BEFORE THE HEARINGS PANEL
FOR THE QUEENSTOWN LAKES PROPOSED DISTRICT PLAN

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of Hearing Stream 05 – District Wide chapters

CASEBOOK FOR QUEENSTOWN LAKES DISTRICT COUNCIL

HEARING STREAM 05 – DISTRICT WIDE

22 September 2016

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Palmerston North City Council v Motor Machinists Ltd

High Court Palmerston North CIV 2012-454-0764; [2013] NZHC 1290
13, 20 March; 31 May 2013
Kós J

Resource management — Appeals — Proposed district plan change — Whether submission "on" a plan change — Whether respondent's submission addressed to or on the proposed plan change — Procedural fairness — Potential prejudice to people potentially affected by additional changes — Whether respondent had other options — Resource Management Act 1991, ss 5, 32, 43AAC, 73, 74, 75 and 279 and sch 1; Resource Management (Simplifying and Streamlining) Amendment Act 2009.

The Council notified a proposed district plan change (PPC1). It included the rezoning of land along a ring road. Four lots at the bottom of the respondent's street, which ran off the ring road, were among properties to be rezoned. The respondent's land was ten lots away from the ring road. The respondent filed a submission that its land too should be rezoned. The Council said the submission was not "on" the plan change, because the plan change did not directly affect the respondent's land. The Environment Court did not agree. The Council appealed against that decision.

Held: (allowing the appeal)

The submission made by the respondent was not addressed to, or "on", PPC1. PPC1 proposed limited zoning changes. All but a handful were located on the ring road. The handful that were not on the ring road were to be found on main roads. In addition, PPC1 was the subject of an extensive s 32 report. The extension of the OBZ on a spot-zoing basis into an isolated enclave within Lombard Street would have reasonably required s 32 analysis to meet the expectations of s 5 of the Act. It involved more than an incidental extension of the proposed rezoning. In addition, if incidental extensions of this sort were permitted, there was a real risk that people directly or potentially directly affected by additional changes would be denied an effective opportunity to respond as part of a plan change process. There was no prejudice to the respondent because it had other options including submitting an application for a resource

consent, seeking a further public plan change, or seeking a private plan change under sch 1, pt 2 of the Act (see [47], [49]).

Clearwater Resort Ltd v Christchurch City Council HC Christchurch AP34/02, 14 March 2003 approved.

Other cases mentioned in judgment

Countdown Properties (Northlands) Ltd v Dunedin City Council [1994] NZRMA 145 (HC).

General Distributors Ltd v Waipa District Council (2008) 15 ELRNZ 59 (HC).

Halswater Holdings Ltd v Selwyn District Council (1999) 5 ELRNZ 192 (EnvC).

Naturally Best New Zealand Ltd v Queenstown Lakes District Council EnvC Christchurch C49/2004, 23 April 2004.

Option 5 Inc v Marlborough District Council (2009) 16 ELRNZ 1 (HC).

Appeal

This was an appeal by the Palmerston North City Council against a decision of the Environment Court in favour of the respondent, Motor Machinists Ltd.

JW Maasen for the appellant.

B Ax in person for the respondent.

KÓS J. [1] From time to time councils notify proposed changes to their district plans. The public may then make submissions "on" the plan change. By law, if a submission is not "on" the change, the council has no business considering it.

[2] But when is a submission actually "on" a proposed plan change?

[3] In this case the Council notified a proposed plan change. Included was the rezoning of some land along a ring road. Four lots at the bottom of the respondent's street, which runs off the ring road, were among properties to be rezoned. The respondent's land is ten lots away from the ring road. The respondent filed a submission that its land too should be rezoned.

[4] The Council says this submission is not "on" the plan change, because the plan change did not directly affect the respondent's land. An Environment Court Judge disagreed. The Council appeals that decision.

Background

[5] Northwest of the central square in the city of Palmerston North is an area of land of mixed usage. Much is commercial, including pockets of what the public at least would call light industrial use. The further from the Square one travels, the greater the proportion of residential use.

[6] Running west-east, and parallel like the runners of a ladder, are two major streets: Walding and Featherston Streets. Walding Street is part of a ring road around the Square.[1] Then, running at right angles between

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1 Between one and three blocks distant from it. The ring road comprises Walding, Grey, Princess, Ferguson, Pitt and Bourke Streets. See the plan excerpt at [11].

Walding and Featherston Streets, like the rungs of that ladder, are three other relevant streets:

(a) *Taonui Street:* the most easterly of the three. It is wholly commercial in nature. I do not think there is a house to be seen on it.
(b) *Campbell Street:* the most westerly. It is almost wholly residential. There is some commercial and small shop activity at the ends of the street where it joins Walding and Featherston Streets. It is a pleasant leafy street with old villas, a park and angled traffic islands, called "traffic calmers", to slow motorists down.
(c) *Lombard Street:* the rung of the ladder between Taonui and Campbell Streets, and the street with which we are most concerned in this appeal. Messrs Maassen and Ax both asked me to detour, and to drive down Lombard Street on my way back to Wellington. I did so. It has a real mixture of uses. Mr Ax suggested that 40 per cent of the street, despite its largely residential zoning, is industrial or light industrial. That is not my impression. Residential use appeared to me considerably greater than 60 per cent. Many of the houses are in a poor state of repair. There are a number of commercial premises dotted about within it. Not just at the ends of the street, as in Campbell Street.

MML's site

[7] The respondent (MML) owns a parcel of land of some 3,326 m^2. It has street frontages to both Lombard Street and Taonui Street. It is contained in a single title, incorporating five separate allotments. Three are on Taonui Street. Those three lots, like all of Taonui Street, are in the outer business zone (OBZ). They have had that zoning for some years.

[8] The two lots on Lombard Street, numbers 37 and 39 Lombard Street, are presently zoned in the residential zone. Prior to 1991, that land was in the mixed use zone. In 1991 it was rezoned residential as part of a scheme variation. MML did not make submissions on that variation. A new proposed district plan was released for public comment in May 1995. It continued to show most or all of Lombard Street as in the residential zone, including numbers 37 and 39. No submissions were made by MML on that plan either.

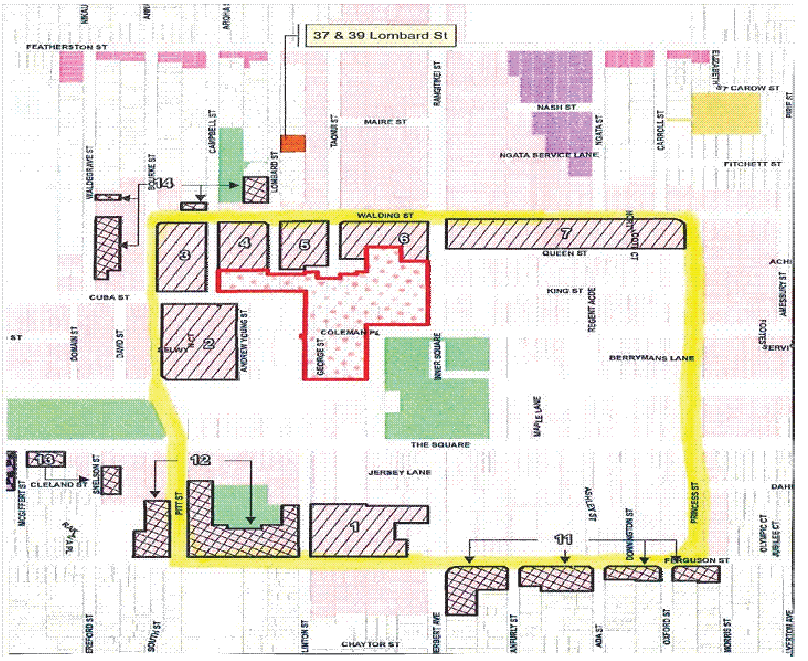
[9] MML operates the five lots as a single site. It uses it for mechanical repairs and the supply of automotive parts. The main entry to the business is on Taonui Street. The Taonui Street factory building stretches back into the Lombard Street lots. The remainder of the Lombard Street lots are occupied by two old houses. The Lombard Street lots are ten lots away from the Walding Street ring road frontage.

Plan change

[10] PPC1 was notified on 23 December 2010. It is an extensive review of the inner business zone (IBZ) and OBZ provisions of the District Plan. It proposes substantial changes to the way in which the two business zones manage the distribution, scale and form of activities. PPC1 provides for a less concentrated form of development in the OBZ, but

does not materially alter the objectives and policies applying to that zone. It also proposes to rezone 7.63 ha of currently residentially zoned land to OBZ. Most of this land is along the ring road.

[11] Shown below is part of the Council's decision document on PPC1, showing some of the areas rezoned in the area adjacent to Lombard Street.



[12] As will be apparent[2] the most substantial changes in the vicinity of Lombard Street are the rezoning of land along Walding Street (part of the ring road) from IBZ to OBZ. But at the bottom of Lombard Street, adjacent to Walding Street, four lots are rezoned from residential to OBZ. That change reflects long standing existing use of those four lots. They form part of an enterprise called Stewart Electrical Limited. Part is a large showroom. The balance is its car park.

MML's submission

[13] On 14 February 2011 MML filed a submission on PPC1. The thrust of the submission was that the two Lombard Street lots should be zoned OBZ as part of PPC1.

