Queenstown Lakes District Council v Hawthorn Estate Ltd

Court of Appeal CA 45/05
14 March; 12 June 2006
William Young P, Robertson and Cooper JJ

Resource consent — Non-complying activity — Appeal on a question of law — Further appeal to Court of Appeal — Land use activity consent — Subdivision consent — Permitted baseline — Assessment of effects of proposed activity on the environment — Relevance of future environment on determination of resource consent application — Resource Management Act 1991, ss 2, 5, 6, 7, 8, 30(1), 31, 45, 56, 61, 66, 94, 104, 105, 123(b), 125, 271A, 308.

Hawthorne Estate Ltd applied to the Queenstown Lakes District Council for both subdivision and land use activity consent to subdivide and develop 33.9 ha of land in the Wakatipu Basin, near Queenstown. The council declined to grant resource consent for the non-complying activity. A key question which arose in relation to the assessment of the effects of the proposed activity on the environment was whether a consent authority should take account of the environment as it might be in the future, assuming that unimplemented resource consents would be given effect to in the future. The council argued that the assessment of effects should be limited to the environment as it existed at the time when the application was considered. On appeal the Environment Court set aside the council's decision and granted consent for the proposed activity. The decision of the Environment Court was upheld on further appeal to the High Court on a question of law. The council then obtained leave to pursue a further appeal to the Court of Appeal.

Held (dismissing the appeal)

1 The "permitted baseline" analysis was designed to isolate activities permitted by a district plan or activities which had been approved by the grant of resource consent, with the result that the effects of such activities should not be taken into account when assessing the effects of a proposed activity on the environment. The "permitted baseline" analysis was conceptually different from the question of whether the future environment should be considered when carrying out the assessment of effects on determination of a resource consent application (see paras [65], [66]).

2 There was no justification for borrowing the term "fanciful" from the "permitted baseline" cases to determine whether the future environment was relevant to determination of the resource consent application. That question could be determined in a practical way by receiving evidence about any resource consents granted by the consent authority in the past in relation to the surrounding area, and whether those consents were likely to be implemented. The possibility of "environmental creep", where successive consents were obtained in respect of the same site, did not result in such consents being disregarded from any assessment of the future environment notwithstanding the fact that later consents may have replaced earlier consents (see paras [74], [75], [77], [79]).

3 Having regard to consented activities as part of the future environment did not create a precedent for the approval of other activities, and cumulative effects arose in the context of a proposed activity not from other activities which might take place in the vicinity (see paras [80], [81], [82], [83], [84]).

Cases mentioned in judgment

Aley v North Shore City Council [1998] NZRMA 361.

Arrigato Investments Ltd v Auckland Regional Council [2001] NZRMA 481; [2002] 1 NZLR 323 (CA).

Bayley v Manukau City Council [1999] NZLR 568 (CA).

Dye v Auckland Regional Council [2001] NZRMA 513; [2002] 1 NZLR 337 (CA).

Fleetwing Farms Ltd v Marlborough District Council [1997] 3 NZLR 257.

Geotherm Group Ltd v Waikato Regional Council [2004] NZRMA 1.

O'Connell Construction Ltd v Christchurch City Council [2003] NZRMA 216.

Rodney District Council v Gould [2006] NZRMA 217.

Smith Chilcott Ltd v Auckland City Council [2001] NZRMA 503; [2001] 3 NZLR 473 (CA).

Wilson v Selwyn District Council [2005] NZRMA 76.

Appeal

This was an appeal by the Queenstown Lakes District Council from the judgment of the Environment Court setting aside a decision of the council declining a resource consent application made by Hawthorn Estate Ltd, the first respondent. The Court of Appeal gave leave to appeal on a question of law.

E D Wylie QC and *N S Marquet* for Queenstown Lakes District Council.

N H Soper and *J R Castiglione* for Hawthorn Estate Ltd.

The judgment of the Court was delivered by

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

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

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

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

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

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

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

Background

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

[8] Hawthorn's development would subdivide the land into 32 separate lots, containing between 0.63 and 1.30 ha, together with access

lots, and a central communal lot containing 12.36 ha. The application also sought consent to the erection of a residential unit on each of the 32 residential sites, within nominated building platforms that were shown on plans submitted with the application. The proposal required consent as a non-complying activity under the operative district plan, and as a discretionary activity under the proposed district plan.

[9] There was an existing resource consent which allowed subdivision of the land into eight blocks of approximately 4 ha in each case. Those approved allotments contained identified building platforms.

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

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

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

The Environment Court decision

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

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

three other subdivisions in the triangle, for which the council had recently granted consent. Those subdivisions had an average area of 2 ha per allotment. Hawthorn had argued that the present development should be considered in the light of a future environment in which subdivision of that intensity would occur throughout the triangle.

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

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

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

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

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

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

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

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

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

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

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

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

The High Court decision

[24] The questions earlier set out particularise the challenged conclusions of Fogarty J. On the first issue, as to whether the receiving

environment should be understood as including not only the environment as it exists, but also the reasonably foreseeable environment, Fogarty J essentially adhered to his own reasoning in *Wilson v Selwyn District Council* [2005] NZRMA 76. He held in that case that "environment" in s 104 includes potential use and development in the receiving environment.

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

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

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

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

[28] The second and third questions raised on the appeal have their genesis in particular provisions in the council's proposed district plan. Under the landscape classification employed by that plan, the Environment Court held that the receiving environment of the subject application should be regarded as an "other rural landscape". In a passage which again uses the expression "baseline" in an unusual context, Fogarty J said at para [76]:

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

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

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

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

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

> Obviously different levels of protection of landscape value will depend on whether the proposed developments impact on romantic landscape, Arcadian landscape or other landscape. Reading the [plan] as a whole one would expect quite significant protection of romantic and Arcadian landscape. The degree of protection of other landscape, including Other Rural Landscape from any further development is less certain.

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

> Had the Court been proceeding on the basis of a classification of the landscape as Arcadian, considering Rural Residential Standards could well

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

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

Question 1(a) – the environment

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

[35] Mr Wylie further submitted that a purposive approach to the relevant statutory provision would lead to a conclusion that the "environment" must be confined to the environment as it exists. He submitted that the reference to "Maintenance and enhancement of the quality of the environment" in s 7(f) of the Act was strongly suggestive that it is the environment as it exists at the date of the exercise of the relevant function or power under the Act which must be relevant. He contended that it would be difficult, perhaps impossible, to have particular regard to the maintenance and enhancement of the quality of a speculative future environment.

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

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

[38] Mr Wylie also argued that to uphold Fogarty J's view on the meaning of the word "environment" would be to run counter to authorities which have established rules for priority between applicants, authorities

dealing with issues of precedent and cumulative effect as well as the authorities already mentioned on the "permitted baseline".

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

[40] The definition reads as follows:

> "Environment" includes —
>
> (a) Ecosystems and their constituent parts, including people and communities; and
> (b) All natural and physical resources; and
> (c) Amenity values; and
> (d) The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters.

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

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

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

> **5. Purpose** — (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
>
> (2) In this Act, "sustainable management" means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well being and for their health and safety while —
>
> (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
> (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
> (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

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

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

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

[47] Each of the components of s 5(2) is, therefore, directed both to the present and the future state of affairs. An analysis of the concepts contained in ss 6 and 7 leads inevitably to the same conclusion. That is partly because the particular directions in each section are all said to exist for the purpose of achieving the purpose of the Act. But in part also, the future is embraced by the words "protection", "maintenance" and "enhancement" that appear frequently in each section. We do not agree with Mr Wylie's argument based on s 7(f). "Maintenance" and "enhancement" are words that inevitably extend beyond the date upon which a particular application for resource consent is being considered.

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

[49] The same obligations must be met by territorial authorities, in relation to district plans. The purpose of the preparation, implementation and administration of district plans is, again, to assist territorial authorities to carry out their functions in order to achieve the purpose of the Act. Similarly, the functions of territorial authorities are conferred only for the purpose of giving effect to the Act (s 31) and district plans are to be prepared and changed in accordance with the provisions of Part II. There is then a direct linkage of the powers and duties of regional and territorial authorities to the provisions of Part II with the necessary consequence that

those bodies are in fact planning for the future. The same forward-looking stance is required of central government and its delegates when exercising powers in relation to national policy statements (s 45) and New Zealand coastal policy statements (s 56). The drafting shows a consistent pattern.

[50] In the case of an application for resource consent, Part II of the Act is, again, central to the process. This follows directly from the statement of purpose in s 5 and the way in which the drafting of each of ss 6 to 8 requires their observance by all functionaries in the exercise of powers under the Act. Self-evidently, that includes the power to decide an application for resource consent under s 105 of the Act. Moreover, s 104 which sets out the matters to be considered in the case of resource consent applications, began, at the time relevant to this appeal:

> **104. Matters to be considerd** — (1) Subject to Part II, when considering an application for a resource consent and any submissions received, the consent authority shall have regard to . . .

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

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

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

[54] That must be the case when district plans permit activities to establish without resource consents, where resource consents are granted and put into effect and where existing uses continue as authorised by the Act. It is not just the erection of buildings that alters the environment: other activities by human beings, the effects of agriculture and pastoral land uses, and natural forces all have roles as agents of environmental change. It would be surprising if the Act, and in particular s 104(1)(a), were to be construed as requiring such ongoing change to be left out of

account. Indeed, we think such an approach would militate against achievement of the Act's purpose.

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

[56] Similarly, it is relevant that many resource consents are granted for an unlimited time. That is certainly the case for most land use and subdivision consents (see s 123(b)). Yet it could not be assumed that the effects of implementing the consent would be the same one year after it had been granted, as they would be in 20 years' time.

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

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

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

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

[60] The concerns expressed by Mr Wylie about practical difficulties were overstated. It will not be every case where it is necessary to consider the future environment, or where doing so will be at all

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

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

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

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

[63] The Judge referred to *Bayley v Manukau City Council*, *Smith Chilcott Ltd v Auckland City Council* and *Arrigato Investments Ltd v Auckland Regional Council*, and concluded that the required comparison for purposes of "permitted baseline" analysis is one that is restricted to the

site in question. There was nothing in those cases which was consistent with the extension of the test for which the appellant had contended. We have earlier expressed our view that the "permitted baseline" has in the previous decisions of this Court been limited to a comparison of the effects of the activity which is the subject of the application for resource consent with the effects of other activities that might be permitted on the subject land, whether by way of right as a permitted activity under the district plan, or whether pursuant to the grant of a resource consent. In the latter case, it is only the effects of activities which have been the subject of resource consents already granted that may be considered, and the consent authority must decide whether or not to do so: *Arrigato Investments Ltd v Auckland Regional Council* at paras [30] and [34] - [35].

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

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

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

[66] Where it applies, therefore, the "permitted baseline" analysis removes certain effects from consideration under s 104(1)(a) of the Act. That idea is very different, conceptually, from the issue of whether the receiving environment (beyond the subject site) to be considered under s 104(1)(a), can include the future environment. The previous decisions of this Court do not decide or even comment on that issue.

