TAB 15

BEFORE THE ENVIRONMENT COURT

Decision No. [2016] NZEnvC 81

IN THE MATTER	of the Resource Management Act 1991
AND	of an appeal under section 120 of the Act
BETWEEN	R J DAVIDSON FAMILY TRUST
	(ENV-2014-CHC-34)
	Appellant
AND	MARLBOROUGH DISTRICT COUNCIL
	Respondent

Court:	Environment Judge J R Jackson Environment Commissioner J R Mills Environment Commissioner I Buchanan Dr A J Sutherland as special advisor under section 259 of the Act
Hearing:	at Blenheim on 4 to 8 and 11, 12 May 2015 and 17 July 2015
Appearances:	J D K Gardner-Hopkins, A M Cameron and E J Hudspith for Davidson Family Trust J W Maassen for Marlborough District Council J C Ironside for Kenepuru and Central Sounds Residents Assn Inc. and Friends of Nelson Haven and Tasman Bay Inc. – section 274 parties
Date of Decision:	9 May 2016
Date of Issue:	9 May 2016

DECISION

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

(1) confirms the decision of the Marlborough District Council on application U130797;

(2) refuses resource consent application (MDC ref) U13097 to establish and operate a 7.34 hectare marine farm at Beatrix Bay, Pelorus Sound.

B: Reserve costs; any application is to be made within 15 working days and any reply within a further 15 working days.

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0. Introduction

0.1 The issue: another marine farm in Beatrix Bay?

[1] On 24 December 2014 the R J Davidson Family Trust applied (Marlborough District Council Application No U130797) for consent to establish and operate a 8.982 hectare marine farm in Beatrix Bay, Central Pelorus Sounds, to enable the cultivation of green shell mussels[1] and other crops. The application also seeks consent to disturb the seabed with anchoring devices, to take and discharge coastal seawater, to harvest the produce from the marine farm and to discharge biodegradable and organic waste during harvest.

[2] The ultimate issue for the court is whether the proposal achieves the objectives and policies of the combined district and regional plan and of the New Zealand Coastal Policy Statement. The first important subordinate issue is to obtain an accurate description of the environment — there is disagreement between the parties over the accurate description of the current and reasonably foreseeable future environment. A further important issue for the court is whether, assessed under the relevant objectives and policies, the clear financial and social benefits of the proposal outweigh the direct and accumulative environmental costs. Finally, there is disagreement about the scale,

[1] *Perna canaliculus*.

character and intensity (inter alia) of the accumulative adverse effects of the proposal on:

- the natural character of Beatrix Bay;
- the landscape values of a promontory at the northern end of the Bay;
- amenities for visitors to and (the few) residents of Beatrix Bay;
- safety through reducing navigational options;
- the marine ecology of Beatrix Bay; and
- the habitat of New Zealand King Shag.

[3] More specific issues are identified as we identify and analyse the matters to be considered.

0.2 The application, the appeal, the other parties and the service of evidence

[4] The applicant for the proposed marine farm is a family trust. The beneficiaries of which are the children of Mr R J Davidson. Mr Davidson is part-owner of a number of other consented marine farm areas in the Marlborough Sounds and is a well-known marine scientist.

[5] The application is for a site adjacent to and surrounding the southern end of an un-named promontory ("the northern promontory") which juts out into the northern end of Beatrix Bay. The amended proposal is to split the farm into two separate blocks (a south-east section of 5.166 hectares and a south-west section of 2.206 hectares) either side of the point of the promontory, with a reduced total area of 7.372 hectares. The farm is otherwise of standard design: it is to consist of a number of lines with an anchor at each end and a single warp rising to the surface. At the surface is a backbone with dropper lines extending to approximately 12m depth (not to the sea floor). Each structure set is spaced 12 to 20 m apart. Despite the array of potential crops[2], we will call the proposed farm a "mussel farm" to distinguish it from other types of marine farm like salmon farms which usually have much greater adverse environmental impacts.

2 In addition to green shell mussels, the application seeks to cultivate scallops (*Pecten novaezelandiae*), blue shell mussels (*Mytilus galloprovincialis*), dredge oysters (*Tiostrea chilensis*), pacific oysters (*Crassostrea gigas*) and algae (*Macrocystis pyrifera, Gracilaria sp., Pterocladia lucida, Undaria pinnatifida*).

[6] The application was heard by an independent commissioner Mrs S E Kenderdine[3] on 21 May 2014 and a decision to decline was issued by the Marlborough District Council on 2 July 2014. The decision was appealed by the Appellant, which has put forward to the court an amended proposal to reduce impacts on the environment.

[7] Two incorporated societies, Kenepuru and Central Sounds Resident's Association Inc and Friends of Nelson Haven and Tasman Bay Inc, (together "the Societies"), which had lodged submissions on the Davidson Family Trust's application, then joined the appeal as section 274 RMA parties in support of the Council's decision.

[8] The service of evidence in this proceeding was rather drawn out for two reasons. First, after the initial service of evidence which largely replicated the evidence given to the hearing Commissioner, the Council decided it wished to put forward evidence on ecological matters. That was challenged, and after submissions, (a procedural[4] decision) allowed a further exchange of evidence.

[9] The Council then lodged evidence by Dr B G Stewart — an ecologist, and Dr P R Fisher — an avian ecologist. The Appellant responded with evidence from its various experts and with a statement from Mr Davidson which was nearly[5] as long as his evidence-in-chief. The Council challenged the admissibility of that evidence on the grounds it was new evidence, rather than rebuttal. Subsequently the Council lodged "supplementary" evidence from Mr R Schuckard, Dr Fisher, and Dr T Cook (an ornithologist) in response to Mr Davidson's long rebuttal statement. The Appellant objected to the admissibility of this evidence on the grounds that the Council had no right to lodge it. Finally, the Appellant applied for consent to call rebuttal evidence on methodology from Dr D M Clement a marine ecologist. The admissibility of this was in turn challenged by the Council.

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3 A retired Environment Judge with very extensive experience in and knowledge of the Marlborough Sounds.

4 Procedural Decision [2014] NZEnvC 257.

5 26 pp evidence-in-chief [Environment Court document 6]; 22 pp further evidence [Environment Court document 6A].

[10] The questions of admissibility raised subsequent to the procedural decision were adjourned to be resolved at the hearing. We considered it appropriate to receive all[6] the information lodged for these reasons. First, the evidence received is relevant which is the main test. Second, Mr Davidson is, in effect, the Appellant and so if he wishes to raise matters he should be allowed to so that he can be reasonably satisfied the Trust has been given a full and fair hearing. Third, to the considerable extent that Mr Davidson raised new matters in his rebuttal, the Council and the Societies should, in fairness, be allowed to reply.

0.3 The mussel farm site[7]

[11] The site is an area of shallow coastal water — between 22m and 42m deep — adjacent to the northern promontory. Dr D I Taylor, an ecologist called by the Appellant, described the benthic environment below the farm's two blocks as primarily soft mud sediments with a small area of mud/shell hash and coarser sand/shell hash sediments at the inshore margin. A bedrock/boulder reef habitat extends to the southwest of the promontory to around 35m from the closest proposed mussel lines. It was to avoid interfering with this reef that the Appellant divided its proposed farm into the two blocks described.

[12] On the site current speeds are generally below 4cm per second which is considered to be in the low to moderate range. Higher flushing events of up to 10cm per second occur periodically throughout the water column and strong currents up to 20cm per second have been recorded in the lower section of the water column. Flow direction is generally balanced east/west around the end of the promontory.

[13] The northern promontory adjacent to the site extends around 700m into the bay, dividing the northern coastline of Beatrix Bay into two relatively sheltered embayments. The western slopes of the promontory are dominated by rough pasture mixed with tauhinu scrub[8], gorse, pig fern, and occasional wilding pines. Further regeneration is inhibited by dry conditions combined with grazing stock (e.g. cattle), feral pig rooting

6 Except the evidence of Dr T Cook who was unable to attend at hearing to confirm his evidence and be cross-examined.

7 See the Assessment Matters in rule 35.4.2.9 of the Sounds Plan [p 35-21].

8 *Olearia leptophyllus*.

and goat and hare grazing. Vegetation cover on the eastern side of the promontory is more advanced but is also inhibited by feral animals and stock.

0.4 The landscape and seascape setting

[14] Beatrix Bay, containing approximately 2,000 ha, is one of the largest bays in Pelorus Sound (total 38,477 ha). It is roughly circular with a coastline of about 22 km. Some sense of the scale of the Bay can be gleaned from the fact that the northern promontory, where the site is, cannot be identified when entering from the south, but looms quite large from close to. The western side of Beatrix Bay is a long near-island running from Kaitira, the East Entry point to Pelorus Sound (from Cook Strait), to Whakamawahi Point. It is connected by a low isthmus along the northern side of Beatrix Bay to the Mount Stoke massif. The slopes of that hill form the higher (1,000 m above sea level) east and south-east margin of the bay. The southern end of the bay descends to Te Puaraka Point. The wide south-western end of Beatrix Bay opens to the rest of Pelorus Sound: south to Clova and Crail Bays, south-west to inner Pelorus Sound and west to Tawhitinui Reach.

[15] The relatively sheltered water of the "Mid Pelorus Marine Character Area"[9] is described in the plan as "... turbid and warm and the seafloor as mostly mud with conspicuous sparse marine life fringed by narrow cobble reef"[10]. Most of Beatrix Bay is 30 to 36 m deep with a seabed of soft sediment[11] (the most common type of habitat in the Marlborough Sounds).

[16] Much of the land surrounding the northern end of Beatrix Bay is in the single ownership of Mr W Scholefield. It has been farmed for many years, but is in varying stages of regeneration (i.e. pasture to kanuka/broad-leaf scrubland). Some of the upper hillsides are administered by the Department of Conservation and support mature forest. Three small reserves reach the coast (two on the western coast of the Bay and one on the eastern coast). None of the reserves are close to the application site.

9 Map 106 Sounds Plan Vol. 3.
10 Appendix Two of Sounds Plan [p Appendix Two – 67].
11 B G Stewart evidence-in-chief para 3.1[Environment Court document 26].

[17] There are[12] 37 existing marine farms (approximately 304.4 ha in total[13]) located around the edge of Beatrix Bay. Backbones (surface structures) on the 37 marine farms span approximately 8.5 km (33%) of total shoreline length[14] at sea level (but more under water). Approximately 85% of the surface area (2,000 ha) of Beatrix Bay is not occupied[15] by mussel farms.

0.5 The matters to be considered when making the decision

[18] The site is located within Coastal Marine Zone 2 ("CMZ2") in the Marlborough Sounds Resource Management Plan (the "Sounds Plan"). That is a zone in which "appropriate"[16] marine farms are provided for, at least close to the shore, as discretionary activities[17]. In fact, because the proposed farm extends beyond 200 m from the shore, the status of the activity under Rule 35.5 of the Sounds Plan is non-complying. One of the gateways of section 104D RMA must therefore be passed before we can grant consent. Those gateways require either:

- that the adverse effects will be minor; or
- that the activity is not contrary to the objectives and policies of the Sounds Plan.

[19] If one of these tests is met, section 104(1) identifies the matters we are to have regard to in coming to a decision. In this case the relevant matters include:

- the actual and potential effects of the activity on the environment (section 104(1)(a));
- the provisions of the New Zealand Coastal Policy Statement ("the NZCPS"), the Marlborough Regional Policy Statement ("the RPS") and the Sounds Plan (section 104(1)(b));

12 R J Davidson evidence-in-chief Table 1 [Environment Court document 6].
13 R J Davidson evidence-in-chief Table 1 [Environment Court document 6].
14 R J Davidson rebuttal evidence-in-chief para 8.1 [Environment Court document 6A].
15 R J Davidson evidence-in-chief Table 1 [Environment Court document 6].
16 Explanation to Issue 9.2 [Sounds Plan p 9-4]; Objective (9.2.1) 1 and Policy (9.2.1) 1.14 [Sounds Plan p 9-6].
17 Rule 35.4.2.9 of the Sounds Plan where "close" means between 50m and 200m of the shore within CMZ2.

- any other relevant matters, if that is reasonably necessary (section 104(1)(c)).

Consideration of matters under section 104(1)(a)-(c) is "subject to Part 2 of the RMA". We must also have regard to[18] the Commissioner's Decision.

[20] The "environment" in section 104(1)(a) is not only the current description of its components (as identified in the section 2 RMA definition) but also the past environment as described in the relevant district plan and the reasonably foreseeable environment. Thus the environment includes the accumulated and reasonably foreseeable accumulative effects of all stressors (other than the application) on the past and current environment.

[21] The future component of the "environment" is well established. In *Queenstown Lakes District Council v Hawthorn Estate Limited*[19] ("*Hawthorn*") the Court of Appeal identified the central question in section 104 (rather than section 104D) of the Act as[20]:

> … 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 court examined numerous provisions in the Act in which the "environment" was referred to, then analysed[21] the scheme and purpose of the RMA and concluded:

> 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.

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18 Section 290A RMA.

19 *Queenstown Lakes District Council v Hawthorn Estate Limited* [2006] NZRMA 424; (2006) 12 ELRNZ 299 (CA) at [57].

20 *Hawthorn* at [11].

21 *Hawthorn* at [57].

[22] More recently, in *Far North District Council v Te Runanga-A-Iwi O Ngati Kahu*[22], the Court of Appeal confirmed that:

> In its plain meaning and in its context, we are satisfied that "the environment" necessarily imports a degree of futurity. [Emphasis added].

0.6 The obligation to supply adequate information (section 104(6) RMA)

Introduction

[23] There is one other, procedural, aspect of section 104 which we need to consider in the light of the evidence given to us. It is the question how to apply section 104(6) of the RMA (as added[23] in 2009). That states:

> (6) A consent authority may decline an application for a resource consent on the grounds that it has inadequate information to determine the application.

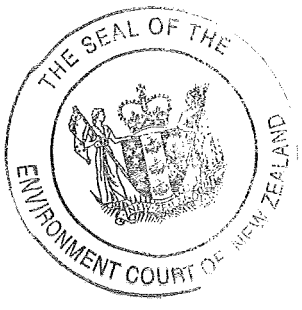
[24] For the Council Mr Maassen relied on this as the basis for his submission[24]:

> … that even though a submitter or the Council does not call evidence on a particular effect, it is open for the consent authority to determine that the information is inadequate and decline the application accordingly. The only way, for example, one can faithfully fulfil the Parliamentary direction to "recognise and provide for" [the] matters of national importance [is] to have adequate information. This supports the evidential onus that the applicant bears.

Mr Maassen carefully did not call this burden an onus of proof. For the Appellant, Mr Gardner-Hopkins did not respond directly to Mr Maassen's submission about section 104(6).

The obligation to supply adequate information

[25] Section 104(6) appears to place an onus on the Appellant for a resource consent to supply enough relevant information to the consent authority to enable it to determine



22 *Far North District Council v Te Runanga-A-Iwi O Ngati Kahu* [2013] NZCA 221 at [80].
23 By section 83(6) Resource Management (Simplifying and Streamlining) Amendment Act 2009.
24 Submissions for Marlborough District Council dated 29 June 2015 at [113].

the application. In particular, the decision-maker must be able to reasonably assess a credible region[25] of probabilities of the relevant adverse effect even if only qualitatively.

[26] However, in some situations there may be inadequate information to even assess the likelihood of the effects of a stressor, and it is then that section 104(6) RMA may come into play. Clearly the power to decline on the basis of inadequate information should be exercised reasonably and proportionately in all the circumstances of the case. The power is also discretionary — that is shown by the use of the word "may" — so the consent authority may grant consent even if it lacks sufficient information. An example may be if there is a proposal for adaptive management to respond to uncertainties.

[27] Some assistance as to the purpose of section 104(6) RMA may be gained from Part 2 of the Act. The purpose of Part 2 is, as described in *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd*[26] ("*King Salmon*"), principally to guide local authorities, for example when considering a resource consent. However, as Mr Maassen observed, it is difficult for a consent authority to provide for the matters of national importance in section 6 unless it recognises them first. This suggests an applicant should put forward adequate information for the consent authority to be able to identify the relevant stressors and their effects.

[28] Another particular provision of Part 2 of the RMA that may assist application of section 104(6) is section 7(b) of the RMA, which requires decision makers to have particular regard to the efficient use and development of the relevant resources. While section 7(b) is only ever one, of many, matters to be considered (and it is silent about the protection of resources) it does imply that in many cases it is the more[27] valuable use and development of the resources which should be preferred. How often could a consent authority deliberately and rationally choose a wasteful use of resources? It appears to us that section 7(b) reinforces or creates a burden on an appellant to show that its proposed consent would use the resources better than the status quo or some other possible use if that is put forward in the evidence.

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25 I.e. between 34% and 66%.

26 *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd* [2014] NZSC 38; [2014] 1 NZLR 593; [2014] NZRMA 195 at [24] and [25] per Arnold J.

27 Or most valuable if there are three or more options.

[29] Several aspects of the scheme of part 6 (Resource Consents) of the RMA are relevant as to how section 104(6) should be applied. First, section 88 prescribes[28] that an application for resource consent must include an Assessment of Environmental Effects ("AEE") as required by Schedule 4 of the Act. The information required by the Schedule (principally as to the effects of the proposal) "... must be specified in sufficient detail to satisfy the purpose for which it is required[29]". One purpose[30] is — as stated in the previous paragraph — found in the particularised objectives and policies of the relevant plan. This appears to impose an obligation to supply information of adequate quality (as well as sufficient detail) to enable grant of consent if no other information is put forward.

[30] An application may now[31] be determined to be incomplete if it does not include the information required by Schedule 4, and returned[32] to the Appellant. Then the Council has the power to request[33] that the Appellant provide further information or to commission a report[34] (in addition[35] to any standard report under section 42A RMA) before the hearing, although the Appellant has the right to refuse[36] to provide the information or even to ignore[37] the request. A similar provision[38] applies in respect of refusing to agree to the commissioning of a report.

[31] So the procedural scheme of Part 6 of the RMA emphasises the provision of information to the consent authority even before the hearing. That is to ensure the consent authority is adequately informed before making a decision. Because the appellant may refuse or ignore the request, section 104(6) still confers a power enabling the consent authority to decline if it has inadequate information.

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28 Section 88(2)(b) RMA.
29 Clause 1, Schedule 4 RMA.
30 Another purpose is to fully and fairly inform the public of the potential effects.
31 Since the Resource Management Amendment Act 2013.
32 Section 88(3A) RMA (added by section 92(2) Resource Management Amendment Act 2013).
33 Section 92(1) RMA.
34 Section 92(2) RMA.
35 Section 92(4) RMA.
36 Section 92A(1)(c) RMA.
37 Section 92A(3) RMA.
38 Section 92B RMA.

[32] The Environment Court has the same[39] powers, duties and discretions as the consent authority in relation to section 104(6) under this appeal, so it appears the court may also decline the application if it has inadequate information to satisfy it that the purpose of the Act will be achieved. Further, when making an assessment under section 104(6) on the adequacy of the information, the consent authority (or, on appeal, the Environment Court) must have regard to[40] whether any request for further information or reports resulted in further information being available. Presumably if further information (or a report) has not been requested that is a factor against declining the application on the grounds of inadequate information.

[33] In *Saddle Views Estate Limited v Dunedin City Council*[41] Whata J, a Judge of the High Court with extensive experience of the RMA, stated:

> Burden of proof is a complex issue in RMA proceedings. Very often RMA proceedings involve proof of existing fact, assessment of future effects and an evaluative judgment in light of prescribed statutory thresholds. Allocation of evidential and persuasive burden is problematic and sometimes inapposite in this context, as several leading cases demonstrate[42].

We respectfully agree subject to two minor qualifications: first we consider it may be more accurate to move (or repeat) the phrase "in light of prescribed statutory thresholds"[43] to follow the words "assessment of future effects"; second, the statement needs to be read in the light of section 104(6) RMA.

[34] In one of the cases referred to by Whata J, *Shirley Primary School v Telecom Mobile Communications Ltd*[44], the Environment Court held that "in a basic way there is always a persuasive burden" on an Appellant for resource consent reflecting the principle that "the person who desires the Court to take action must prove the case".

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39 Section 290(1) RMA.
40 Section 104(7) RMA.
41 *Saddle Views Estate Limited v Dunedin City Council* (2014) 18 ELRNZ 97 (HC) at [90].
42 Referring to *McIntyre v Christchurch City Council* (1996) 2 ELRNZ 84 (PT); *Shirley Primary School v Christchurch City Council* [1999] NZRMA 66 (EnvC); *Ngati Maru Iwi Authority v Auckland City Council* HC Auckland AP 18/02 June 2002; *Director-General of Conservation v Marlborough District Council* [2004] 3 NZLR 127 (2005) 11 ELRNZ 15 (HC); *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council* [2006] NZRMA 193 (HC).
43 "Thresholds" is rather idealistic: few plans are so forthright, and the Sounds Plan is a classic plan that always qualifies its objective and policies.
44 *Shirley Primary School v Telecom Mobile Communications Ltd* [1999] NZRMA 66 at [121]-[122].

That approach was endorsed (obiter) by the majority of the Court of Appeal in *Ngati Rangi Trust v Genesis Power Ltd*[45].

[35] We conclude that since 2009 section 104(6) now imposes a type of legal burden on an Appellant to supply adequate information, although it may in certain circumstances be able to sidestep that if it can satisfy a consent authority that an adaptive management or similar condition is appropriate (i.e. the *Sustain Our Sounds v New Zealand King Salmon Company Ltd*[46] criteria are met — we discuss these later).

[36] The method of applying section 104(6) discussed above seems generally consistent with Principle 15 of the *Rio Declaration*[47]. That includes the statement that "[W]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation". However, we give that no weight since we did not receive full submissions on the principle. In any event, a precautionary approach is (as we shall see) included in the New Zealand Coastal Policy Statement which we will consider later.

[37] Does that mean that an Appellant must either in its AEE[48] or in its evidence "... pre-empt all possible arguments made by opponents, in order to disprove alleged effects"?[49] The answer is "no" for two reasons. First, the relevant effects should usually have been identified in the relevant plan, as should what the plan expects to be done about them. That is why the particularisation in subordinate policy statements or plans of the purpose and principles of Part 2 of the Act, as identified in the majority decision in *King Salmon*[50], is so important. Second, it is impossible to prove (or disprove) a future event, simply because it has not happened yet. The most that can be established is a probability or likelihood that an effect may (or may not) occur. Third, on the facts of this case it is quite clear that the Appellant knew from the beginning that lost feeding habitat for King Shags is an issue because its AEE records that[51].

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45 *Ngati Rangi Trust v Genesis Power Ltd* [2009] NZRMA 312 (CA) at [23].

46 *Sustain Our Sounds v New Zealand King Salmon Company Ltd* [2014] NZSC 40; [2014] 1 NZLR 673; (2014) 17 ELRNZ 520 at [124] and [125].

47 *The Rio Declaration on Environment and Development* UNESCO, 1992.

48 Required under section 88(2)(b) and Schedule 4 of the RMA.

49 Making a question of a proposition by Mr G Severinsen in his recent paper *Bearing the Weight of the World: Precaution and the Burden of Proof* (2014) 26 NZULR 375 at 384.

50 *King Salmon* above n 26.

51 Assessment of Environmental Effects para 5.7 (Seabirds) [Exhibit 6.5].

0.7 The standard of proof and prediction under the RMA

[38] As to the standard of proof, Mr Gardiner-Hopkins submitted[52] that the High Court in *"Buller Coal"*[53] stated that the appropriate standard of proof to be applied is "... the balance of probabilities". He made no distinction between the standard of proof of facts and any assessment of likelihood for predictions. We consider the differences are important.

[39] We accept that we must decide all questions of fact on the preponderance of the evidence. Of course not all disputes about the environmental setting of a proposal are factual. To the extent that the "environment"[54] includes the reasonably foreseeable future, questions about what that may look like are also predictive. However, a standard of proof for predictions that is "on the balance of probabilities" is problematic for several reasons.

[40] First the concept of a "probability of a probability" is at least awkward if not inchoate. Second, the definition of "effects" in section 3 of the Act includes "... effects of low probability but high potential impact". As the court has stated before, it is difficult to understand what is meant by determining an effect of low probability on the "balance" of probabilities.

[41] Third, in *Clifford Bay Marine Farms Ltd v Director General of Conservation*[55], the Environment Court suggested that applying "the balance of probability test to predictions of risk or any other prediction of future effects on every occasion is unhelpful". The court subsequently considered the issue further in *Long Bay-Okura Great Park Society Incorporated v North Shore City Council*[56] (*"Long Bay"*) and considered it was bound[57] by the advice of the Privy Council in *Fernandez v*

52 Closing submissions dated 13 July 2013 at para 2.3(a).
53 Citing *"Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council* [2005] NZRMA 193 (HC) at [73]". The correct reference is [2006] NZRMA 193 (HC).
54 As defined in section 2 RMA.
55 *Clifford Bay Marine Farms Ltd v Director General of Conservation* Decision C131/03 at [63].
56 *Long Bay-Okura Great Park Society Incorporated v North Shore City Council* Decision A78/2008.
57 *Long Bay* at [321].

Government of Singapore[58] where Lord Diplock referred to "the balance of probabilities" as[59]:

> … a convenient and trite phrase to indicate the degree of certitude which the evidence must have induced in the mind of the court as to the existence of facts, so as to entitle the court to treat them as data capable of giving rise to legal consequences.

He continued:

> But the phrase ['the balance of probabilities'] is inappropriate when applied not to ascertaining what has already happened but to prophesying what, if it happens at all, can only happen in the future. There is no general rule of English law that when a Court is required, either by statute or at common law, to take account of what may happen in the future and to base legal consequences on the likelihood of its happening, it must ignore any possibility of something happening merely because the odds on its happening are fractionally less than evens.

As the court said in *Long Bay* that is a clear statement of the law, equally applicable in New Zealand. Predictions of the likelihood of an effect are decided upon the preponderance of the evidence.

[42] The Likelihood Scale[60] set out by the International Panel on Climate Change is useful in this context. It suggests the following "calibrated language for describing quantified uncertainty"[61] about the future:

Table 1. Likelihood Scale	
Term	**Likelihood of the Outcome**
Virtually certain	*99-100% probability*
Very Likely	*99-100% probability*
Likely	*66-100% probability*
About as likely as not	*33 to 66% probability*
Unlikely	*0-33% probability*

58 *Fernandez v Government of Singapore* [1971] 2 All ER 691 (PC).
59 *Fernandez v Government of Singapore* [1971] 2 All ER 691 (PC) at 696.
60 Table 1 Likelihood Scale in *Guidance Note for Lead Authors of the IPCC Fifth Assessment Report on Consistent Treatment of Uncertainties* MD Mastrandrea et al (2010).
61 *Guidance Note for Lead Authors of the IPCC Fifth Assessment Report on Consistent Treatment of Uncertainties* MD Mastrandrea et al (2010).

Very unlikely	*0-10% probability*
Exceptionally unlikely	*0-1% probability*

We will endeavour to be consistent with that Table in our assessment of probabilities of future events.

[43] The court also invited[62] the parties to make submissions before the hearing on the application of the probabilistic principle known as Bayes Rule to evidence (and hypotheses about future effects) but neither counsel nor the witnesses took up the opportunity. The court raised this point because most expert evidence that attempts to quantify the effects of stressors on the environment does so in a frequentist manner with 95% confidence limits. Since much data does not justify frequentist conclusions (disproving — or not — a null hypothesis, when that hypothesis is usually the opposite of what a consent authority wants to know), that information is then discarded as useless. However, such information can still be useful to assess the probabilities of potential events. As the Minute suggests, the principal method known to the court enabling consideration of more uncertain probabilities is Bayes Rule, so we regret the opportunity was not taken. That is especially so since Dr Clement, called for the Appellant, after making standard (and largely justified) frequentist criticisms of the Council's evidence, then admitted to the court that "Bayesian frameworks come in"[63] when assessing probabilities in conditions of uncertainty.

1. The marine environment of Beatrix Bay

1.1 Overview of the environmental setting

[44] The marine environment of Beatrix Bay, like the rest of the Marlborough Sounds, has been the focus of considerable historic human activity. It has been modified by physical disturbance (e.g. dredging and trawling), by runoff after land clearance, and by contaminants from residential and farming use of the land. Little data exists describing the ecological attributes of the Sounds prior to these activities. Some early publications reported on resources such as commercially viable intertidal mussel beds and subtidal scallop and horse mussel beds in the Pelorus Sound although most of these

62 Minute dated 14 April 2015.
63 Transcript p 369.

have been lost as a result of dredging and/or smothering sedimentation from land use practices.

[45] Dredging still occurs in the area, however, the actual number of dredge and trawl tows is not publicly available. The consensus of the experts seemed to be that dredging only occurred once or twice a year, whereas in the past it had been more frequent. In any event the experts seemed to agree that repeated and ongoing trawling for flatfish in Beatrix Bay has resulted in significant changes to the seafloor with fine sediments remaining on the surface. This could potentially result in a turbid layer across the whole Bay, but whether that is so is unclear. Much of the soft bottom marine environment in central Pelorus Sound remains in a modified state with small remnant sites supporting biologically significant communities[64]. Close to the shore there is often domestic rubbish[65] on the seabed.

[46] The intertidal zone of Pelorus Sound is dominated by cobble and boulder substrata interspersed by areas of bedrock. Isolated areas with low gradient soft shores exist at the heads of bays where shellfish such as cockles and pipis exist. In many parts of the Sounds the intertidal biological communities have been modified by historical recreational and commercial fishing activities. For example, from 1960 to 1980, hand harvesting as well as subtidal dredging of natural green-lipped mussel beds was widespread in the Sounds.

[47] The inshore shallow subtidal edges of Pelorus Sound are dominated by relatively steeply sloping shores. These areas have not been dredged and the impact of sediment runoff is minimised due to wave action and water currents that keep these shores relatively free from the effects of sediment smothering. Inshore shallow subtidal habitats in Pelorus Sound and the wider Marlborough Sounds are therefore in a relatively natural[66] state. Where currents are strongest, a variety of filter feeding organisms such as hydroids, sponges, ascidians and tubeworms become abundant. These current-swept shallow subtidal areas have often been recognised as significant sites.

64 Davidson R, Duffy C, Gaze P, Baxter A, DuFresne S, Coutney S and Hamill P. (2011). Ecologically significant marine sites in Marlborough New Zealand (Davidson Environmental Limited) [Exhibit 6.3].

65 R J Davidson rebuttal evidence para 7.5 [Environment Court document 6A].

66 R J Davidson evidence-in-chief para 24 [Environment Court document 6].

[48] At the foot of the shore slope, the topography of the sea floor becomes relatively flat. Deep offshore flat areas are usually dominated by silt and clay (mud). Mud is the most common and widespread marine habitat in the Sounds and supports a characteristic invertebrate community in addition to benthic fish species such as flat fish. In general, the diversity of surface dwelling species in these offshore mud areas is considerably lower than on the sloping bay edges. Surface dwelling species in particular are often relatively uncommon on deep mud. These offshore areas have been dredged in the past and that still continues[67]. Dredged sites support a community dominated by opportunistic species able to cope with regular disturbance. In many instances the original community types found on these offshore soft bottoms do not recover (or recover very slowly) from activities such as dredging.

[49] In addition to dredging and trawling the stressors on coastal marine environments such as Beatrix Bay include anthropogenic effects such as accelerated climate change, sedimentation from run-off from land-based activities[68], fishing[69] and marine farming. We received minimal evidence as to how the effects of climate change might affect the habitats of Beatrix Bay or the species that live in them.

[50] Dr Taylor also observed that[70]:

> Confounding the issue of determining any cumulative ecological effects on sub-tidal and intertidal communities will be the Sound-wide impacts of stochastic (largely random but can be predicted on a probabilistic basis) environmental events. This includes a rapid succession of floods from the Pelorus River (catchment 880 km²) and the Kaituna River (catchment 155 km²), which discharge on average 43.0 m^3s^{-1} and 5.4 m^3s^{-1} respectively (Sutton & Hadfield 1997), and decadal oscillations in weather patterns like El Nino/La Nina[71]. Both of these drivers can cause

67 R J Davidson rebuttal evidence para 8.11 and Figures 5 and 6 [Environment Court document 6A].

68 D I Taylor evidence-in-chief para 36 [Environment Court document 8] referring to "deforestation, pastoral farming, clear-felling of exotic forestry".

69 D I Taylor evidence-in-chief para 36 [Environment Court document 8].

70 D I Taylor evidence-in-chief para 39 [Environment Court document 8].

71 Citing Zeldis JR, Hadfield MG, Booker DJ 2013. "Influence of climate on Pelorus Sound mussel aquaculture yields: predictive models and underlying mechanisms". *Aquaculture Environment Interactions* at 4:1-15.

large shifts in the abundance of intertidal and sub-tidal species[72], and are known to affect the distribution of species within the Marlborough Sounds[73].

1.2 The effects of the existing mussel farms

[51] We have referred to the 37 marine farms around the bay. Many of the earlier mussel farms in Beatrix Bay were — in accordance with the Sounds Plan — located close in to the shore and over rocky or reef substrates. As awareness of the ecological importance of those areas has risen, and as demand for farming space has increased, farms have extended seawards. That has had the effect of extending farms over the soft (flatter) substrate that characterises the seabed of most of Beatrix Bay.

[52] Cultured shellfish such as mussels feed on microscopic suspended particulate matter both living and non-living (collectively referred to as seston) by filtering it from the water column. Mussel diets are primarily composed of phytoplankton, but also include some zooplankton and other living and non-living material. Following digestion of food, the faeces produced by mussels are generally light and tend to break up and dissolve readily. That process releases dissolved nutrients, particularly nitrogen, into the water column. Mr B R Knight, another ecologist called for the Appellant, wrote that nitrogen is considered to be a limiting factor to the growth of phytoplankton in Beatrix Bay, so the effect of grazing by mussels — which reduces phytoplankton stocks — may be somewhat balanced by the recycling of nutrients that encourage replenishment of phytoplankton stocks[74]. However, that is somewhat academic because Mr Knight also described the current trophic status of Beatrix Bay as low-mesotrophic. Indeed basic nitrogen budgets developed for the Pelorus Sound indicate there is an excess of nitrogen inputs occurring.

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72 Citing Schiel DR (2004). "The structure and replenishment of rocky shore intertidal communities and biogeographic comparisons". *Journal of Experimental Marine Biology and Ecology* at 300:309-342.

73 Citing Davidson R.J.; Duffy C.A.J.; Gaze P.; Baxter A.; DuFresne S.; Courtney S.; Hamill P. 2011. "Ecologically significant marine sites in Marlborough, New Zealand". Coordinated by Davidson Environmental Limited for Marlborough District Council and Department of Conservation.

74 B R Knight, evidence-in-chief para 19 [Environment Court document 9].

[53] Mr Knight relied on papers[75] which he said found no change in the base food web as a result of mussel production in Pelorus Sound. There was no indication from these studies that mussel production at a bay or Sounds-wide scale was nearing ecological carrying capacity or that mussel farming associated change in water column properties was occurring[76].

Water column effects

[54] More authoritative information on water column effects is contained in a report by Dr N Broekhuizen and others called "A biophysical model for the Marlborough Sounds Part 2: Pelorus Sound"[77]. A draft was produced by Dr Broekhuizen, under a witness summons, and the final version ("*the Broekhuizen Report*") was referred[78] to by Mr Maassen in his memorandum of June 2015 and produced to the court and parties in February 2016.

[55] *The Broekhuizen Report* presents the results from large scale biophysical modelling of Pelorus Sound designed to describe the effects of existing (at 2012) and proposed (consented since 2012) mussel and finfish farms on water quality[79]. Various marine farming and geochemical scenarios were modelled. A finding of particular relevance in this case was that bay scale effects of increased ammonium concentrations and decreased seston concentrations are predicted by the model as a result of mussel farming.

[56] Counsel submitted that *the Broekhuizen Report* shows that the Existing Mussel farms in Pelorus Sound as at January 2012 have changed the environment compared with a "No Mussel farms" scenario. The report states, as Mr Maassen for the Council quoted[80], that:

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75 Zeldis JR, Howard-Williams C, Carter CM, Schiel DR 2008. *ENSO and riverine control of nutrient loading, phytoplankton biomass and mussel aquaculture in Pelorus Sound, New Zealand.* Marine Ecology Progress Series 371; 131-142; Zeldis JR, Hadfield M, Booker D 2013. *Influence of climate on Pelorus Sound mussel aquaculture yield; predictive models and underlying mechanisms.* Aquaculture Environment Interactions 3(4); 1-15.

76 B R Knight, rebuttal evidence at 4.9-4.10 [Environment Court document 9A].

77 Broekhuizen, N; Hadfield M; Plew D "A biophysical model for the Marlborough Sounds Part 2: Pelorus Sound" (2015) NIWA Report CHC 2014-130.

78 Environment Court document 10A.

79 Broekhuizen N, Hadfield M and Plew D 2015 *A biophysical model for the Marlborough Sounds. Part 2: Pelorus Sound.* NIWA Client Report CH2014-130.

80 Memorandum from Marlborough District Council dated 22 July 2015.

> Relative to the nominated baseline scenario (EM-EF-WD[81]), a no mussel, existing fish with denitrification simulation (NM-EF-WD[82]) yields:
>
> **Winter-time:** lower concentrations of ammonium and nitrate but higher concentrations of particulate organic detritus (dead plankton etc.,) phytoplankton and zooplankton. The largest changes in relative concentration are seen in Kenepuru Sound and the largest relative concentration changes are within the zooplankton. There, time-averaged near-surface winter-time seston3 concentrations in the NM-EF-WD simulation are more than double those of the EM-EF-WD scenario (for zooplankton in Kenepuru, substantially more than double). The Beatrix/Crail/Clova system also exhibits similar (but smaller) changes.
>
> **Summertime:** lower concentrations of ammonium, nitrate, higher concentrations of detritus and zooplankton, but phytoplankton concentrations which are similar to (or lower than) those of the EM-EF-WD scenario. During summer, mussels convert particulate organic nitrogen (not directly exploitable by phytoplankton) to ammonium (directly exploitable by phytoplankton). Phytoplankton growth is normally nutrient limited during this time, but in the immediate vicinity of the mussel farms, phytoplankton (which survive passage through the farms) find a plentiful ammonium supply. This enables them to grow quickly – more than offsetting the losses that the population suffered to mussel grazing (the 'excess' accrued phytoplankton biomass being fuelled out of the detritus that was consumed). …

[57] In summary the *Broekhuizen Report* suggests that there have been "material" changes in water column properties as a result of the development of mussel farms. However, the report does not assist with determining any threshold regarding the ecological carrying capacity of Pelorus Sound for mussel farms. Nor does it substantiate a trajectory of insidious decline (in Mr Maassen's phrase) in relation to the water column.

The benthic zone: physical effects

[58] Shell, mussels, faeces and pseudofaeces are released from mussel farms. The latter comprise inorganic and organic material filtered from the water column, but not digested. The rejected particles are aggregated into a mucus-bound mass and

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81 The abbreviation stands for "existing mussel-farms, existing fish-farms, with benthic dentrificantion": (EM-EF-WD). This "corresponds to present-day conditions in Pelorus Sound" Broekhuizen et al para 4.9.

82 The abbreviation stands for "no mussel-farms, existing fish-farms, with benthic dentrification": (NM-EF-WD).

periodically ejected back into the water column. Pseudofaeces are heavier than faeces and settle out rapidly to the seafloor as sediment.

[59] Between 250 and 400 tonnes of shell, mussels and sediment is released under each hectare of farm each year[83]. For the 304 hectares (approximately) of current farms in Beatrix Bay, that is a minimum of 76,000 tonnes of sediment. The nutrients and fine particulate matter which are part of that sediment are dispersed at a rate which is a function of the current flow at the individual sites and the flushing characteristics of the bay as a whole. The shell hash and live mussels settle on the sea floor.

[60] The obvious visual effect of a mussel farm on the sea floor is the accumulation of live and dead mussels, increased sediment, and the increase in invertebrate predators such as the 11-armed sea star. Chapter 3 (Benthic Effects) of the *Literature Review of Ecological Effects of Aquaculture*[84] ("the *Literature Review*") published by the Ministry of Primary Industries states generally:[85]

> Visual observations suggest that shell deposition within a farm can be patchy, ranging from rows of clumps of live mussels and shell litter directly beneath long lines to widespread coverage across the farm site[86].

Further "Mussel clumps and shell litter beneath a mussel farm have been observed as acting as a substrate for the formation of reef-type communities"[87].

[61] Specifically in the Marlborough Sounds a more recent study we were referred to shows that at two sheltered farm sites[88]:

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83 B G Stewart evidence-in-chief para 6.4 [Environment Court document 26] referring to Hartstein, N.D. and Rowden, A.A. (2004). "Effect of biodeposits from mussel culture on macroinvertebrate assemblages at sites of different hydrodynamic regime". *Marine Environmental Research* 57:339-357 and Hartstein, N.D. and Stevens C.L. (2005). "Deposition beneath long-line mussel farms". *Aquaculture Engineering* 33:192-213.

84 *Literature Review of Ecological Effects of Aquaculture* (2013) Ministry of Primary Industries ("MPI") at section 2.2.2 (Exhibit 11.2). This publication does not contain a consensus view but is a series of individual chapters by different experts on the subject of their expertise.

85 *Literature Review* at p 3-20.

86 *Literature Review* citations omitted.

87 *Literature Review* citations omitted.

88 N D Hartstein "Acoustical and Sedimentological Characterization of Substrates in and Around Sheltered and Open-Ocean Mussel Aquaculture Sites and Its Bearing on the Dispersal of Mussel Debris" (2005) *IEE Journal of Oceanic Engineering* Volume 30 No 1 p 85 at 85.

> Photography and sediment samples reveal farms are underlain by mounds of shells with biodeposits infilling intershell voids and forming a veneer over entire mounds. In contrast, the surrounding seabed is naturally sedimented soft mud. Sediment from beneath the farms had total organic contents of 8%-19% decreasing sharply to natural levels of 4%-7%, 30 m from the farm's boundaries.

The author adds[89] "Given that [the farms] have low current flows and little potential wave energy … there is likely little lateral transportation and redistribution of the shell and organic material, thus causing it to deposit directly beneath the culture site." That might suggest the mussel shells and mussels only fall directly underneath the lines so that there is soft substrate between them. However, that possible interpretation is belied by the description of the "surficial sediments" in Hartstein's Figure 8. That shows the whole footprint of both low-energy farms was "silt and clay with mussel shells" or (smaller areas of) "predominately mussel shells"[90].

[62] We find on the balance of probabilities that the whole area underneath an average mussel farm in Pelorus Sound has a changed substrate. It is no longer reef or soft mud but is usually a patchy mix of clumps of mussels and shells, and larger areas of mud and mussel shells. It is unlikely there is consistent soft mud and an absence of shells. We also find that on average the penumbra of sediment extends no further than 30 metres from the farms, and shell hash extends far less, depending on wind drifting long lines.

[63] Dr Stewart calculated[91] the total amount of soft substrate habitat available within Beatrix Bay as approximately 1960 ha. He then compared that with "… the amount of habitat likely changed due to the presence of mussel farms (approximately 365 ha), based on 320 ha of consented farm space and 15-20% extra for movement of longlines and impacts beyond farm boundaries". He concluded that "…approximately 19% of the soft substrate habitat is potentially affected" by existing mussel farms. He considered that insufficient information was available to determine the effects of mussel farms on

89 N D Hartstein, above n 88, at p 92.
90 N D Hartstein above n 88, at p 91.
91 B G Stewart evidence-in-chief para 7.4 [Environment Court document 26].

benthic communities away from the immediate farm footprint[92] or on the accumulated effects[93] from the scale of farming in Beatrix Bay on these communities.

[64] We are uneasy about Dr Stewart's calculations. The Appellant was generally critical of them, but did not attempt to put up on alternative figure. It seems to us (for example from Figure 1 attached to Dr Fisher's evidence[94]) that about 60% of the existing farms in Beatrix Bay are over water that is at least 20m deep and is thus likely to be both over soft mud seafloor and within King Shag foraging depths (which start at about 10m). Of the 320 hectares of consented space perhaps only 200 hectares is over soft substrate. In addition there is a 30 metre wide strip along the outside edge of all the total farm's length (8.5km) which adds a further 25 hectares of substrate substantially affected, albeit more by sediment than by shell hash and live mussels. Thus the total 225 hectares of affected benthic environment is very approximately 11% of the total area of Beatrix Bay (but more than 11% of the total soft substrate).

The benthic zone: biochemical and infaunal effects

[65] Dr Taylor wrote that[95]:

> … mild enrichment effects are common under mussel farms in the Marlborough Sounds, and are relatively minor and are a natural feature of mussel beds on the seabed. These effects are often result in enriched infauna (animals living in the sediments) and epifauna (animals living on the sediments) communities with greater taxa diversity and abundances[96].
>
> …
>
> In general, mussel farm-related seabed effects reduce to no near undetectable levels within 20 m–30m of farm boundaries[97].

[66] In relation to the deposition of finer sediments, Dr Taylor described how in his opinion deposition in the form of faeces and pseudofaeces from the mussel farm will

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92 B G Stewart evidence-in-chief para 4.2 [Environment Court document 26].

93 B G Stewart evidence-in-chief paras 5.13 and 6.40 [Environment Court document 26].

94 P R Fisher evidence-in-chief p 7 [Environment Court document 28].

95 D I Taylor evidence-in-chief paras 32 and 33 [Environment Court document 8].

96 Citing Kaspar, H.F., Gillespie, P.A., Boyer, I.C. and MacKenzie, A.L. (1985). "Effects of mussel aquaculture on the nitrogen cycle and benthic communities in Kenepuru Sound, Marlborough Sounds, New Zealand". *Marine Biology* at 85: 127–136.

97 Citing Keeley, N., B. Forrest, G. Hopkins, P. Gillespie, D. Clement, S. Webb, B. Knight and J. Gardner (2009). "Review of the Ecological Effects of Farming Shellfish and Other Non-finfish Species in New Zealand". Prepared for the Ministry of Fisheries: *Cawthron Report No. 1476*. Nelson, New Zealand, Cawthron Institute: at p 144.

result in "mild" enrichment of the soft sediment directly below and immediately adjacent to the farm. This enrichment reduces to near undetectable levels within 20-30m of the farm boundary in low to moderate water flow sites.

[67] Dr Mead asserted that based on his own observations and modelling evidence on currents, he expected anoxic conditions (highly enriched) to be widespread under the majority of the mussel farms in Beatrix Bay[98]. He extrapolated from research by Christensen and others[99] in Pelorus Sound.

[68] Responding to Dr Mead's assertion[100] that enrichment of the benthic environment under existing mussel farms had not been investigated, Dr Taylor referred us to two qualitative assessment studies he had been involved with in Pelorus Sound, one of these in Beatrix Bay. Mr Ironside, in a lengthy cross-examination, took Dr Taylor through a detailed examination of all of the elements contributing to benthic changes under mussel farms reported in Christensen[101]. Dr Taylor responded that all have been taken into account in this case.

[69] In response to cross-examination by Mr Ironside on the Christensen research[102] on the "cumulative" effects of suppression of the natural denitrification process under mussel farms, Dr Taylor suggested that it was difficult to extrapolate to a bay-wide scale or even a farm-wide scale the results from three 5cm cores as reported by Christensen. He maintained his position that a gradient of effects under and moving out from mussel farms resulted in largely benign effects at a Beatrix Bay scale. In his opinion, "cumulative" effects were not distinct, marked or adverse[103]. When asked by the court

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98 Transcript, p 412, line 20.

99 Christensen P B, Glud R N, Dalsgaard T and Gillespie P 2003. "Impacts of longline mussel farming on oxygen and nitrogen dynamics and biological communities of coastal sediments". *Aquaculture* 218, 567-588 [Exhibit 8.4].

100 S T Mead evidence-in-chief at para 41 [Environment Court document 20].

101 Christensen P B, Glud R N, Dalsgaard T and Gillespie P 2003. "Impacts of longline mussel farming on oxygen and nitrogen dynamics and biological communities of coastal sediments". *Aquaculture* 218, 567-588 [Exhibit 8.4].

102 Christensen P B, Glud R N, Dalsgaard T and Gillespie P 2003. "Impacts of longline mussel farming on oxygen and nitrogen dynamics and biological communities of coastal sediments". *Aquaculture* 218, 567-588 [Exhibit 8.4].

103 Transcript, p 186, line 17.

if the sediment sampling reported in the Christensen study was adequate to establish bay-wide conclusions, Dr Mead agreed that "this wouldn't be a normal process"[104].

[70] Dr Stewart presented findings from his own dive surveys of "inshore habitats" at the proposed site, under and adjacent to an existing mussel farm, and at a control site in Miro Bay. These surveys revealed a range of differences in epifaunal community structure (diversity) and abundance between sites. Hard substrate communities showed larger differences than those on soft substrate. Dr Stewart observed[105] that without more comprehensive survey work, linking differences in diversity to any specific cause would be difficult. He did however go on to make such a linkage[106] to the presence or close proximity or absence of mussel farms. He concluded that as the benthic community "will almost certainly differ" following development of a mussel farm, the effect on that community was likely to be significant within 100m of the farm.

[71] Dr Taylor and Dr Grange were critical of the design of Dr Stewart's study in that it examined a single site beneath the mussel farm and one control site some 14 km further into Pelorus Sound from Beatrix Bay in an area influenced by freshwater and sediment-laden plumes from the Pelorus River. Dr Taylor considered[107] the lack of site replication meant that analysis of the results had a very high risk of making a type 1 error (a false positive) suggesting there is an effect when none is actually present. In Dr Taylor's opinion the limitations of the study ruled out any conclusions on mussel farm effects on inshore communities as any differences can equally be explained by natural site to site variability as evidenced by the Davidson/Grange study referred to earlier.

[72] Of particular concern in this case are the effects of the mussel farms on specialist (rather than generalist[108]) taxa and particularly on (the habitat of) the specialist King Shag. It is apparent that the 37 mussel farms in Beatrix Bay each have some effect in altering the benthic environment below and adjacent to (within 30 metres of) the direct footprint of the farm. The evidence does not, however, support the claim that bay-wide effects on benthic communities are generally significant. The same conclusion was

104 Transcript, p 416, line 14.
105 B G Stewart evidence-in-chief at 4.19 [Environment Court document 26].
106 B G Stewart evidence-in-chief at 4.24 [Environment Court document 26].
107 D I Taylor, rebuttal evidence-in-chief [Environment Court document 8A].
108 A simple everyday example is to compare nearly ubiquitous house sparrows (relatively generalist) with rock wren (mountain specialists).

earlier reached by the author of Chapter 12 of the *Literary Overview*[109] with the statement:

> While benthic effects are one of the most commonly expected changes as a result of shellfish farming, they are typically of minor ecological consequence **beyond** the boundary of the farm. (Emphasis added).

The implication is that benthic effects are of more than minor ecological significance underneath mussel farms. That is consistent with the evidence of Dr Stewart.

The photic zone

[73] Dr Stewart carried out an analysis[110] in respect of the photic zone — the sunlit zone within which photosynthesizing algae play a significant role in primary production. Using a "conservative" figure of 30 metres to define the depth of the zone in Beatrix Bay, he calculated the percentage of the photic zone likely altered by mussel farms is about 85-90%.

[74] Upon first reading, this appears to be a significant change resulting from mussel farming. However Dr Taylor wrote that[111]:

> … the level of productivity of the microphyto-benthos (the micro algal mats that grow on muddy substrata throughout the Marlborough Sounds) is known to fluctuate greatly depending on the time of year and the time elapsed since significant flood events in the Pelorus River. This is because the river plume reduces water clarity and contributes significantly to sedimentation in the Pelorus Sound[112].

He continued:

> Not only is the productivity of the microphyto-benthos highly variable in space and time, but it is also capable of remaining highly productive beneath mussel farms.

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109 *Literature Review* above n 84: Chapter 12 (C Cornelisen) at section 2.3.2.
110 B G Stewart evidence-in-chief para 7.6 [Environment Court document 26].
111 D I Taylor rebuttal evidence para 4.1 [Environment Court document 8A].
112 Citing Handley S 2015. "The history of benthic change in Pelorus Sound (Te Hoiere), Marlborough". *NIWA Client Report No: NEL2015-001*. Prepared for Marlborough District Council.

[75] We have inadequate information to determine whether the effects of mussel farms have been adverse or beneficial generally on the photic zone of Beatrix Bay. However, since we were not given evidence of any direct link between this and any alleged adverse effect of relevance under the Sounds Plan or NZCPS we consider it no further.

Summary

[76] We find on the balance of probabilities that the effects of the existing mussel farms on:

(a) the water column is that they deplete seston supplies from the water column in winter and add to it in summer;
(b) the reef zone around the promontory are negligible;
(c) the photic zone are uncertain;
(d) the benthic zone are confined to changing the substrate to patches of shell, live mussels and sediments within an incomplete ring no wider than 30 metres from the farm boundaries;
(e) the soft seafloor of Beatrix Bay is that about 11% has been changed quite substantially.

[77] All those accumulated and accumulating effects are a key part of the environmental setting of the proposal.

1.3 Have mussel farms changed fish distribution?

[78] The soft mud floor of Beatrix Bay provides habitat for flatfish including Witch Flounder, other (right-eyed) flounder species and Lemon Sole. While fish species typically spend[113] some of their time feeding, "the remainder of the time [is spent] in other activities such as predator avoidance, where their location may be driven by benthic habitat". When not breeding or feeding, flatfish spend much of their time hidden in the soft substrate of the seafloor according to Dr Fisher. Beatrix Bay also provides habitat "for adult spawning and nursery areas for juvenile flat fish"[114].

113 P R Fisher evidence-in-chief para 4.26 [Environment Court document 28].
114 P R Fisher evidence-in-chief para 4.42 [Environment Court document 28].

[79] The *Literature Review* states[115] "Direct effects from the development of shellfish farms include alteration of essential fish habitats through the deposition of shell litter and biodeposition of particulate matter." It goes on to add "These effects can be avoided or minimised through proper site selection and effects assessments prior to development". Dr Fisher's evidence was consistent with that. In his view[116] the habitat under mussel farms is no longer soft muddy floor.

[80] The *Literature Review* continues[117]:

> The initial attraction of wild fish species to aquaculture structures (e.g., habitat creation) can lead to a variety of related effects including:
>
> - Changes in the distribution and productivity of wild fish populations due to the addition of artificial structures that create new habitats used by wild fish.
> - Changes in recreational fishing patterns and pressure, which in turn could affect wild fish populations differently than in the absence of the structures.
> - Larval fish depletion by shellfish and/or potential trophic interactions (e.g., alteration of plankton composition and food availability).

[81] Dr Stewart was also of the opinion that the "formation of reef-like communities immediately below mussel farms [both] create predator oases"[118] and cause "habitat loss and/or modification"[119] as well as "increased competition for bottom feeders …"[120]

[82] In Mr Shuckard's experience[121] "[f]ish abundance around mussel lines is small[122] and dominated by small, demersal species characteristic of rocky reefs in the area, notably triplefins (*Forsterygion lapillum* and *Grahamina gymnota*) and Spotty (*Notolabrus celidotus*)." He has also observed[123] common species of fish around mussel

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115 *Literature Review* above n 84, at p 5-6.
116 B G Stewart evidence-in-chief para 3.15 [Environment Court document 26] (see P R Fisher evidence-in-chief para 6.2).
117 *Literature Review* above n 84, at p 5-6.
118 B G Stewart evidence-in-chief para 6.15 [Environment Court document 26].
119 B G Stewart evidence-in-chief para 6.17 [Environment Court document 26].
120 B G Stewart evidence-in-chief para 6.17 [Environment Court document 26].
121 R Schuckard evidence-in-chief para 59 [Environment Court document 25].
122 Citing Morrisey, D.J., Cole, R.G., Davey, N.K., Handley, S.J., Bradley, A., Brown, S.N. and Madarasz, A.L. (2006). "Abundance and diversity of fish on mussel farms in New Zealand". *Aquaculture* 252:277-288.
123 R Schuckard evidence-in-chief para 59 [Environment Court document 25].

farms such as Smooth Leatherjacket (*Parika scaber*) and Yellow-eyed Mullet (*Aldrichetta forsteri*).

