BEFORE THE ENVIRONMENT COURT

[2010] NZEnvC 211

IN THE MATTER	of six appeals under Clause 14 of the First Schedule of the Resource Management Act 1991
BETWEEN	CLEVEDON CARES INCORPORATED (ENV-2007-AKL-000676)
	NETHERLEA HOLDINGS LIMITED (ENV-2007-AKL-000689)
	AUCKLAND REGIONAL COUNCIL (ENV-2007-AKL-000710)
	ARDMORE AIRFIELD TENANTS & USERS COMMITTEE (ENV-2007-AKL-000716)
	NGAI TAI UMUPUIA TE WAKA TOTARA INCORPORATED (ENV-2007-AKL-000718)
	WAIROA RIVER CANAL PARTNERSHIP (ENV-2008-AKL-000222)
	Appellants
AND	MANUKAU CITY COUNCIL
	Respondent

Hearing at: Auckland on 18-22 May, 25-29 May, 21-25 September, 5-9 October and 21-23 December 2009

Court: Environment Judge R G Whiting
Environment Commissioner M P Oliver
Environment Commissioner K Prime

Counsel: Mr D Allan and Ms C Kirman on behalf of Clevedon Cares Incorporated
Ms C Greig for Clevedon Cares Incorporated
Ms M Dickey on behalf of Manukau City Council

Mr R Brabant and Mr J Brabant on behalf of Wairoa River Canal Partnership
Mr E Enright and Ms S Fraser on behalf of Auckland Regional Council
Mr B I J Cowper, Ms B Tree and B Watts on behalf of Ardmore Airfields Tenants and Users Committee
Ms P Kapua on behalf of Ngai Tai Umupuia Te Waka Totara Incorporated
Ms K Frazer on behalf of M Whitehouse and M Van Het Bolscher
Ms L Britton for Royal Forest and Bird Protection Society Incorporated
Mr K Glass for Pohutukawa Coast Community
Ms M Whitehouse for self
Ms R Pere for self and husband

DECISION OF THE ENVIRONMENT COURT

A. **For the reasons given in this decision, the appeals against the Plan Change are allowed and the Council's decision is cancelled.**

B. **Costs are reserved.**

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Introduction

[1] These appeals relate to Plan Change 13 (PC13) of the Manukau District Plan. PC13 seeks to introduce a new sub-Chapter 17.12 into Chapter 17 of the operative plan to enable the development of the Wairoa River Maritime Village, with a heavy focus on boating, in the lower reaches of the Wairoa River. It is proposed that the village would provide for up to 267 residential dwellings in a canal village layout.

[2] PC13 was initially a private plan change, initiated by the Wairoa River Canal Partnership (the partnership), which was adopted by the City Council pursuant to clause 25 of the First Schedule to the Act. The plan change attracted large numbers of supporting and opposing submissions. After a protracted hearing the Council upheld the plan change with some amendments. The Council's decision is set out in a report by the Council's Hearing Committee dated 1 August 2007.

[3] Five appeals were filed by opponents to the plan change:

[a] Clevedon Cares Incorporated;

[b] Auckland Regional Council;

[c] Ngai Tai Umupuia Te Waka Totara Incorporated (Ngati Tai);

[d] Netherlea Holdings Limited (Netherlea); and

[e] Ardmore Airfield Tenants and Users Committee (Ardmore Tenants).

[4] A large number of contested issues were raised in the appeals. Despite directions for expert witnesses to caucus and for the parties to define the issues, a large number of contested issues were canvassed at the hearing. We set those out in detail later in this decision.

[5] In August the partnership, who was also a submitter to the plan change adopted by the City Council, was granted leave to file an appeal. By its appeal the partnership proposed quite extensive amendments to the provisions of PC13. Clevedon Cares sought to have the appeal by the partnership struck out on the basis that the appeal contains a

number of elements not included in the notified version of the plan change, and falls outside the scope of the matters raised in the partnership's submission.

[6] The City Council generally supported the changes to PC13 proposed by the partnership. Its advisors consider it represents a "scaling back" of the development enabled by the plan change, reducing the scope of the plan change and its potential effects on the environment. However, there were some specific matters of drafting that caused concern. Early in the hearing the City Council and the partnership reached agreement on a final form of the plan change which was referred to as the 23 September 2009 version.

[7] In a minute of the Court, dated 28 November 2008, it was determined that the question of scope, being a matter of both fact and law, would better be addressed at the substantive hearing. Questions of jurisdiction based on scope are clearly interrelated with the Court's wide discretion to invoke section 293 of the Act. Because an exercise of discretion under section 293 involves, among other things, a consideration of the merits, we propose to consider first the proposal as enunciated in the appeal documents, as amended by the 23 September 2009 version of the plan change.

The Site and Surrounds

[8] The site and its surrounding landscape was described by a number of planning and landscaping witnesses. The site is made up of two parcels of land; the upland block which comprises approximately 111 hectares of steep to rolling land on the north-western side of North Road, 5 km north of Clevedon. It is a mixture of pine trees, remnant native forest and grazing land. The lowland block comprises approximately 123 hectares of generally flat, low-lying alluvial plain, draining eastwards to a 4 km long frontage to the Wairoa River. It is this lower block of land to which the evidence was mainly directed, as it is here that development is intended to be facilitated by PC13. The upper block is ancillary to the development by providing a location for disposal and treatment of sewage from the lowland block.

[9] We found Ms Absolum's description of the surrounding area to be both succinct and comprehensive.[1] It encapsulated what we saw on our site visit. We propose therefore to adopt her description.

[1] EIC, paras [4.1] – [4.12]

[10] A broad flat alluvial plain cuts across the Auckland Isthmus from the Pahurehure Inlet in the south-west (between Manurewa and Papakura) and the Wairoa Estuary in the north-east. The southern and western parts of this plain drain west to the Papakura Creek, while the northern and eastern parts of the plain, along with a large proportion of the western Hunua Ranges drain to the north-east via the Wairoa River.

[11] Clevedon Village is situated towards the northern end of this plain, just upstream from the confluence of the Tataia Stream and the Wairoa River, at a point where the valley floor narrows to about 1 km in width. To the south of Clevedon the valley is broad, about 4 km wide, bounded to the north-west by the Clevedon-Maraetai Hills and to the south-east by the western foothills of the Hunua Ranges. Here the flat valley floor is a patchwork of paddocks, the majority of which are used for grazing. Many of the paddocks have substantial and mature shelterbelts and fence line trees, creating a strong sense of enclosure, despite the flat landform of the valley floor.

[12] To the north of Clevedon the valley widens again in a broad band of alluvial river flats running along the western bank of the Wairoa River between the Clevedon-Maraetai Hills and the river estuary, extending northwards from Clevedon Village as far as the Whakakaiwhara Peninsula. The alluvial flats here are much more open in character with fewer shelterbelts and long vistas.

[13] Ms Lucas attached to her evidence-in-chief a number of graphic representations of the valley which help to place the site of the proposed plan change in a geographic and topographic context. We attach as Appendix 1 to this decision Attachment 7 of Ms Lucas' evidence.

[14] Much of the land in the Wairoa Valley is used for pastoral farming, with some areas for cropping. The grazing extends up the lower slopes of the hills to the west. Hump and hollow drainage patterns and ditches crisscross the land with post and wire fences and mixed hedgerows marking the boundaries of paddocks. Buildings are generally scattered with both farmhouses, and farm buildings and occasional rural lifestyle blocks. Vegetation comprises pasture with hedges, scattered specimen trees and occasional shelterbelts of a range of species, predominantly exotic.

[15] As the estuary broadens out to form Wairoa Bay, it is encircled by two, almost symmetrical promontories of higher land. The headland terminating in Whakakaiwhara

Point on the north-western side, and Koherurahi Point on the south-eastern side. The broad alluvial plain on the north-western side of the river extends all the way to the promontory, apart from a small area of higher ground, about 2 km south of the Whakakaiwhara Peninsula. The higher ground is topped at either end by pa sites, Te Oue to the north and Pehuwai to the south. On the southern edge of the estuary is a similar linear series of small headlands, many of which have pa sites on them, including Pouto Point.

[16] Beyond the river mouth, the waters of Tamaki Strait, the inner Hauraki Gulf are defined by the string of islands Karamuramu, Pakihi, Ponui and Waiheke. These islands also separate the Tamaki Strait from the Firth of Thames to the east.

[17] Ms Absolum summarised the physical landscape features of the lower Wairoa Valley as comprising:

- the forested mass of the Hunua Ranges to the south-east;
- the forested tops of the Clevedon-Maraetai Hills defining the valley's north-western side;
- the lower slopes of the hills in pasture;
- the broad flat, river flood plain under mixed pasture and cultivation;
- scattered exotic trees, hedgerows and occasional shelterbelts;
- the Wairoa River meandering across the valley floor with the river edge highlighted by dense mangroves;
- houses and buildings associated with agricultural activities and lifestyle blocks on the valley floor and lower slopes of adjacent hills;
- the river estuary with sand banks, salt marsh and mangroves; and
- coastal promontories marking the mouth of the river.

[18] We heard undisputed evidence that Ngai Tai Umupuia have had and still have a strong cultural relationship with the Wairoa Valley.

Proposed Plan Change 13 and Subsequent Amendments

[19] As we have said PC13 (as approved by Council decision) provides for the establishment and ongoing operation of the canal housing and recreational development, known as the Wairoa River Maritime Village, on a site approximately 5 km north of Clevedon Township, adjoining North Road. PC13 has two components:

[a] The principal component is the introduction of an entire new section into Chapter 17 – **Special Areas and Activities**, of the District Plan, being – ***"Section 17.12 Wairoa River Maritime Village"***. The new chapter has an explanatory "Introduction", then identifies "Resource Management Issues", "Objectives", "Policies", "Strategy for the Wairoa River Maritime Village", "Implementation", "Rules", "Anticipated Environmental Results" and "Procedures for Monitoring";

[b] The second component of PC13 is the introduction of rules into Chapter 9 – **Land Modification Development and Subdivision** – and Chapter 12 – **Rural Areas**. The rules relate to the construction and operation of the village wastewater disposal system on the land on the northern side of North Road, associated vegetation clearance and water supply.

Zoning

[20] The zoning framework in PC13 involves the creation of two new "Special" zones affecting the lowland block:

[a] the Maritime Village Residential zone; and

[b] the Maritime Village Recreation zone.

[21] The Maritime Village Residential zone covers an area of approximately 44 hectares (or 36% of the lowland block) and includes the proposed canals and housing area. The Maritime Village Recreation zone covers a surrounding area of approximately 79 hectares (or 64% of the lowland block) which has the proposed recreation and conservation areas, linked to the river by a walkway system.

Concept Plan

[22] The two proposed zones are in turn linked to a *"Wairoa River Maritime Village Concept Plan"* that is referred to in both the *"Policy"* and *"Rule"* components of the plan change. Attached as Appendix 2 is a copy of the Concept Plan as contained in the decisions version of the plan change.

[23] The Concept Plan shows existing features like North Road, the Wairoa River and mangroves, along with the proposed layout of the canals, roads, residential, amenity, community open space, pedestrian walkways, wetlands and plantings. It also shows the village and surrounding recreation/conservation area being developed in two stages.

Land Use Activities

[24] The rules in the two proposed zones generally follow the wider district plan approach and list a number of permitted, controlled, restricted discretionary, discretionary and non-complying activities. *"Development and Performance Standards"* covering matters like building height, yards, residential intensity, noise, vehicle access and the like are specified. *"Matters of control"* are outlined for controlled and restricted discretionary activities, along with *"assessment criteria"* for these two activity types and discretionary activities.

Maritime Village Residential Zone

[25] The Maritime Village Residential zone provides for a limited number of permitted activities, primarily being *"single household unit per site"*, *"home enterprises"*, and *"jetty straddles, boat ramps and associated facilities"*. *"Canals"*, *"lock to service the Wairoa River Maritime Village"*, and *"a single accessory building not exceeding 15m^2 gross floor area"*, are amongst the controlled activities.

[26] A list of restricted discretionary and discretionary activities in the Village Residential zone is more extensive. They include *"childcare services and facilities"*, *"community and healthcare services"*, and other similar land uses, with restricted discretionary thresholds set according to the number of children, number of staff and other factors. These rules are derived from policies directed at keeping the village primarily of a canal residential nature. In this regard *"travellers' accommodation"* is

listed as a non-complying activity and no expressed provision is made for any form of commercial or industrial land use.

Maritime Village Recreation Zone

[27] The Maritime Village Recreation zone provides for a number of low key land uses as permitted activities. They include *"ecological restoration work"*, *"gardens"*, *"grazing as part of a management programme ..."*, *"landscaping in accordance with the landscape plan attached ..."*, and *"formed walkways ..."*. Buildings and facilities such as an information centre and interpretation facilities are provided for as restricted discretionary activities, whilst others, such as public toilets, shelters, sports fields and clubrooms are provided for as discretionary activities.

Development and Performance Standards

[28] The two proposed zones have different land use *"development and performance standards"* and *"subdivision rules"*. In the Residential zone household units are not to exceed *"a density of one per 650m^2 net site"* and there is a site coverage limit of 35% and a maximum building height of 8 metres. There are also yard controls, along with noise standards, and schedules of roof and wall colours. There is a limit of a total number of household units at 297 although this has since been amended to 267.

[29] The Recreation zone standards cover yards, building height (up to 8m), site coverage (up to 1% of net size area), noise and accessways. The accessway standards prescribe a minimum width, maximum gradient and other requirements.

Subdivision Controls

[30] The subdivision of land in the Residential zone is a restricted discretionary activity, provided certain specified standards are met; primarily no more than 297 (now 267) residential lots, a minimum net site area of 650m^2 and an average net site area of at least 750m^2. There are no rules on the subdivision of land in the Recreation zone.

District Plan Special Areas and Activities

[31] The proposed section 17.12 is very similar to other sections in the same chapter. It covers other *"special areas and activities"*, notably *"Papakaianga and Maori areas"*, *"Healthcare Activities"* (Middlemore Hospital), education activities, airport activities, boat harbour areas (Half Moon Bay and Pine Harbour Marinas) and *"mineral extraction areas"*.

Revised Proposed Plan Change

[32] The revised PC13 as set out in the Canal Partnership's appeal and as amended by agreement between the Canal Partnership and the City Council, differs in a number of respects from that approved by the Council. A revised concept plan has been introduced which we attached as Appendix 3. The main alterations made to PC13 are set out in some detail in the evidence of Mr Dunn which we repeat here[2]:

(i) The proximity of the site to pleasure boating areas, and basis of the revised concept plan and revised public access proposals, are highlighted in the "introduction";

(ii) The environmental enhancement and landscape/urban design elements of the revised concept plan, including the mix of housing types and proposed village centre site, along with the 'special' zone nature of PC13 are explained in the "Resource Management Issues". This section also explains the restrictions on business and other activities on the village centre site and residential areas;

(iii) A number of the "Objectives" and "Policies" are refined to reflect the amended Issues;

(iv) The "Strategy for the Wairoa River Maritime Village" is expanded, particularly in relation to the 'special' boating/canal nature of the village, mix of housing types, proposed village centre site and vehicle/walkway access arrangements;

(v) Clarification and expansion of the "Anticipated Environmental Results" and "Procedures for Monitoring";

(vi) Substantially revised 'Village' zone and 'Recreation' zone activity tables, with all development on the 'village centre site' being a restricted discretionary activity;

[2] Dunn, EiC, paragraph 25.

(vii) "Rules" limiting the total number of residential units and residential lots to 270 (not 297 as proposed);

(viii) An additional "Rule" on noise emissions from the 'village centre site';

(ix) Replacement of the "Development & Performance Standards" on intensity conditions, exceptions to maximum height, yards, vehicle access to household units and colour of buildings (in Rule 17.12.10), with a comprehensive set of "Infrastructure, Building and Landscaping" controls, as an appendix;

(x) Introduction of a "Village Centre Site – Development Standards" rule (Rule 17.12.10.3.2) similar to that in place for the Business 1 (Local Shops) zone in the operative District Plan;

(xi) Introduction of a rule on "Matters for Discretion – Restricted Discretionary Activities – Activities on the Village Centre Site" (Rule 17.12.12.1a);

(xii) Introduction of "Village Subdivision Design Guidelines" (Rule 12.12.15.1) into the plan change;

(xiii) Alteration of the rule on minimum net site area for a residential lot from 650m^2 to 350m^2 to reflect the expected mix of housing types, but with retention of the rule requiring a 750m^2 average net site area;

(xiv) A more definitive rule on reserve contributions and esplanade reserves;

(xv) The rule on the maximum height of buildings in the 'Recreation' zone is altered to provide for buildings of up to 4m, rather than 8m, and the rule on building coverage in the same zone is altered to provide for individual buildings of not more than 150m^2, rather than 1% of the net site area;

(xvi) The rule on kiosks in the 'Recreation' zone is deleted.

[33] The revised PC13 was, according to Mr Brabant, the response of the partnership to the appeals filed by the opponents to the plan change. In his opening Mr Brabant said:

> 3. After a number of appeals were filed by opponents of Plan Change 13, the Partnership took advice in relation to the matters raised in these appeals. Planning, landscape and urban design consultants engaged by the Partnership after the appeal process had commenced, advised that the village development design, the landscaping, and the wording of Plan Change 13 should be amended to respond to those appeals...

Legal Basis for Decision

[34] We are conscious that many of the contested issues involve a consideration of national, regional and district statutory instruments. While these instruments are largely effects-based, they also include values that are to be attributed to different aspects of the environment. The national and regional instruments include strategic directions or values for the Auckland Region. The relationship between effects and values was summarised by Baragawath J in the Court of Appeal decision of ***Auckland Regional Council v Rodney District Council and Parihoa Farms Limited***[3]***:***

> [12] ...The effects on the environment cannot be considered objectively without reference to the values that are attributed to different aspects of the environment by the relevant instruments. In this case, each of the documents has a slightly different perspective on the environment, and therefore attributes value to it in a different manner. Requirements for protection of important and sensitive values will frequently be expressed at a higher level of specificity in a district plan than in a regional plan, but that will not necessarily be so and was not the case here.

[35] There are six Schedule 1 Clause 14 appeals before the Court. The starting point for considering PC13 is section 74 of the Act. Section 74 prescribes matters to be considered by the Council in preparing and changing its district plan. That section requires the Council to change its district plan in accordance with:

[a] Its functions under section 31;

[b] The provisions of Part 2;

[c] Its duty under Section 32; and

[d] Any regulation.

It also requires that the Council shall have regard to any proposed regional policy statement (subsection 2(a)(i)).

[36] Section 75 requires a district plan to state (among other things):

[a] The significant resource management issues for the district;

[b] The objectives sought to be achieved by the plan;

[3] [2009] NZCA 99 at paragraph 12

[c] The policies for those issues and objectives, and an explanation of the policies; and

[d] The methods (including rules if any) to implement the policies;

And:

A district plan must give effect to:

[a] Any national policy statement;

[b] Any New Zealand coastal policy statement; and

[c] Any regional policy statement.

[37] Section 32 of the Act contains directions that apply to the Council in relation to making decisions on accepting or rejecting any submission on a proposed plan change. As the Court pointed out in ***Long Bay-Okura Great Park Society Incorporated v North Shore City Council***[4]:

> Unlike local authorities [fn 76 see section 32(1)(c) of the RMA] the Environment Court does not have an express duty under section 32 to consider alternatives, benefits and costs. However, Parliament has stated that the Court is "not precluded" [fn 77 section 32A(2)] from taking into account the section 32 matters. As a matter of consistency with local authorities and out of respect for their reasoned decisions we consider it is usually desirable for the Environment Court also to carry out a section 32 evaluation to the extent justified by the evidence.

[38] The Court in ***Long Bay*** set out a comprehensive summary of the Act's mandatory requirements for district plans including changes to district plans. That comprehensive summary was referred to by all counsel and was referred to by most of the planning expert witnesses. The ***Long Bay*** decision applied the Act in its form prior to the Resource Management Amendment Act 2005. Notably, for present purposes, Section 75(3) of the Act requires that a territorial authority must "give effect to" any operative regional policy statement.

[39] As we have said, all Council referred to this well-known passage and some of the planning witnesses assessed PC13 in terms of the ***Long Bay*** framework. We do not in this decision propose to set it out as we do not propose to refer to all of the tests outlined

[4] Decision A78/2008, at paragraph [42].

in ***Long Bay***. To do so would unnecessarily lengthen this decision. We propose to address only those tests that counsel for the appellants maintain PC13 fails to meet the required threshold. They are:

[a] Section 75(3) which requires the contents of a district plan to give effect to:

[i] Any national policy statement;

[ii] Any New Zealand coastal policy statement; and

[iii] Any regional policy statement.

[b] Section 74(1) which requires a territorial authority to prepare and change its district plan in accordance with:

[i] Its functions under section 31;

[ii] The provisions of Part 2; and

[iii] Its duty under section 32.

[c] Section 74(2)(a)(i) which requires that a territorial authority shall have regard to a proposed regional policy statement.

[40] We are required under section 290A of the Act to have regard to the Councils' decision. In so doing we are mindful that this is a de novo hearing and the Council and the Partnership had reached agreement on an amended version of the proposed plan change since the Council's decision. We also had the benefit of extensive evidence and cross examination.

The Relevant Statutory Instruments

[41] The planning witnesses in their evidence and counsel in their submissions referred to a number of statutory instruments. These were:

[a] The Resource Management Act 1991;

[b] Local Government (Auckland) Amendment Act 2004;

[c] Hauraki Gulf Marine Park Act 2000;

[d] New Zealand Coastal Policy Statement;

[e] Auckland Regional Policy Statement;

[f] Change 6 Auckland Regional Policy Statement;

[g] Manukau District Plan.

[42] As the issues require an integrated assessment of the Act, the relevant statutory instruments and matters of fact, we propose to discuss the relevant provisions that apply to a particular issue at the time we address that issue in this decision.

The Hearing

[43] The hearing took place over 26 working days. We heard from a large number of expert witnesses as well as witnesses from the local community. The witnesses were cross-examined at some considerable length. It is not possible in this decision to refer to all of what the various witnesses said in the contested issues. In coming to our decision we have carefully evaluated all of the evidence that has been put before us. We have also had regard to the lengthy submissions that we have heard from counsel and representatives of the parties. The evidence and submissions have been put in context by an extensive site visit.

The Issues

[44] In their opening statements counsel set out the primary contested issues. They were many and varied. In an endeavour to focus attention on the contested issues we, partway through the hearing, invited counsel to caucus in an endeavour to settle the issues still in contention. As a result counsel settled a List of Issues dated 21 September 2009.

[45] The List of Issues sets out twelve primary issues and a number of sub-issues. The issues cover a broad spectrum of matters which require a consideration of both fact and law. In our view the List of Issues can be simplified considerably by integrating the overlapping issues and identifying the key issues which are determinative to our decision. A continuous thread that underlay much of the opposition was the Auckland Regional Policy Statement (ARPS), to which the Plan Change must give effect to pursuant to

Section 75(3) of the Act. In this regard, four core issues emerged from the evidence and submissions. They are:

1. The *"urban containment"* provisions of the ARPS

2. The *"integrated management"* provisions of the ARPS

3. The effects on Maori, and

4. The effects on natural character, the coastal environment, landscape and amenity.

These we call the four *core* issues.

[46] Many of the other issues identified by the parties are subsumed in these four core issues, particularly Issues 1 & 2. For example, the *urban containment* and *integrated management* provisions of the ARPS are designed to avoid the adverse effects of uncontrolled urbanisation on natural and physical resources; the cumulative effects on the region's transport network and infrastructure; and the effects on social and economic sustainability. A failure to give effect to the ARPS provisions on urban containment and integrated management will result in a failure to establish a framework within which to assess these matters in a regional context.

[47] A number of the issues identified are issues that should more particularly be addressed in this case at the resource consenting stage. These include:

[a] Effects of climate change;

[b] Effects of onsite infrastructure;

[c] Effects on flooding;

[d] Effects on water quality and ecology; and

[e] Effects on traffic and the transport network.

We refer to these as the *consent* issues.

[48] A further stand-alone issue was raised by the Ardmore Tenants Committee, namely:

[a] The effects on over-flying aircraft using the low-flying zone.

We refer to this issue as the *stand-alone* issue.

[49] Finally, there is the question of the Court's jurisdiction which we refer to as the *jurisdictional* issue. We propose to:

[a] Discuss in detail the four core issues – Issues 1 & 2 can conveniently be dealt with together; and

[b] Because our findings on the four core issues are determinative of our decision, we will discuss briefly the consent issues, the over-flying aircraft issue, and the jurisdictional issue.

The Core Issues

Issues 1 & 2 – Does PC13 Give Effect to the ARPS Provisions Relating to "Urban Containment" and "Integrated Management?"

Section 75(3) of the Act

[50] Section 75(3) requires that the Plan Change *"must give effect to"* the operative Regional Policy Statement. We agree with Mr Allan, that with respect to Section 75(3) of the Act, the change in the test from *"not inconsistent with"* to *"must give effect to"* is significant. The former test allowed a degree of neutrality. A plan change that did not offend the superior planning instrument could be acceptable. The current test requires a positive implementation of the superior instrument. As Baragwanath J said in ***Auckland Regional Council v Rodney District Council***[5]:

> This does not seem to prevent the District Plan taking a somewhat different perspective, although insofar as it would be inconsistent, it would be ultra vires. (The 2005 Amendment to Section 75, requiring a District Plan to "give effect to"

[5] [2009] NZCA99

> national policy statements, NZCPS and Regional Policy Statements, now allows less flexibility than its predecessor).[6]

[51] The phrase *"give effect to"* is 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 Resource Management Act process, is deemed to give effect to Part 2 matters.

The Regional Strategy on Urban Containment and Integrated Management

[52] Chapter 2 of the ARPS sets out the strategic direction for the region. Part 2.5 states that the *"strategic direction for the Auckland region ... comprises the following strategic objectives and policies ... to achieve integrated management of the natural and physical resources of the whole region"*. The critical provision in terms of accommodating growth is Objective 1 which says:

> To ensure that provision is made to accommodate the region's growth in a manner which gives effect to the purposes and principles of the Resource Management Act, and is consistent with these strategic objectives and with the provisions of this RPS.

This objective indicates a strong intent to deal with growth through a comprehensive, regionally focussed strategy.

[53] The strategic policies which give effect to the objectives are contained in Part 2.5.2 of the Policy Statement. Policy 3 sets out unequivocally the direction to contain urban development:

> 3. Urban development is to be contained, within the metropolitan urban limits shown on Map Series 1 and the limits of rural and coastal settlements as defined so that:
>
> (i) expansion of urban activities outside the metropolitan urban limits as defined and shown in the RPS from time to time is not permitted;

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[6] Paragraph [15]

(ii) environmental values protected by the metropolitan urban limits and/or the limits of rural or coastal settlements are not adversely affected, and that the integrity of those limits is maintained;

(iii) urban intensification at selected locations is provided for and encouraged. Selection of these places will take into account, amongst other things, any significant adverse effects which arise from the interaction with any regionally significant infrastructure and other significant physical resources;

(iv) expansion of rural and coastal settlements outside the limits of existing urban zones and settlements (at the time of notification of the RPS or as shown or provided for in the RPS) is not permitted;

(v) the identification and provision of areas for future growth are managed through an integrated process on a regional basis and are consistent with the Strategic Direction.

[54] Policy 3 is a very strongly worded policy which provides a comprehensive description of the manner in which urban development can be accommodated. It strongly precludes urban development outside the MUL and existing urban areas and rural and coastal settlements, unless areas for further growth are identified and provided for in a managed way through an integrated process on a regional basis, consistent with the Strategic Direction.

[55] Part 2.6 of the Policy Statement is headed *"Regional Development"*. It contains regional development policies which give effect to the strategic direction set out in Part 2.5. Part 2.6.1 of the Policy Statement re-emphasises the urban containment objectives and policies of Part 2.5. Policy 1 requires the management of the growth of metropolitan Auckland over a 30 year time horizon in a manner that *"is consistent with the strategic direction"*, and requires regard to be had to a number of matters including:

[a] The rate of urban development;

[b] The capacity realistically available for further urban development;

[c] The need to recognise and provide for areas of significant natural and physical resources and protect them from urban development;

[d] Areas where provision shall be made for future urban development; and

[e] An explicit evaluation (as required by Section 32 of the Act) of the costs and benefits of alternative forms of development to accommodate Auckland's growth.

[56] Of importance to this case is Policy 2 which we quote in full:

> 2. Urban development shall be contained within the defined limits (including the metropolitan urban limits and the limits of rural and coastal settlements – referred to in Strategic Policy 2.5.2-3) shown in the RPS from time to time, and its form shall be planned and undertaken through an integrated process on a regional basis and in ways that are consistent with the Strategic Direction and:
>
> (i) provide for urban intensification around selected nodes and along selected transport corridors;
>
> (ii) provide for higher intensities of urban activities at selected locations within areas of new development;
>
> (iii) bring about patterns of activities that will mitigate the effects of increased travel and improve the energy efficiency and convenience of urban areas (refer to Chapter 4 – Policy 4.4.1-2, and Chapter 5 – Policy 5.4.1-3);
>
> (iv) enable the operation of existing regional infrastructure and the provision of necessary new or upgraded regional infrastructure which is operated and developed in a manner which ensures that any adverse effects of those activities on the environment are avoided, remedied or mitigated;
>
> (v) facilitate efficient provision of services (including utility services, transportation facilities or services, and community facilities and services, such as schools, libraries, public open spaces) through the utilization or upgrading of existing facilities, or the provision of new ones;
>
> (vi) maintain and enhance amenity values within the existing urban area, and achieve high standards of amenity in areas of new development;
>
> (vii) do not give rise to conflicts between incompatible land uses;
>
> (viii) avoids, remedies, or mitigates adverse effects on the environment.

[57] Part 2.6.2 of the Regional Policy Statement is headed *"Methods"*. In this part the Policy Statement sets out in some detail the manner in which the regional development policies shall be given effect to or implemented. Of relevance to urban containment are Methods 4, 7 and 8 which respectively state:

> 4. The Policies in 2.6.1, shall be given effect to the extent necessary and appropriate, through the provisions of any relevant regional plan, changes to the RPS, district plans, and the RLTS, and should be reflected in the annual plan process and any strategic planning process undertaken by a TA.
>
> ...

7. Each TA shall set out within its District Plan issues, objectives, policies and methods for enabling the management and development of rural and coastal settlements.

   This shall:

   i) be an integrated consideration of the relevant issues;

   ii) be integrated with the urban and rural components of the District Plan;

   iii) not be inconsistent with the RPS.

   Where this method has been complied with, expansion of rural and coastal settlements in district plans beyond the limits applying at the date of notification of the RPS shall be deemed to have been provided for the purposes of strategic objective 2.5.2.3(iv) and policy 2.6.1.2 of the RPS.

8. Significant new areas proposed for urban development, existing urban areas proposed for significant re-development, or significant new areas proposed for countryside living purposes are to be provided for through the Structure Planning Process (or other similar mechanism).

[58] It is against these strategic direction and regional development Objectives, Policies and Methods which provide a strategic framework for management of the region's growth, that we must assess this proposal. The Plan Change *"must give effect to"* them. The Canal Partnership says either:

[a] The objectives, policies and methods relating to urban containment do not apply, because the proposal is not *"urban development"* as defined in the Regional Policy Statement; or

[b] If the proposal is *"urban development"* as defined, it complies with Method 7 of the Strategic Direction and thus gives effect to the Auckland Regional Policy Statement.

Is the Proposal Urban Development?

[59] At the first instance hearing before the council, the council took the view that Plan Change 13 would provide for new "urban development". As we have said, a Notice of Appeal lodged by the partnership sought detailed amendments to the Plan Change and the Concept Plan; changes which are supported by the council. We were told by Ms Dickey, that this prompted a re-analysis by the council in co-ordination with its advisors of how

the development enabled by the Plan Change should be correctly categorised in terms of the ARPS. The council, supported by the Canal Partnership contended before us that the proposed development would not amount to "urban development".

[60] The relevant amendments were described by Mr Brabant in his opening statement:

[a] A reduction in the number of residences from 297 to 270;

[b] Detailed design controls developed for both architecture and landscaping;

[c] The community/commercial building is relocated from the lock to the opposite (western) end of the maritime village where the canals and roads intersect, to create a village "heart";

[d] A framework of kahikatea dominant planting is introduced throughout the maritime village;

[e] A landscape design with an open rural character incorporating stands of trees has been designed for the perimeter of the site;

[f] Restoration of former streams and wetlands have been developed further;

[g] Restoration of indigenous forest on the banks of the Wairoa River have been developed further; and

[h] Changes have been made in the vicinity of the lock and weir designed to have a more low-key and natural character, including a kayak/dingy landing.