[14] The submission referred to the history of the change from mixed use to residential zoning for the Lombard Street lots. It noted that the current zoning did not reflect existing use of the law, and submitted that the entire site should be rezoned to OBZ "to reflect the dominant use

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2 In the plan excerpt above, salmon pink is OBZ; buff is residential; single hatching is proposed transition from IBZ to OBZ; double hatching is proposed transition from residential to OBZ.

of the site". It was said that the requested rezoning "will allow for greater certainty for expansion of the existing use of the site, and will further protect the exiting commercial use of the site". The submission noted that there were "other remnant industrial and commercial uses in Lombard Street" and that the zoning change will be in keeping with what already occurs on the site and on other sites within the vicinity.

[15] No detailed environmental evaluation of the implications of the change for other properties in the vicinity was provided with the submission.

Council's decision

[16] There were meetings between the Council and MML in April 2011. A number of alternative proposals were considered. Some came from MML, and some from the Council. The Council was prepared to contemplate the back half of the Lombard Street properties (where the factory building is) eventually being rezoned OBZ. But its primary position was there was no jurisdiction to rezone any part of the two Lombard Street properties to OBZ under PPC1.

[17] Ultimately commissioners made a decision rejecting MML's submission. MML then appealed to the Environment Court.

Decision appealed from

[18] A decision on the appeal was given by the Environment Court Judge sitting alone, under s 279 of the Resource Management Act 1991 (Act). Having set out the background, the Judge described the issue as follows:

> The issue before the Court is whether the submission ... was on [PPC1], when [PPC1] itself did not propose any change to the zoning of the residential land.

[19] The issue arises in that way because the right to make a submission on a plan change is conferred by sch 1, cl 6(1): persons described in the clause "may make a submission on it". If the submission is not "on" the plan change, the council has no jurisdiction to consider it.

[20] The Judge set out the leading authority, the High Court decision of William Young J in *Clearwater Resort Ltd v Christchurch City Council*.[3] He also had regard to what might be termed a gloss placed on that decision by the Environment Court in *Natural Best New Zealand Ltd v Queenstown Lakes District Council*.[4] As a result of these decisions the Judge considered he had to address two matters:

(a) the extent to which MML's submission addressed the subject matter of PPC1; and
(b) issues of procedural fairness.

[21] As to the first of those, the Judge noted that PPC1 was "quite wide in scope". The areas to be rezoned were "spread over a comparatively wide area". The land being rezoned was "either contiguous

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3 *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.

4 *Naturally Best New Zealand Ltd v Queenstown Lakes District Council* EnvC Christchurch C49/2004, 23 April 2004.

with, or in close proximity to, [OBZ] land". The Council had said that PPC1 was in part directed at the question of what residential pockets either (1) adjacent to the OBZ, or (2) by virtue of existing use, or (3) as a result of changes to the transportation network, warranted rezoning to OBZ.

[22] On that basis, the Judge noted, the Lombard Street lots met two of those conditions: adjacency and existing use. The Judge considered that a submission seeking the addition of 1619 m^2 to the 7.63 ha proposed to be rezoned was not out of scale with the plan change proposal and would not make PPC1 "something distinctly different" to what it was intended to be. It followed that those considerations, in combination with adjacency and existing use, meant that the MML submission "must be *on* the plan change".

[23] The Judge then turned to the question of procedural fairness. The Judge noted that the process contained in sch 1 for notification of submissions on plan changes is considerably restricted in extent. A submitter was not required to serve a copy of the submission on persons who might be affected. Instead it simply lodged a copy with the local authority. Nor did cl 7 of sch 1 require the local authority to notify persons who might be affected by submissions. Instead just a public notice had to be given advising the availability of a summary of submissions, the place where that summary could be inspected, and the requirement that within 10 working days after public notice, certain persons might make further submissions. As the Judge then noted:

> Accordingly, unless people take particular interest in the public notices contained in the newspapers, there is a real possibility they may not be aware of plan changes or of submissions on those plan changes which potentially affect them.

[24] The Judge noted that it was against that background that William Young J made the observations he did in the *Clearwater* decision. Because there is limited scope for public participation, "it is necessary to adopt a cautious approach in determining whether or not a submission is on a plan change". William Young J had used the expression "coming out of left field" in *Clearwater*. The Judge below in this case saw that as indicating a submission seeking a remedy or change:

> ... which is not readily foreseeable, is unusual in character or potentially leads to the plan change being something different than what was intended.

[25] But the Judge did not consider that the relief sought by MML in this case could be regarded as falling within any of those descriptions. Rather, the Judge found it "entirely predictable" that MML might seek relief of the sort identified in its submission. The Judge considered that sch 1 "requires a proactive approach on the part of those persons who might be affected by submissions to a plan change". They must make inquiry "on their own account" once public notice is given. There was no procedural unfairness in considering MML's submission.

[26] The Judge therefore found that MML had filed a submission that was "on" PPC1. Accordingly there was a valid appeal before the Court.

[27] From that conclusion the Council appeals.

Appeal

The Council's argument

[28] The Council's essential argument is that the Judge failed to consider that PPC1 did not change any provisions of the District Plan *as it applied to the site* (or indeed any surrounding land) at all, thereby leaving the status quo unchanged. That is said to be a pre-eminent, if not decisive, consideration. The subject matter of the plan change was to be found within the four corners of the plan change and the plan provisions it changes, including objectives, policies, rules and methods such as zoning. The Council did not, under the plan change, change any plan provisions relating to MML's property. The land (representing a natural resource) was therefore not a resource that could sensibly be described as part of the subject matter of the plan change. MML's submission was not "on" PPC1, because PPC1 did not alter the status quo in the plan as it applied to the site. That is said to be the only legitimate result applying the High Court decision in *Clearwater*.

[29] The decision appealed from was said also by the Council to inadequately assess the potential prejudice to other landowners and affected persons. For the Council, Mr Maassen submitted that it was inconceivable, given that public participation and procedural fairness are essential dimensions of environmental justice and the Act, that land not the subject of the plan change could be rezoned to facilitate an entirely different land use by submission using Form 5. Moreover, the Judge appeared to assume that an affected person (such as a neighbour) could make a further submission under sch 1, cl 8, responding to MML's submission. But that was not correct.

MML's argument

[30] In response, Mr Ax (who appeared in person, and is an engineer rather than a lawyer) argued that I should adopt the reasoning of the Environment Court Judge. He submitted that the policy behind PPC1 and its purpose were both relevant, and the question was one of scale and degree. Mr Ax submitted that extending the OBZ to incorporate MML's property would be in keeping with the intention of PPC1 and the assessment of whether existing residential land would be better incorporated in that OBZ. His property was said to warrant consideration having regard to its proximity to the existing OBZ, and the existing use of a large portion of the Lombard Street lots. Given the character and use of the properties adjacent to MML's land on Lombard Street (old houses used as rental properties, a plumber's warehouse and an industrial site across the road used by an electronic company) and the rest of Lombard Street being a mixture of industrial and low quality residential use, there was limited prejudice and the submission could not be seen as "coming out of left field". As Mr Ax put it:

> Given the nature of the surrounding land uses I would have ... been surprised if there were parties that were either (a) caught unawares or (b) upset at what I see as a natural extension of the existing use of my property.

Statutory framework

[31] Plan changes are amendments to a district plan. Changes to district plans are governed by s 73 of the Act. Changes must, by s 73(1A), be effected in accordance with sch 1.

[32] Section 74 sets out the matters to be considered by a territorial authority in the preparation of any district plan change. Section 74(1) provides:

> A territorial authority shall prepare and change its district plan in accordance with its functions under section 31, the provisions of Part 2, a direction given under section 25A(2), its duty under section 32, and any regulations.

[33] Seven critical components in the plan change process now deserve attention.

[34] First, there is the s 32 report referred to indirectly in s 74(1). To the extent changes to rules or methods in a plan are proposed, that report must evaluate comparative efficiency and effectiveness, and whether what is proposed is the most appropriate option.[5] The evaluation must take into account the benefits and costs of available options, and the risk of acting or not acting if there is uncertain or insufficient information about the subject matter.[6] This introduces a precautionary approach to the analysis. The s 32 report must then be available for public inspection at the same time as the proposed plan change is publicly notified.[7]

[35] Second, there is the consultation required by sch 1, cl 3. Consultation with affected landowners is not required, but it is permitted.[8]

[36] Third, there is notification of the plan change. Here the council must comply with sch 1, cl 5. Clause 5(1A) provides:

> A territorial authority shall, not earlier than 60 working days before public notification or later than 10 working days after public notification was planned, either —
>
> (a) send a copy of the public notice, and such further information as a territorial authority thinks fit relating to the proposed plan, to every ratepayer for the area where that person, in the territorial authority's opinion, is likely to be directly affected by the proposed plan; or
>
> (b) include the public notice, and such further information as the territorial authority thinks fit relating to the proposed plan, and any publication or circular which is issued or sent to all residential properties and Post Office box addresses located in the affected area – and shall send a copy of the public notice to any other person who in the territorial authority's opinion, is directed affected by the plan.

Clause 5 is intended to provide assurance that a person is notified of any change to a district plan zoning on land adjacent to them. Typically territorial authorities bring such a significant change directly to the attention of the adjoining land owner. The reference to notification to persons "directly affected" should be noted.

