight line across the Kawarau River to Cowcliff Hill (557m)
- up the crest of the ridge to Ben Cruachen
- southwest to Double Cone (the Remarkables)
- south along the Remarkables to Wye Creek
- down Wye Creek to Lake Wakatipu
- north around the shore of Lake Wakatipu to Kelvin Golf course
- across to Sunshine Bay

109. Within the Wakatipu Basin there is an outer ring which we find to be an outstanding natural landscape. The outer edge of that ring is given in the previous paragraph and we consider is relatively uncontroversial since the land on the outside of the ring is probably mostly outstanding natural landscape also. Indeed in this chapter we have already found

some of the surrounding landscapes to be outstanding natural landscapes.

110. In terms of the amended ***Pigeon Bay*** factors, the criteria we consider as most significant in the exercise to establish the inside of the ring are:

(a) natural science factors - topographically the basin is bounded by a ring of mountains and Lake Wakatipu; and ecological factors - the mountains have a large component of rock and tussock grasslands. The lower or inner margin of the outstanding natural landscapes is constituted variously by:

(i) the change of slope from glacially cut hillside to terraces;

(ii) foregrounds (from roads) over land not excessively subdivided and domesticated;

(iii) the change from more 'natural' to pastoral vegetation patterns;

(iv) by linking the ecologically or topographical boundaries with practical defined lines.

(b) aesthetic values

The aesthetic qualities of the basin are well-known, although we note that the foreground of the chocolate-box and calendar views around Lake Hayes and Arrowtown (for example of willows, poplars, vineyards or larches) are less strongly natural. The views, which are part of the aesthetic/amenity values, are a strong determinant of inner margins, because public views and their foregrounds need protecting in the context of the basin as a whole.

(c) expressiveness (legibility)

It was WESI's case that the whole landscape (especially the glacially sculpted hills) shows the forces that created it. That was not challenged and we readily accept it.

(d) transient values

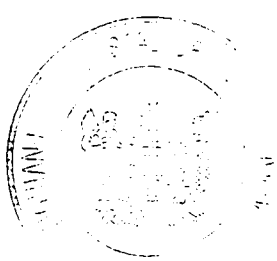
These are not relevant to our findings as to the inner edge of the outstanding natural landscapes.

(e) shared and recognized values

As we have repeatedly said, all parties recognized that the district's landscapes are important, but for unclear reasons most were unwilling to state where the nationally important landscapes ended. We find we can make determinations on factors (a) to (c) above. Factors (e) to (g) of the Pigeon Bay criteria are of little assistance here.

111. Applying those criteria as we have found them in this case, we hold that the inner edge of the ring - inside which the landscape is not an outstanding natural landscape but is at least in part visual amenity landscape – is the area inside the black lines marked on the attached Appendix II[96]. The edge runs approximately:

- Starting at Sunshine Bay, clockwise around Queenstown (as zoned) to Frankton
- doubling back around Ferry Hill to the north at the change of slope, and then
- west to Queenstown Hill Station (so that Queenstown Hill, Sugar Loaf, Lake Johnson, and Ferry Hill are included in the outstanding natural landscape)
- across the Shotover River immediately west of Queenstown Hill homestead
- up the Shotover River at the edge of the terrace to the next marked stream and up the stream to Littles Road
- west along Littles Road to the edge of the escarpment



[96] A copy of part Infomap Series 260 Maps E1 and F41. The dotted lines are:
(a) either where the boundary follows a zone boundary in the revised plan; or
(b) where we have some uncertainty as to where precisely to draw the line.

- north to Point 558m and then north east through Trig J (596m) to the formed end of Mountain View Road
- north to Malaghan Road
- along Malaghan Road to the point south of the tank at Map Reference[97] 768795
- north to the water race
- northeast around the water race to Bush Creek
- down Bush Creek to the Arrow River confluence and then downstream to the Arrow Bridge on SH6 (excluding the Whitechapel Flats)
- southeast along the Kawarau Gorge Road to approximately 300 m short of the Swift Burn
- southwest across the Arrow River and across the flats to the power lines
- west along the line of pylons past Trig T to the first 400m contour on Map F41
- northwest to the 400m contour on the eastern side of Morven Hill
- north round Morven Hill along SH6 (excluding existing residential land) to Hayes Creek
- west across Hayes Creek south of the side road
- south west (and up the Kawarau River and then the Shotover River) at the top of the lowest terrace on the northern bank of the Kawarau River (inside trig M above the existing homes)
- across the Shotover River at the power lines around the sewerage ponds and up to and south along the top edge of the Frankton Flats
- and up the Kawarau River to Riverside Road
- across and downstream to the 400m contour

[97] Map F41.

- south along the 400m contour to Remarkables Station homestead
- around three sides of the homestead - up to the tank and back down to the power lines
- south along the power lines until due east of Trig B
- due west to Lake Wakatipu
- inside Trig E (east of Jack's Point) to the two tanks and around the base of Peninsula Hill to SH6
- around Peninsula Hill excluding urban zoned land in Frankton
- then back to Sunshine Bay around the lake edge as shown on Appendix II

A separate area on Crown Terrace is excluded from the outstanding natural landscape and thus comprises an enclave of visual amenities landscape.

112. There are also three separate outstanding natural features in the Wakatipu Basin and marked "ONF" on Appendix II:
    (a) Trig 12391 at Arrowtown
    (b) Lake Hayes
    (c) Slope Hill

Morven Hill and Queenstown Hill (and its satellites), and Kelvin Peninsula's are also outstanding natural features, but since they are all contiguous to an outstanding natural landscape we only need include them in the latter. The area between Slope Hill and trig D (506m) to the north is of some concern to us because of its visual prominence from a distance. We reserve leave for any party to argue that area should be included in the outstanding natural features of the district. We should also state that our line defining the inner edge of the outstanding natural landscape in the basin is obviously not a surveyed boundary. We are

prepared to move the edge at some points (other than the dotted lines on Appendix II) if any party:

(a) can show us why it is necessary to do so as a matter of law (since zone boundaries will be the real issue); and

(b) calls cogent evidence on the matter

Visual amenity landscapes

113. We now consider the landscapes of the district which are not outstanding natural landscapes but which are visual amenity landscapes either because they are important in respect of visual amenities, or outstanding but insufficiently natural. There may be other reasons for significance, but the evidence did not identify any.

114. Landscapes may be important under section 7 of the RMA for a large variety of reasons. For example we find that the land to the south of Malaghan Road up to the crest of the ridge running parallel with the road is important both in respect of the maintenance of amenity values, and more generally of the quality of the local environment. Similarly, the land to the south of State Highway 6 along the Ladies Mile, and on the Frankton Flats is important as part of the approach to Queenstown[98].

115. We have also already identified an example of a landscape that is at least potentially outstanding but is not an outstanding natural landscape nor likely to be one: the Kawarau Gorge below the bungy bridge. Its landscape has been greatly modified over the last 1000 or so years, and at an exponentially increasing rate - first burning, followed by

[98] See revised plan part 4.9 "Urban Growth" to which we refer later.

goldmining, grazing, more burning, introduction of exotic grasses, trees, and weeds (elder, thistles, sweet briar, hawthorn are the larger species) and animals (sheep, rabbits, mustelids), farm houses and buildings, and fences. All these have occurred in a handsome gorge that when pristine may have been an outstanding natural landscape. Largely within the last decade the flats in the gorge have sprouted grape vines and lines - and it is the latters' posts, wires and tubular plastic shelters which reduce the naturalness of this landscape. Yet the meticulous orderliness of the vineyards makes (to some eyes) a most attractive landscape when contrasted with the wildness of the backdrop of sweet briar, shrubland and tussock. The vineyards are a useful example of the way human intervention through operation of the market can achieve largely beneficial environmental outcomes.

116. Looking at the Wakatipu Basin as a whole, we consider that there is a second ring of visual amenity landscapes inside the first ring of outstanding natural landscapes. Inside the inner (second) ring of visual amenity landscapes there is a core around four roads in which we consider there are lesser landscape values (but not insignificant ones) which may not be visual amenity landscapes.

It is the area around:

- Lower Shotover Road - Hunter Road
- Speargrass Flat Road
- Slope Hill Roads (west and east)
- Arrowtown - Lake Hayes Road

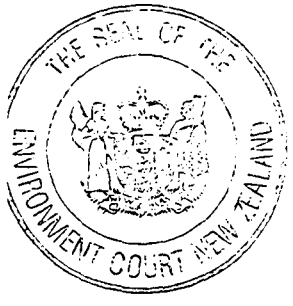
The area is rather larger than that description suggests, because it is roughly the land below the 400m above sea level contour (on Appendix II). We do not make findings on these matters because neither the category of 'visual amenity' landscapes nor the third category was described by any witness in detail - although both were identified by Mr

Rackham. We will need to hear further evidence and submissions before deciding where the visual amenity landscapes end, and what is sustainable management of the third category of landscapes.