[61] It was Mr Brabant's submission, that the amended design specifically focussed on ensuring that the character of the proposed maritime village is different from that of conventional urban, suburban or rural lifestyle patterns. This includes specific and detailed controls identifying a range of high quality building typologies which are cohesive and integrate with the waterways. This submission was supported by the evidence called by the council and the Canal Partnership, particularly the evidence of Mr Andreas de Graaf (architect), Mr Gavin Lister (landscape architect), Mr Dennis Scott (landscape architect), and Mr Maxwell Dunn (planner) called by the Canal Partnership; and Mr David Serjeant (planner) for the council.

[62] As we understand the evidence produced by the council and the Canal Partnership, the characteristics of the proposal, including the canals and their interface with the houses, together with the strong "woodland" framework of planting through and around the village, will create a distinctive maritime character. Looked at from the perspective of the site itself and the surrounding area, and from the perspective of the wider district area (the focus of the evidence of Mr Scott), the proposal would dictate neither an "urban" nor a "rural" nature.

[63] On the other hand, the evidence produced by the Regional Council and Clevedon Cares leads to a conclusion that the proposed village is "urban development" as defined in the ARPS. That evidence emphasised such matters as the scale, density, visual character, and dominance of engineered and built structures.

[64] We refer in particular to the evidence of Ms Melean Absolum (landscape architect), Mr Stephen Brown (landscape architect), Mr Mark Tansley (social economist), and Ms Sylvia Allan (planner) for the Regional Council; and Mr Denis Nugent (planner) for Clevedon Cares.

ARPS Definition of "Urban Development"

[65] *"Urban development"* is defined in the Policy Statement as:

> Urban development means development which is not of a rural nature. Urban development is differentiated from rural development by its scale, density, visual character, and the dominance of built structures. Urban development may also be characterized by a reliance on reticulated services (such as water supply and drainage) by its generation of traffic and includes activities (such as manufacturing), which are usually provided for in urban areas.

[66] We were referred by counsel to a number of authorities which reflect the principles that inform the interpretation of planning instruments. These include ***Powell v Dunedin City Council***[7] and ***Beach Road Preservation Society Incorporated v Whangarei District Council***[8] which support the need for a purposive approach to interpretation, which in this case means interpreting the definition in context. As noted by the Court of Appeal in ***Powell***, while it is appropriate to seek the plain meaning of a rule from the words themselves, it is not appropriate to undertake that exercise in a

[7] [2004] 3NZLR721
[8] [2001] NZRMA176

vacuum. Regard must be had to the immediate context of the words, and sometimes where an obscurity or ambiguity arises, it may be necessary to refer to the other sections of the Plan.

[67] It is clear from a reading of the ARPS, that urban expansion is not controlled because of urban expansion per se. It is the "threat" which urban development can pose to several environmental qualities and thresholds, including rural activity, landscape character, natural and cultural heritage, water quality and ecological values, and infrastructure, which underlays the need to contain urban development. These are all matters identified in Part 2.3 (Issues) of the ARPS as being potentially affected by urban expansion. We bear this in mind when interpreting the definition and applying it to the facts of this case.

[68] As for the definition itself, we had been referred to a number of authorities that had discussed its interpretation. In ***Runciman Rural Protection Society Incorporated v Franklin District Council***[9] the High Court held that in ascertaining the meaning of *"urban development"* one should look to the definition of that term as provided in the ARPS.[10] Whilst all parties to those proceedings had agreed that the proposal was an *"urban development"* under the ARPS, Courtney J made the obiter statement that in her view schools were an activity that themselves were neither inherently rural nor urban. It was the size and nature of a particular proposal for a school that would dictate whether or not it was an urban activity. As will be discussed shortly, this accords with comments subsequently made by Keane J in ***Ballantyne v Auckland Regional Council***[11].

[69] In ***Ballantyne***, the High Court noted that the defined concepts of *"rural character"* and *"urban development"* function by contrast:

> "Rural character" is to be inferred from the distinctive combinations of qualities which make an area "rural" rather than "urban". "Urban development" is development which is not of a rural nature.[12]

[70] With reference to the definition of *"urban development"* Keane J commented:

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[9] [2006] NZRMA278
[10] Paragraph [33]
[11] HC Auckland 20 Dec 2007, CIV-2006-404-03234
[12] Paragraph [25]

> The first sentence proposes an antithesis. It states that "urban development" is not of a "rural nature". It does not define what "rural nature" is. The second sentence, by contrast, enables, indeed requires that antithesis to be worked through by reference to four criteria: scale – relative dimensions or degrees; density – denseness or mass per volume; visual character – visual qualities or characteristics; dominance of built structures – relative prominence within the environment. Singly or together they must invite the conclusion that what is proposed is urban, not rural, in character.
>
> The third sentence, by further contrast, invites but does not require an enquiry into whether the proposal relies on reticulated services, is characterized by generation of traffic, and includes activities usually provided for in urban areas. These are further illustrative and discretionary indicia.[13]

[71] The court then noted that the Environment Court had been correct in assessing the actual proposal for which resource consent was sought and assessing that proposal with reference to the indicia provided in the definition:

> The court was entitled to conclude that the activity proposed, "travellers' accommodation" both inherently and consistently with the district scheme, is neither rural nor urban and, consistently with ***Runciman***, to pass beyond the generic to the particular. That is precisely what the second sentence of the definition *"urban development"* calls for.[14]

[72] From the authorities Mr Allan synthesised a number of principles which we partly adopt with some amendments:

[a] When interpreting the term *"urban development"* one should look at the ARPS definition in context;

[b] The concept of *"urban development"* is defined, first by contrast with *"rural nature"* which is not defined although *"rural character"* is;

[c] A proposal may be neither inherently rural nor urban in the generic sense;

[d] The second sentence of the definition enables the enquiry to pass beyond the generic to the particular by reference to the four specified criteria: scale; density; visual character; dominance of built structures – to determine whether the proposal is either *"urban"* or *"rural"*;

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[13] Paragraphs [58-59]
[14] Paragraph [61]

[e] The third sentence of the definition provides illustrative and discretionary factors that assist the assessment of whether the activities are ones usually provided for in urban areas;

[f] Any assessment is not to be made abstractly or formulaically, but should be made in the round bearing in mind the issues identified in Part 2.3 of the ARPS. Bearing this in mind we have regard to the evidence relating to the relative environmental qualities and thresholds identified and discussed elsewhere in this decision.

[73] We find the argument put forward by the council and the Canal Partnership that the proposal is neither inherently *"rural"* nor *"urban"* difficult to accept in view of the fact that it will contain 270 residences with a minimum lot size of 350m^2, concentrated around the canals.

[74] It seems to us that overall the proposal is not of a "rural" nature so the antithesis of the first sentence of the ARPS definition would apply. Even Mr Lister, the landscape architect called by the Canal Partnership said:

> ... the maritime village itself will not have a rural character, but will have its own distinctive character relating to its maritime setting and function ...

[75] Notwithstanding, even if it was accepted that the proposal was neither inherently *"rural"* nor *"urban"* in the generic sense, we consider that it would become *"urban"* when you pass to the particular by applying the four specified criteria: scale; density; visual character; and dominance of built structures.

[76] As for scale, the residential component of the proposal consists of 270 residences with a minimum lot size of 350m^2. This reflects the size of a small township. As Mr Tansley said, the residential component of the proposed development will be larger than that of Clevedon.[15] Mr Allan pointed out that witnesses for the partnership accept that the Plan Change provides for development that is not rural and will have a scale comparative with that of Clevedon Village.[16]

[15] Tansley, transcript pp 903-904
[16] See Lister EIC paragraph [98] and rebuttal paragraph [10]

[77] As for density, the minimum lot size of 350m^2 with an average of 750m^2 is typical of New Zealand surburban densities. This was accepted by Mr Serjeant where he stated that the maritime village will have "an urban density in terms of lot size".[17] Mr Lister in his evidence-in-chief said:

> The maritime village will not have a rural character, given that it will constitute "densely grouped" housing compared with a typically scattered pattern of housing in rural areas. Nor will it have a conventional urban or suburban character ... [18]

[78] Some of the witnesses who gave evidence in support of the Plan Change sought to calculate density with reference to the whole lowland area including the canals and/or the recreational areas.[19] The issue here is whether the proposed form of development will have a density that is urban in nature. That is a function of the arrangement of dwellings enabled by the Plan Change, not simply a mathematical calculation. It is not the average lot size that is important, but the fact that a significant number of small lots and dwellings will be located within a small area of land. To calculate density with reference to the whole lowland area would, in our view, be artificial and would eschew reality.

[79] As for visual character, we agree with Ms Absolum when she concludes that the residential area will be urban in character.[20] We accept that the proposal has been sensitively designed with the residential and canal component surrounded by a recreational area containing wood lots, walkways and wetlands. Further, as Mr de Graaf told us, the maritime village has been designed to give a connection to the water and the plantings. This he said, differentiates the village from a typical suburban setting.[21] Notwithstanding, we are of the clear view that the residential component will be sufficiently prominent to create a visual character such that the development will reflect an urban quality.

[80] As for the dominance of built structures, the component parts would include not only the houses, but roads and a canal system. This will result in an engineered development. Again, notwithstanding the surrounding recreational area, the development as a whole will be sufficiently dominated by built structures to reflect an urban quality.

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[17] EIC paragraph [6.31]
[18] EIC paragraph [98]
[19] See eg. de Graaf rebuttal paragraph [19]; de Graaf transcript pp 112, line [22] to pp 114, line [4]
[20] EIC paragraph [3.5]
[21] Rebuttal pp 4-5

[81] As for the third sentence of the definition, we are satisfied on the evidence that the proposal with its co-location of residential, retail, cafe and other commercial activities, together with community and recreational facilities, would be typical of the defining characteristics of urban areas. The residential component will rely on some reticulated services such as sewerage with the wastewater areas being located on the upland property.

[82] Considering all of the matters we have discussed, we are led to the inescapable conclusion that the proposal amounts to *"urban development"* as that phrase is defined in the ARPS.

Does Plan Change 13 Comply with Method 7 of the Strategic Direction of the ARPS?

[83] Having found that the proposal does constitute *"urban development"*, then the Relevant Strategic Direction Objectives and Policies in Part 2.5 and the Relevant Regional Development Objectives, Policies and Methods in Part 2.6 apply. Mr Brabant alternatively submitted that the establishment of the maritime village is in accordance with Method 2.6.2.7

[84] For convenience we set out again Method 2.6.2.7 in full:

> 7. Each TA shall set out within its District Plan issues, objectives, policies and methods for enabling the management and development of rural and coastal settlements.
>
> This shall:
>
> i) be an integrated consideration of the relevant issues;
>
> ii) be integrated with the urban and rural components of the District Plan;
>
> iii) not be inconsistent with the RPS.
>
> Where this method has been complied with, expansion of rural and coastal settlements in district plans beyond the limits applying at the date of notification of the RPS shall be deemed to have been provided for the purposes of strategic objective 2.5.2.3(iv) and policy 2.6.1.2 of the RPS.

[85] As we understand Mr Brabant's submission, Method 7 applies not just to the expansion of existing rural and coastal settlements, but also to any new development,

including as in this case, the creation of an entire new stand alone village. On the other hand, both Mr Enright and Mr Allan argued that Method 7 is effectively restricted only to expansion of rural and coastal settlements already identified in the Regional Policy Statement. There is no provision for development of a new settlement.

[86] Mr Brabant contrasted Method 7 with Strategic Policy 2.5.2.3(iv) which says:

> (iv) expansion of rural and coastal settlements outside the limits of **existing urban zones and settlements** (at the time of notification of the RPS or as shown or provided for in the RPS) is not permitted.
>
> *[emphasis Mr Brabant]*

[87] He particularly noted that the word *"existing"* qualifies the words *"urban zones and settlements"*. There is no such qualification in the opening sentence of Method 7. Nor is there any such qualification to the second sentence of Method 7.

[88] Again in the last sentence, the deeming provision, Mr Brabant noted the absence of the qualifying word *"existing"* before the words *"expansion of rural and coastal settlements"* and argues that the reference to "strategic objective 2.5.2.3(iv)" merely references the *"limits"* of rural and coastal settlements for the purpose of the deeming provision. It does not qualify in any way the enabling provisions for the management or development of rural and coastal settlements.

[89] We do not agree. We consider that Strategic Policy 2.5.2.3 is the lodestar for both Regional Development Policy 2.6.1.2 and Regional Development Method 2.6.2.7. Both reference to Policy 2.5.2.3, with Method 7 referencing direct to 2.5.2.3(iv) which is quite specific in not permitting expansion of rural and coastal settlements outside the limits of *"existing urban zones and settlements"*.

[90] As both Mr Allan and Mr Enright submitted, the Method should be interpreted in a way that gives effect to, or is consistent with the objectives and policies. Policy 2.5.2.3 and Policy 2.6.1.2 plainly do not permit urban development outside existing rural and coastal settlements. To accept Mr Brabant's argument would undermine the clear containment objectives and policies by allowing development outside the *"urban fence"*.

[91] Thus we are satisfied that both the Regional Development Policy and the Method apply to existing rural and coastal settlements as defined in the ARPS. Such an interpretation fits with, and is consistent with the strong containment policies and the strong direction for management of new development through an integrated process on a regional basis and in ways that are consistent with the strategic direction.

[92] Further, with regard to the deeming provision, this provides that where the Method 7 process has been complied with, then *"the expansion of rural and coastal settlements in district plans beyond the limits"* applying at the date of notification of the ARPS shall be deemed to have been provided for in terms of the purposes of Strategic Policy 2.5.2.3(iv). This policy provides that *expansion* of rural and coastal settlements outside the limits of existing urban zones and settlements is not permitted. The deeming provision, and indeed Strategic Policy 2.5.2.3(iv), is exclusively limited to *expansion* of rural and coastal settlements. The term *"expansion"* denotes the extension of something that already exists, in contrast to the creation of something new. The Concise Oxford Dictionary[22] relevantly defines the term expansion as:

1. the act or an instance of expanding the state of being expanded
2. enlargement of the scale or scope of (especially commercial) operations
3. increase in the amount of the state's territory or area of control

[93] *"Expand"* is relevantly defined as *"increase in size or bulk or importance"*.

[94] In our view it would be stretching the ordinary plain meaning of expansion *"of existing settlements"* to include the creation of a new settlement totally unrelated to any existing coastal or rural settlement.

[95] Mr Brabant relied, in part, on the ***Rimanui***[23] decision as supporting his position. In ***Rimanui***, the rezoning involved the expansion of an existing settlement policy area, rather than the creation of a new settlement. The Court held that the lack of direct physical contiguity was not relevant. The legal point being considered in this case was not directly at issue. Further, the zone change contemplated for Kawau Island in ***Rimanui*** did not involve urban development – a key point of difference. The Court in

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[22] 9th Edition

[23] ***Rimanui Farms Limited v Rodney District Council***, A070/2008

Rimanui did not have to address the Section 75 arguments raised here in relation to Plan Change 13.

[96] We are satisfied, that looking at the ARPS as a whole, the clear direction is that new urban development outside the MUL or rural and coastal settlements, unless it is an extension of an existing rural or coastal settlement, requires a two-fold procedure. A district plan change preceded or paralleled by a change to the ARPS which, if approved, would either shift the MUL, or the limits of existing rural or coastal settlements, or define the new limits of rural and coastal settlements. This two-fold procedure would reflect the integrated managed approach envisaged by the ARPS.

Conclusion

[97] We have found that the proposed development would be *"urban development"* as that phrase is defined in the ARPS. We have also found that the plan change cannot invoke Method 7. It was also agreed that Method 2.6.2.8 is also not available.

[98] Even if we are wrong in our interpretation, then, for the following reasons, we find that Plan Change 13 does not adequately address the matters required by those methods.

[99] Both methods outline a process or mechanism for the integrated consideration and planning of urban development. Often this is referred to as "structure planning". We see such procedures as being entirely consistent with the Act, in particular the requirements of section 31(1)(a) and thus section 74(1).

[100] *"Integrated management"* is defined in the ARPS:

> Integrated Management means management of natural and physical resources:
> a) Where decision-making about the use, development or protection of natural and physical resources occurs in a holistic way;
> b) Which takes into account the full range of effects which may stem from any such decision over the short- and long- term; and
> c) Which considers effects by referring to section 3 of the RM Act, and may include effects on natural and physical resources and effects on the environment."

[101] In addition to the operative provisions (which we have set out previously), Change 6 to the ARPS, to which we are to *have regard*, unlike the operative ARPS, proposes a mechanism by which new rural and coastal settlements might develop. Part 2.6.2 Strategic Policies – Urban Containment contains Policy 6:

> Any proposal to establish or develop a new rural or coastal settlement that either creates capacity additional to that available under the district plan or does not meet the requirements specified in 2.6.2.5 will need, in addition to the matters outlined in 2.6.2.5(i-ix), to demonstrate that it:
>
> i. Supports the strategic direction of containment and intensification;
>
> ii. Will not compromise intensification within the areas identified in Schedules 1A and 1B;
>
> iii. Provides a clear differentiation between urban and rural areas, for example, through the use of water catchment boundaries and/or visual catchment boundaries in order to reduce pressure for future urban expansion; and
>
> iv. Meets the requirements of Method 2.6.3.9.

[102] Change 6, Part 2.6.3 Methods, outlines the process whereby proposals for new settlements are to be considered, including referral to the Regional Growth Forum for a region-wide strategic review of their appropriateness with reference to the Regional Growth Study. The results of that review would be taken into account in determining whether to change the Statement to include the new settlement in the RPS Schedule 1B. So although Change 6 outlines mechanisms for considering new settlements, it still requires a change to the RPS. Any related district plan change is required to be prepared in an integrated manner similar to the operative ARPS methods. This includes Appendix A, referred to in Change 6 Method 2.6.3.5, which identifies catchment management planning[24] and structure planning as relevant tools for integrated management.

[103] The ARC and Clevedon Cares position was that PC13 was inadequate in terms of these requirements for an integrated consideration of the relevant issues. In particular counsel for Clevedon Cares submitted[25] that: no assessment had been made of the potential effects on the neighbouring settlements such as Clevedon; no strategic planning consideration had been given to the potential for the Wairoa River settlement to act as a catalyst for further development beyond the plan change area; and it was not integrated with the existing urban and rural components of the District Plan, with no amendments being sought to any objectives and policies in the District Plan outside of the new ones

[24] This also links to the requirements of the ARC's Air, Land and Water Plan.
[25] Allan, Memo dated 16 February 2010, para 6.

being sought within the new special zoning for the settlement in Chapter 17. In essence the Society said that the plan change did not "fit" well within the strategic framework of the District Plan.[26]

[104] Ms Allan considered that the provisions of PC13 were internally focussed on the site and did not recognise the context[27]. In addition to expressing concerns about integration with the district plan, Ms Allan was also concerned about the lack of integration with the necessary regional-level consents that would be required in parallel to the district plan land use approvals. Under the Regional Plan – Coastal consents will be required for dredging, disturbance, discharges and diversions. This includes dredging of the river channel and the bar at the river mouth. In Ms Allan's opinion development associated with PC13 is not in accordance with policy elements of the Regional Plan – Coastal such that there may be some difficulty obtaining the necessary consents.[28]

[105] In response to a number of questions from the Court, Mr Serjeant confirmed that he had not undertaken any analysis of the plan change in terms of the strategic framework or the higher order objectives and policies of the district plan. Nor was he aware of any such analysis being undertaken by the Council or any other parties.[29] This was consistent with the evidence of Ms de Ronde.

[106] We concur with Ms Allan and the submissions made for the ARC and Clevedon Cares. The plan change has been prepared in isolation. This applies to both the context *on the ground* and within the district plan. Regardless of which chapter it is filed into in the district plan, the provisions are required to be consistent with, and connected to, the general strategic direction and context for the Wairoa valley, the district and the region.

[107] We accordingly find that the plan change would not give effect to the ARPS in the following respects:

[a] The strong and unequivocal direction of the objectives and policies relating to urban containment; and

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[26] Allan Submissions para 92
[27] Ms Allan, EIC, paras 241,242
[28] Ms Allan, EIC paras 222 – 232.
[29] Transcript pages 751 – 760.

[b] The strong policies relating to the provision of further urban growth to be managed through an integrated process and assessment on a regional basis and consistent with the Strategic Direction.

[108] The failure to give effect to these important provisions of the ARPS means that the necessary framework to enable an adequate regional wide assessment of the effects of the proposal has not been put in place. This relates particularly to the effects on natural and physical resources; cumulative effects on the transport network and infrastructure; and the effects on social and economic sustainability.

To What Extent Should Our Findings on Issues 1 & 2 be Modified by Change 6 to the ARPS?

[109] The provisions of Change 6 to the ARPS are not a consideration for us in terms of Section 75(3) of the Act, as they are not yet procedurally in force. However, they are a matter to which we *"shall have regard to"* under Section 74(2). These words indicate that such matters must be considered, but not necessarily followed. How much regard should be had to Change 6 depends in part on the stage it has reached through the participatory process.

[110] Proposed Change 6 was notified on 31st March 2005 as a requirement of the Local Government (Auckland) Amendment Act 2004. That Act directed all councils in the Auckland region to integrate their Land Transport and Land Use provisions to ensure consistency with the Auckland Growth Strategy, give effect to its growth concept, and contribute in an integrated manner to the Land Transport and Land Use matters specified in Schedule 5[30]. Decisions were released on 31st July 2007 and some 47 appeals have been lodged with the Environment Court against the regional council's decision in relation to both Change 6 and 7. Appeals remain extant against the provisions of Change 6 to the Strategic Direction Objectives and Policies, including all of the Urban Containment Policies and Methods, and new definitions of *"urban growth"* and *"urban activities"*.

[111] Change 6 is the result of a statutory directive. However, its provisions are currently subject to considerable uncertainty. Accordingly, the ARPS continues to be a relevant document until the appeals are determined. Because the outcome of the appeals

[30] Sections 39 & 40

is uncertain, the weight we should give to it should reflect that. In our view, very little weight should be given to Change 6. We also bear in mind that we are only required to have regard to the Change but must give effect to the operative document no matter what stage Change 6 is at.

[112] Because the primary document is the ARPS, we do not propose to set out in detail the provisions of Change 6. Generally, the Change seeks to endorse the growth concepts of the Auckland Regional Growth Strategy and to contain urban development and manage growth to achieve a range of environmental outcomes including:

[a] Protecting landscapes and maritime character;

[b] Maintaining or protecting natural character, amenity values and open space; and

[c] Maximising transport efficiency.

[113] It basically reiterates, in more prescriptive terms, the strategy of urban containment within defined limits – the MUL, and coastal and rural settlements.

[114] Accordingly, we find that our findings on the application of the ARPS should not be modified by Change 6.

Issue 3 - The Effects on Maori

Ko Kohukohunui te Maunga	Kohukohunui is the mountain
Ko Wairoa te Awa	Wairoa is the river
Ko Tikapa te Moana	Tikapa (Hauraki Gulf) is the ocean
Ko Tainui te Waka	Tainui is the canoe
Ko Umupuia te Marae	Umupuia is the Marae
Ko Ngai Tai te Iwi	Ngai Tai are the people

[115] The above pepeha encapsulates Ngai Tai's relationship to the Wairoa River and the surrounding land and sea. A relationship that those exercising functions under the Act shall recognise and provide for under Section 6(e) of the Act which provides:

> **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:
>
> ...
>
> (e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.

[116] Sections 7(a) and 8 of the Act are also relevant. They respectively provide:

> **7 Other Matters**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to –
>
> (a) Kaitiakitanga;
>
> ...
>
> **8 Treaty of Waitangi**
>
> 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 take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

[117] As was said in ***McGuire v Hastings District Council***:[31]

> These are strong directions, to be borne in mind at every stage of the planning process.

[118] The strong directions regarding Maori values contained in the Act have been reflected by equally strong provisions in the relevant planning instruments. The New Zealand Coastal Policy Statement, through principles 8 & 9 and Chapter 2, exhort the protection of characteristics of the coastal environment that are of special value to tangata whenua. The ARPS, which like the New Zealand Coastal Policy Statement, must be given effect to, contains in Chapter 3 objectives, policies, and methods, that address the cultural and heritage aspect of Maori and their relationships to their ancestral lands, water, sites, waahi tapu, and other taonga. Similarly, the District Plan contains strong provisions that reflect the Act. The combined effect of these provisions is that they must

[31] [2002] NZRMA (PC) 81 at para [21]

be considered and applied in accordance with the Act's directions. They are not there merely to give lip-service to the Act.

[119] Four witnesses gave evidence on tangata whenua issues:

[a] Mr Lawrence John Beamish and Mr Matthew Carl Green for the Ngai Tai Umupuia Te Waka Incorporated;

[b] Dr Rod Clough, an archaeologist called by the Canal Partnership; and

[c] Ms Brigitte Doreen de Ronde, a consultant planner called by the Manukau City Council.

[120] Mr Green, a Ngai Tai tribal historian, produced a report titled *Ko Wairoa te Awa, Ngai Tai Culture and Heritage Report on Wairoa River, Clevedon.* In his evidence he emphasised the importance of the Wairoa River to Ngai Tai. Its importance to Ngai Tai can be summarised and encapsulated in the following passages from his evidence:

- ... the Wairoa is the Awa (waterway) central to the identity of Ngai Tai or Ngati Tai. The river is regarded as central to tribal and personal identity and hence Ngai Tai introduce themselves with a pepeha which includes the statement "Ko Te Wairoa Te Awa."[32]

- The mana of the river is inextricably linked to the mana of the people.[33]

- Every part of the river is sacred to Ngai Tai, from its headwaters to kohukohunui to its outlet at Maraetai Moana. The west bank of the lower river is also regarded as having great significance as a waahi tapu, from Te Ruato burial swamp to Te Whakakaiwhara Peninsula.[34]

- ... the mudflats of the river are known in Ngai Tai tradition as urupa burial grounds ...[35]

[121] Mr Green told us that the sites proposed for the canal and its service area fall within two important areas known to Ngai Tai ancestors as Tauranga Kawau and Taka Te Kauere. Tauranga Kawau describes the once extensive swamps and inter-tidal areas inside the river mouth. Taka Te Kauere refers to that part of the development area from

[32] EIC para [5]
[33] EIC para [6]
[34] EIC para [8]
[35] EIC para [11]

the low rise of the lowland property extending back into the proposed service area on the upper property. With regard to Taka Te Kauere he said:

> Taka Te Kauere describes literally burial preparations associated with Te Kauere, the native tree more commonly known in other dialects as puriri. In essence this practice deals with the heaping of one's dead on top of the puriri trees, allowing the flesh to rot before the bones were then cleaned and buried. That practice normally took place over a period of a year and forms the basis of the practice today where a year is generally regarded as an appropriate time between the tangihanga and unveiling of the headstone.[36]

[122] As well as emphasising the sacredness of the river to Ngai Tai, Mr Green discussed in some considerable detail in pages 118 – 126 of his report the waahi tapu status of the lands surrounding the river and in particular in and near the proposed site. In his report he says:

> From the information collated to date, the primary waahi tapu directly affected by the canal proposal are the mudflats of the river's west banks, including the canal entrance itself; Taka Te Kauere within the upper part of the property; ... and undoubtedly other waahi tapu not yet positively located, given the time constraints placed on the gathering and filing of this evidence.[37]

[123] Mr Green concluded:

> The impacts of Plan Change 13 may further be seen to seriously contravene the tapu of Te Wairoa and its many associated waahi tapu. As stated already, the entirety of the lower river's west bank is known to be comprised of urupa and the creation of the canal will disturb these waahi tapu.

[124] In response to a question from Mr Enright regarding the cultural significance of connecting the canal to the river, he replied:

> The technical definition of it being part of the coastal marine area sort of has very little cultural meaning, but the diversion of the course of the river and the drawing of water from the river which is I think all parties are not contesting the fact that it is a waahi tapu to Ngai Tai, is viewed as culturally inappropriate to divert the course of that water because of its tapu nature and to use it for a purpose which is also seen as inappropriate to Ngai Tai.
>
> There are also issues surrounding I think what was commented on in the earlier cultural and heritage assessment report issued by Te Waka Totara Trust. The Waimate and Waikemo [sic] properties of that water are due to the internment of Ngai Tai ancestors within the lower reaches of the river, so the lower reaches of

[36] EIC para [12]
[37] EIC para [1] – [6]

> the river are inherently tapu to our people. So, yes, there are a lot of significant cultural issues for us about diverting the course of that river for those purposes, and drawing from that water.[38]

[125] Responding to a question from the court, Mr Green said:

> There was an older name for the same area which sounds very similar, Takata, one word, "Takata", rather than "Taka Te Kauere". And this was a name given by earlier tangata whenua prior to the arrival of the Tainui waka, but who are also acknowledged as ancestors of Ngai Tai in this area, and it referred also to burial practices in the same area which were slightly different to those adopted later by Ngai Tai migrant people.
>
> It, as I have been told, was that in the earlier period and when there was less warfare the burial practices were slightly different and that there was a sort of mummification type of process that took place in this location. It still included the people being suspended in the trees but there was smoking of the bodies using certain parts of the puriri tree which is where the name "Kauere" comes from, is to do with those particular parts of the puriri associated with those burial rituals.
>
> Part of that process also included the draining of the – you will forgive me if I am a little uncomfortable discussing this in a forum like this –but the draining of the fluids of the body and that according to the korero the fluids of the body flowed down from the trees into the area which is the development site itself and into the swamps, into the river, and there is a link between the tapu of the tupapaku from the whenua down to the swamps, down to the Wairoa River. And that was the particular association that I was only recently given permission to elaborate on.

[126] Under cross-examination by Mr Brabant, Mr Green was pressed to specify the area of waahi tapu within the village complex area. He replied that Ngai Tai buried their dead into the Wairoa River where the soft tidal mud easily accommodated this ritual and customary practice.

[127] Mr Beamish, the CEO of the Ngai Tai Umupuia Te Waka Totara Trust, told us that Plan Change 13 fails to recognise the cultural significance of the site to Ngai Tai and the related iwi Pare Hauraki and Pare Waikato.[39] He maintained[40] that the plan change fails to protect the cultural uniqueness of this area and its waahi tapu status, and that Ngai Tai and other iwi still visit the sites of significance to conduct karakia and other rituals.[41]

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[38] Transcript pages 302 & 303
[39] EIC para [5]
[40] EIC para [7]
[41] EIC para [7]

[128] In response to a question from the court regarding Taka Te Kauere, he replied, *"... again, to put a pinpoint on the map is contrary to the korero of our tepuna"* revealing a reluctance on the part of iwi to divulge the actual location of such places.

[129] Dr Clough, the archaeologist called by the applicant, told us that there were no evident habitation sites in the immediate area and that swamps are not normal places of permanent habitation.[42] Referring to the Ngai Tai submission, he fully acknowledged the cultural significance with the Wairoa River and surrounding areas to Ngai Tai.[43] However he noted, that the submission does not specifically identify sites of cultural significance within the project area, adding that the important burial place of Tara-te-irirangi is over 1km up river.[44] He stated that there is no physical or historical evidence to indicate that the project area was extensively settled or exploited,[45] nor was he aware of any archaeological evidence that the proposed village site was used for burial rituals.[46] He concluded that on the basis of archaeological examination, the area appears to have been used only by:

> ... temporary or transient groups moving up and down the river, and gathering resources ...[47]

[130] Under cross-examination by Ms Kapua, he emphasised that he was not tangata whenua and that Maori values should come from tangata whenua[48] reiterating similar comments he made in his rebuttal evidence.[49]

[131] Ms de Ronde, the consultant planner called by the Council, acknowledged that Council Officers would have been aware of the general waahi tapu status of the Wairoa River to Ngai Tai since consultation meetings with iwi on Proposed Plan Change 13.[50] She again reiterated this under cross-examination.[51]

[132] Ms de Ronde also recognised Ngai Tai's close ancestral connection with the Wairoa River and their right to exercise kaitiakitanga over their ancestral lands within

[42] EIC para [23]
[43] ECI para [25]
[44] EIC para [35]
[45] EIC para [6]
[46] EIC para [7]
[47] Rebuttal, para [10]
[48] Transcript, page 360
[49] Rebuttal, para [13]
[50] EIC para [6.3]
[51] Transcript, page 321

that area.[52] Her main issue was the lack of specific information pertaining to the extent, condition, and/or location of waahi tapu in the Plan Change 13 area. Under cross-examination by Ms Kapua she emphasised,[53] *"None of that specificness is related to that site"*.

