Independent Hearings Panel

Christchurch Replacement District Plan

Te paepae motuhake o te mahere whakahou a rohe o Ōtautahi

IN THE MATTER OF section 71 of the Canterbury Earthquake Recovery Act 2011 and the Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014

AND

IN THE MATTER OF proposals notified for incorporation into a Christchurch Replacement District Plan

Date of hearing: 2-5, 8-12 and 15 December 2014, 7 January 2015

Date of decision: 26 February 2015

Hearing Panel: Hon Sir John Hansen (Chair), Environment Judge John Hassan (Deputy Chair), Dr Philip Mitchell, Ms Sarah Dawson

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DECISION 1

STRATEGIC DIRECTIONS AND STRATEGIC OUTCOMES (AND RELEVANT DEFINITIONS)

Outcomes: **Proposals changed as per Schedule 1**

COUNSEL APPEARANCES

Mr J Winchester and Ms S Scott	Christchurch City Council
Mr P Radich QC and Mr C Carranceja	The Crown
Ms A Dewar and Ms J Walsh	Ngāi Tahu Property Limited Te Rūnanga o Ngāi Tahu Mahaanui Kurataiao Limited on behalf of Te Ngāi Tūāhuriri Rūnanga, Te Hapū o Ngāti Wheke (Rāpaki), Te Rūnanga O Koukourārata, Ōnuku Rūnanga, Wairewa Rūnanga and Te Taumutu Runanga Progressive Enterprises Limited
Ms M Mehlhopt	Canterbury Regional Council
Mr R Bartlett QC	AMP Capital Investors Limited
Ms L Semple	Property Council of New Zealand Carter Group Limited Maurice R Carter Limited Maurice Carter Charitable Trust Oakvale Farm Limited Marriner Investments Limited Marriner No. 1 Limited Avonhead Mall Limited AMP Capital Palms Pty Limited TEL Property Nominees Limited Scentre (New Zealand) Limited
Ms J Crawford and Ms A Roberts	Foodstuffs South Island Limited Foodstuffs (South Island) Properties Limited
Ms J Appleyard	Christchurch International Airport Limited Lyttelton Port Company Limited Waterloo Park Limited
Mr G Cleary	Eros Clearwater Holdings Clearwater Land Holdings Limited
Mr A Beatson and Ms N Garvan	Transpower NZ Limited
Mr H van der Wal	Faulks Investments Limited
Mr M Christensen and Ms S Eveleigh	Memorial Avenue Investments Limited

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INTRODUCTION

[1] This decision ('decision') is the first in a series by the Independent Hearings Panel ('Hearings Panel'/'Panel')[1] concerning the formulation of a replacement district plan for Christchurch City (including Banks Peninsula) ('Replacement Plan'/'Plan'). It concerns the following notified proposals for the Replacement Plan (together, called 'Strategic Directions and Outcomes Proposals'):

(a) Chapter 3 ('Strategic Directions'),[2] and

(b) Section 1.9 of Chapter 1 ('Introduction') and certain definitions of Chapter 2 ('Definitions').[3]

[2] This decision follows our hearing of submissions and evidence on the Strategic Directions and Outcomes Proposals. This was in accordance with the review process for the Replacement Plan that was instituted by the Government,[4] following a request by Christchurch City Council ('the Council').

[3] Under this special process, the Council has been directed to review its existing district plans and formulate the Replacement Plan by preparing and notifying "Proposals".[5] This is being approached in two stages ('Stage 1', 'Stage 2').[6] Stage 1 has been notified. Stage 2 has yet to be notified.[7]

[4] The Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014 ('the OIC') specifies a deadline for our hearing and decisions on all notified Proposals, of 9 March 2016.[8] In addition, our Terms of Reference direct us to make our decisions on certain matters (including Strategic Directions) by 28 February 2015.[9]

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1 The Panel members are Hon. Sir John Hansen (chairperson), Environment Judge John Hassan (deputy chairperson), Sarah Dawson, Dr Philip Mitchell, Jane Huria, John Sax.
2 Throughout, 'Strategic Directions' refers to Chapter 3 of the Notified Version.
3 Consequential changes are also made to other parts of Chapter 1.
4 Under the Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014, which was promulgated under s 71 of the Canterbury Earthquake Recovery Act 2011. The OIC modifies the Resource Management Act 1991 (RMA) and other legislation.
5 The existing district plan is in two parts – the Christchurch City Plan and the Banks Peninsula District Plan.
6 Also referred to on the planning maps as Phases 1 and 2.
7 We understand notification of Stage 2 will commence on 2 May 2015.
8 OIC, cl 12.
9 Our terms of reference, made under cl 9 of the OIC, are available at www.chchplan.ihp.govt.nz.

Effect of decision and rights of appeal

[5] Our decision[10] is to make changes to the Council's notified Strategic Directions and Outcomes Proposals ('Notified Version') set out in Schedule 1.

[6] We are required to serve this decision on the Council as soon as practicable. No later than five working days after the Council receives the decision, it must give public notice of it (and of the matters specified in the OIC) and serve that public notice on all submitters on the Strategic Directions and Outcomes Proposals.[11]

[7] The following persons may appeal our decision to the High Court (within the 20 working day time limit specified in the OIC), but only on questions of law:

(a) the Minister for Canterbury Earthquake Recovery and the Minister for the Environment, acting jointly;

(b) the Council;

(c) submitters on the Strategic Directions and/or Outcomes Proposals.

[8] The Strategic Directions and Outcomes Proposals (as changed by this decision) will be deemed to be approved by the Council on and from:

(a) the date the appeal period expires (if there are no appeals); or

(b) the date on which all appeals, including further appeals, relating to the Strategic Direction and Outcomes Proposals are determined.

[9] As soon as reasonably practicable after that deemed approval, the Council must make the Strategic Directions and Outcomes Proposals (as changed by this decision) operative as part of the Replacement District Plan.[12] That is done by giving public notice in the manner directed by the OIC.

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10 Under cl 12(1)(b) of the OIC.
11 The OIC also specifies other obligations on the Council in terms of making copies of the Decision available.
12 OIC, cl 16.

Identification of parts of existing district plans to be replaced

[10] The OIC requires that our decision also identifies the parts of the existing district plans that are to be replaced by the Strategic Directions and Outcomes Proposal. We return to this later.

[11] The reasons for our decision follow the Preliminary Matters section.

PRELIMINARY MATTERS

Conflicts of interest

[12] We posted notice of any potential conflicts of interest on the Independent Hearings Panel website on 17 December 2014.[13] No submitter raised any issue in relation to this.

[13] Panel member John Sax recused himself from participating in the Strategic Directions and Outcomes Proposals, and took no part. That was in view of his business association with one of the submitters on the Strategic Directions and Outcomes Proposal, Waterloo Park Limited.[14]

[14] In the course of the hearing, on various occasions, submitters were known to members of the Panel. In some cases, that was through previous business associations. In other cases, it was through current or former personal associations. Those matters were recorded in the transcript, which was again available daily on the Hearings Panel's website. No issue was taken by any submitter.

Family bereavement disruption to Ms Huria's participation

[15] Sadly, after sitting as a Panel member during the first week of the hearing, Ms Jane Huria's further participation was disrupted by a family bereavement. It meant she did not sit for the balance of the hearing from 8 December 2015, with associated consequences for deliberation and decision-making. While the Panel felt the loss of Ms Huria's skills, and were saddened by her loss, we satisfied ourselves that remaining members were legally and

[13] The website address is www.chchplan.ihp.govt.nz.
[14] Waterloo Park Ltd (#920) and further submitter (FS#1277).

substantively able to continue. As the transcript records, the Chair invited counsel and submitters to raise any issues.[15] None did. Ms Huria is not, therefore, a signatory to this decision. Following deliberations by the signatories, the decision is the signatories' unanimous view.

Issues with electronic database of submissions

[16] The Council supplied to the Hearings Panel hard copies of all submissions and further submissions. This was pursuant to the OIC.[16]

[17] In addition, the Council gave the Panel access to its electronic database. A reliable electronic database is important for a variety of purposes. In particular, it is needed in order to ensure all submitters are identified so that they are given notice of the relevant pre-hearing meetings and hearings. It is also a primary tool for ensuring that, in making each of its decisions, the Panel considers all relevant submissions and further submissions (including by those who do not seek to be heard).

[18] During pre-hearing meetings, significant problems were encountered with the accuracy and usability of the database. In particular, there were errors identified in its recording of submitters, and of the provisions each submission sought to change. The database was not designed to allow for a sufficient breakdown of individual relief points sought by particular submitters on specific provisions within proposals for the Replacement Plan.

[19] In response (and in accordance with the OIC),[17] the Chair issued directions for the database to be improved so that it would break down each submission point against provisions of the Replacement Plan to the finest level that can be determined from the submission.[18]

[20] As an additional measure, we used the Council's original database to manually cross-check the specifics of submitter relief (whether or not heard).

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15 Transcript, page 582, lines 3-10. At the request of the Chair, those attending the hearing on 8 December stood in silence as a mark of respect for Ms Huria in her time of loss.
16 OIC, Schedule 1, cl 9(2).
17 OIC, Schedule 1, cl 9(2) and Schedule 3, cls 8(1)(a) and 8(3).
18 Request and Directions to Christchurch City Council to Provide Data on Submissions, minute dated 5 December 2014.

[21] In addition to the manual cross-checking that was undertaken prior to the hearing, we arranged for a further manual cross-check to be undertaken after the close of the hearing. That further cross-check identified two further submissions that touched on matters of relevance to the Strategic Directions and Outcomes Proposals. One submission, by Lyttelton Harbour Business Association (#769), concerned temporary activities (also relevant to our separate decision on the temporary activities proposal). It was in broadly narrative terms, and sought an extension of the regime allowed for such activities. Given that the submission recorded a request to be heard, we arranged for the Secretariat to contact the submitter's representative, Ms Gilvray (of Harmans Lawyers) to enquire as to whether the submitter wished to put anything further to the Panel. Ms Gilvray initially asked that her client be able to file written information, but the submitter then elected not to do so.

[22] The other further submission identified was by Fox & Associates Limited (#1422). It opposed in full the submission by Mahaanui Kurataiao Limited (on behalf of Ngā Rūnanga and Te Rūnanga o Ngāi Tahu (#1145)). When contacted, Mr Fox indicated that he no longer sought to be heard, but asked to file some further information that he sought that the Panel consider. According to arrangements with the Secretariat, this further information was filed on 24 February 2015. We were satisfied that we did not need to hear further from the Council or any other party in reply to that information, and we confirm that we have considered it.

[23] In any event, we are satisfied that our decision properly addresses the substance of relief pursued by both of these submissions.

[24] The Council finally provided an updated database on 10 February 2015. Despite this, and the best efforts of the Panel and Secretariat, unfortunately there continue to be issues with its accuracy and functionality. Given those ongoing issues, the Secretariat has given notice of all pre-hearing meetings on our website, and all substantive hearings have been notified on our website and in the media.

REASONS

STATUTORY FRAMEWORK

[25] The OIC directs that we hold a hearing on submissions on a proposal and make a decision on that proposal.[19]

[26] It sets out what we must and may consider in making that decision.[20] It qualifies how the Resource Management Act 1991 ('RMA') is to apply and modifies some of the RMA's provisions, both as to our decision-making criteria and processes.[21] It directs us to comply with s 23 of the Canterbury Earthquake Recovery Act 2011 ('CER Act').[22] The OIC also specifies additional matters for our consideration.

[27] Drawing, in particular, from submissions for the Council and the Crown/Canterbury Earthquake Recovery Authority ('CERA'), we summarise the statutory framework for our decision as follows:[23]

(a) We must hold a hearing on submissions, and make and report our decision. Our decision must provide reasons, including for accepting or rejecting submissions (although we are not required to address individual submissions). If a proposal to which our decision relates would replace any parts of the existing district plan, our decision must identify what it would replace. Our capacity to change a proposal is not limited by the scope of submissions made on the proposal. Rather, we can make any changes we determine appropriate. However, if we consider changes to a proposal are needed to deal with matters that are materially outside the scope of the notified proposal, we must direct the Council to prepare and notify a new proposal, and invite submissions on that new proposal.[24]

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19 OIC, cl 12(1).
20 OIC, cl 14(1) .
21 OIC, cl 5.
22 Our decision does not set out the text of various statutory provisions it refers to, as this would significantly lengthen it. However, the electronic version of our decision includes hyperlinks to the New Zealand Legislation website. By clicking the hyperlink, you will be taken to the section referred to on that website.
23 We have been guided also by *Long Bay-Okura Great Park Society v North Shore City Council A78/2008, 16 July 2008*, at [34].
24 OIC, cls 12, 13(2), (4).

(b) We must be satisfied that, as part of the Replacement Plan, the Strategic Directions and Outcomes provisions will assist the Council to carry out its functions for the purposes of giving effect to the RMA.[25] One function concerns achieving integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the Christchurch district. That function is fulfilled by objectives, policies and methods established by the Replacement Plan. Another function that the Replacement Plan is to serve is the control (for specified purposes) of the effects of the use, development and protection of land.

(c) We must exercise our role in the preparation of the Replacement Plan in accordance with the provisions of Part 2, RMA, and any applicable regulations.[26]

(d) We must be satisfied that the Replacement Plan will give effect to applicable National Policy Statements, the New Zealand Coastal Policy Statement 2010 ('NZCPS') and the Canterbury Regional Policy Statement 2013 ('CRPS') (and any applicable national environmental standards).[27]

(e) We must be satisfied that the Replacement Plan will meet the RMA's specified requirements for alignment with other RMA policy and planning instruments, as we summarise in the table at [42] below.

(f) We must give consideration (in the manner directed by the RMA and/or the OIC) to various statutory documents, as we summarise in the table at [43] below.

(g) We must have regard to the Council's report on the Notified Version entitled 'Section 32 Strategic Directions Chapter' and undertake (and have regard to) a further evaluation under s 32AA, RMA of the matters that s 32, RMA specifies. We must report on that further evaluation in this decision.[28]

(h) We must be satisfied that applicable provisions of Strategic Directions and Outcomes meet their statutory purposes, namely:[29]

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25 RMA, ss 74(1) and 31.
26 RMA, s 74.
27 RMA, s 75(3).
28 OIC, cl 14(4)(a); RMA, s 32AA(1)(d)(ii).
29 RMA, ss 75(1), 76.

(i) objectives for the Christchurch district;

(ii) policies that achieve and implement Replacement Plan objectives; and,

(iii) rules, if any, that achieve Replacement Plan objectives and implement Replacement Plan policies.

[28] Finally, when considering a proposal, we have some capacity to reconsider a previous decision we have made on another proposal. This is in circumstances where we find that would be necessary or desirable to ensure that the Replacement Plan is coherent and consistent.[30] As for this decision, the significance is that there is some potential for us to later decide to reconsider provisions of the Strategic Directions and Outcomes Proposals in Schedule 1. That could occur in light of what we may come to hear and consider in later stages of our inquiry into the Replacement Plan.

Submissions considered and heard on the Strategic Directions and/or Outcomes Proposals

[29] We have considered all submissions and further submissions received in relation to the Strategic Directions and/or Outcomes Proposals. Schedule 2 lists witnesses who gave evidence for various parties, and submitter representatives.[31]

Issues raised by submissions

[30] In making our decision, we have carefully considered the submissions made, the evidence presented, and matters required to be addressed in the superior planning documents and statutory provisions.

[31] A number of submitters who elected to be heard also elected to present a joint or aligned case (for instance, by relying on common expert evidence). For example, several land developers and retail interests joined forces, or aligned themselves, with the Property Council New Zealand case.[32] Another cluster concerned CERA and the various Crown departments

30 OIC, cls 13(5) and (6).

31 Counsel appearances are recorded on page 2.

32 Maurice R Carter (#377), Marriner Investments Ltd (#378), Avonhead Mall Ltd (#379), Marriner Investments № 1 Ltd (#380), Oakvale Farm Ltd (#381), Maurice Carter Charitable Trust (#385), Carter Group Ltd (#386), Property Council New Zealand (#595), Bunnings Ltd (#725), AMP Capital Palms Pty Ltd (#814), TEL Property Nominees Ltd (#816), Kiwi Property Trust and Kiwi Property Holdings (#761), and Progressive Enterprises Ltd (#790).

and agencies, and a range of infrastructure providers (some of whom called evidence and made submissions in their individual capacities).[33]

[32] We heard from some submitters who presented targeted expert and other evidence as to specific issues arising from the Strategic Directions and Outcomes Proposals that affected them.[34]

[33] The Panel found those approaches helped the efficient conduct of the hearing and the crystallisation of some issues.

[34] A range of submitters spoke to the main points of their submissions. Some of these also called lay evidence on behalf of the submitter. These included various Community Boards, residents' associations and special interest groups[35] within the Christchurch community.[36] These submitters assisted us to understand the various perspectives they have through their engagement in different communities, or on particular community issues, throughout the City.[37] The Community Boards were generally in support of the Notified Version and the Council's case. So was the Canterbury Regional Council ('ECan').[38]

[35] Several submitters, including many who elected not to be heard, made simple submissions in support for, or opposition to, the Notified Version. While we do not identify those submissions individually in this decision, we have considered them. Similarly, we have not recorded all submissions made on specific matters our decision addresses. Our recorded reasons pertain to our decision to:

(a) Accept in part those submissions that simply supported the Notified Version,

(b) Accept in part or decline those various submissions that sought specific relief on particular matters; and

(c) Decline in full those submissions that sought full rejection of the Notified Version.

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33 Christchurch International Airport Ltd (#863), Lyttelton Port Company Ltd (#915), Transpower NZ Ltd (#832), Orion New Zealand Ltd (FS#1339), The Crown (#495), Liquigas (#794), Mobil Oil NZ, Z Energy Ltd and BP Oil NZ Ltd (#723), Spark (#363), Chorus New Zealand Ltd (#364).

34 For example, Gelita NZ (#1014), Eros/Clearwater (#730), Kiwi Property Trust (#761), Canterbury Aggregate Producers Group (#886), AMP Capital Investors (NZ) Ltd (#1187), Faulks Investments Limited (#32), Isaac Conservation and Wildlife Trust (#704), Chorus NZ Ltd (#364) and Spark (#363), Transpower New Zealand (#832), Liquigas (#794), Mobil Oil NZ, Z Energy Ltd and BP Oil NZ Ltd (#723) and Peterborough Village Incorporated Society (FS#1228).

35 For example, Styx Living Laboratory Trust (#1193).

36 That information was helpful in conjunction with the statements of evidence of Dr Natalie Jackson, Michelle Mitchell and Ian Mitchell.

37 For example, Lyttelton/Mt Herbert Community Board (#762) concerning the port.

38 Canterbury Regional Council (#342), who presented legal submissions.

[36] We are mindful that the ultimate purpose of our decision is to contribute to the staged formulation of the Replacement Plan. Our reasoning needs to be clear and easily able to be understood – especially in terms of how it bears on the development of the Replacement Plan – by both lay submitters and resource management professionals. Therefore, we have structured our reasoning according to the various themes and matters addressed by the Strategic Directions and Outcomes Proposals.

[37] A common structure for a plan review decision is to commence reasoning with an identification of issues, including as raised by submissions. On this occasion, we have adapted that approach by assessing a number of matters raised by submissions in the context of our required s 32AA, RMA further evaluation of the Proposals. That is because our further evaluation has had to be substantial on this occasion.[39]

[38] There were a number of submitters who sought site-specific or other specific relief on topics or issues that were beyond the intentions of the Strategic Directions and Outcomes Proposals.[40] In some cases, that relief may be more suited to other proposals of Stage 1 or 2 of the Replacement Plan review.

Statutory documents and our obligations in regard to them

Matters as to alignment of the Replacement Plan with other statutory documents

[39] District plans are part of a hierarchy of RMA policy and planning instruments. The RMA prescribes certain consequences for how district plans are to align with other instruments. Other statutory instruments can be made under the CER Act. There was no material dispute amongst parties as to what are the relevant RMA and CER Act instruments for our consideration.

[40] Most notable amongst the CER Act instruments are "recovery plans". There are two currently in existence. The Christchurch Central Recovery Plan ('CCRP') applies within the "four avenues". The other is the Land Use Recovery Plan (known as the 'LURP').[41]

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39 For reasons we explain later.

40 By way of example, several submitters raised issues concerning climate change and sea level rise risks, sustainable transport and sustainable residential building practices, use of reserves, provision for recreational facilities and other public assets, and alternative urban design for residential communities.

41 We were also informed that preparation of a Lyttelton Port Recovery Plan is underway, but that we cannot give it weight as it has not yet been Gazetted (Council opening submissions, 6.22). That position was not disputed by any party, and we agree with it.

[41] Through the LURP, Chapter 6 was inserted into the CRPS. The LURP also directed changes to the existing district plan.

[42] Part of our task is to be satisfied that the Replacement Plan will meet the RMA's and the CER Act's requirements in terms of its alignment with these instruments. Drawing from the Council's opening submissions,[42] we summarise our understanding of the alignment requirements, as follows:

Statutory document	Alignment requirement for Replacement Plan	Comment
New Zealand Coastal Policy Statement 2010 (NZCPS) National Policy Statements (particularly, the National Policy Statement on Electricity Transmission (NPSET)) Canterbury Regional Policy Statement (CRPS)	Give effect to	"Give effect to" means to implement according to the applicable policy statement's intentions[43]
Regional Coastal Environment Plan Canterbury Land and Water Regional Plan Recovery Strategy Christchurch Central Recovery Plan (CCRP) Land Use Recovery Plan (LURP)	Not be inconsistent with	This is usefully tested by asking: • Are the provisions of the Strategic Directions and Outcomes Proposals compatible with the provisions of these higher order documents? • Do the provisions alter the essential nature or character of what the higher order/recovery documents allow or provide for?[44]

42 Council opening submissions, 6.26.

43 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, (2014) 17 ELRNZ 442, at [80], and at [152]-[154]. The Council's summary "comment" on this alignment requirement did not include the rider "according to the applicable policy statement's intentions", but instead included the rider "and is a strong directive". Our intention is to reflect the importance of reading the applicable directives in higher order statutory instruments according to their true intention. Doing so does not involve any misreading of *King Salmon*. Later in our reasons, we explain why we found that the Council erred in this area in its s 32 evaluation and in its formulation of some of the proposed provisions.

44 The Council drew from *Re Canterbury Cricket Association* [2013] NZEnvC 184, [51]–[52] for the first of these questions, and *Norwest Community Action Group Inc v Transpower New Zealand* EnvC A113/01, 29 October 2001, paras [55]–[56] for the second question. We agree, they are valid and useful tests and we have applied them.

Mandatory consideration matters

[43] In addition, we must consider various statutory documents. Again, drawing from the Council's opening submissions, we summarise our obligations as follows:

Statutory document	Our consideration obligation	Comment
Specified management plans and strategies prepared under other legislation[45]	Have regard to	Give genuine attention and thought to the matter[46]
Selwyn and Waimakariri district plans	Have regard to the extent to which there is a need for consistency	As above
Mahaanui Iwi Management Plan	Take into account	We must address the matter and record we have done so in our decision; but weight is a matter for our judgment in light of the evidence[47]
OIC Statement of Expectations	Have particular regard to	Give genuine attention and thought to the matter, on a footing that the legislation has specified it as something important to the particular decision and therefore to be considered and carefully weighed in coming to a conclusion[48]

Part 2 and RMA purpose

[44] The Council's opening submissions noted, and we agree, that we have an overarching obligation to be satisfied that the Strategic Directions and Outcomes Proposals, as part of the Replacement Plan:

(a) Achieve the purpose of the RMA;[49] and

45 The Canterbury Regional Land Transport Strategy, Greater Christchurch Transport Statement, Greater Christchurch Urban Development Strategy, Canterbury Water Management Strategy.

46 *NZ Fishing Industry Assn Inc v Ministry of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at pp 17, 24, 30 and also the Environment Court decision in *Marlborough Ridge Ltd v Marlborough District Council* (1997) 3 ELRNZ 483 and *Unison Networks Ltd v Hastings District Council* [2011] NZRMA 394, at [70] (albeit a resource consent decision, as to s 104).

47 *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213 (HC) at [42].

48 The Council opening submissions refer us to *Marlborough District v Southern Ocean Seafoods Ltd* [1995] NZRMA, noting this is a resource consent decision. However, we accept the substance of the Council's interpretation as valid.

49 RMA, s 72.

(b) Are prepared in accordance with Part 2 of the RMA (in the sense of "in a manner corresponding to").[50]

[45] It is of course true that the directives have subtly different meanings.[51] However, we do not consider those meanings to have any substantive consequence for our evaluation of the various statutory documents in making this decision. Despite the number of statutory documents to consider, we found our task in doing so is relatively straightforward. For the most part, no fine judgments were called for as to how they inter-related.[52]

[46] There were, however, some matters of contention concerning the application and interpretation of these statutory documents.

The influence of the OIC Statement of Expectations

[47] One matter of contention concerned the influence of the OIC Statement of Expectations in Schedule 4 to the OIC. The Council's opening submissions made something of the directive to "have particular regard" to it, arguing that this put this document "near the bottom of the hierarchy". That was in support of the Council's submission in opening concerning paragraphs (a) and (i) of Schedule 4 to the OIC. The Council submitted:[53]

> Amongst other things, the Ministers' expectations include that there will be a significant reduction in the reliance on resource consent process, notification requirements and number/type of development and design controls in the pRDP. The relevance of these three expectations to the Strategic Directions Proposal is arguably limited, as the Proposal does not include any rules. We will however return to the "process policy" sought by the Property Council later in these submissions.

[48] The Council initially opposed the recommendation (by Mr Bonis, on behalf of Property Council New Zealand) that we include a policy as to efficiency of process in Strategic Directions. That was despite the express emphasis on this matter in the OIC Statement of Expectations. The Council's position was that Strategic Directions should be confined to the environmental outcomes that were sought to be achieved.[54] As such, the Council then

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50 RMA, s 74(1).
51 See the authorities referred to at n 43 and following.
52 The Council also submitted that our ultimate obligation is to be satisfied that the outcome we deliver in our Decision "meets the s 32 tests and achieves the purpose of the RMA": Council opening submissions, 7.1. We do not entirely agree with that, and set out how we interpret s 32, RMA at [63]-[70] of this Decision.
53 Council opening submissions, 6.25.
54 Council opening submissions, 7.12, with reference to the evidence-in-chief of Mr Eman.

submitted that a "process policy" "has no proper role or function" in that it would not add anything and potentially cut across provisions of the RMA and the OIC.[55]

[49] To be fair, the Council reflected on that position. Following further planning expert conferencing,[56] which endorsed the inclusion of such a policy, the Council submitted (in closing) that the OIC Statement of Expectations "is a notable difference from the usual RMA process and considerations".[57] It accepted the need to have particular regard to the OIC Statement of Expectations and that this "could result in incorporation of the concept of process efficiencies in a process policy".[58] The Council noted its concern that care was needed in drafting the policy so that it "does not create issues" for the Council's implementation of the Replacement Plan (i.e. when it becomes operative and people start applying for consents under it). The Council sought that any provision be framed to be confined to 'drafting guidance' (i.e. for development of other proposals) rather than also having any ongoing substantive effect on the operation and administration of the Plan.[59]

[50] We do not accept that a "process" provision should be so confined, and give our reasons for that later in this decision. At this stage, however, we concentrate on the concession by the Council that the OIC Statement of Expectations is a notable difference from the usual RMA process and considerations.

[51] When we asked Mr Eman whether "there was any elevated reason to focus on process efficiency and cost issues in the context of post-earthquakes Christchurch", he answered "Yes, I think it is critically important".[60] He also observed that, in addition to the process efficiency dimension, the impacts of the earthquakes were such that the Plan "needs to provide more opportunities for things to happen".[61]

[52] We heard evidence from a number of independent experts (particularly those called by the Crown) substantiating those observations by Mr Eman. That evidence was essentially unchallenged. It included evidence as to the importance of private sector investment

55 Council opening submissions, 7.12.
56 The Panel records its thanks to Environment Commissioner John Mills and to Mark Chrisp for their facilitation of expert witness conferencing prior to and during the hearing.
57 Council closing submissions, 7.3.
58 Council closing submissions, 7.3.
59 Council closing submissions, 7.3-7.6.
60 Transcript, page 362, lines 8-16.
61 Transcript, page 364, lines 16-18.

(including, in particular, attracting new investment) for recovery of the Central City.[62] It included evidence about land and housing supply and demand pressures that have been aggravated by the earthquakes and their social wellbeing consequences (including for housing affordability and for sectors of the community with particular social needs).[63] It was backed by the evaluation we heard from Mr Michael Copeland (an economist), who helped us to see how these matters relate to process inefficiency and uncertainty.[64] We accept his evidence on this matter.

[53] The evidence demonstrated the unsoundness of Council's initial submission that the emphasis on these matters in the OIC Statement of Expectations was of "limited relevance" to what should be included in Strategic Directions as to processes.

[54] We have also weighed the significance of the consensus that was achieved amongst all planning experts through further expert conferencing we directed towards the close of the hearing. Those experts (including Mr Eman) all supported inclusion of a process policy in Strategic Directions (and explicit reference being made to the OIC Statement of Expectations in this chapter of the Replacement Plan). That conferencing was in accordance with the Code of Conduct for Expert Witnesses, and we are satisfied that the consensus is supported by the evidence.

[55] In light of the evidence, we acknowledge as sound Mr Eman's concession that process efficiency and cost are critical resource management issues in the context of post-earthquakes Christchurch.

[56] We also reject the Council's initial submission that the OIC Statement of Expectations is "near the bottom of the hierarchy", in the sense that our obligation is to have "particular regard" to it. We find that submission difficult to reconcile with the Council's own interpretation of "particular regard" as requiring a decision-maker to recognise the matter as "something important to the particular decision and therefore to be considered and carefully weighed in coming to a conclusion". In that sense, the phrase gives more direction to us than "take into account", as it touches on our responsibility in weighing competing mandatory considerations.

62 For example, the evidence of Benesia Smith [7.2], Don Miskell, especially [7.1]-[8.8], Dr Timothy Denne.
63 For example, the evidence of Dr Natalie Jackson and Michelle Mitchell.
64 Transcript, page 457, lines 6-28 and in Copeland (Lyttelton Port Company, 25 November 2014, paras 20-26). Mr Copeland also gave evidence on behalf of Ngāi Tahu Property Ltd (#806) and Transpower (#832).

[57] In any case, our task in weighing the various statutory documents, including the OIC Statement of Expectations, is evaluative. We should undertake that evaluation in light of the evidence. That evidence demonstrates that, if the intended purpose of Strategic Directions is to be fulfilled in the formulation of the Replacement Plan, it needs to include properly-directed process provisions. We see those provisions as validly able to be directed to drafting of the Replacement Plan proposals. That is in the sense that the Strategic Directions chapter, once approved, will be operative. However, we disagree with the Council's submission that the provisions should be confined to giving drafting direction. Rather, as part of a chapter that will have primacy within the Plan, we see these provisions as fulfilling an important ongoing role within the design of the Plan (and in regard to its ongoing implementation and interpretation).

[58] We explain our reasoning for the different drafting approach we have taken to that collectively recommended by the planning experts, in dealing with these matters in our section 32AA evaluation.

Giving effect to the CRPS

[59] A second issue concerned how the Council interpreted the substance of the requirement for the Replacement Plan to give effect to the CRPS. We return to that matter in addressing the Council's s 32 Report and its related evidence.

Requirements of s 23 CER Act for Replacement Plan to be not inconsistent with the LURP

[60] While less contentious, we heard submissions on the meaning of "not inconsistent with", as used in s 23 of the CER Act. The *Shorter Oxford English Dictionary* defines "inconsistent" as "incompatible" and "not in keeping with".[65] Hence, in terms of its natural meaning, "not inconsistent with" has a corresponding meaning. The Council's opening submissions referred to *Canterbury Cricket Association Incorporated*.[66] That case treated the phrase as allowing for judgment to be exercised of the scale or degree of variance allowable in the particular circumstances. We agree that this is a helpful expression of the intention of s 23.

[61] Even when the Replacement Plan is dealing with the same subject matter as provisions of the LURP, the Replacement Plan is not required to treat that subject matter in precisely the

65 *Shorter Oxford English Dictionary* (6th ed, Oxford University Press, Oxford 2007) at 1356.
66 Above n 42.

same way. "Not inconsistent with" is a phrase that gives reasonable allowance for interpretation, and judgment as to how it should be applied in context.

[62] We are satisfied that our decision is in keeping with the LURP.

The required "s 32" and "s 32AA" RMA evaluations

[63] The OIC requires the Council to prepare "an evaluation report" on each draft proposal in accordance with section 32 of the RMA. We must have regard to that report in making our decision.[67]

[64] We must also[68] "undertake, and have particular regard to, a further evaluation of the proposal" in accordance with s 32AA, RMA.[69] We do so in our deliberation for this decision.

[65] Our reporting of that further evaluation in this decision must be "in sufficient detail to demonstrate that the further evaluation was undertaken in accordance with" s 32AA.[70]

[66] Our further evaluation is required "only for any changes that have been made to, or are proposed for, the proposal since the Council's evaluation report for the proposal was completed".[71] However, as our decision makes significant changes to the Notified Version, our further evaluation is extensive.

[67] Our further evaluation must address the specific requirements of s 32:

(a) It must contain a level of detail that corresponds to the scale and significance of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the proposal (s 32(1)(c)). That expectation directs us as to the substantive quality and thoroughness of our evaluation on particular matters.[72]

(b) For "objectives" of a proposal (meaning, in this case, the specified objectives of the particular proposal in issue), the evaluation report has to examine whether these

67 OIC, cl 14(1)(a) and Schedule 1, cl 2.
68 OIC, Schedule 1, cl 2.
69 OIC, cl 14(4).
70 RMA, s 32AA(1)(a)-(d).
71 RMA, s 32AA(1).
72 Likewise, that was required of the Council.

are "the most appropriate way to achieve" the RMA's purpose (s 32(1)(a)). There was no material contention amongst parties as to the meaning of "most appropriate" in this context. For convenience, we draw from the Council's submissions in opening.[73] "Appropriate" is a word that implies informed discretion and value judgment, much akin to "suitable".[74] For instance, it allows ample room for the Council to report that it considers one approach "appropriate" and for us to take an entirely different view, on the basis of the accepted evidence and other information we have received.

(c) In the case of objectives, there is no explicit requirement to undertake a comparative assessment (by contrast to the position in regard to policies). However, the word "most" suggests that it is at least good practice to do so where reasonably practicable alternative approaches to objectives can achieve the RMA's purpose.

(d) For policies, the examination is as to whether the policies "are the most appropriate way to achieve the objectives" (s 32(1)(b)). The relationship back to the Proposal's objectives can be understood in the sense that the statutory purpose of policies is "to implement the objectives" (s 75(1)). The requirements for an evaluation of policies is comparatively more prescriptive. The report is to (i) identify other reasonably practicable options for achieving the objectives, (ii) assess the efficiency and effectiveness of the provisions in achieving the objectives, and (iii) summarise the reasons for deciding on the provisions. By its nature, however, the exercise is one of evaluation. That is, as with the evaluation of objectives, the exercise implies the exercise of informed value judgment. It allows ample room for the Council to report that it considers one approach "appropriate" and for us to take an entirely different view, on the basis of the evidence and other information we have received.

[68] As a further indication of the discretionary nature of these evaluative duties, s 32A specifies that a challenge to an objective, policy, rule or method on the grounds that s 32 or

73 Council opening submissions, 6.26.
74 *Rational Transport Society Inc v New Zealand Transport Agency* [2012] NZRMA 298 (HC) at [45].

32AA has not been complied with "may be made only in a submission" under specified RMA sections.

[69] That helps to show the true substantive purpose and value of s 32 and 32AA evaluative reports. Where a report demonstrates a proportionate thoroughness in how the proposal has been formulated (according to the measures prescribed in s 32), that assists in fostering confidence in the quality and soundness of the work to which it relates. The converse is also true.

[70] We have set out that understanding of the requirements of these sections in some detail, as we next set out some strong criticisms of the Notified Version, in both conceptual and drafting terms.

The Council's s 32 RMA report

[71] The Council's s 32 report is entitled "Section 32 Strategic Directions Chapter" ('Report'/'s 32 Report'). This was notified "alongside the Strategic Directions Proposal".[75]

[72] The OIC directed the Council to "undertake a full review of the operative provisions of the existing district plans" and to develop a replacement plan by preparing and notifying proposals.[76]

[73] Section 1 of the Report explains that the Council found that it needed to refocus the objectives and policies of the currently operative Christchurch District Plan. That was so as to assist with Canterbury's post-earthquakes recovery, identify opportunities, reflect the direction of changing legislation and statutory documents such as the LURP and the CRPS, and to respond to other changed circumstances.

[74] The section gives an overview of what the Council identified as resource management issues and opportunities for the district:

(a) "Providing for the different needs of the community" describes required provision for "housing, commerce and industry, rural activities, community facilities, and

75 Eman evidence-in-chief, 7.1.
76 OIC, cl 6.

public open space and infrastructure". It notes the effects on these issues of the Canterbury earthquakes, changing demographic and economic conditions, and the need to foster certainty and a strong long-term foundation, and to ensure the efficient and properly targeted use of public funds for infrastructure and other community needs;

(b) "Effective functioning of the transport system" describes the disruptive influence on this of the Canterbury earthquakes, in terms of direct damage caused and changed travel patterns;

(c) "Improving the quality of the urban environment" refers to the "unique opportunity" the rebuild provides for this (and the associated challenge of capitalising on this opportunity while meeting immediate needs for a timely recovery);

(d) "Protecting our key resources" recognises the need to manage impacts of activities and development on such specified resources and the opportunity for strengthened recognition of values of significance to tangata whenua; and

(e) "Addressing the consequences of natural hazards" acknowledges the district's vulnerability to flooding, tsunami, earthquakes, slope instability, erosion, and climate change, and the importance of understanding these risks and ensuring they are managed to acceptable levels.

[75] Insofar as the identified issues go, we accept them as valid for Strategic Directions to address. However, neither the Report nor the evidence called by the Council demonstrated the Council to have undertaken any substantive analysis of the issues and how they should inform Strategic Directions. As matters transpired, it was the Crown/CERA who called related, substantive and independent evidence on these matters.

[76] The Report also records that the Council had evaluated that there was a place for a Strategic Directions chapter in the Replacement Plan. It describes this role as being to provide the "strategic context" for the district plan and "the overarching direction" for other chapters

"through high-level objectives and policies for the district as a whole". It also refers to it as setting "an overall pattern of land use for Christchurch".[77]

[77] The importance of having such an overarching chapter within the design of the Replacement Plan was not a matter that was the subject of any material challenge in submissions. Indeed, in light of evidence we heard, we consider the primacy of Strategic Directions warrants specific further reinforcement in its expression.

[78] The Report[78] indicates that the value and role of a Strategic Directions chapter in the Replacement Plan warranted a proportionate treatment of the issues it addressed. Section 3 of the Report, entitled "Scale and Significance Evaluation", states that:

> The issues covered in this chapter are generally significant, both in terms of scale and timing. This is particularly so following the earthquakes, although it is also important to ensure that in providing for immediate recovery needs the long term attractiveness, vitality and sustainability of the district is not compromised.

[79] Despite that, however, the Report demonstrates a disappointing lack of rigour and thoroughness in its testing of its proposed objectives and policies by reference to what s 32 specifies.

[80] Section 4 of the Report presents a tabular summary of the Council's evaluation of proposed objectives. For each of the proposed objectives, there is an explanation of how it is regarded as being "equivalent to" specified provisions of the CRPS (and, in some cases, the LURP). This is in each case followed by a repeat of the following statement:

> Consideration was given as to whether alternative objectives would more appropriately achieve the purpose of the Act, taking into account circumstances within the district. No district issues have been identified that make any other objective more appropriate.

[81] Mr Murray (the economist called by the Property Council New Zealand) observed that the Report does not examine the extent to which the objectives proposed in the Notified Version achieve the RMA's purpose or whether they are most appropriate.[79]

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77 Mr Theelan also explained to us that was the intended purpose of this chapter: Theelan evidence-in-chief, 6.1, 6.2.

78 The Report does not indicate who authored it. However, in cross-examination Mr Eman explained that he was the author of "[T]he principles of it with contributions from other people" (transcript, page 340, line 42).

79 Evidence of Keiran O'Neill Murray on behalf of Property Council New Zealand, 2.1.

[82] We do not go that far. We find that the Report does identify resource management issues and opportunities that pertain to achieving the RMA's purpose. However, we find the quality of its evaluation of this to be poor. The evaluation of objectives is as to their effectiveness and appropriateness in achieving the RMA's purpose. That underlines the important role that objectives are intended to fulfil within a Plan. That is particularly so for objectives within Strategic Directions, given the pivotal role that this chapter is intended to have within the design of the Replacement Plan.

[83] Section 5 of the Report presents a similar summary of the Council's evaluation of proposed policies. For most of these, the very brief evaluations commence with an explanation of how the particular policy is regarded as being "equivalent to" particular CRPS policies. In most cases, this is followed by repetition of the following statement:

> Consideration was given as to whether alternative policies would more appropriately achieve the objectives, taking into account efficiency and effectiveness in the circumstances of the district. No district issues have been identified that make any other policy more appropriate.

[84] Mr Murray observed that the Report fails to assess whether proposed policies will achieve proposed objectives, and fails to test reasonably practicable alternatives according to the requirements of s 32.

[85] Again, we do not go quite that far. Rather, we consider the Report complies with the statutory requirements of s 32, but it does so poorly.

[86] It would appear that the Council took this cursory approach because it was assumed that the CRPS (and, to some extent, the LURP) severely directed (and, perhaps, curtailed) what Strategic Directions could address, and what it could say.

[87] For instance, the above statement as to the importance of Strategic Directions, in the "Scale and Significance Evaluation" part of the Report is followed by this qualification:

> However, the critical element in the above considerations for most of the issues is the high degree to which the options are predetermined by higher order statutory documents, particularly at the strategic level of this chapter.

[88] That same theme is repeated throughout the tabular evaluations in sections 4 and 5. It was also confirmed by Mr Eman's evidence-in-chief (at 6.8):

> … Given the statutory requirements to either give effect to these documents, or not be inconsistent with them, the options that can be considered for most of the objectives and policies in the Strategic Directions Proposal are very limited. Many of the objectives and policies proposed are largely prescribed by higher order documents.

[89] In making that assumption, we consider that the Council significantly misinterpreted relevant provisions of the CRPS and the LURP.[80] Specifically, we find that the CRPS and the LURP were materially compatible with the OIC Statement of Expectations. All of these higher order documents left the Council ample capacity to determine how best they should be addressed, in the context of what the Strategic Directions chapter was intended to achieve within the Replacement Plan.

[90] We find the Council's error of interpretation resulted in poor evaluation, and that in turn resulted in a Notified Version that was wordy and vague and, in many respects, ineffective in addressing the identified resource management issues.

[91] Mr Theelan's answers to our questions showed he was not well-informed of the evaluation that had been undertaken in preparation of the Notified Version. We were surprised by that, given he had the "final say" on the choices made in the Notified Version before it went to the Council.[81] That points to a lack of quality control. This would appear to have also directly contributed to the serious shortcomings of the Notified Version.

[92] In effect, little hearing time was taken up on the question of what Strategic Directions should address by way of resource management issues. Indeed, while a number of submissions expressed degrees of opposition to the Notified Proposal, the evidence called often expressed support for, or only confined difference with, the Council about these things. The gaps (such as in regard to the lack of process efficiency provisions) were significant, but relatively confined. Instead, much of the hearing was taken up dealing with significant differences between the Council and various submitters on how Strategic Directions was structured, and deficiencies and concerns as to the misdirection and confusion in its provisions.

[93] Pre-hearing meetings signalled that these matters of structure and misdirection in the provisions were likely to be a dominant focus. Despite expert witness caucusing, however,

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80 See our analysis under 'Statutory documents and our obligations in regard to them', above.

81 For instance, the Crown/CERA opening legal submissions at para 10; Progressive Enterprises Ltd opening legal submissions at paras 8-10.

little progress towards alignment was achieved (other than in the case of the infrastructure provisions) prior to the hearing.

[94] The Council commenced its case at the hearing by offering several changes to the Notified Version (albeit on the basis that it did not consider this warranted any revision to its s 32 Report).[82] This was, in large part, in response to issues raised by submissions. However, the Crown/CERA and Property Council New Zealand produced complete rewrites.[83]

[95] Yet, ultimately, the planning experts who participated in further expert witness conferencing (towards the end of the hearing) produced a new version of Strategic Directions that reflected a very large degree of consensus ('the Planning Experts' Joint Version').[84]

[96] That chronology serves to reinforce the inadequacies in the quality of the Council's processes for the formulation of the Notified Version. Lack of rigour and attention to the detail in the thinking as to what ought to be addressed in this pivotally important chapter resulted in misdirection and confusion in the substance of what was presented.

Section 32AA RMA further evaluation and findings

[97] We are required to undertake our re-evaluation on the changes that our decision makes to the Notified Version (and to other changes that have been proposed since the Council's s 32 Report).[85]

[98] Although we were required to carry out this evaluation, the limitations of the Council's own report, the infelicitous drafting (Chapter 3), the lack of clarity in mixing policies and objectives, and a lack of rigour in the Planning Experts' Joint Version (admittedly, prepared under extreme time constraints) have compelled us to the view that we need to undertake a more extensive s 32AA evaluation than would be normally the case.

82 Eman evidence in chief, 7.1.
83 Exhibit 1 (Timms) and evidence of Mr M Bonis.
84 Attachment 1, Agreed Matters and Changes to Chapter 3 – Strategic Directions provided in a report to the Panel on 22 December 2014. It is noted that this version recorded confined differences of opinion on some aspects.
85 RMA, s 32AA(1)(a).

What function should Strategic Directions serve relative to other parts of the Replacement Plan?

[99] We have determined that Strategic Directions should provide overarching direction for the Replacement Plan, and have primacy. To codify that, we consider that this should be reflected in a specific "Interpretation" provision.

[100] Our intention is that this provision make explicit that objectives and policies in all other chapters are to be expressed and achieved in a manner consistent with the objectives in Strategic Directions (subject, of course, to the RMA's requirements). Our reference to "are to be expressed" reflects the fact that Strategic Directions will become operative, once approved. As such, it should influence the formation of all other chapters of the Replacement Plan as well as having enduring influence going forward as part of the Replacement Plan.

[101] By contrast, the Planning Experts' Joint Version recommended that it be explicit that no hierarchy was intended as between the objectives (and proposed policies) of Strategic Directions and those of other chapters of the Replacement Plan. Rather, the planners' joint recommendation was that the provisions should be read as a whole, alongside each other.

[102] We observe that the Planning Experts' Joint Version significantly softened the Council's initially-proposed approach. In particular, as we have explained, the Council's s 32 Report explained that Strategic Directions was to provide the "strategic context" for the Plan, and the "overarching direction" for other chapters "through high level objectives and policies for the district as a whole", and to set "an overall pattern of land use for Christchurch".

[103] The weight of evidence we heard overwhelmingly satisfies us that the most appropriate approach is for the objectives of Strategic Directions to be explicitly given primacy. As that evidence was essentially unchallenged, it is not necessary for us to recite it in detail. We simply note that we were satisfied that the expert opinions we heard substantiated for us that the various priorities addressed through the objectives we have determined for inclusion in Strategic Directions warrant such primacy.

[104] By contrast, the planners' joint recommendation as to this point was not supported by the weight of accepted evidence. The Planning Experts Conferencing Statements do not help to explain the logic behind it. We wonder whether the planners may have been concerned that a

hierarchical relationship could have given rise to legal uncertainty as to whether any policies in Strategic Directions could have any primacy over objectives in other chapters. Our decision to confine Strategic Directions to objectives overcomes any such legal difficulty (as we discuss later).

[105] In a comparative sense, on this matter our approach is closer to the Council's originally Notified Version. We are satisfied that, by strengthening the primacy of the Strategic Directions objectives, we will better assist to ensure that the objectives of the Replacement Plan (including in Strategic Directions) achieve the RMA's purpose. In particular, that is because the provisions that we have included will help ensure that the Plan is interpreted and implemented according to the direction this chapter is intended to provide. That is as to both sustainable management outcomes and processes, for Christchurch's recovery and long-term future success.

What are the sustainable management matters that Strategic Directions should address?

Strategic Directions should identify and address district-wide sustainable management priorities

[106] It was not a matter of contention, and we are satisfied, that Strategic Directions should be designed to identify and give overarching direction on district-wide sustainable management priorities. That purpose fits well with the requirement in s 75, RMA, that a district plan state "the objectives for the district" which the Plan's policies and rules will be designed to implement (and the Plan's other objectives be consistent with).

[107] However, to qualify as a priority, the matter must be strategically important for achieving integrated management and for ensuring the RMA's purpose is achieved, and/or to give effect to relevant national policy statements, the NZCPS and the CRPS.

Evaluation of key differences in the identification of sustainable management priorities

[108] The amendments we have decided to make to the Notified Version are extensive. On matters of substance (rather than drafting style), key differences from the Notified Version and other versions (particularly, the Planning Experts' Joint Version) are as follows:

(a) We have strengthened the direction (through various objectives) to enable, encourage and stimulate investment to expedite recovery and assist long-term economic and employment growth. We have done this by including dedicated objectives that express outcomes on these matters, in regard to the district as a whole, business and economic prosperity generally, the Central City, and commercial and industrial activities (in particular, Objectives 3.3.1, 3.3.5, 3.3.8, 3.3.10).

(b) By contrast to the Notified Version, we have partnered these outcome objectives with one that targets efficient processes and clarity of language. This partnering objective picks up on those aspects of the OIC Statement of Expectation. In this respect, our decision is more closely aligned to the Planning Experts' Joint Version (although it recommended a dedicated policy, rather than an objective).

(c) We have not included objectives on a range of matters that were part of the Notified Version and a smaller number of matters that were part of the Planning Experts' Joint Version, for the reasons we set out shortly.

Enabling, encouraging and stimulating investment to expedite recovery and assist long-term growth

[109] The evidence we heard and accept demonstrated the correctness of Mr Eman's concession during questioning,[86] that the challenges facing Christchurch in post-earthquake recovery "marks Christchurch out as an exception from the pack" of other large cities in New Zealand.[87] In an overall sense, we consider that the OIC Statement of Expectations, the LURP and the CRPS (especially Chapter 6) effectively ask for a new sort of plan to meet the unique circumstances of Christchurch. This was accepted by Mr Eman.[88] On the basis of that evidence, we are satisfied that is called for.

[110] Unchallenged independent expert evidence from the Crown/CERA demonstrated, for example, the very significant scale of investment needed from private sector investors ($30

86 By way of example, the evidence of Benesia Smith, Don Miskell, Dr Timothy Denne, Dr Natalie Jackson, Michelle Mitchell, Ian Mitchell and Robert Rouse.
87 Transcript, page 362, lines 18-23.
88 Transcript, page 370, lines 10-17.

billion, or 75 per cent of the total spend) to secure a successful recovery.[89] It also explained how a very significant proportion of this needed to come from new investment that is attracted into the city. A small number of local investors have committed insurance and other funds to rebuilding in the central city. That demonstrates the loyalty of that investment community, but it will not itself be sufficient.

[111] The weight of that accepted evidence also satisfied us that there is a need to go significantly further than the Notified Version in regard to enablement of investment. Given the primacy of Strategic Directions within the Replacement Plan, its objectives need to give clear encouragement to existing and new investment. That is in the sense of giving stimulus to it (which then needs to be backed by related objectives, policies and rules within relevant Plan chapters).

[112] It appeared to us that the Council's view was that other submitters were placing recovery ahead of long-term needs. Others submitted the reverse. The evidence satisfies us that expediting recovery is readily compatible with enabling Christchurch's long-term needs to be met and opportunities to be realised. These matters are not competing. We have framed the objectives accordingly.

[113] The accepted evidence also supported Mr Eman's acknowledgement (in response to Judge Hassan's question) that there is an "elevated reason to focus on process efficiency and cost issues in the context of post-earthquakes' Christchurch", and his emphasis that this was "critically important".[90] In particular, we find as a fact this is a matter that goes to the heart of providing the right investment climate to enable recovery and sustain long-term growth. That is especially in terms of how the costs, delays and uncertainties of RMA administration can have impact upon investment decisions.

[114] In addition, we find the approach we have taken is a more appropriate response to the statutory directives we must apply concerning the higher order statutory documents.

[115] We acknowledge that the CRPS does not include any relevant objectives or policies as to process efficiency. However, nothing in the CRPS (specifically or by implication) directs

89 Evidence in chief, Philip Nevell, paras 7.1 and 7.2.
90 Transcript, page 362, lines 8-16.

against including objectives on this matter in Strategic Directions. As such, we are in a position to respond to the OIC Statement of Expectations on this matter and still give effect to the CRPS.

[116] Again, the objectives in Strategic Directions will have primacy and should be backed by relevant objectives, policies and rules in the other chapters of the Plan.

[117] The Council made clear that it did not seek to argue that it would be ultra vires the RMA to include what it termed "process" provisions in Strategic Directions.[91] In its closing submissions, the Council correctly pointed out the fact that any such provision could not validly override what the RMA prescribed, for instance on resource consent notification (in ss 95-95G). We accept that is a given. However, we are also mindful that nothing in the RMA precludes a plan from including objectives and/or policies (or, for that matter, rules) pertaining to matters of process, including as to notification. Indeed, we go further and say that a properly-framed plan should have objectives and policies that relate to rules governing matters of process. We raised with Mr Winchester the example of notification. Section 95A prohibits public notification of a consent application if a rule precludes it. Alongside that, s 75 describes a relationship between rules and policies (i.e. that the plan must state "rules (if any) to implement the policies") and between policies and objectives (i.e. that the policies are to implement the objectives). Similarly, s 76(1) allows for the inclusion of rules in a district plan "for the purpose of" (in part) "achieving the objectives and policies of the plan". The relationship of rules (including as to notification) and objectives is also reinforced in s 32, in the sense that an evaluation must examine whether provisions (including rules) are the most appropriate way "to achieve the objectives" (s 32(1)).

[118] Mr Winchester submitted that the RMA did not legally preclude a plan from having objectives and policies on plan administration. What was important was that the drafting of such provisions did not overlap or intrude into the specific statutory tests as to notification.[92] He said that came back to drafting and (in the case of notification) how much recourse one is able to have to objectives and policies to guide the assessment of effects for the purposes of notification. However, he noted that having objectives and policies as to matters of notification "may be quite helpful".[93] We agree.

91 Transcript, page 1231, lines 22-29.
92 Transcript, page 1232, lines 7-26.
93 Transcript, page 1233, lines 20-26.

[119] Ultimately, part of what we must be satisfied of is that Strategic Directions will assist the Council to carry out its functions "in order to achieve the purpose of the Act". We are satisfied that a properly-directed objective as to process efficiency and clarity of language will be of such assistance to the Council in achieving the RMA's purpose. Specifically, it will include in the Plan a clear direction as to how the Plan should be administered. "Sustainable management", in this regard, does not direct that environmental outcomes are to be treated in isolation from processes. "Management" is a word connoting process, amongst other things.

[120] We understand, from answers Mr Eman and Mr Winchester gave, that the Council view against including process-related provisions in Strategic Directions was that it was unnecessary (notwithstanding this, Mr Eman agreed in expert conferencing that it should be included).[94] Mr Winchester characterised this as being a "management view" (albeit not Mr Eman's final view as an independent expert).[95]

[121] We disagree with the Council's position on this. On the contrary, we find it a necessary component of Strategic Directions, given the primacy that the chapter is designed to have within the Replacement Plan. The essential consensus reflected in the Planning Experts' Joint Version supports the principle of this approach. Nothing we heard from representations by submitters indicated it would not be appropriate. The evidence (particularly from independent experts called by the Crown and by other submitters) satisfies us that the inclusion of a process-directed objective and related provisions in the Replacement Plan offers significant benefit and no material costs (assuming those provisions are well drafted and directed). These provisions are able to materially assist opportunities for economic growth and employment. That is because they will make explicit, for all plan readers and administrators, an overarching objective for process efficiency under the Replacement Plan.

Objectives v objectives and policies

[122] The Notified Version included an array of policies, in addition to its proposed objectives. Similarly, that was the case for the Planning Experts' Joint Version. We have departed from both by not including any policies in Strategic Directions.

94 Transcript, page 357 lines 25 – 31; page 1235, lines 18 - 37
95 Transcript, page 1235, lines 30 – 37.

[123] We have reached that decision primarily in view of the primacy we find Strategic Directions should have within the Replacement Plan. It also provides greater clarity and certainty.

[124] Relevant to that, the RMA provides for a hierarchical relationship between objectives, policies and rules within a plan. Section 75(1) requires that plans state "the objectives for the district", policies to "implement the objectives", and rules "to implement the policies". That hierarchical relationship is also reflected in ss 32 and 32AA. That is in the sense that the evaluation of objectives is as to whether they are "the most appropriate way to achieve the purpose of the Act" and the evaluation of other provisions is as to whether they are "the most appropriate way to achieve the objectives".

[125] It is important to avoid any undermining of the primacy of Strategic Directions within the Replacement Plan. Were Strategic Directions to have included policies, that could have opened up uncertainty as to their relative primacy over objectives that come to be included in other chapters of the Plan. While the risk may have been reduced by how such policies and other chapter objectives were drafted, we consider it undesirable to leave any residual interpretation risk alive. We reach that view having particular regard to the OIC Statement of Expectations.

[126] In any case, where we examined the substance of each of the proposed policies in both the Notified Version and the Planning Experts' Joint Version, we were satisfied that the most appropriate approach in each case was to leave relevant matters expressed as objectives, but allow for consideration of appropriate other provisions on the matters addressed, in relevant chapters in due course.

[127] Our decision provides that, within Strategic Directions, Objectives 3.3.1 and 3.3.2 have relative primacy. That is on the basis that all other objectives within Chapter 3 are to be expressed and achieved in a manner consistent with those objectives.

[128] Neither the Notified Version nor the Planning Experts' Joint Version provided for that internal hierarchy.

[129] Our design of this internal hierarchical relationship within Strategic Directions sits with the wider design by which Strategic Directions has primacy within the Replacement Plan as a whole. In testing this approach during the hearing, we referred to it as a "family tree" regime. An alternative analogy is with the apex of a pyramid. It bears some similarity with the hierarchical place of s 5 within Part 2, in provisions that have an overarching influence within the RMA.

[130] The evidence overwhelmingly satisfied us that the paired themes within Objectives 3.3.1 and 3.3.2 should have such primacy within this hierarchical structure. In particular, that evidence satisfied us that, in order to achieve the purpose of the RMA:

(a) The expedited recovery and future enhancement of Christchurch as a dynamic, prosperous and internationally-competitive city was the overarching outcome that the Replacement Plan should serve for the district; and

(b) That outcome objective needed to be accompanied by one focussed on process efficiency and clarity of language, framed to reflect what the Statement of Expectations identifies on these matters.

Matters we have not included that were in either the Notified Version or the Planning Experts' Joint Version

[131] There are a number of matters included in the notified and subsequent versions of the Strategic Directions chapter that are not included in our decision.

[132] We heard insufficient evidence on some matters to make a decision at this time. We determined that other matters did not, by nature, qualify to be included in Strategic Directions (although some such matters could be appropriately addressed elsewhere in the plan).

[133] Those matters on which we considered the evidence insufficient were (non-exclusively):

(a) The relationship of out-of-centre versus centre development, and the relationship of both with the central city. The evidence satisfies us as to the importance of maintaining a centres-based approach to urban growth, form and design. However,

it was too broad to determine finer questions, for instance as between consolidation or intensification at centres and as to what could be allowed for out-of-centres;

(b) Rural matters;

(c) Water quality (including freshwater features and values) and the coastal environment (to the extent that these are territorial authority functions);

(d) Specific reference to avoiding urbanisation before infrastructure is in place.

[134] We are informed these topics will be traversed substantially in later proposals. We consider that all of these matters potentially have a strategic component that would make them eligible for provision in Strategic Directions. While Strategic Directions was not identified as being "in part", Mr Winchester and Mr Radich QC conceded that further work may be required to address matters such as these in the chapter at a later date. We elaborate further on specific matters that have been retained later in this decision.

[135] It was apparent to us that the Strategic Directions chapter was also used as a "catch-all" for various other matters that may have wider-ranging impact across the plan, but which we found were not strategic in nature. The matters we excluded on this basis (although they were not culled out in the Planning Experts' Joint Version) were (non-exclusively):

(a) Development of Māori reserves;

(b) General amenity, health and safety and nuisance effects;

(c) Protection of people from contaminated land and hazardous substances;

(d) Reduced levels of service for transport during recovery;

(e) Rural-residential activity.

[136] We have determined that those are better placed within individual later chapters, so as to not derogate from the role Strategic Directions is intended for.

[137] We expect that the Council will consider how best to address these matters in relevant chapters. We note the structure of the Plan as it stands means that there is no "catch-all"

location for objectives and policies that span across the Plan (unless it is intended that Chapter 6 be adapted for this purpose), and as a result (in its current format) repetition appears to be inevitable. The Council may wish to address this at the appropriate time.

Specific topics

The influence of higher order documents

[138] The higher order documents (especially the CRPS, the LURP and the OIC Statement of Expectations) have significant influence in shaping Strategic Directions. That influence includes the priority they give to several resource management matters.

[139] However, even in the case of the CRPS and the LURP, that influence is not so directive as to predetermine or proscribe the substantive content of Strategic Directions provisions. The substance of direction given by higher order documents varies. On some topics (for instance as to urban growth and form and housing capacity and choice), the direction is relatively prescriptive. In other cases, the directions given allow for greater discretion. In those cases, the evidence has been relatively more important in informing us as to how we are best to give effect to those directions.

[140] We now set out our reasoning and evaluation of the provisions in Schedule 1 against other options on specific matters.

Proposal 1 changes

[141] As shown in Schedule 1, our decision deletes section 1.9 of Chapter 1 (Introduction). In substance, section 1.9 is outdated as a consequence of our decision concerning Strategic Directions. In any case, we agree with Mr Eman (and other planning experts) that it serves no valid resource management purpose. As part of a section of Chapter 1 entitled 'Strategic Outcomes form the District Plan', it cuts across the role intended by Strategic Directions. Yet it does not contain objectives, policies or other provisions that would assist the administration of the plan.

[142] In addition, as Schedule 1 shows, our decision makes consequential amendment to parts of Section 5 (the Relationship between the District Plan and other Resource Management

Planning documents). As this is a simple consequential change to non-contentious narrative, we are satisfied there is no need to direct the Council to prepare and notify a new Proposal 1 or call for submissions.

Proposal 3 changes (and related definitions)

[143] Our decision changes Proposal 3 by deleting its content and substituting the provisions in Schedule 1 in its place.

Section 3.1 – Introduction

[144] Section 3.1 comprises a new introductory chapter that better reflects the analysis set out above, in regard to the unique circumstances facing Christchurch.

Section 3.2 – Context

[145] We have retained a modified s 3.2 (Context). The modifications we have made draw from the Notified Version and amendments recommended in the various versions attached to planning evidence.[96] In addition, we have made amendments to improve precision and succinctness.[97]

[146] We have deleted ss 3.4 (Key Issues and Opportunities) and 3.5 (Strategic Directions for the District). Following pre-hearing mediation, several parties agreed with the Council that s 3.4 could be deleted (or moved to Chapter 1) and that s 3.5 could be deleted. Removal of those provisions from Chapter 3 improves the conciseness and clarity of direction provided by this chapter.

Section 3.3 - Objectives

[147] We have already set out our evaluation and reasoning in regard to these changes.

[96] Particularly from Mr Timms, for the Crown.
[97] The Notified Version did not include s 3.3.

Interpretation

[148] As discussed previously, we have determined that Strategic Directions should have primacy over other chapters of the Plan, and that within Strategic Directions, Objectives 3.3.1 and 3.3.2 should have primacy over other objectives.

[149] We have included the Interpretation provision for those reasons.

Objective 3.3.1 - Enabling recovery and facilitating the future enhancement of the district

[150] We have already addressed why we consider Objective 3.3.1 should have an overarching place in the hierarchy of objectives of Strategic Directions and why it should be expressed in terms that encourage and stimulate new investment.

[151] The Notified Version reflected this to an extent in its reference to "a dynamic and internationally competitive city". However, we found that message to have been somewhat lost in translation in the Planning Experts' Joint Version (which referred instead to laying "a solid foundation").

[152] We have noted that the evidence (primarily from the Crown/CERA) demonstrated the importance of having an overarching objective as to expedited recovery and future enhancement of Christchurch as a dynamic, prosperous and internationally competitive city. We determined that the objective ought to make explicit certain ingredients for that. Specifically, on the evidence, we are satisfied those are:

(a) Meeting the community's immediate and longer term needs for housing, economic development, community facilities, infrastructure and transport, and social and cultural wellbeing; and

(b) Fostering investment certainty.

[153] However, the evidence we heard (and various submitter representations)[98] also demonstrated the importance of recognising, in such an objective, other important qualities and values of the City. Our explicit reference to social and cultural wellbeing partly reflects this need for balance. So too does our explicit reference to sustaining "the important qualities and values of the natural environment".

[154] We expect that greater definition of those other values will be secured in the development of other Replacement Plan provisions.

[155] We are satisfied that Objective 3.3.1 is the most appropriate (amongst the various options considered) for achieving the RMA's purpose.

Objective 3.3.2 – Clarity of language and process efficiency

[156] We have already set out our evaluation and reasoning in regard to these changes.

Objective 3.3.3 - Ngāi Tahu Manawhenua

[157] As with the Notified Version, we have included a specific objective. By contrast, we have not included associated policies.

[158] The evidence called on behalf of Te Rūnanga o Ngāi Tahu and Ngā Rūnanga (#1145) was essentially uncontested ('Ngāi Tahu Version').[99] The final version of the provisions they proposed was agreed by the Crown and not opposed by the Council. That gives the Ngāi Tahu Version (including its proposed set of policies) significantly more weight than the Notified Version.

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98 For example, evidence of Hugh Nicholson and Adam Scott Blair for the Council; Tā Mark Solomon for Te Rūnanga o Ngāi Tahu, Ngā Rūnanga and Ngāi Tahu Property Ltd and George Tikao for Ngā Rūnanga and Te Rūnanga o Ngāi Tahu; Ms Lucas for Peterborough Village Inc Society (#228).

99 Evidence of Tā Mark Solomon, Shaun Te Marino and Matthew Lenihan, George Takao and, ultimately, Lynda Murchison. We have considered the further submission in opposition by Fox & Associates Ltd (#1422) and the further information provided by that submitter. That further submission and the associated representations Mr Fox made in his email do not persuade us against including Objective 3.3.3. In particular, we are not persuaded that Part 2 of the RMA and the relationship that Te Rūnanga o Ngāi Tahu and Ngā Rūnanga have with the Council would obviate the role of such an objective. As for the other issues raised in the further submission (for example, as to the costs, delays and risks for developers), these may be further considered in due course, together with the submission by Te Rūnanga o Ngāi Tahu and Ngā Rūnanga, on other relevant proposals for the Replacement Plan.

[159] However, in the final analysis, we must be satisfied that all provisions we decide to include in Strategic Directions fit with the design intentions of this chapter. On that basis, we have decided against having policies included in conjunction with Objective 3.3.3. We have also determined that Objective 3.3.3 should be comparatively simple and less specific in its drafting so that it fits with the purposes of the Strategic Directions chapter.

[160] We anticipate that further targeted provisions, including to give effect to the CRPS, would be appropriate for inclusion in relevant other chapters of the Replacement Plan. We expect that this will involve a review of the related commentary in Chapter 1. We note that the Ngāi Tahu Version also proposed that we replace Section 3 (Manawhenua) of Chapter 1. As this section was not included in the Notified Version, we needed to be satisfied that it was appropriate to change it as a consequential change, at this time. In the final analysis, we were not satisfied that we should do so as part of this decision. We will, in due course, consider and decide upon the substance of that chapter, in light of the evidence and submissions we hear in that context.

[161] In the meantime, we are satisfied that our decision gives effect to the CRPS insofar as it can be addressed at this time. Specifically we refer to the CRPS's directives as to:

(a) provision for the relationship of Ngāi Tahu Manawhenua with their ancestral lands, water, sites, wāhi tapu and other taonga (4.3.15);

(b) methods for protection of those matters, including in resource consent processes (4.3.16, 4.3.18); and

(c) the appointment of tāngata whenua commissioners on resource consent hearing panels and during plan development processes (4.3.19).

[162] We expect, however, that we will need to consider these CRPS directives further in the context of hearing and considering Chapter 1 and other relevant chapters in due course.

[163] We are satisfied that including Objective 3.3.3 in Strategic Directions is the most appropriate way to achieve the purpose of the RMA, within the context of Strategic Directions.