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5 Resource Management Act 1991, s 32(3)(b). All statutory references are to the Act unless stated otherwise.

6 Section 32(4).

7 Section 32(6).

8 Schedule 1, cl 3(2).

[37] Fourth, there is the right of submission. That is found in sch 1, cl 6. Any person, whether or not notified, may submit. That is subject to an exception in the case of trade competitors, a response to difficulties in days gone by with new service station and supermarket developments. But even trade competitors may submit if, again, "directly affected". At least 20 working days after public notification is given for submission.[9] Clause 6 provides:

> **Making of submissions**(1) Once a proposed policy statement or plan is publicly notified under clause 5, the persons described in subclauses (2) to (4) may make a submission on it to the relevant local authority.
>
> (2) The local authority in its own area may make a submission.
>
> (3) Any other person may make a submission but, if the person could gain an advantage in trade competition through the submission, the person's right to make a submission is limited by subclause (4).
>
> (4) A person who could gain an advantage in trade competition through the submission may make a submission only if directly affected by an effect of the proposed policy statement or plan that —
>
> (a) adversely affects the environment; and
>
> (b) does not relate to trade competition or the effects of trade competition.
>
> (5) A submission must be in the prescribed form.

[38] The expression "proposed plan" includes a proposed plan change.[10] The "prescribed form" is Form 5. Significantly, and so far as relevant, it requires the submitter to complete the following details:

> The specific provisions of the proposal that my submission relates to are:
>
> [*give details*].
>
> My submission is:
>
> [*include —*
>
> - *whether you support or oppose the specific provisions or wish to have them amended; and*
> - *reasons for your views*].
>
> I seek the following decision from the local authority:
>
> [*give precise details*].
>
> I wish (*or* do not wish) to be heard in support of my submission.

It will be seen from that that the focus of submission must be on "specific provisions of the proposal". The form says that. Twice.

[39] Fifthly, there is notification of a summary of submissions. This is in far narrower terms – as to scope, content and timing – than notification of the original plan change itself. Importantly, there is no requirement that the territorial authority notify individual landowners directly affected by a change sought in a submission. Clause 7 provides:

> **Public notice of submissions**(1) A local authority must give public notice of —

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9 Schedule 1, cl 5(3)(b).
10 Section 43AAC(1)(a).

(a) the availability of a summary of decisions requested by persons making submissions on a proposed policy statement or plan; and
(b) where the summary of decisions and the submissions can be inspected; and
(c) the fact that no later than 10 working days after the day on which this public notice is given, the persons described in clause 8(1) may make a further submission on the proposed policy statement or plan; and
(d) the date of the last day for making further submissions (as calculated under paragraph (c)); and
(e) the limitations on the content and form of a further submission.

(2) The local authority must serve a copy of the public notice on all persons who made submissions.

[40] Sixth, there is a limited right (in cl 8) to make further submissions. Clause 8 was amended in 2009 and now reads:

> **Certain persons may make further submissions**(1) The following persons may make a further submission, in the prescribed form, on a proposed policy statement or plan to the relevant local authority:
> (a) any person representing a relevant aspect of the public interest; and
> (b) any person that has an interest in the proposed policy statement or plan greater than the interest that the general public has; and
> (c) the local authority itself.
>
> (2) A further submission must be limited to a matter in support of or in opposition to the relevant submission made under cl 6.

[41] Before 2009 any person could make a further submission, although only in support of or opposition to existing submissions. After 2009 standing to make a further submission was restricted in the way we see above. The Resource Management (Simplifying and Streamlining) Amendment Bill 2009 sought to restrict the scope for further submission, in part due to the number of such submissions routinely lodged, and the tendency for them to duplicate original submissions.

[42] In this case the Judge contemplated that persons affected by a submission proposing a significant rezoning not provided for in the notified proposed plan change might have an effective opportunity to respond.[11] It is not altogether clear that that is so. An affected neighbour would not fall within cl 8(1)(a). For a person to fall within the qualifying class in cl 8(1)(b), an interest "in the proposed policy statement or plan" (including the plan change) greater than that of the general public is required. Mr Maassen submitted that a neighbour affected by an additional zoning change proposed in a submission rather than the plan change itself would not have such an interest. His or her concern might be elevated by the radical subject matter of the submission, but that is not what cl 8(1)(b) provides for. On the face of the provision, that might be so. But I agree here with the Judge below that that was not Parliament's intention. That is clear from the select committee report proposing the amended wording which now forms cl 8. It is worth setting out the relevant part of that report in full:

> Clause 148(8) would replace this process by allowing councils discretion to seek the views of potentially affected parties.

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11 See at [25] above.

> Many submitters opposed the proposal on the grounds that it would breach the principle of natural justice. They argued that people have a right to respond to points raised in submissions when they relate to their land or may have implications for them. They also regard the further submission process as important for raising new issues arising from submissions, and providing an opportunity to participate in any subsequent hearing or appeal proceedings. We noted a common concern that submitters could request changes that were subsequently incorporated into the final plan provisions without being subject to a further submissions process, and that such changes could significantly affect people without providing them an opportunity to respond.
>
> Some submitters were concerned that the onus would now lie with council staff to identify potentially affected parties. Some local government submitters were also concerned that the discretionary process might incur a risk of liability and expose councils to more litigation. A number of organisations and iwi expressed concern that groups with limited resources would be excluded from participation if they missed the first round of submissions.
>
> We consider that the issues of natural justice and fairness to parties who might be adversely affected by proposed plan provisions, together with the potential increase in local authorities' workloads as a result of these provisions, warrant the development of an alternative to the current proposal.
>
> We recommend amending clause 148(8) to require local authorities to prepare, and advertise the availability of, a summary of outcomes sought by submitters, and to allow anyone with an interest that is greater than that of the public generally, or representing a relevant aspect of the public interest, or the local authority itself, to lodge a further submission within 10 working days.

[43] It is, I think, perfectly clear from that passage that what was intended by cl 8 was to ensure that persons who are directly affected by submissions proposing further changes to the proposed plan change may lodge a further submission. The difficulty, then, is not with their right to lodge that further submission. Rather it is with their being notified of the fact that such a submission has been made. Unlike the process that applies in the case of the original proposed plan change, persons directly affected by additional changes proposed in submissions do not receive direct notification. There is no equivalent of cl 5(1A). Rather, they are dependent on seeing public notification that a summary of submissions is available, translating that awareness into reading the summary, apprehending from that summary that it actually affects them, and then lodging a further submission. And all within the 10-day timeframe provided for in cl 7(1)(c). Persons "directly affected" in this second round may have taken no interest in the first round, not being directly affected by the first. It is perhaps unfortunate that Parliament did not see fit to provide for a cl 5(1A) equivalent in cl 8. The result of all this, in my view (and as I will explain), is to reinforce the need for caution in monitoring the jurisdictional gateway for further submissions.

[44] Seventhly, finally and for completeness, I record that the Act also enables a private plan change to be sought. Schedule 1, pt 2, cl 22, states:

> **Form of request**

(1) A request made under clause 21 shall be made to the appropriate local authority in writing and shall explain the purpose of, and reasons for, the proposed plan or change to a policy statement or plan [and contain an evaluation under section 32 for any objectives, policies, rules, or other methods proposed].
(2) Where environmental effects are anticipated, the request shall describe those effects, taking into account the provisions of Schedule 4, in such detail as corresponds with the scale and significance of the actual or potential environmental effects anticipated from the implementation of the change, policy statement, or plan.

So a s 32 evaluation and report must be undertaken in such a case.

Issues

[45] The issues for consideration in this case are:

(a) Issue 1: When, generally, is a submission "on" a plan change?
(b) Issue 2: Was MML's submission "on" PPC1?

Issue 1: When, generally, is a submission "on" a plan change?

[46] The leading authority on this question is a decision of William Young J in the High Court in *Clearwater Resort Ltd v Christchurch City Council*.[12] A second High Court authority, the decision of Ronald Young J in *Option 5 Inc v Marlborough District Council*,[13] follows *Clearwater*. *Clearwater* drew directly upon an earlier Environment Court decision, *Halswater Holdings Ltd v Selwyn District Council*.[14] A subsequent Environment Court decision, *Naturally Best New Zealand Ltd v Queenstown Lakes District Council*[15] purported to gloss *Clearwater*. That gloss was disregarded in *Option 5*. I have considerable reservations about the authority for, and efficacy of, the *Naturally Best* gloss.

[47] Before reviewing these four authorities, I note that they all predated the amendments made in the Resource Management (Simplifying and Streamlining) Amendment Act 2009. As we have seen, that had the effect of restricting the persons who could respond (by further submission) to submissions on a plan change, although not so far as to exclude persons directly affected by a submission. But it then did little to alleviate the risk that such persons would be unaware of that development.