[83] Mr Davidson wrote[124]:

> ... Dr Fisher suggests[125] the "smothering of benthos" under mussel farms excludes "naturally occurring benthic species" ... There are no published data on the abundance or distribution of witch flounder (or, for that matter, flat fish) under mussel farms compared to adjacent areas. His statement is therefore unsupported speculation. As mussel farms exclude trawling it is entirely possible that flatfish abundance may be higher under and between farms. Apart from studies investigating fish species inhabiting farm structures, I am not aware of comprehensive data investigating benthic species. (Underlining added).

This is one of the points where the burden on the Appellant (as applicant) of putting forward adequate information becomes critical.

[84] We accept that it is possible that some flatfish may be found underneath mussel farms: some of the prey (e.g. polychaetes) of Witch Flounder may increase in abundance. However, we find that the overall assemblage of fish and other fauna changes quite markedly underneath and in the proximity of most mussel farms. In relation to benthic fish species, Mr Schuckard[126] referred to overseas research which shows that:

> Declining environmental conditions under and in the vicinity of farms as a result of faeces and pseudo-faeces deposition in small discrete areas in and around the farms, have a generally negative impact on oxygen-related processes for the different life stages of fish; settlement probability of juveniles; habitat utilisation of spawning fish; age structure of successful spawners; and food consumption rates of adult fish.

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124 R J Davidson rebuttal evidence para 8.16 [Environment Court document 6A].

125 P R Fisher evidence-in-chief para 6.6 [Environment Court document 28].

126 R Schuckard evidence-in-chief para 57 [Environment Court document 25] citing Folke, C., Kautsky, N., Berg, H., Jansson, A., Troell, M.. (1998). "The ecological footprint concept for sustainable seafood production: A review". *Ecological Applications*, 8(1) Supplement, pp S63-S71; Hinrichsen, H.H., Huwer, B., Makarchouck, A., Petereit, C., Schaber, M. And Voss, R. (2011) "Climate-driven long term trends in Baltic Sea oxygen concentrations and the potential consequences for eastern Baltic cod (*Gadus morhua*)". *ICES Journal of Marine Science*, 68: 2019-2028; Diaz, R., Rabalais, N.N. and Brietburg, D.L "Agriculture's Impact on Aquaculture: Hypoxia and Eutrofication in Marine Waters". *OECD Publishing* (2012)..

That supports the third bullet point in the *Literature Review* quoted above. Further, there appears to be effects on the substrate which may decrease the quality of habitat even for feeding flatfish: increased predator numbers and potentially a poorer hiding environment.

[85] We find that the habitats of flatfish and other benthic fish species have been reduced by the introduction of mussel farms in that:

(a) it is likely that the changes in substrate underneath mussel farms are physically (a change from soft mud to mud and shell, or shell and mussels), chemically (increases in organic matter) and ecologically (a change of in-fauna and increases in predators) different from the original seafloor;
(b) it is very likely that the fish assemblages have changed;
(c) flatfish in all stages of their life-cycle and in most of their activities are largely excluded from underneath most mussel farms;
(d) it is likely that flatfish have been at least partly displaced within about 30 metres of the outside boundary of mussel farms in the Sounds.

[86] The reduction in that habitat within Beatrix Bay is an accumulated effect or stressor which is part of the environment. However, we have found it quite difficult to assess the extent of change to that part of the benthic environment which is soft mud, because by no means all of the existing mussel farms are anchored over that type of seafloor exclusively.

[87] The Appellant (through Dr Taylor) did not address the question whether the nutrients under mussel farms — whether in or on the benthos (seafloor) or in the photic zone — change the food web in a way that assists species higher up the chain, for example by providing them with more prey, or inhibits them. We now turn to that and related issues in respect of one particular species — the New Zealand King Shag.

2. New Zealand King Shags and their habitat

2.1 Description, population and conservation status

[88] One aspect of the environment in which the site is located is of particular importance in this case. It stems from the fact that Beatrix Bay is within the extent of

occurrence ("EOO")[127] of the endemic New Zealand King Shag[128]. The New Zealand King Shag[129] ("King Shag") is one of 16 taxa[130] of blue-eyed shags. Like almost all *Leucocarbo* shags, it is dimorphic: males are larger and heavier than females and they tend to feed in deeper water[131].

[89] The King Shag is a large black and white bird with pink feet and white bars on its black wings. It has yellowish-orange patches of bare skin at the base of the bill. It is smaller than the Black Shag[132] and larger than the Pied Shag[133] (with which it can be confused).

[90] We received evidence about King Shags from three witnesses. Mr R Schuckard who holds a MSc in Biology gave evidence for the Societies. Since 1991 he has conducted long term[134] studies and monitoring of New Zealand King Shag. He is a committee member of the Friends of Nelson Haven and Tasman Bay Inc[135] and is thus not completely disinterested in the outcome of this proceeding. We treat his evidence with caution as we do that of Mr Davidson for the Appellant. In fact Mr Davidson expressly renounced[136] being an expert witness in these proceedings. On the whole those two witnesses both attempted to be as objective as possible and our caution is more about subconscious biases than obvious partisanship by these two witnesses. The largest exceptions are parts of Mr Davidson's rebuttal evidence where he alternates between critical statements on the evidence of other parties' witnesses and rather broad or simplistic assertions of his own. The Council called Dr P R Fisher, a completely independent avian ecologist who has studied the King Shag.

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127 "Extent of occurrence is defined as the area contained within the shortest continuous imaginary boundary which can be drawn to encompass all the known, inferred or projected sites of present occurrence of a taxon, excluding cases of vagrancy … This measure may exclude discontinuities or disjunctions within the overall distributions of taxa (e.g. large areas of obviously unsuitable habitat) … Extent of occurrence can often be measured by a minimum convex polygon (the smallest polygon in which no internal angle exceeds 180 degrees and which contains all the sites of occurrence)". IUCN (2012) *IUCN Red List Categories and Criteria*: [*Version 3.1, Second Edition*] Gland, Switzerland and Cambridge, UK: IUCN. iv + 34 pp11-12.

128 *Leucocarbo carunculatus.*

129 Te Kawau-a-Toru *Leucocarbo carunculatus.*

130 Seven blue-eyed species occur in New Zealand (including the Sub-Antarctic species).

131 P R Fisher evidence-in-chief para 4.5 [Environment Court document 28].

132 Better called Great Cormorant *Phalacrocorax carbo.*

133 *Phalacrocarax varius.*

134 R Schuckard evidence-in-chief para 3 [Environment Court document 25].

135 R Schuckard evidence-in-chief para 7 [Environment Court document 25].

136 R J Davidson evidence-in-chief para 10 [Environment Court document 6].

Population

[91] Mr Schuckard estimated the average population between 1992 and 2002 as 645 birds[137] with breeding colonies restricted to four areas: Duffers Reef, Trio Islands, Sentinel Rock and White Rocks[138]. Relying on his earlier research Mr Schuckard informed[139] us that "... the numbers of shags appear to have been stable for at least the past 50 years — and possibly over 100 years[140]". Mr Davidson saw this as providing "some comfort"[141] that marine farms have not effected the population of King Shags. In Dr Fisher's opinion[142] the methodology used by Mr Schuckard was "... appropriate for the task ..." and provided accurate counts.

[92] Dr Fisher initially wrote that[143] "the most recent *estimate* for the total King Shag population was of 687 birds". That is based on a survey of the marine avifauna of the Marlborough Sounds undertaken between September and December 2006. He sounded a precautionary note that the estimate is based on "... counts at colonies when significant numbers of birds were absent feeding"[144], and that caution was justified by subsequent events.

[93] New, more thorough (and expensive) techniques for surveying the King Shag population have recently (2015) been set up. On 11 February 2015 an aerial survey by Mr Schuckard and two other experts counted more (839)[145] King Shags than ever before. The increase in numbers of birds compared to the results of his earlier surveys is attributed by Mr Schuckard[146] to a better accuracy in the count than before, to the count being done in one morning rather than over tens of days and to more colonies being counted.

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137 R Schuckard "Population Status of the New Zealand King Shag ..." *Notornis* (2006) 53(3): 297-307.

138 All are protected as wildlife sanctuaries under the Reserves Act.

139 R Schuckard evidence-in-chief para 23 [Environment Court document 25].

140 Citing W L Buller "Notes and Observations on New Zealand Birds" (1891) *Trans. NZ Inst.* 24: 65-91.

141 R J Davidson rebuttal evidence para 8.10 [Environment Court document 6A].

142 P R Fisher evidence-in-reply para 3.4 [Environment Court document 28A].

143 P R Fisher evidence-in-chief para 3.2 [Environment Court document 28] citing M Bell "Numbers and distribution of New Zealand King Shag ... colonies in the Marlborough Sounds, September-December 2006" (2010) *Notornis* 57:33-36.

144 P R Fisher evidence-in-chief para 3.2 [Environment Court document 28].

145 R Schuckard Supplementary evidence para 30 [Environment Court document 25A].

146 R Schuckard Supplementary evidence para 30 [Environment Court document 25A].

[94] The highest number of birds counted by Schuckard at the four main colonies during his 1991-2002 surveys was 626 in 1994. The count for these four sites by the 2015 aerial survey was[147] 637. This suggests, given Dr Fisher's comment on the accuracy of Schuckard's 1991-2002 counts, that the numbers of birds at the four colonies has not changed significantly and thus the increase in the total number of birds is likely to be a result of a more wide ranging count.

[95] Mr Gardner-Hopkins in his closing submissions said:

> In 1992, the closest colony to Beatrix Bay, Duffers Reef, posted 168 (of 524) King Shag individuals. In contrast, the latest population count (early in 2015) has nearly 300 King Shags at Duffers Reef (out of 839 overall).[148]

It was unclear what inference he intended us to draw from that. One thing we cannot do is assume[149] there has been an increase in the total population[150].

[96] We conclude that King Shag numbers in the four main colonies have been approximately the same since 1991 and there is no declining trend in total numbers, but that finding is subject to the qualifications stated by Dr Fisher[151] who elaborated on this in his rebuttal evidence[152]: "the colony counts cannot be used to determine the long term '*stability*' of the population because the count[s] do … not reflect the number of breeding pairs, successful breeding attempts or age and sex ratio of birds, the latter determining the number of potential breeding pairs".

Status

[97] The King Shag is a Nationally Endangered[153] species in the *New Zealand Threat Classification System* published by the Department of Conservation. As at 2012 the criteria for King Shag's inclusion as a "Nationally Endangered Species" were that it had

147 R Schuckard evidence-in-chief para 30 [Environment Court document 25].
148 As summarised in the Council's submissions at para 277.
149 Transcript, p 525, line 17.
150 R Schuckard supplementary evidence para 30 [Environment Court document 25A].
151 P R Fisher evidence-in-chief para 3.4 [Environment Court document 28].
152 P R Fisher rebuttal evidence para 6.6 [Environment Court document 28A].
153 "Nationally endangered" is the second in three categories of "Threatened Species": Nationally Critical, Nationally Endangered, and Nationally Vulnerable in the Department of Conservation's Threat Classification System.

a small (250-1,000 mature individuals), stable population[154]. It was also described as "Range Restricted"[155].

[98] The *IUCN Red List Categories and Criteria* ("the *Red List*") categorises taxa by assessing them under five sets of criteria[156]:

A: Reduction in population;
B: Geographic range (EOO or AOO — see next paragraph — or both);
C: Small population size and declining population;
D: Very small or restricted population size;
E: Quantitative analysis showing the probability of extinction in the wild meets a threshold[157].

[99] Obviously the "AOO" needs explanation. The *Red List* states[158]:

> Area of occupancy is defined as the area within its 'extent of occurrence' which is occupied by a taxon, excluding cases of vagrancy. The measure reflects the fact that a taxon will not usually occur throughout the area of its extent of occurrence, which may contain unsuitable or unoccupied habitats. In some cases (e.g. irreplaceable colonial nesting sites, crucial feeding sites for migratory taxa) the area of occupancy is the smallest area essential at any stage to the survival of existing populations of a taxon. The size of the area of occupancy will be a function of the scale at which it is measured, and should be at a scale appropriate to relevant biological aspects of the taxon, the nature of threats and the available data …

[100] King Shag is identified as *vulnerable* by the International Union for the Conservation of Nature and Natural Resources ("IUCN") in the *Red List*. *Vulnerable* is one of the three 'threatened' species in the *Red List*. Dr Fisher explained that the King Shag is so categorised because[159]:

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154 H A Robertson, J E Dowding, G P Elliot et al p 10 Conservation Status of New Zealand Birds (2012) Department of Conservation.
155 H A Robertson, J E Dowding, G P Elliott et al Conservation Status of New Zealand Birds (2012) Department of Conservation p 10.
156 IUCN (2012) *IUCN Red List Categories and Criteria*: [*Version 3.1, Second Edition*] Gland, Switzerland and Cambridge, UK: IUCN. IV + 34.
157 50% probability means taxon is critically endangered, 20% endangered, 10% vulnerable.
158 The *Red List* above n 156, at p 12. The definition of "EOO" is given above n 127.
159 P R Fisher evidence-in-chief para 3.5 [Environment Court document 28].

> ... this **species is facing a high risk of extinction in the wild in the medium-term future** based on the criterion (D1) **population less than 1000 individuals,** *and* is restricted to four core breeding colonies (criterion D2: **five or less locations**), rendering the species susceptible to stochastic effects (e.g. infrequent, significant events) and human impacts.

The criteria he was referring to are contained in the *Red List*. Either of the two criteria referred to (D1 and D2) are sufficient[160] to place King Shag in the *vulnerable* category.

2.2 What is the geographic range of the King Shag?

[101] Neither the extent of occurrence nor the area of occupancy of King Shags is known with much accuracy. In answer to the Appellant's sustained attack on the accuracy of the Sounds Plan's inclusion of King Shag habitat as an area of ecological value (we discuss this later), Dr Fisher suggested that the extent of occupancy is the entire area of the Marlborough Sounds because individuals have occasionally been seen in remote corners. The species is known to breed at less than 10 locations.

Proximity of King Shag colonies to the site

[102] Relatively small numbers of birds breed[161] in any year across the four main colonies (Duffers Reef, Trio Islands, Sentinel Rock and White Rocks) ranging from a minimum of 70 to a maximum of 166 pairs based on census counts between the years 1992-2002.

[103] The closest main colony to Beatrix Bay is the Duffers Reef colony, with approximately[162] 240 birds. That may represent about 30-40% of the world population. There is also a small colony of up to 20 King Shags located 2 kilometres due west of the Beatrix Bay entrance at Tawhitinui Bay point[163].

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160 The *Red List* above n 156, at p 15.

161 P R Fisher evidence-in-chief para 3.7 [Environment Court document 28] citing Schuckard, R "New Zealand King Shag (*Leucocarbo carunculatus*) on Duffer's Reef, Marlborough Sounds." (1994) *Notornis 41*: 93–108 and Schuckard, R. "Population status of the New Zealand King Shag (*Leucocarbo carunculatus*)" (2006) *Notornis* 53: 297-307.

162 P R Fisher evidence-in-chief para 3.8 citing Ornithological Society of New Zealand 2013 [Environment Court document 28].

163 P R Fisher evidence-in-chief para 3.8 [Environment Court document 28].

Foraging areas

[104] Research from the Trios and (Northern) Stewart Island[164] in Admiralty Bay shows that King Shags forage mostly within 10 kilometres of the colonies. That was an approximation from Mr Schuckard's research which found that the mean distance of foraging birds from the Duffers Reef colony was 8.2km for a total count of 219 birds[165]. The maximum distance recorded was 24 kilometres although Dr Fisher acknowledged there had been no systematic studies at greater distances.

[105] In Mr Schuckard's opinion King Shags "... feed predominately southwest from the colonies in the outer Marlborough Sounds where their distribution in the feeding areas appear[s] to be constrained by distance and direction from the colony, and water-depth"[166]. To illustrate that he referred to his Figure 3 identified as "Figure 3 Distribution of feeding King Shags in the Marlborough Sounds". Certainly to our eyes that appears to illustrate his point about distance and direction. However, it was criticised by a witness for the Appellant, Dr D Clement who when asked in cross-examination whether it was an attempt to show area of occupancy agreed but qualified that by answering "... it is an attempt but not necessarily correct"[167]. We understand Dr Clement to be implying that there may be other squares beyond that distance which are within the area of occupancy, and we accept that. However, we also accept Dr Fisher's evidence that[168]:

> The potential marine foraging areas available to King Shags are constrained by energetic and food delivery requirements during the chick rearing period and body-morphometric related physiological constraints on maximal flight distances from the colony and water depth.

[106] Mr Schuckard's first surveys of the Duffers Reef breeding colony and feeding King Shags from this colony were 12 trips in 1990-1991. The foraging surveys were repeated along the same route, but in Beatrix Bay and Forsyth Bay only, in 1997 and 2014. Fewer trips (5) were made for these than for the 1990/91 survey. Finally, a single survey was undertaken by Mr Schuckard in 2015. He considered that he has established

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164 Davidson et al (Ex 6.3) at p 25.

165 P R Fisher evidence-in-chief para 4.8 [Environment Court document 8] citing R Schuckard "New Zealand King Shag ... on Duffer's Reef Marlborough Sounds" (1994) *Notornis* 41: 93-108.

166 R Schuckard evidence-in-chief para 7 [Environment Court document 25].

167 Transcript, p 361, line 33 dated 7 May 2015 1418.

168 P R Fisher evidence-in-chief para 4.4 [Environment Court document 28].

that the majority of feeding occurs within 15 km of the colony (although individual birds were observed beyond that distance).

[107] Usually, King Shags fly low to the sea and do not fly overland on foraging trips. There is one interesting and relevant exception. Beatrix Bay is unique in terms of foraging habitat for King Shags because they access[169] it from Forsyth Bay by flying over the narrow Piripaua Neck. In a nearly direct line the application site in Beatrix Bay is between 8 and 9 km from the Duffers Reef colony. We note that Mr Schuckard also recorded[170]:

> Some differences in foraging range between colonies does occur; about 34% of the feeding birds from the White Rock population fly between 20km and 26km from the colony into the Queen Charlotte Sound whereas most King Shags from Duffers Reef, Trio Island and Sentinel Rock feed up to 16km from their colonies.

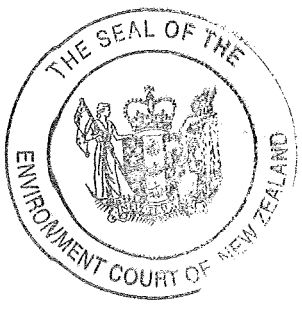
[108] We find that Beatrix Bay is part of the area of occupancy of King Shag and that the area outside the ring of mussel farms is used for foraging and feeding.

2.3 King Shag prey and the shag's foraging depths

King Shag prey

[109] Dr Fisher stated that the "small colony sizes and solitary foraging strategy"[171] of King Shags indicate a "patchy" prey resource which is confirmed by their diet of flatfish and other benthic[172] (seafloor) species, including:

> Witch [Flounder] (*Arnoglossus scapha*), Lemon Sole (*Pelotretis flavilatus*), New Zealand or Common Sole (*Peltorhampus novaezeelandiae*), Sole (*Peltorhamphus* sp.), Flounder (*Rhombosolea* sp.), Opalfish (*Hemerocoetes* sp.), Sea Perch (*Helicolenus percoides*), Triplefins Tripterigydea, Leatherjacket (*Parika scaber*), Blue Cod (*Parapercis colias*), Red Cod (*Pseudophycis bachus*), Red Scorpionfish (*Scorpaena papillosus*), Spotty (*Notolabrus celidotus*) and Octopus (*Octipodidae* sp).



169 P R Fisher evidence-in-chief para 3.9 [Environment Court document 28].
170 R Schuckard evidence-in-chief para 16 [Environment Court document 25].
171 P R Fisher evidence-in-chief para 4.2 [Environment Court document 28].
172 P R Fisher evidence-in-chief para 4.27 [Environment Court document 28].

Not all those prey species are equally important: flatfish are the most frequently taken[173] prey, and spotties are a very small part of King Shags' diet. Lemon Sole (which are known[174] to breed in Beatrix Bay) are an unusually large component of the diet of King Shag from Duffers Reef. That is consistent with the evidence[175] of Mr Schuckard which was uncontested on this issue.

[110] Because, like many predators, King Shags have to search for their prey, the distribution and density of flatfish and other benthic species is important. Dr Fisher wrote[176] "... the foraging efficiency of shags is ... strongly influenced by the availability of prey. Even a small reduction in prey density will prevent birds meeting their energy requirements".

Foraging depth

[111] Reports by Mr Schuckard on some limited observations of foraging King Shags suggests that within Beatrix Bay they "predominantly" feed between 30 and 40 metres depth[177]. However the same survey gave 25% of foraging in Forsyth Bay[178] was in water from 10-30 metres deep. Those figures should not be regarded as conclusive because of the low sample size and differences in survey effort[179] (amongst other reasons[180]).

[112] Because female King Shags are smaller than males it is likely they forage in shallower water[181].

[113] Counsel for the Appellant summarised the evidence in respect of King Shags' use of Beatrix Bay as:

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173 R Schuckard evidence-in-chief paras 51 et ff [Environment Court document 25].
174 B G Stewart evidence-in-chief para 3.3 [Environment Court document 26].
175 R Schuckard evidence-in-chief para 59 [Environment Court document 25].
176 P R Fisher evidence-in-chief para 4.35 [Environment Court document 28] citing D Grémillet and R P Wilson "A life in the fast lane: energetics and foraging strategies of the Great Cormorant" (1999) *Behavioural Ecology* 10: 516-524.
177 P R Fisher evidence-in-chief para 4.11 [Environment Court document 28].
178 P R Fisher evidence-in-chief para 4.12 [Environment Court document 28].
179 P R Fisher evidence-in-chief para 4.14 [Environment Court document 28].
180 P R Fisher evidence-in-chief para 4.14 [Environment Court document 28].
181 P R Fisher evidence-in-chief para 4.21 [Environment Court document 28].

(a) In 1991 and 1992, when Mr Schuckard undertook his survey (upon which the 1/11 notations are based), there were approximately 33 marine farms in Beatrix Bay. However, these were smaller, not having been extended by subsequent applications[182] ...

(b) Across all 12 of Mr Schuckard's surveys in 1991 and 1992, he only recorded 24 sightings of King Shags in Beatrix Bay.

Mr Gardner-Hopkins continued that later surveys showed:[183]

(i) Between 1997 and 2003, 13 King Shags were observed feeding in Beatrix Bay during "two to five" survey events (compared to 12 in 1992).[184] During that period a further eight farms and 23 extensions to existing farms were consented.

(ii) Between 2010 and 2015, nine King Shags were observed feeding in Beatrix Bay during "two to five" survey events (compared to 12 in 1992). [185] During that period it appears as if a further two farms and four extensions were consented.[186]

...

[114] Mr Gardner-Hopkins then submitted:

> ... it was Mr Schuckard's evidence that King Shags in Beatrix Bay tend to feed at depths between 20-40m[187]. In fact, in Mr Schuckard's studies from 1991 to present day, very few King Shags (2) were recorded feeding between 20-30m, and 94% of all King Shags were recorded feeding at depths of greater than 30m.[188]

He put a map called "Special Map: King Shag Foraging/Water Depth/Beatrix Bay" to Dr Fisher. It showed that only one King Shag was recorded in Beatrix Bay as foraging in water less than 20 metres deep, and two between 20 to 30m (where total n = 46). We consider that the evidence does not bear out Mr Gardner-Hopkins' contention that those figures are "significant because most of the mussel farms in Beatrix Bay are situated over seabed that is shallower than 30m deep."

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182 Referring to Exhibit 33.1.
183 Referring to Exhibit 28.1.
184 Citing Schuckard Transcript at 502, lines 25-28.
185 Citing Schuckard Transcript at 503.
186 For accounting purposes, some of the new consented farms have now been counted alongside others to reach the 39 farms currently consented within Beatrix Bay.
187 Schuckard evidence-in-rebuttal at para 11.
188 See Exhibit 28.1 and P R Fisher, transcript at 576-577.

[115] Our reason for that finding is based on Mr Schuckard's description[189] of his survey method. This involved travelling on a reasonably consistent track at around 46 kph for approximately five hours, observing for King Shags 250m either side of the boat. A total of 115 km^2 out of an estimated 240 km^2 area was covered. Survey coverage did not include much of the close inshore areas, or the centre of Beatrix Bay, as shown on the survey track[190]. Indeed his "stylistic depiction" of his survey trips shows that for most of his trips he would have been beyond range to identify any inshore or shallow (20 to 30m) water foraging. We conclude that a more plausible explanation of the data is that fewer shags were observed in the shallower (less than 30m deep) water because there was less survey effort there. To that extent Mr Schuckard's results are biased (in the scientific sense).

[116] Indeed the Appellant called some evidence directed solely to that issue. Dr D Clement challenged the statistical validity of Mr Shuckard's survey methodology in supporting the conclusions reached. In her opinion, the study was not designed to allow for relative and statistical comparisons of King Shag use between areas. Dr Clement's evidence concluded with her opinion that[191]

> In summary, the 1994 Schuckard paper ... was not designed to systematically survey the stated study area for observations of feeding king shags from Duffers Reef. Based on the opportunistic distribution and feeding observations collected, this study cannot statistically presume that any survey sector may be more important as a feeding area relative to any other sector nor assess where feeding may or may not be occurring. Additionally, the stated mean foraging distance appears to represent a minimum range due to sampling design biases. As a result, it would not be appropriate to use the 1994 findings to statistically assess any potential changes in king shag distribution within the Sounds or through time.

[117] She continued[192]:

> Some readers may over- or misinterpret the study's findings based on wording and the lack of discussion around the limits of the study's methods. I attribute some of this confusion to the author's use of the collected data to drive the research questions (rather than the reverse), and the general lack of written detail in the paper. Additionally, the lack of any recent, more systematic

189 R Schuckard evidence-in-chief para 10 [Environment Court document 25].
190 Exhibit 25.5.
191 D Clement evidence-in-chief para 3.26 [Environment Court document 12].
192 D Clement evidence-in-chief para 3.28 [Environment Court document 12].

> studies focused on the distribution and / or foraging ranges of the Duffers Reef colony (unlike Admiralty Bay colonies; Fisher & Boren 2012) also precipitates the data from Schuckard (1994) being applied beyond what is considered statistically defensible.

[118] Dr Clement also states[193] with regard to the identification of King Shag feeding areas:

> … it does not appear that the 1994 study has considered or corrected for any … biases. As a result, the presence of foraging King Shags in the sector most relevant to Beatrix Bay (south) will be an under- or over-estimation in relation to the other sectors due to uncorrected biases. … Given these factors, the study's original Figure 8 map and its caption, *"Main feeding area of king shags from Duffers Reef"* is simply a conclusion that cannot be drawn based on the data collected. It would be more appropriate to say that the map simply represents *observed* feeding locations of king shags from Duffers Reef.

We accept Dr Clement's criticisms.

[119] The Appellant also relied on a report by Mr Davidson and others called *Ecologically Significant Marine Sites in Marlborough, New Zealand*[194] ("the *Davidson 2011 Report*"). This includes a statement[195] that:

> King Shags regularly feed in the middle of the main channel and side arms in the outer Pelorus, particularly Beatrix Bay.

Mr Schuckard considered that is wrong. In his opinion[196]:

> Beatrix Bay has a rather flat bottom without any channels and feeding King Shags are widespread throughout Beatrix Bay at depths ranging predominantly from 20-40m.

We prefer the latter evidence which is consistent with that of Dr Fisher.

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193 D Clement evidence-in-chief para 3.24 [Environment Court document 12].
194 R J Davidson et al *Ecologically Significant Marine Sites in Marlborough, New Zealand* Marlborough District Council and Department of Conservation 2011 [Exhibit 6.3].
195 The *Davidson 2011 Report*, above n 194, at p 83 [Exhibit 6.3].
196 R Schuckard evidence-in-chief para 19 [Environment Court document 25].

2.4 Use by King Shags of habitat within mussel farms

[120] Mussel farms provide one obvious advantageous change to King Shag's habitat: they supply buoys on which shags roost/rest/preen/loaf between flights or foraging. But do they forage within them?

[121] Dr Fisher wrote[197] that the existing and proposed mussel farms in Beatrix Bay "... exclude King Shag foraging from ... much of the soft substrate habitat ..." that is, or was, underneath them. Dr Fisher relied on the evidence of Dr Stewart to establish that about 19% of Beatrix Bay was affected. We have found that figure is an over-estimate, but we do not consider that invalidates Dr Fisher's evidence.

[122] A figure in Dr Fisher's evidence[198] appears to show that a high proportion of King Shags have been observed feeding in offshore areas both with and without mussel farms. Mr Davidson wrote[199] about this:

> Assuming these observations are representative, there are two possible reasons for this:
>
> (a) King Shags avoid mussel farms; or
>
> (b) they prefer to feed in deeper offshore areas of Bays and Reaches.

He continued[200]

> In order to determine which is the case, it is necessary to investigate shag preference in bays without mussel farms. These data have not been produced by Dr Fisher, however, in a paper by Schuckard (1994) the author delineated areas in Pelorus Sound where birds were observed feeding (Figure 4). Most feeding areas are in bays with mussel farms, however, in areas north and west of Maud Island free of mussel farms most feeding areas were located on offshore areas of these reaches. This suggests that birds select these deep offshore areas rather than avoiding mussel farms.

197 P R Fisher evidence-in-chief at para 6.2 [Environment Court document 28].

198 P R Fisher evidence-in-chief Figure 1 [Environment Court document 28] based on unpublished data from Mr Schuckard.

199 R J Davidson rebuttal evidence-in-chief para 8.4 [Environment Court document 6A].

200 R J Davidson rebuttal evidence-in-chief para 8.5 [Environment Court document 6A].

[123] Dr Fisher has conducted and published[201] research directly on this point within inner Admiralty Bay and Current Basin (also in the outer sounds, near French Pass). The most pertinent parts of the paper state[202]:

> Whilst mussel farms are sited away from breeding colonies and appear to have no appreciable direct impact, cumulative effects from habitat modification, alteration of habitat suitability for fish below the farm and wider area, and potential changes in marine species assemblages need to be considered.
>
> ...
>
> King Shags were recorded on 36% of the farms (n = 44) from 13 surveys within inner Admiralty Bay. No individuals were recorded foraging between farm lines from any of the survey methods. The low number of sightings within mussel farms suggests that farms are not important foraging areas for king shags, at least in Admiralty Bay. However, this may vary by site, prey availability and distance from colony/roost. Sightings of king shags foraging within mussel farms [reported in evidence in other proceedings before the Environment Court] show that mussel farms do not preclude king shags However, the low number of reported sightings and lack of published data would suggest that king shags do not exclusively use the areas occupied by mussel farms.

[124] After Mr Davidson relied on that passage to support the Appellant's position, Dr Fisher responded[203]:

> Less than 1% of all foraging King Shag records have been recorded within farms; of these most sightings are of birds diving between lines or on the edge of farms. Whether these individuals successfully captured fish associated with the farm structure, shell debris on the seabed or open water between the mussel lines remains to be substantiated.
>
> The comprehensive coastal strip surveys through all the mussel farms within inner Admiralty Bay between November 2006 to March 2007 (Fisher & Boren 2012) confirmed that King Shags do not feed (rarely; based on observations from Lalas and Brown) within mussel farms and have low attendance rates resting on buoys. ...

[125] Dr Fisher then hypothesised why King Shags do not use mussel farms[204]:

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201 P R Fisher and L J Boren (2012) "New Zealand King Shag (Leucocarbo caruneulatus) foraging distribution and use of mussel farms in Admiralty Bay, Marlborough Sounds". *Notornis*, 59:105-115.

202 P R Fisher and Boren (2012) cited by R J Davidson rebuttal evidence-in-chief at paras 8.6 to 8.8 [Environment Court document 6A].

203 P R Fisher rebuttal evidence-in-chief paras 5.9 and 5.10 [Environment Court document 28A].

204 P R Fisher evidence-in-chief para 5.7 [Environment Court document 28].

> King Shags are typically not pelagic feeders or opportunistic taking prey near the surface ... Whether mussel farms exclude King Shags through the physical structure of the submerged lines reducing the open marine space and ability of birds to access the sea bed and benthic prey, or through unsuitable modification to the benthos habitat where benthic fish prey hide, and changes in benthic assemblages has yet to be determined.

[126] Mr Davidson, while he did not agree that mussel farms exclude King Shag, agreed that there is inadequate information on this. He disputed[205] the first theory on the basis that the water is so opaque near the seafloor anyway that the obstacles in a mussel farm would cause King Shags no difficulties. We have insufficient information to determine this issue.

[127] In any event, Dr Fisher's answer was[206]:

> The modification of the seabed under mussel farms is well documented; whilst it is recognised that the changes in seabed infauna and epifauna are dominated by mussel shell debris that forms artificial reefs and is habitat for a range of marine invertebrates and assemblage of fish. The modified seabed environment is less than suitable for flatfish to hide from predators such as the King Shag. The adverse effects to the King Shag foraging habitat within the footprint of the farm are more than minor.

[128] Mr Schuckard added a further reason why King Shags may not forage on the seafloor under and around mussel farms is their prey may be largely absent because of the increased organic matter underneath them.

[129] There was some suggestion by the Council's witnesses[207] that there is a wider zone of influence outside the boundaries of mussel farms. Dr Fisher referred to a 50 metre exclusion zone around a mussel farm based on the *Literature Review*. This habitat exclusion describes an alleged effect of the physical presence of farm structures in reducing the habitat available for "surface feeding seabirds"[208]. This last point seems to have been overlooked by Mr Gardner-Hopkins when he cross-examined Dr Fisher[209]. King Shags are benthic feeders not surface or even mid-column feeders.

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205 R J Davidson rebuttal evidence para 8.12 to 8.15 [Environment Court document 6A].
206 P R Fisher rebuttal evidence-in-chief para 7.3 [Environment Court document 28A].
207 We have summarised the relevant parts of Dr Stewart's evidence above in part 1 of this decision.
208 Table 6.10 *Literature Review* above n 84, at p 6-9.
209 Transcript, p 587.

[130] The more relevant table in the *Literature Review* is Table 6.11 which describes[210] the effect of reduced habitat available for "benthic feeding seabirds, such as shags and penguins … because of changed benthic fauna due to the settlement of shell and debris from ropes used to grow filter feeders". This effect is described as taking place immediately underneath and within 200 metres of a farm. We are inclined to consider the shadow effect is largely confined to within about 30 metres of the seaward boundary of most mussel farms in Beatrix Bay, and is much narrower around the other three boundaries.

[131] The "Summary" in Chapter 6 (Seabird Interactions) of the *Literature Review* commences[211]:

> The potential effects of smothering of the seabed by debris from ropes leading to changes in the fauna are considered to be insignificant given the small area occupied by filter feeder aquaculture in New Zealand in relation to the large total area of suitable habitat available for foraging seabirds.

Mr Gardner-Hopkins said to Dr Fisher[212] "… again, you haven't given consideration to how the area of mussel farms compares with the foraging area that you define for King Shags?" and the answer was "That's correct". We have two problems with this whole cross-examination. First it appears to suggest that it was Dr Fisher's problem that he had not compared the foraging areas with the area of the mussel farms, when it is, we have held, the Applicant who has the obligation to supply adequate information for us to determine the application.

[132] Second, Dr Fisher's answer might, by itself and if the apparently superfluous word "again" is ignored, convey the wrong impression to a reader of the transcript. To obtain Dr Fisher's fuller answer one needs to read the previous page of the Notes of Evidence. There, Mr Gardner-Hopkins had asked essentially the same question in

210 Table 6.11 *Literature Review* above n 84, at p 6-9.
211 Table 6.11: *Literature Review* above n 84, at p 6-9.
212 Transcript, p 588.

respect of (the barely relevant) Table 6-10 in the *Literature Review*. That contains a summary with a similar first sentence. In answer to the same question Dr Fisher said[213]:

> No. if I can just add to that, I did comment on this, this report and prior reports in my evidence and I noted that they didn't include the DOC survey that I was involved with, which was the most comprehensive survey looking at effects of King Shags on mussel farms …

[133] Mr Gardner-Hopkins submitted that:

> Of the 9 King Shags recorded to be feeding between 2010 and 2015, over half (5) were recorded feeding within the 50m and 200m zones relied upon by Dr Fisher as "excluding" King Shags.[214] The empirical data proves there is no exclusion around the marine farms.

That submission overstates both what Dr Fisher said and any (tentative) conclusion which can be drawn from the information, which is that King Shag may still forage "close" to the outside edge of marine farms. Whether that is with the same success rate, or higher — or lower — than in the absence of marine farms is not known. Changing environmental conditions such as the introduction of mussel farms may lead to an adaptive response that maintains or even increases the productive nature of the benthic ecosystem below the farm. That may even benefit King Shags. For example, it may be that there is an 'edge' effect in which King Shags are drawn to the outer edge of the 30m shadow (of sediment and some shell) because their prey such as Witch Flounder are finding more food e.g. polychaetes in the richer sediments there. That is however, our speculation and we have no evidence for it.

[134] We find on the basis of Dr Fisher's and Mr Schuckard's evidence that King Shags forage within mussel farms only very infrequently and that likely contributors to that is the reduced presence of flatfish on or in the changed seafloor underneath the farms. King Shags' use of mussel farms is likely to be largely confined to resting on them.

213 Transcript, pp 587-588.
214 Exhibit 28.2 and P R Fisher, transcript at 579-580.

[135] While Dr Fisher considered that the whole of the Marlborough Sounds was a "significant habitat" for King Shags[215] — in reliance we suspect on the IUCN Red List and on a policy in the NZCPS[216] — he was also of the opinion[217] that Pelorus Sound (or at least the parts shown on the 1991/1992 map by Mr Schuckard) are the core feeding areas for the birds from the Duffers Reef colony.

3. The statutory instruments

3.1 The relevance of the statutory instruments

[136] The statutory instruments are of course relevant because the consent authority must have regard to[218] them. However, they are of even more importance now than previously in the light of *King Salmon*[219] because the effects on the environment to be considered are not (except in unusual circumstances) necessarily or usually the relevant effects inferred from Part 2 or alleged by opponents of an application but the potential effects particularised in the statutory instruments.

3.2 The Marlborough Sounds Resource Management Plan

[137] The Sounds Plan, made operative on 28 February 2008, is a combined[220] district, regional and regional coastal plan. It is contained in three volumes — Volume 1 sets out the objectives and policies and methods, Volume 2, the rules and Volume 3 the maps. In Volume 1 five (of 23) chapters are particularly relevant. We summarise the relevant provisions below.

Natural Character (Chapter 2.0)

[138] Chapter 2 (Natural Character) of the Sounds Plan attempts to integrate[221] the values and interests identified in other chapters which promote activities while avoiding, remedying and mitigating adverse effects on the identified values.

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215 P R Fisher evidence-in-chief para 7.4 [Environment Court document 28].
216 Policy 11(a)(iv) [NZCPS p 16].
217 P R Fisher rebuttal evidence-in-chief para 3.29 [Environment Court document 28A].
218 Section 104(1)(b) RMA.
219 *King Salmon* above n 26.
220 Sounds Plan para 1.0 [page 1-1].
221 Chapter 2.0 para 2.1 [Sounds Plan p 2-1]. This is repeated in the explanation to policy (2) 1.4 [Sounds Plan p 2.2].

[139] The single objective simply repeats section 6(a) of the RMA. The implementing policies are[222] first to avoid the adverse effects of use or development within those areas of the coastal environment which are predominantly in their natural state and have natural character which has not been compromised[223]; to encourage appropriate use and development in areas where the natural character of the coastal environment has already been compromised, and where the adverse effects of such activities can be avoided, remedied or mitigated[224]; and to consider the effects on those qualities, elements and features which contribute to natural character[225], including (relevantly):

(a) coastal and freshwater landforms;
(b) indigenous flora and fauna, and their habitats;
(c) water and water quality;
(d) scenic or landscape values;
...

[140] Other non-repetitive[226] policies require regard to be had to the ability to restore or rehabilitate natural character in the areas subject to the proposal when considering "appropriateness"[227]; adopt a precautionary approach in making decisions where the effects on the natural character of the coastal environment are unknown[228]; recognise that preservation of the intactness of the individual land and marine natural character management areas and the overall natural character of the freshwater, marine and terrestrial environments identified in Appendix Two is necessary to preserve the natural character of the Marlborough Sounds as a whole[229].

[141] Since this chapter attempts to integrate all the others in the Sounds Plan we will state the questions it raises at the end of this subpart, after ascertaining the other questions those chapters raise.

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222 Chapter 2.0, para 2.2 [Sounds Plan pp 2-3 and 2-4].
223 Policy (2) 1.1 [Sounds Plan p 2-3].
224 Policy (2) 1.2 [Sounds Plan p 2-3].
225 Policy (2) 1.3 [Sounds Plan p 2-4].
226 Policy (2) 1.5 largely repeats policy (2) 1.1 and the start of the chapter.
227 Policy 1.6.
228 Policy 1.7.
229 Policy 1.8.

Indigenous Vegetation and Habitats of Indigenous Fauna (Chapter 4.0)

[142] Objective (4.3) 1 and its two relevant supporting implementation policies[230] are important. The objective provides for "The protection of significant ... fauna ... and their habitats from the adverse effects of use and development". The first two policies are relevant:

> Policy 1.1 Identify areas of significant ecological value which incorporate areas of indigenous vegetation and habitats of indigenous fauna.
>
> Policy 1.2 Avoid, remedy or mitigate the adverse effects of land and water use on areas of significant ecological value.

[143] Those policies are important because feeding habitat of King Shag is identified in Volume 2 of the Sounds Plan (Appendix B, notation 1/11) of the Sounds Plan as an "Area of Ecological Value" ("AOEV"[231]) with national significance. The relevant ecological overlay for King Shag habitat is shown in Map 69 of the Sounds Plan. The site is within an area subject to that notation. Ironically, since this classification was based on recommendations in a report by Mr Davidson and others[232] (and that in turn drew on the foraging range information reported in Schuckard 1994[233]), the Appellant challenged the science behind this notation and asked us to place less weight on it as a result. We will consider that issue later.

[144] Modification of values associated with the ecological overlay for King Shag habitat are to be assessed as discretionary activities[234] with the anticipated environmental result[235] of maintaining population numbers and distribution of the species. The questions that arise under policies (4.3)1.2 are therefore:

- What are the likely adverse effects on the feeding habitat?
- What is the probability of adverse effects occurring?

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230 Policy (4.3) 1.1 and 1.2 [Sounds Plan p 4-2].

231 Not to be confused with an "AOLV" or "Area of Outstanding Landscape Value" which is the term used in the Sounds Plan for outstanding natural features or parts of outstanding natural landscapes.

232 The *Davidson 2011 Report*, above n 194.

233 Schuckard R, 1994 "New Zealand Shag (Leucocarbo Carunculatus) on Duffers Reef, Marlborough Sounds". *Notornis* 41, Collin 93 to 108.

234 Section 4.4 Methods of Implementation [Sounds Plan p 4-4].

235 Section 4.5 Anticipated Environmental Results [Sounds Plan p 4-5].

- What is the probability of adverse effects being avoided, remedied or mitigated?
- What is the probability of a decrease in the number of King Shags? (Noting this last question derives from the methods not the policies).

Landscape (Chapter 5.0)

[145] Chapter 5 (Landscape) of the Sounds Plan recognises that the Marlborough Sounds as a whole has "outstanding visual values"[236]. Areas of "outstanding landscape value" are shown on the Landscape Maps in Volume 3. The promontory in Beatrix Bay, which the site is at the tip of, is not identified as an "Area of Outstanding Landscape Value".

[146] There are no relevant policies. However, Chapter 5 recognises as a relevant issue[237] that when deciding whether development is appropriate or not:

> ... the siting, bulk and design of structures ... on the surface of water can interrupt the consistency of seascape values and detract from the natural seascape character of a bay or wider area.

That is an evaluation matter raised directly in Appendix 1 of the Sounds Plan which we will refer to in due course.

Public access (Chapter 8)

[147] There is a single objective to maintain and enhance public access[238]. The relevant implementing policy expressly states[239] that adverse effects of marine farms on public access should as far as practicable be avoided and otherwise mitigated or remedied. The questions under this policy are first whether there would be any adverse effects on access? Second, can they practically be avoided, or at least mitigated or remedied?

236 Para 5.1.1 [Sounds Plan p 5-1].
237 Para 5.2.2, Landscape [Sounds Plan p 5-3].
238 Objective 8.3.1 [Sounds Plan p 8-2].
239 Policy 8.3.1/1.2 [Sounds Plan p 8-2].

The Coastal Marine Area (Chapter 9)

[148] The first objective (of three) for Chapter 9 is[240] to accommodate appropriate activities in the coastal marine area while avoiding, remedying or mitigating the adverse effects of those activities. The relevant implementing policy (9.2.1) 1.1 identifies as values to be maintained[241]: conservation and ecological values, cultural and iwi values, heritage and amenity values, landscape, seascape and aesthetic values, marine habitats and sustainability, natural character of the coastal environment, navigational safety, public access to and along the coast, public health and safety, recreation values, and water quality. Most of these are at issue to some extent in these proceedings. The policy also requires any adverse effects to be avoided, remedied or mitigated. Policy (9.2.1) 1.2 is at first sight rather repetitive but actually requires adverse effects of development to be avoided as far as practicable and otherwise mitigated or remedied.

[149] The other relevant policy is (9.2.1) 1.14 which is to enable a range of activities in appropriate places in the Sounds. Marine farming is expressly included and is zoned in the Coastal Marine Zone 2 in which marine farms are controlled or discretionary in the inshore area and non-complying beyond 200 metres from the shore. The Sounds Plan explains[242] that "the extent of occupation and development needs to be controlled to enable all users to obtain benefit from the coast and its waters".

[150] The second coastal marine area objective[243] is to manage water quality at a level that enables shellfish gathering and cultivation for human consumption. Implementing policies seek to avoid the discharge of contaminants that adversely affect significant ecological value, cultural areas, outstanding landscapes and seafood consumption. The only possibly relevant policy is that which seeks to avoid discharges affecting "significant ecological value" which seems to echo the policies relating to "areas of ecological value" already referred to, and we will consider the effects under that heading.

240 Objective 9.2.1 [Sounds Plan p 9-4].
241 Policy (9.2.1)1.1 [Sounds Plan pp 9-4 and 9-5].
242 Explanation of objective 9.2.1/1 [Sounds Plan p 9-6].
243 Objective 9.3.2 [Sounds Plan p 9-10].

[151] The third coastal marine objective[244] relates to alteration of the foreshore and seabed. It seeks to protect the coastal environment by avoiding, remedying or mitigating any adverse effects of activities that alter the foreshore or seabed. Policy (9.4.1) 1.1 identifies the same list of values as did policy (9.2.1) 1.1 already listed and so does not raise independent predictive questions. Policy (9.4.1) 1.9 suggests that certain adverse effects can only be addressed when the relevant rules say so, which emphasizes the wording of the rules.

Summary: stating the questions about the natural character of the area

[152] Returning to the policies in Chapter 2 of the Sounds Plan, the summarising questions these raise are:

(1) is the natural character of the area around the site compromised? And if so, to what extent?

(2) can any adverse effects of the mussel farm on coastal landforms, flatfish, King Shag and their habitats, water quality and scenic/landscape values be appropriately avoided, remedied or mitigated?

The rules

[153] Volume 2 of the Sounds Plan contains the rules implementing the objectives and policies. Chapter 35 covers Coastal Marine Zones One, Two and Three. General Assessment Criteria for discretionary activities are set out in Rule 35.4.1 and the specific criteria for marine farms are detailed in Rule 35.4.2.9. The former rule requires consideration of the "likely" effects of the proposal on the locality and wider community, the amenities values of the area, any significant environmental features including the habitat of indigenous species, and generally on the natural and physical resources of the area. The latter rule[245] requires specific assessments for marine farms of (relevantly):

- an assessment of the present nature of the site, both physical and biological including the nature of the sea floor and species found in the area;

...

244 Objective 9.4.1 [Sounds Plan p 9-16].
245 Rule 35.4.2.9 [Sounds Plan p 35-24].

- consideration of navigational matters …
- consideration of aesthetic and cultural matters;

  …
- other matters including

  (a) likely effect on areas used for commercial and recreational fishing;

  (b) the visual effect of the farm and its operation;

  (c) likely effects on water quality and ecology;

  (d) the alienation of public space.

  …

The Council only requires assessment of "likely" effects on some resources. "Likely" may mean "as likely as not" or "fractionally above the balance of probabilities" or it may, following international conventions[246], mean effects with a 66% or higher probability of occurring. Either way, we doubt whether these policies and rules can be said to fully implement part 2 of the RMA in conjunction with that part of the definition of "effects" in section 3 RMA which includes[247] "any potential effect of low probability which has a high potential impact". The Sounds Plan is incomplete on those issues especially on the risk of extinction of King Shag: that may be an event of low probability but high potential impact.

3.3 The Marlborough Regional Policy Statement

[154] We are obliged to have regard to[248] the Marlborough Regional Policy Statement ("MRPS"). However, because it became operative (1995) over a decade before the Sounds Plan (2008) its provisions are deemed to be given effect to and particularised in the Sounds Plan (unless the latter is incomplete, unclear or *ultra vires*) — see *King Salmon*[249]. On the whole it is so broad it gives us little assistance, except that there is an objective[250] to ensure that "… natural species diversity and integrity of marine habitats be maintained and enhanced".

246 See the IPCC's *Guidance Note* (2010) quoted in part 0.7 of this Decision
247 Section 3(f) RMA.
248 Section 104(1)(b)(v) RMA.
249 *King Salmon* above n 26.
250 Objective 5.3.10 [MRPS p 44].

3.4 The New Zealand Coastal Policy Statement

[155] The New Zealand Coastal Policy Statement 2010 ("the NZCPS")[251] was described in *King Salmon*[252] by the Supreme Court as "an instrument at the top of the hierarchy". We respectfully adopt the Supreme Court's description of the objectives in that document. The NZCPS is important in this case because it has not yet been implemented in the Sounds Plan. One procedural policy of potential importance in this case is Policy 3 which requires us to adopt a precautionary approach. We will consider the implications of that later.

[156] The NZCPS identifies the following issues[253] relevant to this proceeding:

- the ability to manage activities in the coastal environment is hindered by a lack of understanding about some coastal processes and the effects of activities on them;
- loss of natural character, landscape values … along extensive areas of the coast …;
- continuing decline in … habitats and ecosystems in the coastal environment under pressures from subdivision and use, vegetation clearance, … plant and animal pests, poor water quality, and sedimentation in estuaries and the coastal marine area;
- demand for coastal sites … for aquaculture …;

…

These issues recognise that in their current state some areas in the coastal environment are not necessarily being managed sustainably.

[157] The NZCPS provides for integrated management of the resources of the coastal environment by requiring particular consideration of situations where "significant adverse cumulative[254] effects are occurring"[255]. A later policy[256] requires plans to set thresholds (including zones …) where practicable "… to assist in determining when activities causing adverse cumulative effects are to be avoided". The areas of ecological value in the Sounds Plan can be seen as an anticipation of this approach.

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251 This came into force on 3 December 2010.
252 *King Salmon* above n 26, at [152].
253 NZCPS 2010 p 5.
254 The word "cumulative" in these policies is being used in the normal (accumulative) sense not in the narrow *Dye* sense discussed below, in part 4.1 of this Decision.
255 Policy 4(c)(v) [NZCPS p 13].
256 Policy 7(2) [NZCPS p 15].

[158] We now turn to the substantive implementing policies.

Aquaculture

[159] Policy 6(2) of the NZCPS 2010 is important[257] because, in relation to the coastal marine area, it requires recognition of:

> a. ... potential contributions to the social, economic and cultural wellbeing of people and communities from use and development of the coastal marine area; ...
> b. ... the need to maintain and enhance the public open space and recreation qualities and values of the coastal marine area;
> c. ... a functional need [for some activities] to be located in the coastal marine area, and [to] provide for those activities in appropriate places;
> ...

[160] Those more general policies are then elaborated on with a specific Policy 8 (b) for aquaculture which is obviously relevant in this case. It is to[258] recognise the significant potential contribution of aquaculture to the well-being of people and communities by[259]:

> ...
> b. taking account of the social and economic benefits of aquaculture, including any available assessments of national and regional economic benefits; and
> c. ensuring that development in the coastal environment does not make water quality unfit for aquaculture activities in areas approved for that purpose.

These policies are clearly applicable. What is less clear is whether these are intended to refer to the net benefits of aquaculture. We assume that they are to be consistent with section 7(b) RMA, otherwise the NZCPS would be incomplete. In any event there was no disagreement over the brief evidence called for the Appellant on the social and financial benefits of the proposal.

Indigenous biodiversity

[161] Policy 11 is (relevantly):

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257 Policy 6(2) relates to the coastal environment generally and is much less relevant to these proceedings.
258 Policy 8: Aquaculture [NZCPS 2010 p 15].
259 Policy 8 (a) is not relevant, because we are not here concerned with the approval of a regional policy statement or plan [NZCPS 2010 p 15].

Policy 11: Indigenous biological diversity (biodiversity)

To protect indigenous biological diversity in the coastal environment:

(a) avoid adverse effects of activities on:

(i) indigenous taxa that are listed as threatened or at risk in the New Zealand Threat Classification System lists;

(ii) taxa that are listed by the International Union for Conservation of Nature and Natural Resources as threatened;

(iii) …

(iv) habitats of indigenous species where the species are at the limit of their natural range, or are naturally rare[260];

(b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on:

…

(iii) indigenous ecosystems and habitats that are only found in the coastal environment and are particularly vulnerable to modification including estuaries, lagoons, coastal wetlands, dunelands, intertidal zones, **rocky reef systems**, eelgrass and saltmarsh;

… [emphasis added].

[162] The first important aspect of policy 11 is that certain adverse effects are simply to be avoided: the effects on certain threatened categories of animals and birds and on certain classes of habitat of indigenous fauna. We note that categories in (a)(i) and (ii) are not mutually exclusive. Adverse effects of activities on a taxon obviously include injury to or death of individuals and reduction in population, but they may also include reductions in EOO or AOO, and reduction in habitat area or quality. This results from the reasons (e.g. very small populations) why they have been classified as threatened or at risk in the first place.

[163] Policy 11(a)(i) and (ii) refer to the adverse effects of activities on taxa, whereas 11(a)(iv) refers to habitats of indigenous species. Subparagraph (i) and (ii) thus simply implement section 5(2) whereas subparagraph (iv) also implements section 6(c) RMA (significant habitats). We mention that because there is some potential for confusion about subparagraph (i) and (ii). They do not refer to 'habitats' or 'significant habitats' and thus do not implement section 6(c). However, to particularise and implement section 5(2)'s direction for the "… protection of natural … resources" the NZCPS adopts the

260 "Naturally rare" is defined in the Glossary as meaning "Originally rare: rare before the arrival of humans in New Zealand" [NZCPS 2010 p 27].

lists in the New Zealand Threat Classification System and in the IUCN Red List. These largely refer to population criteria. However, some of the criteria for small populations do refer to habitat (and they happen to be the relevant ones in this case). But that does not turn the criteria into section 6(c) RMA implementations.