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

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

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

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

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

[69] Mr Wylie referred to other practical difficulties which he illustrated by reference to Fogarty J's decision in *Wilson v Selwyn District Council*. In that case, as in this, Fogarty J held that the term "environment" could include the future environment where the word is used in s 104(1)(a) of the Act. He held further that, to ascertain the future state of the environment it was appropriate to ask, amongst other things, whether it was "not fanciful" that surrounding land should be developed, and to have regard in that connection to what was permitted in a proposed district plan. Because the district plan contemplated the subdivision of neighbouring land as a controlled activity, His Honour held that it was plain that the district council did not regard it as fanciful that the land in the locality might be subdivided down into smaller sites with increased dwellings. Mr Wylie pointed out that although subdivision was a controlled activity under the proposed plan relevant in that case, and there were no submissions challenging that, there were, however, submissions challenging the right to erect dwellings, as Fogarty J himself had recorded in para [38] of the judgment. Mr Wylie criticised the decision on the basis that it had effectively "pre-empted" the submission process in relation to the district plan. It would also, in his submission, lead to considerable uncertainty.

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

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

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

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

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

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

[74] These observations by the Judge express too broadly the ambit of a consent authority's ability to consider future events. There is no justification for borrowing the "fanciful" criterion from the "permitted baseline" cases and applying it in this different context. The word "fanciful" first appeared in *Smith Chilcott Ltd v Auckland City Council* at para [26], where it was used to rule out of consideration, for the purposes of the "permitted baseline" test, activities that the plan would permit on a subject site because although permitted it would be "fanciful" to suppose that they might in fact take place. In that context, when the "fanciful" criterion is applied, it will be in the setting of known or ascertainable information about the development site (its area, topography, orientation and so on). Such an approach would be a much less certain guide when consideration is being given to whether or not future resource consent applications might be made, and if so granted, in a particular area. It would be too speculative to consider whether or not such consents might be granted and to then proceed to make decisions about the future environment as if those resource consents had already been implemented.

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

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

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

notionally degraded by its potential development under the unimplemented consents.

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

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

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

[80] Three other issues, raised by Mr Wylie in support of his argument that "environment" should be confined to what exists at the time the resource consent application is considered by the consent authority, can be briefly mentioned. First, he suggested that the contrary approach would have the effect of negating the result of cases that have decided that priority as between applicants should be established in accordance with the time when applications are made to a consent authority (*Fleetwing Farms Ltd v Marlborough District Council* [1997] 3 NZLR 257 and *Geotherm Group Ltd v Waikato Regional Council* [2004] NZRMA 1). That argument would only be legitimate if we were to endorse Fogarty J's decision that resource consent applications not yet made but which conceivably might be made, could be taken into account. That is not our view.

[81] Secondly, Mr Wylie contended that to hold that the word "environment" included potential use or development would undermine the decision of this Court in *Dye v Auckland Regional Council* where it

had been decided that the grant of a resource consent had no precedent effect in the "strict sense". It is apparent from para [32] of that decision, that what was meant by use of the expression "the strict sense" was that one consent authority is not bound by its own decisions or those of any other consent authority. We do not agree that a decision that the "environment" can include the future state of the environment has any implications for what was decided in *Dye*.

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

[83] There is nothing in the High Court's decision in *Rodney District Council v Gould* [2006] NZRMA 217 on the question of cumulative effects which has any implications for the current issue. That decision simply explained what was already apparent from what this Court had decided in relation to cumulative effects in *Dye v Auckland Regional Council* — that is, that the cumulative effects of a particular application are effects which arise from that application, and not from others.

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

Question 1(b) – speculation

[85] The foregoing discussion means this and the subsequent questions can be answered more briefly. The issue raised by this question is whether taking into account the approved building platforms in and near the triangle, was speculative. The process adopted by the Environment Court cannot properly be characterised as having involved speculation. The Court accepted Mr Goldsmith's evidence that it was "practically certain" that the approved building sites in and near the triangle would be

built on. Mr Wylie confirmed that there was no issue with the Environment Court's finding of fact on the likelihood of future houses being erected.

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

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

Question 1(c) – consideration of the permitted baseline

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

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

[90] We do not consider that it is appropriate to describe what is simply an evaluative factual assessment as the exercise of a discretion. Further, we agree with Mr Castiglione that the council's argument wrongly conflates the "permitted baseline" and the essentially factual exercise of ascertaining the likely state of the future environment. We have previously stated our reasons for limiting the permitted baseline to the effects of developments on the site that is the subject of a resource consent application. On the relevant issue of fact, the Environment Court relied on the evidence of Mr Goldsmith about the virtual certainty of development occurring on the approved building platforms in and around the triangle. There was no error in that approach.

[91] In reality the present question simply raises, in a different guise, the central complaint that the council makes about the acceptance by both the Environment Court and the High Court that the receiving environment can include the future environment. That issue is not to be approached by invoking the permitted baseline, so the question posed does not strictly

arise. We simply answer the question by saying that the issues raised by the council in this part of the appeal do not establish any error of law by the Environment Court, nor by Fogarty J.

Question 2 – landscape category

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

[93] The district plan defines and classifies landscapes into three broad categories, "outstanding natural landscapes and features", "visual amenity landscapes" and "other rural". The classification of a particular landscape can be important to the consideration of resource consent applications, because different policies, objectives and assessment criteria apply to land within the different categories.

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

> They are landscapes which wear a cloak of human activity much more obviously – pastoral (in the poetic and picturesque sense rather than the functional sense) or Arcadian landscapes with more houses and trees, greener (introduced) grasses and tend to be on the district's downlands, flats and terraces.

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

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

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

[96] It then made reference to existing developments in the area finding some to be highly visible and detracting significantly from any

"Arcadian" qualities of the wider setting. It concluded that the landscape category was other rural.

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

[98] In the High Court, Fogarty J recorded the submission that had been made to him by Mr Wylie that, although there was evidence before that Court on which it could have concluded that the landscape was "other rural", nevertheless it had reached that conclusion after taking into account, irrelevantly, that the landscape would be developed to the extent permitted by existing consents. Fogarty J held first that this was in effect a repetition of the arguments previously made about faulty baseline analysis. As he did not consider that the Environment Court had made any error in that respect, Mr Wylie's argument could not be sustained. A little later in the judgment, Fogarty J confirmed his view that a landscape categorisation decision could only be criticised if the Court was obliged to ignore future potential developments in the area (para [79] of his decision, set out in para [29] above).

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

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

> 5.4.2.1 **Landscape Assessment Criteria – Process**
>
> **There are three steps in applying these assessment criteria.** First, the analysis of the site and surrounding landscape; secondly determination of the appropriate landscape category; thirdly the application of the assessment matters. For the purpose of these assessment criteria, the term "proposed development" includes any subdivision, identification of building platforms, any building and associated activities such as roading, earthworks, landscaping, planting and boundaries.
>
> **Step 1 – Analysis of the Site and Surrounding Landscape**
>
> An analysis of the site and surrounding landscape is necessary for two reasons. Firstly it will provide the necessary information for determining a sites ability to absorb development including the basis for determining the compatibility of the proposed development with both the site and the surrounding landscape. Secondly it is an important step in the determination

of a landscape category – ie whether the proposed site falls within an outstanding natural, visual amenity or other rural landscape.
An analysis of the site must include a description of those existing qualities and characteristics (both negative and positive), such as vegetation, topography, aspect, visibility, natural features, relevant ecological systems and land use.
An analysis of the surrounding landscape must include natural science factors (the geological, topographical, ecological and dynamic components in [sic] of the landscape), aesthetic values (including memorability and naturalness), expressiveness and legibility (how obviously the landscape demonstrates the formative processes leading to it), transient values (such as the occasional presence of wildlife; or its values at certain times of the day or of the year), value of the landscape to Tangata Whenua and its historical associations.
Step 2 – Determination of Landscape Category
This step is important as it determines which district wide objectives, policies, definitions and assessment matters are given weight in making a decision on a resource consent application.
The Council shall consider the matters referred to in Step 1 above, and any other relevant matter, in the context of the broad description of the three landscape categories in part 4.2.4. of this Plan, and shall determine what category of landscape applies to the site subject to the application.
In making this determination the Council, shall consider:

(a) to the extent appropriate under the circumstances, both the land subject to the consent application and the wider landscape within which that land is situated; and
(b) the landscape maps in Appendix 8.

Step 3 – Application of the Assessment Matters
Once the Council has determined which landscape category the proposed development falls within, each resource consent application will then be considered:
First, with respect to the prescribed assessment criteria set out in r 5.4.2.2 of this section;
Secondly, recognising and providing for the reasons for making the activity discretionary (see para 1.5.3(iii) of the plan [p 1/3]) and a general assessment of the frequency with which appropriate sites for development will be found in the locality.

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

[102] Mr Castiglione argued to the contrary, suggesting that the words used in step 1, ". . . the basis for determining the compatibility of the proposed development with both the site and the surrounding landscape", were apt to refer to proposed development generally within the landscape. We reject that submission. In context, the reference to "the proposed development" must be the development which is the subject of a particular application for resource consent.

[103] But the wording of steps 1 and 2 does not exclude a consideration of the environment as it would be after the implementation

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

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

Question 3 – reliance on minimum subdivision standards in the Rural Residential zone

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

[106] Mr Wylie pointed to three separate paragraphs in the Environment Court's decision where there had been references to the Rural Residential provisions of the plan. In para [74] of its decision the Environment Court had discussed evidence that had been given about the desire of the developer to create a "park-like" environment. A landscape architect whose evidence had been called by the council expressed the opinion that although the proposal would not introduce urban densities, it was not rural in nature. The Court referred to the fact that in the rural-residential zone a minimum lot size of 4000 m^2 and an associated building platform was permitted. It will be remembered that the subject development would comprise allotments varying in size between 0.6 and 1.3 ha. No doubt with that comparison in mind, the Environment Court expressed the view that the development would provide more than the level of "ruralness" of Rural Residential amenity.

[107] The next reference to the Rural Residential rules was in para [78]. The Environment Court was there dealing with the issue of whether the development would result in the "over-domestication" of the landscape. The Court expressed its view that the proposal could coexist with policies seeking to retain rural amenity and that while it would add to the level of domestication of the environment, the result would not reach the point of overdomestication. That was so, because the site was in an "other rural landscape", and the district plan considered that Rural Residential allotments down to 4000 m^2 retained an appropriate amenity for rural living.

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

[109] Having reviewed the various references to the Rural Residential zone in context, Fogarty J held that the Environment Court had not considered an irrelevant matter or committed any error of law in its references to the Rural Residential zone. We cannot see any basis to disturb that conclusion. In this Court Mr Wylie contended that Fogarty J's reasoning had been based on the fact that the Environment Court had considered that any "Arcadian" character of the landscape had gone. He then repeated the point that that conclusion had turned on the fact that the Court had considered the likely future environment as opposed to confining its consideration to the existing environment. He submitted that the decision was wrong for that reason. We have already rejected that argument.