Clearwater

[48] In *Clearwater* the Christchurch City Council had set out rules restricting development in the airport area by reference to a series of noise contours. The council then notified variation 52. That variation did not alter the noise contours in the proposed plan. Nor did it change the rules relating to subdivisions and dwellings in the rural zone. But it did introduce a policy discouraging urban residential development within the 50 dBA Ldn noise contour around the airport. *Clearwater's* submission

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12 *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.
13 *Option 5 Inc v Marlborough District Council* (2009) 16 ELRNZ 1 (HC).
14 *Halswater Holdings Ltd v Selwyn District Council* (1999) 5 ELRNZ 192 (EnvC).
15 *Naturally Best New Zealand Ltd v Queenstown Lakes District Council* EnvC Christchurch 49/2004, 23 April 2004.

sought to vary the physical location of the noise boundary. It sought to challenge the accuracy of the lines drawn on the planning maps identifying three of the relevant noise contours. Both the council and the airport company demurred. They did not wish to engage in a "lengthy and technical hearing as to whether the contour lines are accurately depicted on the planning maps". The result was an invitation to the Environment Court to determine, as a preliminary issue, whether *Clearwater* could raise its contention that the contour lines were inaccurately drawn. The Environment Court determined that *Clearwater* could raise, to a limited extent, a challenge to the accuracy of the planning maps. The airport company and the regional council appealed.

[49] William Young J noted that the question of whether a submission was "on" a variation posed a question of "apparently irreducible simplicity but which may not necessarily be easy to answer in a specific case".[16] He identified three possible general approaches:[17]

(a) a literal approach, "in terms of which anything which is expressed in the variation is open for challenge";
(b) an approach in which "on" is treated as meaning "in connection with"; and
(c) an approach "which focuses on the extent to which the variation alters the proposed plan".

[50] William Young J rejected the first two alternatives, and adopted the third.

[51] The first, literal construction had been favoured by the commissioner (from whom the Environment Court appeal had been brought). The commissioner had thought that a submission might be made in respect of "anything included in the text as notified", even if the submission relates to something that the variation does not propose to alter. But it would not be open to submit to seek alterations of parts of the plan not forming part of the variation notified. William Young J however thought that left too much to the idiosyncrasies of the draftsman of the variation. Such an approach might unduly expand the scope of challenge, or it might be too restrictive, depending on the specific wording.

[52] The second construction represented so broad an approach that "it would be difficult for a local authority to introduce a variation of a proposed plan without necessarily opening up for relitigation aspects of the plan which had previously been [past] the point of challenge".[18] The second approach was, thus, rejected also.

[53] In adopting the third approach William Young J applied a bipartite test.

[54] First, the submission could only fairly be regarded as "on" a variation "if it is addressed to the extent to which the variation changes the pre-existing status quo". That seemed to the Judge to be consistent with

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16 *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003 at [56].
17 At [59].
18 At [65].

the scheme of the Act, "which obviously contemplates a progressive and orderly resolution of issues associated with the development of proposed plans".

[55] Second, "if the effect of regarding a submission as "on" a variation would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected", that will be a "powerful consideration" against finding that the submission was truly "on" the variation. It was important that "all those likely to be affected by or interested in the alternative methods suggested in the submission have an opportunity to participate".[19] If the effect of the submission "came out of left field" there might be little or no real scope for public participation. In another part of [69] of his judgment William Young J described that as "a submission proposing something completely novel". Such a consequence was a strong factor against finding the submission to be on the variation.

[56] In the result in *Clearwater* the appellant accepted that the contour lines served the same function under the variation as they did in the pre-variation proposed plan. It followed that the challenge to their location was not "on" variation 52.[20]

[57] Mr Maassen submitted that the *Clearwater* test was not difficult to apply. For the reasons that follow I am inclined to agree. But it helps to look at other authorities consistent with *Clearwater*, involving those which William Young J drew upon.

Halswater

[58] William Young J drew directly upon an earlier Environment Court decision in *Halswater Holdings Ltd v Selwyn District Council*.[21] In that case the council had notified a plan change lowering minimum lot sizes in a "green belt" sub-zone, and changing the rules as to activity status depending on lot size. Submissions on that plan change were then notified by the appellants which sought:

(a) to further lower the minimum sub-division lot size; and
(b) seeking "spot zoning" to be applied to their properties, changes from one zoning status to another.

[59] The plan change had not sought to change any zonings at all. It simply proposed to change the rules as to minimum lot sizes and the building of houses within existing zones (or the "green belt" part of the zone).

[60] The Environment Court decision contains a careful and compelling analysis of the then more concessionary statutory scheme at [26]–[44]. Much of what is said there remains relevant today. It noted among other things the abbreviated time for filing of submissions on plan changes, indicating that they were contemplated as "shorter and easier to digest and respond to than a full policy statement or plan".[22]

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19 At [69].
20 At [81]–[82].
21 *Halswater Holdings Ltd v Selwyn District Council* (1999) 5 ELRNZ 192 (EnvC).
22 At [38].

[61] The Court noted that the statutory scheme suggested that:[23]

> ... if a person wanted a remedy that goes much beyond what is suggested in the plan change so that, for example, a submission can no longer be said to be "on" the plan change, then they may have to go about changing the plan in another way.

Either a private plan change, or by encouraging the council itself to promote a further variation to the plan change. As the Court noted, those procedures then had the advantage that the notification process "goes back to the beginning". The Court also noted that if relief sought by a submission went too far beyond the four corners of a plan change, the council may not have turned its mind to the effectiveness and efficiency of what was sought in the submission, as required by s 32(1)(c)(ii) of the Act. The Court went on to say:[24]

> It follows that a crucial question for a Council to decide, when there is a very wide submission suggesting something radically different from a proposed plan as notified, is whether it should promote a variation so there is time to have a s 32 analysis carried out and an opportunity for other interested persons to make primary submissions under clause 6.

[62] The Court noted in *Halswater* the risk of persons affected not apprehending the significance of submissions on a plan change (as opposed to the original plan change itself). As the Court noted, there are three layers of protection under cl 5 notification of a plan change that do not exist in relation to notification of a summary of submissions:[25]

> These are first that notice of the plan change is specifically given to every person who is, in the opinion of the Council, affected by the plan change, which in itself alerts a person that they may need to respond; secondly clause 5 allows for extra information to be sent, which again has the purpose of alerting the persons affected as to whether or not they need to respond to the plan change. Thirdly notice is given of the plan change, not merely of the availability of a summary of submissions. Clause 7 has none of those safeguards.

[63] Ultimately, the Environment Court in *Halswater* said:[26]

> A submissions on a plan change cannot seek a rezoning (allowing different activities and/or effects) if a rezoning is not contemplated by a plan change.

[64] In *Halswater* there was no suggestion in the plan change that there was to be rezoning of any land. As a result members of the public might have decided they did not need to become involved in the plan change process, because of its relatively narrow effects. As a result, they might not have checked the summary of submissions or gone to the council to check the summary of submissions. Further, the rezoning proposal sought by the appellants had no s 32 analysis.

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23 At [41].
24 At [42].
25 At [44].
26 At [51].

[65] It followed in that case that the appellant's proposal for "spot rezoning" was not "on" the plan change. The remedy available to the appellants in that case was to persuade the council to promote a further variation of the plan change, or to seek a private plan change of their own.

Option 5

[66] *Clearwater* was followed in a further High Court decision, *Option 5 Inc v Marlborough District Council*.[27] In that case the council had proposed a variation (variation 42) defining the scope of a central business zone (CBZ). Variation 42 as notified had not rezoned any land, apart from some council-owned vacant land. Some people called McKendry made a submission to the council seeking addition of further land to the CBZ. The council agreed with that submission and variation 42 was amended. A challenge to that decision was taken to the Environment Court. A jurisdictional issue arose as to whether the McKendry submission had ever been "on" variation 42. The Environment Court said that it had not. It should not have been considered by the council.

[67] On appeal Ronald Young J did not accept the appellants' submission that because variation 42 involved some CBZ rezoning, any submission advocating further extension of the CBZ would be "on" that variation. That he regarded as "too crude". As he put it:[28]

> Simply because there may be an adjustment to a zone boundary in a proposed variation does not mean any submission that advocates expansion of a zone must be on the variation. So much will depend on the particular circumstances of the case. In considering the particular circumstances it will be highly relevant to consider whether, as William Young J identified in *Clearwater*, that if the result of accepting a submission as on (a variation) would be to significantly change a proposed plan without a real opportunity for participation by those affected then that would be a powerful argument against the submission as being "on".

[68] In that case the amended variation 42 would change at least 50 residential properties to CBZ zoning. That would occur "without any direct notification to the property owners and therefore without any real chance to participate in the process by which their zoning will be changed". The only notification to those property owners was through public notification in the media that they could obtain summaries of submissions. Nothing in that indicated to those 50 house owners that the zoning of their property might change.

Naturally Best

[69] Against the background of those three decisions, which are consistent in principle and outcome, I come to consider the later decision of the Environment Court in *Naturally Best New Zealand Ltd v Queenstown Lakes District Council*.[29]

[70] That decision purports to depart from the principles laid down by William Young J in *Clearwater*. It does so by reference to another

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27 *Option 5 Inc v Marlborough District Council* (2009) 16 ELRNZ 1 (HC).
28 At [34].
29 *Naturally Best New Zealand Ltd v Queenstown Lakes District Council* EnvC Christchurch C49/2004, 23 April 2004.

High Court decision in *Countdown Properties Ltd v Dunedin City Council*.[30] However that decision does not deal with the jurisdictional question of whether a submission falls within sch 1, cl 6(1). The Court in *Naturally Best* itself noted that the question in that case was a different one.[31] *Countdown* is not authority for the proposition advanced by the Environment Court in *Naturally Best* that a submission "may seek fair and reasonable extensions to a notified variation or plan change". Such an approach was not warranted by the decision in *Clearwater*, let alone by that in *Countdown*.