Specifically, as an objective with primacy (within a scheme of related objectives, policies, rules and other methods in other chapters):

(i) Objective 3.3.3 will assist Ngāi Tahu as kaitiaki (s 7(a)) and hence assist 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 (s 6(e)).

(ii) It will bring direct focus on Treaty principles (s 8), including matters of active protection and rangatiratanga.

(iii) It will give further expression to Treaty principles in referring to Ngāi Tahu Manawhenua's active participation in resource management decision-making and their aspirations to participate in the revitalisation of Ōtautahi (Christchurch City).

(iv) It will allow for the proper further expression of related objectives, policies, rules (and other methods) in relevant other chapters of the Replacement Plan. In that regard, it is more appropriate than either the Notified Version or the Ngāi Tahu Version.

Objective 3.3.4 - Housing capacity and choice

[164] The final round of planners' expert conferencing served to demonstrate that the Notified Version was insufficiently clear and directive on the very important subject of housing capacity and choice.

[165] The evidence, particularly from the Crown's independent experts, provided a sound foundation for preferring the Planning Experts' Joint Version over the Notified Version. In particular, that evidence crystallised the very significant pressures that have been put on housing demand, supply and affordability. That evidence explained that those pressures are in large part from the enormous damage resulting from the earthquakes. In addition, it explained that pressures have also arisen from changing demographics. The evidence demonstrated there was a consequential need for the Plan to allow for additional housing capacity (23,700

dwellings between 2012 and 2028) and additional housing opportunities (including types, densities, locations, affordability, social housing and papakāinga).

[166] The Crown's independent experts explained how these present and growing problems were adversely affecting social wellbeing.[100] We also heard from Dr Alistair Humphrey on behalf of the Canterbury District Health Board ('CDHB').[101] He spoke about the specific impacts that were occurring (in terms of housing unaffordability) as to the ability of those suffering mental health issues to reintegrate.[102] In addition, Mr McMahon of the Spreydon/Heathcote Community Board[103] explained his personal experience of young people having to be accommodated in substandard hostel-type accommodation because rental properties were no longer affordable.[104]

[167] In an overall sense, that demonstrated relevant provisions of the Notified Version would fail to promote sustainable management. In particular, its Policy 3.6.1.2 referred vaguely and inconsistently to notions of "housing affordability" and "opportunities for affordable housing development… sufficient to meet demand". Without properly defining an objective or goal, the Notified Version did not provide any helpful measure of the problem or ability to monitor whether the problem was being resolved (through the administration of related Plan provisions, for example).

[168] By comparison, the Planning Experts' Joint Version was much clearer. In one recommended policy, it specified the measurable end of creating sufficient capacity to accommodate 23,700 additional dwellings in the period 2012 to 2028. It also clarified the means as "through a combination of residential intensification, brownfield and greenfield development". In another recommended policy, it addressed the matter of choice (a "range of housing opportunities including a choice in housing types, densities, locations and that enable affordable, community and social housing to meet the diverse needs of Christchurch residents"). Both proposed provisions were well supported by the accepted evidence and submissions heard.[105]

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100 In particular, the evidence of Michelle Mitchell.
101 Dr Humphrey appeared as a public health physician representing the CDHB (transcript, page 1020, lines 41-44).
102 Transcript, page 1025, lines 20-44; page 1026, lines 1-18.
103 Spreydon/Heathcote Community Board (#899).
104 Transcript, page 1005, lines 43-46; page 1006, lines 1-16.
105 For example, the evidence of Adam Scott Blair for the Council, and Dr Natalie Jackson and Michelle Mitchell for the Crown.

[169] For those reasons, we find that the Planning Experts' Joint Version would achieve the RMA's purpose.

[170] For the reasons we have given, our decision departs from the Planning Experts' Joint Version by having objectives and no associated policies. More substantively, it refers directly to "an additional 23,700 dwellings" (as opposed to "capacity for" these). That change is made to provide a sharpened objective more readily able to be monitored. Specifically, it recognises the required solution to this sustainable management problem in Christchurch is the availability of actual physical dwellings. Zoning capacity alone will not solve the problem. A Plan cannot, of course, get houses built. However, the policies and rules (and their sound administration) can help facilitate and stimulate this necessary solution. The objectives are, in part, intended to serve as a measuring point for the formulation of related policies and rules, and monitoring of their effectiveness over time. The explicit primacy we give to the objectives will also inform the drafting of objectives in other chapters.

[171] Our decision on this is made mindful of the care and attention that will be needed during the development of the plan (especially of its policies, rules and methods) to ensure the right incentives, stimulation and regulation is delivered to best meet this sustainable management priority for Christchurch.

Objective 3.3.5 - Business and economic prosperity

[172] The Notified Version included reference to this matter in its objective (3.6.1) as to the recovery and long-term future of the district. Its focus was on having diverse opportunities for business to establish and prosper. The Planning Experts' Joint Version also proposed a dedicated objective, linked to concepts of wellbeing and resilience.

[173] We are satisfied, on the evidence, that the Notified Version was sound in its approach of linking business and economic prosperity to Christchurch's recovery. In particular, we heard from various witnesses about the importance, to recovery, of securing substantial new investment and the significant challenges that are presented in doing so. We also accept that the objective should refer to the relationship between business and economic prosperity and community wellbeing and resilience.

[174] On the basis of the evidence, we consider that the objective should explicitly identify these matters as being of "critical importance". We have deliberately chosen those words, as they give due emphasis to the relative importance of this matter. In the equation of post-earthquakes Christchurch, it is at the heart of enabling the Christchurch community to provide for its wellbeing.

[175] Therefore, we have included Objective 3.3.5. For the reasons stated, we are satisfied that it is the most appropriate for achieving the RMA's purpose.

Objective 3.3.6 – Natural hazards

[176] In the context of post-earthquakes Christchurch, there is a clear logic to having Strategic Directions address natural hazards.[106] Also, as can be expected, this is a matter on which the CRPS (as amended by the LURP) gives detailed direction. In addition, Action 42 of the LURP directs the Council, in reviewing its district plan, to provide for protection of people from risks in 'High Hazard Areas' (as defined in the CRPS) and other risks from natural hazards.

[177] However, a number of issues arose concerning how natural hazards should best be addressed. The primary difficulty was in how best to give effect to detailed directions in the CRPS, in the context of Strategic Directions. Related to that, the expert evidence called was understandably high-level.[107]

[178] Through the course of the hearing, we were offered several, quite differently expressed, versions of a natural hazards objective. The Notified Version (proposed Objective 3.6.5) as follows:

> The risk to people, property and infrastructure from natural hazards is avoided or reduced to acceptable levels.

[179] In opening, the Council proposed that the wording be changed to:

> The risk to people, property ~~and~~ infrastructure and the environment from natural hazards is avoided or reduced ~~to acceptable levels~~.

106 As can also be expected, the Replacement Plan includes a dedicated chapter on natural hazards (Chapter 5).
107 Our hearing of the Natural Hazards proposal will commence on 2 March 2015.

[180] The Planning Experts' Joint Version proposed that the objective be changed from a focus on risk avoidance to one of overall risk reduction and improved resilience:

> A land use pattern where the overall risk of natural hazards to people, property and infrastructure is reduced to acceptable levels, resilience is improved and risk is not transferred to significant natural areas.

[181] The Joint Version's reference to avoiding transfer of risk to "significant natural areas" was made subject to a rider that the words "significant natural areas" needed to be revisited once Chapter 5 and the natural areas chapters were considered.

[182] The Council offered a further revision in its closing submissions:

> The risk from natural hazards to people, property, infrastructure, and aspects of the natural environment ~~from natural hazards~~ is avoided or reduced, or where this is not practicable, minimised.

[183] The Council submitted that a risk avoidance construct was vital given the higher order documents (specifically the CRPS and Action 42 of the LURP) and the circumstances in Christchurch following the earthquakes[108]. However, the Council acknowledged that it was valid to recognise that avoidance may not be practicable in all circumstances (for example, in regard to critical infrastructure where there is no practicable alternative location).

Responding to the CRPS and the LURP

[184] The CRPS specifies four objectives (11.2.1 to 11.2.4) and nine associated policies (11.3.1 to 11.3.9) in its dedicated natural hazards chapter (in addition to Christchurch-specific provisions in Chapter 6). The objectives contain various complexities and nuances that make it difficult to frame a suitably comprehensive response in Strategic Directions. For example:

(i) Objective 11.2.1, although entitled "Avoid new subdivision, use and development that increases risks associated with natural hazards", refers in its detail to mitigation where avoidance is not possible. Objective 11.2.1 does not explicitly set any benchmark for avoidance, such as "to acceptable levels". However, its associated explanatory text adds certain qualifiers. For instance, it explains that "in lower risk areas and where development may be otherwise appropriate in high hazard risk areas (where avoidance is not

[108] Council closing submissions, para 8.4.

possible), mitigation measures may provide alternative means of achieving the overall objective".

(ii) Objective 11.2.2 (entitled "Adverse effects from hazard mitigation are avoided or mitigated") broadly targets adverse effects on people, property, infrastructure and the environment. That broad coverage is reinforced by the associated explanatory text (and, hence, is to be interpreted as broadly as the RMA provides). The text does not seek to narrow what is intended by the word "environment". Further, it elaborates that the objective extends to adverse effects on "other values that contribute to the well-being of people and the community, including cultural well-being".

[185] Associated policies are expressed to a level of detail that, in a practical sense, is best addressed when considering the details of specific objectives, policies and rules of Chapter 5.

[186] It is the Replacement Plan as a whole, including Chapter 5 which we have yet to consider, that must give effect to the CRPS and that we must ensure is not inconsistent with the LURP. What Strategic Directions says is clearly an important overarching part of this. However, we find that both the CRPS (including Chapters 6 and 11) and Action 42 of the LURP allow for sensible exercise of discretionary judgement in how that is best achieved. In exercising that judgment, we have sought to be guided by relevant expert opinion.

[187] Of the various submitters on Objective 3.6.5 of the Notified Version, only CERA/the Crown called an expert with relevant scientific expertise, namely Dr Kelvin Berryman.

[188] Dr Berryman is undoubtedly well qualified to assist, in view of his independent expertise in the specialities of earthquake geology and natural hazards. However, his brief was (understandably) limited to a broad conceptual risk management level at this stage. Even so, we appreciated the further assistance he gave us in answer to questions.

[189] CERA/the Crown did not oppose what the Council proposed as modifications to Objective 3.6.5. However, Dr Berryman was cautious in his view as to the merits of what the Council proposed in its opening submissions. Key aspects of his opinion were:

(a) There are significant uncertainties and limitations in the data pertaining to most, if not all, natural hazards and associated risks in Christchurch.[109] The natural hazard constraints affecting Christchurch include earthquakes and related events (e.g. tsunami, river flood, rockfall, landslide), severe weather and compounding hazards (e.g. sea level rise from climate change and exacerbated storm surge, accelerated erosion and inundation, and further earthquake activity damaging stop banks and resulting in flood events exacerbated through liquefaction damage).[110]

(b) The Plan needs to address *compounding risk over the planning horizon* (our emphasis), and to establish acceptable risk criteria for the impacts of foreseeable natural hazard events that are possible in Christchurch. Only after the hazards have been characterised and the acceptable risk criteria have been developed (with associated community engagement) can land use planning controls offer appropriate mitigation.[111] The Plan needs to define "acceptable risks". There is a need for a framework within which acceptable levels of future economic losses can be assessed and then appropriate planning interventions considered should the economic loss be deemed unacceptable.[112]

(c) His support for the addition of "and the environment" to the objective was qualified for his stated reason, namely "To what extent society should control some elements of the natural environment to protect other elements of the natural environment is a value judgment".[113]

(d) Similarly, his willingness to agree to the removal of "acceptable levels" from the objective was qualified on the basis that what is deleted is picked up elsewhere so that the objective can be achieved.[114]

[190] Drawing from Dr Berryman's opinion, we consider the objective which the Council offered in closing is more appropriate than the Planning Experts' Joint Version in two key

109 Berryman, 3.5.
110 Berryman, 7.1.
111 Berryman, 9.4.
112 Berryman, 4.4.
113 Berryman, 8.4.
114 Berryman, 8.5.

respects. Those are in its recognition of the importance of avoidance of unacceptable risk, and the need for the Plan to define acceptable risk.

[191] However, we find that all versions proposed to us are weak in how they respond to the CRPS on these matters.

[192] In addition, while both the Planning Experts' Joint Version and the Council's final position in closing both recommended referring to risks to the natural environment (as well as to people, property and infrastructure), we do not consider there is a sufficient basis for expanding on the Notified Version of Strategic Directions in this way.

[193] We note that the CRPS does not direct that the objective be expanded in this way.[115]

[194] Ms Carter explained that the Council's position (that the words "and the environment" be added) stemmed from a submission from Tonkin & Taylor.[116] That submission was to the effect that the RMA's definition of "natural hazards" refers to other aspects of the environment, not just people and communities.[117]

[195] However, the fact that the RMA defines "natural hazard" as encompassing an occurrence that adversely affects or may adversely affect "other aspects of the environment" does not mean that provision for natural hazards in Strategic Directions must or should do likewise.

[196] As Dr Berryman put it, the extent to which society should control some elements of the natural environment to protect other elements of it is a societal value judgment question. On the limited evidence we have so far received, we are not satisfied that the benefits of including in a natural hazards provision reference to "aspects of the natural environment" is appropriate. Nor do we find it appropriate to follow the Planning Experts' Joint Version by adding "and risk is not transferred to significant natural areas".

[197] In each case, those additional words would involve making untested trade-offs as to the use, development and protection of resources (including private property). On the limited

115 Objective 11.2.2 of the CRPS is, instead, directed to the adverse effects of natural hazard mitigation on the environment (and other matters).
116 Submitter #970.
117 Transcript, page 312, 25-29.

evidence we have received to date, we cannot determine (for Part 2 and s 32AA RMA purposes), what the costs and benefits of those trade-offs would be.

[198] Hence, we have framed Objective 3.3.6 on the following basis:

(a) Paragraph (a) is specific to new subdivision, use and development. In that regard, it responds to Objective 11.2.1 of the CRPS. It provides a two-tiered approach, in its subparagraphs (i) and (ii). The first tier is to avoid new subdivision, use and development in areas where risks to people, property and infrastructure "are assessed as being unacceptable". Its second tier provides that new subdivision, use and development is to be undertaken in a manner that ensures natural hazard risks to people, property and infrastructure "are appropriately mitigated". Deliberately, this paragraph is confined to new subdivision, use and development and does not extend to encompass risk to the wider environment. Also, in those respects, we find that this drafting better gives effect to the CRPS, notably Objective 11.2.1 of it.

(b) Paragraph (b) provides a qualification to the application of paragraph (a), for new strategic infrastructure. It allows for such infrastructure to be located in areas where risks to people, property and other infrastructure are assessed as unacceptable, provided two prerequisites are met. The first is that there must be no reasonable alternative. The second is that the infrastructure must be designed to maintain, as far as practicable, its integrity and form during natural hazards. We are satisfied, on the basis of the uncontested evidence we received from infrastructure providers, that this exception was important. We note that it also responds to Policy 11.3.4 of the CRPS as to "critical infrastructure".

(c) We have decided against extending the objective to encompass either "aspects of the natural environment" or "and risk is not transferred to significant natural areas" for the reasons we have stated.

(d) We have added the following rider:

> The requirement for further or alternative strategic direction in respect of "Natural hazards" will be reconsidered by the Panel as part of considering the Chapter 5 Proposal.

[199] That rider acknowledges the limited evidence we have so far received, and our capacity (under the OIC) to revisit proposals on which we have made decisions.

[200] We are satisfied that our framing of Objective 3.3.6 better and more accurately gives effect to the CRPS than any of the alternative options put to us. As such, we are also satisfied that it is the most appropriate for achieving the RMA's purpose.

Objective 3.3.7 – Urban growth, form and design

[201] Objective 3.3.7 replaces several provisions of the Notified Version:

(a) Proposed Objective 3.6.2 on "development form and function", and its related policies on accessible development (3.6.2.1), greenfield urban land supply (3.6.2.2), urban consolidation (3.6.2.3), timing of urban development (3.6.2.4), and community focal points (3.6.2.7);[118] and,

(b) Policies 3.6.1.1 on existing and new greenfield urban land, and 3.6.1.5 on development design and quality.[119]

[202] The Planning Experts' Joint Version was quite differently structured from the Notified Version in regard to its equivalent provisions. Specifically, it proposed:

(a) An objective on "urban growth and form" and related policies on urban consolidation, timing of urban development, brownfield redevelopment, accessible development (amongst others).

(b) An objective on "quality urban environment" and related policies, including as to "development design and quality".

[203] We have already noted why we have determined that Strategic Directions should not encompass policies. That has informed our approach to the development of Objective 3.3.7.

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118 Policy 3.6.2.5 on education activities is partially replaced by Objective 3.3.11, with the rural policy aspects deleted for the reasons we give on that matter; Policy 3.6.2.6 on rural-residential is deleted and not replaced for the reasons we give on that matter; and Policy 3.6.2.8 on infrastructure is replaced by Objective 3.3.12.

119 Policy 3.6.1.2 on housing affordability is replaced by Objective 3.3.4 (on housing capacity and choice), Policy 3.6.1.3 on business development by Objective 3.3.5 (on business and economic prosperity) and Objective 3.3.10 (commercial and industrial activities), Policy 3.6.1.4 (on temporary recovery activities) by Objective 3.3.15 on the same topic.

We record, however, that we have not simply elected to delete anything called a policy in either the Notified Version or the Planning Experts' Joint Version. Rather, we have examined the substance of all provisions and, where appropriate, carried into Objective 3.3.7 all the relevant matters from those provisions.

Good urban design

[204] That Strategic Directions should make provision for good urban design was not a matter of significant dispute. On the evidence we have received, we are satisfied that good urban design is an essential ingredient not only in the recovery but also in providing for the long-term future of Christchurch.

[205] However, it is important that such provision is properly targeted to each relevant zone and subject-specific context. Otherwise, there is a high risk that significant costs will be imposed that are not justified by the environmental benefits that could be realised. We understand that the Council had envisaged targeted urban design control. Mr Winchester explained that the targeting would be to matters such as the Central City, development of Centres, and some categories of multi-unit development in residential areas.[120]

[206] To better reflect that intention, Mr Eman's opening proposition was for the Notified Version policy to include the qualifier "recognising that different issues will be relevant to different areas depending on their environment and function…".[121] The Crown/CERA initially opposed the specific nature of the Council's proposed policy. By comparison, Property Council New Zealand sought relatively less change from the Notified Version. A number of submitters (for instance, various community boards) supported the Council's Notified Version. Finally, the Planning Experts' Joint Version recommended a wording that was closely similar to Mr Eman's modified version (but with slightly different qualifying words).

[207] We understand that a common thread in the various drafting approaches that were promoted to us was a concern to ensure that the Replacement Plan gave effect to the CRPS, as is required by the RMA. However, for the reasons we have given, we are satisfied that we have considerably greater capacity than has been assumed to ensure Strategic Directions reflects a proper overarching direction on the subject of urban design given in the CRPS. That includes

120 Transcript, page 1226, lines 5-35.
121 Eman rebuttal, 27 November 2014, Attachment A, page 33.

Policy 6.3.2. That policy is prescriptive in the sense that it specifies seven subparagraphs as "the principles of good urban design" and supplements these by incorporating by reference "those of the NZ Urban Design Protocol 2005". Significantly, however, it qualifies that prescription. One qualifier it states is "to the extent appropriate". A further qualifier is that the policy is targeted to "business development, residential development (including rural residential development and the establishment of public space". Other provisions of the CRPS also give direction on urban design, in various ways. Our Objective 3.3.7 is framed to both acknowledge the overarching importance of a high quality urban environment and to give overarching direction that will allow for targeted urban design direction in specifically identified contexts, through relevant other chapters.

[208] In addition to the specific targets that Mr Winchester identified (Central City, development of centres, some categories of multi-unit development), we envisage good urban design could also be targeted to the protection of areas of demonstrated special and valued character. We include a paragraph (b) to address that.[122]

[209] Fundamentally, we consider that targeted intervention is the best way of ensuring the costs of urban design intervention do not exceed its benefits and that "sustainable management" is promoted. Because our Objective 3.3.7 would better allow for that targeting than any other provisions on urban design that were proposed, we are satisfied that it is better in giving effect to the CRPS and is most appropriate for achieving the RMA's purpose.

Urban growth and form

[210] This is one important example of where we have carefully tested to ensure Objective 3.3.7 captures all relevant dimensions of policies it replaces. In particular, we have been mindful of the relatively prescriptive directions given on these matters by the CRPS, especially in Chapter 6, as is acknowledged in our specific reference to applicable CRPS-directed outcomes.

[211] For those reasons, we are satisfied that Objective 3.3.7 is the most appropriate for achieving the RMA's purpose.

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122 We note that paragraph (b) draws to an extent from Objective 3.6.4(a)(iii) of the Notified Version (concerning "natural and cultural environment").

Objective 3.3.8 - Revitalising the Central City

[212] The Notified Version recognised the importance of Central City revitalisation, but not as a discrete priority in its own right. The Council's proposed Objective 3.6.2 as to development form and function made reference to the restoration and enhancement of the role of the Central City. This theme was also reflected in the Council's proposed Policy 3.6.2.7 (as to community focal points).

[213] Similarly, the Planning Experts' Joint Version recognised elements of this approach in its proposed policy on community focal points. Separately, it added into a policy on "business development" a provision as to restoring, reinforcing and enhancing the role of the Central City. However, in questioning during closing submissions, counsel for the Crown/CERA acknowledged this addition to that policy was misplaced.[123]

[214] Mr Bartlett QC, counsel for AMP Capital Investors (NZ) Ltd, sounded caution about imposing any bias in favour of Central City retail activity, in terms of the risks and costs associated with such planning intervention. His submission was supported by Mr Fraser Colgrave, an economist. In part, that submission and evidence questioned the validity of Mr Tim Heath's independent evidence, for the Council, in support of what the Notified Version described as commitment to the "primacy" of the Central City "alongside a network of complementary suburban and town centres".[124]

[215] We note that the CCRP explains that it has not adopted what the draft had proposed (namely to restrict development outside the Central City to protect the Central City as a consolidated business hub). The CCRP explains that restriction of suburban development was not "necessary or desirable" for achieving the aspirations of the CCRP including as to continued investment in the Central City.[125]

[216] Mr Nevell, on behalf of the Crown/CERA, gave evidence that revitalisation of the Central City is by no means assured, at least in the absence of effective direction. In particular, that evidence explained to us the very large scale of investment needed and the very large extent that it was dependent upon the private sector, particularly from new investors. That emphasised

123 Transcript, page 1208, lines 3-14.
124 Tim Heath is an independent expert on retail distribution.
125 CCRP, page 105.

for us the very high importance of including in Strategic Directions (and in related Plan Chapters) provisions that will effectively encourage and stimulate Central City investment. We also heard about the important ingredients for a successful revitalisation. Importantly, revitalisation is not to put back what was the pre-earthquake CBD. That has been and gone, and something new is required. Those new ingredients are likely to include offices (of different grades) and public sector projects. However, such investment will not be sufficient. Substantial new residential investment is also sought (the CCRP refers to between 12,000 and 24,000 living in the central city).[126] In addition to the much-diminished existing retail presence, it is anticipated that the return of office activities and the introduction of new residential activity will help stimulate further retail presence.

[217] Mr Humphry Rolleston gave us some interesting insights. In his representation, he spoke about some of the challenges in securing sufficient interest in residential redevelopment, and also about the possible value of encouraging new tertiary education investment in the Central City. While an oral representation, Mr Rolleston's views helped to reinforce the requirements for a successful Central City revitalisation.

[218] In the final analysis, on the weight of evidence, we find it necessary and appropriate for the Replacement Plan to include provisions to promote and help secure successful recovery and revitalisation of the Central City. In that sense, we find it appropriate for the Plan to convey a preference to those ends. The fact that the Central City has been chosen, on behalf of the community, as the jewel in the crown makes that choice as the primary community focal point appropriate and valid. However, we find the weight of evidence also supports a preference being expressed in favour of Central City revitalisation, in Objective 3.3.8.

[219] We acknowledge that the evidence we have received so far is limited. As such, we consider it appropriate to frame the objective in terms of broad principle only. How that is then reflected in objectives, policies and rules of particular chapters will be a matter for our later consideration. In light of the limited evidence we have received and accepted, we consider that Objective 3.3.8 (as a dedicated provision) is more appropriate for achieving the RMA's purpose in regard to the Central City (as compared to the more dispersed treatment given in both the Notified Version and the Planning Experts' Joint Version).

126 Miskell, para 7.5.

Objective 3.3.9 - Natural and cultural environment

[220] The CRPS includes various provisions as to the natural and cultural environment. These include objectives and policies and other provisions on fresh water, the coastal environment, ecosystems and indigenous biodiversity, beds of rivers and lakes and riparian zones, landscape, historic heritage and other matters.

[221] In addition, s 6 of the RMA (on matters of national importance), includes protection and preservation directives as to the natural character of the coastal environment (s 6(a)), outstanding natural features and landscapes (s 6(b)), areas of significant indigenous vegetation and significant habitats of indigenous fauna (s 6(c)), public access to and along the coastal marine area, lakes and rivers (s 6 (d)), and the protection of historic heritage (s 6(f)). Alongside that, s 7 directs that particular regard be given to a range of related topics, including the maintenance and enhancement of amenity values and of the quality of the environment (s 7(c), (f)), and the intrinsic values of ecosystems (s 7(d)).

[222] All of that provides ample direction that these matters ought to be addressed in Strategic Directions. Nor was that a matter of serious challenge in any evidence called by any submitter.

[223] On the other hand, the evidence we received on this matter was very limited. On that basis, we have determined to include Objective 3.3.9. In doing so, given those limitations, we have added the following rider:

> The requirement for further or alternative strategic direction to be provided in respect of the "Natural and cultural environment" will be reconsidered by the Panel as part of its further hearing of relevant proposals.

[224] We emphasise that we expect to receive detailed expert evidence on this topic from relevant disciplines (not simply planning evidence), such as can assist us to ensure properly targeted provision in the Replacement Plan, including in the expression of any Strategic Direction objective(s). We see that as very important, given the use, development and protection trade-offs that can be associated with such provisions. Those trade-offs can impact on both private property rights and at a wider community scale.

Objective 3.3.10 - Commercial and industrial activities

[225] The Notified Version did not include any specific provision to acknowledge the importance of the recovery of commercial and industrial activities for the expedited recovery and long-term economic and employment growth of Christchurch.

[226] The Planning Experts' Joint Version did so, proposing the following:

> Ensure the recovery of commercial and industrial activities in a way that promotes an expedited recovery and long term economic and employment growth through enabling rebuilding of existing business areas, revitalising of centres, and provision in greenfield areas.

[227] We are satisfied that this consensus position was well supported by the independent expert evidence we heard. That evidence satisfied us as to the importance of recognising the link between the recovery of commercial and industrial activities, and Christchurch's recovery and its long-term economic and employment growth.

[228] The Planning Experts' Joint Version recommended the inclusion of a policy, rather than an objective. We have already set out our reasons for why we have confined Strategic Directions to objectives.

[229] However, we found little adjustment was needed to express this provision as an objective. We have used subparagraphs to improve clarity. We find the words "promotes an expedited recovery and…", as used in the Planning Experts' Joint Version, do not give sufficient clarity of purpose. Hence, we have liberated the proper verb in "expedites the recovery and…". We find "ensure that" misplaced, as that is beyond the scope of what can be delivered through plan provisions. However, we consider active stimulation ought to be expressed in the objective. That is in the sense that we see this is an area where plan methods will extend beyond regulatory ones to proactive initiatives and incentives to secure the confidence of investors to invest.

Objective 3.3.11 - Community facilities and education activities

[230] Again, we found the Planning Experts' Joint Version was well-supported on the evidence. It served to demonstrate that the Notified Version would not have given helpful direction on these matters. For those reasons, we find that the Planning Experts' Joint Version would achieve the RMA's purpose. However, we consider Objective 3.3.11 will better do so.

We have explained why we consider an objective is more appropriate for this purpose. In addition, we have tightened the provision by referring to "expedited" rather than "timely" and expanded its coverage to the establishment of new facilities, in addition to the "recovery" of facilities. We have also clarified aspects of drafting.

[231] For those reasons, we are satisfied that Objective 3.3.11 is the most appropriate for achieving the RMA's purpose.

Objective 3.3.12 – Infrastructure (and related definitions)

[232] On the topic of infrastructure, facilitated expert witness caucusing saw a large degree of consensus being achieved prior to commencement of the hearing, as between the Council and infrastructure providers. That significant consensus was as to both the form and the content of proposed infrastructure provisions for Strategic Directions (and related definitions). That consensus was reflected in the substance of changes proposed by Mr Eman, for the Council.[127] Ultimately, that consensus led to the development of a more refined set of proposed provisions set out in the Planning Experts' Joint Version. That version reveals very confined differences of opinion amongst those experts. Helpfully, that version also records sources of foundation evidence for the changes proposed. As such, we are satisfied that the experts' joint recommendations for change are well supported on the evidence.

[233] However, we have not overlooked issues that various submitters have raised on the substance of these proposed provisions despite that large degree of consensus. In particular:

(a) Eros Clearwater Holdings Limited and Eros Land Holdings Limited ('Eros/Clearwater') presented evidence and made submissions about whether an exception should be accorded to the Clearwater land, from what Strategic Directions provided for in respect to avoidance of noise sensitive activities within the 50dBA Ldn noise contour for Christchurch International Airport Limited. On behalf of Eros/Clearwater, Mr Cleary's closing submissions raised issues with aspects of the Planning Experts' Joint Version. Christchurch International Airport Limited ('CIAL') expressed other concerns.

127 Eman rebuttal, Attachment A.

(b) CIAL sought specific provision as to the management of bird strike risk for aircraft using the Airport.

(c) Gelita sought that we expand the application of reverse sensitivity provisions beyond strategic infrastructure to also encompass activities such as heavy industry.[128]

(d) Transpower sought various changes to the provisions to give better effect to the National Policy Statement on Electricity Transmission ('NPSET').

[234] In addition, we must be satisfied that the provisions we decide upon properly give effect to NPSET and the CRPS. The CRPS has specific relevance to the consideration of issues in relation to noise and Christchurch International Airport.

Exemption for the Clearwater land

Planning Experts' Joint Version

[235] The Planning Experts' Joint Version proposed the following exemption within its applicable policy (2(c)(iii)) as to avoiding noise sensitive activities within the 50dBA Ldn noise contour for Christchurch International Airport:

> … except… the limited extent of activities authorised within the Open Space 3D (Clearwater Zone).

[236] However, the Version recorded disagreement between Mr Phillips (planning expert for Eros/Clearwater), Mr Bonis (planning expert for CIAL) and Mr Eman "as to the extent to which 'authorised' is needed or more specific definition is required in this policy". It also observed that this was a matter that may be resolved in Stage 2, when considering provisions for Clearwater.

Submissions for CIAL

[237] In her closing submissions for CIAL, Ms Appleyard cautioned that the wording of proposed Policy 2(c)(iii) of the Planning Experts' Joint Version was loose and (depending on

128 Gelita NZ Ltd (#1014).

how it was read) may not give proper effect to the CRPS. On that basis, CIAL proposed that it be amended by the addition of a definition of "authorised" to mean:

> The scale of building development in the Open Space 3D (Clearwater) Zone shall not exceed… that authorised under Variation 93 to the Operative Christchurch City Plan.

Closing submissions for Eros/Clearwater

[238] Mr Cleary submitted that we should confirm proposed Policy 2(c)(iii), as worded in the Planning Experts' Joint Version. However, he said that was premised on certain assumptions as to how its references to "limited extent" and "authorised" would be treated:

(a) One assumption was that the meaning and practical effect of those words could be the subject of evidence and submissions in Stage 2 of the Replacement Plan enquiry process. On this, he pointed out that Eros/Clearwater were opposed to any strict reading of these words such as would limit them to only mean permitted activities.

(b) A related assumption was that the agreement reached by the planning experts indicated that they were of the opinion that their proposed Policy 2(c)(iii) would give effect to Policy 6.3.5(4) of the CRPS. CIAL's closing submissions recorded a different position on this point.

How we interpret Policy 6.3.5(4) CRPS

[239] Relevantly, Policy 6.3.5(4) of the CRPS says:

> Recovery of Greater Christchurch is to be assisted by the integration of land use development with infrastructure by… Only providing for new development that does not affect the efficient operation, use, development, appropriate upgrading and safety of existing strategic infrastructure, including by avoiding noise sensitive activities within the 50 dBA Ldn airport noise contour for Christchurch International Airport, unless the activity is within an existing residentially zoned urban area, residential greenfield area identified for Kaiapoi, or residential greenfield priority area identified in Map A (page 64).

[240] We note that Policy 6.3.5(4) concerns only "new development". On a purposive reading, we are satisfied that this would not catch any permitted activity under the Open Space 3D (Clearwater) Zone of the existing district plan. In addition, we consider that it would not catch activities that were authorised by resource consent on the date the policy came into effect (i.e. on 6 December 2013), provided the resource consent can still be exercised. We consider our

purposive reading[129] of "new development" appropriate in the sense we consider it unlikely that the drafting intention was to remove any such existing lawful right to develop.

[241] That leads us to the relevant aspects of Objective 3.3.12(b) of this decision, and our evaluation of it against other options.

[242] CIAL proposed that the Planning Experts' Joint Version of the exception (to the avoidance of noise sensitive activities within the noise contour) be amended by adding a definition of "authorised". This definition was confined to the "scale of building development" and to what was "authorised under Variation 93" of the existing district plan.

[243] Insofar as it goes, we consider that CIAL proposal is generally in keeping with the intentions of the CRPS. However, we find it falls short in not explicitly providing an exception for the ability to exercise a resource consent secured before 6 December 2013 (and that remains in effect). We recognise that the evidence we heard from Eros/Clearwater did not detail any specific resource consents that were in effect (but not exercised). Rather, their focus was on plan provisions. However, we consider that the exception allowed for by this provision should encompass reference to existing resource consents for completeness. In addition, we consider it clearer to refer to the actual name of the zone ("Open Space 3D (Clearwater) Zone") rather than to Variation 93.

[244] We have worded Objective 3.3.12 relevantly as follows:

> Strategic infrastructure, including its role and function, is protected by avoiding adverse effects from incompatible activities, including reverse sensitivity effects, by, amongst other things… avoiding noise sensitive activities within the 50 dBA Ldn noise contour for Christchurch International Airport, except… for permitted activities within the Open Space 3D (Clearwater) Zone of the Christchurch City Plan or activities authorised by resource consent granted on or before 6 December 2013.

[245] Counsel did not seek that we revisit what the Planning Experts' Joint Version proposed for the first bullet point (as to the meaning of "existing"). As such, we are presently satisfied that Objective 3.3.12(b) gives sufficient effect to the CRPS. However, we record that we have capacity to revisit this question (in terms of the OIC) if that is called for at Stage 2 of our enquiry.

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129 *Powell v Dunedin City Council* [2004] 3 NZLR 721 at [35] (CA).

[246] We have already covered off our reasons for confining Strategic Directions to objectives. For the reasons stated, we consider that the quoted part of Objective 3.3.12(b) in this decision properly gives effect to the CRPS. We are satisfied, on the basis of the weight of evidence, that this preference in favour of protection of the Airport is the most appropriate for achieving the RMA's purpose. We heard about the strategic importance of the Airport from Mr Boswell (General Manager Strategy and Sustainability) and Mr Osborne (an economist). We acknowledge that the CIAL evidence on these matters was relatively confined; but it was uncontested. On that basis, we accept it for present purposes. We are satisfied, in light of that evidence, that reverse sensitivity protection for the Airport is warranted. We acknowledge that such protection involves a trade-off, in the sense of limiting development opportunity at Clearwater. However, we consider that trade-off accords with Part 2, RMA. Specifically, that is on the basis of the relative scale of economic and social wellbeing importance of the Airport, both for Christchurch and nationally. In any case, in determining how to best make that trade-off, we must give effect to the CRPS. We find that the CRPS is relatively prescriptive and directive in that respect.

[247] Mr Cleary also submitted that the Council was precluded from acting inconsistently with the LURP in the preparation of the Replacement Plan. As we have noted, we accept that we are also subject to that directive. Mr Cleary went on to submit, "To the extent that there might be any tension between the Clearwater Exemption and a single policy within the RPS, it is clear that the decision-makers were comfortable in holding any such (asserted) tension was acceptable".[130]

[248] To the extent that Mr Cleary was suggesting that this was a basis for allowing for a Clearwater exemption at odds with giving effect to the CRPS, we disagree. Rather, we find it invalid to seek to read back the obligation to give effect to the CRPS in that way.

[249] We have set out our interpretation of the CRPS. We have done so, mindful that its policy 6.3.5(4) is one part of a document to be read as a whole. However, we find nothing elsewhere in the CRPS to take away from its plain meaning and effect. As such, we are not in a position to deny any aspect of our statutory obligation to give effect to the CRPS by reading that obligation down in light of the LURP. To the extent that Eros/Clearwater consider that the

130 Eros/Clearwater closing submissions, 4.12.

CRPS ought to have been differently framed, that is not something we can deliver any relief about.

[250] Mr Cleary made submissions (with reference to Mr Phillips' evidence) as to the high amenity values of Clearwater, and as to the value of non-complaint mechanisms for avoiding noise risks. Whether or not that is so, it does not overcome the requirement to give effect to the CRPS. On the same basis, we did not find helpful Mr Cleary's submissions as to whether the Council (allegedly supported by CIAL) have acted inconsistently (in regard to "Plan Change 84") with their current positions or as to whether Mr Bonis had given inconsistent evidence on that matter. Those submissions are not directed to what is relevant for our present purposes. They did not influence how we weighed Mr Bonis's evidence.

[251] Mr Cleary asked for a change to the Plan's definition of "sensitive activities" so as to ensure exemption for short term stays in guest accommodation. We have decided against doing so at this time, given that we have not received sufficient evidence and the definition serves wider purposes beyond Strategic Directions. These matters could be relevant to consideration of later chapters.

Management of bird strike risks for the Airport

[252] There was no provision for the management of bird strike risks in the Notified Version. CIAL sought such provision in its submission, and this was further addressed in the evidence of Mr Boswell and Mr Bonis. The Planning Experts' Joint Version did not make provision for it, recording:

> Bird strike clause not agreed, particularly in the context of "avoid". Preference for "manage" and may sit better in phase 2 chapter 6 and in subdivision chapter? Policy 2 is likely to address bird strike at a generic level via avoiding adverse effects.

[253] CIAL sought, through Mr Bonis, policy provision to "Ensure the threat of bird strike to Christchurch International Airport operations is minimised when considering plan changes, resource consents or any other development through the management of Bird Strike Risk Activities".[131] Those Activities were proposed to be defined to encompass a very wide range of matters, namely "Within 13 kilometres of [the] … Airport includes, but is not limited to, the creation, design and management of water features, stormwater management systems, the

131 Bonis, para 69.

establishment of refuse dumps, landfills, sewage treatment and disposal, pig farming, fish processing, cattle feed lots, wildlife refuges, abattoirs and freezing works, and any other activities that have the potential to attract dangerous bird species."[132]

[254] The evidence we heard on this topic was thin. Mr Boswell referred to CIAL's responsibility for managing this risk. He asserted bird strike risk was "a key threat" to the safe operation of the Airport, noting that "a single strike will have catastrophic effects." He did not elaborate further.[133]

[255] Neither Mr Bonis nor Mr Boswell could elucidate as to how the list of bird strike risk activities was derived. We were given little assistance on how this corresponded to the environment of the Airport (for instance in terms of its proximity to the Waimakariri River, and to water features at Clearwater). When we asked, we were given little assistance as to the number of land owners giving rise to this risk.

[256] It seems to us CIAL's proposal covers such a wide geographic area it would encompass most of metropolitan Christchurch and large swathes of rural land.

[257] Mr Bonis readily conceded to the lack of any adequate cost-benefit analysis, for our s 32AA evaluation purposes. He acknowledged, also, the importance of proper engagement with affected landowners. As such, Mr Bonis proposed that only light-handed treatment was appropriate, in terms of what (if anything) should be included in Strategic Directions at this time.[134]

[258] We accept, as a starting proposition, that bird strike risk is likely to be a real risk for the Airport. We accept as valid Mr Boswell's evidence that a single strike may have catastrophic consequences, but record that Mr Boswell did not elaborate on the nature of those consequences, nor of the risk profile. However, we accept that the effects are potentially catastrophic.

[259] Given that "effect", under the RMA, extends to a potential effect of low probability but high potential impact, we accept that bird strike qualifies for consideration. Given it could

132 Bonis, para 78.
133 Boswell, para 40; transcript page 1052, lines 38-41.
134 Transcript, page 1090, lines 35-47.

affect airport operations, we accept at this stage that it qualifies for inclusion in Strategic Directions.

[260] We carefully considered whether, even so, this matter should be left aside for Stage 2 consideration. On balance, we have decided to include provision at this time to the following effect (subject to a rider):

> …managing the risk of bird strike to aircraft using Christchurch International Airport.

[261] We have included the following rider in a footnote:

> The requirement for alternative strategic direction in respect of Objectives 3.3.12(b)(iii) and (iv) will be reconsidered by the Panel as part of its further hearing of relevant proposals.

[262] We record that we will need substantial further evidence on this topic, at Stage 2. Specifically, in order to define appropriate management consequences (including as to whether these are to be confined to non-regulatory ones, and/or include any measures affecting or restricting land use, and/or requiring effects assessment to be undertaken on specified applications in specified areas).

[263] On balance, we find that inclusion of that provision within the objective, together with that rider, is the most appropriate option for achieving the purpose of the RMA. That is in the sense that it provides some acknowledgement of the need to manage this issue, pending further consideration of the nature of that management.

Gelita gelatine factory

[264] Gelita (NZ) Ltd ('Gelita')[135] has a gelatine factory on a 3.14 hectare site in Woolston, zoned for heavy industry. The factory has been in existence there since 1855. We learned from Mr Monk (Gelita's General Manager) that its Woolston factory is New Zealand's sole producer of gelatine products, both edible and commercial. Over 70 per cent of its product is exported, and it has a 90 per cent share of the New Zealand market for edible product. However, Mr Monk explained that, in more recent years, odour discharge has been an issue. He explained this was in part due to aging plant, but has been exacerbated by earthquake damage. He explained that this has given rise to a "reverse sensitivity" problem, as a result of

135 Submitter #1014.

new land use activities (mixed use residential and retail) coming to be established in close proximity to the factory. He commented that this has led to opposition to Gelita's air discharge consent application, with these new businesses having expectations of a higher level of amenity than has been enjoyed in the area in the past. He spoke about the risks this posed for his company's viability. He also addressed us on the wider strategic economic implications of failing to give proper direction about avoiding the potential conflicts that can result between activities when non-industrial activity moves into an industrial zone.

[265] We agree that controlling the location of incompatible activities to minimise conflict is of sufficient strategic importance to warrant provision in Strategic Directions. We do not know much of the background to Gelita's particular position, but we consider Mr Monk's point concerning the strategic consequences of mismanagement of this issue to be well made.

[266] Further, we do not have enough evidence to adjudge how influential air odour issues are in giving rise to activity conflict in the area.

[267] However, we do not consider that this should be addressed by expanding the application of a reverse sensitivity regime beyond strategic infrastructure. Specifically, on the evidence, we acknowledge Gelita is a significant local employer and contributes to the economy. However, the evidence does not persuade us that Gelita is of sufficient scale or significance to be a beneficiary of reverse sensitivity protection at the expense of other potential activities. As such, we consider Gelita's issues are best addressed by a separate objective (3.3.14, which we address below), and in later specific chapters.

[268] On the evidence, we find that the Planning Experts' Joint Version was sound in its recommendation that reverse sensitivity provisions, in Strategic Directions, should be confined to defined "strategic infrastructure" (as later defined). On consideration of the accepted evidence, we do not accept that Gelita qualifies for inclusion.

Definition of "reverse sensitivity"

[269] "Reverse sensitivity" is defined in Chapter 2 of the Replacement Plan:

> … means the effect on existing activities from the introduction of new activities into the same environment, where the new activities may raise concerns or complaints regarding the effects of existing activities which could lead to restrictions being placed on the existing activities.

[270] Gelita asked that this definition be amended by striking out the words "into the same environment".[136] Gelita's planning expert, Mr Bligh, supported this change on the basis that he considered decision-makers would come to equate "environment" with "zone", which he considered an overly-narrow construct.

[271] We do not think it likely that decision-makers would equate "environment" with "zone", in view of the purpose of the definition. Inherently, the provision is dealing with the risks of conflicts occurring between activities, within a proximate area of influence. How narrow or broad that area is will depend on context, including the scale and impacts of the incumbent activity. It could be a narrow circle of immediate neighbours, or much broader. As such, we consider that "environment" is a more flexible word than "zone" and should, in any case, be retained. However, the need for such flexibility does serve to highlight the importance of precision in defining what activities can benefit from reverse sensitivity protection.

[272] While the definition is a little clumsy, we consider it satisfactory at this stage, for the purposes for which it is intended within Strategic Directions.

Transpower National Grid and NPSET

Definition of "strategic infrastructure"

[273] By the conclusion of the hearing there was a considerable degree of consensus as to what constituted "strategic infrastructure". We have considered the precise wording carefully, and have made minor amendments to improve certainty and clarity. We have also included a definition of "national grid", as requested by Transpower.

NPSET

[274] To an extent, we are given direction on how to provide for the national grid by the NPSET, to which the Replacement Plan must give effect. Its Policy 10 is:

> In achieving the purpose of the Act, decision-makers must to the extent reasonably possible manage activities to avoid reverse sensitivity effects on the electricity transmission network and to ensure that operation, maintenance, upgrading, and development of the electricity transmission network is not compromised.

136 Evidence of Kevin Bligh, 2.4.

[275] NPSET also has a Policy 11 in regard to buffering, as follows:

> Local authorities must consult with the operator of the national grid, to identify an appropriate buffer corridor within which it can be expected that sensitive activities will generally not be provided for in plans and/or given resource consent. To assist local authorities to identify these corridors, they may request the operator of the national grid to provide local authorities with its medium to long-term plans for the alteration or upgrading of each affected section of the national grid (so as to facilitate the long-term strategic planning of the grid).

[276] The Notified Version did not include any policy for buffer corridors specifically. However, it included an objective on "amenity, health and safety" to the effect that "sensitive activities are not established near lawfully established activities that generate noise, odour and other adverse effects". The Planning Experts' Joint Version provided for a concept of buffering, as follows:

> Ensuring… strategic infrastructure, including its role and function, is provided for and is protected by avoiding adverse effects, including reverse sensitivity effects from incompatible activities.

[277] In its submissions, Transpower sought such provision, as a foundation for the detail to follow in subsequent chapters. Mr Beatson submitted that this is a key component to facilitate the long-term strategic planning of the Grid.

[278] We are satisfied that Objective 3.3.12 gives proper effect to NPSET (and is better than both the Notified Version and the Planning Experts' Joint Version in doing so). Specifically:

(i) paragraph (a) acknowledges the benefits of infrastructure;

(ii) paragraph (b) makes provision for "reverse sensitivity" protection for strategic infrastructure (including the national grid); and

(iii) paragraph (b)(ii) provides explicitly for buffer corridors.

Giving effect to NPSET in the context of Strategic Directions being confined to objectives

[279] For the reasons we have stated, we have determined that Strategic Directions should be confined to objectives. That has had some consequences for the scale of response we have made to some policies of NPSET, as compared to the Planning Experts' Joint Version. Specifically, that Version included a policy:

> Minimise significant adverse effects from all infrastructure, recognising that for strategic infrastructure the constraints imposed by the technical and operational requirements can limit the extent to which it is feasible to minimise such effects.

[280] We recognise that this proposed policy responds, in part, to NPSET (particularly, its Policy 3). This is reflected, to some extent, in Objective 3.3.12(c). However, beyond that we consider the better place to consider the framing of policies on infrastructure is in considering the relevant later chapters of the Replacement Plan.

Overall evaluation of Objective 3.3.12

[281] We are satisfied that Objective 3.3.12 is the most appropriate for achieving the purpose of the Act, in regard to the matters it addresses. We have set out our reasons for reaching that finding on the various specific matters raised by submitters. For those reasons, we find Objective 3.3.12 more appropriate for achieving the purpose of the Act than any of the various alternative approaches put to us.

[282] We have been mindful that having reverse sensitivity provisions in Strategic Directions involves picking winners. Specifically, by according protection to one activity from others, those other activities bear a cost in terms of restriction and constraint on development opportunity.

[283] It is important that such provisions are properly targeted, in terms of what is most appropriate for achieving the purpose of the Act. On the accepted evidence, we are satisfied that Objective 3.3.12 is properly targeted. In particular, that is in terms of how strategic infrastructure is defined, how specific aspects of protection are described for certain identified strategic infrastructure, and in the fact that the requirements of paragraph (b)(iii) and (iv) will be reconsidered as part of hearing of relevant other proposals for the Replacement Plan.

[284] For all of those reasons, we have determined that Objective 3.3.12, as framed by this decision (and the associated definitions), will give effect to the CRPS and NPSET and is the most appropriate to give effect to the RMA's purpose. To the extent that we have not explicitly covered all matters of content within the objective, that is because those matters are non-contentious or are matters of drafting style.

Objective 3.3.13 - Emergency services and public safety

[285] The Notified Version included objectives on natural hazards (3.6.5) and amenity, health and safety (3.6.6), but did not make specific provision for emergency services. The Planning Experts' Joint Version did so, in the context of its proposed policies as to public safety and accessible development. The public safety policy was to "Ensure that provision is made for emergency service access and firefighting capability". The accessible development policy was, relevantly, "Locate and design development and activities, including the transport network, so as to… provide adequate and efficient access for emergency service vehicles".

[286] We are satisfied that the tenor of that joint planning experts' recommendation was well supported on the evidence we heard from Mr Alan Merry, Manager Strategic Redevelopment for the NZ Fire Service. That evidence was unchallenged, and we accept it.

[287] The critical importance of having an effective emergency services regime is imbedded in the memories of the many who suffered the trauma of the Christchurch earthquakes. The challenge ahead is to ensure that effectiveness going forward, in the wake of the damage wrought by those events. That includes a need to rebuild, and in many cases, relocate all of the six "career" fire stations in Christchurch and repair many others for the volunteer service. Reconfiguration is needed so that station locations are optimal for the communities they serve, in particular so that Commission-set response times will be at least met, if not exceeded.[137] It also requires necessary access to properties and adequate fire-fighting water supplies.[138] Mr Merry also sought reference to the New Zealand Fire Service Firefighting Water Supplies Code of Practice SNZ PAS 4509:2008. More appropriately, this should be considered in later hearings as to other proposals.

[288] Therefore, we have determined that we should include a specific objective on the topic of emergency services and public safety, addressing each of the elements identified by Mr Merry as required. We have framed it to capture the substance of what is recommended in the Planning Experts' Joint Version, but expressed as an objective. That anticipates that it will be reflected in associated Plan policies and rules, in relevant chapters of the Plan.

137 Evidence of Alan Dermot Merry, section 4.
138 Merry, 4.7.

[289] We are satisfied that Objective 3.3.13 is the most appropriate for achieving the RMA's purpose.

Objective 3.3.14 - Incompatible activities

[290] We refer to our earlier discussion on the Gelita submission.

[291] The Notified Version made somewhat vague reference to the topic of managing incompatible activities. In its proposed objective on form and function (3.6.2), it referred to an "integrated pattern of development and well-functioning urban form" that, amongst a range of other things, "provides certainty about where development can occur". In addition, as noted, it included provision in its objective on "amenity, health and safety" that "sensitive activities are not established near lawfully established activities that generate noise, odour and other adverse effects".

[292] The Planning Experts' Joint Version recognised the issue. It made specific provision in the context of addressing the redevelopment of brownfield sites. It also proposed a policy to "Control the location of activities so as to minimise conflicts between incompatible activities, and avoid conflicts where there may be significant adverse environmental effects on the health, safety and amenity of people and communities".

[293] Similar to that jointly-recommended approach, we consider it appropriate to have a specific objective on this matter. We consider that the approach is warranted, especially in light of the evidence from Gelita.

[294] The earthquakes have caused significant flux and change in land use patterns, including in the relocation of activities. The position is likely to remain fluid for some time. That makes it important to manage the risks associated with incompatible activities. This involves managing the location of activities to minimise potential conflict. It also involves avoiding conflicts where there is a potential for long-term significant adverse health, safety and amenity consequences for people and communities.

[295] At such a scale, managing those impacts is important to achieving the RMA's purpose. We see zoning as the primary suitable means for doing so. We have framed Objective 3.3.14

accordingly. We are satisfied that it is the most appropriate option for achieving the RMA's purpose.

Objective 3.3.15 - Temporary recovery activities

[296] It was not a matter of dispute that Strategic Directions needed to provide a regime for temporary recovery activities.[139] These recognise the reality of the disruption that the earthquakes have caused in terms of dislocation, and an associated need for tolerance of this for a period sufficient to allow for "normal" operations to resume. However, given that significant impacts can arise from such tolerance, it is important to be satisfied that the boundaries of tolerance are clearly defined by what the demands of recovery require and are reasonable.

[297] There are two categories of such activities:

(a) Temporary construction and related activity for recovery (e.g. infrastructure recovery), whose impacts can be wide-ranging and felt at a community scale;

(b) Temporarily-displaced activities (e.g. for households or businesses, or to allow for continuation of community facilities), whose impacts are comparatively localised but can still be significant.

[298] The Notified Version and the Planning Experts' Joint Version each proposed a specific policy on temporary recovery activities. A substantive difference between them was that the Planning Experts' Joint Version made extended provision for temporary construction and related activities to 30 April 2022 (the Notified Version, in its proposed Policy 3.6.1.4, narrowing this to 30 April 2018, with a requirement for activities to then relocate into appropriately-zoned areas).

[299] Given that the Planning Experts' Joint Version was founded on the evidence heard, and represents a substantial degree of consensus, we consider it more appropriate than the Notified Version as our starting position for achieving the RMA's purpose. Our following evaluation is on that basis.

139 OIC Statement of Expectations (f) and (g).

[300] For the reasons we have already set out, we have determined that Strategic Directions should be confined to objectives.

[301] Aside from that, the substance of Objective 3.3.15 of this decision differs from the policy recommended by the Planning Experts' Joint Version in the following essential respects:

(a) As noted above, the Planning Experts' Joint Version proposed the following wording: "permitting temporary construction and related activities until 22 April 2022". This is subject to the rider: "Agreed this date may change subject to decisions in relation to Hearing 2 – Temporary Activities". It included a similar rider concerning the specified date in that part of its proposed policy, reading (relevantly): "providing for additional housing and accommodation opportunities, business, services and community facilities... taking into account… the ability and/or practicality for the activity to be discontinued by 30 April 2018". We have decided that, as an objective, 3.3.15 should not specify dates for either matter (rather, this is better addressed in relevant rules). In respect of temporary activities, we pick up on two intentions in the Planning Experts' Joint Version. In addition to enabling a range of permitted activities, we make reference to: "providing for an additional transitional period" for the consideration of temporary construction and related and displaced activities. We note we have deliberately widened this to "temporary construction and related activities". That is so as to pick up associated infrastructure relocation or other related activities.

(b) We have made various changes to align the objective more closely to the relevant wording of paragraphs (f) and (g) of the OIC Statement of Expectations. A range of temporary and construction activities will be "permitted",[140] and beyond this there will be a "transitional period" where further consideration can be given to their continuation.[141]

(c) We have incorporated into this objective some additional matters covered by the Planning Experts' Joint Version. Those were its policies as to infrastructure recovery and aggregate. That is simply for clarity. However, for aggregate, we

140 OIC, Statement of Expectations (f).
141 OIC, Statement of Expectations (g).

> note that we have used the words "the importance", rather than "the necessity", deliberately. That was in view of the evidence before us, including from the aggregates sector. That satisfied us that this was an important matter in the recovery, but not such as to be inherently overriding, bearing in mind that aggregate extraction has adverse effects. We expect further evidence on these matters as the Replacement Plan inquiries continue. In addition, we have expanded the provision to specifically refer to concrete manufacturing. That was in light of the unchallenged evidence we heard as to fact that this should be included.[142]

[302] The question of the duration of such temporary activity provision was raised by some submitters.

[303] The extended regime recommended by the Planning Experts' Joint Version was consistent with what some submitters sought (for example, Lyttelton Harbour Business Association and Project Lyttelton).[143]

[304] Mr English (in his capacity as a representative of the Ilam and Upper Riccarton Residents' Association Inc ('the Residents' Association'))[144] spoke to the Residents' Association's sense of aggravation concerning the impacts of displaced Canterbury University activities on residents in that locality. He referred, in particular, to traffic inconvenience in the locality. His Residents' Association was opposed to any extension to the discontinuance date specified in the Notified Version (i.e. 30 April 2018).

[305] We do not accept Mr English's submission, as we are satisfied that all of the accepted evidence supports the recommendation of the Planning Experts' Joint Version. Specifically, the substance of what he raised concerning the University was not such as to warrant the relief the Residents' Association pursued. Indeed, such relief would be undermining of what needs to be secured for wider community wellbeing.

[306] The information we have received (in the context of the Temporary Activities hearing) indicates to us that there should be provision in the Replacement Plan for a cascading consent

142 Transcript, page 816, line 41; page 723, lines 21-23 and 31-46.
143 Lyttelton Harbour Business Association (#769), Project Lyttelton (#1143).
144 Submitter #738.

process over time. That will be a matter that we will cover in the decision we issue on that topic. In the meantime, we are satisfied that Objective 3.3.15 of this decision will properly accord with such an approach, and is the most appropriate option for achieving the purpose of the Act.

Our decision concerning the provisions

[307] We are satisfied that, individually and collectively, the objectives in Schedule 1 are the most appropriate way to achieve the purpose of the RMA. Specifically, they properly target the resource management issues that we are satisfied have been sufficiently and comprehensively identified for inclusion in Strategic Directions.

Identifying the parts of the operative plans to be replaced

[308] When making this decision, we are required to identify those parts of the existing district plans that are to be replaced.[145]

[309] That obligation mirrors that which the Council had in notifying proposals for the Replacement Plan.[146] To that end, the Council included, with the Stage 1 proposals, tables identifying those provisions in the operative plan to be replaced.

[310] For this decision, we have considered those parts of the table relevant to Chapters 1 and 3. However, because Strategic Directions is now confined to objectives, we do not identify any objectives, policies or methods (including rules) of the existing plans that are appropriately replaced at this time.

[311] While there are corresponding objectives in both the operative Banks Peninsula District Plan and the Christchurch City Plan, there are associated policies and methods that implement those objectives that will remain in force until such time as they are replaced (by later proposals). As such, it would not be appropriate to delete any of those objectives at this time.

145 OIC, cl 13(3).
146 OIC, cl 6(1)(b).

[312] The provisions in Schedule 1, once approved, will become operative provisions of the Replacement Plan. As such, they will become critical considerations in the formulation of the balance of the Replacement Plan (in terms of s 75, as *operative* objectives).

[313] Schedule 3 identifies some provisions of the existing district plans that it would be appropriate to delete or replace. One is an overall objective for Christchurch. There are no other objectives, policies or methods (including rules). By this decision, these provisions are replaced by the content of s 3.2 Context and s 3.3 Objectives. Our reasons are set out in the right-hand column in the table in Schedule 3.

Overall evaluation and conclusions

[314] In light of the submissions and evidence we have considered, and for the reasons we have set out, we are satisfied that:

(a) We have exercised our function, in making this decision, in accordance with the provisions of Part 2, RMA (there are no applicable regulations).

(b) As part of the Replacement Plan, the Strategic Directions and Outcomes in Schedule 1 to this decision will:

(i) accord with and assist the Council to carry out its statutory functions for the purposes of giving effect to the RMA;

(ii) give effect to NPSET, the NZCPS and the CRPS (to the extent relevant);

(iii) duly align with other RMA policy and planning instruments, the land use recovery plans and the OIC (including the Statement of Expectations).

(c) As part of the Replacement Plan, the objectives we have included in Strategic Directions (individually and collectively) are for the district and will achieve the purpose of the RMA.

[315] We record that those objectives are intended to have the primacy that is expressed, in relation to other provisions of the Replacement Plan (including policies and rules that will

implement them). We urge the Council to bear that in mind in regard to other proposals that we will come to consider during this enquiry. We also urge the Council to be mindful of the importance of coherence and consistency in drafting the provisions of other proposals. We specifically note that Objective 3.3.2, as an objective for the Replacement Plan, should also be considered in the drafting of all other proposals.

[316] Finally, in view of the requirement of our Terms of Reference that we deliver this decision at this early stage, we intend to keep under continuing review the question of whether any aspect of it should be revisited in light of what we come to consider in later stages of our inquiry into the Replacement Plan.

Letter from the Mayor of Christchurch received on 16 December 2014

[317] We record that, on 16 December 2014, after the close of the hearing, we received a letter from the Mayor of Christchurch on behalf of the elected Council. A copy has been posted on our website. As can be seen from the website, the letter correctly acknowledges the point that the Panel must only have regard to the submissions and evidence before us, rather than be influenced in any sense by the views the letter expresses. The letter then sets out some matters of background and expresses various concerns and aspirations that the Mayor and elected members have for the city and its communities. We acknowledge the Mayor's and Councillors' concerns and aspirations. Indeed, some of them were the subject of submissions and evidence. However we make no other comment on the letter other than to record that we took no account of it in our deliberations and it had no influence on our findings and decision.

Dated 26 February 2015

For the Hearings Panel:

Hon Sir John Hansen
Chair

Environment Judge John Hassan
Deputy Chair

Ms Sarah Dawson
Panel Member

Dr Philip Mitchell
Panel Member

SCHEDULE 1

Changes that the decision makes to the Proposals

Change Proposal 1 by:

(a) Deleting Section 9 - Strategic Outcomes of the District Plan, from Chapter 1 - Introduction

and

(b) Deleting Section 5 - The relationship between the District Plan and other Resource Management Planning Documents, from Chapter 1 – Introduction, and substituting the following in its place:

5 The relationship between District Plans and other Resource Management Planning Documents

District Plans form part of a group of planning and policy documents from all levels of government that together are required to achieve integrated management of natural and physical resources.

At a national level, the Resource Management Act 1991 provides for:

i. National Policy Statements which set out objectives and policies for resource management matters of national significance that are relevant to achieving the purpose of the Act. Such statements guide subsequent decision-making under the Act at the national, regional and district levels.

   The preparation of a New Zealand Coastal Policy Statement by the Minister of Conservation is mandatory, but other national policy statements, which must be approved by the Minister for the Environment, are optional (for example the National Policy Statement for Freshwater Management, the National Policy Statement for Renewable Electricity Generation and the National Policy Statement on Electricity Transmission). The District Plan must give effect to National Policy Statements.

ii. National Environmental Standards which are regulations that apply nationally to the use, development and protection of natural and physical resources and which prescribe technical standards, methods or other requirements for implementing the standards in a consistent manner. National standards generally override existing provisions in plans that have a lower standard. Conversely, if a District Plan has a standard that is stricter than a national standard then that plan standard prevails.

At a regional level, the Act provides for:

i. A Regional Policy Statement required to be prepared by each regional council. These statements enable regional councils to provide broad direction and a framework for resource management within their regions. A regional policy statement must give effect to all national policy statements. The District Plan must give effect to the Canterbury Regional Policy Statement.

ii. Regional Plans to be prepared by a regional council. These plans focus on particular issues or areas and assist regional councils to carry out their functions under the Act. A regional council must prepare a regional coastal plan (applying below mean

high water springs) but other regional plans are optional (subject to any directions in a national policy statement). Regional plans must give effect to national policy statements and regional policy statements. They must also not be inconsistent with water conservation orders and other regional plans for the region. The District Plan must not be inconsistent with regional plans.

Change Proposal 2 by:

Amending the definitions in Chapter 2 Definitions as follows:

Insertions shown as Underlined
Deletions shown with Strikethrough

Development - delete the definition

Strategic infrastructure – amend the definition as follows:

Strategic infrastructure

means those necessary infrastructure facilities, services and installations which are of greater than local importance, and ~~can~~ includes infrastructure that is nationally significant. ~~The following are examples of strategic infrastructure:~~

Explanatory note

The following are non-exclusive examples of strategic infrastructure:

(a) strategic transport networks;

(b) Christchurch International Airport;

(c) Lyttelton Port of Christchurch;

(d) bulk fuel supply and storage infrastructure including terminals, wharf lines and pipelines;

(e) defence facilities;

(f) strategic telecommunication and radiocommunication facilities;

(g) the ~~electricity transmission network~~National Grid; and

(h) ~~other strategic network utilities~~public water supply, wastewater and stormwater networks and associated facilities.

Strategic transport networks – amend the definition as follows:

Strategic transport networks

means:

(a) the strategic road network;

(b) the rail network;

(c) the region's core public passenger transport operations and significant regional transport hubs (including freight hubs) such as Christchurch International Airport and Lyttelton Port of Christchurch; and

(d) the strategic cycle network of major cycle routes.

National Grid – add the following Definition:

National Grid

means the national grid as defined in the National Policy Statement on Electricity Transmission 2008.

Change Proposal 3 by:

Deleting the following Sections of Chapter 3 Strategic Directions:

3.1 Introduction
3.2 Context
3.3 Strategic Outcomes from the District Plan (*Transferred to Introduction Chapter)*
3.4 Key Issues and opportunities
3.5 Strategic directions for the district
3.6 Objectives and policies
3.7 Linkages

and

Substituting the following in their place:

3.1 Introduction

1. This Chapter:
   a) Provides the overarching direction for the District Plan, including for developing the other chapters within the Plan, and for its subsequent implementation and interpretation; and
   b) Has primacy over the objectives and policies in the other chapters of the Plan, which must be consistent with the objectives in this Chapter.
2. This Chapter recognises and sets the statutory planning context for the other chapters of the Plan, in order that they:
   a) Clearly articulate how decisions about resource use and values will be made in order to minimise:
      (i) reliance on resource consent processes; and
      (ii) the number, extent, and prescriptiveness of development controls and design standards in the rules, in order to encourage innovation and choice; and
      (iii) the requirements for notification and written approval;
   (b) Set objectives and policies that clearly state the outcomes that are intended for the Christchurch district;
   (c) Recognise and provide for the relationships of Ngāi Tahu Manawhenua and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga, have particular regard to their role as kaitiaki and take into account the principles of the Treaty of Waitangi;
   (d) Provide for the effective functioning of the urban environment of the Christchurch district, reflecting the changes resulting from the Canterbury earthquakes, including changes to population, land suitability, infrastructure, and transport;
   (e) Facilitate an increase in the supply of housing, including by:
      (i) confirming the immediate residential intensification changes included in the Land Use Recovery Plan; and
      (ii) ensuring that the District Plan has capacity to accommodate up to 23,700 additional dwellings by 2028 (as compared with the number of households in the 2012 post-earthquake period); and

(iii) addressing further intensification opportunities, in line with the Land Use Recovery Plan principle of supporting the Central City and Key Activity Centres; and

(iv) having regard to constraints on environmental and infrastructure capacity, particularly with regard to natural hazards; and

(v) providing for a wide range of housing types and locations;

(f) Ensure sufficient and suitable development capacity and land for commercial, industrial, and residential activities;

(g) Provide for a range of temporary and construction activities as permitted activities, recognising the temporary and localised nature of the effects of those activities;

(h) Provide, as appropriate, for transitional provisions for the future of temporary activities established under the Canterbury Earthquake (Resource Management Act Permitted Activities) Order 2011 after that order expires;

(i) Set a clear direction on the use and development of land for the purpose of avoiding or mitigating natural hazards; and

(j) Use clear, concise language so that the Plan is easy to understand and use.

3. The Council must commence a review of the provisions of an operative district plan within 10 years of the provisions having last been reviewed or changed, meaning that this Plan is likely to have a life of not less than 10 years. Whilst certain parts of the district's built environment will have been re-established and aspects of peoples' lives will have returned to normal within that timeframe, the district as a whole will still be in a state of recovery. In this Plan, therefore, the term "recovery" is intended to span the entire ten year timeframe, and in so doing facilitate the return to normality as quickly as possible, while also creating a strong platform for the longer term future of the district.

4. Focussing as it does on Strategic Directions, this Chapter provides a series of high-level objectives for the district, and leaves the articulation of activity-specific and location-specific objectives and policies to the subsequent chapters of the Plan. However, the objectives and policies in the other chapters of the Plan must be consistent with the objectives in this Chapter.