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

Result

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

[112] The respondent is entitled to costs in this Court of $6000 plus disbursements, including the reasonable travel and accommodation expenses of both counsel to be fixed, if necessary, by the Registrar.

BEFORE THE ENVIRONMENT COURT

Decision No. [2016] NZEnvC 229

IN THE MATTER	of the Resource Management Act 1991
AND	of an appeal pursuant to Clause 14 of the First Schedule to the Act
BETWEEN	A & A KING FAMILY TRUST
	(ENV-2014-AKL-000144))
	Appellant
AND	HAMILTON CITY COUNCIL
	Respondent
AND	NEW ZEALAND TRANSPORT AGENCY
	s 274 party

Court:	Environment Judge M Harland Environment Commissioner J A Hodges Environment Commissioner KA Edmonds
Hearing:	13 – 17 June, 10 August, 8, 9, 12 & 13 September 2016 at Hamilton
Counsel:	PM Lang for A & A King Family Trust R Bartlett QC and M Mackintosh for Hamilton City Council AMB Green and MJL Dickey for New Zealand Transport Agency
Date of Decision:	23 November 2016
Date of Issue:	23 NOV 2016

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

DECISION OF THE ENVIRONMENT COURT

A: The appeal is dismissed. The Council's decision of 9 July 2014 in relation to the land now subject to this appeal is confirmed.

B: Any application for costs is to be filed within 10 working days of the date of this decision, with any reply to be filed 10 working days thereafter.

REASONS

Introduction

[1] This appeal is against parts of the proposed Hamilton City District Plan ("**the proposed plan**").[1] It concerns the planning framework that should apply to a 1.7 hectare block of land owned by the A & A King Family Trust ("**the Trust**") that fronts onto State Highway 1 ("**SH1**") at Greenwood Street (travelling north) and Killarney Road, west Hamilton. It is depicted in the map attached to this decision.[2]

[2] Under the proposed plan this land is zoned industrial. The Trust wishes to undertake certain commercial activities on its land but at the same time retain its industrial zoning despite having sought a commercial zoning of the land in its notice of appeal. The Trust has resource consent to construct a small supermarket on its land which it has not yet implemented. Even though it is still able to implement its resource consent, the Trust wants the supermarket to be specifically recognised in the proposed plan and to complement it with a limited amount of additional retail and office development over and above that which is already there.

[3] It is difficult, but not impossible to establish commercial activities such as these in the Industrial Zone, so the Trust proposes a tailor-made overlay with a new objective, policies and rules that make it easier for it to achieve its goal and to meet what it says is

[1] The proposed plan was notified in December 2012 and the Council's decision on it was dated 9 July 2014.
[2] Exhibit 1.

an unmet need for such activities in the nearby western suburbs. The Trust contends that its overlay is the most appropriate planning framework for the land.

[4] The Council and the New Zealand Transport Agency ("**the Agency**") disagree. The Council says that the objective and the new policies attached to it are outside the scope of the appeal because they were not reasonably and fairly raised in the Trust's submission or the notified plan from which the appeal emanates. If they are within scope, the Council says the notified plan provides sufficient zoned land to meet any unmet commercial need in the western suburbs without adding the Trust's land to the available pool and that the Trust's land, because of its location, is not suitable for such activities. The Agency echoes this concern with particular focus on the transport network.

[5] As well, both the Council and the Agency contend that in different ways the Trust's proposal conflicts with the strategic direction of the Waikato Regional Policy Statement ("**the RPS**") carried through into the proposed plan.

[6] Overall the Council and the Agency say that the industrial zoning of the land without the overlay is the most appropriate planning framework for it.

[7] The questions in this appeal are therefore:

(a) are the Trust's new proposed objective and policies within scope? And if they are,

(b) is the Council's industrial zoning or the Trust's overlay the most appropriate planning outcome for the land?

The statutory framework

[8] There is a right of appeal to the Environment Court if a person who made a submission on the proposed plan does not agree with the Council's decision in respect of it.[3] By virtue of s 290 of the Resource Management Act ("**the RMA**") such an appeal is heard de novo, and the Court may confirm, amend or cancel a decision made by the

[3] Clause 14, Schedule 1 of the Resource Management Act 1991.

Council, however the Court is required to have regard to the decision that is the subject of the appeal.[4]

[9] The legal framework for plan reviews is set out in sections 31, 32 and 72-76 of the RMA. The matters that need to be addressed were comprehensively set out by the Court in ***Colonial Vineyard Ltd v Marlborough DC***[5] and ***Reiher v Tauranga City Council***[6] as follows:

> [10] In examining a provision under the Act, including Section 32, we must consider:
>
> a) Whether it assists the territorial authority to carry out its functions in order to achieve the purpose of the Act;
>
> b) Whether it is in accordance with Part 2 of the Act;
>
> c) If a rule, whether it achieves the objectives and implements the policies of the plan; and
>
> d) Whether having regard to efficiency and effectiveness, the provisions are the most appropriate way to achieve the objectives of the proposed plan, having regard to the benefits, the costs and the risks of not acting.
>
> [11] In doing so the Court must take into account the actual and potential effects that are being addressed to consider the most appropriate provisions, if any, to respond to this.

[10] As well, s 74 of the RMA requires a territorial authority to prepare and change its district plan in accordance with its functions under s 31 (among other things). These functions include the establishment, implementation, and review of objectives, policies and methods to achieve integrated management of the effects of the use, development or protection of land and associated natural and physical resources of the district.[7]

[11] Because the proposed plan was notified in December 2012, the relevant s 32 provisions are those which were in force prior to the amendments which took effect from 3 December 2013. Relevantly, s 32(3) provides:

4 s 290A of the RMA.
5 [2014] NZEnvC 55.
6 [2014] NZEnvC 121.
7 Resource Management Act 1991, s31(1)(a).

...

(3) an evaluation must examine–

(a) the extent to which each objective is the most appropriate way to achieve the purpose of this Act; and

(b) whether, having regard to their efficiency and effectiveness, the policies, rules or other methods are the most appropriate for achieving the objectives.

[12] The test under s 32 has been considered in many decisions of the Environment Court, including *Gisborne District Council v Eldamos Investments Limited*,[8] *Long Bay-Okura Great Park Society Incorporated v North Shore City Council*,[9] *Colonial Vineyard Limited v Reiher* referred to above to name a few. As well, the High Court considered it in *Shotover Park Limited and Remarkables Park Limited v Queenstown Lakes District Council*.[10] In *Shotover Park Limited*, the term *most appropriate* was applied as follows:

> [57] The RMA objective is "the most appropriate way" to achieve the purposes of this Act. See above, ss 32(2)(a) and (b). The phrase "the most appropriate" acknowledges that there can be more than one appropriate way to achieve the purpose of the Act. The task of the territorial authority is to select the most appropriate way, the one it considers to be the best.

[13] In addition, s 73(4) requires a council to amend its district plan to *give effect* to a *regional policy statement*, however s 74(2)(a)(i) requires a council to *have regard* to any *proposed regional policy statement.* At the time the proposed plan was notified, the RPS was also proposed, however it has now been formally declared operative.[11] No party took issue with the fact that the provisions of the RPS should be given effect to, but in any event the difference in the wording to reflect if an RPS is operative or proposed does not affect the conclusions we have reached.

The site and its context

[14] The 1.7ha site owned by the Trust consists of 18 lots held in 16 separate certificates of title, with each title able to be developed separately.[12] The site has one

8 W047/2005.
9 A78/2008.
10 [2013] NZHC 1712.
11 As of 20 May 2016.
12 Mr Manning, evidence-in-chief at [18].

existing access to Killarney Road and nine to Greenwood Street (two of which are not currently used).[13]

[15] Currently, yard-based retail is undertaken on most of the site, being car yards operated at 102-106 Killarney Road, 11-13, 21-25 and 27-35 Greenwood Street; a vehicle service workshop at 37 Greenwood Street and a trade-supply depot with ancillary retail at 15-17 Greenwood Street. Office activities are undertaken on the site. There is a pocket of residential activity at 110 (A, B and C) Killarney Road, which abuts the car yard at 104 and 106 Killarney Road to the south and east, and to the west abuts other residences that front onto Smith Street. Smith Street runs parallel to Greenwood Street (**SH1**) and can be accessed to the south from Killarney Road and to the north from Bandon Street.

[16] Most of the yard-based retail fronts onto Greenwood Street (SH1) but the properties at 102-106 Killarney Road, as the address suggests, front onto Killarney Road. The remaining car yard activity on Greenwood Street and the vehicle service workshop also abut the residential area along Smith Street on their western boundaries.

[17] All of the above was pictorially depicted in Annexure 1A to Mr O'Dwyer's evidence-in-chief and to a lesser extent in Exhibit 1 attached to this decision.

[18] Under the proposed plan, approximately 1.4ha of the 1.7ha site (83% of it) contains land uses that are provided for in the Industrial Zone.[14] This is depicted in Exhibit 1, which reveals that the bulk of the site, comprising yard-based retail, could be operated as a permitted activity, the yard-based retail undertaken on the Killarney Road sites could be conducted as a restricted discretionary activity, with the offices and residential parts of the site being the only parts that would be non-complying. Food and beverage outlets (no greater than 250m^2) are permitted activities, and drive-through services[15] are assessed as a restricted discretionary activity in the Industrial Zone.

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[13] Mr Apeldoorn, Transportation Assessment Report, 12 July 2015 at 542.

[14] Mr O'Dwyer, evidence-in-chief at [53].

[15] **Drive-through services (excluding service stations within the Rototuna Town Centre Zone)**; means any premises where goods and services are offered for sale to the motoring public, primarily in a manner where the customer can remain in their vehicle. Drive-through services can include dispensing and associated storage of motor fuels (as the primary activity) and the sale of associated goods, services, food and beverages, fast-food outlets providing on-demand meals prepared on the premises for consumption therein or take away, the provision of servicing and running repairs for light motor vehicles and any other activity of a drive-through nature, including those ancillary to the above.

[19] To the north of the site, along Greenwood Street, are a mix of commercial properties and a place of worship. Mr King referred to this portion of Greenwood Street (SH1) as "grease alley", as there are a number of fast food outlets situated there including, on the eastern side, a Carl's Junior and McDonalds, and on the northern side a KFC.

[20] To the west of the site along Killarney Road to the Dinsdale Road roundabout is residential land, much of which is earmarked under the proposed plan for residential intensification.