[133] Mr Brabant in his closing submissions, submitted that ... *"the court should decide questions of fact on evidence of probative value"*, especially when assessing conflicting evidence and opinions concerning the presence or not of waahi tapu, urupa, or locations alleged to be tapu. He further submitted that, *"none of the urupa referred to in the cultural impact assessment report ... by Mr Beamish ... are located on the subject site"*.

[134] Ms Kapua in her opening submissions asserted that Plan Change 13 does not recognise and provide for the relationship that Maori and their culture and traditions have with this land, this water, the sites, the waahi tapu, and the taonga of Ngai Tai. Nor she said does the plan change have regard to kaitiakitanga or take account of the Treaty of Waitangi.

Evaluation of Effects on Maori

[135] We are satisfied from the evidence, especially the comprehensive and detailed evidence of Mr Green, that there exists an exceptionally strong relationship between Ngai Tai and the Wairoa River, its banks and the adjacent lands. This relationship has developed over many years of occupation, during which sensitive and meaningful cultural practices were carried out; practices which are still acknowledged today by Ngai Tai visiting the sites of significance to conduct karakia and other rituals. We have no difficulty in concluding that Ngai Tai derive their identity as a people from this area, this river, and these lands.

[136] We find that Ngai Tai, their culture and traditions, have a strong relationship with their ancestral lands, water, sites, the waahi tapu and taonga. A relationship which we must recognise and provide for as a matter of national importance. There was some argument about the exact location of waahi tapu sites. In this instance, identification by means of cartographic location is not important. Section 6(e) of the Act requires us to recognise and provide for the relationship of Maori, their culture and traditions with their

[52] EIC para [6.19] and Transcript page 314
[53] Transcript page 324

ancestral lands, water, sites, and taonga, as well as waahi tapu sites. In this case, notwithstanding sites identified by the Maori witnesses as waahi tapu, and whether such sites lie within the proposed canal site, we find that there is a strong relationship to ancestral lands (which includes the site), water (which will be affected by the canal development) and taonga (the river which will be affected by the proposed development).

[137] Our finding does not necessarily mean that the proposal is stymied. We need to have regard to our finding in the context of the proposal and having regard to the whole of the evidence and the benefits that may accrue from the proposal. However, such an appraisal cannot be adequately made without a carefully managed regional-wide integrated assessment as is required by the ARPS. The strategy that is required by the provisions of the ARPS is to ensure that such decisions are not made on an ad hoc site by site basis.

Issue 4 - The Effects on Natural Character, the Coastal Environment, Landscape and Amenity

[138] Natural character, the coastal environment, and landscape issues are very much interrelated. In this estuarine rural area these related values underlay the amenity of the surrounding area, both in the context of the site and its immediate surrounds and the wider regional context.

[139] The site and the immediate surrounding area have been modified over time by farming activities. The site sits within the coastal environment. As Mr Dunn, planning consultant for the partnership said:

> The site is generally considered to be within the "coastal environment". The site adjoins the coastal marine area and is generally within the visual catchment of the coast.[54]

[140] We summarise the relevant statutory documents that apply to this issue.

[54] EIC para [76]

Statutory Provisions

The Act

[141] The site being within the coastal environment Section 6(a) applies. It provides:

> **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:
>
> (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 subdivision, use, and development.

[142] All the landscape architects who gave evidence agreed that the site is not contained within an *"outstanding natural landscape"*. Accordingly, Section 6(b) does not apply. However, the *Auckland Regional Plan: Coastal* identifies the whole of the Wairoa River Estuary and Whakakaiwhare as falling within a regionally significant landscape. Thus, Sections 7(c) and (f) apply. They respectfully provide:

> **7 Other Matters**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to –
>
> (c) the maintenance and enhancement of amenity values:
>
> ...
>
> (f) maintenance and enhancement of the quality of the environment;

The New Zealand Coastal Policy Statement

[143] The New Zealand Coastal Policy Statement contains general principles which include reference to Part 2 of the Act and lists 14 more specific general principles. Of particular relevance to this issue are:

> 1. Some uses and developments which depend upon the use of natural and physical resources in the coastal environment are important to "the social, economic and cultural well-being" of "people and communities". Functionally, certain activities can only be located on the coast or in the coastal marine area.

2. The protection of the values of the coastal environment need not preclude appropriate use and development in appropriate places.

3. The proportion of the coastal marine area under formal protection is very small and therefore management under the Act is an important means by which the natural resources of the coastal marine area can be protected.

4. Expectations differ over the appropriate allocation of resources and space in the coastal environment and the processes of the Act are to be used to make the appropriate allocations and to determine priorities.

[144] Chapter 1 sets out five policies to give effect to the preservation of the natural character of the coastal environment, the lodestar of which is Policy 1. It provides:

Policy 1.1.1

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

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

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

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

[145] Policy 1.1.3 is also important, as is Policy 1.1.5. They respectfully provide:

Policy 1.1.3

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

(a) landscapes, seascapes and landforms, including:

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

(ii) visually or scientifically significant geological features; and

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

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

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

Policy 1.1.5

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

The Auckland Regional Policy Statement (ARPS)

[146] Chapter 7 of the ARPS is particularly relevant to this issue. It sets out in some considerable detail the Issues, Objectives, Policies, and Methods that are to apply to the complex and diverse coastal environment of the Auckland Region. The Objectives and Policies relevantly seek to protect the natural character, landscape and amenity of the coastal environment from inappropriate development.[55]

[147] When preserving the natural character of the coastal environment and protecting it from inappropriate development, decision-makers are exhorted to take into account the fact that Auckland's coastal environment ranges from areas which are predominantly in their natural state to areas which have been highly modified.[56]

[148] Policies of 7.4.4.1(i)(c) and (d) direct us to avoid adverse effects on the coastal landforms and their features, elements, and patterns which contribute to landscape values and scenic and visual values. The need for preservation and protection needs to be balanced with the recognition that some forms of development are dependent on the coastal environment[57] as they have a functional need to locate there. Such development is enabled and considered appropriate where any adverse effects can be avoided, remedied, or mitigated.[58] Overall, a precautionary approach is signalled where potentially significant adverse effects may arise.[59]

[149] The Policy Statement requires the complex interrelationship between the land and sea in the coastal environment to be managed in an integrated manner. Issue 7.2.9 provides:

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[55] See particularly Objective 7.3.1 and Policy 7.4.10
[56] Issue 7.2.1
[57] See Issue 7.2.3
[58] For example, see Objectives 7.3.3 and 7.3.4
[59] See Policy 7.4.10.3

> 7.2.9 Fragmented management of the land and water components of the coastal environment has, and could lead to, undesirable environmental outcomes.

Under this issue the statement says:

> Achieving the environmental outcomes in relation to the key issue outlined above, through objectives, policies and methods of this chapter, requires an integrated management approach between all agencies with resource management responsibilities in the coastal environment.

[150] Policy 7.4.10(2)(xii) links Chapter 7 with Chapter 2 – Regional Overview and Strategic Direction. Clearly, to give effect to the ARPS requires development in the coastal environment to be managed in an integrated way in accordance with the directions in Chapter 2. As we have found, in this case that did not occur. For reasons we are about to give, we consider that the potential adverse effects on natural character and landscape are considerable and thus need to be assessed as part of an integrated management approach. This will enable their significance in the regional context to be properly determined.

Auckland Regional Plan: Coastal

[151] The *Auckland Regional Plan: Coastal* covers the coastal marine area – the area below Mean High Water Springs, the point 1km upstream from a river mouth, or the point calculated by multiplying the width of the river mouth by 5, whichever is less. The Plan maps the upstream extent of the coastal marine area on the Wairoa River as a point opposite the site, a short distance (approximately 300m) upstream of the canal entrance. The coastal marine area includes the river itself and adjacent tidal mangroves, salt marsh, and mudflats.

[152] The river opposite the site in the vicinity of the canal entrance is classified as Coastal Protection Area 2, and areas downstream and the fringes of the river on the opposite bank are zoned as Coastal Protection Area 1. These are generally wetlands, salt marsh and mangrove forest.

[153] The portion of the river deemed to be within the coastal marine area is classified as a *"regionally significant landscape"* in common with the shoreline of the adjacent part

of the coast. This is a matter to which we have already adverted to, and such a classification brings into play Sections 7(c) and (f) of the Act.

[154] Section 4 of the Plan addresses landscape matters. Objective 4.3.1 relevantly seeks to protect the key elements, features, and patterns of regionally significant landscapes (as identified in the Plan Maps) from inappropriate subdivision use and development in the coastal environment. Objective 4.3.2 seeks to maintain and enhance the diversity, integrity and landscape quality of the coastal environment.

[155] Policy 4.4.2 provides that:

> Subdivision, use and development in the coastal marine area shall be considered inappropriate where it would result in significant adverse effects on those key elements, features and patterns which contribute positively to the landscape quality, aesthetic value and landscape sensitivity of those areas identified in the Plan as being Regionally Significant Landscapes of the coastal environment.

[156] Policy 4.4.5 sets out seven matters to which particular regard will be had in assessing the effects of subdivision, use and development in the coastal marine area. These include:

[a] Integration of adjacent areas of the coastal marine area and adjacent land above Mean High Water Springs;

[b] Maintaining visual links between the coastal marine area and adjacent land;

[c] Maintaining and enhancing appropriate vegetation patterns (particularly indigenous);

[d] Maintaining natural variation of the foreshore; and

[e] Maintaining topography of the seabed in particular areas.

[157] Other chapters of the Plan cover natural character, natural features and ecosystems, and public access. These generally reflect the provisions of Part 2 of the Act and the New Zealand Coastal Policy Statement.

Manukau City Operative District Plan

[158] The site is located within the Rural 1 Zone in the Operative District Plan, which, together with the other rural zones and related provisions, is described as being designed to relevantly provide the following outcomes:

[a] Open rural landscape character;

[b] Uncompromised rural coastal environment;

[c] Retention of areas of ecological significance, indigenous vegetation and fauna in the rural areas;

[d] A stock of high-quality soils that are accessible and useable;

[e] A healthy environment (e.g. good air quality, acceptable noise levels); and

[f] High quality streams and coastal water.[60]

[159] The Rural 1 Zone is primarily directed at maintaining rural activities and productivity, whereas Manukau City's Rural 2 and Rural 3 Zones are directed towards accommodating countryside living. In Section 12.9.1, the Rural 1 Zone is described as being designed to accommodate:

> ... primary production activities such as farming, forestry and quarrying to occur. A limited range of other activities such as rural industries and services, cleanfills, recreational and tourist activities are also able to locate in the rural area subject to being able to avoid, remedy or mitigate any adverse effects on the environment. **It is also important that the rural zone maintains the integrity of the urban containment** and the business policies set out in Chapters 4 City Environment and 14, Business Areas.
>
> To mitigate the adverse effects of residential activity on the rural environment countryside living is also limited in this zone to manage the effects outlined above. A number of limited households for countryside living can be established and lots subdivided. The restrictions put in place aim to limit the number of dwellings in the rural area and thus help to retain rural character, landscape quality and minimise incidents of conflicts between rural activities and "countryside" residents.
>
> *[added emphasis]*

[60] See Section 12.7

[160] The Rural 1 zoning makes provision for a range of often quite utilitarian activities and structures – from farming and pig-keeping to production forestry and greenhouses – Section 12.9.1 of the Plan clearly stipulates that non-rural activities and development:

> ... are constrained to avoid adverse effects on the rural environment and in particular the cumulative effects of such activities. These include:
>
> - the effect on the rural character and amenity values of the rural area;
> - the effect on the productive potential of the soil resources from building coverage and fragmentation;
> - the effect on landscape qualities and open space amenity values;
> - the effect of carrying out activities on neighbours.

Hauraki Gulf Maritime Park Act 2000

[161] The purpose of the Hauraki Gulf Maritime Park Act 2000 as set out in Section 3 includes integrating the management of the natural, historic, and physical resources of the Hauraki Gulf, its islands, and catchments. Sections 7 and 8 are to be regarded as though they were a national policy statement under the Resource Management Act. Accordingly, Plan Change 13 must give effect to those sections by virtue of Section 75(3) of the Act.

[162] A careful reading of Sections 7 and 8 which are in general terms, leads us to the conclusion that it adds nothing to the statutory directions of the Resource Management Act, the provisions of the New Zealand Coastal Policy Statement, or the more detailed provisions of the ARPS and Coastal Plan.

The Site's Landscape Setting

[163] We have described the site and surrounding landscape earlier in this decision.[61] The landscape witnesses all described the modified character of the river and its margins – the moorings, boats, jetties, sheds and slipways which clearly leave an imprint on the current river corridor. They also referred in some detail to the adjacent modified farmland. The earlier vegetation cover has been almost completely removed, the land drained by a network of ditches and in some cases floodgates, the field and shelter-belt

[61] Paras [8] – [19]

patterns are rectilinear and include hedgerows of weed species, and stock have access to the riverbank.[62]

[164] Notwithstanding the modified character, all of the landscape witnesses recognised to a varying degree a measure of natural character. Mr Lister opined that the river and its margins would have *a moderately high degree of natural character*. But the adjacent farmland was *highly modified*.[63]

[165] Ms Absolum had this to say:[64]

> 4.20 Despite these structures, the natural elements and patterns of the river remain largely unchanged. In terms of natural processes within this part of the coastal environment, many of them remain unchanged. Although the volume of water in the river is reduced by two water catchment dams in the Hunua Ranges, the river still flows, the tides still rise and fall. On the land natural processes have been changed more dramatically, but vegetation and the absence of built structures still dominate.
>
> 4.21 In my opinion, when assessed on a scale of 'pristine' to 'highly modified urban', the lower Wairoa Valley has areas of high natural character and the protection of these is a national priority.

[166] Mr Brown had this to say[65]:

> 38. Although the Wairoa River is therefore far from pristine, its sinuous waterway, mangrove margins, banks and marshland all reinforce the pleasant and distinctive interplay of natural and cultural dimensions at play within the Wairoa Valley/Clevedon landscape. Having regard to that interplay in its entirety, I consider that the Wairoa River Canal Partnership site lies within what would now be typically referred to as an Amenity Landscape. It is not outstanding at either the regional or city/district level, but it is sufficiently characterful, unified, coherent and – in a compositional sense –appealing, that I believe it qualifies as such in terms of section 7(c) of the Resource Management Act ...

[167] With regard to the site and surrounds, Mr Scott has this to say[66]:

> 31. The catchment has been highly modified since human settlement. The once expansive lowland kahikatea forest and wetland systems have now been cleared, resulting in a landscape that is dominated by pastoral

[62] See Lister EIC para [87]
[63] EIC para [87]
[64] Absolum, EIC, paras [4.20] – [4.21]
[65] Brown, EIC, para [38]
[66] Scott, EIC, paras [31] and [38]

> activities. Clearance of the land has contributed to the situation of the lower Wairoa River and estuarine system. There can be no doubt that the natural character of this coastal environment has been modified. While there is a remnant natural character, the components of this landscape show substantial modification and loss of ecological quality and diversity.
>
> ...
>
> 38. The surrounding rural area is now comprised of a number of relatively small land holdings with associated landscaped gardens, small-scale orchards, vineyards, constructed ponds, small wetland and a number of individual moorings to the river. These developments have increasingly 'domesticated' and landscaped the rural corridor environment ... They have also enhanced the managed character of that semi-rural environment.

[168] We acknowledge that the site has been highly modified by many years of farming. We also note the marine and farming structures in and on the banks of the Wairoa River. Nevertheless, we consider that the Wairoa Valley landscape within which the site is set still retains a strong natural character and landscape quality. We agree with Mr Brown when he said[67]:

> 32. It would be fair to say that, as a whole, the Wairoa Valley landscape is less than spectacular or exemplary. Nevertheless, the relatively soft-edged interplay of natural and cultural elements within it, and the coalescence of different landscape features (listed above) around a gently meandering Wairoa River, lend this landscape a certain unity and cohesion, tranquility, charm and identity – or sense of place – that is unique within the Auckland Region. Duders Regional Park, and views from it, capture most of these qualities.

Landscape Effects

[169] All of the landscape architects carried out a detailed assessment of the effects of the Proposed Plan Change on the natural character and landscape of the Wairoa Valley. Mr Lister discussed:

[a] The orientation of the houses to the canals;

[b] The variety and intricacy of the canal edge;

[c] The focus provided by the village centre;

[d] The vegetation framework;

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[67] Brown, EIC, para [32]

[e] The recreational attributes; and

[f] The effects on surrounding river character and amenity.

[170] He concluded[68]:

> 130. The proposal will have a distinctive character different from that of conventional suburban, urban, or lifestyle patterns, by means of the architectural and landscaping controls discussed above.
>
> 131. The effects on rural character of the surrounding landscape will be substantially avoided by the village's design: particularly the concentration of the woodland framework within the canal area and the creation of an open parkland landscape around the perimeter.
>
> 132. The proposal will enhance environmental sustainability through the extensive restoration, which will connect the hill to the river and restore a type of vegetation that is now missing from the valley.

[171] Mr Scott made an analysis on a regional and sub-regional basis, including the *historic and emerging nodal settlement patterns of the wider contextual landscape*[69]. He concluded[70]:

> 26. In my opinion, the proposed village is consistent with the historic and emerging nodal settlement patterns of the wider contextual landscape. In addition, the village offers an innovative and unique lifestyle option. The proposed form of the development has a distinctive character that contrasts and complements the existing traditional and conventional urban, suburban and rural residential patterns.

[172] Mr Scott described in some detail the effects of the proposal on natural character and rural character. He concluded[71]:

> 74. In my opinion, the proposed Wairoa Maritime Village is an appropriate development in this location, and is consistent with the historic and emerging settlement patterns of the wider contextual landscape.
>
> 75. While the maritime village itself will not have a rural character, the village design character will reflect the maritime setting and function within a restored natural and ecological landscape framework. The rural

[68] Lister, paras [130] – [132]
[69] Scott, EIC, para [22] and following
[70] Scott, EIC, para [26]
[71] Scott, EIC, paras [74] – [76]

character of the surrounding landscape will be maintained, which is also consistent with the wider landscape settlement pattern.

76. The maritime village will enhance access to and along the coastal marine area and river for both residents and recreational visitors.

[173] Ms Absolum made a detailed landscape assessment with particular reference to the relevant statutory instruments. She concluded[72]:

7.1 The Wairoa Valley is a broad, open and attractive rural area, with only limited rural residential development. Despite its relative proximity to Auckland city it retains its particular rural qualities and these are valued by the local community.

7.2 The canal housing proposal is urban in character and will occupy a substantial area, in excess of 85ha. The level of built development, including terraced housing around the commercial centre, will create a suburban environment with both roads and canals separating rows of houses.

7.3 The Wairoa Valley at present maintains a very clear pastoral rural character; this character will be significantly altered by the introduction of development in line with either the PC13 or RPC provisions.

7.4 The site is within the coastal environment with important coastal natural character values. The proposed residential zone will introduce a substantial urban element which will break through the coastal edge of the site, thus impacting adversely on natural character of the site, its river margins and the coastal environment beyond the site.

7.5 The proposed canal housing will have adverse impacts on the amenity values and cultural landscape values of the local area as appreciated by the local community, both Maori and Pakeha.

7.5 *[sic]*Although environmental enhancement initiatives are proposed, in my opinion they do not sufficiently avoid, remedy or mitigate the adverse impacts on the landscape character, natural character or amenity values of the lower Wairoa Valley.

[174] Mr Brown was of the view that inserting the canal development into the area *would fundamentally change its character*.[73] He questioned the credibility of the proposed screening and found it *inconceivable that the proposed canal housing and village centre would remain benign in terms of landscape effects*.[74] He concluded[75]:

[72] Absolum, EIC, paras [7.1] – [7.5]
[73] Brown, EIC, para [42]
[74] Brown, EIC, para [46]

48. There is an obvious attraction to concepts that promote development in exchange for rehabilitation and extension of natural habitats and ecosystems. The aesthetic connotations of canal based urban or suburban developments add another layer of appeal to the Wairoa River Partnership scheme. This is reinforced by the idea of some new and different form of development that doesn't quite fit existing development models within the Auckland Region.

49. From my standpoint, however the proposal is unambiguously suburban, and I believe that it fully complies with the ARPS's description of 'urban development'. With reference to the village centre, it perhaps even connotes mixed use or medium intensity forms of development. This, combined with its appeal, as both a place to live and destination for day-trippers, is precisely what would undermine the existing rural/natural character of both the site and its wider river valley setting.

...

51. ... the current proposal appears to be arbitrary and responds to site specific conditions, rather than having careful and considered regard for its wider implications. If local history is a guide, it would almost certainly provide the spur for more wide ranging change to the Wairoa River catchment in the future.

52. As such, I believe that the Wairoa River Canal Partnership proposal and Plan Change 13 (including Revised PC13) are diametrically opposed to the protection and/or maintenance of the very landscape and amenity values espoused in both the regional and district policy documents. Accordingly, it is my opinion that Plan Change 13 is not appropriate and the land subject to the current appeals should continue to be zoned Rural 1.

Evaluation of Effects on Natural Character, the Coastal Environment, Landscape and Amenity

[175] We have considered the expert landscape evidence carefully and we have been helped in our understanding of that evidence by our site visit. We are conscious of the fact that the canal proposal has been carefully designed from an engineering and architectural point of view. We also recognise the rehabilitation and extension of natural habitats and ecosystems that is proposed in exchange for the development.

[176] Balanced against these positive results, we are mindful that the relevant statutory instruments chart a direction for the valley[76] that revolves around the protection of its existing rural values and remnant natural character. We conclude that to allow the

[75] Brown, EIC, paras [48] – [49], [51] – [52]
[76] As pointed out by Mr Brown, see EIC para [50]

proposal without a thorough integrated assessment would result in too fundamental a change to the nature and landscape values of the Wairoa Valley. The current proposal is too site-specific. Without a regional-wide integrated management assessment, as is required under the ARPS, we are unable to determine its wider implications for the region and the district.

[177] The real question that emerges from this exercise is whether a fundamental change to the nature and landscape of the Wairoa Valley is warranted without a regional-wide integrated assessment?. We say the answer is no. It is for this very reason that there are clear strategen directions in the ARPS that must be given effect to.

Cultural Heritage Landscape

[178] Ms Lucas, addressed the cultural heritage values of the subject site and surrounding landscape to tangata whenua and assessed Plan Change 13 on them. The cultural assessment did not include non tangata whenua values. For Maori values she relied upon the evidence called by Ngai Tai Umupuia te Whaka Totora Incorporated.

[179] No detailed submissions were received from counsel for the regional council or Clevedon Cares as to the provisions of the Act that ground the concept of a cultural heritage landscape within the court's jurisdiction. Ms Lucas told us that her assessment was relevant to Sections 6(b), 6(e), 6(f) and 7(c) of the Act.

[180] As to Section 6(b), that section requires us to recognise and provide for the protection of *outstanding natural features and landscapes* – not cultural heritage landscapes. All of the parties and the other landscape witnesses agreed that there was no outstanding natural feature or landscape that needed protection.

[181] As to Section 6(e), which requires us to recognise and provide for the relationship of Maori with their ancestral lands etc, we have discussed this under the heading *Effects on Maori*.

[182] As to Section 7(c), which requires us to have regard to the maintenance and enhancement of amenity values, that is not relevant to the question of jurisdiction other than the fact that a reduction in Maori values within our landscape may cause a loss of amenity values.

[183] We are thus left with Section 6(f) which provides:

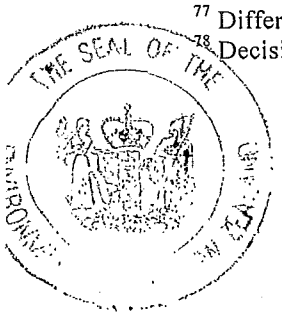
> **6 Matters of national importance**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
>
> ...
>
> (f) the protection of historic heritage from inappropriate subdivision, use, and development:
>
> ...

[184] Section 2 of the Act defines *historic heritage* as:

> (a) means those natural and physical resources that contribute to an understanding and appreciation of New Zealand's history and cultures, deriving from any of the following qualities:
>
> (i) archaeological:
>
> (ii) architectural:
>
> (iii) cultural:
>
> (iv) historic:
>
> (v) scientific:
>
> (vi) technological; and
>
> (b) includes—
>
> (i) historic sites, structures, places, and areas; and
>
> (ii) archaeological sites; and
>
> (iii) sites of significance to Māori, including wāhi tapu; and
>
> (iv) surroundings associated with the natural and physical resources

[185] In this division of the court,[77] we discuss the application of these sections to the concept of a cultural heritage landscape in ***Waiareka Valley Preservation Society Incorporated and Ors v Waitaki District Council & Otago Regional Council.***[78] For the reasons there given we find that it is open to us to find, on sufficiently probative evidence, that the Wairoa Valley, or part of it, is a cultural heritage landscape. For such a landscape to be of sufficient substance to warrant protection as being a matter of *national importance*, would depend on its significance and the effects of the proposed canal

[77] Differently constituted
[78] Decision No. C058/2009, paras [224] – [231]



village on it. It is also important to recognise the need to avoid the double counting of Maori issues which are specifically provided for in Sections 6(e), 7(a) and 8 of the Act.

[186] Ms Lucas based her methodology on the cultural values model used by Ms Janet Stephenson in the Akaroa case study, which in turn was based on a trial study conducted in Bannockburn, Central Otago – commonly referred to as the *Bannockburn Heritage Landscape Study* published in a monograph in September 2004.[79] The primary purpose of the Bannockburn study was to trial a newly developed methodology for investigating heritage at a landscape scale. The monograph described its content:

> **Identification**
>
> The study offers an understanding of the landscape both spatially and as it has evolved over time through human interaction. It identifies relationships between physical features in the land, both where these evolved simultaneously and where they evolved sequentially. It also provides information about the relationships between people and the landscape, both in the past and today. It attempts to identify key heritage features, stories and traditions in the Bannockburn landscape.

[187] It defines heritage landscape as:

> (a) **Heritage Landscape** – is a landscape, or network of sites, which has heritage significance to communities, tangata whenua, and/or the nation.

[188] The authors of the monograph entered into a complex and detailed inter-disciplinary methodology of spatial analysis, using connectivities between superimposed layers of history.[80] No such study has been undertaken here.

[189] Ms Lucas characterised and analysed the landscape context with regard to:

- Biophysical;
- Historical; and
- Cultural dimensions.

[190] She evaluated the heritage landscape with respect to:

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[79] Stephenson, J: Bauchop, H; Petchey, P. [2004]: Bannockburn Heritage Landscape Study, Wellington: Department of Conservation Te Papa Atawhai

[80] See abstract page 9

- Heritage fabric;
- Natural science value;
- Time depth;
- Tangata Whenua Value;
- Cultural Diversity;
- Legibility and Evidential Value;
- Shared and Recognised Value;
- Aesthetic Value; and
- Significance.

[191] As we have said, Ms Lucas relied on the evidence produced by the Maori appellant. She related a summary of historical and cultural evidence they presented, then undertook an evaluative exercise in accord with the Bannockburn study.

[192] Ms Lucas was not assisted in her evaluation by any other expert as had been the case in the Bannockburn studies. As we have said, such an analysis is complex and requires a spatial analysis, using connectivities between superimposed layers of history. It requires a multi-disciplinary input covering historical, cultural, archaeological, and landscape expertise depending on the circumstances. For Ms Lucas to extend her landscape expertise to the other disciplines is a big ask.

[193] Because of the strong direction in the Act to *recognise and provide for* matters of national importance, decision makers under the Act should not hold that a landscape qualifies as a cultural heritage landscape under Section 6(f) without adequate expert evidence of a probative nature. There requires sufficient intensity of heritage fabric woven into the landscape to warrant the application of Section 6(f). We are satisfied that the evidence in this case falls short of enabling us to make such a finding. We have, of course, identified the importance of Maori values under Section 6(e).

Effects of Our Findings on Core Issues

[194] Our findings on these *core* issues lead us to the inescapable conclusion that to allow the Plan Change would have:

[a] Significant adverse effects on Maori;

[b] Significant adverse effects on natural character, the coastal environment, landscape and amenity;

[c] Would fail to give effect to the strong provisions contained in the ARPS on [a] and [b] above as is required by Section 75(3) of the Act;

[d] Would fail to give effect to the strong provisions of the ARPS on *urban containment* and *strategic direction* as is required by Section 75(3) of the Act; and

[e] Would fail to achieve the function of integrated management pursuant to Section 31(a) and thus Section 74(1) of the Act.

[195] In our view these findings are fatal to the proposal. We are conscious of the effort put in by the architects and engineers to produce a quality product. But the proposal needs to be evaluated in terms of the planning framework, particularly the strong provisions of the ARPS to which we have already referred. We are also conscious of the benefits that the proposal, if it proceeds, would generate. But our findings weigh too heavily against approving the Plan Change.

[196] We find that the proposed Plan Change would not assist the Council in terms of carrying out its functions – being the integrated management of, and control over effects of, the use, development or protection of land – in order to achieve the purpose of the Act.

[197] Having so found, it is not necessary for us to consider the other issues. However, for completeness, we discuss each briefly.

The Consent Issues

[198] There are five contested issues in this group. In so grouping these matters we acknowledge that they do include a strategic component, to which we have already referred, which should be considered as part of an integrated management analysis. In considering matters of this kind, the proponents of the Plan Change have, in our view, a

relatively low threshold at this stage to satisfy us that these are matters that can be appropriately addressed at the consent stage. There may be cases where the evidence is such that it is blatantly obvious that such matters cannot be appropriately addressed at the consent stage. Or there may be matters where it is obvious that there is considerable uncertainty as to whether such matters can be appropriately addressed at the consent stage. In the first case, that would be a clear factor weighing against the approval of the Proposed Plan Change. Indeed, it may well be its death-knell. In the later case however, the court should be more circumspect and leave an opportunity for those proposing the Plan Change to remove any such uncertainty.

[199] In this case, these are effects which, as we have said, would be addressed at the consenting stage for land use consents applied for under the provisions of the Proposed Plan Change, or for regional consents. We heard a voluminous amount of evidence relating to these issues. It would be wrong for us to determine these matters at this stage of the proceedings without a full understanding of the resource consent applications and the proposed conditions of consent.

[200] We are satisfied on the evidence that all of the contested matters in the Group 2 effects could be addressed appropriately at the consent stage.

Jurisdictional Issue

[201] All parties agreed that this issue need not be considered by the court if the court decided on the merits to not approve the Plan Change. We having decided not to approve the Plan Change, we do not address this issue.

Effects on Over-Flying Aircraft

[202] This issue was raised by Ardmore Airfield Tenants and Users Committee, an incorporated body comprising the various tenants of Ardmore Airfield, and representing those that use the airfield. Ardmore Airfield is located approximately 5kms northeast of Papakura township and 12km southwest of the proposed maritime village. The airfield is located within the Wairoa Valley.

[203] A designated low-flying zone is located in the mouth of the Wairoa River, approximately 1km northeast of the proposed maritime village. This limited flying zone was established in 1965.

[204] We were told that the limited flying zone is an integral part of flight training and that aircraft and helicopters use the zone to practice manoeuvring between sea level and 500 feet ASL, with most exercises being carried out at 200 feet ASL.

[205] Because the airfield is located within the Wairoa Valley, the valley largely dictates a main transit route to and from Ardmore through the valley, over the proposed maritime village, to the designated low-flying zone.

[206] It was the committee's concern that the proposed maritime village introduces a significant urban residential population into this area. The residents may well be subject to noise from over-flying aircraft transiting through the Wairoa Valley, descending into and ascending from the low-flying zone, and using the low-flying zone. The committee is concerned that aircraft noise will be annoying to residents of the village and will give rise to reverse sensitivity complaints.

[207] This issue gives rise to two sub-issues:

Sub-Issue 1 A legal issue as to whether the High Court decision in ***Dome Valley District Residents Society Incorporated v Rodney District Council***[81] excludes consideration of the effect of the Proposed Plan Change on over-flying aircraft; and

Sub-Issue 2 Whether in fact aircraft noise will be a potential effect which is likely to give rise to reverse sensitivity complaints.

[208] The first issue is an interesting legal question and on the face of it, it is a moot point as to whether or not the principles of law enunciated in the High Court decision, and therefore binding on us, applies with respect to a plan change. However, it is not necessary for us to resolve this matter for the purposes of arriving at a clear decision on this appeal. Although it is an arguable question as to whether or not the effect of low-flying aircraft will be such that the noise generated would be likely to lead to complaints,

[81] 01/08/08, Priestley J, HC Auckland, CIV-2008-404-000587

we are satisfied that, on balance, reverse sensitivity issues have not been made out. Because we are going to refuse to approve the Plan Change for other reasons it is not necessary, in the interests of brevity, to discuss in detail our reasons for so finding.