5. Within this Chapter, Objectives 3.2.1 and 3.2.2 have primacy, meaning that the remaining objectives must be expressed and achieved in a manner consistent with Objectives 3.2.1 and 3.2.2. The other objectives in this Chapter are to be read as a whole and no statutory hierarchy applies.

6. In all other Chapters of the Plan, the objectives and policies must be expressed and achieved in a manner consistent with the objectives in this Chapter.

3.2 Context

3.2.1 Impact of the Canterbury earthquakes

The earthquakes of 2010 and 2011 devastated Christchurch, resulting in the death of 185 people, many serious injuries and widespread damage to, and destruction of, thousands of homes and businesses, including most of the Central City, and much of the city's infrastructure.

Christchurch people were significantly affected by the earthquakes. The pattern of damage was uneven, with some areas, such as the Central City and the east, devastated. A substantial number of people have lived, and continue to live, in substandard accommodation for extended periods.

Population levels fluctuated — there was an initial net loss of people from the city, followed by net population growth as the city's rebuild got underway. Households, particularly in the Central City and the east, relocated to the north and west of the city and to Waimakariri and Selwyn Districts. Many people had to leave their established communities. In some cases, people had to live further from their jobs or attempt to find new employment. The composition of communities changed. Many households, particularly those with children, moved out of Christchurch. There was also an influx of new people to the city to assist with the rebuild.

More than 7,000 of the most significantly affected residential properties were purchased by the Government and the housing removed. The total number of badly damaged homes in Christchurch was considerably higher, with an estimated 10,000-15,000 houses rendered uninhabitable. Social and affordable housing were disproportionately represented in the housing stock lost. As a consequence, the housing shortfall needs to be replaced as a matter of urgency, in addition to providing for ongoing growth and changes in housing demand.

The earthquakes also had a disastrous impact on commercial and industrial activity, interrupting the operation of many businesses and forcing others to relocate temporarily or permanently, or close. Over 50,000 workers were displaced from the Central City. There was a redistribution of business activity, particularly from the eastern and central city, to the north and west. Travel patterns for both people and freight changed substantially.

There was considerable damage to public infrastructure, including roads, bridges and underground services. Many of the district's community facilities were lost or damaged. The district lost many of its heritage features, and considerable damage was caused to natural and cultural values, particularly associated with waterways.

3.2.2 A city in transition

The earthquake rebuild is estimated as a $40 billion investment in greater Christchurch, on top of business-as-usual development activity. This includes a $4 billion cost to repair infrastructure, and the repair or replacement of more than 130,000 residential properties.

The effects of the earthquakes will be felt for many years and the shape of urban Christchurch will continue to change during the recovery period, particularly over the next 10 to 15 years. Further movement of people and households is likely as homes are repaired, new development is undertaken, and demographic changes occur as Christchurch evolves. As the rebuild proceeds, many businesses will need to relocate again and many are likely to move into the Central City as it recovers as the city's thriving heart.

The tourism sector remains seriously affected. Many businesses and community organisations continue to operate from temporary premises.

The District Plan must respond to the evolving needs of the community to enable rebuilding, recovery and future growth. Considering the scale of damage and rebuild, decisions made through the District Plan will have a significant, long-term influence on the city, its urban form and how the city functions. It will also influence how the city addresses the risks from future earthquakes and other natural hazards.

There is an unprecedented opportunity for this District Plan to expedite the efficient recovery and future for Christchurch as a dynamic and internationally competitive city, which meets the community's immediate and longer-term needs.

3.2.3 Ngāi Tahu Manawhenua

Prior to European settlement of Nga Pakihi Whakatekateka o Waitaha (Canterbury Plains) and Te Pataka o Rakaihautu (Banks Peninsula), Ngāi Tahu maintained numerous permanent and temporary settlements among, and gathered resources from, the network of springs, waterways, swamps, coastline, grasslands and lowland podocarp forests in the area. These

associations remain important to Ngāi Tahu and are key to its ongoing cultural identity and wellbeing.

Following the signing of the Treaty of Waitangi, the Crown purchased traditional Ngāi Tahu lands through a series of deeds, including Kemp's Deed under which the largest land sale, the 1848 Canterbury Purchase, took place. One of the conditions of sale was that Ngāi Tahu communities would continue to have adequate areas of land to occupy on a permanent and seasonal basis to provide for their present and ongoing needs, including access to the natural resources they had hunted and gathered for generations.

While certain areas were gazetted as Māori reserves, many of the Crown's guarantees were not upheld. As a result, Ngāi Tahu whānui have become alienated from the land that should have been set aside for them to live on. The Ngāi Tahu Claims Settlement Act 1998 records the Crown's apology to Ngāi Tahu and gives effect to the settlement of Ngāi Tahu's claims.

As described in Chapter 1, six papatipu Rūnanga are the organisations which represent Manawhenua within Christchurch District - Ngāi Tūāhuriri Rūnanga, Te Hapū o Ngāti Wheke Rūnanga (Rāpaki), Te Rūnanga o Koukourārata, Ōnuku Rūnanga, Wairewa Rūnanga, and Te Taumutu Rūnanga.

Ngāi Tahu Manawhenua's role as kaitiaki (guardian) is fundamental to their relationship with the environment. This is readily understood in relation to the protection of natural resources, such as water and biodiversity, and access to and protection of sites and areas of historic and cultural significance. Ngāi Tahu Manawhenua's interests in the rebuild and future development of Ōtautahi and its surroundings are much broader. They encompass a significant role and interest in the rebuilding and ongoing development of the city and the ability of Ngāi Tahu Manawhenua to provide for their economic and social wellbeing through access to affordable housing, appropriate education and community facilities, and economic opportunities.

Ngāi Tahu Manawhenua see an unprecedented opportunity to rediscover and incorporate Ngāi Tahu heritage alongside that of colonial Christchurch in the rebuild and future development of Ōtautahi and its surroundings, as well as to enhance the social, economic, cultural and environmental wellbeing of greater Christchurch.

3.2.4 Longer-term population change

Whilst there is uncertainty about the rate of recovery and growth, on current projections Christchurch will need to accommodate and provide services for a population that is still expected to grow by approximately 130,000 people by 2041. The demographic composition of the district is also projected to change significantly during the next 30 years. Like the rest of New Zealand, the district's population is ageing. The proportion of those aged 65 years and over will increase, nearly doubling in number by 2031.

Population growth, ageing and increasing cultural diversity will result in demands for additional housing (with a range of housing types and locations), commercial facilities and services, and infrastructure (such as transport), as well as changing the demand for community services and their delivery (for example, recreation activities).

The policy decisions already made and to be made over the next few years by central and local government (including through this District Plan), together with decisions by all other participants in the recovery, will influence the city's population growth, and its demographic and socio-economic composition.

3.2.5 Supporting recovery and the city's future

It is critical to ensure that the recovery of Christchurch is expedited. The District Plan plays an important role by providing certainty about where and how development will occur, and

making integrated provision for the community's immediate and longer term needs for housing, business, infrastructure and community facilities. It is essential that the District Plan clearly and actively supports the rebuilding of Christchurch and its social, economic, cultural and environmental recovery, at the same time as providing for the long-term sustainability of the city and the wellbeing of its residents.

3.3 Objectives

Interpretation

For the purposes of preparing, changing, interpreting and implementing this District Plan:

(a) All other objectives within this Chapter are to be expressed and achieved in a manner consistent with Objectives 3.3.1 and 3.3.2; and

(b) The objectives and policies in all other Chapters of the District Plan are to be expressed and achieved in a manner consistent with the objectives in this Chapter.

3.3.1 Objective - Enabling recovery and facilitating the future enhancement of the district

The expedited recovery and future enhancement of Christchurch as a dynamic, prosperous and internationally competitive city, in a manner that:

(a) Meets the community's immediate and longer term needs for housing, economic development, community facilities, infrastructure, transport, and social and cultural wellbeing; and

(b) Fosters investment certainty; and

(c) Sustains the important qualities and values of the natural environment.

3.3.2 Objective - Clarity of language and efficiency

The District Plan, through its preparation, change, interpretation and implementation:

(a) Minimises:

(i) transaction costs and reliance on resource consent processes; and

(ii) the number, extent, and prescriptiveness of development controls and design standards in the rules, in order to encourage innovation and choice; and

(iii) the requirements for notification and written approval; and

(b) Sets objectives and policies that clearly state the outcomes intended; and

(c) Uses clear, concise language so that the District Plan is easy to understand and use.

3.3.3 Objective - Ngāi Tahu Manawhenua

A strong and enduring relationship between the Council and Ngāi Tahu Manawhenua in the recovery and future development of Ōtautahi (Christchurch City) and the greater Christchurch district, so that:

(a) Ngāi Tahu Manawhenua are able to actively participate in decision-making; and

(b) Ngāi Tahu Manawhenua's aspirations to actively participate in the revitalisation of Ōtautahi are recognised; and

(c) Ngāi Tahu Manawhenua's culture and identity are incorporated into, and reflected in, the recovery and development of Ōtautahi; and

(d) Ngāi Tahu Manawhenua's historic and contemporary connections, and cultural and spiritual values, associated with the land, water and other taonga of the district are recognised and provided for; and

(e) Ngāi Tahu Manawhenua can retain, and where appropriate enhance, access to sites of cultural significance.

(f) Ngāi Tahu Manawhenua are able to exercise kaitiakitanga.

3.3.4 Objective - Housing capacity and choice

(a) For the period 2012 to 2028, an additional 23,700 dwellings are enabled through a combination of residential intensification, brownfield and greenfield development; and

(b) There is a range of housing opportunities available to meet the diverse and changing population and housing needs of Christchurch residents, including:

(i) a choice in housing types, densities and locations; and

(ii) affordable, community and social housing and papakāinga.

3.3.5 Objective – Business and economic prosperity

The critical importance of business and economic prosperity to Christchurch's recovery and to community wellbeing and resilience is recognised and a range of opportunities provided for business activities to establish and prosper.

3.3.6 Objective - Natural hazards

[The requirement for further or alternative strategic direction in respect of "Natural hazards" will be reconsidered by the Panel as part of considering the Chapter 5 Proposal.]

(a) New subdivision, use and development, shall:

(i) be avoided in areas where the risks of natural hazards to people, property and infrastructure are assessed as being unacceptable; and

(ii) otherwise be undertaken in a manner that ensures the risks of natural hazards to people, property and infrastructure are appropriately mitigated;

(b) Except that new strategic infrastructure may be located in areas where the risks of natural hazards to people, property and other infrastructure are assessed as being unacceptable, provided that:

(i) there is no reasonable alternative; and

(ii) the strategic infrastructure has been designed to maintain, as far as practicable, its integrity and form during natural hazard events.

3.3.7 Objective - Urban growth, form and design

A well-integrated pattern of development and infrastructure, a consolidated urban form, and a high quality urban environment that:

(a) Is attractive to residents, business and visitors; and

(b) Has its areas of special character and amenity value identified and their specifically recognised values appropriately managed; and

(c) Provides for urban activities only:

(i) within the existing urban areas; and

(ii) on greenfield land on the periphery of Christchurch's urban area identified in accordance with the Greenfield Priority Areas in the Canterbury Regional Policy Statement Chapter 6, Map A; and

(d) Increases the housing development opportunities in the urban area to meet the intensification targets specified in the Canterbury Regional Policy Statement, Chapter 6, Objective 6.2.2 (1); particularly:

(i) in and around the Central City, Key Activity Centres (as identified in the Canterbury Regional Policy Statement), larger neighbourhood centres, and nodes of core public transport routes; and

(ii) in those parts of Residential Greenfield Priority Areas identified in Map A, Chapter 6 of the Canterbury Regional Policy Statement; and

(iii) in suitable brownfield areas; and

(e) Maintains and enhances the Central City, Key Activity Centres and Neighbourhood Centres as community focal points; and

(f) Identifies opportunities for, and supports, the redevelopment of brownfield sites for residential, business or mixed use activities; and

(g) Promotes the re-use and re-development of buildings and land; and

(h) Improves overall accessibility and connectivity for people, transport (including opportunities for walking, cycling and public transport) and services; and

(i) Promotes the safe, efficient and effective provision and use of infrastructure, including the optimisation of the use of existing infrastructure; and

(j) Co-ordinates the nature, timing and sequencing of new development with the funding, implementation and operation of necessary transport and other infrastructure.

3.3.8 Objective – Revitalising the Central City

(a) The Central City is revitalised as the primary community focal point for the people of Christchurch; and

(b) The amenity values, function and viability of the Central City are enhanced through private and public sector investment.

3.3.9 Objective – Natural and cultural environment

[The requirement for further or alternative strategic direction to be provided in respect of the "Natural and cultural environment" will be reconsidered by the Panel as part of its further hearing of relevant proposals.]

A natural and cultural environment where:

(a) People have access to a high quality network of public open space and recreation opportunities, including areas of natural character and natural landscape; and

(b) Important natural resources are identified and their specifically recognised values are appropriately managed, including:

(i) outstanding natural features and landscapes, including the Waimakariri River, Lake Ellesmere/Te Waihora, and parts of the Port Hills/Nga Kohatu Whakarakaraka o Tamatea Pokai Whenua and Banks Peninsula/Te Pātaka o Rakaihautu; and

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

springs/puna, lagoons/hapua and their margins; and

(iii) indigenous ecosystems, particularly those supporting significant indigenous vegetation and significant habitats supporting indigenous fauna, and/or supporting Ngāi Tahu Manawhenua cultural and spiritual values; and

(iv) the mauri and life-supporting capacity of ecosystems and resources; and

(c) Objects, structures, places, water/wai, landscapes and areas that are historically important, or of cultural or spiritual importance to Ngāi Tahu Manawhenua, are identified and appropriately managed.

3.3.10 Objective - Commercial and industrial activities

The recovery and stimulation of commercial and industrial activities in a way that expedites recovery and long-term economic and employment growth through:

(a) Enabling rebuilding of existing business areas, revitalising of centres, and provision in greenfield areas; and

(b) Ensuring sufficient and suitable land development capacity.

3.3.11 Objective – Community facilities and education activities

(a) The expedited recovery and establishment of community facilities and education activities in existing and planned urban areas to meet the needs of the community; and

(b) The co-location and shared use of facilities between different groups is encouraged.

3.3.12 Objective – Infrastructure

[The requirement for alternative strategic direction in respect of Objectives 3.3.12 (b) (iii) and (iv) will be reconsidered by the Panel as part of its further hearing of relevant proposals.]

(a) The social, economic, environmental and cultural benefits of infrastructure, including strategic infrastructure, are recognised and provided for, and its safe, efficient and effective development, upgrade, maintenance and operation is enabled; and

(b) Strategic infrastructure, including its role and function, is protected by avoiding adverse effects from incompatible activities, including reverse sensitivity effects, by, amongst other things:

(i) avoiding noise sensitive activities within the Lyttelton Port Influences Overlay area; and

(ii) managing activities to avoid adverse effects on the National Grid, including by identifying a buffer corridor within which sensitive activities will generally not be provided for; and

(iii) avoiding noise sensitive activities within the 50dBA Ldn noise contour for Christchurch International Airport, except:

- within an existing residentially zoned urban area; or
- within a Residential Greenfield Priority Area identified in the Canterbury Regional Policy Statement Chapter 6, Map A; or
- for permitted activities within the Open Space 3D (Clearwater) Zone of the

Christchurch City Plan, or activities authorised by a resource consent granted on or before 6 December 2013; and

(iv) managing the risk of bird strike to aircraft using Christchurch International Airport; and

(c) The adverse effects of infrastructure on the surrounding environment are managed, having regard to the economic benefits and technical and operational needs of infrastructure.

3.3.13 Objective – Emergency services and public safety

Recovery of, and provision for, comprehensive emergency services throughout the city, including for their necessary access to properties and the water required for firefighting.

3.3.14 Objective - Incompatible activities

(a) The location of activities is controlled, primarily by zoning, to minimise conflicts between incompatible activities; and

(b) Conflicts between incompatible activities are avoided where there may be significant adverse effects on the health, safety and amenity of people and communities.

3.3.15 Objective - Temporary recovery activities

Temporary construction and related activities (including infrastructure recovery), and temporarily displaced activities, as a consequence of the Canterbury earthquakes are enabled by:

(a) Permitting a range of temporary construction and related activities and housing, accommodation, business, services and community facilities, recognising the temporary and localised nature of such activities, and the need to manage any significant adverse effects; and

(b) Providing an additional transitional period for consideration of temporary construction and related activities and temporarily displaced activities, taking into account:

(i) the need for the activity to remain for a longer period; and

(ii) the effects on the surrounding community and environment; and

(iii) any implications for the recovery of those areas of the district where the activity is anticipated to be located; and

(c) Accommodating the adverse effects associated with the recovery of transport and infrastructure networks recognising:

(i) the temporary and localised nature of the effects of these activities; and

(ii) the long-term benefits to community wellbeing; and

(iii) the need to manage and reduce adverse effects; and

(d) Recognising the importance of aggregate extraction, associated processing (including concrete manufacturing) and transportation of extracted and processed product to support recovery.

SCHEDULE 2

Provisions of operative district plans to be replaced or deleted by the proposed Strategic Directions and Introduction (in part) decision

Operative provision to be replaced or deleted	Reason
Christchurch City Plan	
Volume 1 – Introduction to the Statement of Issues (part) Chapter 3 – The issues for Christchurch	Replaced by Chapter 3, s 3.2 Context
Volume 2 – The statement of objectives, policies and issues (in part) Section 1 Planning for a sustainable Christchurch	Replaced by Chapter 3 Strategic Directions as a whole
Banks Peninsula District Plan	
Vision Statement	Replaced by Chapter 3 Strategic Directions as a whole

SCHEDULE 3

Table of persons heard

Submitter Name	Number	Person	Expertise or Role if Witness
Christchurch City Council	310	M Theelan	Planning Overview
		H Nicholson	Urban Design
		R Osborne	Transport
		D Falconer	Transport
		P Osborne	Economics
		T Heath	Retail/Centres
		M Stevenson	Commercial /Industrial
		S Blair	Residential
		J Carter	Natural Hazards
		P Eman	Planning
		R Rickerby	Marketing and plan usability
Mahaanui Kurataiao Ltd & Te Rūnanga o Ngāi Tahu	1145 FS1448	Tā Mark Solomon[147]	Ngāi Tahu overview
		G Tikao	Cultural Issues
		T Lenihan	Cultural Issues
		L Murchison	Planning
		T Sewell	Cultural issues
Ngāi Tahu Property	840 FS1375	T Sewell	Cultural Issues
		M Copeland	Economist
		J Jones/D Chrystal	Planning

147 Tā Mark Solomon was not required to attend.

Submitter Name	Number	Person	Expertise or Role if Witness
Crown	495 FS1347	D Miskell	Central City Recovery
		J Richards	Transport
		T Denne	Economics
		M Ogg	Commercial and Industrial Activity
		R Rouse	Horizontal Infrastructure
		I Mitchell	Housing
		B Smith	Government response to earthquake recovery
		D Hobern	Educational Infrastructure
		A Merry	NZ Fire Service Infrastructure
		A MacLeod	New Zealand Fire Service and New Zealand Transport Agency
		M Mitchell	Social and Cultural
		K Berryman	Natural Hazards
		S Timms	Planning
		J McDonald	Industry Representative
		N Jackson	Demographics
Property Council	595 FS1294	K Murray	Economics
		M Bonis	Planning
		J Jones/D Chrystal	Planning
Styx Living Laboratory Trust	1193	J Glennie	Planning

Submitter Name	Number	Person	Expertise or Role if Witness
Carter Group Limited Maurice R Carter Limited Maurice Carter Charitable Trust Oakvale Farm Limited Marriner Investments Limited Marriner Investments No. 1 Limited Avonhead Mall Limited AMP Capital Palms Pty Limited TEL Property Nominees Limited Scentre (New Zealand) Limited	386/FS1355 377/FS1316 385 381/FS1253 378 380/FS1256 379/FS1417 814/FS1308 816/FS1325 742/FS1270	J Phillips	Planning
AMP Capital Investors NZ Ltd	1187 FS1335	D Cosgrove	Company Representative
		F Colgrave	Economist
		P Harte	Planning
Bunnings Ltd Kiwi Property Trust Progressive Enterprises	725/FS1367 761/FS1352 790/FS1450	D Chrystal	Planning
Gelita	1014	G Monk	Company Representative
		K Bligh	Planning
Faulks Investments Ltd	799 FS1363	T Faulks	Company Representative
		C Pyewell	Company Representative
		M Brown	Planning
Isaac Conservation and Wildlife Trust	704 FS1357	K Seaton	Planning
Canterbury Aggregate Producers Group	886 FS1334	R English	Economics
		T Ensor	Planning
Chorus NZ Spark NZ	364 363	M McCallum-Clark	Planning

Submitter Name	Number	Person	Expertise or Role if Witness
Transpower	832	R Noble	Company Representative
		M Copeland	Economics
		A MacLeod	Planning
Liquigas	774 FS 1333	J Clease	Planning
Mobil Oil, Z Energy Ltd and BP Oil Ltd	723 FS1295	Mr C Taylor	Company evidence
		D Le Marquand	Planning
		C Taylor	Business
Eros Clearwater Holdings Ltd	730 FS1314	J Phillips	Planning
Ilam and Upper Riccarton Residents Association	738	P Harding	
		R English	
Peterborough Village Incorporated Society	1228	D Lucas	Landscape
Avonhead Community Group	1018	M Thomas/C Paris	
Hagley/Ferrymead Community Board	803	S Templeton	
Riccarton/Wigram Community Board	254	M Mora	
Spreydon/Heathcote Community Board	889	P McMahon	
Lyttelton/Mt Herbert Community Board	762	P Smith	
Burwood/Pegasus Community Board	375	L Stewart	
Canterbury District Health Board	648	A Stevenson & S Brinsdon	
		A Humphrey	Public health
H Rolleston	906	H Rolleston	

Submitter Name	Number	Person	Expertise or Role if Witness
R Broughton	820	R Broughton	
H Broughton	592	H Broughton	
B Hutchinson	1040	B Hutchinson	
Christchurch International Airport Limited	863 FS1359	R Boswell	Company Representative
		P Osborne	Economist
		M Bonis	Planning
Lyttelton Port Company Ltd	915 FS1444	P Davie	Chief Executive
		M Copeland	Economist
		M Bonis	Planning
Waterloo Park	920 FS1277	J Clease	Planning
Panel Witness		M Crisp	Planning

IN THE SUPREME COURT OF NEW ZEALAND

SC 82/2013
[2014] NZSC 38

BETWEEN	ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED Appellant
AND	THE NEW ZEALAND KING SALMON COMPANY LIMITED First Respondent
	SUSTAIN OUR SOUNDS INCORPORATED Second Respondent
	MARLBOROUGH DISTRICT COUNCIL Third Respondent
	MINISTER OF CONSERVATION AND DIRECTOR-GENERAL OF MINISTRY FOR PRIMARY INDUSTRIES Fourth Respondents

Hearing:	19, 20, 21 and 22 November 2013
Court:	Elias CJ, McGrath, William Young, Glazebrook and Arnold JJ
Counsel:	D A Kirkpatrick, R B Enright and N M de Wit for Appellant D A Nolan, J D K Gardner-Hopkins, D J Minhinnick and A S Butler for First Respondent M S R Palmer and K R M Littlejohn for Second Respondent C R Gwyn and E M Jamieson for Fourth Respondents P T Beverley and D G Allen for the Board of Inquiry
Judgment:	17 April 2014

JUDGMENT OF THE COURT

A The appeal is allowed.

B The plan change in relation to Papatua at Port Gore did not comply with s 67(3)(b) of the Resource Management Act 1991 as it did not give effect

to policies 13(1)(a) and 15(a) of the New Zealand Coastal Policy Statement.

C Costs are reserved.

REASONS

Elias CJ, McGrath, Glazebrook and Arnold JJ [1]
William Young J [175]

ELIAS CJ, MCGRATH, GLAZEBROOK AND ARNOLD JJ

(Given by Arnold J)

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Introduction

[1] In October 2011, the first respondent, New Zealand King Salmon Co Ltd (King Salmon), applied for changes to the Marlborough Sounds Resource

Management Plan[1] (the Sounds Plan) so that salmon farming would be changed from a prohibited to a discretionary activity in eight locations. At the same time, King Salmon applied for resource consents to enable it to undertake salmon farming at these locations, and at one other, for a term of 35 years.[2]

[2] King Salmon's application was made shortly after the Resource Management Act 1991 (the RMA) was amended in 2011 to streamline planning and consenting processes in relation to, among other things, aquaculture applications.[3] The Minister of Conservation,[4] acting on the recommendation of the Environmental Protection Agency, determined that King Salmon's proposals involved matters of national significance and should be determined by a board of inquiry, rather than by the relevant local authority, the Marlborough District Council.[5] On 3 November 2011, the Minister referred the applications to a five member board chaired by retired Environment Court Judge Gordon Whiting (the Board). After hearing extensive evidence and submissions, the Board determined that it would grant plan changes in relation to four of the proposed sites, so that salmon farming became a discretionary rather than prohibited activity at those sites.[6] The Board granted King Salmon resource consents in relation to these four sites, subject to detailed conditions of consent.[7]

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1 Marlborough District Council *Marlborough Sounds Resource Management Plan* (2003) [Sounds Plan].

2 The proposed farms were grouped in three distinct geographic locations – five at Waitata Reach in the outer Pelorus Sound, three in the area of Tory Channel/Queen Charlotte Sound and one at Papatua in Port Gore. The farm to be located at White Horse Rock did not require a plan change, simply a resource consent. For further detail, see *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2013] NZHC 1992, [2013] NZRMA 371 [*King Salmon* (HC)] at [21].

3 Resource Management Amendment Act (No 2) 2011. For a full description of the background to this legislation, see Derek Nolan (ed) *Environmental and Resource Management Law* (looseleaf ed, LexisNexis) at [5.71] and following.

4 The Minister of Conservation deals with applications relating to the coastal marine area, the Minister of the Environment with other applications: see Resource Management Act 1991 [RMA], s 148.

5 The Marlborough District Council is a unitary authority with the powers, functions and responsibilities of both a regional and a district council. The Board of Inquiry acted in place of the Council: see *King Salmon* (HC), above n 2, at [10]–[18].

6 Board of Inquiry, *New Zealand King Salmon Requests for Plan Changes and Applications for Resource Consents*, 22 February 2013 [*King Salmon* (Board)].

7 At [1341].

[3] An appeal from a board of inquiry to the High Court is available as of right, but only on a question of law.[8] The appellant, the Environmental Defence Society (EDS), took an appeal to the High Court as did Sustain Our Sounds Inc (SOS), the appellant in SC84/2013. Their appeals were dismissed by Dobson J.[9] EDS and SOS then sought leave to appeal to this Court under s 149V of the RMA. Leave was granted.[10] We are delivering contemporaneously a separate judgment in which we will outline our approach to s 149V and give our reasons for granting leave.[11]

[4] The EDS and SOS appeals were heard together. They raise issues going to the heart of the approach mandated by the RMA. The particular focus of the appeals was rather different, however. In this Court EDS's appeal related to one of the plan changes only, at Papatua in Port Gore. By contrast, SOS challenged all four plan changes. While the SOS appeal was based principally on issues going to water quality, the EDS appeal went to the protection of areas of outstanding natural character and outstanding natural landscape in the coastal environment. In this judgment, we address the EDS appeal. The SOS appeal is dealt with in a separate judgment, which is being delivered contemporaneously.[12]

[5] King Salmon's plan change application in relation to Papatua covered an area that was significantly greater than the areas involved in its other successful plan change applications because it proposed to rotate the farm around the area on a three year cycle. In considering whether to grant the application, the Board was required to "give effect to" the New Zealand Coastal Policy Statement (NZCPS).[13] The Board accepted that Papatua was an area of outstanding natural character and an outstanding natural landscape and that the proposed salmon farm would have significant adverse effects on that natural character and landscape. As a consequence, policies 13(1)(a) and 15(a) of the NZCPS would not be complied with

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8 RMA, s 149V.

9 *King Salmon* (HC), above n 2.

10 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2013] NZSC 101 [*King Salmon* (Leave)].

11 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 41.

12 *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 40.

13 Department of Conservation *New Zealand Coastal Policy Statement 2010* (issued by notice in the New Zealand Gazette on 4 November 2010 and taking effect on 3 December 2010) [NZCPS].

if the plan change was granted.[14] Despite this, the Board granted the plan change. Although it accepted that policies 13(1)(a) and 15(a) in the NZCPS had to be given considerable weight, it said that they were not determinative and that it was required to give effect to the NZCPS "as a whole". The Board said that it was required to reach an "overall judgment" on King Salmon's application in light of the principles contained in pt 2 of the RMA, and s 5 in particular. EDS argued that this analysis was incorrect and that the Board's finding that policies 13(1)(a) and 15(a) would not be given effect if the plan change was granted meant that King Salmon's application in relation to Papatua had to be refused. EDS said that the Board had erred in law.

[6] Although the Board was not named as a party to the appeals, it sought leave to make submissions, both in writing and orally, to assist the Court and deal with the questions of law raised in the appeals (including any practical implications) on a non-adversarial basis. The Court issued a minute dated 11 November 2013 noting some difficulties with this, and leaving the application to be resolved at the hearing. In the event, we declined to hear oral submissions from the Board. Further, we have taken no account of the written submissions filed on its behalf. We will give our reasons for this in the separate judgment that we are delivering contemporaneously in relation to the application for leave to appeal.[15]

[7] Before we address the matters at issue in the EDS appeal, we will provide a brief overview of the RMA. This is not intended to be a comprehensive overview but rather to identify aspects that will provide context for the more detailed discussion which follows.

The RMA: a (very) brief overview

[8] The enactment of the RMA in 1991 was the culmination of a lengthy law reform process, which began in 1988 when the Fourth Labour Government was in power. Until the election of the National Government in October 1990, the Hon Geoffrey Palmer MP was the responsible Minister. He introduced the Resource Management Bill into the House in December 1989. Following the change of Government, the Hon Simon Upton MP became the responsible Minister and it was

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14 *King Salmon* (Board), above n 6, at [1235]–[1236].

15 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*, above n 11.

he who moved that the Bill be read for a third time. In his speech, he said that in formulating the key guiding principle, sustainable management of natural and physical resources,[16] "the Government has moved to underscore the shift in focus from planning for activities to regulating their effects …".[17]

[9] The RMA replaced a number of different Acts, most notably the Water and Soil Conservation Act 1967 and the Town and Country Planning Act 1977. In place of rules that had become fragmented, overlapping, inconsistent and complicated, the RMA attempted to introduce a coherent, integrated and structured scheme. It identified a specific overall objective (sustainable management of natural and physical resources) and established structures and processes designed to promote that objective. Sustainable management is addressed in pt 2 of the RMA, headed "Purpose and principles". We will return to it shortly.

[10] Under the RMA, there is a three tiered management system – national, regional and district. A "hierarchy" of planning documents is established. Those planning documents deal, variously, with objectives, policies, methods and rules. Broadly speaking, policies implement objectives and methods and rules implement policies. It is important to note that the word "rule" has a specialised meaning in the RMA , being defined to mean "a district rule or a regional rule".[18]

[11] The hierarchy of planning documents is as follows:

(a) First, there are documents which are the responsibility of central government, specifically national environmental standards,[19] national policy statements[20] and New Zealand coastal policy statements.[21] Although there is no obligation to prepare national environmental standards or national policy statements, there must be at least one New Zealand coastal policy statement.[22] Policy statements of

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16 As contained in s 5 of the RMA.
17 (4 July 1991) 516 NZPD 3019.
18 RMA, s 43AA.
19 Sections 43–44A.
20 Sections 45–55.
21 Sections 56–58A.
22 Section 57(1).

whatever type state objectives and policies,[23] which must be given effect to in lower order planning documents.[24] In light of the special definition of the term, policy statements do not contain "rules".

(b) Second, there are documents which are the responsibility of regional councils, namely regional policy statements and regional plans. There must be at least one regional policy statement for each region,[25] which is to achieve the RMA's purpose "by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region".[26] Besides identifying significant resource management issues for the region, and stating objectives and policies, a regional policy statement may identify methods to implement policies, although not rules.[27] Although a regional council is not always required to prepare a regional plan, it must prepare at least one regional coastal plan, approved by the Minister of Conservation, for the marine coastal area in its region.[28] Regional plans must state the objectives for the region, the policies to implement the objectives and the rules (if any) to implement the policies.[29] They may also contain methods other than rules.[30]

(c) Third, there are documents which are the responsibility of territorial authorities, specifically district plans.[31] There must be one district plan for each district.[32] A district plan must state the objectives for the district, the policies to implement the objectives and the rules (if any)

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23 Sections 45(1) and 58.
24 See further [31] and [75]–[91] below.
25 RMA, s 60(1).
26 Section 59.
27 Section 62(1).
28 Section 64(1).
29 Section 67(1).
30 Section 67(2)(b).
31 Sections 73–77D.
32 Section 73(1).

to implement the policies.[33] It may also contain methods (not being rules) for implementing the policies.[34]

[12] New Zealand coastal policy statements and regional policy statements cover the coastal environment above and below the line of mean high water springs.[35] Regional coastal plans operate below that line out to the limit of the territorial sea (that is, in the coastal marine area, as defined in s 2),[36] whereas regional and district plans operate above the line.[37]

[13] For present purposes we emphasise three features of this scheme. First, the Minister of Conservation plays a key role in the management of the coastal environment. In particular, he or she is responsible for the preparation and recommendation of New Zealand coastal policy statements, for monitoring their effect and implementation and must also approve regional coastal plans.[38] Further, the Minster shares with regional councils responsibility for the coastal marine area in the various regions.[39]

[14] Second, the scheme moves from the general to the specific. Part 2 sets out and amplifies the core principle, sustainable management of natural and physical resources, as we will later explain. Next, national policy statements and New Zealand coastal policy statements set out objectives, and identify policies to achieve those objectives, from a national perspective. Against the background of those documents, regional policy statements identify objectives, policies and (perhaps) methods in relation to particular regions. "Rules" are, by definition, found in regional and district plans (which must also identify objectives and policies and may identify methods). The effect is that as one goes down the hierarchy of documents, greater specificity is provided both as to substantive content and to locality – the

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33 Section 75(1).
34 Section 75(2)(b).
35 Sections 56 (which uses the term "coastal environment") and 60(1) (which refers to a regional council's "region": under the Local Government Act 2002, where the boundary of a regional council's region is the sea, the region extends to the outer limit of the territorial sea: see s 21(3) and pt 3 of sch 2). The full extent of the landward side of the coastal environment is unclear as that term is not defined in the RMA: see Nolan, above n 3, at [5.7].
36 RMA, ss 63(2) and 64(1).
37 Section 73(1) and the definition of "district" in s 2.
38 Section 28.
39 Section 30(1)(d).

general is made increasingly specific. The planning documents also move from the general to the specific in the sense that, viewed overall, they begin with objectives, then move to policies, then to methods and "rules".

[15] Third, the RMA requires that the various planning documents be prepared through structured processes that provide considerable opportunities for public consultation. Open processes and opportunities for public input were obviously seen as important values by the RMA's framers.

[16] In relation to resource consents, the RMA creates six categories of activity, from least to most restricted.[40] The least restricted category is permitted activities, which do not require a resource consent provided they are compliant with any relevant terms of the RMA, any regulations and any plan or proposed plan. Controlled activities, restricted discretionary activities, discretionary and non-complying activities require resource consents, the difference between them being the extent of the consenting authority's power to withhold consent. The final category is prohibited activities. These are forbidden and no consent may be granted for them.

Questions for decision

[17] In granting EDS leave to appeal, this Court identified two questions of law, as follows:[41]

> (a) Was the Board of Inquiry's approval of the Papatua plan change one made contrary to ss 66 and 67 of the Act through misinterpretation and misapplication of Policies 8, 13, and 15 of the New Zealand Coastal Policy Statement? This turns on:
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> (i) Whether, on its proper interpretation, the New Zealand Coastal Policy Statement has standards which must be complied with in relation to outstanding coastal landscape and natural character areas and, if so, whether the Papatua Plan Change complied with s 67(3)(b) of the Act because it did not give effect to Policies 13 and 15 of the New Zealand Coastal Policy Statement.
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> (ii) Whether the Board properly applied the provisions of the Act and the need to give effect to the New Zealand Coastal

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40 See s 87A.

41 *King Salmon* (Leave), above n 10, at [1].

Policy Statement under s 67(3)(b) of the Act in coming to a "balanced judgment" or assessment "in the round" in considering conflicting policies.

(b) Was the Board obliged to consider alternative sites or methods when determining a private plan change that is located in, or results in significant adverse effects on, an outstanding natural landscape or feature or outstanding natural character area within the coastal environment? This question raises the correctness of the approach taken by the High Court in *Brown v Dunedin City Council* [2003] NZRMA 420 and whether, if sound, the present case should properly have been treated as an exception to the general approach. Whether any error in approach was material to the decision made will need to be addressed if necessary.

We will focus initially on question (a).

First question: proper approach

[18] Before we describe those aspects of the statutory framework relevant to the first question in more detail, we will briefly set out the Board's critical findings in relation to the Papatua plan change. This will provide context for the discussion of the statutory framework that follows.

[19] The Board did not consider that there would be any ecological or biological impacts from the proposed farm at Papatua. The Board's focus was on the adverse effects to outstanding natural character and landscape. The Board said:

> [1235] Port Gore, and in particular Pig Bay, is the site of the proposed Papatua farm. Port Gore, in the overall context of the Sounds, is a relatively remote bay. The land adjoining the proposed farm has three areas of different ecological naturalness ranked low, medium and high, within the Cape Lambert Scenic Reserve. All the landscape experts identified part of Pig Bay adjoining the proposed farm as an area of Outstanding Natural Landscape.
>
> [1236] We have found that the effects on natural character at a site level would be high, particularly on the Cape Lambert Reserve, which is recognised as an Area of Outstanding Natural Character. We have also found that there would be high to very high adverse visual effects on an Outstanding Natural Landscape. Thus the directions in Policy 13(1)(a) and Policy 15(1)(a) of the [New Zealand] Coastal Policy Statement would not be given effect to.
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> …
>
> [1241] We have, also, to balance the adverse effects against the benefits for economic and social well-being, and, importantly, the integrated management of the region's natural and physical resources.

> [1242] In this regard, we have already described the bio-secure approach, using three separate groupings. The Papatua site is particularly important, as King Salmon could operate a separate supply and processing chain from the North Island. Management of the biosecurity risks is critical to the success of aquaculture and the provision of three "biosecure" areas through the Plan Change is a significant benefit.
>
> [1243] While the outstanding natural character and landscape values of outer Port Gore count against the granting of this site the advantages for risk management and the ability to isolate this area from the rest of the Sounds is a compelling factor. In this sense the appropriateness for aquaculture, specifically for salmon farming, [weighs] heavily in favour. We find that the proposed Papatua Zone would be appropriate.

[20] As will be apparent from this extract, some of the features which made the site outstanding from a natural character and landscape perspective also made it attractive as a salmon farming site. In particular the remoteness of the site and its location close to the Cook Strait made it attractive from a biosecurity perspective. King Salmon had grouped its nine proposed salmon farms into three distinct geographic areas, the objective being to ensure that if disease occurred in the farms in one area, it could be contained to those farms. This approach had particular relevance to the Papatua site because, in the event of an outbreak of disease elsewhere, King Salmon could operate a separate salmon supply and processing chain from the southern end of the North Island.

Statutory background – Pt 2 of the RMA

[21] Part 2 of the RMA is headed "Purpose and principles" and contains four sections, beginning with s 5. Section 5(1) identifies the RMA's purpose as being to *promote* sustainable management of natural and physical resources. The use of the word "promote" reflects the RMA's forward looking and management focus. While the use of "promote" may indicate that the RMA seeks to foster or further the implementation of sustainable management of natural and physical resources rather than requiring its achievement in every instance,[42] the obligation of those who perform functions under the RMA to comply with the statutory objective is clear. At issue in the present case is the nature of that obligation.

[22] Section 5(2) defines "sustainable management" as follows:

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[42] BV Harris "Sustainable Management as an Express Purpose of Environmental Legislation: The New Zealand Attempt" (1993) 8 Otago L Rev 51 at 59.

> In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—
>
> (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
>
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[23] There are two important definitions of words used in s 5(2). First, the word "effect" is broadly defined to include any positive or adverse effect, any temporary or permanent effect, any past, present or future effect and any cumulative effect.[43] Second, the word "environment" is defined, also broadly, to include:[44]

> (a) ecosystems and their constituent parts, including people and communities; and
>
> (b) all natural and physical resources; and
>
> (c) amenity values; and
>
> (d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters …

The term "amenity values" in (c) of this definition is itself widely defined to mean "those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes".[45] Accordingly, aesthetic considerations constitute an element of the environment.

[24] We make four points about the definition of "sustainable management":

(a) First, the definition is broadly framed. Given that it states the objective which is sought to be achieved, the definition's language is

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43 RMA, s 3.
44 Section 2.
45 Section 2.

necessarily general and flexible. Section 5 states a guiding principle which is intended to be applied by those performing functions under the RMA rather than a specifically worded purpose intended more as an aid to interpretation.

(b) Second, as we explain in more detail at [92] to [97] below, in the sequence "avoiding, remedying, or mitigating" in sub-para (c), "avoiding" has its ordinary meaning of "not allowing" or "preventing the occurrence of".[46] The words "remedying" and "mitigating" indicate that the framers contemplated that developments might have adverse effects on particular sites, which could be permitted if they were mitigated and/or remedied (assuming, of course, they were not avoided).

(c) Third, there has been some controversy concerning the effect of the word "while" in the definition.[47] The definition is sometimes viewed as having two distinct parts linked by the word "while". That may offer some analytical assistance but it carries the risk that the first part of the definition will be seen as addressing one set of interests (essentially developmental interests) and the second part another set (essentially intergenerational and environmental interests). We do not consider that the definition should be read in that way. Rather, it should be read as an integrated whole. This reflects the fact that elements of the intergenerational and environmental interests referred to in sub-paras (a), (b) and (c) appear in the opening part of the definition as well (that is, the part preceding "while"). That part talks of managing the use, development *and protection* of natural and physical resources so as to meet the stated interests – social, economic

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[46] The Environment Court has held on several occasions, albeit in the context of planning documents made under the RMA, that avoiding something is a step short of prohibiting it: see *Wairoa River Canal Partnership v Auckland Regional Council* [2010] 16 ELRNZ 152 (EnvC) at [15]; *Man O'War Station Ltd v Auckland Council* [2013] NZEnvC 233 at [48]. We return to this below.

[47] See Nolan, above n 3, at [3.24]; see also Harris, above n 42, at 60–61. Harris concludes that the importance of competing views has been overstated, because the flexibility of the language of ss 5(2)(a), (b) and (c) provides ample scope for decision makers to trade off environmental interests against development benefits and vice versa.

and cultural well-being as well as health and safety. The use of the word "protection" links particularly to sub-para (c). In addition, the opening part uses the words "in a way, or at a rate". These words link particularly to the intergenerational interests in sub-paras (a) and (b). As we see it, the use of the word "while" before sub-paras (a), (b) and (c) means that those paragraphs must be observed in the course of the management referred to in the opening part of the definition. That is, "while" means "at the same time as".

(d) Fourth, the use of the word "protection" in the phrase "use, development and protection of natural and physical resources" and the use of the word "avoiding" in sub-para (c) indicate that s 5(2) contemplates that particular environments may need to be protected from the adverse effects of activities in order to implement the policy of sustainable management; that is, sustainable management of natural and physical resources involves protection of the environment as well as its use and development. The definition indicates that environmental protection is a core element of sustainable management, so that a policy of preventing the adverse effects of development on particular areas is consistent with sustainable management. This accords with what was said in the explanatory note when the Resource Management Bill was introduced:[48]

> The central concept of sustainable management in this Bill encompasses the themes of use, development and protection.

[25] Section 5 is a carefully formulated statement of principle intended to guide those who make decisions under the RMA. It is given further elaboration by the remaining sections in pt 2, ss 6, 7 and 8:

(a) Section 6, headed "Matters of national importance", provides that in achieving the purpose of the RMA, all persons exercising powers and functions under it in relation to managing the use, development and protection of natural and physical resources "shall recognise and

[48] Resource Management Bill 1989 (224-1), explanatory note at i.

provide for" seven matters of national importance. Most relevantly, these include:

(i) in s 6(a), the preservation of the natural character of the coastal environment (including the coastal marine area) and its protection from inappropriate subdivision, use and development; and

(ii) in s 6(b), the protection of outstanding natural features and landscapes from inappropriate subdivision, use and development.

Also included in ss 6(c) to (g) are:

(iii) the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna;

(iv) the maintenance and enhancement of public access to and along the coastal marine area;

(v) the relationship of Maori and their culture and traditions with, among other things, water;

(vi) the protection of historical heritage from inappropriate subdivision use and development; and

(vii) the protection of protected customary rights.

(b) Section 7 provides that in achieving the purpose of the RMA, all persons excising powers and functions under it in relation to managing the use, development and protection of natural and physical resources "shall have particular regard to" certain specified matters, including (relevantly):

(i) kaitiakitanga and the ethic of stewardship;[49]

(ii) the efficient use and development of physical and natural resources;[50] and

(iii) the maintenance and enhancement of the quality of the environment.[51]

(c) Section 8 provides that in achieving the purpose of the RMA, all persons exercising powers and functions under it in relation to managing the use, development and protection of natural and physical resources "shall take into account" the principles of the Treaty of Waitangi.

[26] Section 5 sets out the core purpose of the RMA – the promotion of sustainable management of natural and physical resources. Sections 6, 7 and 8 supplement that by stating the particular obligations of those administering the RMA in relation to the various matters identified. As between ss 6 and 7, the stronger direction is given by s 6 – decision-makers "shall recognise and provide for" what are described as "matters of national importance", whereas s 7 requires decision-makers to "have particular regard to" the specified matters. The matters set out in s 6 fall naturally within the concept of sustainable management in a New Zealand context. The requirement to "recognise and provide for" the specified matters as "matters of national importance" identifies the nature of the obligation that decision-makers have in relation to those matters when implementing the principle of sustainable management. The matters referred to in s 7 tend to be more abstract and more evaluative than the matters set out in s 6. This may explain why the requirement in s 7 is to "have particular regard to" them (rather than being in similar terms to s 6).

[27] Under s 8 decision-makers are required to "take into account" the principles of the Treaty of Waitangi. Section 8 is a different type of provision again, in the

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49 RMA, ss 7(a) and (aa).
50 Section 7(b).
51 Section 7(f).

sense that the principles of the Treaty may have an additional relevance to decision-makers. For example, the Treaty principles may be relevant to matters of process, such as the nature of consultations that a local body must carry out when performing its functions under the RMA. The wider scope of s 8 reflects the fact that among the matters of national importance identified in s 6 are "the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga" and protections for historic heritage and protected customary rights and that s 7 addresses kaitiakitanga.

[28] It is significant that three of the seven matters of national importance identified in s 6 relate to the preservation or protection of certain areas, either absolutely or from "inappropriate" subdivision, use and development (that is, ss 6(a), (b) and (c)). Like the use of the words "protection" and "avoiding" in s 5, the language of ss 6(a), (b) and (c) suggests that, within the concept of sustainable management, the RMA envisages that there will be areas the natural characteristics or natural features of which require protection from the adverse effects of development. In this way, s 6 underscores the point made earlier that protection of the environment is a core element of sustainable management.

[29] The use of the phrase "inappropriate subdivision, use or development" in s 6 raises three points:

(a) First, s 6(a) replaced s 3(c) of the Town and Country Planning Act, which made "the preservation of the natural character of the coastal environment, and the margins of lakes and rivers, and the protection of them from *unnecessary* subdivision and development" a matter of national importance.[52] In s 6(a), the word "inappropriate" replaced the word "unnecessary". There is a question of the significance of this change in wording, to which we will return.[53]

(b) Second, a protection against "inappropriate" development is not necessarily a protection against *any* development. Rather, it allows

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[52] Emphasis added.
[53] See [40] below.

for the possibility that there may be some forms of "appropriate" development.

(c) Third, there is an issue as to the precise meaning of "inappropriate" in this context, in particular whether it is to be assessed against the particular features of the environment that require protection or preservation or against some other standard. This is also an issue to which we will return.[54]

[30] As we have said, the RMA envisages the formulation and promulgation of a cascade of planning documents, each intended, ultimately, to give effect to s 5, and to pt 2 more generally. These documents form an integral part of the legislative framework of the RMA and give substance to its purpose by identifying objectives, policies, methods and rules with increasing particularity both as to substantive content and locality. Three of these documents are of particular importance in this case – the NZCPS, the Marlborough Regional Policy Statement[55] and the Sounds Plan.

New Zealand Coastal Policy Statement

(i) General observations

[31] As we have said, the planning documents contemplated by the RMA are part of the legislative framework. This point can be illustrated by reference to the NZCPS, the current version of which was promulgated in 2010.[56] Section 56 identifies the NZCPS's purpose as being "to achieve the purpose of [the RMA] in relation to the coastal environment of New Zealand". Other subordinate planning documents – regional policy statements,[57] regional plans[58] and district plans[59] – must "give effect to" the NZCPS. Moreover, under s 32, the Minister was obliged to carry

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54 See [98]–[105] below.
55 Marlborough District Council *Marlborough Regional Policy Statement* (1995).
56 The 2010 version of the NZCPS replaced an earlier 1994 version: see [45] below.
57 RMA, s 62(3).
58 Section 67(3)(b).
59 Section 75(3)(b).

out an evaluation of the proposed coastal policy statement before it was notified under s 48 for public consultation. That evaluation was required to examine:[60]

> (a) the extent to which each objective is *the most appropriate way to achieve the purpose of this Act*; and
>
> (b) whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are *the most appropriate way for achieving the objectives*.
>
> …

[32] In developing and promulgating a New Zealand coastal policy statement, the Minister is required to use either the board of inquiry process set out in ss 47 to 52 or something similar, albeit less formal.[61] Whatever process is used, there must be a sufficient opportunity for public submissions. The NZCPS was promulgated after a board of inquiry had considered the draft, received public submissions and reported to the Minister.

[33] Because the purpose of the NZCPS is "to state policies in order to achieve the purpose of the [RMA] in relation to the coastal environment of New Zealand"[62] and any plan change must give effect to it, the NZCPS must be the immediate focus of consideration. Given the central role played by the NZCPS in the statutory framework, and because no party has challenged it, we will proceed on the basis that the NZCPS conforms with the RMA's requirements, and with pt 2 in particular. Consistently with s 32(3), we will treat its objectives as being the most appropriate way to achieve the purpose of the RMA and its policies as the most appropriate way to achieve its objectives.

[34] We pause at this point to note one feature of the Board's decision, namely that having considered various aspects of the NZCPS in relation to the proposed plan changes, the Board went back to pt 2 when reaching its final determination. The Board set the scene for this approach in the early part of its decision in the following way:[63]

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

61 Section 46A.

62 NZCPS, above n 13, at 5.

63 *King Salmon* (Board), above n 6. Emphasis in original, citations omitted.

> [76] Part II is a framework against which all the functions, powers, and duties under the RMA are to be exercised for the purposes of giving effect to the RMA. There are no qualifications or exceptions. Any exercise of discretionary judgment is impliedly to be done for the statutory purpose. The provisions for the various planning instruments required under the RMA also confirm the priority of Part II, by making all considerations *subject to Part II* – see for example Sections 51, 61, 66 and 74. The consideration of applications for resource consents is guided by Sections 104 and 105.
>
> …
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> [79] We discuss, where necessary, the Part II provisions when we discuss the contested issues that particular provisions apply to. When considering both Plan Change provisions and resource consent applications, the purpose of the RMA as defined in Section 5 is not the starting point, but the finishing point to be considered in the overall exercise of discretion.
>
> [80] It is well accepted that applying Section 5 involves an overall broad judgment of whether a proposal would promote the sustainable management of natural and physical resources. The RMA has a single purpose. It also allows for the balancing of conflicting considerations in terms of their relative significance or proportion in the final outcome.

[35] The Board returned to the point when expressing its final view:

> [1227] We are to apply the relevant Part II matters when balancing the findings we have made on the many contested issues. Many of those findings relate to different and sometimes competing principles enunciated in Part II of the RMA. We are required to make an overall broad judgment as to whether the Plan Change would promote the single purpose of the RMA – the sustainable management of natural and physical resources. As we have said earlier, Part II is not just the starting point but also the finishing point to be considered in the overall exercise of our discretion.

[36] We will discuss the Board's reliance on pt 2 rather than the NZCPS in reaching its final determination later in this judgment. It sufficient at this stage to note that there is a question as to whether its reliance on pt 2 was justified in the circumstances.

[37] There is one other noteworthy feature of the Board's approach as set out in these extracts. It is that the principles enunciated in pt 2 are described as "sometimes competing".[64] The Board expressed the same view about the NZCPS, namely that

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64 *King Salmon* (Board), above n 6, at [1227].

the various objectives and policies it articulates compete or "pull in different directions".[65] One consequence is that an "overall broad judgment" is required to reach a decision about sustainable management under s 5(2) and, in relation to the NZCPS, as to "whether the instrument as a whole is generally given effect to".[66]

[38] Two different approaches to s 5 have been identified in the early jurisprudence under the RMA, the first described as the "environmental bottom line" approach and the second as the "overall judgment" approach.[67] A series of early cases in the Planning Tribunal set out the "environmental bottom line" approach.[68] In *Shell Oil New Zealand Ltd v Auckland City Council*, the Tribunal said that ss 5(2)(a), (b) and (c):[69]

> … may be considered cumulative safeguards which enure (or exist at the same time) whilst the resource … is managed in such a way or rate which enables the people of the community to provide for various aspects of their wellbeing and for their health and safety. These safeguards or qualifications for the purpose of the [RMA] must all be met before the purpose is fulfilled. The promotion of sustainable management has to be determined therefore, in the context of these qualifications which are to be accorded the same weight.
>
> In this case there is no great issue with s 5(2)(a) and (b). If we find however, that the effects of the service station on the environment cannot be avoided, remedied or mitigated, one of the purposes of the [RMA] is not achieved.

In *Campbell v Southland District Council*, the Tribunal said:[70]

> Section 5 is not about achieving a balance between benefits occurring from an activity and its adverse effects. … [T]he definition in s 5(2) requires adverse effects to be avoided, remedied or mitigated, irrespective of the benefits which may accrue … .

[39] The "overall judgment" approach seems to have its origin in the judgment of Grieg J in *New Zealand Rail Ltd v Marlborough District Council*, in the context of an appeal relating to a number of resource consents for the development of a port at

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65 At [1180], adopting the language of Ms Sarah Dawson, a planning consultant for King Salmon. This paragraph of the Board's determination, along with others, is quoted at [81] below.

66 At [1180].

67 See Jim Milne "Sustainable Management" in *DSL Environmental Handbook* (Brookers, Wellington, 2004) vol 1.

68 *Shell Oil New Zealand Ltd v Auckland City Council* W8/94, 2 February 1994 (PT); *Foxley Engineering Ltd v Wellington City Council* W12/94, 16 March 1994 (PT); *Plastic and Leathergoods Co Ltd v The Horowhenua District Council* W26/94, 19 April 1994 (PT); and *Campbell v Southland District Council* W114/94, 14 December 1994 (PT).

69 *Shell Oil New Zealand Ltd v Auckland City Council*, above n 68, at 10.

70 *Campbell v Southland District Council*, above n 68, at 66.

Shakespeare Bay.[71] The Judge rejected the contention that the requirement in s 6(a) to preserve the natural character of a particular environment was absolute.[72] Rather, Grieg J considered that the preservation of natural character was subordinate to s 5's primary purpose, to promote sustainable management. The Judge described the protection of natural character as "not an end or an objective on its own" but an "accessory to the principal purpose" of sustainable management.[73]

[40] Greig J pointed to the fact that under previous legislation there was protection of natural character against "unnecessary" subdivision and development. This, the Judge said, was stronger than the protection in s 6(a) against "inappropriate" subdivision, use and development:[74] the word "inappropriate" had a wider connotation than "unnecessary".[75] The question of inappropriateness had to be determined on a case-by-case basis in the particular circumstances. The Judge said:[76]

> It is "inappropriate" from the point of view of the preservation of natural character in order to achieve the promotion of sustainable management as a matter of national importance. It is, however, only one of the matters of national importance, and indeed other matters have to be taken into account. It is certainly not the case that preservation of the natural character is to be achieved at all costs. The achievement which is to be promoted is sustainable management and questions of national importance, national value and benefit, and national needs, must all play their part in the overall consideration and decision.
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> This Part of the [RMA] expresses in ordinary words of wide meaning the overall purpose and principles of the [RMA]. It is not, I think, a part of the [RMA] which should be subjected to strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used. There is a deliberate openness about the language, its meaning and its connotations which I think is intended to allow the application of policy in a general and broad way. Indeed, it is for that purpose that the Planning Tribunal, with special expertise and skills, is established and appointed to oversee and to promote the objectives and the policies and the principles under the [RMA].
>
> In the end I believe the tenor of the appellant's submissions was to restrict the application of this principle of national importance, to put the absolute preservation of the natural character of a particular environment at the forefront and, if necessary, at the expense of everything except where it was

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71 *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC).
72 At 86.
73 At 85.
74 Town and Country Planning Act 1977, s 3(1).
75 *New Zealand Rail Ltd*, above n 71, at 85.
76 At 85–86.

> necessary or essential to depart from it. That is not the wording of the [RMA] or its intention. I do not think that the Tribunal erred as a matter of law. In the end it correctly applied the principles of the [RMA] and had regard to the various matters to which it was directed. It is the Tribunal which is entrusted to construe and apply those principles, giving the weight that it thinks appropriate. It did so in this case and its decision is not subject to appeal as a point of law.

[41] In *North Shore City Council v Auckland Regional Council*, the Environment Court discussed *New Zealand Rail* and said that none of the ss 5(2)(a), (b) or (c) considerations necessarily trumped the others – decision makers were required to balance all relevant considerations in the particular case.[77] The Court said:[78]

> We have considered in light of those remarks [in *New Zealand Rail*] the method to be used in applying s 5 to a case where on some issues a proposal is found to promote one or more of the aspects of sustainable management, and on others is found not to attain, or fully attain, one or more of the aspects described in paragraphs (a), (b) and (c). To conclude that the latter necessarily overrides the former, with no judgment of scale or proportion, would be to subject s 5(2) to the strict rules and proposal of statutory construction which are not applicable to the broad description of the statutory purpose. To do so would not allow room for exercise of the kind of judgment by decision-makers (including this Court — formerly the Planning Tribunal) alluded to in the [*New Zealand Rail*] case.
>
> …
>
> *The method of applying s 5 then involves an overall broad judgment of whether a proposal would promote the sustainable management of natural and physical resources. That recognises that the [RMA] has a single purpose. Such a judgment allows for comparison of conflicting considerations and the scale or degree of them, and their relative significance or proportion in the final outcome.*

[42] The Environment Court has said that the NZCPS is to be approached in the same way.[79] The NZCPS "is an attempt to more explicitly state the tensions which are inherent within Part 2 of the [RMA]".[80] Particular policies in the NZCPS may be

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77 *North Shore City Council v Auckland Regional Council* (1996) 2 ELRNZ 305 (EnvC) at 345–347; aff'd *Green & McCahill Properties Ltd v Auckland Regional Council* [1997] NZRMA 519 (HC).

78 *North Shore City Council v Auckland Regional Council*, above n 77, at 347 (emphasis added). One commentator expresses the view that the effect of the overall judgment approach in relation to s 5(2) is "to render the concept of sustainable management virtually meaningless outside the facts, circumstances and nuances of a particular case": see IH Williams "The Resource Management Act 1991: Well Meant But Hardly Done" (2000) 9 Otago L R 673 at 682.

79 See, for example, *Te Runanga O Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council* [2011] NZEnvC 402 and *Man O'War Station*, above n 46.

80 *Ngai Te Rangi Iwi Trust*, above n 79, at [257].

irreconcilable in the context of a particular case.[81] No individual objective or policy from the NZCPS should be interpreted as imposing a veto.[82] Rather, where relevant provisions from the NZCPS are in conflict, the court's role is to reach an "overall judgment" having considered all relevant factors.[83]

[43] The fundamental issue raised by the EDS appeal is whether the "overall judgment" approach as the Board applied it is consistent with the legislative framework generally and the NZCPS in particular. In essence, the position of EDS is that, once the Board had determined that the proposed salmon farm at Papatua would have high adverse effects on the outstanding natural character of the area and its outstanding natural landscape, so that policies 13(1)(a) and 15(a) of the NZCPS would not be given effect to, it should have refused the application. EDS argued, then, that there is an "environmental bottom line" in this case, as a result of the language of policies 13(1)(a) and 15(a).

[44] The EDS appeal raises a number of particular issues – the nature of the obligation to "give effect to" the NZCPS, the meaning of "avoid" and the meaning of "inappropriate". As will become apparent, all are affected by the resolution of the fundamental issue just identified.

(ii) Objectives and policies in the NZCPS

[45] Section 57(1) of the RMA requires that there must "at all times" be at least one New Zealand coastal policy statement prepared and recommended by the Minister of Conservation following a statutorily-mandated consultative process. The first New Zealand coastal policy statement was issued in May 1994.[84] In 2003 a lengthy review process was initiated. The process involved: an independent review of the policy statement, which was provided to the Minster in 2004; the release of an issues and options paper in 2006; the preparation of the proposed new policy statement in 2007; public submissions and board of inquiry hearings on the proposed

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81 At [258].
82 *Man O'War Station*, above n 46, at [41]–[43].
83 *Ngai Te Rangi Iwi Trust*, above n 79, at [258].
84 "Notice of the Issue of the New Zealand Coastal Policy Statement" (5 May 1994) 42 *New Zealand Gazette* 1563.

statement in 2008; and a report from the board of inquiry to the Minister in 2009. All this culminated in the NZCPS, which came into effect in December 2010.

[46] Under s 58, a New Zealand coastal policy statement may state objectives and policies about any one or more of certain specified matters. Because they are not mentioned in s 58, it appears that such a statement was not intended to include "methods", nor can it contain "rules" (given the special statutory definition of "rules").[85]

[47] As we discuss in more detail later in this judgment, Mr Kirkpatrick for EDS argued that s 58(a) is significant in the present context because it contemplates that a New Zealand coastal policy statement may contain "national priorities for the preservation of the natural character of the coastal environment of New Zealand, including protection from inappropriate subdivision, use and development". While counsel were agreed that the current NZCPS does not contain national priorities in terms of s 58(a),[86] this provision may be important because the use of the words "priorities", "preservation" and "protection" (together with "inappropriate") suggests that the RMA contemplates what might be described as "environmental bottom lines". As in s 6, the word "inappropriate" appears to relate back to the preservation of the natural character of the coastal environment: it is preservation of natural character that provides the standard for assessing whether particular subdivisions, uses or developments are "inappropriate".

[48] The NZCPS contains seven objectives and 29 policies. The policies support the objectives. Two objectives are of particular importance in the present context, namely objectives 2 and 6.[87]

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85 In contrast, s 62(e) of the RMA provides that a regional policy statement must state "the methods (excluding rules) used, or to be used, to implement the policies". Sections 67(1)(a) to (c) and 75(1)(a) to (c) provide that regional and district plans must state the objectives for the region/district, the policies to implement the objectives and the rules (if any) to implement the policies. Section 43AA provides that rule means "a district or regional rule" Section 43AAB defines regional rule as meaning "a rule made as part of a regional plan or proposed regional plan in accordance with section 68".

86 The 1994 version of the New Zealand coastal policy statement did contain a number of national priorities.

87 It should be noted that the NZCPS provides that the numbering of objectives and policies is for convenience and is not to be interpreted as an indication of relative importance: see NZCPS, above n 13, at 8.

[49] Objective 2 provides:

> **Objective 2**
>
> To preserve the natural character of the coastal environment and protect natural features and landscape values through:
>
> - recognising the characteristics and qualities that contribute to natural character, natural features and landscape values and their location and distribution;
>
> - identifying those areas where various forms of subdivision, use, and development would be inappropriate and protecting them from such activities; and
>
> - encouraging restoration of the coastal environment.

Three aspects of objective 2 are significant. First, it is concerned with preservation and protection of natural character, features and landscapes. Second, it contemplates that this will be achieved by articulating the elements of natural character and features and identifying areas which possess such character or features. Third, it contemplates that some of the areas identified may require protection from "inappropriate" subdivision, use and development.

[50] Objective 6 provides:

> **Objective 6**
>
> To enable people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through subdivision, use, and development, recognising that:
>
> - the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits;
>
> - some uses and developments which depend upon the use of natural and physical resources in the coastal environment are important to the social, economic and cultural wellbeing of people and communities;
>
> - functionally some uses and developments can only be located on the coast or in the coastal marine area;
>
> - the coastal environment contains renewable energy resources of significant value;

- the protection of habitats of living marine resources contributes to the social, economic and cultural wellbeing of people and communities;

- the potential to protect, use, and develop natural and physical resources in the coastal marine area should not be compromised by activities on land;

- the proportion of the coastal marine area under any formal protection is small and therefore management under the [RMA] is an important means by which the natural resources of the coastal marine area can be protected; and

- historic heritage in the coastal environment is extensive but not fully known, and vulnerable to loss or damage from inappropriate subdivision, use, and development.

[51] Objective 6 is noteworthy for three reasons:

(a) First, it recognises that some developments which are important to people's social, economic and cultural well-being can only occur in coastal environments.

(b) Second, it refers to use and development not being precluded "in appropriate places and forms" and "within appropriate limits". Accordingly, it is envisaged that there will be places that are "appropriate" for development and others that are not.

(c) Third, it emphasises management under the RMA as an important means by which the natural resources of the coastal marine area can be protected. This reinforces the point previously made, that one of the components of sustainable management is the protection and/or preservation of deserving areas.

[52] As we have said, in the NZCPS there are 29 policies that support the seven objectives. Four policies are particularly relevant to the issues in the EDS appeal: policy 7, which deals with strategic planning; policy 8, which deals with aquaculture; policy 13, which deals with preservation of natural character; and policy 15, which deals with natural features and natural landscapes.

[53] Policy 7 provides:

> **Strategic planning**
>
> (1) In preparing regional policy statements, and plans:
>
> (a) consider where, how and when to provide for future residential, rural residential, settlement, urban development and other activities in the coastal environment at a regional and district level; and
>
> (b) identify areas of the coastal environment where particular activities and forms of subdivision, use and development:
>
> (i) are inappropriate; and
>
> (ii) may be inappropriate without the consideration of effects through a resource consent application, notice of requirement for designation or Schedule 1 of the [RMA] process;
>
> and provide protection from inappropriate subdivision, use, and development in these areas through objectives, policies and rules.
>
> (2) Identify in regional policy statements, and plans, coastal processes, resources or values that are under threat or at significant risk from adverse cumulative effects. Include provisions in plans to manage these effects. Where practicable, in plans, set thresholds (including zones, standards or targets), or specify acceptable limits to change, to assist in determining when activities causing adverse cumulative effects are to be avoided.

[54] Policy 7 is important because of its focus on strategic planning. It requires the relevant regional authority to look at its region as a whole in formulating a regional policy statement or plan. As part of that overall assessment, the regional authority must identify areas where particular forms of subdivision, use or development "are" inappropriate, or "may be" inappropriate without consideration of effects through resource consents or other processes, and must protect them from inappropriate activities through objectives, policies and rules. Policy 7 also requires the regional authority to consider adverse cumulative effects.

[55] There are two points to be made about the use of "inappropriate" in policy 7. First, if "inappropriate", development is not permitted, although this does not necessarily rule out any development. Second, what is "inappropriate" is to be

assessed against the nature of the particular area under consideration in the context of the region as a whole.

[56] Policy 8 provides:

> **Aquaculture**
>
> Recognise the significant existing and potential contribution of aquaculture to the social, economic and cultural well-being of people and communities by:
>
> (a) including in regional policy statements and regional coastal plans provision for aquaculture activities in appropriate places in the coastal environment, recognising that relevant considerations may include:
>
> (i) the need for high water quality for aquaculture activities; and
>
> (ii) the need for land-based facilities associated with marine farming;
>
> (b) taking account of the social and economic benefits of aquaculture, including any available assessments of national and regional economic benefits; and
>
> (c) ensuring that development in the coastal environment does not make water quality unfit for aquaculture activities in areas approved for that purpose.

[57] The importance of policy 8 will be obvious. Local authorities are to recognise aquaculture's potential by including in regional policy statements and regional plans provision for aquaculture "in appropriate places" in the coastal environment. Obviously, there is an issue as to the meaning of "appropriate" in this context.

[58] Finally, there are policies 13 and 15. Their most relevant feature is that, in order to advance the specified overall policies, they state policies of avoiding adverse effects of activities on natural character in areas of outstanding natural character and on outstanding natural features and outstanding natural landscapes in the coastal environment.