117. Lastly the scenic rural roads as they were identified in the notified proposed plan[99] are (with our numbering):

(1) All state highways
(2) Queenstown-Glenorchy Road
(3) Glenorchy-Routeburn Road
(4) Hunter Road
(5) Lower Shotover Road
(6) Speargrass Flat Road
(7) Malaghan Road to Arrowtown
(8) Lake Hayes-Arrowtown Road
(9) Crown Range Road
(10) Mt Aspiring Road
(11) Hawea-Luggate Road
(12) Skippers Canyon Road
(13) Littles Road
(14) Centennial Avenue to Arrow Junction

We hold that numbers (4), (5), (6), (8) and (13) cannot be scenic rural roads since they are not in outstanding natural landscapes, nor on the edge of such landscapes or features. We return to the status of the others later, if we decide such a status should be reinstated in the district plan.



[99] Notified plan Appendix [pp.8/4-8/5].

Chapter 8 : Issues relating to landscapes

118. Having identified the outstanding natural landscapes, features and other important landscapes of some areas within the district we now have to identify the significant issues[100] in respect of those areas. As an aside in respect of drafting plans we can state here that our technique for identifying issues is to phrase them as questions. That may assist in guarding against them being simply objectives or policies in disguise.

119. For its part, the Council, in the revised plan identifies only two relevant issues. They are:

> ***4.2.4 Issues***
>
> *The District's landscapes are of significant value to the people who live, work or visit the District, and need to be protected. Increasing development and activity makes the District's landscape particularly vulnerable to change.*
>
> *Land use and development activities in the District are varied and intensive. The following significant resource management issues in respect of the landscape have been identified:*
>
> ***i Potential detraction of landscape and visual amenity of the District***
>
> - ***Development and activities may detract from the landscape***
>
> *The landscape provides both a backdrop to development as well as the economic base for much activity. Because of the quality of the landscape and*

[100] Section 75(1)(a).

the important role it plays in the District's economy it is necessary to ensure that buildings and developments are managed to mitigate any adverse effects resulting from location, siting and appearance.

ii ***Potential detraction of the Open Character of the Rural Landscape***

- ***A significant part of the District's visual character comes from the open expanse of its landscapes and the views these afford***

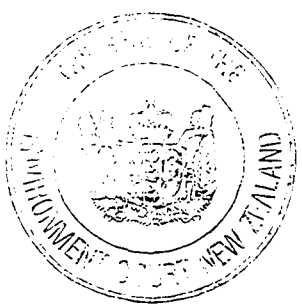
  Visual impact may be increased when the form and colour of structures contrast with the surroundings and when they are located in visually sensitive areas. The demand for housing and other developments in the rural area is growing and poor location, siting and appearance of these developments threatens to increase the level of modification in the rural landscape and to reduce its open character. The hill and mountain slopes surrounding the lakes assume greater importance because of their role in providing a setting for the lakes[101].

120. WESI sought a fuller statement of issues under the headings:

(i) General degradation of and detraction from the landscape and visual amenity of the district

(ii) Degradation of landscapes which have special characteristics and are highly visible

(iii) Degradation of special landscape features



101 Revised plan p.4/7.

(iv) Degradation of the visual and landscape amenity of the shorelines and adjoining hillslopes.

Fairly detailed descriptions of specific landscapes and features accompanied that statement of issues.

121. The Council did not support the addition of any of the new 'policies' sought by WESI. Ms C O Hume's written evidence for the Council, usually clear and accurate, is slightly confusing at this point because she refers to policies in part 4.2.4 when she is clearly referring to the issues.

122. On balance because its landscapes are a very significant issue for the district - as the introductory words for the issues in the revised plan state expressly - we consider that the brevity of the revised plan, recommended by Ms Hume and Ms Dawson is too skeletal. No expert resource manager gave evidence opposing the opinions of Ms Hume and Ms Dawson. However their suggestions for appropriate issues have two problems:

(a) they do not follow from a clear statement of the facts - in particular they have not identified the outstanding natural landscapes - they have simply identified all the landscapes of the district as important. As already explained we consider that approach is wrong, and even the landscape experts on whom they relied expressed a sense of unease about the approach in the revised plan.

(b) the brief issue statements they approve in part 4.2 - basically those in the revised plan - do not follow from either the facts or from the more general statements in part 4.1.

123. On the other hand we consider WESI's statement of issues is far too long to be useful. Further, many of their issues are, in effect, objectives

and policies. There is a happy medium. We consider that some more focused issues can be stated in respect to landscape and visual amenity. It might be useful to add the following subordinate issues to the statement of issues in paragraph 4.2.4 of the revised plan. However since none of the parties sought similar issues be added we will not do so, unless we receive an application to do so. It is appropriate for us to state that these are the sub-issues we have considered when deciding the appropriate objectives and policies. They are:

Issues

(1) What is inappropriate subdivision and development of the outstanding natural landscapes of the district?

(2) How far should the domestication and/or commercialisation/industrialisation of outstanding natural landscapes visual amenity landscapes and other rural landscapes be allowed to continue?

(3) How far should urban sprawl be allowed to run?

(4) Should foregrounds be protected?

(5) How far should farming, forestry and other rural activities be managed to maintain values of outstanding natural landscapes?

(6) Should there be landscape objectives, policies, methods (including rules) in rural areas (other than outstanding natural landscapes/neighbouring landscapes, rural scenic roads) e.g. in outstanding landscapes (but not outstanding ***natural*** *landscapes)?*

(7) To what extent do the activities identified in part 4.2.3 (Activities) need to be managed?

(8) Is there any need to define urban edges on landscape grounds?

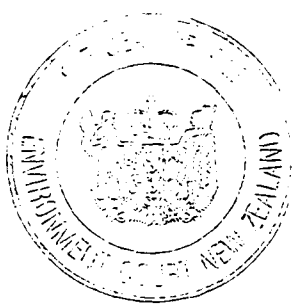
(9) Whether there is a need to maintain the open character of outstanding natural landscapes and of visual amenity landscapes?

124. We have considered whether, in the light of WESI's case and Mr Kruger's evidence in particular, we should state that one of the significant issues for the district is the freeholding of 'pastoral lease' land held under the Land Act 1948 and its companion the Crown Pastoral Land Act 1998. It is interesting to speculate how many of the open landscapes valued by the citizens of and visitors to the district have been retained in that largely unsubdivided and relatively indigenous ('unimproved') state just because they are subject to pastoral leases, rather than to any provisions or practice under district schemes under the Town and Country Planning Act 1977. In the end the form of land tenure is irrelevant. If land held under a pastoral lease is nationally important because it is contained within an outstanding natural landscape then that is a matter that the lessee should take into account when and if they freehold. If they subsequently find their options for use and subdivision limited, then section 85 of the RMA may come into play. In that case, a former lessee's knowledge (or imputed knowledge) that the land was in an outstanding natural landscape before freeholding may be of some relevance to the Environment Court in deciding whether the interest in land is incapable of reasonable use, or whether there is an unfair and unreasonable burden[102] on the freehold subdivider.

125. Ms Munro, for the Council, suggested some extra explanatory statements relating inter alia to land held under pastoral leases. We do not consider them necessary as such, but in a shortened amended form

[102] Section 85(3) RMA.

one will alert readers of the district plan to the issue, and so we add it as issue (iii) in Part 4.2 of the district plan.



126. This is the appropriate point to remember that we are to achieve the integrated management of the effects of the use, development or protection of land[103] in the district. That is particularly important in respect of such an uncertain and complex concept as landscape. Our conclusions below are a suite of interlinked policies which are connected to each other and to the existing district-wide policies in the revised plan that are unchallenged by references. The policies are stated in (roughly) greater degree of specificity, so specific policies over-ride general ones if they conflict: ***NZ Rail Ltd v Marlborough District Council***[104]. For example in this case the later specific policy on 'utilities' over-rides an earlier one on 'structures'.

127. Some general explanation of how we arrived at the policies we are setting may assist here. First we observe that there was a significant gap between what WESI sought on the one hand, and what the other parties considered appropriate on the other hand. None of the witnesses was unshaken in cross-examination, nor was anybody's evidence in chief wholly satisfactory. Consequently, we had to frame policies not sought by either party, but somewhere in between. As a further consequence our decision on these will only be final as to their spirit and intentions. We will reserve leave to the parties to improve our drafting.

128. Secondly, the guiding objective for Part 4.2 of the district plan refers to "subdivision and development". However only once do WESI's references refer to subdivision in respect of policies, so far as we can see. Consequently we have referred to subdivision in most of the

103 Section 31(a).
104 [1993] 2 NZRMA 449 at 460.

policies even though it was not expressly referred to. Our justifications for proceeding in that way are the two mentions of subdivision referred to above – especially in the guiding objective. Further, we accept as a matter of mixed fact, degree and law that subdivision can have an effect on the environment. That view was expressly opposed by Messrs Clark, Fortune & McDonald ("CFM"), a firm of surveyors opposing WESI and with their own reference in Part 15 of the plan. However it runs counter to ***Yates v Selwyn District Council***[105] to which CFM's counsel did not refer. That case stated:

> *Section 11 of the [RMA] recognises that allotments which are usually (but certainly not always) contained in one certificate of title are fundamental units in terms of the creation of property rights which of course include (from an economic point of view) rights in resource consents or certificates of compliance under the Act .... The smaller an allotment the greater the chances there are of causing external effects (or not being able to internalize effects) and of course this case is a classic example of that. Subdivision down to 2 hectares might mean that externalities in the form of sewage, pollution plumes or reverse sensitivity effects (such as complaints from what are, in effect, lifestyle units on the two hectare blocks about noise or spray or the other incidents of rural use) increase. In summary: subdivision of land tends to cause multiplication of complaints about effects.*

129. ***Yates*** was not particularly concerned with landscape issues. However we consider the principle it states is correct and does apply when landscapes are in contention. Subdivisions draw lines across the landscape, and in fact those lines tend to be marked by fences or trees or other changes in vegetation patterns. All those demarcations have

105 Decision C44/99 at p.21.

effects on the visual quality of the landscape and thus need to be taken into account.