Comment

In this case a proliferation of evidence, including documentation was placed before us. It reflects a tendency that appears to be getting worse rather than better. The proliferation of material placed before us was exacerbated by the failure of the appellants opposed to the Plan Change to identify the core issues. We were faced with a wide range of issues, many of which were not determinative of the result. The wide range of matters canvassed by those opposed to the Plan Change resulted in those supporting it having to aduce evidence to address them. For this reason we are tentatively of the view that costs should lie where they fall. Further, it is not usual to award costs on a plan change appeal.

DATED at Auckland this 22nd day of June 2010

For the Court:

R G Whiting
Environment Judge

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

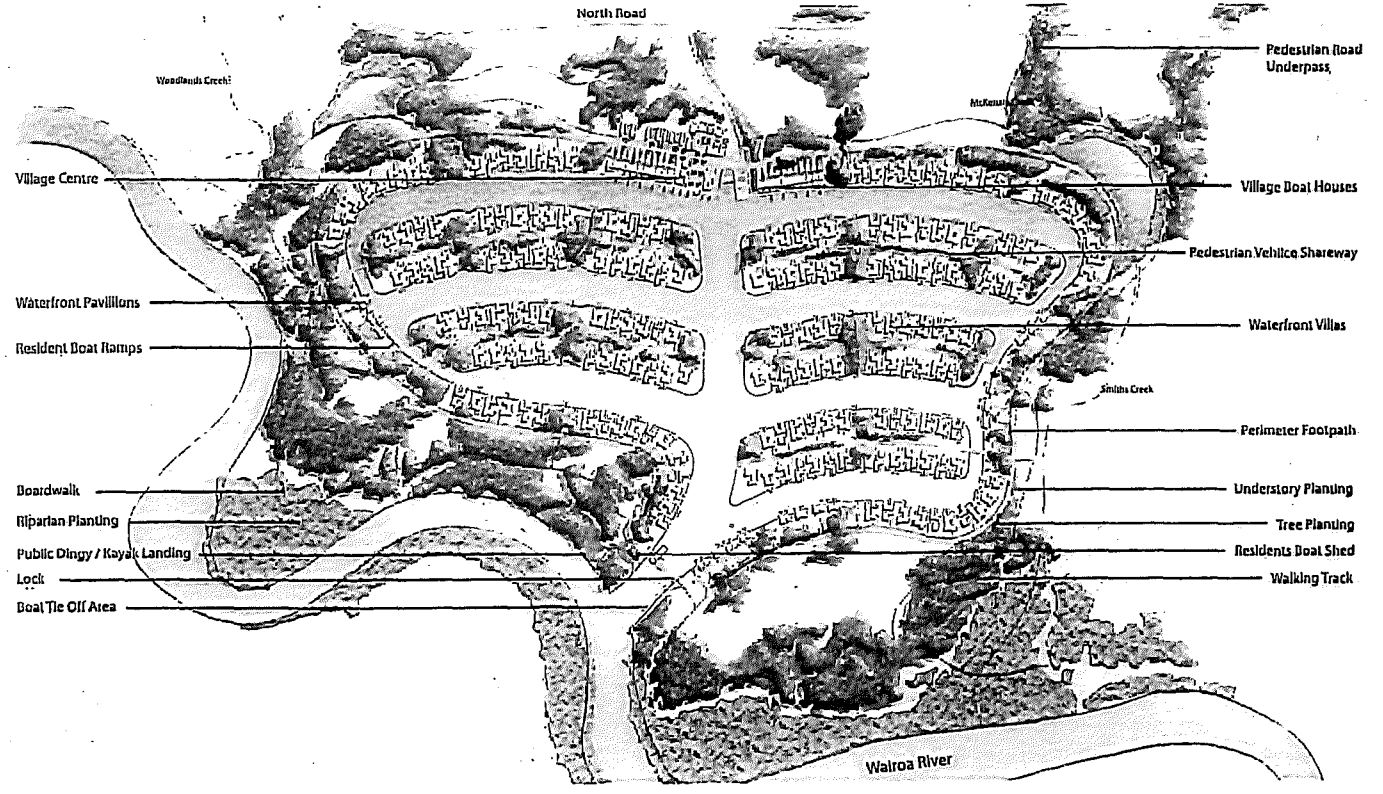
Appendix 1 – Te Wairoa o Muriwai, Context photograph.

Te Wairoa O Muriwai, from Koherurahi (left) to Whakakaiwhara (right)

Village Site

Geographx (NZ) Ltd 2009
Base photo 2003/04

Appendix 2 – Wairoa River Maritime Village, Concept plan, Council's decision version.



WAIROA RIVER MARITIME VILLAGE

SCALE 1:7500 (A3)

FIGURE 5 - REVISED CONCEPT PLAN

35768-FIG05

BEFORE THE ENVIRONMENT COURT

Decision No. [2012] NZEnvC 120

IN THE MATTER of appeals under Clause 14(1) of the First Schedule of the Resource Management Act 1991 **(the Act)**

BETWEEN

GAVIN H WALLACE LIMITED
(ENV-2009-AKL-000505)
(ENV-2010-AKL-000011)
(ENV-2010-AKL-000031)

MAKAURAU MARAE MAORI TRUST BOARD INCORPORATED
(ENV-2010-AKL-000024)
(ENV-2010-AKL-000027)

THE TRUSTEES OF THE ERNEST ELLETT RYEGRASS TRUST AND OTHERS
(ENV-2010-AKL-000030)
(ENV-2010-AKL-000147)

EVELYN MENDELSSOHN (BY THE EXECUTORS OF HER ESTATE)
(ENV-2009-AKL-000502)

Appellants

AND

AUCKLAND COUNCIL (as successor to Auckland Regional Council and Manukau City Council)

Respondent

Hearing: At Auckland, 28 November – 2 December 2011, 5 – 8 December 2011, 26 – 29 March 2012, 4 May 2012

Court: Environment Judge R G Whiting
Environment Commissioner M Oliver
Environment Commissioner K Prime

Counsel: Ms M J Dickey & Mr M C Allan for Auckland Council **(the Council)**
Mr P Cavanagh QC for The Trustees of the Ernest Ellett Ryegrass Trust and Others **(the Ellett Interests)**
Mr K R M Littlejohn for Evelyn Mendelssohn (by the Executors of her Estate) **(the Mendelssohn Estate)**
Mr M E Casey QC and Ms A J Davidson for Gavin H Wallace Limited **(Gavin H Wallace)**
Mr R B Enright for Makaurau Marae Maori Trust Board Incorporated and Te Kawerau Iwi Tribal Authority Incorporated (s 274 party) **(the Maori Appellants)**
Ms J Bain for the New Zealand Transport Agency (NZTA) (s 274 party)

DECISION OF THE ENVIRONMENT COURT

A. The MUL is to be extended to include the land subject to appeal;

B. The land subject to appeal is to be zoned Future Development Zone;

C. The NOR is cancelled as it affects the land subject to appeal

D. The Council is directed, under Section 293, to prepare, in consultation with all other parties to these appeals:

1. A change to the Auckland Regional Policy Statement to amend the location of the MUL in accordance with A above; and

2. A change to the Auckland Council District Plan (Manukau Operative Section) to provide for the subject land as Future Development Zone within Chapter 16 – Future Development Areas. The subject land is to be identified as a FDZ subzone and we suggest it could be described as "Ihumātao Peninsula". The amendments to the District Plan are to provide for:

a. A succinct description and explanation of the subzone and its context which:

i. Identifies and provides for the significant characteristics of the area, including:

- Maori cultural associations with the area, including wahi tapu;
- Heritage and historic associations;
- The Otuataua Stonefields Historic Reserve;
- Landscape and amenity values;
- The Manukau Harbour and coastal environment; and
- The Auckland International Airport and business zoned lands.

ii. Requires that a future structure planning process for the subzone:

- Further identifies and recognises these significant characteristics;
- Determines the location and density of urban development selectively; with urban activities concentrated in nodes and areas of open space and lower intensity development; and
- Provides for efficient and effective servicing and an Integrated Transport Assessment (ITA).

b. The FDZ Rules (16.10 to 16.14) to be amended as necessary to restrict the activities that might compromise the features and values of significance in the area, including limiting earthworks, land cultivation and large buildings (including greenhouses).

c. Any consequential amendments to the District Plan.

E. The Council is to submit the changes directed under D. to the Court for confirmation by 28 September 2012.

F. Costs are reserved, but in our tentative view should lie where they fall.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

TABLE OF CONTENTS

REASONS FOR THE DECISION

INTRODUCTION

[2] This hearing concerned appeals against three planning instruments that relate to an area at the end of the Ihumātao Peninsula encompassing land to the west of Oruarangi Road and to the west of Auckland International Airport. The area was termed in the evidence as the *Western Gateway Area.* The Ihumātao Peninsula generally forms part of what is referred to as the *Mangere Gateway Heritage Area* (**MGHA**).

[3] The MGHA has recently come under increasing development pressure for a number of reasons, including:[1]

[a] Continued expansion at Auckland International Airport, including the proposed second runway, and expansion of airport commercial activities to the north of the second runway as provided for under the Airport Designation;

[b] The associated need to plan for the realignment of several public roads which will be affected by the development of the second runway;

[c] The upgrading of the Mangere Wastewater Treatment Plant and the establishment of an Odour Buffer Area, which creates the opportunity for potential development of land for business purposes in the Kirkbride Road area;

[d] The rapid development of business land in the vicinity of the Airport, and of the emerging shortage of business land available in Auckland, particularly for large-scale business uses such as distribution activities and warehousing in close proximity to major transport infrastructure; and

[e] The desire by the Council to reduce employment related trips out of the Mangere area by increasing employment opportunities within the MGHA.

[1] Reaburn, EIC, at [5.3]

[4] As a consequence of the development pressure, the then Manukau City Council initiated Plan Change 14 (**PC14**) which introduced urban zones – the Airport Activities Zone and the Mangere Gateway Business Zone. To accommodate PC14, the Manukau City Council applied to the then Auckland Regional Council for a change to the Metropolitan Urban Limit (**MUL**). Change 13 to the Auckland Regional Policy Statement was notified to give effect to the MUL change. Both PC14 and Change 13 were notified on 18 October 2007.

[5] Following the Councils' decisions there were a number of appeals to this Court. All but the appeals which are the subject of this hearing have been settled resulting in consent orders. As a consequence, the MUL has been extended out to a line along Oruarangi Road. Thus, the subject land which is to the west of Oruarangi Road is outside the MUL.

[6] The appellants wish to have their land included within the MUL and some of the appellants have sought a change of zoning of their land from the current rural zoning.

[7] In addition to the current rural zoned land of the appellants, the land to the west of Oruarangi Road contains the Otuataua Stonefields Historic Reserve (**the Stonefields or OSHR**). To the west and north, the land is bounded by the Manukau Harbour coastline.

[8] It is accepted by all that the land to the west of Oruarangi Road, as is all the land in the MGHA, is of special significance to Maori and also contains important historical associations to post-European settlement.

[9] Recognising the cultural and historical significance of the area and to protect and preserve the public open space and landscape characteristics of the appellants' land and the neighbouring Stonefields, the former Manukau City Council issued a Notice of Requirement (**NOR**) over the appellants' land on 18 October 2007. The NOR was for "*Otuataua Stonefields Passive Public Open Space and Landscape Protection Purposes*".

[10] The Council released its decision on the NOR on 27 March 2009. The appellants' whose land is subject to the NOR have appealed and seek the removal of their land from the designation and its cancellation.

[11] There are thus three major issues:

[a] The line of the MUL;

[b] The appropriate zoning of the appellants' land; and

[c] The cancellation of the NOR.

[12] It was common ground that there is a close relationship between Change 13, PC14 and the NOR. Thus it was appropriate that they be considered together. Further, there were a number of matters where we heard disputed evidence which relate to all three, such as cultural, historical, landscape, and the planning context. We propose to deal with the general matters first before assessing the merits of the competing planning options.

THE APPELLANTS AND THE SUBJECT LAND

[13] We attach as **Appendix 1** a map produced by Mr Reaburn, planning consultant for the Council, which shows the subject land.

The land belonging to the Ellett Interests

[14] Mr Ellett's family have farmed land owned by the Ellett Interests for approximately 147 years. These interests include:

[a] Mr Ellett himself;

[b] the Ernest Ellett Ryegrass Trust;

[c] Scoria Sales Limited; and

[d] Johnston Trust Quarry.

Parcel 1 – Ernest Ellett Ryegrass Trust

[15] Parcel 1 is a 5.61ha site owned by the Trust. It is relatively flat pasture land bounded by the Manukau Harbour to the west, Parcel 7 (owned by the Mendelssohn Estate) to the east, and Ihumātao Road to the south. To the north it is bounded by the Stonefields. The Elletts originally owned part of the Stonefields which were acquired by the then Manukau City Council in 1999.

[16] The land is zoned *Mangere–Puhinui Rural* and is subject to the NOR. The appellants seek a *Future Development (Ellett Holdings) Zone* or similar, the cancellation of the NOR, and that all the land be included within the MUL.

Parcel 2 – T R Ellett

[17] Parcel 2 is a 30.30ha site owned by Mr Ellett. It is generally rolling pasture land bounded by the Manukau Harbour to the west, and the Ellett land to the southeast. It is zoned *Mangere–Puhinui Rural.* The appellants seek a *Future Development (Ellett Holdings) Zone* or similar, and that all the land be included within the MUL.

Parcel 3 – Scoria Sales Limited & Parcel 4 – Johnston Trust

[18] Parcel 3 is a 24.58ha site owned by Scoria Sales Limited, Mr Ellett being the sole director. Parcel 4 is a 6.59ha site owned by the Trust. Together, these parcels contain an active quarrying operation. Parcel 3 adjoins the Ellett land to the north and extends to the coastal edge to the southwest. Parcel 4 adjoins land owned by the Auckland International Airport to the southeast, which has recently been designated for airport purposes. This land is zoned *Mangere–Puhinui Rural.* The appellants seek to rezone the land to *Future Development (Ellett Holdings) Zone*, or similar, and that all the land be included within the MUL.

Parcel 5 – T R Ellett

[19] Parcel 5 is a 14.2ha site owned by Mr Ellett. It is generally flat pasture land bounded by Ihumātao Road to the north, the quarry to the southwest, and other Ellett land to the northwest. This land is also zoned *Mangere–Puhinui Rural.* The appellants seek to have it rezoned *Future Development (Ellett Holdings) Zone*, or similar, and that it be included within the MUL.

Parcel 6 – T R Ellett

[20] Parcel 6 is a 0.45ha residential site owned by Mr Ellett, containing Mr Ellett's house. It is zoned *Mangere–Puhinui Rural.* The appellant seeks the same relief as the owners of Parcels 2 – 5.

The land belonging to the Mendelssohn Estate

Parcel 7 – E Mendelssohn Estate

[21] Parcel 7 is a 9.06ha site owned by the E C Mendelssohn Estate and has been in the Mendelssohn family for over 50 years. It is relatively flat pasture land bounded by Parcel 1 (owned by the Ellett Rygrass Trust) to the west, Ihumātao Road to the south, and the Stonefields to the north.

[22] The land was originally farmed as a 55 acre dairy block. A large part of the original farm was acquired by the then Manukau City Council in 1999 to form part of the Stonefields. The remaining 9.06ha of the land is subject to the NOR.

[23] The land is zoned *Mangere–Puhunui Rural*, but the Plan reserves a controlled activity subdivision opportunity for the land to be divided into two parcels, without which the subdivision would be non-complying. The subdivision entitlement was provided by Variation 5 as part of the agreement with the Manukau City Council acquiring the balance of the land for the Stonefields.

[24] The appellants seek the cancellation of the NOR. The Estate is not a participant in the Change 13 (MUL) or PC14 (Zoning) proceedings.

The land belonging to Gavin H Wallace

Parcel 8 (including the adjacent parcel) – Gavin H Wallace Limited

[25] Parcel 8 is a 24.2ha site owned by Gavin H Wallace Limited. The Wallace family have had a long association with the land for some 145 years. In 1999 a significant portion of the land was acquired by the then Manukau City Council for the Stonefields. This parcel is generally flat to gently rolling pasture land, bounded to the north by the Stonefields, and to the southeast by Oruarangi Road. This land is zoned *Mangere-Puhunui Rural* and is subject to the NOR.

[26] It will be noted from Appendix 1, that there is an adjacent parcel of land (identified as "Wallace") owned by Gavin H Wallace Limited which is also zoned *Mangere-Puhunui Rural*, but it is not included in the NOR. It is bounded on the east by the Papakainga Zone housing land. It was the intention of the Council to zone this adjacent parcel of land residential, but the proposal was not carried through to the notified version of PC14.

[27] By its appeal, Gavin H Wallace Limited challenged the decisions of the former Manukau City Council to designate its land, and of the former Regional Council to exclude the land from the MUL. At the hearing it was contended, subject to jurisdictional objections, that the appropriate zoning for this land was a Future Development Zone.

Other Parties

Makaurau Marae Maori Trust Board Incorporated (Makaurau)

[28] Makaurau filed two appeals relating to Change 13 (MUL) and PC14. The appeals challenged the decisions of the Auckland Regional Council and the Manukau District Council respectively. Settlement was reached on all matters, with the exception of the Western Gateway Area.

[29] Before us, Makaurau opposed any urban development on the subject land and any extension of the MUL to include the subject land.

Te Kawerau Iwi Tribal Authority Incorporated (Kawerau)

[30] Kawerau were a Section 274 party to the appeals relating to Change 13 and PC14. Before us, they also opposed any urban development on the subject land and any extension of the MUL to include the subject land.

The New Zealand Transport Agency (NZTA)

[31] The NZTA is a Section 274 party with respect to two of the appeals filed against Change 13 and PC14.

[32] The NZTA's principal concern was the potential traffic and transportation effects of the proposed re-zoning of land as Future Development Zone.

GENERAL MATTERS

[33] We now propose to deal with the general matters that pertain to all three planning instruments.

Statutory Framework

[34] Mr Reaburn, Mr Putt and Mr Jarvis (planning witnesses) analysed the rezoning of the land in terms of what is referred to as the ***Long Bay*** tests[2] and also as these are set out by the Court in ***Clevedon Cares***[3] for the post 2005 Amendment to the Resource Management Act 1991. Those cases set out fully the now well settled framework which begins with Sections 72 – 76 and incorporates, by reference, Sections 31 and 32.

[35] Those cases related only to district plan changes. In this case we are also considering a change to the Regional Policy Statement and hence Section 30 (Regional Functions) and Sections 59 – 62 (relating to Regional Policy Statements) are also relevant to the shift in the MUL.

[36] In terms of the NOR, Section 171(1) of the Act sets out a list of matters to have regard to when considering the effects on the environment of allowing the requirement.

[37] Finally, recognising the structure of the Act, Part 2 matters provide overarching directives to be considered in terms of all of the proposed planning provisions.

[38] We propose to discuss the relevant statutory provisions in more detail, where appropriate, when we deal with each of the proposed planning instruments.

Planning Documents

[39] In the Planners' Joint Witness Statement (JWS) it was agreed that the Auckland Regional Policy Statement (***ARPS***) and the Auckland Council District Plan (Manukau Section) (***District Plan***) contained the primary assessment framework for addressing the issues. The relevant provisions were included in the Agreed Bundle of

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[2] ***Long Bay Okura Great Parks Society Inc. v North Shore City Council***, A078/2008
[3] ***Clevedon Cares Incorporated & Ors v Manukau City Council*** [2010] NZEnvC211

documents prepared by the parties. Towards the end of the hearing Mr Reaburn provided an updated version of relevant provisions, particularly the recently operative version of Change 6 to the ARPS, as agreed in the Planners JWS.

[40] Reference was also made to provisions in the New Zealand Coastal Policy Statement (**NZCPS**) in relation to section 6(a) of the RMA and the natural character of the coastal environment, and to the Auckland Regional Plan: Coastal.

Auckland Regional Policy Statement (ARPS)

[41] The updated operative provisions provided to the Court were dated 21 March 2012. The Chapters referred to included:

[a] *Chapter 2 – Regional Overview and Strategic Direction, and in particular Sections 2.2 (The Setting – Auckland Today); 2.3 (The Auckland Regional Growth Strategy); and 2.6 (The Strategic Direction)*
Chapter 2 of the ARPS states that the function of that chapter is to integrate the management of the various components and specifically address growth and development issues. The subsequent chapters deal with the effects of growth and development on the natural and physical resources. These other chapters provide for the management of specific resources.

Subsequent chapters highlighted in this case were:

[b] *Chapter 3 – Matters of Significance to Iwi*
A suite of directions to give regional effect to the strong directions relating to Maori matters in Part 2 of the Act.

[c] *Chapter 6 – Heritage*
Directions aimed at protecting and providing for heritage matters as required by Part 2 of the Act.

[d] *Chapter 7 – Coastal Environment*
Directions relating to the preservation of the natural character of the coastal environment and protection from inappropriate development, and public access, as required by Part 2 of the Act.

Auckland Council District Plan (Manukau Operative Section)

[42] Relevant Chapters included in the Planners' JWS included:

[a] Chapter 2 – the City's Resources

[b] Chapter 3A – Tangata Whenua

[c] Chapter 6 – Heritage

[d] Chapter 16 – Future Development Areas

[e] Chapter 17.3 – Mangere-Puhinui Rural Area

[f] Chapter 17.13 – Mangere Gateway Heritage Area

[43] The District Plan provisions give effect to the NZCPS and the ARPS. Chapters 3A and 6 particularly recognise the significance to be accorded to Maori matters including the relationship of Tangata Whenua and their taonga, culture and traditions. The wide range of matters encompassed in the Act's definition of historic heritage is also recognised in Chapter 6. Many of these district-wide provisions are given local meaning in Chapter 17.13 – Mangere Gateway Heritage Area which contains extensive provisions detailing the significance of the area's heritage, public open space, social, cultural and natural resources and by reference to the comprehensive list of resources and features included in 17.13.1.1. Chapter 17.3 contains the current rural zone provisions applying to the subject land and Chapter 16 details the manner in which this District Plan identifies areas for future development and the structure planning process to be undertaken prior to specific zonings and development.

LANDSCAPE, CULTURE AND HERITAGE

[44] Two landscape architects gave evidence – Ms Absolum, called by the Council, and Mr Scott, called by the landowner appellants. As directed, the landscape architects caucused on 24 November 2011. As a consequence of the caucusing, they produced a joint landscape architect witness statement which set out the agreed key facts and the areas where agreement was reached.

Agreement Key Facts – Cultural, Heritage, Landscape and Context

[45] The following facts were agreed by the landscape architects:[4]

> **2 AGREED KEY FACTS**
>
> ...
>
> **Characteristics of the subject land**
>
> The majority of the land is within the Coastal Environment.
>
> The majority of the land has a gently rolling, subtle landform, with remnant volcanic cones within the OSHR and a working quarry on parcels 3 and 4, shown on Figure 1.
>
> The subject land is currently used for farming purposes, apart from the quarry, with public access provided for on the OSHR.
>
> The landscape character is open, rural, gently rolling with few buildings, extensive dry stone walling, scattered specimen trees, copses and shelterbelts. There are no permanent water courses on the subject land.
>
> The long history of occupation and use of the subject land, by both Maori and European settlers has left numerous tangible heritage features across the subject land.
>
> The history of occupation by Maori and European settlers has also left intangible associations and meanings ascribed to the land or parts of it. These are described in the evidence of other expert witnesses.
>
> **Context of the subject land**
>
> The land lies between the Manukau Harbour to the north-west, west and south-west, the Makaurau Marae and Papakainga to the north-east and recently rezoned and designated land which will, in due course, be developed for business development to the east and airport expansion to the south-east.
>
> The proposed Mangere Gateway Heritage Route passes along the boundary of the subject land and accesses the OSHR.
>
> Te Araroa Walkway passes through the subject land, utilising, the recently reinstated coastal edge of the OSHR.

[46] The cultural and heritage characteristics, although largely agreed, occupied a considerable amount of the evidence and deserves some comment. Mr Murdoch, a historian called by the Council, described how the wider Mangere-Puhunui area has rich human historical and cultural associations that have developed over eight centuries.

[47] He said:[5]

[4] Joint Landscape Architects Witness Statement
[5] Murdoch, EIC, at [3.1]

> 3.1 In my opinion the undeveloped Ihumātao portion of [the area] is collectively a cohesive cultural heritage landscape of regional significance ...

[48] Mr Murdoch then set out in some detail an historic narrative that identified both Maori and European associations with the land.

[49] We heard evidence from an archaeologist, Dr Clough. He described in detail the archaeological values of the area and concluded:[6]

> 9.1 In reviewing the archaeology and history of the general "Mangere Gateway Heritage Area", it is evident that this is a rich historic heritage landscape interweaving numerous strands of history from the earliest settlement of New Zealand, to the earliest European contact and beyond, incorporating evidence for pre-European subsistence and cultivation, the response of Maori to the introduction of European crops, animals and farming practices, for the activities of missionaries, and for those of early European farmers and their descendants still living on the land today.

[50] The Maori dimension is of particular importance. There was no dispute that the subject lands are part of a peninsula which has significance to Maori. We heard a considerable quantity of evidence telling us of the Maori perspective. A summary of that evidence is attached as **Appendix 2**.[7]

[51] As will be seen from **Appendix 2**, a number of Maori witnesses gave evidence at a special sitting of the Court on the Makaurau Marae. This included a statement of evidence by Te Warena Taua, chairman of Te Kauwerau Iwi Tribal Authority Incorporated. He outlined the Maori associations with the subject land. Importantly, Mr Taua identified a number of waahi tapu sites, some of which were situated on, or partly on, the subject land. These sites included:[8]

- The sacred mountain, Maungataketake, also known as Te Ihu a Mataoho;
- Ancient and contemporary (20th century) burials;
- Ancient and more recent (19th century) pa sites;
- Battle sites;
- Subterranean caverns that contain ancestral taonga –

...

[6] Clough, EIC, at [9.1]
[7] Appendix 2, headed "Summary of Evidence Relating to Maori Issues"
[8] Taua, EIC, at [31]

[52] He then said:[9]

> 33 Furthermore, given that the subject site is part of a wider network of sites of significance, and that it contains a number of interrelated waahi tapu, from the perspective of tangata whenua the subject area is considered waahi tapu in its entirety.

[53] We acknowledge Maori have strong associations to the land subject to these appeals and that there are particular sites of special significance. However, it is also clear from the evidence that Maori lived, worked, fought and played there. It was at all times a working and lived in landscape which seems incompatible with the whole area being of waahi tapu status.

[54] Mr Taua was cross-examined on this at the Marae. In our view his answers were general and not specific. He tended to exaggerate at times and habitually refused to make even the slightest concession. Even if the whole area is waahi tapu as he claimed, it is still a working and lived in landscape and the waahi tapu status needs to be considered in this context.

[55] Ms Absolum considered that the Ihumātao Peninsula, including the subject land, the Stonefields and the Papakainga constitutes a Heritage Landscape that is at least of regional and possibly national significance. She said:[10]

> 5.21 In my opinion the Ihumātao Peninsula, including the land subject to these appeals, the OSHR and Papakainga constitutes a heritage landscape that is of at least regional and possibly national significance. I base this opinion on the following evidence:
>
> - Both the archaeological and historical record indicate that the volcanic soils of the Ihumātao Peninsula were intensively cultivated over the generations, and that the resources of the adjoining marine environment provided a varied and bountiful harvest.
>
> - The only areas that were not cultivated were the defensive areas of the cone pa, the settlements themselves, and sacred burial areas, several of which lie within the NOR land and on the land surrounding Maungataketake.
>
> - The evidence of both Mr Murdoch and Dr Clough that the Wesleyan Mission Station, established in 1847, is significant as one of the few archaeologically intact mission sites on the Tamaki Isthmus that retains its rural context and farmstead.

[9] Taua, EIC, at [33]
[10] Absolum, EIC, at [5.21]

- Ihumātao retains a special place in the history of the Tainui people because of its direct association with Te Wherowhero and the foundation of the Kingitanga (Maori King Movement).

- The Ellett, Montgomerie (later Mendelssohn), Rennie and Wallace properties have a historical coherence in that they were all developed and farmed in a similar manner for well over a century, and remained in the ownership of the same families for most of this time.

- The large number of scheduled and listed heritage sites and items found in the area, and the range of early vernacular farm buildings, including barns and cowsheds, as well as an unusually large number of former windmill sites and cisterns.

- The high potential for archaeological remains surviving under the pasture throughout the subject land, particularly on the Ellett block (Parcels 2, 5 and 6).

- The archaeological, architectural, cultural, historic, scientific and technological values associated with the natural and physical resources of Ihumātao that relate to both the Maori and the European occupation and use of the land.

- The historic farmscape which, as well as the scheduled buildings, also contain the extensive 19th century dry stone wall field boundaries and a number of historic trees associated with existing and former house sites.

- The extensive regionally significant coastal edge which retains a high degree of natural character.

[56] It would appear from the Joint Witness Statement that there was disagreement between the landscape architects as to the extent to which the heritage, cultural and archaeological values identified by the expert witnesses, contribute to the subject land being identified as a heritage landscape. However, that apparent difference evaporated at the hearing.

[57] First, in his evidence Mr Scott acknowledged the basis of Ms Absolum's opinion.[11] He said:[12]

> 36 To this extent I support the respondent's evidence that the landscape (subject to these appeals) is dominated by its historical associations and its heritage features.

[11] Scott, EIC, at [35]
[12] Scott, EIC, at [36]

[58] He went even further in his evidence as is evidenced from this exchange from the Court:[13]

QUESTIONS FROM THE COURT:

Q. Mr Scott, listening to the cross-examination from Mr Allan and from Mr Enright, I got the clear impression that as far as you are concerned as an expert witness you are in agreement with the heritage and cultural values that have been, and archaeological values, that other witnesses had averred to?

A. Yes.

Q. And in fact you don't profess to have any of those areas of expertise?

A. No.

Q. And to the extent that there are cultural and archaeological and historical nodes in the subject land, you accept that to that extent it is a heritage landscape?

A. Yes.

Q. The next question is of course whether it is a heritage landscape which is elevated to a s 6 status, are you able to give an opinion on that?

A. I think it does have a s 6 status –

Q. Yes, thank you.

A. - yes. Well I'm sure it does, yes.

Q. You are therefore in complete agreement with Ms Absolum?

A. Yes.

Q. And you defer to Dr Clough and Mr Murdoch?

A. Yes.

Q. The difference between you and the other witnesses that I have mentioned is that it being a heritage landscape they say it should be conserved –

A. That's correct.

Q. - and conservation, total conservation should apply>

A. That's correct.

Q. Whereas you say no, some development should be allowed providing adequate protection is made for the heritage, historical, and archaeological values?

A. That is correct.

Q. So that's the difference between the two of you?

A. And it's more than protection. It's actually enhancement.

[13] Transcript, Volume 2, at pages 308 - 309

[59] Thus, there is no dispute as to the importance of the historical, cultural or heritage associations in the landscape. In addition to Ms Absolum, Mr Murdoch and Dr Clough sought that the Court determine the land, the subject of the appeals, to be part of a *Cultural Heritage Landscape*. And indeed, Mr Scott appeared to acquiesce to such a suggestion.

[60] The construct *Cultural Heritage Landscape* is of relatively recent origin. Its use as a concept in landscape analysis stems from a trial study conducted in Bannockburn, Central Otago, commonly referred to as the *Bannockburn Heritage Landscape Study* published in a monograph in September 2004.[14]

[61] The primary purpose of the Bannockburn Study was to trial a newly developed methodology for investigating heritage in a landscape scale. The monograph described its content:

> ***Identification.*** The study offers an understanding of the landscape both spatially and as it has evolved over time through human interaction. It identifies relationships between physical features in the land, both where these evolved simultaneously and where they evolved sequentially. It also provides information about the relationships between people and the landscape, both in the past and today. It attempts to identify key heritage features, stories and traditions in the Bannockburn landscape.

[62] It defines heritage landscape as:

> A **heritage landscape** is a landscape, or network of sites, which has heritage significance to communities, tangata whenua, and/or the nation.

[63] The authors of the monograph entered into a complex and detailed interdisciplinary methodology of spatial analysis, using connectivities between super-imposed layers of history.

[64] This division of the Court, although differently constituted, has held that it is open to us to find, on sufficiently probative evidence, that a landscape, or part of it, is a heritage landscape under Section 6(f) of the Act.[15] However, it was stressed that decision-makers should exercise a degree of caution before determining such a landscape to be a heritage or cultural landscape and to recognise the need to avoid

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[14] Janet Stephenson, Heather Beauchop, and Peter Petchey, *Bannockburn Heritage Landscape Study*, Wellington, Department of Conservation, Te Papa Atawhai, 2004

[15] See ***Wairakei Valley Preservation Society Incorporated & Ors v Waitaki District Council & Otago Regional Council***, C58/09, at [224] – [231], and ***Clevedon Cares Incorporated v Manukau District Council***, NZEnvC211, 2010

double counting of Maori issues. Maori issues are specifically provided for in Sections 6(e), 7(a) and 8 of the Act.