[59] Policy 13 provides:

Preservation of natural character

(1) To preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development:

(a) avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character; and

(b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on natural character in all other areas of the coastal environment;

including by:

(c) assessing the natural character of the coastal environment of the region or district, by mapping or otherwise identifying at least areas of high natural character; and

(d) ensuring that regional policy statements, and plans, identify areas where preserving natural character requires objectives, policies and rules, and include those provisions.

(2) Recognise that natural character is not the same as natural features and landscapes or amenity values and may include matters such as:

(a) natural elements, processes and patterns;

(b) biophysical, ecological, geological and geomorphological aspects;

(c) natural landforms such as headlands, peninsulas, cliffs, dunes, wetlands, reefs, freshwater springs and surf breaks;

(d) the natural movement of water and sediment;

(e) the natural darkness of the night sky;

(f) places or areas that are wild or scenic;

(g) a range of natural character from pristine to modified; and

(h) experiential attributes, including the sounds and smell of the sea; and their context or setting.

[60] Policy 15 provides:

Natural features and natural landscapes

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

(a) avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment; and

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

including by:

(c) identifying and assessing the natural features and natural landscapes of the coastal environment of the region or district, at minimum by land typing, soil characterisation and landscape characterisation and having regard to:

(i) natural science factors, including geological, topographical, ecological and dynamic components;

(ii) the presence of water including in seas, lakes, rivers and streams;

(iii) legibility or expressiveness – how obviously the feature or landscape demonstrates its formative processes;

(iv) aesthetic values including memorability and naturalness;

(v) vegetation (native and exotic);

(vi) transient values, including presence of wildlife or other values at certain times of the day or year;

(v) whether the values are shared and recognised;

(vi) cultural and spiritual values for tangata whenua, identified by working, as far as practicable, in accordance with tikanga Māori; including their expression as cultural landscapes and features;

(vii) historical and heritage associations; and

(viii) wild or scenic values;

(d) ensuring that regional policy statements, and plans, map or otherwise identify areas where the protection of natural features and natural landscapes requires objectives, policies and rules; and

(e) including the objectives, policies and rules required by (d) in plans.

[61] As can be seen, policies 13(1)(a) and (b) and 15(a) and (b) are to similar effect. Local authorities are directed to avoid adverse effects of activities on natural character in areas of outstanding natural character (policy 13(1)(a)), or on outstanding natural features and outstanding natural landscapes (policy 15(a)). In

other contexts, they are to avoid "significant" adverse effects and to "avoid, remedy or mitigate" other adverse effects of activities (policies 13(1)(b) and 15(b)).

[62] The overall purpose of these directions is to preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use and development (policy 13) or to protect the natural features and natural landscapes (including seascapes) from inappropriate subdivision, use and development (policy 15). Accordingly, then, the local authority's obligations vary depending on the nature of the area at issue. Areas which are "outstanding" receive the greatest protection: the requirement is to "avoid adverse effects". Areas that are not "outstanding" receive less protection: the requirement is to avoid significant adverse effects and avoid, remedy or mitigate other adverse effects.[88] In this context, "avoid" appears to mean "not allow" or "prevent the occurrence of", but that is an issue to which we return at [92] below.

[63] Further, policies 13 and 15 reinforce the strategic and comprehensive approach required by policy 7. Policy 13(1)(c) and (d) require local authorities to assess the natural character of the relevant region by identifying "at least areas of high natural character" and to ensure that regional policy statements and plans include objectives, policies and rules where they are required to preserve the natural character of particular areas. Policy 15(d) and (e) have similar requirements in respect of natural features and natural landscapes requiring protection.

Regional policy statement

[64] As we have said, regional policy statements are intended to achieve the purpose of the RMA "by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the

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[88] The Department of Conservation explains that the reason for the distinction between "outstanding" character/features/landscapes and character/features/landscapes more generally is to "provide the greatest protection for areas of the coastal environment with the highest natural character": Department of Conservation *NZCPS 2010 Guidance Note – Policy 13: Preservation of Natural Character* (September 2013) at 14; and Department of Conservation *NZCPS 2010 Guidance Note – Policy 15: Natural Features and Natural Landscapes* (September 2013) at 15.

natural and physical resources of the whole region".[89] They must address a range of issues[90] and must "give effect to" the NZCPS.[91]

[65] The Marlborough Regional Policy Statement became operative on 28 August 1995, when the 1994 version of the New Zealand coastal policy statement was in effect. We understand that it is undergoing revision in light of the NZCPS. Accordingly, it is of limited value in the present context. That said, the Marlborough Regional Policy Statement does form part of the relevant context in relation to the development and protection of areas of natural character in the Marlborough Sounds.

[66] The Marlborough Regional Policy Statement contains a section on subdivision, use and development of the coastal environment and another on visual character, which includes a policy on outstanding landscapes. The policy dealing with subdivision, use and development of the coastal environment is framed around the concepts of "appropriate" and "inappropriate" subdivision, use and development. It reads:[92]

> **7.2.8 POLICY - COASTAL ENVIRONMENT**
>
> Ensure the appropriate subdivision, use and development of the coastal environment.
>
> *Subdivision, use and development will be encouraged in areas where the natural character of the coastal environment has already been compromised. Inappropriate subdivision, use and development will be avoided. The cumulative adverse effects of subdivision, use or development will also be avoided, remedied or mitigated.*
>
> *Appropriate subdivision, use and development of the coastal environment enables the community to provide for its social, economic and cultural wellbeing.*

[67] The methods to implement this policy are then addressed, as follows:

> **7.2.9 METHODS**
>
> (a) Resource management plans will identify criteria to indicate where subdivision, use and development will be appropriate.

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89 RMA, s 59.
90 Section 62(1).
91 Section 62(3).
92 Italics in original.

The [RMA] requires as a matter of national importance that the coastal environment be protected from inappropriate subdivision, use and development. Criteria to indicate where subdivision, use or development is inappropriate may include water quality; landscape features; special habitat; natural character; and risk of natural hazards, including areas threatened by erosion, inundation or sea level rise.

(b) Resource management plans will contain controls to manage subdivision, use and development of the coastal environment to avoid, remedy or mitigate any adverse environmental effects.

Controls which allow the subdivision, use and development of the coastal environment enable the community to provide for their social, economic and cultural wellbeing. These controls may include financial contributions to assist remediation or mitigation of adverse environmental effects.

Such development may be allowed where there will be no adverse effects on the natural character of the coastal environment, and in areas where the natural character has already been compromised. Cumulative effects of subdivision, use and development will also be avoided, remedied or mitigated.

[68] As to the outstanding landscapes policy, and the method to achieve it, the commentary indicates that the effect of any proposed development will be assessed against the criteria that make the relevant landscape outstanding; that is, the standard of "appropriateness". Policy 8.1.3 reads in full:[93]

8.1.3 POLICY — OUTSTANDING LANDSCAPES

Avoid, remedy or mitigate the damage of identified outstanding landscape features arising from the effects of excavation, disturbance of vegetation, or erection of structures.

The Resource Management Act requires the protection of outstanding landscape features as a matter of national importance. Further, the New Zealand Coastal Policy Statement [1994] requires this protection for the coastal environment. Features which satisfy the criteria for recognition as having national and international status will be identified in the resource management plans for protection. Any activities or proposals within these areas will be considered on the basis of their effects on the criteria which were used to identify the landscape features.

The wellbeing of the Marlborough community is linked to the quality of our landscape. Outstanding landscape features need to be retained without degradation from the effects of land and water based activities, for the enjoyment of the community and visitors.

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93 Italics in original.

Regional and district plans

[69] Section 64 of the RMA requires that there be a regional coastal plan for the Marlborough Sounds. One of the things that a regional council must do in developing a regional coastal plan is act in accordance with its duty under s 32 (which, among other things, required an evaluation of the risks of acting or not acting in circumstances of uncertainty or insufficient information).[94] A regional coastal plan must state the objectives for the region, policies to implement the objectives and rules (if any) to implement the policies[95] and must "give effect to" the NZCPS and to any regional policy statement.[96] It is important to emphasise that the plan is a *regional* one, which raises the question of how spot zoning applications such as that relating to Papatua are to be considered. It is obviously important that the regional integrity of a regional coastal plan not be undermined.

[70] We have observed that policies 7, 13 and 15 in the NZCPS require a strategic and comprehensive approach to regional planning documents. To reiterate, policy 7(1)(b) requires that, in developing regional plans, entities such as the Marlborough District Council:

> identify areas of the coastal environment where particular activities and forms of subdivision, use, and development:
>
> (i) are inappropriate; and
>
> (ii) may be inappropriate without the consideration of effects through a resource consent application, notice of requirement for designation or Schedule 1 of the [RMA] process;
>
> and provide protection from inappropriate subdivision, use, and development in these areas through objectives, policies and rules.

Policies 13(1)(d) and 15(d) require that regional plans identify areas where preserving natural character or protecting natural features and natural landscapes require objectives, policies and rules. Besides highlighting the need for a region-wide approach, these provisions again raise the issue of the meaning of "inappropriate".

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94 RMA, s 32(4)(b) as it was at the relevant time (see above n 60 for the legislative history).
95 Section 67(1).
96 Section 67(3)(b).

[71] The Marlborough District Council is a unitary authority with the powers, functions and responsibilities of both a regional and district council.[97] It is responsible for the Sounds Plan, which is a combined regional, regional coastal and district plan for the Marlborough Sounds. The current version of the Sounds Plan became operative on 25 August 2011. It comprises three volumes, the first containing objectives, policies and methods, the second containing rules and the third maps. The Sounds Plan identifies certain areas within the coastal marine area of the Marlborough Sounds as Coastal Marine Zone One (CMZ1), where aquaculture is a prohibited activity, and others as Coastal Marine Zone Two (CMZ2), where aquaculture is either a controlled or a discretionary activity. It describes areas designated CMZ1 as areas "where marine farming will have a significant adverse effect on navigational safety, recreational opportunities, natural character, ecological systems, or cultural, residential or amenity values".[98] The Board created a new zoning classification, Coastal Marine Zone Three (CMZ3), to apply to the four areas (previously zoned CMZ1) in respect of which it granted plan changes to permit salmon farming.

[72] In developing the Sounds Plan the Council classified and mapped the Marlborough Sounds into management areas known as Natural Character Areas. These classifications were based on a range of factors which went to the distinctiveness of the natural character within each area.[99] The Council described the purpose of this as follows:[100]

> *This natural character information is a relevant tool for management in helping to identify and protect those values that contribute to people's experience of the Sounds area. Preserving natural character in the Marlborough Sounds as a whole depends both on the overall pattern of use, development and protection, as well as maintaining the natural character of particular areas. The Plan therefore recognises that preservation of the natural character of the constituent natural character areas is important in achieving preservation of the natural character of the Marlborough Sounds as a whole.*
>
> The Plan requires that plan change and resource consent applications be assessed with regard to the natural character of the Sounds as a whole as well as each natural character area, or areas where appropriate. …

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97 Sounds Plan, above n 1, at [1.0].
98 At [9.2.2].
99 At Appendix 2.
100 At [2.1.6]. Italics in original.

[73] In addition, the Council assessed the landscapes in the Marlborough Sounds for the purpose of identifying those that could be described as outstanding. It noted that, as a whole, the Marlborough Sounds has outstanding visual values and identified the factors that contribute to that. Within the overall Marlborough Sounds landscape, however, the Council identified particular landscapes as "outstanding". The Sounds Plan describes the criteria against which the Council made the assessment[101] and contains maps that identify the areas of outstanding landscape value, which are relatively modest given the size of the region.[102] It seems clear from the Sounds Plan that the exercise was a thoroughgoing one.

[74] In 2009, the Council completed a landscape and natural character review of the Marlborough Sounds, which confirmed the outstanding natural character and outstanding natural landscape of the Port Gore area.[103]

Requirement to "give effect to" the NZCPS

[75] For the purpose of this discussion, it is important to bear two statutory provisions in mind. The first is s 66(1), which provides that a regional council shall prepare and change any regional plan[104] in accordance with its functions under s 30, the provisions of Part 2, a direction given under section 25A(1), its duty under s 32, and any regulations. The second is s 67(3), which provides that a regional plan must "give effect to" any national policy statement, any New Zealand coastal policy statement and any regional policy statement. There is a question as to the interrelationship of these provisions.

[76] As we have seen, the RMA requires an extensive process prior to the issuance of a New Zealand coastal policy statement – an evaluation under s 32, then a board of inquiry or similar process with the opportunity for public input. This is one indication of such a policy statement's importance in the statutory scheme. A further indication is found in the requirement that the NZCPS must be given effect to in subordinate planning documents, including regional policy statements and

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101 At ch 5 and Appendix 1.
102 At vol 3.
103 *King Salmon* (Board), above n 6, at [555] and following.
104 The term "regional plan" includes a regional coastal plan: see RMA, s 43AA.

regional and district plans.[105] We are concerned with a regional coastal plan, the Sounds Plan. Up until August 2003, s 67 provided that such a regional plan should "not be inconsistent with" any New Zealand coastal policy statement. Since then, s 67 has stated the regional council's obligation as being to "give effect to" any New Zealand coastal policy statement. We consider that this change in language has, as the Board acknowledged,[106] resulted in a strengthening of the regional council's obligation.

[77] The Board was required to "give effect to" the NZCPS in considering King Salmon's plan change applications. "Give effect to" simply means "implement". On the face of it, it is a strong directive, creating a firm obligation on the part of those subject to it. As the Environment Court said in *Clevedon Cares Inc v Manukau City Council*:[107]

> [51] The phrase "*give effect to*" is a strong direction. This is understandably so for two reasons:
>
> [a] The hierarchy of plans makes it important that objectives and policies at the regional level are given effect to at the district level; and
>
> [b] The Regional Policy Statement, having passed through the [RMA] process, is deemed to give effect to Part 2 matters.

[78] Further, the RMA provides mechanisms whereby the implementation of the NZCPS by regional authorities can be monitored. One of the functions of the Minister of Conservation under s 28 of the RMA is to monitor the effect and implementation of the NZCPS. In addition, s 293 empowers the Environment Court to monitor whether a proposed policy statement or plan gives effect to the NZCPS; it may allow departures from the NZCPS only if they are of minor significance and do not affect the general intent and purpose of the proposed policy statement or plan.[108] The existence of such mechanisms underscores the strength of the "give effect to" direction.

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105 See [31] above.
106 *King Salmon* (Board), above n 6, at [1179].
107 *Clevedon Cares Inc v Manukau City Council* [2010] NZEnvC 211.
108 RMA, ss 293(3)–(5).

[79] The requirement to "give effect to" the NZCPS gives the Minister a measure of control over what regional authorities do: the Minister sets objectives and policies in the NZPCS and relevant authorities are obliged to implement those objectives and policies in their regional coastal plans, developing methods and rules to give effect to them. To that extent, the authorities fill in the details in their particular localities.

[80] We have said that the "give effect to" requirement is a strong directive, particularly when viewed against the background that it replaced the previous "not inconsistent with" requirement. There is a caveat, however. The implementation of such a directive will be affected by what it relates to, that is, what must be given effect to. A requirement to give effect to a policy which is framed in a specific and unqualified way may, in a practical sense, be more prescriptive than a requirement to give effect to a policy which is worded at a higher level of abstraction.

[81] The Board developed this point in its discussion of the requirement that it give effect to the NZCPS and the Marlborough Regional Policy Statement (in the course of which it also affirmed the primacy of s 5 over the NZCPS and the perceived need for the "overall judgment" approach). It said:[109]

> [1180] It [that is, the requirement to give effect to the NZCPS] is a strong direction and requires positive implementation of the instrument. However, both the instruments contain higher order overarching objectives and policies, that create tension between them or, as [counsel] says, "pull in different directions", and thus a judgment has to be made as to whether the instrument as a whole is generally given effect to.
>
> [1181] Planning instruments, particularly of a higher order, nearly always contain a wide range of provisions. Provisions which are sometimes in conflict. The direction "to give effect to" does not enjoin that every policy be met. It is not a simple check-box exercise. Requiring that every single policy must be given full effect to would otherwise set an impossibly high threshold for any type of activity to occur within the coastal marine area.
>
> [1182] Moreover, there is no "hierarchy" or ranking of provisions in the [NZCPS]. The objective seeking ecological integrity has the same standing as that enabling subdivision, use and development within the coastal environment. Where there are competing values in a proposal, one does not automatically prevail over the other. It is a matter of judgement on the facts of a particular proposal and no one factor is afforded the right to veto all other considerations. It comes down to a matter of weight in the particular circumstances.

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[109] *King Salmon* (Board), above n 6 (citations omitted).

> [1183] In any case, the directions in both policy statements are subservient to the Section 5 purpose of sustainable management, as Section 66 of the RMA requires a council to change its plan in accordance, among other things, the provisions of Part II. Section 68(1) of the RMA requires that rules in a regional plan may be included for the purpose of carrying out the functions of the regional council and achieving the objectives and policies of the Plan.
>
> [1184] Thus, we are required [to] "give effect to" the provisions of the [NZCPS] and the Regional Policy Statement having regard to the provisions of those documents as a whole. We are also required to ensure that the rules assist the Regional Council in carrying out its functions under the RMA and achieve the objective and policies of the Regional Plan.

[82] Mr Kirkpatrick argued that there were two errors in this extract:

(a) It asserted that there was a state of tension or conflict in the policies of the NZCPS without analysing the relevant provisions to see whether such a state actually existed; and

(b) It assumed that "generally" giving effect to the NZCPS "as a whole" was compliant with s 67(3)(b).

[83] On the Board's approach, whether the NZCPS has been given effect to in determining a regional plan change application depends on an "overall judgment" reached after consideration of all relevant circumstances. The direction to "give effect to" the NZCPS is, then, essentially a requirement that the decision-maker consider the factors that are relevant in the particular case (given the objectives and policies stated in the NZCPS) before making a decision. While the weight given to particular factors may vary, no one factor has the capacity to create a veto – there is no bottom line, environmental or otherwise. The effect of the Board's view is that the NZCPS is essentially a listing of potentially relevant considerations, which will have varying weight in different fact situations. We discuss at [106] to [148] below whether this approach is correct.

[84] Moreover, as we indicated at [34] to [36] above, and as [1183] in the extract just quoted demonstrates, the Board ultimately determined King Salmon's applications not by reference to the NZCPS but by reference to pt 2 of the RMA. It did so because it considered that the language of s 66(1) required that approach. Ms Gwyn for the Minister supported the Board's approach. We do not accept that it is correct.

[85] First, while we acknowledge that a regional council is directed by s 66(1) to prepare and change any regional plan "in accordance with" (among other things) pt 2, it is also directed by s 67(3) to "give effect to" the NZCPS. As we have said, the purpose of the NZCPS is to state policies in order to achieve the RMA's purpose in relation to New Zealand's coastal environment. That is, the NZCPS gives substance to pt 2's provisions in relation to the coastal environment. In principle, by giving effect to the NZCPS, a regional council is necessarily acting "in accordance with" pt 2 and there is no need to refer back to the part when determining a plan change. There are several caveats to this, however, which we will mention shortly.

[86] Second, there are contextual considerations supporting this interpretation:

(a) As will be apparent from what we have said above, there is a reasonably elaborate process to be gone through before the Minister is able to issue a New Zealand coastal policy statement, involving an evaluation under s 32 and a board of inquiry or similar process with opportunity for public input. Given that process, we think it implausible that Parliament intended that the ultimate determinant of an application such as the present would be pt 2 and not the NZCPS. The more plausible view is that Parliament considered that pt 2 would be implemented if effect was given to the NZCPS.

(b) National policy statements such as the NZCPS allow Ministers a measure of control over decisions by regional and district councils. Accordingly, it is difficult to see why the RMA would require regional councils, as a matter of course, to go beyond the NZCPS, and back to pt 2, when formulating or changing a regional coastal plan which must give effect to the NZCPS. The danger of such an approach is that pt 2 may be seen as "trumping" the NZCPS rather than the NZCPS being the mechanism by which pt 2 is given effect in relation to the coastal environment.[110]

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[110] Indeed, counsel in at least one case has submitted that pt 2 "trumps" the NZCPS: see *Port Gore Marine Farms v Marlborough District Council* [2012] NZEnvC 72 at [197].

[87] Mr Nolan for King Salmon advanced a related argument as to the relevance of pt 2. He submitted that the purpose of the RMA as expressed in pt 2 had a role in the interpretation of the NZCPS and its policies because the NZCPS was drafted solely to achieve the purpose of the RMA; so, the NZCPS and its policies could not be interpreted in a way that would fail to achieve the purpose of the RMA.

[88] Before addressing this submission, we should identify three caveats to the "in principle" answer we have just given. First, no party challenged the validity of the NZCPS or any part of it. Obviously, if there was an allegation going to the lawfulness of the NZCPS, that would have to be resolved before it could be determined whether a decision-maker who gave effect to the NZCPS as it stood was necessarily acting in accordance with pt 2. Second, there may be instances where the NZCPS does not "cover the field" and a decision-maker will have to consider whether pt 2 provides assistance in dealing with the matter(s) not covered. Moreover, the obligation in s 8 to have regard to the principles of the Treaty of Waitangi will have procedural as well as substantive implications, which decision-makers must always have in mind, including when giving effect to the NZCPS. Third, if there is uncertainty as to the meaning of particular policies in the NZCPS, reference to pt 2 may well be justified to assist in a purposive interpretation. However, this is against the background that the policies in the NZCPS are intended to implement the six objectives it sets out, so that reference to one or more of those objectives may well be sufficient to enable a purposive interpretation of particular policies.

[89] We do not see Mr Nolan's argument as falling within the third of these caveats. Rather, his argument is broader in its effect, as it seeks to justify reference back to pt 2 as a matter of course when a decision-maker is required to give effect to the NZCPS.

[90] The difficulty with the argument is that, as we have said, the NZCPS was intended to give substance to the principles in pt 2 in respect of the coastal environment by stating objectives and policies which apply those principles to that environment: the NZCPS translates the general principles to more specific or focussed objectives and policies. The NZCPS is a carefully expressed document

whose contents are the result of a rigorous process of formulation and evaluation. It is a document which reflects particular choices. To illustrate, s 5(2)(c) of the RMA talks about "avoiding, remedying or mitigating any adverse effects of activities on the environment" and s 6(a) identifies "the preservation of the natural character of the coastal environment (including the coastal marine area) … and the protection of [it] from inappropriate subdivision, use and development" as a matter of national importance to be recognised and provided for. The NZCPS builds on those principles, particularly in policies 13 and 15. Those two policies provide a graduated scheme of protection and preservation based on the features of particular coastal localities, requiring avoidance of adverse effects in outstanding areas but allowing for avoidance, mitigation or remedying in others. For these reasons, it is difficult to see that resort to pt 2 is either necessary or helpful in order to interpret the policies, or the NZCPS more generally, absent any allegation of invalidity, incomplete coverage or uncertainty of meaning. The notion that decision-makers are entitled to decline to implement aspects of the NZCPS if they consider that appropriate in the circumstances does not fit readily into the hierarchical scheme of the RMA.

[91] We acknowledge that the scheme of the RMA does give subordinate decision-makers considerable flexibility and scope for choice. This is reflected in the NZCPS, which is formulated in a way that allows regional councils flexibility in implementing its objectives and policies in their regional coastal policy statements and plans. Many of the policies are framed in terms that provide flexibility and, apart from that, the specific methods and rules to implement the objectives and policies of the NZCPS in particular regions must be determined by regional councils. But the fact that the RMA and the NZCPS allow regional and district councils scope for choice does not mean, of course, that the scope is infinite. The requirement to "give effect to" the NZCPS is intended to constrain decision-makers.

Meaning of "avoid"

[92] The word "avoid" occurs in a number of relevant contexts. In particular:

(a) Section 5(c) refers to "avoiding, remedying, or mitigating any adverse effects of activities on the environment".

(b) Policy 13(1)(a) provides that decision-makers should "avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character"; policy 15 contains the same language in relation to outstanding natural features and outstanding natural landscapes in the coastal environment.

(c) Policies 13(1)(b) and 15(b) refer to avoiding significant adverse effects, and to avoiding, remedying or mitigating other adverse effects, in particular areas.

[93] What does "avoid" mean in these contexts? As we have said, given the juxtaposition of "mitigate" and remedy", the most obvious meaning is "not allow" or "prevent the occurrence of". But the meaning of "avoid" must be considered against the background that:

(a) the word "effect" is defined broadly in s 3;

(b) objective 6 recognises that the protection of the values of the coastal environment does not preclude use and development "in appropriate places and forms and within appropriate limits"; and

(c) both policies 13(1)(a) and (b) and 15(a) and (b) are means for achieving particular goals – in the case of policy 13(1)(a) and (b), preserving the natural character of the coastal environment and protecting it from "inappropriate" subdivision, use and development and, in the case of policy 15(a) and (b), protecting the natural features and natural landscapes of the coastal environment from "inappropriate" subdivision, use and development.

[94] In *Man O'War Station*, the Environment Court said that the word "avoid" in policy 15(a) did not mean "prohibit",[111] expressing its agreement with the view of the Court in *Wairoa River Canal Partnership v Auckland Regional Council*.[112] The Court accepted that policy 15 should not be interpreted as imposing a blanket

[111] *Man O'War Station*, above n 46, at [48].
[112] *Wairoa River Canal Partnership*, above n 46.

prohibition on development in any area of the coastal environment that comprises an outstanding natural landscape as that would undermine the purpose of the RMA, including consideration of factors such as social and economic wellbeing.[113]

[95] In the *Wairoa River Canal Partnership* case, an issue arose concerning a policy (referred to as policy 3) proposed to be included in the Auckland Regional Policy Statement. It provided that countryside living (ie, low density residential development on rural land) "avoids development in those areas … identified … as having significant, ecological, heritage or landscape value or high natural character" and possessing certain characteristics. The question was whether the word "inappropriate" should be inserted between "avoids" and "development", as sought by Wairoa River Canal Partnership. In the course of addressing that, the Environment Court said that policy 3 did "not attempt to impose a prohibition on development – to avoid is a step short of to prohibit".[114] The Court went on to say that the use of "avoid" "sets a presumption (or a direction to an outcome) that development in those areas will be inappropriate …".[115]

[96] We express no view on the merits of the Court's analysis in the *Wairoa River Canal Partnership* case, which was focussed on the meaning of "avoid", standing alone, in a particular policy proposed for the Auckland Regional Policy Statement. Our concern is with the interpretation of "avoid" as it is used in s 5(2)(c) and in relevant provisions of the NZCPS. In that context, we consider that "avoid" has its ordinary meaning of "not allow" or "prevent the occurrence of". In the sequence "avoiding, remedying, or mitigating any adverse effects of activities on the environment" in s 5(2)(c), for example, it is difficult to see that "avoid" could sensibly bear any other meaning. Similarly in relation to policies 13(1)(a) and (b) and 15(a) and (b), which also juxtapose the words "avoid", "remedy" and "mitigate". This interpretation is consistent with objective 2 of the NZCPS, which is, in part, "[t]o preserve the natural character of the coastal environment and protect natural features and landscape values through … identifying those areas where various forms of subdivision, use, and development would be inappropriate and protecting

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113 *Man O'War Station*, above n 46, at [43].
114 *Wairoa River Canal Partnership*, above n 46, at [15].
115 At [16].

them from such activities". It is also consistent with objective 6's recognition that protection of the values of the coastal environment does not preclude use and development "in appropriate places and forms, and within appropriate limits". The "does not preclude" formulation emphasises protection by allowing use or development only where appropriate, as opposed to allowing use or development unless protection is required.

[97] However, taking that meaning may not advance matters greatly: whether "avoid" (in the sense of "not allow" or "prevent the occurrence of") bites depends upon whether the "overall judgment" approach or the "environmental bottom line" approach is adopted. Under the "overall judgment" approach, a policy direction to "avoid" adverse effects is simply one of a number of relevant factors to be considered by the decision maker, albeit that it may be entitled to great weight; under the "environmental bottom line" approach, it has greater force.

Meaning of "inappropriate"

[98] Both pt 2 of the RMA and provisions in the NZCPS refer to protecting areas such as outstanding natural landscapes from "inappropriate" development – they do not refer to protecting them from *any* development.[116] This suggests that the framers contemplated that there might be "appropriate" developments in such areas, and raises the question of the standard against which "inappropriateness" is to be assessed.

[99] Moreover, objective 6 and policies 6 and 8 of the NZCPS invoke the standard of "appropriateness". To reiterate, objective 6 provides in part:

> To enable people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through subdivision, use, and development, recognising that:
>
> - the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits;

[116] RMA, s 6(a) and (b); NZCPS, above n 13, objective 6 and policies 13(1)(a) and 15(a).

This is echoed in policy 6 which deals with activities in the coastal environment. Policy 6(2)(c) reads: "recognise that there are activities that have a functional need to be located in the coastal marine area, and provide for those activities in appropriate places". Policy 8 indicates that regional policy statements and plans should make provision for aquaculture activities:

> … in appropriate places in the coastal environment, recognising that relevant considerations may include:
>
> (i) the need for high water quality for aquaculture activities; and
>
> (ii) the need for land-based facilities associated with marine farming;

[100] The scope of the words "appropriate" and "inappropriate" is, of course, heavily affected by context. For example, where policy 8 refers to making provision for aquaculture activities "in appropriate places in the coastal environment", the context suggests that "appropriate" is referring to suitability for the needs of aquaculture (for example, water quality) rather than to some broader notion. That is, it is referring to suitability in a technical sense. By contrast, where objective 6 says that the protection of the values of the coastal environment does not preclude use and development "in appropriate places and forms, and within appropriate limits", the context suggests that "appropriate" is not concerned simply with technical suitability for the particular activity but with a broader concept that encompasses other considerations, including environmental ones.

[101] We consider that where the term "inappropriate" is used in the context of protecting areas from inappropriate subdivision, use or development, the natural meaning is that "inappropriateness" should be assessed by reference to what it is that is sought to be protected. It will be recalled that s 6(b) of the RMA provides:

> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
>
> …
>
> (b) the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:
>
> …

A planning instrument which provides that any subdivision, use or development that adversely affects an area of outstanding natural attributes is inappropriate is consistent with this provision.

[102] The meaning of "inappropriate" in the NZCPS emerges from the way in which particular objectives and policies are expressed. Objective 2 deals with preserving the natural character of the coastal environment and protecting natural features and landscape values through, among other things, "identifying those areas where various forms of subdivision, use, and development would be inappropriate and protecting them from such activities". This requirement to identify particular areas, in the context of an overall objective of preservation and protection, makes it clear that the standard for inappropriateness relates back to the natural character and other attributes that are to be preserved or protected, and also emphasises that the NZCPS requires a strategic, region-wide approach. The word "inappropriate" in policies 13(1)(a) and (b) and 15(a) and (b) of the NZCPS bears the same meaning. To illustrate, the effect of policy 13(1)(a) is that there is a policy to preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development *by avoiding the adverse effects on natural character in areas of the coastal environment with outstanding natural character*. The italicised words indicate the meaning to be given to "inappropriate" in the context of policy 13.

[103] If "inappropriate" is interpreted in the way just described, it might be thought to provide something in the nature of an "environmental bottom line". However, that will not necessarily be so if policies 13 and 15 and similarly worded provisions are regarded simply as relevant considerations which may be outweighed in particular situations by other considerations favouring development, as the "overall judgment" approach contemplates.

[104] An alternative approach is to treat "inappropriate" (and "appropriate" in objective 6 and policies 6(2)(c) and 8) as the mechanism by which an overall judgment is to be made about a particular development proposal. On that approach, a decision-maker must reach an evaluation of whether a particular development proposal is, in all the circumstances, "appropriate" or "inappropriate". So, an

aquaculture development that will have serious adverse effects on an area of outstanding natural character may nevertheless be deemed not to be "inappropriate" if other considerations (such as suitability for aquaculture and economic benefits) are considered to outweigh those adverse effects: the particular site will be seen as an "appropriate" place for aquaculture in terms of policy 8 despite the adverse effects.

[105] We consider that "inappropriate" should be interpreted in s 6(a), (b) and (f) against the backdrop of what is sought to be protected or preserved. That is, in our view, the natural meaning. The same applies to objective 2 and policies 13 and 15 in the NZCPS. Again, however, that does not resolve the fundamental issue in the case, namely whether the "overall judgment" approach adopted by the Board is the correct approach. We now turn to that.

Was the Board correct to utilise the "overall judgment" approach?

[106] In the extracts from its decision which we have quoted at [34] to [35] and [81] above, the Board emphasised that in determining whether or not it should grant the plan changes, it had to make an "overall judgment" on the facts of the particular proposal and in light of pt 2 of the RMA.

[107] We noted at [38] above that several early decisions of the Planning Tribunal adopted what has been described as the "environmental bottom line" approach to s 5. That approach finds some support in the speeches of responsible Ministers in the House. In the debate on the second reading of the Resource Management Bill, the Rt Hon Geoffrey Palmer said:[117]

> The Bill as reported back does not reflect a wish list of any one set of views. Instead, it continues to reflect the balancing of the range of views that society holds about the use of land, air, water and minerals, while recognising that there is an ecological bottom line to all of those questions.

In introducing the Bill for its third reading, the Hon Simon Upton said:[118]

> The Bill provides us with a framework to establish objectives by a physical bottom line that must not be compromised. Provided that those objectives are met, what people get up to is their affair. As such, the Bill provides a

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[117] (28 August 1990) 510 NZPD 3950.
[118] (4 July 1991) 516 NZPD 3019.

> more liberal regime for developers. On the other hand, activities will have to be compatible with hard environmental standards, and society will set those standards. Clause 4 [now s 5] sets out the biophysical bottom line. Clauses 5 and 6 [now ss 6 and 7] set out further specific matters that expand on the issue. The Bill has a clear and rigorous procedure for the setting of environmental standards – and the debate will be concentrating on just where we set those standards. They are established by public process.

[108] In the plan change context under consideration, the "overall judgment" approach does not recognise any such bottom lines, as Dobson J accepted. The Judge rejected the view that some coastal environments could be excluded from marine farming activities absolutely as a result of their natural attributes. That approach, he said, "would be inconsistent with the evaluative tenor of the NZCPS, when assessed in the round".[119] Later, the Judge said:[120]

> The essence of EDS's concern is to question the rationale, in resource management terms, for designating coastal areas as having outstanding natural character or features, if that designation does not protect the area from an economic use that will have adverse effects. An answer to that valid concern is that such designations do not afford absolute protection. Rather, they require a materially higher level of justification for relegating that outstanding natural character or feature, when authorising an economic use of that coastal area, than would be needed in other coastal areas.

Accordingly, Dobson J upheld the "overall judgment" approach as the approach to be adopted.

[109] One noteworthy feature of the extract just quoted is the requirement for "a materially higher level of justification" where an area of outstanding natural character will be adversely affected by a proposed development. The Board made an observation to similar effect when it said:[121]

> [1240] The placement of any salmon farm into this dramatic landscape with its distinctive landforms, vegetation and seascape, would be an abrupt incursion. This together with the Policy directions of the Sounds Plan as indicated by its CMZ1 classification of Port Gore, weighs heavily against the Proposed Plan Change.

We consider these to be significant acknowledgements and will return to them shortly.

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119 *King Salmon* (HC), above n 2, at [149].
120 At [151].
121 *King Salmon* (Board), above n 6.

[110] Mr Kirkpatrick argued that the Board and the Judge were wrong to adopt the "overall judgment" approach, submitting in particular that it:

(a) is inconsistent with the Minister's statutory power to set national priorities "for the preservation of the natural character of the coastal environment of New Zealand, including protection from inappropriate subdivision, use, and development";[122] and

(b) does not reflect the language of the relevant policies of the NZCPS, in particular policies 8, 13 and 15.

[111] In response, Ms Gwyn emphasised that the policies in the NZCPS were policies, not standards or rules. She argued that the NZCPS provides direction for decision-makers (including boards of inquiry) but leaves them with discretion as to how to give effect to the NZCPS. Although she acknowledged that policies 13 and 15 give a strong direction, Ms Gwyn submitted that they cannot and do not prohibit activities that adversely affect coastal areas with outstanding features. Where particular policies are in conflict, the decision-maker is required to exercise its own judgment, as required by pt 2. Mr Nolan's submissions were to similar effect. While he accepted that some objectives or policies provided more guidance than others, they were not "standards or vetos". Mr Nolan submitted that this was "the only tenable, workable approach that would achieve the RMA's purpose". The approach urged by EDS would, he submitted, undermine the RMA's purpose by allowing particular considerations to trump others whatever the consequences.

(i) The NZCPS: policies and rules

[112] We begin with Ms Gwyn's point that the NZCPS contains objectives and policies rather than methods or rules. As Ms Gwyn noted, the Full Court of the Court of Appeal dealt with a similar issue in *Auckland Regional Council v North Shore City Council*.[123] The Auckland Regional Council was in the process of hearing and determining submissions in respect of its proposed regional policy statement. That proposed policy statement included provisions which were designed

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122 RMA, s 58(a).

123 *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18 (CA).

to limit urban development to particular areas (including demarking areas by lines on maps). These provisions were to have a restrictive effect on the power of the relevant territorial authorities to permit further urbanisation in particular areas; the urban limits were to be absolutely restrictive.[124]

[113] The Council's power to impose such restrictions was challenged. The contentions of those challenging these limits were summarised by Cooke P, delivering the judgment of the Court, as follows:[125]

> The defendants contend that the challenged provisions would give the proposed regional policy statement a master plan role, interfering with the proper exercise of the responsibilities of territorial authorities; that it would be "coercive" and that "The drawing of a line on a map is the ultimate rule. There is no scope for further debate or discretion. No further provision can be made in a regional plan or a district plan".

The defendants' essential point was that the Council was proposing to go beyond a policy-making role to a rule-making role, which it was not empowered to do under the RMA.

[114] The Court considered, however, that the defendants' contention placed too limited a meaning on the scope of the words "policy" and "policies" in ss 59 and 62 of the RMA (which deal with, respectively, the purpose and content of regional policy statements). The Court held that "policy" should be given its ordinary and natural meaning and that a definition such as "course of action" was apposite. The Court said:[126]

> It is obvious that in ordinary present-day speech a policy may be either flexible or inflexible, either broad or narrow. Honesty is said to be the best policy. Most people would prefer to take some discretion in implementing it, but if applied remorselessly it would not cease to be a policy. Counsel for the defendants are on unsound ground in suggesting that, in everyday New Zealand speech or in parliamentary drafting or in etymology, policy cannot include something highly specific. …

[115] As to the argument that a regional policy statement could not contain what were in effect rules, Cooke P said:[127]

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124 At 19.
125 At 22.
126 At 23.
127 At 23.

> A well-meant sophistry was advanced to bolster the argument. It was said that the [RMA] in s 2(1) defines "rule" as a district rule or a regional rule, and that the scheme of the [RMA] is that "rules" may be included in regional plans (s 68) or district plans (s 76) but not in regional policy statements. That is true. But it cannot limit the scope of a regional policy statement. The scheme of the [RMA] does not include direct enforcement of regional policy statements against members of the public. As far as now relevant, the authorised contravention procedures relate to breaches of the rules in district plans or proposed district plans (s 9 and Part XII generally). Regional policy statements may contain rules in the ordinary sense of that term, but they are not rules within the special statutory definition directly binding on individual citizens. Mainly they derive their impact from the stipulation of Parliament that district plans may not be inconsistent with them.

[116] In short, then, although a policy in a New Zealand coastal policy statement cannot be a "rule" within the special definition in the RMA, it may nevertheless have the effect of what in ordinary speech would be a rule. Policy 29 in the NZCPS is an obvious example.

(ii) Section 58 and other statutory indicators

[117] We turn next to s 58. It contains provisions which are, in our view, inconsistent with the notion that the NZCPS is, properly interpreted, no more than a statement of relevant considerations, to which a decision-maker is entitled to give greater or lesser weight in the context of determining particular matters. Rather, these provisions indicate that it was intended that a New Zealand coastal policy statement might contain policies that were not discretionary but would have to be implemented if relevant. The relevant provisions provide for a New Zealand coastal policy statement to contain objectives and policies concerning:

(a) national priorities for specified matters (ss 58(a) and (ga));

(b) the Crown's interests in the coastal marine area (s 58(d));

(c) matters to be included in regional coastal plans in regard to the preservation of the natural character of the coastal environment (s 58(e));

(d) the implementation of New Zealand's international obligations affecting the coastal environment (s 58(f));

(e) the procedures and methods to be used to review the policies and monitor their effectiveness (s 58(g)); and

(f) the protection of protected customary rights (s 58 (gb)).

[118] We begin with s 58(a), the language of which is set out at [110](a) above. It deals with the Minister's ability (by means of the NZCPS) to set national priorities in relation to the preservation of the natural character of the coastal environment. This provision contemplates the possibility of objectives and policies the effect of which is to provide absolute protection from the adverse effects of development in relation to particular areas of the coastal environment. The power of the Minister to set objectives and policies containing national priorities for the preservation of natural character is not consistent with the "overall judgment" approach. This is because, on the "overall judgment" approach, the Minister's assessment of national priorities as reflected in a New Zealand coastal policy statement would not be binding on decision-makers but would simply be a relevant consideration, albeit (presumably) a weighty one. If the Minister did include objectives or policies which had the effect of protecting areas of the coastal environment against the adverse effects of development as national priorities, it is inconceivable that regional councils would be free to act inconsistently with those priorities on the basis that, although entitled to great weight, they were ultimately no more than relevant considerations. The same is true of s 58(ga), which relates to national priorities for maintaining and enhancing public access to and along the coastal marine area (that is, below the line of mean high water springs).

[119] A similar analysis applies in respect of ss 58(d), (f) and (gb). These enable the Minister to include in a New Zealand coastal policy statement objectives and policies concerning first, the Crown's interests in the coastal marine area, second, the implementation of New Zealand's international obligations affecting the coastal environment and third, the protection of protected rights. We consider that the Minister is entitled to include in such a statement relevant objectives and policies that are intended, where relevant, to be binding on decision-makers. If policies concerning the Crown's interests, New Zealand's international obligations or the protection of protected rights were to be stated in binding terms, it is difficult to see

what justification there could be for interpreting them simply as relevant considerations which a decision-maker would be free to apply or not as it saw appropriate in particular circumstances. The Crown's interests in the coastal marine area, New Zealand's relevant international obligations and the protection of protected rights are all matters about which it is to be expected that the Minister would have authority to make policies that are binding if he or she considered such policies were necessary.

[120] Next we come to s 58(g), which permits objectives and policies concerning "the procedures and methods to be used to review the policies and to monitor their effectiveness". It will be recalled that one of the responsibilities of the Minister under s 28(d) of the RMA is to monitor the effect and implementation of New Zealand coastal policy statements. The Minister would be entitled, in our view, to set out policies in a New Zealand coastal policy statement that were designed to impose obligations on local authorities so as to facilitate that review and monitoring function. It is improbable that any such policies were intended to be discretionary as far as local authorities were concerned.

[121] Finally, there is s 58(e). It provides that a New Zealand coastal policy statement may state objectives or policies about:

> the matters to be included in 1 or more regional coastal plans in regard to the preservation of the natural character of the coastal environment, including the activities that are required to be specified as restricted coastal activities because the activities—
>
> (i) have or are likely to have significant or irreversible adverse effects on the coastal marine area; or
>
> (ii) relate to areas in the coastal marine area that have significant conservation value: …

The term "restricted coastal activity" is defined in s 2 to mean "any discretionary activity or non-complying activity that, in accordance with section 68, is stated by a regional coastal plan to be a restricted coastal activity". Section 68 allows a regional council to include rules in regional plans. Section 68(4) provides that a rule may specify an activity as a restricted coastal activity only if the rule is in a regional coastal plan and the Minister of Conservation has required the activity to be so

specified on one of the two grounds contained in s 58(e). The obvious mechanism by which the Minister may require the activity to be specified as a restricted coastal activity is a New Zealand coastal policy statement. Accordingly, although the matters covered by s 58(e) are to be stated as objectives or policies in a New Zealand coastal policy statement, the intention must be that any such requirement will be binding on the relevant regional councils. Given the language and the statutory context, a policy under s 58(e) cannot simply be a factor that a regional council must consider or about which it has discretion.

[122] This view is confirmed by policy 29 in the NZCPS, which states that the Minister does not require any activity to be specified as a restricted coastal activity in a regional coastal plan and directs local authorities that they must amend documents in the ways specified to give effect to this policy as soon as practicable. Policy 29 is highly prescriptive and illustrates that a policy in a New Zealand coastal policy statement may have the effect of what, in ordinary speech, might be described as a rule (because it must be observed), even though it would not be a "rule" under the RMA definition.

[123] In addition to these provisions in s 58, we consider that s 58A offers assistance. It provides that a New Zealand coastal policy statement may incorporate material by reference under sch 1AA of the RMA. Clause 1 of sch 1AA relevantly provides:

> **1 Incorporation of documents by reference**
>
> (1) The following written material may be incorporated by reference in a national environmental standard, national policy statement, or New Zealand coastal policy statement:
>
> (a) standards, requirements, or recommended practices of international or national organisations:
>
> (b) standards, requirements, or recommended practices prescribed in any country or jurisdiction:
>
> …
>
> (3) Material incorporated by reference in a national environmental standard, national policy statement, or New Zealand coastal policy statement has legal effect as part of the standard or statement.

[124] As can be seen, cl 1 envisages that a New Zealand coastal statement may contain objectives or policies that refer to standards, requirements or recommended practices of international and national organisations. This also suggests that Parliament contemplated that the Minister might include in a New Zealand coastal policy statement policies that, in effect, require adherence to standards or impose requirements, that is, policies that are prescriptive and are expected to be followed. If this is so, a New Zealand coastal policy statement cannot properly be viewed as simply a document which identifies a range of potentially relevant policies, to be given effect in subordinate planning documents as decision-makers consider appropriate in particular circumstances.

[125] Finally in this context, we mention ss 55 and 57. Section 55(2) relevantly provides that, if a national policy statement so directs, a regional council[128] must amend a regional policy statement or regional plan to include specific objectives or policies or so that objectives or policies in the regional policy statement or regional plan "give effect to objectives and policies specified in the [national policy] statement". Section 55(3) provides that a regional council "must also take any other action that is specified in the national policy statement". Under s 57(2), s 55 applies to a New Zealand coastal policy statement as if it were a national policy statement "with all necessary modifications". Under s 43AA the term "regional plan" includes a regional coastal plan. These provisions underscore the significance of the regional council's (and therefore the Board's) obligation to "give effect to" the NZCPS and the role of the NZCPS as an mechanism for Ministerial control. They contemplate that a New Zealand coastal policy statement may be directive in nature.

(iii) Interpreting the NZCPS

[126] We agree with Mr Kirkpatrick that the language of the relevant policies in the NZCPS is significant and that the various policies are not inevitably in conflict or pulling in different directions. Beginning with language, we have said that "avoid" in policies 13(1)(a) and 15(a) is a strong word, meaning "not allow" or "prevent the occurrence of", and that what is "inappropriate" is to be assessed against the

[128] Section 55 of the RMA uses the term "local authority", which is defined in s 2 to include a regional council.

characteristics of the environment that policies 13 and 15 seek to preserve. While we acknowledge that the most likely meaning of "appropriate" in policy 8(a) is that it relates to suitability for salmon farming, the policy does not suggest that provision must be made for salmon farming in *all* places that might be appropriate for it in a particular coastal region.

[127] Moreover, when other provisions in the NZCPS are considered, it is apparent that the various objectives and policies are expressed in deliberately different ways. Some policies give decision-makers more flexibility or are less prescriptive than others. They identify matters that councils should "take account of" or "take into account",[129] "have (particular) regard to",[130] "consider",[131] "recognise",[132] "promote"[133] or "encourage";[134] use expressions such as "as far as practicable",[135] "where practicable",[136] and "where practicable and reasonable";[137] refer to taking "all practicable steps"[138] or to there being "no practicable alternative methods".[139] Policy 3 requires councils to adopt the precautionary approach, but naturally enough the implementation of that approach is addressed only generally; policy 27 suggests a range of strategies. Obviously policies formulated along these lines leave councils with considerable flexibility and scope for choice. By contrast, other policies are expressed in more specific and directive terms, such as policies 13, 15, 23 (dealing with the discharge of contaminants) and 29. These differences matter. One of the dangers of the "overall judgment" approach is that it is likely to minimise their significance.

[128] Both the Board and Dobson J acknowledged that the language in which particular policies were expressed did matter: the Board said that the concern underpinning policies 13 and 15 "weighs heavily against" granting the plan change and the Judge said that departing from those policies required "a materially higher

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129 NZCPS, above n 13, policies 2(e) and 6(g).
130 Policy 10; see also policy 5(2).
131 Policies 6(1) and 7(1)(a).
132 Policies 1, 6, 9, 12(2) and 26(2).
133 Policies 6(2)(e) and 14.
134 Policies 6(c) and 25(c) and (d).
135 Policies 2(c) and (g) and 12(1).
136 Policies 14 (c), 17(h), 19(4), 21(c) and 23(4)(a).
137 Policy 6(1)(i).
138 Policy 23(5)(a).
139 Policy 10(1)(c).

level of justification".[140] This view that policies 13 and 15 should not be applied in the terms in which they are drafted but simply as very important considerations was based on the perception that to apply them in accordance with their terms would be contrary to the purpose of the RMA and unworkable. Both Ms Gwyn and Mr Nolan supported this position in argument; they accepted that policies such as policies 13 and 15 provided "more guidance" than other policies or constituted "starting points", but argued that they were not standards, nor did they operate as vetoes. Although this view of the NZCPS as a document containing guidance or relevant considerations of differing weight has significant support in the authorities, it is not one with which we agree.

[129] When dealing with a plan change application, the decision-maker must first identify those policies that are relevant, paying careful attention to the way in which they are expressed. Those expressed in more directive terms will carry greater weight than those expressed in less directive terms. Moreover, it may be that a policy is stated in such directive terms that the decision-maker has no option but to implement it. So, "avoid" is a stronger direction than "take account of ". That said however, we accept that there may be instances where particular policies in the NZCPS "pull in different directions". But we consider that this is likely to occur infrequently, given the way that the various policies are expressed and the conclusions that can be drawn from those differences in wording. It may be that an apparent conflict between particular policies will dissolve if close attention is paid to the way in which the policies are expressed.

[130] Only if the conflict remains after this analysis has been undertaken is there any justification for reaching a determination which has one policy prevailing over another. The area of conflict should be kept as narrow as possible. The necessary analysis should be undertaken on the basis of the NZCPS, albeit informed by s 5. As we have said, s 5 should not be treated as the primary operative decision-making provision.

[131] A danger of the "overall judgment" approach is that decision-makers may conclude too readily that there is a conflict between particular policies and prefer one

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[140] *King Salmon* (Board), above n 6, at [1240]; and *King Salmon* (HC), above n 2, at [151].

over another, rather than making a thoroughgoing attempt to find a way to reconcile them. In the present case, we do not see any insurmountable conflict between policy 8 on the one hand and policies 13(1)(a) and 15(a) on the other. Policies 13(1)(a) and 15(a) provide protections against adverse effects of development in particular limited areas of the coastal region – areas of *outstanding* natural character, of *outstanding* natural features and of *outstanding* natural landscapes (which, as the use of the word "outstanding" indicates, will not be the norm). Policy 8 recognises the need for sufficient provision for salmon farming in areas suitable for salmon farming, but this is against the background that salmon farming cannot occur in one of the outstanding areas if it will have an adverse effect on the outstanding qualities of the area. So interpreted, the policies do not conflict.

[132] Policies 13(1)(a) and (b) and 15(a) and (b) do, in our view, provide something in the nature of a bottom line. We consider that this is consistent with the definition of sustainable management in s 5(2), which, as we have said, contemplates protection as well as use and development. It is also consistent with classification of activities set out in s 87A of the RMA, the last of which is activities that are prohibited.[141] The RMA contemplates that district plans may prohibit particular activities, either absolutely or in particular localities. If that is so, there is no obvious reason why a planning document which is higher in the hierarchy of planning documents should not contain policies which contemplate the prohibition of particular activities in certain localities.

[133] The contrast between the 1994 New Zealand Coastal Policy Statement (the 1994 Statement) and the NZCPS supports the interpretation set out above. Chapter 1 of the 1994 Statement sets out national priorities for the preservation of the natural character of the coastal environment. Policy 1.1.3 provides that it is a national priority to protect (among other things) "landscapes, seascapes and landforms" which either alone or in combination are essential or important elements of the natural character of the coastal environment. Chapter 3 deals with activities involving subdivision, use or development of areas of the coastal environment. Policy 3.2.1 provides that policy statements and plans "should define what form of

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[141] See [16] above.

subdivision, use or development would be appropriate in the coastal environment, and where it would be appropriate". Policy 3.2.2 provides:

> Adverse effects of subdivision, use or development in the coastal environment should as far as practicable be avoided. Where complete avoidance is not practicable, the adverse effects should be mitigated and provision made for remedying those effects, to the extent practicable.

[134] Overall, the language of the 1994 Statement is, in relevant respects, less directive and allows greater flexibility for decision-makers than the language of the NZCPS. The greater direction given by the NZCPS was a feature emphasised by Minister of Conservation, Hon Kate Wilkinson, when she released the NZCPS. The Minister described the NZCPS as giving councils "clearer direction on protecting and managing New Zealand's coastal environment" and as reflecting the Government's commitment "to deliver more national guidance on the implementation of the [RMA]".[142] The Minister said that the NZCPS was more specific than the 1994 Statement "about how some matters of national importance under the RMA should be protected from inappropriate use and development". Among the key differences the Minister identified was the direction on protection of natural character and outstanding landscapes. The emphasis was "on local councils to produce plans that more clearly identify where development will need to be constrained to protect special areas of the coast". The Minister also noted that the NZCPS made provision for aquaculture "in appropriate places".

[135] The RMA does, of course, provide for applications for private plan changes. However, we do not see this as requiring or even supporting the adoption of the "overall judgment" approach (or undermining the approach which we consider is required). We make two points:

(a) First, where there is an application for a private plan change to a regional coastal plan, we accept that the focus will be on the relevant locality and that the decision-maker may grant the application on a basis which means the decision has little or no significance beyond that locality. But the decision-maker must nevertheless always have

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[142] Office of the Minister of Conservation "New Coastal Policy Statement Released" (28 October 2010).

regard to the region-wide perspective that the NZCPS requires to be taken. It will be necessary to put the application in its overall context.

(b) Second, Papatua at Port Gore was identified as an area of outstanding natural attributes by the Marlborough District Council. An applicant for a private plan change in relation to such an area is, of course, entitled to challenge that designation. If the decision-maker is persuaded that the area is not properly characterised as outstanding, policies 13 and 15 allow for adverse effects to be remedied or mitigated rather than simply avoided, provided those adverse effects are not "significant". But if the coastal area deserves the description "outstanding", giving effect to the NZCPS requires that it be protected from development that will adversely affect its outstanding natural attributes.

[136] There are additional factors that support rejection of the "overall judgment" approach in relation to the implementation of the NZCPS. First, it seems inconsistent with the elaborate process required before a national coastal policy statement can be issued. It is difficult to understand why the RMA requires such an elaborate process if the NZCPS is essentially simply a list of relevant factors. The requirement for an evaluation to be prepared, the requirement for public consultation and the requirement for a board of inquiry process or an equivalent all suggest that a New Zealand coastal policy statement has a greater purpose than merely identifying relevant considerations.

[137] Second, the "overall judgment" approach creates uncertainty. The notion of giving effect to the NZCPS "in the round" or "as a whole" is not one that is easy either to understand or to apply. If there is no bottom line and development is possible in any coastal area no matter how outstanding, there is no certainty of outcome, one result being complex and protracted decision-making processes in relation to plan change applications that affect coastal areas with outstanding natural attributes. In this context, we note that historically there have been three mussel farms at Port Gore, despite its CMZ1 classification. The relevant permits came up

for renewal.[143] On various appeals from the decisions of the Marlborough District Council on the renewal applications, the Environment Court determined, in a decision issued on 26 April 2012, that renewals for all three should be declined. The Court said:[144]

> [238] In the end, after weighing all the evidence in respect of each mussel farm individually in the light of the relevant policy directions in the various statutory instruments and the RMA itself, we consider that achieving the purpose of the [RMA] requires that each application for a mussel farm should be declined.

[138] While the Court conducted an overall analysis, it was heavily influenced by the directives in policies 13 and 15 of the NZCPS, as given effect in this locality by the Marlborough District Council's CMZ1 zoning. This was despite the fact that the applicants had suggested mechanisms whereby the visual impact of the mussel farms could be reduced. There is no necessary inconsistency between the Board's decision in the present case and that of the Environment Court,[145] given that different considerations may arise on a salmon farm application than on a mussel farm application. But a comparison of the outcomes of the two cases does illustrate the uncertainty that arises from the "overall judgment" approach: although the mussel farms would have had an effect on the natural character and landscape attributes of the area that was less adverse than that arising from a salmon farm, the mussel farm applications were declined whereas the salmon farm application was granted.

[139] Further, the "overall judgment" approach has the potential, at least in the case of spot zoning plan change applications relating to coastal areas with outstanding natural attributes, to undermine the strategic, region-wide approach that the NZCPS requires regional councils to take to planning. We refer here to policies 7, 13(1)(c) and (d) and 15(d) and (e).[146] Also significant in this context is objective 6, which provides in part that "the proportion of the coastal marine area under any formal protection is small and therefore management under the [RMA] is an important

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143 Although the farms were in a CMZ1 zone, mussel farming at the three locations was treated as a discretionary activity.

144 *Port Gore Marine Farms v Marlborough District Council*, above n 110.

145 The Board was aware of the Court's decision because it cited it for a particular proposition: see *King Salmon* (Board), above n 6, at [595].

146 See [63] above.

means by which the natural resources of the coastal marine area can be protected". This also requires a "whole of region" perspective.

[140] We think it significant that the Board did not discuss policy 7 (although it did refer to it in its overview of the NZCPS), nor did it discuss the implications of policies 13(1)(c) and (d) and 15(d) and (e). As applied, the "overall judgment" approach allows the possibility that developments having adverse effects on outstanding coastal landscapes will be permitted on a piecemeal basis, without a full assessment of the overall effect of the various developments on the outstanding areas within the region as a whole. At its most extreme, such an approach could result in there being few outstanding areas of the coastal environment left, at least in some regions.

[141] A number of objections have been raised to the interpretation of the NZCPS that we have accepted, which we now address. First, we acknowledge that the opening section of the NZCPS contains the following:

> [N]umbering of objectives and policies is solely for convenience and is not to be interpreted as an indication of relative importance.

But the statement is limited to the impact of numbering; it does not suggest that the differences in wording as between various objectives and policies are immaterial to the question of relative importance in particular contexts. Indeed, both the Board and the Judge effectively accepted that policies 13 and 15 did carry additional weight. Ms Gwyn and Mr Nolan each accepted that this was appropriate. The contested issue is, then, not whether policies 13 and 15 have greater weight than other policies in relevant contexts, but rather how much additional weight.

[142] Second, in the *New Zealand Rail* case, Grieg J expressed the view that pt 2 of the RMA should not be subjected to "strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used".[147] He went on to say that there is "a deliberate openness about the language, its meanings and its connotations which … is intended to allow the application of

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147 *New Zealand Rail Ltd*, above n 71, at 86.

policy in a general and broad way."[148] The same might be said of the NZCPS. The NZCPS is, of course, a statement of objectives and policies and, to that extent at least, does differ from an enactment. But the NZCPS is an important part of a carefully structured legislative scheme: Parliament required that there be such a policy statement, required that regional councils "give effect to" it in the regional coastal plans they were required to promulgate, and established processes for review of its implementation. The NZCPS underwent a thoroughgoing process of development; the language it uses does not have the same "openness" as the language of pt 2 and must be treated as having been carefully chosen. The interpretation of the NZCPS must be approached against this background. For example, if the intention was that the NZCPS would be essentially a statement of potentially relevant considerations, to be given varying weight in particular contexts based on the decision-maker's assessment, it is difficult to see how the statutory review mechanisms could sensibly work.

[143] The Minister might, of course, have said in the NZCPS that the objectives and policies contained in it are simply factors that regional councils and others must consider in appropriate contexts and give such weight as they think necessary. That is not, however, how the NZCPS is framed.

[144] Third, it is suggested that this approach to policies 13(1)(a) and 15(a) will make their reach over-broad. The argument is that, because the word "effect" is widely defined in s 3 of the RMA and that definition carries over to the NZCPS, any activity which has an adverse effect, no matter how minor or transitory, will have to be avoided in an outstanding area falling within policies 13 or 15. This, it is said, would be unworkable. We do not accept this.

[145] The definition of "effect" in s 3 is broad. It applies "unless the context otherwise requires". So the question becomes, what is meant by the words "avoid adverse effects" in policies 13(1)(a) and 15(a)? This must be assessed against the opening words of each policy. Taking policy 13 by way of example, its opening words are: "To preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development". Policy 13(1)(a)

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148 At 86.

("avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character") relates back to the overall policy stated in the opening words. It is improbable that it would be necessary to prohibit an activity that has a minor or transitory adverse effect in order to preserve the natural character of the coastal environment, even where that natural character is outstanding. Moreover, some uses or developments may enhance the natural character of an area.

[146] Finally, Ms Gwyn and Mr Nolan both submitted, in support of the views of the Board and the High Court, that to give effect to policies 13(1)(a) and 15(a) in accordance with their terms would be inconsistent with the purpose of the RMA. We do not accept that submission. As we have emphasised, s 5(2) of the RMA contemplates environmental preservation and protection as an element of sustainable management of natural and physical resources. This is reinforced by the terms of s 6(a) and (b). It is further reinforced by the provision of a "prohibited activity" classification in s 87A, albeit that it applies to documents lower in the hierarchy of planning documents than the NZCPS. It seems to us plain that the NZCPS contains policies that are intended to, and do, have binding effect, policy 29 being the most obvious example. Policies 13(1)(a) and 15(a) are clear in their terms: they seek to protect areas of the coastal environment with outstanding natural features from the adverse effects of development. As we see it, that falls squarely within the concept of sustainable management and there is no justification for reading down or otherwise undermining the clear terms in which those two policies have been expressed.

[147] We should make explicit a point that is implicit in what we have just said. In *New Zealand Rail*, Grieg J said:[149]

> The recognition and provision for the preservation of the natural character of the coastal environment in the words of s 6(a) is to achieve the purpose of the [RMA], that is to say to promote the sustainable management of natural and physical resources. That means that the preservation of natural character is subordinate to the primary purpose of the promotion of sustainable management. It is not an end or an objective on its own but is accessory to the principle purpose.

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149 At 85.

This passage may be interpreted in a way that does not accurately reflect the proper relationship between s 6, in particular ss 6(a) and (b), and s 5.

[148] At the risk of repetition, s 5(2) defines sustainable management in a way that makes it clear that protecting the environment from the adverse effects of use or development is an aspect of sustainable management – not the only aspect, of course, but an aspect. Through ss 6(a) and (b), those implementing the RMA are directed, "in relation to managing the use, development, and protection of natural and physical resources", to provide for the preservation of the natural character of the coastal environment and its protection, as well as the protection of outstanding natural features and landscapes, from inappropriate development, these being two of seven matters of national importance. They are directed to make such provision in the context of "achieving the purpose of [the RMA]". We see this language as underscoring the point that preservation and protection of the environment is an element of sustainable management of natural and physical resources. Sections 6(a) and (b) are intended to make it clear that those implementing the RMA must take steps to implement that protective element of sustainable management.

[149] Section 6 does not, we agree, give primacy to preservation or protection; it simply means that provision must be made for preservation and protection as part of the concept of sustainable management. The fact that ss 6(a) and (b) do not give primacy to preservation or protection within the concept of sustainable management does not mean, however, that a particular planning document may not give primacy to preservation or protection in particular circumstances. This is what policies 13(1)(a) and 15(a) in the NZCPS do. Those policies are, as we have interpreted them, entirely consistent with the principle of sustainable management as expressed in s 5(2) and elaborated in s 6.

Conclusion on first question

[150] To summarise, both the Board and Dobson J expressed the view that the "overall judgment" approach was necessary to make the RMA workable and to give effect to its purpose of sustainable management. Underlying this is the perception, emphasised by Grieg J in *New Zealand Rail*, that the Environment Court, a specialist

body, has been entrusted by Parliament to construe and apply the principles contained in pt 2 of the RMA, giving whatever weight to relevant principles that it considers appropriate in the particular case.[150] We agree that the definition of sustainable management in s 5(2) is general in nature, and that, standing alone, its application in particular contexts will often, perhaps generally, be uncertain and difficult. What is clear about the definition, however, is that environmental protection by way of avoiding the adverse effects of use or development falls within the concept of sustainable management and is a response legitimately available to those performing functions under the RMA in terms of pt 2.

[151] Section 5 was not intended to be an operative provision, in the sense that it is not a section under which particular planning decisions are made; rather, it sets out the RMA's overall objective. Reflecting the open-textured nature of pt 2, Parliament has provided for a hierarchy of planning documents the purpose of which is to flesh out the principles in s 5 and the remainder of pt 2 in a manner that is increasingly detailed both as to content and location. It is these documents that provide the basis for decision-making, even though pt 2 remains relevant. It does not follow from the statutory scheme that because pt 2 is open-textured, all or some of the planning documents that sit under it must be interpreted as being open-textured.

[152] The NZCPS is an instrument at the top of the hierarchy. It contains objectives and policies that, while necessarily generally worded, are intended to give substance to the principles in pt 2 in relation to the coastal environment. Those objectives and policies reflect considered choices that have been made on a variety of topics. As their wording indicates, particular policies leave those who must give effect to them greater or lesser flexibility or scope for choice. Given that environmental protection is an element of the concept of sustainable management, we consider that the Minister was fully entitled to require in the NZCPS that particular parts of the coastal environment be protected from the adverse effects of development. That is what she did in policies 13(1)(a) and 15(a), in relation to coastal areas with features designated as "outstanding". As we have said, no party challenged the validity of the NZCPS.

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150 At 86.

[153] The Board accepted that the proposed plan change in relation to Papatua at Port Gore would have significant adverse effects on an area of outstanding natural character and landscape, so that the directions in policies 13(1)(a) and 15(a) of the NZCPS would not be given effect to if the plan change were to be granted. Despite this, the Board granted the plan change. It considered that it was entitled, by reference to the principles in pt 2, to carry out a balancing of all relevant interests in order to reach a decision. We consider, however, that the Board was obliged to deal with the application in terms of the NZCPS. We accept the submission on behalf of EDS that, given the Board's findings in relation to policies 13(1)(a) and 15(a), the plan change should not have been granted. These are strongly worded directives in policies that have been carefully crafted and which have undergone an intensive process of evaluation and public consultation. The NZCPS requires a "whole of region" approach and recognises that, because the proportion of the coastal marine area under formal protection is small, management under the RMA is an important means by which the natural resources of the coastal marine area can be protected. The policies give effect to the protective element of sustainable management.

[154] Accordingly, we find that the plan change in relation to Papatua at Port Gore did not comply with s 67(3)(b) of the RMA in that it did not give effect to the NZCPS.

Second question: consideration of alternatives

[155] The second question on which leave was granted raises the question of alternatives. This Court's leave judgment identified the question as:[151]

> Was the Board obliged to consider alternative sites or methods when determining a private plan change that is located in, or results in significant adverse effects on, an outstanding natural landscape or feature or outstanding natural character area within the coastal environment?

The Court went on to say:[152]

> This question raises the correctness of the approach taken by the High Court in *Brown v Dunedin City Council* [2003] NZRMA 420 and whether, if sound, the present case should properly have been treated as an exception to

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151 *King Salmon* (Leave), above n 10, at [1].
152 At [1].

> the general approach. Whether any error in approach was material to the decision made will need to be addressed if necessary.

[156] At the hearing of the appeal, Mr Kirkpatrick suggested modifications to the question, so that it read:

> Was the Board obliged to consider alternative sites when determining a site specific plan change that is located in, or does not avoid significant adverse effects on, an outstanding natural landscape or feature or outstanding natural character area within the coastal environment?

We will address the question in that form.

[157] We should make a preliminary point. We have concluded that the Board, having found that the proposed salmon farm at Papatua would have had significant adverse effects on the area's outstanding natural attributes, should have declined King Salmon's application in accordance with policies 13(1)(a) and 15(a) of the NZCPS. Accordingly, no consideration of alternatives would have been necessary. Moreover, although it did not consider that it was legally obliged to do so, the Board did in fact consider alternatives in some detail.[153] For these reasons, the second question is of reduced significance in the present case. Nevertheless, because it was fully argued, we will address it, albeit briefly.