[71] The effect of the decision in *Naturally Best* is to depart from the approach approved by William Young J towards the second of the three constructions considered by him, but which he expressly disapproved. In other words, the *Naturally Best* approach is to treat "on" as meaning "in connection with", but subject to vague and unhelpful limitations based on "fairness", "reasonableness" and "proportion". That approach is not satisfactory.

[72] Although in *Naturally Best* the Environment Court suggests that the test in *Clearwater* is "rather passive and limited", whatever that might mean, and that it "conflates two points,"[32] I find no warrant for that assessment in either *Clearwater* or *Naturally Best* itself.

[73] It follows that the approach taken by the Environment Court in *Naturally Best* of endorsing "fair and reasonable extensions" to a plan change is not correct. The correct position remains as stated by this Court in *Clearwater*, confirmed by this Court in *Option 5*.

Discussion

[74] It is a truth almost universally appreciated that the purpose of the Act is to promote the sustainable management of natural and physical resources.[33] Resources may be used in diverse ways, but that should occur at a rate and in a manner that enables people and communities to provide for their social, economic and cultural wellbeing while meeting the requirements of s 5(2). These include avoiding, remedying or mitigating the adverse effects of activities on the environment. The Act is an attempt to provide an integrated system of environmental regulation.[34] That integration is apparent in s 75, for instance, setting out the hierarchy of elements of a district plan and its relationship with national and regional policy statements.

[75] Inherent in such sustainable management of natural and physical resources are two fundamentals.

[76] The first is an appropriately thorough analysis of the effects of a proposed plan (whichever element within it is involved) or activity. In the context of a plan change, that is the s 32 evaluation and report: a comparative evaluation of efficiency, effectiveness and appropriateness of options. Persons affected, especially those "directly affected", by the

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30 *Countdown Properties Ltd v Dunedin City Council* [1994] NZRMA 145 (HC).
31 At [17].
32 At [15].
33 Section 5(1).
34 Nolan (Ed) *Environmental and Resource Management Law* (4th ed, Lexis Nexis, Wellington 2011) at 96.

proposed change are entitled to have resort to that report to see the justification offered for the change having regard to all feasible alternatives. Further variations advanced by way of submission, to be "on" the proposed change, should be adequately assessed already in that evaluation. If not, then they are unlikely to meet the first limb in *Clearwater.*

[77] The second is robust, notified and informed public participation in the evaluative and determinative process. As this Court said in *General Distributors Ltd v Waipa District Council*:[35]

> The promulgation of district plans and any changes to them is a participatory process. Ultimately plans express community consensus about land use planning and development in any given area.

A core purpose of the statutory plan change process is to ensure that persons potentially affected, and in particular those "directly affected", by the proposed plan change are adequately informed of what is proposed. And that they may then elect to make a submission, under cls 6 and 8, thereby entitling them to participate in the hearing process. It would be a remarkable proposition that a plan change might so morph that a person not directly affected at one stage (so as not to have received notification initially under cl 5(1A)) might then find themselves directly affected but speechless at a later stage by dint of a third party submission not directly notified as it would have been had it been included in the original instrument. It is that unfairness that militates the second limb of the *Clearwater* test.

[78] Where a land owner is dissatisfied with a regime governing their land, they have three principal choices. First, they may seek a resource consent for business activity on the site regardless of existing zoning. Such application will be accompanied by an assessment of environment effects and directly affected parties should be notified. Secondly, they may seek to persuade their council to promulgate a plan change. Thirdly, they may themselves seek a private plan change under sch 1, pt 2. Each of the second and third options requires a s 32 analysis. Directly affected parties will then be notified of the application for a plan change. All three options provide procedural safeguards for directly affected people in the form of notification, and a substantive assessment of the effects or merits of the proposal.

[79] In contrast, the sch 1 submission process lacks those procedural and substantial safeguards. Form 5 is a very limited document. I agree with Mr Maassen that it is not designed as a vehicle to make significant changes to the management regime applying to a resource not already addressed by the plan change. That requires, in my view, a very careful approach to be taken to the extent to which a submission may be said to satisfy both limbs 1 and 2 of the *Clearwater* test. Those limbs properly reflect the limitations of procedural notification and substantive analysis required by s 5, but only thinly spread in cl 8. Permitting the public to enlarge significantly the subject matter and resources to be addressed through the sch 1 plan change process beyond the original

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35 *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59 (HC) at [54].

ambit of the notified proposal is not an efficient way of delivering plan changes. It transfers the cost of assessing the merits of the new zoning of private land back to the community, particularly where shortcutting results in bad decision making.

[80] For a submission to be on a plan change, therefore, it must address the proposed plan change itself. That is, to the alteration of the status quo brought about by that change. The first limb in *Clearwater* serves as a filter, based on direct connection between the submission and the degree of notified change proposed to the extant plan. It is the dominant consideration. It involves itself two aspects: the breadth of alteration to the status quo entailed in the proposed plan change, and whether the submission then addresses that alteration.

[81] In other words, the submission must reasonably be said to fall within the ambit of the plan change. One way of analysing that is to ask whether the submission raises matters that should have been addressed in the s 32 evaluation and report. If so, the submission is unlikely to fall within the ambit of the plan change. Another is to ask whether the management regime in a district plan for a particular resource (such as a particular lot) is altered by the plan change. If it is not then a submission seeking a new management regime for that resource is unlikely to be "on" the plan change. That is one of the lessons from the *Halswater* decision. Yet the *Clearwater* approach does not exclude altogether zoning extension by submission. Incidental or consequential extensions of zoning changes proposed in a plan change are permissible, provided that no substantial further s 32 analysis is required to inform affected persons of the comparative merits of that change. Such consequential modifications are permitted to be made by decision makers under sch 1, cl 10(2). Logically they may also be the subject of submission.

[82] But that is subject then to the second limb of the *Clearwater* test: whether there is a real risk that persons directly or potentially directly affected by the additional changes proposed in the submission have been denied an effective response to those additional changes in the plan change process. As I have said already, the 2009 changes to sch 1, cl 8, do not avert that risk. While further submissions by such persons are permitted, no equivalent of cl 5(1A) requires their notification. To override the reasonable interests of people and communities by a submissional side-wind would not be robust, sustainable management of natural resources. Given the other options available, outlined in [78], a precautionary approach to jurisdiction imposes no unreasonable hardship.

[83] Plainly, there is less risk of offending the second limb in the event that the further zoning change is merely consequential or incidental, and adequately assessed in the existing s 32 analysis. Nor if the submitter takes the initiative and ensures the direct notification of those directly affected by further changes submitted.

Issue 2: Was MML's submissions "on" PPC1?

[84] In light of the foregoing discussion I can be brief on Issue 2.

[85] In terms of the first limb of the *Clearwater* test, the submission made by MML is not in my view addressed to PPC1. PPC1 proposes limited zoning changes. All but a handful are located on the ring road, as

the plan excerpt in [11] demonstrates. The handful that are not are to be found on main roads: Broadway, Main and Church Streets. More significantly, PPC1 was the subject of an extensive s 32 report. It is over 650 pages in length. It includes site-specific analysis of the proposed rezoning, urban design, traffic effects, heritage values and valuation impacts. The principal report includes the following:

> 2.50 PPC1 proposes to rezone a substantial area of residentially zoned land fronting the Ring Road to OBZ. Characteristics of the area such as its close proximity to the city centre; site frontage to key arterial roads; the relatively old age of residential building stock and the on-going transition to commercial use suggest there is merit in rezoning these sites.
>
> ...
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> 5.8 **Summary Block Analysis** – Blocks 9 to 14 are characterised by sites that have good frontage to arterial roads, exhibit little pedestrian traffic and have OBZ sites surrounding the block. These blocks are predominately made up of older residential dwellings (with a scattering of good quality residences) and on going transition to commercial use. Existing commercial use includes; motor lodges; large format retail; automotive sales and service; light industrial; office; professional and community services. In many instances, the rezoning of blocks 9 to 14 represents a squaring off of the surrounding OBZ. Blocks 10, 11, 12 and 13 are transitioning in use from residential to commercial activity. Some blocks to a large degree than others. In many instances, the market has already anticipated a change in zoning within these blocks. The positioning of developer and long term investor interests has already resulted in higher residential land values within these blocks. Modern commercial premises have already been developed in blocks 10, 11, 12 and 13.
>
> 5.9 Rezoning Residential Zone sites fronting the Ring Road will rationalise the number of access crossings and will enhance the function of the adjacent road network, while the visual exposure for sites fronting key arterial roads is a substantial commercial benefit for market operators. The location of these blocks in close proximity to the Inner and Outer Business Zones; frontage to key arterial roads; the relatively old age of the existing residential building stock; the ongoing transition to commercial use; the squaring off of existing OBZ blocks; and the anticipation of the market are all attributes that suggest there is merit in rezoning blocks 9 to 14 to OBZ.

[86] The extension of the OBZ on a spot-zoning basis into an isolated enclave within Lombard Street would reasonably require like analysis to meet the expectations engendered by s 5. Such an enclave is not within the ambit of the existing plan change. It involves more than an incidental or consequential extension of the rezoning proposed in PPC1. Any decision to commence rezoning of the middle parts of Lombard Street, thereby potentially initiating the gradual transition of Lombard Street by instalment towards similar land use to that found in Taonui Street, requires coherent long term analysis, rather than opportunistic insertion by submission.