[164] As recorded above, New Zealand King Shag is an indigenous taxon which is listed as threatened in both the New Zealand Threat Classification and in the IUCN Red List, so NZCPS policy 11(a)(i) and (ii) both apply. That means that the issue emphasised so strongly by the Appellant — whether the site's classification as a "significant habitat" for New Zealand King Shag is correct — is not really relevant at least to policies 11(a)(i) and (ii) of the NZCPS.

[165] Policy 11(a)(iv) recognises that habitats are particularly important at the edges of a species' range. This policy recognises that reduction in the quality or quantity of habitat may itself have consequences for a qualifying species, even if the consequences for individuals and/or populations are not yet known, and treats such reductions as effects to be automatically avoided.

[166] The King Shag is at the limit of its natural range primarily because its apparent area of occupation is so small. Anywhere within the AOO is close to its edges in the sense that birds from the principal Pelorus colonies are always within foraging range of the edges. The evidence is that the King Shag has a foraging range of about 25 km. Given the very small number of colonies we do not understand NZCPS policy 11(a)(iv) to apply in a way so that only the outermost ring (with an inner radius of say 20 km) is protected habitat. That would be an absurd consequence whereby potentially less important habitat is protected under the policy while more important habitat is not. Consequently we consider policy 11(a)(iv) applies in this proceeding.

[167] The court's knowledge of New Zealand King Shag suggests that neither its taxonomic status nor its (former) extent of occurrence are necessarily as black-and-white as Mr Schuckard portrayed them. It is possible, for example, that King Shag should be lumped as a northern outlier of a superspecies of "New Zealand Blue-eyed Shags" within the *Leucocarbo* genus. That would put King Shags at the limit of the (super-) species range so NZCPS policy 11(a)(iv) would still apply (i.e. a lumping of the species

with, for example, Stewart Island Shag, would make no difference to the analysis). The other matter is that the fossil record of King Shags apparently shows[261] a wider extent of occurrence (EOO) in the past. However, no evidence was given about these matters so we simply record them as potential complications in any future cases.

[168] The site is also close to the reef system wrapped around the promontory so policy 11(b)(iii) is relevant.

[169] The questions raised by these policies are: will the proposed mussel farm cause adverse effects on:

(a) the King Shag species?
(b) the habitat of King Shags?
(c) effects which are significant on the reef system around the promontory?

Natural character and natural landscapes in the coastal environment

[170] Policy 13 is (relevantly):

Policy 13: Preservation of natural character

1. To preserve the natural character of the coastal environment and to protect it from inappropriate use, and development:
   a. avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character; and
   b. avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on natural character in all other areas of the coastal environment; including by:
   …

The meaning of "natural character" in section 6(a) of the RMA — as it applies to the coastal environment — now needs to be read in the light of the particularisation of that phrase in policy 13(1) of the NZCPS.

[171] Policy 15 is (relevantly):

[261] P Schofield and B Stephenson Birds of New Zealand (2013) Auckland University Press p 229.

Policy 15: Natural features and natural landscapes

To protect the natural features and natural landscapes (including seascapes) of the coastal environment from inappropriate subdivision, use, and development:

a. Avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment;

b. Avoid significant adverse effects and avoid, remedy, or mitigate other adverse effects on other natural features and natural landscapes in the coastal environment;

...

[172] The important questions raised by these two policies are:

(1) Will the proposed mussel farm cause adverse effects:
  (i) to the natural character of Beatrix Bay?
  (ii) to the natural features in, or landscape of, Beatrix Bay?

(2) If the answer to question (1) is "yes" will any of those effects be significant?

(3) Will the proposed mussel farm, together with other mussel farms, cause cumulative adverse effects on the natural character/natural features/landscape of Beatrix Bay?

4. What are the predicted effects of the mussel farm?

4.1 Introduction: identifying the relevant effects

[173] Under section 104(1)(a) RMA the consent authority must have regard to the "actual and potential effects on the environment of allowing the activity".

[174] At first sight that requires a comprehensive inquiry because the word "effect" is defined very widely in section 3 of the Act as including:

3 Meaning of effect

In this Act, unless the context otherwise requires, the term **effect** includes—

(a) any positive or adverse effect; and

(b) any temporary or permanent effect; and

(c) any past, present, or future effect; and

(d) any cumulative effect which arises over time or in combination with other effects—

regardless of the scale, intensity, duration, or frequency of the effect, and also includes—

(e) any potential effect of high probability; and

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

The wording suggests that any cumulative effects of any stressor appear to be included. For example, the ecologist Dr Stewart referred to Chapter 12 of the *Literary Overview* which describes "cumulative" effects in relation to marine aquaculture as[262]:

> *... Ecological effects in the marine environment that result from the incremental, accumulating and interacting effects of an aquaculture development when added to other stressors from anthropogenic activities affecting the marine environment (past, present and future activities) and foreseeable changes in ocean conditions (i.e. in response to climate change).*

That description appears to fit within section 3(d) RMA.

[175] However, in 1999 the Court of Appeal issued a decision in *Dye v Auckland Regional Council*[263] ("*Dye*") which held that a "cumulative effect" is not a wide concept in the context of a resource consent application. Tipping J, giving the decision of the Court, wrote[264]:

> The definition of effect includes "any cumulative effect which arises over time or in combination with other effects". The first thing which should be noted is that a cumulative effect is not the same as a potential effect. This is self evident from the inclusion of potential effects separately within the definition. A cumulative effect is concerned with things that will occur rather than with something which may occur, that being the connotation of a potential effect. This meaning is reinforced by the use of the qualifying words "which arises over time or in combination with other effects". The concept of cumulative effect arising over time is one of a gradual build up of consequences. The concept of combination with other effects is one of effect A combining with effects B and C to create an overall composite effect D. All of these are effects which are going to happen as a result of the activity which is under consideration. [Underlining added].

The converse appears to be that effects of other stressors (which are not the activity under consideration) are not cumulative effects as a matter of law. That is problematic in

262 *Literature Review* above n 84, at p 12-13.
263 *Dye v Auckland Regional Council* [2002] 1 NZLR 337; [2001] NZRMA 513 (CA).
264 *Dye* at paras [38] and [39].

relation to the (extensive) parts of the environment which are[265] "ecosystems and their constituent parts" because they are all affected accumulatively by all effects from all stressors. Further, *Dye* does not recognise that 'cumulative' effects of multiple stressors are the main consideration in preparations of district plans and other statutory instruments.

[176] *Dye* was explained by Cooper J in *Rodney District Council v Gould*[266] as follows:

> … I consider that all that was said in *Dye* was that an effect that may never happen, and which, if it does, will be the result of some activity other than the activity for which consent is sought, cannot be regarded as a "cumulative effect".

[177] We record that other decisions show some disquiet over that restrictive application of the term "cumulative effects". First, *Dye* does not use the ordinary meaning of "cumulative" as pointed out by the Environment Court in *The Outstanding Landscape Protection Society Inc v Hastings District Council*[267]. Second, the learned Chief Justice, in her minority judgment in *West Coast ENT Inc v Buller Coal Ltd*[268], wrote:

> I … would have thought that contribution to the greenhouse effect is precisely the sort of cumulative effect that the definition in s 3 permits to be taken into account under s 104(1)(a) in requiring the consent authority to "have regard to any actual and potential effects on the environment of allowing the activity".

Third, *Harris v Central Otago District Council*[269] has recently pointed out that strictly *Dye* is only authority for the proposition that a potential effect on the environment which might be caused by some other activity which requires a resource consent under the relevant plan is not a cumulative effect of allowing the activity for which consent is sought. It seems that the restrictions of *Dye* are not necessary: the potential effects of

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265 Section 2 RMA.

266 *Rodney District Council v Gould* [2006] NZRMA 217 (HC) at [122].

267 *The Outstanding Landscape Protection Society Inc v Hastings District Council* [2008] NZRMA 8 at [50].

268 *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87; [2014] 1 NZLR 32; [2014] NZRMA 133; (2013) 17 ELRNZ 688 (SC) at [91].

269 *Harris v Central Otago District Council* [2016] NZEnvC52 at [48].

another independent application for resource consent would not usually be part of either the existing or the reasonably foreseeable future environment and so are irrelevant anyway.

[178] We observe that the complexity of *Dye*'s discussion of 'actual and potential effects' in section 104(1)(a) RMA are also unnecessary. There is a simple reason why Parliament used that phrase rather than the defined word "effects". Obviously if a resource consent is applied for in the proper order — in advance of carrying out an activity — all its effects are potential, i.e. they have not occurred yet. However, the legislature anticipated the reality that in a small but significant percentage of cases, particularly after an abatement notice has been issued by a local authority, a resource consent is applied for retrospectively. In such a case most of the effects are "actual".

[179] To those points we can add:

(1) *Dye* does not take into account — because it did not need to — the reality that all stressors, regardless of who or what causes them, cause "cumulative" effects on ecosystems; and

(2) the *Dye* view of the world is rather static — in reality this second's effects are the next second's environment. The past effects of stressors — the accumulated[270] effects — have become and are continually becoming, part of the environment which is the setting of any proposal.

[180] It is important to realise that *Dye* does not mean that "cumulative" effects in a wider sense are irrelevant. If the potential effects of stressors, other than the activity for which consent is sought, are relevant then they may be taken into account under section 104(1)(c) RMA. Accordingly we will analyse such potential effects — which we will call "accumulative effects" — separately so as not to confuse the analysis imposed by *Dye*. The different treatment of such effects under *Dye* may have been intended to have this consequence: whereas cumulative (in the *Dye* sense) effects must be had regard to under section 104(1)(a), the consent authority has a discretion under section 104(1)(c) as to whether it takes accumulative effects into account at all. However that is probably an

270 We will use "accumulated" for the past effects of any stressors; "accumulative" for future effects of all stressors (other than the application).

over legalistic approach, because the potential (future) effects of other stressors are also part of the reasonably foreseeable future environment (under section 104(1)(a)) and that must be established in any event. In other words, there is no bright line distinguishing accumulative effects of other stressors from the future dimensions of the 'environment': to the contrary, they are the same thing.

4.2 Effects on the water column[271]

[181] As described earlier, the operation of the mussel farm will cause discharge of seawater and contaminants (mussel shells, mussel faeces and pseudofaeces) to the seawater of Beatrix Bay. The question under the Sounds Plan is whether discharges affecting significant ecological value are avoided.

[182] Mr Knight also assessed the effects of the proposed farm structures on currents, waves, shading and water column stratification, concluding that these effects would be small and localised[272]. In Mr Knight's opinion, an additional mussel farm is unlikely to contribute to oligotrophication (lowering of nutrient levels) of the region. He described his application of the *Aquaculture Stewardship Guidelines*[273] to estimate the effects of the proposed farm on phytoplankton depletion. He reported as follows[274]:

> Results of the carrying capacity analysis ... show that the estimated stocking density of the farm would filter the estimated area of influence of the farm every 13.5 days (the clearance time CT) and that the area of influence would be flushed approximately every 4.5 days (the retention time RT). Consequently, the analysis shows that the water currents at the site are sufficient to support the proposed culture at the site and that the proposal will meet with the ASC (2012) criteria, that the ratio of the clearance to retention time would be greater than one. (Footnote omitted).

This analysis of local scale effects of the proposed farm on phytoplankton productivity diversity and succession was not challenged by other expert evidence or in cross-examination. In fact, the conclusion appears to be supported by Dr S T Mead[275], ecologist for the Societies, because he stated that the farm in isolation is unlikely to exceed its localised carrying capacity or influence nutrient properties in the wider bay.

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271 See the Assessment Matters in rule 35.4.2.9 [Sounds Plan p 35-21].
272 B R Knight, evidence-in-chief at para 82 [Environment Court document 9].
273 Aquaculture Stewardship Council 2012: *ASGBivalve Standard Version 1* (January 2012).
274 B R Knight, evidence-in-chief para 56 [Environment Court document 9].
275 S T Mead, evidence-in-chief, paras 25 and 34 [Environment Court document 20].

[183] Dr Mead extrapolated the farm scale calculations by Mr Knight to show how quickly or slowly the seawater in the bay is replaced. He calculated a bay-wide CT/RT[276] score of 0.0675. In his opinion the capacity indicators[277] for clearance efficiency and regulation ratio indicated that cultured mussels control the ecosystem of Beatrix Bay (i.e. exceed carrying capacity)[278]. Based on his calculations, Dr Mead asserted that the accumulated ecological effects of mussel farms were already significant in Beatrix Bay and that no more farms should be added. Mr Knight responded to those calculations[279], noting that while they were useful tools "they do not account for the spatial complexity of an area and so will become increasingly less useful at larger scales." An equally cogent criticism of Dr Mead's opinion was that of Dr Stewart. He did not see the relevance in extrapolating the theoretical calculations because empirical observations at a base scale showed that carrying capacity was not being exceeded most of the time.

[184] We consider that the proposal is unlikely to add any adverse cumulative effects to the water column in Beatrix Bay that are more than minimal in the context of larger "natural"[280] variations. However, whether the regularity of winter/summer fluctuations changes the food web in a way that affects King Shag is unknown.

4.3 Effects on the seabed[281]

[185] Dr Taylor and Dr K Grange provided expert ecological evidence for the Appellant on the benthic effects of the proposal. Mr Davidson also gave us his expert opinions (although not claiming to be independent). Dr Stewart and Dr Mead provided expert evidence for the Council and the Societies respectively. A site-specific assessment[282] of the proposal was prepared by Mr R Forest for the original (now

276 CT=clearance time; RT=retention time.

277 Using methodology described in Gibbs M T 2007. "Sustainability performance indicators for suspended bivalve aquaculture activities". *Ecological indicators*, 7(1), 94-107.

278 S T Mead, evidence-in-chief, at para 28 [Environment Court document 20].

279 B R Knight, rebuttal evidence at para 4.11 [Environment Court document 9A].

280 "Natural" is in inverted commas to recognise the possibility that el Niño/ la Niña events may be influenced by anthropogenic global warming.

281 See the Assessment Matters in rule 35.4.2.9 [Sounds Plan p 35-21].

282 Forest R 2013, *Proposed Marine Farm Site Assessment for a new application located in Northern Beatrix Bay, Pelorus Sound*, (Cawthron Report No 2406) [Exhibit 6.5].

modified) application. While Mr Forest was not called by the Appellant, that report was relied on by Dr Taylor and others.

Will there be adverse effects on the rocky reef system at the promontory?

[186] We must assess the probability and degree of adverse effects on the rocky reef[283], which it will be recalled, is at least 35 metres from any part of the marine farm. There was no suggestion that there would be any shell drop on the reef. The only issue was whether finer suspended sediments would be moved on to and smother the reef.

[187] For the Appellant, Dr Taylor's evidence[284] was that the water flow regime at the site (typically less than 4cm per second), combined with the 35 metre buffer, would make farm-related deposition difficult to distinguish from background levels at the adjacent inshore reef area. Further, episodic high current flows recorded at the site (up to 20cm per second) would have the effect of re-suspending any fine organic material that might reach the reef. Dr Taylor also pointed out[285] research evidence establishing the inherent variability of rocky reef communities supporting his opinion that any "cumulative" effects from mussel farming on these communities are likely to be very difficult to detect when compared to large scale environmental processes. Finally Dr Taylor suggested that any residual concerns around potential effects on the reef habitat could be met by requiring an adaptive management approach based on benthic monitoring linked to a review of the farm's layout if significant issues were identified. Proposed conditions to this effect have been provided by Mr J C Kyle, planning witness for the Appellant[286].

[188] Dr Mead, after recalculating his figures related to flow rate and the deposition footprint, accepted that a deposition footprint limited to up to 35m from the farm was likely[287]. He also accepted[288] that the high currents experienced from time-to-time at the site may re-suspend any fine sediment that may travel further than the main footprint. Despite accepting these propositions, Dr Mead continued to assert that fine material

283 NZCPS policy 11(b)(iii).
284 D I Taylor evidence-in-chief paras 33 and 34 [Environment Court document 8].
285 D Taylor evidence-in-chief paras 38 to 43 [Environment Court document 8].
286 J C Kyle, evidence-in-reply, Appendix A [Environment Court document 32].
287 Transcript, p 394, line 28.
288 Transcript, p 396, lines 10-15.

reaching the reef area from the proposed adjacent mussel farm would have a major effect on the ecological community at the reef.[289]

[189] We see a low probability of such an effect — it is unlikely to occur on the preponderance of the evidence given to us.

Will there be adverse effects on the intertidal zone?

[190] We are also required[290] to examine whether there will be adverse effects on another indigenous ecosystem found only in the coastal environment — the intertidal zone. Prompted by concerns expressed at the Council hearing on the possible impact of mussel farms on the wider biological community at Beatrix Bay, Mr Davidson undertook a sampling project on intertidal habitats[291] adjacent to and distant from mussel farms within Beatrix Bay in collaboration with Dr Grange. Mr Davidson selected the survey sites and collected the relevant data, which was analysed by Dr Grange. While acknowledging the snapshot nature of the survey, Dr Grange concluded from his analysis that there are differences in the biological communities between sites, but these differences are not consistent with the proximity to mussel farms. In his opinion, the differences can be explained by habitat differences and inherent patchiness in the shore communities (temporal and spatial variability)[292].

[191] Dr Grange's analysis was not disputed by Dr Stewart and he agreed[293] that it provided useful data. However, he went on to suggest that effects from mussel farms on intertidal communities are less easily determined than effects on subtidal communities. This was due to the influence of factors such as time submerged, wave action, aspect, substrate type, adjacent land use and exposure to the sun. These influences are moderated in the subtidal zone by the overlying water column.

[192] For his part Dr Mead dismissed[294] the analysis and conclusions of Dr Grange as providing no evidence one way or the other of the effects of mussel farms on intertidal communities. He asserted that the effects of mussel farms on intertidal habitats have not

289 Transcript, p 397, line 2.
290 Under policy 11(b)(iii) of the NZCPS.
291 K Grange evidence-in-chief Appendix 1 [Environment Court document 11].
292 K Grange evidence-in-chief at para 8.1 [Environment Court document 11].
293 B G Stewart evidence-in-chief at para 8.23 [Environment Court document 26].
294 S T Mead evidence-in-chief 15 [Environment Court document 20].

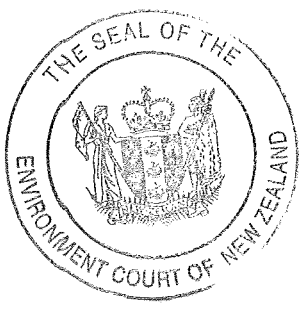
been extensively researched. Responding to questions in cross-examination, Dr Grange disputed this, noting extensive research had been reported and that no effects had been observed.[295] On this issue we prefer the evidence for the Appellant and predict that it is likely there will be only very minor (if any) independent or cumulative effects on the intertidal zone.

What will be the effects of the marine farm on the seafloor and its macrofauna?

[193] There is no policy in the NZCPS which directly requires consideration of this ecosystem in itself. However, the Sounds Plan requires identification of likely effects on the sea floor and marine ecosystems generally. As it happens, the Appellant's experts all acknowledged that sedimentation and shell drop from mussel farms does alter infaunal and epifaunal biological communities (these include flat fish) within the direct footprint of the farm. Species diversity may diminish in some circumstances and the abundance of some species may increase. This can vary from site to site depending on current velocities and farm management practices.

[194] We have already described the shell drop from other mussel farms. No one disputed that the same will occur under the Appellant's farm. The proposal will change the 7.372 hectares of soft mud seafloor to a reef-like system of shells, live mussels and sediment to a distance of 30 metres from the seaward edge of each part of the farm.

[195] When questioned by the court on the relative impact of mussel farming alongside other anthropogenic influences and stochastic events, Dr Mead asserted that mussel farms were having by far the greatest impact[296], but without giving any detail to support this assertion other than to dismiss the impact of dredging and trawling as pulse events from which recovery was rapid. This was in contrast to the evidence of Dr Stewart, who considered the risk or threat from aquaculture to be lower than that from other influences. In his opinion, the probability of adverse effects occurring remained high, but the consequence of these effects would be orders of magnitude less than other stressors. Dr Stewart qualified this to some extent by saying that changes in dredging/trawling effort, reductions in exotic forest harvesting and native tree and shrub regeneration may mean that the gap between relative importances of major influences



295 Transcript, p 284, line 11.
296 Transcript, p 418, line 20.

may be diminishing. Mr Davidson considered anthropogenic effects from land generated sedimentation and trawling/dredging are the "biggies"[297] in driving benthic effects.

4.4 Effects on King Shag habitat and population

[196] The Council alleged that the Appellant's case was defective because its evidence-in-chief omitted to supply any information on the question whether the proposal would affect King Shags and their habitat. Mr Gardner-Hopkins, counsel for the Appellant, explained that it had not produced expert primary evidence on this issue as it was not significant in the Commissioner's decision and had not come to the fore until receipt of primary evidence from the respondent and section 274 parties. Counsel submitted that the Appellant was entitled to rely on aspects of evidence produced by other parties and to present rebuttal evidence on this. We agree with this submission and have considered all of the expert evidence, regardless of its source. However, that does not change the legal obligation on the Appellant to supply adequate information (from whatever source) to enable us to grant consent. We have already observed that some of the cross-examination by Mr Gardner-Hopkins seemed to proceed on the opposite basis.

[197] In Part 2 of this decision we found that the habitat of King Shags has been degraded (mainly by land use causing run-off of sediment and pollution, and by dredging) and reduced by installation of mussel farms. The impact of a further mussel farm will by itself generally have less than minor impacts on that habitat. On the other hand the accumulated and accumulating impacts of existing (and past) operations are adverse and more than minor, and the Trust's application can only add to those adverse effects on habitat.

[198] For convenience we summarise our findings[298] on the preponderance of evidence from parts 2 and 3 of this decision as follows:

(1) King Shags forage, feed and rest in Beatrix Bay.

297 Transcript p 85, line 20.
298 See the Assessment Matters in rule 35.4.2.9 [Sounds Plan p 35-21].

(2) Foraging occurs principally on or above the soft substrate of the Bay's floor at depths below 10m and mainly between 20m and 40m with female shags preferring shallower water in that range.

(3) The principal prey are flat fish including Witch Flounder and Lemon Sole.

(4) King Shags rarely forage within marine farms. There is anecdotal evidence of such foraging, but Dr Fisher's study showed none.

(5) Beatrix Bay is likely to be a better habitat for the Duffer's Reef colony than similar areas further away because King Shags require less energy to travel to (and return from) this area.

(6) A mussel farm over soft substrate modifies the habitat substantially by covering the area under it and an incomplete ring of variable width[299] (but up to 30m wide) around it under shell debris, mussel faeces and pseudofaeces.

(7) Mussel farms over soft substrate are potentially stressors of King Shag because they may reduce the presence King Shag's preferred prey or the ability of King Shag to catch them.

[199] We conclude that there are already adverse effects on King Shag in the current and reasonably foreseeable environment of the site.

[200] We have already found that the presence of mussel farms is having an adverse effect on the habitat of King Shags by excluding their benthic footprints from being foraged by King Shags. The telling figure is that less that 1% of the observations of swimming King Shags in the Marlborough Sounds have been of birds within mussel farms, and even then there is no evidence that they have been foraging, let alone successful. Further, there is a 30 metre wide (maximum) bulge outside each mussel farm in which the habitat is also likely to be modified adversely.

[201] The footprint of the 37 farms is 304.4 hectares and a 30 metre strip along the outside[300] of the farms would add (8.5 km x 0.03 km =) 25 hectares, which makes a total of 329.9 hectares subtracted from the potential optimum foraging area. That is (329.9 /

299 The "ring" is likely to be incomplete because there is unlikely to be shell drop and sediment inside the farm, and it will be asymmetric too: stretching in the direction of the predominant current.

300 We assume the inside edge of most farms is on or inside the boulder/reef zones.

2,000 =) 16% of the area of Beatrix Bay which is a more than minor reduction in foraging area[301] within the Bay. There is already an adverse accumulated effect, and the addition of the proposed farm will only exacerbate that.

[202] There is one other aspect of the application which may have a more than minor effect. It results from the fact that the site is nearly the last empty but potentially available mussel farm site around the circumference of Beatrix Bay. The site may be important as a control site for recording foraging by King Shags. If a mussel farm is installed and operated on the site, that opportunity is lost.

[203] Mr Maassen submitted[302] that a threshold of "cumulative effects" would be passed. However, we have no evidence of a threshold of effects on the habitat of King Shags. There are a number of reasons why reduction in habitat might affect the King Shag e.g. directly by killing displaced individuals by removing food (or decreasing hunting efficiency) and indirectly by fragmenting populations, increasing vulnerability to extinction from stochastic events (disease, el Niño and climate change effects and genetic problems). We have no information that any of those are causing problems at present or not.

[204] The Appellant argued that because there was no, or insufficient, evidence that any "tipping point" has been reached in respect of the cumulative (or accumulative) effects which are relevant under the Sounds Plan and the NZCPS, we can disregard these matters. We do not consider that is correct: the concept of a 'tipping point' is not found in the RMA. It is a tempting but misleading metaphor: it adds a connotation of a valued resource being at the top of a cliff, and one more push (in the form of the activity being applied for) will see the resource in pieces at the bottom. In reality it is often impossible to say where tipping points are in relation to habitats. Ecosystems and their components react to the myriad of stressors they are exposed to in a multitude of ways, very few of them known with accuracy. While dose-response relationships are often (but not necessarily) sigmoidal[303], identifying a "tipping point" on such a curve can be difficult. The point is that nobody has any idea whether a sigmoidal curve is correct, or

301 We note this is less than Dr Stewart's figure (19%) but consider our figure is more conservative.
302 Mr Maassen's submissions dated 29 July 2015, paras 216-218.
303 An elongated 'S' shape rather than the 'U' shaped or parabolic curve shown by Mr J Z Butler, the planner for the Marlborough District Council, at his para 9.4 [Environment Court document 33].

if Mr Butler's curve[304] or some other is correct. Further, nobody knows where on any of the curves the current population is, and what the effects of other stressors are.

[205] What the RMA actually requires is protection of significant habitats. Local authorities have worked at stating methods for evaluating areas of vegetation and habitats, see for example the criteria stated in *Minister of Conservation v Western Bay of Plenty District Council*[305]. In the statutory documents relevant to this proceeding (the Sounds Plan and the NZCPS) two other methods of responding to section 6(c) RMA have been used. Neither refers to tipping points. The NZCPS refers to the IUCN criteria which does use some thresholds, for example population decreases[306] or changes in extent of occurrence or area of occupancy[307] but they are tightly defined and are given as alternatives. Nobody attempted to apply them in this case. For the King Shag the IUCN small population criterion D[308] applies instead. As recorded earlier there are no applicable thresholds for criterion D in the IUCN Red List.

[206] In summary, we have adequate information to find/predict that:

(1) King Shag habitat will be changed by shell drop and sedimentation;
(2) the effects of the farm accumulate and are likely to be adverse; and
(3) it is as likely as not there will be adverse effects on the populations of New Zealand King Shags and their prey;
(4) there is a low probability (it is very unlikely but possible) that the King Shag will become extinct as a result of this application.

[207] On the other hand we have insufficient information to assess the effects in the previous paragraph (the combined effects of the Davidson Family Trust mussel farm together with the other mussel farms in the bay) against the effects of other major environmental stressors, both anthropogenic and stochastic. Pastoral farming, exotic forestry, deforestation, dredging and trawling fall into the first category, while flooding

304 J Z Butler evidence-in-chief para 9.4 [Environment Court document 33].
305 *Minister of Conservation v Western Bay of Plenty District Council* Decision EnvC A71/01 at [20].
306 See the *Red List* Vulnerable Criteria A above n 156.
307 See the *Red List* Vulnerable Criteria B above n 156.
308 The *Red List* Vulnerable Criteria D above n 156, at p 22.

in the Pelorus and Kaituna Rivers and oscillations in weather patterns fall into the latter (or both).

[208] The most direct likely effect on King Shag habitat is that an area of over 10 hectares (the 8.982 ha farm plus a 20 to 30 metre wide strip along its outside edge) is very likely to be covered in detritus from the farm at the rate of 250 tonnes/hectare (or more) each year. The studies of fish around mussel farms suggest that the new benthic habitats they form underneath them may not encourage flat fish. We hold that change is likely to be an adverse effect on King Shag habitat.

[209] In Dr Fisher's opinion benthic changes resulting from the scale of mussel farming reduce the availability of significant feeding habitat. Cross-examined by Mr Gardner-Hopkins he confirmed his view that the change in substrate under the farm meant that the "… benthic fish prey that the King Shags forage for are unable to use that habitat"[309]. This exchange occurred[310]:

> Q: The question that I think I asked was, on the basis of your paragraph 9.5 [of Dr Fisher's evidence-in-chief] and your earlier paragraph 7.4 you would consider any mussel farm in the Marlborough Sounds as having a more than minor effect because it removes foraging habitat for King Shags.
>
> A: That's correct. Yes I'd say that, yes.

Dr Fisher's approach is consistent with the approach in the NZCPS which is to avoid any adverse effect on threatened species and in particular to avoid adverse effects on the habitats of indigenous species (at the limit of their natural range).

[210] Given the scale of the proposal these will be minor (but not minimal) effects by themselves, but they are, with the accumulated and accumulative effects of existing farms, adverse to King Shag habitat (NZCPS Policy 11(a)(iv)) and to King Shags (NZCPS Policy 11(a)(i) and (ii)).

309 Transcript, p 585.
310 Transcript, p 585, lines 24 to 29.

4.5 Cultural effects[311]

[211] The local Iwi, Ngati Koata, supported the application as they apparently consider it complies with the Ngati Koata Iwi Management Plan. We have evaluated the evidence relating to effects on King Shag habitat and population above. We consider the application does not meet the protection focus for indigenous fauna and their habitats in the Iwi Management Plan. So we give the Ngati Koata support minimal weight.

4.6 The effects on the amenity and other values of the promontory

[212] On these and wider landscape/natural character issues the court read the evidence lodged by the following witnesses (and heard cross-examination on that evidence):

Landscape architects

- Mr C R Glasson for the Appellant;
- Mr A Bentley for the Marlborough District Council; and
- Dr M Steven for the section 274 parties.

Planners

- Mr Kyle for the Appellant;
- Mr J Z Butler for the Council; and
- Ms S J Allan for the section 274 parties.

[213] All of Beatrix Bay is considered by the landscape experts and planners and has been accepted by the court (in *Knight Somerville Partnership v Marlborough District Council*[312] and elsewhere) as having a high level of natural character even though 16% of its surface area is adversely affected by mussel farms. The promontory does not stand out from the rest of the bay in this regard in anyone's assessment except Dr Steven who considered that the southern third of the promontory is outstanding. While we do not accept Dr Steven's opinion, we do acknowledge the promontory's high values and sensitivity and we now consider the effects of the proposal on that.

311 See the Assessment Matters in rules 35.4.1 and 35.4.2.9 [Sounds Plan p 35-14 and 35-21 respectively].

312 *Knight Somerville Partnership v Marlborough District Council* [2014] NZEnvC 128.

How visible will the mussel farm be?

[214] For the Council Mr Bentley produced a table[313] as to the visibility of mussel farms at various distances. He explained that the table has been developed with his colleagues at the firm Boffa Miskell and contains an overall consensus from the Environment Court on different mussel farm appeals over the last 20 years. Mr Glasson, for the Appellant, produced his own table[314] of 'Visibility of Mussel Farms at Sea Level' (we think he means at about 1.5m above sea level). We have compiled this table:

Distance from farm	**Mr Glasson**	**Mr Bentley**
0-500m	Highly visible	Dominant
500-700m	Very visible	Prominent
700-1000m	Visible	Prominent
1000m-1.5km	Low visibleness	Prominent
1.5km-3km	Low visibleness	Visible as part of view
More than 3km	Low visibleness	Difficult to see

We find problems with both assessments. First, Mr Bentley's table seems to include two sets of value judgments — as to degree of visibility and as to its impact on the seascape — where the first might suffice. The use of the words "dominant" and "prominent" seems to make an aesthetic assessment which is arguably premature. In that regard Mr Glasson's vocabulary is preferable since it only attempts to assess the degree of visibility (albeit still in a subjective way).

[215] The difficulty with Mr Glasson's table is that it divides the units of distance so finely that we have doubts about its utility. A reasonable person on the water would struggle to identify whether they were 500 or 700 metres from a mussel farm in any conditions less than flat calm (and without other information).

[216] Mr Bentley's table describes the degree of visibility from 500 metres to 1.5km (from a farm) as *prominent*. We can accept this may be accurate (although we prefer

313 Visibility from water/Visibility from land (usually elevated) – J A Bentley evidence-in-chief, para 5.59 [Environment Court document 30].

314 Table 3.0, Visibility of Mussel Farms at Sea Level. Glasson evidence-in-chief, para 10.16 [Environment Court document 7].

"very visible") when viewing conditions are extremely favourable — flat sea with sun directly onto the farm. In other circumstances the table may not be correct, depending on both conditions and the eyesight of the observer.

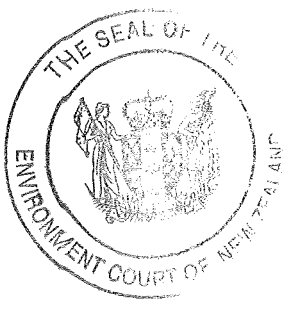
[217] In summary, on this site we predict that at a range of less than 400 metres (particularly where existing farms are not part of the foreground view) the farm would be highly visible in good conditions. In good but not millpond conditions from a range of 400m to 750m the farm may be visible depending on conditions and angle of approach. From about 750 metres to 1.5 kilometres the farm would, in many conditions, be visible. Beyond that it may be difficult to see even in good conditions.

[218] No ONL or ONF is identified for the site — it is not an Area of Outstanding Landscape Value ("AOLV") under the Sounds Plan. Thus the avoidance directives of Policy 15 NZCPS are not triggered. Given that finding, Policy 15(b) is applicable, even to an un-named promontory. That policy requires decision-makers to:

> Avoid significant adverse effects and avoid, remedy, or mitigate other adverse effects of activities on other natural features and natural landscapes in the coastal environment;

Any significant adverse effects need to be avoided and other adverse effects need to be remedied or mitigated.

[219] In Mr Glasson's opinion[315] the proposal in its modified form will still maintain the quality of the coastline and the landscape feature of the promontory. Now that the two mussel farm blocks are separated by an expanse of water *the integrity of the promontory can remain intact*. He also concluded that the proposal has avoided significant adverse effects on natural landscape, and the natural landscape values have been protected from other adverse effects due to the fact that the proposed mussel farm is integrated with a similar scale of existing farms in the area and is appropriately sited. Therefore he does not see the proposal, as amended, being contrary to Policy 15 of the NZCPS. Mr Glasson's overall conclusion was that[316]:



315 C R Glasson evidence-in-chief, para 7.28 [Environment Court document 7].
316 C R Glasson evidence-in-chief, para 11.8 [Environment Court document 7].

> The proposal is of a small scale, consistent with existing marine farm activity in Beatrix Bay, and would not compromise the landscape, natural character and visual amenity of the Bay. The presence of mussel farms in Beatrix Bay has already partly compromised the natural character at the head of the Bay, along with failed pastoral farming. One further mussel farm of this size will not affect the Bay's landscape, natural character and visual quality any further, or reach a threshold beyond which the effects are unacceptable.

[220] Mr Bentley noted that due to the location of the proposed farm, it will appear from some locations to be not *wholly visually anchored to the landform* as is the case for the majority of farms around the Bay — this could in some conditions amplify the visual presence towards the unmodified waters offshore[317]. He concluded that the proposal will occupy an area of the coastal edge that is currently free from aquaculture development and the only remaining part of the promontory's naturalness that is unencumbered by mussel farms will be lost; therefore natural character will not be preserved.[318]

[221] We accept Mr Bentley's[319] answer when he described the headland which is the background landform of the proposal as:

> … it's sort of quite different in that regard from other landscape areas within the Bay … the fact that it's at the tip of that landform that in my view amplifies its prominence from a number of viewpoints and potential viewpoints, and leads to greater effects visually in that regard.

[222] We also agree with Mr Bentley when he describes some views of the proposed farm (and some existing farms) where there is a lack of (terrestrial) backdrop[320]. He cites the example of viewing the proposed mussel farms looking at the promontory and beyond towards the mouth of Beatrix Bay. In that situation:

> … existing mussel farm development from that viewpoint is not anchored towards a local backdrop, so that it appears that it's visually a part of the open water… and what I am saying about this proposal is due to its location at the tip of the promontory, and there are more locations where that would be the case.

317 J A Bentley evidence-in-chief, para 8.51 [Environment Court document 30].
318 J A Bentley evidence-in-chief, para 8.51 [Environment Court document 30].
319 Transcript, page 652.
320 Transcript, page 653.

His point is illustrated from the aerial photograph on the cover of the Council's Graphics[321] (Exhibit 30.1) with the proposed farms overlaid in red — there is a considerable area at the head of the bay where a viewer from a boat cruising inside, through or outside the existing mussel farms would observe the farm with only a sea backdrop. That experience would not align with the Appellant's slightly conflicting contentions that the proposed farm continues an existing pattern of development, and/or that the proposal will not interrupt[322] the natural sequence because the two parts of the farm are on either side of the head of the promontory.

[223] In terms of NZCPS 15(b) requiring the avoidance of significant adverse effects and the avoidance remedying or mitigation of other adverse effects, Mr Bentley's conclusion was:

> That close-up these structures would detract from the valued natural qualities of this part of the coast and reduce aesthetic coherence of the promontory.[323]

In Mr Bentley's opinion the proposal clearly failed the NZCPS 15(b) requirement. That is consistent with the evidence of Dr Steven[324]. In the latter's opinion[325]:

> The presence of the marine farm will detract from the wild state that currently exists, and that is largely responsible for the erosional forces that have shaped the southern end of the promontory. The marine farms … add a degree of industrialisation to an otherwise wild natural section of the coastal environment.

[224] As we have already noted, marine farms are traditionally located away from the most exposed parts of the headlands and promontories. While none of the witnesses could be definitive as to why this was the case it appears from their responses that adverse effects on navigation are likely to be one reason and another was the potential for adverse effects on landscape and natural character. Headlands/promontories by their very name suggest prominence and therefore potential sensitivity. NZCPS Policy 6(1)(h) requires us to:

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321 Exhibit 30.1.
322 Transcript, pp 113 to 114.
323 J A Bentley evidence-in-chief, para 8.80 [Environment Court document 30].
324 M L Steven evidence-in-chief, para 117 [Environment Court document 23].
325 M L Steven evidence-in-chief, para 119 [Environment Court document 23].

(h) Consider how adverse visual impacts of development can be avoided in areas sensitive to such effects, such as headlands and prominent ridgelines, and as far as practicable and reasonable apply controls or conditions to avoid those effects.

Dr Steven[326] noted that visual impact on the promontory can arise from structures on the surrounding sea because of the way in which the sea/land interface is experienced. That aligns with Mr Bentley's evidence described above.

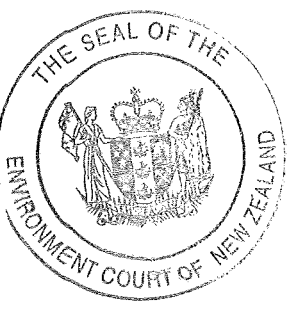
[225] We are unable to accept Mr Glasson's proposition[327] that the amended proposal (with the gap between the two farm blocks) will allow the integrity of the promontory to remain intact. We can accept from some view points (particularly from the south) that the promontory may appear unencumbered by marine farm structures. However, there are many views of the promontory that will have the proposed farm in the foreground. In such circumstances and at any distance less than 500 metres, the integrity of the promontory will, in our opinion, from a visual/aesthetic/natural character perspective be compromised. In our view that amounts to a significant adverse effect (which is clearly not avoided).

4.7 The effects on the natural character of Beatrix Bay

[226] The Sounds Plan through its CMZ2 zoning provides for the establishment of marine farms, particularly in inshore areas, as appropriate use of the coastal marine area, subject to individual farm assessment. One aspect of that is to determine the "natural character" of the relevant coastal marine area.

[227] Policy 13 in the NZCPS and the Sounds Plan together require us to answer these questions:

- Does the proposed mussel farm cause adverse effects on the natural character of Beatrix Bay?
- If so, are they significant adverse effects?
- Can any adverse effects be avoided, remedied or mitigated?



326 M L Steven evidence-in-chief, para 109 [Environment Court document 23].
327 C R Glasson evidence-in-chief, para 7.28 [Environment Court document 7].

Preservation of Natural Character (Policy 13)

[228] Dr Steven described how[328]:

> When viewed from the water, the farm will be viewed against a sensitive land/sea interface. … The perception of the land/sea interface contributes significantly to the natural character and aesthetic appreciation of that part of Beatrix Bay.

[229] In Mr Glasson's opinion, as a result of its already compromised natural character, the proposed mussel farm will not adversely impact further on the natural character of the headland. He considered[329] that the proposal is not contrary to Policy 13(1)(b) of the NZCPS as it avoids significant adverse effects, and will avoid, remedy or mitigate other adverse effects on natural character in all other areas of the coastal environment by co-locating in an already modified environment. In his opinion the farm site is only a small area adjacent to the promontory, access to the coastline is available and the farm is *but a small addition to the already existing development in the Bay*[330].

[230] Mr Maassen referred[331] us to the Commissioner's decision[332] on the scale of direct visual effects. Notwithstanding the care taken by the Commissioner in her assessment, backed by decades of experience assessing the effects of marine farms in the Marlborough Sounds, we were not greatly assisted by this part of her decision because the amended application which is before us is quite different to the proposal considered by the Commissioner. In the paragraphs identified by Counsel, the Commissioner mentioned on three occasions how the farm *wrapped around the headlands* or words to that effect. This was her response to the staple-shaped farm in the original application which did indeed completely wrap around the headland without any separating gap. It gave rise to a completely different set of effects all of which were more adverse than those associated with the proposal before us.

328 M L Steven evidence-in-chief, para109 [Environment Court document 23].
329 C R Glasson evidence-in-chief, para 7.17 [Environment Court document 7].
330 C R Glasson evidence-in-chief, para 7.18 [Environment Court document 7].
331 Mr Maassen's submissions dated 29 July 2015, para 13.
332 In particular paras [139] through to [151].

[231] Mr Glasson's evidence was criticised by Mr Ironside who submitted[333] that Mr Glasson's overall approach is that existing development justifies further development. This is certainly not what NZCPS Policy 13(1)(b) intends even if it is the Sounds Plan's policy. Further, Mr Ironside observed[334] that there is no pattern of developing marine farms off headlands as Mr Glasson seeks to suggest. There has been a recent exception — the mussel farm allowed by the Environment Court in the *Knight Somerville*[335] case. The Appellant may have been fortunate in that case: the evidence against the proposal was very limited especially on King Shags; a good part of the justification for the location in that case was to avoid a reef further in; and finally, the promontory in this case is a much more dominant feature than the headland in *Knight Somerville*.

[232] In Dr Steven's opinion marine farming within Beatrix Bay has reached a point of unacceptable "cumulative" adverse effects with respect to the natural character of the coastal environment, and to the appreciation of amenity and the aesthetic quality of the landscape[336]. He went on to say that:

> cumulative effects must be understood in terms of the total changes evident in the landscape, and not simply the cumulative effects arising from an additional marine farm. In this regard, the cumulative effects of marine farming generally must be considered, together with other modifications to the landscape.

He concluded with respect to NZCPS Policy 13:

> The effects will be significantly adverse, and as such should be avoided. If the effects would have been considered less than significantly adverse, I am of the opinion that the effects can neither be remedied nor mitigated, and as such should also be avoided.[337]

[233] Our overall finding is that the adverse visual effects of the Appellant's proposal on natural character might be minor by themselves if the other farms were not in the bay. It is their cumulative effect on top of the accumulated effects of the other mussel farms which makes us pause. We assess that the proposed farm does not satisfy Policy

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333 Mr Ironside's submissions dated 6 July 2015, para 19.
334 Mr Ironside's submissions dated 6 July 2015, para 19.
335 *Knight Somerville Partnership v Marlborough District Council* [2014] NZEnvC128.
336 M L Steven evidence-in-chief, para 104 [Environment Court document 23].
337 M L Steven evidence-in-chief, para 111 [Environment Court document 23].

13(b) because its cumulative effect — added to the accumulated and accumulative effect of all the existing farms — will be significant and thus should be avoided.

4.8 Effects on Navigation[338]

[234] The proposed site at the head of Beatrix Bay is primarily used by commercial boats servicing mussel farms in the area and by low numbers of recreational fishers and divers. Direct access from the open water of Beatrix Bay to the reef area at the southern end of the promontory is retained by the 190m separation of the eastern and western sections of the proposed farm.

[235] Access to inshore waters and the shoreline is maintained by the siting of the nearest mussel lines 100m from the shore. Mr Brian Tear, navigation witness for the Appellant, considered navigation by recreational boats in and around mussel farms either in transit or for fishing as commonplace in the Marlborough Sounds. In his opinion, the effects of the proposed new farm are minor. While some small inconvenience may occur, this would only be to mariners transiting between the embayments on either side of the point. This was likely to affect mussel service boats only, as very few recreational boats were likely to use this route. This view was supported by Mr C Godsiff, a long-term mussel farmer and tourism operator with extensive boating experience in Pelorus Sound.

[236] Mr L Grogan, Deputy Harbour Master for the Council, considered that as the proposal breached the Maritime New Zealand *Guidelines for Aquaculture Management Areas and Marine Farms* 2005 ("the Guidelines") there was an increased risk of vessels using the area to become entangled in farm structures. Of particular concern to Mr Grogan was the placement of the farm within 200m of the promontory (a headland) and 500m of a recognised navigational route.

[237] Mr Tear responded that the Guidelines in this regard should not be applied in a blanket manner based on geography as there are many differences between headlands that determine navigational safety. Also, in his opinion, the proposed site was not on a navigational route between popular destinations since it is at the end of the promontory

338 See Assessment Matter 35.4.2.9 [Sounds Plan p 35-21].

in an isolated bay with comparatively low recreational boating use. We consider this latter point is of some importance.

[238] The Guidelines are non-regulatory and as such applications for marine farms do not need to be compliant. They do, however, identify navigational safety matters to be taken into account when assessing marine farm applications. We prefer the evidence of Mr Tear that any concern over navigational safety has been appropriately mitigated in this application.

[239] On navigational safety, the court in *Knight Somerville Partnership v Marlborough District Council*[339] said:

> Any marine farm will present some risk to navigational safety simply by its shared common space in the sea. The Sounds, and Beatrix Bay in particular, have a long history of marine farming with its associated structures and hazards and mariners in the area are familiar with these. … Prudent seamanship is required in the vicinity of all farms and the lack of serious accidents associated with marine farms in the Sounds is a clear indicator that this is generally being exercised.

We agree and predict that there will likely be no more than minor adverse effects on navigational safety from the proposal.

4.9 Effects on fishing amenity and access

[240] Most effects on amenity have effectively been considered in parts 4.6 and 4.7 of this decision. However, one particular recreation — fishing — still needs to be considered. The reef area at the southern end of the promontory is used by locals and visitors for recreational fishing and diving[340]. Access to the reef area as a recreational destination is generally by boat, travelling directly across Beatrix Bay from the south. Although the area is relatively lightly used compared to less remote reef sites in Pelorus Sound, it is nevertheless highly valued by those who regularly use it, mostly in summer months.

339 *Knight Somerville Partnership v Marlborough District Council* [2014] NZEnvC 128 at para [67].
340 Transcript, p 601.

[241] We heard competing evidence from recreational witnesses on the likely accessibility of the reef after installation of the proposed farm. These ranged from perceiving it as a complete sealing off of access to the entire southeast embayment shoreline, to having no effect at all. Observations from our site visit tend to confirm the latter. Access to the reef and adjacent shore will remain unimpeded. Indeed, it was apparent that access to inshore areas between and through mussel farms is not significantly affected in good weather conditions when most fishing takes place. We accept that a little more care may be needed, but this is not a significant limitation to a moderately competent boat user in most conditions when recreational boat users would be out on the water. In this regard we do not accept the Societies' submission that recreational use of near shore areas in Beatrix Bay is severely limited by the presence of mussel farms, making this proposed currently unoccupied site even more important. However, we do accept the evidence[341] of Mr Offen for the Societies that drift fishing around the reef at the promontory's tip for blue cod will be difficult and that trolling across the reef for kingfish may be impossible.

[242] Mr Glasson stated that while water space has been infilled, the actual effects on the amenity values will be no more than minor because there will be so few boating recreationalists passing by the proposed farm or even accessing the northern beaches. He considers that Beatrix Bay is not an attraction for recreation due to the existing number of marine farms around the coastline. He came to this conclusion because Beatrix Bay is one that boaties, recreationalists and fishermen must make a special effort to enter — rather than a place where people pass-by. As there is no road access, all public access is by boat. The nearest (and only) dwelling in the Bay is 1.37 km from the proposed farm and the distance from the seaward end of the wharf (associated with the house) to the proposed farm is 1200m.

[243] We find that the layout of the proposed farm, which provides sufficient buffer distance between the mussel farm lines and the reef, is likely to reduce substantially any adverse effects on the recreational amenity provided by the reef and its adjacent shore or on access to it. We predict (with some reservations about the effects on trolling) that the adverse effects on fishing and access are as likely as not to be minor.

341 T Offen evidence-in-chief paras 13 and 15 [Environment Court document 19].

4.10 Economic effects

[244] Despite the court's attempt to explain how to analyse these in *Port Gore Marine Farms v Marlborough District Council*[342] we received minimal evidence on this issue. We accept that there will be a producer surplus and consumer surplus which would give benefits to society. We also take into account the social benefits of employment identified by Mr M G Holland[343] even though strictly speaking that may be double counting benefits.

[245] Beyond that we are not able to make any quantitative comparison of the net benefits of the proposed marine farm with the net benefits of the status quo (i.e. no farm).

5. Evaluation

5.1 Preliminary issues: the gateway tests and the Commissioner's Decision

The gateway tests

[246] As noted earlier, this is an application for a non-complying marine farm under the Sounds Plan. As such we must be satisfied that it passes one of the gateways in section 104(D) RMA before consideration can be given to granting consent.

[247] We have found that some of the adverse effects are likely to be more than minor, so the first gateway is not passed. As for the second, Mr Maassen submitted that the test is a blunt one: "If a proposal is contrary to any material objective or policy, it fails the second gateway test". He relied on the judgment of Fogarty J in *Queenstown Central Limited v Queenstown Lakes District Council* where Fogarty described it as an error of law to "finess… out qualifiers of one objective by looking at another objective, to reach some overall conclusion that viewed as a whole the objectives allowed … the activity"[344].

342 *Port Gore Marine Farms v Marlborough District Council* [2012] NZEnvC 72 at [200] and [201].
343 M G Holland evidence-in-chief para 23 [Environment Court document 5].
344 See *Queenstown Central Limited v Queenstown Lakes District Council* [2013] NZHC 817 [2013] NZRMA 239 at [39].

[248] Strictly Forgarty J's statement may have been obiter because "errors of law" found by Fogarty were (he said) sufficient to dispose of the appeals[345]. In any event we respectfully prefer to follow the Court of Appeal in *Dye* where Tipping J wrote that the correct question was whether the application was consistent "on a fair appraisal of the objectives and policies as a whole"[346]. Otherwise we prefer not to lengthen this decision and simply refer to other decisions of the court: *Cookson Road Character Preservation Society Inc v Rotorua District Council*[347], *Calveley & Anor v Kaipara District Council*[348] and *Saddle Views Estate Ltd v Dunedin City Council*[349].

[249] As it happens, because the Sounds Plan tries to be "all things to all people", as another division of the Environment Court recorded a planner's view[350], it is difficult for an application to be contrary to the objectives and policies of the plan: "... nominally non-complying activities are effectively discretionary". We consider the second threshold test is met because the application cannot be said to be contrary to the objectives and policies of the Sounds Plan as a whole, although this is quite a close-run judgment in this case.

The Council's decision (section 290A)

[250] The court is required to have regard to the Council decision which refused the consents sought. In this case the decision of the Council's Commissioner cannot guide us because the application considered by Commissioner Kenderdine is markedly different from that put to us. In bringing the appeal the Appellant has radically altered the layout of the proposed marine farm so that we are being asked to determine a different and smaller proposal than that presented to the Commissioner. This is particularly important in relation to the key findings of the Commissioner on access, natural character, landscape and amenity on which the decision to decline the application was based.

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345 *Queenstown Central Limited v Queenstown Lakes District Council* [2013] NZHC 817 [2013] NZRMA 239 at [3] to [6].

346 *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA) at [25].

347 *Cookson Road Character Preservation Society Inc v Rotorua District Council* [2013] NZEnvC [194] at [46]-[51].

348 *Calveley & Anor v Kaipara District Council* [2014] NZEnvC 182 at [142].

349 *Saddle Views Estate Ltd v Dunedin City Council* [2014] NZEnvC 243, [2015] NZRMA 1 at [82].

350 *Kuku Mara Partnership (Admiralty Bay West) v Marlborough District Council* (2005) 11 ELRNZ 466 (EnvtC) at [86]. We understand the court was quoting Ms S Dawson the planner then advising the Council.

[251] On the effect of the proposal on King Shag, Commissioner Kenderdine wrote[351]:

> The protection of the King Shag habitat is a role not only for future decision makers, but for the applicant if this proposal goes ahead through monitoring and conditions. A large scale monitoring programme will assist in this regard. Meanwhile the King Shag population has been stable for 50 years and it appears to have adaptively managed its (new) aquaculture environment (s6(c)).

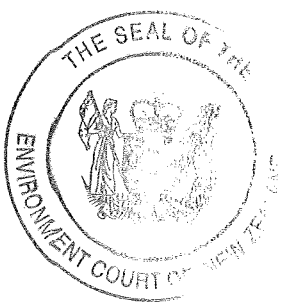
We note from the Commissioner's decision that the Council officers' section 42A report did not appear overly concerned with effects on King Shags or their habitat, and recommended that consent be granted. Mr Gardner-Hopkins submitted that the Council had (belatedly) taken a significantly different approach to this appeal than to previous applications where consents were supported. Mr Maassen's response was that this was the first application for some time that impinged on the King Shag habitat ecological overlay, which had resulted in the Council "taking a hard look" at this application to ensure the integrity of this component of the Sounds Plan. This was not a determinative factor for the Commissioner, but is for us.

[252] We now turn to consider the merits of the application as a whole under section 104 RMA, but before we do, there is a preliminary issue as to the relationship between the matters we must have regard to under section 104(1) RMA and Part 2 of the RMA.

5.2 "Subject to Part 2" in the light of the effect of *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd*

The correct application of 'subject to Part 2'

[253] As for the application of section 104 Mr Maassen submitted that in *KPF Investments v Marlborough District Council*[352] ("*KPF*") where the Environment Court concluded that the overall broad judgment under Part 2 whether a proposal would promote the sustainable management of natural and physical resources still applies.



351 Council Decision at para 279.

352 *KPF Investments Ltd v Marlborough District Council* [2014] NZEnvC 152 at [202].

[254] We now doubt whether that is quite accurate as a result of more recent decisions. In *Thumb Point Station Ltd v Auckland City Council*[353] ("*Thumb Point*") the implications of the majority decision in *King Salmon*[354] for the application of section 104 RMA were summarised by the High Court as being that:

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

[255] In *Appealing Wanaka Inc v Queenstown Lakes District Council*[355] the Environment Court agreed with the *Thumb Point* summary, and explained[356] that the reference to any "deficiency" in *Thumb Point* was a reference to the "caveats" identified by Arnold J in *King Salmon* in the following passage[357]:

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

[256] We note that a similar issue about the phrase 'subject to Part 2 …' came before the High Court in *New Zealand Transport Authority v Architectural Centre Inc & Ors*[358] ("*NZTA*"). While *NZTA* was concerned with section 171 RMA, the identical wording — "subject to Part 2 of the Act" — also occurs. The reasoning behind Brown J's decision is not completely obvious.