[158] Section 32 is important in this context. Although we have referred to it previously, we set out the relevant portions of it for ease of reference:

> **32 Consideration of alternatives, benefits, and costs**
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> (1) In achieving the purpose of this Act, before a proposed plan, proposed policy statement, change, or variation is publicly notified, a national policy statement or New Zealand coastal policy statement is notified under section 48, or a regulation is made, an evaluation must be carried out by—
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> …
>
> (b) the Minister of Conservation, for the New Zealand coastal policy statement; or
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> …
>
> (2) A further evaluation must also be made by—

[153] *King Salmon* (Board), above n 6, at [121]–[172].

(a) a local authority before making a decision under clause 10 or clause 29(4) of Schedule 1; and

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

(3) An evaluation must examine—

(a) the extent to which each objective is the most appropriate way to achieve the purpose of this Act; and

(b) whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives.

…

(4) For the purposes of the examinations referred to in subsections (3) and (3A), an evaluation must take into account—

(a) the benefits and costs of policies, rules, or other methods; and

(b) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods.

…

[159] A number of those who made submissions to the Board on King Salmon's plan change application raised the issue of alternatives to the plan changes sought, for example, conversion of mussel farms to salmon farms and expansion of King Salmon's existing farms. As we have said, despite its view that it was not legally obliged to do so, the Board did consider the various alternatives raised and concluded that none was suitable.

[160] The Board noted that it has been held consistently that there is no requirement for consideration of alternatives when dealing with a site specific plan change application.[154] The Board cited, as the principal authority for this proposition, the decision of the High Court in *Brown v Dunedin City Council*.[155] Mr Brown owned some land on the outskirts of Mosgiel that was zoned as "rural". He sought to have the zoning changed to residential. The matter came before the Environment Court on a reference. Mr Brown was unsuccessful in his application

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154 At [124].

155 *Brown v Dunedin City Council* [2003] NZRMA 420 (HC).

and appealed to the High Court, on the basis that the Environment Court had committed a number of errors of law, one of which was that it had allowed itself to be influenced by the potential of alternative sites to accommodate residential expansion. Chisholm J upheld this ground of appeal. Having discussed several decisions of the Environment Court, the Judge said:

> [16] I am satisfied that the theme running through the Environment Court decisions is legally correct: s 32(1) does not contemplate that determination of a site-specific proposed plan change will involve a comparison with alternative sites. As indicated in *Hodge*,[156] when the wording of s 32(1)(a)(ii) (and, it might be added, the expression "principal alternative means" in s 32(1)(b)) is compared with the wording of s 171(1)(a) and clause 1(b) of the Fourth Schedule it appears that such a comparison was not contemplated by Parliament. It is also logical that the assessment should be confined to the subject site. Other sites would not be before the Court and the Court would not have the ability to control the zoning of those sites. Under those circumstances it would be unrealistic and unfair to expect those supporting a site-specific plan change to undertake the mammoth task of eliminating all other potential alternative sites within the district. In this respect a site specific plan change can be contrasted with a full district-wide review of a plan pursuant to s 79(2) of the [RMA]. It might be added that in a situation where for some reason a comparison with alternative sites is unavoidable the Court might have to utilise the powers conferred by s 293 of the [RMA] so that other interested parties have an opportunity to be heard. However, it is unnecessary to determine that point.
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> [17] It should not be implied from the foregoing that the Court is constrained in its ability to assess the effects of a proposed plan change on other properties, or on the district as a whole, in terms of the [RMA]. Such an assessment involves consideration of effects radiating from the existing or proposed zoning (or something in between) of the subject site. This is, of course, well removed from a comparison of alternative sites.

(Chisholm J's observations were directed at s 32 as it was prior to its repeal and replacement by the version at issue in this appeal, which has, in turn, been repealed and replaced.)

[161] The Board also noted the observation of the Environment Court in *Director-General of Conservation (Nelson-Marlborough Conservancy) v Marlborough District Council*:[157]

> It seems to us that whether alternatives should be considered depends firstly on a finding of fact as to whether or not there are significant adverse effects on the environment. If there are significant adverse effects on the

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156 *Hodge v Christchurch City Council* [1996] NZRMA 127 (PT) (citation added).

157 *Director-General of Conservation (Nelson-Marlborough Conservancy) v Marlborough District Council* [2010] NZEnvC 403 at [690] (quoted in *King Salmon* (Board), above n 6, at [126]).

> environment, particularly if they involve matters of national importance, it is a question of fact in each case as to whether or not an applicant should be required to look at alternatives, and the extent to which such an enquiry, including the undertaking of a cost/benefit analysis, should be carried out.

[162] In the High Court Dobson J held that the Board did not commit an error of law in rejecting a requirement to consider alternative locations.[158] The Judge adopted the approach taken by the Full Court of the High Court in *Meridian Energy Ltd v Central Otago District Council*.[159] There, in a resource consent context, the Court contrasted the absence of a specific requirement to consider alternatives with express requirements for such consideration elsewhere in the RMA.[160] The Court accepted that alternatives could be looked at, but rejected the proposition that they must be looked at.[161] Referring to *Brown*, Dobson J said:[162]

> Although the context is relevantly different from that in *Brown*, the same practical concerns arise in imposing an obligation on an applicant for a plan change to canvass all alternative locations. If, in the course of contested consideration of a request for a plan change, a more appropriate means of achieving the objectives is raised, then there is nothing in s 32 or elsewhere in the RMA that would preclude the consenting authority having regard to that as part of its evaluation. That is distinctly different, however, from treating such an assessment as mandatory under s 32.

[163] For EDS, Mr Kirkpatrick's essential point was that, in a case such as the present, it is mandatory to consider alternatives. He submitted that the terms of policies 13(1)(a) and 15(a) required consideration of alternatives in circumstances where the proposed development will have an adverse effect on an area of the coastal environment with outstanding natural attributes. Given that these policies appear alongside policy 8, the Board's obligation was to consider alternative sites in order to determine whether, if it granted the plan change sought, it would "give effect to" the NZCPS. Further, Mr Kirkpatrick argued that *Brown* had been interpreted too widely. He noted in particular the different context – *Brown* concerned a landowner seeking a zoning change in respect of his own land; the present case involves an application for a plan change that will result in the exclusive use of a resource that is in the public domain. Mr Kirkpatrick emphasised that, in considering the plan change, the

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158 *King Salmon* (HC), above n 2, at [174].
159 *Meridian Energy Ltd v Central Otago District Council* [2011] 1 NZLR 482 (HC).
160 At [77]–[81].
161 At [86]–[87].
162 *King Salmon* (HC), above n 2, at [171].

Board had to comply with s 32. That, he argued, required that the Board consider the "efficiency and effectiveness" of the proposed plan change, its benefits and costs and the risk of acting or not acting in conditions of uncertainty. He emphasised that, although this was an application in relation to a particular locality, it engaged the Sounds Plan as a whole.

[164] In response, Mr Nolan argued that s 32 should not be read as requiring consideration of alternative sites. He supported the findings of the Board and the High Court that there was no mandatory requirement to consider alternative *sites*, as opposed to alternative *methods*, which were the focus of s 32: that is, whether the proposed provisions were the most appropriate way to achieve the RMA's purpose. He relied on the *Meridian Energy* case. Mr Nolan accepted that there is nothing to preclude consideration of an alternative raised in the context of an application for a private plan change but said it was not a mandatory requirement. He noted that the decision in *Brown* has been widely adopted and applied and submitted that the distinction drawn by Mr Kirkpatrick between the use of private land and the use of public space for private purposes was unsustainable: s 32 applied equally in both situations. Mr Nolan submitted that to require applicants for a plan change such as that at issue to canvass all possible alternatives would impose too high a burden on them. In an application for a site-specific plan change, the focus should be on the merits of the proposed planning provisions for that site and whether they satisfy s 32 and achieve the RMA's purpose. Mr Nolan noted that there was nothing in policies 13 or 15 which required the consideration of alternative sites.

[165] We do not propose to address these arguments in detail, given the issue of alternatives has reduced significance in this case. Rather, we will make three points.

[166] First, as we have said, Mr Nolan submitted that consideration of alternative sites on a plan change application was not required but neither was it precluded. As he neatly put it, consideration of alternative sites was permissible but not mandatory. But that raises the question, when is consideration of alternative sites permissible? The answer cannot depend simply on the inclination of the decision-maker: such an approach would be unprincipled and would undermine rational decision-making. If consideration of alternatives is permissible, there must surely be something about the

circumstances of particular cases that make it so. Indeed, those circumstances may make consideration of alternatives not simply permissible but necessary. Mr Kirkpatrick submitted that what made consideration of alternatives necessary in this case was the Board's conclusion that the proposed salmon farm would have significant adverse effects on an area of outstanding natural character and landscape.

[167] Second, *Brown* concerned an application for a zoning change in relation to the applicant's own land. We agree with Chisholm J that the RMA does not *require* consideration of alternative sites as a matter of course in that context, and accept also that the practical difficulties which the Judge identified are real. However, we note that the Judge accepted that there may be instances where a consideration of alternative sites was required and suggested a way in which that might be dealt with.[163]

[168] We agree with Chisholm J that there may be instances where a decision-maker must consider the possibility of alternative sites when determining a plan change application in relation to the applicant's own land. We note that where a person requests a change to a district or regional plan, the relevant local authority may (if the request warrants it) require the applicant to provide "further information necessary to enable the local authority to better understand … the benefits and costs, the efficiency and effectiveness, and *any possible alternatives to the request*".[164] The words "alternatives to the request" refer to alternatives to the plan change sought, which must bring into play the issue of alternative sites. The ability to seek further information on alternatives to the requested change is understandable, given the requirement for a "whole of region" perspective in plans. At the very least, the ability of a local authority to require provision of this information supports the view that consideration of alternative sites may be relevant to the determination of a plan change application.

[169] Third, we agree with Mr Kirkpatrick that the question of alternative sites may have even greater relevance where an application for a plan change involves not the use of the applicant's own land, but the use of part of the public domain for a private

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163 *Brown v Dunedin City Council*, above n 155, at [16].
164 RMA, sch 1 cl 23(1)(c) (emphasis added).

commercial purpose, as here. It is true, as Mr Nolan argued, that the focus of s 32 is on the appropriateness of policies, methods or rules – the section does not mention individual sites. That said, an evaluation under s 32(3)(b) must address whether the policies, methods or rules proposed are the "most appropriate" way of achieving the relevant objectives, which requires consideration of alternative policies, methods or rules in relation to the particular site. Further, the fact that a local authority receiving an application for a plan change may require the applicant to provide further information concerning "any possible alternatives to the request" indicates that Parliament considered that alternative sites may be relevant to the local authority's determination of the application. We do not accept that the phrase "any possible alternatives to the request" refers simply to alternative outcomes of the application, that is, granting it, granting it on terms or refusing it.

[170] This brings us back to the question when consideration of alternative sites may be necessary. This will be determined by the nature and circumstances of the particular site-specific plan change application. For example, an applicant may claim that that a particular activity needs to occur in part of the coastal environment. If that activity would adversely affect the preservation of natural character in the coastal environment, the decision-maker ought to consider whether the activity does in fact need to occur in the coastal environment. Almost inevitably, this will involve the consideration of alternative localities. Similarly, even where it is clear that an activity must occur in the coastal environment, if the applicant claims that a particular site has features that make it uniquely, or even especially, suitable for the activity, the decision-maker will be obliged to test that claim; that may well involve consideration of alternative sites, particularly where the decision-maker considers that the activity will have significant adverse effects on the natural attributes of the proposed site. In short, the need to consider alternatives will be determined by the nature and circumstances of the particular application relating to the coastal environment, and the justifications advanced in support of it, as Mr Nolan went some way to accepting in oral argument.

[171] Also relevant in the context of a site specific plan change application such as the present is the requirement of the NZCPS that regional councils take a regional approach to planning. While, as Mr Nolan submitted, a site-specific application

focuses on the suitability of the planning provisions for the proposed site, the site will sit within a region, in respect of which there must be a regional coastal plan. Because that regional coastal plan must reflect a regional perspective, the decision-maker must have regard to that regional perspective when determining a site-specific plan change application. That may, at least in some instances, require some consideration of alternative sites.

[172] We see the obligation to consider alternative sites in these situations as arising at least as much from the requirements of the NZCPS and of sound decision-making as from s 32.

[173] Dobson J considered that imposing an obligation on all site-specific plan change applicants to canvass all alternative locations raised the same practical concerns as were canvassed by Chisholm J in *Brown*.[165] We accept that. But given that the need to consider alternative sites is not an invariable requirement but rather a contextual one, we do not consider that this will create an undue burden for applicants. The need for consideration of alternatives will arise from the nature and circumstances of the application and the reasons advanced in support of it. Particularly where the applicant for the plan change is seeking exclusive use of a public resource for private gain and the proposed use will have significant adverse effects on the natural attributes of the relevant coastal area, this does not seem an unfairly onerous requirement.

Decision

[174] The appeal is allowed. The plan change in relation to Papatua at Port Gore did not comply with s 67(3)(b) of the Resource Management Act 1991 as it did not give effect to policies 13(1)(a) and 15(a) of the New Zealand Coastal Policy Statement. If the parties are unable to agree as to costs, they may file memoranda on or before 2 June 2014.

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[165] *King Salmon* (HC), above n 2, at [171].

WILLIAM YOUNG J

A preliminary comment

[175] The plan change to permit the Papatua salmon farm in Port Gore would permit activities with adverse effects on (a) "areas of the coastal environment with outstanding natural character" and (b) "outstanding natural features and outstanding natural landscapes in the coastal environment" (to which, for ease of discussion, I will refer collectively as "areas of outstanding natural character"). The majority conclude that the protection of areas of outstanding natural character from adverse effects is an "environmental bottom line" by reason of the New Zealand Coastal Policy Statement (NZCPS)[166] to which the Board of Inquiry was required to give effect under s 67(3)(b) of the Resource Management Act 1991. For this reason, the majority is of the view that the plan change should have been refused.

[176] I do not agree with this approach and for this reason disagree with the conclusion of the majority on the first of the two issues identified in their reasons.[167] As to the second issue, I agree with the approach of the majority[168] to *Brown v Dunedin City Council*[169] but, as I am in dissent, see no point in further analysis of the Board's decision as to what consideration was given to alternative sites. I will, however, explain, as briefly as possible, why I differ from the majority on the first issue.

The majority's approach on the first issue – in summary

[177] Section 6(a) and (b) of the Resource Management Act 1991 provide:

> **6 Matters of national importance**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:

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166 Department of Conversation *New Zealand Coastal Policy Statement 2010* (issued by notice in the New Zealand Gazette on 4 November 2010 and taking effect on 3 December 2010) [NZCPS].

167 At [17] of the majority's reasons.

168 At [165]–[173] of the majority's reasons.

169 *Brown v Dunedin City Council* [2003] NZRMA 420 (HC).

(a) the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate … use, and development:

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

…

The majority consider that these subsections, and particularly s 6(b), contemplate planning on the basis that a "use" or "development" which has adverse effects on areas of outstanding natural character is, for that reason alone, "inappropriate". They are also of the view that this is the effect of the NZCPS given policies 13 and 15 which provide:

13 Preservation of natural character

(1) To preserve the natural character of the coastal environment and to protect it from inappropriate … use, and development:

(a) avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character; and

(b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on natural character in all other areas of the coastal environment;

…

15 Natural features and natural landscapes

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

(a) avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment; and

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

…

[178] The majority interpret policies 13 and 15 as requiring regional and territorial authorities to prevent, by specifying as prohibited, any activities which will have adverse effects on areas of outstanding natural character. Section 67(3)(b) of the

RMA thus requires salmon farming to be a prohibited activity in Port Gore with the result that the requested plan change ought to have been refused.

Section 6(a) and (b)

[179] As a matter of logic, areas of outstanding natural character do not require protection from activities which will have no adverse effects. To put this in a different way, the drafting of ss 6(a) and (b) seems to me to leave open the possibility that a use or development might be appropriate despite having adverse effects on areas of outstanding natural character.

[180] Whether a particular use is "inappropriate" or, alternatively, "appropriate" for the purposes of ss 6(a) and (b) may be considered in light of the purpose of the RMA. and thus in terms of s 5. It thus follows that the NZCPS must have been prepared so as to be consistent with, and give effect to, s 5. For this reason, I consider that those charged with the interpretation or application of the NZCPS are entitled to have regard to s 5.

The meaning of the NZCPS

Section 58 of the Resource Management Act

[181] Section 58 of the RMA provides for the contents of New Zealand coastal policy statements:

> **58 Contents of New Zealand coastal policy statements**
>
> A New Zealand coastal policy statement may state objectives and policies about any 1 or more of the following matters:
>
> (a) national priorities for the preservation of the natural character of the coastal environment of New Zealand, including protection from inappropriate … use, and development:
>
> …
>
> (c) activities involving the … use, or development of areas of the coastal environment:
>
> …
>
> (e) the matters to be included in 1 or more regional coastal plans in regard to the preservation of the natural character of the coastal

> environment, including the activities that are required to be specified as restricted coastal activities because the activities—
>
> (i) have or are likely to have significant or irreversible adverse effects on the coastal marine area; or
>
> (ii) relate to areas in the coastal marine area that have significant conservation value:
>
> …

[182] I acknowledge that a "policy" may be narrow and inflexible (as the Court of Appeal held in *Auckland Regional Council v North Shore City Council*[170]) and I thus agree with the conclusion of the majority that a policy may have such a controlling effect on the content of regional plans as to make it a rule "in ordinary speech".[171] Most particularly, I accept that policies stipulated under s 58(e) may have the character of rules.

[183] Under s 58(e), the NZCPS might have stipulated what was required to be included in a regional coastal plan to preserve the natural character of the coastal environment. The example given in the subsection is confined to the specification of activities as restricted coastal activities. This leaves me with at least a doubt as to whether s 58, read as a whole, contemplates policies which require particular activities to be specified as prohibited. I am, however, prepared to assume for present purposes that s 58, and in particular s 58(e), might authorise a policy which required that activities with adverse effects on areas of outstanding natural character be specified as prohibited.

[184] As it happens, the Minister of Conservation made use of s 58(e) but only in a negative sense, as policy 29(1) of the NZCPS provides that the Minister:

> … does not require any activity to be specified as a restricted coastal activity in a regional coastal plan.

[185] Given this explicit statement, it seems plausible to assume that if the Minister's purpose was that some activities (namely those with adverse effects on areas of outstanding natural character) were to be specified as prohibited, this would

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170 *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18 (CA).
171 At [116] of the majority's reasons.

have been "specified" in a similarly explicit way. At the very least, policy 29 makes it clear that the Minister was not relying on s 58(e) to impose such a requirement. I see this as important. Putting myself in the shoes of a Minister who wished to ensure that some activities were to be specified in regional plans as prohibited, I would have attempted to do so under the s 58(e) requiring power rather than in the form of generally stated policies.

The scheme of the NZCPS

[186] Objective 2 of the NZCPS is material to the preservation of the coastal environment. It is relevantly in these terms:

> To preserve the natural character of the coastal environment and protect natural features and landscape values through:
>
> …
>
> - identifying those areas where various forms of … use, and development would be inappropriate and protecting them from such activities; and
>
> …

[187] It is implicit in this language that the identification of the areas in question is for regional councils. I think it is also implicit, but still very clear, that the identification of the "forms of … use, and development" which are inappropriate is also for regional councils.

[188] To the same effect is policy 7:

> **7 Strategic planning**
>
> (1) In preparing regional policy statements, and plans:
>
> …
>
> (b) identify areas of the coastal environment where particular activities and forms of … use, and development:
>
> (i) are inappropriate; and
>
> (ii) may be inappropriate without the consideration of effects through a resource consent application, notice of requirement for designation or Schedule 1 of the [RMA] process;

> and provide protection from inappropriate … use, and development in these areas through objectives, policies and rules.
>
> …

It is again clear – but this time as a result of explicit language – that it is for regional councils to decide as to both (a) the relevant areas of the coastal environment and (b) what "forms of … use, and development" are inappropriate in such areas. There is no suggestion in this language that such determinations have in any way been pre-determined by the NZCPS.

[189] The majority consider that all activities with adverse effects on areas of outstanding natural character must be prevented. Since there is no reason for concern about activities with no adverse effects, the NZCPS, on the majority approach, has pre-empted the exercise of the function which it, by policy 7, has required regional councils to perform. Decisions as to areas of the coastal environment which require protection should be made by the same body as determines the particular "forms of … use, and development" which are inappropriate in such areas. On the majority approach, decisions in the first category are made by regional councils whereas decisions as to the latter have already been made in the NZCPS. This result is too incoherent to be plausibly within the purpose of the NZCPS.

[190] The point I have just made is reinforced by a consideration of the NZCPS's development-focused objectives and policies.

[191] Objective 6 of the NZCPS provides:

> **Objective 6**
>
> To enable people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through … use, and development, recognising that:
>
> - the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits;
>
> - some uses and developments which depend upon the use of natural and physical resources in the coastal environment are important to

the social, economic and cultural wellbeing of people and communities;

- functionally some uses and developments can only be located on the coast or in the coastal marine area;

…

- the protection of habitats of living marine resources contributes to the social, economic and cultural wellbeing of people and communities;

…

- the proportion of the coastal marine area under any formal protection is small and therefore management under the [RMA] is an important means by which the natural resources of the coastal marine area can be protected; and

…

[192] Policy 8 provides:

Aquaculture

Recognise the significant existing and potential contribution of aquaculture to the social, economic and cultural well-being of people and communities by:

(a) including in regional policy statements and regional coastal plans provision for aquaculture activities in appropriate places in the coastal environment, recognising that relevant considerations may include:

(i) the need for high water quality for aquaculture activities; and

(ii) the need for land-based facilities associated with marine farming;

(b) taking account of the social and economic benefits of aquaculture, including any available assessments of national and regional economic benefits; and

(c) ensuring that development in the coastal environment does not make water quality unfit for aquaculture activities in areas approved for that purpose.

[193] Policy 8 gives effect to objective 6, just as policies 13 and 15 give effect to objective 2. There is no suggestion in the NZCPS that objective 2 is to take precedence over objective 6, and there is likewise no indication that policies 13 and 15 take precedence over policy 8. Viewed solely through the lens of policy 8

and on the findings of the Board, Port Gore is an appropriate location for a salmon farm. On the other hand, viewed solely through the lens of policies 13 and 15, it is inappropriate. On the approach of the majority, the standards for determining what is "appropriate" under policy 8 are not the same as those applicable to determining what is "inappropriate" in policies 13 and 15.[172]

[194] I disagree with this approach. The concept of "inappropriate … use [or] development" in the NZCPS is taken directly from ss 6(a) and (b) of the RMA. The concept of a "use" or "development" which is or may be "appropriate" is necessarily implicit in those subsections. There was no point in the NZCPS providing that certain uses or developments would be "appropriate" other than to signify that such developments might therefore not be "inappropriate" for the purposes of other policies. So I simply do not accept that there is one standard for determining whether aquaculture is "appropriate" for the purposes of policy 8 and another standard for determining whether it is "inappropriate" for the purposes of policies 13 and 15. Rather, I prefer to resolve the apparent tension between policy 8 and policies 13 and 15 on the basis of a single concept – informed by the NZCPS as a whole and construed generally in light of ss 6(a) and (b) and also s 5 – of what is appropriate and inappropriate. On the basis of this approach, the approval of the salmon farm turned on whether it was appropriate (or not inappropriate) having regard to policies 8, 13 and 15 of the NZCPS, with ss 5 and 6(a) and (b) of the RMA being material to the interpretation and application of those policies.

[195] I accept that this approach requires policies 13 and 15 to be construed by reading into the first two bullets points of each policy the word "such" to make it clear that the polices are directed to the adverse effects of "inappropriate … use, and development". By way of illustration, I consider that policy 13 should be construed as if it provided:

> **13 Preservation of natural character**
>
> (1) To preserve the natural character of the coastal environment and to protect it from inappropriate … use, and development:

[172] At [98]–[105] of the majority's reasons.

> (a) avoid adverse effects of *such* activities on natural character in areas of the coastal environment with outstanding natural character; and
>
> (b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of *such* activities on natural character in all other areas of the coastal environment; …

[196] The necessity to add words in this way shows that my interpretation of the policies is not literal. That said, I do not think it is difficult to construe these policies on the basis that given the stated purpose – protection from "inappropriate … use, and development" – what follows should read as confined to activities which are associated with "inappropriate … use, and development". Otherwise, the policies would go beyond their purpose.

[197] The majority avoid the problem of the policies going beyond their purpose by concluding that any use or development which would produce adverse effects on areas of outstanding natural character is, for this reason, "inappropriate". That, however, is not spelt out explicitly in the policies. As I have noted, if it was the purpose of the Minister to require that activities with such effects be specified as prohibited, that would have been provided for directly and pursuant to s 58(e). So I do not see their approach as entirely literal either (because it assumes a determination that adverse effects equates to "inappropriate", which is not explicit). It is also inconsistent with the scheme of the NZCPS under which decisions as to what is "appropriate" or "inappropriate" in particular cases (that is, by reference to specific locations and activities) is left to regional councils. The approach taken throughout the relevant objectives and policies of the NZCPS is one of shaping regional coastal plans but not dictating their content.

[198] We are dealing with a policy statement and not an ordinary legislative instrument. There seems to me to be flexibility given that (a) the requirement is to "give effect" to the NZCPS rather than individual policies, (b) the language of the policies, which require certain effects to be avoided and not prohibited,[173] and (c) the context provided by policy 8. Against this background, I think it is wrong to

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[173] Compare the discussion and cases cited in [92]–[97] of the majority's reasons.

construe the NZCPS and, more particularly, certain of its policies, with the rigour customary in respect of statutory interpretation.

Overbroad consequences

[199] I think it is useful to consider the consequences of the majority's approach, which I see as overbroad.

[200] "Adverse effects" and "effects" are not defined in the NZCPS save by general reference to the RMA definitions.[174] This plainly incorporates into the NZCPS the definition in s 3 of the RMA:

> **3 Meaning of effect**
>
> In this Act, unless the context otherwise requires, the term **effect** includes—
>
> (a) any positive or adverse effect; and
>
> (b) any temporary or permanent effect; and
>
> (c) any past, present, or future effect; and
>
> (d) any cumulative effect which arises over time or in combination with other effects—
>
> regardless of the scale, intensity, duration, or frequency of the effect, and also includes—
>
> (e) any potential effect of high probability; and
>
> (f) any potential effect of low probability which has a high potential impact.

[201] On the basis that the s 3 definition applies, I consider that a corollary of the approach of the majority is that regional councils must promulgate rules which specify as prohibited any activities having any perceptible adverse effect, even temporary, on areas of outstanding natural character. I think that this would preclude some navigation aids and it would impose severe restrictions on privately-owned land in areas of outstanding natural character. It would also have the potential generally to be entirely disproportionate in its operation as any perceptible adverse effect would be controlling irrespective of whatever benefits, public or private, there

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[174] The NZCPS, above n 166, at 8 records that "[d]efinitions contained in the Act are not repeated in the Glossary".

might be if an activity were permitted. I see these consequences as being so broad as to render implausible the construction of policies 13 and 15 proposed by the majority.

[202] The majority suggest that such consequences can be avoided.[175] They point out that the s 3 definition of "effect" does not apply if the context otherwise requires. They also, rather as I have done, suggest that the literal words in which the policies are expressed can be read down in light of the purposes stated in each policy (in essence to the protection of areas of outstanding natural character). There is the suggestion of a de minimis approach. They also point out that a development might enhance an area of outstanding character (presumably contemplating that beneficial effects might outweigh any adverse effects).

[203] I would like to think that a sensible approach will be taken to the future application of the NZCPS in light of the conclusions of the majority as to the meaning of policies 13 and 15 and I accept that for reasons of pragmatism, such an approach might be founded on reasoning of the kind provided by the majority. But I confess to finding it not very convincing. In particular:

(a) I think it clear that the NZCPS uses "effects" in its s 3 sense.

(b) While I agree that the policies should be read down so as not to go beyond their purposes,[176] I think it important to recognise that those purposes are confined to protection only from "inappropriate" uses or developments.

(c) Finally, given the breadth of the s 3 definition and the distinction it draws between "positive" and "adverse" effects, I do not see much scope for either a de minimis approach or a balancing of positive and adverse effects.

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[175] At [144] of the majority's reasons.
[176] See above at [195].

My conclusion as to the first issue

[204] On my approach, policies 13 and 15 on the one hand and policy 8 on the other are not inconsistent. Rather, they required an assessment as to whether a salmon farm at Papatua was appropriate. Such assessment required the Board to take into account and balance the conflicting considerations – in other words, to form a broad judgment. A decision that the salmon farm at Papatua was appropriate was not inconsistent with policies 13 and 15 as I construe them and, on this basis, the s 67(3)(b) requirement to give effect to the NZCPS was not infringed.

[205] This approach is not precisely the same as that adopted by the Board. It is, however, sufficiently close for me to be content with the overall judgment of the Board on this issue.

Solicitors:
DLA Phillips Fox, Auckland for Appellant
Russell McVeagh, Wellington for First Respondent
Dyhrberg Drayton, Wellington for Second Respondent
DLA Phillips Fox, Wellington for Third Respondent
Crown Law Office, Wellington for Fourth Respondents
Buddle Findlay, Wellington for Board of Inquiry

BEFORE THE ENVIRONMENT COURT

Decision No. [2014] NZEnvC 55

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of an appeal under clause 14 of the First Schedule to the Act
BETWEEN	COLONIAL VINEYARD LIMITED
	(ENV-2012-CHC-108)
	Appellant
AND	MARLBOROUGH DISTRICT COUNCIL
	Respondent

Court:	Environment Judge J R Jackson Environment Commissioner J R Mills Environment Commissioner A J Sutherland
Venue:	Blenheim
Hearing dates:	9 to 13 and 16 and 17 September 2013. (Final submissions received 24 October 2013).
Appearances:	N Davidson QC and M J Hunt for Colonial Vineyard Limited S F Quinn and M Booth for Marlborough District Council Q A M Davies and D P Neild for New Zealand Aviation Limited and The Marlborough Aero Club (under s274) M Radich for Trustees of the Carlton Corlett Trust (under s274)
Date of Decision:	14 March 2014
Date of Issue:	14 March 2014

DECISION

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

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

(1) the appeal is allowed;

(2) the decision of the Marlborough District Council dated 31 July 2012 is cancelled; and

(3) Plan Change 59 as notified is approved subject to the changes stated in the Reasons below.

B: Subject to C, the parties are directed to discuss the proposed policies, maps and rules and if possible to lodge an agreed set by Wednesday 30 April 2014.

C: Under section 293 the council is directed to consult with the parties over the urban design principles included in Mr T G Quickfall's Appendix 4 and to lodge its approved version for approval by the Environment Court by 30 April 2014.

D: Leave is reserved for any party to apply for further directions (under section 293 of the RMA or otherwise) if agreement cannot be reached.

E: Costs are reserved.

REASONS

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1. Introduction

1.1 The issue: should the land be rezoned residential?

[1] The principal question in this proceeding is whether a 21.4 hectare vineyard in New Renwick Road on the southern side of the Wairau Plains near Blenheim should be rezoned for residential development, as sought in private Plan Change 59 ("PC59").

1.2 The vineyard and its landscape setting

[2] The vineyard is owned by Colonial Vineyard Ltd ("CVL"). The land is legally described as Lot 2 DP350626 and Lot 1 DP11019 ("the site"). The site is flat and is located south of New Renwick Road between Richardson Avenue and Aerodrome Road, on the periphery of Blenheim. It is west of the Taylor River which is about 100 metres away at its closest, and about 400 metres from the extensive reserves and walking tracks of the Wither Hills. The site is currently planted with Sauvignon Blanc grapes, and the north, south and east boundaries are lined by olive trees[1].

[1] M Davis, evidence-in-chief at para [9] [Environment Court document 3].

[3] The land opposite the site on the eastern and northern boundaries has Residential zoning[2]. The land to the south of the site is rural land owned by the Carlton Corlett Trust. It is currently in pasture and light industrial/commercial development and likely future light industrial development[3].

[4] Further to the south, on more land owned by the Carlton Corlett Trust, are the Omaka Aviation Heritage Centre and related aviation and engineering activities, and a Car Museum. An airport used for general aviation called "the Omaka airfield" adjoins the Omaka Museum site and is to the southwest of the CVL site.

[5] The Omaka aerodrome was established in 1928 and contains what are reputed to be the oldest set of grass runways in the country. The Marlborough Aero Club Inc., which is based there, is one of the oldest flying clubs in the country. Omaka is now the main airfield in Marlborough for general (as opposed to commercial) aviation. Operations include helicopter businesses for crop spraying and frost protection, pilot training and aircraft repair work. Omaka is also the home of the Aviation Heritage Centre which houses a superb collection of World War I aircraft and replicates and other memorabilia. The grass runways and the adjacent workshops in the hangars are of heritage value, whereas the helicopter operations and some of the aircraft maintenance are parts of the "air transport" infrastructure.

[6] The site and the airfield are about 600 metres apart at their closest. The 55 dBA Ldn noise contour from the Omaka airfield currently crosses the Carlton Corlett land in (approximately) an east-west line several hundred metres south of the site as shown in the acoustic engineer, Dr J W Trevathan's Plan B[4]. This contour is based on three months of data recorded by Mr D S Park and includes helicopter noise abatement paths as discussed later in this decision.

[7] Blenheim's urban area is to the north and east of the site. The Wither Hills lie south, and to the west and northwest is the Wairau Plain, principally covered in large-scale vineyards. Approximately 5 kilometres northwest of the site is Marlborough's main commercial airport at Woodbourne.

1.3 Plan Change 59

[8] CVL was the initiator of the request for a private plan change (PC59) to the Wairau Awatere Resource Management Plan ("WARMP"). The proposal for Plan Change 59 was lodged with the Marlborough District Council in April 2011. PC59 sought to rezone the site from Rural 3 (the Wairau Plain zone) to Urban Residential 1 and 2 to provide for residential development. The plan change also sought to amend or

2 T G Quickfall, evidence-in-chief [9](b) [Environment Court document 18].
3 T G Quickfall, evidence-in-chief [9](c) [Environment Court document 18].
4 J W Trevathan, supplementary brief of evidence, Attachment B [Environment Court document 14B].

add some policies[5] in the district plan, together with consequential changes to methods of implementation.

[9] CVL initiated its plan change following the initial completion of the Southern Marlborough Urban Growth Strategy 2010 ("the 2010 Strategy") that assessed the residential growth potential in different areas using a "multi-criteria" approach[6]. The analysis under the 2010 Strategy is quite comprehensive and CVL placed some reliance on that process and its findings as part of its section 32 analysis of PC59.

[10] CVL's original version of PC59 (as notified) sought the following:

(a) to produce a residential development consistent with good design principles;
(b) to rezone the bulk (15 hectares) of the site as Urban Residential 1;
(c) to rezone 6.4 hectares on the southern and western boundaries of the site as Urban Residential 2;
(d) to amend the WARMP by introducing proposed policies set out in Appendix 1 to the application;
(e) to amend Appendix G of the WARMP so that the CVL site be identified and the rules will require buildings to be constructed in accordance with the 'Indoor Design Sound Levels set out in Appendix M'[7].

[11] The only important policy change is that PC59 (as notified) proposes that policy (11.2.2)1.3 be amended as follows:

> Maintain high density residential use <u>close to open spaces and</u> within the inner residential sector of Blenheim located within easy walking distance to the west and[8] [south of] the Central Business Zone.

The underlined words are the addition. The effect of the proposed change would be to allow some relatively high density residential development close to open spaces, thus expanding the scope for residential development of the site, and elsewhere to the south of the CBD.

[12] The application for a plan change was approved for notification and publicly notified. There were submissions and a hearing. So far that was routine. However, at the council hearing CVL purported to amend its application to incorporate the following changes:

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5 Policies (11.2.2)1.3; (19.3)1.7 and (19.7)1.8; (23.5.1)1.17 and 1.18; (29.2)8.1.
6 T G Quickfall, evidence-in-chief [15] [Environment Court document 18].
7 Commissioners' Decision para 12 – citing the CVL application at p 56.
8 PC59 actually uses the words "sought for" rather than "south of" but that misquotes (and makes nonsense of) the actual policy.

(a) the provision of an internal roading hierarchy including a primary local road and low speed residential streets;
(b) a requirement for acoustic insulation within the entire site for dwellings;
(c) a new zoning map;
(d) a concept plan showing likely roading connections and open space layout; and
(e) other changes to objectives and policies to better reflect those requirements in this location.

Changes (a) to (d) cause us no jurisdictional difficulties, but (e) may.

[13] The potential difficulties were compounded because the proposed objectives and policies were further amended in Mr Quickfall's evidence. CVL now proposes to add two new objectives to Section 23.6 of the WARMP[9]. The first is a new objective specific not to the site but to Omaka Aerodrome and the aviation cluster. This would be[10]:

> To recognise, provide for and protect on-going operation and strategic importance of the Omaka Aerodrome and aviation cluster (activities related to the Aerodrome).

While well-intentioned, the additions to objectives proposed by CVL at the council hearing and then, in an expanded version, to the court are beyond jurisdiction. They refer to land which is not the subject of the notified plan change (and not even contiguous to the site) and there are persons not before the court (e.g. some neighbours of the airfield) who might be affected by further amendments to the plan change. On the principles stated in *Hamilton City Council v NZ Historic Places Trust*[11] and *Auckland Council v Byerley Park Limited*[12], there must be considerable doubt about the court's jurisdiction to add the first objective. In any event, since no party suggested we give directions under section 293 in respect of them, we will not consider them further.

[14] Although the 2010 Strategy made some initial recommendations, the final recommendations are dated March 2013 and were adopted by MDC on 21 March 2013. These final recommendations note the importance of Omaka airfield as a regional resource and suggest that the appellant's land (the subject of PC59) be earmarked for employment activities, rather than residential. That is a significant shift from the 2010 Strategy's recommendations[13] as we shall discuss in more detail later.

[15] The council issued its decision declining CVL's application for private plan change on 31 July 2012. CVL appealed the decision to the Environment Court. The

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9 We question the number: existing 23.6 of the WARMP relates to Methods of Implementation, not objectives or policies.
10 T G Quickfall, evidence-in-chief Annexure 4 [Environment Court document 18].
11 *NZ Historic Places Trust v Hamilton City Council* [2005] NZRMA 145 at [25] (HC).
12 *Auckland Council v Byerley Park Limited* [2013] NZHC 3402 at [41]-[42].
13 M J Foster, evidence-in-chief [1.11] [Environment Court document 27].

council supported its decision and was supported by the section 274 parties — NZ Aviation Ltd and the Marlborough Aero Club (together called "the Omaka Group") and the Carlton Corlett Trust.

[16] Throughout the hearing various terms were used to describe non-residential urban land. We will, with some reservations about the term's generality, follow the council's new practice and use the term "employment land" to encompass land suitable for business, retail and industrial uses.

1.4 What matters must be considered?

[17] Since these proceedings concern a plan change we must first identify the legal matters in relation to which we must consider the evidence. In *Long Bay-Okura Great Park Society Incorporated v North South City Council*[14] the Environment Court listed a "relatively comprehensive summary of the mandatory requirements" for the RMA in its form before the Resource Management Amendment Act 2005. The court updated this list in the light of the 2005 Amendments in *High Country Rosehip Orchards Ltd v Mackenzie District Council ("High Country Rosehip")*[15]. We now amend the list given in those cases to reflect the major changes made by the Resource Management Amendment Act 2009. The different legal standards to be applied are emphasised, and we have underlined the changes and additions[16] since *High Country Rosehip*[17]:

A. General requirements
   1. A district plan (change) should be designed to **accord with**[18] — and assist the territorial authority **to carry out** — its functions[19] so as to achieve the purpose of the Act[20].
   2. The district plan (change) must also be prepared **in accordance with** any regulation[21] (there are none at present) and any direction given by the Minister for the Environment[22].
   3. When preparing its district plan (change) the territorial authority **must give effect to**[23] any national policy statement or New Zealand Coastal Policy Statement[24].
   4. When preparing its district plan (change) the territorial authority shall:
      (a) **have regard to** any proposed regional policy statement[25];

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14 *Long Bay-Okura Great Park Society Incorporated v North Shore City Council* Decision A78/2008 at para [34].

15 *High Country Rosehip Orchards Ltd v Mackenzie District Council* [2011] NZEnvC 387.

16 Some additions and changes of emphasis and/or grammar are not identified.

17 Noting also:
   (a) that former A6 has been renumbered as A2 and all subsequent numbers in A have dropped down one;
   (b) that the list in D has been expanded to cover fully the 2005 changes.

18 Section 74(1) of the Act.

19 As described in section 31 of the Act.

20 Sections 72 and 74(1) of the Act.

21 Section 74(1) of the Act.

22 Section 74(1) of the Act added by section 45(1) Resource Management Amendment Act 2005.

23 Section 75(3) RMA.

24 The reference to "any regional policy statement" in the *Rosehip* list here has been deleted since it is included in (3) below which is a more logical place for it.

25 Section 74(2)(a)(i) of the RMA.

(b) **give effect to** any operative regional policy statement[26].

5. In relation to regional plans:
   (a) the district plan (change) must **not be inconsistent** with an operative regional plan for any matter specified in section 30(1) or a water conservation order[27]; and
   (b) **must have regard to** any proposed regional plan on any matter of regional significance etc[28].
6. When preparing its district plan (change) the territorial authority must also:
   - **have regard to** any relevant management plans and strategies under other Acts, and to any relevant entry in the Historic Places Register and to various fisheries regulations[29] to the extent that their content has a bearing on resource management issues of the district; and to consistency with plans and proposed plans of adjacent territorial authorities[30];
   - **take into account** any relevant planning document recognised by an iwi authority[31]; and
   - not have regard to trade competition[32] or the effects of trade competition;
7. The formal requirement that a district plan (change) must[33] also state its objectives, policies and the rules (if any) and may[34] state other matters.

B. Objectives [the section 32 test for objectives]

8. Each proposed objective in a district plan (change) **is to be evaluated** by the extent to which it is the most appropriate way to achieve the purpose of the Act[35].

C. Policies and methods (including rules) [the section 32 test for policies and rules]

9. The policies are to **implement** the objectives, and the rules (if any) are to **implement** the policies[36];
10. Each proposed policy or method (including each rule) is to be examined, **having regard to its efficiency and effectiveness,** as to whether it is the most appropriate method for achieving the objectives[37] of the district plan **taking into account**:
    (i) the benefits and costs of the proposed policies and methods (including rules); and
    (ii) 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[38]; and
    (iii) if a national environmental standard applies and the proposed rule imposes a greater prohibition or restriction than that, then whether that greater prohibition or restriction is justified in the circumstances[39].

D. Rules

11. In making a rule the territorial authority must **have regard to** the actual or potential effect of activities on the environment[40].

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26 Section 75(3)(c) of the Act [as substituted by section 46 Resource Management Amendment Act 2005].
27 Section 75(4) of the Act [as substituted by section 46 Resource Management Amendment Act 2005].
28 Section 74(2)(a)(ii) of the Act.
29 Section 74(2)(b) of the Act.
30 Section 74(2)(c) of the Act.
31 Section 74(2A) of the Act.
32 Section 74(3) of the Act as amended by section 58 Resource Management (Simplifying and Streamlining) Act 2009.
33 Section 75(1) of the Act.
34 Section 75(2) of the Act.
35 Section 74(1) and section 32(3)(a) of the Act.
36 Section 75(1)(b) and (c) of the Act (also section 76(1)).
37 Section 32(3)(b) of the Act.
38 Section 32(4) of the RMA.
39 Section 32(3A) of the Act added by section 13(3) Resource Management Amendment Act 2005.
40 Section 76(3) of the Act.

12. Rules have the force of regulations[41].
13. Rules may be made for the protection of property from the effects of surface water, and these may be more restrictive[42] than those under the Building Act 2004.
14. There are special provisions for rules about contaminated land[43].
15. There must be no blanket rules about felling of trees[44] in any urban environment[45].

E. Other statues:
16. Finally territorial authorities may be required to comply with other statutes.

F. (On Appeal)
17. On appeal[46] the Environment Court must **have regard to** one additional matter — the decision of the territorial authority[47].

[18] In relation to A above:

(1) it is expressly within the prescribed functions of the council to control[48] the actual or potential effects of the use, development and protection of land by establishing and implementing[49] objectives, policies and rules. Part 2 of the Act is considered later;
(2) there are no directions from the Minister for the Environment;
(3) no national policy statement is relevant, nor is the NZ Coastal Policy Statement;
(4) we outline the relevant provisions in the operative regional policy statement in Part 2 of this Decision;
(5) the regional plan is the district plan in this case because, as a unitary authority the Marlborough District Council has prepared a combined plan[50];
(6) none of the witnesses identified any relevant matter under this heading;
(7) section 75(2) would be satisfied by acceptance or refusal of PC59.

We will return to the issue of whether the plan change achieves the purpose of the RMA at the end of this decision.

[19] Item B is irrelevant since objectives of the district plan are not sought to be changed by the plan change as notified.

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41 Section 76(2) RMA.
42 Section 76(2A) RMA.
43 Section 76(5) RMA as added by section 47 Resource Management Amendment Act 2005 and amended in 2009.
44 Section 76(4A) RMA as added by the Resource Management (Simplifying and Streamlining) Amendment Act 2009.
45 Section 76(4B) RMA — this "Remuera rule" was added by the Resource Management (Simplifying and Streamlining) Amendment Act 2009.
46 Under section 290 and Clause 14 of the First Schedule to the Act.
47 Section 290A RMA as added by the Resource Management Amendment Act 2005.
48 Section 31(1) RMA.
49 Section 31(1)(b) RMA.
50 Chapter 1 para 1.0 [WARMP p 1-1].

[20] In relation to C, a key part of the case is to consider the proposed new policy and the rezoning. Since the new policy effectively seeks to justify the zoning of the site for residential purposes, we will consider the policy and the zoning together under the section 32 tests. They require us to examine, having regard to the efficiency and effectiveness of the proposed policy change and zoning, whether they are the most appropriate method for achieving the objectives of the district plan.

[21] We will consider D in relation to the proposed rules at the appropriate time. E (Other statutes) is irrelevant. Finally, in relation to F: we will have regard to the Commissioners' decision at the end of this decision.

1.5 The questions to be answered

[22] In summary the questions which need to be answered under the list in the previous section are:

- what are the relevant provisions in the operative regional policy (which must be given effect to) and what are the relevant objectives in the WARMP — the operative district plan (which must be implemented by PC59)? [See 2 below];
- what are the benefits and costs of PC59 and the alternatives? [See 3 below];
- what are the risks of approving (or not) PC59? [See 4 below];
- does PC59 give effect to the RPS and is it the most appropriate method for achieving the objectives of the WARMP? [See 5 below];
- does PC59 achieve the purpose of the RMA? [See 6 below];
- should the result be different from the council's decision? [See 7 below].

[23] The first alternative in this case is, whether the site should be rezoned for residential development now or whether any urban rezoning should wait until a district plan review is carried out. It is largely uncontested (at least by the council, the Omaka Group position is less clear) that the site should be used for urban purposes. However, the case for the council before us was that the site should probably be used for industrial ("employment") purposes, and that should be resolved in a proposed plan review.

[24] The other choice is to do nothing. That is, to retain the existing zoning at present because of the alleged effects that residential development may have on future use of the Omaka airfield and the Omaka Aviation Heritage Centre.

2. Identifying the relevant objectives and policies

2.1 The Marlborough Regional Policy Statement

[25] We must give effect to any operative regional policy statement. In these proceedings the relevant document is the Marlborough Regional Policy Statement ("the RPS") which became operative on 28 August 1995. The policies and methods most relevant to this proceeding are found in the chapter on Community Wellbeing (Part 7 of the RPS). Objective 7.1.2 focuses on the quality of life, seeking to maintain and enhance the quality of life for people while ensuring activities do not adversely affect the environment. Implementing policy 7.1.5 seeks to avoid, remedy or mitigate adverse effects of activities on the health of people and communities. Another implementing policy is to enhance amenity values provided by the unique character of Marlborough settlements[51]. The explanation recognises that Blenheim is the main urban, business and service settlement in Marlborough.

[26] A further policy[52] enables the appropriate type, scale and location of activities by:

- clustering activities with similar effects;
- ensuring activities reflect the character and facilities available in the communities in which they are located;
- promoting the creation and maintenance of buffer zones (such as stream banks or 'greenbelts');
- locating activities with noxious elements in areas where adverse environmental effects can be avoided, remedied or mitigated.

[27] Objective 7.1.14 is to provide safe and efficient community infrastructure in a sustainable way. An important implementing policy relates to 'Air Transport'. The relevant policy, methods and explanation state[53]:

> 7.1.17 Policy – Air Transport
> [To] enable the safe and efficient operation of the air transport system consistent with the duty to avoid, remedy or mitigate adverse environmental effects.
>
> 7.1.18 Methods
> (a) Recognise and provide for Marlborough (Woodbourne) Airport as Marlborough's main air transport facility for both military and civilian purposes.
>
> *Marlborough Airport is an important link for air transport (for passengers and freight) between Marlborough and the rest of New Zealand and potentially overseas. Operation of the airport for civilian and military purposes is an important activity in Marlborough and it is appropriate that Council has a policy which reflects this.*

51 Policy 7.1.7 [RPS p 57].
52 Policy 7.1.10 [RPS p 59].
53 Policy 7.1.17 and 18 RPS.

(b) Commercial and industrial activities which support or service the air transport industry and defence will be provided for.

Facilities at Marlborough Airport and the associated RNZAF Base Woodbourne are well developed to serve air transport and military aviation needs. This policy recognises this and seeks to promote commercial and industrial development and military activities associated with air transport.

(c) Regulate within the resource management plans, land use activities which have a possible impact on the safe and efficient operation of air transport systems.

Urban development in the vicinity of Woodbourne Airport should be discouraged where the use of land for such purposes would adversely affect the safe and efficient operation of aircraft and airport facilities. Some controls may be necessary to ensure that activities do not conflict with the safe and efficient operation of aircraft operating into and out of Marlborough. The resource management plans will also provide for navigation aids within Marlborough which service aircraft using the airport and for any aircraft generally in the area.

It is noteworthy that the Woodbourne airport is identified as the main air transport facility for Marlborough. The Omaka airfield is not expressly mentioned. In his closing submissions for the council, Mr Quinn stated that the Omaka airfield is regionally significant[54] in respect of its provision of general aviation functions since Woodbourne is primarily a commercial airport for scheduled air services and some military activity. The RPS does not support that submission. At best the significance of the Omaka airfield is recognised at the policy level in the District Plan, (as we will see shortly). On the other hand, the Omaka airfield does have heritage values — especially in connection with the Aviation Heritage Centre — which we consider later.

[28] In relation to heritage values, objective 7.3.2 of the RPS requires that buildings and locations identified as having significant heritage value are retained. Potentially, that could apply to the Omaka airfield. However, the implementing policy[55] is to protect "identified" heritage features. The methods contemplate that resource management plans will identify significant features, and the Omaka airfield has not been so identified in the RPS.

2.2 The Wairau Awatere Resource Management Plan

[29] The combined district and regional plan for the Wairau Awatere area of the district is called "The Wairau Awatere Resource Management Plan" (abbreviated to "WARMP") and envisages its life as being ten years[56]. It became operative in full on 25 August 2011.

[30] The WARMP is in three volumes. Volume 1 contains 24 chapters of objectives and policies, the rules are in Volume 2, and zoning and other maps are in Volume 3. Of the many chapters of objectives and policies, three are of particular relevance in this proceeding. They are:

54 Closing submissions for Marlborough District Council, dated 4 October 2013, at [87].
55 Policy 7.3.3 RPS.
56 Chapter 1, para 1.5 [WARMP Vol 1 p 1-2].

Chapter 11	Urban Environments
Chapter 12	Rural Environments
...	
Chapter 22	Noise

[31] The principal policies guiding potential residential development are found in Chapter 11, to which we now turn.

Urban environments (Chapter 11)

[32] The first objective in this chapter of the WARMP is to maintain and create[57] residential environments which provide for the existing and future needs of the "community". The primary policy to implement that objective is to accommodate[58] residential growth and development of Blenheim within the current boundaries of the town. Policy 1.3 states:

> Maintain high density residential use within the inner residential sector of Blenheim located within easy walking distance to the west and[59] south of the Central Business Zone.

We have already recorded that PC59 proposes a minor change to this policy with the addition of words justifying high density residential use "close to open spaces".

[33] Some urban expansion is contemplated by policy 1.5 which is[60]:

> ... [to] ensure where proposals for the expansion of urban areas are proposed, that the relationship between urban limits and surrounding rural areas is managed to achieve the following:
>
> - compact urban form;
> - integrity of the road network;
> - maintenance of rural character and amenity values;
> - appropriate planning for service infrastructure; and
> - maintenance and enhancement of the productive soils of rural land.

[34] Chapter 11 of the WARMP also describes the sort of environment contemplated for an urban environment. Objective 11.4 provides for "the maintenance and enhancement of the amenities and visual character of residential environments".

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57 Objective (11.2.2)1 [WARMP p 11-3].
58 Policy (11.2.2)1.1 [WARMP p 11-3].
59 PC59 actually uses the words "sought for" rather than "south of" but it misquotes (and makes nonsense of) the actual policy.
60 Policy (11.2.2)1.5 [WARMP p 11-3].

[35] Chapter 11 of the WARMP also provides for business and industrial activities. In relation to the latter the objective[61] is to contain the effects of industry within the two identified Industrial Zones: the heavy industrial activity in Industrial 1 Zone at Riverlands and Burleigh; and the lighter Industrial 2 Zone strung along State Highways 1 and 6. There is no objective or policy governing the creation of new industrial zones within the urban environments of the district.

The rural environment (Chapter 12)

[36] Chapter 12 contains two relevant sections, relating to General Rural Activities and to Airport Zones. Subchapter 12.4 which covers the area outside Wairau Plain's Rural 3 zoning[62] contains an objective[63] of providing a range of activities in the large rural section of the district. The implementing policy[64] seeks to ensure that the location, scale and nature, design and management of (amongst other activities) industry will protect the amenity values of the rural areas. In summary, any industrial growth in the Rural Zones is to be in the general rural areas, not in the lower Wairau Plain.

[37] In fact the land of most interest to this case is in special zones:

- the current zoning of the site[65] is Rural 3;
- the Omaka airfield is zoned[66] 'Airport Zone' (as are the Woodbourne and Picton airfields) in the WARMP;
- the Aviation Museum site to the northeast of the Omaka airfield is also zoned Rural 3.

[38] Chapter 12 (Rural Environments) of the WARMP sets out a range of issues, objectives and policies for the district's "Airport zone[s]". PC59 as notified did not include any amendments to chapter 12 and so it should be consistent with the objectives and policies in that chapter so far as that may be required by the plan. Paragraph 12.7.1 identifies[67] as an issue:

> Recognition of the need for and importance of national, regional and local air facilities, and providing for them, whilst avoiding, remedying or mitigating any adverse effects of airport activities on surrounding areas.

The explanation continues:

> Each of the air facilities has the potential to cause significant environmental effects including traffic generation, chemical / fuel hazard, landscape impact, and most significantly, noise pollution. The operational efficiency and functioning of Marlborough Airport, Base

61 Objective (11.4.2)1 [WARMP p 11-24].
62 Subchapter 12.2 pp 12-1 *et ff.*
63 Objective (12.4.2)2 [WARMP p 12-15].
64 Policy (12.4.2)2.5 [WARMP p 12-15].
65 See e.g. Map 155 in WARMP Vol 3.
66 See Maps 153 and 164 [WARMP Vol 3] which shows the airport zone in an ochre colour and specifically identifies "Omaka Airport".
67 WARMP Vol 1 p 12-22.

> Woodbourne, and Omaka Airfield requires continual on-site maintenance and servicing of aircraft, often associated with significant noise generation (engine testing in particular). It is essential for the continued development of industry, commerce and tourism activity in the District that a high level of air transport access is maintained. Performance standards will be applied to all activities within airport areas to avoid, remedy or mitigate adverse effects. **Likewise, the sustainability of the airport is also dependent on not being penalised by the encroachment of activities which are by their very nature sensitive to noise for normal airport operations.** (emphasis added).

[39] In that light, the objective and three policies for the airport zone(s) are[68]:

Objective 1	The effective, efficient and safe operation of the District's airport facilities.
Policy 1.1	To provide protection of air corridors for aircraft using Marlborough, Omaka and Picton Airports through height and use restrictions.
Policy 1.2	To establish maximum acceptable levels of aircraft noise exposure around Marlborough Airport and Omaka Aerodrome for the protection of community health and amenity values whilst recognising the need to operate the airport efficiently and provide for its reasonable growth.
Policy 1.3	To protect airport operations from the effects of noise sensitive activities.

[40] The methods of implementation identified are to represent the airfields as Airport Zones in the planning maps and then to establish rules to[69]:

> Plan rules provide for the continued development, improvement and operation of the airports subject to measures to avoid remedy or mitigate any adverse effects. Rules define the extent of the airport protection corridors through height and surrounding land use restrictions.
>
> Plan rules will, within an area determined with reference to the 55 Ldn noise contour (surveyed in accordance with NZS 6805 'Airport Noise Management and Land Use Planning'), require activities to be screened through the resource consent process and where permitted to establish noise attenuation will be required.
>
> | | |
> |---|---|
> | Performance Conditions | Conditions are included to protect surrounding residential land uses from excessive noise. |

[41] In fact no air noise contours or outer control boundaries have yet been introduced for the Omaka airfield. In contrast they <u>are</u> shown for the Woodbourne Airport on Map 147[70] as an "Airport Noise Exposure Overlay". CVL placed significant weight on this difference since the WARMP anticipated that an outer control boundary will be created for all the District's airports[71]. The council's evidence is that the process began for the Omaka airfield in 2007[72] and as demonstrated by the uncertainty in the noise evidence it will apparently take some time yet to resolve.

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68 Objective 12.7.2 [WARMP p 12-23].

69 Para 12.7.7.3 [WARMP p 12-23 to 12-24].

70 WARMP Vol 3 Maps 146 and 147.

71 e.g. noise buffers surrounding the airport are considered the most effective means of protecting "their" operations (WARMP p 12-23).

72 R L Hegley, evidence-in-chief, para 5 [Environment Court document 25].

Noise (Chapter 22)

[42] Chapter 22 of the district plan essentially provides for the protection of communities from noise which may raise health concerns. The objective and most relevant policies are those in subchapter 22.3 which state:

Objective 1	Protection of individual and community health, environmental and amenity values from disturbance, disruption or interference by noise.
Policy 1.1	Avoid, remedy or mitigate community disturbance, disruption or interference by noise within coastal, rural and urban areas.
Policy 1.2	Include techniques to avoid the emission of excessive or unreasonable noises within the design of any proposal for the development or use of resources.
Policy 1.3	Accommodate inherently noisy activities and processes which are ancillary to normal activities within industrial and rural areas.

...

Subdivision (Chapter 23)

[43] We were referred to a number of policies in this chapter. Policy 1.6 requires decision-makers to "recognise the potential for amenity conflict between the rural environment and the activities on the urban periphery". Similarly policy 1.8 is to: "consider the effects of subdivision on the rural environment in so far as this contributes to the character of the Plan Area, and avoid or mitigate any adverse effects". Policy 23.4.1.1.11 is "to ensure that any adverse effects of subdivision on the functioning of services and other infrastructure and on roading are avoided, remedied or mitigated". We consider these policies are to be applied when a subdivision application or consent for land use is being applied for. They are not relevant when the rezoning of land is being considered. There is a plethora of policies — as identified above — to be considered already.

Rules

[44] For completeness we record that in the volume of rules[73], section 44 sets out the rules in the Airport Zone. These apply to Omaka airfield. The usual aviation activities are permitted activities[74]. Woodbourne Airport has its take-off and landing paths protected on the Planning Maps in accordance with Map 213 'Airport Protection and Designation 2'. Omaka airfield's flight paths are set out in a rule[75] rather than in a map.

2.3 NZS 6805: the Air Noise Standard

[45] It will be recalled that the methods of implementation in the district plan expressly contemplate application of the New Zealand Standard ("NZS 6805:1992") called "Airport Noise Management and Land Use Planning". That includes as the main recommended methods of airport noise management[76]:

73 WARMP Vol 2.
74 Rule 44.1.1 [WARMP Vol 2 p 44-1].
75 Rule 44.1.4.2.2 [WARMP Vol 2 p 44-3].
76 NZS 6805 para 1.1.5.

(a) ... establish[ing] maximum levels of aircraft noise exposure at an Airnoise Boundary, given as a 24 hour daily sound exposure averaged over a three month period (or such other period as is agreed).

(b) ... establish[ing] a second, and outer, control boundary for the protection of amenity values, and prescribes the maximum sound exposure from aircraft noise at this boundary.

[46] In relation to the latter, NZS 6805 explains:

1.4.2 *The outer control boundary*

1.4.2.1
The outer control boundary defines an area outside the airnoise boundary within which there shall be no new incompatible land uses (see table 2).

1.4.2.2
The predicted 3 month average night-weighted sound exposure at or outside the outer control boundary shall not exceed 10 Pa^2s (55 Ldn).

[47] NZS 6805 then describes how to locate the two boundaries. The two important points for present purposes are that once the technical measurements and extrapolations have been made, the decision as to where to locate the two boundaries is made under the procedures[77] for preparation of district plans under the RMA; and, secondly, that evaluative (normative) decisions have to be made by the local authority under clause 1.4.3.7 as to whether the predicted contours at the chosen date in the future are a "reasonable basis for future land use planning", taking into account a wide range of factors.

[48] For completeness we record that the standard then refers to two tables which are explained in this way[78]:

1.8 Explanation of tables

C1.8.1
All considerations of annoyance, health and welfare with respect to noise are based on the long term integrated adverse responses of people. There is considerable weight of evidence that a person's annoyance reaction depends on the average daily sound exposure received. The short term annoyance reaction to individual noise events is not explicitly considered since only the accumulated effects of repeated annoyance can lead to adverse environmental effects on public health and welfare. Thus in all aircraft noise considerations the noise exposure is based on an average day over an extended period of time — usually a yearly or seasonal average. (Further details may be obtained from US EPA publication 500/9-74-004 "Information on levels of environmental noise requisite to protect public health and welfare with an adequate margin of safety").

77 Schedule 1 to the RMA.
78 Para 1.8 NZS 6805.

Table 2

[49] A Table 2 is then introduced as follows[79]:

> Table 2 enumerates the recommended criteria for land use planning within the outer control boundary i.e. 24 hour average night-weighted sound exposure in excess of 10 Pa^2s.

Table 2 states:

> RECOMMENDED NOISE CONTROL CRITERIA FOR LAND USE PLANNING INSIDE THE OUTER CONTROL BOUNDARY BUT OUTSIDE THE AIR NOISE BOUNDARY

Sound exposure Pa^2s (1)	Recommended control measures	Day/night level Ldn (2)
>10	New residential, schools, hospitals or other noise sensitive uses should be prohibited unless a district plan permits such uses, subject to a requirement to incorporate appropriate acoustic insulation to ensure a satisfactory internal noise environment. Alterations or additions to existing residences or other noise sensitive uses should be fitted with appropriate acoustic insulation and encouragement should be given to ensure a satisfactory internal environment throughout the rest of the building.	>55

> NOTE –
>
> (1) Night-weighted sound exposure in pascal-squared-seconds or "pasques".
>
> (2) Day/night level (Ldn) values given are approximate for comparison purposes only and do not form the base for the table.

[50] There is a problem as to what Table 2 means. The MDC's Commissioners wrote[80]:

> There appear ... to be two alternatives we should consider viable:
>
> (a) that the qualification after the word *unless* only applies if the District Plan presently permits residential activity within the OCB. In such a case the Standard does not consider that the existing 'development rights' attaching to the land should be withdrawn on acoustic grounds alone. In such a case mitigation will be a sufficient response; or
>
> (b) that the qualification after *unless* applies to both existing and new district plan provisions where new residential activity is proposed subject to appropriate acoustic insulation.

They preferred the first interpretation[81].

[51] We are reluctant to step into this debate. It is not our task to establish an outer control boundary in this proceeding and so we do not need to establish the correct meaning of the Standard. We consider the proper approach to the standard is to use it as

79 Para 1.8.3 NZS 6805.
80 Commissioners' Decision para 118 [Environment Court document 1.2].
81 Commissioners' Decision para 119 [Environment Court document 1.2].

a guide — always bearing in mind, as we have said, that the standard itself involves value judgements as to a range of matters.

2.4 Plan Changes 64 to71

[52] Following the Southern Marlborough Urban Growth ("SMUGS") process the council notified Plan Changes 64-71 ("PC64-71") to rezone areas to meet the demand for residential land. CVL is a submitter in opposition.

[53] As noted by the Omaka Group, these plan changes do not form part of the matters the court is to consider in terms of the legal framework although the need for residential land was one argument put forward in support of PC59[82]. It is submitted by the Omaka Group that, given any future residential shortage will be addressed by PC64 to 71, the court should be cautious in giving weight to the effect of PC59 on this need[83]. For its part the council says that while that may be the case the court must still make its decision in the context of the relevant planning framework[84]. Notification of PC64 to 71 is a fact and that process is to be separately pursued by the council[85]. While there is no guarantee the plan changes will become operative in their notified form, they are — at most — a relevant consideration under section 32 of the RMA. PC64 to 71 are of very limited assistance to the court since these plan changes are at a very early stage in their development. They had not been heard, let alone, confirmed by the council at the date of the court hearing.

3. What are the benefits and costs of the proposed rezoning?

3.1 Section 32 RMA

[54] Under section 290 of the Act, the court stands in the shoes of the local authority and is required to undertake a section 32 evaluation.

[55] Section 32(1) to (5) of the Act, in its form prior to the 2013 amendments[86], states (relevantly):

> 32 Consideration of alternatives, benefits, and costs
>
> (1) In achieving the purpose of this Act, before a ... change, ... 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) ...
> (b) ...
> (ba) ...

82 Closing submissions for Omaka Group, dated 11 October 2013 at [26].
83 Closing submissions for Omaka Group, dated 11 October 2013 at [29].
84 Closing submissions for Marlborough District Council, dated 4 October 2013 at [72].
85 Closing submissions for Marlborough District Council, dated 4 October 2013 at [48].
86 Schedule 12 clause 2 Resource Management Amendment Act 2013: If Part 2 of the amendment Act comes into force on or after the date of the last day for making further submissions on a proposed policy statement or plan (as publicly notified in accordance with clause 7(1)(d) of Schedule 1), then the further evaluation for that proposed policy statement or plan must be undertaken as if Part 2 had not come into force.

(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 Schedule 1); or
(d) the person who made the request, for plan changes that have been requested and the request accepted under clause 25(2)(b) ... of the Schedule 1.

(2) A further evaluation must also be made by —
(a) a local authority before making a decision under clause 10 or clause 29(4) of the Schedule 1; and
(b) ...

(3) An evaluation must examine —
(a) the extent to which each objective is the most appropriate way to achieve the purpose of this Act; and
(b) whether having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives.

(4) For the purposes of the examinations referred to in subsections (3) and ... 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.

[56] Mr T G Quickfall, a planner called by CVL, gave evidence that he prepared PC59 including its section 32 analysis[87]. He relied on that in his evidence-in-chief[88], writing "I am confident that section 32 has been met". To the opposite effect Ms J M McNae, a consultant planner called by the council, stated that the section 32 analysis was "inadequate"[89]. The other planners who gave evidence[90] did not write anything about the plan change in relation to section 32.

3.2 The section 32 analysis in the application for the plan change

[57] In fact, the analysis in the application for the plan change is confusing. Table 2[91] commences by referring to the appropriateness under section 32 of three objectives (in chapters 11, 19 and 23 respectively). However, PC59 does not seek to change any objectives or to add any new ones so that analysis is irrelevant.

[58] Slightly more usefully the next table in the application then contains[92] a qualitative comparison of the benefits and costs. In summary the Table stated that the proposed changes to explanation; policies, rules and other methods would lead to these benefits: better provision for urban growth, alignment with urban design principles, implements growth strategy and land availability report, implements NZS 4404:2010, provides for more flexible road design and more efficient layout, reduces hard surfaces,

87 Section 4 of the proposed plan change dated 28 April 2011.
88 T G Quickfall, evidence-in-chief para 30 [Environment Court document 18].
89 J M McNae, evidence-in-chief para 40 [Environment Court document 28].
90 M J G Garland, M A Lile, P J Hawes and M J Foster.
91 Proposed Plan Change 28 April 2011 p 25.
92 Proposed Plan Change 28 April 2011 p 26.

increases residential amenity through wider choice of roading types, and recognises Omaka airfield as regional facility and avoids reverse sensitivity effects.