[21] To the east of the site, running parallel with Greenwood Street (SH1) is the main trunk rail line. Crossing points to the rail line in the vicinity are limited to Killarney Road and the Massey Street/Hall Street over bridge approximately 750m north-east of the site. Further to the east of the main trunk line is the Frankton suburban centre. The suburban centres closest to the site are Dinsdale, Frankton and Nawton.[16]

The relief sought by the Trust

[22] In its notice of appeal the Trust sought a Business 5 zoning over a much larger area of land, being a 5.9 ha block of land fronting onto Greenwood Street from Killarney Road in the south through to Massey Street in the north. The Trust's site comprised 1.7ha of this land. After filing its evidence-in-chief, but before the hearing the Trust amended its relief to seek a planning framework that retains the industrial zoning over the site, but applies an overlay known as the Greenwood Mixed-use Overlay ("**the overlay**") to it. Specifically the Trust proposes the following:[17]

(a) add a new section to the purpose of the Industrial Zone (chapter 9.1k)) as follows:

> The Greenwood Industrial Mixed Use Overlay Area is part of the Greenwood/Kahikatea drive corridor that has a number of consented retail and office activities and has resource consent provision for a supermarket. To provide for an integrated development of that site in accordance with existing consents and compatible mixed use activities, overlay provisions for the 1.7ha site will enable a small mixed use development to occur at a scale and character that will not adversely

[16] Council Ex 2
[17] Mr Manning, supplementary evidence, dated 19 August.

affect industrial activities in the Industrial Zone or impact adversely on the strategic role and business hierarchy of the central city and other business centres in the City.

(b) add a new objective (9.2.9) to reflect the purpose outlined in 9.1k) stating:

An integrated mixed use development opportunity is provided for within the Greenwood Industrial Mixed Use Overlay area of a scale and character that will not adversely affect industrial activity in the surrounding Industrial Zone and will not adversely affect the strategic role of the Central City and other business centres in the city.

(c) add three new implementing policies for the objective, as follows:

Policy 9.2.9b

The Greenwood Industrial Mixed Use Overlay area, in providing limited retail and office development opportunities in the Industrial Zone, requires the integrated development of the site.

Policy 9.2.9c

Urban Design outcomes and Traffic Management Safety and Efficiency are best managed through the integrated development of the Greenwood Industrial Mixed Use Overlay area.

Policy 9.2.9d

Caps on the extent of retail and office development within the Greenwood Industrial Mixed Use Overlay area ensure that the viability and vitality of the Central City and other Centres within the Commercial hierarchy are not compromised.

(d) An explanation of the above provisions is also proposed.

[23] The main elements of the overlay rule framework to implement the policy framework and which override the Industrial Zone rules (which otherwise remain in effect) involve a new activity status table[18] for the overlay area[19] and specific standards[20] and provide for:

[18] Rule 9.3.5
[19] Identified in Figure 6-16 in Volume 2, Appendix 6.
[20] Rule 9.5.11

(a) development on the 1.7 ha site with a maximum gross floor area (**GFA**) of 7,000m2 [21];

(b) within the maximum combined total of 5,600 m^2 for "commercial activity" [22];

(i) supermarket with a maximum of 3,600m^2 GFA[23];

(ii) total non-supermarket retail activity that is not otherwise provided for in the Industrial Zone is not to exceed 2,000m^2 GFA retail (non-supermarket) activity[24] ; and

(iii) total office activity is to occupy not more than 1,000m^2 GFA[25];

(c) New supermarket activity under 3,600m^2 GFA is to be assessed as a restricted discretionary activity[26] and subject to the same provisions which apply to a supermarket in the Industrial Zone[27]. These are:

Resource consent applications for new supermarkets in the Industrial Zone must provide a Centre Assessment report, in accordance with section 1.2.2.19 (Information Requirements), which does the following:

(i) addresses assessment criteria H2 which reads:

Whether and to what extent the proposed Supermarket activity in the Industrial zone:	
a)	Avoids adverse effects on the vitality, function and amenity of the Central City and sub-regional centres that go beyond those effects ordinarily associated with competition on trade competitors.
b)	Avoids the inefficient use of existing physical resources and promotes a compact urban form.
c)	Promotes the efficient use of existing and planned public and private investment in infrastructure.
d)	Is located within a catchment where suitable land is not available within the business centres.
e)	Reinforces the primacy of the Central City and does not undermine the role and function of other centres within the business hierarchy where they are within the same catchment as the proposed supermarket.

[21] Rule 9.3.5j
[22] Rule 9.5.11.2.
[23] Rule 9.5.11.3.
[24] Rule 9.5.11.4.
[25] Rule 9.5.11.5.
[26] Rule 9.3.5.d.
[27] Rule 9.5.4 and Rule 9.5.6.

To demonstrate the above criteria can be satisfied an applicant must supply a Centre Assessment report. The content of the Centre Assessment report shall be prepared in accordance with clause 1.2.2.19.

(ii) demonstrates that the proposal will not undermine the role and function of other centres within the localised catchment in the business hierarchy;

(d) new buildings, new activities, expansion of existing buildings and expansion of existing activities are to be restricted discretionary (overriding all the permitted and controlled activities in the Industrial Zone) with matters of discretion and assessment matters addressing:[28] design and layout, character and amenity, hazards and safety, transportation and three waters capacity and techniques.

Along with the cross-references to the general matters of discretion and assessment matters, there are additions for design and layout and for character and amenity. These include consideration of the design and layout, the character and amenity and the transportation effects of development of the whole of the overlay area, and integration of the proposed new or expanded building or activity with the proposed full development of the overlay area. For transportation, there are the additions of the preparation of a broad integrated transport assessment (**ITA**) and the consideration of the maximum practical reduction in the number of vehicle crossings to ensure safe and efficient traffic management.

(e) commercial activities over the caps specified above are non-complying activities;[29]

(f) add new "integrated development standards"[30] to require the Trust to provide an Overlay Area Development Plan with any application for resource consent to show details of the whole overlay area and to include:[31]

(i) title amalgamation. The proposed condition includes specific details of the lots required to be amalgamated into one certificate of title. Non-compliance with this standard results in the proposal being treated as a non-complying activity;

[28] Rule 9.7xvii.
[29] Rule 9.3.5h
[30] Counsel for the appellants' closing submissions at [154].
[31] Rule 9.5.12.

(ii) a reduction in the number of vehicle crossings (one onto Killarney Road and no more than three onto SH1 where the proposal includes a supermarket and/or results in a total GFA of development greater than 3500m^2), with failure of this standard resulting in the proposal being a non-complying activity. There is also a requirement that the location, function and controls of the vehicle crossings be addressed in the required broad ITA; and

(iii) a staging plan to show how any staging of development within the overlay area provides for the required integrated site development.

[24] Mr Manning (the planner for the Trust) referred to the above as a *commercial node*; however in reality the Trust seeks a spot zone for the site to establish a new commercial centre in the Industrial Zone whilst retaining its option to establish other industrial activities alongside it. In particular, Mr King referred to the option of a fast food drive-through being a possibility, such an activity being assessed as a restricted discretionary activity in the Industrial Zone.[32]

[25] We signal that the type of commercial centre the Trust seeks does not fit within the business centres hierarchy provisions of the proposed plan because it is neither a suburban centre nor a neighbourhood centre, the two options nearest in kind to the commercial centre the overlay seeks to provide for. More will be said of this later.

Are the Trust's new objective and policies within scope?

[26] The scope issue has arisen because the Trust has re-shaped the relief sought by it over the course of the appeal, most relevantly in relation to the underlying zoning that should apply to the site. The introduction of the overlay has proved challenging because the objectives and policies of the Industrial Zone do not sit easily with what the Trust proposes, so it has put forward the new objective and policies outlined above as part of the package for consideration.

[27] The new objective and policies that are at the heart of the Council's challenge about scope. Mr Bartlett QC submitted they are an attempt to *back-fill* something that does not fit within the Industrial Zone. However, the Trust says that its relief has

[32] Transcript, p 396, line 18.

remained the same in principle throughout the process. It argues that the new objective and policies emphasise that the rules apply only to this site and the issues peculiar to it.

[28] It is the parameters (or scope) of an appeal that provides the Court with the power (or jurisdiction) to hear it. If the new objective and policies are outside the scope of the appeal, then they are not able to be considered as part of the Trust's relief. This will impact on how well the Trust's proposed rules fit within the unchallenged objectives and policies of the Industrial Zone.

[29] It is useful to first outline the changes to the relief sought before analysing them against the legal principles that have developed about scope.

The changes/iterations to the Trust's relief

[30] Mr Bartlett QC provided us with a table which very helpfully set out the various changes to the relief sought by the Trust which was largely accepted as correct by Mr Manning during cross-examination. We have summarised the relevant parts of it below:[33]

(a) The relevant Trust submission on the proposed plan was dated 29 March 2013.[34] It opposed the proposed industrial zoning over a 5.9ha block fronting onto Greenwood Street from Killarney Road through to Massey Street (including the site) and instead sought a zone change to Business 6 (Suburban Centre Fringe) with the rules of this zone to apply as a consequence. There were no amendments sought to any objectives and/or policies of either zone.

(b) As is usual, a section 42A report was prepared and circulated to all parties prior to the Council hearing on the proposed plan. In relation to the Trust's site, it stated:[35]

> Whilst it is acknowledged that commercial activities have occurred within the Industrial Zone as a direct result of the permissive nature of the Operative Plan, the purpose of the proposed plan is to reverse this ad-hoc dispersal trend from occurring. To re-zone large tracts of Industrial Zone to commercial would be contrary to the compact centres approach and the

[33] Transcript, p 140
[34] Submission number 281, agreed bundle of documents, Tab 2. Specifically, and relevant to this appeal, it sought changes to Zoning Map 43A
[35] Agreed bundle of documents, Tab 4.

strategic direction of the PRPS. No sufficient justification has been provided to justify change of zoning of the large extent of land proposed or any consideration given to the existing centres hierarchy. Policy 6.15, now Policy 6.16 of the RPS is quite clear that commercial development is not located on land specifically provided for industrial activities unless it is ancillary to those industrial activities. No change is therefore proposed.

(c) Mr Manning provided a statement supporting the Trust's submission at the hearing of the proposed plan before the commissioners.[36] Mr Manning considered it important to consider the existing surrounding environment, which he described as comprising "a vast majority of existing premises that are of a retail-commercial nature". He referred to the regeneration of the adjoining residential area to the west (Business Zone 6 - Suburban Centre Fringe); he referred to the site having approval for *a large retail development* of approximately 3,600m^2 with at-grade parking; and he contended that the section 32 analysis by the Council was flawed because it did not detail any rationale for retaining the area as industrial; nor did it examine any alternative zoning. Mr Manning did not analyse or refer to any of the then proposed RPS provisions.

(d) The Council decided to reject the Trust's submission to change the zoning from Industrial to Business 6. The decision was expressed as follows:

> The submissions seek a change of zoning from Industrial to Business 6 zoning and are rejected as:
>
> - It reduces the efficient and effective implementation of the Plan to achieve its objectives;
> - The relief sought is not considered to be valid in the context of ensuring vitality and vibrancy of the higher order centres within the business hierarchy;
> - It contains no relevant justification as to why the alternative sought would be more appropriate.