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353 *Thumb Point Station Ltd v Auckland City Council* [2015] NZHC 1035 at [31].
354 *King Salmon* above n 26.
355 *Appealing Wanaka Inc v Queenstown Lakes District Council* [2015] NZEnvC 139.
356 *Appealing Wanaka Inc v Queenstown Lakes District Council* at [44]-[45].
357 *King Salmon* above n 26, at [90].
358 *New Zealand Transport Authority v Architectural Centre Inc & Ors* [2015] NZRMA 375 (HC) at [108].

[257] Brown J quoted, and seemed to accept a passage in *Auckland City Council v The John Woolley Trust*[359] ("*Woolley*") which was an appeal about a resource consent under the RMA. Randerson J wrote:

> [47] … Given the primacy of Part 2 in setting out the purpose and principles of the RMA, I do not accept the general proposition mentioned at para [94] of the decision in *Auckland City Council v Auckland Regional Council*[360], that the words "subject to Part 2" in s 104 mean that Part 2 matters only become engaged when there is a conflict between any of the matters in Part 2 and the matters in s 104. Part 2 is the engine room of the RMA and is intended to infuse the approach to its interpretation and implementation throughout, except where Part 2 is clearly excluded or limited in application by other specific provisions of the Act.

While we doubt if anything turns on the metaphor, we respectfully question its accuracy: Part 2 of the RMA appears to us — if a nautical image is to be used — to be more akin to the bridge or, nowadays the operations room, on a flagship.

[258] In contrast, in *King Salmon* Arnold J simply described section 5 as "… a guiding principle which is intended to be applied by those performing functions under the RMA rather than a specifically worded purpose intended more as an aid to interpretation;"[361]. Alternatively it is "… a carefully formulated statement of principle intended to guide those who make decisions under the RMA[362]". Later Arnold J also observed (presumably obiter) that the provisions in Part 2 are not operative provisions in the sense of being sections under which particular planning decisions are made[363], rather they "comprise a guide for the performance of the specific legislative functions". These passages suggest *Woolley* may need to be applied carefully in future.

[259] Brown J's other approach to the application of the phrase 'subject to Part 2 …' was simply to adopt[364] what the Board wrote[365]:

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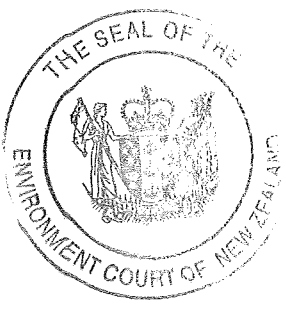
359 *Auckland City Council v The John Woolley Trust* [2008] NZRMA 260 (HC) at [47].
360 *Auckland City Council v Auckland Regional Council* [1999] NZRMA 145.
361 *King Salmon* above n 26, at [24(a)].
362 *King Salmon* above n 26, at [25].
363 *King Salmon* above n 26, at [151].
364 *New Zealand Transport Authority v Architectural Centre Inc & Ors* [2015] NZRMA 375 (HC) at [118].
365 Decision of the Board of Inquiry into the Basin Bridge (29 August 2014) para [183].

> [183] Further and perhaps more importantly, as we have already noted, Section 171(1) and the considerations it prescribes are expressed as being *subject to Part 2*. We accordingly have a *specific statutory direction* to appropriately consider and apply that part of the Act in making our determination. The closest corresponding requirement with respect to statutory planning documents is that those must be prepared and changed *in accordance with ... the provisions of Part 2*.

The difficulty is that the phrase 'subject to Part 2' does not give a specific direction to apply Part 2 in all cases, but only in certain circumstances. As Cooke P explained for the Court of Appeal in *Environmental Defence Society Inc v Mangonui County Council*[366] (a case under the Town and Country Planning Act 1977): "The qualification "subject to" is a standard drafting method of making clear that the other provisions referred to are to prevail in the event of a conflict". We now know, in the light of *King Salmon*, that it is not merely a "conflict" which causes the need to apply Part 2. The Supreme Court has made it clear that, absent invalidity, incomplete coverage or uncertainty of meaning in the intervening statutory documents, there is no need to look at Part 2 of the RMA even in section 104 RMA.

[260] We accept that in this proceeding we are not obliged to give effect to the NZCPS, merely to "have regard to" it, and even that regard is "subject to Part 2" of the RMA. However, logically the *King Salmon* approach should apply when applying for resource consent under a district plan: absent invalidity, incomplete coverage or uncertainty of meaning in that plan or in any later statutory documents which have not been given effect to, there should be usually no need to look at most of Part 2 of the RMA. We note that the majority of the Supreme Court in *King Salmon* was clearly of the view that its reasoning would apply to applications for resource consents.[367]

[261] We consider that *Thumb Point* is, with respect, more accurate than *NZTA* on how to apply *King Salmon* in the context of section 104. Further, *Woolley* may now need to be applied with caution. None of those cases were cited to us by counsel but since no party relied strongly on Part 2 of the Act as over-riding considerations under section 104(1)(a) to (c), we consider it is unnecessary to seek further submissions. Rather this



366 *Environmental Defence Society Inc v Mangonui County Council* [1989] 3 NZLR 257; (1989) 13 NZTPA 197 (CA) at 202.

367 *King Salmon* above n 26, at [137]-[138].

exercise is simply the court trying to articulate the correct way of applying *King Salmon* in a section 104 context in the face of conflicting High Court decisions and the court's own erroneous decision in *KPF*[368].

Summary

[262] In summary we hold that the correct way of applying section 104(1)(b) RMA in the context of section 104 as a whole is to ask:

(1) "Does the proposed activity, after: assessing the relevant potential effects of the proposal in the light of the objectives, policies and rules of the relevant district plans[369];

(2) having regard to any other relevant statutory instruments[370] but placing different weight on their objectives and policies depending on whether:

  (a) the relevant instrument is dated earlier than the district (or regional) plan in which case there is a presumption that the district (or regional) plan particularises or has been made consistent with the superior instruments' objectives and policies;

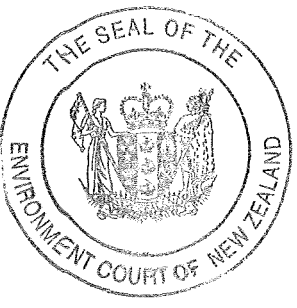
  (b) the other, usually superior, instrument is later, in which case more weight should be given to it and it may over-ride the district plan even if it does not need to be given effect to; and/or

  (c) there is any illegality, uncertainty or incompleteness in the district (or regional) plan, noting that assessing such a problem may in itself require reference to Part 2 of the Act, can be remedied by the intermediate document rather than by recourse to Part 2;

(3) applying the remainder of Part 2 of the RMA if there is still some other relevant deficiency in any of the relevant instruments; and

(4) weighing these conclusions with any other relevant considerations[371]

— achieve the purpose of the Act as particularised in the objectives and policies of the district/regional plan?"



368 *KPF* above n 352.
369 I.e. the operative district plan and any proposed plan (including a plan change).
370 Under section 104(1)(b) RMA.
371 E.g. under section 104(1)(c) and 290A RMA.

[263] Whether that process can still be called an "overall broad judgement" is open to some doubt. The breadth of the judgment depends on the following matters in the district or regional plan:

- the status of the activity for which consent is applied;
- the particularity (or lack of it) in the relevant objectives and policies about the effects of the activity; and
- the existence of any uncertainty, incompleteness or illegality (in those plans or in any higher order instruments).

Consequently we consider that in *KPF*[372] the court may have overstated the width of the judgment under section 104 at least if the *KPF* approach is applied to other district plans which are more particular than the rather generalised Sounds Plan.

Incomplete tests for efficiency

[264] There is one other matter: it appears all district or regional plans are incomplete in the sense that they are not Stalinist Five-year Plans: they do not attempt to resolve the most efficient use of all resources: see *Meridian Energy Ltd v Central Otago District Council*[373]. While plans give guidance and/or directions (particularised implementations of Part 2 RMA) in policies, which are deemed to be appropriate (which includes efficient) — *King Salmon*[374] — some activities are stated by rules to be discretionary or non-complying so that more efficient uses can be ascertained on a case-by-case basis.

[265] That means that one aspect of Part 2 of the RMA may often need to be looked at as a result of *King Salmon*. That is section 7(b) which states:

> 7 **Other matters**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—
>
> ...
>
> (b) the efficient use and development of natural and physical resources:

372 *KPF* above n 352, at [200].
373 *Meridian Energy Ltd v Central Otago District Council* [2010] NZRMA 477 (HC) at 118.
374 *King Salmon* above n 26, at [24] (d).

...

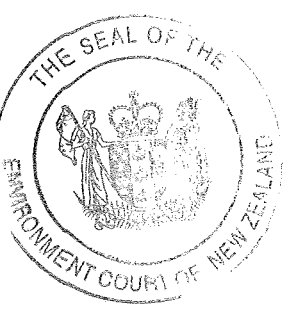
[266] Efficiency is, in our view, one of the least well understood concepts in the RMA. First it is important to understand that efficiency is a neutral concept: the efficient use of a resource cannot be ascertained until there are policies by which it can be assessed. Second, the standalone efficiency of a use of a resource can be ascertained by comparing the probability of environmental gains with the risk of adverse effects, or in 'economic' terms ascertaining whether the benefits exceed the costs. However, since those are rarely quantified, that assessment of efficiency (e.g. that refusing consent to a wind farm will "waste" the wind resource) adds little to the overall assessment. The third and potentially most useful point is that efficiency can be assessed in a practical and relative way. Efficiency asks "does the proposed use of the resource implement the relevant policies and achieve the objectives better[375] than the current (or permitted) use of the resource?" Consequently we consider there may be an extra step in the ultimate evaluation as follows:

> Having particular regard to section 7(b) RMA by assessing (at least) is the proposal more efficient in implementing the policies and achieving the objectives of the relevant plan than the status quo (or the permitted activities in the plan)?

[267] We have not needed to ask for further submissions on this issue because section 7(b) is largely irrelevant in this case. That is because the subsection is only concerned with two of the elements of sustainable management of resources — their use and development — not their third: protection. This case is essentially about the protection of the resources in the environment around the site and so we take this issue no further here.

5.3 Having regard to the potential effects of the mussel farm

[268] When considering the effects of the proposal and their consequences the consent authority should consider those effects as avoided, remedied or mitigated by any conditions of consent. We have done so in this case. However, there is one exception,



375 It is possible, especially in the absence of section 6 matters, to quantify and compare net benefits of a proposal with those of the status quo — see *Port Gore Marine Farms v Marlborough District Council* [2012] NZEnvC 72.

which is the proposed "adaptive management conditions". Since these neither avoid, remedy or mitigate effects but rather provide a recipe for future possible avoidance, remediation or mitigation of effects, we will consider adaptive management later.

[269] It will be recalled that in part 3 of this decision we asked a series of questions about the potential effects of concern under the Sounds Plan's objectives and policies. The answers to these questions were given in part 4. Pulling together and summarising the more important predicted non-neutral effects of the Davidson Family Trust application with the accumulative effects of the other identified stressors which we should consider under the Sounds Plan and the NZCPS, they are:

(1) likely net social (financial and employment) benefits;
(2) a likely significant adverse effect on the natural feature which is the promontory;
(3) likely significant cumulative adverse effects on the natural character of the margins of Beatrix Bay;
(4) likely adverse cumulative effects on the amenity of users of the Bay;
(5) very likely minor adverse impact on King Shag habitat by covering the muddy seafloor under shell and organic sediment, an effect which cannot be avoided (or remedied or mitigated);
(6) very likely a reduction in feeding habitat of New Zealand King Shags;
(7) very likely more than minor (11% plus this proposal) accumulated and accumulative reduction in King Shag habitat within Beatrix Bay and an unknown accumulative effect on the habitat of the Duffer's Reef colony generally; and
(8) as likely as not, no change in the population of King Shags, but with a small probability of extinction.

5.4 Consideration under the Sounds Plan

[270] The Sounds Plan in itself requires a fairly broad judgment. In the bigger picture, the proposal is generally consistent with Chapter 2 (natural character) and Chapter 5 (landscape) provisions of the Sounds Plan. The direct visual effects on the natural character and landscape of the promontory and associated inshore area are more than minor by themselves i.e. in the notional absence of existing marine farms on either side

of the promontory. Importantly, the proposal applies the natural character policy[376] to place development in areas "where the natural character of the coastal environment has already been compromised". We have wrestled with this and find the problem nearly intractable: in the absence of this policy we would find inappropriate the cumulative effects of the proposal on the amenity of the inshore area of Beatrix Bay and the feature which is the promontory. However, this policy seems to render cumulative effects on natural character irrelevant.

[271] Focussing on Chapter 9 (The Coastal Marine Area) the first objective is[377] to accommodate appropriate activities in the coastal marine area while avoiding, remedying or mitigating the adverse effects of those activities. The proposal achieves policies (9.2.1) 1.1 and 1.12 by (relevantly) enabling marine farming while maintaining, mitigating or remedying adverse effects on[378] cultural and iwi values, cultural and iwi amenity values, public health and safety, recreation values, and water quality. The question is whether it adequately mitigates effects on the remaining values in the policy (9.2.1)1.12 list, specifically conservation and ecological values, seascape and aesthetic values, the natural character of the coastal environment, navigational safety and public access to and along the coast — to make the site appropriate[379] in the landscape.

[272] The third coastal marine objective[380] seeks to protect the coastal environment by avoiding, remedying or mitigating any adverse effects of activities that alter the seabed. That raised the key question[381] whether the effects on the "value" of the marine habitat are sufficiently mitigated or remedied.

[273] It will be recalled that a key policy[382] in the Sounds Plan is to avoid, remedy or mitigate the adverse effects of (in this case) water use on areas of significant ecological value ("AOEV"). We have also recorded that the Appellant challenged the basis of the notation in the Sounds Plan describing the area around the site as an AOEV. We note that the challenge was not to the fact that the AOEV is habitat of King Shag. That is

376 Policy (2.2)1.2 [Sounds Plan].
377 Objective 9.2.1 [Sounds Plan at 9-4].
378 Policy (9.2.1)1.1 [Sounds Plan at 9-4 and 9-5].
379 Policy (9.2.1) 1.14 [Sounds Plan].
380 Objective 9.4.1 [Sounds Plan at 9-16].
381 Policy (9.4.1)1.1 [Sounds Plan at 9-16].
382 Policy (4.3) 1.2 [Sounds Plan p 4-2].

incontestable. The challenge by the Appellant was to whether the AOEV represented 'significant' habitat of King Shag. The Marlborough District Council was obliged to recognise and then to provide for the significant habitat of King Shag under section 6(c) RMA, and the AOEV was a response. It is far too late — more than a decade after the Sounds Plan came into force — to challenge the basis on which the Council made its decision to identify the area around the site as an AOEV. The proper approach on this issue would have been for the Appellant to call evidence showing that the site was not part of the habitat of King Shag, since it is likely that the whole AOO is significant for the species given its very small population. Consequently we consider policy (4.3)1.2 should be given full weight along with all the other relevant policies.

[274] Consequently, we consider that if we were to decide simply on the Sounds Plan itself and without yet considering the NZCPS we would on balance refuse resource consent on the basis that the proposal inappropriately reduces the habitat of King Shag.

5.5 Consideration under the NZCPS

[275] We recognise that mussel farms such as the application can only be located[383] in the coastal marine area. We also take into account the (social and) economic benefits[384] of the proposed farm. However, we consider the site is not an appropriate area for the reasons identified by the Council and the Societies: the change in benthic conditions within the direct footprint of the farm and nearby, particularly alterations to seabed morphology from shell drop, faeces and pseudofaeces represented an adverse effect on the foraging and feeding habitat of King Shag. Those adverse effects on King Shag habitat cannot be avoided as directed by the policy 11 of the NZCPS.

[276] We recognise that there are considerable uncertainties about the inter-relationships between stressors. The accumulative effect of marine farms on King Shag habitat may be less of an immediate threat than sediment run-off from land-based activities and bottom dredging. That does not mean it is not a threat. Further, potential effects of climate change (such as increase in water temperature) loom in the next few decades.

383 Policy 6(2)(c) [NZCPS p 14].
384 Policy 8(b) [NZCPS p 15].

[277] The point of policy 11(1) NZCPS is that if a species is at the limit of its range then it is automatically susceptible to stressors and any adverse effects on its habitat should be avoided. Applying that policy we consider that this is a strong factor against granting consent. More information and analysis is required beyond what we have been presented with here to address accumulative effects in a comprehensive manner. In the Appellant's view this is properly the province of a review of the Sounds Plan. We do not accept that an applicant can avoid the issue in this way when faced with the strong direction given in Policy 11 of the NZCPS. The applicant needs to put forward information that will satisfy the decision-maker that the risk of accumulative effects is acceptable. The onus is on the applicant because under section 104(6) RMA we may, as discussed, decline the application on the grounds that we have inadequate information.

[278] The cases for the Council and the Societies suggested the court take a precautionary approach in declining the application on the basis of uncertainty around the current knowledge of the effects of mussel farms on the environment. This was particularly the case in respect of adverse accumulative ecological effects and accumulative effects on King Shag where these effects are poorly understood. Policy 3 of the NZCPS[385] requires us to:

> Policy 3 Precautionary approach
>
> (1) Adopt a precautionary approach towards proposed activities whose effects on the coastal environment are uncertain, unknown, or little understood, but potentially significantly adverse.
>
> (2) In particular, adopt a precautionary approach to use and management of coastal resources potentially vulnerable to effects from climate change, so that:
>
> (a) avoidable social and economic loss and harm to communities does not occur;
>
> (b) natural adjustments for coastal processes, natural defences, ecosystems, habitat and species are allowed to occur; and
>
> (c) the natural character, public access, amenity and other values of the coastal environment meet the needs of future generations.

385 Policy 3 [NZCPS p 12].

[279] Policy 3 NZCPS applies where environmental effects are both "uncertain, unknown, or little understood" and "potentially significantly adverse". The Appellant submitted[386] that neither criterion is met.

[280] We have predicted that the adverse effect of the change to King Shag habitat under the site will be minor given the extent of potential habitat in the Sounds. On the other hand we have also predicted that the accumulative adverse effects could be serious. Counsel for the Appellant warned us[387] against the "real risk of loading a (new) potential effect upon multiple (existing) potential effects to arrive at an unrealistic potential cumulative effect scenario". Some *Dye*-induced confusion in that submission aside, we have heeded the warning. However, the prediction remains: potentially the King Shag could be driven to extinction by the accumulated and accumulative effects of mussel farms which are part of the environment in Beatrix Bay. That is a low probability event, but extinction is indubitably a significantly adverse effect which would be exacerbated, to a small extent, by the Davidson proposal.

[281] The precautionary approach suggests both that we should exercise our discretion under section 104(1)(c) to take accumulative effects into account, and — to the extent we have inadequate information about those — to consider declining the application under section 104(6) RMA (after taking into account in the Appellant's favour that the Council did not, it appears, ask for further information about this before the Commissioner's hearing).

5.6 Overall weighing under the Sounds Plan and the NZCPS

[282] Weighing the proposal under the Sounds Plan and the NZCPS, we judge that the undoubted benefits of the proposal are outweighed by the costs it imposes on the environment. In particular the proposal does not avoid or (where mitigation is possible) sufficiently mitigate:

(1) the direct minor effect of changing a small volume of the habitat of King Shag;

386 Opening submissions para 6.25.
387 Closing submissions for the Appellant dated 13 July 2015 at para 2.7(c).

(2) the accumulative effect — with other existing mussel farms in Beatrix Bay — of an approximate 11% reduction in the surface area of that soft bottom habitat on King Shag, even acknowledging that there are other suitable foraging areas within Pelorus Sounds which have not been quantified;

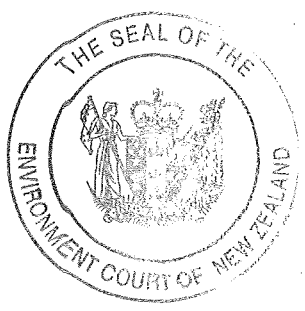
(3) the more than minor adverse effects on the landscape feature of the northern promontory; and

(4) the addition to the already significant adverse accumulated and accumulative effects on the natural character of Beatrix Bay.

[283] We have spent considerable time considering the implications of the apparently stable population of King Shag. If the population is stable despite all the existing mussel farms, how can one more have an adverse effect on the taxon?

[284] The first answer is that our finding that the current population of King Shag is apparently stable needs to be qualified by the lack of information about almost all other aspects of its population dynamics. The information given to us was completely inadequate to allow us to detect any trend in the population. At present data on the number of breeding pairs, breeding success rates, or even of the age and sex ratio of birds is almost completely lacking. In particular there is no data on the survival rates and population trends of mature female King Shags. These last are particularly important because it is the likely preferred foraging grounds of females which mussel farms have been extended into over the last 10 to 15 years.

[285] A second additive answer is that it is generally recognised that the precise effects of combinations of stressors on bird populations are not known. Thus the *Red List* works usually on the basis that if there is a percentage reduction in population of a taxon over time then that puts the species at risk. There are elaborate criteria depending on initial population; size of population reduction, declines in EOO or AOO or habitat quality, and so on[388]. However, when a taxon is reduced to less than 1,000 individuals on the planet, because of the risk of stochastic events, waiting for a reduction in population is no longer regarded as an appropriate trigger for protecting the taxon.



388 "V The Criteria for Critically Endangered, Endangered and Vulnerable" The *Red List* above n 156, at p 16 et ff.

[286] The NZCPS has also recognised[389] that continuing decline in habitats is a key issue in the coastal marine area. That is one of the reasons that policy 11(a)(iv) expressly avoids adverse effects (not only significant adverse effects) on habitats of indigenous species where the species is at the limit of its natural range.

[287] No party argued that the NZCPS was uncertain or incomplete so there is no need to apply the 'subject to Part 2' qualification in section 104 RMA.

5.7 Would the difficulties be met by adaptive management?

[288] The Appellant has proposed that any uncertainty over the effect of the proposed mussel farm on the environment can be met by adaptive management conditions. In *Sustain our Sounds Inc v Marlborough District Council* ("*SOSI*") the Supreme Court stated that there are two questions[390] to be answered:

> ... [First] what must be present before an adaptive management approach can even be considered and what an adaptive management regime must contain in any particular case before it is legitimate to use such an approach rather than prohibiting the development until further information becomes available.

The second question is whether any adaptive management regime is considered consistent with a precautionary approach[391] or whether consent should be refused.

[289] Giving the judgment of the Supreme Court, Glazebrook J elaborated[392]:

> As to the threshold question of whether an adaptive management regime can even be considered, there must be an adequate evidential foundation to have reasonable assurance that the adaptive management approach will achieve its goals of sufficiently reducing uncertainty and adequately managing any remaining risk. The threshold question is an important step and must always be considered. As Preston CJ said in *Newcastle*, adaptive management is not a "suck it and see"

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389 Issues [NZCPS p 5].

390 *Sustain our Sounds Inc v Marlborough District Council* [2014] NZSC 40; (2015) 17 ELRNZ 520 at [124].

391 *SOSI* at [129].

392 *SOSI* at [125].

approach[393]. The Board did not explicitly consider this question but rather seemed to assume that an adaptive management approach was appropriate. This may be, however, because there was clearly an adequate foundation in this case.

[290] The proposed regime is claimed[394] by the Appellant to meet the requirements for adaptive management in respect of "proximate benthic effects" by[395]:

> (a) establish[ing] effective baseline monitoring to accurately assess the existing environment at the Application site and at least two control sites (in addition to the already existing data);
> (b) introduce[ing] clear and strong monitoring, reporting, and checking mechanisms; and
> (c) enable[ing] the removal or reduction in farming or other mitigation if monitoring results warrant such action.

[291] However that was qualified as counsel for the Davidson Family Trust explained in their opening submissions[396]:

> This adaptive management regime is offered by the Trust to assist in confirming the relationship between mussel farms and nearby reef habitats, and is offered notwithstanding the lack of any evidence that reef and rocky habitats inshore of mussel farms have been substantially altered by mussel farming.
> No other adaptive management conditions are required (or offered).

Thus the adaptive management regime is not proposed for the habitat (soft substrate) actually occupied by the farm.

[292] Given the apparent stability of the King Shag population, we have considered whether, despite the Appellant's disavowal of any other kind of adaptive management, we should impose an adaptive management condition involving research into (at least):

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393 Referring to *SOSI* at [121] and adding: "See also the comments of Tremblay-Lamer J quoted at [123] above; the explicit consideration of the two options in *Clifford Bay Marine Farms Ltd v Marlborough District Council*, above n 199, at [113]; and the threshold question discussed in *Crest Energy Kaipara Ltd v Northland Regional Council*, ..., at [229]."

394 J C Kyle rebuttal evidence Appendix A [Environment Court document 32A].

395 See proposed conditions of consent in Appendix A to J C Kyle evidence-in-rebuttal [Environment Court document 32].

396 Opening submissions paras 6.31 and 6.32.

- Use of the areas covered by mussel farms and their shell shadow by preferred prey (flatfish) of King Shags.
- Whether there are seasonal or other periodic changes to use of Beatrix Bay by flatfish?
- Use of different substrates and depths by male King Shags and (separately) by females.
- Survival rates of male versus female King Shags.
- The other matters raised by Dr Fisher.

[293] If the Davidson Family Trust's proposal was for one of the first mussel farms in Beatrix Bay, that sort of condition might work. Unfortunately, its site is one of the few still available on the soft substrate immediately outside the rocky inshore substrate. If research is carried out, as it urgently needs to be, into the various questions posed in the previous paragraph, then this site will likely be needed as an unmodified or control site.

[294] A further, more important, difficulty in this case is that there is still considerable uncertainty over the probabilities as to whether marine farms are stressors of King Shags. Clearly what is needed are before and after controlled studies, but none have been conducted in Beatrix Bay or indeed elsewhere in the Sounds. Consequently we have little confidence that amendments of the proposed[397] adaptive management conditions would reduce uncertainty and manage any remaining risk.

[295] Finally, relying on an adaptive management condition triggered by a change in King Shag population is in our view precisely what the IUCN Red List criteria suggest is inappropriate for very small populations. The geographic range criteria B and the very small population criteria D are independent of the "change in population" criteria[398]. A population change condition is inappropriate because by the time a population change (at whatever relatively arbitrary level of change — 5%, 10% or 20% — is chosen) has been established to the appropriate degree of certainty, the species may be doomed to extinction.

397 J C Kyle rebuttal evidence Appendix A [Environment Court document 32A].
398 The *Red List* above n 156, at pp 21 and 22.

[296] We find that the adaptive management threshold test of *SOSI* is not met and therefore it would be inappropriate to rely on adaptive management of adverse effects in relation to these applications.

6. Result

[297] After considering all the matters raised by the parties and after weighing all the relevant factors we judge that the objectives and policies of the Sounds Plan, reinforced by the more directive policies of the NZCPS, require that we should refuse the consents sought.

[298] We have attempted to assist the Appellant by assessing the information and making predictions where we can. For example we have attempted to assess the probable area of mud seafloor covered by mussel farms in Beatrix Bay. However, if that or any of our other assessments are too inaccurate, then the alternative outcome is clear: we were simply given inadequate information by the Appellant (and other parties) to determine that the application should be granted. Accordingly we would exercise our discretion under section 104(6) RMA to decline to grant consents.

Afterword

[299] We have also briefly considered the implications of refusing consent in this case for other applications in the area of occupancy of King Shags. In the short term this decision may cause difficulties. For the Appellant, Mr Gardner-Hopkins gained admissions[399] from a number of witnesses that the impetus for gathering information "should" occur at an industry level or higher (referring to local or even central government). The answer is that the Aquaculture Industry and the Council[400] may need to commission rather more sophisticated and detailed research into King Shags than appears to be carried out at present. In particular all the matters covered by the IUCN Red List criteria would be a minimum requirement of any research programme.

[300] The survival of a very rare species of bird is at risk here. With a population of less than 1,000 individuals it is at high risk of extinction. Much more robust research needs to be carried out both on New Zealand King Shag population structures and on the

399 For example — Transcript, p 485, line 24.

400 See the Methods of Implementation in the Sounds Plan at 9.3.3.

interrelationship between stressors on this species before the industry can expand (or even perhaps continue at the same level) in outer Pelorus Sound.

Reasons of Environment Commissioner Buchanan

Preliminary comment

[301] The application to establish a marine farm at the head of an unnamed promontory in Beatrix Bay by the RJ Davidson Family Trust was declined by the Marlborough District Council following a hearing before an independent Commissioner in July 2014. The decision to decline the application was based on the adverse effects of the proposal on navigation, natural character values, landscape values and recreational amenity being more than minor. As noted in the majority decision, the Court was presented with a modified marine farm layout at the site that sought to avoid many of the adverse effects noted in the Commissioner's decision.

[302] The majority conclude that there is an adverse effect on the habitat of King Shag and significant adverse effects on visual perceptions of natural character of the promontory and of Beatrix Bay. For this reason, the majority is of the view that the application should be refused. I disagree with the weight given to the effects on King Shag habitat and the evaluation of adverse visual effects of the proposed marine farm in an environment already containing 37 similar marine farms. The application should be granted.

King Shag

[303] I agree with the description of King Shag biology, population and status set out in Part 2 of the majority decision, including the findings:

(a) That King Shag numbers have remained constant since 1991 and that there is no declining trend in numbers.
(b) Beatrix Bay is part of the area of occupancy of King Shag.
(c) That King Shag forage very infrequently within mussel farms, likely due to reduced flatfish numbers under the farms.

[304] In relation to (a) Schuckard (2006)[401] established that the population of King Shag has on average been not less than around 650 birds over the past 50 years. Daytime counts reported from the four main colonies prior to 1992, taken when part of the population was away feeding, were adjusted by Mr Schuckard using a correction factor described in his 2006 paper. This correction factor was adopted by Bell (2010)[402] as an acceptable multiplier to estimate population and size from daytime counts at the colonies. Mr Schuckard was of the opinion that the population numbers of King Shag had remained stable for at least 50 years. The uncontested evidence he produced supports this. I therefore extend the finding of the majority decision to include the period from 1951 when full colony counts were first recorded.

Statutory instruments

[305] The questions that arise from Policy 4.3(1.2) of the Sounds Plan regarding the likely adverse effects on King Shag habitat relate only to those areas of the Sounds mapped as an area of ecological significance in Appendix B notation 1/11 of the Plan. Activities within the area of ecological value are to be assessed as discretionary and the anticipated environmental result is the maintenance of population numbers and distribution of the species, in this case King Shag.

[306] The New Zealand Coastal Policy Statement Policies 11(a)(i) and (ii) refer to threatened taxa. Taxa is a generic term used to refer to a taxonomic category at any level, such as phylum, order, family, genus or species. In this case we are dealing with a threatened seabird of the genus Leucocarbo and species carunculatus. The threatened taxon for the purpose of Policies 11(a)(i) and (ii) is the species *Leucocarbo carunculatus.* These policies direct the avoidance of adverse effects of the activity on a threatened species (King Shag).

[307] Policy 11(a)(iv) refers to the habitats of indigenous species where the species is at the limit of its natural range. Species range limits are the spatial boundaries beyond which individuals of the species do not occur. The natural range of King Shag is the Marlborough Sounds. Populations of species occupying habitats at the outer limits or

401 Schuckard, R. (2006). Population status of New Zealand King Shag (Leucocarbo carunculatus). Notornis, 53: 297-307.

402 Bell M. (2010). Numbers and distribution of New Zealand King Shag (Leucocarbo carunculatus) colonies in the Marlborough Sounds, September-December 2006. Notornis 57: 33-36.

periphery of the species' natural range are significant to ecology, evolution and conservation in that they provide opportunities to understand the conditions under which populations expand or contract or evolve new forms. Adverse effects of activities at these margin habitats may not affect the wider population of the species, so the maintenance of biological diversity in these areas of the marine environment is dependent on the avoidance of adverse effects on their habitats. This is the purpose of Policy 11(a)(iv).

[308] We are dealing here with a species that has a very limited range. The subject site is recognised as within the central feeding range of the population of King Shag centred on the Duffers Reef colony, which in turn is the largest colony of this species found within the natural range of the species.

[309] The majority decision finds that *Leucocarbo carunculatus* is at the limit of its natural range because its extent of occupancy (natural range) is small. Policy 11(a)(iv) NZCPS is not qualified by any size constraints large or small. The natural range is just that, the natural range, irrespective of its size. The majority decision also introduces the finding that *Leucocarbo carunculatus* is an outlier of a superspecies (collection of related species of largely sub-antarctic blue-eyed shags (genus Leucocarbo). This misinterprets Policy 11(a)(iv) which refers to indigenous species, not superspecies. The species *Leucocarbo carunculatus* is not found outside the Marlborough Sounds. The limit of its range is determined by the geography of the Sounds and physiology of the birds themselves that limit the foraging flight range to about 25 kilometres. King Shag are therefore not a qualifying species under Policy 11(a)(iv) NZCPS where any reduction in habitat at the limit of its range is to be avoided. King Shag cannot be considered as "naturally rare" under the NZCPS definition of that term for the purpose of the second qualifying requirement of Policy 11(a)(iv) as we have little knowledge of the status of the species in pre-human times.

Effects on King Shag

[310] The majority decision examines at length the likelihood and scale of adverse effects on the habitat of King Shag, both directly as a result of this proposal and cumulatively from all mussel farms in Beatrix Bay. The conclusion from this examination is that the altered environment under the proposed farm is likely to cause an

adverse effect on King Shag habitat. Given the scale of the proposal these effects will be minor (but not minimal) by themselves, but taken together with all the other existing farms will be adverse to King Shag habitat.

[311] The majority decision summarises that there was adequate information to find/predict that:

(1) King Shag habitat is changed by shell drop and sedimentation;
(2) The effects of each farm will accumulate and are likely to be adverse;
(3) That it is as likely as not there will be adverse effects on the population of King Shag and their prey;
(4) There is a low probability (it is very unlikely but possible) that the King Shag will become extinct as a result of this application.

[312] I did not dispute that (1) and (2) above are supported by the evidence and that regard should be given to these effects under section 104(1)(a) RMA. I disagree that there is adequate information to support (3) or (4). The accepted population information establishes that King Shag numbers are not declining and have not done so for the past 50 years at least. This cannot be dismissed. The likelihood of this farm resulting in the extinction of the species is so remote that it cannot be considered as a credible threat in the context of the definition of effect under Section 3 RMA.

[313] The majority decision states that completely inadequate information was available to detect any trend in the population, as data on breeding pairs, breeding success rates, and age and sex ratios was almost completely lacking. This does not recognise the reality that it is these and many other aspects of a species' population dynamics that contribute to the balance of recruitment and mortality that results in a static or stable population over time. Adverse effects from environmental stressors having a substantial impact on critical aspects of King Shag population dynamics would be reflected in the population counts available since 1951. King Shag are adapted to a specialist niche habitat, provided only in the Marlborough Sounds. This niche habitat has been subject to a range of anthropogenic and stochastic stressors over the past 50 years with no observed effect on the population of King Shag. A complete understanding of the population dynamics of the species will not alter this fact.

[314] I find there is adequate information to support the alternative finding that it is extremely unlikely that there will be adverse effects on the population of King Shag from the proposal.

Evaluation

[315] The subject site is within the ecological overlay (Map 69) described in Appendix B, Notation 1/11 of the Sounds Plan defining the significant foraging habitat of King Shag. A very small proportion of mussel farms occupy space within this Area of Ecological Value as it primarily covers areas seemingly favoured by foraging King Shag at depths below 30 metres. The adverse effect of a reduction of 10 hectares available to King Shag for foraging in the context of the extent of the ecological overlay is minimal and extremely unlikely to result in a decrease in the number of King Shag. The significant habitat identified within Beatrix Bay remains viable. Policy 4.3(1.2) of the Sounds Plan is satisfied.

[316] There is no question that Policies 11(a)(i) and (ii) NZCPS apply. Adverse effects on King Shag may include reduction in the area occupied by King Shag and reduction in habitat quality. While the existing mussel farms may have displaced King Shag from feeding in that area of the species' habitat occupied by mussel farms in Beatrix Bay, this has resulted in no harm to the population. The numbers of King Shag foraging in Beatrix Bay has not diminished over the 25 years since snapshot foraging bird surveys were first carried out in 1991 and the population of King Shag has not shown any downward trends since mussel farms were first established in the Sounds.

[317] Policies 11(a)(i) and (ii) are satisfied by this finding. Indigenous biodiversity in Beatrix Bay is not compromised by adverse effects on the habitat of King Shag. That habitat remains viable and the population of King Shag as far as it exploits this part of its natural range is not adversely affected by mussel farms.

[318] Policy 11(b)(iii) NZCPS refers to avoiding significant adverse effects on rocky reef systems. Adverse effects of the proposal on the rocky reef area at the head of the promontory have been evaluated in the majority decision which found there to be a low probability of there being a more than minor effect on the ecology of the reef. The

majority decision also evaluates the adverse effects on the indigenous eco-system within the intertidal range as required by Policy 11(b)(iii) finding that it is likely there will be only minor (if any) independent or cumulative effects on the intertidal zone. Policy 11(b)(iii) it is therefore satisfied by these findings.

Comment

[319] Concern for the effects of new salmon farms being introduced into the area of occupancy of King Shag was raised at the Board of Inquiry (BOI) into the New Zealand King Salmon proposal. The BOI found that there were potential adverse effects of low probability but high consequence that needed to be considered. The Board adopted a precautionary approach to these effects in granting consents within King Shag habitat by including in consent conditions the requirement for an adaptive management approach under a King Shag Management Plan (KSMP). This approach was confirmed as part of the wider consideration of adaptive management conditions by the Supreme Court[403].

[320] The KSMP is required to include a baseline survey of King Shag numbers followed by repeat surveys at least every three years. The BOI identified a statistically significant decline in King Shag numbers of 5 percent as a threshold for investigation of whether the marine farm was contributing to the decline and possible remediation measures if such a contribution was identified. The baseline counts for the KSMP were those included in the evidence of Mr Schuckard and Dr Fisher and recorded in the majority decision. If, as the majority decision suggests, a residual low risk remains that the reduction in King Shag habitat from this proposed farm either directly or cumulatively with all other mussel farms may adversely affect the King Shag population, then a similar adaptive management approach would seem to be appropriate.

[321] The scale of this proposal in comparison to the King Salmon application does not justify a specific adaptive management approach for King Shag as applied by the BOI decision. It is very important, however that the mussel industry within the Sounds generally becomes linked in some manner to the KSMP. A way needs to be found to involve the mussel industry in monitoring the KSMP results as they are published on the

403 *Sustain our Sounds Inc v Marlborough District Council* [2014] NZSC 40; (2015) 17 ELRNZ 520 at [140] and [158].

New Zealand King Salmon website and contribute to any subsequent investigation if the threshold 5 percent decline in King Shag population is exceeded in order to establish whether mussel farming is contributing to that decline and response measures that could be adopted. This would be a sensible and pragmatic marine farming approach to a potential effect of low probability but high consequence, but is not one we can impose on a single consent holder in this case.

[322] The alternative approach is to decline all future applications for marine farms in the natural range of King Shag until such time as sufficient information is available to determine with certainty the risk posed by marine farms on the King Shag population. This seems to be the approach taken in the majority decision.

Conclusion on King Shag

[323] The majority decision largely turns on the interpretation of Policy 11(1)(iv) NZCPS and the directive within that policy to avoid adverse effects on habitats of an indigenous species and the risk this poses as a potential contributor to the decline (or indeed demise) of King Shag. This, in my view, is not a correct application of the policy.

[324] The real issue (under Policies 11(a)(i) and (ii)) is the effect of the small adverse reduction in habitat on the population of King Shag. The primary indicator of the population status of King Shag is the reliable data set on the trend in the population over time. This indicates to me that marine farming in the Sounds has not had a negative influence on that population.

[325] The very low residual risk of the adverse effects of mussel farming in the Sounds on King Shag habitat having an adverse effect on King Shag population warrants an industry wide adaptive management approach that piggybacks on the KSMP now in place for New Zealand King Salmon.

Effects on the Promontory

[326] Competing evidence on the effects of the proposal on the promontory was provided by three independent experts as summarised in the majority decision. All of Beatrix Bay is considered by the experts and accepted by the Court (in *Knight*

Somerville Partnership[404] and elsewhere) as having a high level of natural character. The promontory does not stand out from the rest of the Bay in this regard. The Sounds Plan through its CMZ2 zoning provides for the establishment of marine farms, particularly in the inshore area of Beatrix Bay, as appropriate use of the coastal marine area subject to individual farm assessment. The proposed farm is not exceptional in this environment. The small (2 percent) extension of occupied space at the southeast and southwest ends of the promontory does not differ in effects on natural character from any other farm in the Bay, including the recently consented (by the Court) farm adjacent to the headland between Tuhitarata and Laverique Bays (*Knight Somerville Partnership*).

[327] Mr Glasson's opinion and conclusion set out in paragraph [217] of the majority decision provides an evaluation of the proposal in the context of the land/water interface of the promontory and the presence of existing mussel farms. I accept Mr Glasson's proposition that the proposal will allow the integrity of the promontory to remain intact. When viewed from the south, the most common approach by sea, the end of the promontory and its background are unencumbered by marine farm structures even with this proposal in place. From all other viewpoints, the visual effects of the proposal on the natural character of the promontory cannot be viewed in isolation from existing farms that stretch to the outer margin of the feature. The visual perspective in this regard is already compromised with the seaward extension resulting from the proposal having only a minor additional effect.

[328] The majority decision accepts that cumulative effects on the natural character of Beatrix Bay reported by Dr Steven are significantly adverse. This conclusion does not appear to recognise the collective advice of the landscape experts that the natural character of the Bay remains high. This is inclusive of the presence of 37 marine farms. It was not suggested by anyone that the assigned high status would be revised to some lower assessment category as the result of adding this additional farm. As such, the very small change on a Bay-wide scale of an additional 7.34 ha of mussel buoy lines cannot be considered as significant. To do so would require the acceptance that some concept of threshold for the area covered by marine farms existed, beyond which additional

404 *Knight Somerville Partnership v Marlborough District Council* [2014] NZEnvC 128.

marine farms had significant cumulative effects and were therefore inappropriate despite the CMZ2 zoning. No case for this was made other than Dr Steven's assertion that it was a *reasonable and defenceable proposition* that such a threshold had been reached.

[329] For the above reasons, I give greater weight to the evidence of Mr Glasson than to that of Mr Bentley and Dr Steven in concluding that the adverse effects on the visual/natural character perceptions of the promontory in particular, and Beatrix Bay in general, are likely to be no more than minor.

[330] In considering the Sounds Plan, I agree with the evaluation in the majority decision that Policy 2.2(1.2) seems to render cumulative effects on natural character irrelevant in that it encourages development in already compromised areas of the coastal environment.

[331] In considering the NZCPS, my finding on the absence of significant adverse effects on natural character and landscape means the "avoidance" directives of Policy 13(1)(b) and Policy 15(b) respectively are not triggered. In having regard to the policy alternative to avoid, remedy or mitigate any adverse effects on natural character and landscapes, I consider that it is not possible to achieve any of these in operating a marine farm that requires visible suspension infrastructure, although the ability to remove this infrastructure can be seen as a mechanism to remedy any unacceptable adverse effects of the mussel farm over time. The adverse visual effects of this proposal in the context of existing marine farms in the visual catchment are of a scale that is not determinative on its own.

Summary

[332] In summary:

(a) An adverse effect on King Shag habitat is likely that is more than minor but less than significant at a cumulative Bay-wide scale.

(b) There is no evidence that the adverse effect on King Shag habitat is having any adverse effect on the population of King Shag generally and the Duffers Reef Colony in particular.

(c) There is a low risk that mussel farms in the outer Pelorus Sounds may have adverse effects on the Duffers Reef Colony of King Shag.

(d) The proposal is unlikely to have significant adverse visual effects on the natural character and landscape of the promontory or cumulatively on the natural character and landscape of Beatrix Bay.

(e) The proposal is likely to have no more than minor adverse effects on non-visual aspects of natural character including benthic and water column effects, recreational amenity, navigation and King Shag.

Result

[333] The application should be granted with standard mussel farm conditions to be advised by the Council.

[334] The majority decision to refuse the application is a disproportionate response to the extremely unlikely risk that an additional marine farm in Beatrix Bay may contribute to a decline in the King Shag population in the Marlborough Sounds. In my view, the proposal represents an appropriate development in the coastal marine area.

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

J R Jackson
Environment Judge

J R Mills
Environment Commissioner

I Buchanan
Environment Commissioner

Jacksoj\Jud_Rule\d\Davidson Family Trust v Marlborough DC

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2016-409-001157
[2017] NZHC 669

BETWEEN	ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED Appellant
AND	CHRISTCHURCH CITY COUNCIL Respondent
AND	INDEPENDENT HEARINGS PANEL First Third Party
AND	CANTERBURY REGIONAL COUNCIL Second Third Party
AND	FEDERATED FARMERS OF NEW ZEALAND Third Third Party
AND	LYTTELTON PORT COMPANY Fifth Third Party

Hearing: 7 April 2017 (On the papers)

Appearances: P Anderson S Gepp for Appellant
M G Conway and C G Coyle for Respondent
No appearance for First Third Party (abides decision of the Court)
M A Mehlopt for Second Third Party
R Gardner for Third Third Party
J M Appleyard for Fifth Third Party

Judgment: 7 April 2017

JUDGMENT OF DUNNINGHAM J

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[1] The appellant has appealed against Decision 50, Chapter 9: Natural and Cultural Heritage (Part) Sub-Chapter 9.1 – Biodiversity and Ecosystems (the Decision) made by an Independent Hearings Panel (the Panel), on the Christchurch

Replacement District Plan (the Plan). Other parties to the appeal are the Canterbury Regional Council, North Canterbury Province of Federated Farmers of New Zealand (Inc.), Lyttelton Port Company Limited, and the Panel itself.[1]

[2] The parties (aside from the Panel)[2] have negotiated a proposed partial settlement of the appeal. They seek the Court's approval of the proposed amendments to the Plan as negotiated, under the Court's power to substitute its decision for that of the Panel. However, they recognise that there can be no expectation that, in every case, consent orders are suitable for approval through appeals to the Court. As Whata J said in *Meridian Energy Ltd v Canterbury Regional Council,* "this is a public law process and there must be due consideration given to the wider public interest in the promulgation of planning instruments".[3]

[3] In support of the request that orders are made in accordance with the partial settlement negotiated, a detailed memorandum has been filed by the parties setting out:

(a) the issues on appeal;

(b) the proposed amendments to the provisions of Sub-Chapter 9.1 of the Plan;

(c) the reasons why they consider the proposed amendments address the errors of law asserted; and

(d) an explanation of why the parties consider the proposed amendments give effect to the New Zealand Coastal Policy statement (NZCPS), the Canterbury Regional Policy Statement (CRPS), and the purposes and principles of the RMA to the extent they are relevant to this chapter of the Plan.

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1 Te Rūnanga O Ngāi Tahu joined the appeal but subsequently withdrew its interest.

2 The Panel, quite properly, took a passive role, abiding the decision of the Court: *Portage Licensing Trust v Auckland District Licensing Agency* (1997) 10 PRNZ 554 (HC).

3 *Meridian Energy Ltd v Canterbury Regional Council* HC, Christchurch CIV-2010-409-002604, 23 May 2011 at [11].

[4] The Panel has indicated that it will abide the decision of this Court.

[5] The issue for me to consider is whether, having regard to the explanation for the amendments proposed by the parties to resolve the identified issues on appeal, those amendments are appropriate. In doing this, I must have regard to:

(a) the statutory context in which the Decision is required to be made; and

(b) the public interest in the formulation of such planning documents.

Background to the Decision

[6] The procedure for preparing the Plan had its genesis in the Canterbury Earthquake Recovery Act 2011. Section 71 of that Act authorised the making of Orders in Council which were necessary or expedient for the purposes of that Act. Those purposes included enabling a "focused, timely and expedited recovery" and to enable "community participation in the planning of the recovery".[4]

[7] The Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014 (the Order) was made under s 71 and required the Christchurch City Council (the Council) to:

(a) undertake a full review of the operative provisions of the existing district plans; and

(b) develop a replacement district plan and to prepare proposals for that within a specified time from the commencement of the order.

[8] The Order went on to require the Minister to appoint the Panel. The principal functions of the Panel are to:

(a) hold hearings on submissions on proposals; and

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4 Canterbury Earthquake Recovery Act 2011, s 3(b), (d).

(b) make decisions in relation to those proposals.[5]

[9] Proposals were notified by the Council and divided up into sub-chapters, or topics, for the purposes of conducting the Plan hearings over three stages.

Sub-Chapter 9.1

[10] Sub-Chapter 9.1: Indigenous Biodiversity and Ecosystems was notified on 25 July 2015, as part of stage three of the hearings process. It is intended to implement Chapter 9 of the CRPS, which sets out the way in which the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna is to be carried out in Canterbury.[6]

[11] Sub-Chapter 9.1 establishes the framework for the identification, assessment, management and protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna within the Council's district, along with the maintenance of indigenous bio-diversity and ecosystems generally. The effects of activities and development on areas or habitats listed as sites of ecological significance (SES), in Schedule A of appendix 9.1.6.1, and on other areas containing potentially significant vegetation and habitat listed in Appendix 9.1.6.6 are controlled through provisions managing the clearance of indigenous vegetation.

[12] The parties explain that the schedule of SES listed in the notified replacement district plan did not identify all areas that are known to have high ecological values, as time and resource constraints limited the number of surveys that could be commissioned before the proposals had to be notified in accordance with the Order. However, the Council has identified areas for priority survey and assessment in the coming years, with a view to adding further SES to the schedule through a plan change.

[13] The Council also recognised that many of the SES on Banks Peninsula are on private land and there had been an extensive programme of land owner engagement in that area, in order to share information and discuss land owner concerns which

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5 See clauses 6, 8, 10, 12 and 14 of the order.
6 As required under s 6(c) Resource Management Act 1991.

may arise through having an SES identified on their property. The parties noted that the truncated process for preparing the Plan did not allow for full consultation with potentially affected land owners, but that the Council was continuing to engage with them and had committed to doing so.

[14] The parties explain that the hearing for Sub-Chapter 9.1 commenced on 18 January 2016, but was adjourned for further mediation in late January and in February 2016. A number of parties attended the mediation, including entities representing conservation and farming interests, and individual submitters. During the mediation the parties reached agreement regarding the prioritisation assessment criteria and the identification of further sites in the future. The parties decided to use farm bio-diversity management plans and to see how these would work in practice. Agreements were reached as to how these management plans would link to the SES Statements. The majority of the objectives, policies and rules were agreed upon for areas of land, both inside and outside identified SES, leaving comparatively few remaining areas of disagreement. Furthermore, those areas of disagreement did not materially relate to the provisions addressed in this appeal.

[15] A revised version of Sub-Chapter 9.1 was submitted to the Panel along with the Council's submissions. Areas of disagreement between the parties were identified. Closing submissions on the issues covered in Sub-Chapter 9.1 were filed in April 2016.

[16] The Panel then issued a minute on 9 August 2016 which expressed concerns about aspects of the revised version of Sub-Chapter 9.1. The Panel provided two options to the parties to address the identified deficiencies:

(a) it could reject the revised version of Sub-Chapter 9.1 and leave the existing Plan in place until the future Plan change could occur; or

(b) it could direct the Secretariat to prepare and invite further closing submissions on a revised version of the proposal for Sub-Chapter 9.1.

[17] After considering further submissions from the parties, the Panel directed the Secretariat to redraft Sub-Chapter 9.1 (the Secretariat draft). Further submissions were filed in relation to the Secretariat draft and the Panel issued its Decision on 21 October 2016.

The appeal

[18] Forest and Bird filed a notice of appeal in relation to the Decision on 25 November 2016. It alleged seven errors of law. In summary, these related to:

(a) whether the changes the Panel made to Sub-Chapter 9.1 were materially different in scope, such that they were obliged, under cl 13.4 of the Order, to direct the Council to notify a new proposal (first alleged error of law);

(b) whether or not the decision to accept the redrafted Sub-Chapter 9.1 breached natural justice (second alleged error of law);

(c) whether certain provisions added by the Panel, requiring the Council to serve notice on owners or occupiers of potential SES, before rules relating to the protection of these sites came into force (indigenous vegetation notice provisions) were void for uncertainty (third alleged error of law);

(d) whether or not the inclusion of the indigenous vegetation notice provisions breached natural justice (fourth alleged error of law);

(e) whether the indigenous vegetation notice provisions failed to give effect to the NZCPS and CRPS (fifth alleged error of law);

(f) whether the Panel failed to give effect to the CRPS, including policy 9.3.1, when it distinguished between significant sites on the schedule of SES listed in appendix 9.1.6.1 and significant sites within the potentially significant vegetation types in Appendix 9.1.6.6 (sixth alleged error of law); and

(g) whether the Panel failed to give effect to the NZCPS and CRPS, and misapplied s 6(c) of the RMA when it concluded that farm practices played a part in the determination of the boundary of significant ecological sites (seventh alleged error of law).

Proposed partial settlement of the appeal

[19] The parties have engaged in discussions in an attempt to resolve the appeal, continuing the collaborative approach that has been taken throughout the hearings and earlier mediation, in relation to this Sub-Chapter. They advised that, through these discussions, they have significantly narrowed the issues and they agree that the appeal can be resolved, in part, by amendments to the Decision.

[20] The partial settlement involves:

(a) Forest and Bird withdrawing the first, second and fourth alleged errors of law;

(b) settlement of the third and sixth errors of law; and

(c) an agreement to only pursue the fifth error of law if the Court is not minded to make the orders sought by the parties.

[21] The seventh alleged error of law remains unresolved, although the parties continue to discuss its potential resolution.

[22] The withdrawal of the first, second and fourth alleged errors of law does not prejudice the consideration of the remaining errors of law, as they relate to the procedure adopted by the Panel and not to the actual provisions of Sub-Chapter 9.1 itself.

[23] The parties also agree that the seventh error of law can remain to be resolved by the Court as it is a discrete matter relating to the role that farm practices have in the identification of SES boundaries.

The third alleged error of law – Indigenous Vegetation Notice Provisions

[24] The Plan contains a number of provisions that require the Council to have served an indigenous vegetation notice on an owner or occupier of land before rules regulating the clearance of indigenous vegetation listed in Appendix 9.1.6.6 come into force. The third error of law claims that the Panel erred in creating these provisions because they are void for uncertainty. In particular the appellant alleges:

> The Panel erred in approving indigenous vegetation notice provisions, which trigger the indigenous vegetation rules in relation to potentially significant vegetation types in Appendix 9.1.6.6, only where a Council indigenous vegetation notice under rule 9.1.4.0.1 is served on the owner or occupier of land. The panel erred because the provisions are void for uncertainty, as there are circumstances where no person can reasonably ascertain whether the clearance of indigenous vegetation is permitted or not.

[25] The parties go on to explain that Appendix 9.1.6.1 is divided into two schedules, Schedule A and Schedule B. Schedule A lists SESs which are either on public land, or on private land where the land owners have agreed to inclusion of the site on the schedule. However, Schedule A is not a comprehensive list of SES within the district. There are other sites that meet the criteria for being an SES and which may include, but are not limited to, those sites identified in Schedule B. The areas identified in Schedule B are for information purposes only and are not subject to the rules relating to SES. Council's intention is to continue discussion with the land owners about the ecological values that exist on their property and the management of these values.

[26] The approach adopted in the decision is to identify certain vegetation types that are potentially significant and include them in an appendix (Appendix 9.1.6.6) with corresponding indigenous vegetation rules. The Council is then required to serve an indigenous vegetation notice, as defined in rule 9.1.4.0.1, on the owner or occupier of the land in order to trigger those rules.