130. Even Mr N T McDonald, one of the referrers, appears to recognize this. His written evidence states:

> *I acknowledge that Part 4 of the [revised plan] dealing with district wide issues does not adequately deal with section 6(b) issues as they relate to subdivision.*

His view was that, provided the Part II matters relating to subdivision were "adequately provided for" in Part 15 of the district plan there would be no need to deal with them in Part 4. However we are by no means satisfied that the agreed proposals by CFM and the Council begin to satisfactorily state subdivision policies in the light of Part II of the Act. We return to the subdivisional issues and that agreement in Chapter 11.

The parties' proposals

131. In the revised plan the general **objective** in Part 4.2 of the plan (dealing with landscape and visual amenity) read:

> *Subdivision, use and development being undertaken in the District in a manner which avoids potential adverse effects on landscape values*[106].

[106] Objective 4.2.5 [Revised plan p.4/7].

The only issues raised by the parties were:

(a) whether the words "remedies or mitigates" should be added after "avoids"; and

(b) the words "and visual amenity" should be added after "landscape" and before "values".

Everybody supported these changes except Mr Lawrence who was silent on the issue. We consider the changes are appropriate if rather vapid since, in effect, they merely co-ordinate and repeat parts of the requirements of Part II of the Act. There was little disagreement that the general objective should read instead:

> ***Objective:***
>
> ***Subdivision, use and development being undertaken in the District in a manner which avoids, remedies or mitigates potential adverse effects on landscape and visual amenity values.***

132. Nobody sought to retain, without amendment, the first three **policies**[107] of the revised plan which deals with future development, structures and new urban development. In the light of the concession by all parties that all of the landscapes of the district are important, we find that those policies are completely inadequate. Instead Ms Dawson, after considering Ms Hume's recommendations suggested the four policies which, after some further amendment in the course of cross-examination by Mr Todd, read:

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[107] Revised plan p.4/7.

Policies:

1. Future Development

To avoid, remedy or mitigate the adverse effects of new development in those areas of the District where the landscape and visual amenity values are vulnerable to potential detraction.

To encourage new development to occur in those areas of the District with greater potential to absorb change without detraction from landscape and visual amenity values.

2. Outstanding Landscapes

To avoid (remedy or mitigate) any adverse effects of development on the character and quality of the outstanding landscapes of the District.

3. Highly Visible Landscape Areas

To avoid, remedy or mitigate the adverse effects of development on the landscape and visual amenity values of those parts of the landscape which are highly visible from public places and other places which are frequented by members of the public generally.

4. Structures

To preserve the visual coherence of the landscape by:

- *encouraging structures which are in harmony with the line and form of the landscape.*
- *avoiding, remedying or mitigating the adverse effects of structures on the skyline, ridges and prominent slopes and hilltops.*
- *encouraging the colour of buildings and structures to complement the dominant colours in the landscape.*
- *encouraging placement of structures in locations where they are in harmony with landscape.*
- *promoting the use of local, natural materials in construction.*
- *providing for a minimum lot size for subdivision.*
- *limiting the size of corporate images and logos.*

133. In answer to a question from the Court she stated that the words 'remedy or mitigate' in her policy 2 might be removed. She deleted any policy for new urban development. For her part Ms Hume did recommend an amended policy for new urban development as follows:

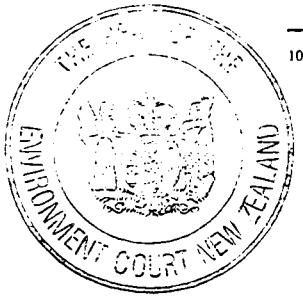
> *5. New Urban Development*
>
> *To maintain the open character of, and minimise the level of modification in the landscape, by avoiding sprawling or sporadic subdivision for residential or commercial activities outside of the areas already occupied or zoned for such use.*

134. For its part WESI sought more detailed policies to replace the three policies in the revised plan. It suggested policies for:

- *Future development (separately for*
  (a) Wanaka-Makarora-Hawea
  (b) Wakatipu Basin
  (c) Upper Wakatipu - Glenorchy area)
- *Highly Visible Landscape Areas*
- *Special Landscape Features*

Future development and landscapes

135. We consider that outstanding natural landscapes and features should be dealt with in (at least) two parts: the Wakatipu Basin and the rest of the district[108]. The residual policy is largely as the experts agreed in respect of the 'outstanding landscapes' of the district. We also agree with Ms



[108] We say 'at least' because this decision comes to no conclusions as to the outstanding natural landscapes outside the Mt Aspiring National Park and the greater Wakatipu basin.

Dawson and Ms Hume that there should be a general policy of avoiding, remedying or mitigating adverse effects of subdivision and/or development on outstanding natural landscapes. We consider that the words 'remedy or mitigate' should be added because there may be places in which some development could be allowed if some substantial remedial work enhancing the naturalness (e.g. by removal of fences or a house and planting of native tussock or grasses) was carried out.

136. The Wakatipu Basin is more difficult to manage sustainably. The outstanding natural landscapes and features of the basin differ from most of the other outstanding natural landscapes of the district in that they are more visible from more viewpoints by more people. The scale of the basin is also important as Mr Kruger pointed out. People in the basin are never more than 2-3 kilometres from an outstanding natural feature or landscape. Consequently, we find that it is generally inappropriate to allow any development for residential, industrial or commercial activities on the outstanding natural landscape or features. We accept Mr Kruger's evidence (and Mr Rough said something similar) that, for these reasons, the Wakatipu Basin needs to be treated as a special case and as a coherent whole. We find that there has been inappropriate urban sprawl in the basin - in particular on Centennial Road in the vicinity of Arrow Junction and again along parts of Malaghan Road on its south side. It is arguable from observation that the housing along McDonnell Road (on the top of a prominent terrace) is also inappropriate although we heard no evidence on that issue[109].

[109] This is not the first time this Court or its predecessor, the Planning Tribunal, has commented on this issue: ***Design 4 Ltd v Queenstown Lakes District*** (1992) 2 NZRMA 161 at 169.

We consider the cumulative effects have already gone further than is desirable. In the outstanding natural landscape[110] of the Wakatipu Basin, and on the outstanding natural features in it, any further structures are undesirable – they should be avoided. In the visual amenity landscape (inside the outstanding natural landscape) structures can be built, with appropriate remedial work[111] or mitigation down to some kind of density limit that avoids inappropriate domestication.

137. On this issue we prefer the evidence of Mr Kruger to that of Mr Rackham and the other landscape experts. The latters' argument that the capacity of the landscape to absorb development should be assessed on a case by case basis does not impress us. While there are dangers in managing subjective matters rather than letting the market determine how the landscape should be developed and altered, those factors are outweighed when the appropriate management is the status quo and there is statutory sanction for the protection of the outstanding natural landscape from inappropriate subdivision and development. Management under a plan may avoid inconsistent decisions, and cumulative deterioration of the sort that has already occurred.

Visual amenity landscapes

138. It is the middle tier landscapes – the visual amenity landscapes - which are difficult to define. These include both areas which border outstanding natural landscapes and other landscapes which are insufficiently 'natural' although they may still be outstanding. They are loosely the 'highly visible areas' described by WESI in its case. Mr Rackham in his evidence said of these:

---

110 In paragraph 108 we defined this to exclude the skifield areas (Coronet and The Remarkables).

111 e.g. removing inappropriate houses in the adjacent outstanding natural landscape or elsewhere in the visual amenity landscapes.

> *The WESI requests for changes to Policy 4 relate to visibility. In my opinion visibility, particularly from public viewpoints, does make a significant contribution to the appropriateness of a development in a particular location. However, visibility in itself is not the issue. A highly modified area may be eminently suited to development despite being highly visible. Conversely, a secluded location may be unsuited to development due to its other landscape qualities.* ***Consequently it is important that any such policy should convey the point that valued landscapes may become less suitable for development because of their high visibility. It is not correct to suggest that all highly visible areas are inevitably unsuited to development.***

139. Unfortunately he gave no examples of 'highly modified areas ... eminently suitable for development despite being highly visible'. We can think of no such areas on the perimeter of the Wakatipu basin although there may be some at its core. So while we agree with Mr Rackham in general terms - see ***Marlborough Ridge Ltd v Marlborough District Council***[112] - we disagree where there are modified areas adjacent to outstanding natural features or landscapes. Some kind of sensitive transition must be desirable. The question is whether the first policy suggested - "future development" - is enough. Our answer is that it is insufficient; and to have effective sustainable management more specific policies are necessary.

140. In this district we consider there are two further appropriate and complementary policies for visual amenity areas:

[112] 3 ELRNZ 483; [1998] NZRMA 73.