[65] Another division of the Court, led by Judge Jackson, signalled the following note of caution:[16]

> [208] The phrase 'heritage landscape' is often used when speaking of the surroundings of historic heritage ... However, we consider this usage may be dangerous under the RMA where the word 'landscape' is used only in Section 6(b). Further, the concept of a landscape includes heritage values, so there is a danger of double-counting as well as of confusion if the word 'landscape' is used generally in respect of section 6(f) of the Act.

[66] On reflection we have difficulty in endorsing the concept as part of the RMA process for a number of reasons, including:

[a] *Heritage Landscape* is not a concept referred to in the Act;

[b] Outstanding landscapes and features are protected from inappropriate subdivision use and development by Section 6(b) of the Act;

[c] Maori values are recognised and protected by Sections 6(e), 7(a) and 8 of the Act;

[d] Historic heritage is protected from inappropriate subdivision use and development by Section 6(f) of the Act; and

[e] There are also other important matters provided for in the Act that would apply, such as matters relating to amenity, indigenous vegetation, natural character and coastal environment, that may at times be relevant to a given situation.

[67] To introduce a new concept not recognised explicitly by the statute would in our view add to the already complex web of the Act and make matters more confusing.

[68] Suffice it to say therefore, that in this case there is no dispute as to the importance of the historical, cultural or heritage associations in the landscape. There

[16] ***Maniatoto Environmental Society Incorporated v Central Otago District Council***, C103/09, at [208]

is no dispute about the importance of the coastal edge. There is no dispute as to the open rural character and amenity.

[69] There is no dispute as to the context of the subject land. It lies between the Manukau Harbour to the northwest, west and southwest; the Makaurau Marae and Papakainga to the northeast; and recently rezoned and designated land which will, in due course, be developed for business development to the east and airport expansion to the southeast.

Areas of Disagreement

[70] What is disputed is the extent to which the acknowledged landscape, cultural and heritage values should prevent any prospect of the land being developed for urban purposes.

[71] On the one hand, the Council, supported by the Maori parties, with its suite of techniques, seek to protect landscape, heritage and amenity values by way of an overall development exclusion approach.[17] This suite of techniques will fundamentally lock up the land.

[72] On the other hand, Mr Scott identifies an opportunity to protect the sensitive characteristics of the subject land while enabling careful development through a long-term planning approach. He said:[18]

> 25 While, in my opinion, the subject land does comprise a relatively sensitive coastal and rural character, incorporating clear legibility of significant historic heritage and cultural values, therein also lies the opportunity. The opportunity, in my opinion, is that this is an appropriate time to reconsider this regressive landscape planning and management option in favour of a positive, creative and innovative approach to the long term planning and management of the subject land.

[73] Mr Scott pointed out that the current zoning enables some unacceptable development, particularly in relation to land coverage opportunities by built structures (e.g. greenhouses) given the heritage and landscape characteristics.[19] He also made the point that the subject land, in a landscape sense, is very much located within an urban context.[20] In addition to the obvious infrastructural focus of the Auckland

[17] Scott, EIC, at [24]
[18] Ibid, at [25]
[19] Ibid, at [24]
[20] Ibid, at [27]

Airport and its national importance as the nation's primary port, is the auxiliary business development provided for by PC14 and earlier District Plan zone changes on the eastern side of Oruarangi Road.[21] He concluded:[22]

> 30 I also recognise and support "fresh voices" communicating a new relevance to the current perception of the nation's landscapes, and how landscape is an important element to us all as individuals and as diverse and interacting different cultural and social groups and therefore as a society. **In this sense, I have no debate with much of the respondent's heritage and archaeological assessments, including many of the perceptions and assertions underlying the assessment of the landscape and visual issues. However, this does not require the land to be locked away.**
>
> *[our emphasis]*

[74] Mr Scott then undertook a detailed land use and landscape planning, design and management strategy which he put forward as "*a realistic development scenario*" [23] for the subject land. This strategy recognised the urban, coastal and open space contextual location; the biophysical, visual, cultural and heritage sensitivity of the land; and the effects of development. He concluded:[24]

> 119 ... This landscape is significant. The opportunity for the collective land holdings "sandwiched" between the two critical land use entities – the urban/infrastructural (airport and associated service industry) and the historic/heritage landscape of the OSHR – is yet to be imagined. Our view of the world can be too simple and so reductionist that we often avoid the exploration of loftier options. This is the interface of significant open space, heritage, private rural holdings and significant infrastructure.
>
> 120 In my opinion, to pause and preserve the NOR land as public open space does not do justice to the outstanding future use, development and management opportunity for the area. I support the requests for new zones and inclusion within the MUL as set out in the appellant's relief.

[75] Ms Absolum, Mr Murdoch and Dr Clough all supported the suite of techniques put forward by the Council to protect the subject land from development. Ms Absolum considered the protection of the land would:

> [a] be a perfect response to the relationship of the proposed heritage route and the Stonefields;[25]

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[21] Ibid, at [28]
[22] Ibid, at [30]
[23] Ibid, at [117]
[24] Ibid, at [119] – [120]
[25] Absolum, EIC, at [6.7]

[b] would ensure the retention of clear visual connections for the residents and visitors;[26]

[c] would enhance the interface between the business development zone to the east of Oruarangi Road and the Stonefields;[27] and

[d] would provide an open space frontage to the Stonefields which would ensure the open, expansive and strongly rural character of the Stonefields and enhance the relationship between the Stonefields and important heritage features.[28]

[76] In summary, Ms Absolum said:[29]

> 6.7 In summary, the NOR land forms the foreground of public views to the OSHR from the southern part of Oruarangi Road and from Ihumatao Road. As such, it complements the open pastoral character of the OSHR and in fact, carries many of the same landscape features, such as mature trees, stone boundary walls and grass paddocks. In order to protect the integrity of the OSHR it is appropriate to keep this foreground land similarly open and rural in character. In other words, the introduction of any sort of development on to the land, other than that directly related to the appreciation of the important cultural heritage characteristics of the OSHR and surrounding area, would be inappropriate.

[77] In her rebuttal evidence, Ms Absolum criticised the long-term planning approach of Mr Scott. She was of the view that despite Mr Scott's comprehensive descriptive material, at no point in his evidence does he demonstrate a causal link between his description of the subject land and its context and the Preliminary Development Opportunities exhibited to his evidence.[30]

[78] Ms Absolum concluded:[31]

> 2.20 In summary, by my reading of Mr Scott's evidence, he has concentrated his attention so strongly on the degree to which the landscape of the nine parcels of land has changed since human occupation of the area began, that he has lost sight of heritage, rural, open space and amenity values inherent in the landscape of today. While we both acknowledge the inevitable changes about to occur in the landscape context of the subject land, as a result of settled parts

[26] Ibid, at [6.3]
[27] Ibid, at [6.6]
[28] Ibid, at [6.6]
[29] Ibid, at [6.7]
[30] Absolum, Rebuttal Evidence, at [2.3]
[31] Ibid, at [2.20] – [2.21]

> of Plan Change 14 and the Airport expansion programme, Mr Scott has seen this as sufficient reason to propose extending intensive urban development across the appeal area.
>
> 2.21 I remain fundamentally opposed to this approach, because of the reasons set out in my evidence in chief.

[79] We do not agree with Ms Absolum's criticism that Mr Scott has lost sight of heritage, rural, open space and amenity values inherent in the landscape today. Those values do not necessarily mean that the landscape has to be protected from all urban type development. The Bannockburn Report, after finding the area was an important heritage landscape, then asked what the implications of such findings should be. Referring to the Conservation Act and ICOMOS, the authors observed:[32]

> The practice of conservation ... is usually applied to historic places which are limited in extent – most often a building or cluster of buildings, but occasionally a pa site or other archaeological feature. It has rarely, from our knowledge, been applied at a landscape scale except possibly where the entire area is managed for conservation purposes (e.g. Bendigo).
>
> ... We consider that it is unrealistic to expect the entire [Bannockburn] area to be 'conserved' (in the preservation sense), because it is a living landscape. People have always used the land to make a living and to live, and must be able to continue to do this. It is not possible to regard it simply as a heritage artefact – it is simultaneously a place in which people have social, economic, and cultural stakes. While there are particular features, nodes, networks, and spaces that may require a conservation approach, we believe that this is inappropriate for a whole landscape.

[80] That approach reflects the approach taken by Mr Scott. We consider that sympathetic development which protects specific heritage, cultural and historic values, and which does not detract from the Stonefields, could be undertaken under the right planning regime. Such a regime needs to ensure that the development would have to be such that the area remains an appropriate buffer to the Stonefields from the business development proposed to the east of Oruarangi Road. This would mean providing for areas of open space and protecting the coastal environment. Such a regime would reflect the fact that this is a living landscape.

Part 2 Assessment

[81] We need to be satisfied that such a finding is in accordance with the single purpose of the Act – sustainable management. This term is defined in Section 5 of the Act and that definition is informed by the remaining sections in Part 2.

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[32] Janet Stephenson, Heather Beauchop, and Peter Petchey, *Bannockburn Heritage Landscape Study*, Wellington, Department of Conservation, Te Papa Atawhai, 2004, at pages 100 - 101

[82] Part 2 of the Act involves an overall broad judgment of whether or not some form of constrained development promotes the sustainable management of natural and physical resources.

[83] In our view the protection afforded under Section 6 of the Act has been overstated by the Council witnesses. The protection is from *inappropriate subdivision, use, and development.*

[84] With regard to Section 6(a) of the Act, the protection is for the natural character of the coastal environment. A carefully and constrained development could be undertaken, that is sensitive to and protects the character of the coastal environment.

[85] The protection of Maori relationships under Section 6(e) of the Act is already largely provided for on the Stonefields Reserve. The evidence establishes that by far the majority of identified archaeological and Maori spiritual sites are located there. Those that are located on the subject land are more widely dispersed, and could be catered for by sensitive development. In fact, by cautious and thoughtful development, their status and historical association could be enhanced.

[86] Identified heritage values under Section 6(f) are similarly, in part, protected by the Stonefields Reserve. The heritage characteristics of the subject land could also be protected, provided the land is developed in a manner that is sympathetic to relevant heritage aspects.

[87] Amenity and landscape values could equally be accommodated by appropriate development. We discuss the parameters of such development later in this decision. We are satisfied that, subject to the constraints imposed by those parameters, and the need for them to be satisfied in any Plan Change or resource consent application, that future urban development could satisfy relevant directions contained in Sections 6, 7 and 8 of the Act.

[88] This would, unlike a development exclusion approach, enable the owners of the land to also provide their social and economic well-being in accordance with Section 5 of the Act. This would also enable the value of the land to reflect its potential for appropriate development.

Overall finding on Landscape, Culture and Heritage

[89] We therefore find that a degree of sensitive urban development, appropriately constrained, would better give effect to the single purpose of the Act, than a total restraint on future development. We discuss the appropriate constraints later in this decision.

SHOULD THE MUL BE EXTENDED?

[90] The ARPS, as amended by Change 6[33] provides for the containment of urban activities within the MUL. While *Urban Activities* and *Rural Activities* are defined in the Policy Statement, the case law[34] reflects a continuing debate as to what is an *Urban Activity* or a *Rural Activity*, and therefore allowed outside the MUL.

[91] The definition of MUL in the ARPS is:

> ... the boundary between the rural area and the urban area. The urban area includes both the existing built-up area and those areas committed for future urban expansion in conformity with the objectives and policies expressed in the Regional Development chapter of the RPS. The metropolitan urban limits are delineated on the Map Series 1, Sheets 1 – 20. Also see definitions of Urban area and Rural lands/area.

[92] The Strategic Policy of the ARPS provides a framework for limited extension to the MUL. Policies 2.6.2 provide the policy direction which is based upon not compromising the strategic direction of containment and intensification, supporting the integration of land use and transport, and avoiding adverse effects on the environment.[35]

[93] In accordance with *Methods 2.6.3 – Urban Containment*, the then Manukau City Council made a request to the Auckland Regional Council to change the ARPS which included, relevantly for these proceedings, extending the MUL northwards to include the Airport area and land to the north. The request was considered by the Regional Council on 27 August 2007. The Council agreed to accept the request in

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[33] Change 6 was made operative by the Council 21 March 2012

[34] See ***Roman Catholic Diocese of Auckland v Franklin District Council***, W61/04, 29 July 2004; ***Runciman Rural Protection Society Inc v Franklin District Council***, [2006] NZRMA 278; ***Roman Catholic Diocese of Auckland v Franklin District Council***, W18/07, 22 March 2007; ***Auckland Regional Council v Roman Catholic Diocese of Auckland***, [2008] NZRMA 409

[35] ARPS at page 2 – 32; *Reasons 2.6.4 – Urban Containment*

part, and Change 13 was notified on 18 October 2007 as a private change. The period for further submissions closed on 14 March 2008.

[94] A number of submissions sought that the Bianconi land (on the southeast side of Oruarangi Road) be included within the MUL, but the Council in its decision[36] decided not to include the land for the following reasons:[37]

> 4.26 We consider that the inclusion of this land in the MUL and its subsequent development will have adverse effects on the heritage resources of the area (including the Otuataua Stonefields) and will not appropriately provide for the relationship between the Makaurau Marae and its peoples relationship with their ancestral lands. We consider that the Makaurau Marae is a rare if not unique resource in the Auckland Region as its relationship with its ancestral land is largely intact. The surrounding land has not been significantly developed and we recognise that this relationship is under pressure from development in the airport area. We heard considerable evidence from the Marae about the importance of the Marae peoples' relationship with the area and its landscape that was not challenged in our view.

[95] Appeals were lodged by the Bianconi submitters, and consent orders were made, reflecting negotiated agreements, resulting in the land being brought within the MUL. The result is that the MUL line now follows Oruarangi Road. The land is thus identified for urban purposes and is now zoned *Mangere Gateway Business Zone*. This together with the expansion of the *Airport Zone*, the second runway and associated service industry development, now effectively creates a hard edge to the current open space patterns of the subject land – save for a small and, in our view, ineffective buffer area within the Bianconi land.[38]

[96] All of the land northwest of Oruarangi Road falls outside the MUL. This constitutes the land, the subject of these appeals, a small piece of land purchased by the Council to be used as a reserve contiguous to the Stonefields and the Stonefields Reserve itself.

[97] Of the appellants, the Ellett Interests and Gavin H Wallace submitted on Change 13 seeking that their land be included within the MUL. The Council in its decision decided not to include the land, for the following reasons:[39]

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[36] See Decision Report, 17 November 2009 at [4.23] – [4.29]
[37] At [4.26]
[38] See Scott EIC, at [7]
[39] At [4.36] - [4.39]

4.36 We are satisfied on the basis of the evidence that this land should remain outside of the MUL. We consider that urban development on this land has the potential to have adverse effects on the landscape and heritage values in the area.

4.37 We also consider that the inclusion of this land will have adverse effects on the heritage resources of the area and specifically on the relationship between the Makaurau Marae and its relationship (and their peoples' relationship) with their ancestral lands. We consider that the Makaurau Marae is a unique resource in the Auckland Region in that its relationship with its ancestral land is largely intact and we recognise that this relationship is under pressure from development in the Airport area. We heard considerable evidence from the Marae about this relationship that was not challenged in our view.

4.38 We also consider that the landscape values associated with the coastal edge in this area together with the location and relationship of the Otuataua Stonefields are such that inclusion of the land within the MUL is not warranted.

4.39 We are also satisfied that we were not presented with any convincing evidence concerning the need for this land to be included within the MUL and note that a portion of this land is used as a quarry, the consent for which has some time yet to run. This activity is not compatible with urban development in our view.

[98] Hence, the appeals to this Court.

[99] We note that the Council in its decision, assessed Change 13 against *Methods 2.6.3* of the ARPS, and the relevant comprehensive provisions of the ARPS. Importantly, it found:

[a] The Airport is regionally significant infrastructure;[40]

[b] Because of the synergistic nature of modern airports and the related need for a broader range of activities in the Airport area, it is appropriate that the land within the existing Airport zonings and designations should be within the MUL;[41]

[c] There is a recognised shortage of business land in Auckland, especially for activities that require large sized sites;[42]

[d] The Airport is an appropriate location for such activities;[43]

[40] At [4.2]
[41] At [4.2]
[42] At [4.3]

[e] Some expansion of the MUL is generally consistent with the criteria set out in the ARPS and Change 13;[44] and

[f] It is not appropriate to extend the MUL into the area south of the Stonefields (the Bianconi and appellant's land), as to do so would have the potential to have significant adverse effects on the Marae.[45]

[100] It is the findings from the Council's decision that relate to the subject land that form the basis of the appeals. Clearly, the Council's panel of Commissioners found that urban development on the land has the potential to have adverse effects on:

[a] Landscape and heritage values;

[b] The relationship of Maori with their ancestral lands;

[c] The landscape values of the coastal edges; and

[d] The Stonefields.

[101] It is not surprising, that before us, by far the bulk of the evidence was directed at the Maori values, heritage and landscape issues and whether a development exclusion approach should be adopted, or whether the subject land should be zoned to allow for some development while protecting the sensitivities of the landscape.

Current Zoning and Usage

[102] The land is currently zoned Mangere – Puhunui Rural. Apart from the quarry operation, the land is largely used for grazing. We are satisfied from the evidence[46] that the size of the holdings are such that the current use is far from economic.

[103] Mr Hollis, a farm management consultant and registered valuer, carried out an assessment of other land use options, including:

[a] Pastoral farming;

[43] At [4.3]
[44] At [4.5]
[45] At [4.7] – [4.10]
[46] See T R Ellett, EIC; R G Hollis, EIC; J Blackwell, EIC

[b] Dairy support;

[c] Arable;

[d] Intensive food production; and

[e] Sheep farming.

[104] We summarise his findings:

[a] Farming in such close proximity to urban development and the International Airport has significant limitations and liabilities;

[b] The scale of the activity also makes farming uneconomic;

[c] The obstacles to farming are not only financial, with high rates relative to marginal returns, but also a growing environment somewhat hostile to normal farming activities;

[d] There is no possible return on capital for any farming enterprise.

[105] He concluded:[47]

> The areas being considered are already isolated, almost trapped within an environment of urban development on one side, the harbour and Otuataua Stonefields on the other, each with their own constraints to good farming. This is not conducive to the land being utilised economically for primary production.
>
> It is my conclusion that the subject farms are uneconomic with no viability in the foreseeable future. At best their future is hobby farming only.

[106] While Mr Hollis was cross-examined, there was really no dent made on his findings, which were effectively incontestable. Further, if, as is the most feasible, some form of intensive farming was undertaken, this would give rise to large buildings, such as glasshouses, which would not ensure that an open space character would be retained on this land.

[107] We conclude that the farms are uneconomic with no viability in the foreseeable future. Clearly, with the advance north and west of the Airport related

[47] Hollis, EIC, at page 17

land to provide industrial and commercial support to the Airport, this pocket of existing rural land has become sandwiched between that expansion and the Stonefields and the coast. It is therefore an anomaly.

[108] We are satisfied on the evidence, that to keep this relatively small piece of land outside the MUL would affect its value considerably, to the detriment of the owners.

Protectionism v Sensitive Development

[109] We have already discussed this debate in some detail where we found that some form of urban development, sensitive to the special landscape characteristics of the land, could be undertaken. We discuss the bounds of such development in the next part of this decision.

[110] Suffice it to say, we found that the witnesses for the Council and Maori appellants were too narrowly and intensively focussed on the subject land's heritage, cultural, archaeological and landscape values. Other potential land use scenarios were not adequately analysed. In our view, the evidence of the Council and the Maori appellants has underplayed the scale of the Airport and commercial development in contrast to, what they considered to be the main determinant, the landscape and heritage matters.

[111] We agree with Mr Scott,[48] that the heritage route will be the future connection that opens this *cultural treasure* to public attention. Such an opportunity could be extended to accommodate a range of appropriate high quality development opportunities set within an open space framework that identifies and respects the heritage features. As we make clear in the next part of this decision, such opportunities need to be constrained by appropriate controls. We consider, keeping the land outside the MUL would be too constraining in view of the continuous debate as to what is, or is not, an *urban activity*.

Is the current MUL line defensible?

[112] Again, we agree with Mr Scott, that the MUL in its current location, creates an anomaly in landscape management and land use terms.[49] The MUL does not relate to physical constraints in the landscape, such as a coastal edge, mountain range or

[48] Scott, EIC, at [22]
[49] Ibid, EIC at [12]

prominent ridge. Its inherent instability is exacerbated by the difference in property value that is created by allowing development on one side of the line and not on the other. If the property values become significant, those outside the line inevitably strive to be included.

[113] We agree that the close proximity of the land to the nationally significant infrastructure of the Airport and other urban activities will further exacerbate the unstable nature of the MUL in this landscape.

[114] The most defensible line for the MUL in this area is the coastal edge. The Stonefields would be protected by its reserve designation. The landscape and heritage characteristics of the subject land could be protected by an appropriate zoning of the land. However, because of the jurisdictional difficulties raised by the Council,[50] we are limited in the scope of these appeals to extending the MUL to include the Ellett land and the Wallace land, unless we invoke Section 293 of the Act. We conclude that the MUL line should be extended to include all of the subject land, which also includes the Mendelssohn land for which a direction under Section 293 will be necessary.

Should a shift in the MUL be restricted without appropriate zoning in place?

[115] In her opening submissions, Ms Dickey, counsel for the Council, said:

> ... a shift in the MUL should ... be restricted where there is no clear evidence-based zoning proposed to accompany it.

[116] In reply, counsel for the Wallace interests quoted the following passage from an earlier decision of this division of the Court in ***Clevedon Cares***:[51]

> [96] We are satisfied, that looking at the ARPS as a whole, the clear direction is that new urban development outside of the MUL ... requires a two-fold procedure. A district plan change preceded or paralleled by a change to the ARPS which, if approved, would ... shift the MUL ... This two-fold procedure would reflect the integrated management approach envisaged by the ARPS.

[117] We think the position is as stated in that quote. There is no fundamental reason why a shift in the MUL should not precede a change of zoning. Nor is that

[50] The Ellett and Wallace appeals only sought the MUL to be extended to include their land. The land owned by the Council and zoned MPRZ (shown as Parcel 9 on the plan at Appendix 1 to this decision) is not part of the subject land.
[51] [2010] NZEnvC211 at [96]

approach unprecedented, with the Long Bay area having been brought within the MUL some years before the specific zonings for its development were devised.

[118] We agree with Mr Casey QC, that there are two main reasons why in this case it is appropriate that the MUL shift precede, rather than parallel, the zone change, namely:

[a] While the land is proposed to be brought within the MUL now, it is not proposed to be released for development immediately. It would be premature to write into the District Plan a highly specific structure plan when actual development might not take place for up to a decade. The particular details should be devised closer to the time when the receiving environment would be better known;

[b] The shift is not being pursued by the territorial authority, but by private land owners. Should we hold that the MUL cannot be shifted in the absence of what amounts to a fully developed structure plan exercise, it would place an insurmountable hurdle to anyone other than a Council to seek its extension; and

[c] We would add a third reason – namely, that the extension sought by the appellants arises out of Change 13 which has been preceded by the request sought by the then Manukau City Council in accordance with *Methods 2.6.3*.

Should there be a thorough assessment under Method 2.6.3.3?

[119] The general answer to this is yes. Method 2.6.3.3 is the springboard for a local authority to request a Change. It was the basis for the Council to make the request in 2007. The request was assessed by the Council before notifying Change 13. Method 2.6.3.3 was also assessed by the Commissioners appointed by the Council to hear Change 13 at the first instance hearing. The Council's decision, together with the analytical findings in the many reports that have been put before us, form the background of this hearing. There has been a cumulative aggregation of data which is available to us.

[120] The findings contained in the decision of the Council are generally accepted, save for the finding that the MUL should not extend beyond the line sought as notified

in Change 13. Even that finding has, in part, been compromised by the consent orders bringing the Bianconi land within the MUL.

[121] This leaves just the subject land in issue. The challenge to the Council's decision is focussed on one underlying issue – whether the sensitive landscape and heritage characteristics are such, that the land should be protected from any form of urban development.

[122] We are satisfied that we have sufficient information before us to make an informed decision on that fundamental issue.

Application of our findings in the context of Part 2 and the ARPS

[123] The whole focus of the ARPS, and indeed the RMA itself, is to ensure that decision makers give effect to the single purpose of the Act – sustainable management. As we have said, this term is defined in Section 5 of the Act and that definition is inferred by the remaining sections in Part 2.

[124] By achieving the purpose of the Act, any proposal would:

[a] Assist the Council to carry out its functions of achieving integrated management of the natural and physical resources of the region;

[b] Assist the council to carry out is functions in relation to any actual or potential effects of the use, development, or protection of land which is of regional significance; and

[c] Has a purpose of achieving the objectives and policies of the Regional Policy Statement.

[125] We are required to be satisfied that excluding the subject land from the MUL better achieves the purpose of the Act than bringing it within the MUL. This involves the balancing of the landowner's interests in providing for their social and economic well-being, and providing urban zoned land against locking the land up from any urban development to protect heritage and landscape characteristics.

[126] We are conscious of the strong directions contained in Part 2 protecting historic heritage from inappropriate development;[52] and recognising and providing for the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga.[53]

[127] These strong directions are emphasised in the Strategic Objectives and Policies and other provisions of the ARPS. However, we are satisfied that Maori values and heritage characteristics can be provided for and/or adequately protected by sensitive development with appropriate constraints. This will, at the same time, enable the landowners to provide for their social and economic needs in accordance with Section 5 of the Act. A need which cannot be achieved while this land has a rural zoning because appropriate rural uses are not a viable option.

[128] To keep the land outside the MUL, with a rural zoning, would without further constraints, offer less protection to the characteristics protected by Section 6(e) and (f) of the Act. To lock the land up might indeed provide for Maori and heritage values. But it would not provide for the economic needs and well-being of the owners. By allowing sensitive constrained development, heritage and landscape characteristics can be protected while at the same time allowing the owners to provide for their economic well-being.

[129] We are also conscious of the strong directions relating to amenity and the coastal environment in Part 2 of the Act. These directions are also emphasised in the provisions of the ARPS. Again, we are satisfied, that some urban type development with proper constraints could adequately satisfy those directions.

[130] We accordingly find that an extension of the MUL to include the subject land would reflect the sustainable management provisions provided for in the framework of Part 2 of the Act.

[131] We consider it appropriate for all the subject land to be so included. This means that the Mendelssohn land would need to be activated by a notification under Section 293 of the Act. Accordingly, we make such a direction.

[52] Section 6(f) of the Act
[53] Section 6(e) of the Act

Overall finding on MUL

[132] For the reasons given we find that the MUL should be extended to include the subject land. We direct the Council, under Section 293 of the Act, to prepare, in consultation with all other parties to these appeals, a change to the Auckland Regional Policy Statement to amend the location of the MUL accordingly.

ZONING

Jurisdictional Matters

[133] As outlined earlier in this decision not all of the parties had requested a change to the zoning for all of the land.

[134] The appeals by the Ellett Interests sought a *Future Development (Ellett Holdings) Zone* or similar, for all of Parcels 1 to 6. The Planners' Joint Witness Statement[54] noted that the only direct rezoning outcome sought in appeals was in respect of the Ellett land south of Ihumātao Road, that is excluding Parcel 1 affected by the NOR. This reflected the submissions lodged with the Council which did not seek a change to the zoning of Parcel 1.

[135] The Mendelssohn appeal (Parcel 7) did not seek a change to the zoning.

[136] For the Wallace land (Parcel 8 and the adjacent land to the east) an amendment to the MUL notice of appeal was allowed by the Court to include a consequential prayer for relief that, should the Court decide to include the land within the MUL, the Court should then consider making;

> ... appropriate orders and/or directions as to the appropriate steps to re-zone the appellant's land.

[137] In its decision allowing the amendment the Court noted that the question of whether the Court had jurisdiction to make the order sought by the amendment was a matter to be decided at the substantive hearing.[55]

[138] In terms of the appeals filed the zoning options before us were to retain the current *Mangere –Puhinui Rural Zone (***MPRZ***)* on all of the land, or apply a *Future*

[54] Joint Witness Statement Planners, 8 November 2011, at [2]
[55] [2011] NZEnvC 336

Development (Ellett Holdings) Zone, or similar (**FDZ**), to some of the Ellett land (Parcels 2 -5).

[139] During closing submissions, in response to matters raised by the Court, all Counsel agreed that if the Court found that a zoning other than the current rural zone was appropriate for all of the subject land then Section 293 would be an appropriate way forward given the jurisdictional limitations.

[140] Therefore at this stage we propose to assess the appropriate zoning for all of the subject land affected by these appeals without being restricted by the jurisdictional limitations.

Zoning Evaluation

[141] The current MPRZ rules (Rule 17.3.10) allow, as a permitted activity, one household unit, farming, greenhouses, breeding and boarding of domestic pets, farmstay accommodation, horse riding clubs/schools, pig keeping, produce stalls, production forestry (more than 500m from the coast) and open space. The front yard requirement is 10 metres, the side and rear yards are 3 metres and the coastal setback is 30 metres. The height requirement is 9 metres. Building coverage is not controlled on sites over 5,000m^2, it is 10% for sites less than 5,000m^2.

[142] Mr Reaburn noted that under this rural zoning greenhouses are a potential use and that substantial greenhousing already exists in the area, although not on the subject land. He was concerned about substantial buildings for farming activities. Ms Absolum expressed similar concerns about the possibility of greenhouses.

[143] Mr Reaburn acknowledged that the current grazing activities may not be sustainable for much longer. He noted that the rural zoning potentially allows for significant building development. He considered that the major threat to the heritage, cultural, archaeological and landscape values would arise from more intensive development of the land.

[144] In terms of public access to the coast, the rural zoning only provides for enhanced access if subdivision occurs and Mr Reaburn confirmed that there are limited subdivision possibilities under the rural zoning for this land. Mr Reaburn also held concerns about whether the current MRPZ adequately addressed heritage,

cultural, archaeological and landscape values, noting in particular that the wahi tapu rules were weak.[56]

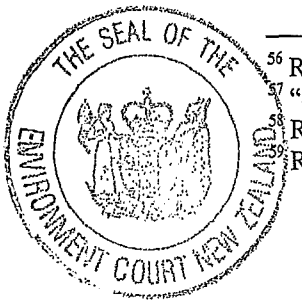
[145] Mr Reaburn advised that prior to his involvement in the plan change the Council had proposed zoning the land to FDZ. The section 32 report to PC 14 makes it clear that the then Manukau City Council's preference was for a wider area to be within the MUL and zoned for urban development. This included the Ellett land south of Ihumātao Road and the small part of the Wallace land adjacent to the Papakainga Zone. It did not include the NOR land. This expanded area was rejected by the then ARC. After lodging an appeal against the ARC decision the Manukau City Council decided to progress a reduced rezoning in line with the ARC decision rather than await the outcome of the appeal.[57]

[146] However in this hearing Mr Reaburn, whilst acknowledging the region's shortage of business land and the potential suitability of the subject land for business use from a "*purely physical and servicing point of view*"[58], stated that he

> ... came to the opinion, informed by my consultation, that the cultural, heritage and landscape values of this land made it inappropriate to continue with a Future Development Zone proposal.
>
> The same concerns have led me to the conclusion that re-zonings (and an associated MUL extension) to provide for an urban scale of development are not appropriate on any part of the land subject to these appeals. ... [59]

[147] Taking into account the research and reports which have culminated in the evidence presented at this hearing, Mr Putt proposed a FDZ as being more appropriate than the current MPRZ. In addition to a FDZ, primarily for the Ellett and Mendelssohn lands, Mr Putt also proposed specific zonings for other parts of the subject lands. This included the Main Residential Zone for the piece of Wallace land outside of the NOR and adjacent to the Papakainga Zone, and the Oruarangi Sub-Zone for the Wallace land affected by the NOR.

[148] A FDZ is already provided for in Chapter 16 of the District Plan. It is effectively a "holding" zone and it requires a structure plan to be prepared as the basis for a subsequent plan change and specific zoning provisions. The process is set out in



[56] Reaburn, EIC, at [8.5], [8.7], [9.5] – [9.7]
[57] "Special Note" at page 8
[58] Reaburn EIC at [8.8] and Rebuttal at [4.3(b)]
[59] Reaburn Rebuttal at [4.10] & [4.11]

Part 16.6.1.2 and has been used in a number of other parts of the Manuaku District to date.