[27] The parties agree, for the purpose of these proceedings, that the indigenous vegetation notice rules are void for uncertainty as there are many circumstances where it is not possible to ascertain whether the clearance of indigenous vegetation is permitted under the rules, particularly, where there has been a change in occupation or ownership of a property. The memorandum sets out a range of such examples, for

example, when land is sold, but a new owner is not provided with a copy of the notice. They consider that in its current form, the Decision offends the principle that owners and occupiers of land should be able to determine on the face of the plan whether they can undertake an activity on their property or not, and consequently, the current rules are void for uncertainty.[7]

[28] The amendments proposed by the parties recognise that there is merit in advising land owners of the presence of potentially significant ecological sites, but are agreed that the formal service of an indigenous vegetation notice should not be necessary for the rules to apply and that the provisions will be more certain and effective with a notice requirement removed. The amendments proposed remove the requirement for notice to be served before the rules apply.

[29] The specific amendments proposed are:

(a) amendment to policy 9.1.2.6 by:

(i) replacing the requirement for service of Council indigenous vegetation notice on land owners with the potentially significant vegetation types on their land, with a reference to working with and advising such land owners;

(ii) replacing the requirement to keep the notice on the property file, with provision that the Council will keep its advice on the property file;

(iii) deleting the reference to notified properties in policy 9.1.2.6(a)(iii) in order to ensure that the provision applies to all sites in Appendix 9.1.6.6;

(b) removing the reference to land owner notification from policy 9.1.2.9, 10 and 15 to ensure that the policies apply to all sites in Appendix 9.1.6.6;

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7 *New Plymouth District Council v Baker* W101/94, 28 October 1994 at 6.

(c) deleting the reference to Council indigenous vegetation notices from the rules;

(d) a minor amendment to improve readability by moving the words "and that the size and scale identified in Appendix 9.1.6.6" from policy 9.1.2.6(a)(i) to policy 9.1.2.6(a)(iii); and

(e) deletion of rule 9.1.4.0.1 which describes what a Council indigenous vegetation notice is.

Sixth alleged error of law – protection of significant indigenous vegetation

[30] The sixth alleged error of law relates to the distinction between SES listed in Schedule A in Appendix 9.1.6.1 of the Plan and potentially significant sites containing vegetation types listed in Appendix 9.1.6.6.

[31] Objective 9.1.2.1 of the Plan provides for the protection of areas of significant vegetation in Schedule A, but there was evidence before the Panel that there may be other potentially significant sites that were not included in that schedule.

[32] The CRPS, which the plan is required to give effect to under s 75(c) of the RMA, requires protection for all significant indigenous vegetation.

[33] The parties agree, for the purposes of these proceedings, that the panel has erred in law by failing to give effect to the CRPS when it determined that objective 9.1.2.1 and policy 9.1.2.16 did not apply to significant indigenous vegetation within the potentially significant vegetation types listed in Appendix 9.1.6.6.

[34] As the plan recognises and is acknowledged in the Decision, not all areas or habitats that meet the criteria in Appendix 3 of the CRPS are listed in Schedule A of Appendix 9.1.6.1. There are other potentially significant sites containing the vegetation listed in Appendix 9.1.6.6 that may also meet the criteria in Appendix 3 of the CRPS. The parties therefore agree to the following amendment to objective 9.1.2.1 to resolve this error of law:

> Areas of significant indigenous vegetation and significant habitats of indigenous fauna ~~listed in Schedule A of Appendix 9.1.6.1~~ are protected so as to ensure that there is no net loss of indigenous biodiversity.

[35] This amendment also necessitates a consequential amendment to policy 9.1.2.16 which relates to offsetting significant sites, and to policy 9.1.2.9 ensuring the provisions no longer relate only to SES listed in Schedule A of Appendix 9.1.6.1.

Jurisdiction to determine appeal

[36] The Court has jurisdiction to determine this appeal under r 20.19 of the High Court Rules. It provides:

> (1) After hearing an appeal, the court may do any 1 or more of the following:
>
> (a) make any decision it thinks should have been made:
>
> (b) direct the decision-maker—
>
> (i) to rehear the proceedings concerned; or
>
> (ii) to consider or determine (whether for the first time or again) any matters the court directs; or
>
> (iii) to enter judgment for any party to the proceedings the court directs:
>
> (c) make any order the court thinks just, including any order as to costs.
>
> …

[37] I am satisfied that I have heard from the parties through the comprehensive joint memorandum they have filed and it is open to me to amend the Plan in accordance with the proposed changes set out at Appendix 1 to the memorandum.

[38] I am also satisfied that approval of the amendments is appropriate in the present circumstances because:

(a) the amendments sought are within the scope of the appeal;

(b) one of the fundamental purposes of the Order was to provide an expedited process for replacing the District Plan, and by settling the

appeal in the way proposed, this represents a just, speedy and inexpensive way to implement that part of the replacement District Plan that supports recovery and rebuilding;

(c) the agreement has been reached on the amendments sought by parties who represent a cross section of the community, and persons who might have had an interest in the appeal have had an opportunity to participate through service of the notice of appeal;

(d) the proposed amendments are consistent with the purpose and principles of the RMA including, in particular, s 6(c) of Part 2 which this Sub-Chapter of the plan is intended to give effect to. It also gives effect to the NZCPS and CRPS under s 75 of the RMA;

(e) I am advised that the amendments are also consistent with the position reached in mediation, between a wider range of parties during the Panel hearing process and, in particular, I am advised that:

(i) there was no disagreement that objective 9.1.1 should apply to all significant ecological sites, whether they were on the schedule or not; and

(ii) at no stage prior to the Secretariat draft being circulated on 2 September 2016, did Sub-Chapter 9.1 contain any provisions resembling the indigenous vegetation notice provisions;

(f) given the narrow scope of the relief requested I do not consider it is necessary for the matter to be remitted back to the Panel; and

(g) the remaining appeal point is not affected by the making of these orders. It can be separately argued, although the Court is advised that discussions are continuing with a view to resolving it too.

Outcome

[39] After reading the joint memorandum of counsel filed on 31 March 2017, this Court orders:

(a) that the Christchurch City Council amend the Christchurch Replacement District Plan as set out in Appendix 1 to the consent memorandum; and

(b) by consent, there is no order as to costs.

Solicitors:
Simpson Grierson, Wellington
Wynn Williams, Christchurch
Chapman Tripp, Christchurch

Copy To:
P Anderson and S Gepp, Forest and Bird Protection Society
R Gardner, Federated Farmers

TAB 17

BEFORE THE ENVIRONMENT COURT

Decision No: [2013] NZEnvC 110

ENV-2012-WLG-000075

IN THE MATTER	of the direct referral of an application for a resource consent under s87G of the Resource Management Act 1991
BETWEEN	TE PUNA MATAURANGA O WHANGANUI and UNIVERSAL COLLEGE OF LEARNING Applicants
AND	THE WANGANUI DISTRICT COUNCIL Consent Authority

Court: Environment Judge C J Thompson
Deputy Chief Māori Land Court Judge C L Fox
Environment Commissioner D J Bunting

Hearing: at Wanganui 25 – 27 March 2013: Closing submissions 2 May 2013

Counsel/Representatives:
J W Maassen and N Jessen for applicants
P J Page & K E Krumdieck for NZ Historic Places Trust – s274 party
W K Pettigrew for Whanganui Regional Heritage Trust Board – s274 party
P Drake for the Wanganui District Council – consent authority

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DECISION ON DIRECT REFERRAL

Decision issued: 17 MAY 2013

The application is declined

Costs are reserved

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

Introduction

[1] On 18 June 2012 the Wanganui District Council directly referred this application for a resource consent to the Court for a decision under s87G of the Resource Management Act. It is not, therefore, an appeal against a decision made by a consent authority and the hearing in this Court is the only opportunity for evidence for and against the proposal to be heard. For that reason we will discuss the issues and evidence in a little more detail than would normally be the case on an appeal from a Council decision.

Background

[2] The application, jointly made by Universal College of Learning (UCOL) and Te Puna Matauranga O Whanganui (Te Puna), was lodged on 10 April 2012, and was publicly notified on 26 April 2012. It is for a resource consent in these terms:

> A land use consent to demolish the former Māori Land Court and ancillary building and establish, operate and maintain an iwi tertiary institute, Te Whare Matauranga.

[3] The site on which the former Court building stands is 707m^2 and is at 11 Rutland Street, on the corner of Rutland Street and Market Place, Whanganui. It is owned by UCOL. The building was purpose-designed and constructed c1922 for the Aotea Māori Land Board, and was occupied by the Land Board, the Native Land Court (later the Māori Land Court) and officers of the then Native Affairs Department. It was occupied by the Court until c1982, and was then transferred to the Proprietors of the Morikaunui Block and Atihau-Whanganui, jointly. This is a Māori land incorporation and has no direct legal relationship with the Whanganui Iwi – Te Atihaunui a Paparangi, although its shareholders may or may not be members of the tribe. The building then had a variety of occupiers including an Iwi Radio Station, and the Wanganui Iwi Law Centre, until the joint-ownership venture sold it to UCOL in 2006. It has been vacant since at least that point.

[4] It is a single-storey building of about 470m^2 and while the exterior is largely intact, it is presently in only fair condition – there is considerable deferred maintenance and in places the roof is not watertight. Interior water damage is increasingly evident. Over the 90 years of its existence, there have been significant interior alterations, and little remains of the original layout. There are also smaller

utility buildings at the rear of the main building, one of which is *original*, but they are of little real consequence in this decision-making process.

[5] The site is part of a larger area of Whanganui along the west bank of the river known to Māori as Pakaitore. That name derived from a Pa and fishing kainga once located nearby.

UCOL and Iwi Partnerships

[6] In its Whanganui UCOL Education Plan (2004), the applicant UCOL defined *Whanganui Iwi* as Te Atihaunui a Paparangi. This is the Iwi particularly associated with Whanganui. UCOL's region also takes in the traditional territories of Ngā Rauru and Ngāti Apa. It has as one of its long-term goals a commitment to support and collaborate with these tribes to realise their aspirations for Māori tertiary education in the Whanganui area. However, those who form Te Puna, only represent the Whanganui Iwi - Te Atihaunui a Paparangi. They do not represent Ngāti Apa or Ngā Rauru and those have only been informally consulted regarding this application for a resource consent.

[7] Te Puna is the mandated authority for Te Atihaunui a Paparangi for education. Those who have membership of Te Puna are selected based upon the 5 tipuna rohe or traditional hapu cluster areas of Whanganui Iwi, namely: Tupoho, Tamaupoko, Hinengakau, Ngāti Rangi and Tamahaki.

Māori Population

[8] The population of Māori in the Whanganui District constitutes approximately 22% of the total population, but 43% of that Māori community have no formal educational qualifications. The Māori population is growing and current projections indicate it will increase to 29.8% by 2026. The case for the applicants stressed the need for improved educational outcomes for Māori, given that currently there are discrepancies in participation and success rates between Māori and non-Māori in tertiary education.

[9] The applicants seek, through this proposal, to ... *enhance the social and cultural wellbeing of Whanganui Māori by improving: (a) access to culturally relevant facilities in the Old Town Conservation Zone (OTCZ); (b) educational outcomes; and participation in the life of the city centre.* Ms Esther Tinirau, who was called to give evidence about Te Puna's position, advised that culturally appropriate facilities are needed to validate student learning and this proposal would provide such a place. The implicit assumption is that this project is intended to improve Māori participation and success rates in tertiary education.

The Native Land Court and the Aotea Māori Land Board

[10] The Native Land Court started sitting in the Aotea District, using premises in the Wanganui town, in 1866 and it was to become a focal point for Māori attempting to protect their title to land. Court hearings were lengthy and many were forced to stay for long periods in unhygienic conditions at encampments along the river side of what is now Taupo Quay. The history of land alienation through the individualisation of title and the impact of that system on Māori social organisation was covered before us by Mr David Armstrong. He noted that under the leadership of Major Kemp and others, Whanganui Māori tried to mitigate the worst aspects of this system. In 1881 the Court moved to Upokongaro (about 10 kms up the river) to a purpose-built building. That building still exists today (in a rather modified form) and is registered by the Historic Places Trust. In 1884 the Court returned to Whanganui. In 1905, the Aotea Māori Land Board was constituted. It took over responsibility of acting as agent for land owners in the alienation of land and the pace of alienation, through sale and lease, accelerated. In 1917 the Board purchased the site on the corner of Rutland Street and Market Place and erected the present building in 1922.

The 2010 decision

[11] An unusual aspect of this matter, and one which no doubt influenced the decision to refer this application directly to the Court, is that after a hearing in December 2009 and March 2010, a differently constituted panel of the Court declined an appeal against the Council's decision to refuse consent to demolish the same building. It is apparent from reading the decision (*Universal College of*

Learning v Wanganui DC [2010] NZEnvC 291) that an (but not sole) influence on that outcome was the absence of a firm proposal for a replacement building or buildings on the site. What was proposed at that point was the demolition of the existing building and the conversion of the site to a ... *green space*. That clearly was an interim position, with the prospect of unspecified development to be undertaken at an unspecified future time. At paras [148] to [150] the Court said this:

> [148] ... Heritage interests do not *trump everything else*. It may be that the promotion of sustainable management requires the social advancement (through education) of Whanganui iwi to take precedence over historic heritage in this case, particularly in the light of our reservations as to the heritage significance of the Māori Land Court building. We accept that establishment of an iwi institute will potentially have a positive effect on the social well being of Whanganui Māori by supporting Māori students at UCOL. However our difficulty lies in adequately identifying and assessing that positive effect due to the present uncertainty as to the form and functions of the institute.
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> [149] We return to the fact that the application is to demolish the Māori Land Court building and establish a green space. We did not understand UCOL to contend that creation of a green space of itself outweighed the adverse effects on historical heritage which would be occasioned by demolition of the building even subject to the reservations which we have expressed as to its architectural and historic values. It was the intended future use of the green space which provided the rationale for the proposal.
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> [150] We have given as much weight as we reasonably can in our considerations to the intended future use of the green space for an iwi institute but consider that weight is considerably diminished by the nebulous nature of the iwi institute proposal. We are conscious of UCOL's position that it was not prepared to commit to the degree of planning and expenditure necessary to promote a more specific development proposal without being certain that demolition would be approved. However we consider that UCOL's case would have been considerably advanced by a more comprehensive application incorporating an application for approval of the iwi institute with sufficient detail to address the various issues we have raised in this decision.

[12] So the Court's decision to decline the consent enabling demolition of the existing building was reached, at least in part, because it could not compare the present site and building with a known future development. It is apparent that the

Court was somewhat lukewarm about the heritage significance of the existing building, but we certainly do not take the 2010 decision as having irrevocably decided that point – the building's heritage significance is not, in the Latin legal jargon, *res judicata.*

The parties' positions – UCOL and Te Puna

[13] UCOL merged with the former Wanganui Regional Community Polytechnic in 2002 and has since consolidated almost all of its former six Wanganui tertiary education sites into one Campus in the part of the City bounded by Rutland Street, Market Place, Taupo Quay and Drews Avenue, close to the river and Moutua Gardens. We understand that it came to occupy six structures of heritage interest within the Campus area. Some were renovated and adapted for reuse by it. Two buildings, both on Taupo Quay, were already in use for educational purposes and were incorporated into the Campus but, because of their inadequate seismic capacity, have since been vacated. Their future, with possible strengthening, is presently being discussed. Other existing buildings on the Campus were demolished and their sites rebuilt. The former Court building is diagonally across Rutland Street from the main pedestrian access to the campus proper, so it is not part of the campus, but is very close to it.

[14] UCOL's interest in the site of the former Court building is brought about by its agreement, formalised in 2006, with Te Puna. The 2006 agreement records the shared objectives of the two organisations as including:

- To form a close, strong and long-term relationship in which UCOL as the principal (mainstream) tertiary education provider and Te Puna Matauranga O Whanganui, as the Whanganui Iwi Education Authority, work closely together to achieve the goals contained in the MOA introduction.
- To work together in an environment characterised by (Whakahoahoatanga, manaakitanga and rangatiratanga) good will and mutual respect, infused by honesty and openness and mediated by trust.
- To focus on increased participation of Māori students of the Whanganui rohe.
- To focus on the successful completion of qualifications of Māori students of the Whanganui rohe.

- To assist in the establishment of the Whanganui Iwi Cultural Centre, in close proximity to the UCOL campus development, not only to meet Whanganui Iwi aspirations and also for mutuality of services for student support.
- To explore tangible options for collaborative activity on campus in the areas of student support, shared services, cultural advice role.
- To recognise the unique nature of this collaboration in using the strengths of the established academic and collegial infrastructure of UCOL and the unique commitment of Whanganui Iwi to facilitate education as a key priority for whanau and hapu to achieve their development goals and aspirations. ...

[15] The possible future use of the site in partnership with Te Puna is seen as other than just *teaching space*. The intention is that it will give Māori students a cultural focus that is close to, but not actually on, the Campus. Its ability to accommodate and foster cultural events such as powhiri is seen as very important. UCOL regards the Court building as in a different category from the other buildings it has renovated and adapted for reuse. It sees it as, or perhaps more accurately is told by its partner Te Puna that it is, unsuitable for adaptation to its intended purpose because it is single-storeyed and too small, and it lacks suitably oriented outdoor space suitable for powhiri and similar uses. A concern is also that it is likely to be expensive to bring up to a watertight and acceptable seismic standard, with adaptation and additions requiring further expenditure.

[16] Even if those issues can be overcome, Te Puna is reported to be disinclined to occupy the existing building, even if strengthened, renovated and adapted. It is said to be interested only in a purpose-built facility. It does though regard the site, being close to Moutua Gardens and within sight of the river, as being appropriate and desirable for its purposes. We shall return to this issue, and the evidence of Ms Tinirau on Te Puna's views about the site, in discussing s6 issues.

The Council

[17] The Council's Senior Resource Management Planner, Ms Rachelle Voice, provided the Court and the parties with a helpful report under s87F RMA, and amplified that in evidence. In summary, Ms Voice has the view that the adverse effects of the proposal are not more than minor. She acknowledges of course the

declining of the earlier application, but points out that this application is different, and that ... *recent plan changes to the District Plan affect the subject site.* Formally, the Council does not take a position on the merits of the current application and focussed its participation on helping the Court to understand the relevant planning documents.

The New Zealand Historic Places Trust

[18] During the course of the proceedings about the application to demolish dealt with in the 2010 decision, the Historic Places Trust (HPT) took steps to classify the building as a *Category 1 Historic Place*. That took effect in 2008 - previously, the building was not on the Trust's Register at all. The Trust expresses the view that this building has high architectural and historic heritage significance and should be preserved. It submits that the building has significance for Māori, perhaps negative in some aspects, but positive in others; that it is a reminder of significant times and events of inter-Māori and Māori-Pakeha relationships, land transactions and colonial settlement. It also regards the building as significant in that it was one of the last public buildings (the other being Parliament Buildings in Wellington) designed by (or at least under the supervision of) the then Government Architect, John Campbell. It represents a pivotal shift in Government style – to ... *the restrained geometrics of the art deco Moderne style*. Among the buildings surviving in the OTCZ of urban Whanganui, the Trust regards this building as unique.

[19] The Trust first suggested that there may be at least one other site already within the UCOL campus that could be used for the desired facility, a suggestion that does not find favour with UCOL/Te Puna. That was a site, presently a carpark, referred to as 10 Taupo Quay, within the block containing the UCOL campus. Te Puna dislikes it because it is within the campus, rather than being, as the Rutland Street site is, close but separate. Also, because of the slope of the landform towards the riverbank, it is also slightly lower than the portions of the campus built on the eastern side of Rutland Street and this was said to give it an *inferior* status. During the course of the hearing the possibility of using the site of the former Federal Hotel on the corner of Market Place and Taupo Quay came into sharper focus. The site is owned by UCOL and the building is vacant, with no current plans for its reuse. It is

not registered with the HPT but is a Class B building in terms of Plan Change 29 (of which more later). Mr Hoskins discounted its possible use for the project because it is ... *too disconnected from the UCOL site* ... and sits at a lower plane than the balance of the campus. From other evidence, supported by our observations, we cannot agree that it is *disconnected*, but in any event, disconnection is seen by Te Puna as a positive attribute for its proposed facility. The site is actually within the UCOL block and is immediately beside the carved kuwaha, or gateway, onto the campus from Market Place, and has a view across Market Place to Moutua Gardens and to the river. We would accept though that the river view is not nearly as expansive or direct as that from the old Court site.

The Whanganui Regional Heritage Trust Board

[20] Those forming the Trust Board formerly constituted the local branch committee of the HPT, but in anticipation of the disestablishment of those committees by legislation presently before Parliament, the committee has already dissolved and has reconstituted itself as an independent entity. The Trust is a s274 party to the application. Ms Wendy Pettigrew, who has considerable experience in heritage conservation, is the Trust Board's Chair and gave evidence explaining its position. The Board does not oppose the application, and is content with the agreement reached between some of the parties on the question of memorialisation, in the event that the existing building is demolished. We shall return to that later also.

The proposed new structure

[21] The proposed building, as presented in the evidence of the architect engaged by Te Puna, Mr Rau Hoskins, is designed with two, two-storey wings, with a total floor area of about 615m^2. The southern wing is designed for service functions and would be of masonry construction. The more prominent northern wing is designed with a transparent glass facade. At the corner of Rutland Street and Market Place there is to be a circular welcoming, or powhiri, area on the ground floor. There will be a double height corridor off the foyer. Apart from the service areas, the spaces are designed to be flexible. A large, covered and landscaped courtyard beside the welcoming area

can extend that area and will be usable for outdoor learning activities. The first floor will contain office and, possibly, teaching spaces.

Adapting the existing building

[22] In their joint statement[1], engineers Mr John Silvester for UCOL and Mr Winston Clark for HPT, agreed that in its current state, the building has a seismic capacity as low as 10% NBS (National Building Standard)[2]. They also agreed on the measures required to strengthen the building to achieve 67% NBS[3] or, if required by the building owners, up to 100% NBS.

[23] In very general terms the strengthening would require the tops of the perimeter and partition walls to be braced with new structural elements constructed within the ceiling space; for tie rods to be inserted and then stressed in ducts drilled vertically from the tops of the brick masonry walls to the foundations; and for a grillage of carbon fibre strips to be fitted and fixed into saw cuts formed on the two faces of each partition wall.

[24] The caucus statement notes that the tie rod and carbon fibre grillage strengthening techniques are relatively new and that (as at 2009) further development of them is continuing at the University of Auckland[4]. The concept of such strengthening has however been proved to be cost effective and successful in at least one Canterbury heritage building – the Arts Centre – which was strengthened pre-2010.

[25] The Court building has settled at its eastern (Rutland Street/Market Place) corner, with this being attributed to poor compaction of material placed as backfill in what is assumed to have been the cellar of a former building. The engineers agree that this settlement can be stabilised by constructing a reinforced concrete beam to carry the wall load from this corner back to firm foundation material and on to a new

[1] Caucus Statement of Engineering Experts, 7 December 2009
[2] NZS 1170.5:2004 Structural Design Actions Part 5:Earthquake Actions – New Zealand (Published by Standards New Zealand)
[3] 67% is the recommended strength level considered appropriate for the protection of heritage buildings.
[4] Caucus Statement para 25

pile[5]. They note that re-levelling of the wall is not required for structural stability, although it may be for aesthetic reasons.

[26] The joint statement also records the agreement of the two engineers about a strengthening method which could be used if it was desired to remove the existing strong-rooms to provide a more open-plan internal layout. They agree that this would involve significantly more expense than if the strong-rooms were retained.

[27] The engineers also agree that it is feasible to add one or two stories to the existing building. In doing so they note that, for this option, the requirement to strengthen the existing masonry walls and the need to construct the additional storey(s) from within the existing building perimeter would double the construction costs from ground floor up to first floor (presumably compared with the cost of a new building), with construction above this level being similar to conventional construction. The addition of a first floor however would provide an ideal medium to tie the external walls to the central part of the building.

[28] Finally, the engineers agree that the existing roof cladding is beyond the end of its working life, and that there has been severe deterioration of the Gunac membrane applied sometime between 1950 and 1970 to prevent moisture ingress to the perimeter walls.

[29] At the request of the HPT, Mr Jeremy Salmond, a highly qualified and very experienced conservation architect, prepared an indicative concept of how the existing building might be adapted for Te Puna's use. He regards it as ... *eminently adaptable for this purpose.* Principally, he suggests adding a first floor to expand the service and teaching space and, in the space now occupied by the utility outbuildings at the southern end, placing a covered and paved atea, or welcoming space, with an entryway from there into the main building. The exterior of the building would be retained, in keeping with Mr Salmond's view that it is ... *a building of architectural and historic significance to the Whanganui District.* He acknowledges that the atea

[5] Caucus Statement para 23

does not face towards Moutua Gardens and the direct line of sight to the river, but has the view that:

> It does, however, provide a high level of amenity, and could be argued as having a better relationship with the facilities of the other partner in the project (UCOL). It provides also significantly greater potential for expansion.

Comparative costings

[30] As neither UCOL's nor the HPT's evidence provided us with comprehensive costing information for the building alternatives for the new facility, we have had to piece together our own assessment of the costings. In doing so we have drawn from the evidence of Mr Silvester and Mr Bruce Dickson (engineer and architect respectively for UCOL) and from our questioning during the hearing of Mr Hoskins. As Mr Dickson was unable to attend the hearing we have information provided by him in his 12 April 2013 written response to the Court's questions.

[31] Mr Hoskins told us that the cost of the new building proposed by UCOL was of the order of $2 million[6]. It is not clear whether this includes the $60,000 cost for the demolition of the NLC building[7], although in the overall scheme of things this does not appear to be particularly significant.

[32] The 2012 report of *Good Earth Matters Consulting* (Mr David Forrest, UCOL's consultant planner's firm) forms part of UCOL's Resource Consent Application and AEE and is for a new building with a floor area of about 615m^2 [8]. This is about 144 m^2 more than the 471m^2 (25.150 m by 18.720 m) [9] floor area of the existing building.

[33] The costings for the adaptive re-use of the NLC building to provide a tertiary facility with a floor area of 615 m^2 are summarised in this table:

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[6] Transcript Page 28, l 25
[7] Clark EIC para 37
[8] *gemconsulting* report para 2.4.2
[9] Clark EIC para 9

Cost Estimate for Adaptive Re-Use of NLC Building

Item	Cost ($)	Source	Comment
Seismic Strengthening to 67% NBS	1,000,000	Silvester[10]	Based on upper end of range of minus 20% to plus 50% for rough order of cost estimate of $800,000.
Compliance works to address fire safety, heating, waterproofing of the external walls, replacement of the roof, disabled person's access and toilets, mechanical ventilation and insulation.	550,000	Dickson[11]	
Building settlement mitigation works: Rutland St/Market Place	250,000	Dickson[12]	Includes geotechnical work and up to 37x15 metre piles.
Repair/refurbishment of building interiors	1,099,000	Dickson[13]	In addition to compliance costs listed above.
Extension to provide floor area equivalent to that of UCOL proposed new building (from 471m^2 to 615 m^2)	585,000	Dickson[14]	Cost of new first floor area. Excludes cost of lift and stair access, included in repair/refurbishment listed above.
Covered outdoor entry area	385,000	Dickson[15]	Provides for covered outdoor area equivalent to that of new building.
Sub-Total $3,869,000			
Less Reduction in Seismic Strengthening Cost	280,000	Dickson[16]	Floor slab for first floor extension would replace horizontal bracing provided for in seismic strengthening cost listed above. Cost reduction of $280,000 is very approximate only.
Total $3,589,000			

[10] Original evidence, 24 March 2009 (attached as Appendix 2 to 30 November 2012 rebuttal evidence)
[11] Dickson EIC Para 27
[12] Dickson Answer to Questions 12 April 2013
[13] Dickson Answer to Questions 12 April 2013
[14] Dickson Answer to Questions 12 April 2013
[15] Dickson Answer to Questions 12 April 2013
[16] Dickson Answer to Questions 12 April 2013

[34] This costing information can at best be described as being a "rough order of cost". For instance, Mr Silvester describes his cost estimate for the seismic strengthening works, as being a rough order of cost over a range from minus 20% to plus 50%.

[35] None of the costings has been peer reviewed and on the face of it there could well be elements of double counting between some of the items. Also, the extent of the building settlement mitigation works (and their associated costings) seem excessive when compared with the information provided in the engineering experts' joint statement which indicated maybe only "one pile"[17].

[36] The costings for consultant and local authority fees are quoted by Mr Dickson as being around $300,000 for the adaptive re-use option but it is not clear to us whether the $2 m cost estimate for the new building provided by Mr Hoskins includes/ excludes these fees.

[37] Considerable caution must therefore be exercised in attempting to draw a direct comparison between the cost estimates that have been provided to us for the two options other than it being quite clear that re-use of the existing building is likely to cost a lot more.

[38] In its closing legal submission, HPT has assessed that the cost of the adaptive re-use option would be in the vicinity of $2m.[18] It reaching this conclusion, it would seem that HPT has failed to include the costs of the seismic strengthening and the compliance works which were provided separately and not included in Mr Dickson's 12 April 2013 response.

[39] The capital funding for this project, if granted, will be provided by the Crown as part of Project Coverage pursuant to a capital injection agreement dated 22 July 2002. Funding provision for the project has also been approved by the UCOL

[17] Engineering experts' joint statement, 7 December 2009, para 23

[18] Closing Submission, NZHPT para 41

governing Council. We take it that this funding is presently of the order of the $2M that Mr Hoskins told us would be the cost of a new building.

[40] The costing figures both for adaptive reuse and for demolition/new construction are certainly imprecise at the moment, but we accept for the purposes of this decision that there will be a premium to be paid for retaining the existing building, strengthening it, and adapting it for the intended use. That is the all but inevitable consequence of recognising and providing for ... *the protection of historic heritage from inappropriate ... use and development.*

[41] There may be some financial assistance available from the HPT for a restoration of the existing building. Ms Alison Dangerfield, a heritage advisor for the HPT, confirmed that the maximum contribution presently available would be $100,000, but whether that or any lesser sum would actually be available would be decided on a case-by-case basis.

Zoning and Activity Status

[42] In her s87F report, Ms Voice identified that, at the time the application was lodged, the site was within the *Outer Commercial* zone, and subject to the overlay of the OTCZ.

[43] She said that the proposal is categorised as an educational facility, and is therefore a *community activity* as per the District Plan's definition of that term. Chapter 14 provided that community activities are permitted in the *Outer Commercial* zone, if they comply with the relevant zone rules. As the proposal did not comply with the Parking Loading and access rule (R47[19]) and the requirements of Rule R24, it was to be assessed as a *restricted discretionary* activity. Ms Sylvia Allan, the planner called by the HPT, agreed with this assessment.

[44] Ms Voice noted that the application seeks to demolish structures in the OTCZ. She also noted that the construction of a new structure is a *restricted discretionary* activity under Rule R180. Ms Allan agreed that *restricted discretionary* status

[19] Ms Voice explained that PC 20, now operative, amended the numbering in the Plan to make it useable online. The content of the plan was not changed.

applied to the new building, but also noted that Rule R181 makes demolition of structures in the OTCZ a fully *discretionary* activity.

[45] Under the bundling principle, Ms Voice said that the application should be treated as a *restricted discretionary* activity under the operative District Plan (that is, the plan as it stood when the application was made), but, as Ms Allan pointed out, R181 makes demolition a fully *discretionary* activity. Therefore, Ms Allan considered that the application (again, bundling the different aspects requiring consent) should be considered as a *discretionary* activity.

[46] Plan Change 21 (made operative on 25 May 2012, after the application was lodged) changed the site's zoning from *Outer Commercial* to *Arts and Commerce*, while retaining the OTCZ. The proposal is still defined as a *community activity*, but failure to comply with two rules – R238 (structures) and R240 (Parking Loading and access) still makes its construction and use a *restricted discretionary* activity. Ms Allan noted that the proposed new building does not meet R238(a) which would require the exterior walls to be built to street and site boundaries. Therefore the passive surveillance requirement of R238 cannot be achieved. As the OTCZ has not been amended, the demolition aspect of the proposal is still a fully *discretionary* activity.

[47] The overall status of the activity was not, therefore, changed as a result of PC 21. We will consider it as a fully *discretionary* activity.

The local significance of the site

[48] At para [108] of the 2010 decision, the Court found that the OTCZ under the Operative Plan did not:

> ... seek to prohibit demolition of buildings in the OTCZ and contemplates future use and development although that must be consistent with the conservation of cultural heritage. The cultural heritage which the OTCZ seeks to conserve is the European cultural heritage largely reflected in the buildings contained within the Overlay Zone.

[49] The OTCZ overlaps the broader area of Pakaitore and Moutoa Gardens. The Court noted in the 2010 decision that Pakaitore is of considerable cultural importance

to Whanganui Iwi. The evidence before us was that it was where their ancestors had kainga, fishing camps and paa; where their chiefs signed the Treaty of Waitangi; where their ancestors interacted with the new settlers for commerce and trade; and where they gathered to stage hui of regional significance.

[50] The Native Land Court building sits on the margin of the OTCZ at the corner of Market Place and Rutland Street. As the Court noted at para [17] of the 2010 decision:

> ... the site is situated at the northern extremity of the campus. Rutland Street divides the site from the bulk of the campus buildings and there is a certain stand alone element about this site in relation to the rest of the campus.

[51] The site is directly opposite Moutoa Gardens, with direct and open view shafts, appropriately looking past the statute of Major Kemp, towards the Whanganui River. It sits on the only site owned by UCOL where, in Te Puna's reported view, the Whanganui Iwi relationship with Pakaitore, Moutoa Gardens and the Whanganui River can be provided for. The possible alternative sites of the Federal Hotel on the corner of Market Place and Taupo Quay and the current car park off Taupo Quay, do not enjoy the same direct, unimpeded, link with all three iconic remnants of the cultural landscape of Whanganui township. Ms Tinirau explained that the old Court site was selected because of its natural character, its relationship with Moutua Gardens and the mana of the river.

[52] In supporting the proposition that demolition of the existing building is essential to the overall project, Mr Maassen submitted (at para 12) that:

> The Iwi Institute is the final part of Project Coverage. It is an essential part of Project Coverage and will enable the Whanganui Iwi to have a Whare o te Wananga within an important ancestral/cultural area for Whanganui Iwi and celebrate the identity of tangata whenua with strong design elements connecting them to their ancestral lands and the Whanganui Māori more fully in the life and work of Whanganui's only tertiary institution. ... The Iwi Institute will happen if the Native Land Court building is demolished. ... If it is not demolished it is improbable that Whanganui Iwi will have an Iwi Institute at all.

Section 104(1)(a) effects of the proposal - permitted baseline/existing environment

[53] UCOL suggested that part of the *permitted baseline* could be to simply leave the building as it is, and allow it to deteriorate further. We do not consider that to be part of the *permitted baseline*, as we were not referred to any rule in the Plan that permits that to occur. In the sense that *doing nothing* is not *prevented* by the Plan, the existing building, in its present state, is though part of the existing environment against which we consider the proposal. We do not consider the possibility of *demolition by neglect* to be a likely outcome and we discuss it further in the next section of the decision.

[54] Ms Allan considered the Plan's Rules, and said that they provide only for minor changes and the maintenance of structures with the OTCZ. Within the definition of *minor change and maintenance* is a detailed description of such *permitted* activities, which include: cleaning, repainting, maintenance and sympathetic replacement of surface elements. In her opinion, the *permitted baseline* for the area is an environment which would be very similar to the present, where the building's fabric may be enhanced through maintenance and minor repairs, and where a relatively wide range of activities may occupy the existing building (subject to meeting other plan requirements). Ms Allan noted Mr McElroy's evidence that UCOL could allow the building to continue to decay, but hoped that would not be the case. Ms Allan also questioned whether the building would realistically reach that state, as the Council has recently signalled the building's importance and the HPT has offered to assist.

[55] While we acknowledge that hope, it is not a requirement that the building be maintained to any standard, there is no *permitted* activity for demolition, and the changes that can be made are minor. As for the construction of the new building, the planners noted that the building fails to comply with two *permitted* activity standards.

Positive and adverse effects

[56] If the application is granted, the adverse effects on the environment will be centred on the loss of a building to which the HPT has given its highest formal

recognition for its heritage value. Others may not entirely share that level of esteem for it, nor see its loss as an adverse effect of much significance. But the considered view of the organisation charged with administering the Historic Places Act – the purpose of which is: ... *to promote the identification, protection, preservation, and conservation of the historical and cultural heritage of New Zealand* - deserves considerable respect, and as we discuss shortly we would not differ from it without clear reasons.

[57] The other side of that coin, and the positive effect promoted by the applicants, will be the construction of a new building to a design that UCOL and Te Puna both want, on a site that has significance for Te Puna; the encouragement of participation by the rangatahi of Whanganui Iwi in tertiary education (so better providing for their social, economic and cultural wellbeing), and the enhancement of their experience while studying.

[58] If the application is declined, the ultimate outcome is not clearly predictable. One possibility is that the UCOL/Te Puna partnership may abandon any plans for the site, and perhaps look elsewhere, even if alternative sites may be regarded as *second-best*. If the site is not used for the Te Puna project, it may be available to UCOL for another campus project.

[59] If the site is not used for educational purposes, we understand from Mr McElroy that the funding arrangements with the Crown would oblige UCOL to return it to Crown ownership, or dispose of it at the direction of the Crown. What may then be done with it is presently imponderable. In any event, the rather faintly suggested spectre of UCOL choosing to do nothing with the site, and allowing the building to deteriorate to the point of collapse, would be fiscally insupportable even if UCOL retained it, and hardly seems a credible possibility.

[60] The other alternative, which the UCOL/Te Puna partnership did not advance, but did not convincingly discount either, was that Te Puna might decide to make the best of what it can get and accept the existing building after all, adapted and extended perhaps along the lines suggested by Mr Salmond in his evidence or some

adaptation of it. The added first storey would give the required floor area, and would provide the opportunity for an atea, or formal 'outdoor' ceremonial area. Granted, if his plan is adopted, the atea would face towards the south-east, rather than the more desirable east-to-north, and it would not have direct line-of-sight to the river across Moutua Gardens. Alternatively, it may be possible to use the upper floor, with its views overlooking Moutua Gardens to the River, for those purposes.

Section 104(1)(b) - Planning documents - Regional Plan and Policy Statement

[61] The (partly operative) Regional Policy Statement (Part 1 of the Manawatu Wanganui Regional Council's One Plan) has these provisions:

> Objective 7-3 Protect historic heritage from activities that would significantly reduce heritage qualities.
>
> Policy 7-10 Historic heritage
>
> The Regional Coastal Plan and district plans must include provisions to protect historic heritage of national significance, which may include places of special or outstanding heritage value registered as Category 1 historic places, wahi tapu, and wahi tapu areas under the Historic Places Act 1993.
>
> Policy 7-11 Historic heritage identification
>
> (a) Territorial Authorities must develop and maintain a schedule of known historic heritage for their district to be included in their district plan.
>
> (b) The Regional Council must develop and maintain a schedule of known historic heritage for the coastal marine area to be included in the Regional Coastal Plan.
>
> (c) Historic heritage schedules must include a statement of the qualities that contribute to each site.

[62] Under 7.5 Methods, this table appears:

Method 7-9	Proactive Identification of Historic Heritage
Description	The aim of this method is to determine an approach to provide for the proactive identification of historic heritage resources within the Region. The approach may include the development of a Region-wide database or list of areas with a high potential for containing unidentified historic heritage *sites* and structures, amendments or variations to existing regional or Territorial Authority plans, or agreed partnerships for funding and carrying out surveys.
Who	Regional Council, Territorial Authorities, New Zealand Historic Places Trust, New Zealand Archaeological Association, *hapu* and *iwi* and landowners.
Links to	This method implements Policies 7-10 and 7-11.

Policy	
Targets	An approach is agreed upon within two years of this Plan becoming operative.

[63] The Regional Policy Statement concludes with this statement:

> The protection of historic heritage from inappropriate subdivision, use and development is a matter of national importance. It is considered important to provide a regional framework for the protection of historic heritage by:
>
> (a) requiring Territorial Authorities and the Regional Council to identify historic heritage sites and structures, and to include them in district plans and the Regional Coastal Plan, and
>
> (b) requiring the Regional Council to manage the effects on historic heritage for those resource use activities for which it has jurisdiction.
>
> Objective 7-3 and Policies 7-10 and 7-11 provide the regional framework, guidance and direction required to manage historic heritage.

[64] We note that the One Plan's Regional Coastal Plan provisions do, as required, extend to the protection of historic heritage in the coastal marine area (see eg Table 17.1) but those provisions are not relevant to the issues here. There is nothing in the Regional documents that requires further analysis here – they are given effect to in the District documents, rounded out by the proposed terms of PC 29.

Section 104(1)(b) - The District Plan provisions

[65] The operative District Plan has a number of provisions generally relevant to the issues. While none individually could be described as decisive either way, taken overall, we think we agree with Ms Allan's opinion that they are supportive of the HPT position. The provisions we particularly have in mind, beginning with the identified *Issues* in the District Plan, are:

> Heritage Issue 2 *Conservation of Cultural Heritage Resources of the Wanganui District*
>
> Even with identification and recognition of *cultural heritage values*, there are concerns that unless conservation mechanisms are in place, *cultural heritage values* may be eroded or lost as a result of land use activities and the development process and natural events.
>
> Damage or loss of *cultural heritage values* may be due to:

a. Poor maintenance of heritage *buildings* or items leading to a state of disrepair and structural instability, which may be costly to repair and restore, and might ultimately require the demolition of the *buildings* or items.
b. Demolition of heritage items, or redevelopment of heritage items or areas without regard to, and provision for, conservation of *cultural heritage values.*
c. Inappropriate alterations or adaptations of heritage items or areas.
d. New *development* which is incompatible with, and detracts from, the *cultural heritage values* of surrounding *buildings* or areas.

Equally, there are concerns that requirements to conserve items or places with recognised *cultural heritage values* may significantly constrain opportunities and design flexibility for new *development.*

Heritage Issue 3 *Conservation of the Cultural Heritage Values of the Old Town*

The 1990 Heritage Study of the Central Area of Wanganui has identified the Old Town of Wanganui as being of high conservation value. While individually many *buildings* and items may not be of extreme *cultural heritage significance,* the collective significance of the concentration of items and streetscapes endows the Old Town area with an overall significance that far outweighs that of the individual component.

There are *sites, buildings* and areas within the Old Town which require restoration, or redevelopment. Guidelines and incentives for the *conservation,* restoration and enhancement of *buildings,* or groups of *buildings,* in this area are considered necessary. Management of new infill *development* and redevelopment is required to ensure that new *development* is of appropriate design, materials, and scale to maintain and enhance *cultural heritage values.*

Historically, development in the Old Town was focused on, and closely associated with, the Whanganui River. Trading and transport-related activities were concentrated in the area between Bates Street and the City Bridge, and in particular, along Moutoa Quay. Historical buildings in the area have been demolished. Apart from the loss of *cultural heritage values,* the landscape and cultural significance of linkages to the Whanganui River has also been weakened. ...

Urban Issue 2 *Loss of Urban Amenity*

1. There are a number of particular amenity 'sub-issues' that relate to how the *effects* of urban land use should be managed in the interests of sustaining a high level of amenity

in the city. In order to establish what *effects* will be adverse to urban amenity, the individual components of urban amenity require identification. These would then form the basis of the 'sub issues'.

Components of urban amenities include:

a. Landscape and visual characteristics – the shape, size, landscape features, streetscape and landmarks of the urban area; bulk, location and height of buildings; openness or density of *development.* ...

d. Character – the vibrancy, style intensity and uniqueness of the urban form, its structures, and recreation opportunities, monuments and *infrastructure.*

2. Adverse effects on amenity include:

a. Features and characteristics valued by the District community could come under threat from inappropriate *development,* unsympathetic modification, pollution and *natural hazards.* The landscape character of Wanganui is defined and enhanced by a number of landscapes features, heritage buildings, landmarks and physical characteristics which give shape, cohesion, and identity to the urban area. Examples of such features include the Whanganui River and adjacent terraces, the estuary and coastal dune system, Bastia and Durie Hills, Queens Park, the Old Town and tree-lined streetscape etc. ...

d. Redevelopment and infill development within the existing urban area increases the density of development. This may reduce on site and neighbourhood amenities like daylight, privacy, outlook and visual character.

...

[66] We can then move to the relevant Objectives of the District Plan:

Objective O15 *Recognition and Conservation of the Special Cultural Heritage Significance of the Old Town*

The Old Town has a great concentration of heritage items and groups of heritage items. However, the *cultural heritage significance* of the Old Town is more than the individual items and areas that have been registered. The entire Old Town is recognised as a *conservation* area where special management is required to conserve its great *cultural heritage significance.*

Objective O23 *To ensure that development and activities in the central city area maintain or enhance the high quality amenity of the area.*

Development and *activities* have the potential to adversely affect the amenity of the central city area. Amenity will be maintained if the characteristics that people value are maintained or enhanced.

There are characteristics common to all of the areas of the central city, and characteristics unique to the individual areas that make up the central city. There are also characteristics that, while they do not currently exist, are important to create the places that the community desire.

The characteristics, or distinguishing qualities, that contribute to the amenity of *the central city area* include:

- The presence of heritage *sites* and *buildings,*
- Natural and historic heritage features;
- Good urban design. ...

In addition to the characteristics of the central city, *the old town area* has characteristics, or distinguishing qualities, that include:

- A mix of boutique, commercial and arts *activities* reliant on pedestrian movement;
- Buildings built to a high standard, up to the street frontage, reflecting the historic rhythm and with no gaps between them.

In addition to the characteristics of the central city, *the riverfront area* has characteristics, or distinguishing qualities, that include:

- Visual and physical connections with the Whanganui River;
- Riverbank shared pathway connection;
- Connects to Moutoa Gardens/Pakaitore, Queens Park/Pukenamu, and the central city;
- *Commercial activities* reliant on pedestrian movement;
- Public open space;
- Public open space is used for events and *activities.*

Objective O24 *To ensure that development and activities in the central city area reflect the importance of the Whanganui River to Wanganui*

The Whanganui River is perhaps the single most important feature of the District. Its historical significance is immense, to both colonial and Māori cultures. It is important that the significance of the Whanganui River is reflected in all development.

[67] Finally, we can refer to the Policies:

Policy P65 *Enable a range of activities that will revitalise the Old Town as a vibrant and physically attractive centre and conserve cultural heritage values to be located within the Old Town conservation area*

> Empty *buildings* or floors contribute to the physical deterioration of the building stock and threaten the economic viability of development in the Old Town. Both can lead to damage or loss of cultural heritage values.
> This policy aims at allowing greater flexibility in the way *buildings/sites* are used. The contribution of physical improvements to the *environment,* eg introduction of landscaping works, is also recognised by this *policy.*

Plan Change 29

[68] PC 29 was notified in late 2012, well after this application was made. It has yet to be considered by the Council, so it has no status other than as a possible modification to the District Plan's heritage provisions. Ms Allan said that while PC 29 removes the *Old Town Conservation* Zone in its entirety, it recognises the Old Town as a conservation area (as an Overlay zoning) and has specific provisions, including rules, for that area. She considered it to be a substantial rework of the heritage provisions of the District Plan.

[69] Ms Allan considers that some weight should be given to the objectives, policies and other provisions relating to *Built Heritage* in that Plan Change. This is because they are specific; relate to a s6 matter, and build on and enhance the way the Plan addresses heritage matters. Ms Allan also considers PC 29 assists in giving effect to the relevant RPS. PC 29 identifies the Native Land Court building as a Class A Heritage Inventory Item, which would make its demolition a *non-complying* activity if those provisions become operative. In its submissions, UCOL is somewhat dismissive of PC 29, regarding it as coloured by a *Eurocentric* view of historic heritage. In a sense, that may be so, but in this instance even if there may be a Eurocentric colour to the provisions, that will not disadvantage Māori save that their reported preference for a new, rather than adapted, building on this site will not come to pass.

[70] Ms Voice noted that UCOL has made a submission on PC 29. The submission seeks amendments to the rules about the notification of applications for different activities. Ms Voice confirmed that UCOL had not challenged the Class A categorisation for the Native Land Court Building and also confirmed that no other submitter asked for that classification to be changed. She also acknowledged that 11

Rutland Street was the only Category A item in the Old Town, and that it was given that status because of its Category 1 registration with the HPT.

[71] We note that the contents of PC 29 support the Category 1 scheduling of the building by the HPT, but given that it is at such an early stage of its processing, we give it no more specific weight than that.

Section 104(1)(c) – other relevant matters

[72] In some respects, this might have an appropriate heading under which to discuss the Court's 2010 decision, but we have found it more convenient to do so under individual topics.

Part 2 RMA

[73] In order to achieve the purpose of the RMA as outlined in section 5, we are required to have regard to the provisions of Part 2 of the RMA.

[74] We will discuss these statutory provisions about culture and heritage sequentially. Section 6 of the RMA contains matters to be ... *recognised and provided for* ... as matters of ... *national importance*. It provides:

> Matters of national importance
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance: ...
> (e) The relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.
> (f) the protection of historic heritage from inappropriate subdivision, use, and development. ...

[75] In some situations there can be a tension between matters of national importance under s6, and it was suggested that could be so here. In many circumstances, such tension can be resolved by recalling that the protection of s6(f) is not absolute, but is a protection from *inappropriate* subdivision, use and development. But, as we hope will be apparent from the balance of the decision, we think that any tension really is a construct of the way the cases for the parties have been put.

[76] Mr Salmond criticises the suggestion of conflict as:

> ... a false conflict between two matters of national importance identified in the Act. It is based on the erroneous presumption that the objectives of Te Puna and UCOL for Te Whare Matauranga O Whanganui cannot be accommodated in the existing heritage building on this site.

[77] Perhaps that is a little sternly expressed, but we are inclined to agree with the sentiment and the conclusion. There is the clear possibility that, with a little compromise on the part of Te Puna, both nationally important matters of s6(e) and (f) can be recognised and provided for.

Section 6(e) – the relationship of Māori with ancestral lands, water and sites

[78] There can be no doubt from the evidence that the Te Atihaunui a Paparangi – Whanganui Iwi have a strong relationship with the land traditionally known as Pakaitore, of which the old Court site forms part. They are the tangata whenua of this land. This area was of practical and spiritual significance to them before, and in the early times of, European contact, and it remains of cultural significance now. We heard how important it was for them to be able to regain a *foothold* in this area. It would also go some little way to restoring mana whenua for these people and would at least give them an independent physical presence on Pakaitore, close to Moutua Gardens (a place of great significance in itself) and with a direct line of sight across the Gardens to the Whanganui River.

[79] The importance of the site includes that it provides a nexus to the Gardens and the River. The latter remains of major cultural significance and is a strong icon of self-identification for all Whanganui Iwi, perhaps best expressed in the proverb:

> *E rere kau mai te awa nui mai i te Kahui maunga ki Tangaroa*
> *Ko au te awa ko te awa ko au*
> (The great river flows from the noble mountains to the majestic sea
> I am the river and the river is me)

[80] As noted above, we are required to recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga. In this case the term Māori must mean first and foremost, Te

Atihaunui a Paparangi – Whanganui Iwi and the ancestral land and waters we are concerned with are Pakaitore and the Whanganui River. We turn now to consider whether granting the consent sought is the only way of recognising and providing for that relationship.

The Māori view of the old Court building – should it be demolished?

[81] The old Court building is not, as we understand the evidence, regarded by Te Atihaunui a Paparangi – Whanganui Iwi as having cultural significance in itself. Indeed, the evidence was that it may even have strong negative connotations for Māori. That is because the Native land legislation and the Native Land Court from the 1860s to the 1920s, converted customary tenure into individualised freehold titles thereby facilitating the alienation of huge areas of land from Māori ownership. Such alienations were approved by the Court or the Land Boards in a manner that many complain accelerated the pace of colonisation. However, from the 1920s onward (ie from about the time this building was constructed and occupied) the thrust of the Native Land Court and the Land Boards work moved to focusing on recording ownership and successions; to consolidating Māori land titles into viable ownership units; and to creating productive and profitable enterprises on the land. Dubbed *the administration era* by the applicants, its work focused on Māori land development and administration – and all that of course was positive.

[82] It was originally said that for the applicants the negative memories of what had gone before still remain. As the building which housed the institutions formerly involved in land alienation and, perhaps more directly, as the repository (until the Court moved elsewhere in 1982) of the records of that alienation process, it is said that some regard the building with distaste and therefore it should be demolished.

[83] Conversely evidence for the HPT was that many Māori (who do not have a direct relationship with the land as ancestral land) would take a neutral position on the building itself. Indeed they may see its possible future adaptive use as a centre for Whanganui rangatahi involved in tertiary education as a strong and happy outcome which will outweigh and expunge whatever negatives may remain from its past.

[84] Even should they consider the history of the building as negative, Mr Te Kenehi Teira, the Kaihautu (the manager of Māori heritage nationally) for HPT, argued that negative associations can be as important as positive associations for Māori. At para 11 of his brief, he says this:

> Examples of these types of places will also be presented [ie in his later evidence] to illustrate the value that iwi, hapu and whanau hold for places that have negative historical associations. Two of the examples, also former Native land Court buildings, have been conserved and adaptively reused for modern purposes with the support of iwi, hapu and whanau.

[85] We consider that these two contrasting views do not indicate one way or the other why the relationship of the Whanganui Iwi cannot be recognised and provided for without the need to demolish the building. The views of Māori from other iwi, while important to how the history of the building should be portrayed, either as of regional or local significance, do not assist in the determination of how to recognise and provide for the ancestral relationship of Atihaunui a Paparangi – Whanganui Iwi with the site.

[86] While we must recognise and provide for s6(e) matters, our clear view is that any stigma associated with the Land Board and the Native Land Court cannot be the basis for preferring the UCOL/Te Puna demolition and rebuild option over the adaptive reuse of the building. We would require much stronger and direct evidence about such sentiment as a basis for rational decision making, and no authority has been cited to justify such an approach. We consider, as an alternative, that we can provide for and recognise s6(e) matters by reconciling these with the matters we must recognise and provide for under s6(f).

[87] Another, although somewhat faint and indirect, suggestion about a disapproving view of the building came from the fact, mentioned earlier, that that site was purchased, and the building constructed, using Māori Land Board funds. The Board was responsible for collecting rents for leased Māori land and distributing it to the (often multiple) owners. Sometimes, said to be because of administrative shortcomings, that was not properly done, and sometimes because the individual amounts were so trifling that they were not worth the owners' bother of coming to

town to collect them, parts of the rents were never distributed. After a lapse of time, unclaimed amounts were accumulated by the Board as *surplus* funds. In part at least, these were the funds used to finance the new building, together with other funds accumulated by the Board which did not carry the taint of being money that *should have* found its way to its rightful owners. What the relative amounts and proportions of these income flows were, we simply do not know. One can understand a lingering sense of unfairness about that although it was a process having an exact and current counterpart in the Unclaimed Money Act 1971, where money held by various institutions and deemed to be *unclaimed*, is required to be paid to the Commissioner of Inland Revenue and is available for use as part of the Crown Bank Account.

[88] More importantly, we do not see how this can be relevant to a decision under s6(e) because the money used by the Land Board would have been derived from the lands of the many tribes throughout the Aotea region not just the Whanganui Iwi and their lands.