(e) On 19 August 2014 the Trust filed its notice of appeal to the Environment Court.[37] It sought as its relief to:

[36] Agreed bundle of documents, Tab 3.
[37] Agreed bundle of documents, Tab 6.

(i) Apply a Business 5 or 6 zoning to the properties outlined in the 5.9ha block of land fronting Greenwood Street bounded by Killarney Road and Massey Street to the north;

(ii) **Alternatively** to retain the industrial zoning over the land, but provide an overlay to allow for convenience retailing and for the existing/approved/ similar developments to continue to operate and grow without having to place reliance on s 10 (existing use rights);

(iii) Such other consistent relief as appropriate to make provision for ongoing commercial use of the land and make provision for commercial use of those parts of it subject to existing resource consents for commercial activities.

(emphasis added).

(f) After various case management steps were taken by this Court and it became evident that a hearing would be necessary, an evidence exchange timetable was directed which included Court-facilitated expert witness conferencing.

(g) On 23 November 2015 the transport experts took part in such a witness conference. At this point the land area concerned was stated to be the 1.7ha site owned by the Trust and not the 5.9ha block originally covered by the notice of appeal. In other words, the appeal was identified as being limited to the land owned by the Trust. Various baseline scenarios were considered at the conference[38] upon which estimates of the traffic likely to be generated by each were discussed. The baseline scenarios used for the purposes of comparison were:

- Scenario 1 – the permitted baseline under the Industrial zoning in the proposed plan.

- Scenario 2 – the consented baseline with the consented supermarket in place and the remaining parts of the overall area taking the industrial baseline.

[38] JWS transport experts, 23 November 2016; Mr Apeldoorn, evidence-in-chief, Appendix H. The wording of the scenarios is that which appears in the JWS. The description and use of the term "baseline" is not accepted by us as legally correct, however this does not affect the figures produced.

- Scenario 3 – the proposed Business 5 zone (as referenced in the July 2015 Traffic Design Group Report – paragraph 1), assumed to have a maximum GFA of 7,000m^2.

The Business 5 zoning was not a change from the Business 6 zoning originally sought by the Trust; rather, it reflected the fact that both Business 5 and Business 6 zones had been merged into one Business 5 zone. For all intents and purposes, therefore, the zoning sought at this stage by the Trust remained the same, albeit for a reduced area (1.7 ha) with a maximum specified GFA of 7,000m^2.

(h) On 10 February 2016, Mr Manning filed his evidence-in-chief. The relief addressed in his evidence sought to retain a Business 5 zoning over the land.

(i) On 7 April 2016 counsel for the Trust wrote to the Court and parties outlining draft alternative relief for the 1.7ha site as follows:

(i) to retain the Industrial Zone over the land, but to add an overlay to enable mixed use/commercial activities based on the suburban centre zone rules;

(ii) a cap on commercial development of 5,600m^2 GFA, with the remaining land to be subject to the underlying Industrial Zone rules/standards.

(j) On 8 April 2016 counsel for the Trust proposed a further version of the alternative relief now sought by the Trust in the form of tracked changes to chapter 9 of the proposed plan which deals with the objective, policies and rules in the Industrial Zone. The tracked change amplified that which had been relayed on 7 April 2016, but added the following:

(i) a new addition to the purpose statement for the Industrial Zone;

(ii) a new objective 9.2.7 and a new policy 9.2.7a together with a new explanation;

(iii) an additional assessment criterion H entitled "Function Vitality and Amenity of Centres with particular focus on effects on the Frankton B5 Suburban Centre."

(iv) There was a proposed cap on commercial development of 5,600m ^{2} GFA, but with any remaining GFA subject to the Industrial Zone rules/standards, i.e. there was no overall cap for the site.

(k) On 11 April 2016 Mr Manning filed supplementary evidence. This evidence referred to the additional objective and policies, and referred to a site development capacity of 7,000m^2 GFA with a 5,600m^2 retail/office cap. The remaining GFA was to be "supplemented by industrial development already provided for in the Industrial Zone up to the site development capacity."

(l) On 18 April 2016 a further version of the proposed relief was circulated to the Court and the parties by counsel for the appellant in the form of tracked changes to chapter 9 Industrial Zone including proposed amendments to the Industrial Zone Purpose Statement, proposed new objective 9.2.7 and proposed new Policy 9.2.7a together with a new explanation.

(m) On 29 April 2016 a further version of the proposed relief was circulated to the parties in the form of tracked changes to chapter 9 Industrial Zone. This included a new Rule 9.3.4 requiring a comprehensive development consent for the overlay area. This was the first time the idea of a comprehensive development consent had been raised by the Trust.

(n) On 6 May 2016 Mr Manning filed further evidence-in-chief. This addressed the previous amendments that had occurred since his supplementary evidence of 11 April 2016.

(o) On 9 May 2016 further tracked changes were circulated, however these changes were described as modest and on 13 May 2016 Mr Manning filed his rebuttal evidence, which included certain minor amendments.

(p) The hearing began on 13 June 2016. On the fourth day of the hearing (16 June 2016) counsel for the Trust circulated amended and updated

proposed relief – three more policies, 9.2.9b, c and d were added; the use of a comprehensive development consent was abandoned, and a new rule was proposed in the activity status table in the list of activities to include "new buildings and activities" as restricted discretionary activities. New assessment criteria for these restricted discretionary activities were added. Standards were also included to reflect caps on commercial and office activities within the overlay. The key change to the policies was to include a reference to integrated site development in the objective and policies, as well as referencing traffic and amenity effects.

(q) Further supplementary evidence and rebuttal evidence was filed by Mr Manning in July and August 2016, and on 19 August 2016 Mr Manning filed a further statement which had not been directed by the Court and had not been provided for in timetabling directions. In relation to policy 9.2.8d, reference was made to caps on "total development" for the site, and previous reference to "convenience" retail was deleted. The further relief was refined to include reference to "supermarkets" in activity status table 9.3.5(8) together with a cross-reference to the proposed standards in rules 9.5.11.2 to 9.5.11.5, which has an activity status of non-complying. A new activity j) was included in the proposed activity status table for "development in excess of 7,000m^2 GFA within the Mixed Use Overlay Area", which was also identified as a non-complying activity.

[31] This process of refinement and iteration extended into closing submissions, when the amalgamation of titles and limitation of vehicle crossings to and from the site were proposed to be included in the rules. Whilst some changes can be expected in cases such as this, we consider that many of the changes (especially those made during the hearing) were proffered significantly late in the piece, were reactive to difficulties revealed during questioning and unfortunately gave the clear impression that the relief sought had not been particularly well thought out.

The legal principles

[32] The starting point is Schedule 1 of the RMA. It outlines the process to be followed when a district plan is reviewed.[39] The local authority that has prepared the proposed plan must prepare an evaluation report (under s 32) in respect of it, and publicly notify it.[40] Members of the public then have the opportunity to inspect the proposed plan and make a submission in respect of it, with certain limitations applying where the issue of trade competition arises.[41] A summary of all the decisions requested by submitters must then be publicly notified[42] and there is then a period provided for certain persons to make further submissions on the plan.[43] A hearing is then undertaken unless no person filing a submission has indicated they wish to be heard.[44] A decision *on the provisions and matters raised in the submissions* must then be made[45] and notified,[46] and there is a right of appeal to the Environment Court.[47] Only a person who has made a submission on a proposed plan may appeal to the Environment Court, but they can only do so if they referred to *the provision or the matter* in their submission on the proposed plan.[48]

[33] In *Re Vivid Holdings Limited*[49] the Environment Court determined that to establish the right to appeal, a submission must first raise a relevant resource management issue and then a particular form of relief must be:[50]

> (a) Fairly and reasonably within the general scope of:
>
> (i) an original submission[51]; or
>
> (ii) the proposed plan as notified[52]; or
>
> (iii) somewhere in between[53]. ...

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39 It also applies when there are proposed reviews of regional policy statements, regional plans and regional coastal plans.
40 Clause 5, Schedule 1.
41 Clause 6.
42 Clause 7.
43 Clause 8.
44 Clauses 8B and C
45 Clause 10.
46 Clause 11.
47 Clause 14.
48 Clause 14(2)(a).
49 [1999] NZRMA 468.
50 Above FN 19 at [19]
51 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145; *Royal Forest and Bird Protection Society Inc v Southland District Council* [1997] NZRMA 408; *Atkinson v Wellington Regional Council* W13/99 is a recent example referred to by Mr Todd
52 *Telecom NZ Ltd v Waikato District Council* A74/97 at p.4
53 *CBD Development Group v Timaru District Council* C43/99

[34] In order to determine whether or not a form of relief is within scope, the Court will need to consider the facts of the case and the inferences that can properly be drawn from those facts. We were referred to two cases which illustrate this point.

[35] In *The Church of Jesus Christ of Latter Day Saints Trust Board v Hamilton City Council*[54] neither the submission nor the notice of appeal made reference to the policy provisions that the appellant sought to change, which included a new policy and an amendment to an existing policy in order to provide consistency between the agreed amendments to the rules determining activity status for the demolition of certain heritage buildings and structures. In that case the Court held:

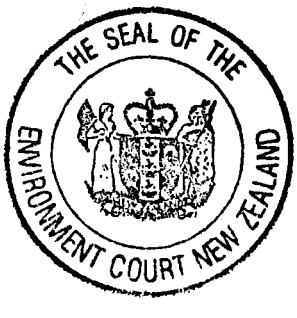
> [40] Neither the appellant's submissions nor the notice of appeal raised Policy 19.2.3a in the relief sought; however, the test is not about determining whether the policy was named in the submissions or appeal documents, but whether the amendments sought are reasonably and fairly raised in the course of the submissions.

[36] As the policy framework was raised in the course of submissions, the Court found that the agreed relief was *sufficiently inferential* such that a person reading the submissions would have contemplated that those matters were at issue.[55] The amendments were determined by the Court to be within the scope of the appeal.

[37] In *The Warehouse Limited & Ors v Dunedin City Council,*[56] the Court heard two proceedings together; a reference in relation to a decision by the Council in relation to the proposed plan's zoning of the site as industrial, and an appeal against the refusal of the Council to grant a resource consent to one of the appellants to build and operate a large scale bulk retail store on the same site.

[38] In relation to the proceeding concerning the proposed plan change, the Court considered a later proposal for amendments to objectives and policies when the submission did not raise those particular matters. We were referred to in the following excerpt from the case:[57]

> [74] We consider that a submission or (on appeal to this Court) a reference may fail simply because it is inconsistent with wider objectives and policies of a



[54] [2015] NZEnvC 166.
[55] [2015] NZEnvC 166, at [46.
[56] C101/2001.
[57] Above fn 32 at [76].

proposed plan; each case has to be assessed on the particular wording of the plan involved...