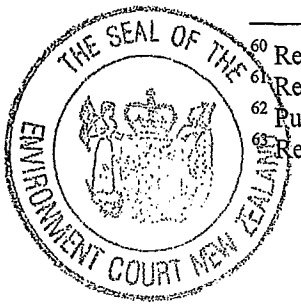
[149] We do not agree with Mr Reaburn when he states that the effects of urban zoning and development are almost certainly likely to be greater on the heritage, cultural, archaeological and landscape values of the subject area than would be the case with activities possible under the current MPRZ provisions.[60] Indeed we have some difficulty reconciling Mr Reaburn's concerns about the effects of permitted activities under the current rural zoning with his support for retaining the MPRZ on this land.

[150] Mr Reaburn accepted that visitor accommodation/tourist destination facility and clustered residential development were possibilities on some parts of the subject land, although he saw them as being at a rural or rural-residential density rather than an urban density.[61] This was repeated in his conclusion that there will likely be a future need to look at a targeted zoning for the land, as an improvement on the MPRZ, but that this would need to be more of a rural zone than an urban one.

[151] We think Mr Reaburn and Mr Jarvis exaggerate the degree of "urbanness" across all of the land that could follow on from a FDZ and a subsequent structure planning and plan change process. We are satisfied that a FDZ can adequately recognise the particular values of the land and provide for more appropriate management and development than is presently provided for under the MPRZ.

[152] On the basis of the information presented through this hearing we do not think it is appropriate to select specific urban zones for some parts of the subject land at this stage. The evidence indicates that the whole of the subject land would benefit from being included in a FDZ and made the subject of a more detailed structure planning exercise in the future.

[153] Mr Putt's amended FDZ illustrates how a set of provisions might be tailored to this land as a subzone and fit within the structure of the District Plan.[62] We recognise that Mr Putt prepared his provisions primarily for the Ellett lands but we consider that many of Mr Reaburn's criticisms are valid.[63] We agree that there needs to be a better recognition of the context of the subject land and the significant Maori, heritage,



[60] Reaburn EIC at [8.9]
[61] Reaburn, EIC, at [9.21]
[62] Putt, EIC, Appendix A
[63] Reaburn, Rebuttal, at [6.3] and [6.4]

coastal and amenity values. We do not consider it appropriate to signal that all of the subject land will be developed in the future for conventional urban activities or densities. However, neither do we consider it appropriate to signal that all of the subject land should be developed at a countryside living scale. As we have previously stated we consider that selective development will be required with some parts of the land likely to be able to be developed for urban activities and other parts managed as open space and lower intensity development. Whilst we understand the reason for the focus on traffic details included in Mr Putt's proposal, we consider that to be unnecessary and premature at this stage. It is more than sufficient to acknowledge that traffic and transport, along with other servicing matters, will be assessed, as usual, as part of a future structure planning process.

Overall finding on Zoning

[154] Accordingly, we find that all of the subject land would be more appropriately zoned FDZ; with the provisions being further amended to better recognise the significant values of the area; to provide guidance to the future structure planning process; and also to limit the interim use and management of the land. This will require amendments to the District Plan Chapter 16 – Future Development Areas.

[155] The Council is directed, under Section 293, to prepare, in consultation with all other parties to these appeals, a change to the Auckland Council District Plan (Manukau Operative Section) to provide for the subject land as Future Development Zone within Chapter 16 – Future Development Areas. The subject land is to be identified as a FDZ subzone and we suggest it could be described as "Ihumātao Peninsula". The amendments to the District Plan are to provide for:

[a] A succinct description and explanation of the subzone and its context which:

[i] Identifies and provides for the significant characteristics of the area, including:

- Maori cultural associations with the area, including wahi tapu;
- Heritage and historic associations;
- The Otuataua Stonefields Historic Reserve;

- Landscape and amenity values;
- The Manukau Harbour and coastal environment; and
- The Auckland International Airport and business zoned lands.

[ii] Requires that a future structure planning process for the subzone:

- Further identifies and recognises these significant characteristics;
- Determines the location and density of urban development selectively; with urban activities concentrated in nodes and areas of open space and lower intensity development; and
- Provides for efficient and effective servicing and an Integrated Transport Assessment (ITA).

[b] The FDZ Rules (16.10 to 16.14) to be amended as necessary to restrict the activities that might compromise the features and values of significance in the area, including limiting earthworks, land cultivation and large buildings (including greenhouses).

[c] Any consequential amendments to the District Plan.

[156] A FDZ in accordance with these directions will assist the Council to carry out its functions and is the most appropriate way to achieve the single purpose of the Act, as espoused in Part 2.

SHOULD THE NOR BE CONFIRMED?

Introduction and History

[157] On 18 October 2007, the then Manukau City Council issued a Notice of Requirement (**NOR**) for a designation for *Otuataua Stonefields Passive Public Open Space and Landscape Protection Purposes.* The NOR applies to the subject land to

the west of Oruarangi Road and to the north of Ihumātao Road, bordering the Otuataua Stonefields Historic Reserve.

[158] The objective is to *create public open space adjacent to the Otuataua Stonefields ... and to protect the landscape, the cultural heritage landscape, and the visual amenity of the Mangere Gateway Heritage Area.* It is clear from the requirement that its purpose is to extend the Stonefields Reserve so that it includes all of the lands from the coast to Oruarangi and Ihumātao Roads.

[159] The land which constitutes the Stonefields Reserve was acquired from the appellants in 1999.[64] It appears from the evidence,[65] that the Stonefields Reserve has its genesis from investigations and identification of the area for protection by the New Zealand Historic Places Trust (**NZHPT**) in the early 1980s. The Stonefields was listed as an historic place – Category 2, by the NZHPT in November 1991.

[160] It would appear that the Council relied on the work done by the NZHPT and the Department of Conservation as a basis for issuing the NOR for the existing Stonefields in June 1995. The boundary of the designation was similar to, but not the same as, the boundary shown on the NZHPT Plan. The issue of the NOR was accompanied by complementary provisions in the notified version of the 1995 Proposed Manukau City District Plan.

[161] Despite opposition, including from the appellant landowners, the designation was confirmed by Council on 20 May 1998. The Council then embarked on a process of negotiation with the appellants and settled the purchase of all the Stonefields land in late 1999.

[162] Variation 5 to the then Proposed District Plan was promulgated in late 2000. The Variation rezoned the Ellett and Mendelssohn land from Mangere-Puhinui Heritage Zone to Mangere-Puhinui Rural Zone, removed the waahi tapu identification from the Ellett and Mendelssohn land, and introduced site specific land use and subdivision rules for the Ellett and Mendelssohn land. This was part of a negotiated agreement which included that Council would:[66]

[a] Take all reasonable steps, by way of consent order, to zone the residue land Mangere-Puhinui Rural Zone;

[64] There was one other landowner – Rennie
[65] See Reaburn, Supplementary Evidence, Part 3
[66] Reaburn, Supplementary Evidence at [3.6]

[b] Take all reasonable steps, by way of consent order, to permit the creation of two lots from the residue land, including one lot of 1ha; and

[c] Consult with tangata whenua requesting their consent to either remove the waahi tapu notation from the residue land or to agree to the creation of two lots referred to above, including the construction of a single dwelling and garage on the 1ha lot.

[163] In accordance with the negotiated agreement, a kaumatua of the Makaurau Marae *conducted a ceremony to uplift the waahi tapu on the site ... namely Part Allotments 170 and 171 Parish of Manurewa.*[67]

[164] All of the landowners testified to the fact that, in their view, the negotiated agreement set a price well below market value, hence the agreed concessions by Council. More importantly, an assurance was given that no more land would be taken for reserve.

[165] However, by December 2006 the Council's attitude changed. As part of the process relating to Plan Change 14, the Council sought further landscape reviews. The *Peake Design Landscape Assessment*, dated March 2006, and the *Nick Robinson Landscape and Visual Assessment*, dated November 2006, were obtained. Both attributed high values to the NOR land. Two further reports were obtained, one by Buckland and McMillan in July 2007, and one by Absolum in March 2009.

[166] Buckland and McMillan state:

> ... while previous landscape assessments have focussed on individual heritage sites and landscape units, none have focussed on the heritage value of the open space as part of a wider context, a network of high quality open space which includes the Manukau Harbour.

[167] Mr Scott, in his evidence-in-chief, had three major criticisms of the landscape reports relied upon by the Council:

[a] Other potential land use scenarios were not adequately analysed in regard to the existing and proposed zoning of the area and land titles subject to the appeals;[68]

[67] *See* Council Report introducing Variation 5, Section 1.1, Exhibit G to Reaburn Supplementary Evidence

[b] They did not adequately consider the scale of the Airport development as a primary landscape determinant beyond the natural features and/or heritage matters;[69] and

[c] The landscape qualities have been elevated beyond the status identified in the regional provisions.

[168] According to Mr Reaburn, the Council decided to initiate the NOR in November 2006. He said:[70]

> 4.3 Amendments to proposed Plan Change 14 and associated processes were considered (as confidential items) by the Council in November and December 2006. It is at that time that the Council decided to initiate the NOR. This decision was based on the landscape assessments referred to above, the November 2005 Louise Furey archaeological appraisal and a February 2006 Social and Cultural Impact Assessment Report prepared by Integrated Research Solutions Limited for the Makaurau Marae.

[169] Informal notice was given to the landowners by letter dated 30 November 2006 giving them until 11 December 2006 to communicate their views. The Urban Design Committee of the Council resolved to notify the NOR at a meeting in March 2007.

[170] It is against this contextual background that we now look at the contested issues.

Notice of Requirement

[171] Section 168A of the Act[71] relevantly provides as follows. The **bolded** portions are those which identify the contested issues:

> (1) When a territorial authority proposes to issue a notice of requirement for a designation –
>
> (a) **for a public work within its district and for which it has financial responsibility**; or
>
> (b) in respect of any land, water, subsoil, or airspace where a restriction is necessary for the safe or efficient functioning or operation of a public work –

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[68] Scott, EIC, at [19]
[69] Ibid, EIC, at [20]
[70] Reaburn, Supplementary Evidence, at [4.3]
[71] As it applied at the relevant time

It shall notify the requirement in accordance with s.93(2); and the provisions of s.168, with all necessary modifications, shall apply to such notice.

...

(3) When considering a requirement and any submissions received, a territorial authority must, **subject to Part 2, consider the effects on the environment of allowing the requirement, having particular regard to—**

(a) any relevant provisions of—

(i) a national policy statement:

(ii) a New Zealand coastal policy statement:

(iii) a regional policy statement or proposed regional policy statement:

(iv) a plan or proposed plan; and

(b) **whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work** if—

(i) the requiring authority does not have an interest in the land sufficient for undertaking the work; or

(ii) it is likely that the work will have a significant adverse effect on the environment; and

(c) **whether the work and designation are reasonably necessary for achieving the objectives of the requiring authority for which the designation is sought**; and

(d) **any other matter the territorial authority considers reasonably necessary in order to make a decision on the requirement.**

(4) The territorial authority may decide to—

(a) confirm the requirement:

(b) modify the requirement:

(c) impose conditions:

(d) withdraw the requirement.

[172] Under Section 174(4) of the Act, the Court is to have regard to the matters set out in Section 171 which are the same matters set out in Section 168A(3), and the Court may cancel or confirm the requirement, and may modify it or impose conditions.

Is the designation a public work?

[173] Public work is defined in the RMA as:

... the same meaning as in the Public Works Act 1981, and includes any existing or proposed public reserve within the meaning of the Reserves Act 1977 and any National Park purposes under the National Parks Act:

[174] The RMA definition expressly includes existing or proposed public reserves under the Reserves Act 1977. The NOR document needs to be considered robustly and in the round. We are satisfied that it is clear from a reading of the NOR documentation in the round, that the work proposed by the Council is an extension of the Stonefields Reserve.[72]

[175] We thus consider that the NOR is for a public work.

Does the Council have financial responsibility?

[176] As a requiring authority, the Council may notify a requirement for the designation of a public work within its district for which it has financial responsibility (Section 168A(1)(a)). Counsel for Wallace submitted, that the Council has made no financial provision for acquiring the land and has not accepted financial responsibility now or in the reasonably foreseeable future for the work on the designated land.[73]

[177] There is no evidence before us that would suggest the Council has disclaimed financial responsibility for the works. The Council continues to actively pursue the designation. Ms Bowers confirmed that the Council has always accepted, and continues to accept, financial responsibility for the NOR.[74] Council Senior Acquisitions and Disposals Adviser, Mr Alan Walton, repeats this confirmation in his rebuttal evidence.[75]

[178] We agree with the submission of counsel for the Council, that the purpose of the reference to financial responsibility in Section 168A is to avoid situations where a requiring authority issues a NOR but seeks, in some way to disclaim any responsibility for it. As the Environment Court noted in ***Re Waitaki District Council***, citing earlier High Court authority:[76]

> [31] The reason why financial responsibility is important was explained in Waiotahi Contractors Limited v Owen [(1993) 2 NZRMA 425]. There the High Court was considering an appeal from the Planning Tribunal in a case where the Whakatane District Council has refused to accept continuing financial responsibility for a public work. The High Court concluded that a designation could not be maintained in the face of a designating authority's disclaimer of financial responsibility for it. Henry J concluded:

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72 Bowers, EIC, at [5.1] and Reaburn, EIC, at [10.2] – [10.3]
73 Opening Submissions, at [50] and [51]
74 Bowers, EIC, at [4.13]
75 Walton, Rebuttal, at [3.2]
76 [2007] NZRMA 68, at [31]

> ... The provision in a District Plan for a public work such as this is directly tied to financial responsibility for it, which is something the Tribunal cannot force on an authority. *In this context the nature and extent of the financial responsibility is irrelevant. That is something that must necessarily be uncertain and may or may not involve future expenditure of a capital nature, and usually would involve maintenance expenditure. It is the existence of the responsibility which is important.* I am therefore of the view that the Tribunal erred in law in proceeding to consider this appeal on the planning merits without taking into account and giving due weight to a relevant consideration, namely the council's refusal to accept continued financial responsibility for the public work [Emphasis added].

[179] The Town and Country Planning Appeal Board put the matter well in an early decision, ***Newspaper House Limited v Wellington City Council***[77]:

> **By designating land in its district scheme, on its own motion, for a proposed public work, the council thereby records that vis a vis the owners of the land, it accepts the financial responsibility for the acquisition of the land for the proposed work.** But this Board has no jurisdiction positively to order a council to execute a proposed work. The only positive power the Board has is in certain circumstances to order the council to acquire land ... but it does not follow that the designation of the land required for a work binds the Minister or public body to execution of the proposed work. Designation of land for a public work is a planning action. Construction of a public work is an executive action.
>
> *[emphasis ours]*

[180] The acceptance of financial responsibility is evident from the fact that it is the Council (and not some other entity) that has requested the designation, and the fact that, if approved, the Council will be the party that holds the designation. The Council has not disclaimed financial responsibility for the designation.

Are the works and designation reasonably necessary to achieve Council's objectives?

[181] Under Section 171(1) of the Act, we are required to determine whether both the public work and the designation are reasonably necessary for achieving the objectives of the Council for which the designation is sought.

What are the Council's objectives?

[182] It is clear from the NOR and the submission for the Council, that the public work (reserve land) is required to achieve the objective of protecting and preserving the public open space and landscape characteristics (which include the

[77] (1977) 1 NZTPA 289

cultural/historic heritage landscape characteristics) of the land and, importantly, the adjacent Stonefields Reserve.[78]

Is the public work reasonably necessary to achieve the objective?

[183] We consider that the reasonably necessary test is an objective, but qualified one. In ***Watkins v Transit New Zealand***[79] the Court noted:

> ... In short "necessary" falls between expedient or desirable on the one hand, and essential on the other, and the epithet "reasonably" qualifies it to allow some tolerance.

[184] We are also aware of the limits of any enquiry into the merits of the objectives. It is now well settled that the Act neither requires or allows the merits of the objectives themselves to be judged by the Court. For instance, in ***Babington***, the Planning Tribunal said:[80]

> ... It is not for us to pass judgment on the merits or otherwise of this objective. What we are required to do is to have particular regard to whether the proposed designation is reasonably necessary for achieving it.

[185] We have already considered some of the evidence base relevant to the historic landscape, and the threat to that landscape. Ms Bowers introduces the NOR in her evidence, describes its purpose,[81] and explains the contribution the land will make in practical terms if it is added to the OSHR. Mr Reaburn discusses the need for the NOR and whether it is necessary to achieve the objectives in his evidence-in-chief.[82] The evidence of Mr Murdoch (historic heritage), Dr Clough (archaeology) and Ms Absolum (landscape), provides direct support for the NOR.

As for the protection of the Stonefields Reserve

[186] We are well aware of the value of the Stonefields as an historic reserve. Its acquisition by the Council from the landowner appellants was preceded by some 20 years or so of research and reporting of its heritage values. These reports consistently referred to the Stonefields as a nearly complete Stonefields system of about 100 acres. The boundaries of the Stonefields were defined in 1984 when Historic Places Trust gave the land a Category 2 registration under the transitional provisions of the

[78] Dickey, Opening Submissions, at [4.19] and [4.83]
[79] A54/03, at [47]
[80] (1993) 2 NZRMA 480, at [486]
[81] Bowers, EIC, at [4.8] and onwards
[82] Reaburn, EIC, at [10.11] – [10.13] and [10.4] – [10.7]

Historic Places Trust Act 1993. The acquisition followed nearly the same boundaries as the Historic Places Trust schedule.

[187] The evidence established, and this was confirmed by our observation on our site visit, that the Stonefields are very well contained, as was pointed out by counsel for Wallace.[83] From the approach to the Stonefields there is already a buffer of sorts in the remnant volcanic cones at Otuataua and Pukeiti (former quarry sites), the former water and quarry reserves and the Wallace land acquired as part of the reserve.

[188] The NOR for the Stonefields identifies that the public works may include an interpretation centre, a carpark, public toilets, and a cultural/heritage centre. Suitable areas for all of these activities were identified within the reserve, areas which had lesser remnants of the Stonefields due to the past farming practices.

[189] We are satisfied that the Stonefields themselves, well contained as they are, can be adequately protected by sensitive development that recognises and provides for their value.

As for the subject land

[190] As for the subject land itself, we are conscious that, notwithstanding the availability of a Mangere-Puhinui Heritage zoning, which is applied to some land within the Mangere-Puhinui Heritage area, the subject land was given a less restrictive *rural zoning* – a zoning that does not protect the heritage and cultural aspects espoused by all the witnesses. This would tend to indicate that the heritage aspects of this land are ranked as less important.

[191] We are also conscious that the Council arranged for a kaumatua to carry out a ceremony over part of the land to lift any tapu. While such a ceremony is not determinative or binding on all Maori, it does reflect the worth of the land in cultural terms to the Council at that time.

[192] In our view, the Council witnesses have over-emphasised the need for a reserve to protect and preserve the special characteristics of this land. By focussing on the special cultural, historical and landscape characteristics of the land, they have closed their minds to the possibility of sensitive development of the properties. In other words, they have not adequately factored in sensitive development of the

[83] Opening Submissions, at [79]

properties. Development that would need to be carried out in compliance with the Historic Places Trust Act, may well require further archaeological survey work and the obtaining of a resource consent. A well thought out Structure Plan could recognise significant features and values and could address landscape buffers, setbacks, height controls, view shafts, and access to the coastal marine area and the Stonefields.

[193] The Council Commissioners in their decision relied heavily on the landscape, heritage and archaeological reports for their finding that the designation is reasonably necessary to achieve the Council's objective of protecting the cultural, heritage and landscape values of the land and the Stonefields Reserve. We have already averred to Mr Scott's three major criticisms of these reports, namely:

[a] Other potential land use scenarios were not adequately analysed in regard to the existing and proposed zoning of the area and land titles subject to the appeals;[84]

[b] They did not adequately consider the scale of the Airport development as a primary landscape determinant beyond the natural features and/or heritage matters;[85] and

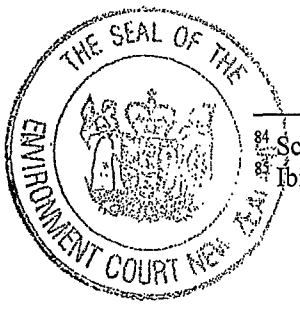
[c] The landscape qualities have been elevated beyond the status identified in the regional provisions.

Criticisms that we consider on the evidence to be valid for the reasons we have given in our discussion on the MUL line.

[194] For the above reasons, we conclude that the public work is not reasonably necessary to achieve the Council's objectives.

Has adequate consideration been given to alternatives?

[195] Where, as in this case, the requiring authority does not have a sufficient interest in the land, Section 171(1)(b) of the Act requires the Court to examine what consideration has been given by the Council to alternative sites or methods for



[84] Scott, EIC, at [19]
[85] Ibid, EIC, at [20]

achieving its objectives. In ***Bungalo Holdings Limited v North Shore City Council,*** the Environment Court observed:[86]

> [111] We understand that Section 171(1)(b) calls for a decision maker to have particular regard to whether the proponent has made sufficient investigations of alternatives to satisfy itself of the alternative proposed, rather than acting arbitrarily or giving only cursory consideration to alternatives. A proponent is not required to eliminate speculative or suppositious options.

[196] The test is whether *adequate consideration* has been given. As counsel for Wallace pointed out, the entire consideration given to alternatives in the NOR is:

> The council considers that this land is part of a cultural heritage landscape, with landscape values and a unique visual amenity. There are no other sites that meet these criteria.

No mention is made of *alternative methods* for achieving the objective, which do not involve designation and the prevention of any reasonable use of the land. He said, it is difficult to describe such an analysis as anything more than *cursory*.

[197] All counsel for the land hold appellants referred to the limited consideration by Mr Reaburn to alternatives. He devoted three paragraphs in his evidence-in-chief and one paragraph in rebuttal. In rebuttal, Mr Reaburn was dismissive of alternatives being practically achieved, but the point is, they were not considered at all, or at most in a very cursory way, prior to issuing the NOR.

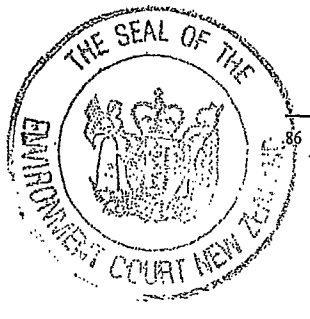
[198] The most obvious alternative methods include:

[a] To acquire the land by private treaty;

[b] To acquire the land under the Public Works Act; or

[c] To address the proper zoning of the land which could have been done as a prelude to Plan Change 14.

[199] Any one of these options could have preserved and protected the open space and landscape characteristics of the appellants' land without driving down the price of the land and disenabling the landowners from any benefit.



[86] A052/01, at [111]

[200] The lacuna left by the Council was addressed in part by the evidence of Mr Scott and Mr Putt. They advocated a *future development zone*. A matter that was peremptorily dismissed in the Council decision:[87]

> Counsel for Mr Ellett et al. suggested that there had been no real consideration of alternatives for achieving the Council's purposes and suggested that an appropriate zoning with particular controls could achieve the same result. However, the Commissioners do not consider Counsel is seriously suggesting that Council has been remiss in its choice of method to achieve its goals, noting that zoning itself provides no opportunities for the purchase of the properties. ...

[201] On the other hand, we have found that a *future development zone* would be in accordance with the purpose of the Act having regard to the relevant provisions of Part 2. This is a matter, that we have already discussed in some detail.

[202] We accordingly find that adequate consideration has not been given to alternative methods.

Overall finding on NOR

[203] For the above reasons, we cancel the requirement as it affects the subject land.

THE COUNCIL DECISIONS

[204] Under Section 290A of the Act, we are required to have regard to the decisions that are the subject of the appeals. As we have decided differently on the underlying general issue relevant to the appeals, we have, not surprisingly, come to a different conclusion.

[205] The fundament of the Council's decisions were that protection from all development was the most appropriate way:

[a] to protect the Stonefields;

[b] to protect Maori associations with the land; and

[c] to protect heritage values.

[87] Notice of Requirement Decision, Section 12, page 15

[206] We have already averred to parts of the Council's decisions in earlier sections of this decision. In the decision of the Commissioners on the NOR dated 27 March 2009, they said:[88]

> Section 6(f) The protection of historic heritage from inappropriate use and development: The NoR will ensure the protection of the Stonefields and provide a buffer from adjoining Airport and other development.

And:

> The Commissioners have carefully carried out this evaluation and accept that Maori have a relationship with the NoR land; that that relationship is no more or less important than the relationship with all of the land in the Mangere-Puhinui area, carrying as it does a rich historical narrative as described in Mr Murdoch's evidence. Given its location adjoining the Stonefields, a recognised wahi tapu, care must be taken to ensure that activities which could be 'intrinsically offensive' are avoided.
>
> The Commissioners find that maintaining this land in a rural zoning will not necessarily maintain the section 6(e) relationship; and that the only way to achieve this is through the passive public open space designation.

[207] The strong directions contained in Section 6 relating to Maori and historic heritage are not a total veto on development. They are directions to decision makers to recognise and provide for protection from inappropriate development. We are satisfied on the evidence before us that the most appropriate way of achieving the statutory directions is to provide for a mechanism that allows sensitive development, while at the same time safeguarding and protecting the special characteristics of this land.

[208] We have had the benefit of lengthy, and at times, detailed cross-examination on the major underlying issue. At all times we have been conscious of the Council's decisions. However, after careful consideration of the evidence before us, we have, for the reasons given in this decision come to a different conclusion.

[88] At page 30

DETERMINATION

[209] We make the following determination:

A. The MUL is to be extended to include the land subject to appeal;

B. The land subject to appeal is to be zoned Future Development Zone;

C. The NOR is cancelled as it affects the land subject to appeal

D. The Council is directed, under Section 293, to prepare, in consultation with all other parties to these appeals:

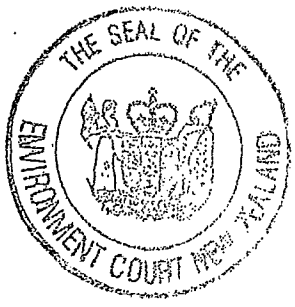
1. A change to the Auckland Regional Policy Statement to amend the location of the MUL in accordance with A above; and

2. A change to the Auckland Council District Plan (Manukau Operative Section) to provide for the subject land as Future Development Zone within Chapter 16 – Future Development Areas. The subject land is to be identified as a FDZ subzone and we suggest it could be described as "Ihumātao Peninsula". The amendments to the District Plan are to provide for:

a. A succinct description and explanation of the subzone and its context which:

i. Identifies and provides for the significant characteristics of the area, including:

- **Maori cultural associations with the area, including wahi tapu;**
- **Heritage and historic associations;**
- **The Otuataua Stonefields Historic Reserve;**
- **Landscape and amenity values;**
- **The Manukau Harbour and coastal environment; and**



- **The Auckland International Airport and business zoned lands.**

ii. Requires that a future structure planning process for the subzone:

- **Further identifies and recognises these significant characteristics;**
- **Determines the location and density of urban development selectively; with urban activities concentrated in nodes and areas of open space and lower intensity development; and**
- **Provides for efficient and effective servicing and an Integrated Transport Assessment (ITA).**

b. The FDZ Rules (16.10 to 16.14) to be amended as necessary to restrict the activities that might compromise the features and values of significance in the area, including limiting earthworks, land cultivation and large buildings (including greenhouses).

c. Any consequential amendments to the District Plan.

E. The Council is to submit the changes directed under D. to the Court for confirmation by 28 September 2012.

F. Costs are reserved, but in our tentative view should lie where they fall.

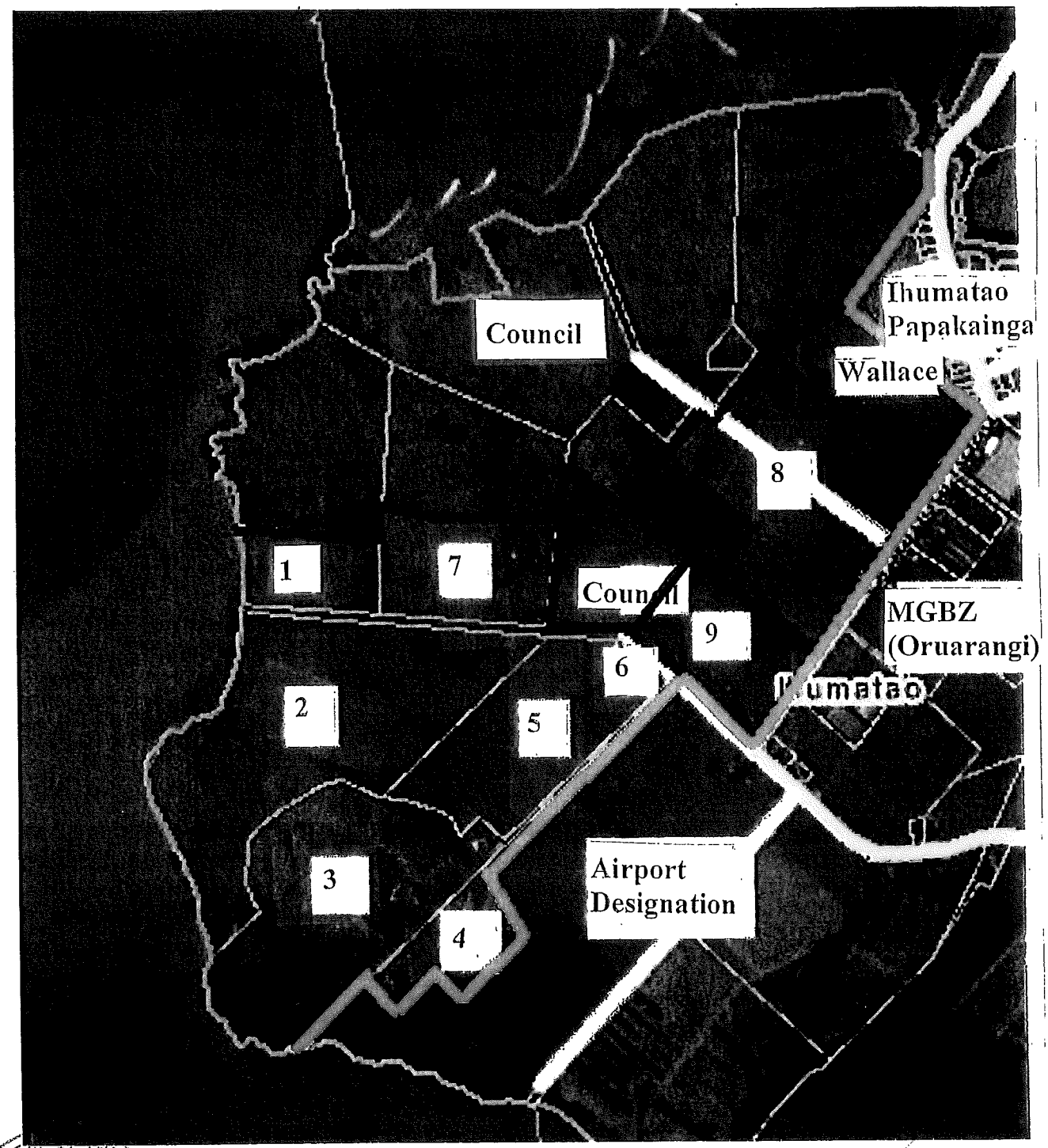
SIGNED at AUCKLAND this 15th day of June 2012

For the Court:

R G Whiting
Environment Judge.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

APPENDIX 1 – The subject land



APPENDIX 2
SUMMARY OF EVIDENCE RELATING TO MAORI ISSUES

Ko Maungataketake te maunga
Ko Rakataura te tangata
Ko Te Kawerau a Maki me Te Waiohua nga iwi
Ngati Te Ahiwaru me Te Akitai oku hapu
Ko Makaurau te Marae (Warena Taua, Mihi eic)

Maungataketake is the mountain
Rakataura is the person
Te Kawerau a Maki and Te Waiohua are the tribes
Ngati Te Ahiwaru and Te Akitai are my sub-tribes
Makaurau is the Marae

[1] Over 8 centuries several iwi and hapu have occupied the Ihumātao area and the wider Auckland Isthmus.

[2] These iwi and hapu include Ngati Rori (later called Te Ahiwaru), Te Kawerau a Maki, Ngati Te Ata, Ngai Tai, Ngati Poutukeka (abbreviated to Ngati Pou then later changed to Te Wai o Hua), Te Akitai, Ngati Paretaua, Ngati Tamaoho, Ngati Huatau, Te Aua, Ngati Tahuhu, Ngati Kaiaua plus others.