(a) specific policies for the visual amenity landscapes as 'highly visible landscapes';

(b) the scenic rural road concept (of course these run through outstanding natural and possibly other landscapes also).

Both issues relate in large part but not exclusively to the issue of urban sprawl so we deal with these issues in Chapter 10.

141. We find that the appropriate general landscape policies are 1-4 stated below:

Policies[113]:

1. Future Development

(a) To avoid, remedy or mitigate the adverse effects of development and/or subdivision in those areas of the District where the landscape and visual amenity values are vulnerable to degradation.

(b) To encourage development and/or subdivision to occur in those areas of the District with greater potential to absorb change without detraction from landscape and visual amenity values.

(c) To ensure subdivision and/or development harmonises with local topography and ecological systems and other nature conservation values as far as possible.

2. Outstanding Natural Landscapes (District-Wide/Greater Wakatipu)[114]

(a) To maintain the openness of those outstanding natural landscapes and features which have an open character at present.

(b) To avoid subdivision and development in those parts of the outstanding natural landscapes with little or no capacity to absorb change.

---

113 We have shaded all the policies which we decide are necessary in the district plan (and differ from the revised plan).

114 Whether this is "District-Wide" or confined to the "Greater Wakatipu" area (other than the Wakatipu basin) depends on the outcome of the adjourned hearing.

(c) To allow limited subdivision and development in those areas with higher potential to absorb change.

3. Outstanding Natural Landscapes (Wakatipu Basin)

(a) To avoid subdivision and development on the outstanding natural landscapes and features of the Wakatipu basin.
(b) To maintain the openness of those outstanding natural landscapes and features which have an open character at present.
(c) To remedy or mitigate the continuing effects of past inappropriate subdivision and/or development.

4. Visual Amenity Landscapes

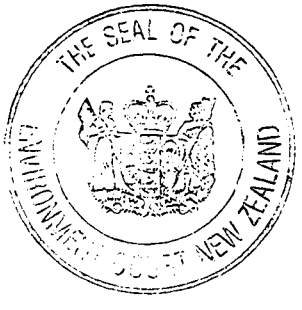
(a) To avoid, remedy or mitigate the adverse effects of subdivision and development on the visual amenity landscapes which are:
- highly visible from public places and other places which are frequented by members of the public generally; and
- visible from scenic rural roads.

(b) To mitigate loss of or enhance natural character by appropriate planting and landscaping.

142. Policy 1(c) was not specifically sought by any party but we consider it derives from the compromise we are imposing on what WESI sought which was:

> *To avoid the adverse visual effect of development on the landscapes and visual values of ...*

By adding the words "remedy or mitigate" to 1(a) we give scope for further development, and in that case some guidance as to the remedial work or mitigation appropriate and we achieve that by adding policy 1(c). The policy also attempts to link the landscape policies back to the nature conservation policies. In relation to our policy 3 some counsel submitted that a policy should refer to effects of activities (or, by implication, buildings) rather than seek to control activities (or buildings) themselves. In general terms we agree it is often preferable to do so, but buildings may be a special case, especially when considering landscape issues. In such a case it is often the building



itself which is the adverse effect. To speak of the adverse effects of buildings is to make life (and causation) unnecessarily complicated.

143. We also hold that it would be useful to have a specific policy in respect of outstanding natural features, to emphasize their uniqueness. We consider WESI's policy is appropriate and thus we add:

> 5. Outstanding Natural Features
>
> **To avoid subdivision and/or development on and in the vicinity of distinctive landforms and landscape features, including:**
>
> - **in Wanaka/Hawea/Makarora; [....yet to be resolved by further hearing]**
> - **in Wakatipu; the Kawarau, Arrow and Shotover Gorges; Peninsula, Queenstown, Ferry, Morven and Slope hills; Lake Hayes; the Hillocks; Camp Hill; Mt Alfred; Pig, Pigeon and Tree Islands.**

Structures

144. As for structures we do not consider it appropriate to have general aesthetic criteria for all landscapes of the district, indeed we are reluctant to impose any at all. However we accept there is a case for such criteria in respect of the first two categories of landscape we have identified:

- outstanding natural landscape and features[115]
- 'visual amenity' landscapes[116].

115 Section 6(b).
116 Section 7.

However before we can come to any conclusions about structures we need to examine the issue of urban sprawl which is one subject in the next chapter.

Chapter 10 : Policies - Urban Growth

The parties' proposals

145. References by WESI[117] and the Minister for the Environment ("the MFE")[118] raised questions about policies on "new urban development" and "established urban areas". The policies challenged by WESI, MFE and various section 271A parties represented by Messrs More, Todd and Goldsmith stated[119]:

> ***(3) New urban development***
>
> *To maintain the open character of, and to minimise the level of modification in the landscape, by:*
>
> - *avoiding sprawling or sporadic subdivision for residential or commercial activities outside of the area already occupied or zoned for such use.*
>
> ***(4) Established urban areas***
>
> *To retain and enhance the distinctive identity of existing urban areas.*

146. For reasons explained earlier, much of the evidence to be called on this issue was actually heard in respect of the general references on Part 4 at the earlier part of the hearing. As stated earlier it was only part way through that hearing that counsel for the Minister for the Environment advised us that the MFE case should have been heard at the same time. Consequently these urban development issues were adjourned so that they could be heard at the same time as the MFE's reference. That had

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117 RMA 1043/98.
118 RMA 1194/98.
119 Paragraph 4.2.5 Objective and Policies [Revised plan p.4/7].

the result that the evidence of the following witnesses was carried forward:

- Mr Wild
- Mr Kruger
- Ms Dawson.

Also, with the consent of all other interested parties the evidence of Ms Buckland and Mr Glasson was carried forward from a Terrace Towers hearing[120] which relates to the Frankton Flats. At the reconvened hearing none of the parties sought to cross-examine any of the witnesses who had already given evidence. We then heard evidence from two further witnesses: Ms L J Woudberg (a policy analyst for the MFE) and Ms C O Hume for the Council and submissions from those parties' representatives.

147. For his part the Minister for the Environment wished policy (3) to be deleted and called Ms Woudberg. After cross-examination by Mr Todd she considered the appropriate wording for a policy on new urban developments would state:

> ***New urban development***
> *To maintain the open character of the landscape by avoiding, remedying, or mitigating any adverse effects of subdivision and development in rural areas.*

This was rather weakened by her concessions to Mr More that that policy could be subsumed within the general future development policy (1) so that her new policy is redundant.

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120 RMA 1028/98.

148. On the other hand WESI wanted to amend the wording of the policies so they read:

> ***New urban development***
>
> *To maintain the open character of, and minimise the level of modification in the landscape, by:*
>
> - *restricting major new residential development outside of areas identified on the plan*
> - *requiring the preparation of detailed structure plans which identify major activity areas and building development form for new residential areas*
> - *restricting housing development within the semi-enclosed rural valleys to help maintain the natural setting*
> - *avoiding sprawling or sporadic subdivision for residential or commercial activities outside ... the areas already occupied or zoned for such use.*
>
> ***Established urban areas***
>
> *To retain and enhance the distinctive identity of existing urban areas by:*
>
> - *strongly identifying the edges of the existing urban areas*
> - *retaining and enhancing the rural landscape approaches to the towns and urban areas along the main approach roads.*

149. WESI was opposed to the reductionist approach to the suggested 'new urban development' policy whereby it was subsumed in the general "future development" policy. Mr Lawrence submitted that:

> *under the guise of 'enabling', policy is being reduced to general platitudes and repetition of phrases from the Act. Our view is that the Plan is to articulate the RMA in this district, not just repeat the*

Act ... Under the guise of improving words (or lines on maps) which pose problems of definition, the suggested alternatives are so general they need no definition. Our submission is that several of the options being offered to you pretend to solve problems but are in reality ignoring them.

150. We have some sympathy for that submission. There is an observable trend from the notified plan to the revised plan, increased in suggested solutions to us, which is to adopt a standard policy formula, parroting section 5(2)(c) of the RMA: to "avoid, remedy or mitigate the adverse effects of ...". We consider that policies with more detail may be of more assistance in both determining the relative methods of implementation, and in applying the policies when the district plan is operating.

151. Before we assess the contrasting approaches to new urban development in respect of landscape, we agree with Mr More that we must first consider what the issue is that these policies are intended to address. This is especially so since there is a separate section of Part 4 - Part 4.9[121] - which deals expressly with urban growth so the issues we are now considering relate mainly to the effects of urban growth and 'urban sprawl' on landscape. We add that some of the unchallenged policies in section 4.9 of the revised plan are protective of outstanding landscapes, and we consider that any new policies should be consistent in respect of landscape as it relates to urban growth in section 4.9.

152. The landscape issue as stated in the revised plan is:

[121] Revised plan pp4/39 - 4/43.

(ii) Potential detraction of the open character of the rural landscape

- *a significant part of the District's visual character comes from the open expanse of its landscapes and the views these afford.*[122]

We record that no party sought in any reference to have that issue deleted. WESI's reference simply sought to add further, more specific issues.

153. The key parts of the stated issue are its references to:
- 'open character'
- 'open expanse of ... landscapes and the views these afford'.