[75] However in other cases such an approach – whether by way of submission (or resulting reference) or even by plan change or variation – might lead to a substantial weakening of a (proposed) plan. Indeed results quite other than those intended in the original plan may occur because the proposed method of implementation does not implement or achieve any of the proposed plan's objectives or policies. In such cases where no specified change has been sought to the objectives and policies, the proposed zone (or rule) is unlikely to be justifiable.

[76] In our view the correct approach when drafting a submission (or reference) on rezoning is to ensure that the relief sought covers not only the issue of rezoning itself, but also – and primarily – any necessary changes to the plan's objectives and policies.

[77] We do not overlook the power given to a local authority by clause 10(2) of the First Schedule to the Act to include any consequential alterations arising out of submissions and any other relevant matters it considered relating to matters raised in submissions. However in our view a change to the objectives and policies which govern zonings (which are themselves either policies (*North Shore City Council v North Shore Regional Council*) or methods of implementation) will not usually be able to be perceived as a "consequential" change. We have commented elsewhere that the tail should not wag the dog: objectives and policies drive methods of implementation; not the other way round. So we do not consider clause 10(2) can be used to widen the scope of a submission or reference. ...

[39] In that case the appellant sought to add to an objective providing for large-scale retail activity to the area affected by the plan change in circumstances where the objective referred to two other areas within the city that did not include the site. The Court considered that the only way to do this would be via s 293 of the RMA and that an application would need to be made for this to occur, with the indication that the proposed re-zoning would have to be re-notified.

[40] These cases are helpful, but do no more than highlight that each particular case will depend on its facts.

Analysis

[41] As outlined above, to establish jurisdiction a particular form of relief must be fairly and reasonably within the general scope of an original submission, or the proposed plan as notified, or somewhere in between.

[42] In the present case, the proposed plan as notified zoned the Trust's land Industrial, and the Trust's submission in respect of it sought a Business 6 zoning (now Business 5) over the land. Mr Lang's point was that the relief now proposed by the Trust is between those two ends of the spectrum of jurisdiction, being an industrial zoning but with provision for business activities similar to those that can establish within the Business 5 zone, or something in between. He submitted that the overlay as opposed to a complete zone change was an option within the bounds of the two zoning options, and was therefore *something in between.* If this is accepted, Mr Lang submitted that a site-specific modification of the objectives and policies, to create consistency between the objectives, policies and the rules of the zone was foreseeable. Mr Lang referred to the use of overlay provisions being endorsed by the Council as a way to resolve other appeals against the proposed plan. He referred to the A & A King Family Trust (Greenwood Street corridor provisions) appeal,[58] the Body Corporate 550337 (Te Rapa corridor provisions) appeal[59] and the Porters (activities on land between Maui Street and Eagle Way) appeal.[60]

[43] We agree that the Greenwood Street corridor and Te Rapa corridor appeals are relevant by way of analogy, but the Porters' appeal, whilst being resolved by way of an overlay, is not, as that concerned the use of s 293 of the RMA by the Court to achieve the outcome proposed. We note that the Greenwood Street corridor and Te Rapa corridor appeals both were resolved by including dedicated objectives and policies (in the case of the Greenwood Street corridor) as well as additional permitted retail activities, and a policy in respect of the Te Rapa corridor case.[61]

[44] The question for us is whether the amendments sought were reasonably and fairly raised in the course of the submission or the notified decision. On balance we consider that they are. The Trust was seeking a commercial zoning over the land and the Council was seeking an industrial zoning. What has subsequently been sought by the Trust is something in between the two. Whilst Mr Bartlett QC correctly identified

[58] ENV-2014-AKL-000156.
[59] ENV-2014-AKL-000148.
[60] ENV-2014-AKL-000145.
[61] See [2016] NZEnvC 101 A & A King Family Trust v Hamilton City Council.

that the original submission did not signal that the objectives and policies of the Industrial Zone would be subject to amendment, this approach has been taken without objection by the Council to other areas within the Industrial Zone that have been amended through the appeal process. We have referred to these above.

[45] In all of the circumstances we consider that there is scope for the Court to consider the new objective and policies, and that the real issue for us is whether they, together with the accompanying rules, survive the legal tests applicable to plan reviews. This decision has however been one we have considered very carefully, because the iterations to the relief sought in this case and the timing of it have been well beyond what we consider to be acceptable on appeal.

Which option best meets the legal tests for a plan review?

[46] There were two main areas which the Council contended were problematic for the Trust's argument and which favoured the Council's proposed provisions. The first concerned the very nature of the commercial activity sought to be undertaken on this site (a commercial centre in an Industrial Zone), which it said fundamentally contravened the business centres hierarchy approach and the approach to the use of industrial land in the proposed plan for which there was no factual justification. The second concerned transportation effects which it and the Agency said would be greater if the Trust's overlay was favoured, and would therefore not give effect to the RPS provisions about transport or those in the proposed plan.

[47] We deal with both the commercial and transport topics in turn, however we first provide a brief overview of the strategic direction signalled under the proposed plan with reference to the RPS provisions and then address the relevance of the existing unimplemented supermarket consent. This provides a context to both the commercial and transport topics and are needed to understand the detail of the evidence called about the need for the commercial centre on the site and the potential for adverse traffic effects to arise if the overlay is incorporated into the proposed plan.

Overview of strategic provisions in the RPS and the proposed plan

[48] The proposed plan contains specific objectives and policies which are designed to give effect to the RPS. We start therefore by outlining the relevant provisions of the RPS and the background that informed them. The purpose of providing this level of

detail is to signal that the strategic direction outlined in the proposed plan as it relates to this appeal is one which has been developed over a long period of time with significant input from all three territorial authorities within the Waikato Region (including the Hamilton City Council), the Waikato Regional Council, tangata whenua (Tainui Waka Alliance) and the Agency.

Future Proof Strategy

[49] The development of the Future Proof Strategy (**the strategy**) preceded the RPS.[61] It is a growth management strategy and implementation plan for the territorial areas of the Waikato District Council, the Waipa District Council and Hamilton City Council (described in the strategy as "**the future proof area**"). The strategy was developed within the broad context of the Local Government Act 2002 (**LGA 2002**) with the regional council, tangata whenua and the Agency being directly involved in its development. It takes a strategic, integrated approach to long-term planning and growth management in the future proof area.[62] The strategy's operational and implementation processes have been designed to be consistent with the RMA, the LGA 2002 and the Land Transport Management Act 2003 (**LTMA**).[63]

[50] Having identified the future proof area as one with on-going population growth and significant levels of development, the strategy identifies 50-year land supply needs in the future proof area and sequences its release and development according to its ability to be serviced by appropriate infrastructure and equitable funding.[64] The strategic approach underpinning it is described as a "blend of compact settlement and concentrated growth". The rationale for this approach was to allow the costs of growth to be identified early so that a more cost-effective form of infrastructure could be delivered, and also because land use certainty would thereby be provided to the community, developers, local and central government.[65]

[51] The strategic options for land use were publicly consulted upon, as was the draft strategy, and the settlement pattern scenario which forms the basis of the strategy was selected on the basis of public feedback and the evaluation results.[66] Whilst the strategy is currently being updated, the evidence before us was that this will not alter

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61 Formally known as the Future Proof Growth Strategy & Implementation Plan 2009.
62 Mr Tremaine, evidence-in-chief, at [15].
63 As FN 35 above, at [16].
64 As FN 35 above, at [15].
65 As FN 35 above, at [17].
66 As FN 35 above, at [18].

the fundamental principles of it or the overall approach to the settlement pattern it promotes.[67]

[52] The strategy contains key principles for business development, with the term "business" encompassing both industrial and commercial activities.[68] It identified that devolved or out of centre retail and office development had the potential to undermine the viability of the Hamilton Central Business District (**the CBD**), neighbourhood centres, towns and villages.[69]

[53] The strategy contains the following key approaches for business development:

(a) there is a focus on Hamilton CityHeart (being the CBD)[70] as the commercial and business heart of the future proof area, i.e. it is of regional significance;

(b) it seeks to ensure commercial and industrial developments are not located in areas that undermine the areas of influence of the CBD, including the extensive development of retail/mall shopping in locations not identified in the strategy;

(c) it outlines that commercial activity should aim to maximise the use of existing areas and facilities;

(d) it seeks to discourage the development of large format retail outside of the CBD, suburban and town centres.[71]

[54] The strategy contains actions to give effect to these matters. These include:[72]

- providing for suitable business and employment opportunities close to where people live;

- agreed locations for business land; and

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67 As FN 35 above, at [22].
68 As FN 35 above, at [23].
69 As FN 35 above, at [25].
70 Whilst the strategy refers to Hamilton CityHeart, we refer to it as the CBD for consistency reasons.
71 As FN 35 above, at [26].
72 As FN 35 above, at [27].

- developing a strategic approach to office and retail development and ensuring that settlement patterns do not adversely impact upon the benefits of the Waikato Expressway.

[55] Mr Tremaine, the implementation advisor for the strategy, gave evidence that the Industrial Zone provisions of the proposed plan are consistent with these approaches. His evidence was not challenged.[73]

The RPS

[56] The RPS implements key aspects of the strategy, including the settlement pattern and gives statutory effect to its principles, approaches and actions.

[57] The RPS identifies issues relating to managing the built environment in Issue 1.4. It directs specific attention to the following matters:

(a) high pressure for development in Hamilton City;[74]

(b) increasing conflict with and demands for new infrastructure;[75]

(c) the need to use existing infrastructure efficiently and to manage and enhance that infrastructure;[76]

(d) unplanned dispersal of retail and office development having had consequential effects on the function, amenity and vitality of some elements of the CBD;[77] and

(e) the integrated relationship between land use and development, and the transport infrastructure network.[78]

[58] The Explanation to Issue 1.4 outlines that:

> ...
> Efficient and effective infrastructure is crucial for our economic progress in social and visible wellbeing. However, land use change can adversely affect this, for

[73] As FN 35 above, at [28].
[74] Issue 1.4 a).
[75] Issue 1.4 c).
[76] Issue 1.4 ca)
[77] Issue 1.4 f).
[78] Issue 1.4 g)

example ribbon development along arterial roads can result in the slowing of traffic and may consequentially affect the efficiency of transport along these routes. ...

Hamilton Central Business District's continued viability, vibrancy and accessibility is significant to the entire region. The previous planning framework has enabled an unplanned dispersal of retail and office development which has contributed to the under-performance of some elements of the Central Business District with consequential effects on its function, amenity and vitality.