[3] There is little doubt that Ngati Ahiwaru, the inhabitants of this area in 1853, were unfairly treated by the Crown but such matters cannot be addressed through this RMA process.[1]

[4] On Wednesday 7 December we sat at the Makaurau Marae. We heard evidence on Maori issues from Mr Hori Winikerei Taua, Mr Hare Paewhiro Huia Tone, Ms Dawn Maria Matata, Mr Rapata Roberts, and Mr Te Warena Taua.

[5] **Te Warena Taua** of Te Kawerau a Maki, Ngati Te Ahiwaru, and Te Akitai of Waikato, and Chairman of Te Kawerau a Maki Tribal Authority gave evidence on their whakapapa, history and tradition which he had learnt from his grandfather and Waikato elders.

[1] Murdoch, EIC, at [6.7]

[6] Having been brought up in te ao Maori by his parents and elders, he trained as an ethnologist and has published history of the Auckland tribes, and Maori history of the Howick, Pakuranga and surrounding area.[2]

[7] His evidence is that Makaurau and Kawerau reached settlement with the landowners and Auckland International Airport Ltd regarding the rezoning of the Metropolitan Urban Limits but consider that protecting the remaining land is of critical importance to them. This land is directly adjacent to the Stonefields reserve, and contains significant wahi tapu. He states, "*Both Kawerau and Makaurau have unbroken ancestral relationships with this land and assert mana whenua over this area*" and because Maungataketake has been desecrated through quarrying they prefer minimal invasive future development on this land.[3]

[8] Mr Taua gave evidence on the historic occupation of their people in this Ihumatao area since the arrival of the Tainui waka up to present day. We received a confidential map setting out waahi tapu sites and sites of special significance within the subject land and adjacent land. This included burial sites of ancestors, sacred caves and tunnels, and other matters of importance to Kawerau and Makaurau. The numerous, and great significance of the, wahi tapu has lead them to regard the whole area as wahi tapu.[4]

[9] He was cross-examined at length regarding the wahi tapu by counsel for the appellants.

[10] When questioned by Mr Cavanagh as to whether food and tapu were able to mix, Mr Taua replied:

> ... Te Rau-anga-anga, King Potatau's father, now he was a General in the wars, and while they were eating at Kaitotehe, the old pā of theirs, they were eating food and kumara. They summoned the heads and hence, his name Te Rau-anga-anga, of 100 heads. They asked for the heads to come, be put in front of them while they ate. They have that right, they are the chiefs. They can determine whatever they wish. They can make tapu, they can break tapu. The right is solely theirs.[5]

[11] Mr Littlejohn queried the validity of the tapu lifting ceremony performed by Mr Wilson on the Mendelssohn property in 1999 given Mr Taua's earlier comments that tangata whenua were able to "*make tapu or break the tapu*". Mr Taua replied:

> ... Please understand that when he went there, it was to placate the owners of the land, because they feared somewhat that a tapu had been put over by the Māoris who were

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[2] Taua, EIC, at [6] – [7]
[3] Ibid, EIC, at [12]
[4] Ibid, EIC, at [14] – [19]
[5] Taua, Transcripts at page 450

> involved with the Stonefields. His karakia was simply to make the family feel happy, by offering a karakia... [6]

[12] Mr Enright argued that there were two separate entities represented at this hearing and that "*any waiver of wahi tapu by the Makaurau Marae kaumatua does not bind Kawerau*".[7]

[13] Mr Casey in his closing submitted that no wahi tapu or sites of significance have been identified on the current Wallace land other than part of the slopes of Puketapapa.[8]

[14] While he accepted Mr Taua's "*broad understanding of the meaning of tapu*", he submitted that this "*expansive understanding does not fit with the meaning ascribed in Section 6(e)*", citing ***Serenella Holdings Ltd v Rodney District Council***:[9]

> It is important however to record that the matters of national importance in s 6(e) that are to be recognised and provided for , should not generally include everyday activities and wide-spread but long lost random burials, with the consequence of preventing new endeavour on the land. The consequences for continuing human endeavour are obvious, it would become difficult or even impossible to obtain consents to carry out activities on land that has passed out of Maori ownership to non-Crown interests, if the principles in s 6(e) are to be considered to operate in some sort of blanket fashion based on daily general association with the land of Maori life in times past. Section 6(e) calls for proof of something more in order to attain recognition and provision as a matter of national importance.

[15] The ancestral relationship and cultural relevance of an area is often reflected in the named localities.[10] We note some of these names in the following examples: [11]

[a] Mataoho - Te Kawerau a Maki and the people of Ihumātao regard this area as part of the creation of the atua Mataoho, as portrayed in many of the landmarks of the Auckland Isthmus;

[b] Te Ihu a Mataoho (Mataoho's nose, later abbreviated to Ihumatao, then Maungataketake, then Elletts Quarry);

[c] Te Pane a Mataoho (The Head of Mataoho or Mangere mountain);

[6] Ibid, Transcripts, at page 464
[7] Points of Reply by Counsel for Makaurau Marae Maori Trust Board Inc & Te Kawerau a Iwi Tribal Authority Inc, at [1]
[8] Casey, Closing Submissions, at [38]
[9] Ibid, Closing Submissions, at [39]
[10] Murdoch, EIC, at [4.59]
[11] Taua, EIC, at [22]

[d] Kouora and Pukaki Craters are Nga Tapuwae a Mataoho (The footprints of Mataoho); and

[e] Te Kapua Kai a Mataoho (Mataoho's Food Bowl or Mt Eden Crater).

[16] Other examples include:[12]

[a] Te Tahuhu o Tainui, now called Otahuhu (alluding to the Tainui waka being carried upside down from Tamaki River to Manukau Harbour);

[b] Te Manukanuka a Hoturoa, now Manukau Harbour (where Hoturoa, the captain of the Tainui waka became anxious due to the treacherous conditions);

[c] Nga Hau Mangere, now Mangere (the lazy winds, named by Rakataura, the Tainui waka tohunga);

[d] Te Motu a Hiaroa, (Hiaroa's Island) named after Rakatarua's sister Hiaroa, now called Puketutu Island.

[17] Mr Murdoch expanded on Puketutu as follows: [13]

> What we now know as Puketutu Island is really known as Te Motu a Hiaroa, the island of Hiaroa, who was a woman on the Tainui canoe, and that's the proper name for the island. The highest point of the island was one of, I think, three or four cones and it had a very sharp pointed peak on it, and that was called Puketutu. And so Puketutu is a landmark on Te Motu a Hiaroa, and as we so often do, we shift and cut and paste Māori names and in the same way Puketapapa has become Ihumatoa [Ihumatao] and so on.

[18] The wahi tapu within the area include sacred mountains, battle sites, burial sites, Pa sites and subterranean caverns that contained taonga.[14]

> Whilst wahi tapu such as Maungataketake have been desecrated and physically destroyed, we hold fast to the tikanga that tapu associated with those sites remains intact.[15]

[19] Of significance to Te Kawerau a Maki and Makaurau is that one of the hui to select the first Maori king was held at Ihumātao and Potatau Te Wherowhero lived there prior to his accepting the mantle as king.[16]

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[12] Ibid, EIC, at [26]
[13] Murdoch, Transcripts, at page 269
[14] Taua, EIC, at [31]
[15] Ibid, EIC, at [32]
[16] Ibid, EIC, at [37] – [38], Murdoch, EIC, at [5.2.2]

[20] Mr Taua cited a number of development ventures in this area that have been detrimental to their iwi. These included:[17]

[a] the Auckland Airport;

[b] the Mangere Sewerage Treatment Facility;

[c] the destruction of Maungataketake for a quarry.

[21] The common elements of these examples are:[18]

[a] Imposition of decisions that directly impact on tangata whenua;

[b] Prioritisation of regional amenity over the values of tangata whenua;

[c] Destruction of significant landmarks;

[d] Environmental degradation, which in turn effects water quality and the availability of natural resources such as kai moana, which are fundamental to our way of life;

[e] Desecration of wahi tapu and other sites of spiritual, cultural and heritage significance;

[f] Marginalisation of tangata whenua from ownership and development opportunities; and

[g] Encroachment of development on the oldest papakainga in the Auckland region, which impacts the character of the area and the quality of lifestyle of tangata whenua.

[22] In summary, Mr Taua concluded that Te Kawerau Iwi Tribal Authority and Makaurau Marae Trust as representatives of the ahi ka:

[a] oppose urbanisation of the Ellett, Wallace and Mendelssohn lands;[19]

[b] support the acquisition of those lands as public open space;[20]

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[17] Taua, EIC, at [40]
[18] Ibid, EIC, at [41]
[19] Ibid, EIC, at [44]

[c] emphasise the significance of the area because of

[i] the number of wahi tapu;[21] and

[ii] wrongful confiscation by the Crown.

[23] **Mr Graeme Murdoch** a noted scholar and historian provided a detailed summary of the pre and post European human and cultural history of the Mangere-Puhinui, Ihumātao block and the wider Auckland region on behalf of the Auckland Council.

[24] He had the added advantage of being proficient in the Maori language and having learnt from a life long association with the elders of Ngati Ahiwaru, Te Akitai, Te Kawerau a Maki and other iwi in the greater Auckland Isthmus.

[25] Mr Murdoch opines that sacred knowledge acquired through discussion with kaumatua has "*equal validity*" and often "*greater importance*" in Section 6(e) RMA matters than academic and archaeological sources.[22]

[26] In his youth he was aware that the volcanic features of the Ihumātao were recognised as taonga by local Maori[23] and that the subsequent modification and destruction of these features have caused "*immense distress*" and "*ongoing grief*" to the tangata whenua.[24]

[27] Examples of these modifications include the creation of the sewerage ponds and the water treatment plant, the quarrying of various maunga (Maungataketake and Puketutu) and building the second runway for the Auckland International Airport.

[28] Another cultural icon, Te Kahui Tipua "*assemblage of spiritual guardians*" Haumia, Papaka and Kaiwhare were destroyed when the Mangere Wastewater Treatment Plant sewerage ponds were built.[25]

[29] Similarly Te Punga o Tainui – "*the anchor stone of Tainui*" situated just off the Oruarangi Creek was "*tragically*" destroyed during the construction of the Mangere Wastewater Treatment Plant sewerage ponds.[26]

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[20] Ibid, EIC, at [44]
[21] Taua, EIC, at [46]
[22] Murdoch, EIC, at [4.1.1]
[23] Ibid, EIC, at [4.2.3]
[24] Ibid, EIC, at [4.2.4]
[25] Ibid, EIC, at [4.2.5]
[26] Ibid, EIC, at [4.2.7]

[30] When Tainui waka left Ihumātao and ventured on to Kawhia, two "*illustrious founding ancestors*", Rakataura their leading tohunga, and a younger rangatira named Poutukeka, remained. Their direct descendants are the people of Ihumātao connected with the Pukaki and Makaurau Marae.[27]

[31] Poutukeka was the eldest son of Hoturoa the captain of the Tainui waka.[28] His descendants, Ngati Poutukeka, lived in this wider Mangere-Puhinui area.[29]

[32] Rakataura later became known as Hape. Puketapapa or Te Puketapapatanga a Hape (the hilltop resting place of Hape) "*imbues the wider Ihumatao Penninsula with particular mana, spiritual unity and significance*".[30]

[33] In spite of the Crown confiscation of the 1100 acre Ihumātao block in 1865 the hapu associated with Makaurau Marae have maintained an unbroken "*ahi ka roa*" in this area for over 6 centuries.[31]

[34] Mr Murdoch also narrated the tribal interactions and occupations arising from the musket wars,[32] and the alienation of lands in the Tamaki-Manukau area.[33]

[35] He gave evidence on the Te Waiohua practice of shifting agriculture in a seasonal cycle of gardening and resource gathering and how they left aside the defensive areas of the cone pa, the settlements and the sacred burial areas.[34]

[36] He cautioned against relying solely on archaeological site records for identifying heritage areas citing the discovery of the largest burial found in the district during earthworks for the Airport second runway as an example.[35]

> Archaeological sites and their qualities and values of course provide only one component of the historic and cultural heritage values of the Ihumatao cultural landscape of significance to Tangata Whenua.[36]

[37] Mr Murdoch emphasises the importance of Maori identity through ancestral relationships to cultural landscapes regardless of whether or not the land is in Maori ownership.[37]

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[27] Ibid, EIC, at [4.2.8]
[28] Taua, Transcripts, page 469
[29] Murdoch, EIC, at [4.3.2]
[30] Ibid, EIC, at [4.2.9]
[31] Ibid, EIC, at [4.3.1]
[32] Ibid, EIC, at [4.3.6] – [4.3.8]
[33] Ibid, EIC, at [4.4.1] – [4.4.7]
[34] Ibid, EIC, at [4.5.5]
[35] Ibid, EIC, at [4.5.8], Taua, EIC, at [42]
[36] Murdoch, EIC, at [4.5.9]

[38] In Section 5, EIC, he detailed the post European occupation of the Ihumātao area including their interactions with local iwi.

[39] With reference to Section 6(f) matters he states:

> ... the archaeological, architectural, cultural, historic, technological, and to some degree scientific qualities associated with the natural and physical resources of Ihumatao, relate to both the Maori and European occupation and use of the land. The Maori ancestral relationship that is held with the land, waters and other taonga associated with Ihumatao, forms a significant and integral component of these values. It is inextricably linked to all of these natural and physical resources, and not just to their "cultural and historical qualities".[38]

[40] He opines that the post-European component of the cultural heritage landscape of Ihumātao illustrates the early adaptation of Maori to the colonial economy and social change, adding that the Maori mission station is the finest remaining example of a nineteenth [century] complex left in the Auckland region.[39]

[41] He summarised that the cultural heritage landscape of Ihumātao is a significant example of "*a coherent and legible landscape that covers the entire continuum of human history and settlement in the region*" and that:[40]

> The Maori ancestral relationship with Ihumatao extends well beyond the nationally significant archaeological assemblage and landscape associated with the OSHR, to all parts of the Ihumatao peninsula and its natural and physical resources, including those areas modified by quarrying.

[42] He closes with the observation that the area is rich in human historical and cultural associations that have developed over nearly eight centuries that reflects the full range of Maori and post European heritage[41] and a quote from the Heritage Chapter of the District Plan:[42]

> Titiro ki nga wa o mua
> Ki te whakamarama I tenei ao
> Rapua te mea ngaro
> Hei maramatanga mo nga Ao e eke mai
>
> Look to the past to understand the present and seek answers for the future

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[37] Ibid, EIC, at [4.5.10]
[38] Ibid, EIC, at [6.3]
[39] Ibid, EIC, at [6.10]
[40] Ibid, EIC, at [6.14]
[41] Ibid, EIC, at [7.5.9]
[42] Ibid, EIC, at [7.5.10]

IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

CIV-2014-488-000113
[2014] NZHC 3328

BETWEEN	TW REED ESTATE (Trustees J M Cropper, K E McGill, V D L Reed and E D Aickin) and DALLING INVESTMENTS LIMITED (J and M Zazulak) Appellants
AND	FAR NORTH DISTRICT COUNCIL Respondent

Hearing: 21 October 2014

Appearances: Paul Cavanagh QC for the Appellant
Joanne Baguley for the Respondent
Martin Williams for the Paihia Heritage Precinct Society Inc (Section 301 party)

Judgment: 18 December 2014

RESERVED JUDGMENT OF MOORE J

This judgment was delivered by on 18 December 2014 at 4:00pm pursuant to Rule 11.5 of the High Court Rules.

Registrar/ Deputy Registrar

Date:

Contents

Introduction

[1] The appellants, TW Reed Estate and Dalling Investments Limited, own land on Marsden Road, Paihia. The TW Reed Estate owns 30 Marsden Road and Dalling Investments Limited is the owner of 24 Marsden Road. These properties fall within the Paihia Mission Heritage Area ("PMHA") which is included in the Far North District Plan ("the Plan"). The PMHA imposes various planning restrictions on the land contained within it with the object of protecting the heritage values contained within it.

[2] It is common ground that this area and the activities which took place in and around it before the signing of the Treaty of Waitangi played a significant part in the early development history of New Zealand during the contact period between Maori and European.

[3] Indeed, as one historian noted in the course of his evidence at the hearing, the Church Missionary Society's Mission Station ("the CMS") established by Reverend Henry Williams in the 1820s was the central site of the most important group of pakeha in early colonial New Zealand.

[4] The physical remnants of these very early colonial activities are limited. Furthermore, the physical vestiges or "built heritage", is not located on any of the properties owned by the appellants.

[5] The issue before the Environment Court was whether various restrictions imposed by a plan change to protect the wider heritage values of the area should apply to the land owned by the appellants. The Environment Court concluded that it should.

[6] The appellants appeal that decision.

Summary of appeal

[7] The respondent, the Far North District Council ("the Council"), proposed a plan change ("PC12") to the Plan. This established the PMHA over land not only in Marsden Road but also Kings Road in Paihia.

[8] The appellants challenged PC12 in the Environment Court.[1] While the decision of the Environment Court reduced the scope of the PMHA, the appellants' land remained within it. It is from that decision that the appellants now appeal.

[9] The Council's position is that the restrictions imposed by PC12 are necessary to protect the area's unique heritage resources. Conversely, the appellants claim that the PMHA contains little in the form of heritage resources and, in any event, for those heritage resources which do exist the current Plan provides adequate protection. The appellants seek relief in the form of an order quashing that part of the Environment Court's decision which confirms PC12 over their land and an order quashing the interim plan change provisions incorporated in 2006 by a consent order. The appellants submit it is unnecessary to remit the proceedings back to the Environment Court. This Court can simply remove PC12 with the effect that the underlying commercial zone revives. It is submitted that this aligns with the approach the Environment Court took with the land removed from the PMHA, submitting that this Court can finish what the Environment Court started by removing PC12 in its entirety rather than prolonging matters by reference back.

[10] Before examining the merits of the appeal it is necessary to examine the factual background to this appeal, the plan change and the procedural history which led to the present appeal.

Factual background

[11] The PMHA includes part of the site of the CMS Mission Station established by Reverend Henry Williams in the 1820s. The land contains a number of heritage elements. Some relate back to that early contact period. Others are more recent. In total there are five. They are:

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[1] *Guyco Holdings Limited v Far North District Council* [2014] NZEnvC 129.

(a) St Paul's Church (built in 1926) and its churchyard, graves and other monuments;

(b) the ruins of William Williams' house and the Colenso printing workshop. These were both originally located in the same building and are now part of the same ruins;

(c) a protected Norfolk pine;

(d) a plaque commemorating the construction and launching of the ship *Herald*;

(e) a plaque commemorating the service of the Reverend Henry Williams to local Maori.

[12] All of these features enjoy protection separate to and outside the PMHA provisions.[2]

[13] When the Plan was last reviewed by the Council in 2000 the subject land was zoned commercial. That zoning was appealed to the Environment Court by the Paihia Heritage Precinct Support Society ("the Society"). By a consent order dated 16 January 2006 the Council was directed by the Environment Court to create a heritage overlay over the subject land. This was the PMHA.

[14] The PMHA covers all the properties between and including 16 to 36 Marsden Road and a slither of land on 3 Kings Road, Paihia.

[15] The consent order required that:

(a) buildings visible from any public place required controlled activity consent; and

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[2] The William Williams ruins, Colenso printing workshop (both on 28 Marsden Road), the Church of St Paul and the cemetery and churchyard and Henry Williams memorial on 36 Marsden Road are all listed in the Schedule of Historic Sites, Buildings and Objects in the existing district plan. The Norfolk Pine (on 24 Marsden Road) is listed on the existing district plan on the Schedule of Notable Trees. The *Herald* plaque on 3 Kings Road and is managed by the Waitangi National Trust.

(b) buildings were required to be set back 20 metres from Marsden Road; and

(c) the building height limit overall is 8.5 metres and to secure appropriate sunlight admission at any point, the maximum height of a building may not exceed 2 metres plus the horizontal distance between the buildings and the site boundary.

[16] Only one land owner took part in the appeal process that resulted in the consent order being made. This was Mr Rendell, the owner of 40 Marsden Road also known as the "Bistro 40" site. He secured the exclusion of his land from the PMHA and the imposition of some controls tailored to the particular site and buildings.

[17] The consent orders recorded that the Council resolved to commence a plan change process by 31 July 2006 to examine the provision of historic heritage in Paihia more generally. The Council undertook a consultation process and notified the plan change (PC12) on 28 June 2012.

[18] A hearing was held before an independent commissioner in November 2012. The Commissioner confirmed the PMHA over the sites. Significant changes from the controls introduced by the Council in 2006 were:

(a) the set back provision from Marsden Road was reduced to 15 metres;

(b) the sunlight admission rule stating that no building to penetrate a 45^{o} recession plane commencing 2 metres high on a site boundary adjoining land zoned conservation or a site containing a notable tree, historic building or objects scheduled in the Plan;

(c) a site coverage restriction where the proportion of the site that could be covered by buildings was limited to 50 per cent as a permitted activity and 60 per cent for a restricted discretionary activity;

(d) the provision for the above rules to be relaxed for discretionary activities if a comprehensive development plan is complied with.

[19] As can be seen, these restrictions are significantly more onerous than those which would have been applicable under the commercial zoning approved in 2000.

[20] The Commissioner's decision was appealed to the Environment Court by the Society which sought to retain certain restrictions imposed by the 2006 consent order. The appellants, including the appellants in the present appeal, opposed PC12 in its entirety. The Environment Court removed the applicability of PC12 from 16 to 22 Marsden and 3 Kings Road. However it confirmed that the remaining area should continue to be subject to PC12. This includes the land in Marsden Road owned by the appellants. It is this decision of the Environment Court which is the subject of the present appeal.

Approach to appeal

[21] Section 299 of the Resource Management Act 1991 ("the Act") provides that a party may appeal against a decision of the Environment Court to the High Court on questions of law. An error of law occurs if the Environment Court:[3]

(a) applied a wrong legal test; or

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

(c) took into account matters which should not have been taken into account; or

(d) failed to take into account matters which should have been taken into account.

[3] *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 153.

[22] Any identified error of law must materially affect the result of the Court's decision before this Court should grant relief.[4] On appeal this Court is not to revisit the merits of the case under the guise of a question of law.[5] As the Environment Court is a specialist court, this Court on appeal may not get involved in a qualitative analysis of expert evidence that was before the Environment Court and any preferences shown as to competing expert evidence does not give rise to a question of law.[6]

[23] The appellants claim their grounds of appeal fall under the first two categories of error in terms of the *Countdown Properties (Northlands) Ltd v Dunedin City Council* test,[7] as set out above.

Grounds of appeal

[24] The grounds relied upon by the appellants are narrow and can be simply stated. They are:

(a) That the Environment Court erroneously applied a "heritage landscape" construct to the PMHA. In summary the appellants' submission is that the Environment Court found as a matter of fact that there was no built heritage on any of the appellants' land and that the topography and setting of the PMHA was remote from the experience of persons in the 19th century.[8] The appellants submit that despite this finding the Environment Court did, in fact, apply a heritage landscape construct to reach its decision that s 6(f) of the Resource Management Act 1991 ("the RMA") justified the restrictions proposed in PC12.[9] Thus the appellants submit it was an error of law for the Environment Court to apply a heritage landscape construct because it did not have the rigorous multidisciplinary evidence required to make a decision about the existence of a heritage

[4] At 153. See also, *Young v Queenstown Lakes District Council* [2014] NZHC 414 at [19].
[5] *Nicholls v Papakura District Council* [1998] NZRMA 233 (HC) at 235.
[6] *Friends of Pakiri Beach v Auckland Regional Council* [2009] NZRMA 285 (HC) at [28].
[7] *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC).
[8] *Guyco Holdings Ltd,* above n 1, at [74].
[9] At [71] where the Environment Court states none "of these s 7 matters are of themselves definitive in this case."

landscape and the evidence the Environment Court did have does not support a finding that a heritage landscape of national significance existed in the PMHA. It is submitted by the appellants that once the façade of a heritage landscape falls away it is clear that the heritage values associated with the appellants' land could not support the restrictions in PC12.

(b) By applying a "heritage landscape" construct the Environment Court double-counted the landscape and amenity values of the PMHA in its Part 2 analysis. The appellants submit this error also caused the Environment Court to erroneously place a corresponding lack of weight on the economic effects of the PMHA. The appellants submit that a reasonable decision maker, not committing a double counting error, could not have reached the view that the restrictions in PC12 were justified under Part 2.

(c) The Environment Court erred in holding the 15 metre set back in PC12 was not required to be designated but was a reasonable planning restriction. The appellants submit that in the absence of a designation and purchase by the Council of the land affected by it, the 15 metre set back from Marsden Road cannot be sustained.

[25] In order to examine these issues it is necessary to place them in the wider statutory context of the RMA and, more particularly, the Act's purposes and principles.

Principles and purposes of the RMA

[26] Decision making under the RMA is tested through Part 2 which sets out its purposes and principles. The core purpose of the RMA is stated in s 5(1):

> [To] promote the sustainable management of natural and physical resources.

[27] This purpose is supplemented by the mandatory considerations found in other sections in Part 2. Decision makers "shall recognise and provide for" matters of

national significance in s 6, and "have particular regard to" other matters under s 7 and, pursuant to s 8, shall "take into account" the principles of the Treaty of Waitangi. But the "cardinal and pivotal matter to bear in mind is the purpose set out in s 5".[10]

[28] A broad judgement is to be applied in relation to Part 2 considerations. The oft-cited decision of Greig J in *NZ Rail Limited v Marlborough District Council* describes the balance to be achieved:[11]

> 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.
>
> This part of the Act [Part 2] expresses in ordinary words of wide meaning the overall purpose and principles of the Act. It is not, I think, a part of the Act which should be subjected to strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used. There is a deliberate openness about the language, its meanings and its connotations which I think is intended to allow the application of policy in a general and broad way.

[29] As Mr Cavanagh QC, for the appellants submits, the factors under s 6 are not ends in themselves but are to be weighed amongst themselves together with the other relevant factors contained in ss 6 to 8 to inform the decision maker in terms of making an overall judgment about the proposal under s 104.[12]

[30] Those parts of ss 6 and 7 which are relevant to the present appeal are set out below:

> 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:
>
> (a) the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes

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[10] *Genesis Power Ltd v Franklin District Council* [2005] NZRMA 541 (EnvC) at [213] per Judge Whiting.
[11] *NZ Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC) at 85-86 per Greig J.
[12] Section 104 deals with the matters a consent authority is to have regard to when considering an application for resource consent.

and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:

...

(f) the protection of historic heritage from inappropriate subdivision, use and development.

7 Other matters

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—

...

(c) The maintenance and enhancement of amenity values:

...

[31] Of particular relevance to this appeal is s 6(f) which elevates the protection of heritage to a matter of national importance.

[32] "Historic heritage" is defined in s 2 as follows:

(a) Means those natural and physical resources that contribute to an understanding and appreciation of New Zealand's history and cultures, deriving from any of the following qualities:

(i) archaeological;

(ii) architectural;

(iii) cultural;

(iv) historical;

(v) scientific

(vi) technological; and

(b) includes—

(i) historic sites, structures, places and areas; and

(ii) archaeological sites; and

(iii) sites of significance to Maori, including waahi tapu; and

(iv) surroundings associated with the natural and physical resources.

[33] Generally, to give effect to s 6(f), a district plan will include rules and policies relating to heritage and character. District plans will normally list buildings, places or trees for protection. However, s 6(f) does not provide absolute or total protection because, consistent with the wider principles contained in the RMA, historic heritage is simply one of the considerations required to be taken into account by the decision maker under Part 2.

[34] The purpose of district plans is to "assist territorial authorities to carry out their functions in order to achieve the purpose of [the] Act".[13] As the Chief Justice observed in *Discount Brands Ltd v Westfield (New Zealand) Ltd*:[14]

> The district plan is key to the Act's purpose of enabling "people and communities to provide for their social, economic, and cultural well being". It is arrived at through a participatory process, including through appeal to the Environment Court. The district plan has legislative status. People and communities can order their lives under it with some assurance.

[35] A district plan or a plan change must be prepared in accordance with the district council's functions under s 31, the provisions of Part 2 of the RMA and the council's obligation to prepare and have particular regard to an evaluation report in accordance with s 32.[15] The mandatory content of district plans is provided for in s 75. The hierarchical structure of planning documents under the RMA mandates that a district plan must give effect to national policy statements, the New Zealand Coastal Policy Statement and any regional policy statements.[16] Section 73(1) of the RMA provides that the district plan must be prepared in the manner set out in Schedule 1. However, it is not a mandatory requirement for plan changes to also adhere to the processes set out in Schedule 1.[17]

"Heritage landscape"

[36] Mr Cavanagh submits that s 6(f) has no application because none of the properties owned by the appellants within the MPHA contains any identified archaeological sites or heritage fabric and that any built heritage existing within the

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[13] Section 72.
[14] *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597 at [10].
[15] Section 74.
[16] Section 75(3).
[17] Section 73(1)(A).

PMHA is not on the appellants' land and is, in any event, already subject to protection under the district plan.

[37] Mr Cavanagh submits that the Environment Court applied the heritage landscape construct and thus erred in law. He submits that the Environment Court did not have before it the rigorous multidisciplinary evidence necessary to make a decision on the existence of a heritage landscape. He submits that this Court must be satisfied that the heritage landscape is of significant national significance to justify the proposed development restrictions.

[38] Mr Cavanagh also submits that the Court must be the satisfied that the heritage landscape is of sufficient national significance to justify the proposed development restrictions. In the present case he submits that the key landscape features of the PMHA have nothing to do with the area's heritage and thus there was no evidential foundation for the Environment Court to apply a heritage landscape construct. He acknowledges that the Environment Court did not actually adopt the term "heritage landscape" in its decision but, nonetheless, effectively applied that construct in its analysis. He submits that despite finding that the PMHA contained minimal built heritage (and the appellants' land contained no built heritage whatsoever) the Environment Court considered that the "historical ambience" of the area, provided by its visual character and landscape, justified placing weight on s 6(f) concerns.

[39] Mr Cavanagh submits that as the Environment Court has recognised in earlier decisions, the decision maker must be cautious before applying a heritage landscape construct. The decision maker must undertake a rigorous analysis, involving interdisciplinary expert evidence, and be satisfied that the heritage values in the landscape are of sufficient national significance to trigger s 6(f). In the present case he submits that the Environment Court:

(a) did not have the necessary evidence before it to find that the PMHA was a "heritage landscape" and

(b) its factual conclusions indicate that any heritage value in the PMHA landscape is not of "national significance".

[40] Alternatively, he submits that if the Environment Court applied the correct legal test its factual findings cannot support its conclusion that the PC12 restrictions are justified for the purpose of protecting historic heritage. In making that submission, Mr Cavanagh stressed that he was not asking this Court to undertake a factual evaluation; rather he relied on the Environment Court's factual findings to support his argument that the conclusion was not one which the evidence supported.

[41] Mr Williams, appearing for the Society,[18] carried the argument for the respondents in relation to this part of the appeal. He submits that the appeal is a thinly veiled attempt to re-examine the merits and policy findings of the Environment Court. He submits that the appellants' real concern relates to the weight which was placed by the Environment Court on the heritage and amenity values of the PMHA. He says that there is no error of law and described the heritage landscape argument as a "red herring". He submits that PC12 was not developed on a heritage landscape basis and the Environment Court did not apply a heritage landscape construct in reaching its decision.

[42] Mr Williams submits that the Environment Court did not err in its reasoning because neither the definition of historic heritage nor amenity values are confined to "built heritage". Furthermore, any finding that the built heritage on the appellants' land was minimal would not preclude a finding the PMHA triggered the provisions which deal with heritage and amenity values in ss 6(f) and 7(c). He submits that the Environment Court had sufficient evidence before it to support its conclusion.

[18] The Society, having filed a notice of intention to appear within the prescribed time, had a right to appear and be heard on the appeal under s 301 of the RMA.

Analysis

"Heritage landscape"

[43] The issue of whether a decision maker should take into account the heritage landscape construct under s 6(f) has, apparently, not yet been considered by this Court.

[44] Section 6(f) has been used to protect built heritage, the surroundings of heritage areas and heritage landscapes. The concept of a heritage landscape has been considered in a number of decisions of the Environment Court. However, that Court has tended to adopt a cautious, even non-committal, approach to its considerations of the concept.

[45] It appears that the heritage landscape construct stems from a 2004 Department of Conservation-led study referred to in argument by Mr Cavanagh, known as the *Bannockburn Heritage Landscape Study*.[19] Apparently the primary purpose of the *Bannockburn* study was to trial a newly developed methodology for investigating heritage at a landscape scale. It appears, at least in part, that the catalyst for this initiative was the concern that previously, heritage management agencies in New Zealand "tended to focus on individual heritage sites and features".[20] The methodology is interdisciplinary and involves spatial analysis using connectivities between superimposed layers of history.