While it is correct that large parts of the district are relatively open in that they are not covered by forest or towns it is important to recognize that situation is:

(a) not completely natural - there has been considerable human influence first by Maori burning, and latterly and with more impact, by pastoral and other European practices;

(b) dynamic and changing.

The evidence was that there are many more trees and much more conscious landscaping now than there were in the Wakatipu Basin 100 years ago. We conclude that open character is a quality that needs only be protected if it relates to important matters, otherwise it should be left to individual landowners (subject to not creating 'nuisances' or other unacceptable adverse effects to neighbours) to decide whether their land

[122] Paragraph 4.2.4. Issues (Revised Plan) [p.4/7].

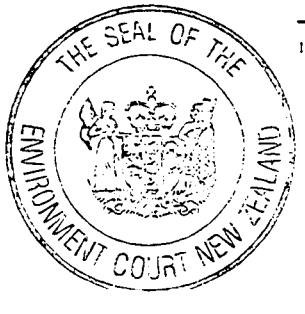
should be open or not. Of course in relation to section 6(b) landscapes which are outstanding simply because they are open, there is little difficulty in establishing need for protection. Similarly section 7(b) landscapes which are important because they give foregrounds to views of outstanding landscapes may also need protection.

154. While the open character of outstanding natural landscapes can be justifiably maintained, we do not see that it is appropriate to maintain the open character of all other landscapes. They may after all be improved:

- in an aesthetic sense by the addition of trees and vegetation; and/or
- in an ecological sense by the planting of native trees, shrubs, or grasses recreating an endemic habitat.

We consider that the protection of open character of landscapes should be limited to areas of outstanding natural landscape and features (and rural scenic roads).

155. Even in more closed-in landscapes there can be problems – and we agree with WESI's case about this – with what is loosely but understandably called 'urban sprawl'. We have stated that one issue is 'How far should urban sprawl be allowed to run?' Several counsel opposed the term 'sprawl' because of its emotive connotations. We think they overstate the difficulties: the words "urban sprawl" are a term referring to undesirable domestication[123] of a landscape. We also accept, as agreed by Ms Hume, under cross-examination by Mr Lawrence, that sprawl is 'development without an edge'.



[123] To extend the metaphor in ***Crichton v Queenstown Lakes District Council*** Decision W12/99 where the term was used of the chattels or fixtures (e.g. clotheslines/trampolines) that accumulate around dwellinghouses.

156. As far as new urban development is concerned we consider three landscape policies are needed - one for each of the general rural landscape categories:

(1) To maintain the open character of outstanding natural landscapes.

(2) To maintain and enhance the natural character of visual amenity landscapes.

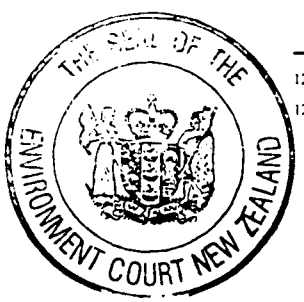
(3) We suggest, but do not decide, that an appropriate policy for other rural landscapes is to maintain rural character and capacity by providing 50m buffer strips (appropriately planted and landscaped) between any subdivision with lot sizes of less than 4ha and the adjacent land.

157. The distinction between (1) and (2) above is to encourage the planting of trees[124] as a way of maintaining natural character. This cannot be encouraged on most of the outstanding natural landscapes of the district because of the policy to maintain their 'openness'[125]. The justification for (3) in the preceding paragraph is only partly on grounds of protecting visual amenities. It also serves:

(a) to internalise the reverse sensitivity (to farming activities such as noise, smells, sprays etc) created by establishing residential activities in rural areas;

(b) to encourage efficient use of land by subdividing larger blocks (perhaps in more than one title or ownership) in a co-ordinated way rather than occasionally lopping pieces off single titles; and

(c) to encourage subdivisions to be self-contained in respect of services etc.



124 See policy 4.1.4 Policy 1.17 [revised plan p.4/3]
125 See our discussion of "Forestry" in Chapter 11 below.

158. We are also concerned that having density limits for subdivision in the third category of rural area, at least in the centre of the Wakatipu basin, sends the wrong signals. This is because a minimum lot size is inherently wasteful and needs to be justified, and secondly such a policy removes choices for landowners for no apparent environmental gain. Further, the character of this kind of landscape can be largely protected by private property rights e.g. by not subdividing, or by imposing restrictive covenants in respect of landscaping, or against further subdivision. Covenants can internalise 'nimby'[126] reactions at the time of subdivision. In such cases there may be no need for policies (let alone rules) specifying how to manage land on landscape grounds. There may, of course, be other issues as to services or ecological factors justifying restraints on subdivision.

159. At the same time we are mindful of the amenities of neighbours who might consider the qualities of naturalness and peace which they enjoy are ruined by what is in effect urban development next door. That is our reason for earlier suggesting 50m buffer strips between these subdivisions and rural neighbours. Also, without deciding issues under references we still have to hear, we consider there may be some merit in the Residential New Development sections contained in the notified plan[127] but dropped from the revised plan, and ask the parties to reconsider that in preparing for the relevant hearing.

160. We hold that the appropriate policies are a reworded compromise between the positions of the parties, as follows:

126 Nimby = not in my backyard.

127 Part 7.10 [notified plan p.7/69].

6. Urban Development

(a) To avoid new urban development in the outstanding natural landscapes of Wakatipu basin.

(b) To discourage urban subdivision and development in the other outstanding natural landscapes (and features) and in the visual amenity landscapes of the district.

(c) To avoid remedy and mitigate the adverse effects of urban subdivision and development where it does occur in the other outstanding natural landscapes of the district by:

- maintaining the open character of those outstanding natural landscapes which are open at the date this plan becomes operative;
- ensuring that the subdivision and development does not sprawl along roads.

(d) To avoid, remedy and mitigate the adverse effects of urban subdivision and development in visual amenity landscapes by avoiding sprawling subdivision and development along roads.

7. Urban Edges

To identify clearly the edges of:

(a) Existing urban areas;

(b) Any extensions to them; and

(c) Any new urban areas

- by design solutions and to avoid sprawling development along the roads of the district..

8. Avoiding Cumulative Degradation

In applying the policies above the Council's policy is:

(a) to ensure that the density of subdivision and development does not increase to a point where the benefits of further planting and building are outweighed by the adverse effect on landscape values of over domestication of the landscape.

(b) to encourage comprehensive and sympathetic development of rural areas.

(c) To adopt minimum lot sizes for subdivision in outstanding natural landscapes and visual amenities [except if a residential new development has been accepted by the Council].

Policy 8 is another policy not specifically sought, but because we are not adopting the rigorous relief sought by WESI and since we accept Mr Kruger's evidence about the dangers of cumulative adverse effects, we consider a policy in respect of avoiding cumulative degradation is important. The exception to policy 8(c) as to residential new development is a suggestion only since, as we have said, there are unheard references on whether that concept should be reintroduced to the district plan. If it is not then the exception will need to be deleted.

Frankton Flats

161. At the beginning of Chapter 9 we referred to relevant district-wide policies in the revised plan that are unchallenged. Some of these relate to urban growth – but more from the perspective of being in the urban areas looking out rather than, as in Chapters 9-10 to this point, being in the countryside gazing in to an urban area. We refer to section 4.9[128] which is headed "Urban Growth". The place where the urban growth issue meets from both directions (i.e. urban/rural and vice versa) most clearly is the Frankton Flats which is the site of the Queenstown airport, amongst other developments. Much of the land on the north side of the airport – between the airport and State Highway 6 – is zoned rural. We have already found as a fact that the rural land and the airport at Frankton are included in the visual amenity landscapes under section 7 of the Act. The Council obviously considers there are separate issues of

[128] Revised plan p.4/39.

importance in relation to Frankton because the revised plan states a specific "District-wide' objective and related policies as follows[129]:

> ***Integrated and attractive development of the Frankton Flats locality providing for airport operations, in association with residential, recreation, retail and industrial activity while retaining and enhancing the rural open landscape approach to Frankton along State Highway No. 6.***
>
> ***Policies***
>
> *6.1 To provide for the efficient operation of the Queenstown airport and related activities in the Airport Mixed Use Zone.*
>
> *6.2 To provide for expansion of the Industrial Zone at Frankton, away from State Highway No. 6 so protecting and enhancing the open space and rural landscape approach to Frankton and Queenstown.*

162. Mr More appeared for Terrace Towers NZ Pty Ltd ("Terrace Towers") in respect of future development of that part of the Frankton Flats which is owned by his client. Terrace Towers wishes to build a retail shopping complex between State Highway 6 and the airport. That aim is complicated by the objective and policy above. Mr More submitted that the 'open character' of Frankton has to be questioned as a matter of fact since:

- the western side and half the southern (Kawarau River) side are residential;
- the airport buildings and adjacent supermarket are larger complexes in the middle;

[129] Section 4.9, Objective 6 [p.4/43].

- there is Council's own recreation centre of the western end of State Highway 6;
- there is an industrial zone – to be enlarged significantly in the revised plan at the eastern end above the Shotover Terraces;
- various minor intrusions – a garden centre and several residences.

We agree: on the evidence we find that the Frankton Flats are not an outstanding natural landscape, and they are not particularly open. However, they are a visual amenities landscape and an important one because the objective and policies quoted above give it special emphasis.