[59] The relevant objective addressing this issue is:

Objective 3.12 Built environment

Development of the **built environment**[79] (including transport and other infrastructure) and associated land use occurs in an integrated, sustainable and planned manner which enables positive environmental, social, cultural and economic outcomes, including by:

...

c) integrating land use and infrastructure planning, including by ensuring that development of the built environment does not compromise the safe, efficient and effective operation of infrastructure corridors;

...

e) recognising and protecting the value and long-term benefits of **regionally significant infrastructure**[80];

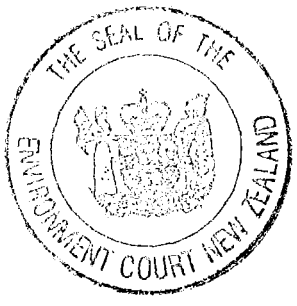
...

g) minimising land use conflicts, including minimising potential for reverse sensitivity;

...

j) promoting a viable and vibrant central business district in Hamilton city, with a supporting network of sub-regional and town centres; and

k) providing for a range of **commercial development** to support the social and economic wellbeing of the region.



[79] The RPS bolds terms that are defined in its glossary.
[80] The RPS defines "regionally significant infrastructure" to include "significant transport corridors as defined in Map 6.1 and 6.1A".

[60] Policy 6.16 of the RPS deals with commercial development in the future proof area. "Commercial development" is defined in the glossary to the RPS as:

> The range of commercial activities including office, retail and commercial service provision.

[61] Particularly relevant to this appeal are the following parts of Policy 6.16:

> Policy 6.16 - Commercial development in the Future Proof Area
>
> Management of the built environment in the **Future Proof area** shall provide for varying levels of **commercial development** to meet the wider community social and economic needs, primarily through the encouragement and consolidation of such activities in existing commercial centres, and predominantly in those centres identified in Table 6-4 (Section 6D). Commercial development is to be managed to ...
>
> b) support and sustain existing physical resources, and ensure the continuing ability to make efficient use of, and undertake long-term planning and management for the transport network, and other public and private infrastructure resources including community facilities;...
>
> f) maintain Industrial Zoned land for industrial activities unless it is ancillary to those industrial activities, while also recognising that specific types of commercial development may be appropriately located in industrially zoned land; and
>
> g) ensure new commercial centres are only developed where they are consistent with a) to f) of this policy. New centres will **avoid** adverse effects, both individually and cumulatively, on:
>
> (i) the distribution, function and infrastructure associated with those centres identified in Table 6-1 (Section 6D);
>
> (ii) people and communities who rely on those centres identified in Table 6-4 (Section 6D) for their social and economic wellbeing, and require ease of access to such centres by a variety of transport modes;
>
> (iii) the efficiency, safety and function of the transportation network; and
>
> (iv) the extent and character of industrial land and associated physical resources, including through the avoidance of reverse sensitivity effects.
>
> (underline added for emphasis)

[62] Table 6-4 sets out a hierarchy of major commercial centres which identifies the CBD as the primary centre in the region for commercial, civic and social activity and the Te Rapa North Commercial Centre (The Base shopping centre) as the primary sub-regional centre and Chartwell as a secondary sub-regional centre. Table 6-2 sets out the number of hectares allocated for industrial land allocation within the future-proof area and the timing or staging of its release. Industrial development is to be *primarily* located in the strategic industrial nodes (Policy 6.14 c)) outlined in Table 6-2. The overlay area is not one of these.

[63] The implementation methods in respect of Policy 6.16 include a requirement that any new commercial development is managed in accordance with Policy 6.16 through the Council's district plan.[81]

The proposed plan

[64] Mr O'Dwyer, the Council's city planning manager, gave evidence about the role and influence of the strategy in the plan review and also addressed how the proposed plan gives effect to the RPS provisions, which he described as being "directive about the preservation of the industrial land resource in Hamilton". He described the introduction of the centres hierarchy within the proposed plan as also giving effect to the relevant provisions of the RPS.[82] Mr Manning did not fully address the ways in which the Trust's most recent proposal gives effect to the RPS.

[65] The proposed plan involves a substantial shift in the policy approach to retail and commercial provision from the operative plan, reflecting concerns about the outcomes of the approach in the operative plan which enabled dispersed, ad hoc office and retail development across the city, including within the Industrial Zone and outside the CBD. This, coupled with the strategy's proposed land use pattern embedded in the RPS (which was developed at around the same time as the proposed plan), and the specific policies about industrial and commercial development, have influenced the strategic direction of the proposed plan.

[66] Mr O'Dwyer gave evidence of the policy shift and the reasons for it:[83]

[81] Policy 6.16.1.
[82] As FN 10 above, at [26], [27].
[83] As FN 10 above, at [22] – [28]. In this quote the PDP refers to the proposed plan and the ODP refers to the operative plan.

> In contrast to the PDP, the ODP provided for a much wider set of land uses in the Industrial Zone which enabled general office and retailing activities. This has contributed to the distribution of these activities away from the established and planned for commercial and business centres in Hamilton over a 10 to 15 year period, while simultaneously diluting the industrial land resource and making it harder to effectively plan and manage integrated infrastructure development.
>
> Against that background, the most significant elements in the PDP that are relevant to this appeal relate to introduction of a centres hierarchy to proactively manage the location and distribution of office and retail development across the city, and the preservation of industrial land for industrial purposes. ...
>
> The decisions version of the PDP includes objectives, policies and land uses in the Industrial Zone to ensure that Industrial land is primarily preserved for industrial land uses.
>
> The strategic direction of maintaining industrial land for industrial purposes also gives effect to the relevant provisions in the Waikato Regional Policy Statement (WRPS) that are directive about the preservation of the industrial land resource in Hamilton.
>
> The introduction of a centres hierarchy within the PDP is directly linked to the policy position to preserve industrial land and also gives effect to the relevant provisions of the WRPS which is now operative.

[67] The proposed plan gives effect to the RPS through the objectives, policies and methods in chapter 2 Strategic Framework, chapter 6 Business Zones, chapter 7 Central City Zone and chapter 9 Industrial Zone and through the city-wide transportation provisions.

[68] Chapter 1 of the proposed plan is entitled Plan Overview. At 1.1.3 Plan Structure, the following is outlined:

> b) Strategic Chapter
>
> This outlines the strategic objectives and policies for the future direction of the City. It is intended that the Objectives and Policies of this chapter provide a hierarchy of district-wide strategic considerations that **sit over** the Objectives and Policies of specific zones, sites and features.
>
> (emphasis added)

[69] Chapter 2 Strategic Framework of the proposed plan is clear, unambiguous and self-explanatory. We set out the relevant parts of it as follows:

> 2.1 Purpose
>
> a) The principal purpose of this chapter is to provide clear and strong links between the District Plan and the City's Strategies, which are listed in Chapter 1: Plan Overview, Section 1.1.2.2 – Integration of the Plan with Other Plans and Documents. To this end, this chapter sets out the strategic objectives and policies for Hamilton City. Other chapters contain objectives, policies and rules that implement and support this strategic policy framework.
>
> b) One of the key approaches to achieving a compact city and sustainable management of physical resources is to recognise the existing and distinctive business centres that will make up a business hierarchy. The overall aim is to maintain the primacy of the Central City as a viable and vibrant metropolitan centre.
>
> ...
>
> Objective 2.2.4
>
> Establish and maintain a hierarchy of viable and vibrant business centres that provide a focus for retail, commercial and entertainment activities and serve the social, cultural, environmental and economic needs of the community
>
> Policy 2.2.4
>
> 2.2.4a) Business activity and development shall locate in the most appropriate centre for its role, according to the following hierarchy:
>
> i. The Central City is the primary business centre, serving the City and wider region, and is the preferred location for significant office, commercial, retail, entertainment and civic activities.
>
> ii. Chartwell and Te-Rapa North complement the Central City, to serve large parts of the City and adjoining districts, and contain primarily retailing, entertainment and services.
>
> iii. Suburban centres, to provide convenience goods, community services, facilities and employment to service immediate suburban catchments.[84]
>
> iv. Ruakura Retail Centre, to serve the Ruakura Structure Plan area and adjacent catchment.

[84] The suburban centres are noted on Figure 2.1a "Hamilton's Plan at a Glance", p 2-2.

v. Neighbourhood centres, to contain retailing and service activities to serve immediate residential catchments.

2.2.4b) The distribution, type, scale and intensify of activities outside the Central City does not undermine the viability, vitality and vibrancy of the Central City, its amenity values, or role in meeting the needs of the region

...

Policy 2.2.5

...

2.2.5c) Industrial Zoned land shall be safeguarded for industrial purposes.

[70] The strategic framework then drives the other provisions of the proposed plan as referred to above, relevantly here chapter 9 Industrial Zone. Any discretionary or non-complying activity has to consider the strategic framework objectives and policies, which is a strong signal of their importance.[85]

The relevance of the unimplemented supermarket consent

[71] As outlined above, the Trust's intention is to establish a small-scale convenience shopping and service centre to serve the western suburbs and passing traffic, with a supermarket as the "anchor" activity.

[72] Resource consent to allow a supermarket development on the site was granted on 12 February 2013 by the Council. Although Mr Swears (the transport expert for the Agency) did not support the application, the Agency gave affected party approval to the application.[86] If not implemented, that consent lapses within 6 years, which now leaves a life of 2.5 years.[87]

[73] The supermarket consent has not been implemented. Mr King explained that he intends to implement the consent, which will either take the form of a small supermarket (such as a Four Square or Fresh Choice) or an ethnic supermarket.[88] We were told during the course of the hearing that the approved supermarket is 3,600m^2 and covers 75% or 80% of the overlay area. Any change to the size of the supermarket may involve an application to vary the conditions of the existing consent or a new

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[85] As in the proposed plan and stated directly under the heading of chapter 2.2 Objectives and Policies: Strategic Framework.

[86] The Agency's opening at [5.1], [5.3].

[87] The appellant's closing, 13 September 2016 at [88], Agreed bundle of documents volume 2, p 22.

[88] Transcript, p 379.

consent. We were provided with a copy of the decision on the application to allow the supermarket development at the site, but not all of the background documents or plans referred to in the decision.

[74] There are requirements for a suitably qualified person to prepare for approval by the Council a Landscape and Planting Plan before the consent is implemented (conditions 20-22). That plan is to generally screen and soften the carparking area fronting Greenwood Street and Killarney Road with a minimum of 2m wide amenity planting and provide solid or wide screening in a minimum 2m area along the western Amenity Protection Area boundary abutting the Residential Zone. One tree is to be planted for each 15 car parking space.

[75] Conditions (6, 7 and 8) require a minimum of 180 vehicle parking spaces, with four accessible needs parks and loading bays.

[76] There are conditions that relate to access:

(a) left-in, left out, right in access to Greenwood Street, the detailed design of which is subject to approval by the Agency (conditions 10 and 13);

(b) left-in, left-out access to Killarney Road, the detailed design of which is subject to approval by the Council (condition 11);

(c) yellow no-stopping lines along the site frontage on the western side of Greenwood Street (condition 12); and

(d) a heavy/service vehicle exit to the north on Greenwood Street (condition 14) with a sign advising operators not to use Bandon, Smith, Allen and Primrose Streets (condition 15).