[87] There is, as I say, no hardship in approaching the matter in this way. Nothing in this precludes the landowner for adopting one of the three

options identified in [78]. But in that event, the community has the benefit of proper analysis, and proper notification.

[88] In terms of the second limb of *Clearwater*, I note Mr Ax's confident expression of views set out at [30] above. However I note also the disconnection from the primary focus of PPC1 in the proposed addition of two lots in the middle of Lombard Street. And I note the lack of formal notification of adjacent landowners. Their participatory rights are then dependent on seeing the summary of submissions, apprehending the significance for their land of the summary of MML's submission, and lodging a further submission within the 10-day time frame prescribed.

[89] That leaves me with a real concern that persons affected by this proposed additional rezoning would have been left out in the cold. Given the manner in which PPC1 has been promulgated, and its focus on main road rezoning, the inclusion of a rezoning of two isolated lots in a side street can indeed be said to "come from left field".

Conclusion

[90] MML's submission was not "on" PPC1. In reaching a different view from the experienced Environment Court Judge, I express no criticism. The decision below applied the *Naturally Best* gloss, which I have held to be an erroneous relaxation of principles correctly stated in *Clearwater.*

Summary

[91] To sum up:

(a) This judgment endorses the bipartite approach taken by William Young J in *Clearwater Christchurch City Council*[36] in analysing whether a submission made under sch 1, cl 6(1) of the Act is "on" a proposed plan change. That approach requires analysis as to whether, first, the submission addresses the change to the status quo advanced by the proposed plan change and, secondly, there is a real risk that persons potentially affected by such a change have been denied an effective opportunity to participate in the plan change process.

(b) This judgment rejects the more liberal gloss placed on that decision by the Environment Court in *Naturally Best New Zealand Ltd v Queenstown Lakes District Council,*[37] inconsistent with the earlier approach of the Environment Court in *Halswater Holdings Ltd v Selwyn District Council*[38] and inconsistent with the decisions of this Court in *Clearwater* and *Option 5 Inc v Marlborough District Council*.[39]

(c) A precautionary approach is required to receipt of submissions proposing more than incidental or consequential further changes to a notified proposed plan change. Robust, sustainable

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36 *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.

37 *Naturally Best New Zealand Ltd v Queenstown Lakes District Council* EnvC Christchurch C49/2004, 23 April 2004.

38 *Halswater Holdings Ltd v Selwyn District Council* (1999) 5 ELRNZ 192 (EnvC).

39 *Option 5 Inc v Marlborough District Council* (2009) 16 ELRNZ 1 (HC).

management of natural and physical resources requires notification of the s 32 analysis of the comparative merits of a proposed plan change to persons directly affected by those proposals. There is a real risk that further submissions of the kind just described will be inconsistent with that principle, either because they are unaccompanied by the s 32 analysis that accompanies a proposed plan change (whether public or private) or because persons directly affected are, in the absence of an obligation that they be notified, simply unaware of the further changes proposed in the submission. Such persons are entitled to make a further submission, but there is no requirement that they be notified of the changes that would affect them.

(d) The first limb of the *Clearwater* test requires that the submission address the alteration to the status quo entailed in the proposed plan change. The submission must reasonably be said to fall within the ambit of that plan change. One way of analysing that is to ask whether the submission raises matters that should have been addressed in the s 32 evaluation and report. If so, the submission is unlikely to fall within the ambit of the plan change. Another is to ask whether the management regime in a district plan for a particular resource is altered by the plan change. If it is not, then a submission seeking a new management regime for that resource is unlikely to be "on" the plan change, unless the change is merely incidental or consequential.

(e) The second limb of the *Clearwater* test asks whether there is a real risk that persons directly or potentially directly affected by the additional changes proposed in the submission have been denied an effective opportunity to respond to those additional changes in the plan change process.

(f) Neither limb of the *Clearwater* test was passed by the MML submission.

(g) Where a submission does not meet each limb of the *Clearwater* test, the submitter has other options: to submit an application for a resource consent, to seek a further public plan change, or to seek a private plan change under sch 1, pt 2.

Result

[92] The appeal is allowed.

[93] The Council lacked jurisdiction to consider the submission lodged by MML, which is not one "on" PPC1.

[94] If costs are in issue, parties may file brief memoranda.

Reported by: Carolyn Heaton, *Barrister and Solicitor*

Royal Forest and Bird Protection Society Inc v Southland District Council

High Court Christchurch AP198/96
15 July 1997
Panckhurst J

Rules — Planning instruments — Ultra vires — Submissions lodged in relation to plan — Amendment to plan — Whether substance of amendment was raised in submissions — Proper test for whether rule was ultra vires — Resource Management Act 1991

The proposed district plan contained two rules, one in respect of heritage matters (HER.5, which applied district-wide), and one in respect of the coastal area (COA.4). The appellant submitted that the former was inadequate to protect natural flora and fauna, and the latter provided adequate protection. After all submissions had been considered the respondent inserted a new rule into the Heritage section of the plan, affecting the entire district (HER.3) in terms almost identical to Rule COA.4 The new Rule transformed removal of native flora and fauna into a discretionary activity. Rayonier NZ Ltd, which owned thousands of hectares of forest containing native undergrowth, argued that Rule HER.3 was ultra vires. The Planning Tribunal held that it was. The Tribunal held that the new Rule went beyond matters raised in submissions lodged with respect to the plan. The appellant considered that the rule was not ultra vires, as the matter was fairly raised in its submissions to the respondent.

Held (allowing the appeal):

(1) The respondent was required to consider whether the amendment went beyond what was reasonably and fairly raised in submissions in respect of the plan change. Determination of this question should have been approached in a realistic workable fashion rather than from the perspective of legal nicety. This test could not be substituted for other extraneous considerations.

(2) Submissions made in relation to the heritage section of the plan clearly raised the theme of greater control upon activities likely to affect native flora and fauna. The substance of Rule HER.3 was properly raised in submissions on the plan. Rule HER.3 was within the scope of the appellant's submission with respect to Rule HER.5. The respondent did not reject the appellant's submission in that regard. The respondent was

aware that the adoption of Rule HER.3 would impact upon the entire district. The Tribunal erred in law in deciding that Rule HER.3 was ultra vires the respondent.

Cases referred to in judgment

Countdown Properties (Northlands) Ltd v Dunedin City Council (1994) NZRMA 145

Environmental Defence Society Inc v Mangonui County Council (1987) 12 NZTPA 349

Nelson Pine Forest Ltd v Waimea County Council (1988) 13 NZTPA 69

Appeal

This is an appeal pursuant to s 299 Resource Management Act 1991.

P J Milne for the appellant
B J Slowly for the respondent
B I J Cowper for Rayonier NZ Ltd

PANCKHURST J.

Introduction

In a decision delivered on 1 July 1996 the then Planning Tribunal ("the Tribunal") held that a rule included in the Southland District Council's District Plan, by way of amendment to the proposed Plan, was ultra vires the Southland District Council ("the Council"). Such decision reflected an application of the principle recognised in *Countdown Properties (Northlands) Limited v Dunedin City Council* [1994] NZRMA 145, and other cases, that an amendment to a Plan should not go beyond what was reasonably and fairly raised in submissions lodged in relation to that Plan. This requirement flows from a value which underscores the Resource Management Act 1991: that there should be public participation in the resource management process.

Unusually in the present case the Council itself made a concession before the Tribunal that it considered it had acted ultra vires. That view was shared by a number of parties who had lodged references to the Tribunal pursuant to cl 14 of the First Schedule to the Resource Management Act 1991 ("the Act"). However, the Royal Forest and Bird Protection Society Incorporated ("RF & B") contended that the amendment was validly made, in that it was fairly raised in a submission RF & B lodged in relation to the Plan.

In this Court three parties were represented. RF & B as the appellant again contended that the relevant amendment was properly made, while the Council supported the Tribunal's ultra vires ruling. Rayonier New Zealand Limited ("Rayonier") likewise supported the Tribunal's decision. Rayonier owns approximately 100,000 hectares of forest throughout New Zealand. An area approaching 30,000 hectares is in Southland and therefore directly affected by the provisions of this District Plan. Although Rayonier's forests are all exotic, a significant understorey of native vegetation develops within maturing forests. Accordingly Rayonier's concern in the present instance was with any provision controlling the

clearance of native vegetation, as such provisions may impact upon the company's ability to harvest its crop.

Background

The Southland proposed District Plan was publicly notified by the Council on 1 August 1994. Clause 5 of the First Schedule to the Act prescribes the steps to be followed to ensure all potentially interested parties have notice of the proposed plan and the opportunity to make submissions concerning its content. Those steps were followed.

The Plan was divided into sections, and then into subsections. Section 4 was entitled **"Resource Areas"**, and section 4.6 **"Coastal Resource Area"**. This section of the plan applied essentially to the coastal margin of the Southland District, which runs from Fiordland in the west, to the Catlans in the east. Within section 4.6 was a proposed Rule COA.4 as follows:

> "Rule COA.4 Native flora and fauna
>
> Any activity that has the effect of destroying, modifying, removing or in any way adversely affecting any:
>
> native vegetation, or
>
> habitat of any native fauna
>
> shall require a Discretionary Resource Consent."

The Rule then prescribed criteria to be applied by the Council in relation to applications for consent.