163. There is no reference to this Court, of Objective 6 in Part 4.9 of the revised plan. Mr More submitted that we could rely on section 293 RMA to amend it although he did not go so far as to make such an application. In case it assists the parties we can state that while - consistent with our approach to visual amenities landscapes generally – we consider the openness of the Frankton Flats has been significantly compromised, we should not allow any further detraction from the amenities of the approach to Frankton. Our preliminary view is that 'openness' can be further compromised, but only if the naturalness can be maintained, or preferably enhanced. A landscape compromise that would allow Terrace Towers some use of its land, but improve the approaches to Frankton might be to use mounding and especially evergreen trees to screen any development (commercial or residential) behind. The trees might have to be set back up to 100 metres from the highway if State Highway 6 is to be a scenic rural road. These issues can be decided at the hearing of the Terrace Towers' reference which is to be reconvened at the end of November 1999.

Structures Revisited

164. Returning to the position of structures in the landscape, we consider the necessary policy is:

> 9. <u>Structures</u>
>
> **To preserve the visual coherence of**
>
> **(a) outstanding natural landscapes and features (subject to (b)) and visual amenity landscapes by:**
> - **encouraging structures which are in harmony with the line and form of the landscape;**
> - **avoiding, remedying or mitigating any adverse effects of structures on the skyline, ridges and prominent slopes and hilltops;**
> - **encouraging the colour of buildings and structures to complement the dominant colours in the landscape;**
> - **encouraging placement of structures in locations where they are in harmony with the landscape;**
> - **promoting the use of local, natural materials in construction;**
> - **providing for a minimum lot size for subdivision; and**
>
> **(b) outstanding natural landscapes and features of the Wakatipu Basin by avoiding construction of new structures for:**
> - **residential activities and/or**
> - **industrial and commercial activities; and**
>
> **(c) visual amenity landscapes**
> - **by screening structures from roads and other public places by vegetation whenever possible to maintain and enhance the naturalness of the environment; and**
>
> **(d) all rural landscapes by**
> - **limiting the size of corporate images and logos**
> - **providing for greater development setbacks from scenic rural roads.**

The wording in (a) is largely derived from Mr A D George's evidence for the Council. The policy in (b) reflects our decision that the outstanding natural landscapes and features of the Wakatipu basin are a special case requiring extra protection since almost all development is inappropriate. Policy (c) results from the matters discussed in Chapter

10 and results from our recognition that the visual amenity landscapes are no longer 'open' landscapes. Thus they can be developed to a degree but preferably in a way that potentially increases the 'naturalness' of the landscape. We reject WESI's other suggestions as to colour palette as too prescriptive. Mr George's wording on that issue seems more appropriate.

Scenic Rural Roads

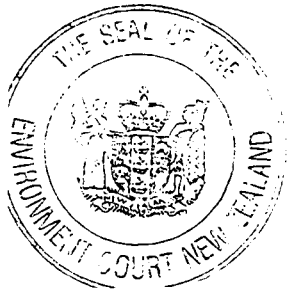
165. The main witness opposing the concept of scenic rural roads was Mr George who stated that the policy for structures preserving visual coherence of the landscape by:

> *- providing for greater development setbacks from scenic rural roads in order to retain their rural character*

- was flawed. He gave two reasons. First he said that:

> *there is little justification why particular roads have been given this status, other than that they are high usage roads, while others have not. [That] ... is contrary to the philosophy that the [revised p]lan has adopted; that being [that] the entire district is important in terms of landscape values.*

Secondly he stated that the Council has reserved controls over building platforms in its rules on subdivision[130]. In cross-examination by Mr Lawrence, Mr George conceded that development on flat land in the foreground could compromise landscape in the background, and that there was no specific policy dealing with this issue if WESI's suggestion was not reinstated.



130 Part 15: Zone subdivision standard 15.2.6.3.(iii) [revised plan p.15/17].

166. Mr George's first and general point is, in our view, another example of the fudging caused by the statement that all the landscapes of the district are important. The delusion caused by the statement is that it suggests general policies which in fact:

- do not protect what really needs protecting;
- cause policies and (potentially) methods of implementation to be set out when none are necessary.

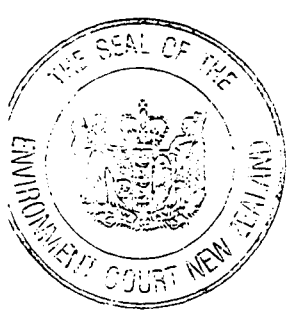
167. Mr George's second and specific point may not work either. If in some rural areas, subdivision is allowed as a controlled activity down to 4000m^2, then even a long thin section, say a 40m x 100m, must obviously necessarily entail a building on a platform within 100m of a road.

168. Nor do we think it is necessarily inconsistent resource management to isolate some roads as being scenic rural roads. There is admittedly a degree of arbitrariness, but we have to make a pragmatic decision. We consider the concept of protecting scenic rural roads should be reintroduced as WESI suggests, but limiting it to the following roads:

- **All state highways**
- **Queenstown Glenorchy Road**
- **Glenorchy Routeburn Road**
- **Malaghan Road to Arrowtown**
- **Centennial Avenue to Arrow Junction**
- **Crown Range Road**
- **Mt Aspiring Road**
- **Skippers Canyon Road**

[Any further roads in the Wanaka/Hawea/Makarora area that we are satisfied, after further hearing, should be added to the list].

We consider a reasonable case has been made to reinstate Appendix 8, as stated in the proposed plan[131], duly amended, in the district plan, under section 293 of the Act.



131 Appendix 8: Roading Hierarchy [notified plan p.8/1-8/5].

Chapter 11 : Policies - Utilities and Other Issues

[A] Utilities

169. There are issues as to how much control, if any, there should be over utilities (power and telephone lines, transmitters etc) in the district's landscapes. Transpower and Contact Energy each sought that the description of the 'activities' covered by 'utilities' include a statement recognising that the Council should when considering controls *tak[e] ... into account the needs of users and economics of providing for demands.* We consider such a statement is unnecessary in describing the activity and the issue it generates. Those matters are always relevant in terms of section 32, and, when considering resource consents, section 7(b) of the RMA.

170. For its part WESI wished to change the utilities policy by adding the underlined words in the following policy (and deleting those in brackets):

Utilities

To protect the visual coherence provided by the natural resources and open rural character by:

- *requiring utilities to be sited [where practicable] away from skylines, ridgelines, prominent locations, and landscape features*
- *encouraging utilities to be located along the edges of landforms and vegetation patterns*
- *encouraging utilities to be co-located wherever possible*

- *encouraging or requiring the alignment and/or location of utilities to be based on the dominant lines in the landscape.*
- *Requiring that structures be as unobtrusive as is practicable with forms appropriate for the landscape and finished in low reflective colours of dull grey, green or brown or derived from the background landscape.*
- *requiring that transmission lines [where technically and economically feasible] in the large towns, settlements and areas of landscape importance be placed underground.*

171. Telecom appeared and eventually filed a memorandum recording an agreed position with the Council. It sought to change policy 5 in the revised plan:[130]

- By deleting the words *"to protect"* in the phrase: *"To protect the visual coherence provided by the natural resources and open rural character ..."*
- And substituting

  "To avoid, remedy or mitigate ..."

That change makes no sense as it stands, and so we will not adopt it but modify the policy to achieve what we think the parties intended. We accept that this is a case where the policy should refer to the full panoply of section 5(2)(c) options.

172. The fundamental point in considering the siting of utilities in outstanding natural landscapes (at least in this district) is that it should not be as of right. A policy that states:

Siting, where practicable, utilities away from skylines etc ...

130 Policy 4.2.5 [revised plan 4/8].

always leaves the door open for a utility operator to argue that it is not practicable to site a utility anywhere else. That is not a correct approach. The policy should be one that gives the Council the final say on location within outstanding natural landscapes.

173. We consider there should be at least two different policies, one for landscapes and features in the Wakatipu basin and for outstanding natural features everywhere in the district, and the other for 'other' landscapes. This includes the rest of the district's outstanding natural landscape (subject to further submissions requesting different policies in the general Wanaka area). We consider that WESI's co-location policy has some merit – especially on Slope Hill – which should be an exception to the general policy on outstanding natural landscape. However, its colour palette policy is again unduly restrictive.

174. Therefore we decide the policy should <u>delete</u> the introductory words and the first bullet point and <u>substitute</u>:

10. <u>Utilities</u>

To avoid, remedy or mitigate the adverse effects of utilities on the landscapes of the district by:

- **Avoiding siting utilities in outstanding natural landscapes or features in the Wakatipu Basin (except on Slope Hill in the vicinity of current utilities).**
- **Encouraging utilities to be sited away from skylines, ridgelines, prominent locations, and landscape features**
- **Encouraging utilities to be co-located wherever possible.**

... [otherwise as in the revised plan]

In other respects we agree with Mr George's evidence that the policies in the revised plan under 'Utilities' are appropriate.