[46] The methodology developed by the Department of Conservation was to:[21]

> Facilitate the identification, management and interpretation of landscapes which may have multiple historic sites, many stories and close community relationships with the land. It was recognised that identifying, interpreting and managing heritage at a landscape scale would require different techniques to discrete heritage sites …

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[19] Janet Stephenson & Ors, *Bannockburn Heritage Landscape Study* (Department of Conservation, Wellington, 2004).
[20] At [1.1].
[21] At [1.1].

[47] Significantly, the study defined "heritage landscape" as:[22]

> A heritage landscape is a landscape, or network of sites, which has heritage significance to communities, tangata whenua, and/or the nation.
>
> The landscape methodology uses the concept of layered webs to analyse and highlight key relationships between physical remains, key stories, and contemporary associations.
>
> As development and subdivision make their own marks on the landscape, the older continuities become fainter, and their cohesion as a physical aspect of the past become more difficult to establish. A landscape approach, recognising the interconnectedness of physical remains and stories associated with the land, can help to bring together understanding about the different traces of the past on the landscape, and how and why it is valued by people today.

[48] It appears that the first judicial reference to the concept of "heritage landscape" is found in *Waiareka Valley Preservation Soc Inc v Waitaki District Council* where the Environment Court was satisfied that a purposive interpretation of s 6(f) enabled that provision to "describe a collection of historic sites, places or areas as a heritage landscape".[23]

[49] But just several months later, the Court cautioned against the use of the phrase "heritage landscape" in *Maniototo Environmental Society Inc v Central Otago District Council* noting that such usage:[24]

> ... may be dangerous under the RMA where the word "landscape" is used only in s 6(b). Further, the concept of a landscape includes heritage values, so there is a danger of double-counting as well as of confusion if the word "landscape" is used generally in respect of section 6(f) of the Act.

[50] Further words of judicial caution were expressed by the Environment Court over the use of the term and its inclusion in the complex lexicon of the RMA, noting in *Gavin H Wallace Ltd v Auckland Council*:[25]

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[22] At [1.4].
[23] *Waiareka Valley Preservation Soc Inc v Waitaki District Council* EnvC C058/2009; 14 August 2009 at [230]-[231].
[24] *Maniototo Environmental Society Inc v Central Otago District Council* EnvC Christchurch 103/09, 28 October 2009 at [208].
[25] *Gavin H Wallace Ltd v Auckland Council* [2012] NZEnvC 120 at [66].

> On reflection we have difficulty in endorsing the concept as part of the RMA process for a number of reasons, including:
>
> (a) *Heritage landscape* is not a concept referred to in the Act;
>
> (b) Outstanding landscapes and features are protected from inappropriate subdivision use and development by s 6(b) of the Act;
>
> (c) Maori values are recognised and protected by sections 6(e), 7(a) and 8 of the Act;
>
> (d) Historic heritage is protected from inappropriate subdivision use and development by Section 6(f) of the Act ; and
>
> (e) There are also other important matters provided for in the Act that would apply, such as matters relating to amenity, indigenous vegetation, natural character and coastal environment, that may at times be relevant to a given situation.
>
> To introduce a new concept not recognised explicitly by the statute would, in our view, add to the already complex web of the Act and make matters more confusing."

[51] The dangers of double-counting Part 2 matters under the umbrella of a heritage landscape have also been discussed in relation to Maori issues which are specifically provided for in ss 6(e), 7(a) and 8 of the RMA.[26]

Protection of the surrounding area

[52] Section 6(f) extends beyond the protection of a listed heritage item. The definition of "historical heritage" includes the "surroundings associated with the natural and physical resources" that contribute to an understanding and appreciation of our history. As a matter of commonsense, the s 6(f) protection extends to the curtilage of the heritage item and the surrounding area if the protection of those areas helps to retain the heritage significance of the heritage item itself. This is uncontroversial. The difficulty, however, is the extent of the relevant curtilage or "surrounding area". Where that area is expansive the boundary between heritage protection and the concept of a "heritage landscape" may begin to blur. This issue arose in *Waiareka Valley Preservation Soc Inc v Waitaki District Council* where Judge Whiting said at [231]:[27]

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[26] See *Clevedon Cares Inc v Manukau City Council* [2010] NZEnvC 211 at [185].
[27] *Waiareka Valley Preservation Soc Inc,* above n 23, at [230]-[231].

> We further agree that it is open to us under section 6(f) to describe a collection of historic sites, places or areas as a heritage landscape. However, the nomenclature "landscape" could easily be substituted by "area" or "surrounds". Which nomenclature is used would depend on the particular context.

[53] It is the imprecision of the language which has led to the criticism of the "landscape heritage" construct as noted in the cases referred to above.

[54] A helpful case which discusses the relationship between a heritage item and its setting is to be found in the Environment Court's decision in *Oriental Parade (Clyde Quay) Planning Society v Wellington City Council*.[28] That case involved a more restricted application of the s 6(f) protection to the surroundings heritage site in Oriental Bay. The Wellington District Plan attempted to control the height of buildings on Oriental Parade under a plan change which specified a 22 metre height limit for certain properties and set back restrictions. The appellant wished to build to a height of 30 metres. The subject site is dominated by the St Gerard's Monastery on the hill behind Oriental Bay which serves as a back drop to the central city. The monastery is a Category 1 historic place under the Historic Places Act 1993 and a listed heritage item in the district plan.[29]

[55] A heritage advisor in that case defined "heritage curtilage" as:[30]

> Meaning the area of land surrounding an item or area of heritage significance which is essential for retaining and interpreting its heritage significance. It can apply to land which is integral to the heritage significance of items of the built heritage, or a precinct which includes buildings, works, relics, trees or places and their setting.

[56] He defined the curtilage of St Gerard's as the actual chapel, the hillside location, the views of St Gerard's and its setting and "adjacent nearby residential dwellings".

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[28] *Oriental Parade (Clyde Quay) Planning Society v Wellington City Council* EnvC W63/05, 2 August 2005.
[29] At [12].
[30] At [38].

[57] In the same case, another heritage expert observed:[31]

> ... there is a clear presumption in the RMA that the surroundings of a historic place are important qualities that should be recognised and provided for.

[58] The Environment Court concluded:[32]

> ... the council's limitation of the height limits of buildings adjacent to the escarpment is a careful, well thought out approach to ensuring that St Gerard's and its setting are not incrementally encroached upon by unsympathetic and smothering development. ...
>
> If high buildings were allowed to 30 metres many of the values of St Gerard's in its setting be they landscape, heritage, grandeur or open space at night, would merge into a blur of lit domesticity.

[59] The Environment Court then considered the height restriction in the context of assessing the views of the monastery and concluded: [33]

> Returning from a site visit to those facilities, from the boardwalk the close up views of the escarpment and monastery are thus immediate with strong visual appeal. It takes little extrapolation from 166 Oriental Parade to see that the 30 metre height limit sought by the appellant across the face of the escarpment would markedly reduce the green podium on which the monastery sits and the open space "frame" for the monastery ...
>
> ... The beauty of St Gerard's in its prominent location is that it can be seen from numerous places with sequential views (rather than fixed ones) gained from walking or driving so the view changes.

[60] The appeal was dismissed. The Environment Court concluded that extending the height limit to 30 metres in Oriental Parade would not fulfil the purposes of the RMA.

[61] Similar comments can be found in *Pick v Far North District Council*[34] which dealt with appeals concerning the level of heritage protection afforded to the township of Russell in the proposed district plan. The Environment Court noted the comments of an expert on the subject of heritage protection and surrounding areas:[35]

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[31] At [42].
[32] At [43]-[44].
[33] At [71] and [73].
[34] *Pick v Far North District Council* EnvC A064/06, 26 May 2006 at [25].
[35] At [25].

> Mr Salmond is an architect very experienced and qualified by training in heritage conservation work. Building on his description of the way in which the town has come together, he opined that the relatively small number of heritage structures in the mapped heritage precincts required to have their surrounding amenity protected by a "fitting in" so as to maintain established patterns of scale and setting, meaning the relationship to other buildings, the streets, and the broader urban landscape.

[62] The Environment Court was persuaded that the heritage precinct in the proposed plan was insufficient to satisfy the objectives of the plan:[36]

> We find that lack of broader support by way of provisions in the buffer area of the basin and gateway, is inapt. …
>
> … we are persuaded that a number of the very clear objectives, policies and issues quoted earlier in this decision (which properly address the relevant aspects of the purpose and principles of Part 2 of the Act), should have further reinforcement at policy and implementation levels. … The evidence clearly established that there is an attractive village atmosphere in the relevant parts of the town, with a distinctive low density character, that the setting and landscape character give Russell a particular distinction from other urban localities in the district and beyond, that historic heritage and amenity values are interwoven, and that these qualities can be diminished by encroachment by out of scale new buildings, alterations and additions, on the flat area and basin slopes.

[63] The appeals were allowed and the parties were directed to draft new provisions for insertion into the proposed district plan.[37]

[64] That the decision maker can take into account features which fall outside the development area because "they nevertheless influenced, and will be influenced by, what will take place within the development area" was recognised by the Environment Court in *Waterfront Watch Inc v Wellington City Council*.[38]

[65] As is apparent from the case law, s 6(f) applies to the protection of the specific heritage site and its surroundings. The degree to which those surroundings will be protected is to be determined by reference to a range of considerations including those in Part 2 as well as the regional and district planning documents. The protection of the surroundings of a heritage site is supported by the learned authors of *Environmental* and *Resource Management Law* where it is noted that

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[36] At [34]-[35].
[37] At [47].
[38] *Waterfront Watch Inc v Wellington City Council* [2012] NZEnvC 74 at [47].

amenity and design control policies and rules may be introduced in district plans in recognition of the fact that:[39]

> The relationship between heritage buildings and new structures may be compromised by an incompatible design which diminishes the integrity of the heritage protection objective, and detracts from the value of heritage within the location.

Did the Environment Court apply the heritage landscape construct?

[66] As already noted and frankly acknowledged by Mr Cavanagh, nowhere in the decision of the Environment Court is express reference made to a "heritage landscape". I am of the view the Environment Court did not adopt a "heritage landscape" construct to its assessment of heritage considerations within the PMHA. What the Environment Court did, correctly in my view, was to apply the concept of "surrounding areas" heritage to protect the listed items located on the site.

[67] For the reasons already discussed, the notion of a heritage landscape does not readily apply to the PMHA. The value of the *Bannockburn* study is that its methodology required a shift from a focus on individual heritage sites to a wider consideration of the landscape within which they fit. In my view the Environment Court adopted a conventional approach to this assessment.

[68] The subject land within the PMHA does not lend itself to ready comparisons with other cases where the scale of the area involved is a good deal greater.[40] The subject land area in the PMHA is modest and commercially zoned. It originally affected a limited scattering of properties at 16 to 36 Marsden Road and 3 Kings Road. The cases discussed above involve tracts of land often measuring hundreds of hectares. They thus fit within the conventional and commonly accepted definition of "landscape".

[69] Secondly, the Environment Court did not refer to the *Bannockburn* study and did not use the terminology used in that study to characterise the heritage landscape. Instead the Environment Court restricted the PMHA to "critical neighbouring sites",

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[40] See *Waiareka Valley Preservation Soc Inc,* above n 23; *Maniototo Environmental Society Inc,* above n 24; *Clevedon Cares Inc,* above n 26; and *Gavin H Wallace Ltd,* above n 25

the scheduled stone ruins, St Paul's Church and its environs and the scheduled Norfolk pine.[41]

[70] Thirdly, there are other indications in the Environment Court's judgment which tell against the use of a heritage landscape concept in favour of the more conventional and settled approach to heritage protection. After considering the expert evidence and the effects of the various planning regimes proposed, the Environment Court turned to consider PC12 in light of the Plan, other policy documents and Part 2 considerations. This is the correct and principled approach to take, as mandated by s 74 of the RMA. The Environment Court made express reference to and highlighted the policies under the Plan such as:[42]

> A heritage resource [is] recognised as a complete entity whose surrounds or setting may have an important relationship with the values of the resource. (FNDP 12.5.4.1). By way of explanation the policy outlines instances where the setting is important ...

[71] A further statement of the Environment Court which demonstrates that recourse was not made to the heritage landscape construct is:[43]

> The polices, as we have indicated, look to avoid compromising the heritage values of areas with significant historic character and to recognise heritage resources as a complete entity *whose surrounds and setting may relate significantly to the resources' value*.
>
> (Emphasis added)

[72] The Environment Court concluded that the purpose of the RMA and the objectives and policies of the Plan would not be served by treating the area as "simply another part of the commercial zone of Paihia".[44] The Environment Court then found that the planning restrictions in PC12 were required on the "critical neighbouring sites" of the listed historic heritage resources. The effect of surrounding properties on the appreciation of listed heritage sites was explicitly stated:[45]

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[41] *Guyco Holdings Limited*, above n2 at [84](a).
[42] At [58].
[43] At [62].
[44] At [77].
[45] At [86].

> Building mass, dominance and the location of development on *adjoining sites* will determine the extent to which persons at 28 and 36 Marsden Road appreciate the sites' historic heritage and amenity values.
>
> (Emphasis added)

[73] A further demonstration of the Environment Court's focus on neighbouring sites was the removal of certain properties from the PMHA. On that topic the Environment Court said:[46]

> [W]e have concluded that 16 to 22 Marsden Road and the sliver of 3 Kings Road behind the "Herald" plaque site are *sufficiently distant* from the historic heritage resources around St Pauls and the Trust land and are sufficiently devoid of historic heritage values, as not to warrant management for the purposes of s 6(f) RMA.
>
> (Emphasis added)

[74] In my view it is plainly apparent the Environment Court did not apply the heritage landscape construct. It is thus not necessary to address whether rigorous multidisciplinary evidence was required.

Appellants' other arguments

[75] I turn now to consider the further arguments advanced by the appellants under this ground of appeal.

[76] Mr Cavanagh submits that s 6(f) has no application because the appellants' properties are bereft of any built heritage and what heritage does exist within the PMHA is already protected under the Plan. The details of these protections were set out earlier in this judgment.

[77] For the reasons earlier set out, s 6(f) can apply to protect the surroundings of specific heritage sites even if no built heritage is evident on those surrounding sites.

[78] Mr Cavanagh also submits that the Environment Court's conclusion that PC12 was justified for the purpose of protecting historic heritage is not supported by its factual findings. I do not accept that submission.

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[46] At [88].

[79] The Environment Court expressly found that the "site contains very few physical remains above ground from the early period when it was most significant" and that the built heritage on the site is "minimal".[47] The Environment Court considered the evidence of landscape architects that the defining elements of the PMHA are limited site coverage, generous building set backs and that the views from St Paul's to the beachfront and to the Paihia Scenic Reserve are "key elements in its character".[48]

[80] The Environment Court then considered the evidence of the appellants' expert, Mr Scott, who conceded that under a commercial zone without additional heritage protection, "many of the attributes which are key to the present character of the site would be lost".[49] Mr Scott also accepted that the views of St Paul's from Marsden Road would be "significantly diminished" and that the sense of place and the character of the experience would "change completely" under his modified rules.[50] The Environment Court then added:[51]

> However, any of the other planning regimes proposed would also bring change to the experience of anyone on or close to the site.

[81] The Environment Court noted the evidence of Dr Gilling, an historian with particular expertise in early colonial New Zealand history called by the Society, who was asked:

> What outside the area of the properties controlled by St Paul's parish and the society, provides memory to the site?

He replied, "very little, if anything".

[82] Although the judgment does not make reference to other parts of Dr Gilling's evidence, reference to them adds to the body of evidence which supports the conclusion that the surroundings to the identifiable historical features contribute to the special character of the PMHA. He said:[52]

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[47] At [22].
[48] At [25].
[49] At [31].
[50] At [31].
[51] At [32].
[52] At [10], statement of evidence dated 5 August 2013.

> The preservation of a historical precinct on the site of the CMS Mission Station at Paihia would nevertheless be a valuable and appropriate recognition of the *central site of the most important group of Pakeha in early colonial New Zealand.*
>
> (Emphasis added)

[83] Dr Gilling maintained that view even though an overlay, as opposed to a precinct, was what was proposed by PC12. On this topic he said:[53]

> ... precisely because of the lack of built remains from the CMS period, it is all the more important to ensure this area "stands apart" from the rest of Paihia, in order to prompt people living within the District or visiting the locality to ask "*Why is this area different, what happened here?*"
>
> (Emphasis added)

[84] The Environment Court concluded its findings that whilst the PMHA contains few remnants of the past colonisation and contact period, the open, low density development "still enables the visitor to get a sense of place and the context of the remaining structures of the period". Such an experience would change completely under a commercial zoning. However, if the area was developed to the full extent allowed by PC12, "the visitor would find it much more difficult to get a sense of place".[54]

[85] For these reasons I do not accept that the Environment Court reached a conclusion which was irrational or one that no reasonable decision maker would have come to. There was ample evidence available to the Environment Court to conclude that the area has heritage values worthy of protection. Despite the express finding that the built heritage within the PMHA is "minimal" and that the setting has been significantly altered and can expect to be further modified, it was still open to the Environment Court to conclude that the area required differentiation from the balance of the commercial zone. The finding that "under any scenario the experience of the person on site will be remote from the experience of people in the 19th century"[55] does not exclude the PMHA "from contribut[ing] to an understanding and appreciation of New Zealand's history of cultures".[56]

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[53] At [16], statement of evidence dated 5 August 2013.
[54] At [48]-[49].
[55] At [74].
[56] See definition of "historic heritage" in s 2.

[86] For these reasons I reject the submission that the Environment Court adopted a heritage landscape construct. The Environment Court's factual findings support its conclusion that the PC12 restrictions are justified. I am thus not satisfied that the Environment Court fell into error.

Double counting

Appellant's submissions

[87] Mr Cavanagh submits that because the Environment Court adopted a "heritage landscape" construct it erroneously conflated landscape and amenity values with historic heritage which led to the type of double counting that the Environment Court warned against in *Maniototo Environmental Society Inc* and *Gavin H Wallace*.

[88] Mr Cavanagh submits that the experts retained by the Council and the Society used the concepts of landscape and amenity value to inflate the heritage value of the PMHA and that, in fact, there is no link between the landscape and amenity qualities of the PMHA and the historical events which took place there. He submits that these errors flow through and flawed the Environment Court's analysis.

[89] Mr Cavanagh also highlights passages in the Environment Court's decision where it noted that apart from already protected items, the most significant feature of the PMHA is its typography and setting and that the experience of persons on the site today is "remote" from the experiences of the 19th century.

[90] Furthermore, Mr Cavanagh submits that the Environment Court erred by placing inadequate weight on the economic effects of the PC12 restriction when considering the merits of PC12 under its Part 2 analysis. He submits that PC12 disrupts the longstanding planning development partnership between Russell and Paihia and that PC12 alters this balance by removing an important strip of commercially zoned beachfront land from the future development potential of the township of Paihia. He refers to the evidence of Mr Putt whose evidence was to the effect that the restrictions prevented reasonable development on most land within the PMHA. Mr Cavanagh says that without PC12, the underlying commercial zoning

would still promote the use of the land and would ensure that the identified heritage resources on the waterfront are protected.

[91] It is Mr Cavanagh's submission that the Environment Court did little to address the submissions on economic effects and did not draw any real conclusions as to the economic effects. As a consequence, the Environment Court fell into error by giving disproportionate weight to landscape and amenity values in preference to economic values. He submits that a reasonable decision maker could not have reached the conclusion that PC12 fits within the purpose of the RMA.

Respondent's submissions

[92] Mr Williams, for the Council, submits that the question of weight to be attached to policy questions and evidence is a matter for the Environment Court. He repeats his submission that the question of evidential weight may not be considered on an appeal on a point of law. Furthermore, he rejects the argument that there was any "double counting" relying on the evidence of Mr Brown that there is an important inter-relationship between heritage and amenity factors.

[93] Mr Williams submits that the Environment Court did not fail to consider the economic effects of the competing planning options. He observes that no party analysed the costs and benefits of PC12 compared with the costs and benefits of a commercial zone. The Environment Court decision, he submits, turned upon matters of evaluation and fact which are not amenable to challenge on this appeal.

[94] The weight to be attached to a particular planning policy and the Environment Court's view on a matter of opinion within its specialist expertise will generally be a matter for the Environment Court. No question of law arises from the expression by the Environment Court of its view on a matter of opinion within its specialist expertise,[57] unless there is an error of law falling under one of the four categories as listed in *Countdown Properties (Northlands) Ltd.*

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[57] *Guardians of Paku Bay Association Ltd v Waikato Regional Council* [2012] 1 NZLR 271 (HC) at [33]; *Stark v Auckland City Council* [1994] 3 NZLR 614 (HC) at 617 per Blanchard J; *Hutchinson Brothers Ltd v Auckland City Council* (1988) 13 NZTPA 39 (HC); *Hungry Horse Ltd v Manukau City Council* HC Wellington M117/84, 28 October 1984 at [6].

Analysis

[95] Under s 6(b) of the RMA the Court is required to take into account the need to protect "... outstanding natural features and landscapes from inappropriate subdivision, use, and development". The Court is also required to recognise and provide for other matters of national importance including those referred to in s 6(f), namely the protection of historic heritage from inappropriate subdivision, use, and development. The Environment Court has urged caution not to "double count" when considering a heritage landscape, in other words to ensure that the consideration of outstanding natural features and landscapes is quarantined from the considerations and assessment of historic heritage and its protection. This principle was discussed in *Maniototo Environmental Society Inc* where the Environment Court observed:[58]

> [W]e consider this usage may be dangerous under the RMA where the word "landscape" is used only in section 6(b). Further, the concept of a landscape includes heritage values, so there is a danger of double-counting as well as of confusion if the word "landscape" is used generally in respect of section 6(f) of the Act.

[96] Plainly, the need for caution is justified. In *Maniatoto Environmental Society Inc* the Environment Court determined that the Lammermoor range was an outstanding natural landscape worthy of protection in terms of s 6(b). However, due to the historic heritage considerations, particularly the Old Dunstan Road, which runs across the range, the landscape also has historic values in terms of s 6(f). The Environment Court concluded there was a risk of double counting the landscape value by also dressing it up as a heritage consideration.

[97] The question of double counting has also been in discussed in relation to s 6(e) which requires the Environment Court to recognise and provide for the relationship of Maori and their culture and traditions, being matters of national importance. This was discussed by the Environment Court in *Clevedon Cares Inc* which determined that the Wairoa Valley was a cultural heritage landscape but noted that:[59]

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[58] *Maniototo Environmental Society Inc,* above n 24, at [208].

[59] *Clevedon Cares Inc* above, n 24 at [185].

> It is also important to recognise the need to avoid the double counting of Maori issues which are specifically provided for in Sections 6(e), 7(a) and 8 of the Act.

[98] As I have already discussed, I am satisfied that in the present case the Environment Court did not apply a heritage landscape construct in its analysis and on this basis alone the cases cited by Mr Cavanagh are capable of being distinguished. In the present case there was no suggestion that the land within the PMHA was an area of outstanding natural features and landscapes. In fact, the Environment Court did not consider s 6(b) at all. Nor did it need to. That being the case it is difficult to see how the claim of double counting in this case can be maintained. It is a wholly different position from that which was involved in *Maniatoto Environmental Society Inc*.

[99] Furthermore, Mr Cavanagh's submission that the concept of landscape and amenity value were used by the Environment Court to erroneously inflate the heritage value of the PMHA by the Environment Court equating "distinctive landscapes" with "heritage" cannot succeed. There was no error of law involved for the reasons which follow.

[100] First, in my view, it is artificial to attempt to segregate or quarantine the various Part 2 considerations in every case. Matters such as landscape, heritage and amenity are all values which, to a greater or lesser extent, are shared and their consideration must, inevitably, to some extent overlap when examining the value and importance to be ascribed to them. In the present case heritage values and amenity values are inevitably linked. The Environment Court, in its assessment, made it clear that the existing landscape characteristic such as limited site coverage, generous setbacks and low fences, operated to enhance the amenity value of the area and assisted the public's appreciation of St Paul's Church and the historic events which took place within the PMHA.[60]

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[60] *Guyco Holdings Ltd,* above n 1, at [49], [75] and [86][c].

[101] The difficulty, if not artificiality, of an assessment which completely segregates the factors requiring consideration is illustrated by Mr Brown's evidence where he said:[61]

> Once cannot, therefore, address amenity without regard to the locality's heritage or *vice versa*. Consequently, I don't see my assessment of the area as some sort of double counting: it simply acknowledges an important inter-relationship.

[102] The Environment Court's approach in the present case parallels that adopted by that Court in *Oriental Parade (Clyde Quay) Planning Society* and *Waterfront Watch Inc* where that Court, in its balancing of the need to manage use and development with the protection of natural and physical resources, concluded that the proposed development of the surroundings of protected heritage can have a detrimental effect on the amenity values of the site and the public's perception and appreciation of the heritage values. In *Oriental Parade (Clyde Quay) Planning Society* the Court placed emphasis on the importance of sight lines to the monastery and the effect which a 30 metre height limit on Oriental Parade might have on the green podium on which the monastery sits and the open space "frame" for the monastery.[62] This is similar to the present case where the Environment Court determined that the limitations on development imposed by PC12 would help retain sight lines into St Paul's Church. Dr Gilling's evidence on this point is worthy of repeating. He said:[63]

> Should the Paihia Mission site be lost to view, it is quite possible, even probable, that a potentially distorted picture of history will result, based largely on what may appear today as the most significant old buildings preserved in other places of the Far North, simply because through accidents of construction or location they have survived this long. A more complete and therefore accurate understanding cannot be gained without reference to a more embedded, less immediately visible and accessible, but arguably more important history, requiring more subtle forms of recognition to enable and even encourage continued study and understanding of the past it represents.

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[61] Rebuttal statement dated 18 October 2013 at [28].
[62] *Oriental Parade (Clyde Quay) Planning Society,* above n 28, at [71].
[63] Dr Gilling's evidence-in-chief at [15].

[103] This evidence led to the following conclusion by the Environment Court on the need to maintain sight lines in order to appreciate the area's heritage values:[64]

> We are not confident that the corresponding Commercial Zone ... would be the most appropriate way of dealing with these matters in order to maintain sight lines into and from St Paul's and a level of amenity commensurate with the appreciation of its heritage values.

[104] It follows that I do not accept that the concepts of landscape and amenity value were improperly used by the Environment Court to inflate the heritage value of the PMHA and that there was no conflation of the notions of "distinctive landscape" with "heritage". Indeed, the Environment Court appears to have been assiduous in its treatment of the requirement of separation in its judgment.

Economic effects

[105] Finally, I need to consider whether the Environment Court placed insufficient weight on the economic effects of the restrictions imposed by PC12. The appellants' submission is that the statutory purpose of sustainable management includes enabling communities, and those living within them, to promote their economic well-being. That is plain from the wording of ss 5, 6, 7 and other provisions within the RMA.

[106] Questions of weight, as earlier noted in this judgment, are not normally capable of examination on an appeal on a question of law unless the appeal Court concludes the decision maker failed to take into account a relevant consideration.

[107] A reading of the Environment Court's judgment reveals that it did, expressly, take into account the economic effects of PC12 but determined that the relevant matters required to be considered in terms of ss 6 and 7 weighed against development of the PMHA under the commercial zone rules.

[108] For example, in the judgment under the heading, "Economic effects of the various planning regimes,"[65] the Environment Court specifically dealt with Mr Cavanagh's submission that the Council had failed to provide specialist

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[64] *Guyco Holdings Ltd,* above n 1, at [86](d).
[65] *Guyco Holdings Ltd,* above n 2, at [37]-[50].

economic assessment to quantify the losses both to the landowners through lost development opportunity and to the community in terms of reduced ability to provide more extensive tourist-related facilities in the PMHA. The Environment Court made particular reference to the evidence of Mr Putt, a town planner called by the appellants, who stated there had been no assessment of the benefits and costs of the policies and methods produced by PC12 compared to the benefits and costs for the community at large from the operation over this land of unfettered commercial-zoned provisions.

[109] The Environment Court recorded that no party had brought to the case such an analysis, adding, however, that common sense would dictate that the range of development opportunities available under the provisions of PC12 would be somewhat less than if development were allowed in accordance with commercial zone rules. The Environment Court referred to evidence called by the appellants from Mr Rendell, the owner of the "Bistro 40" site who was also a Paihia real estate agent. His evidence was that there was a shortage of commercial land in Paihia for the future development of retail and tourist accommodation buildings. He noted, in particular, the lack of vacant retail space on the Paihia waterfront. He also referred to a perceived lack of good quality, high-end accommodation in Paihia expressing the view that the appropriate place for such accommodation was on the waterfront and, in this context, the land subject to PC12 was important for the future development of tourist facilities in Paihia but would be seriously constrained by the restrictions of PC12.

[110] The Environment Court also referred to the evidence of Professor Milne, a tourist expert, who was of the opinion that the area of most demand was not necessarily for a large-scale five-star property but rather for boutique style high-end accommodation. The Environment Court recorded Mr Putt's concession that under PC12, as proposed by the Council, development of this sort could occur on the subject land.

[111] The Environment Court explicitly dealt with the question of the economic effects. It accepted that the landowners would not receive as high a return from the land as they would if commercial zoning only applied, noting, despite this, that there

was no evidence on which the Court could estimate the extent of that loss. The Environment Court also recognised that the land would service fewer visitors and so the input from it into the wider community would be reduced, again by "an unquantifiable amount".[66]

[112] The Environment Court then went on to balance those losses against any gain from increased "heritage tourism" which could result from the enhanced protection to the heritage of the site afforded by the proposed plan change. The Environment Court referred to the evidence of Professor Milne whose opinion was that a more diversified tourism offering, including better use of the region's heritage resources, had the potential to extend the "shoulder-season" on either side of the summer peak. Professor Milne also referred to research by the Travel Industry Association of America which showed that, on average, visitors to historic sites stayed longer in destinations and spent more money than other types of tourist. That tendency has been confirmed by recent research from the New Zealand Tourism Research Institute in both New Zealand and the South Pacific.

[113] The Environment Court summarised the issue of balancing the economic effects with the heritage and amenity values in the following way:[67]

> We summarise our findings on the effects of the various planning regimes proposed, in the following way. The PMHA covers a site where important events in the early period of European colonisation occurred. It contains few remnants of that era, but the open, low-density development that has occurred so far still enables a visitor to get a sense of place and the context of the remaining structures of the period. That would change completely if a Commercial Zone enabled by the rules favoured by *Guyco* was imposed on the site. However, PC12 in its present form would reduce the range and flexibility of commercial activities on this site and would reduce, to an extent we are unable to quantify with precision, the level of contribution the site would make to the provision of tourist-related facilities in the area. The extent to which this reduction would be offset by the effect of visitors exploring the site's historic heritage features also remains uncertain, but it is likely to be less to the extent that development in accordance with PC12 would reduce the ability of people to interpret the area and its history.

[114] For these reasons I am satisfied that this ground of appeal must also fail.

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[66] At [43].
[67] *Guyco Holdings Limited*, above n 2 at [49].

Setback designation

[115] Mr Cavanagh accepts that the success of this ground of appeal is inextricably linked to the success of the first two grounds of appeal. If the appellants are unsuccessful in relation to those grounds the argument in relation to the setback designation must consequentially fail. As Mr Cavanagh conceded:

> If the setback control is justified for the protection of heritage values then it is a legitimate planning control.

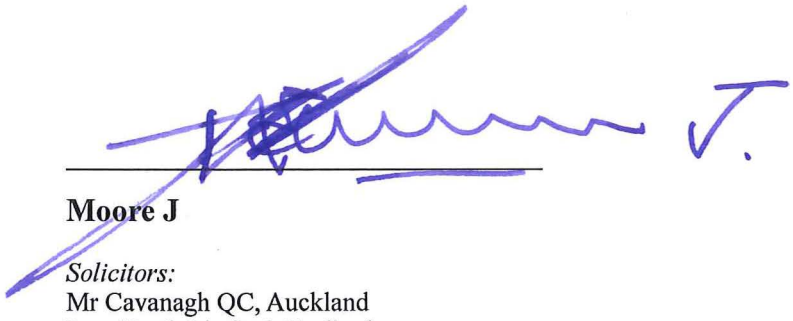
[116] Having regard to the findings I have made in relation to the first two grounds of appeal it is not necessary for me to consider the question of setback.

Result

[117] The appeal is dismissed.

Costs

[118] The respondent and the Paihia Heritage Precinct Society Inc (s 301 party) are entitled to costs. Costs are awarded on a 2B basis with disbursements as fixed by the Registrar.



Moore J

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