Section 6(f) - heritage values

[89] The RMA defines *historic heritage* as:

> (a) ... those natural and physical resources that contribute to an understanding and appreciation of New Zealand's history and cultures, deriving from any of the following qualities:
>
> (i) archaeological:
> (ii) architectural:
> (iii) cultural:
> (iv) historic:
> (v) scientific:
> (vi) technological; and
>
> (b) includes—
>
> (i) historic sites, structures, places, and areas; and
> (ii) archaeological sites; and
> (iii) sites of significance to Māori, including wāhi tapu; and
> (iv) surroundings associated with the natural and physical resources

[90] It is clear from this provision that we are required to recognise and provide for both European and Māori historic heritage where they are both present in cases before us. The question is one of balance depending upon the circumstances of the case and the relevant planning documents. In this case, we have a historic building on one part of an important cultural site.

[91] The building is important because it has received HPT registration under the provisions of the Historic Places Act 1993. The purpose and principles of that Act are set out in s4:

> (1) The purpose of this Act is to promote the identification, protection, preservation, and conservation of the historical and cultural heritage of New Zealand.
>
> (2) In achieving the purpose of this Act, all persons exercising functions and powers under it shall recognise—
>
> (a) The principle that historic places have lasting value in their own right and provide evidence of the origins of New Zealand's distinct society; and
>
> (b) The principle that the identification, protection, preservation, and conservation of New Zealand's historical and cultural heritage should—
>
> (i) Take account of all relevant cultural values, knowledge, and disciplines; and
>
> (ii) Take account of material of cultural heritage value and involve the least possible alteration or loss of it; and
>
> (iii) Safeguard the options of present and future generations; and
>
> (iv) Be fully researched, documented, and recorded, where culturally appropriate; and
>
> (c) The relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wahi tapu, and other taonga.

[92] It can be seen that the provisions in the two statutes, the RMA and the Historic Places Trust Act 1993, are entirely compatible. The Native Land Court building is registered with the HPT with a Category 1 listing and, as a result of Plan Change 29 (and because it is an HPT Category 1 building), it is proposed to be listed in the heritage inventory of the District Plan for Category A protection.

[93] The HPT, in summary, contended that the building has important heritage values because:

- *It has architectural significance*, this being derived from the period and style of its design and construction, and its context and streetscape values. It was one of the last two buildings that Government Architect John Campbell was responsible for before he retired in 1922. The other was Parliament Buildings.

- *Uniqueness* - the building is unique as there is no other like it within the OTCZ. Adaptive reuse would allow it to continue to contribute to the streetscape of Market Place and the OTCZ. Its absence would diminish the variety and extent of the OTCZ by removing the firmness of the building on the corner.
- *Historical significance* - the HPT noted the history of the Native Land Court and the Land Board.

[94] In terms of s22 of the Historic Places Act 1993, a classification as Category 1 indicates that the Trust regards the building as a place ... *of special or outstanding historical or cultural heritage significance or value*. Having so classified it, the HPT regards the building's demolition as a breach of the principles of the Act and of the ICOMOS: International Charter for the Conservation and Restoration of Monuments and Sites: NZ Charter. Its position is that the building should be adapted for reuse by UCOL, and that that can be done at a reasonable cost, although we note again that in its closing submission HPT omitted to include the costs of the seismic strengthening in its assessment of the overall cost for reuse.

[95] Section 22 also expresses *the purposes of the register* as including:

> (2) ...
>
> (c) To assist historic places, historic areas, wahi tapu, and wahi tapu areas to be protected under the Resource Management Act 1991.

[96] The placing of a building or site on the HPT register does not have the legal effect that the making of a heritage order under s187ff of the RMA would have, and the registration does not, as a matter of law, create an onus which an applicant must displace. But it does reflect the considered and processed opinion of an expert body, measured against the criteria in s23 of the Historic Places Act, and as such is worthy of considerable respect and should not be overturned without coherent evidence.

[97] Conversely, in the 2010 decision, the Environment Court was somewhat lukewarm about the heritage significance of the building. At para 136ff it said this:

> [136] In the *Heritage Issues* section of this decision we identified that the significance attributed to the Māori Land Court building by NZHPT derived from its

architectural and historic qualities. Although we accept that the building does have architectural and historic qualities as identified by NZHPT we have some reservations as to whether or not those qualities are of the significance which NZHPT has asked us to attribute to them.

[137] In para [90] of this decision we ask the questions what is specifically *unique* or *purpose built* about the building. It appears not untypical of small administrative buildings of the 1920's/30's era. We do not think that there were any features which proclaimed it to be a Māori Land Court. We appreciate that the building was designed by the Public Works Department of the New Zealand Government whilst Mr Campbell was its director. Whether it is one of his significant works seems highly debateable.

[138] Insofar as historic significance is concerned, we generally accept the propositions advanced for NZHPT that retention of the building as a symbol or reminder of the history of land alienation both in the Whanganui region and in New Zealand generally and the effect which this alienation had on Māori communities may potentially contribute to the understanding and appreciation of New Zealand's history and cultures. On the other hand, those Māori interests represented by Te Puna at our hearing might consider that contribution less important than advancing their own social and cultural needs and indeed might wish to see the symbolic reminder demolished as a desirable end in itself.

[139] Our acknowledgement of the building's historic significance however must be tempered. We have referred to the Māori Land Court building as potentially contributing to the understanding of our history and cultures by providing a reminder or symbol of the land alienation process. We have deliberately used the word *potentially*.

[140] Other than to that section of the community which has a particular knowledge or interest in the building it presently provides little of a reminder or symbol. There is nothing of any kind on the building at present to indicate what its initial use was. There is nothing to indicate that it was a courthouse, let alone a Māori Land Courthouse. It simply appears to be a small, old, somewhat dilapidated building which may have been used for administrative purposes. While there may be a story to be told by the building, it does not presently tell that story to the wider public.

[141] It might be possible for the building to be adaptively reused for some other purpose and as part of that process for it to be rejuvenated in some way so as to highlight its historic significance. We think that would be a matter of some moment

> and a desirable outcome. It is not one which can be forced on UCOL. It is equally possible that the building could be left to deteriorate to such an extent that its retention becomes impossible. This is the process known as demolition by neglect. Arguably the building's historic significance might be appropriately marked in some way by memorialisation even if it was demolished, but there was no firm proposal before us in that regard.

[98] We find ourselves more positive about the historic heritage value of the building than did the Court in 2010. In addition to the witnesses heard then, we had the advantage of the appraisal by Mr Salmond, who was very positive about it. He considered it to be ... *a building of architectural and historic significance to the Whanganui district.* In considering the comments made about it in the 2010 decision, he went on to say:

> In the previous case the Court notes that there is *"nothing to indicate that it was a courthouse, let alone a Māori Land Courthouse"*. At that time, however, architectural styles were not generally applied to reflect the functions of such buildings (and nor are they today), but were intended to provide an appropriate setting in the wider urban landscape for the activities they accommodated. They followed formal architectural rules of order, scale and geometry, which were applicable to all institutional and most commercial buildings.

[99] Nor did Mr Salmond agree with the Court's view that the building has diminished heritage value because it presented as ... *a small, old, somewhat dilapidated building that may have been used for administrative purposes.* He said:

> In my professional view the former Land Court is a sound building that is the victim of systematic neglect through lack of prudent maintenance that all buildings need for their well-being.
>
> I do not agree that being "small" or "old" diminishes either the historic significance or utility value of this or any other heritage building, nor its capacity to be adapted for a new purpose. (He then went on to note the revised and now significantly smaller UCOL space requirements.)

Conclusions on s6

[100] We conclude, first that the adaptive reuse of the existing building could, on the evidence we heard, recognise and provide for the relationship of Māori (Te

Atihaunui a Paparangi – Whanganui Iwi) with their ancestral land, water, and sites. Secondly, the provision of specific space in Pakaitore for fostering cultural activities and awareness among Māori UCOL students would recognise and provide for their culture and traditions and their relationship with their ancestral lands, waters and sites. Thirdly, we accept the evidence for the HPT that the existing building is a significant piece of historic heritage in local, regional, and national terms and should be protected from inappropriate use and development.

[101] The only open issue might be whether the building is significant enough that the reported disinclination of Te Puna to have it adapted for the intended use makes its demolition and replacement an appropriate use and development.

[102] Our clear view is that it does not. While we can understand a wish to have a new and purpose-built facility the existing building can, we are satisfied, be adapted and made to satisfactorily fit Te Puna's purpose, with only minor compromises in design, while at the same time recognising and providing for a matter of national importance. We do not, however, go so far as to approve the design suggested by the HPT, but rather consider that so long as the facade of the building is maintained, the applicants should be free to utilise the interior as they see fit.

[103] We repeat here our earlier acceptance that there will be a premium to be paid for retaining and reusing the existing building, in our view an all but inevitable consequence of recognising and providing for the protection of historic heritage from inappropriate use and development.

Section 7

[104] Section 7 contains the matters to which we are to also have ... *particular regard*. It provides:

> 7 Other matters
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—
>
> (a) Kaitiakitanga:
> (aa) The ethic of stewardship:
> (b) The efficient use and development of natural and physical resources:
> (c) The maintenance and enhancement of amenity values:

(f) Maintenance and enhancement of the quality of the environment:
(g) Any finite characteristics of natural and physical resources:

[105] The term *kaitiakitanga* is defined as the *exercise of guardianship by tangata whenua of an area in accordance with tikanga Māori in relation to natural and physical resources; and includes the ethic of stewardship.* The term *tangata whenua* is defined as the iwi, or hapu, that holds mana whenua over a particular area. *Mana whenua* is defined as the ... *customary authority exercised by an iwi or hapu in an identified area.*

[106] Kaitiakitanga was an issue discussed by Mr Hoskins, Ms Tinirau and Mr Teira. These witnesses accepted that the Kaitiaki for this area were Whanganui Iwi. It was also accepted that there were obligations associated with the term, including looking after the students from other tribes who participate in activities occurring within the new facility. Ms Tinirau noted that the principle of manakitanga would govern the issue. Mr Hoskins and Ms Tinirau explained that the new building would incorporate design features that emphasise Whanganui Iwi identity and whakapapa links to the other iwi of the UCOL area.

[107] We note that the obligations of kaitiakitanga may also include acknowledging other Māori in the region when deciding whether to support demolition of the building or, alternatively, deciding how to preserve and present the history of the Native Land Court from a regional perspective.

[108] The latter obligation arises because the geographical district of the Aotea Native Land Court and the Aotea Māori Land Board – for which Whanganui was, and remains, the only Registry and depository of Māori land records, is huge. Its boundary extends from northern Taranaki eastwards to Lake Taupo and down the mountainous central spine of the Island to Wellington, so it includes Taranaki, Taihape, Turangi, Ruapehu, Rangitikei, Manawatu, Horowhenua/Kapiti and Wellington, encompassing the rohe of many iwi. Those iwi include Ngāti Ira, Ngāi Tara, Ngāti Toa, Te Atiawa, Ngāti Raukawa, Rangitane, Ngāti Apa, Muaupoko, Ngāti Haua, Ngāti Tūwharetoa, Ngāti Hauiti, Te Atihaunui-a-Paparangi, Pakakohe/Tangahoe, Ngā Rauru, Ngāti Ruanui, Ngāti Tama, Ngāti Maru, Ngāti

Mutunga, Taranaki, Ngā Ruahine. There are also the smaller groups identified by Mr Teira. This information is readily available on the Māori Land Court web-site.

[109] While there were satellite Court sittings at venues throughout the District, the Court held the title records of most of these tribes in Whanganui. The records of the hearings were stored in the building, or in Wellington, and many Māori from these tribes would have travelled to Whanganui or Wellington to access them. The Minute Books for Aotea are replete with their traditional and cultural histories, or with the Court cases that were filed to defend land rights. One of these was the famous case of *Te Heuheu Tukino v Aotea District Māori Land Board* [1941] NZLR 590, eventually resolved in the Privy Council. The short point is that the use of the building is not only relevant to the history of Whanganui Iwi, it is also relevant to other Iwi of the historic Aotea Native Land Court District. We do not consider that we are over inflating the importance of the building by recognising this point; rather we are reporting why it is historically significant to the region.

[110] While in tikanga terms, the ahi kaa, rangatiratanga and kaitiakitanga of Te Atihaunui a Paparangi – Whanganui Iwi are to be respected, the link for the other tribes should also be acknowledged.

[111] A further matter to which we have had regard is the definition of *the ethic of stewardship*. A steward is one who manages the property or estate of another - recognition that a current generation is to be charged with, in terms of s5, sustaining the potential of resources to meet the reasonably foreseeable needs of future generations. Protecting historic heritage for Māori and other New Zealanders has resonance in this case, although we recognise that it should not impose an obligation on an owner to maintain a heritage item at all costs: - see eg *NZHPT v Christchurch CC* (C173/2001).

[112] We also consider that the maintenance and enhancement of amenity values, and the quality of the environment, will be met by protecting this building, from use and development that is inappropriate in s6 terms. Our approach is also an

acknowledgement of the finite characteristics of the physical resource of heritage buildings. By definition, they are scarce and irreplaceable.

Conclusions on s7

[113] As with the s6 factors, and having *particular regard* to the s7 issues we conclude that the principles of the section would be best served by a solution that avoids demolition of the existing building, in favour of allowing its adaptive reuse.

Section 8 – the Treaty of Waitangi

[114] It of course needs to be recognised that the partnership embedded in the Treaty is between Māori and the Crown, and that UCOL and the Council are not the Crown and are not subject to the obligations imposed on the Crown.

[115] But there was no disagreement that the principles of the Treaty to be *taken into account* here (in terms of s8) are those of the obligation to act reasonably and in good faith, and of rangatiratanga: - see eg *Hanton v Auckland CC* [1994] NZRMA 289; and *Outstanding Landscape Protection Society Inc v Hastings District Council* [2008] NZRMA 8.

[116] We consider that the rangatiratanga of Whanganui Iwi is not denied by declining this consent. Rather it is reconciled with the competing interests of other New Zealanders, including other Māori, represented by the HPT. In addition, as kaitiakitanga is an element of rangatiratanga, we consider the impact of the Native Land Court in the history of the region should be acknowledged and accommodated. In the end, how this should be done should be left to the applicants.

Conclusion – s5 – the purpose of the Act

[117] In summarising its reasons in the 2010 decision, the Court said (para [47]) that the uncertainty about just what was proposed as the replacement facility was significant for two reasons:

> At least one plank of UCOL's case was the inability of the present Māori Land Court building to be adapted for use for modern educational purposes. We were told that what is required to meet Māori educational needs at UCOL is a three storey, 1200m^2

> building which cannot be accommodated by adaptive reuse of the Māori Land Court building. However, those requirements have been arrived at by reference to a specific series of design guidelines catering for uses which might never be accommodated within the iwi institute. On the basis of the evidence which we heard, there are some real questions as to whether or not a structure of the dimensions proposed (and which therefore requires demolition of the present building), is in fact required to meet Te Puna's needs.
>
> Ultimately, we think that the outcome of these proceedings comes down to an assessment of the social and cultural benefits which might accrue to Māori from the establishment of the iwi institute against the adverse effects on heritage values which might arise from demolition of the Māori Land Court building. It is however, difficult to assess the benefits to Māori in other than a quite vague and general way, when the nature of the iwi institute and what it is to do remains as nebulous as it presently appears to be.

[118] As we see it, the position now is significantly different in material respects. It is not now suggested that only a three-storey, 1200m^2 building will suffice. The required floor area is now half that and, as Mr Salmond has modelled, the existing building could be adapted and expanded to meet that requirement. The Court's earlier doubt has been clarified – demolition is not required to meet Te Puna's needs.

[119] Secondly, it is now possible to better compare, insofar as such different concepts can be compared, the social and cultural benefits which would undoubtedly accrue to Māori from the establishment of the institute, against the adverse effects on heritage values which would arise from the demolition of the building. More to the point, it is possible to say that now that the actual requirements are known, with a little compromise on the part of UCOL/Te Puna, and the expenditure of more money, the community can have the benefits of both the institute and the retention of a heritage building. If both can reasonably be had, the dilemma of the sacrifice of one to achieve the other no longer needs to be resolved.

[120] If the existing building is kept, and adaptively reused, its significance as the home of the former Land Board and Native Land Court, and Māori Land Court could very well be marked by good memorialisation of those times and events in its history. As one mitigant of the loss, or the absence, of that history, memorialisation

should not, we suggest, be done only when a building is demolished. If it changes use, its former significant uses deserve to be recorded.

Result

[121] For the reasons traversed, we have come to the clear view that, when the purposes of the UCOL/Te Puna partnership can be met by adaptively reusing this building, to demolish it to make space for a new building will be an inappropriate use and development of it, and thus fail to recognise and provide for a matter of national importance, in terms of s6. We should add too that given the extensive reworking of the building's interior over the years, we would not be overly concerned at the absence of an attempt to recreate the interior's original form. In the end though, that will be a matter to be decided if and when there is an application for consent to renovate and adapt it.

[122] In the overall weighing of issues to decide whether the application would meet the purpose of the Act – *the sustainable management of natural and physical resources* - we conclude that the adaptive reuse of this building for the purpose of enabling people and communities to enhance their cultural and economic (and probably social also) wellbeing will undoubtedly be the better option.

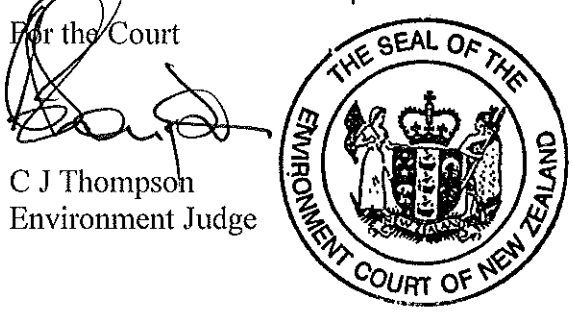
[123] The application for a resource consent authorising the demolition of the building is declined.

Costs

[124] Costs are reserved. Any application should be made within 15 working days of the issuing of this decision, and any response lodged within a further 10 working days.

Dated at Wellington this 17th day of May 2013

For the Court



C J Thompson
Environment Judge

TAB 18

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-002294
[2015] NZHC 1035

UNDER	the Resource Management Act 1991
AND	
IN THE MATTER	of an appeal against a decision of the Environment Court under section 299 of the Act
BETWEEN	THUMB POINT STATION LTD Appellant
AND	AUCKLAND COUNCIL Respondent

Hearing: 26 March 2015

Appearances: M Williams for Appellant
G Lanning and A Smith for Respondent

Judgment: 18 May 2015

(RESERVED) JUDGMENT OF ANDREWS J

This judgment is delivered by me on 18 May 2015 at 2.30 pm pursuant to r 11.5 of the High Court Rules.

.....
Registrar / Deputy Registrar

Introduction

[1] Thumb Point Station Ltd and associated entities[1] own the Man O'War farm on Waiheke Island. Thumb Point appealed to the Environment Court in relation to subdivision rules set out in the Proposed Auckland Council District Plan - Hauraki Gulf Islands ("the HGI Plan"), notified in September 2006 (Decisions Version issued in May 2009).

[2] In its decision delivered on 13 August 2014, the Environment Court rejected Thumb Point's submission that more liberal rules should be made in the HGI Plan for subdivision of those parts of the Man O'War farm designated as "Landform 5" (productive land).[2] The subdivision issue was one of five issues determined by the Court. Only the subdivision issue was subject to the present appeal.

[3] Thumb Point has appealed to this Court pursuant to s 299 of the Resource Management Act 1991 ("the Act") on the grounds that the Environment Court made errors of law in its consideration of proposed amendments to the subdivision rules for Landform 5.

Relevant statutory provisions

[4] Sections 72–76 of the Act relate to district plans. Section 72 sets out the purpose of a district plan as being "to assist territorial authorities to carry out their functions in order to achieve the purpose of the Act". The purpose of the Act is set out in s 5: "to promote the sustainable management of natural and physical resources".

[5] Sections 73–75 set out provisions as to the preparation and change of district plans (s 73), matters to be considered by a territorial authority when preparing and changing its district plan (s 74), and the contents of a district plan (s 75). Section 76 provides that a territorial authority may include rules in a district plan, for the

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1 Huruhe Station Ltd, Man O'War Farm Ltd, Man O'War Station Ltd and South Coast Station Ltd, collectively referred to in this judgment as "Thumb Point".

2 *Thumb Point Station Ltd v Auckland Council* [2014] NZEnvC 175 ("the Environment Court decision").

purpose of carrying out its function under the Act and achieving the objectives and policies of the plan.

[6] The Environment Court has set out tests to be applied when considering proposed district plan provisions as being whether the provisions:[3]

(a) accord with and assist the Council in carrying out its functions under Part 2 of the Act;

(b) take account of effects on the environment;

(c) are consistent with and give effect to applicable national, regional and local planning documents; and

(d) meet the requirements of s 32 of the Act, including whether the policies and rules are the most appropriate for achieving the objectives of the plan.

[7] Section 32 of the Act, as at the time the HGI plan was notified,[4] provided:

> **32 Consideration of alternatives, benefits, and costs**
> (1) In achieving the purpose of this Act before a proposed plan, proposed policy statement, change, or variation is publicly notified, a national policy statement or New Zealand coastal policy statement is notified under section 48, or a regulation is made, an evaluation must be carried out by—
> (a) the Minister, for a national policy statement or a national environmental standard; or
> (b) the Minister of Conservation, for the New Zealand coastal policy statement; or
> (c) the local authority, for a policy statement or a plan (except for plan changes that have been requested and the request accepted under clause 25(2)(b) of Part 2 of Schedule 1)
> (2) A further evaluation must also be made by—
> (a) a local authority before making a decision under clause 10 or clause 29(4) of the Schedule 1; and
> (b) the relevant Minister before issuing a national policy statement or New Zealand coastal policy statement.

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3 See e.g. *Long Bay-Okura Great Park Society Inc v North Shore City Council* Environment Court A78/2008, 16 July 2008 at [34] and *Fairley v North Shore City Council* [2010] NZEnvC 208 at [7].

4 As at 10 August 2005 to 30 September 2009.

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

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

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

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

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

[8] Relevant to the HGI plan are the New Zealand Coastal Policy Statement 2010 ("NZCPS 2010") and the Auckland Regional Policy Statement ("ARPS"). The ARPS contains provisions which must be given effect to in the HGI plan. Of particular relevance is policy 2.6.17, which seeks to manage the use, development and protection of natural and physical resources and the subdivision of land in rural areas in an integrated manner.

[9] Objective 6.3.5 of the ARPS is "to maintain the overall quality and diversity of character and sense of place of the landscapes in the Auckland region" and objective 7.3 relates to the preservation of the coastal environment and its protection from inappropriate subdivision, use and development. Related policies include policy 6.4.22.3, which relates to the management of landscapes immediately adjoining areas identified as "outstanding natural landscapes" ("ONLs")[5] so that they protect the visual and biophysical linkage between the two areas, and policy

[5] See *Man O'War Station Ltd v Auckland Council* [2015] NZHC 767; this Court's judgment on the appeal by Man O'War Station Ltd against the identification of ONL 78 on Man O'War farm on Waiheke Island in Proposed Change 8 to the ARPS.

6.4.22(7) which provides that subdivision incentives associated with the restoration and enhancement initiatives may be appropriate in certain circumstances.

[10] The HGI plan sets out strategic objectives for resource management issues across the gulf islands. Particularly relevant in the present case are:

> **A** **Objective 2.5.4.3**. To limit the intensity of land use and subdivision to a level which is appropriate to the natural character of the coastal environments.
>
> **B** **Objective 2.5.4.1**. To ensure that buildings and structures in areas of high natural character and/or significant landscape value are sited and designed in a manner that maintains the dominance of the natural environment.
>
> **C** **Objective 2.5.5.3** To encourage retention, management and enhancement of existing indigenous vegetation and the rehabilitation and enhancement of degraded areas of existing indigenous vegetation.
>
> **D** **Objective 2.5.5.4**. To achieve positive environmental benefits from subdivision and development including planting and protection of significant environmental features, heritage features, and other notable landscape features.

[11] Also relevant are the following objectives and policies in s 3 of the HGI Plan: "strategic management areas":

> **A** **Objective 3.3.4**. To provide for the economic, social and cultural well-being of the Waiheke community while ensuring the protection of the historic heritage, landscape character, the natural features, eco sytems and visual amenity of the Island.
>
> **B** **Policy 3.3.4.2**. By providing for larger scale, rural activities to occur in eastern Waiheke, while ensuring that such development does not detract from the natural landscape and natural features of the Island.
>
> **C** **Policy 3.3.4.4**. By protecting the landscape character of the Island, including its elements and patterns, particularly outstanding natural landscapes, coastal and rural landscapes and landscapes with regenerating bush.
>
> **D** **Policy 3.3.4.5**. By protecting and, where appropriate, enhancing natural features and associated processes, such as wetland systems, indigenous vegetation, wild life habitats and coastal and other eco systems.

[12] This appeal concerns, in particular, the minimum site area for restrictive activity subdivisions in "Landform 5" (productive land). Landform 5 has specific

objectives and policies which are set out in s 10(a).6 of the HGI plan. Of particular relevance are:

> **A** **Objective** 10(a).6.3. To provide for productive activities and to ensure that the open pattern and rural character of the landscape is maintained.
>
> **B** **Policy** 10(a).6.3.1. By providing for productive activities such as pastoral farming, viticulture and horticulture to establish and operate within the land unit.
>
> **C** **Policy** 10(a).6.3.2. By limiting the non-productive activities that can occur so that the rural use and character of the landscape is maintained.
>
> **D** **Policy** 10(a).6.3.3. By requiring new sites to be of a size and nature which ensures that moderate to large scale productive activities can occur and which protects the open pattern and rural character of the landscape.

[13] Part 12 of the plan deals with subdivisions. Under restricted discretion activity r 12.8.2, the minimum site size in Landform 5 is 25 ha.

The Environment Court decision

[14] The Court noted that Thumb Point sought to have the rules as to the minimum lot sizes for Landform 5 to be amended by reducing the minimum from 25 ha to 15 ha. The Court also noted that the 15 ha minimum was sought to apply to only those parts of the Waiheke property which were not part of the area identified as ONL 78. The Court recorded that Thumb Point proposed that the subdivision rules be amended so that the minimum restricted discretionary activity lot size within the ONL would be maintained at 25 ha, while in the remaining areas of Landform 5, the minimum lot size would be 15 ha, with an expanded assessment criteria which allowed for active re-vegetation.[6] Thumb Point argued that this represented the most appropriate method for achieving the objectives and policies of the HGI Plan.

[15] The Court summarised the respective submissions for Thumb Point and the Council. The Court noted Thumb Point's submission that an "arbitrary" minimum lot size for Landform 5 of 25 ha would neither achieve the purpose of the Act, nor be the most appropriate (efficient or effective) way of achieving the objectives and policies of the HGI plan. The Court noted that it was Thumb Point's case that a

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6 Environment Court decision, above n 2 at [20]–[23].

minimum lot size of 25 ha is too small for pastoral farming and too large for horticulture, and consequently inefficient in terms of s 32 of the Act.[7]

[16] The Court then recorded Thumb Point's submission that the (unspecified) revised rule framework it sought would give better effect to objectives and policies of the NZCPS 2010, operative regional policy statement policies for the coastal environment, protection of areas identified as ONL, provisions of the HGI plan, and specific Landform 5 objectives.[8]

[17] The Court noted the submission for the Council that a relatively straight-forward rule framework should be retained, with a 25 ha minimum site area for all Landform 5 areas. The Court also noted the submission for the Council that a 25 ha minimum was the most appropriate, as it would meet the subdivision objectives of the HGI Plan and the objectives and policies of Landform 5, and would not reduce the productive capacity of the land. The Council had also submitted that reducing the minimum from 25 to 15 ha would potentially change the nature of the landscape from one with an open pattern and rural character to one of greater diversity, reduced land use scale and openness, and increased presence of built form.[9]

[18] The Court then summarised the evidence given for Thumb Point and the Council.[10]

[19] In its "evaluation and findings", the Court first noted that Thumb Point had not proffered a specific rule change, but had set out its understanding of what amendments would be required.[11] The Court then stated:[12]

> This part of the case being concerned with an inquiry under s 32(3), we confine our attention to the objectives. That is, we cannot for the present purpose bring to account methods, or policies in the HGI plan, or indeed higher-order planning imperatives … as urged by [Thumb Point] as well.

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7 At [25]–[26].
8 At [27].
9 At [30]–[31].
10 At [37]–[66].
11 At [67]-[69].
12 At [71].

[20] Having referred to the HGI objectives put forward by Thumb Point, the Court noted that "the difficulty" for Thumb Point was that most of the objectives referred to could be discounted from the equation by reason of their focus on protection, preservation, retention, management, avoidance, and reference to existing features. The Court considered that objective 2.5.5.4 in the HGI Plan (to achieve positive environmental benefits from subdivision and development including planting and protection of significant environmental features, heritage features, and other notable features) was the most relevant. However, the Court said:[13]

> … We are faced with the wording of the provision that focuses on features. The provisions (indeed the relevant parts of the HGI plan) are notably deficient in encouraging re-vegetation for enhancement or even remediation of natural landscapes.
>
> (underlining as in original)

[21] The Court accepted as correct the submission for the Council that "this lacuna" was explained by the fact that Landform 5 "is essentially concerned with an area providing for productive activities, and that is why 2.5.5.4 goes no further than the protection or enhancement of features".[14]

[22] The Court concluded:[15]

> Section 32 RMA is constructed in imperative terms ("must"). [Thumb Point] has drawn too long a bow in its submissions on the point. It is questionable whether the evaluations required by the section have been undertaken, but even if they have, we cannot be satisfied that the provisions advanced by [Thumb Point] are the most appropriate way to achieve the plan objectives as analysed by us above.
>
> We cannot find in favour of [Thumb Point] on issue 1. We simply observe that if in future there are to be proposals to loosen density controls in this part of Waiheke, it might be desirable if they take the form of a comprehensive suite of objectives, policies and methods. Naturally, we can make no prediction about the likelihood of such proposals.

Appeal issues

[23] Thumb Point appeals against the Environment Court's decision on the following grounds:

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13 At [73].
14 At [74].
15 At [75]–[76].

(a) The Court was wrong to apply s 32 of the Act as a limit to the Court's jurisdiction. Thumb Point argues that the Court declined to determine the appeal on the basis that it was unable to do so, because s 32 had not been complied with.

(b) In any event, the Court misapplied the objectives of the HGI Plan in rejecting Thumb Point's proposal.

[24] The Council contends in response:

(a) The Court did not apply s 32 as a limit to its jurisdiction, but did in fact determine the substance of the appeal directly.

(b) The Court applied the objectives of the HGI Plan correctly. Re-vegetation is not consistent with the objectives of the HGI Plan.

(c) Thumb Point's appeal is not on a question of law; rather it involves revisiting the merits of the matter, which should not be countenanced.

(d) Even if this Court were to re-examine the merits, it should not differ from the Environment Court's conclusion. In particular, Thumb Point's proposal was insufficiently certain to be applied.

Approach on appeal

[25] In my earlier judgment in *Man O'War Station Ltd v Auckland Council*,[16] I set out the agreed approach to be taken in an appeal to the High Court under s 299 of the Act. It suffices to summarise the approach as follows:[17]

(a) An appeal to this Court under s 299 of the Act is an appeal limited to questions of law, and appellate intervention is therefore only justified if the Environment Court can be shown to have:

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16 *Man O'War Station Ltd v Auckland Council*, above n 5 at [25]–[27].

17 See *Ayrburn Farm Estates Ltd v Queenstown Lakes District Council* [2012] NZHC 735, [2013] NZRMA 126 at [33]–[36]; *Young v Queenstown Lakes District Council* [2014] NZHC 414, at [19]; and *Guardians of Paku Bay Association Inc v Waikato Regional Council* (2011) 16 ELRNZ 544 (HC) at [33].

i) applied a wrong legal test; or

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

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

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

(b) The Court will not engage in a re-examination of the merits of the case under the guise of a question of law, and the question of the weight to be given relevant considerations is for the Environment Court alone and is not for reconsideration by the High Court as a point of law.

(c) Further, not only must there have been an error of law, the error must have been a 'material' error, in the sense that it materially affected the result of the Environment Court's decision.

(d) The High Court acknowledges the expertise of the Environment Court, and will be slow to determine what are really planning questions, involving the application of planning principles to the circumstances of the case.

The HGI Plan "anomaly"

Submissions

[26] Before addressing the specific appeal issues, Mr Williams referred in his submissions to the "anomaly" or "lacuna" in the HGI Plan. This was that in an "unrestricted" discretionary activity application for a subdivision consent the Council considers (under r 12.11.13 of the HGI Plan):

> The extent to which the subdivision provides for ecological restoration and enhancement where appropriate. Ecological enhancement may include enhancement of existing indigenous vegetation, replanting, and weed and pest control.

[27] However, in r 12.8.2 of the HGI Plan, which sets out the matters the Council may in the exercise of its discretion consider in relation to an application for a restricted discretionary activity, "ecological restoration and enhancement" is not included; nor are any of the other matters set out in r.12.11.13 (the extent of adverse effect on natural features, patterns and landscape character, the extent to which the size and shape of sites maximises protection of indigenous vegetation, and the extent to which the proposed subdivision maximises the use of areas already cleared for vehicle access and building sites). Thus active re-vegetation could not be required as part of a subdivision complying with the 25 ha minimum lot size in Landform 5.

[28] Mr Williams submitted that in its decision the Environment Court had noted the deficiency in the HGI Plan, but had rejected submissions that it could, and should, move to correct the anomaly by including additional assessment criteria. He submitted that the Court had done so on a "technicality" that was wrong in law. He submitted that this was the principal motivating factor behind the appeal.

[29] Mr Williams submitted that the Environment Court had erred in law in that, notwithstanding its finding that the HGI Plan provisions (including the Plan's objectives) were notably deficient, the Court treated those objectives as determinative, precluding any further consideration of Thumb Point's proposed amendments, once it had found that those amendments did not meet the HGI Plan objectives. Referring to the Environment Court's decision in *Eldamos Investments Ltd v Gisborne District Council*,[18] and the Supreme Court's judgment in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*,[19] he submitted that the deficiencies in the HGI Plan required the Court to consider Thumb Point's proposed amendments against Part 2 of the Act and other relevant higher-order planning documents such as the NZCPS 2010 and Change 8 to the ARPS.

[30] On the other hand, Mr Lanning submitted that there was no anomaly, and that while the Environment Court had recorded its initial concern with the plan, this concern had been addressed and resolved during argument in that Court. He

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[18] *Eldamos Investments Ltd v Gisborne District Council*, NZ Env Ct W47/2005, 22 May 2005 at [131].

[19] *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593.

submitted that the Environment Court had correctly accepted that the HGI Plan objectives are consistent with the Act. The HGI Plan objectives do not encourage re-vegetation of Landform 5 land so as to enable subdivision, because Landform 5 is intended to provide for large-scale productive farm use. This is shown by the emphasis on maintaining the "open pattern and rural character" of Landform 5 land.

Discussion

[31] In most cases, the Environment Court is entitled to rely on a settled plan as giving effect to the purposes and principles of the Act. There is an exception, however, where there is a deficiency in the plan.[20] In that event, the Environment Court must have regard to the purposes and principles of the Act and may only give effect to the plan to the degree that it is consistent with the Act. As such, it is necessary to assess whether the highlighted anomaly required the Court to have regard to the wider context of the Act.

[32] At [72] of its decision, the Environment Court directly addressed this issue, and recorded the Council's submission that the objectives in relation to Landform 5 were directed at the purposes of protecting a particular feature and so were narrower than the general purposes of the Act. The Court concluded that the Council was correct, and that the HGI Plan was properly able to select purposes for particular areas that reflected the needs of that area, rather than treating all areas with the uniform brush of the principles and purposes of the Act.

[33] I am not persuaded that the Environment Court was wrong to conclude that the Council, in settling the HGI Plan, was entitled to prioritise certain objectives over others in particular areas. Indeed, one of the major reasons why councils are given the power to settle regional plans is to allow them to identify where and how objectives of the Act should be given effect.

[34] It follows that the Environment Court was entitled to rely on the HGI Plan as giving effect to the higher directives contained in the Act and elsewhere. As the Council identified, the purpose of protecting Landform 5 was to protect its current

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[20] *Eldamos Investments Ltd v Gisborne District Council*, above n 18; *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*, above n 19.

character as productive land – that is, working farms. This is the basis on which the provisions relating to Landform 5 were included in the HGI Plan. Where re-vegetation is normally a benefit in terms of the objectives of the Act, that may not be the case where a council wished to protect the current character of an area, without re-vegetation. There is no inconsistency between this and the higher objectives.

[35] I therefore conclude that there is no anomaly, and the Environment Court was not in error in applying the objectives of the HGI Plan.

Appeal submissions

[36] Mr Williams submitted that s 32 of the Act (as applicable to the present case) requires "an evaluation" of a proposed plan before it is publicly notified (s 32(1)), then "a further evaluation" before a local authority makes a decision on submissions on the proposed plan (s 32(2)). He submitted that on an appeal, the Environment Court steps into the shoes of the territorial authority, by virtue of s 290 of the Act (which provides that the Court has the same powers, duty and discretion as the person against whose decision the appeal is brought). Section 32(3) sets out what the evaluation must examine.

[37] Mr Williams then submitted that the Environment Court had confined its consideration to "objectives" then, having found that Thumb Point's proposed amendments to the subdivision rules for Landform 5 did not meet the objectives of the HGI Plan, did not go on to consider, for example, Part 2 of the Act ("Purpose and Principles"), the NZCPS 2010, and Change 8 to the ARPS. In doing so, the Court had wrongly interpreted s 32 as a constraint on its jurisdiction to consider the proposed rules further, when an adverse finding under s 32 does not preclude consideration of other matters.

[38] In support of his submissions, Mr Williams referred to the judgments of the Court of Appeal in *Kirkland v Dunedin City Council*,[21] and of Chisholm J in *Shaw v Selwyn District Council*,[22] He submitted that these authorities supported his

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21 *Kirkland v Dunedin City Council* CA 121/01, 29 August 2001.
22 *Shaw v Selwyn District Council* [2001] NZRMA 399.

submission that s 32 is of a procedural nature, and the Environment Court should not have take an overly rigid "jurisdictional" approach to s 32 which precluded it from properly evaluating Thumb Point's proposed amendments. He also pointed to the way that the Court had responded to the alleged anomaly in the HGI Plan, and had declined to consider the NZCPS 2010 and Change 8 to the ARPS, as being errors in the way the Court had approached the HGI Plan and s 32.

[39] As a result of the above errors, Mr Williams submitted, the Environment Court had failed to consider evidence regarding the social and economic implications of Thumb Point's proposed amendments, and had failed to consider a substantial purpose of the proposed amendments, which was to confine the proposed amended rules to land outside the ONL 78 area. Further, the court did not consider Thumb Point's submission that its amendments were aimed at ensuring that regard was had to the provisions of s 6(a) and (b) of the Act (which provides that the preservation of the natural character of the coastal environment and outstanding natural features and landscapes from inappropriate subdivision, use and development are "matters of national importance".

[40] For the Council, Mr Lanning submitted that the Environment Court did not approach s 32 as a limit on its jurisdiction. Rather, the Court identified the key issue as being the extent to which Thumb Point's (unspecified) amendments would achieve the objectives and policies of the HGI Plan. Those objectives and policies had been recently settled and encapsulated the purposes of the Act. Therefore, the Court did not need to undertake an evaluation of other matters under the Act.

[41] Further, he submitted that it cannot be concluded that the Court was making statements as to a limit on its jurisdiction when it said that it "cannot be satisfied" that Thumb Point's proposed amendments were the most appropriate way to achieve the objectives of the HGI Plan, and that "we cannot find in favour of Thumb Point". Rather, it was simply stating its finding as to which of the options before it was more appropriate to achieve the objectives and policies of the Plan.

[42] Mr Lanning also submitted that the Court did not misinterpret the relevant HGI Plan objectives and policies. It heard extensive argument as to the

identification and interpretation of, and relationship between, the relevant objectives and policies.

[43] Mr Lanning submitted that no question of law is raised by Thumb Point's submission that the Environment Court failed to place sufficient emphasis on other objectives and policies. In any event, the Court correctly interpreted the hierarchy of HGI plan provisions and focussed on Landform 5 objectives and policies, as the issue was what subdivision rules would most appropriately deliver the environmental outcome for Landform 5.

[44] He also submitted that Thumb Point had not presented a sufficiently detailed and certain rule proposal for either the Council, or the Environment Court, to consider. In particular, there was no certainty as to the nature and scope of the re-vegetation requirements Thumb Point agreed would be necessary to justify a smaller lot size and achieve the objectives and policies Thumb Point said would be achieved. Thus, even if the Court had been required to undertake the type of assessment contended for by Thumb Point, it could not have done so.

[45] Mr Lanning submitted that the Environment Court had heard, and discussed in its decision, extensive landscape, ecological, economic and planning evidence. The Court's discussion touched on the broad range of resource management matters at issue. He submitted that it is reasonable to assume that the Court took all of this evidence into account when evaluating Thumb Point's proposed amendments.

[46] Mr Lanning submitted that the Environment Court was assessing the options of Thumb Point's "unspecified and (relatively) complex 15 ha rule framework", and the Council's "(relatively) clear and simple 25 ha rule framework". The Court properly concluded that there was no deficiency in the HGI Plan in the context of the present case, as the absence of provisions requiring re-vegetation in Landform 5 is explained by Landform 5's focus on retaining its capacity for productive use, and maintaining an open rural landscape. Thus it made sense that there was no requirement for re-vegetation on subdivision in Landform 5, and that it was not encouraged.

Discussion

[47] Thumb Point's appeal raises three main questions:

(a) Did the Environment Court have jurisdiction to consider Thumb Point's proposal as to subdivision in areas designated as Landform 5?

(b) If the Court had jurisdiction, did it refuse to exercise that jurisdiction and consider Thumb Point's proposal?

(c) Did the Court err in the way it decided Thumb Point's appeal?

Did the Environment Court have jurisdiction to consider Thumb Point's proposal?

[48] It is appropriate to begin by considering the extent of the Environment Court's jurisdiction on the appeal before it. Pursuant to s 290(1) of the Act, the Court "has the same power, duty, and discretion in respect of a decision appealed against … as the person against whose decision the appeal … is brought". Thus, the Court must have the power to determine the most appropriate method of achieving the objectives of the HGI Plan. Thumb Point argued that s 32 sets out a process which the Council is required to follow, but does not limit the jurisdiction of the Court to determine the overarching question if that process has not been followed. This is not disputed by the Council, which went on to argue that the Court did not apply s 32(3) as a limit to its jurisdiction.

[49] I accept as correct Thumb Point's submission that the Environment Court could determine this appeal, regardless of whether the s 32 process had been complied with. This is necessarily the case, in order to give effect to the Court's power under s 290(1), and has been recognised in, for example, *Kirkland v Dunedin City Council*.[23] Further, as said by Chisholm J in *Shaw v Selwyn County Council*, the Environment Court should not take an overly jurisdictional approach to an appeal, but should consider the merits of an appeal.[24] I am satisfied that the Environment Court had jurisdiction to determine Thumb Point's appeal.

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[23] *Kirkland v Dunedin City Council*, above n 21.
[24] *Shaw v Selwyn County Council*, above n 22.

Did the Environment Court consider Thumb Point's proposal?

[50] This question turns on what the Environment Court meant when it said:[25]

> *We cannot find in favour of [Thumb Point] on issue 1*. We simply observe that if in future there are to be proposals to loosen density controls in this part of Waiheke, it might be desirable if they take the form of a comprehensive suite of objectives, policies and methods. Naturally, we can make no prediction about the likelihood of such proposals.
>
> (emphasis added)

[51] Thumb Point submits that in saying "cannot" in this paragraph, the Environment Court was making a finding that it was barred by s 32 of the Act from considering the real issue under appeal – namely whether Thumb Point's proposal was the most appropriate way to achieve the objectives of the HGI Plan.

[52] I do not accept that submission. The words used, while perhaps awkward phraseology, are commonplace in a situation where a court's conclusion is that a test has not been satisfied. In this case, in saying that it "cannot find in favour of" Thumb Point, the Environment Court was saying that it was not finding in favour of Thumb Point, because it was not satisfied that its proposal met the objectives of the HGI Plan.

[53] This conclusion is supported by reference to the Court's preceding comments:[26]

> Counsel for the Council explained [the lacuna or anomaly referred to at [26]-[30] above] by reminding us that Landform 5 is essentially concerned with an area providing for productive activities, and that is why 2.5.5.4 goes no further than the protection or enhancement of features, counsel stressed that the rather general provisions listed in [Thumb Point's] December 2013 memorandum are relatively high level provisions that apply across the plan, and must be read subject to the more specific objectives relating to Landform 5. Further that, with reference to 2.5.5.4, planting will not necessarily achieve a "positive environmental benefit" where it would displace otherwise productive land, unless intended for protection or enhancement of a <u>feature.</u> We consider that the council is correct in these submissions. The context of the structure of the general and the specific objectives explains the lacuna and underlines the limitations in objective 2.5.5.4. It might well be that in light of advancements in [outstanding

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[25] Environment Court decision, above n 2 at [76].
[26] At [74]–[75].

> natural landscape] protections at a regional level some strengthening of the district objectives would be desirable. But that is for the future and does not help [Thumb Point's] situation vis-à-vis s 32(3) at this time.
>
> Section 32 RMA is constructed in imperative terms ("must"). [Thumb Point] has drawn too long a bow in its submissions on this point. It is questionable whether the evaluations required by the section have been undertaken, but even if they have, we cannot be satisfied that the provisions advanced by [Thumb Point] are the most appropriate way to achieve the plan objectives as analysed by us above.
>
> (emphasis as in original)

[54] It is clear from these paragraphs that the Environment Court directly considered s 32(3), and applied it to the situation before it. In accepting the Council's submissions, the Court rejected the arguments for Thumb Point, and concluded that its proposal was not the most appropriate way to achieve the objectives of the HGI Plan.

[55] Accordingly, I am not persuaded that the Environment Court treated s 32(3) as being a limit on its jurisdiction. It considered Thumb Point's proposal and concluded that it was not the most appropriate way to achieve the objectives of the HGI Plan.

Did the Environment Court make an error of law in rejecting Thumb Point's proposal?

[56] Thumb Point further submitted that the Environment Court had committed an error of law when determining the appeal, in that it incorrectly assessed the relationships between the different objectives of the HGI Plan. It submitted, in particular, that the Court wrongly interpreted objective 2.5.5.4 as applying only to existing vegetation. The Council contends that Thumb Point is in fact (wrongly) arguing questions of weight, which are not matters that can be raised on appeal. The Council further contends that the Court correctly identified and applied the relevant objectives, and appropriately balanced the competing interests which these represented.

[57] Despite the detail and nuance with which these arguments were advanced, this aspect of Thumb Point's appeal effectively reduces to one issue. The Environment Court concluded that the objectives of the HGI Plan related to

protecting the landscapes on Waiheke as they are at present. Thumb Point submits that the objectives should instead be interpreted as intending to preserve and improve the naturalness of the landscape in every case.

[58] The protection of the areas designated as Landform 5 is intended to preserve the unique character of those areas as productive – that is, working – farms. The intent of the objective is to preserve an environment which, while not entirely natural, is used for a particular purpose, in a certain way, and has a certain character. In order to give effect to the objective, development which undermines the particular character of Landform 5 has been limited. While Thumb Point's proposal may lead to a landscape which has more vegetation (and may be closer to the historical nature of the land), it is not consistent with the objectives of the HGI Plan.

[59] I am not persuaded that the Environment Court was wrong to reject Thumb Point's interpretation, or to approach the issue in the manner in which it did.

Result

[60] For the reasons set out above, Thumb Point's appeal is dismissed.

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Andrews J

TAB 19

BEFORE THE ENVIRONMENT COURT

Decision No. [2012] NZEnvC 43

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of an appeal under section 120 of the Act
BETWEEN	UPPER CLUTHA TRACKS TRUST
	(ENV-2008-CHC-124)
AND	UPPER CLUTHA ENVIRONMENTAL SOCIETY INCORPORATED
	(ENV-2008-CHC-113)
AND	D THORN
	(ENV-2008-CHC-117)
	Appellants
AND	QUEENSTOWN LAKES DISTRICT COUNCIL
	Respondent

Court:	Environment Judge J R Jackson Environment Commissioner C E Manning Environment Commissioner D H Menzies
Venue:	Wanaka
Hearing:	14 February 2012 (Site inspection 15 February 2012)
Appearances:	T Borick for Upper Clutha Environmental Society Incorporated R H Ibbotson for D Thorn J Wellington for Upper Clutha Tracks Trust M A Ray for Queenstown Lakes District Council W P Goldsmith for Parkins Bay Preserve Limited

Date of Decision: 1 March 2012

Date of Issue: 2 March 2012

DECISION

A: Under section 291 of the Resource Management Act 1991:

(1) the appeals fail insofar as they sought cancellation of the resource consents granted to Parkins Bay Preserve Limited; and
(2) the appeals are allowed insofar as they seek amendment to the resource consent.

B: The decision of the Queenstown Lakes District Council is generally confirmed (but subject to the amendments to the resource consent and conditions made under Order C below).

C: Consent is granted in relation to land at West Wanaka (being part Computer Freehold Register 478353 Otago Land Registry) to Parkins Bay Preserve Limited to construct, plant, create and use:

- an 18 hole championship golf course located either side of the Mt Aspiring Road;
- a series of lakeside buildings, including:
  (a) a club house with restaurant and café;
  (b) a jetty to facilitate public access to the building from the water;
  (c) twelve visitor accommodation units, spread over three buildings;
- 42 residences/visitor accommodation units, to be located on the rolling terrace to the south of the golf course, each set on an area of land between 3,525 m^2 and 8,719 m^2;
- ecological enhancement in accordance with a revegetation strategy which must include planting of approximately 65 hectares of locally appropriate native plants in the golf course and around the proposed houses;
- removal of stock from covenanted areas to allow natural revegetation to occur unimpeded;
- enhanced public access to the site including provision of formed access from the Mt Aspiring Road to the Parkins Bay foreshore, formed access from Glendhu Bay to Parkins Bay and further along Parkins Bay, northwest of the Clubhouse to form a link to the second underpass under Mt Aspiring Road; and

- further public access in the form of a track along the Fern Burn to the existing Motatapu Track, provision for mountain bike access to the Motatapu Track, a track to the high point on Glendhu hill, and a track from Rocky Mountain to the existing Matukituki River track

(1) upon the conditions (December 2011) attached to this decision marked "D";
(2) as shown in the plans lodged with the court;
(3) with, and subject to, the volunteered easements and covenants;

– provided (1)-(3) are amended as required by the Reasons below.

D: The applicant, Parkins Bay Preserve Limited, is directed to lodge and serve:

(1) an amended copy of Plan B;
(2) a more detailed plan or map (showing contours) covering Wetlands B and C and Area 2 within Covenant Area G, and the proposed route and fencing more accurately;
(3) a topographical map showing the proposed walking tracks;
(4) an amended set of conditions

– by 13 April 2012.

E: Leave is reserved to Parkins Bay Preserve Limited to apply to amend the wording of the resource consent in Order C above if that wording does not reflect the court's decision or amendments volunteered by the applicant.

F: Costs are reserved. Any application must be lodged and served by 13 April 2012 and any reply by 13 May 2012.

REASONS

Table of Contents

1. Introduction

1.1 The interim decision

[1] Parkins Bay Preserve Limited ("PBPL") wishes to build and use a golf course and clubhouse and 42 residential buildings west of Glendhu Bay, Wanaka. In its interim decision dated 22 December 2010[1], the court concluded[2]:

> As matters stand – that is on the proposal with the conditions and covenants volunteered by PBPL through counsel ... – we are not satisfied after weighing all the matters we have considered that the proposal would achieve the purpose of the Act.

But in the circumstances the court considered[3] it should give PBPL an opportunity to produce some further evidence on that issue.

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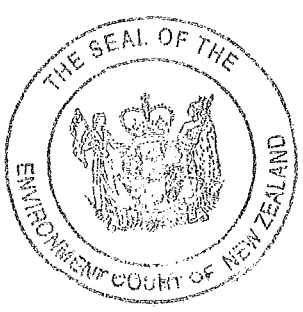
1 The Environment Court described the proposal and its effects on the environment.
2 Decision [2010] NZEnvC 432 at [277].
3 Decision [2010] NZEnvC 432 at [278].



[2] Accordingly, in the interim decision the court gave directions as follows:

> A: Subject to Orders B and C below:
>
> (1) the applicant, Parkins Bay Preserve Limited, is directed to lodge with the Registrar and serve on the other parties by 24 February 2011 a memorandum advising what (if any) further mitigation and/or environmental compensation it wishes to put forward in respect of the court's provisional findings in the Reasons below; and
>
> (2) leave is reserved for any other party to lodge a memorandum in response.
>
> B: Leave is reserved for the applicant, Parkins Bay Preserve Limited, and the Queenstown Lakes District Council to call further evidence on the following matters:
>
> - the supplementary evidence of Mr R F W Kruger [Environment Court document 34A];
> - the court's provisional findings in respect of the "off-site" areas on Glendhu Station and on Lake Wanaka and possible conditions/covenants in respect of them;
> - possible changes to planting plans around the proposed 42 houses because of the questionable viability of keeping the grassland patches open (and possible fire hazards);
> - and in particular whether there should be express conditions requiring on-going removal of sweet-briar and/or lupins from the site, and pest control and requiring
> - removal of conifers from between the site and the Fern Burn;
> - protection of on-lake and on-site (lake-edge) habitat for (Southern) Crested Grebe;
> - environmental compensation generally; and
> - on any other matter in the Reasons on which leave is reserved or on which the court's decision is not final;
>
> – and they are directed to advise the Registrar and other parties by 14 February 2011 whether either party wishes to exercise such leave.

The other parties were given the opportunity to respond.

[3] The applicant PBPL and two other parties (but not the Queenstown Lakes District Council) have lodged further evidence. We have received statements from:

- J G Darby, landscape architect (for PBPL)[4]
- J L McRae, organic farmer (for PBPL)[5]
- R J Potts, engineer (for PBPL)[6]
- D Palmer, ecologist (for PBPL)[7]

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4 Environment Court document 4.
5 Environment Court document 5
6 Environment Court document 6.
7 Environment Court document 7.

- J S Baker, horticulturalist (for PBPL)[8]
- R F W Kruger, landscape architect (for D Thorn)[9]
- J Haworth (for Upper Clutha Environmental Society Incorporated ("UCESI"))[10].

By consent and since no party wished to cross-examine any witness, we have entered most of these statements on the record without requiring the witnesses to attend court and confirm their evidence on affirmation or oath. However, the court wished to ask Mr Darby and Mr McRae some questions so the court reconvened at Wanaka for that purpose. Their answers have been helpful to us. In addition, Mr J Wellington lodged submissions for the Upper Clutha Tracks Trust ("UCTT") which contained rather more evidence than they should. PBPL's counsel, Mr Goldsmith, charitably did not object to the court's suggestion that Mr Wellington be sworn and then confirm the submissions as evidence[11], so that duly occurred. Mr Ray for the council was given leave to be absent from the reconvened hearing since the council ("the QLDC") did not wish to be heard further.

[4] To assist the reader understand that evidence and the submissions, and the site, its location south of Parkins Bay, and relationship to Glendhu Station and other features, we attach marked "A" a "Concept Master Landuse Plan".

1.2 What is still in issue?

[5] Some of the evidence for UCESI and the submissions of Mr Borick rather suggest that UCESI wishes to change settled predictions and findings of the court in the interim decision. We agree with Mr Goldsmith that the appellants cannot relitigate findings in the interim decision unless they are issues on which we have reserved leave, or (and we think Mr Goldsmith overlooked this) they are some/all of the legal issues which go to our final weighing up.