[B] Forestry and Amenity Planting

175. WESI seeks the reinstatement of the following Part 4 provisions for forestry and tree planting (as contained in the notified plan[131]):

4.2.5 Policies

Forestry

To maintain the open character of the landscape and avoid increasing its apparent level of modification by:

- encouraging forestry to be located on the outside edges of valley floors and that it be linked to an existing landform or vegetation edge.

- discouraging forestry on or around prominent ice sculptured ridges and features.

- encouraging planting to be located so that mature trees will not obstruct views from main roads and viewpoints.

- encouraging a limited range of species in each stand.

- encouraging interest be created by varying the density and spacing of the forestry trees rather than by the addition of ornamental planting.

131 Paragraph 4.2.5 policies 12 and 13 [notified plan p.4/24].

13 Amenity Planting

To protect the existing boldness and clarity of the natural landscape by:

- promoting the location of amenity planting only near settlements and in the immediate vicinity of structures in the rural environment,

- discouraging amenity planting in isolated stands away from urban or settlement areas.

176. Both those policies and Mr George's suggested improvements of the forestry policy (he opposed any amenity planting policy) suffer from their generality. They both refer to the 'open character' of the landscape, but as we have already discussed, some areas of the district are not 'open'. In particular, the lower areas of the Wakatipu basin are increasingly becoming a treed landscape. We do not see that there should be any policy against forestry in that area. Consequently, we consider the policy should state:

11. <u>Forestry and Amenity Planting</u>

Subject to policy 16, to maintain the existing character of openness in the relevant outstanding natural landscapes and features of the district by:

(a) encouraging forestry and amenity planting to be consistent with the patterns, topography and ecology of the immediate landscape.

(b) encouraging planting to be located so that mature trees will not obstruct views from scenic rural roads.

We exclude the policy from applying to visual amenity landscapes since these are landscapes which may benefit from the presence of trees. We do not consider there is any need for a separate amenity policy if amenity planting is included in the policy as stated above.

[C] Transport Infrastructure

177. WESI also sought to introduce a policy in respect of transport infrastructure which required that carparks in rural and natural areas be depressed below existing ground level and screened. We agree with Mr George that depressed car parks could cause ponding problems and that the existing policy of screening is adequate. The policy on transport infrastructure should remain unchanged.

[D] Subdivision

178. District-wide subdivisional issues were raised by Messrs Clark, Fortune & McDonald ("CFM") in respect of Part 15 (Subdivision etc) of the district plan. At the hearing we were handed a memorandum signed by their counsel and by Mr Marquet for the Council. The changes to the revised plan as agreed by those two parties were as follows:

Part 15.1.3 Policies 4.1 and 4.3

CFM and Council agree to the substitution of the words in Policy 4.1 with the following:

> ***"protect outstanding natural features and landscapes and nature conservation values from inappropriate subdivision"***

CFM and Council agree that in place of Policy 4.3 should be substituted the following:

> ***"To avoid, remedy or mitigate any potential adverse effect on the landscape and visual amenity values as a result of land subdivision."***

179. The policies are now rather too vague to be wholly desirable, especially since they do not sit easily with the policies in Part 4 of the district plan. We consider that it might be desirable to qualify those policies by adding introductory words to each:

> ***Subject to the landscape and visual amenity policies in Part 4.2 of the plan.***

We reserve leave for the parties to make submissions (and/or call evidence) on our suggestion.

Chapter 12 : Policies - Wellbeing and Energy

180. WESI and Central Electric Ltd also sought changes to other sections of Part 4 in their references. We now turn to these.

Social and Economic Wellbeing

181. First WESI requests a completely new section 4.9 on 'social and economic wellbeing'[132]. In the statement of 'resources and activities' at the beginning of its proposed section 4.9 WESI seeks a statement in the district plan stating:

> *Within [the Queenstown-Lakes District] environment recognition needs to be given to ensuring development and activities do not adversely effect (sic) community's economic and social wellbeing."*

Mr Lawrence made a similar submission:

> *The Society believes the purpose of the Act is the social and economic wellbeing of people and communities* ***while*** *looking after the environment and using resources with care.*

As Mr Goldsmith and Ms Ongley pointed out in their respective submissions, WESI's approach is misconceived. The purpose of the Act[133] is to promote the sustainable management of resources not the environment. We agree with Ms Ongley that the role of councils under the RMA in relation to social, economic and cultural activities is

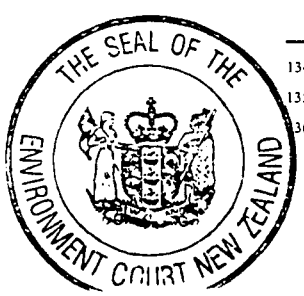
132 See paragraph 9 of this decision.
133 Section 5 RMA.

essentially a passive one. It is to enable[134] people and communities to provide for their wellbeing, not to direct how that is to be achieved. Consequently we do not have to consider the objectives and policies sought by WESI, or the evidence of its witness Mr M Wild in any detail on its proposed section 4.9 especially since, as we shall see, these proposals on wellbeing fail to pass the section 32 RMA tests in any event. WESI's failure to convince us on this section is not as damaging to it as it first appears, because the important policies it sought in its new section 4.9 related to landscape and we have been persuaded by its case (in parts) on some landscape issues.

Energy

182. WESI seeks to add explanatory statements to the energy issue[135]. Its first paragraph relating to consumption of fossil fuel is not a matter the RMA seeks to manage sustainably because minerals are expressly excluded: ***Winter and Clark v Taranaki Regional Council***[136]. As for the second policy this encourages new options of energy use, but we consider that the statement is too long to assist in the identification of the issue. It is unnecessary.

183. Central Electric Ltd in its reference sought a change seeking that on any plan change or resource consent application relating to hydro-electricity developments, the council should take into account, in addition to other listed factors: "the social and economic needs of the community". We do not consider that is appropriate for these reasons:



134 See ***Marlborough Ridge*** [1998] NZRMA 73 at 94-95.
135 Policy 4.5.2 [revised plan p.4/21].
136 (1998) 4 ELRNZ 506 at 512-513 referring to section 5(2)(a) of the RMA.

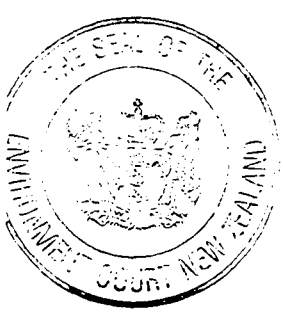
(a) this referrer seems to suffer from the same misconception as does WESI, that the Council has an active role in respect of social and economic needs;

(b) in any event efficiency must be had particular regard to[137];

(c) although the difficulties of assessing these matters should not be under estimated[138].

Summary

184. None of the changes requested and referred to in this chapter should be inserted on the district plan. On these matters the revised plan should stand without change.



137 Section 7(b) RMA.

138 ***Baker Boys Ltd v Christchurch City Council*** [1998] 10 NZRMA 433 at para 57.

Chapter 13 : Section 32 Analysis

185. Section 32 of the RMA imposes various duties to consider alternatives and assess benefits and costs of the proposals. These matters were put in issue by Mr Goldsmith's parties. Section 32 states:

> *(1) In achieving the purpose of this Act, before adopting any objective, policy, rule, or other method in relation to any function described in subsection (2), any person described in that subsection shall -*
>
> *(a) Have regard to -*
>
> *(i) The extent (if any) to which any such objective, policy, rule, or other method is necessary in achieving the purpose of this Act; and*
>
> *(ii) Other means in addition to or in place of such objective, policy, rule, or other method which, under this Act or any other enactment, may be used in achieving the purpose of this Act, including the provision of information, services, or incentives, and the levying of charges (including rates); and*
>
> *(iii) The reasons for and against adopting the proposed objective, policy, rule, or other method and the principal alternative means available, or of taking no action where this Act does not require otherwise; and*
>
> *(b) Carry out an evaluation, which that person is satisfied is appropriate to the circumstances, of the likely benefits and costs of the principal alternative means including, in the case of any rule or other method, the extent to which it is likely to be effective in achieving the objective or policy and the likely implementation and compliance costs; and*

(c) *Be satisfied that any such objective, policy, rule, or other method (or any combination thereof) -*

(i) Is necessary in achieving the purpose of this Act; and

(ii) Is the most appropriate means of exercising the function, having regard to its efficiency and effectiveness relative to other means.

186. We have considered the matters in section 32(1)(a) earlier in our discussion of the need for the various policies. We add that we agree with Mr Goldsmith's submission that section 9 of the Act, and its underlying policy direction that landowners are free to use land as they wish unless the district plan imposes controls, is important. However, he went on to submit that the debate at the heart of this proceeding is the "enabling" regime promoted by the revised plan as compared to a "prescriptive" and "regulatory" regime being promoted by WESI. We do not consider that is entirely fair to WESI's case since at least in respect of section 6 matters it is a matter of national importance to consider the imposition of controls. For the reasons earlier stated we consider some objectives and policies are dictated by the issues and our findings of fact.