[59] The only costs were the costs of the plan change in his view.

[60] Similarly, the application identified[93] the benefits of the proposed zoning as being:

- provides for immediate to short term further growth and residential demand;
- wider range of living and location choices;
- implements urban design principles;
- enables continued operation of Omaka and avoids reverse sensitivity effects; and
- improved connections to Taylor River Reserve.

The costs identified were "the replacement of rural land use with residential land use".

[61] The application for the plan change identifies it as being more efficient and effective although what PC59 is being compared with is a little obscure — presumably the status quo. That analysis merely makes relatively subjective assertions which are elaborated on more fully in the planners' evidence. It would have been much more useful if the section 32 report or the evidence had contained quantitative analysis. As the court stated — of section 7 rather than section 32 of the RMA, but the same principle applies — in *Lower Waitaki Management Society Incorporated v Canterbury Regional Council*[94]:

> ... it is very helpful if the benefits and costs can be quantified because otherwise the section 7(b) analysis merely repeats the qualitative analysis carried out elsewhere in respect of sections 5 to 8 of the Act.

[62] Section 4 of the application for the plan change then assessed[95] the following "alternative means for implementing the applicant's intentions":

> ...
> (i) Do nothing.
> (ii) Apply for resource consent(s).
> (iii) Initiate a plan change.
> (iv) Wait for the final growth strategy.
> (v) Wait for a council initiated plan change ...

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93 Proposed Plan Change 28 April 2011 Table 3 p 26.

94 *Lower Waitaki Management Society Incorporated v Canterbury Regional Council* Decision 080/09 (21 September 2009).

95 Application for plan change 28 April 2011 pp 27-58.

We have several difficulties with that. First, we doubt if (i) or (v) would implement the applicant's intentions. Second, the application is drafted with reference to a repealed version of section 32.

3.3 Applying the correct form of section 32 to the benefits and costs

[63] The applicable test is somewhat different. As noted earlier, from 1 August 2003, with minor subsequent amendments, section 32 (in the form we have to consider[96]) requires an examination[97] of whether, having regard to their efficiency and effectiveness, the policies and methods are the most appropriate for achieving the objectives. Then subsection (4) reads:

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

The reference to "alternative means" has been deleted, so read by itself, the applicable version of section 32(4) looks as if a viability analysis — are the proposed activities likely to be profitable? — might suffice. Certainly section 32 analyses are often written as if applicants think that is what is meant. However, the purpose of the benefit/cost analysis in section 32(4) is that it is to be taken into account when deciding the most appropriate policy or method under (here) section 32(3). The phrase "most appropriate" introduces (implicitly) comparison with other reasonably possible policies or methods. Normally in the case of a plan change, those would include the status quo, i.e. the provisions in the district plan without the plan change. Here, as we have said, the recently notified PC64 to 71 are also relevant as options.

[64] Given that the relevant form of section 32 contains no reference to alternatives, the applicant questioned the legal basis for considering alternative uses of the land. Counsel referred to *Environmental Defence Society Incorporated & Sustain Our Sounds v The New Zealand King Salmon Co. Ltd*[98] where Dobson J stated:

> If, in the course of contested consideration of a request for a plan change, a more appropriate means of achieving the objectives is raised, then there is nothing in s 32 or elsewhere in the RMA that would preclude the consenting authority having regard to that as part of its evaluation. That is distinctly different, however, from treating such an assessment as mandatory under s 32.

Given that the High Court decision in that proceeding was appealed direct to the Supreme Court (with special leave) we prefer to express only brief tentative views on the law as to alternatives under section 32. First, that 'most appropriate' in section 32

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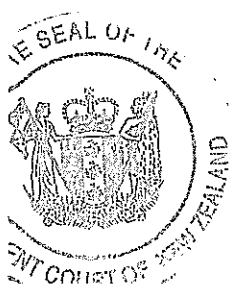
96 It was amended again on 3 December 2013 by section 70 Resource Management Amendment Act 2013.

97 Section 32(3) RMA.

98 *Environmental Defence Society Incorporated & Sustain Our Sounds v The New Zealand King Salmon Company Limited* [2013] NZRMA 371 at [171] (HC).



suggests a choice between at least two options (or, grammatically, three). In other words, comparison with something does appear to be mandatory. The rational choices appear to be the current activity on the land and/or whatever the district plan permits. So we respectfully agree with Dobson J when he stated that consideration of yet other means is not compulsory under the RMA. We would qualify this by suggesting that if the other means were raised by reasonably cogent evidence, fairness suggests the council or, on appeal, the court should look at the further possibilities.

[65] Secondly a review of alternative uses of the resources in question is required at a more fundamental level by section 7(b) of the RMA. That requires the local authority to have particular regard to the "efficient use of natural and physical resources". The primary question there, it seems to us, is which, of competing potential uses put forward in the evidence, is the more efficient use. We consider that later.

[66] For those reasons, Mr Quickfall was not completely wrong to rely on the analysis in section 4 of the application for the plan change when he relied on its qualitative comparison of alternatives. However, as we have stated the analysis is not, in the end, particularly useful because it adds little to the analysis elsewhere more directly stated in his and other CVL witnesses' evidence-in-chief.

[67] The only planner to respond in detail on section 32 was Ms McNae for the council. Her analysis[99] is as unhelpful as Mr Quickfall's for the same reason: it repeats subjective opinions stated elsewhere[100]. We will consider their differences in the context of the next section 32 question, to which we now turn.

4. What are the risks of approving PC59 (or not)?

4.1 Introducing the issues

[68] The second test in section 32 is to consider the risks of acting (approving PC59) or not acting (declining PC59) if there is insufficient certainty or information. We bear in mind that when considering the future, there is almost always some practical uncertainty about possible future environments beyond a year or two. A local authority or, on appeal, the Environment Court has to make probabilistic assessments of the "risk", recalling that a risk is the product of the probability of an event and its consequences (see *Long Bay Okura Great Park Society v North Shore City Council*[101]).

[69] The evidence on the risks of acting[102] (i.e. approving PC59) was that the experts were agreed that the following positive consequences are likely:

99 J McNae, evidence-in-chief para 53 [Environment Court document 28].
100 e.g. J McNae, evidence-in-chief para 54 [Environment Court document 28].
101 *Long Bay Okura Great Park Society v North Shore City Council* A078/2008 at [20] and [45].
102 See section 32(4) RMA.

(a) urgent demand for housing will be (partly) met[103];

(b) the site has positive attributes[104] for all the critical factors for residential development except for one. That is, the soils and geomorphological conditions and existing infrastructure and stormwater systems are all positive for such development. The exception is that the consequences for the roading network and other transport factors would be merely neutral;

(c) of the (merely) desirable factors[105], the site only shows positively on one factor — the proximity of recreational possibilities. It is neutral in respect of community, employment and ecological factors, and is said to be negative in respect of landscape although we received minimal evidence on that point;

(d) although the potential to develop land speedily is not a factor referred to in the district plan, we agree with CVL that it is a positive factor that the land is in single ownership and could be developed in a co-ordinated single way. The 2010 Strategy recognised[106] that with the anticipated growth rates the site might be fully developed within 3.5 years.

[70] The negative consequences of approving PC59 are likely to be:

(a) that versatile soils would be removed from productivity;
(b) that some rural amenities would be lost;
(c) that an opportunity for 'employment' zoning would be lost;
(d) there is the loss of a buffer for the Omaka airfield;
(e) there may be adverse effects on future use of Omaka airfield.

[71] The risks of not acting (i.e. refusing PC59) are the obverse of the previous two paragraphs.

[72] Few of the witnesses seemed much concerned with loss of rural productivity. As Mr Quickfall recorded[107] the site contains 21 hectares, and the Rural 3 Zone as a whole covers 17,100 hectares. Development of the whole site would displace 0.1228% from productive use. We prefer his evidence to that of Ms McNae.

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103 Transcript p 427 (Cross-examination of Mr Bredemeijer).
104 South Marlborough Urban Growth Strategy May 2010 — summarised in T G Quickfall, evidence-in-chief Table 1 at para 25 [Environment Court document 18].
105 T G Quickfall, Table 1, evidence-in-chief at para 25 [Environment Court document 18].
106 2010 Strategy para 120.
107 T G Quickfall, evidence-in-chief para 54 [Environment Court document 18].

[73] On the effects of PC59 on rural character and amenity, again we accept the evidence of Mr Quickfall[108] that the site and its surroundings are not typical of the Rural 3 Zone. Rather than being surrounded by yet more acres of grapevines, in fact the site has sealed roads on three sides[109], beyond which are residential zones and some houses on two sides, and the Carlton Corlett land to the south. We accept that rural character and amenity are already compromised[110].

[74] The remaining questions raised by the evidence are:

- what is the supply of, and demand for, employment land?
- what is the reasonably foreseeable residential supply and demand in and around Blenheim?
- what is the current intensity of use, and the likely growth of the Omaka and Woodbourne airports?
- what effects would airport noise have on the quantity of residential properties demanded and supplied in the vicinity of the airports?

4.2 Employment land

[75] Obviously the risk of not meeting demand for industrial or employment land is reduced if there is already a good supply of land already zoned. There was a conflict of evidence about this, but before we consider that, we should identify the documents relied on by all the witnesses.

The Marlborough Growth Strategies

[76] In relation to the CVL land, all the planning witnesses referred to the fact that the MDC has been attempting to develop a longer term growth "strategy" which considers residential and employment growth. There are three relevant documents:

- the "Southern Marlborough Urban Growth Strategy" ("the 2010 Strategy") (this is the 2010 Strategy already referred to);
- the "Revision of the Strategy for Blenheim's Urban Growth" ("2012 Strategy")[111];
- the "Growing Marlborough ... district-wide ..." ("2013 Strategy").

It should be noted that the three strategies cover different areas — Southern Marlborough, Blenheim, and the whole district respectively. Further, as Mr Davies reminded us these documents are not statutory instruments.

[77] As we have recorded, PC59 was strongly influenced by the 2010 Strategy, so CVL was disappointed when the 2010 Strategy, after being put out for public

108 T G Quickfall, evidence-in-chief paras 57 and 58 [Environment Court document 18].
109 T G Quickfall, evidence-in-chief para 57 [Environment Court document 18].
110 T G Quickfall, evidence-in-chief para 58 [Environment Court document 18].
111 C L F Bredemeijer, evidence-in-chief Appendix 3 [Environment Court document 21].

consultation, was revised by the subsequent strategies. The council pointed out that, while the 2010 Strategy was relevant in terms of PC59, it had not undergone the process set out in Schedule 1 of the RMA and so was always subject to change[112].

[78] For the reasons given in the 2013 Strategy, Colonial's site (and its proposed PC59) was set aside as an option for Residential zoning and the matter left for this court to determine.

The council's approach

[79] Mr C L F Bredemeijer, of Urbanismplus and on behalf of the council, was the project manager and report author during the processes leading to the three Marlborough Growth Strategies[113]. He, in turn, engaged Mr D C Kemp, an economist and employment and development specialist, to investigate employment and associated land issues for the Marlborough region[114].

[80] In Mr Kemp's view the traditional rural services at present around the Blenheim town centre should be relocated and provision made for future growth in employment related activities which should be located away from the town centre. The CVL site, according to Mr Kemp, offers "an exceptional opportunity" for accommodating these activities[115]. He saw a need to protect the site as strategic land for existing, new and future oriented business clusters[116].

[81] To quantify the need for employment land up to the year 2031 Mr Kemp considered two scenarios. The first he called the Existing Economy Scenario and the second, a realistic Future Economy Scenario. The latter includes, in addition to all factors considered in the Existing Economy Scenario, consideration of the perceived shortfall in industrial land uses where Marlborough currently has less than expected employment ratios and provides for relocation of existing inappropriately located activities[117]. For the period 2008 to 2031 the Existing Economy Scenario led to a requirement for 69 hectares of employment land with 120 hectares required for the Future Economy Scenario[118]. These represent growth rates of 3.0 and 5.2 hectare/year respectively.

[82] Mr Kemp's figures were incorporated into the 2010 Strategy, being referred to as the "minimum" and the "future proofed" requirements[119]. The latter required:

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112 Closing submissions for Marlborough District Council, dated 4 October 2013 at [24].
113 C L F Bredemeijer, evidence-in chief para 7 [Environment Court document 21].
114 D C Kemp, evidence-in-chief para 7 [Environment Court document 20].
115 D C Kemp, evidence-in-chief paras 11–19 [Environment Court document 20].
116 D C Kemp, evidence-in-chief para 26 [Environment Court document 20].
117 D C Kemp, evidence-in-chief paras 31 and 35 [Environment Court document 20].
118 D C Kemp, evidence-in-chief paras 33 and 36 [Environment Court document 20].
119 Southern Marlborough Growth Strategy 2010, p 108.

- 63 hectares for small scale Clean Production and Services;
- 7 hectares for Vehicle Sales and Services;
- 24 hectares for larger-scale Transport and Logistics; and
- 30 hectares for other "Difficult to Locate" activities with low visual amenity and potentially offensive impacts.

The 2010 Strategy then notes: "There is clearly sufficient employment land in Blenheim to meet all of these potential needs with the exception of "... 5 ha ..."". The 5 ha refers to land for "difficult to locate activities" which Mr Kemp acknowledged would be inappropriate to place on the site[120].

[83] Following the 2010 and 2011 Christchurch earthquakes the council sought reports on liquefaction prone land in the vicinity of Blenheim. The reports raised serious concerns about the suitability of some of the land identified for development in the 2010 Strategy. (No liquefaction issues were identified with respect to the site). The council recognised that there would be a severe shortfall of residential and employment land in Blenheim[121] assuming no change to the demand for employment land. Instead of there being "clearly sufficient" land for employment purposes there was now a shortfall of approximately 85 hectares[122]. Mr Hawes, planner for the council, appeared to accept this figure[123]. The court has no reason to dispute it and thus accepts it as the best estimate of employment land required to future proof Blenheim in this regard until 2031.

[84] To meet the perceived shortfall of 85 hectares, revised strategies for provision of employment land identified a preference for employment land development near Omaka and Woodbourne airports. That near Omaka included the site, which was identified in the 2010 Strategy for residential use[124] and the Carlton Corlett Trust land to its south[125]. This was seen as a logical progression of employment land north from the Omaka airport to New Renwick Road and as a solution to noise issues. These preferences were carried through to the 2013 Strategy which was released in March 2013 and ratified by the full council on 4 April 2013[126]. We note that neither CVL as the site's land owner nor adjacent residential owners and occupiers[127] were consulted about this change in preference from residential to industrial[128].

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120 D C Kemp, evidence-in-chief para 25 [Environment Court document 20].
121 P J Hawes, evidence-in-chief paras 33 and 36 [Environment Court document 22].
122 C L F Bredemeijer, evidence-in-chief para 37 [Environment Court document 21].
123 P J Hawes, evidence-in-chief para 36 [Environment Court document 22].
124 P J Hawes, evidence-in-chief Figure 1 [Environment Court document 22].
125 P J Hawes, evidence-in-chief para 37.3 [Environment Court document 22].
126 P J Hawes, evidence-in-chief paras 44 and 46 [Environment Court document 22].
127 There are 84 adjacent residential properties, 31 of which face the site along New Renwick Road and Richardson Avenue.
128 C L F Bredemeijer, evidence-in-chief paras 44-46 [Environment Court document 21].

[85] The 2013 Strategy summarised planning over the last 5 or 10 years for urban growth as follows[129]:

> Land use and growth
> The original Southern Marlborough Urban Growth Strategy Proposal catered for residential and employment growth in a variety of locations on the periphery of Blenheim, including the eastern periphery. As explained earlier, the areas to the east of Blenheim were removed from the Strategy as a result of the significant risk and likely severity of the liquefaction hazard. This decision was made by the Environment Committee on 3 May 2012.
>
> The Strategy now focuses residential growth to the north, north-west and west of Blenheim and employment growth to the south-west. In this way, the Strategy will provide certainty in terms of the appropriate direction for growth for the foreseeable future.
>
> The Strategy, including the revision of Blenheim's urban growth, is based on the sustainable urban growth principles presented in Section 2.1. In assessing the suitability of these sites, it was clear that residential activity would encroach onto versatile soils to the north and north-west of Blenheim. The decision to expand in this direction was not taken lightly. However, given the constraints that exist at other locations, the Council did not believe it had any other options to provide for residential growth. The decision was made also knowing that land fragmentation in some of the growth areas had already reduced the productive capacity of the soil.

[86] In summary, the council's strategic vision with respect to provision of employment land is set out in the 2013 Strategy as[130]:

- a further 64 hectares for future general and large scale industry in the Riverlands area;
- additional employment land near the Omaka Aerodrome (53 hectares) and the airport at Woodbourne (15 hectares);
- possible future business parks near Marlborough Hospital, near Omaka and near the airport at Woodbourne.

[87] However, the 2013 Strategy expressly left open the future appropriate development of the (Colonial) site[131]:

> W2 (or Colonial Vineyard site)
> During the process of considering submissions on W2, the owners of the land requested a plan change to rezone the property Urban Residential to facilitate the residential development of the site. The Council declined to make a decision on this growth area to ensure there was no potential to influence the outcome of the plan change process. Given the delay caused by the liquefaction study and the subsequent revision, the plan change request has now been heard by Commissioners and their decision was to decline the request. This decision has been appealed to the Environment Court by the applicant. This appeal will be heard during 2013.
>
> Due to the effect of the liquefaction study on the strategy and the areas it identified for employment opportunities to the east of Blenheim, other areas have now been assessed in terms of their suitability for employment uses. This includes the W2 site and adjoining land in the vicinity of Omaka Aerodrome. Refer to the employment land section below for further details.

129 Page 36 of the 2013 Strategy.
130 2013 Strategy, p 30.
131 C L F Bredemeijer, evidence-in-chief Appendix 4 [Environment Court document 21].

> It is noted that if the plan change request is approved by the Court, the subsequent development of the rezoned land will assist to achieve the objectives of this strategy. If the Court does not approve the plan change then the Council will be able to promote Area 8 as an alternative.

CVL's approach

[88] Mr Kemp's approach was challenged by the applicant's witnesses on the grounds that:

- much industrial expansion and new employment occurs in the rural zone as discretionary activities. This reduces the need for industrial zoning. This factor was not mentioned by Mr Kemp[132];
- Mr Kemp's projections require an additional 3,650 employees to support them while Statistics New Zealand's projection of population growth for the same period is 2,700 persons[133];
- use of only one year's data on which to base projections is inappropriate. That the year is a boom year, 2008, and prior to the global financial crisis caused further concern[134].

[89] In predicting the future need for employment land CVL's witnesses preferred to consider the past take up of industrial land and to account for the areas of land available at present for employment land. They also considered which industries would be likely to develop on or relocate to the site. Mr T P McGrail, a professional surveyor, compared land use as delineated in a 2005 report to council with the existing situation for what he described as business and industrial uses. Noting the area of land available for these uses in 2005 was essentially the same as that available in 2013 he concluded the net take up of vacant land since 2005 has been "very low"[135]. As an example he records that in May 2008 54 hectares was rezoned at Riverlands but no take up of this land has occurred in the 5 years it has been available[136]. His evidence was that there have been three greenfield industrial subdivisions in the Blenheim area in the last 34 years of which 19 hectares has been developed[137]. This is at a rate of 0.56 hectares/year. That contrasts with the growth rates of 3.0 and 5.2 hectares/year adopted by Mr Kemp and noted above.

[90] In considering which industries may chose to locate or relocate to the site, Mr McGrail dismissed wet industries (on advice from the council) together with processing of forestry products and noxious industries including wool scouring and sea food processing on the basis of their effects on neighbouring residents[138]. Other employment uses discussed by Mr McGrail were aviation, large format retail and business. Due to

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132 T P McGrail, Rebuttal evidence paras 37 and 38 [Environment Court document 9A].
133 T J Heath, Rebuttal evidence para 58 [Environment Court document 16].
134 T J Heath, Rebuttal evidence para 58 [Environment Court document 16].
135 T P McGrail, Rebuttal evidence paras 3–6 [Environment Court document 9A].
136 T P McGrail, Rebuttal evidence para 33 [Environment Court document 9A].
137 T P McGrail, Rebuttal evidence paras 26 and 28 [Environment Court document 9A].
138 T P McGrail, Rebuttal evidence paras 8–10 [Environment Court document 9A].

the Carlton Corlett Trust land's proximity to the airfield it would be preferred to the site for aviation related industries. This 31 hectares together with 42 hectares designated as Area 10, located immediately to the northwest of Omaka airfield, gives 73 hectares of land better suited to employment (particularly aviation) uses than the site.

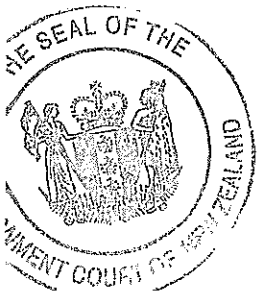
[91] Council has identified five areas, including the site, which are available for large format retail. Mr McGrail believed large format retail is well catered for even if the site becomes residential[139]. He also considered that some 50% of the types of business presently in Blenheim would not choose to locate or relocate to the site because they would lose the advantages that accrue by being close to main traffic routes and the town centre[140]. This underlay his skepticism of Mr Kemp's projections for business uptake of the site[141].

[92] Mr T J Heath, an urban demographer and founding Director of Property Economics Limited, was asked by CVL to determine if there was any justification for the council preferred employment zoning of the site[142]. To do so he assessed the demand for employment land using his company's land demand projection model. This uses Statistics New Zealand Medium Series population forecasts, historical business trends and accounts for a changing demographic profile in Marlborough. It first predicts increases in industrial employment which are then converted to a gross land requirement[143]. Use of this model to predict the need for future employment land was not challenged during the hearing.

[93] Industrial employment projections from the model suggested a 28% increase over the period 2013 to 2031 which translated to a gross land requirement of 49 hectares[144]. This result is considered by Mr Heath to be "towards the upper end of the required industrial land over the next 18 years". Two other scenarios are presented in his Table 3 each of which results in a smaller requirement[145]. Mr Heath then relied upon Mr McGrail's estimates of presently available employment land which totalled 103 hectares[146]. This comprised the 19 hectares identified by Mr McGrail and referred to above plus the 84 hectares of land available at Riverlands[147].

[94] During cross examination Mr Heath stated[148] "My analysis shows me you have zoned all the land required to meet the future requirements out to 2031". This was a reiteration of his rebuttal evidence where he wrote[149] "even at the upper bounds of

139 T P McGrail, Rebuttal evidence para 19 [Environment Court document 9A].
140 T P McGrail, Rebuttal evidence para 21 [Environment Court document 9A].
141 T P McGrail, Rebuttal evidence paras 21 and 22 [Environment Court document 9A].
142 T J Heath, Rebuttal evidence para 6 [Environment Court document 16].
143 T J Heath, Rebuttal evidence para 31 [Environment Court document 16].
144 T J Heath, Rebuttal evidence Table 3 [Environment Court document 16].
145 T J Heath, Rebuttal evidence paras 35and 36 [Environment Court document 16].
146 T J Heath, Rebuttal evidence Table 4 [Environment Court document 16].
147 T P McGrail, Rebuttal evidence Figure 2.
148 Transcript p 315.
149 T J Heath, Rebuttal evidence para 39 [Environment Court document 16].



49 hectares, there is clearly more than sufficient industrial land to meet Blenheim's and in fact Marlborough's future industrial needs ...".

Findings

[95] We ignore the 15 hectares near Woodbourne as this is Crown land that could form part of a Treaty settlement for Te Tau Ihu Iwi[150]. Its future is thus uncertain. The 53 hectares near Omaka includes the site (21.7 hectares) and the Carlton Corlett Trust land (31.3 hectares). The land owner of the latter has expressed a desire to develop the property to provide for employment opportunities[151]. Indeed, together the Carlton Corlett Trust land (31 hectares) and the further 64 hectares at Riverlands total 91.3 hectares. This is in excess of the 85 hectares sought by council for its future proofing to 2031.

[96] In addition to the lands listed above, council has identified 42 hectares of land (referred to as Area 10) to the west of Aerodrome road and north of the airfield for additional employment growth in the long term[152].

[97] The council strategy requires 89 hectares of employment land to future proof the need for such land in the vicinity of Blenheim. There is at present sufficient land available to provide for this without any rezoning. We conclude the need for employment land within a planning horizon of 18 years (to 2031) is not a factor weighing against the requested plan change.

4.3 Residential supply and demand

[98] Prior to 2011, there was a demand for between 100 and 150 houses a year and an availability of approximately 1,000 greenfield sites[153]. Based on that, counsel for the Omaka Group submitted there is no evidence that the alleged future shortfall will materialise before further greenfield sites are made available[154]. We are unsure what to make of that submission because counsel did not explain what he meant by "shortfall". There is not usually a general shortfall. Excess demand is an excess of a quantity demanded at a price. In relation to the housing market(s), excess demand of houses (a shortfall in supply) is an excess of houses demanded at entry level and average prices over the quantity supplied at those prices.

[99] Mr Hayward gave evidence for CVL that there has been "a subnormal amount of residential land coming forward from residential development in Marlborough"[155]. He also stated that there was an imbalance between supply and demand, with a greater quantity demanded than supply[156]. Further, none of the witnesses disputed Mr Hawes'

150 2013 Strategy, p 41.
151 2013 Strategy, p 40.
152 2013 Strategy, p 40.
153 Environmental Management Services Limited report, dated 11 January 2011.
154 Closing submissions for Omaka at [101].
155 A C Hayward, Transcript at p 98, lines 10-15.
156 A C Hayward, Transcript at p 103, lines 20-25.

evidence[157] that the Strategies are clear that there is likely to be a severe shortfall of residential land in Blenheim if more land is not zoned for that purpose.

[100] Plan Changes 64 to 71 would potentially enable more residential sections to be supplied to the housing market. However, in view of the existence of submissions on these plan changes, we consider the alternatives represented by those plan changes are too uncertain to make reasonable predictions about.

[101] We find that one of the risks of not approving PC59 is that the quantity of houses supplied in Blenheim at average (or below) prices is likely to decrease relative to the quantity likely to be demanded. That will have the consequence that house prices increase.

4.4 Airports

[102] In view of the importance placed on the Woodbourne Airport in the RPS, it was interesting to read the 2005 assessment by Mr M Barber in his report[158] entitled "Air Transport - Provision for the future use, development and protection of air transport facilities in Marlborough District – Part 1 Issues and options". He wrote[159] of Omaka:

> The principal threats to the sustainable use of Omaka Aerodrome arise from its proximity to Woodbourne/Blenheim Airport, the potential for encroachment on the obstacle limitation surfaces, and urban or rural-residential encroachment.

[103] Currently Omaka aerodrome may expand its operations as a permitted activity. However, it is uncertain what restrictions or protection may be put in place for Omaka by way of a future plan change process and it is in this uncertain context that the court is asked to determine what the likely noise effects of the airfield will be in the future.

[104] The Omaka Group argued that, given the uncertainty around the air noise boundary and outer control boundary which are likely to be imposed in the future, it is helpful to have regard to the capacity of the airfield. Although, as Mr Day conceded in cross-examination[160], the capacity approach is unusual, the Omaka Group argued it is sensible in the context of uncertainty about the level of use to consider the capacity of the airfield. This would allow for full growth in the future, regardless of the current recession[161]. CVL responded that the capacity approach is an argument not advanced by any witness and so there is no evidence as to the capacity of the airfield[162].

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157 P J Hawes, evidence-in-chief paras 33 and 36 [Environment Court document 22].

158 P J Hawes, evidence-in-chief Appendix 2 [Environment Court document 22].

159 M Barber, "Air Transport - Provision for the future use, development and protection of air transport facilities in Marlborough District – Part 1 Issues and options" 8 December 2005 at p 40. (Appendix 2 to the evidence-in-chief of P J Hawes) [Environment Court document 22].

160 Transcript 501 line 3.

161 Closing submissions for Omaka at 81-82.

162 Closing submissions for Colonial Vineyards Ltd at 161.

[105] Mr Barber in his 2005 report wrote in relation to the potential for urban encroachment[163]:

> Clearly, there is considerable existing and future potential for urban residential development to the south-west of Blenheim which could result in encroachment on Omaka Aerodrome. To avoid possible adverse effects on the future safe and efficient operation of the aerodrome, it is important that the area likely to be subject to aircraft noise in the future be identified and appropriate protection measures be incorporated in the District Plan.

4.5 Noise

[106] In relation to the risks of acting when there is insufficient certainty and/or information about the subject matter of the policies or methods, we observe that the uncertainties are not about the current environment but about the environment in 15 or 25 years' time.

[107] Similarly the Marlborough Aviation Group was aware of the issue in 2008. As a former President, Mr J McIntyre, admitted in cross-examination[164], he wrote[165] of The Marlborough Aero Club Inc. in the President's Annual Report for 2008:

> The opening of the Airpark adjacent to the Aviation Heritage Centre is a positive aspect of this, but has thrown up some curly questions as to how operations should take place from this area. Concurrent with increased numbers of aircraft (of all types) is the concern that we will draw undue attention to ourselves with noise complaints, as we are squeezed by ever-increasing urban encroachment. On this front, it does not help that the District Council did not see fit to have the fact that airfield exists included in developer's information and LIM reports for the new sub division up Taylor Pass Road.

Current airport activity

[108] The site lies under the 01/19 vector runways[166] of the Omaka airfield. Thus it is subject to some noise from aircraft taxiing, taking off and landing. How much noise was a subject of considerable dispute.

[109] Two methods of assessing aircraft noise were put forward. CVL produced the evidence of Mr D S Park based on 2013 measurements and extrapolations. In December 2012 Mr Park had installed a system at the site for recording the radio transmissions made by pilots operating at Omaka. In this way he sought an understanding of aircraft noise data obtained at the site as described by Dr Trevathan[167] and to aid in the analysis of that data. In contrast the MDC and the aviation cluster initially relied on data collected at Woodbourne between 1997 and 2008 ("the Tower data"), extrapolated to the present. They later based their predictions out to 2039 on Mr Park's measurements, as discussed below.

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163 M Barber, "Air Transport - Provision for the future use, development and protection of air transport facilities in Marlborough District – Part 1 Issues and options" 8 December 2005 at p 42. (Appendix 2 to the evidence-in-chief of P J Hawes) [Environment Court document 22].

164 Transcript p 732 lines 15-20 (Tuesday 17 September 2013).

165 Exhibit 35.1.

166 i.e. runways on which aircraft taking off are on bearings of 10° and its reciprocal 190° (magnetic) respectively.

167 J W Trevathan, evidence-in-chief para 5.1 [Environment Court document 14].

[110] Mr Park's figures relied on the fact that at unattended aerodromes, such as Omaka, it is normal for pilots to transmit, by radio, a VHF transmission, their intentions to take off or to land and their intended flight path. While this is a safety procedure it also provides a record of movements to and from the aerodrome. Once recorded on Mr Park's equipment the VHF transmissions were analysed to provide[168]:

- the number of takeoffs and landings by radio equipped aircraft at Omaka during the recording period;
- the approximate time of each movement;
- the runway used during each movement; and
- the aircraft registration.

An aircraft's registration allows it to be identified and thus categorised as either a helicopter or a fixed wing aircraft and, if the latter, as having either a fixed or a variable pitch propeller. This is necessary as the two types have different noise signatures with the variable pitch propellers being the louder. Helicopters are noiser again.

[111] The runway information suggests which movements are likely to have resulted in a noise event being recorded by the equipment on the site.

[112] At the time of filing his evidence-in-chief (22 February 2013) Mr Park had data from the period 10 January – 9 February 2013 only, which he acknowledged[169] was "a relatively short time". His rebuttal evidence filed on 3 July 2013 reported on data from the period 10 January – 8 April 2013. Data from the Easter Air Show was not captured as that used a different transmission frequency[170]. Data from 81 days was analysed, there being over 30,000 transmissions of which 7,553 related to movements at Omaka: 7,082 were fixed wing aircraft and 471 were helicopters.

[113] The results of Mr Park's monitoring were given as[171]:

• average fixed wing movements/day	87.4
• average fixed wing movements/night	0.8
• average helicopter movements/day	5.8
• average helicopter movements/night	0.6
• average use of runway 01 for takeoffs	26%
• ratio fixed pitch/variable pitch	84%/16%

168 D S Park, evidence-in-chief para 4.6 [Environment Court document 13].
169 D S Park, evidence-in-chief para 5.8 [Environment Court document 13].
170 D S Park, Rebuttal evidence para 11.2 [Environment Court document 13A].
171 D S Park, Rebuttal evidence para 11.4 [Environment Court document 13].

These numbers are subject to error from a number of causes including aircraft not equipped with radio, pilots choosing not to transmit their intentions, or by confusion of call signs. Mr Park chose to account for this by adding 10% to the recorded numbers: some 750 extra movements[172]. He also added 1.1 helicopter movements/night to reflect a suggestion from Mr Dodson that some night helicopter movements had been missed[173]. Whether this was before or after the 10% increase was not stated. The results of these adjustments[174] are given in terms of averages per day as:

- fixed wing 96.1
- helicopter 8.0

Mr Park noted[175] that the entry for helicopters should have been 7.5 flights per day. The quoted figure of 8.0 was retained by Mr Park and used in his subsequent projections of future helicopter movements.

[114] These figures are difficult but not impossible to understand. In summary:

- the figure of 96.1 fixed wing flights is an increase of 10% on the recorded figure for fixed wing movements/day of 87.4. The night movements of fixed wing aircraft are thus not included in the adjusted figures. We infer that the term "averages per day" used in connection with these figures means day time flights only;

- the figure of 7.5 helicopter flights can be obtained by increasing the recorded 5.8 day time helicopter flights by 10% and then adding 1.1. However this is mixing day and night flights and may well be a coincidence. For day flights only a 10% increase gives 6.4 flights, a figure that would fit into the averages per day table above. If the total of recorded day time plus night time helicopter flights (6.4) is increased by 10% and 1.1 flights added the result is 8.1 flights, a figure close to that used by Mr Park in his projections;

- of the fixed wing movements only those takeoffs from Runway 01 are assumed by Mr Park to result in noise effects on the site[176]. He reports 26.2% of day time fixed wing movements and 2.8% of fixed wing night time movements occur on Runway 01. Of the helicopter movements 25% of those departures to the north from Runways 01 and 07 together with 16.1% of those arrivals from the north on Runways 19, 25 and 30 were considered by Mr Park to have a noise effect on the site.

172 D S Park, Supplementary evidence para 3.4 [Environment Court document 13B].
173 D S Park, Rebuttal evidence para 11.6(b) [Environment Court document 13A].
174 D S Park, Rebuttal evidence para 11.11 [Environment Court document 13A].
175 Transcript p 143 lines 21-24.
176 D S Park, Rebuttal evidence para 11.12 [Environment Court document 13A].

[115] Dr Trevathan was asked[177] to provide a current 55 dB Ldn contour based on Mr Park's data from the period 10 January to 8 April 2013 for aircraft movements that affect the site. This contour is shown as crossing the Carlton Corlett land in a generally east/west direction and at least 180 metres from the site[178]. We find that helicopters departing and arriving fly directly[179] over the site at present. Dr Trevathan's modeling confirms that these flights make a significant contribution to the average noise levels experienced on the site. Similarly, flight paths for departures and arrivals from the east — on the 07/29 vector runways — lie directly over the residential area to the east of Taylor River[180].

[116] Mr A Johns, a member of the Marlborough Aero Club, challenged the reliability of Mr Park's VHF recordings and the data derived from them. He was concerned about the presence of unrecorded aircraft movements which included those by aircraft not equipped with radios, movements which the pilot chose not to report and those associated with the Air Show held at Easter 2013. Possible misidentification of aircraft type which would lead to an incorrect noise signature being assigned and the percentage of movements allocated to Runway 01 were other concerns. Mr Johns' information was based on his knowledge of actual use of Omaka airfield from, presumably, records held by the Marlborough Aero Club. Mr Park through his company, Astral Limited, sought access to these records[181] which would have allowed him to assess the accuracy of his VHF results. This request was declined[182] as the Omaka Group and the Aero Club did not consider the request "had merit". We note that Mr Johns did not produce any of these records in his evidence preferring simply to give aircraft types and movement percentages that cannot be verified. Since the Marlborough Aero Club did not cooperate with Mr Park's reasonable request, we prefer the latter's evidence.

[117] With respect to the flights associated with the Air Show Mr Park, based on his experience as chair of the Ardmore Airport Noise Committee, expressed the view that these would be excluded from any noise evaluation and expressly provided for in any Noise Management Plan that the Aero Club might produce and in any special recognition the council may wish to give the Air Show in the District Plan[183].

[118] Mr Johns gave a list[184] of historic aircraft which were misidentified as modern aircraft. Having been identified by Mr Park the movements made by these aircraft would have been recorded and thus included in the total number of movements. It is

177 J W Trevathan, Rebuttal evidence para 3.1 [Environment Court document 14A].
178 J W Trevathan, Supplementary evidence Attachment 2 [Environment Court document 14B].
179 D S Park, evidence-in-chief para 65 [Environment Court document 13].
180 D S Park, evidence-in-chief Annexure 3, Figures 5 and 6 [Environment Court document 13].
181 D S Park, Supplementary evidence para 3.1 and Exhibit A [Environment Court document 13B].
182 D S Park, Supplementary evidence para 3.1 and Exhibit B [Environment Court document 13B].
183 D S Park, Rebuttal evidence para 8.2 and Supplementary evidence para 3.23 [Environment Court documents 13A and 13B respectively].
184 A Johns, Supplementary evidence para 18 [Environment Court document 24A].

likely the assigned noise category would have been in error. Reference to 48 flights of an Avro Anson, a World War II bomber, that appeared to have been missed by Mr Park was made by Mr Johns[185]. In his oral evidence[186] he stated that subsequent to filing his written evidence he had identified that the bomber had used a call sign unknown to Mr Park and that at least half the bomber's flights had been recorded, but not recognised as such, by Mr Park.

[119] Another consideration which adds uncertainty is that the split between variable pitch and fixed pitch propeller aircraft will influence the location of any derived contour[187]. Mr Johns, from a "back of the envelope" calculation, suggested aircraft with variable pitch propellers make up close to 20% of the total fixed wing aircraft movements[188]. Mr Park's measurements over the three month period indicated a figure of 16%.

[120] Mr Park's recordings indicated runway 01 was used for 26.2% of the fixed wing takeoff movements[189]. Mr Johns, having made allowance for the interruption to movements on runway 01 from the Air Show, suggested 28% which he noted was closer to the estimate provided by Mr Sinclair for the modelling done by Mr Hegley for the council[190]. In taking all these perceived deficiencies in Mr Park's recording and analysis into account[191] Mr Johns believed "a greater level of error should be allowed for than the 10% suggested by Mr Park". No alternative figure was produced by Mr Johns. We found that the 10% increase in movements (over 700) allowed by Mr Park is more than sufficient to cover at most 24 flights (48 movements) by the bomber that may have been missed.

Findings

[121] We prefer Mr Park's data set to that of the Aero Club because the latter derives from flights at a period of unusually intense activity immediately prior to the global financial crisis. For example, on the numbers of flights in 2008, Mr J McIntyre wrote[192] in the President's Annual Report for 2008:

> After dipping slightly last year, flying hours were up again with 2288 hours chalked up for the Clubs 80th year. This is the highest since 1990/91 and is heartening in the face of rocketing fuel prices and escalating charges from all quarters.

The 2013 base data from Mr Park can be used to predict the location of noise contours near and over the site in 2038. The court is not charged with fixing these contours and indeed does not have sufficient information to do so. Rather, we are interested in the

185 A Johns, Supplementary evidence para 20 [Environment Court document 24A].
186 Transcript pp 525-526.
187 As recorded above: Variable pitch propellers are louder than fixed pitch propellers.
188 A Johns, Supplementary evidence para 30 [Environment Court document 24A].
189 D S Park, Rebuttal evidence para 11. 12 [Environment Court document 13].
190 A Johns, Supplementary evidence para 33 [Environment Court document 24A].
191 A Johns, Supplementary evidence para 43 [Environment Court document 24A].
192 Exhibit 35.1.

contours as an indication of what could happen in the next 25 years. For this purpose we are satisfied that Mr Park's data is an appropriate base from which to project forward.

Future noise

[122] In fact some attempts had been made to establish likely noise contours. The experts endeavoured to formulate a growth rate and applied it to the current use to calculate the contours which would restrict the airfield's growth. Mr Park and Dr Trevathan, the experts for CVL, adopted a compounding annual growth rate of 2.7% for fixed wing aircraft[193]. Mr Foster, for the council, gave unchallenged evidence that were a proposed World War II fighter squadron project to eventuate then a 4% per annum growth rate would be more realistic[194]. Looking at the Tower data one could calculate a compounding growth rate of 4.4%[195] which provides support for Mr Foster's proposed growth rate. Omaka submits that any certainty in the contours proposed by Dr Trevathan is diminished by the uncertainty around the flight numbers supplied by Mr Park[196].

[123] Parallel to the SMUGS process, the council commissioned reports from Hegley Acoustic Consultants as an initial step to introducing airnoise boundaries and outer control boundaries.

[124] Mr R Hegley, of Hegley Acoustic Consultants, was commissioned in 2007 to undertake acoustic modelling of Omaka airfield[197]. He based his model on data provided by Mr Sinclair[198] which included growth rates to determine aircraft numbers up to the selected design year of 2028. These growth rates were not recorded in Mr Hegley's evidence. Mr Park deduced, from Mr Sinclair's evidence to the initial hearing[199], that they were[200]:

- fixed wing 2.7% per annum
- helicopter 10% per annum

The projected values used by Mr Hegley to derive his 55 dB Ldn contour were not recorded in his evidence.

[125] Mr Park[201] used Mr Hegley's growth rates to project his one month of recorded movements out to 2028 and provided the data to Dr Trevathan for his derivation of the

193 Transcript at 178 line 32ff.
194 M J Foster, evidence-in-chief at [6.17] [Environment Court document 23].
195 A Johns, supplementary evidence at [12].
196 Closing submissions for Omaka at 53.
197 R L Hegley, evidence-in-chief para 5 [Environment Court document 25].
198 R L Hegley, evidence-in-chief para 17 [Environment Court document 25].
199 D S Park, evidence-in-chief Annexure 1A [Environment Court document 13].
200 D S Park, evidence-in-chief paras 5.12–5.16 [Environment Court document 13].
201 D S Park, evidence-in-chief, para 5.19 [Environment Court document 13].

resultant 55 dB Ldn contour. Doubt was expressed by Mr Park over the 10% growth rate for helicopters which he considered excessive[202].

[126] Initial projections used by Mr Hegley on behalf of the council were 20 year projections from 2008, i.e. out to 2028. In preparing for the hearing all witnesses agreed this was too short for airport planning and agreed 2038 to be an appropriate planning horizon. The rates of growth in fixed wing and helicopter movements were not agreed.

[127] With concern having been expressed by a number of witnesses in their evidence-in-chief over the inadequacy of a 2028 design year, attention turned to providing projections out to the agreed year of 2038. Mr Hegley was instructed by the council to project out to 2038 retaining the 2.7% and 10% per annum growth rates for fixed wing and helicopters respectively[203]. He was asked to use the aircraft flight numbers as presented in Dr Trevathan's evidence-in-chief[204]. These figures came from Mr Park and were thus based on his one month of VHF recorded data. At this point all use of the alternate data set favoured by the Airport Cluster and the Aero Club ceased.

[128] Mr Park also considered the 2038 design year. He retained the 2.7% growth rate to 2038 for fixed wing aircraft and used a 6.6% growth rate for helicopters both applied to his three month 2013 base data[205]. The latter he considered appropriate in view of the CAA helicopter registration records[206] which show a 4.4% per annum growth rate from 1993 until 2013 with a period (8 years) having a maximum growth rate of 7.8% per annum. The 6.6% rate is 50% above the long term growth rate and will result in almost five times as many helicopter movements in 2038 suggesting up to 35 helicopters will be operating from Omaka at that time. In Mr Park's view the 6.6% growth rate is adequate to account for the special nature of helicopter operations from Omaka[207]. The planning consultant[208] for the council, Mr Foster, who has extensive experience in airport planning, stated that the 2.7% growth rate for fixed wing aircraft is not unreasonable[209] and that 6.6% as a growth rate for helicopters is realistic[210].

[129] Using these growth rates and Mr Park's adjusted 2013 data for flight movements the projected movements for 2038 expressed as averages per day are[211]:

- fixed wing 187.1
- helicopter 39.7

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202 D S Park, evidence-in-chief, para 5.17 [Environment Court document 13].
203 R L Hegley, evidence-in-chief para 29 [Environment Court document 25].
204 R L Hegley, evidence-in-chief para 27 [Environment Court document 25].
205 D S Park, Rebuttal evidence, para 11.7 [Environment Court document 13].
206 D S Park, Rebuttal evidence Annexure 1 [Environment Court document 13A].
207 D S Park, Rebuttal evidence paras 11.9 and 11.10 [Environment Court document 13A].
208 M J Foster, evidence-in-chief paras 1.2 – 1.4 [Environment Court document 27].
209 M J Foster, evidence-in-chief para 6.27 [Environment Court document 27].
210 Transcript at 646 line 24.
211 D S Park, Rebuttal evidence para 11.11 [Environment Court document 13A].

The percentages of these flights to affect the site were assumed to be the same as those derived from Mr Park's 2013 data.

The 55 dB Ldn contours

[130] Noise contours are produced using software referred to as an Integrated Noise Model ("INM"). The acoustic experts agreed[212] this software was appropriate to predict future noise levels at Omaka airfield and that the model aircraft types and settings that have been developed by Mr Hegley and Marshall Day Acoustics and confirmed by Dr Trevathan's measurements to be appropriate. The software requires at a minimum the input of runway locations, aircraft types and numbers of flights and flight tracks. There is disagreement over the helicopter flight tracks that should be modelled.

[131] Helicopters taking off towards and landing from the north currently track over the site[213]. Mr Hegley has used these tracks in his INM modelling. Mr Park believes these tracks create unnecessary disturbance over the site and to adjacent residential areas[214]. He thus proposed "helicopter noise abatement flight paths". On takeoff to the north a helicopter would veer slightly right and as it crossed New Renwick Road it would turn left and follow the Taylor River. Approaches from the north would come along the river and turn right to reach the eastern edge of the airfield[215]. Such noise abatement paths, according to Mr Park, are in common use at other aerodromes in New Zealand and are in accord with both the Aviation Industry Association of New Zealand's code of practice for noise abatement and Helicopter Association International guidelines[216].

[132] Mr M Hunt, an acoustics expert for the council, found the use of selected flight paths to reduce noise on the ground to be highly unusual but not unheard of. He was also concerned over the practicality of the paths suggested by Mr Park and how they could be imposed and enforced[217]. Mr Day, acoustic consultant to the Omaka Group, also found the approach unusual in that it moved flight paths so as to push the noise over existing residences to avoid noise on a future residential development[218]. This criticism was echoed by Mr Dodson, Managing Director of Marlborough Helicopters and holder of a Commercial Helicopter Pilot Licence. He described the noise abatement tracks as "clearly an inferior option from a noise abatement perspective and arguably is a less safe option"[219].

[133] Opinion as to the efficacy of the abatement paths was clearly divided. One reason is that no evaluation of the noise effects generated by flights along the abatement

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212 Joint Statement of Acoustic Experts dated 21 August 2013 Exhibit 14.1 para 5.
213 D S Park, evidence-in-chief Annexure 3 figures 5 and 6 [Environment Court document 13].
214 D S Park, evidence-in-chief para 6.9 [Environment Court document 13].
215 D S Park, evidence-in-chief Annexure 3 figure 8 [Environment Court document 13].
216 D S Park, evidence-in-chief paras 6.10–6.15 [Environment Court document 13].
217 M J Hunt, evidence-in-chief paras 55 and 58 [Environment Court document 26].
218 C W Day, evidence-in-chief para 3.6 [Environment Court document 23].
219 O J Dodson, evidence-in-chief para 21 [Environment Court document 30].

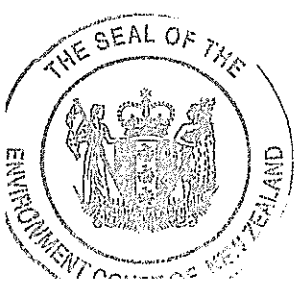
paths, and in particular on the residences along the river, has been carried out. The court has no power to introduce or enforce any flight paths and offers no view as to the appropriateness of the proposed paths at Omaka.

[134] The court received a number of 55 dB Ldn contours from the parties each derived under different assumptions. We list each contour received:

- Mr Hegley's 2028 contours: errors in the derivation of his first contour were corrected with a second contour being produced. Because both contours were for only 15 years in the future, they are disregarded.
- Mr Hegley's 2038 contour: this incorporates Mr Park's flight information for Runway 01 from one month of VHF recordings, annual growth rates of 2.7% and 10% for fixed wing aircraft and helicopter movements respectively, and uses the current flight paths from all runways. This contour crosses the site in an east/west direction with some 45% (9.6 ha)[220] of the site inside the contour.
- Dr Trevathan's 2028 contour: being only a 15 year projected contour this too is disregarded.
- Dr Trevathan's 2038 contours: all four contours are based on the three months (10 January – 8 April 2013) of recorded VHF data and a 2.7% growth rate for fixed wing aircraft movements. Two annual growth rates for helicopter movements, 6.6% and 7.7% (being 10% to 2028 and 4.4% for 2028 -2038), are used and for each there are contours with and without helicopter noise abatement paths.

[135] Dr Trevathan's contours all cross the site from east to west at varying distances from the southern boundary. The most intrusive contour is the 7.7% annual growth rate for helicopters with no abatement paths. It is at most 112.1 metres from the boundary[221] and encompasses 3.84 hectares. The least intrusive contour is the 6.6% annual growth rate for helicopters with abatement paths. This contour is not more than 42.9 metres from the boundary[222]. It encompasses 1.11 hectares.

[136] Dr Trevathan's contour assumed that helicopters would use "noise abatement flight paths" where helicopters alter course shortly after takeoff in order to reduce noise. At Omaka such a route would require a heading change of 10 degrees after takeoff from runway 01 to follow the Taylor River north and pass over an industrial area[223]. This flight path was used by Dr Trevathan in his modeling. It is a significant difference to Mr Hegley's modeling which used the current flight paths.



220 M J Hunt, evidence-in-chief para 62 [Environment Court document 26].
221 T P McGrail, Rebuttal evidence figure 7 [Environment Court document 9A].
222 T P McGrail, Rebuttal evidence figure 6 [Environment Court document 9A].
223 D S Park, evidence-in-chief para 6.20 [Environment Court document 13].

[137] The Omaka Aero Club has not implemented noise abatement paths for helicopters as an attempt to protect the amenity of its neighbours. Mr Dodson, of Marlborough Helicopters, states his company has a written policy to avoid overflying built areas whenever possible[224] but we received no indication that this policy is adopted by Omaka as an airport. Should the helicopter numbers increase at the suggested rate of 10% per annum there very likely will be reverse sensitivity effects arising from the helicopter tracks to the east which may force Omaka to adopt noise abatement paths (as suggested by Mr Park). Such paths operate at other New Zealand airports including Ardmore. Mr Park believes such paths should be developed for Omaka[225] in accordance with the Helicopter Association International guidelines and the Aviation Industry Association of New Zealand Code of Practice. The former includes a guideline[226] for daily helicopter operations which reads "Avoid noise sensitive areas altogether, when possible ... Follow unpopulated routes such as waterways".

[138] We see this as a possible way to protect residents' amenity and still let Omaka grow some of its operations as predicted out to 2038. There are differences of opinion[227] regarding the practicality and efficacy of the proposed tracks which we acknowledge. Further, as suggested by witnesses for the Omaka Group, those flight tracks might impose more noise on residents east of the Taylor River. We cannot ascertain from the noise contours (see the next paragraph) whether or not that is likely to be the case. Despite that we accept this approach in principle and thus regard Dr Trevathan's 2038 contour[228] as the best indication of the likely (but still inaccurate) location of the 55 dB Ldn contour in the vicinity of the site in 2038.

[139] The 55 dB Ldn contour was also plotted by Mr McGrail as a complete contour surrounding the aerodrome[229]. It encloses 349 existing residential properties east of the Taylor River. To obtain this contour Dr Trevathan assumed movements on runways other than 01 to be those recorded in a Hegley Acoustic Consultants' report which he attached to his evidence as Attachment 6. In the light of Mr Park's 2013 recording, Dr Trevathan was not confident about the correctness of these movements and thus believed the contour at places away from the site was incorrect[230]. He gave no indication of the magnitude or location of discrepancies from a "correct" contour.

Findings

[140] The 2013 55 dB Ldn noise contour produced by Dr Trevathan and not challenged by any witness will expand as airport activity increases. The court accepts Mr Day's view that the contour will reach the residential area east of the Taylor River

224 O J Dodson, evidence-in-chief para 17 [Environment Court document 30].
225 D S Park, evidence-in-chief para 6.16 [Environment Court document 13].
226 D S Park, evidence-in-chief para 6.15 [Environment Court document 13].
227 D S Park, evidence-in-chief para 6.2 [Environment Court document 13] and O S Dodson, evidence-in-chief para 21 {Environment Court document 30].
228 J W Trevathan, evidence-in-chief Attachment 9 [Environment Court document 14].
229 T P McGrail, Rebuttal evidence figure 4 [Environment Court document 9A].
230 J W Trevathan, evidence-in-chief para 6.2 [Environment Court document 14].

before it reaches the site[231]. It is the general view of the acoustic witnesses, and the court concurs, that there has not been sufficient work done to enable the location of a 55 dB Ldn noise contour for 2038 either near the site or for the airport as a whole. Not only is there insufficient information, but in any event there is considerable uncertainty as to the likely character of future use of the Omaka airfield.

[141] As a set the contours are sufficient to indicate to the court, the Omaka Group Aero Club and the council what may occur in the future. They will be a useful guide when formulating noise abatement procedures by way of a Noise Management Plan and possible protection within the District Plan.

Noise mitigation measures

[142] In addition to the use of abatement paths, Dr Trevathan provided a number of other suggestions for mitigating noise effects on the Colonial land[232]:

(i) aviation themed subdivision;
(ii) covenants;
(iii) situating houses so that outdoor areas are to the north;
(iv) reducing dwelling density on the southern boundary;
(v) mechanical ventilation;
(vi) acoustic insulation.

[143] Dr Trevathan suggested that the development could have an aviation theme[233], so that only people who liked airfield noise would choose to live there. As counsel for Omaka pointed out, this relies on people correctly identifying themselves as not being noise sensitive. Further, as the noise level is predicted to increase over time it is difficult to assess whether people will be able to cope with the noise in the future.

[144] The effectiveness of "no-complaints" covenants was discussed by Mr P Radich, an experienced lawyer in Marlborough, who gave evidence for Carlton Corlett Trust. While he accepted covenants are legally enforceable[234], Mr Radich was cautious about their effectiveness since they really just signal a problem rather than providing an effective solution[235]. He said that enforcement was dependent on how reasonable the covenanter thought it and whether they were the original covenanter[236]. Further, it is not council practice to enforce private covenants as such disputes are viewed as a private matter for the parties to determine themselves[237].

231 Transcript pp 514-515.
232 J W Trevathan, evidence-in-chief para 10.1 [Environment Court document 14].
233 J W Trevathan, evidence-in-chief para 10.11 [Environment Court document 14].
234 *South Pacific Tyres Ltd v Powerland (NZ) Ltd* [2009] NZRMA 58 (HC).
235 Transcript at 748 line 17.
236 Transcript at 749 line 7.
237 Transcript at 750 line 14.

[145] It was suggested each house on the CVL site could be situated to the south of its allotment so that the outdoor areas were further away, although Dr Trevathan acknowledged this would not protect residents from the noise of planes flying overhead[238].

[146] With regard to acoustic ventilation, Dr Trevathan accepted that if all houses on the Colonial land were outside the OCB any additional insulation would be unnecessary[239]. As for mechanical ventilation, this allows people to keep windows closed reducing internal noise levels. However, since the internal noise level is already satisfactory with open windows at the level of external noise likely to be experienced on the Colonial land (depending on where the future airnoise boundary is) mechanical ventilation is not needed[240].

[147] In our view the only mitigation which is desirable is the registration of "no-complaints" covenants. The other measures would simply add costs without gaining commensurate benefits. We have considered whether even the proposed covenants will give sufficient benefits to outweigh the transaction costs of imposing them. Counter-considerations are that, as we find elsewhere, residents east of the Taylor River are likely to be affected by noise from aircraft taking off and landing at Omaka airfield before residents on the site — yet, so far as we know, there are no covenants imposed on the Taylor River residents. Further, there are likely to be other limitations on helicopter numbers operating from Omaka (e.g. conflict with Woodbourne operations).

[148] Over-riding those concerns is that airports — even those with very small numbers of aircraft using them — are potentially subject to "noise" complaints. Such complaints may have a critical mass beyond which the legality (or existing use rights) can potentially become irrelevant in the face of political pressure. Further, there is a suggestion by the High Court that councils are responsible for ensuring that nuisance issues do not arise through activities it allows: *Ports of Auckland Limited v Auckland City Council*[241].

[149] Since CVL is volunteering the covenants, we consider they should be accepted.

5. Does PC59 give effect to the RPS and implement WARMP's objectives?

5.1 Giving effect to the RPS

[150] We judge that PC59 would give effect to the Regional Policy Statement. It would enhance the quality of life[242] by supplying houses while not causing adverse effects on the environment, and it would appropriately locate a type of activity

238 Transcript at 245 line 7.
239 J W Trevathan, evidence-in-chief para 10.1 [Environment Court document 14].
240 Transcript at 246 line 21.
241 *Ports of Auckland Limited v Auckland City Council* [1999] 1 NZLR 600 at 612 (HC).
242 Regional objective 7.1.2.

(residential development) which would cluster[243] with housing to the north and east, reflect the local character and provide the use of the river banks and beyond that, the Wither Hills.

[151] The air transport policy in the RPS — which focuses on Woodbourne — would not be affected.

5.2 Implementing the objectives of the WARMP

[152] The question for the court in this proceeding is whether the rezoning of a 21.4 hectare vineyard on the southern side of the Wairau Plains near Blenheim for 'residential' development, given its proximity to Omaka airfield, would promote the objectives and policies of the WARMP and the sustainable management of the district's natural and physical resources.

[153] The most relevant policy — (11.2.2)1.5 — requires that any expansion of the urban area of Blenheim achieves specified outcomes. We consider these in turn. In relation to achieving a compact urban form we note that development of the CVL would add to an existing part of Blenheim. In some ways it would tidy the existing rather anomalous residential enclaves along New Renwick Road and Richardson Avenue, both adjacent to the site.

[154] No issues were raised in relation to integrity of the road network. The site is adjacent to three roads, and can be suitably developed.

[155] As for maintenance of rural character and amenity values, the rural character of the site will be reduced, but the site is already rather anomalous in that respect since it has residential development to the north and east, and the business activities of the Omaka airfield and the Heritage Museum to the south.

[156] Appropriate planning for service infrastructure is an important issue. A significant feature of the site is that all services are readily available at a reasonable cost. The section 42 report presented to the council hearing stated "The development of the site is not constrained by the development of services"[244].

[157] Infrastructure must also be provided within the site to each dwelling. The site is essentially flat with a fall of 4 to 5 metres from southwest to northeast. This will allow the sewer and stormwater services to be easily staged throughout the development of the site[245]. Planning for this will necessarily be part of the overall development plan for the site and will produce no difficulties.

243 Regional policy 7.1.10.
244 T P McGrail, evidence-in-chief para 13 [Environment Court document 9].
245 T P McGrail, evidence-in-chief para 11 [Environment Court document 9].

[158] The 2010 Strategy assessed the site, along with nine other locations, for the provision of water, sewer and stormwater services. It found that "Development in this area can be connected to existing networks without upgrades of infrastructure"[246]. We conclude appropriate planning has been done for service infrastructure to the site and thus no further planning is necessary in this regard.

[159] Perhaps the key service infrastructure issue in the case — and a central issue in the proceeding — is the extent to which residential development of the site might restrain future development of the Omaka airfield. We discuss that in our conclusions below.

[160] No issue was raised in relation to productive soils.

[161] The Rural Environments section (Chapter 12) of the WARMP recognises the importance of the airport zone(s) and the explanatory note states that noise buffers surrounding the airport are the most effective means of protecting the airport's operation[247]. The RPS also requires that buildings and locations identified as having significant historical heritage value are retained[248] and as we have found Omaka airport to be a heritage feature this is relevant in terms of its protection, especially with reference to section 6(f) of the Act. We consider the covenant suggested as a mitigating measure by CVL can assist in that regard so that the heritage operation — flights of old aircraft — can continue and grow (within reason).

[162] While the objectives and policies of the WARMP give some protection to Omaka there is a "balance"[249] to be achieved with activities that might be affected by them. In summary we consider PC59 meets more objectives and policies (especially the important ones) than not, and thus represents integrated management of the district's resources.

5.3 Considering Plan Changes 64 to 71

[163] We consider the Plan Changes 64-71 are only relevant to the extent they show that the council has other solutions to the problem of supplying land for further residential development and we considered them earlier. We reiterate that these plan changes are at such an early stage in their development we should give them minimal weight.

246 SMUGS 2010 Summary for Public Consultation, p 14.
247 Wairau/Awatere Resource Management Plan 12.7.2, explanatory note at pp 12-23.
248 RPS objective 7.3.2.
249 M J Foster, evidence-in-chief para 4.14 [Environment Court document 27].

6. Does PC59 achieve the purpose of the RMA?

[164] In *Hawthorn*[250], the future state of the environment was considered in a land use context. The Court of Appeal concluded that[251]:

> ... 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.

The future state of the environment includes the environment as it might be modified by permitted activities and by resource consents that have been granted where it appears likely those consents will be implemented. It does not include the effects of resource consents that may be made in the future. CVL submitted that, in a plan appeal context, this must extend to the prospect of plan changes or even plan reviews with entirely uncertain outcomes at some indeterminate time in the future[252]. CVL accepts there is a requirement to consider the future environment and has endeavoured to do so in its evidence using a predicted level of activity and effects associated with it. However, while the projections to 2038 will influence the resolution of the plan, CVL says the plan must also reflect other influences over those 25 years[253].

[165] Counsel for the Omaka Group submitted we should distinguish *Hawthorn* as concerning a resource consent application rather than a plan change. If the proposed airnoise boundary is to be taken into account as part of the environment the Omaka Group suggested that great care needs to be taken in assuming that airnoise and (outer control) boundaries will protect the community from noise and reverse sensitivity effects when there is currently no plan change proposed[254]. CVL argued that Omaka misses the point — section 5 applies to all functions under the RMA[255].

[166] The council submitted that, given the timing of PC59, before restrictions or protection are put in place for Omaka through a future plan change process, the planning environment as it is today is the appropriate reference. Mr Quinn submitted that the policy and planning framework of the WARMP:

- affords the district's airports, including Omaka, a high level of protection relative to land use aspirations around the airport;
- provides that an outer control boundary should be created for Omaka and specifically cites NZS 6805 and states that any 55 dBA Ldn noise contour must be surveyed in accordance with it; and

250 *Queenstown Lakes District Council v Hawthorn Estate Limited* (2006) 12 ELRNZ 299
251 *Queenstown Lakes District Council v Hawthorn Estate Limited* (2006) 12 ELRNZ 299 at [57]
252 Closing submissions for CVL, dated 21 October 2013 at [48].
253 Closing submissions for CVL, dated 21 October 2013 at [55].
254 Closing submissions for Omaka, dated 11 October 2013 at [11].
255 Closing submissions for CVL, dated 21 October 2013 at [54].

- allows expansion of the Omaka aerodrome as a permitted activity.

6.1 Sections 6 and 7 RMA

[167] Section 6 of the Act concerns matters of national importance. Only one paragraph in section 6 is relevant. Section 6(f) provides for the protection of historic heritage from inappropriate subdivision, use, and development and is relevant for two reasons. First, the three grass runways are claimed to be the longest surviving set in New Zealand. They were prepared in 1928 and have been used ever since. Secondly, there is the world-class collection of World War I aircraft and replicas, superbly displayed with other thematic memorabilia, at the Aviation Heritage Centre.

[168] We accept it is a matter of national importance to protect those heritage values, and to allow their responsible expansion. There was no evidence that residential activities on the site will cause reverse sensitivity effects on the Omaka airfield in the near future. The evidence did establish that a business as usual approach for the Omaka airfield as a whole might cause issues for residents of the CVL site and thus potential reverse sensitive effects (complaints) by 2039. But not all activities at the Omaka airfield have heritage value. In particular there are helicopter and other general aviation activities whose expansion will need to be carefully examined by the council as it makes its decision about an outer control boundary for the airfield. Given those circumstances, we hold that the heritage values of the airfield need not be affected by the plan change and so give this factor minimal weight in the overall weighing exercise.

[169] Section 7 of the Act sets out other matters the court is to have particular regard to when making its decision. Section 7(b) of the Act concerns the efficient use and development of natural and physical resources and we will consider it in the context of the section 32 analysis. Section 7(c) provides for the maintenance and enhancement of amenity values and section 7(f) is also relevant since it talks about maintenance and enhancement of the quality of the environment. Both these matters are covered by and subsumed in the objectives and policies in the district plan.

[170] Counsel for the Omaka Group suggested[256] that section 7(g) of the RMA could be relevant but there was no specific evidence about that. There are extensive grass flats on the Wairau Plains so we consider that that argument cannot get off the ground.

6.2 Section 5(2) RMA

[171] The ultimate purpose of any proposed plan or plan change under the RMA is to achieve the purpose of the RMA as defined in section 5 of the Act. In the case of a plan change (depending on its breadth) that purpose is usually subsumed in the greater detail and breadth of the operative objectives and policies which are not sought to be changed. That is broadly the situation in this proceeding as we have discussed already.

256 Closing submissions for Omaka para 172.

[172] In terms of section 5 of the RMA the proceeding comes down to this: we must weigh enabling of a potential small community of residents on the site in the near future (in a situation where there is a relative undersupply of houses) against the potential longer-term (post 2038) disenabling expansion of activities on the Omaka airfield as the aviation cluster would like. We have found that the evidence, that growth in activities which would need to be restricted is unlikely, is more plausible than the evidence of greater growth (e.g. to 35 helicopters operating from the airfield by 2038). While we have recognised above the superb heritage value represented by the grass airstrips and the Aviation Heritage Centre, those can be protected into the future without causing reverse sensitivity effects if the site is rezoned under PC59.

[173] We also take into account that it is possible that some limitation on, in particular, helicopter movements at Omaka airfield may be necessary in the future. However, it will not necessarily be as the result of complaints from residents of the site. On the evidence it is more likely to be caused by complaints from occupiers of the council's subdivision east of Taylor River, or as a result of restrictions imposed by CAA, in order to safeguard operations at Woodbourne.

[174] In any event we have found that the objectives and policies of WARMP favour acceptance of the PC59 rather than its refusal. Our provisional view is that PC59 should be approved. However, there are some further considerations.

7. Result

7.1 Having regard to the MDC decision

[175] In accordance with section 290A of the Act the court must have regard to the decision which is the subject of the appeal.

[176] The Commissioners' Decision deals with the site in two parts. "Area A" is outside a notional outer control boundary ("OCB") and Area B is within the OCB. In respect of the area inside the contour — Area B — the Commissioners concluded[257]:

> 122. We consider that Area B should not be rezoned to accommodate new residential development. Sufficient reasons for that conclusion are:
>
> (a) The Standard directs that new residential activity should not be located in the OCB;
>
> (b) The reverse sensitivity effects on the Omaka Aerodrome from new residential development will be serious and potentially imperil the present and future operations of the Omaka Aerodrome not least by demand by residents to limit aviation related activities;
>
> (c) New residential development will not achieve the settled WARMP goals as expressed in the following provisions:
> (i) Section 11.2.1, Objective 1;
> Section 12.7.2, Objective 1. Section 11.2.2, Objective 2.

257 Commissioners' Decision para 122 [Environment Court document 1.2].

(ii) Section 22.3, Policy 1.1
Section 23.4.1, Policy 23.4.1 and Section 12.7.2, Policies 1.2 and 1.3.

(d) By reason of (a) – (c) above MDC is not assisted by PPC 59 in carrying out its functions under RMA s 31(1)(a) and PPC 59 does not achieve the overarching purpose of the RMA of sustainable management.

[177] In respect of mitigation they decided[258]:

(a) That full noise insulation (not just of bedrooms) was required;

(b) That insulation would have been inadequate mitigation because it did not allow for natural airflow from open windows which is an adverse amenity effect;

(c) Noise insulation within the building fabric does not address wider amenity concerns;

(d) We do not support the use of no complaint methods in this context as an adequate mitigation method to achieve the social wellbeing of the community which is a key component of sustainability.