[6] At the end of this decision we must consider whether the proposal as now modified and with the extra environmental compensation offered meets the purpose of the Act. In relation to that, we think the argument that UCESI was attempting to express and which Mr Thorn's counsel expressly put forward[12] is that even with the further environmental compensation offered by PBPL and the landowners, the McRae family for whom Mr J L McRae gave evidence, when we add up all the costs and

8 Environment Court document 8.
9 Environment Court document 10.
10 Environment Court document 12.
11 Environment Court document 13.
12 R H Ibbotson, submissions 13 November 2011 para 2.3 [Environment Court document 9].

benefits, properly weighted (or multiplied) using the various tests in Part 2 of the RMA and in the district plan, we must still find the proposal to be on the negative side of the ledger.

[7] As a preliminary point we should mention that there were attacks by counsel in their submissions on the independence and objectivity of the two opposing landscape architects who gave evidence : Mr J G Darby[13] and Mr R F W Kruger[14]. The court has commented before on the difficulty of assessing the objectivity of architects and landscape architects. Even the ostensibly most independent and objective architect is likely to be receiving a fee for his expert opinion. Rather than simply assessing these issues by reference to the directness of their views (subject always to standards of professional courtesy) and alleged partiality, we must also assess the value of such subjective evidence by reference to its consistency, coherence, and thoroughness in evaluating effects in the context of, and giving the correct weight to, the relevant statutory objectives and policies. On that approach we find some of both Mr Darby and Mr Kruger's evidence to be quite professional and insightful, even if they rather write past each other. We will consider their respective evidence on an issue by issue basis. We do not judge that either has acted unprofessionally.

[8] Mr Goldsmith also criticised Mr Kruger for trespassing beyond his expertise on soil and water, and ecological issues. However, we are satisfied that Mr Kruger has some expertise on those issues, albeit not as much as the specific experts called by PBPL, whose evidence we prefer where there is a conflict on those issues.

[9] Mr Ibbotson, counsel for Mr Thorn, also submitted that "[i]n effect, the applicant has again been given yet another opportunity ... to buy success with further mitigation and greater environmental compensation than it was prepared to offer during the ... hearing ..."[15]. This seems to break into two separate arguments : the first is that the applicant should not have been given the opportunity to call further evidence, and the second is that PBPL is buying a consent.

[10] As to the first, usually once an applicant for resource consent has given its primary evidence and responsive (rebuttal) evidence then the public interest in the finality of litigation rules against any further opportunity being given to it. However, the court has a discretion to request any (further) evidence if it thinks fit[16]. Usually the finality principle wins but where – as in this case – there is a "highly laudable"[17] proposal and evidence suggesting the possibility of direct, tangible environmental

13 J G Darby, second and third supplementary evidence [Environment Court documents 4 and 4A].
14 R F W Kruger, second supplementary evidence [Environment Court document 10].
15 R H Ibbotson, submissions 13 December 2011 [Environment Court document 9].
16 Section 269(1) and (2); section 276(1)(a) and (b) of the RMA.
17 Decision [2010] NZEnvC 432 at [276].

compensation then the court has the power to give an opportunity for an applicant to call further evidence. Natural justice was served by giving the appellants, Mr Thorn and UCESI, an opportunity to call evidence in response, to cross-examine and make submissions. Except that they have chosen not to further cross-examine PBPL's witnesses, they have exercised that opportunity.

1.3 Buying a consent?

[11] Mr Ibbotson submitted[18] that the process followed "... is best described as a buying of consent with the applicant doing almost anything to secure [the desired] ... outcome". We consider that is wrong : the test for environmental compensation is whether it is reasonably related to the natural and physical resources being used in the application. Whether that test is satisfied as a mixed matter of fact, opinion and degree we should assess on an issue by issue basis. However, the PBPL's proposal is not like the cases where an applicant offered a $4 million fund plus $250,000 per year to a district council for "... investigating recreational possibilities ..." : see the *North Bank Tunnel* case[19]. The court has described its concern about that approach. In these proceedings the environmental compensation is all "logically connected to the development" to use the test stated by the Supreme Court in *Waitakere City Council v Estate Homes Limited*[20] because it remedies problems (water quality, weeds) on both the golf course site and adjacent land, it is close to the site and with fencing is likely to be effective.

1.4 Mr Haworth's evidence for UCESI

[12] Mr Haworth's evidence[21] for UCESI was critical of the small size of environmental compensation being offered as at 18 August 2011 by the applicants. However, as will be discussed below, many of the court's suggestions which, when Mr Haworth wrote his evidence, had not been taken up, have subsequently been volunteered at least in part by the applicants. We consider the weight of the final mitigation and compensation package later.

[13] In his evidence Mr Haworth was also critical of the court's predictions[22] in the interim decision in respect of the assessment matters in the district plan[23]. At law we cannot revisit these matters : we did not reserve leave for any party to call further

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18 R H Ibbotson, submissions 13 November 2011 [Environment Court document 9].

19 *Lower Waitaki River Management Society Incorporated v Canterbury District Council* Decision C80/2009 at [455].

20 *Waitakere City Council v Estate Homes Limited* [2007] 2 NZLR 149; [2007] NZRMA 137; (2007) 13 ELRNZ 33 at [66] (SC).

21 J R Haworth, evidence 18 August 2011 [Environment Court document 12].

22 Decision [2010] NZEnvC 432 at [110] *et ff.*

23 Queenstown Lakes District Plan section 5.4.2.2 [pp 5-26 to 5-30].

evidence or make further submissions on these issues so our predictions must stand. However, as an indulgence to Mr Haworth in these proceedings[24], we will comment briefly on some of the matters he raises about the landscape assessments. We do this because he seems aggrieved[25] that we did not refer to his evidence in our interim decision. We should explain now that we only mentioned Mr Haworth's evidence once there because we were not impressed by it. We thought a discreet silence might be preferable since he was purporting to be an expert not an advocate, and his evidence was rather adversarial.

[14] Turning to his evidence for the reconvened hearing : we consider Mr Haworth's criticisms of the interim decision are based on a rather selective reading of part 4.3 of that decision and of the evidence which we referred to in it. For example:

- he failed to acknowledge the court's reliance[26] on the special features of the residences' design (in particular that the roofs will be flat and vegetated) or the complex topography in which they will be set;
- he conflated[27] the court's discussion of views from the lake[28] with its assessments from roads[29], and from tracks[30];
- he "has difficulties"[31] with the court's reliance on Dr Steven's evidence despite the defects in Dr Steven's evidence. It may help if we explain that we see Dr Steven's practical assessment as being separable from his rather dubious theoretical framework. It just so happened that in these proceedings we thought Dr Steven's assessment of the visibility of the proposed development in the context of the very large and complex surrounding landscape was closest to a reasonable viewer's reactions[32] from the various important viewpoints we identified;
- as for reliance on "Truescape" simulations[33], we only assessed that some weight could be given to them. We do not understand any witness to have suggested the location and scale of proposed residences and other buildings was incorrect in those simulations, simply the visibility : and we allowed for that[34];

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24 The court is not likely to do this again.
25 J R Haworth, evidence 18 August 2011 para 4 [Environment Court document 12].
26 Decision [2010] NZEnvC 432 at [114].
27 J R Haworth, evidence 18 August 2011 [Environment Court document 12].
28 Decision [2010] NZEnvC 432 at [114]-[115].
29 Decision [2010] NZEnvC 432 at [116] *et ff.*
30 Decision [2010] NZEnvC 432 at [121] *et ff.*
31 J R Haworth, evidence 18 August 2011 para 39 [Environment Court document 12].
32 Decision [2010] NZEnvC 432 at [128].
33 J R Haworth, evidence 18 August 2011 para 39 [Environment Court document 12].
34 Decision [2010] NZEnvC 432 at [114].

- Mr Haworth considered that the court was inconsistent when it predicted first that[35] for many days in the year there are:

> unlikely to be any observers from the lake. The surface ... will be too cold or windy (and/or dangerous) a place to tempt people out in boats, ...

– and second that Parkins Bay/Emerald Bay is "... less remote"[36]. This allegation bears out Mr Goldsmith's response that Mr Haworth is being an advocate, because we simply fail to see an inconsistency. Parkins Bay is relatively accessible for boats – especially from Glendhu Bay – and the evidence was that at a few peak times it is busy, at others not. Even on the relatively few occasions when people are out on the water we predicted that "... signs of development ... will be obvious but discreet"[37]. We repeat that from the lake viewers will not at any one time see 42 complete traditional residences : there is extensive screening, and the houses are intrinsically less visible than the average house in the district.

[15] As for other matters raised by Mr Haworth:

- while he is correct that views from the top of Glendhu Bluff[38] will include more obvious views of the built development, those views are insufficiently important when compared with the opportunity for other walking tracks and views offered by the application;
- we agree with him that the kanuka screening will take five years to become fully effective[39] but assess any extra visibility of development in that time to be a short-term and in this context very minor adverse effect. In any event, as we shall see, the staging of the proposed development is designed to mitigate that effect.

2. What is the proposed environmental compensation?

2.1 Summary of the volunteered compensation

[16] PBPL and the McRae family have volunteered conditions over the balance lot(s) in respect of weed management and maintaining and improving water quality around the PBPL site. To understand their proposals we have attached, marked "Plan B", a copy of Mr Darby's "Plan B" which shows (amongst other detail) the various watercourses which flow into, through, or past the proposed golf course and residential areas. The applicants have[40]:

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35 Decision [2010] NZEnvC 432 at [115].
36 Decision [2010] NZEnvC 432 at [106].
37 Decision [2010] NZEnvC 432 at [114].
38 J R Haworth, evidence 18 August 2011 at 43 [Environment Court document 12].
39 J R Haworth, evidence 18 August 2011 at 46 [Environment court document 12].
40 W P Goldsmith, supplementary submissions 29 November 2011 para 2 [Environment Court document 3].

(a) Proposed fencing of part Wetland A, Wetland B and Wetland C shown on Parkins Bay Plan B dated September 2011.
(b) Proposed stock fencing and active regeneration of the Gully and the Moraine Slope shown on attached Plan B.
(c) Proposed stock fencing and passive regeneration of Area 1 and Area 2 shown on attached Plan B.
(d) Proposed fencing off from cattle of the Fern Burn riparian corridor [20 metres either side of the stream] from the Motatapu Road culvert/bridge down to Lake Wanaka, subject to retention of two crossing points to enable cattle to be driven from the farmland on one side of the Fern Burn to the farmland on the other side.

[17] In addition, PBPL and the McRae family have agreed to:

(a) Removal of conifers and other wilding firs/pines from the development site entirely and from the land between the development site and the Fern Burn.
(b) Maintenance of the fenced and revegetating Area 1, Area 2, Gully and Moraine Slope free of wilding trees and other exotic pest plants.
(c) Eradication of sweet-briar and other noxious pest plants entirely from Covenant Area B (house-sites and golf course).
(d) [An] Additional condition to address fire risk.
(e) Removal of formed lakeside track northwest of the clubhouse (to minimise impacts on lake margin wildlife).
(f) Provision of additional public access easement along the Motatapu River, between Motatapu Road and Mt Aspiring Road, to ensure public access is not prevented by erosion of the marginal strip.
(g) Formation of walking track along the Parkins Bay foreshore, including within the development site where required, to ensure continuous public access along the foreshore.
(h) Provision of additional public access track from the top of Rocky Hill (CA1) to the Motatapu River ("the western descent").
(i) Additional consent condition to ensure that the clubhouse at all times remains available to users of the golf course.
(j) [An] Additional consent condition to ensure that the "rough" areas of the golfcourse are allowed to regenerate naturally (excluding noxious weeds).
(k) Removal of ability to apply for consent for a shed in Covenant Area E if required by the Court.
(l) Restriction of the ability to apply for consent for a marquee in the Covenant Area E to a maximum of 6 individual days per year (assuming the clubhouse has been built) [reducible down to 1 day per year if required by the Court.]
(m) Removal of ability to apply for consent for a chapel in Covenant Area E if required by the Court.
(n) Removal of ability to apply for consent for an additional ancillary residential unit in Covenant Area E if required by the Court.

Some of those matters are straight mitigation rather than environmental compensation, but we are satisfied that the overall package – if modified in parts as discussed below – now provides for some solid environmental compensation. Whether that is sufficient to tip the balance in favour of the proposal we will discuss in the last part of this decision. We will now consider each covenant area – as shown on Plan "C" attached – in turn.

2.2 The Bull Paddock : Covenant Area A

[18] This is the area in which the proposed golf clubhouse and "shearers' quarters" accommodation are proposed to be located[41]. The covenants proposed for this area mainly relate to landscaping materials and access. There is one that has been questioned by UCESI : Mr Haworth in his evidence has asked whether a covenant against further development for ten years is adequate to protect future generations. In fact, the covenant[42] is for ten years "from the implementation of Stage 3". We recall the evidence that stage 3 may be five years away, and in the current financial climate, it may be even longer than that. While we agree 15-20 years is at most one generation, we do not regard this condition as worthless. If the proposal does gain consent, and if it is built, we see little potential harm in revisiting the question of development of this relatively small area in (nearly) one generation's time. It would certainly be considered by a differently composed Environment Court on any appeal at that time.

2.3 Covenant Area B

[19] Covenant Area B – see "Plan B" annexed – contains the higher part of the golf course and the 42 residences. It is to be covenanted in perpetuity against further subdivision except (since the consent applied for is not for subdivision) of the golf course and the 42 residential units and a further eight visitor accommodation/residential units if another resource consent is applied for those eight. We regard this rather longer covenant as a distinct benefit in favour of the proposal.

[20] The interim decision suggested[43] that the landscaping plans might be amended "... to make it clear beyond doubt how sweet-briar and other weeds are to be managed around the houses, and especially in the open spaces. The response by the applicant has been direct : they are to be eliminated. The proposed conditions are to be amended as suggested by Mr Darby[44] to achieve that.

2.4 Covenant Area C

[21] There are two conservation areas marked C. Area C1 is the higher part of the farm on the northern side of the road towards the Matukituki River. There is a ten year covenant against further development of this area[45] which counts as a minor benefit in the same way as the Bull Paddock covenant referred to above.

[22] Area C2 is more important in the short term. It is the land on the south side of the Mt Aspiring Road behind the well-known Glendhu motorcamp. It is separated from the golf course by the Fern Burn and much also lies east of the Motatapu Road. The

41 See Decision [2010] NZEnvC 432 at [4].
42 W P Goldsmith : Proposed condition 41a(i)aa (December 2011 version).
43 Decision [2010] NZEnvC 432 at [279].
44 J G Darby, second supplementary evidence para 6.4 [Environment Court document 4].
45 Condition 41a iii [Conditions December 2011 version].

applicants propose that[46] this be covenanted against further development (other than for farming activities) for 20 years but not prohibiting:

- camping;
- subdivision of Area C2 for its existing title 478353;
- subdivision of the old homestead block (an enclave to the west of the Motatapu Road);
- any boundary adjustment which does not create additional titles.

The intent is to preclude residential development on this land for at least 20 years. That is probably desirable and so we consider this a positive environmental gain. In approving it we are not giving our imprimatur to camping on the terrace above the road and beyond the windbreak.

2.5 Covenant Areas D, E, F and G

[23] Covenant Area D is the proposed lodge area. We discussed this in the interim decision[47]. Mr Kruger referred[48] to that as a suggestion that there should be more mitigation planting. We do not think that is the implication of our interim decision : we recorded that it may happen anyway according to the evidence of Dr Roper-Lindsay at the 2010 hearing. As for Mr Kruger's suggestion that there be a more "natural planting pattern" on Area D, we must have misunderstood him if he was referring to that area which has even more complex topography than the already complex Areas B and G. It is not the subject of this proceeding and we make no comment on it, except in relation to one boundary issue (see our discussion of boundaries of Area G in part 4 of this decision).

[24] Covenant Areas E and G raise enough issues to be considered separately below.

[25] Covenant Area F is the remainder of Glendhu Station on the eastern side of Motatapu Road. We consider the proposed covenant (which practically will last for over 40 years) is a useful brake on inappropriate development of this area. While it does not preclude subdivision for up to two residential dwellings, that does not mean we encourage or approve them.

2.6 Revegetation proposals

[26] In the interim decision[49] the court looked at the revegetation proposals in the light of other approved residential development in West Wanaka. We suggested that the proposed mitigatory planting "... seems light at 1.5 hectares per house"[50]. Mr

46 Condition 41a iv [Conditions December 2011 version].
47 Decision [2010] NZEnvC 432 at [158].
48 R F W Kruger para 10 : Table "Overview of Environmental Compensation ..." [Environment Court document 10].
49 Decision [2010] NZEnvC 432 at [158]-[159].
50 Decision [2010] NZEnvC 432 at [159].

Darby questioned whether the averaging was "entirely fair and reasonable in the circumstances"[51]. Amongst other factors he pointed out that six of the seven developments which the court referred to were for a single extra (lot and) dwelling, and compared the PBPL proposal (1.5 hectares planting) with the ecosustainability proposal (eight houses – 15 hectares planting).

[27] In addition, Mr Darby commented of the PBPL proposal:

- simply increasing the planting around houses conflicts with other design criteria as to open space and minimising fire risk (we say more about this later)[52];
- that the amended PBPL now includes[53] fencing of land and wetlands off from stock, and that native vegetation will regenerate on that land[54];
- also includes beneficial outcomes in other protected open space which will passively (our word) revegetate in brown grasslands including in introduced browntop[55] as well as native tussock grass species.

[28] While Mr Haworth referred to the revegetation as inadequate, he did not refer to the passive regeneration in the new areas proposed to be fenced off, or to the grassland regeneration in the rough along the golf course. We prefer the evidence of Mr Darby on this issue : we find that the area of regeneration is likely to be considerably higher than we estimated in the interim decision[56].

[29] Also on the subject of vegetation, in the interim decision we suggested there were three matters that needed attention to mitigate the potential adverse visual impacts of the development on the landscape. First, we asked whether there could be more complete screening of houses from views at the layby on Glendhu Bluff. We are now satisfied with Mr Darby's further explanation that such screening is likely to occur naturally. He pointed out[57] that the simulations upon which we based our assessment showed kanuka at two metres high, that kanuka easily grows above that height (4.5 metres after five years)[58], and that only three dwellings will be (partly) visible from that viewpoint once the kanuka reaches four metres. Some further planting is now proposed in respect of those three dwellings[59]. Mr Darby also reminded[60] us that the staging of

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51 J G Darby, second supplementary evidence para 4.1d [Environment Court document 4].
52 J G Darby, second supplementary evidence para 4.1b [Environment Court document 4].
53 See part 4 of this decision.
54 J G Darby, second supplementary evidence para 4.1c [Environment Court document 4].
55 In answer to a question from the court.
56 Decision [2010] NZEnvC 432.
57 J G Darby, second supplementary evidence para 3.1 [Environment Court document 4].
58 J S Baker, supplementary evidence para 2.1 [Environment Court document 8].
59 J G Darby, third supplementary evidence para 3.1 and Plans Y1 and X1 in his Schedule B [Environment Court document 4A].
60 J G Darby, second supplementary evidence para 3.1b [Environment Court document 4].

the development is deliberately related to the visibility of dwellings and kanuka growth rates.

[30] Secondly, the court also referred to Mr Kruger's suggestion of a "more natural" planting pattern – specifically in relation to the Fern Burn and the moraine side slopes east and south of the development site. The applicant now proposes:

- to fence off and allow passive regeneration on the steep bluffy hillsides shown in Areas 1 and 2 (see Plan B annexed);
- active regeneration in the southern tributary gully (as shown on Plan B annexed);
- active planting on the moraine slope on the western side of the Fern Burn.

Those proposals are in addition to the original proposal for extensive planting within Covenant Areas A and D, and the natural regeneration which will occur in the (now) Crown land on Glendhu Bluff and further west.

[31] Those proposals need to be looked at in the round together with the proposals to fence off the wetlands and the Fern Burn riparian margins, and to control weeds in Covenant Areas A and B.

2.7 Dealing with fire risk

[32] We requested reassurance about the fire risk around the 42 house sites, especially since one of the key planting species is kanuka which is highly flammable. Mr Darby wrote that[61] "Fire risk is an important consideration that was taken into account ... the vegetation was located an appropriate distance from the house sites to mitigate potential fire risk". He also pointed out that areas of open space will act as fire breaks and evacuation routes. Condition 9 (which we had overlooked) specifically refers to the first of those matters. We do not consider that the extra proposed condition[62] is necessary.

3. The Fern Burn Delta (Covenant Area E)

3.1 Introduction

[33] To the east of the proposed golf course, much of the Fern Burn delta is in the conservation estate. However, part is still owned by the McRae family. That part, Covenant Area E, is an older part of the Fern Burn delta. In the interim decision the court wrote of it[63]:

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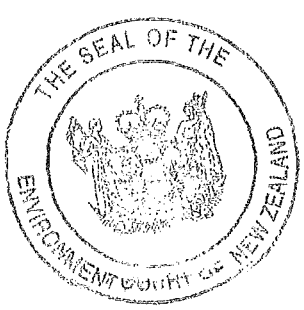
61 J G Darby, second supplementary evidence para 5.2 [Environment Court document 4].

62 J G Darby, second supplementary evidence para 5.5 [Environment Court document 4].

63 Decision [2010] NZEnvC 432 at paragraphs 197-199.



The area marked E contains the home of Mr John McRae's parents, B and P McRae. PBPL volunteers that this land should be covenanted in perpetuity from the date of the grant of consent against further development, but not prohibiting:

i. subdivision to separate the area marked E from the rest of the land currently contained in Certificate of Title 478353 and any boundary adjustment which does not create additional titles;
ii. the construction of a chapel;
iii. the erection of any temporary buildings such as marquees and other shelters used for the purpose of conducting weddings and reception functions;
iv. a shed for the purpose of storing farming and landscaping equipment;
v. alterations to the existing dwelling located on the land, and
vi. the construction of a residential unit ancillary to the main dwelling;

Mr Kruger wrote about this area on the Fern Burn Delta[64]:

3 Fernburn Delta
Question: Would precluding development here be a gain in landscape terms?
[Answer]: Yes. I am of the opinion that any further development in that area must be avoided. The way the fan area has been developed in recent years created a significant degree of domestication on this rather vulnerable landform close to the lake margin.

In the light of that evidence we are initially reluctant for any new building whether permanent (a chapel and an ancillary dwelling) or temporary (a marquee) to be allowed on this land given its prominence in the landscape. That is particularly so since one of our reasons for potentially allowing the clubhouse to be erected in the bull paddock is because there is often a marquee on that site over the summer months. Replacing that with the golf clubhouse seems meritorious but not if it is likely to export the marquee to another site. That is the epitome of an adverse accumulative effect.

Our initial view is that there should be a condition expressly prohibiting the proposed activities, but we are prepared to hear submissions evidence from PBPL on that issue.

The parties have differing interpretations of the court's determinations and/or intentions as expressed in those paragraphs. However, arguments over what the court meant at that point are fruitless : the court's view in the interim decision was expressed to be an "initial" one and we expressly stated that we were prepared to hear submissions and/or evidence on the issue. This is an evidential issue which we will determine on the evidence now before us.

3.2 An additional ancillary residential unit?

[34] The main concern of the court was (and remains) with the degree of domestication of the Fern Burn delta. We agree with Mr Kruger that allowing potential further subdivision for an "ancillary residential unit" is not good resource management of the area. The volunteered covenant prohibiting this is very useful and should be accepted if the proposal is to succeed. In respect of subdivision, our intention was to ensure that further subdivision (after excision of the delta block) was not to result in residential accommodation on the delta. The public is entitled to some certainty that will not occur in future since there is already a relatively large amount of domestication occurring on the adjacent golf course.

64 R F W Kruger, supplementary evidence paragraphs 3 *et ff* [Environment Court document 34A].

3.3 A shed?

[35] We did not intend to preclude a shed to service the (relatively) new home for Mr B and Mrs P McRae.

3.4 Limitations on a marquee

[36] Mr Darby gave evidence that Mrs D and Mr B McRae would like the opportunity to erect a marquee on their land for some occasions when the clubhouse is already booked. We have no difficulty with a marquee being erected for a maximum of say twelve days per year. The McRaes volunteered six days, but we consider that it may be preferable to erect it the day before an event and take it down the day after so we are prepared to allow four such events. We consider that a restrictive covenant on this lot in respect of:

(a) any further residential development; and
(b) any marquee for not more than twelve days per year, and a maximum of six occasions

– is appropriate. We will weigh the proposal on the basis that it would be volunteered as amended. We anticipate no difficulty with the amendment since it is less stringent than what has been volunteered already.

3.5 A chapel?

[37] In the light of Mr Darby's evidence[65] the court considers that the interim decision was too restrictive about the possibility of a chapel. We can see that a suitably-sited chapel in schist or other Otago vernacular might be appropriate. Of course, we do not decide that : it is a matter for a resource consent application at some time in the future.

4. Management of Area G

4.1 Fencing of wetlands

[38] We consider all the proposed measures relating to water quality are desirable. The main question is whether they are adequate. However, before we comment on that we should deal with the criticism by Mr Ibbotson that these proposed mitigatory or compensation measures are only offered reluctantly. The applicant's attitude is very largely irrelevant : this is a matter where substance is more important than form. Further, we can understand Mr McRae's reluctance – as he said in answer to a question from the court – if he had the option of giving his stock natural flowing water or water from a trough, he would "take the natural water any day". There are at least three reasons for that : the natural flowing water is more healthy than trough water, second

[65] J G Darby, second supplementary evidence paragraphs 10.13 to 10.17 [Environment Court document 2].

stock prefer it and third, on Mr McRae's evidence, troughs would need to be checked every 1.5 days, which is a managerial task he could do without. We should also record that we were impressed with Mr McRae's positive attitude towards maintaining and enhancing water quality. Having said that, we must look at the issue as if a less careful and thoughtful farmer was to become the neighbour of the golf course.

[39] However, we are also concerned that Plan B both does not go far enough, and that it is too small in detail to be helpful. In particular, there is a rectangular area (within the western part of Area G) shown on Plan B as largely surrounded by the existing fence (the fence-line is marked purple. This area contains 50 hectares according to Mr McRae. The northwestern side is not fenced because of the topography. If Areas 1 and 2 and Wetlands B and C are fenced out of that area, then the balance of the rectangle reduces to about 15-20 hectares, according to Mr McRae. Further, this area would only be used twice a year for seven days, more or less, each time. That use was not completely consistent with his supplementary evidence, which suggested rather more use especially for breeding stock. However, the court asked Mr McRae to confirm the twice-yearly short-term use and he did. In other words, the 15-20 hectares inside the fence in Covenant Area G (excluding his proposed Areas 1 and 2 and Wetlands B and C) is intended to be rather less used for breeding than his supplementary evidence had suggested.

Wetland A

[40] Wetland A is an ephemeral wetland, and PBPL is proposing a partial fencing and a review condition[66]. Wetland A connects downhill with Wetland B.

Wetlands B and C

[41] The proposed management of this area is generally acceptable, but it is inadequate in these ways:

- there is insufficient fencing of the ephemeral stream paths above and in the vicinity of Wetlands B and C; in particular
- the route needs to be fenced off from the streams which also follow the runnel;
- there is confusion (we elaborate on this below) on the eastern side of Wetland C; and
- some of the proposed fencing looks unnecessary, especially if an inclusive approach to fencing is taken.

[42] The streams in the runnel should be fenced off from the stock route, except at crossings (which should be fenced across the streams above and below the crossings). The stream in Wetland A from where it flows under the existing fence above Wetland B should be included with Wetland A and Area 2. In fact, there is a good argument for

[66] Proposed condition 51 (December 2011 version).

including that stream in Area 2 and Wetlands B and C in one enlarged Area 2. Quite apart from the fact that it appears to make more ecological sense by combining three otherwise separated and small ecological units at the expense of a minimal loss in hillside for potential pasture, it may also save a significant length of fencing.

Wetland D

[43] We have been slightly troubled by the unwillingness to fence the ephemeral stream running out of Wetland D, particularly since Plan B is rather ambiguous as to where this wetland drains. If the plan is inspected closely it appears that this wetland's stream drains two ways : into Parkins Bay via the "Eastern Tributary" and into the Fern Burn via the "Southern Tributary". From our site inspection it was not obvious which of the blue lines on Plan A is correct. However, if the Wetland D stream is not fenced and it does cause pollutants to flow onto the golf course (Covenant Area B) then it may be possible to manage that issue, e.g. by directing the stream into the Southern Tributary[67]. In the end we decide that the lack of fencing of Wetland D's stream is only a minor issue that does not need to be resolved now.

4.2 A covenant in perpetuity over Area G?

[44] We are reassured, with one caveat, that Covenant Area G is to be covenanted in perpetuity against any development not associated with farming activities. The caveat is that we consider the door should be left open for some future owner of Area G to decide to let the land revert to native forest and register for an emissions trading scheme under the Climate Change Response Act 2002 and subsequent amendments. Accordingly covenant 41a.viii[68] should be amended by the addition of the underlined words to read:

> viii The area marked G shall be covenanted in perpetuity ... against any development not associated with farming activities or regeneration of native forest, or other vegetation but not prohibiting ....

5. The stock route

[45] The proposed stock route – a black dashed line on Plan B annexed – is located in a wide sloping runnel on the northeastern flank of Te Matuki or Glendhu Hill (775 masl). Most of the runnel cannot be seen from the main road (Wanaka-Mt Aspiring Road) because it is obscured by intervening glacially-rounded mounds of bedrock. From our site inspection we can see the logic of the stock route (which largely follows an old bull-dozed track).

[46] Inspection of Plan B will reveal that in the vicinity of Wetland C four (or possibly five) management components coincide or nearly so:

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67 With a resource consent from the Otago Regional Council.

68 Conditions, December 2011 version.

- the eastern edge of the wetland;
- the boundary between the farm and the Covenant Area;
- the proposed stock route; and (at one point)
- the existing fence.

The fifth component is the proposed public walkway easement over Covenant Area D. The "Parkins Bay Glendhu Station Concept Master Landuse Plan"[69] shows that easement as being on the Covenant Area D. However, the proposed conditions appear to suggest that this walkway will follow the stock route (generally northwest). Given Mr McRae's evidence as to how little the stock route will be used, we consider it would be unnecessary duplication to have two parallel routes (if that is what is proposed). It would be cheaper and make more ecological sense if the easement followed the stock route of least most of the way.

[47] Regardless of that point, slight boundary adjustment is desirable southeast of Wetland C so that Covenant Area D includes the fall line of the ephemeral stream rather than crossing and recrossing the stream.

[48] Finally, we consider that a more careful and detailed plan of the proposed stock route, boundaries and fencing in the vicinity of Wetland C is necessary.

6. The Fern Burn

6.1 The marginal strips

[49] The McRae family has volunteered to fence off the riparian margins. We see that as a benefit of the proposal.

6.2 The crossings

[50] As we understand it, there is only one crossing at present – where the stock route crosses a culvert. There will need to be a condition that this crossing be fenced off immediately above and below the culvert to keep the integrity of the marginal strips. Such fencing may be temporary or permanent. A new stock crossing of the Fern Burn is to be established upstream of Wetland E.

6.3 Wetland E

[51] The McRaes have volunteered to fence off this wetland (fed by impressive springs) in the Fern Burn's flood plain. That is highly desirable, but will represent some loss to the farming operation : on our inspection at least two bulls were ruminating in the wet ground and long vegetation of the wetland. We comment that this wetland should be fenced at the top of the demarcating bank on its eastern side. That may reduce the length of new fencing since the road boundary fence will suffice for about 100 metres.

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[69] Lodged by Mr Goldsmith with his final submissions.

On its western side it would be unfortunate if the wetland was fenced off from the marginal strip.

7. The tracks

[52] There are three sets of issues concerning tracks on Glendhu Station. The first is about who should be the holder of the proposed easements in gross; the second is over closure periods to allow lambing/calving; and the third set is over specific matters for different tracks.

Who should be the easement holder?

[53] PBPL and the McRae family now accept[70] that the Queenstown Lakes District Council may not necessarily be the appropriate body to hold the easements. The applicant's proposed conditions have been amended to reflect this. However, we understood Mr Goldsmith to resile from this slightly at the hearing when he explained the difficulties of having another legal person as holder of the easement if that "person" dies or, as an incorporated body, becomes moribund. He also reassured us about the notification process for varying conditions of resource consents. In the circumstances we are prepared to let the council decide whether it wishes itself or a third party to be the holder of the easements, and so Mr Goldsmith's proposed condition[71] may stand.

Closure

[54] The second issue is as to closure of tracks. Mr Goldsmith advised[72] that his instructions were that the McRae family agreed to "far more limited closure periods and to remove, as far as possible, the extent of uncertainty relating to closures". Thus the conditions of consent should be amended as stated in Mr Wellington's evidence[73] and should be on "similar terms to the existing easements along the Motatapu River, so that (for example[74]):

- the easements exclude dogs and firearms without consent of the landowner;
- closure on health and safety grounds for track maintenance or if there is an extreme fire risk in the opinion of the Department of Conservation's local fire officer;
- at most the tracks may be closed for a specific period (not exceeding six weeks) from lambing.

[55] We also consider it is acceptable to close the tracks through (or around the edges of) the golf course at certain times (primarily tournaments but also for reasonable maintenance and/or safety reasons).

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70 W P Goldsmith, final submissions para 52a [Environment Court document 3A].
71 W P Goldsmith, final submissions para 52a [Environment Court document 3A].
72 W P Goldsmith, final submissions para 51 [Environment Court document 3A].
73 J Wellington, evidence 14 December 2011 page 4 [Environment Court document 13].
74 J Wellington, evidence 14 December 2011 page 4 [Environment Court document 13].

[56] These proposals seem to be reflected in Mr Goldsmith's "Schedule A" to his final submissions except that in relation to other conditions the words "the consent holder" should be followed by "... and the QLDC" so that any reasonable restriction on use of the relevant easement in gross should be determined by the two parties together.

Te Araroa (Fern Burn)

[57] The Te Araroa footpath comes from Wanaka township via the Centennial Walkway to Glendhu Bay and then around the foreshore (or through the motor camp) to the Fern Burn delta. It then turns south along the Motatapu Road to the next exclusive track section at the road's culvert over the Fern Burn (the track stays on the eastern side of the stream).

[58] The UCTT requested[75] that this track not be closed at any stage since certainty of access is essential, and that the easement should allow for cycles as well as pedestrian access. With one limited exception we do not understand why an easement is even necessary here : as we stated in the interim decision[76]: "... mountain bikers could use the Motatapu Road, and ... walkers could use the grass berm along the western side of the road". The exception is the first four hundred metres of the road where it goes through a low cutting to reach the terraces above the Mt Aspiring Road. We consider there should be a formed and marked walking/cycle track on the McRae land (or the road margin if that can be accomplished) for the first four hundred metres to clearly show users of Te Araroa footpath where they are to go when they turn away from the lake.

[59] The applicant volunteered[77] an easement on its land "... in the location approximately shown as a blue dotted line on the [landuse ... plan]"[78]. We have several difficulties with this : first it seems largely unnecessary when there is already a quiet no-exit road from Mt Aspiring Road to the official start of the Motatapu track; secondly there are places where such an easement would be forced down the side of the terrace along which the road runs. That is especially so in the vicinity of Wetland E, which would be unfortunate : we consider that neither fencing nor a track should go beyond the existing road boundary fence where that is directly above Wetland E.

[60] The UCTT also requested[79] that the fencing along the riparian strip be as close as practical to the boundary between the freehold title and the public marginal strip to "clarify" the public land. The applicants agree. For our part we consider some flexibility would be useful there : for example, as discussed elsewhere, we consider that important Wetland E should not be cut off from the river by the riparian fencing.

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75 J Wellington, evidence p. 5 [Environment Court document 13].

76 Decision [2010] NZEnvC 432 at [176].

77 See proposed condition 41d "Covenants" (as Mr Wellington pointed out this should be "Covenants and Easements").

78 See Mr Goldsmith's map set "Concept Master Landuse Plan".

79 J Wellington, evidence 14 December 2011 p. 5 [Environment Court document 13].

Further, as we understand it, the fencing of the marginal strip should be 20 metres back from each bank, not 20 metres back from the current centre-line of the burn.

Motatapu River

[61] The McRae family have volunteered an easement over their land on the edge of the Motatapu River so that where it is impracticable to build and maintain the track in the marginal strip, it may be built on their land. To be meaningful over the longer term, an extra condition needs to be added as a fourth bullet point:

- in the event that the river erodes both the marginal strip and the land over which the easement runs, the landowner will, when requested, provide an alternative easement (to be surveyed and registered, formed, and maintained by the council at its request).

Track northwest of clubhouse

[62] The applicant has agreed, according to counsel, to remove the track along the foreshore of the lake northwest of the clubhouse, to minimise impact on wild life. However, there appears on the basis of Ms Palmer's evidence[80] no need to do so, since the main species of concern to the court – crested grebe – live in the lake and build their nests on mounds on the lake. In fact, a more useful idea would be to retain the track (which Mr Haworth appeared sorry to lose) but place it as far back from the lake as possible – unless there are obvious beaches to access and maximise vegetation between the path and the average lake edge so as to protect potential nesting sites. We merely raise that as a design matter. Retaining that track will allow the track around the golf course to be completed.

8. Outcome

8.1 The actual and potential effects assessed under Part 2

[63] We now reconsider the fundamental question whether granting the resource consent sought will better achieve sustainable management of the Parkins Bay resources or not. We consider first the actual and potential effects.

[64] Ultimately we must consider whether the applicants' proposal achieves the purpose of the RMA. Part of that purpose is to manage the use, development and protection of natural resources in a way, or at a rate which enables people and communities to provide for their wellbeing, health and safety[81]. We consider that the proposal will measurably add to the active wellbeing and health of the people of the district : there will be a high quality golf course in the Wanaka area, and there will be additional tracks for walkers and mountain bikers to use. While the Te Araroa trail may continue to largely follow the Motatapu Road, the first four hundred metres should be better constructed and visible on the ground. There will be extra employment for those

80 D Palmer, supplementary evidence [Environment Court document 7].

81 Section 5(2) of the RMA.

engaged in construction and maintenance of the golf course and residences – those would be direct contributions to economic and social wellbeing.

[65] At the same time section 5(2)(a) of the RMA is met because the potential of the natural resources of the land south of Parkins Bay (in Covenant Areas A to G) would be sustained[82] rather better than it is at present. In fact, the life-supporting capacity of the water, soil and ecosystems is likely to be safeguarded[83] and improved with the proposed management change in removing stock, weeds and introduced grasses. In comparison, the footprint of added residences is quite small and even the roofs of the 42 houses are to be covered in native grasses.

Matters of national importance

[66] Turning to the matters of national importance in section 6, we have recognised that the proposed buildings, especially the clubhouse at Parkins Bay, and the "Shearer's" accommodation quarters nearby, together with the 42 residences, will reduce the naturalness of part of the outstanding natural landscape in which they are set. However, we have found that the adverse effects will, in this particular context, be minor. That is because of the unique and complex landscape in which the proposal is set and its very careful and imaginative design.

[67] Further, as against the subjective effects of the proposal on the landscape (some people would love the final development and others will hate it) there would now be, as a result of the volunteered covenants, some real environmental compensation that directly relates to, and knits the proposal into, the surrounding environment, thus making the development appropriate.

[68] Another matter of national importance that is now in favour of the application is the potential enhancement in water quality running into the Fern Burn and Parkins Bay from the fencing of five wetlands, excluding stock from some areas, fencing of some streams, and riparian fencing for the full length of the Fern Burn. We find that those measures must preserve[84] the natural character of Lake Wanaka and the Fern Burn. Thus we do not accept Mr Ibbotson's submissions on that issue.

Section 7 matters

[69] Most of the section 7 matters to which we must have particular regard have been adequately discussed in the interim decision or earlier in this. However, there are two sets of issues we should summarise. The first relates to the maintenance and enhancement of amenity values in particular, and of the environment in general. What is being replaced in Parkins Bay is a patchwork of open exotic grassed paddocks, a plantation of conifers, and extensive areas of sweetbriar and some native vegetation. The passive amenity that the road users or walkers on the lake edge or further away on

82 Section 5(2)(a) of the RMA.
83 Section 5(2)(b) of the RMA.
84 Section 6(a) of the RMA.

the surrounding mountains enjoy at present from those amenities is, we consider, rather small. Their eyes will tend to be focussed on the many other aspects of the complex views of the southern end of the lake.

[70] In contrast, the active recreational amenities we have already described (the golf course and tracks) will be complemented by an improved landscape with better water quality, more native grasses, shrubs and, after five to ten years, trees. We hold that there will be an overall substantial improvement in amenities. Concentration by Mr Haworth on the views of the residences from above the road on Glendhu Bluff suggests that he is not looking at the (literal) big picture in a landscape that is essentially nearly all big pictures.

[71] Finally, we refer to the efficient use of the natural resources of Parkins Bay. Mr Borick and Mr Haworth returned to this issue in their submissions and evidence but nothing they said undermined our findings in the interim decision and those must stand. We did not give leave for further submissions or evidence on those issues.

8.2 The district plan's objectives and policies

[72] We discussed these too, at length, in the interim decision and none of the new evidence or submissions affects that, with one exception. In his supplementary evidence Mr J L McRae wrote[85]:

> Creation of the Parkins Bay development ... will result in the farm losing a good part of its productive, low-lying farm. This increases the importance of Covenant Area G for a number of reasons relating to reproduction and farm operations.

Mr Ibbotson used that passage as the basis for an argument that the rural policy which requires the council (and now the court) to[86]:

> Ensure land with potential value for rural productive activities is not compromised by the inappropriate location of other developments and buildings.

Ironically, Mr Goldsmith, for PBPL, had used the same policy as justification for not imposing controls on Covenant Area G.

[73] The first question is, which is the correct interpretation of rural policy 1 : does it refer to the land the subject of a proposal or to neighbouring land? In traditional terms is the policy directed towards ensuring that "versatile soils" can be used, or against reverse sensitivity issues? In our view, looking at the issues[87] in Chapter 5 (Rural), this particular policy is primarily aimed at reverse sensitivities – locations for proposals which might cause complaints from new neighbours. That interpretation has the result

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85 J L McRae, supplementary evidence para 2.10 [Environment Court document 5].

86 Rural policy (5.2)/1.3 [QLDC district plan p. 5-2].

87 Para 5.1 Resource Management Issues [QLDC district plan pp 5-1 and 5-2].

that Mr Ibbotson's submission is incorrect. The policy is not aimed at preferring the use of the "golf course land"[88] for farming over its golfing use. The other rural policies chiefly address that issue. What it is aimed at is the potential rural sensitivity issues created on adjacent land by the presence of the golf course. We find that is not an issue in this case.

8.3 Other matters (section 104(1)(c) of the RMA)

A precedent?

[74] Mr Haworth raised the issue of precedent. This had both backwards- and forwards-looking components. He wrote[89] that the court gave "... little weight to the *Hillend*[90] and *Infinity*[91] decisions. We pass over the error of law there : no weight is given to other Environment Court decisions even if they are a precedent (which they are not). The principle he was adverting to is that there is a "planning precedent" where like cases should be treated alike. In those earlier cases (and many others) the court has expressed scepticism over whether screening and mounding will survive when owners seek views. But, in the very passage Mr Haworth quoted, the court relied on Mr Darby's evidence that all houses would have views of the lake (albeit some only when the viewer was standing) and also found[92] that "... the lake is only a part of the substantial landscape that occupants would otherwise have unimpeded views of". Again the court's findings and predictions need to be read as a whole, not selectively.

[75] As for the future, Mr Haworth was concerned[93] that future developers will rely on this case. Of course they will : and the court will consider all the facts and predictions carefully. It will then decide either that the *Hillend* and *Infinity* cases are more similar, or that this one is. It will all depend on the circumstances. It is a gross travesty of the sophisticated design put forward by Mr Darby for Mr Haworth to describe it as "... plant-something-in-front-of-it-and-it-will-be-all-right logic"[94].

Overall evaluation

[76] We agree with Mr Haworth[95] that the changes made to the application have done little to reduce the cumulative effect of the development. But that is not the applicant's intention. What they have done is to stop treating the golf course and residential development in isolation but retro-fitted them into their embedding environment. The mitigation and compensation offers now volunteered mean that we have a different number and weight of factors to consider in coming to our decision.

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88 Covenant areas A and B on Plan C annexed.

89 J R Haworth, evidence 18 August 2011 at 46 [Environment Court document 12].

90 *Upper Clutha Environmental Society Incorporated v Queenstown Lakes District Council*, Decision 88/2006.

91 *Infinity Group Limited v Queenstown Lakes District Council*, Decision C10/2005.

92 Decision [2010] NZEnvC 432 at [126].

93 J R Haworth, evidence 18 August 2011 at 49 [Environment Court document 12].

94 J R Haworth, evidence 18 August 2011 at 50 [Environment Court document 12].

95 J R Haworth, evidence 18 August 2011 para 51 [Environment Court document 17].

[77] Mr Ibbotson submitted that[96] "the applicant has not been proactive but only responsive – in a ... minimalist way". We agree that the applicant has not been as forthcoming as is desirable to meet the spirit of the district plan, and particularly Part 2 of the RMA. The attitude of the R McRae family was initially that the proposal is only in respect of Covenant Areas A, B and D (as on Plan C annexed) and that the remaining land can be used for the McRae's business, if not quite as normal, then as directed by the new (and admirable) organic principles espoused by Mr J L McRae. However, at least around the margins of the golf course and in the streams whose catchments run through it, land management practices will impinge on the environmental standards that can be met in the golf course and around its margins, and we consider that the matters now volunteered by the applicant are essential.

[78] What has changed since the interim decision is, as we have stated, the amount of compensation (and mitigation) now offered by PBPL and the McRae family. Indeed, the proposals for fencing and removal of stock have increased markedly since Mr Kruger assessed them as "limited, insufficient"[97]. When the environmental compensation, as amended by this decision, is added to the scales, we consider it brings them down on the side of the proposal. We judge that the proposal as now put forward, subject to the minor changes suggested by this decision, will be sustainable management of resources under the RMA. The appellants need not fear that a Millbrook is coming to west Wanaka. That is not this proposal. We hold that the proposal when amended as approved in this decision will achieve the purpose of the Act, and will make orders accordingly.

Media reporting of these proceedings

[79] The coverage of resource management issues in the Otago Daily Times is generally some of the best in the country. However, there has been a suggestion[98] that the Parkins Bay proposal has been held up by environmental groups. Since we have been critical of some aspects of the evidence of UCESI's witness, Mr Haworth, we should record clearly that the delays have not primarily been caused by the appellants. What has happened here is that the appellants were not happy with the council's decision, they appealed to this court, and we found that on the evidence put to us at the hearing in 2010, the proposal should not succeed.

[80] However, the landscape witness, Mr Kruger, who had been called by the other meritorious appellant, Mr Thorn, gave evidence at the earlier hearing which suggested to us various steps that the applicants could take which might swing the merits of the application in their favour. Any subsequent delays have been caused by the applicant PBPL or by the court's workload. As it happens, we now feel able to approve the proposal, but that does not mean the appellants were wrong to appeal. We consider that the involvement of the appellants has largely been beneficial to the public interest.

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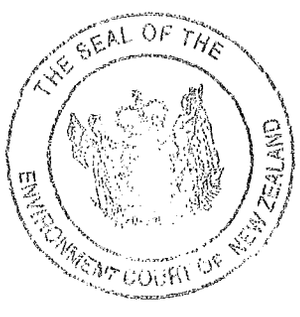
96 R H Ibbotson, submissions 13 December 2011 para 8.4 [Environment Court document 9].

97 R F W Kruger, supplementary (2) evidence 12 August 2011 [Environment Court document 10].

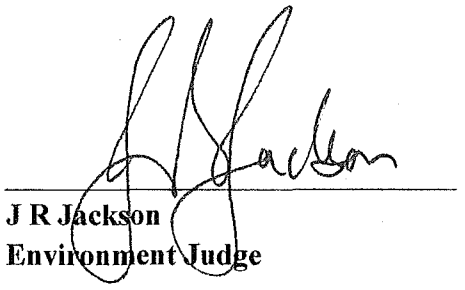
98 e.g. Otago Daily Times 15 February 2012.



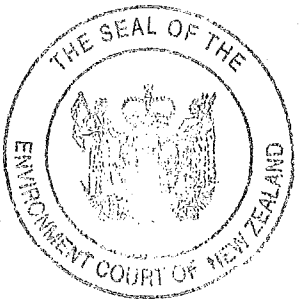
Costs

[81] We will reserve the issue of costs, but our initial inclination is that they should lie where they fall. If we were to make any order at all it would probably be in favour of Mr Thorn towards the costs of his witness Mr Kruger.