187. As for section 32(1)(b), in this case we totally lack any evidence that would allow us to carry out a cost/benefit analysis in monetary terms. Until recently we were unclear as to whether it was ever possible to carry out such a monetary analysis meaningfully under the RMA in respect of such a diffuse subject as landscape. However we now learn from our research that methodologies are being developed (admittedly with some heroic assumptions) that might be able to be applied in New Zealand. In particular we draw attention to a paper on 'The Welfare

Economics of Land Use Regulation'[139]. The introduction to that paper - which is concerned with the British Town and Country Planning system - and in particular policies for the provision of 'open space' - states:

> *The question of interest is not whether these public policies generate benefits, but rather what is the value of the benefit and how do these benefits compare with the costs associated with the policies. In this paper we develop and test an approach for such an evaluation of land use planning.*

188. Our reasons for accepting an absence of any rigorous benefit/cost analysis is first that the analysis are only required to be 'appropriate to the circumstances'[140]. In these proceedings where there are issues concerning 'open space' in the most general sense and matters of national importance the need for analysis is greatly reduced. That is especially so since the revised plan expressly recognises the importance of the district's landscapes to its economy[141]. Secondly, the costs/benefits we are to evaluate include non-monetary benefits and costs[142]. In the circumstances of this district, with landscape being such an important issue, we consider there is no need to consider a monetary evaluation of the landscapes and can rely on the non-monetary evaluations given to us by the expert witnesses.

189. However, that is not to say that a much more detailed monetary evaluation could not be undertaken even for this district. We consider an evaluation could be carried out. Even if it did not exhaust the values of the landscapes, such a study, if well designed and tested, might be

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139 Research Papers in Environmental and Spatial Analyses No. 42 (Department of Geography, London School of Economics) Cheshire, P and Sheppard, S (1997).

140 Section 32(1)(b).

141 Part 4.2.1 [Revised plan p4/5].

142 See Section 2 RMA: definition of 'benefits and costs'.

helpful for similar reasons to the utility of the English study we have already referred to. The authors concluded of their study that:

> *The results also reinforce the often repeated advice of economists that the provision of public goods by regulation has the additional disadvantage from a liberal viewpoint: the real costs are not directly visible, but require some effort and ingenuity even to approximate. That they are not visible, however, does not mean that they are not real nor ... that they cannot be substantial*[143].

190. As for section 32(1)(c) we consider:

(a) There is no need for the district plan to state policies for **all** the landscapes of the district;

(b) The corollary to (a) is that some landscapes (as landscapes) can be cared for by their owners, especially having regard to the presumption in section 9 of the RMA - see ***Marlborough Ridge Ltd v Marlborough District Council***[144]***;***

(c) Only outstanding natural landscapes and visual amenity landscapes require some kind of policies and methods of implementation in respect of, and on, landscape grounds alone. These are situations where WESI's evidence persuades us that some landscape policies are efficient and effective because market transactions fail to protect these landscapes sufficiently.

191. There are, however, other objectives and policies requested by WESI in its reference which we do not think can meet the tests in section 32. As we explained in earlier chapters of this decision WESI sought to add:

(a) a policy in air quality in section 4.1;

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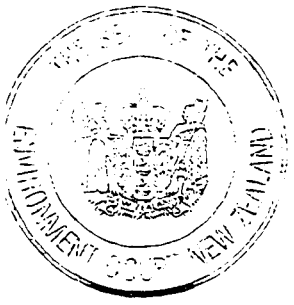
143 Research Papers in Environmental and Spatial Analyses No. 43 (Department of Geography, London School of Economics) Cheshire, P and Sheppard, S (1997).

144 (1997) 3 ELRNZ 483; [1998] NZRMA 73 at 90.



(b) a policy on energy to section 4.5; and

(c) an entirely new section 4.9 on "Social and Economic Wellbeing".

WESI did not attempt to justify its changes under section 32 and we accept in general terms and in the absence of argument to the contrary, Mr Goldsmith's argument that there was an obligation on WESI to produce evidence on the efficiency and effectiveness of its proposals including some kind of benefit/cost analysis.

Chapter 14 : Orders

192. We are satisfied that on the broad ultimate issue, the purpose of the Act will be met if we substitute in the district plan the proposals stated earlier in this decision. Accordingly, we make the following orders:

(1) Under section 292(1) of the Act

(a) we delete paragraph 4.1.2 of the revised plan and substitute a new paragraph 4.1.2 in the district plan as follows:

4.1.2 Resources, Activities and Values

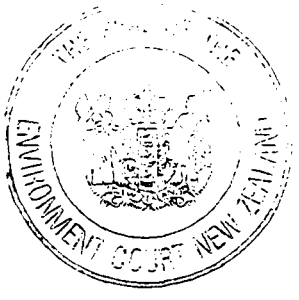
The resources and values of the natural environment of the District and the activities that interact with those resources and values are described in various sections of this Part of the District Plan, namely:

- **Section 2 Landscape and Visual Amenity**
- **Section 3 Takata Whenua**
- **Section 4 Open Space and Recreation**
- **Section 5 Energy**
- **Section 6 Surface of Lakes and Rivers**
- **Section 7 Waste Management**
- **Section 8 Natural Hazards**
- **Section 9 Urban Growth**

In addition Section 10 deals with Monitoring, Review and Enforcement.

(b) We add to Objective 1 - Nature Conservation Values - of Part 4.1.4 the words emphasized below in the following sub-objective:

The protection of outstanding natural features and outstanding natural landscapes.



(2) Under section 293(1) and clause 15 of the First Schedule to the Act the Council is directed to change Parts 4.1, 4.2, and 15 of the revised plan as follows:

(a) **Part 4.1: Nature Conservation Values**

By adding the words: *"or containing geological and/or geomorphological features of scientific interest"*
to method (i) on p.4/3 of the revised plan.

(b) **Part 4.2.4: Issues for Landscape**

By adding a third issue as follows:

iii The Department of Conservation also administers large areas of ex-State forests and retired pastoral leases within the Conservation Estate. In addition, the District contains vast areas of Crown land held under pastoral lease. Much of the land in these reserves and conservation areas, as well as land within the pastoral leases and private ownership, is used and enjoyed by residents and visitors to the District, both actively and passively. Some of the areas are intensively used and are a focus for many visitors to the District.

(c) **Part 4.2.5: Landscape and Visual Amenity**

By deleting Objectives and Policies 4.2.5 in part 4.2 of the revised plan in its entirety and substituting Objectives and Policies 4.2.5 as stated in Appendix III.

(3) **Part 15: Subdivision, Development and Financial Contributions**

These issues are adjourned for further hearing about how to reconcile them with Part 4.2.

(4) This decision is interim in respect of the following matters:

(a) It is limited territorially in that all persons appearing may make further submissions (and call further evidence) on the district plan as it relates to these areas of the district not in the catchment of Lake Wakatipu and the Kawarau River (other than the Arrow and Shotover rivers above the Wakatipu basin).

(b) We have made only very limited decisions as to the appropriate methods of implementation that might flow from the objectives and policies settled by this decision. Except where expressly decided all methods are open for argument.

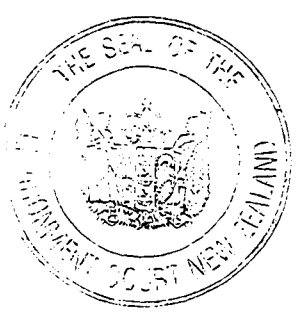
(c) We have adjourned the hearing in respect of "areas of landscape importance", and note that in due course WESI will have to elect whether it wishes to pursue the reinstatement of ALI's. Currently we do not favour that course.

(5) Leave is reserved to any party or interested person to apply to the Court in respect of Part 4 of the district plan:

(a) To correct any omissions or errors (both generally and in respect of outstanding natural landscapes or features);

(b) To make any necessary changes necessary to meet the spirit and intentions of our decision if the suggested changes do not achieve the same.

(c) To apply under sections 292 and/or 293 of the Act in respect of any matters on which leave has been expressly reserved



(including the matters in paragraphs 60, 61, 65 and 168 of this decision).

(6) All these proceedings (apart from those where the referrers have withdrawn) are adjourned to a further conference of the parties at Queenstown on **Monday 29 November 1999 at 2.00 p.m.** on the issues of:

(a) Whether there are any errors arising or other matters under order (5) above in respect of the amendments to part 4.

(b) Whether there are any outstanding matters under sections 1, 2 and 9 of Part 4 of the district plan.

(c) Whether a further hearing is needed in respect of
(i) the general Wanaka/Hawea area;
(ii) zone boundaries.

(d) Appropriate methods of implementation of the relevant district-wide issues.

(7) Costs are reserved. We note, without making any final determination as to relevance:

(a) That WESI made out its claim that the revised plan was completely inadequate in respect of landscape issues; and

(b) That without the involvement of WESI, that issue could not have come before the Court.

193. Although the question of zoning boundaries is as much a matter of policy as methods we have not in fact decided any zone boundaries as a result of this hearing. We hope the parties will be able to consider our three-way division of rural landscapes and suggest appropriate zone boundaries by agreement. Naturally if agreement cannot be reached we

will set those issues down for further hearing. We comment that we have tried to draw the lines for the outstanding natural landscapes so that they should be able to be defined with reasonable certainty without too much extra effort.

194. As far as the visual amenity landscapes of Wakatipu basin are concerned we remind the parties of Chapter 7 of this decision. It contains suggestions for defining the inner boundaries of the section 7 landscapes.

DATED at CHRISTCHURCH this 29th day of **October** 1999.

J R Jackson
Environment Judge