[178] While Area A is outside of the OCB and therefore potentially suitable for residential development the Commissioners identified the following issues[259]:

124. The difficulties are:

(a) the total urban design concept presented by CVL is based on the whole site being developed for new residential use;

(b) there was no urban design assessment of the appropriateness of development on Area A alone;

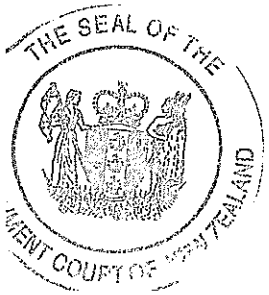
(c) there is no concept plan for Area A alone that can be used in order to ensure an appropriate planning outcome is achieved;

(d) it is unclear how the balance of the site (Area B) will be utilised in the long term. Conceivably it can be used for other purposes such as industrial development. An integrated solution will need to be carefully thought through and more detailed analysis undertaken.

[179] On balance the Commissioners considered that:

> ... the risk of approving new residential development on Area A by rezoning presents an unacceptable risk of poor strategic planning and lack of integrated development. A comprehensive strategic planning exercise is part of MDC's work stream and review of the WARMP and there is no pressing need for new residential land[260].

[180] The Commissioners' overall conclusion was that the application in its entirety should be declined[261].



258 Commissioners' Decision para 120 [Environment Commissioner document 1.2].
259 Commissioners' Decision para 124 [Environment Commissioner document 1.2].
260 Commissioners' Decision para 125 [Environment Commissioner document 1.2].
261 Commissioners' Decision para 126 [Environment Commissioner document 1.2].

7.2 Should the result be different from the council's decision?

[181] First, we have found the plan change meets more objectives and policies of the WARMP than not. This finding is in contrast to the Commissioners who found the goals of the WARMP would not be achieved.

[182] There was repeated reference in the evidence of the council's witnesses to PC59 not representing integrated management. That evidence reiterated the findings of the Commissioners' decision quoted above. We have taken special care to identify and consider the relevant objectives and policies of the district plan (the WARMP) and we find that PC59 is more likely than not to achieve most of the relevant objectives, and to do so in a generally integrated way.

[183] We also accept counsel for CVL's argument that the council is being inconsistent. Mr Davidson QC and Mr Hunt wrote[262]:

> If the Council is reliant on the notion that PC59 is a pre-emptive strike to a fully integrated process under the RMA then it [the Council] stands against the very process it utilised in Plan Changes 64 – 71. The importance of integrating Employment land use was not matched with any similar urgency or affirmative action.
>
> If Plan Changes 64 – 71 are thought to be fully integrated because they are incorporated as part of the final iteration of SMUGS then the same can be said of Colonial, which is expressly acknowledged to give effect to the Growth Strategy (with the only qualification that it be approved by the Environment Court).

[184] Second, the Commissioners' decision is predicated on the assumption that a (future) outer control boundary would cross the site dividing it into the two areas identified by the Commissioners as 'A' and 'B'. We do not consider that assumption is justified, because, as we have stated, the location of any future outer control boundary depends on a number of value judgements which we cannot (should not) make now.

[185] In fact, it was agreed by all parties that the noise contours provided to the Commissioners were for too short a time period and were erroneous. The 2038 timeline was agreed and the council accepted Mr Park's data as appropriate for projecting future noise levels. Dr Trevathan's 2038 contour with abatement paths is our preferred prediction although we accept it with due caution especially since we share Mr Park's scepticism that 30 helicopters will be using the Omaka airfield even by 2038.

[186] That analysis assumes that the Omaka airfield will continue to grow as it has in the recent past. However, as NZS 6805 recognises, there is a normative element to establishing where outer control boundaries should go. That exercise of judgement under the objectives and policies of the district plan and, ultimately, under section 5 of the RMA requires us to consider whether the Omaka airfield can, or should, develop at whatever pace supply (under the Aero Club's policies) and demand drive.

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262 Final submissions for CVL paras 30 and 31 [Environment Court document 39].

[187] It seems probable (and appropriate) that some constraints in growth of the Omaka airfield — especially in helicopter numbers — will be appropriate due to two constraints independent of development of the site. These are the recent residential development east of the Taylor River, and the requirements of the Woodbourne airfield as it grows. Mr Day stated[263] that any 55 dB Ldn contour would expand on to the land east of the Taylor River well before it reaches the site.

[188] Third, the Commissioners were influenced by the need for "employment" land. While the obvious alternatives for the land are between the proposed Residential zoning and the existing Rural zone, we accept that the realistic alternatives for the site are residential versus some kind of "employment" use in the sense discussed earlier.

[189] We have found that industrial zoning of the site is likely to be an inefficient use of the resource. Nor would that inefficiency be sufficiently remedied by consideration of the Omaka airfield.

[190] It would (also) be inefficient to block residential development of the site because of perceived future reverse sensitivities of the Omaka airfield sometime after 2030. That is for two reasons: first, the best estimate of the 55 dB Ldn contour in 2038 depends on helicopter growth (30 helicopters operating out of the airfield) which we consider is unlikely; and secondly, there are more than likely to be other constraints[264] on such growth of Omaka airfield use in any event — for example complaints from residents of the new subdivision east of Taylor River, and operational demands of the Woodbourne airport as its operations increase in size and frequency.

7.3 Outcome

[191] Weighing all matters in the light of all the relevant objectives and policies, we conclude comfortably that the scales come down on the side of PC59 in general terms. We conclude that the purpose of the RMA and of the WARMP are better met by rezoning the site part as Urban Residential 1 and part as Urban Residential 2 as shown in the notified application subject to any adjustments for services as described by Mr Quickfall in his evidence.

[192] Two new objectives were proposed by CVL for the new section 23.6.1 of the WARMP. Those objectives are beyond jurisdiction as we discussed earlier. However, they are well-intentioned, and the second in particular seeking to introduce urban design principles — is potentially very useful. We consider they can be introduced as policies.

[193] We generally endorse the amendments to the policies and rules as stated in Mr Quickfall's Appendix 4 (subject to the *vires* deletions discussed at the beginning of this

263 Transcript pp 514-515.
264 Transcript p 160 lines 20-30.

decision) but we expect the parties to agree on the amended policies and rules in the light of these Reasons. For the avoidance of doubt we record that we regard the best practice urban design principles identified in Mr Quickfall's Appendix 4 as important and expect them to be written into PC59 (since no party opposed them) although we doubt whether they should be in "section 23.6" since that already exists in the WARMP. Since we have some doubts as to our jurisdiction under section 290, we will make an order under section 293 in respect of the urban design principles in order they may be introduced as policies, rather than as objectives. In case it assists we see these as implementing the urban growth objectives in the WARMP and thus tentatively suggest they should be located there.

For the court:

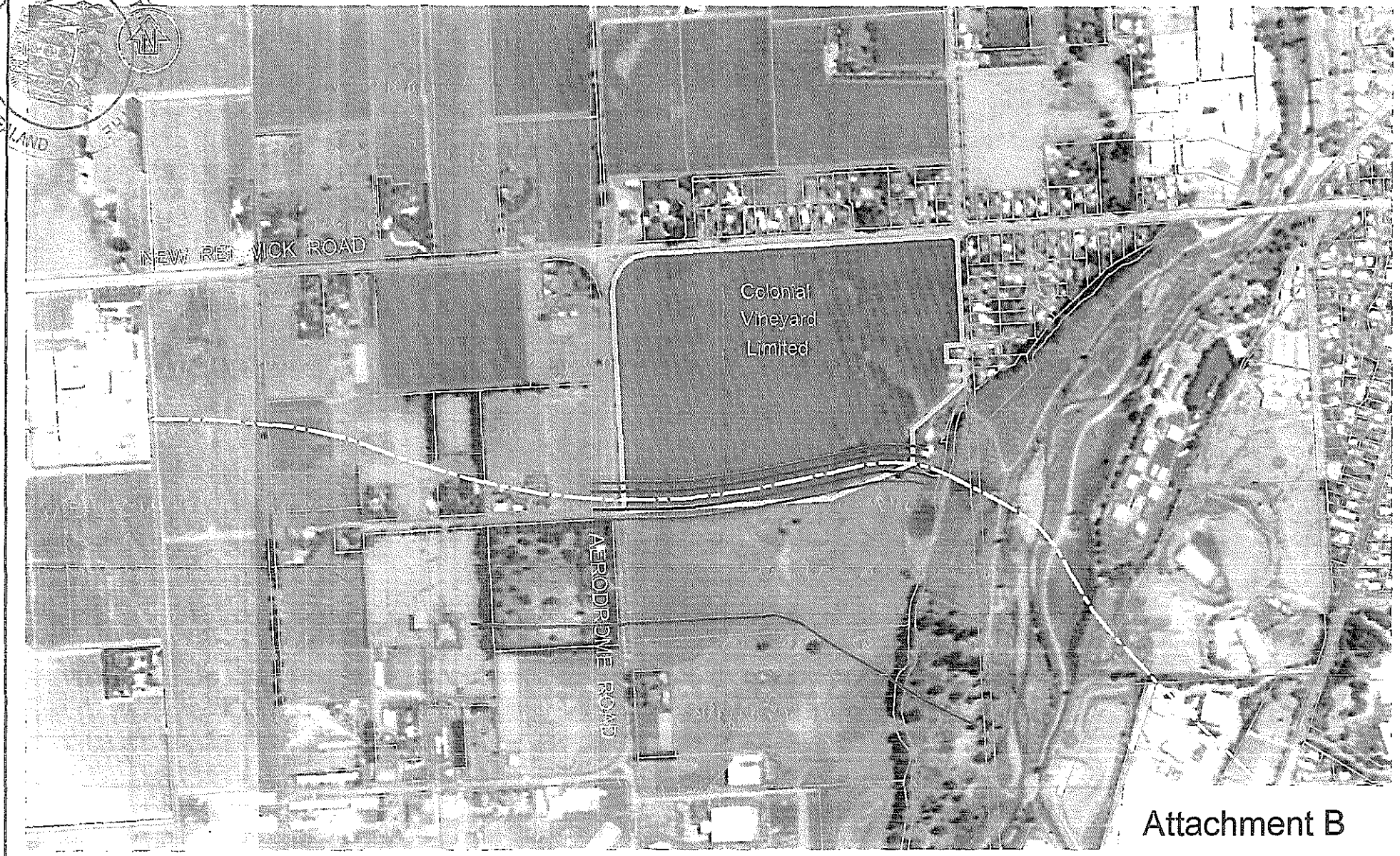
J R Jackson
Environment Judge

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

A J Sutherland
Environment Commissioner

Attachment 1: Site Map.

JacksojJud_Rule\d\Colonial Vineyards v Marlborough DC.doc



Attachment B

Ayson and Partners Ltd
REGISTERED PROFESSIONAL SURVEYORS
Davidson Ayson House
4 Nelson Street, P.O. Box 256
Blenheim, New Zealand
Ph 03 579 2099, Fax 03 578 7028
Email: office@aysonandpartners.co.nz
www.aysonandpartners.co.nz
Consultants in Surveying, Resource Management, Subdivision and Land Development

SUPPLEMENTARY EVIDENCE OF JEREMY TREVATHAN

2038 55dB Ldn Noise Exposure Contour. Based on updated flight movement data provided by Dave Park including helicopter abatement tracks

- Change to contour if 2013 fixed wing *and* helicopter flight numbers increased or decreased by 5 %
- Change to contour if 2013 fixed wing *and* helicopter flight numbers increased or decreased by 10 %
- Approximate 2013 55 dB Ldn contour

SCALE (A3)	JOB NUMBER	
1:6000	13217	
DATE 09.09.2013	SHEET 25	ISSUE A
LB GW / CHECK TM		

0 10 20 30 40 50 60 70 80 90 100mm

J:\13200\13217-Colonial Env Court\AutoCAD\13217 NP 3E & 4E.dwg

ATTACHMENT 1

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2011-485-002259

UNDER	the Resource Management Act 1991 and its amendments
IN THE MATTER OF	an appeal under s 149V of the Act to the High Court on questions of law
BETWEEN	RATIONAL TRANSPORT SOCIETY INCORPORATED Appellant
AND	A BOARD OF INQUIRY APPOINTED UNDER S 149J OF THE RESOURCE MANAGEMENT ACT Decision-maker
AND	NEW ZEALAND TRANSPORT AGENCY Respondent

Hearing: 7 December 2011

Counsel: T H Bennion for Appellant
J J M Hassan and M J R Conway for Respondent

Judgment: 15 December 2011

In accordance with r 11.5 I direct the Registrar to endorse this judgment with the delivery time of 2.30pm on the 15th day of December 2011.

RESERVED JUDGMENT OF GENDALL J

---

[1] The New Zealand Transport Agency (NZTA) is contemplating realigning State Highway 1 through what is known as "Transmission Gully", north of Wellington, between Linden and Paekakariki, via Pauatahanui. In order to do so it will require certain resource consents. Some of these relate to roading developments

that would affect waterways through that area. That is governed by the Regional Freshwater Plan for the Wellington region.

[2] The NZTA requested changes to be made to that Freshwater Plan because, as it presently stands, some of the activities for which resource consents may be required (if the project proceeds) are "non-complying activities", including reclamation activities. As such, they are only eligible for consent if either:[1]

- the environmental effects are "no more than minor"; or
- the activity would not be contrary to the Objectives and Policy of the Freshwater Plan.

[3] For such major construction works of State Highway 1 it is going to be difficult, if not impossible for the NZTA, to meet the test that any adverse effects were no more than minor. Further, the present policy framework of the Freshwater Plan potentially closes the door on the ability to obtain necessary consents unless the plan could be changed.

[4] As a consequence NZTA requested that certain changes be made to the Freshwater Plan for the Wellington region (Request). The Resource Management Act 1991 (Act) allows for any person to seek a change to a Regional, or District, Plan.

[5] Upon the Minister for the Environment determining the Request was part of a proposal of national significance, a Board of Inquiry (the Board) was set up pursuant to Part 6AA of the Act, with the conduct of the Inquiry taking place under ss 149L - 149P. The Board was directed to hear the Request, and determine it as if it were a regional authority. The Board of six members had particular expertise, knowledge and skill, being selected in part for their experience relating to the local community. The chair was a widely experienced Judge of the Environment Court. The process encouraged public submissions. The Board conducted a hearing over seven days

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[1] Resource Management Act 1991, s 104D.

between 6 – 13 July 2011; received extensive evidence, expert and lay, multiple submissions, and representations by "submitters" which although perhaps not formal evidence, were statements of their views. The Board delivered a final decision and report encompassing 337 paragraphs and 86 pages (together with five appendices). The outcome was that the Request to change the Regional Freshwater Plan was approved by the Board.

[6] Applications by NZTA for resource consents have been referred to the Board, constituting the same members of those who heard the Request. Those applications have been publicly notified and submissions closed, and a public hearing is scheduled to commence on 12 February 2012. Consequently, the Court has had to deliver its decision under severe time restraints given that the Court vacation is between 16 December 2011 and 1 February 2012.[2]

[7] In the time available to deliver this decision it is not possible to do more than summarise the essential features of the Board's decision.

[8] Unsurprisingly, the Board found that Transmission Gully was a project of regional and national significance. It found that the project was likely to have adverse effects which are more than minor on certain water bodies in its construction. The policy of the Freshwater Plan required that those adverse effects be avoided. The Board accepted however that avoidance was not the only appropriate method of achieving sustainable management of those water bodies. It was appropriate to include a wider range of management methods (i.e. remedy or mitigate) in the plan in relation to Transmission Gully. In terms of offsetting the effect on the water bodies, the Board rejected the argument that offsetting was an inappropriate management method. Rather, it was a possible form of remedy or mitigation, which could be considered on a case by case basis in relation to the actual water bodies concerned, when resource consent applications were made. The Board determined that the changes which it accepted were not inconsistent with the relevant national and regional policies and objectives, and that they did not preclude

---

[2] See [83].

the Freshwater Plan from giving effect to such policies. The changes also met the purposes of the Act.

[9] The appellant does not want the Transmission Gully highway to be constructed. If it had been successful the NZTA would have probably failed to obtain necessary resource consents. It opposed the Request before the Board. It now appeals the Board's decision. If it fails in the appeal it may continue to oppose the application for resource consents.

Jurisdiction to appeal

[10] A right of appeal is provided in s 149V of the Act but only on a question of law. No appeal exists to the Court of Appeal from the determination of the High Court. A party may apply to the Supreme Court for leave to bring an appeal to that Court.

[11] The principles to be applied are well known and dealt with by the Supreme Court in *Bryson v Three Foot Six Ltd*:[3]

> An appeal cannot, however, be said to be on a question of law where the fact-finding Court has merely applied law which it has correctly understood to the facts of an individual case. It is for the Court to weigh the relevant facts in the light of the applicable law. Provided that the Court has not overlooked any relevant matter or taken account of some matter which is irrelevant to the proper application of the law, the conclusion is a matter for the fact-finding Court, unless it is clearly insupportable.
>
> An ultimate conclusion of a fact-finding body can sometimes be so insupportable – so clearly untenable – as to amount to an error of law: proper application of the law requires a different answer. That will be the position only in the rare case in which there has been, in the well-known words of Lord Radcliffe in *Edwards v Bairstow*, a state of affairs "in which there is no evidence to support the determination" or "one in which the evidence is inconsistent with and contradictory of the determination" or "one in which the true and only reasonable conclusion contradicts the determination". Lord Radcliffe preferred the last of these three phrases but he said that each propounded the same test. ...

---

[3] *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [25] – [26].

Background

[12] As mentioned, the Transmission Gully Project (TGP) involves the proposed construction of a 27 kilometre highway from Linden via Pauatahanui to Paekakariki. Its construction will require works affecting streams which will be subject to diversions, culverts and dams. The highway will have impact upon the waterways along its length. The NZTA lodged the Request for changes to the Regional Freshwater Plan because of its concern about policies 4.2.10 and 4.2.33 of the Freshwater Plan.

[13] Policy 4.2.10 provides that:

> To *avoid* adverse effects on wetlands, and lakes and rivers and their margins, identified in Appendix 2 (Parts A and B), when considering the protection of their natural character from the adverse effects of subdivision, use, and development. (Emphasis added)

[14] By way of contrast, policy 4.1.12 provides that:

> The adverse effects of the use and development of freshwater resources are *avoided, remedied, or mitigated*. (Emphasis added)

[15] In the "Explanation" to policy 4.2.10 the distinction is explained:

> Wetlands, and lakes and rivers and their margins, are identified in Appendix 2 as having a high degree of natural character ... The preservation of natural character in this policy is achieved by avoiding adverse effects. In this policy "to avoid adverse effects" means that when "avoiding, remedying or mitigating adverse effects", as identified in subsection 5(2)(c) of the Act, the emphasis is to be placed on avoiding adverse effects. "To avoid adverse effects" means that only activities with effects that are no more than minor will be allowed in the water bodies identified. Further elaboration on the meaning of "minor" is contained in Policy 4.2.33.

[16] Policy 4.2.33 provides that adverse effects are likely to be no more than minor if certain criteria are met. Amongst those criteria are that:

> ...
>
> (2) any adverse effects of plants, animals or their habitats are confined to a small area or are temporary, and the area will naturally re-establish [comparable] habitat values ... ; and
>
> (3) there are no significant or prolonged decreases in water quality; and

...

(7) there are no adverse effects on the natural character of wetlands, and lakes and rivers and their margins.

[17] As the TGP would inevitably affect waterways, and in particular three streams (Horokiri, Ration, and lower Pauatahanui) that fall within policy 4.2.10, the NZTA was concerned that the TGP, when seeking consents, would be unable to meet, or would require uneconomic engineering to meet, the absolute requirement for avoidance of more than minor adverse effects in policies 4.2.10 and 4.2.33. Consequently, applications by NZTA for resource consent for non-complying activities would fail because that consent could only be granted for a non-complying activity where the effects of it were likely to be no more than minor, or the activity would not be contrary to the objectives or policies of the relevant plan. Obviously, effects will be more than minor.

[18] It was for that reason that the NZTA sought an exception to the policies 4.2.10 and 4.2.33. It sought a change in the policy for an avoidance of adverse effects, to allow for remedy, mitigation and offsetting such effects where avoidance was impracticable or where it would impose uneconomic costs on the TGP.

The Board's decision

(a) Preliminary findings

[19] The Board made four preliminary findings that "inform[ed] and underpin[ned]" its consideration of the merits of NZTA's Request. Three are relevant and provide that:

- the Freshwater Plan, in its present form, potentially precludes consideration of the merits of any resource consent applications for TGP (particularly non-complying reclamation activities) because the project is likely to have adverse effects which are more than minor on relevant water bodies and because the Freshwater Plan policies lack flexibility in that situation;

- the condition of Horokiri, Ration and Pauatahanui Streams is such that avoidance of adverse effects is not the only way of ensuring their sustainable management (as a general rule). They have each experienced catchment forest clearance, farming, riparian degradation, water quality changes, sedimentation and large changes in species composition; and

- TGP is a roading project of national and regional significance, and accordingly it is appropriate to consider the changes to the Freshwater Plan as sought by the NZTA.

(b) Final conclusions

[20] First, the Board considered a range of alternatives for the purpose of s 32, one being the status quo and the other four being changes of some sort, and the benefits and costs of each. It concluded that a limited amendment of policy 4.2.10 (with consequential amendments) was the most appropriate way of achieving the overarching objectives of the Freshwater Plan. Relevantly, the Board concluded that:

- retaining the status quo is not the most appropriate way of achieving the plan's objectives:

    - policy 4.2.10 is more limited than the relevant objectives: the objectives require that important values are preserved and protected, and that adverse effects are avoided, remedied or mitigated (objectives 4.1.4 – 4.1.6 and 7.1.1); and

    - the qualities of the water bodies potentially affected by the TGP are not such that avoidance of adverse effects is the only way of sustainably managing those streams: remedy or mitigation would also be appropriate;

- limited amendment of policy 4.2.10 to remove avoidance as a mandatory requirement, but retaining it as the preferred requirement, for the water

bodies affected by the TGP, is the most appropriate means for achieving the objectives of the Freshwater Plan. In particular, the Board held that the objectives of protection and preservation of freshwater values require that avoidance be the preferred outcome in any situation, followed by remediation and mitigation.

[21] Second, the Board concluded that the changes to the Freshwater Plan would not preclude that plan from giving effect to the National Policy Statement for Freshwater Management (NPSFM), as required by ss 66 and 67 of the Act. The key aspects of the NPSFM related to water quality (Part A). In particular, objective A2 provides that:

> The overall quality of fresh water within a region is maintained or improved while:
>
> (a) protecting the quality of outstanding freshwater bodies;
>
> (b) protecting the significant values of wetlands; and
>
> (c) improving the quality of fresh water in water bodies that have been degraded by human activities to the point of being over-allocated.

[22] Policy A2 provides that:

> Where water bodies do not meet the freshwater objectives made pursuant to Policy A1, every regional council is to specify targets and implement methods (either or both regulatory and non-regulatory) to assist the improvement of water quality in the water bodies, to meet those targets, and within a defined timeframe.

[23] The objectives and policies are set out in full:[4]

> A. Water quality
>
> Objective A1
>
> To safeguard the life-supporting capacity, ecosystem processes and indigenous species including their associated ecosystems of fresh water, in sustainably managing the use and development of land, and of discharges of contaminants.

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[4] National Policy Statement Freshwater Management 2011.

Objection A2

The overall quality of fresh water within a region is maintained or improved while:

a) protecting the quality of outstanding freshwater bodies

b) protecting the significant values of wetlands and

c) improving the quality of fresh water in water bodies that have been degraded by human activities to the point of being over-allocated.

Policy A1

By every regional council making or changing regional plans to the extent needed to ensure the plans:

a) establish freshwater objectives and set freshwater quality limits for all bodies of fresh water in their regions to give effect to the objectives in this national policy statement, having regard to at least the following:

    i) the reasonably foreseeable impacts of climate change

    ii) the connection between water bodies

b) establish methods (including rules) to avoid over-allocation.

Policy A2

[quoted at [22]].

Policy A3

By regional councils:

a) imposing conditions on discharge permits to ensure the limits and targets specified pursuant to Policy A1 and Policy A2 can be met and

b) where permissible, making rules requiring the adoption of the best practicable option to prevent or minimise any actual or likely adverse effect on the environment of any discharge of a contaminant into fresh water, or onto or into land in circumstances that may result in that contaminant (or, as a result of any natural process from the discharge of that contaminant, any other contaminant) entering fresh water.

Policy A4 and direction (under section 55) to regional councils

By every regional council amending regional plans (without using the process in Schedule 1) to the extent needed to ensure the plans include the following policy to apply until any changes under Schedule 1 to give effect to Policy A1 and Policy A2 (freshwater quality limits and targets) have become operative:

> *"1. When considering any application for a discharge the consent authority must have regard to the following matters:*
>
> *a) the extent to which the discharge would avoid contamination that will have an adverse effect on the life-supporting capacity of fresh water including on any ecosystem associated with fresh water and*
>
> *b) the extent to which it is feasible and dependable that any more than minor adverse effect on fresh water, and on any ecosystem associated with fresh water, resulting from the discharge would be avoided.*
>
> *2. This policy applies to the following discharges (including a diffuse discharge by any person or animal):*
>
> *a) a new discharge or*
>
> *b) a change or increase in any discharge–*
>
> *of any contaminant into fresh water, or onto or into land in circumstances that may result in that contaminant (or, as a result of any natural process from the discharge of that contaminant, any other contaminant) entering fresh water.*
>
> *3. ...."*

[24] The Board was of the opinion that the changes to the Freshwater Plan were not inconsistent with those objectives because:

- avoidance of adverse effects remained the first preference;

- the specific terms of new policy 4.2.33A and its explanation would ensure the safeguarding or life supporting capacity, ecosystem processes and indigenous species will be adequately achieved; and

- the consent authority retains an overall discretion to determine whether adverse effects have been adequately addressed by the NZTA. The proposed changes did not preclude a consent authority from determining that the concepts of safeguarding or protecting require the avoidance of adverse effects in any given case.

[25] Finally, the Board concluded that the changes to the Freshwater Plan were in accordance with Part 2 of the Act. This followed from earlier conclusions of the Board, and from its specific conclusions that:

- the TGP may potentially have downstream effects on the coastal environment by way of sediment discharge into Pauatahanui Inlet, however the consent authority will be in a position to assess whether such adverse effects are required to be avoided;

- the values of the relevant water bodies are not such that avoidance of adverse consequences is the only appropriate means of achieving sustainable management of those water bodies; and

- the water bodies in question are small, confined to a distinct geographic area, and have already been subject to considerable degradation. The management of those water bodies by means of remedial and mitigation measures may lead to better outcomes than current management of those water bodies.

[26] A full summary of the determinative findings and reasons of the Board follows:[5]

- TGP is a roading project which has been identified as nationally and regionally significant;[6]

- TGP is likely to have adverse effects which are more than minor on water bodies on its route;[7]

- The relevant policies of the Freshwater Plan require the avoidance of adverse effects on those water bodies, notwithstanding that avoidance of adverse effects is not the only appropriate method of achieving their sustainable management provided for by the Act;[8]

- The Freshwater Plan in its present form potentially precludes consideration of the merits of any resource consent applications for TGP in accordance with s 104 as a consequence of the operation of s 104D due [to] the lack of flexibility in the relevant policies;[9]

- Changing the Freshwater Plan to include provision for a wider range of management methods than just avoidance of adverse effects is the appropriate option to achieve sustainable management of the water

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5 At [332].
6 At [178] – [190].
7 At [98].
8 At [237].
9 At [162] – [166].

bodies and allow consideration of resource consent applications for TGP *on their merits*;[10]

- The appropriate form of the Request having regard to alternatives and to its efficiency and effectiveness in enabling the Freshwater Plan to achieve its Objectives, is that set out in Appendices 1 and 2 [accompanying the decision];[11]

- The changes to the Freshwater Plan contained in Appendices 1 and 2 do not of themselves give effect to any national or regional policy statements as they are limited in scope. The changes are not inconsistent with the relevant national and regional policy instruments and will not preclude the Freshwater Plan from giving effect to such instruments if they are incorporated into the Freshwater Plan;[12]

- The changes to the Freshwater Plan contained in Appendices 1 and 2 will enable Greater Wellington to carry out its functions;[13] and

- The changes to the Freshwater Plan contained in Appendices 1 and 2 are in accordance with Part 2[14] and meet the purposes of the Act.

and further:[15]

> Having regard to all of our findings above, we are satisfied that it is appropriate to approve the Request subject to the plan changes requested being in the form contained in Appendices 1 and 2. Changes should be made to the Freshwater Plan accordingly.

[27] Broadly, the effect of the Board's decision was to grant the exception sought by NZTA by amending policy 4.2.10 to exclude the TGP and by inserting policy 4.2.33A, which provides that:

> To manage adverse effects of the development of the Transmission Gully Project, in accordance with the following management regime: (1) Adverse effects are all avoided to the extent practicable; (2) Adverse effects which cannot be avoided are remedied or mitigated.

Consequential changes were also made to policies 7.2.1 and 7.2.2.[16]

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10 At [233] – [241].
11 At [242] – [252].
12 At [253] – [304].
13 At [316] – [317].
14 At [318] – [331].
15 At [333].
16 At [332].

Appellant's points of appeal

[28] Mr Bennion, on behalf of the appellant, provided extensive submissions which ran to 43 pages and 129 paragraphs. I mean no disservice to counsel by not referring in detail with every point advanced, because it is necessary for the Court to keep squarely in mind that an appeal such as this can only be on a point of law.

[29] The appellant's submissions focus on three aspects of the Board's decision, namely s 32 and Part 2 of the Act and the NPSFM.

Section 32

[30] First, the appellant contended that the Board erred in law in its application of s 32 of the Act, and consequently incorrectly concluded that the plan change was the "most appropriate" way to achieve the relevant objectives of the Regional Freshwater Plan. In particular, counsel argued that the Board:

(a) erred in law, by applying a wrong legal test, by considering that mitigation (to be contrasted with avoidance and remediation) could amount to protection in accordance with the objectives of the Freshwater Plan. Protection would not be satisfied where a residual unremediated impact remains (in the case of mitigation). The plan changes were not the optimum or superior method of achieving stream protection;

(b) failed to take into account detailed criteria in the Freshwater Plan (including policy 4.2.33) requiring adverse effects to be limited in time and space, and therefore failed to consider why those shorter and smaller temporal and spatial limits are not the most appropriate approach to protection, all being relevant factors. Instead, the Board simply preferred the longer and larger temporal and spatial requirements of the TGP, which were irrelevant factors;

(c) failed to take into account the adverse effects of stormwater discharges from the operation of the TGP, that being a relevant factor. Dr Keesing (an expert ecological witness called by the NZTA), whose evidence was accepted by the Board, stated that the proposal would have long-term high adverse impacts due to stormwater; and

(d) took into account irrelevant matters, namely the timing and spatial extent of TGP.

National Policy Statement for Freshwater Management

[31] Second, the appellant contended that, in concluding the plan change would not preclude the Regional Freshwater Plan giving effect to the NPSFM, the Board erred by failing to take into account the definition of "over-allocation" as it applies to streams to be affected by the plan change, and the implications in terms of policy A2 of the NPSFM. Counsel said that as the Board accepted that the condition of the Ration, Horokiri and the lower Pauatahanui Streams was not high and that substantial degradation had taken place, this led plainly to a situation of "over-allocation" as to water quality, the streams are being used to a point where a freshwater objective (i.e. protection) is no longer met. Counsel argued that in such a situation, the NPSFM requires, under policy A2, that methods be implemented to assist the improvement of water quality to specified targets within a defined timeframe. Counsel submitted that the Board accordingly needed to consider whether the plan change – including the adverse effects of the TGP (including stormwater discharges), with its greater temporal and spatial limits – would frustrate that requirement and erred in law in that respect.

Part 2 Resource Management Act

[32] Third, the appellant argued that the Board applied the wrong legal test in determining whether to grant the application under Part 2. He argued that it erred in its consideration of the benefits and costs of the changes for the purpose of s 5(2), and the significance of TGP, by failing to take into account relevant factors, taking into account irrelevant factors, and by making findings that were not reasonably

open on the evidence. Counsel said the Board erred by failing to assess the plan changes for their potential adverse and positive effects; took an overly passive approach by deferring specific assessments of adverse effects to the resource consent authority (demonstrated by the approach to the issue of sediment discharge in the Pauatahanui Inlet).

[33] The extensive adverse effects in this case were, counsel submitted, significant according to the evidence of Dr Keesing, which was accepted by the Board. Because the Board did not discuss the stormwater issues, it failed to take this into account as a relevant factor. Counsel submitted that whilst the Board accepted that the TGP was one of national and regional significance, the significance of that could not alone outweigh the significant potential adverse effects of the plan change and thus, counsel said, this consideration was irrelevant.

[34] Lastly, counsel submitted that the Board had a statement from a witness, Dr Nicholson, which it accepted for the purpose of s 5 on the basis that it was "not challenged", whereas counsel contends that that was an incorrect conclusion – in fact it was not "unchallenged evidence". In any event, the appellant submits that the Board had correctly earlier concluded that it did not have sufficient evidence of the proposal's benefits to justify a statement to that effect in the explanation to policy 4.2.33A. So, counsel argued the Board's finding about the benefits of the proposal – and the overall balance in favour of the plan changes – for the purpose of s 5 were not reasonably open to it.

Respondent's contrary arguments

Section 32

[35] Counsel contended that s 32(3) of the Act requires examinations of what objective would be "the most appropriate" to achieve the purpose of the Act, or whether other methods are the most appropriate. It does not require determination of what is the "superior method". Neither the Act nor the Freshwater Plan objectives required the Board to focus only on "stream protection". Counsel says the Board was entitled to consider the significance of the TGP but did not give it undue weight.

[36] "Protection" was neither an absolute nor sole objective, whether under the Freshwater Plan or the Act and "protection" does not equate with "avoidance".

[37] Counsel submitted the Board in any event did not confine its consideration to mitigation nor preclude protection or constrain other future decision-makers. Counsel submitted the appellant's interpretation of policy 4.2.33 is misleading and, in any event, did not apply because more than minor adverse effects were likely and the Board gave proper regard to the relevant Freshwater Plan policies.

National Policy Statement for Freshwater Management

[38] On this issue counsel submitted that the Freshwater Plan does not set "Freshwater Objectives" within the meaning of the NPSFM. That requires them to be set by Regional Councils through a process directed by the NPSFM which have not yet occurred. On the issue of "over-allocation", counsel submitted that the decision was not relevant to any risk of over-allocation because it:

- did not alter the Freshwater Plan's objectives, nor constrain resource consent decision-makers from giving effect to them, and to the intentions of the NPSFM, in their decision; and

- the Regional Council is not in any sense impeded or restrained in its capacity to further change its Regional Plans and/or make new Regional Plans in accordance with its functions and responsibility.

[39] Counsel submitted that the Freshwater Plan did not require the Board to specifically address stormwater discharges in its decision, yet in any event it did so, and it was entitled to reach the view that further consideration was a matter for the resource consent stage (when detailed proposal to deal with that would be presented). Counsel submitted that the Board properly weighed the options presented to it against the objectives in accordance with its discretion.

Part 2 issues

[40] The respondent contended that the Board was not making a decision about the Transmission Gully proposal and did not have obligations imposed upon it to undertake a detailed analysis of the potential effects. The Board could not make a decision about the proposal, nor remove any discretion that rested with decision-makers at the resource consent stage. Counsel submitted the Board was properly entitled to leave detailed consideration of the effects of the proposal to the decision-makers and the scheme of Part 2 enabled the Board to exercise informed and expert judgment about competing values and priorities. So the scheme of the Act is deliberately compartmentalised.

Discussion

Appellate approach of the Courts

[41] The law is well understood. It is discussed in *Contact Energy Ltd v Waikato Regional Council*:[17]

> The question of whether the Tribunal's conclusion is one to which it could not reasonably have come is not determined by asking whether it is a reasonable outcome. "Reasonable" refers to the quality of the reasoning, not the quality of the result. The task of this Court is to decide whether the decision "was one that could be arrived at by rational process": *Stark v Auckland Regional Council* [1994] 3 NZLR 614 at 617 per Blanchard J.
>
> The careful scrutiny required of points of law of this nature was discussed by Fisher J in *NZ Suncern Construction Ltd v Auckland City Council* [1997] NZRMA 419 at 426 as follows:
>
> > *"[T]he Court should resist attempts by litigants disappointed before the ... Environment Court to use appeals to this Court as an occasion for revisiting resource management merits under the guise of questions of law: Sean Investments v MacKellar* (1981) 38 ALR 363; *Parkinson v Waimairi District Council* (1988) 13 NZTPA 244 at 245. *This includes attempts to re-examine the mere weight which the Tribunal gave to various conflicting considerations before it: Manukau City Council v Trustees of Mangere Lawn Cemetery* (1991) 15 NZTPA 58, 60.

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[17] *Contact Energy Ltd v Waikato Regional Council* [2007] 14 ELRNZ 128 (HC) at [58] – [59].

> If an error of law is detected it will not warrant relief on appeal unless this Court is satisfied that the error materially affected the decision of the Environment Court: *Royal Forest and Bird Protection Society Inc v W A Habgood Ltd* (1987) 12 NZTPA 76, 81-82; *Countdown Properties* at 153.

and further:[18]

> In *Green and McCahill Properties Ltd v Auckland Regional Council* [1997] NZRMA 519, Salmon J said at 528:
>
> > *No question of law arises from the expression by the Environment Court of its view on a matter of opinion within its specialist expertise: J Rattray & Son Ltd v Christchurch City Council* (1983) 9 NZTPA 385. *The Environment Court's special expertise and experience enable it to reach conclusions based on the sound judgment of its members, without needing or being able to relate them to specific findings of fact. This is particularly so in cases of planning discretion: Lynley Buildings Ltd v Auckland City Council* (1984) 10 NZTPA 145 and *EDS v Mangonui County Council* (1987) 12 NZTPA 349.
> >
> > *Mr Bartlett for the appellants warned against the danger of accepting an Environment Court decision just because it was an expert Tribunal. It would, of course, be inappropriate to do so. Its expertise cannot save decisions which do not meet the principles set out above. However, it is important to bear in mind that the Court is required constantly to make decisions relating to planning practice, it is constantly required to assess and make decisions relating to conflicting expert opinion. Members of the Court are able to contribute to the formation of a judgment as a result of experience gained in other professional disciplines. These considerations and the fact that the Court is constantly exposed to litigation arising from the application of the Resource Management Act, justifies the respect which this Court and the Court of Appeal has customarily accorded its decisions.*

[42] The Board was required to consider the Request in terms of Part 2 of the Act, being "Purpose and Principles" (ss 5 – 8). The purpose of the Act is to promote the sustainable management of natural and physical resources.[19] Sustainable management means managing the use and protection of natural and physical resources in a way which enables people and communities to provide for their social and economic well being while safeguarding the life-supporting capacity of air, water, soil, and ecosystems and avoiding, remedying, or mitigating any adverse effects of activities on the environment.[20]

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18 At [63].
19 Section 5(1).
20 Section 5(2).

[43] Sections 6 and 7 provide certain principles relating to that balance. They are to be read as subject to s 5.

Section 32

[44] Section 32 requires that, before adopting any proposed changes to policies, the Board must evaluate and examine whether, having regard to the efficiency and effectiveness, the changes are the most appropriate way of achieving the objectives of the Freshwater Plan.[21] In making that evaluation the Board had to take into account the benefits and costs of the proposed policies (i.e. "benefits and costs of any kind, whether monetary or non-monetary");[22] and the "risk of acting or not acting, if there is uncertain, or insufficient information" about the subject matter of the proposed policies.[23]

"Most appropriate" test

[45] I do not accept the submission by the appellant's counsel that the policy "most appropriate" must be the superior method in terms of stream protection. Section 32 requires a value judgment as to what on balance, is the most appropriate, when measured against the relevant objectives. "Appropriate" means suitable, and there is no need to place any gloss upon that word by incorporating that it be superior. Further, the Freshwater Plan does not only have stream protection as a sole object; its objectives relate to preserving, safeguarding, and protecting identified values (objectives 4.1.4-6) and to avoid, remedying, or mitigating adverse effects (7.1.1).

[46] As to Mr Bennion's argument that s 32(3)(b) mandated that "each objective" had to be the "most appropriate way" to achieve the Act's purpose; i.e. it was an error to look at the combined objectives; I do not agree that the Board is to be constrained in that way. It is required to *examine* each, and every, objective in its process of evaluation – that may, depending on the circumstances result in more than

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21 Section 2(1).
22 Section 2(1).
23 Section 32(4).

one objective having different, and overlapping, ways of achieving sustainable management of natural and physical resources (the purpose of the Act). But objectives cannot be looked at in isolation, because "the extent" of each may depend upon inter relationships. Provided the Board examined, in its evaluation the *extent* of each objective's relationship to achieving the purpose of the Act, it complied with s 5(3).

[47] Mr Bennion relies for support upon *Orewa Land Ltd v Auckland Council*.[24] There the High Court found that the Environment Court had, wrongly, only considered one of three factors required under s 32(3)(b).

[48] The decision *Orewa Land Ltd* turned upon the Court finding that the Environment Court erred by only deciding on the actual or potential effects of a proposal, without analysing whether the proposal would avoid, or remedy, or mitigate the effects of any particular development. On the facts, there was no indication that the Environment Court gave consideration to the efficacy of the rules and their ability to achieve the objectives and Faire J said:[25]

> I am left in some doubt as to whether the Court, in fact, evaluated the complete package provided by [a set of district plan provisions that would overlay an existing high intensity residential zone] when it considered whether [it] was an appropriate method of achieving the objectives of the District Plan. ...

[49] That decision was entirely dependent upon the particular surrounding circumstances, which include a detailed set of rules for integrated residential development. It is clearly distinguishable, and I note that the Auckland Council one of the respondents, in fact, supported the appeal. The decision does not assist the present appellant.

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[24] *Orewa Land Ltd v Auckland Council* HC Auckland CIV-2010-404-6912, 21 April 2011.
[25] At [37] – [38].

Significance of the TGP

[50] Beyond doubt, s 32(3)(b) envisages a matter of judgment.[26] The Board carefully discussed the s 32 assessment in the course of 20 paragraphs,[27] and made it clear it was assessing whether the policies were the most appropriate for achieving objectives – when compared with other options.

[51] Read in its entirety the Board's decision balanced a range of matters. I do not accept that in placing the TGP on the scales, as it should, it elevated that beyond what was permissible. It was one factor, properly considered, but not to the exclusion of others. The TGP was relevant as the essential reason for the plan change Request to enable:[28]

> ... what NZTA contends to be a *more balanced* consideration of the management of the effects of TGP at the time resource consents are applied for.

Mitigation vs protection

[52] The appellant further says the Board erred in law by approving the plan change that allows for mitigation but not protection. That provides:

> 4.2.33A To manage adverse effects of the development of the Transmission Gully Project, in accordance with the following management regime:
>
> (1) Adverse effects are avoided to the extent practicable;
>
> (2) Adverse effects which cannot be avoided are remedied *or mitigated*.

[53] This submission revolves around an intricate, linguistic or semantic argument contrasting "protect" with "mitigate". Yet protection is not the sole objective of the Freshwater Plan. The Board as an expert body was aware of that. It summarised the relevant objectives as including:[29]

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[26] *Contact Energy Ltd v Waikato Regional Council* (2007) 14 ELRNZ 128 (HC) and *Meridian Energy Ltd v Central Otago District Council* [2011] 1 NZLR 482 (HC).
[27] At [222 – [241].
[28] At [22].
[29] At [232].

> ... preserving, safeguarding and protecting identified values ... or avoiding, remedying or mitigating adverse effects.

[54] To mitigate is to alleviate. It may lessen, or it may reduce the severity of an impact – and it may as a consequence result in protection, or even removal of an unwanted effect, depending on its degree. The appellant submits that mitigation and protection are different and the Board misunderstood the difference. I do not agree. The term "protection" is used in Part 2 of the Act are, in ss 6 and 7, but is not expressed as an absolute, and those sections are subject to s 5, which refers to "avoiding, remedying, or mitigating any adverse effects on the environment".

[55] The Board is approving a policy framework which requires later decision makers to endeavour to avoid adverse effects to the extent practicable and to remedy or mitigate effects which cannot practicably be avoided. It balanced the Freshwater Plan's objectives, evaluated different options, and decided what was most appropriate to achieve those objectives. It had ample expert and other evidence, including its own specialist expertise.

[56] I am satisfied that the Board made no error of law in making its determination as to what was "most appropriate" and it did not apply a wrong legal test as the appellant contends in paragraph 5.1(a) of the submissions.

Stormwater discharges

[57] The evidence of an expert witness, Dr Keesing, accepted by the Board, included his opinion that the TGP would have long term high negative impacts in terms of stormwater in some parts of some catchments. He indicated a likelihood that they might be managed to a reasonable level in the long term. He considered that, after mitigation, the stormwater effects on "High Value Habitat" due to "Contamination from road runoff into stormwater into streams already highly modified by land use" would be "High negative long term" even with "Target treatment levels achieved through proprietary devices and wetland treatment prior to discharge".

[58] Counsel contended that the Board failed to directly address stormwater discharge, except by generally alluding to such matters being for consideration subsequently, when consents are applied for, and the possibility exists that such effects might not occur. Counsel says this was a failure by the Board to take into account a relevant factor and thus, was an error of law. I do not accept that argument.

[59] The Board accepted expert evidence which included that given as to potential stormwater effects. The Freshwater Plan's objectives do not specifically refer to stormwater discharges. Nothing in s 32(3)(b) required the Board to evaluate the policies by reference to that and reach any conclusions on the point. Nevertheless, the evidence of the possible effect of stormwater discharge was before the Board and of which it was aware when it made its decision. It not only must have had it, but it would unquestionably have known from its own expertise that management of stormwater runoff is always a feature when highways are constructed. As an expert Board, it was entitled to regard it as more relevant to later determination in the resource consent process when detailed proposals as to how stormwater discharges were to be arranged were before the consent authority.

[60] This challenge is not a sustainable point of law.

Temporal and spatial considerations

[61] The appellant then argued that the Board erred in law by failing to take into account:

> Detailed criteria in the freshwater plan as to the timing and spatial extent of adverse effects consistent with the Objectives of the Plan (in particular policy 4.2.33).

[62] The appellant also contended that by taking into account "the timing and spatial requirements for the Transmission Gully Project" (instead), the Board relied on an irrelevant matter, and thus erred in law.

[63] The submissions proceeded that the Board adopted the timing and site requirements preferred for the TGP and, consequently it failed to consider whether

they "better met the objective of protection" (i.e. as opposed to other options such as a shorter period and smaller geographical area); so that the required analysis under s 32 did not occur.

[64] The Freshwater Plan does not rest upon one "protection" objective. Section 32 does not prevent consideration of TGP as a relevant matter. I agree with the respondent's submission that simply by reference to timing and site requirements for TGP the Board was not constraining its decision-making. The five options identified as available to the Board, and its evaluation of those, are clearly recorded in [233] – [241] of the decision. It explicitly explains its approach and the reasons why it preferred a particular option. Timing and site requirements of the TGP did not fall outside relevant considerations, being several of many, to be factored into the evaluation under s 32(3)(b). And while the Board did not expressly refer to - and compare - the temporal and spatial requirements in policy 4.2.33, that is a policy (not an objective), that does not strictly apply in this case as adverse effects were always going to be more than minor.

[65] Accordingly, no error of law arises.

National Policy Statement for Freshwater Management

[66] The Board considered, having first determined that it was not necessary for the Request to give strict effect to the NPSFM, whether the Request was consistent with or precludes the Freshwater Plan from giving effect to the NPSFM. As discussed above, the Board concluded that the (revised) Request did not run counter to the objectives or the policies of the NPSFM and gave its reasons:[30]

> - Our suggested refinements to Policy 4.2.33A (and its attendant Explanation) would ensure that the safeguarding of life supporting capacity, ecosystem processes and indigenous species will be adequately achieved;
>
> - Avoidance of adverse effects is the first preference under the proposed (revised) policy framework;

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[30] At [282].

- When considering resource consent applications for TGP, the consent authority retains an overall discretion to determine whether adverse effects have been adequately addressed by NZTA. Nothing in the proposed policies precludes a consent authority from determining that the concepts of safeguarding or protecting provided for in Objectives A1 and A2, require the avoidance of adverse effects in any given case.

[67] That finding followed upon its "review of the evidence on the relevant objectives and policies".[31]

[68] The argument by Mr Bennion that the Board erred because it did not mention certain policies under, or the definition of "over-allocation" in, the NPSFM, and he sets out parts relating to "over-allocation" of water quantity and quality. He argued that the Board in its analysis failed to consider that there are existing Freshwater objectives required under the plan and on the evidence provided and recorded by the Board those objectives were not being met currently in relation to waterways and in particular the three main streams. Counsel deferred to the evidence of Dr Keesing and the Board's agreement with the view of the experts and argued that this was namely a situation of "over-allocation" as to water quality in that the streams are "being used to appoint where a freshwater objective is no longer being met". Counsel submitted that in such a situation the Board needed to consider whether the plan change would frustrate the requirements under policy A2 that targets must be specified, and that "methods implemented to assist the improvement of water quality in the water bodies, to meet those targets" within a defined timeframe. He argued that had the Board undertaken that assessment it would have concluded that the plan change did interfere with the ability of the Regional Council to give effect to the NPSFM and at the very least make adjustments to it to ensure that it did not conflict with the requirements of NPSFM; and because it did not consider that assessment and adjustment it made an error of law.

[69] This complex, and in parts convoluted, argument must fail. Essentially, that is because:

- there is no over-allocation unless a 'limit" is set to meet a "freshwater objective" which has been exceeded or a "freshwater objective" is not

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[31] At [291].

met. It is for the responsible Regional Council for the making and changing of plans which may be given effect progressively which establish freshwater objectives and set limits;

- the objectives identified in the Freshwater Plan could not be said to be "freshwater objectives" within the meaning of the NPSFM and none of the objectives in the Freshwater Plan can be treated as a basis for the argument that waterways impacted by the Request are "over-allocated" within the meaning of the NPSFM;

- the Regional Council's statutory responsibility to give effect to the NPSFM is not in any sense frustrated or interfered with by the decision; and

- the Board says its findings were from all the evidence and challenge to these in truth is a challenge to merits. As a specialist Board it was entitled to come to its conclusion.

[70] If it should be that the Regional Freshwater Plan objectives could as a matter of law be "freshwater objectives" for the purposes of the NPSFM, nothing in the Board's decision would alter that in any event. It does not alter the Freshwater Plan's objectives. Resource consent decision-makers may give effect to the objectives and to the intentions of the NPSFM when decisions come to be made by them.

[71] Apart from those points, the evidence of Dr Keesing and comments were not made referring to an allocation regime required to be implemented by the NPSFM, but in the context of describing the quality of waterways, which might more generally be impacted by TGP.

[72] No error of law existed.

Part 2

[73] The appellant's case was that the Board should have considered the many potential adverse effects and benefits of the TGP and weighed those up before deciding to change the policy framework in the Freshwater Plan and it was not sufficient to leave these issues to be considered by decision-makers at the resource consent (and notice of requirement) stage. Counsel contended the Board applied the wrong test in its consideration of the benefits and costs, and the significance of the TGP. But he was not able to articulate the precise test that it said was wrongly adopted. His complaint boiled down to that:[32]

> on the balancing of all ... matters that is required under Part 2:
>
> (a) The Board ... did not have necessary evidence to consider that balance;
>
> (b) The Board ... did not ... consider the benefits against potential effects, it only considered the "significance" of the TGP in a general sense;
>
> (c) In as far the TGP has "significance" arising from the Transmission Gully route being mentioned in the Regional Land Transport Plan and similar documents, the Board never weighed those against the evidence of disbenefits.

[74] Counsel argued that those are matters of law. I do not agree. They are complaints about outcome and the Board's conclusion that those factual matters were for ultimate determination on any resource consent application. They represent challenges to the factual approach the Board took in the exercise of its expert assessment, and within its discretion. I do not accept that the Board did not have sufficient evidence to undertake the task of assessing whether a plan change was required. There was ample evidence, reports and other material to enable the Board to balance what was required of it. It was not exercising the functions that a consent authority would have in hearing an application for resource consent.

[75] The Freshwater Plan change did not necessarily enable the TGP to proceed but simply allows consideration of a subsequent resource consent application to be

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[32] Applicant's submissions at paragraph 7.31.

made on its merit. Consideration of the TGP under Part 2 of the Act is a matter for the decision-maker at the resource consent stage. Part 2 provides ample scope for the decision-makers to weigh competing expert opinions and facts in the light of the values expressed in Part 2 and associated policies. This is obvious from the leading authority, namely *NZ Rail Ltd v Marlborough District Council*.[33]

[76] It would be wrong to require the Board to duplicate the resource consent stage, especially when it is unlikely to have all the relevant information. The respondent has satisfied the Court that in balancing competing factors and values the Board considered and applied the relevant Part 2 provisions in accordance with the discretion conferred upon it. The matter before it was not applications for consent for the TGP, but whether the Request to change some of the policies in the Freshwater Plan could be accepted. If the Board had applied the approach now advocated by the appellant there may have been error of law because its order would have been enlarged beyond what was proper or necessary. I am satisfied that under this head there is no error of law which would vitiate the Board's decision.

Evidence issue

[77] Finally, the appellant says that the Board was wrong to say that the evidence of a witness, Mr Nicholson, as to the benefits of the TGP "was unchallenged" in cross-examination or evidence, and consequently the Board erred in law because it could not reasonably have come to that conclusion.

[78] That part of Mr Nicholson's evidence related to his opinions as to a number of benefits he thought would follow from construction of TGP. They included, improved route security, reduction in journey times, lessening safety risks and reduction of adverse impact on communities through which State Highway 1 presently passes.

[79] Mr Bennion argued that this evidence was not unchallenged because Ms Warren, an ecological expert and submitter in her own right, had refuted in detail

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[33] *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC) at [86].

each of the assertions of Mr Nicholson. Counsel said the Board was wrong not to say why it preferred the views of Mr Nicholson. He then went on to argue that the Board erred because it said it could reach its conclusions without issues raised in evidence of the wider benefits of TGP being finally determined.

[80] What the Board said was that it had no hesitation in finding that TGP was an important roading project at both a national and regional level.[34] It had regard to the Minister's assessment (that is why the Board was set up) as well as references to the proposed TGP development project as a long term solution in a statutory document prepared by the Regional Council;[35] and that State Highway 1 (and TGP as part of that road) was identified as a road of national significance in a document issued by the Minister of Transport pursuant to the Land Transport Management Act 2003. It also was entitled to take into account its own knowledge and expertise – in part common sense – in accepting what the benefits might be from rerouting State Highway 1.

[81] It may have been an overstatement to say that Mr Nicholson's benefits of TGP was "unchallenged" but the Board was *not* making findings on that specific issue, but rather on whether TGP was an important roading project – the evidence of which was extensive.

[82] No error of law arises from that statement in the Board. Nor does it arise from the Board not being drawn into considering, or deciding the benefits of TGP as a whole as against adverse effects on freshwater or otherwise. To do so it would have proceeded outside its mandated boundaries. I recognise that the appellant and others had the general aim of preventing TGP proceeding for various reasons, and the Board heard evidence and submissions aimed at the benefits – or not – of the proposal. But it was not required to determine those on their merits. It did not err in law in concluding that all those matters, as well as adverse effects, were to be determined by "the relevant consent authority or when resource consent applications are made to carry out TGP works in the water bodies concerned.[36]

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34 At [187].
35 Wellington Regional Land Transport Strategy 2010- 2040.
36 At [191].

And:[37]

> It will be apparent from our earlier summary of the submissions made to us that a number of parties to these proceedings challenged the concept that it was appropriate to make provision for roading projects such as TGP at all. We have made no determination on those issues which do not seem relevant to our considerations in this case. We are deciding the comparatively restricted issue of whether or not TGP is of such significance (whatever the views on its merits might be) that the policies of the Freshwater Plan ought to be changed in the manner requested by NZTA.

Conclusion

[83] As I commented to counsel, because of time constraints and the necessity of a decision on the outcome of this appeal being quickly delivered (there were seven working days before the Court closed for the vacation, and on reopening I am required to sit on a nine day civil case), I have had very limited time within which to write this reserved decision. As a consequence I have had to rely very much upon the submissions of counsel in my acceptance, or rejection, of them, as the case may be. It will be apparent that in many respects I have accepted as persuasive and valid the submissions made by counsel for the respondent. And have recorded these. That is because I agree with them. I am satisfied that there are no errors on points on questions of law, as required by s 149V, upon which the appellant can succeed.

[84] The reality is that the TGP for realigning State Highway 1 is a matter of national, and regional significance. The expert Board was set up by the Minister and conducted a six day hearing of evidence and submissions from many individuals and groups (33 in opposition, 22 in support). Its report of 86 pages was delivered on 5 October 2011, a consideration period of almost three months.

[85] Those who oppose the TGP for all manner of reasons (not just related to waterways) will disagree with the conclusions. The appellant is one of those. Its challenge to the outcome of the Board's inquiry in this Court, is however rejected. It should pursue its multiple challenges to the merits of any grant of resource consents for work proposed at the very extensive hearing to commence early February. There is no presumption that consent, with or without conditions, would be forthcoming or

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[37] At [192].

for that matter withheld. This decision and the dismissal of the appeal simply means that the process under which the Board conducted its inquiry and its findings and the reasons given by it do not comprise any errors of law, which entitles the appellant to a remedy from this Court.

[86] Although dressed up in the guise of points of law a substantial number of the appellant's submissions, when analysed, are challenges to factual findings, or the merits by the Board in the exercise of its expert judgment and discretion. Courts have repeatedly warned against this.

[87] I have a clear view that the appeal must fail, and the Board's decision to approve the Request for plan changes in the form contained in the decision and its determinative finds as summarised in [332] are unassailable on questions of law. Whether or not the Court agrees with conclusions of fact is immaterial. The respondent may proceed with its resource consent applications and objectors can be heard to oppose so that the outcome on the merits will be decided by the consent authority.

[88] The appeal is dismissed. The respondent is entitled to costs. The parties may submit memoranda on that issue.

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J W Gendall J

Solicitors:
Bennion Law, Wellington for Appellant
Chapman Tripp, Wellington for Respondent

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

AP 214/93

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of Appeals pursuant to that Act from Decision No W53/93, and Decision ENF 210/92 of the Planning Tribunal

BETWEEN COUNTDOWN PROPERTIES (NORTHLANDS) LIMITED and COUNTDOWN FOODMARKETS NEW ZEALAND LIMITED

Appellant

AND THE DUNEDIN CITY COUNCIL

Respondent

AND M L INVESTMENT COMPANY LIMITED and WOOLWORTHS (NZ) LIMITED

Second Respondent

AP 215/93

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of An Appeal thereunder from Decision No W53/93 of the Planning Tribunal

BETWEEN FOODSTUFFS (OTAGO/SOUTHLAND) PROPERTIES LIMITED

Appellant

AND THE DUNEDIN CITY COUNCIL

Respondent

AND M L INVESTMENT COMPANY LIMITED and WOOLWORTHS (NZ) LIMITED

Second Respondent

AP 216/93

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of An Appeals pursuant to that Act from Decision No W53/93 and Decision ENF 210/92 of the Planning Tribunal

BETWEEN TRANSIT NEW ZEALAND

Appellant

AND THE DUNEDIN CITY COUNCIL

Respondent

AND M L INVESTMENT COMPANY LIMITED and WOOLWORTHS (NZ) LIMITED

Second Respondent

Coram: Barker J (presiding)
Williamson J
Fraser J

Hearing: 1,2,3,4,7,8 February 1994 (in Christchurch)

Counsel: R J Somerville and R J M Sim for Foodstuffs
T C Gould and D G Bigio for Woolworths
E D Wylie for Countdown
A J P More for Transit New Zealand
N S Marquet for Dunedin City Council

Date of Judgment: 7 March 1994

JUDGMENT OF THE COURT

Introduction:

These appeals from a decision of the Planning Tribunal ('the Tribunal') given on 4 August 1993 have significance beyond their particular facts. They involve the first consideration by this Court of various provisions of the Resource Management Act 1991 ('the RMA') - a statute which made material alterations to the way in which land use and natural resources are managed. A number of statutes, notably the Town & Country Planning Act 1977 ('the TCPA') were repealed by the RMA and the regimes which they imposed were altered significantly, both in form and in substance. Although the RMA was amended extensively last year, counsel assured the Court that its decision is likely nevertheless to offer long-term guidance to local authorities and to professionals concerned with planning. Counsel were agreed that transitional provisions in the 1993 amendment required these appeals to be determined under the provisions of the 1991 Act without reference to the 1993 amendment.

All three appeals were heard together by a Court of three Judges which was assembled because of the importance of the issues raised and the need for guidance in the early

stages of the RMA's regime. At the commencement of the hearing, the Court was advised by counsel for the appellant, Transit NZ Limited ('Transit') that his client had reached a settlement with the first respondent, the Dunedin City Council ('the Council') and the second respondents, M L Investment Company Limited and Woolworths (NZ) Ltd, (called collectively 'Woolworths'). This settlement was on the basis that, if the other two appeals were substantially to fail, agreement had been reached on the appropriate rules for parking, access and traffic control which should be incorporated in the relevant section of the Council's District Plan.

Counsel for Transit was given leave to be absent for the bulk of the hearing but appeared for the hearing of submissions by the other appellants who claimed that the proposed settlement was incapable of implementation. Those other appellants were -

(a) Countdown Properties (Northlands) Limited and Countdown Foodmarkets New Zealand Limited (collectively called 'Countdown'); and

(b) Foodstuffs (Otago/Southland) Limited ('Foodstuffs').

Like most local bodies in New Zealand, the Dunedin City Council underwent major territorial changes in 1991 as a result of local body re-organisation. Instead of being just one of several territorial authorities in the

greater Dunedin region, the Council now exercises jurisdiction over a greatly enlarged area which includes all the former Dunedin municipalities plus areas of rural land formerly located in several counties. Allowing a certain straining of the imagination in the interests of municipal efficiency, the 'city', as now defined, penetrates into Central Otago, past Hyde, and up the northern coast, including within its boundaries a number of seaside townships such as Waikouaiti.

In consequence, the Council inherited a pot-pourri of District Schemes under the 1977 Act, some urban, some rural. These schemes became the Council's transitional district plan under the RMA. The task imposed by the RMA on the Council of preparing a comprehensive plan for this new and varied territorial district is a daunting one, particularly in view of the wide consultation required by the RMA. It was estimated at the hearing before the Tribunal that the section of the new district plan covering urban Dunedin will not be published until late 1994 at the earliest.

We note that the RMA has introduced a whole new vocabulary which has supplanted the well-known terms used by the TCPA. For example, "scheme" becomes "plan"; "ordinance" becomes "rule". Presumably, the drafters of the RMA wanted to emphasise that Act's new approach; it was not to be seen as a mere refurbishment of the TCPA.

One of the many ways in which the RMA differs from the TCPA, lies in the ability of persons other than public bodies, to request a Council to initiate changes to a district plan. The cost is met by the person proposing the plan change. Under the TCPA, only public authorities of various sorts could request a scheme change. The process by which this kind of request is made and implemented is an important feature of these appeals and will be discussed in some detail later.

Essentially, these appeals are concerned with a request by Woolworths to the Council, seeking a plan change to rezone a central city block from an existing Industrial B zone to a new Commercial F zone. On about 40% of the area of this block (which is bounded by Cumberland, Hanover, Castle and St Andrew Streets and has a total land area of some 2 hectares), stands a large building, formerly used as a printing works. Woolworths wishes to develop a "Big Fresh" supermarket within this building; all parking as well as the retail outlet would be under the one roof. Had Woolworths sought an ad hoc resource management consent under the RMA to use the land in this way (cf the 'specified departure' procedure under the TCPA) Countdown and Foodstuffs would not have been able to object. When a plan change is advertised, however, there is no limit to those who may object.

Both appellants operate supermarkets within the same general area in or near the Dunedin central business

district. They lodged submissions in opposition to the plan change with the Council and appeared at a hearing of submissions before a Committee of the Council. Dissatisfied with the Council's decision in favour of the plan change, they initiated references to the Tribunal under clause 14 of the First Schedule to the RMA ('the First Schedule'). The concept of a 'reference' of a proposed plan change to the Tribunal instead of an appeal to the Tribunal is part of the new approach found in the RMA. The appellants subsequently appealed to this Court alleging errors of law in the Tribunal's decision. Appeal rights to this Court are governed by S.299 of the RMA but are similar in scope to those conferred by the TCPA.

Amongst numerous parties, other than Countdown and Foodstuffs, making submissions to the Council were two who subsequently sought references of the proposed plan change to the Tribunal; i.e. Transit and the NZ Fire Service. Transit's concern was with the efficiency of the State Highway network and with parking and access;, two of the streets bounding the proposed new Commercial F zone constitute the north and southbound lanes respectively of State Highway 1. The Fire Service was concerned with the effect of the traffic generated by various vehicle-orientated retail outlets on the efficient egress of fire appliances from the nearby central fire station. NZ Fire Service did not appeal to this Court.

In addition to the references, there was a related application to the Tribunal by Countdown seeking the following declarations under S.311 of the RMA -

(a) whether the Council could change its transitional district plan; and

(b) whether the Council could lawfully complete the evaluation and assessments required by S.32 of the RMA subsequent to the public hearing of submissions on the plan change.

The first question was considered by Planning Judge Skelton sitting alone; on 1 February 1993, he determined that it was permissible for Woolworths to request the Council to change its transitional district plan at the request of Woolworths and to promote the change in the manner set out in the First Schedule. There was no appeal against that decision. The second question was subsumed with other matters raised in the references, and was left for argument in the course of the substantive hearing before the Tribunal.

That hearing before the Tribunal chaired by Principal Planning Judge Sheppard, lasted 16 sitting days; its reserved decision occupies some 130 pages. The decision is notable for its clarity and comprehensiveness; we have been greatly assisted in our consideration of the complex issues by the way in which the Tribunal has both

expressed its findings and discussed the statutory provisions which are at times difficult to interpret.

Because the decision of the Tribunal contains all the necessary detail, we do not need to repeat many matters of fact and history adequately summarised in that decision. Nor do we feel obliged to refer to all the Tribunal's reasons particularly where we agree with them. Aspects of the essential chronology need to be mentioned.

Chronology:

Woolworths' request, made pursuant to S.73(2) of the RMA, was received by the Council on 19 December 1991. In addition to asking for the change of zoning of the relevant land from Industrial to Commercial, Woolworths provided the Council with an environmental analysis of the request and some suggested rules for a new zone. On 20 January 1992, the Planning and Environmental Services Committee of the Council, acting under delegated authority, resolved to "agree to the request" in terms of Clause 24(a) of the First Schedule of the Act ('the First Schedule'). This resolution was made within 20 working days of receiving the request as required by Clause 24. The Council also resolved to delegate to the District Planner authority to prepare the plan change, undertake all necessary consultations and to request and commission all additional information as required by the RMA. There was consultation by the Council with Woolworths as

envisaged by the legislation, which requires private individuals seeking plan changes to underwrite the Council's expenses in undertaking the exercise.

Early in February 1992, the Council informed the owners of land in the block and some statutory authorities of the proposal. Public notice of the proposed plan change was given on 21 March 1992. It advised the purpose of the proposed change as "to provide for vehicle-orientated large scale commercial activity on the selected area of land on the fringe of the Central Business District." The proposed changes to policy statements and rules in the District Plan were opened to public inspection and submission.

Some 15 submissions on the plan change were received by the Council and a summary prepared. A further 66 notices of opposition or support were then generated; a public hearing was convened at which submissions were made by the parties involved in this present appeal plus many others who had either made submissions or who had supported or opposed the submissions of others. After the public hearing, a draft report purporting to address matters contained in S.32 of the RMA, was presented to the Council Planning Hearings Committee by a Mr K. Hovell, a consultant engaged by the Council to advise it on the proposed change. It was found by the Tribunal as fact, that the analysis required by S.32 (to be discussed in some detail later) was not prepared by the Council

until after the hearing of submissions. Obviously therefore, no draft S.32 report was available for comment at the public hearing of the submissions.

After the hearing of submissions, amendments were made by the Committee to a draft S.32 analysis prepared by Mr Hovell; a final version was prepared by him at the Committee's direction on 31 July 1992. The Tribunal found that Mr Hovell acted as a secretary and did not advise the Committee at this stage of its deliberations. On 11 August 1992, the Committee acting under delegated powers, decided that the change be approved. It had amended both the policy statements and the rules from those which had originally been advertised. The extent to which these amendments could or should have been made will be discussed later. All those who had made submissions were supplied with the Council's decision, a legal opinion from the Council's solicitors and a revised report from Mr Hovell headed "Section 32 Summary".