For the court:

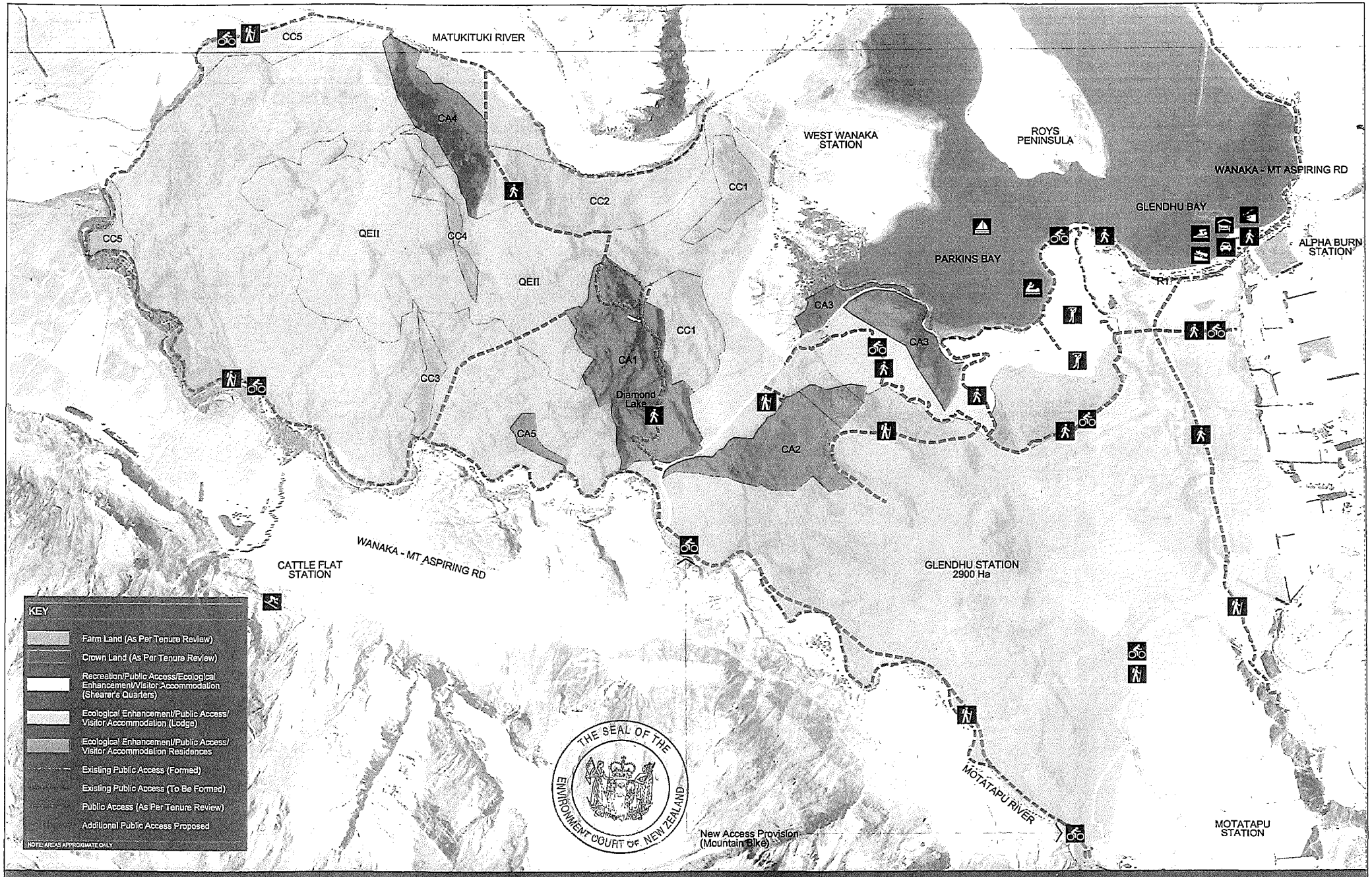


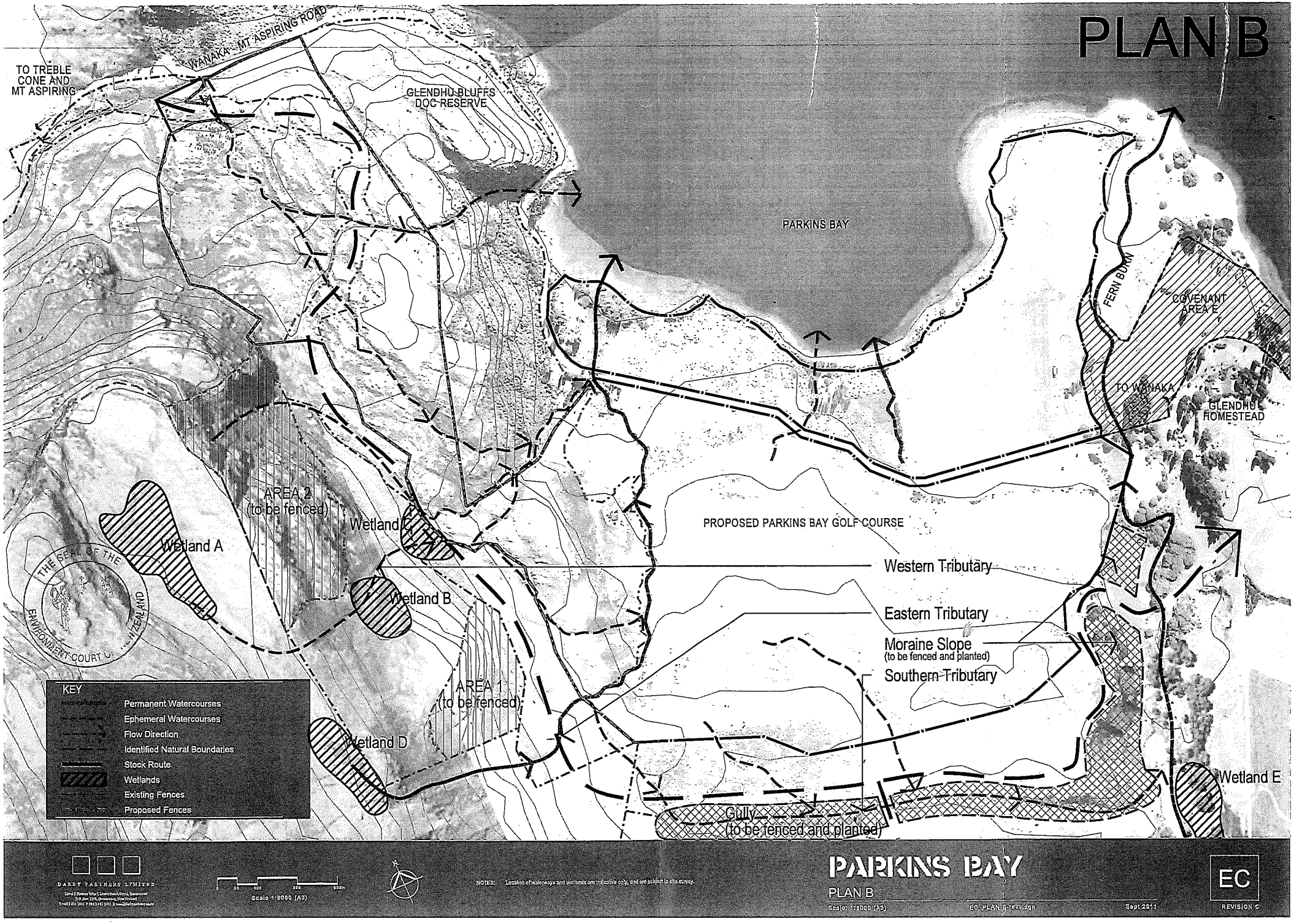
J R Jackson
Environment Judge

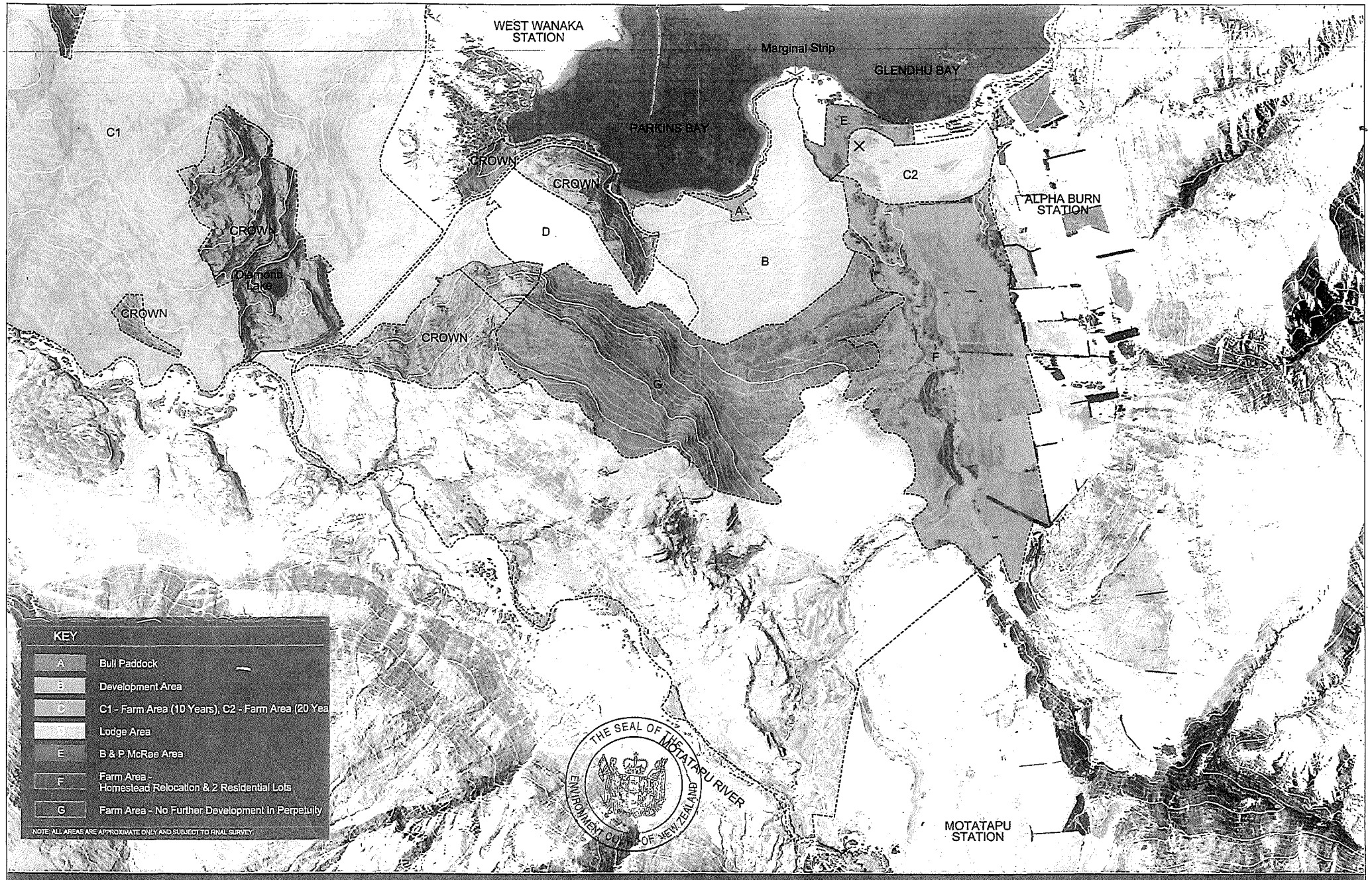


Attachments:

A: Parkins Bay Glendhu Station Master Landuse Plan (June 2011 Revision C)
B: Plan B (watercourses and fences)
C: Covenant Areas
D: Conditions (December 2011 version)


A
MATUKITUKI RIVER
CC5
CA4
CC2
CC1
QEII
CC4
CC5
QEII
CC1
CA1
CC3
Diamond Lake
CA5
CA2
WEST WANAKA STATION
ROYS PENINSULA
WANAKA - MT ASPIRING RD
GLENDHU BAY
ALPHA BURN STATION
PARKINS BAY
R1
CA3
CA3
CATTLE FLAT STATION
WANAKA - MT ASPIRING RD
GLENDHU STATION
2900 Ha
MOTATAPU RIVER
MOTATAPU STATION
New Access Provision (Mountain Bike)
KEY
Farm Land (As Per Tenure Review)
Crown Land (As Per Tenure Review)
Recreation/Public Access/Ecological Enhancement/Visitor Accommodation (Shearer's Quarters)
Ecological Enhancement/Public Access/ Visitor Accommodation (Lodge)
Ecological Enhancement/Public Access/ Visitor Accommodation Residences
Existing Public Access (Formed)
Existing Public Access (To Be Formed)
Public Access (As Per Tenure Review)
Additional Public Access Proposed
NOTE: AREAS APPROXIMATE ONLY
THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND
NOTE: All areas are approximate and is subject to final survey
Scale 1:15,000 (A1) 1:30,000 (A3)
PARKINS BAY
GLENDHU STATION
CONCEPT MASTER LANDUSE PLAN
Scale 1:30,000 (A3)
EC_concept-MLP-rev2.dgn
JUNE 2011
EC
REVISION C


PLAN B
B
TO TREBLE CONE AND MT ASPIRING
WANAKA - MT ASPIRING ROAD
GLENDHU BLUFFS DOC RESERVE
PARKINS BAY
FERN BURN
COVENANT AREA E
TO WANAKA
GLENDHU HOMESTEAD
AREA 2 (to be fenced)
Wetland C
Wetland A
Wetland B
PROPOSED PARKINS BAY GOLF COURSE
Western Tributary
Eastern Tributary
Moraine Slope (to be fenced and planted)
Southern Tributary
AREA 1 (to be fenced)
Wetland D
Wetland E
Gully (to be fenced and planted)
THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND
KEY
Permanent Watercourses
Ephemeral Watercourses
Flow Direction
Identified Natural Boundaries
Stock Route
Wetlands
Existing Fences
Proposed Fences
DARBY PARTNERS LIMITED
Scale 1:8000 (A3)
NOTES: Location of waterways and wetlands are indicative only, and are subject to a to survey.
PARKINS BAY
PLAN B
Scale: 1:8000 (A3)
EC_PLAN B-revision
Sept 2011
EC
REVISION C



C

DARBY PARTNERS LIMITED

Scale 1:25,000 (A3)

NOTE: All areas shown are indicative only, and are subject to final survey

PARKINS BAY

DETAIL B
PROPOSED COVENANT AREAS

Scale 1:25,000 (A3) EC_Proposed-option 2-revb.dgn June 2011 REVISION B

EC

"D"

Parkins Bay Conditions of Consent [December 2011]

General Conditions

1. That the activity be undertaken in accordance with the application and subsequent amendments (except to the extent that they are inconsistent with the following conditions) as shown on the plans referenced:

- Glendhu Station Stage 0: Master Plan, revision EC, dated Sep 2009;
- Glendhu Station Stage 1: Master Plan, revision S1 EC, dated Sep 2009;
- Glendhu Station Stage 2: Master Plan, revision S2, EC, dated Sep 2009;
- Glendhu Station Stage 3: Master Plan, revision S3, EC, dated Sep 2009;
- Glendhu Station Parkins Bay Golf Course Master Plan, revision EC, dated Sep 2009;
- Parkins Bay Indicative Vegetation Categories Plan dated Sep 2009;
- Parkins Bay Glendhu Station Concept Master Landuse Plan, dated June 2011;
- Parkins Bay Glendhu Station Covenant Areas Plan, dated June 2011;
- Parkins Bay Detail A Proposed Public Easement and Covenant area, dated Sep 2009
- Parkins Bay Detail B Proposed Covenant Areas, dated June 2011;
- Parkins Bay Detail 1 Proposed Club House area Figure 10a, dated June 2011;
- Parkins Bay Detail 2 Maintenance Compound Site Plan, Sep 2009;
- Parkins Bay Visitor Accommodation Residences Site Location Plan;
- Parkins Bay Visitor Accommodation Residences Building Mitigation Plan;
- Parkins Bay Proposed Golf Course Earthworks Plan, dated August 2009;
- Parkins Bay Entry Gate elevation, dated Sep 2009;
- Parkins Bay Plan B, dated September 2011;

- Parkins Bay, Visitor Accommodation Residences Detail Site Plan; House Site 1, dated Sep 2009;
- Parkins Bay, Visitor Accommodation Residences Detail Site Plan, House Site 3 and 4, date; Sep 2009;
- Parkins Bay, Visitor Accommodation Residences Detail Site Plan, House Site 5, dated Sep 2011;
- Parkins Bay, Visitor Accommodation Residences Detail Site Plan, House Site 6, dated Sep 2009;
- Parkins Bay, Visitor Accommodation Residences Detail Site Plan, House Site 8, dated Sep 2009;
- Parkins Bay, Visitor Accommodation Residences Detail Site Plan, House Site 9, dated Sep 2009;
- Parkins Bay, Visitor Accommodation Residences Detail Site Plan, House Site 10, dated Sep 2009;
- Parkins Bay, Visitor Accommodation Residences Detail Site Plan, House Site 11, dated Sep 2009;
- Parkins Bay, Visitor Accommodation Residences Detail Site Plan, House Site 13, dated Sep 2009;
- Parkins Bay, Visitor Accommodation Residences Detail Site Plan, House Site 16 & 17, dated Sep 2011;
- Parkins Bay, Visitor Accommodation Residences Detail Site Plan, House Site 18, dated Sep 2009;
- Parkins Bay, Visitor Accommodation Residences Detail Site Plan, House Site 19, dated Sep 2009;
- Parkins Bay, Visitor Accommodation Residences Detail Site Plan, House Site 20, dated Sep 2009;
- Parkins Bay, Visitor Accommodation Residences Detail Site Plan, House Site 21 & 22, dated Sep 2009;
- Parkins Bay, Visitor Accommodation Residences Detail Site Plan, House Site 24, dated Sep 2009;

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- Parkins Bay, Visitor Accommodation Residences Detail Site Plan, House Site 26, dated Sep 2009;
- Parkins Bay, Visitor Accommodation Residences Detail Site Plan, House Site 27, dated Sep 2009;
- Parkins Bay, Visitor Accommodation Residences Detail Site Plan, House Site 29 & 30, dated Sep 2009;
- Parkins Bay, Visitor Accommodation Residences Detail Site Plan, House Site 31 & 32, dated Sep 2009;
- Parkins Bay, Visitor Accommodation Residences Detail Site Plan, House Site 33 & 34, dated Sep 2009;
- Parkins Bay, Visitor Accommodation Residences Detail Site Plan, House Site 35 & 36, dated Sep 2009;
- Parkins Bay, Visitor Accommodation Residences Detail Site Plan, House Site 37, dated Sep 2009;
- Parkins Bay, Visitor Accommodation Residences Detail Site Plan, House Site 38 & 39, dated Sep 2009;
- Parkins Bay, Visitor Accommodation Residences Detail Site Plan, House Site 40, dated Sep 2009;
- Parkins Bay, Visitor Accommodation Residences Detail Site Plan, House Site 41 & 42, dated Sep 2009;
- Parkins Bay, Visitor Accommodation Residences Detail Site Plan, House Site 43 &44 , dated Sep 2009;
- Parkins Bay, Visitor Accommodation Residences Detail Site Plan, House Site 45, dated Sep 2009;
- Parkins Bay, Visitor Accommodation Residences Detail Site Plan, House Site 46 & 47, dated Sep 2009;
- Parkins Bay, Visitor Accommodation Residences Detail Site Plan, House Site 48, dated Sep 2009;
- Parkins Bay, Visitor Accommodation Residences Detail Site Plan, House Site 49, dated Sep 2009;
- Parkins Bay, Visitor Accommodation Residences Detail Site Plan, House Site 50, dated Sep 2009;

a. The Clubhouse is to be moved back 3 metres from the position identified in the plan referenced Parkins Bay Detail 1 Proposed Club House area Figure 10a, dated June 2011, and any necessary amendments required to be made to the layout accordingly;

b. The public mountain access track through the visitor accommodation residential units area (Area B) shall be in the location outlined on the plan referenced Parkins Bay Glendhu Station Concept Landuse Master Plan, dated June 2011.

2. The consent holder shall pay to the Council an initial fee of $240 for the costs associated with the initial monitoring of this resource consent in accordance with section 35 of the Resource Management Act 1991 and any ongoing costs associated with the monitoring of this decision.

3. Upon completion of the proposed activity, the consent holder shall contact the Monitoring Section at Council to arrange a time for an inspection of the proposed work to ensure all conditions have been complied with

Timeframe and Staging

4. The lapsing date of this consent under section 125 of the Resource Management Act 1991 shall be ten years from the commencement of the consent

5. The programme for implementation of the consent, including landscaping, shall be staged generally in accordance with the timing outlined below, subject to compliance with Condition 8 below, relating to certification of planting for visitor accommodation residences. Each stage shall be completed to the satisfaction of Council, within the specified timeframe and before the next stage commences.

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The proposed staging is as follows:

i. **Stage 1 - within approximately 24 months of the works commencing on site.**

- Eco source seed stock and grow-on in nursery
- 18 hole golf course/driving range and maintenance compound
- Clubhouse
- Shearer's quarters
- 10 x Visitor Accommodation Residences (Units 24, 29, 31, 32, 34, 35, 36, 42, 43 & 44)
- Access road, car park and golf underpasses
- Jetty
- Roading earthworks
- Earthworks for the building platforms of the 42 visitor accommodation residences
- Re grass/sow-out exposed golf villa earthworks
- Sow out entire golf course. This is to be done progressively as holes are completed and irrigation is available.
- 2ha mitigation revegetation planting as detailed in the Revegetation Strategy prepared in accordance with Condition 6
- Creation of the public access tracks and appropriate access easement.
- Install new farm fencing as required
- The removal of the row of Douglas Fir Trees to the southeast of the development site
- Removal of conifers as required by Condition 41(u).

The golf course shall be constructed prior to the occupation of the visitor accommodation residences specified in Stage 1

ii. **Stage 2 - within 24 months of the completion of Stage 1**

- 6ha of mitigation revegetation as detailed in the Revegetation Strategy prepared in accordance with Condition 6
- 20 x Visitor Accommodation Residences (Units 1, 3, 4, 5, 8, 9, 10, 11, 13, 16, 18, 19, 20, 30, 33, 38, 47, 48, 49 & 50)

iii. **Stage 3 – within 24 months of the completion of Stage 2**

- Remaining revegetation as detailed in the Revegetation Strategy prepared in accordance with Condition 6
- 12 x Visitor Accommodation Residences (Units 6, 17, 21, 22, 26, 27, 37, 39, 40, 41, 45, 46).
- Fencing off the Stock Route shown on Parkins Bay Plan A dated June 2011 to prevent stock accessing the regeneration areas in Covenant Area D identified on the Parkins Bay Glendhu Station Covenant Areas Plan dated June 2011.
- Fencing of the areas required by Conditions 41(v) and 41(z).

Planting Plan

6. The consent holder shall prepare and implement a Revegetation Strategy that achieves the following objectives:

- To provide a vegetation cover framework of Kanuka and other appropriate native species in the short term, which can be become the basis for biodiversity enhancement as the project develops,

- To provide screening for residential buildings for viewers from the road in accordance with the attached plans and the Revegetation Strategy,

- To reflect the underlying of landform and soils in the native vegetation cover of the site,

- To achieve eventual revegetation of the Gully shown on Parkins Bay Plan B dated September 2011 with a mix of locally sourced native species including Totara.
- To achieve eventual revegetation of the Moraine Slope shown on Parkins Bay Plan B dated September 2011.
- To ensure that the "rough" areas of the golfcourse, being the vegetated areas not required to be mowed or otherwise maintained, regenerate naturally (excluding noxious weeds).
- To link with other revegetated areas outside the site;

The Revegetation Strategy shall identify those steps that need to be undertaken in each of the three areas shown on the attached plans referenced Glendhu Station Stage 1: Master Plan, Glendhu Station Stage 2: Master Plan, Glendhu Station Stage 3: Master Plan, dated September 2009 to give effect to the Strategy.

The Revegetation Strategy shall include:

- timing of planting and replacement/additional planting over 5 years;
- details of the management proposed from the time of granting consent up to 10 years after initial planting - site preparation, weed control, pest control, any watering or fertilisers, stock control and maintenance;
- details of plant sources;
- protection measures for existing values - wetlands, lake shore, lake water quality;
- integration of planting with other components of the development - earthworks, construction;
- fencing of the regeneration area for stock to pass through parts of the site;
- the replacement of the existing poplar trees next to the clubhouse and shearer's accommodation if they become diseased or die. Root stock shall be sourced from the existing healthy Lombardy poplars which are to be taken and grown on for this purpose

Prior to the commencement of the construction the consent holder shall provide the Revegetation Strategy for certification by Council.

7. Prior to the commencement of any construction of the visitor accommodation/residential units the consent holder shall provide for the certification of the Council details of all earth mounds, if any, and their respective volumes, location and elevations required to provide screening for the visitor accommodation/residential units which shall be tied into existing landforms and organically shaped to be congruent with their respective surroundings.

8. Prior to the construction of visitor accommodation / residential units for:

   a. Stage 1 and 2 (as specified in Condition 5), certification shall be obtained from the Council that the planting conforms to the certified Revegetation Strategy for those stages and that more than 75% of the plants are live and healthy at a period of 12 months from the date of establishment. All diseased or dying plants shall be replaced to the satisfaction of the Council.

   b. Stage 3 (as specified in Condition 5), certification shall be obtained from the Council that the planting conforms to the certified Revegetation Strategy for that stage and that more than 75% of the plants are live and healthy and at an average height of 3

metres. All diseased or dying plants shall be replaced to the satisfaction of the Council.

9. Planting for all visitor accommodation residences implemented in accordance with the Revegetation Strategy shall be irrigated for a period of five years from establishment to ensure optimal growth rates. To avoid fire risk all planting shall be located at an appropriate distance from any residential villa.

10. All planting implemented in accordance with the Revegetation Strategy is to be:

    a. maintained for a period of ten years from the first season of planting to the satisfaction of Council.

    b. All diseased or dying plants shall be replaced to the satisfaction of Council.

    c. An annual report on the maintenance and health of planting is to be provided to the Council for a period of ten years from the first season of planting.

    The Council may serve notice of its intention to review, amend or add to the Revegetation Strategy to require additional planting, as may be required in order to achieve the Objectives outlined in Condition 6. Revegetation is to be protected by a covenant registered on the land title that will protect the planting in perpetuity.

Lighting

11. All exterior lighting shall be fixed and no higher than 1 metre above finished ground level, capped, filtered or pointed downwards and screened so as to reduce lux spill. There shall be no lighting of the vehicle access ways within the site. The lighting shall be limited to:

    a. Lighting at the entry point to the golf course.

    b. Sensor lights in the arrival forecourts for each of the visitor accommodation residences to allow for safe navigation from the garage. These will be limited to downlights on either side of the garage and entry doors and will be located on the south side of the buildings.

    c. Bollard and subtle up-lighting around the Clubhouse and the Shearers' Quarters.

    d. Solar LED lights on the path between the Clubhouse and the Shearers' Quarters.

    e. A navigation light at the end of the jetty.

    f. Road lighting limited to low wattage, solar LED catseye lights placed at intersections in the middle of the road. These are to provide a visual cue to denote the intersection.

Ongoing Management Obligations

12. No person is permitted to remove or physically alter the approved earth mounds and landscaping.

13. No person shall be permitted to plant exotic trees other than those tree species (or similar, subject to approval by QLDC) specified within the Planting Plan approved pursuant to Condition 6).

14. The consent holder shall provide for the on-going management of wilding plants and animal pests over the Development Site as outlined in the Revegetation Strategy approved pursuant to Condition 6.

Engineering

15. All engineering works shall be carried out in accordance with the Queenstown Lakes District Council's policies and standards, being New Zealand Standard 4404:2004 with the amendments to that standard adopted on 5 October 2005, except where specified otherwise.

16. The owner of the land being developed shall provide a letter to the Council advising who their representative is for the design and execution of the engineering works and construction works required in association with this development and shall confirm that these representatives will be responsible for all aspects of the works covered under sections 1.4 and 1.5 of NZS4404:2004 "Land Development and Subdivision Engineering", in relation to this development.

17. Prior to the commencement of any building construction the consent holder shall provide to the Queenstown Lakes District Council a geotechnical report, prepared by a suitably qualified and experienced geotechnical engineer, which certifies that all building platforms are capable of supporting the proposed buildings, are suitable for the activity and are free from inundation, subsidence, erosion and slippage and otherwise suitable for the proposed use.

18. Prior to the commencement of any work on the land being developed the consent holder shall provide to the Queenstown Lakes District Council for review copies of specifications, calculations and design plans as is considered by Council to be both necessary and adequate, in accordance with Condition (15), to detail the following engineering works required:

    a. The construction of all roads within the development to be in accordance with the guidelines provided for in Table 3.2(a) of the NZS4404:2004 amendments as adopted by the Council in October 2005. Internal roads serving the Shearers Quarters, Golf Course and Clubhouse shall be constructed to the standards of a Local road as a minimum standard. All internal roads may remain in private ownership and shall be maintained by the consent holder. Passing bays are to be provided on one way carriageways as required but at maximum intervals of 100 metres.

    b. The construction of the intersections of the new roads to serve the development with the Wanaka–Mt Aspiring Road to be in accordance with Council's standards and in accordance with the information supplied with the application with respect to sight distances. The sight distance from the main golf course entrance to the west is to be improved by removing obstructing trees and shrubs on the bend in Wanaka–Mt Aspiring Road. This visibility splay is to be maintained by the consent holder on a continuing basis. The intersections for both the main golf course roads and the residential chalets road shall be formed in accordance with Diagram 4 of the PODP and also in accordance with the Council's Rural Roading Corridors – Corridor Management Guideline (particularly Section 4.10 – Slip Lanes).

    c. The construction of all vehicle manoeuvring areas and car parks specified in the application to serve the development are to be constructed in accordance with the attached Plan referenced "Parkins Bay Detail 1 Proposed Clubhouse Area, Figure 10a, dated June 2011. This plan shows 12 covered parking spaces adjacent to the clubhouse, a 40 space gravel car parking area adjacent to the clubhouse, a ten space gravel car park area adjacent to the bus turning bay/parking area and 16 spaces to be provided on all weather surfacing along the access road under the trees; one gravel bus turning bay/parking area and an overflow parking area for at least 150 vehicles that is not required to be formed

d. All walking and cycling tracks marked by blue dotted lines on the attached plan referenced Parkins Bay Glendhu Station Concept Master Landuse Plan dated June 2011 shall be constructed and maintained in accordance with the Walking Track Standard as defined in the Standard New Zealand Handbook for Tracks and Outdoor Visitor Structures (SNZ HB 8630; 2004), except as specified in Condition 41.

e. The construction of the underpasses under Wanaka–Mt Aspiring Road are to be designed by a suitably qualified and experienced engineer. These underpasses are to be approved by the Council and all necessary permits and licenses are to be applied for and granted prior to undertaking any development on site. If the necessary Council approvals are not granted then the consent holder shall submit a revised traffic assessment for approval that addresses any issues with the golf course and other internal traffic crossing Wanaka–Mt Aspiring Road.

f. The consent holder shall obtain approval from the Council and all necessary permits and licences are to be applied for and obtained prior to commencing construction of the jetty including the pontoon.

g. The provision of a water supply to each residence and all other components of the development in terms of Council's standards. Each residence shall be supplied with a minimum of 2100 litres per day of potable water that complies with the requirements of the Drinking Water Standard for New Zealand 2005. All other components of the development are to be supplied with the quantity of potable water that complies with the requirements of the Drinking Water Standard for New Zealand 2005 specified in the application.

h. The provision of fire hydrants with adequate pressure and flow to service each residence with a Class W3 fire risk in accordance with the NZ Fire Service Code of Practice for Firefighting Water Supplies 2003. Any lesser risk must be approved in writing by Fire Service NZ, Dunedin Office.

i. The provision of fire hydrants with adequate pressure and flow to service each component of the development with the appropriate Class of fire risk in accordance with the NZ Fire Service Code of Practice for Firefighting Water Supplies 2003. Any lesser risk must be approved in writing by Fire Service NZ, Dunedin Office.

j. The provision of sealed vehicle crossing to each residence site from internal roads to be in terms of Diagram 2, Appendix 7 and Rule 14.2.4.2 of the Partially Operative District Plan. This shall be trafficable in all weathers and be capable of withstanding a laden weight of up to 25 tonnes with an axle load of 8.2 tonnes or have a load bearing capacity of no less than the public roadway serving the property, whichever is the lower. Provision shall be made to continue any roadside drainage.

k. The provision of a stormwater disposal system that is to provide stormwater disposal from all impervious areas within the site. The proposed stormwater system shall be designed by a suitably qualified professional as defined in Section 1.4 of NZS4404:2004 and subject to the review of Council prior to implementation.

l. The provision of an access way to each residence that complies with the guidelines provided for in Table 3.2(a) of the NZS4404:2004 amendments as adopted by the Council in October 2005.

m. The provisions of an effluent disposal system designed by a suitably qualified professional as defined in section 1.4 of NZS4404:2004in terms of AS/NZS 1547:2000 that will provide sufficient treatment / renovation to effluent from on-site disposal, prior to discharge to land. To maintain high effluent quality such a system would require the following:

- Specific design by a suitably qualified professional engineer.
- A requirement that each component of the development must include systems that achieve the levels of treatment determined by the specific design.
- Regular maintenance in accordance with the recommendations of the system designer and a commitment by the owner of each system to undertake this maintenance.
- Intermittent effluent quality checks to ensure compliance with the system designer's specification.
- Disposal areas shall be located such that maximum separation (in all instances greater than 50 metres) is obtained from any watercourse or water supply bore.
- The system is to be designed and constructed in accordance with the information supplied in the application in particular the report prepared by Glasson Potts Fowler (ref 9198GLE-1A dated July 2006)

n. The drinking water supply is to be monitored in compliance with the Drinking Water Standards for New Zealand 2005 for the presence of E.coli, by the management group for the development, and the results forwarded to the Queenstown Lakes District Council. The Ministry of Health shall approve the laboratory carrying out the analysis. Should the water not meet the requirements of the Standard then the management group for the lots shall be responsible for the provision of water treatment to ensure that the Drinking Water Standards for New Zealand 2005 are met or exceeded.

o. In the event that the number of persons to be accommodated in any residence is to be greater than three, then the Queenstown Lakes District Council will require commensurate increases in the water supply to that lot at the rate of 700 litres per extra person per day.

p. All water tanks to be underground.

19. Prior to the occupation of any visitor accommodation residential unit, or of the Clubhouse, or of the Shearers Quarters, or of the Maintenance Compound the consent holder shall complete the following for each stage (as specified in condition 5):

a. The submission of 'as-built' plans and information required to detail all engineering works completed in relation to or in association with the appropriate part of this development.

b. The completion of all relevant works detailed in condition 18 above.

c. The consent holder shall provide a suitable and usable power supply and telecommunications connection to the residences and all other components of the development. These connections shall be underground from any existing reticulation and in accordance with any requirements/standards of Aurora Energy/Delta and Telecom.

20. Prior to commencing work on the site the consent holder shall obtain all necessary consents relevant to that work from the Otago Regional Council. This shall include, but is not restricted to, all necessary consents for the construction of a jetty in Lake Wanaka.

21. Prior to commencing any work on the site the consent holder shall install a vehicle crossing, which all construction traffic shall use to enter and exit the site. The minimum standard for this crossing shall be a minimum compacted depth of 150mm AP40 metal. This crossing

shall be upgraded in accordance with Council's standards, or removed, at the time development is undertaken on the site.

22. Prior to commencing works, the consent holder shall submit to Council for review a site management plan for the works.

23. All retaining systems, permanent or temporary, shall be designed by a suitably qualified and experienced engineer. The designs shall be submitted to the Council for approval prior to installation.

24. The consent holder shall provide Council with the name of a suitably qualified professional as defined in section 1.4 of NZS4404:2004 who is to supervise the excavation procedure. This engineer shall continually assess the condition of the excavation and implement any design changes / additions if and when necessary.

25. All temporary retention systems shall be installed immediately following excavation to avoid any possible erosion or instability.

Landscape

26. Final colours for the maintenance building, visitor accommodation/residential units and jetty shall be submitted to Council for approval prior to development commencing on the site. In this instance, the final colour scheme for these buildings and structures shall appear appropriately recessive throughout all seasons of the year and within the natural colour ranges of browns, greens and greys as indicated throughout the surrounding landscape.

27. Prior to development commencing on the site, elevations of all buildings within the maintenance compound shall be submitted to Council for approval. The external appearance of these buildings shall be consistent with the rural context within which they are located.

28. A site plan shall be submitted to Council for approval prior to development commencing, which indicates the location and form of all batter slopes and areas of fill. The consent holder should aim to achieve batter slopes and areas of fill which have a maximum gradient of 1:3 (rise:run), with natural undulations across vertical and horizontal planes, as well as smooth transitions in changes in slope, to ensure that these are integrated as much as possible into the existing landform character.

29. In regards to golf course holes 1, 2, 5, 8 and 9; prior to development commencing on the site, further details of the proposed earthworks and finishing of the proposed golf course holes shall be submitted to Council for approval in relation to achieving a naturalised contour.

30. At the completion of earthworks for each stage (as specified in Condition 5), grassing shall occur within six weeks, to ensure that exposed areas of soil do not direct additional attention to the earthworks.

31. Any fencing within the development site shall be restricted to post and wire fencing to a maximum height of 1.2m only, with the exception of the fencing of the regeneration area for stock to pass through as identified within the Revegetation Strategy prepared in accordance with Condition 6.

Earthworks

32. Prior to commencing earthworks on the site the consent holder shall submit to the Council a detailed site plan of all of the earthworks proposed including depth of cut and fill and the proposed finished shape of the land. The accurate earthwork volumes need to be firmly calculated. Earthwork calculations and finished levels of all earthworks are to be supplied to Lakes Environmental.

33. The consent holder shall undertake measures to prevent sediment run off from the site and to prevent a dust nuisance resulting from the works on the site. These measures shall be installed prior to commencing earthworks on the site.

34. A suitably qualified engineer shall assess site conditions and determine safe working conditions with regards to batters and any retention that may be required.

35. The consent holder shall implement suitable measures to prevent deposition of any debris on surrounding roads by vehicles moving to and from the site. In the event that any material is deposited on any roads, the consent holder shall take immediate action, at their expense, to clean the roads. The loading and stockpiling of earth and other materials shall be confined to the subject site.

36. At the completion of the earthworks for each stage (as specified in Condition 5) a suitably qualified Registered Engineer experienced in soils investigations shall provide certification, in accordance with NZS 4431 for all areas of fill within the site on which buildings are to be founded.

37. The earthworks shall be undertaken in a timely manner. Any excavation shall not remain open long enough to enable any instability (caused by over exposure to the elements) to occur.

38. No earthworks, temporary or permanent, are to breach the boundaries of the site

39. At the completion of the earthworks, all earthworked areas shall be topsoiled and grassed or otherwise permanently stabilized as soon as practicable, subject to Condition 29.

40. Upon completion of the earthworks, the consent holder shall remedy any damage to all existing road surfaces and berms that result from work carried out for this consent.

Covenants

41. Prior to the construction of any buildings on the site the consent holder shall register a covenant, in accordance with section 108(2)(d) of the RMA, in favour of the Queenstown Lakes District Council.

For the purpose of Condition 41(a) Stage 3 shall be deemed to be "implemented" when a final code of compliance certificate under the Building Act 2004 has issued for the 12 visitor accommodation residences referred to in Condition 5(iii).

The covenant shall provide for the following:

a. In respect of the areas identified on the attached plans referenced "Parkins Bay Glendhu Station Covenant Areas Plan" dated June 2011 and "Parkins Bay Detail B Proposed Covenant Areas" dated June 2011:

i. The area marked A Bull Paddock shall be covenanted as follows:

aa. For a period that commences on the date of the grant of consent until the date that is ten years from the implementation of Stage 3 there shall be no further development except that this restriction does not prohibit subdivision;

bb. Regardless of titling structure and/or ownership, the clubhouse shall at all times be available to cater to, and for use by, users of the golf course as a place for rest, shelter, refreshment and possibly entertainment. If at any time in the future the land containing the proposed or existing clubhouse is subdivided from the land containing the proposed or

existing golf course, a consent notice shall be registered against both resulting titles recording this ongoing consent obligation.

cc. All activities which are carried out within, and any future allotments which are created from, A Bull Paddock area shall share one access off Mt Aspiring Road.

ii. The area marked B Development Area shall be covenanted in perpetuity from the date of the grant of consent against further development but not prohibiting subdivision of the golf course and the 42 house-sites, and the subdivision and development of eight visitor accommodation/residential units.

Advice Note: For the avoidance of doubt this consent only authorises 42 visitor accommodation/residential units. Any future application for up to eight additional visitor accommodation/residential units within Area B will require a variation to this consent or a new consent and a rigorous assessment of the measures proposed to sufficiently mitigate any potential adverse visibility/domestication effects.

iii. The area marked C1 Farm Area shall be covenanted, for a period that commences on the date of the grant of consent until the date that is ten years from the implementation of Stage 3, against further development not associated with usual farming activities;

iv. The area marked C2 shall be covenanted, for a period that commences on the date of the grant of consent until the date that is 20 years from the implementation of Stage 3, against further development not associated with usual farming activities, but not prohibiting:

aa. activities for camping purposes;
bb. subdivision to separate the area marked C2 from the rest of the land currently contained in Certificate of Title 478353;
cc. a subdivision which will create a separate certificate of title for the area marked X within C2; and
dd. any boundary adjustment which does not create additional titles;

v. Subject to subclause vi below, the area marked E shall be covenanted in perpetuity from the date of the grant of consent against further development, but not prohibiting:

aa. Subdivision to separate the area marked E from the rest of the land currently contained in Certificate of Title 478353 and any boundary adjustment which does not create additional titles;

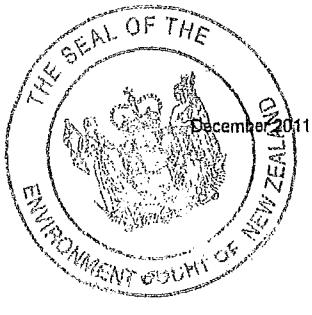
bb. Any alterations, repairs or extensions to the existing dwelling located on the land;

*[cc. The construction of a shed for the purpose of storing farming and landscaping equipment;]

dd. The erection of any temporary buildings such as marquees and other shelters used for the purpose of conducting weddings and reception functions, up to a maximum of 6** days per calendar year;

*[ee. The construction of a chapel;]

*[ff. The construction of a residential unit, ancillary to the main dwelling;]



[**Subject to determination by the Court as to whether this should be deleted*]
[***Reducible down to 1 day if determined by the Court*]

vi. The restriction detailed in v. above relating to temporary buildings for weddings and reception functions shall take effect on and from the date the clubhouse is constructed and operational.

vii. The area marked F shall be covenanted for a period that commences on the date of the grant of consent until the date that is 35 years from the implementation of Stage 3, against any further development, but not prohibiting:

aa subdivision to separate the area marked F from the rest of the land currently contained in Certificate of Title 478353;
bb subdivision for farming purposes;
cc any boundary adjustment which does not create additional titles;
dd the relocation, repair and replacement of the existing homestead and ancillary buildings;
ee the construction, repair and relocation of any improvements or buildings which relate to the farming activities carried out on the land;
ff the construction of two further residential dwellings on the land and any subsequent repairs and alterations to those residential dwellings;

viii The area marked G shall be covenanted in perpetuity from the date of the grant of consent against any development not associated with farming activities, but not prohibiting any boundary adjustment which does not create additional titles.

b. The consent holder will enable public access by way of a registered easement in gross over the area identified in red, as number 12, on the attached plan referenced "Parkins Bay Detail A Proposed Public Easement", dated September 2009, in favour of the Queenstown Lakes District Council to enable public access to this area in perpetuity.

c. The consent holder will enable public access by way of a registered easement in favour of the Queenstown Lakes District Council along a route between Rocky Hill (CA1) and the Matukituki River in the location approximately shown as a blue dotted line on the attached plan referenced "Parkins Bay Glendhu Station Concept Master Landuse Plan" dated June 2011, subject to the following conditions:

- The access route shall be restricted to a route connecting Rocky Hill (CA1) and the Matukituki River that will be marked by bollards and/or poles and signs erected by the consent holder.
- Public access shall be restricted to walking access only.
- The conditions detailed in Schedule A.

Advice note: The Queenstown Lakes District Council shall be responsible for the maintenance of the access route.

d. The consent holder will enable public access by way of a registered easement in favour of the Queenstown Lakes District Council along a route along the Motatapu Road between the Mt Aspiring Road and the Motatapu Track, in the location approximately shown as a blue dotted line on the attached plan referenced "Parkins Bay Glendhu Station Concept Master Landuse Plan" dated June 2011, subject to the following conditions:

- The access route shall be restricted to a specific route that will be marked by bollards and/or poles and signs erected by the consent holder.

- Public access shall be restricted to walking access only.
- The conditions detailed in Schedule A.

Advice note: The Queenstown Lakes District Council shall be responsible for the maintenance of the access route.

e. The consent holder will enable public access by way of a registered easement in favour of the Queenstown Lakes District Council along a route from the development site to Glendhu Hill, in the location approximately shown as a blue dotted line on the attached plan referenced "Parkins Bay Glendhu Station Concept Master Landuse Plan" dated June 2011, subject to the following conditions:

- The access route shall be restricted to a specific route that will be marked by bollards and/or poles and signs erected by the consent holder.
- Public access shall be restricted to walking access only.
- The conditions detailed in Schedule A.

Advice note: The Queenstown Lakes District Council shall be responsible for the maintenance of the access route.

f. The consent holder will procure variation of the terms of the easement EI 6594177.5, so that mountain biking is permitted over the easement areas V, W and Section 19 on SO 347712, and will procure registration of an instrument providing for that variation on the relevant certificate of title.

g. The consent holder will procure variation of the terms of the easement EI 6594177.7, so that mountain biking is permitted over the easement areas X and U on SO 347712, and will procure registration of an instrument providing for that variation on the relevant certificate of title.

h. The consent holder will enable public access by way of a registered easement in favour of the Queenstown Lakes District Council along a route between easement areas V and W on SO 347712 along the Motatapu River, in the location approximately shown as a blue dotted line on the attached plan referenced "Parkins Bay Glendhu Station Concept Master Landuse Plan" dated June 2011, subject to the following conditions

- The access route shall be restricted to a specific route that will be marked by bollards and/or poles and signs erected by the consent holder. This route will use both the marginal strip and enable access by way of easement over parts of the adjacent land where access along the marginal strip is not available due to erosion of the river bank;
- Public access shall be restricted to walking and mountain biking access only.
- The conditions detailed in Schedule A.

Advice note: The Queenstown Lakes District Council shall be responsible for the maintenance of the access route.

i. Subject to Condition (j) below, the consent holder shall be entitled to close or restrict access to the tracks within the Development Site, as the consent holder considers necessary, for golf course operations (including tournaments), maintenance, repair, safety or security purposes.

j. The consent holder shall be entitled to close or restrict access to the track along the Parkins Bay foreshore, where the track passes through the Development Site, as the consent holder considers necessary, for golf course operations (including

tournaments), maintenance, safety or security purposes, for up to 25 individual days per year (but not exceeding 5 weekends).

k. Preventing the removal and or physical alteration of the earth mounds and landscaping located around each visitor accommodation/residential unit approved in accordance with Conditions 6 and 7.

l. The ongoing maintenance of planting implemented to give effect to the Revegetation Strategy approved in accordance with Condition 6.

m. The establishment of exotic species within the areas identified as A, B and D on the attached plan referenced "Glendhu Station Covenant Areas Plan" dated March 2010 other than those species specified within the Revegetation Strategy approved in accordance with Condition 6 is prohibited.

n. The ongoing management of wilding plants and animals pests by the consent holder in accordance with the Revegetation Strategy prepared in accordance with Condition 6.

o. The installation or use of fires that emit smoke are prohibited except for any fire installed at the clubhouse.

p. That the 18 hole golf course will be available for green fee players to use at all times, other than when the golf course is being used for tournaments or functions held at the golf course. Affiliated members of the Wanaka Golf Course will be entitled to use the golf course at a discounted rate of no less than 20% off the green fee rate which is charged to the general public at any time.

q. In respect of the curtilage areas identified for the visitor accommodation/residential units within Area B on the plan referenced "Glendhu Station Covenant Areas Plan" dated June 2011:

- The curtilage area for each visitor accommodation/residential unit shall be restricted to the curtilage areas defined on the attached plans referenced "Parkins Bay Visitor Accommodation Residences – Detail Site Plan, House Sites 1, 3-6, 8-11, 13, 16-22, 24, 26-27, 29-50 " dated September 2009

- All domestication including hard landscaping and ancillary structures associated with the visitor accommodation/residential units shall be restricted to the designated curtilage area. No domestic elements shall be located outside the designated curtilage areas;

- No introduced planting over 0.5m is permitted within the designated curtilage areas unless it is from the approved Kanuka/Grey shrubland plant list detailed in the Revegetation Strategy prepared in accordance with Condition 6;

- No structures or fences over 0.75m in height are permitted within the designated curtilage areas (this allows for the extension of the existing stone retaining walls), except as required under the Fencing of Swimming Pools Act 1987;

- No introduced planting is permitted outside the designated curtilage areas unless it is from the approved Kanuka/Grey shrubland plant list detailed in the Revegetation Strategy prepared in accordance with Condition 6.

r. The keeping of cats at the consented visitor accommodation/residential units is prohibited.

s. Prior to the occupation of any house-site the proposed occupier shall request, and the Council shall undertake, a site visit to confirm that the existing (and any proposed)

vegetation required to be planted and maintained under this consent on that house-site achieves adequate separation distance (from buildings) and evacuation access to avoid fire risk as required by Condition 9.

t. In order to achieve appropriate control of wilding trees and noxious weeds on an ongoing basis the following requirement shall apply within Covenant Area B identified on the attached plan referenced "Parkins Bay Glendhu Station Covenant Areas Plan" dated June 2011:

   i. For the purposes of this condition "Plant Pests" means and includes any fir or conifer species with potential to spread naturally, sweet briar, lupins, gorse, broom, and any other Pest Plant as specified in the Regional Pest Management Strategy for Otago.

   ii. Prior to occupation of any dwelling the relevant house-site shall be cleared of all Plant Pests.

   iii. The owner of any house-site shall keep the house-site clear of any Plant Pests.

   iv. Any areas managed and maintained by a Parkins Bay Residents and Owners Association (or similar body) shall keep those areas clear of any Plant Pests.

u. Prior to completion of Stage 1 of the development the consent holder shall remove all conifers (including any conifers or firs with wilding potential) from Covenant Areas A, B and D and from that part of Covenant Areas F and G located between Covenant Area B and the Fern Burn, all Covenant Areas as identified on the attached plan referenced "Parkins Bay Glendhu Station Covenant Areas Plan" dated June 2011.

v. Prior to completion of Stage 3 of the development the areas detailed below shall be fenced to prevent stock access into those areas. The fencing shall be maintained permanently to prevent stock accessing those areas. The areas are approximately detailed on Parkins Bay Plan B dated September 2011 as follows:

   i. The wetter area of Wetland A, comprising an area of approximately 150 metres by 20 metres, subject to monitoring and assessment under Condition 51.

   ii. Wetland B and Wetland C and Areas 1 and 2.

   iii. The Gully and the Moraine Slope.

w. The consent holder shall ensure that any stock access to or across the watercourse running between Wetland A and Wetland C and any other watercourses shown on Parkins Bay Plan A dated June 2011 has a firm rocky or pebbly substrate to prevent pugging and erosion caused by stock movements.

x. The consent holder will enable public access by way of a registered easement in favour of the Queenstown Lakes District Council along a route between Rocky Hill (CA1) and the Motatapu River in the location approximately shown as a blue dotted line on the attached plan referenced "Parkins Bay Glendhu Station Concept Master Landuse Plan" dated June 2011, subject to the following conditions:

   - The access route shall be restricted to a route connecting Rocky Hill (CA1) and the Motatapu River that will be marked by bollards and/or poles and signs erected by the consent holder.
   - Public access shall be restricted to walking access only.

- The conditions detailed in Schedule A.

Advice note: The Queenstown Lakes District Council shall be responsible for the maintenance of the access route.

y. The consent holder will enable public access by way of a registered easement in favour of the Queenstown Lakes District Council along a route from the development site to the Motatapu Road and continuing southeast to the boundary with Alpha Burn Station, in the location approximately shown as a blue dotted line on the attached plan referenced "Parkins Bay Glendhu Station Concept Master Landuse Plan" dated June 2011, subject to the following conditions:

- The access route shall be restricted to a specific route that will be marked by bollards and/or poles and signs erected by the consent holder.
- Public access shall be restricted to walking and mountain biking access only.
- The conditions detailed in Schedule A.

Advice note: The Queenstown Lakes District Council shall be responsible for the maintenance of the access route.

z. Prior to completion of Stage 3 of the development the consentholder shall fence the eastern and western riparian boundaries of the Fern Burn to exclude cattle from the Fern Burn riparian corridor between the Motatapu Road culvert/bridge and Lake Wanaka. When implementing such fencing the consentholder may install gates to enable cattle to cross the Fern Burn riparian corridor at two crossing points, one identified as "Stock Route" on Parkins Bay Plan B dated September 2011 and the other located south of Wetland E shown on Parkins Bay Plan B dated September 2011. When cattle use either of those crossing points the consentholder shall ensure that the cattle move straight across from the private land on one side of the riparian corridor to the private land on the other side of the riparian corridor without lingering in the Fern Burn. Fencing installed under this condition shall be installed as close as is reasonably and practically possible to the boundary between the freehold title and the public marginal strip.

aa. Area 1, Area 2, the Gully and the Moraine Slope (all identified on Parkins Bay Plan B dated September 2011) which must be fenced as required under v. above, shall be kept free of Plant Pests (as defined in t. above).

Review

42. In accordance with sections 128 and 129 of the Resource Management Act 1991, the Council may serve notice of its intention to review; amend, delete or add to the conditions of this consent at the consent holders expense yearly for the first ten years after the commencement of consent and thereafter at two yearly intervals and at any other time when the consent holder shall be in default in a material particular in the implementation or compliance with the consent for the purposes of requiring the consent holder to:

- deal with any adverse effect on the environment which may arise from the exercise of this consent and which it is appropriate to deal with at a later stage, or which became evident after the date of commencement of the consent, or
- review the effectiveness of the conditions of this resource consent in avoiding or mitigating any adverse effects on the environment from the exercise of this resource consent and if necessary require the consent holder to avoid, remedy or mitigate such effects by way of further or amended conditions.

Poplar Trees

43. Prior to the commencement of earthworks on site, further detailed arboricultural advice shall be sought on the potential effects of the earthworks on those trees most at risk from earthworks and construction. A substantial barrier fence is to be erected in accordance with the recommendation of the arboriculturalist to ensure protection of the trees and their associated root system.

44. Regular inspections and monitoring of tree health is to be undertaken every two years and a report provided to the Queenstown Lakes District Council. This work is to be undertaken by a qualified Arborist.

45. Where the two year inspection and reporting programme identifies evidence of tree decline, a more detailed inspection shall be arranged and the recommendations of the more detailed inspection reported to the Queenstown Lakes District Council.

Golf Course Management

46. Fertilisers are only to be applied to green and fairway areas in small and frequent applications at a level which ensures that the rate of application accurately meets plant demands and no more. Details of the application rates are to be supplied to the Council for review prior to the commissioning of the golf course.

47. An integrated pest management plan is to be prepared which demonstrates that the use of chemical pesticides is targeted in application only to those areas where treatment has been identified as being necessary.

48. Irrigation of the golf course is to be computerised to ensure that the rate of water application to the green and fairway is appropriate to maintain soil moisture at the correct level avoiding wastage of water, the saturation of soils, ponding, excess soil drainage and contaminant leaching.

49. Riparian vegetative buffer strips are to be maintained between the golf course and Lake Wanaka and the golf course and the edge of the Fern Burn watercourse. These buffer strips must be a minimum of 20m wide and not be subject to the application of any fertiliser, pesticide or irrigation

Monitoring

50. Monitoring of water quality is to be undertaken every six months as detailed below from the date the golf course is commissioned. Details of the sampling methods and monitoring are to be provided to the Council for review prior to the commissioning of the golf course. The details of this monitoring regime including frequency of monitoring, what contaminants will be required to be assessed, and immediate responses required if contamination is found, needs to be established to the satisfaction of Council prior to the commissioning of the golf course. The following monitoring is required:

    a. Monitoring of water quality within Parkins Bay close to the shoreline adjacent to the golf course.

    b. Monitoring of stream water from streams upstream of the golf course/house-sites development areas, at the points where such streams cross from Glendhu Station into the golf course/house-sites development areas.

    Note: The purpose of a. and b. above is to monitor the effect of golf course activities on water quality.

    c. Monitoring of water quality upstream and downstream of those parts of the Fern Burn within Covenant Area F which are accessible to stock, such monitoring to be carried out during periods of stock access for the purpose of monitoring the affected of stock

access on water quality. If monitoring detects a ≥ 10% change in nitrogen and phosphorus, or bacteria above recreational guidelines (200 faecal coliforms/100ml), then the possibility of fencing the river from stock access on a regular basis should be reviewed.

51. The areas of Wetland A detailed on Parkins Bay Plan B dated September 2011 which are outside that part of Wetland A fenced under Condition 41(v) shall be monitored 5 years after the date the golf course is commissioned, within 2 weeks after the area has been grazed by stock, for the purpose of assessing any adverse effects caused by stock on the balance dry wetland areas on the margins of the fenced wetter area. If this monitoring reveals an inappropriate degree of adverse effect then the area of Wetland A required to be fenced under Condition 41(v) may be reviewed.

52. There shall be no netting erected associated with the driving range.

Accidental Discovery Protocol and Archaeology

53. That if any koiwi (human skeletal remains), waahi taoka (resource of importance), waahi tapu (place or feature of special significance) or artefact material are discovered as part of the development process, then work shall stop to allow a site inspection by the appropriate runanga and their advisors, who would determine whether the discovery is likely to be extensive and whether a thorough site investigation is required. Materials discovered should be handled and removed by tribal elders responsible for the tikanga (custom) appropriate to their removal or preservation.

54. An archaeological authority shall be obtained from the New Zealand Historic Places Trust, should further site investigation confirm that the historic house site identified in the report of Mr Petchey is affected by construction activities.

55. The camp site identified in the report of Mr Petchey shall be protected during construction with fencing in a location approved by a registered archaeologist.

Limitations on curtilage areas

56. The curtilage area for each visitor accommodation/residential unit shall be limited to 1000m^2, including the building platform but excluding the driveway, as identified on the attached plans referenced "Parkins Bay Visitor Accommodation Residences Detail Site Plans, House Sites 1, 3-6, 8-11, 13, 16-22, 24, 26-27, 29-50 " dated September 2009.

57. All domestication including hard landscaping and ancillary structures associated with the visitor accommodation/residential unit shall be restricted to the designated curtilage area.

58. No introduced planting over 0.6m is permitted within the designated curtilage areas unless it is from the approved Kanuka/Grey shrubland plant list detailed in the Revegetation Strategy approved in accordance with Condition 6.

59. No structures over 0.75m are permitted within the designated curtilage areas (this allows for the extension of the existing stone retaining walls) except as required under the Fencing of Swimming Pools Act 1987.

60. No introduced planting is permitted outside the designated curtilage areas unless it is from the approved Kanuka/Grey shrubland plant list detailed in the Revegetation Strategy approved in accordance with Condition 6.

Fencing

61. Fencing is to be retained and up-graded along the frontage of the Wanaka–Mt Aspiring Road ensuring that people are directed to use the underpasses.

62. No gates or monumental structures are permitted at or near entrances ways which would potentially distract motorists on the Wanaka–Mt Aspiring Road. The design of any entrance gate designs shall be submitted to Council for approval.

63. There shall be no fencing of the individual visitor accommodation residential units;

Car Parks

64. All car parks on-site shall be publicly available and shall not be restricted for specified activities or purposes.

Signs

65. Signage design for the purpose of readily identifying the clubhouse and shearers quarters, the location of car parking, public walkways, cycleways, public picnic area and jetty and the lake foreshore shall be submitted to Council for prior consent. Specific signage on the lakeside walkway and the jetty shall indicate that these areas are available for public use.

66. The existing public access along the edge of the lake, parallel to the length of the development site, shall be identified by signage to the satisfaction of the Council.

Sundry

67. There shall be no permanent mooring at the jetty. The owner shall have priority for one berth.

68. All covenants as offered by the consent holder shall be in form approved by the Council. Any easements referred to in Condition 41 which have been registered prior to the registration of Covenant(s) under Condition 41 need not be referred to in such Covenant(s).

69. This proposal may generate a demand for network infrastructure and reserves and community facilities. If so, an invoice will be generated by the Queenstown Lakes District Council. Payment will be due prior to application under the Resource Management Act for certification pursuant to section 224(c). Pursuant to section 208 of the Local Government Act 2002 the Council may withhold a certificate under section 224(c) of the Resource Management Act 1991 if the required Development Contribution has not been paid.

70. Any easement proposed to be granted in favour of the Queenstown Lakes District Council under Condition 41 may instead be granted in favour of another public body or entity nominated by the Queenstown Lakes District Council provided such body or entity agrees to accept the benefit of the easement and acknowledges responsibility for maintenance of the relevant access route or other area subject to the easement for the purposes of the easement.

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND
December 2011

SCHEDULE A (Refer Condition 41)

[Standard Conditions Applicable to Public Access Routes]

1. The access route may be closed by the consent holder for such periods as it deems necessary to carry out its farming activities, provided that periods shall not exceed more than 3 consecutive days or a total of more than 10 days (cumulatively) in any calendar year.

2. In addition to the periods specified in 1 above, any access route through an area being used for sheep farming may be closed for one period (in any calendar year) of up to 6 weeks during the lambing season to prevent disturbance of ewes with lambs.

3. The access route may be closed by the consent holder for periods as shall be reasonably necessary if the actions of public users result in significant adverse effects to farming operations, provided that prior approval is obtained from the consent authority for such closure.

4. Dogs (other than dogs used by the farmer for farming activities) are prohibited on the access route.

5. Use or carrying of firearms is prohibited on the access route (unless with prior approval from the consent holder).

6. Camping is prohibited on the access routes at all times.

7. Such other conditions as the consent holder reasonably considers necessary to protect the public and to control the public use of the easement area (for example restrictions relating to noxious substances, noise, rubbish, track maintenance, repairs, fire risk or for safety and/or security purposes);

Note: When the relative easements are registered, the references above to 'consent holder' will become references to 'grantor'.