Section 3 of the Plan was entitled **"General Objectives Policies Methods and Rules"**. This section was further divided into thirteen subsections of diverse content, ranging from **"Manawhenua Issues"** to **"Public Works and Network Utilities"**. Section 3.4 was entitled **"Heritage"** and was devoted to three heritage types namely: natural, built, and cultural. Importantly for present purposes section 3.4 is of district-wide application. By proposed Rule HER.5 it was provided:

> "Any activity or work that would or is likely to have an effect on, or destroy, remove or damage any of those natural heritage or items in Schedule 6.13 and 6.12, shall require a Discretionary Resource Consent."

The Rule then set out matters which the Council must consider in determining applications for Resource Consents. Schedule 6.13 described some **"123 Significant Geological Sites of Land Forms"**, while Schedule 6.12 described various **"Significant Tree and Bush Stands"**.

Both the proposed Rules COA.4 and HER.5 excited submissions and cross submissions from a range of interested parties. RF & B made submissions in relation to both Rules. In relation to the **Heritage** section generally it described the Plan as *"deficient and inadequate overall"*. Of Rule HER.5, RF & B argued:

> "this rule is currently far too limited in its scope as it is dependent on the schedules, which only scratch the surface of significant areas."

For present purposes it is not necessary to consider the submission in greater detail, other than to note the concern that there were in RF & B's

view no controls on indigenous vegetation clearance, save for the quite circumscribed controls contained in proposed Rules HER.5 and COA.4. In argument counsel for RF & B summarised what RF & B sought in these terms:

> "In essence the relief sought by RF & B was a new heritage rule or an amendment to existing Rule HER.5, to provide for clearance of all indigenous vegetation to be a discretionary activity and to require the Council in assessing application for Resource Consents to identify and protect areas of significant indigenous vegetation and significant habitats of indigenous fauna."

In relation to Rule COA.4 RF & B made a very short submission in which it noted its support for the Rule which it considered would *"allow the Council to implement the purpose and principles of the Act in the coastal area"*.

By contrast Rayonier lodged a submission in which it sought the deletion of proposed Rule HER.5. Alternatively it contended the operation of the Rule should be restricted or other methods of control recognised. Following the submission lodged by RF & B, that the clearance of all indigenous vegetation should be a discretionary activity, Rayonier lodged a cross submission in opposition. It contended that RF & B's approach would effectively elevate all native vegetation to the status of significant vegetation and would unjustifiably catch understorey in forest plantations. Rayonier did not make submissions in relation to proposed Rule COA.4 since the coastal strip which comprised the Coastal Resource Area was outside the company's area of operation. I have focused upon the submissions of RF & B and Rayonier to the exclusion of those from other parties. Of course there were submissions on Rules HER.5 and COA.4 from a range of people. In my view a focus upon RF & B and Rayonier's positions is sufficient for present purposes. Their markedly different positions sufficiently expose the issues which arise in the present vires context.

Before the Planning Tribunal Mr D G Halligan, Resource Manager for the Southland District Council, gave evidence by way of a prepared statement which was not challenged by any of the parties then represented. As the Tribunal noted his evidence was largely a recital of relevant portions of: the District Plan as publicly notified, the submissions and cross submissions, the resultant decisions of the Council, and the District Plan as amended consequent upon those decisions.

Mr Halligan's evidence also included a description of a revised Rule COA.4 which was drafted by Council staff and tabled before the District Plan Committee. The revised version of the rule provided as had the first draft that any activity which had the effect of destroying, modifying, removing or adversely affecting native vegetation or the habitat of native fauna should be a discretionary activity. However qualifications were added, namely such activity on land subject to the South Island Landless Natives Act 1906 would be a controlled activity. Further, if an approved sustainable yield management plan existed, then activity which would otherwise have a discretionary status would become a controlled activity

and activity which would otherwise have a controlled status would become a permitted activity.

Contrary to the expectation of the Council's planning staff the Committee in a decision concerning proposed Rule COA.4 and after review of submissions on that Rule, resolved to amend the Heritage section of the Plan by introducing a new Rule HER.3.

The new Rule read:

Rule HER.3 – Indigenous Flora and Fauna

(i) Any activity which has the effect of destroying, modifying, removing or in any way adversely affecting any:
  (a) significant indigenous vegetation or
  (b) significant habitats of indigenous fauna
shall, except to the extent set out in this Rule, be considered to be a discretionary activity.

Defined exceptions in paragraphs (ii) and (iii) provided for the taking of timber from an area to which the Forests Amendment Act 1993 did not apply, and for the carrying out of proper agricultural practices on agricultural land, to be controlled activities. Further certain activities in accordance with a sustainable forest management plan and certain silvicultural, horticultural, and agricultural practices were defined as permitted activities. At the same time the Committee resolved to amend Rule COA.4 by restricting its application to *"significant"* indigenous vegetation or fauna, and by incorporation of a reference back to the new Rule HER.3.

In the most general of terms therefore the final result was to introduce into the District Plan an area-wide provision whereby works which would adversely affect significant indigenous vegetation or fauna became a discretionary activity. The thrust of Rule COA.4 was largely unchanged, subject to some refinement. The decision of the Council to introduce area-wide control of significant indigenous vegetation and fauna by a new Rule in the Heritage section, but to do so in reliance upon submissions relevant to the Coastal Resource Area section, fuelled the ultra vires argument before the Planning Tribunal.

RF and B's Contentions

In the present appeal pursuant to s 299 of the Act, RF & B alleges that the Tribunal erred in law in three respects:

(a) in finding that Rule HER.3 was not reasonably and fairly raised in RF & B's submission on the proposed Plan,
(b) in taking into account irrelevant considerations, namely the reasoning by which the Council justified the inclusion of Rule HER.3 and the circumstance that the general Heritage submission of RF & B seeking greater control of activities affecting indigenous vegetation or fauna was in the Tribunal's view *"disallowed by the Council"*, and
(c) in failing to take into account its own finding that RF & B's Heritage submission was publicly notified in a way that would

> have made it perfectly clear it was seeking in the Heritage section of the Plan a new Rule to control the clearance, logging or other use of land that would adversely affect indigenous vegetation, by making such activities discretionary.

It was argued by counsel for RF & B that such errors of law, either singly or in combination, required this Court to intervene and set aside the ultra vires ruling. I regard the three points raised as so interrelated, that the convenient course is to consider them together.

Was HER.3 fairly raised?

The First Schedule to the Act lays down a clear process by which there must be public notification of both the proposed Plan and of a summary of the submissions received thereon. Thereafter the parties have the opportunity to make further submissions and ordinarily the Council must hold a hearing in relation to the rival submissions. This staged process is designed to ensure that before a Plan is amended the opportunity of informed public participation in the establishment of the Plan has been extended.

All counsel accepted the test laid down in *Countdown Properties (Northlands) Limited v Dunedin City Council* as appropriate in the present context. In that case a full Court, after review of earlier High Court decisions including in particular *Nelson Pine Forest Limited v Waimea County Council* (1988) 13 NZTPA 69, concluded that in deciding whether a plan amendment was properly made:

> The local authority or tribunal must consider whether any amendment made to the plan change as notified goes beyond what is reasonably and fairly raised in submissions of the plan change. . . It will usually be a question of degree to be judged by the terms of the proposed change and the content of the submissions."

The Court then made some general observations concerning the extent to which the Act encouraged public participation in the resource management process. In this context it noted that persons making submissions were unlikely to fill in the forms exactly as required by the First Schedule, but opined that the process should not be one "bound by formality". I agree with, and adopt, the approach embraced in the Countdown Properties judgment.

The process of public notification, submissions, and hearing before the Council is quite involved. Issues commonly emerge as a result of the participation of diverse interests and the thinking in relation to such issues frequently evolves in the light of competing arguments. Thereafter the Council must determine whether changes to the Plan are appropriate in response to the public's contribution. Against this background it is important that the assessment of whether any amendment was reasonably and fairly raised in the course of submissions, should be approached in a realistic workable fashion rather than from the perspective of legal nicety.

In the present case submissions made in relation to s 3.4, the **Heritage** section, clearly raised the theme of greater control upon activities likely to

adversely affect indigenous vegetation. The Tribunal accepted as much at p 6 of its decision when it held:

> "This part of RF & B's submissions was publicly notified in a way that would have made it perfectly clear that it was seeking, in this section of the Plan, a new rule to control the clearance, logging or other use of land that would directly and adversely affect indigenous vegetation, by making this a discretionary activity."

Rayonier, for example, readily appreciated the significance of RF & B's submission and moved to counter it. Had the Council, in the context of a decision concerning the **Heritage** section, and in response to submissions thereon, decided to introduce Rule HER.3, a vires argument could hardly even have been raised.

The problem is one borne of the particular approach the Council adopted. In its **Decisions on Submissions** issued on 1 August 1995 the Council in Decision 3.4.2.201 first summarised the extensive submissions made in relation to Rule HER.5. It then continued:

> Decision: There was a general misconception in fee submissions received that this section related to the removal of indigenous vegetation on private property.
>
> If detailed consideration is given to Schedule 6.12 it can be seen that the items of significant tree and bush stands identified are either situated on public property (ie reserves), or in the alternative where they exist on private property, are a schedule of those lands already protected under QEII covenants in one form or another
>
> It was not the intention of Council under Rule HER.5 to impose restrictions as it relates to indigenous plantations on indigenous vegetation on private property. This matter is more strictly addressed under Method HER. 8.