The extensive hearing before the Tribunal ensued as a result of the references made by the present appellants and NZ Fire Service. In broad terms, the effect of the Tribunal's decision was to direct the Council to modify the proposed plan change in a number of respects; however, it approved the change of zoning of the block in question from Industrial to Commercial.

Foodstuffs, Countdown and Transit exercised their limited right of appeal to this Court. A number of conferences with counsel and one defended hearing in Wellington refined the issues of law. Counsel co-operated so as to avoid unnecessary duplication of submissions. We record our gratitude to all counsel for their careful and full arguments.

Approach to Appeal:

We now deal with the various issues raised before us. Before doing so, we note that this Court will interfere with decisions of the Tribunal only if it considers that the Tribunal -

(a) Applied a wrong legal test; or
(b) Came to a conclusion without evidence or one to which on evidence, it could not reasonably have come; or
(c) Took into account matters which it should not have taken into account; or
(d) Failed to take into account matters which it should have taken into account.

See Manukau City v Trustees of Mangere Lawn Cemetery (1991), 15 NZTPA 58, 60.

Moreover, the Tribunal should be given some latitude in reaching findings of fact within its areas of expertise.

See **Environmental Defence Society v Mangonui County Council** (1988), 12 NZTPA 349, 353.

Any error of law must materially affect the result of the Tribunal's decision before this Court should grant relief. **Royal Forest & Bird Protection Society Inc v W.A. Habgood Ltd** (1987), 12 NZTPA 76, 81-2.

In dealing with reformist new legislation such as the RMA, we adopt the approach of Cooke, P in **Northern Milk Vendors' Association Inc v Northern Milk Ltd** [1988] 1 NZLR 530, 537. The responsibility of the Courts, where problems have not been provided for especially in the Act, is to work out a practical interpretation appearing to accord best with the intention of Parliament.

In dealing with the individual grounds of appeal, we adhere to counsel's numbering. Some of the grounds became otiose when Transit withdrew from the hearing and one ground was dismissed at a preliminary hearing.

Grounds 1, 2 and 3:

1. **The Tribunal misconstrued the provisions of S.32(1) when it held that the first respondent adopted the objectives, policies, and rules contained in Plan Change No 6 at the time when it made its decision that the plan change be approved in its revised form;**

2. **The Tribunal applied the wrong legal tests and misconstrued the Act when it concluded that the first respondent performed the various legal duties imposed on it by S.32;**

3. **The Tribunal misconstrued S.32 and S.39(10(a) of the Act and failed to apply the principles of natural justice by holding that the report of the first respondent's S.32 analysis did not need to be publicly disclosed before the first respondent held a hearing on proposed plan change 6.**

These grounds are concerned with the Council's duty under S.32 of the RMA and can be dealt with together by a consideration of the following topics -

(a) Was the Council correct in not fulfilling its duties under S.32(1) of the RMA before it publicly notified the plan change and called for submissions? Put in another way, was the Council right to carry out the S.32 analysis after the public hearing of submissions but before it published its decision?

(b) Should the Council have made a S.32 report available to persons making submissions on the plan change?

(c) Was the Council's actual S.32 report an adequate response to its statutory responsibility?

(d) If the Council was in error in its timing of the S.32 report or in the adequacy of the report as eventually submitted, was the error cured by the extensive hearing before the Tribunal an independent judicial body before which all relevant matters were canvassed?

S.32 of the Act at material times read as follows

> "32 **Duties to consider alternatives, assess benefits and costs, etc** - (1) In achieving the purpose of this Act, before adopting any objective, policy, rule or other method in relation to any function described in

subsection (2), any person described in that subsection shall -

(a) Have regard to -
  (i) the extent (if any) to which any such objective policy, rule, or other method is necessary in achieving the purpose of this Act; and
  (ii) other means in addition to or in place of such objective, policy rule, or other method which, under this Act or any other enactment, may be used in achieving the purpose of this Act, including the provision of information, services, or incentives, and the levying of charges (including rates); and
  (iii) the reasons for and against adopting the proposed objective, policy, rule, or other method and the principal alternative means available, or of taking no action where this Act does not require otherwise, and

(b) Carry out an evaluation, which that person is satisfied is appropriate to the circumstances, of the likely benefits and costs of the principal alternative means including, in the case of any rule or other method, the extent to which it is likely to be effective in achieving the objective or policy and the likely implementation and compliance costs; and

(c) Be satisfied that any such objective, policy, rule, or other method (or any combination thereof) -
  (i) is necessary in achieving the purpose of this Act; and
  (ii) is the most appropriate means of exercising the function, having regard to its efficiency and effectiveness relative to other means.

(2) Subsection (1) applies to -

(a) The Minister, in relation to -
  (i) the recommendation of the issue, change, or revocation of any national policy statement under sections 52 and 53;
  (ii) the recommendation of the making of any regulations under section 43.

(b) The Minister of Conservation, in relation to -
  (i) the preparation and recommendation of New Zealand coastal policy statements under section 57'

(ii) the approval of regional coastal plans in accordance with the First Schedule.

(c) Every local authority, in relation to the setting of objectives, policies, and rules under Part V.

(3) No person shall challenge any objective, policy, or rule in any plan or proposed plan on the grounds that subsection (1) has not been complied with, except -

(a) in a submission made under clause 6 of the First Schedule in respect of a proposed plan or change to a plan; or

(b) In an application or request to change a plan made under section 64(4) or section 65(4) or section 73(2) or clause 23 of the First Schedule."

Consideration must first be given to the method ordained by the RMA for implementing a plan change initiated by persons other than public bodies. S.73(2) provides -

"Any person may request a local authority to change its district plan and the plan may be changed in the manner set out in the First Schedule."

Clause 2 of the First Schedule requires -

"A written request to the local authority defining the proposed change with sufficient clarity for it to be readily understood and to describe the environmental results anticipated from the implementation of the change".

An applicant is not required to provide any other assessments or evaluations, although Woolworths did so.

Under clause 24 of the First Schedule, the local authority is required to consider the request for a plan change. Within 20 working days it must either "agree to the request" or "refuse to consider" it. The words

"agree to the request" are unfortunate; on one reading, the local authority might be seen as being required to assent to the plan change (i.e. agree to the request for a plan change) within 20 working days. We accept counsel's submissions that the only sensible meaning to be given to the phrase "agree to the request" is "agree to process or consider the request". This interpretation is consistent with the remainder of the First Schedule. The local authority may refuse to consider the request on one of the narrow grounds specified in clause 24(b) or defer preparation or notification on the grounds stated in clause 25. The Council's decision to refuse or defer a request for a plan change may be the subject of an appeal (not a 'reference') to the Tribunal (clause 26).

Clause 28 requires the local authority to prepare the change in consultation with the applicant and to notify the change publicly within 3 months of the decision to agree to the request; (copies of the request must be served on persons considered to be affected). 'Any person' is entitled to make submissions in writing; clause 6 details the matters which submissions should cover. In particular, a submitter must specify what it is he, she or it wants the Council to do. There is no statutory restriction on who can make a submission.

It is doubtful whether the local authority can make a submission to itself under the RMA in its original form.

The Court of Appeal in **Wellington City Council v Cowie** [1971] NZLR 1089 held that a local authority could not object to its own proposed scheme. The TCPA was changed to permit this. A similar provision was not found in the RMA; we were told by counsel that the 1993 amendment now permits the practice. In this case, the Council's development planner lodged a submission which the Tribunal found was lodged in his personal capacity.

The local authority must prepare a summary of all submissions and then advertise the summary seeking further submissions in support or opposition. The applicant for the plan change is entitled to receive a copy of all submissions and has a right to appear at the hearing as if the applicant had made a submission and had requested to be heard. The local authority must fix a hearing date, notifying all persons who made a submission and hold a public hearing; the procedure at the hearing is outlined in S.39 of the RMA; notably, no cross-examination is allowed.

After hearing all submissions, the local authority must give its decision "regarding the submissions" and state its reasons for accepting or rejecting the submissions. Any person who made a submission, dissatisfied with the decision of the local authority, has the right to seek a reference to the Tribunal.

As noted earlier, the words "refer" or "reference", refer to the way in which the jurisdiction of the Tribunal is invoked on plan changes by those unhappy with the Council's decision on the submissions. We shall discuss the Tribunal's powers on a reference later in this judgment. The Tribunal, after holding a hearing, can confirm the plan change or direct the local authority to modify, delete or insert any provision or direct that no further action be taken on the proposed change (clause 27 of the First Schedule). The Council may make amendments, of a minor updating and/or 'slip' variety before resolving to approve the plan change (as amended as a result of the hearing of submissions or any reference to the Tribunal).

The Act does not define the phrase used in S.32(1) "before adopting". The word "adopting" is not used in the First Schedule, which in reference to plan changes uses the words "proposed" (clause 21), "prepared" (clause 28), "publicly notified" (clause 5), "considered" (clauses 10 and 15), "amended" (clause 16), and "approved" (clauses 17 and 20). Section 32 also uses "to set" which implies a sense of finality.

Accepted dictionary meanings of the word "adopt" are "to take up from another and use as one's own" or "to make one's own (an idea, belief, custom etc) that belongs to or comes from someone else". The Tribunal held that the meaning of the word adopting is "the act of the

functionary accepting that the instrument being considered is worthy of the action that is appropriate to its nature".

The Tribunal's findings on the local authority's S.32 duties can be summarised thus.

(a) Read in the context of S.32(2) the word "adopting" as used in S.32(1) refers to the action of a local authority which, having heard and considered the submissions received in support of or in opposition to proposed objectives policies and rules, decides to change the measure from a proposal to an effective planning instrument.

(b) The duties imposed by S.32 are to be performed before adopting", that is, before the change is made into an effective planning instrument.

(c) All that the RMA requires is that the duties be performed at some time before the act of adoption.

(d) If Parliament had intended that in every case S.32 duties were to be performed before public notification of a proposed measure, and that people would have been entitled to make submissions about the performance of them, then there would have been words to express that intention directly.

(e) A separate document of the local authority's conclusions on the various matters raised in S.32(1) is not required to be prepared, let alone published for representations or comments, before the decision is made.

(f) In relation to change 6, the Council adopted the objectives, policies and rules of the change at the time when, having heard and deliberated on the submissions received, it made its decision than the planned change be approved in the revised form.

The essential argument for Foodstuffs and Countdown is that the Tribunal was wrong in law and that S.32 requires the Council to prepare the report before advertising the plan change or at the latest before the hearing of submissions regarding a plan change; it cannot fulfil its obligations under S.32 after that point.

Interpreting the provisions of S.32 of the RMA must commence with an examination of the words used in the section having regard not only to their context, but also to the purposes of the Act. S.32(2) describes the persons to whom the duties it imposes shall apply. They are the Minister for the Environment, the Minister of Conservation and every local authority.

So far as the Ministers are concerned, the description relates only to "recommendations" or the "preparation and recommendation" of policy statements or approvals. A

local authority is limited to "the setting" of objectives, policies and rules under Part V which applies to regional policy statements, regional plans and district plans. A distinction has thus been made in the section between Ministers and local authorities. In relation to Ministers, the section expressly refers to recommendation or preparation and recommendation whereas with local authorities, the section refers to the **setting** of objectives, policies and rules.

Under S.32(1) the local authority involved in the setting of objectives, policies and rules must complete certain duties before adopting such objectives, policies or rules. We see no reason to read the phrase "before adopting" other than in its plain and ordinary meaning. Adopting involves the local authority making an objective, policy or rule its own. The Appellants submitted that the phrase requires the duties to be carried out prior to public notification of change. They argued that the local authority adopts a privately requested change prior to public notification because it had, by then, set or settled the substance of the requested change.

We do not accept this submission because the procedure in Clauses 21 to 28 (inclusive) of the First Schedule does not envisage the local authority making the changes its own until after public notification, submissions, and decisions on submissions. It is inconsistent with that

procedure to conclude that the local authority adopted (or made its own) the proposed change prior to the decision on submissions.

A local authority's obligation under Clause 28 of the First Schedule is to prepare a requested change of plan in consultation with an applicant. The process relates to the form rather than the merits of the change. Even after public notification, the local authority has a discretion, on the application of an applicant, to convert the application to one for a resource consent rather than for a change to a plan (Clause 28(5)(a)). To decide that a local authority is adopting a requested change to an objective, policy or rule prior to its decision on submissions requires a conclusion which limits the meaning of "adopting" to encompassing prescribed procedural steps. No decision or positive act of will by the local authority would be required.

Lord Esher, MR in **Kirkham v Attenborough**, [1897] 1 QB 201, 203 held that, with a contract for sale of goods, there must be some act which showed that a transaction was adopted, an act which was consistent only with the person being a purchaser. In this case, there is no act of the Council which shows anything other than an initial acknowledgment that: (a) the proposed change has more than a little planning merit; and (b) a performance of prescribed duties to invest the proposed plan change with a form whereby its merits can be assessed by the public

submission process. There can be no act or decision, inconsistent with the performance of the obligations of the local authority until it has reached its decision upon the submissions.

During argument, two obstacles to this view were signposted. They concerned, first, S.32(3) and, second, S.19. It was submitted that S.32(3) clearly indicated that "before adopting" must mean "prior to public notification"; otherwise, the public would not have the right to challenge an objective policy or rule on the grounds of non-compliance with S.32. This conclusion followed, it was argued, from the necessity for the challenge to be in a submission under Clause 6 in respect to a proposed plan or change to a plan.

The Tribunal accepted that S.32(3) was capable of giving that indication but concluded that, if Parliament had intended the S.32 duties to be performed before public notification, then there would have been express words to that effect.

The first point to consider is whether S.32(3) applies to a privately requested plan change. In the definition section of the RMA, "proposed plan" means "a proposed plan or change to a plan that has been notified under clause 5 of the First Schedule but has not become operative in terms of clause 20 of the First Schedule; but does not include a proposed plan or change originally

requested by a person other than the local authority or a Minister of the Crown".

The Tribunal held: (a) there was no exlusion of privately requested changes in the words "change to a plan" in S.32(3)(a); (b) the use of the term "proposed plan" in the first phrase of S.32(3) does not preclude a challenge to the Council's performance of its S.32 duties in a submission under clause 16 of the First Schedule.

With respect we do not agree. There is no reason to read down the second part of the definition of "proposed plan" which clearly indicates that the definition of proposed plan does not apply to privately requested plan changes; accordingly, there can be no restriction as to the time when persons making submissions on a privately requested plan change may raise non-compliance with S.32 by the Council. They do not have to do so in their submission.

This approach to S.32(3) supports our view on the timing of the "adopting" of the plan change by the local authority. The Tribunal held, in this case, that the plan was not 'adopted' for the purposes of S.32 until it had heard and considered the submissions on the plan change. It was enough for it to provide the S.32 report at the time when it gave its decision on the submissions which it had heard and considered.

We agree with the Tribunal's decision in the result, although differing on the interpretation of S.32(3). We hold that the "adopting" by the local authority under S.32(1) takes place at a different time with a privately requested plan change than it does when the plan change is initiated by the local authority itself or at the request of another local authority or a Minister. This view follows from our interpretation of S.32(3). A person making a submission on a plan change instituted by a Minister or local authority can challenge the sufficiency of the S.32 report only in his or her submission on the plan change. We give this interpretation in the hope this important Act will prove workable for those who must administer it but at the same time, preserve the rights of persons affected by a plan change.

When a private individual requests a scheme change, the local authority's options are fairly limited. It can only reject the application out of hand if a plan change is 3 months away or if the request is frivolous,vexatious or shows little or no planning merit or is unclear or inconsistent or affects a policy statement or plan which has been operative for less than two years. At the stage of the initial request, the local authority could not possibly have carried out a potentially onerous S.32 investigation. It may not have time to do so even within the 3 months required under clause 28 of the First Schedule before notifying publicly the plan change.

Whilst a privately-inspired plan change may pass the threshold test, as the investigative process unrolls, the local authority may come to the view that the requested change is not a good idea; it may wish to await the hearing and consideration of the submissions before deciding whether to 'adopt' it. It will have to consider the wider implications of a proposed plan change during a period limited by clause 28 to 3 months. These considerations would often be canvassed at the hearing of submissions, as they were in this case, without a S.32 report being prepared. A local authority might not be therefore in a position to 'adopt' the plan change until it had the S.32 report; it could need the public hearing and consideration of submissions to flesh out that report to its own satisfaction.

In response to the argument that those making submissions should have access to a S.32 report because the Act in S.32(3) clearly envisages their having the right to comment on a S.32 report, the answer lies in the interpretation we have given to S.32(3). There is no restriction on the time in which a S.32 report can be challenged on a privately requested plan change; therefore, persons wishing to refer the Council's decisions or submissions to the Tribunal can criticise the S.32 report by means of a reference to the Tribunal.

However, the situation is different for those plan changes to which S.32(3) applies; i.e. plan changes

initiated by the local authority itself or requested by a regional authority or another territorial authority or by a Minister. In those situations, the S.32 report would have to be available at the time the plan change is advertised because of the limitation contained in S.32(3) on the right to comment on the adequacy or otherwise of a S.32 report. For scheme changes requested by a Minister or a local authority, such comment may only be made in a submission on the plan change.

It is no answer to say that a person making a submission in advance of knowing the contents of a S.32 report should include as a precaution a statement that the S.32 report was inadequate; this was suggested in argument by counsel for the Council. Such a course would make a mockery of the process and would imply little cause for confidence in the competence of the local authority.

In this scenario, the difference between 'adopt' and 'approval' is quite wide. The approval, which is the act of making a formal resolution about and affixing the seal to the text of the change may never happen; the result of the submissions to the Council or of a Tribunal direction on a reference may cause the local authority to find that its 'adopting' of the change was erroneous. However, with the plan change initiated privately, adopting comes at the time when the Council decides after hearing all the submissions that it should adopt the

change. Formal approval may follow later, depending on whether there are references to the Tribunal.

When the local authority itself initiates the plan change, the situation is simple; it should not do so unless it is then in a position to 'adopt' a plan change.

In the case of a plan change requested by another authority or by the Minister to which S.32(3) applies, a Council receiving the request will have to 'adopt' the change prior to advertising the change and therefore complete its S.32 report by that stage. Again, the Council may not ultimately 'approve' the change because it may come to a different view on the wisdom of doing so after hearing the submissions or after a Tribunal direction.

As to the argument that time is needed for a S.32 report, one imagines that other local authorities or a Minister in requesting the change should be in a position to supply the territorial authority with most of the information needed for its S.32 evaluation of the proposal. If there were not time available within the 3 months, then there is power for the local authority under S.38(2) to increase the time to a maximum of double. One would not envisage, however, a regional council or a Minister requesting a change without providing sufficient prima facie information justifying the request which would make the adopting process simple.

The time for 'adopting' the plan change therefore in terms of S.32, is a 'moveable feast' depending on whether or not the plan change is initiated by a private individual.

S. 19 of the RMA is as follows -

> "19. **Change to plans which will allow activities - Where -**
>
> (a) A new rule, or a change to a rule, has been publicly notified and will allow an activity that would otherwise not be allowed unless a resource consent was obtained; and
>
> (b) The time for making or lodging submissions or appeals against the new rule or change was expired and -
>
> (i) No such submissions or appeal have been made or lodged; or
> (ii) All such submissions have been withdrawn and all such appeals have been withdrawn or dismissed -
>
> then, notwithstanding any other provision of this Act, the activity may be undertaken in accordance with the new rule or change as if the new rule or change had become operative and the previous rule were inoperative."

This section allows activities to be undertaken in accordance with a new rule as if it had become operative, provided that the new rule has been publicly notified and the time for making submissions or appeals against the new rule has expired and no submissions or appeals have been made. The appellants argued that this section implies that consideration under S.32 must take place before the time for making or lodging submissions or

appeals against the new rule have expired; otherwise, activity could be undertaken which was contrary to S.32.

The Tribunal did not place any weight on the argument under S.19. We have carefully considered the submissions and conclude that, while S.19 may appear to produce the possibility of an anomalous situation, it does not affect the powers of a local authority in setting objectives, policies or rules. In particular, it does not reflect upon the time at which the local authority adopts such an objective, policy or rule. Section 19 is concerned with activities which may be undertaken. It is not concerned, as S.32 is, with the rule-making process. Even if a person takes the risk of commencing activity before approval of a change, that activity does not affect the policy, objective or rule itself. Whatever the position about such activity, a local authority is still required to be satisfied of the matters arising under S.32(1)(a), (b) and (c). Certainly there are no words within S.19 which purport to affect the duty under S.32.

Our general approach is supported, we think, by the difference between officially promoted and privately requested changes in their interim effect. S.9(1) of the RMA provides as follows-

> "No person may use any land in a manner that contravenes a rule in a district plan or proposed district plan unless the activity is -

(a) Expressly allowed by a resource consent granted by the territorial authority responsible for the plan; or
(b) An existing use allowed by S.10 (certain existing uses protected).
..."

As noted, 'proposed district plan' includes a proposed change initiated by a local authority or Minister but not a privately requested change. Consequently an officially promoted plan has general planning effect from the date of public notification, whereas a privately requested plan has no general planning effect until approval. S.19 bears to some extent on the question of effect before approval but it is limited to activities allowed by the new rule where there is no opposition to it; in our opinion, as previously discussed, it does not support the appellants' case.

In the result, we believe that the Tribunal came to the correct decision about the timing of the S.32 report; in the circumstances of this case, the report was properly 'adopted' at the time when the Council gave its decision on the submissions.

In Ground 3 of the appeal it was argued that the principles of natural justice required persons making submissions to a local authority to have a S.32 report available to them prior to the hearing of submissions. Reference was made to S.39(1)(a) of the RMA requiring an appropriate and fair procedure at a hearing.

We did not consider that there is any merit in this submission. S.39 requires a public hearing with appropriate and fair procedures. Such a hearing took place on this occasion. There was no report or analysis under S.32 available since the local authority had been under no duty to carry it out prior to that time. The applicant and those making submissions were able to call evidence. When the report did come into existence, it was circulated to the parties. Later, during the reference to the Tribunal, there was ample opportunity to criticise the content of the report and to make submissions and call evidence concerning all aspects of it. We reject Ground 3.

The adequacy of the report prepared by the First Respondent is challenged in Ground 2. It was claimed that the Council (a) had taken into account irrelevant considerations, namely, Sections 6, 7 and 8 of the RMA; (b) had failed to take into account the matters; and had (c) applied the wrong test.

These same criticisms were considered by the Tribunal which concluded that, while the Council's S.32 analysis report did not scrupulously follow the language of S.32(1), it was not substantially deficient in any respect. After weighing the appellant's detailed criticisms, we are of the view that the Tribunal was correct in the robust and practical view that it took. It was suggested in submissions that the Tribunal

incorrectly permitted an inadequate compliance by the Council with its S.32 duties upon the basis that local authorities were still learning the extent of their responsibilities under the Act. We do not share that view. We note that the Tribunal stated -

> "In our opinion failures to perform the S.32 duties in substance which are material to the outcome should not be excused. However deficiencies of form that are not material to the outcome, may properly be tolerated, at least in the introductory period when functionaries are still learning the extent of their responsibilities under the Act."

Earlier it stated -

> "Although functionaries are not to be encouraged in expecting that failure to comply with duties imposed by S.32 can be condoned compliance needs to be considered in terms of a reasonable comparison of the material substance of what is done with what is required if any deficiency that may be discovered from a punctilious scrutiny of a S.32 assessment results in a requirement to return to the starting point as in some board games, the Act will not provide a practical process of resource management addressing substance not form."

We agree with those views.

Since our conclusions are that the Tribunal was not in error in relation to either the timing of the S.32 exercise or the adequacy of the First Respondent's S.32 analysis, there is no need to consider in depth the matter raised in the fourth question under this heading.

It is sufficient to note that the references to the Tribunal took place by way of a complete re-hearing. Any defect of substance in the Council's decision and

S.32 analysis was capable of exploration and resolution by the Tribunal. Even if there had been an error, we believe that it would have been corrected by the detailed, careful and extensive hearing by the Tribunal over a period of 16 days when detailed evidence was given by 19 witnesses and thorough submissions made by experienced Counsel. We are conscious of the approach described in Calvin v Carr, (1980) AC 574, A J Burr Limited v Blenheim Borough, [1982] NZLR 1 and Love v Porirua City Council, [1984] 2 NZLR 308.

We consider that this was one of those instances where any defects at the Council stage of hearing were cured by the thorough and professional hearing accorded to all parties by the Tribunal. Accordingly, grounds of appeal 1, 2 and 3 are dismissed.

Ground 4. **"That the Tribunal applied the wrong legal tests and misconstrued the Act when it held that the first respondent did not exceed its lawful authority in making the amendments to the proposed plan change that were incorporated in the revised version of the change appended to its decision."**

A revised and expanded version of the plan change as advertised emerged when the Council's decision was issued after hearing submissions. The appellants submitted that because many of the changes had not been specifically sought in the submissions lodged with and notified by the Council, that the Council's action in making many of the changes was ultra vires. Mr Wylie for Countdown presented detailed submissions comparing

relevant segments of the change as advertised with the counterparts in the Council's finished product.

Mr Marquet for the Council helpfully provided a compilation which, in each case, demonstrated: (a) the provision as advertised; (b) the provision in the form settled by the Council after the hearing of submissions; (c) the appellants' criticism of the alteration or addition; (d) (where applicable) the submission on which the alteration or addition was said by the Tribunal to have been based; (e) the Tribunal's decision in respect of each alteration or addition; and (f) other relevant references. We have found this compilation extremely helpful; we do not think it necessary to embark on the same detailed analysis of Counsel's submissions which occupied some 20 pages of the Tribunal's judgment, because we agree generally with the Tribunal's approach and its decision in respect of each individual challenge.

The Tribunal categorised the challenged variants into five groups:(a) Those sought in written submissions; (b) Those that corresponded to grounds stated in submissions; (c) Those that addressed cases presented at the hearing of submissions; (d) Amendments to wording not altering meaning or fact; (e) Other amendments not in groups (a) to (d).

Clause 6 of the First Schedule refers to the making of submissions in writing on any proposed plan change. A

person making a submission is required by clause 6 to state whether he/she wishes to be heard in respect of the submissions and to state the decision which the person wishes the local authority to make. A prescribed form requires the statement of grounds for the submission.

A summary of the submissions is advertised by the Council under clause 7(a) and submissions for or against existing submissions are then called for by way of public advertisement. A summary of submissions can only be just that; persons interested in the content of submissions are entitled to inspect the text of the submissions at the Council offices so that an informed decision on whether to support or object can be made. In this case, criticism was made of the adequacy of the summary but we see no merit in such a contention.

Many of the submissions did not specify the detailed relief or result sought. Many (such as Countdown's) pointed up deficiencies or omissions in the proposed plan. These alleged deficiencies or omissions were found in the body of the submissions. Countdown sought no relief other than rejection of the plan change. The Council in its decision accepted many of the criticisms made by Countdown and others and reflected these criticisms in the amendments found in the decision.

Clause 10 of the First Schedule states that, after hearing the submissions "the local authority concerned

shall give its decision regarding the submissions and state its reasons for accepting or rejecting them". This is to be compared with Regulation 31 of the Town and Country Planning Regulations 1978 which stated that "the Council shall allow or disallow each objection either wholly or in part..." (Emphasis added)

Counsel for the appellants submitted that clause 10 was narrower in its scope than the TCP Regulations and did not permit the Council to do other than accept or reject a submission.

Like the Tribunal, we cannot accept this submission. We agree with the Tribunal that the word "regarding" conveys no restriction on the kind of decision that could be given. We accept the Tribunal's remark that "in our experience a great variety of possible submissions would make it impracticable to confine a Council to either accepting a submission in its entirety or rejecting it".

Councils customarily face multiple submissions, often conflicting, often prepared by persons without professional help. We agree with the Tribunal that Councils need scope to deal with the realities of the situation. To take a legalistic view that a Council can only accept or reject the relief sought in any given submission is unreal. As was the case here, many submissions traversed a wide variety of topics; many of

these topics were addressed at the hearing and all fell for consideration by the Council in its decision.

Counsel relied on **Meade v Wellington City Council** (1978), 6 NZTPA 400 and **Morrow v Tauranga City Council** (A.6/80 Planning Tribunal, 13 December 1979) which emphasised that a Council's role under a scheme change was to allow or disallow an objection.

The Tribunal held that a test formulated by Holland J in **Nelson Pine Forest Limited v Waimea County Council** (1988), 13 NZTPA 69, 73 applied. In that case the Tribunal on appeal had added conditions to ordinances which made certain uses "conditional uses". The Tribunal had dismissed the appellant's appeal from the Council scheme change whereby the logging of native forests on private land became a conditional rather than a predominant use. The Judge held that this extension of ordinances articulating conditions for the conditional use, was within the jurisdiction of the Council and accordingly of the Tribunal, although no objector had expressly sought it. He said -

> "...that an informed and reasonable owner of land on which there was native forest should have appreciated that, if NFAC's objection was allowed and the logging or clearing of any areas of native forest became a conditional use, then either conditions would need to be introduced into the ordinance relating to conditional use applications, or at some stage or other the Council would adopt a practice of requiring certain information to be supplied prior to considering such applications. Had the Council adopted the conditions to the ordinances that it presented to the Tribunal at the

> time of the hearing of the objection, I am quite satisfied that no one could reasonably have been heard to complain that they had been prejudiced by lack of notice. Such a decision would accordingly have been lawful."

The Tribunal noted and applied this test in **Noel Leeming Limited v North Shore City (No 2)**, (1993), 2 NZRMA 243, 249.

Counsel for Countdown submitted that Holland J's observations were obiter and made in the context of the TCPA rather than of clauses 10 and 16 of the First Schedule. Counsel contended that Holland J's decision meant no more than that the Judge would have been prepared to find that the amendments ultimately made would have been within the parameters of and (by implication envisaged by) the objection as lodged.

There is some force in this submission. Indeed, a close reading of the decision in the **Nelson Pine Forest v Waimea County** case, the Tribunal's decision in **Noel Leeming v North Shore City (No 2)** and the Tribunal's decision in this case confirms that the paramount test applied was whether or not the amendments are ones which are raised by and within the ambit of the submissions. Holland J's reference to what an informed and reasonable owner of land should have appreciated was included within the context of his previous statement (p.73) -

> "...it is important to observe that the whole scheme of the Act contemplates notice before changes are made by a local authority to the scheme statement nd ordinances in its plan. It follows that when an

> authority is considering objections to its plan or a review of its plan it should not amend the provisions of the plan or the review beyond what is specifically raised in the objections to the plan which have been previously advertised."

The same point was made by the Tribunal in **Noel Leeming v Northshore City (No 2)** at p.249 and the Tribunal in this case at p.59 of the decision.

Adopting the standpoint of the informed and reasonable owner is only one test of deciding whether the amendment lies fairly and reasonably within the submissions filed. In our view, it would neither be correct nor helpful to elevate the "reasonable appreciation" test to an independent or isolated test. The local authority or Tribunal must consider whether any amendment made to the plan change as notified goes beyond what is reasonably and fairly raised in submissions on the plan change. In effect, that is what the Tribunal did on this occasion. It will usually be a question of degree to be judged by the terms of the proposed change and of the content of the submissions.

The danger of substituting a test which relies solely upon the Court endeavouring to ascertain the mind or appreciation of a hypothetical person is illustrated by the argument recorded in a decision of the Tribunal in **Meadow Mushrooms Ltd v Selwyn District Council & Canterbury Regional Council** (C.A.71/93, 1 October 1993). The Tribunal was asked to decide whether it was either "plausible" or "certain" that a person would have

appreciated the ambit of submissions and consequently the need to lodge a submission in support or opposition. We believe such articulations are unhelpful and that the local authority or Tribunal must make a decision based upon its own view of the extent of the submissions and whether the amendments come fairly and reasonably within them.

The view propounded by the appellants is unreal in practical terms. Persons making submissions in many instances are unlikely to fill in the forms exactly as required by the First Schedule and the Regulations, even when the forms are provided to them by the local authority. The Act encourages public participation in the resource management process; the ways whereby citizens participate in that process should not be bound by formality.

In the present case, we find it difficult to see how anyone was prejudiced by the alterations in the Council's finished version. The appellants did not (nor could they) assert that they had not received a fair hearing from either the Council or the Tribunal. They expressed a touching concern that a wider public had been disadvantaged by the unheralded additions to the plan. We find it difficult to see exactly who could have been affected significantly other than those 81 who made submissions to the Council. More importantly, it is hard to envisage that any person who had not participated

in the Council hearing and the Tribunal hearing could have offered any fresh insight into the wisdom of the proposed plan change. We make this observation considering the exhaustive scrutiny given to the proposal by a range of professionals.

We have considered the detailed arguments addressed to us concerning each of the changes in the policy statement and rules. On the whole we agree with the classifications of the Tribunal into the categories which it created itself. Mr Marquet pointed out a few instances where the Tribunal may have wrongly categorised a particular variation. Even if he were correct, that does not alter our overall view. We broadly agree with the Tribunal's assessment of each variation, many of which were cosmetic.

There is only one variation which requires specific mention. That is the change to Rule 4. After the hearing of objections, the Council added a Rule to the effect that "any activity not specified in the preceding rules or permitted by the Act is not permitted within the zone unless consent is obtained by way of resource consent".

We find that there was no submission which could have justified that insertion. Nor is the fact that the omission may have been mentioned in evidence appropriate;

because the jurisdiction to amend must have some foundation in the submissions.

We do not see this omission as fatal. The Tribunal held, correctly, that there there is power to excise offending variations without imperilling the scheme change as a whole. If Rule 4 can be excised, then S.373(3) of the RMA would apply; that subsection provides as follows -

> "Where a plan is deemed to be constituted under subsection (1), or where a proposed plan or change is deemed to be constituted under subsection (2), the plan shall be deemed to include a rule to the effect that every activity not specifically referred to in the plan is a non-complying activity."

We say generally that no-one seems to have been disadvantaged by the amendments. Even where the relationship to the submissions was somewhat tenuous, it seems quite clear that at the extensive hearing before the Council, most of the matters were discussed. If they were not discussed before the Council, they were certainly discussed before the Tribunal at great length.

In fact the whole of the appellant's case can hardly be based on any lack of due process. Their objections to the plan were considered at great length and fairness by the Tribunal. Any complaints now (such as those under this ground) are of the most technical nature. We see nothing in this ground of appeal which is also rejected.

Ground 5. **"The Tribunal erred in law when it determined the status of the written submission on plan change No. 6 made by an employee of the first respondent Mr J. Chandra, and its decision thereon was so unreasonable that no reasonable Tribunal properly directing itself in law and considering the evidence could have reached such a decision."**

This ground was struck out by Barker ACJ at a preliminary hearing.

Ground 6. **"The Tribunal applied the wrong legal test and misconstrued the Act when it declined to defer a decision on the merits of proposed plan change No 6 pending review by the first respondent of its transitional district plan.**

Ground 7. **The Tribunal misdirected itself when it determined that the Act restricts the authority of a territorial authority to decline to approve a plan change where it raises issues that have implications beyond the area encompassed by the plan change and which, in the instant case, should more appropriately be dealt with at a review of the transitional district plan.**

Although these two grounds relate to discrete findings by the Tribunal, they cover similar ground and will be considered together. The appellants claimed that significant resource management issues involving the whole Dunedin City area arise when a Council is addressing a plan change involving only part of the district; consequently, any change to the district plan must have implications for other parts of the district. The appellants asserted that the Tribunal should have referred the proposed plan change back to the Council with the direction that it should be cancelled because the forthcoming review of the whole district plan was a more appropriate way of managing the resource management issues involved.

The Tribunal heard evidence from witnesses giving reasons why it was preferable to pursue integrated management for all parts of the district and that the best time to do that was at the time of the review. The Tribunal rejected this evidence. Its decision is succinctly stated thus -

> "Although we accept that issues raised by plan change 6 would have implications for a wider area than the subject block, these proceedings are not inappropriate for addressing those issues. The proposed plan change was publicly notified; a number of submissions were received, and they were publicly notified; further submissions were received; the respondent's committee held a public hearing at which evidence was given; it made a full decision which was given to the parties; five parties exercised their rights to refer the change to the Tribunal; the Tribunal conducted a three week hearing in public at which public and private interests were represented, evidence was given by 19 witnesses, and full submissions were made. No one could be prejudiced by the Tribunal making decisions on matters in issue in the proceedings on the merits. On the contrary, the applicants would be prejudiced, and would be deprived of what they were entitled to expect, if the Tribunal were to withhold decisions on the merits on questions properly at issue before it. If we have a discretion in the matter, we decline to exercise it for those reasons."

The Tribunal went on to point out that clause 25 of the First Schedule provides that a local authority may defer preparation or notification of a privately requested change only where a plan review is due within 3 months; the review was due to be publicly notified at the end of 1994 at the earliest; it was not likely to be operative before 1997. The Tribunal further held that this was not the unusual case where a change should be deferred

and that the express provision for deferment in the First Schedule shows an intent by the Legislature that deferment is not intended for reviews that are more remote.

We entirely agree with the approach of the Tribunal. Clearly, the legislature was indicating that plan changes which had more than minimal planning worth should be considered on their merits, even although sponsored by private individuals, unless they were sought within a limited period before a review. We see no reason to differ from the view of the experienced Tribunal. This ground of appeal is also rejected.

Ground 8. "The Tribunal wrongly construed the ambit of the first respondent's lawful functions under Part V of the Act and in particular, misconstrued Ss.5(2), 9, 31(a), 31(b) and 76 by allowing the first respondent to direct and control the use and development of natural and physical resources within the subject block.

Under this ground, the appellants mounted a challenge to the way in which the Council used zoning in the proposed plan change. The appellants acknowledged that zoning was an appropriate resource management technique under the RMA. They did not accept that the RMA provides for zoning to restrict activities according to type or category unless it can be shown that the effects associated with a particular category breach "effects-based" standards. According to this argument, if any use is able to meet the environmental standards relating

to that zone, it is not lawful for rules under a plan to prevent any such use on the basis of type or description.

Counsel submitted that the plan change should have created a framework intended to enable people in communities to provide for their own social, economic and cultural wellbeing (the words of S.5 of the RMA). Much was made of the difference between the RMA and the TCPA. S.5 was said to be either or both 'anthropocentric' and 'ecocentric'.

Consideration of S.76 is required -

> "S.76.
>
> (1) A territorial authority may, for the purpose of -
>
> (a) Carrying out its functions under this Act; and
> (b) Achieving the objectives and policies of the plan,- include in its district plan rules which prohibit, regulate, or allow activities.
>
> (2) Every such rule shall have the force and effect of a regulation in force under this Act but, to the extent that any such rule is inconsistent with any such regulation, the regulation shall prevail.
>
> (3) In making a rule, the territorial authority shall have regard to the actual or potential effect on the environment of activities including, in particular, any adverse effect; and rules may accordingly specify permitted activities, controlled activities, discretionary activities, non-complying activities, and prohibited activities.
>
> (4) A rule may -
>
> (a) Apply throughout a district or a part of a district;
> (b) Make different provision for -
> (i) Different parts of the district; or
> (ii) Different classes of effects arising from an activity:

(c) Apply all the time or for stated periods or seasons;
(d) Be specific or general in its application;
(e) Require a resource consent to be obtained for any activity not specifically referred to in the plan."

The Tribunal considered that the plan change represented a reasonable and practical accommodation of the new plan with the old scheme which was acceptable for the remainder of the life of the transitional plan. It rejected the various contentions that the change was inconsistent with the transitional district plan and saw no legal obstacle to approval of the change. It characterised the Council's method of managing possible effects by requiring resource consent as a "rather unsophisticated response" to the new philosophies of the RMA but it held the response was only a temporary expedient, capable of being responsive in the circumstances.

We think that the Tribunal's approach was entirely correct. S.76(3) enables a local authority to provide for permitted activities, controlled activies, discretionary activities, non-complying activities and prohibited activities. The scheme change has done exactly this.

Similar submissions about S.5, the new philosophies of the RMA and the need to abandon the mindset of TCPA procedures were given to the Full Court in **Batchelor v Tauranga District Council (No 2)** [1992] 2 NZLR 84; that

was an appeal against a refusal by the Tribunal to grant consent to a non-complying activity. The Court said at 89 -

> "Our conclusion on the competing submissions about the application of S.5 to this case is that the section does not in general disclose a preference for or against zoning as such; or a preference for or against councils making provision for people; or a preference for or against allowing people to make provision for theselves. Depending on the circumstances, any measures of those kinds may be capable of serving the purpose of promoting sustainable management of natural and physical resources."

As in **Batchelor's** case, reference was made in the appellants' submissions to the speech in Hansard of the Minister in charge introducing the RMA as a bill. We find no occasion here to resort to our rather limited ability to use statements in parliamentary debates in aid of statutory interpretation. **Wellington International Airport Ltd v Air New Zealand Ltd**, [1993] 1 NZLR 671, 675 sets limits for resort to such debates.

To similar effect to **Batchelor's** case is a decision of Thorp J in **K.B. Furniture Ltd v Tauranga District Council** [1993] 3 NZLR 197. He too noted that the aims and objects of the RMA represent a major change in policy in that the RMA moved away from the concept of protection and control of development towards a more permissive system of management of resource focused on control and the adverse effects of activities on the environment.

We find the **Batchelor** and **K.B. Furniture** cases of great relevance when considering this ground of appeal; they looked at the underlying philosophy between the two Acts and, in particular, the application of S.5 of the RMA. In **Batchelor's** case, the Tribunal had taken a similar pragmatic view to that taken by the Tribunal in this case. The Full Court held that there was no general error in an approach which recognised the difficulty of operating with a transitional plan, conceived as a scheme under the TCPA, yet deemed to be a plan under the RMA. Zoning is a method of resource management, albeit a rather blunt instrument in an RMA context; under a transitional plan, activities may still be regulated by that means.

In the **K.B. Furniture** case, Thorp J characterised **Batchelor's** case as pointing to -

> "...the need to construe transitional plans in a pragmatic way during the transitional period, and in that consideration to have regard to the "integrity" of such plans, must have at least persuasive authority in this Court; and with respect must be right. It would be an extraordinary position if a clear statement of legislative policy as to the regulation of land use by territorial local authorities were to have no significance in the interpretation of "transitional plans". At the same time, it would in my view be equally difficult to support the contention that such plans must now be re-interpreted in such a fashion as to ensure that they accord fully with, and promote only, the new and very different purposes of the 1991 Act. That endeavour would be a recipe for discontinuity and chaos in the planning process".

We agree with this statement entirely. This ground of appeal is also dismissed.

Ground 9. **"That the Tribunal applied the wrong legal tests and misconstrued the Act when it concluded that the incorporation of Rule 4 in plan change No 6 is intra vires the Act, and in particular by concluding that Rule 4 is within the bounds of S.76 of the Act and by determining that Rule 4 is necessary with reference to the transitional plan rather than the provisions and purposes of the Act."**

This ground is rather similar to Ground 4.

Rule 4 of plan change 6 provides: "Any activity not specified in rules 1-3 above or permitted by the Act is not permitted within the zone unless consent is obtained by way of a resource consent". The contention of the appellants is that this rule purports to require persons undertaking a number of activities expressly referred to in the district plan to acquire a resource consent before they can proceed. It was submitted that this rule was ultra vires the rule-making power of S.76 (cited above).

Counsel for the appellants drew on the well-known principles that a Court is reluctant to interpret a statute as restricting the rights of landowners to utilise their property unless that interpretation is necessary to give effect to the express words of the RMA Act; in a planning context, this principle is demonstrated by such authorities as **Ashburton Borough v Clifford** [1969] NZLR 921, 943. Counsel submitted that S.9 introduced a permissive regime and that the ability of the local authority to reverse that presumption is prescribed by S.74(4)(e); that normal principles of

statutory interpretation should properly have applied to the construction of S.76.

The Tribunal held that there must be one coherent planning instrument in the context of a hybrid transitional district plan and for the purposes of marrying provisions prepared under one Act which are to change a plan prepared under another Act. "We infer that the need in such circumstances for a rule requiring resource consent to be obtained for activities in one zone that are specifically referred to elsewhere in the plan has on balance more probably been overlooked from the list in S.76(4) than deliberately excluded. The rule is clearly within the general scope of S.76(1) and we do not consider that it was ultra vires respondent's powers".

The Tribunal did not find helpful (and neither do we) various maxims of statutory interpretation advanced by the appellants. The Tribunal could not believe that the Legislature intended, by providing expressly for such rules in the circumstances referred to in S.76(4)(e), to preclude similar rules in other cases where they are needed. We think the Tribunal's reasoning sound and find no reason to depart from it.

Mr Marquet referred to a decision of the Tribunal in **Auckland City Council v Auckland Heritage Trust** (1993), 1 NZRMA 69 where Judge Sheppard held that a reference

anywhere in a plan to a particular activity was sufficient to preclude the application of S.373 to a zone which did not permit that activity. We agree with the criticisms of Mr Marquet of this decision in that no reference was made in it to the ability of a Council to make different provisions for different parts of a district.

In that case, there had been a provision protecting buildings specified in the schedule from alteration or destruction. As alteration or destruction was referred to in the plan, the Judge held that other buildings were not constrained by the rule that demolition and construction can only take place with a resource consent because that requirement was limited only to the scheduled buildings. Such a view could have the effect of taking away control formerly had under the district scheme. However, we are not concerned with the correctness of the **Auckland Heritage Trust** decision.

Even if the Tribunal were wrong in that decision, then our view, already discussed under Ground 4, is that S.373(3) applies; a transitional district plan must be deemed to include a rule to the effect that every activity not specifically referred to in the plan is a non-complying activity.

We reject this ground of appeal.

Ground 10. **"The Tribunal incorrectly applied the law relating to uncertainty and vagueness, and came to a decision which was so unreasonable in the circumstances, that no reasonable tribunal could reach the same, by holding that certain phrases in the rules in change No 6 are valid and have the requisite measure of certainty."**

At the hearing before the Tribunal it was argued by the appellants that the rules contained a number of phrases which were vague and uncertain. The Tribunal listed a number of expressions so attacked, discussed relevant authorities and ruled on the matters listed. In some cases, it upheld the submission and either severed and deleted the phrase objected to or held the whole provision invalid. In other cases it rejected the submission made and upheld the validity of the phrase concerned.

In its decision, the Tribunal dealt with this aspect of the case as part of a wider group of matters under the heading "Whether rules 4 and 6 are ultra vires".

Countdown's notice of appeal para 7, under the same heading, specified a number of respects (including the present point) in which the Tribunal is alleged to be in error in that section of the decision.

As a result of pre-trial conferences and argument before Barker ACJ, the grounds of appeal were re-stated by the appellants jointly in 24 propositions or grounds and these were the bases on which (with some excisions and amalgamations) the appeal came before us.

In submissions for the appellant, Mr Wylie covered a number of matters raised in para 7 of the notice of appeal which are outside the ambit of ground 10. We confine ourselves to the specific issue raised by the ground as framed; i.e. whether in respect of the phrases upheld as valid by the Tribunal, it incorrectly applied the law and came to a decision which was so unreasonable in the circumstances that no reasonable tribunal could reach it.

As to the law, the Tribunal cited and quoted passages from the judgments of Davison CJ in **Bitumix Ltd v Mt Wellington Borough**, [1979] 2 NZLR 57, and McGechan J in **McLeod Holdings v Countdown Properties** (1990), 14 NZTPA 362. The Tribunal then said (p.81) -

> "With those judgments to guide us and bearing in mind that unlike the former legislation the Resource Management Act does not stipulate that conditions for permitted use be 'specified', we return to consider the phrases challenged ..."

My Wylie questioned the validity of the distinction that the RMA, unlike the former legislation, does not stipulate that conditions for permitted uses be "specified". No submissions were made by other counsel in this respect and we are unclear about this step in the Tribunal's reasoning. We consider, however, that the correct approach was as indicated by the judgments cited; in our opinion the Tribunal would have reached the same result even if it had applied them alone and had not

borne in mind the further factor derived from the absence of the word "specified".

The Tribunal held, for example, that the phrase "appropriate design" and the limitation of signs to those "of a size related to the scale of the building..." were too vague and could not stand. On the other hand it determined that whether an existing sign is "of historic or architectural merit" and whether an odour is "objectionable", although matters on which opinions may differ, are questions of fact and degree which are capable of judgment and were upheld.

We do not consider that the Tribunal incorrectly applied the law or came to a decision that was so unreasonable that it could no stand. This ground of appeal is also dismissed.

Ground 11. **That the Tribunal's conclusion that the land in the block the subject of Plan Change No 6 is in general an appropriate location for large scale vehicle orientated retailing is a conclusion which on the evidence it could not reasonably come to."**

This ground was withdrawn at the hearing and is therefore dismissed.

Ground 12.. **"That the Tribunal's decision accepting the evidence adduced by the second respondent about the economic effects of proposed change No 6 were so unreasonable, that no reasonable Tribunal, properly considering the evidence, and directing itself in law, could have made such a decision."**

This ground relates to the evidence of a statistical retail consultant, Mr M.G. Tansley, who generally supported the plan change. No witness was called to contradict his evidence. The appellants made detailed and sustained criticisms of his evidence before the Tribunal and claimed that Mr Tansley did not have the relevant expertise to predict economic effects of the proposed change. The Tribunal held that an economist's analysis would not have assisted it any more than did Mr Tansley's.

In a close analysis of Mr Tansley's evidence, counsel for Countdown examined the witness's qualifications and his approach to a cost and benefit consideration of the proposed plan change; they alleged deficiencies in his predictions about the economic effects of the change. These matters were before the Tribunal when they made their assessment of the evidence. Its decision (p.34) records the Tribunal's appreciation of such criticisms.

The Court is dealing with the decision of an specialist Tribunal, well used to assessing evidence of the sort given by Mr Tansley, who was accepted by the Tribunal as an expert. We see no reason for holding that the Tribunal should not have accepted his evidence. Although it is possible for this Court to hold in an appropriate case that there was no evidence to justify a finding of fact, it should be very loath to do so after the Tribunal's exhaustive hearing. The Tribunal is not

bound by the strict rules of evidence. Even if it were, the acceptance or rejection of Mr Tansley's evidence is a question of fact. We see this ground of appeal as an attempt to mount an appeal to this Court against a finding of fact by the Tribunal - which is not permitted by the RMA. We therefore reject this ground of appeal.

Ground 24. **"The Tribunal erred in law and acted unreasonably by failing to consider either in whole or in part the evidence of the appellants and by reaching a decision regarding the merits of the plan change that no reasonable Tribunal considering that evidence before it and directing itself properly in law could reasonably have reached. In particular the Tribunal failed to consider the evidence of the following -**

> **Anderson, Page, Nieper, Cosgrove, Hawthorne, Bryce, Chandrakumaran, Constantine, Edmonds,**

This ground is similar to ground 12, so we consider it next. The appellants complaint here is that the Tribunal took considerable time to analyse the Council's and Woolworths' witnesses' views on the appropriateness of the location for the commercial zone and on the economic and social effects of allowing the proposed change. They claim, in contrast, that the witnesses called by the appellants on the same topics were not considered at all or not given the same degree of attention. The Tribunal heard full submissions by the appellants as to reliability of opposing witnesses, but, the appellants submitted before us, it failed to place any weight at all on the evidence given by the appellants' witnesses. The Tribunal was said to have been unfairly selective and that, therefore, its decision was against the weight of

evidence and one which no reasonable Tribunal could have reached.

Again, this submission must be considered in the light of the Tribunal's expertise. Even a cursory consideration of the extensive record shows that the hearing was extremely thorough; every facet and implication of the proposed scheme change appears to have been debated at length. The Tribunal conducted a site visit and a tour of suburban shopping centres. An analysis presented by Mr Gould shows that the witnesses whom the appellants claim were ignored in the decision were questioned by the presiding Judge. In the course of its decision (p.86), the Tribunal expressly confirmed that it was reaching a conclusion after "hearing the witnesses for the respondent and applicant cross-examined and hearing the witnesses for Foodstuffs and Countdown..." The Tribunal was not required in its judgment to refer to the evidence of each witness.

Once again, we are totally unable to hold that the Tribunal erred in law just because its thorough decision omitted to mention these witnesses by name. It is impossible for us to say that their evidence was not considered. Again, this ground comes close to be an appeal on fact masquerading as an appeal on a point of law. There is nothing to this ground of appeal which is accordingly dismissed.

Ground 13. **"That the Tribunal applied the wrong legal tests and misconstrued the Act when it held that Change No 6 assisted the first respondent in carrying out its functions in order to achieve the statutory purpose contained in Part II of promoting sustainable management of natural and physical resources and that the change is in accordance with the function of S.31."**

Ground 14. **"The Tribunal misdirected itself in law by concluding that the content and provisions of Plan Change 6 promulgated under Part V of the Act are subject to the framework and legal premises of the first respondent's transitional district plan created under the Town and Country Planning Act 1977."**

These grounds were included in the arguments on Grounds 8 and 9 and do not need to be considered separately.

Grounds 15, 16, 17 and 18:

15. **"That the Tribunal erred in law by holding that S.290 of the Act did not apply to the references in Plan Change No 6."**

16. **"That the Tribunal misconstrued the statute when it held that it did not have the same duty as the first respondent to carry out the duties listed in S.32(1)."**

17. **"That the Tribunal misconstrued the Act when it held that it has the powers conferred by S.293, when considering a reference pursuant to clause 14."**

18. **"That the Tribunal misdirected itself by failing to apply the correct legal test when it purported to confirm Plan Change 6, namely by deciding that it was satisfied on balance that implementing the proposal would more fully serve the statutory purpose than would cancelling it."**

The first step in the appellant's argument to the Tribunal on this part of the hearing was that S.290 of the RMA applied to the proceedings. That section reads -

> **"Powers of Tribunal in regard to appeals and inquiries -**

> (1) The Planning Tribunal has the same power, duty, and disecretion in respect of a decision appealed against, or to which an inquiry relates, as the person against whose decision the appeal or inquiry is brought.
>
> (2) The Planning Tribunal may confirm, amend, or cancel a decision to which an appeal relates.
>
> (3) The Planning Tribunal may recommend the confirmation, amendment or cancellation of a decision to which an inquiry relates.
>
> (4) Nothing in this section affects any specific power or duty the Planning Tribunal has under this Act or under any other Act or regulation."

The second step in the argument was that pursuant to S.290(1) the Tribunal had a duty to carry out a S.32(1) analysis in the same way as the Council had.

The Tribunal held that S.290 did not apply because the proceedings were not an appeal against the Council's decision as such and that the Tribunal was not under the same duty as the Council to carry out the duties listed in S.32(1). It went on to say -

> "However the Tribunal's function is to decide whether the plan change should be confirmed, modified, amended, or deleted. To perform that function, the matters listed in S.32(1) are relevant. We therefore address those matters as a useful method to assist us to perform the Tribunal's functions on these references."

The Tribunal then considered those matters in detail.

The appellant's submission to this Court is that the Tribunal was wrong as a matter of law in holding that S.290 did not apply and in determining that it was not itself required to discharge the S.32 duties.

The Tribunal also held that S.293 of the RMA, unlike S.290, was applicable and that it had the powers conferred thereby. S.293 (in part) is as follows -

> "Tribunal may order change to policy statements and plans
>
> (1) On the hearing of any appeal against, or inquiry into, the provisions of any policy statement or plan, the Planning Tribunal may direct that changes be made to the policy statement or plan.
>
> (2) If on the hearing of any such appeal or inquiry, the Tribunal considers that a reasonable case has been presented for changing or revoking any provision of a policy statement or plan, and that some opportunity should be given to interested parties to consider the proposed change or revocation, it may adjourn the hearing until such time as interested parties can be heard."

Although S.293 refers to "plan" which (by the relevant definition) means the operative district plan and changes thereto, the Tribunal considered that, because there is no mechanism by which there could be an appeal to the Tribunal against the provisions of an operative plan, for S.293 to have any application to plans, therefore, it must apply to appeals against provisions of proposed plans and proposed changes to plans. It accordingly held that the context requires that the defined meanings do not apply and that it has the powers conferred by S.293 in respect of a proposed change as well as those conferred by clause 15(2) of the First Schedule. That clause is as follows -

> "(2) Where the Tribunal holds a hearing into any provision of a proposed policy statement or plan (other than a regional coastal plan) that reference

> is an appeal, and the Tribunal may confirm, or direct the local authority to modify, delete, or insert, any provision which is referred to it."

The appellants submit that the Tribunal was wrong as a matter of law in holding that it had the powers conferred by S.293 in the present case.

Mr Marquet accepted (as he had before the Tribunal) that Ss.290 and 293 both applied and that the Tribunal had the powers set out in those provisions but contended, for reasons amplified in his submissions, that there had been no error of law.

Mr Gould supported the Tribunal's findings. He argued, however, that on a careful reading of the decision the Tribunal did not rely upon the powers contained in S.293 but instead on its jurisdiction under clause 15(2) of the First Schedule. It had correctly defined its function, he contended, and in the performance of that function, had reviewed all the elements of S.32. He submitted that even if the Tribunal had the duties under S.32 of the Council (but in a manner relevant to an appeal process), the steps it would have taken in its deliberation and judgment would have been no different. No material effect would arise, he submitted, if the Tribunal were found to be technically in error in its views as to Ss. 290 and 293.

We consider that, for the reasons given by the Planning Tribunal, it correctly determined that it had the powers

conferred by S.293 although we accept Mr Gould's submission that, in the end, the Tribunal did not exercise those powers and acted only pursuant to clause 15(2) of the First Schedule.

We differ from the Tribunal's conclusion as to S.290. In our view, the nature of the process before the Tribunal, although called a reference, is also, in effect an appeal, from the decision of the Council. In addition, the provisions in clause 15(2) that a reference of the sort involved here is an 'appeal' and a reference into a regional coastal plan pursuant to clause 15(3) is an 'inquiry' link, by the terminology used, clause 15 in the First Schedule with S.290.

The general approach that the Tribunal has the same duties, powers and discretions as the Council is not novel. S.150(1) and (2) of the TCPA conferred upon the Tribunal substantially the same powers as S.290(1) and (2) of the RMA; in particular, S.150(1) provided that the Tribunal has the same "powers duties functions and discretions" as the body at first instance. Under that legislation, the Tribunal's approach to plan changes was that the Tribunal is an appellate authority and not involved in the planning process as such. This principle was discussed in this Court in **Waimea Residents Association Incorporated v Chelsea Investments Limited** (Davison CJ, Wellington, M.616/81, 16 December 1981).

There was no provision in the TCPA corresponding to S.32 of the RMA but the judgment of Davison CJ is relevant as confirming the judicial and appellate elements of the Tribunal's function even although it had the same powers and duties as the Council.

We accept Mr Gould's submission that even if the Tribunal had decided that S.290 applied and it had the same duties as the Council (in a manner relevant to its appellate jurisdiction) the steps it would have taken in its deliberation and judgment would have been no different from those set out in detail in pages 121 to 125 of the decision.

The appellants argue next, in respect of ground 18, that the test required is not simply to decide whether on balance the provisions achieve the purpose of the RMA but whether they are in fact necessary. Alternatively, it is submitted that its construction of the word 'necessary' was not stringent enough in the context.

We deal with the alternative point first. The Tribunal in its decision discussed the submissions made by counsel and the judgments of the Court of Appeal in **Environmental Defence Society Inc and Tai Tokerau District Maori Council v Mangonui County Council** [1989] 13 NZTPA 197 and of Greig J in **Wainuiomata District Council v Local Government Commission** (Wellington, 20 September 1989, C.P.546/89).

The Tribunal considered that in S.32(1), 'necessary' requires to be considered in relation to achieving the purpose of the Act and the range of functions of Ministers and local authorities listed in S.32(2). In this context, it held that the word has a meaning similar to expedient or desirable rather than essential.

We agree with that view and do not consider that the Tribunal was in error in law.

We return now to the appellants' primary submission.

It is true that the Tribunal said (at p.128) -

> "On balance we are satisfied that implementing the proposal would more fully serve the statutory purpose than would cancelling it, and that the respondent should be free to approve the plan change."

But we do not think it is correct that the Tribunal adopted this test in place of the more rigorous requirement that it be satisfied that the provisions are necessary. S.32 is part only of the statutory framework; by S.74, a territorial authority is to prepare and change its district plan in accordance with its functions under S.31, the provisions of Part II, its duty under S.32 and any regulations. This was fully apprehended by and dealt with appropriately by the Tribunal. It said at p.127 -

> "We have found that the content of proposed Plan Change 6 would, if implemented, serve the statutory

> purpose of promoting sustainable management of natural and physical resources in several respects; and that the proposal would reasonably serve that purpose; and would serve the aims of efficient use and development of natural and physical resources, the maintenance and enhancement of amenity values, the recognition and protection of the heritage values of building and ares; and the maintenance and enhancement of the quality of the environment.
>
> We have also found that the measure is capable of assisting the respondent to carry out its functions in order to achiege that purpose, and is in accordance with those functions under S.31; that its objectives, policies and rules are necessary, in the sense of expedient, for achieving the purpose of the Act; that the proposed rules are as likely to be effective as such rules are able to be; and that the objectives, policies and rules of the plan change are in general the most appropriate means of exercising the respondent's function."

The Tribunal went on to deal with possible alternative locations, the road system, pedestrian safety, the obstruction of fire appliances leaving the fire station, non-customers' use of carparking, and adverse economic and social effects. It then concluded with the passage which, the appellants contend, shows that the Tribunal adopted the wrong test by saying that on balance it was satisfied that implementing the proposal would more fully serve the statutory purpose than cancelling it.

In our view, the Tribunal applied the correct test when considering the relevant part of S.32; it asked itself whether it was satisfied that the change was necessary and held, after a full examination, that it was. On the basis of that and numerous other findings, it then proceeded to the broader and ultimate issue of whether it should confirm the change or direct the Council to modify, delete or insert any provision which had been

referred to it. It determined that, on balance, implementing the proposal would more fully serve the statutory purpose than would cancelling it and that the Council should accordingly be free to approve the plan change. Reading the relevant part of the Tribunal's decision as a whole we consider that its approach was correct and that it did not err in law as the appellants contend. This ground of appeal is dismissed.

Ground 19. **"That the Tribunal misdirected itself when it determined that the onus of proof rested with the appellant Transit to establish a case that approving Plan Change No 6 would rresult in adverse effects on the traffic environment."**

Ground 20. **"In considering Plan Change No 6 in terms of S.5 of the Act the Tribunal erred in failing to consider the effects of the Plan Change on the sustainable management of the State Highway, on the reasonably foreseeable transportation needs of future generations, and on the needs of the people of the district, pedestrians, and road users, as to their health and safety, and on the need to avoid, remedy or mitigate adverse effects of the plan change on the transportation environment of the Dunedin district."**

Ground 21. **"The Tribunal erred in determining that the Plan Change would create no adverse effects on the State Highway and on persons using and crossing the State Highway."**

Ground 22. **"In considering the effectiveness of the rules contained in the plan change the Tribunal erred in failing to take account of the fact that in respect of permitted and controlled activities allowed by the plan change the general ordinances of the transitional district plan as to vehicle access are ultra vires and of no effect."**

Ground 23. **"The Tribunal erred in considering the effectiveness of the rules contained in the Plan Change, and in particular wrongly determined that the issue of what are appropriate rules for vehicle access should be resolved by the appellant and the first respondent through the process of proposed draft plan change 7 or some informal process."**

These grounds were not argued because of the settlement reached by Transit with the Council and Woolworths. However, because all the other appellants' grounds of appeal have been dismissed, we have now to consider submissions from those appellants as to why the settlement should not be implemented in the manner suggested.

The settlement arrived at amongst Transit, the Council and Woolworths provided for certain rules as to access to the site to be incorporated in the plan change. Details of these rules were annexed to the parties' agreement and submitted to the Court. Counsel for Transit sought an order that the now agreed rules be referred back to the Tribunal where the parties would seek appropriate orders by consent incorporating the new rules. Such a procedure was only to be necessary if the appeals by Countdown and Foodstuffs alleging the invalidity of the planning change were unsuccessful. We have ruled that they are. We therefore consider the viability of implementing the Transit settlement.

Counsel for Countdown who submitted that the new rules contained within the settlement agreement required public notification before the local authority or Tribunal could proceed to include them in the plan change. Further, it was contended that the Tribunal had refused such proposed amendments sought by Transit upon the basis that Transit's submission to the Council had not specifically

stated the amendments sought and that that was final because it had not been appealed. Reference was made to S.295 of the RMA viz -

> "that a decision of the Planning Tribunal ... is final unless it is re-heard under S.294 or appealed under S.299."

It was further agreed that Transit's grounds of appeal did not embrace the new rules but rather dealt with the procedure adopted by the Tribunal in advising both Transit and the Council actively to consider the issues raised by Transit's proposed amendments.

All parties accepted that the Tribunal had power under clause 15(2) of the First Schedule to confirm or to direct the local authority to modify, delete or insert any provision which had been referred to it; as well, it had powers to direct changes under S.293 of the RMA. The latter power includes a specific power to adjourn a hearing if it considers that some opportunity should be given to interested parties to be notified of and to consider the proposed change. The detailed procedure is contained in S.293(3).

On the penultimate page of its decision the Tribunal stated -

> "The other two amendments sought by Transit would replace general provisions about the design of vehicle accesses to car parking and service and loading areas with detailed rules containing specific standards. However, although Transit's submission to the respondent on the plan change

> referred to pedestrians crossing Cumberland Street mid-block, and to the design and location of accesses and exits, it did not state that the submitter wished the respondent specifically to make the amendments that were sought in Transit's reference to the Tribunal. Further, those amendments were not put to the respondent's traffic engineering witness, Mr N.S. Read, in cross-examination by Transit's counsel.
>
> The applicants' traffic engineering witness, Mr Tuohey, proposed a different rule about design and location of vehicle accesses, and that is also a topic currently being considered within the Council administration, focusing on a draft Plan Change 7. In all those circumstances, we do not feel confident that the specific provisions sought by Transit would necessarily be the most appropriate means of addressing the concern raised by it. We are content to know that both Transit and the respondent are actively considering the issues which the amendments sought by Transit are intended to address."

We do not read those paragraphs, in the context of the Tribunal's decision as a whole, as a concluded finding upon Transit's reference to the Tribunal. We accept that these amendments, now settled upon, may be within the Tribunal's jurisdiction under S.293 or clause 15(2) of the First Schedule.

In Port Otago Limited v Dunedin City Council (Dunedin, A.P.112/93, 15 November 1993, Tipping J expressed the view that it would be a rare case in an appeal on a point of law where this Court could substitute its own conclusions on the factual matters underlying the point of law for that of the Tribunal. He considered, and we agree, that unless the correctly legal approach could lead to only one substitute result, the proper course is to remit the matter to the Tribunal as R.718A(2) of the High Court Rules empowers.

Accordingly, we allow Transit's appeal by consent and remit to the Tribunal for its further consideration and determination the possible exercise of its powers under S.293 or Clause 15(2) of the First Schedule in relation to the rules forming part of the settlement.

Since this judgment may have interest beyond the facts of this case and because we have mentioned R.718A of the High Court Rules, we make some comments about the scheme of the Act relating to appeals to this Court.

Section 300-307 of the RMA provide detailed procedure for the institution of appeals to this Court under S.299 and for the procedure up to the date of hearing. In our view, it is unfortunate that such detailed matters of procedure are fixed by statute. Our reasons are: (a) statutes are far more difficult to alter than Rules of Court should some procedural amendment be considered desirable; (b) most statutes are content to leave procedural aspects to the Rules once the statute has conferred the right of appeal; (c) the High Court Rules in Part X aim for a uniform procedure for all appeals to this Court other than appeals from the District Court. There is much to be said for having the same rules for similar kinds of appeals.

Although the RMA goes into considerable detail on procedure, it is silent on the powers of the Court upon hearing an appeal from the Tribunal. One might have

thought that the power of the Court on hearing an appeal might have been a better candidate for legislative precision than detailed provisions which are similar to but not identical to well-understood and commonly used rules of Court. We hope that, at the next revision of the Act, consideration be given to reducing the procedural detail in Ss.300-307 and that the same measure of confidence be reposed in the Rules of Court as can be found in other legislation granting appeal rights from various tribunals or administrative bodies.

Result:

The appeals of Countdown and Foodtown are dismissed. The appeal of Transit is allowed by consent in the manner indicated. Woolworths and the Council are both entitled to costs. We shall receive memoranda from counsel if agreement cannot be reached.

R D. Barker J.

Fraser J.

Solicitors: Gallaway Haggitt Sinclair, Dunedin, for Foodstuffs
Duncan Cotterill, Christchurch, for Countdown
Timpany Walton, Timaru, for Transit
Chapman Tripp Sheffield Young, Auckland, for Woolworths
Ross Dowling Marquet & Griffin, Dunedin, for Dunedin City Council