The decision of the Council relevant to Rule COA.4 was Decision 4.6.2.191. Again the approach of summarising the thrust of the submissions from various parties was adopted.

There then followed a lengthy decision of more than four pages. The decision included:

> "The Committee has carefully read and listened to all of the submissions that have been made in respect of this Rule. As a result of that consideration the Committee has decided that the Rule should have the following amendments and that it should apply to the whole of the District and as a consequence be included in the **Heritage** section:"

There then followed a description of what was to become Rule HER.3 and a description of the exceptions to it. The Council then continued:

> "With those general amendments the Council believes that the Rule can be sensibly applied throughout the whole District through its inclusion as Rule HER. 3."

A little later the full text of Rule HER.3, and of the consequential amendments to Rule COA.4, were set out. These provisions are sufficiently quoted, or summarised, earlier in this judgment.

Against that background the Tribunal concluded Rule HER.3 was ultra vires for three reasons. First, it found that the Rule was *"clearly founded on, and only on, the submissions and cross submissions made on Rule COA.4"*. Moreover the Tribunal considered that *"none of the submissions or cross submissions on that Rule sought the resultant Rule HER.3"*. Second, the Tribunal found that *"although there are similarities between Rule HER.3 and (what) was sought by RF & B, there are important differences"*. In this regard the Tribunal noticed the specific exceptions in respect of forest management plans and the link between Rule HER.3 and Method HER.9 whereby determinations about whether indigenous vegetation was *"significant"* were to be made. Accordingly Rule HER.3 was described as *"a different rule"* from what was sought by RF & B. Third, the Tribunal found that the **Heritage** submission made and relied upon by RF & B to support Rule HER.3 was disallowed by the Council. Decision 3.4.2.201, read as a whole, led the Tribunal to this conclusion.

It then noted however that the introduction of Rule HER.3 seemed at first sight to conflict with a rejection of RF & B's submission. However, the Tribunal referred again to the *"material differences"* between what RF & B sought and Rule HER.3. Finally, it added in a passage which seems to me to capture a principal concern of the Tribunal members that:

> "It is plain from the Council's reasoning that in introducing Rule HER.3 it did not think it was controlling all activities relating to indigenous vegetation throughout the district which would have been the effect of the rule sought by RF & B. Nevertheless of course, the Council did introduce a District Rule containing a measure of control in respect of indigenous vegetation and the habitats of indigenous fauna, based on submissions that did not seek this relief."

Then followed the ultra vires ruling.

Mr Slowley, in submissions on behalf of the Council, argued that the above findings, in particular the conclusion that Rule HER.3 was founded only on submissions made on Rule COA.4, were findings of fact which this Court should not disturb. The observations of Chilwell J in *Environmental Defence Society v Mangonui County Council* (1987) 12 NZTPA 349 at 353 are apposite:

> "An expert tribunal, such as the Planning Tribunal, ought to be given some latitude to reach findings of fact which fall within the area of its own expertise even in the absence of evidence to support such findings; and some latitude in reaching findings of fact made in reliance upon its own expertise in the evaluation of conflicting evidence; and some latitude in reaching conclusions based on its expertise, without relating them or being able to relate them to specific findings of fact; but care should be taken to ensure that expertise is not used as a substitute for evidence such that the burden of proof is unfairly shifted."

I accept these observations have some application in the present context. The Tribunal undoubtedly possesses expertise in relation to the evaluation of the process for public participation prescribed in the First Schedule. It must see and consider many examples of that process in the course of its

work. On the other hand, the present are not findings of fact in the conventional sense. The Tribunal did not hear contested evidence and therefore enjoy an opportunity not possessed by this Court. The subject findings are rather conclusions drawn in the main from the Council's **Decisions on Submissions** issued on 1 August 1995. I accept it is appropriate to afford those findings special recognition as emanating from an expert Tribunal, but I do not accept counsel's submissions that the findings are decisive of the present problem.

Mr Milne for RF & B squarely confronted each of the reasons advanced by the Tribunal for its ruling. As to the point that Rule HER.3 was founded only on submissions made in relation to Rule COA.4, he argued that the Tribunal's focus upon the reasons given by the Council was wrong in law; as the sole issue was whether the new Rule went beyond what was reasonably and fairly raised in RF & B's **Heritage** submission. Put another way, the ultimate issue was whether the public had received a fair crack of the whip; had enjoyed the opportunity to be heard in answer to RF & B's **Heritage** submission before Rule HER.3 was included in the Plan. Likewise, counsel disputed the finding that there were important differences between Rule HER.3 and what RF & B sought in its **Heritage** submission. He accepted there were differences, but argued such were as to matters of emphasis. The new Rule was fairly to be seen as a watered down version of what RF & B sought in the first place, counsel contended. Moreover, he submitted the proper test was not whether Rule HER.3 was *"materially different"* from, but whether its substance was *"reasonably within"* the scope of, the submission made by RF & B.

As to the finding that the Council rejected RF & B's **Heritage** submission, counsel argued that rejection was far from clear upon a reading of the Council's decision as a whole. In particular, the decision did not expressly state whether it accepted or rejected the submission, although cl 10 of the First Schedule required that to be done.

Conclusion

With some hesitation I am driven to the conclusion that the appeal must be allowed. The fundamental issue must be whether Rule HER.3 was *"reasonably and fairly raised"* in submissions relevant to the Southland Plan. There can only be one answer to that inquiry, namely that the substance of the rule was properly raised. Not only does a reading of the RF & B submission demonstrate this to be so, but the Tribunal found as much in the passage quoted earlier from p 6 of its decision.

As to the three matters relied upon by the Tribunal in support of its ultra vires ruling I do not see them, either singly or in combination, as supportive of the essential ruling. Unquestionably the Council's process of reasoning was curious, in that it made the decision to include Rule HER.3 in the **Heritage** section, in the context of its consideration of the **"Coastal Resource Area"** section. But such a curious process of reasoning does not detract from the fact that the content of Rule HER.3 was squarely raised in RF & B's **Heritage** submission. In real terms no-one could be heard to argue that during the public consultative process they were denied the

opportunity to oppose a change sought by RF & B. Put another way, the subsequent faulty reasoning of the Council does not impinge upon the effective process of consultation which preceded it.

Further the Tribunal's view that there were important differences between Rule HER.3 and what RF & B sought in its **Heritage** submission, is not helpful. I accept counsel's argument that the new rule was nothing more than a watered down version of what RF & B sought. Moreover the required approach was to ask whether Rule HER.3 was within the scope of RF & B's submission, rather than whether there were material differences. Likewise, I am not at all confident that a sensible reading of the Council's decision leads to the conclusion that it rejected RF & B's **Heritage** submission. In the absence of an express acceptance or rejection of this submission I am of the view that the proper conclusion to be drawn is that the Council accepted the thrust of RF & B's **Heritage** submission, by including Rule HER.3 in the **Heritage** section; albeit that the process of reasoning adopted was curious. Lastly, I reject the concern averted to by the Tribunal that the Council did not appreciate in introducing Rule HER.3 that *"it was controlling all activities relating to indigenous vegetation throughout the District. . ."*. Such conclusion is not tenable when one has regard to the terms of Decision 4.6.2.191 where, albeit in the **"Coastal Resource Area"** section, the Council expressed its belief that an amendment could *"be sensibly applied throughout the whole District through its inclusion as Rule HER.3"*.

To summarise, in my view the essential inquiry was whether the amendment effected through Rule HER.3 was reasonably and fairly raised in submissions. Once it is decided that it was, the answer to a vires argument was plain. Instead the Tribunal focused upon the three reasons it advanced in support of its ultra vires conclusion. Aside from the fact that such reasons were dubious anyway, it was in my view wrong in law to elevate those issues above the test recognised in*Countdown Properties*.

The formal determination of the Court is that the Tribunal erred in law in determining that Rule HER.3 was ultra vires the Council. Accordingly such ruling is set aside. Counsel for Rayonier submitted that should the appeal be allowed, the case should be remitted to the Environment Court for consideration on its merits. I agree. In that regard it is appropriate to make two observations. First, the present vires decision may not preclude parties before the Environment Court from challenging the merits of Rule HER.3 by reference to the terms of the Council decision which produced it. Second, Rayonier in support of the Tribunal's vires ruling, argued that because the Council introduced rule HER.3 in the context of its decision in the **"Coastal Resource Area"** section, Rayonier could not challenge the merits of the new rule before the Environment Court. This because it had not made submissions or sought to be heard in relation to the **"Coastal Resource Area"** of the Plan. I doubt that this can be so. The decision of this Court that Rule HER.3 is not ultra vires, because it was reasonably and fairly raised in RF & B's **Heritage** submission, must carry the consequence that Rayonier has standing to challenge the new Rule. It made a cross submission in direct response to RF & B's **Heritage** submission. Just as the curious process of reasoning whereby the Council

introduced Rule HER.3 does not make the Rule ultra vires, nor can that same process of reasoning deny Rayonier standing which it would otherwise undoubtedly possess.

The question of costs is reserved. If RF & B seeks an award it should promptly file a memorandum. The Council and Rayonier, following filing and service of such memorandum, shall have fourteen days in which to respond.