[77] Mr Apeldoorn, the traffic expert for the appellant, prepared a Transport Assessment Report (**TAR**) which included two plans showing two possible design layouts which he considered would meet the above conditions. The accesses to the supermarket have never been submitted to either the Council or the Agency for approval. For this reason, it cannot be assumed that either of the layouts will be approved.

[78] The unimplemented supermarket consent has not, in our view, reached the stage where it could be considered as a permitted baseline, which in any event is not a relevant consideration when considering a plan change appeal. In terms of this appeal, however, we do not agree that it should be used as a springboard for further commercial activity, or that the fact that consent was granted for it under a more permissive planning regime means it should be given any particular weight when assessing which proposal is the most appropriate.

The proposed commercial centre

[79] Apart from the strategic framework referred to above (the purpose set out in chapter 2.1, Objective 2.2.4 and its related policies), an issue arose about whether or not the objectives and policies in chapter 6 Business Zones and chapter 9 Industrial Zone would apply to the proposed overlay. We heard a considerable amount of evidence and submission on this topic, and without intending any disrespect to the parties or counsel we have formed the view that the arguments somewhat miss the point. This is because what the Trust proposes does not neatly fit within the Business or Industrial Zones' objectives and policies. The commercial centre is something more than a neighbourhood centre, and considerably less than a suburban centre.[89]

[80] Mr Manning, the planning witness for the appellant, said he based the proposed overlay and particularly the rule regime on the suburban centre provisions (with some exceptions in terms of activity provision) which provided for a supermarket (unlike the neighbourhood centre provisions which did not).[90]

[81] In terms of the Suburban Centres (Business 5 Zone) Mr O'Dwyer said:[91]

> The City's residential neighbourhoods are served by numerous existing suburban centres, being medium sized shopping centres also supporting community services and facilities. Further, new centres are proposed as part of planned residential expansion in the Rotokauri, Rototuna, and Peacocke Structure Plan areas. Some of these centres are zoned at present (such as for Rotokauri) while others are identified and clearly provided for as part of detailed structure plans.

[89] The business centres hierarchy comprises five tiers and is set out in chapter 6 of the proposed plan at 6.1e) listed above.

[90] Chapter 6 Business Zone Suburban Centres Objective 6.6.2 and its accompanying policy; Neighbourhood Centres – Objective 6.2.3 and accompanying policies.

[91] Evidence in chief, at 111-114.

> These centres are medium sized centres (ranging in area from 10,000-20,000m^2 GFA). The centres are dispersed throughout the residential suburbs, and generally (although not exclusively) located on higher order transport corridors (major and minor arterial roads) and accessible to a large vehicle-oriented travelling public. Supermarkets commonly anchor these centres supported by limited office, community and other services to a suburban population

[82] Even if we were to evaluate the proposed overlay against the Suburban Centres objectives and policies, there is still a need to understand the Business 5 zone in the round – its purpose, function and nature and the reasons for the rule framework including its activity mix, and the anticipated outcome. Mr Bartlett QC referred to it not being a "pick and mix" exercise.[92] There was no principled analysis to explain why Mr Manning only selected the items he did, neither was any comparison of the rule framework with the proposed overlay undertaken. Our analysis of the rule framework is that a suburban centre is intended to be more than just retail and offices.

[83] If considered against the Industrial Zone provisions, the overlay would clearly not be the most appropriate outcome, however the reality is that what is proposed does not properly fit with the Business Zone objectives and policies and particularly those that relate to suburban centres. We cannot see how it would therefore, be relevant to evaluate the overlay against these provisions. It is therefore not surprising and indeed we would have thought crucial to the Trust's case for there to be a new objective and policies justifying the inclusion of the overlay within the Industrial Zone. A critical question is, however, how the new objective and policies fit within the strategic framework of the proposed plan. We return to this question after considering the commercial and particularly retail and transportation effects that could arise if the overlay is included in the proposed plan.

Commercial and particularly retail considerations

[84] Mr Robert Speer and Mr Fraser Colegrave for the appellant and Mr Tim Heath, Mr Mark Tansley and Mr Phil Osborne for the Council as retail and economic experts, and Mr Manning, Mr Speer and Mr O'Dwyer as planning experts, gave evidence about potential commercial and retail implications.

[92] Transcript, p 150 (8 September 2016).

[85] We have felt it necessary to record our concern about the retail and economic evidence provided to us. There was little attempt to present the evidence in a way that facilitated evaluation on an "apples with apples" basis, for example by defining a "catchment" and "core catchment" and their physical location. A much sharper identification of the issues and evidence addressing these would have shortened proceedings and been of greater assistance. This lack of focus resulted in considerable time spent in cross-examination on matters that, in the final analysis, we have concluded are not material to our decision, with the result that we do not intend to traverse them in detail.

[86] A large part of the case for the appellant was that the overlay proposal would meet a potential and unfulfilled demand for retail in the western part of the city and that there was insufficient supply of suitably zoned and available land to meet that demand. That would mean the proposal would not conflict with the objective and policies for suburban centres.

[87] While the appellant's witnesses considered the proposed new commercial centre within the overlay to be a suburban centre and their evidence was based on this, as outlined above, we have concluded that it is not. However, we accept that the potential effect of the proposed new commercial centre on suburban centres in the western suburbs is a relevant consideration. It may be that the new commercial centre within the overlay would have potential effects on neighbourhood centres in the western suburbs, but we had no argument or evidence on this point. There was no suggestion that it would undermine the primacy, function, vitality, amenity or viability of the CBD, an important plank in both the RPS and proposed plan policy framework.

[88] Another key issue was the effect on Frankton, the suburban centre in relatively close proximity to the proposed overlay area. The appellant's case was that a new commercial centre within the proposed overlay would not reduce the current trading patterns at Frankton or inhibit the consolidation, or growth of it as a suburban centre. A further key issue was whether there is a shortage of zoned land for retail in the western suburbs.

[89] We understand the evidence to be that the provision of 1,000m^2 GFA of offices is unlikely to have any significant adverse effect on centres in the business hierarchy,

given that there is approaching 1,000m^2 GFA of office available on the site currently.[93] We set this issue aside as it is not determinative.

What are the likely implications for Frankton?

[90] As signalled above, Frankton is zoned as a suburban centre. Mr Heath gave evidence that, from the whole of the western catchment, the Frankton suburban centre derives 13% of its retail trade and attracts 1% of the retail spend from that catchment.[94] It has been dominated by Forlongs department store with its household goods and homeware for many years and most recently at the replacement outlets selling similar products but established under a different business model. It has no supermarket.

[91] The appellant's witnesses gave evidence that the provision of supply to meet the convenience shopping demand from the western suburbs is not one of Frankton's actual roles. Its retail function is to meet the demand from the surrounding workforce and a broader city-wide demand for destination shopping for household goods and homeware, formerly at the Forlongs department store. Mr Speer also considered there are a number of constraints against Frankton as a convenience shopping destination for western suburbs residents, particularly poor accessibility and more easily accessible locations by vehicles to other parts of the city.

[92] The Council's witnesses urged us to look beyond today's snapshot of Frankton and to the future when considering the potential for adverse retail effects on it. Mr Heath and Mr Tansley gave evidence that the Frankton Suburban Centre is an underperforming centre with sufficient capacity to meet any unmet retail demand. Both considered that the failure of Frankton to attract custom from the western suburbs is the product of its current physical state and the specialisation in its retail offering of household goods and homeware. Both had a concern that introducing another "centre" could have an adverse impact on Frankton's ability to perform to the level envisaged for an existing suburban centre. We took from their evidence that Frankton is an appropriate location to promote supply to meet the demand from the western suburbs; there are opportunities for revival and the need to give it a chance. However, our assessment of their evidence is that this will be a challenging prospect, particularly without a supermarket.

[93] Transcript, p 399 (13 June 2016).
[94] Mr Heath, evidence-in-chief, at [77], p 122.

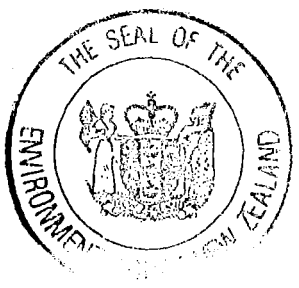
[93] The Council considers that Frankton has the potential and opportunity to regenerate and it has embarked on a planning project to enable it to realize that potential. The Council produced a plan entitled "Discover Frankton: The Frankton Neighbourhood Plan" post-decision making on the proposed plan and we were provided with a copy of it. We take it as no more than an indication of the Council's interest in promoting and regenerating Frankton.

[94] We accept from the evidence that the future area of influence from the overlay proposal includes Frankton. We also infer from the evidence that the potential regeneration of Frankton is likely to take some years and therefore extend beyond the life of the proposed plan. While it may not be set back by the commercial development of the overlay area (even under the most severe of the predictions by the retail witnesses), there is still some uncertainty about that and it raises the question of the need to take that risk.

Is there a shortage of zoned land in the western suburbs?

[95] Mr Heath relied on the existence of the wider western Hamilton catchment's established network of centres designed to accommodate the area's future convenience retail and commercial services requirements as providing an adequate supply. Mr Colegrave was critical of this, pointing out the Marketview data presented by Mr Heath showed that western suburbs retailers currently capture only 22% of total retail spend.[95] Mr Speer's evidence also made much of the under-supply of retail in the western suburbs. Messrs Speer and Colegrove both referred to market research based on vehicle customer surveys at Dinsdale and Newton centres showing a strong fall off in customer support at the railway lines.[96]

[96] None of the witnesses for the appellant made any evidential link to an alleged shortfall of retail supply in the western suburbs with a lack of zoned capacity. No land use study has been undertaken to show that there is insufficient zoned opportunity. Mr Colegrave conceded that his analysis could not be relied upon to conclude that there is a shortage of available zoned land for retailing in the western area[97] and



[95] Mr Colegrave, rebuttal evidence at [78].
[96] Economic – Expert Witness Conferencing Statement, dated 25 February 2016, p 2.
[97] Transcript p 473, lines 6-8.

confirmed that he had no information to suggest a present shortfall of zoned opportunity.[98]

[97] When questioned about his conclusion that there is a lack of available capacity within the suburban centres in the vicinity of the overlay area, Mr Speer acknowledged that he had no objective information or data to support this proposition, other than having walked around and looked at what may happen and what may be available.[99] Furthermore, he had not taken any advice from existing operators within these centres about what they consider to be their long-term options in terms of peripheral acquisitions, building and reconfigurations.[100]

[98] During the hearing the Council drew our attention to the "Suburban Centres Review August 2011", an assessment of the suburban centres and evaluation of the current employment composition, the current and future retail floor space provisions and land requirements of each centre. The Suburban Centres Review estimates the level of provision required or that can be sustained by each localised catchment by 2041, factoring in both the retail and commercial sectors and their estimated growth in demand. The "at grade" suburban centre land area forecasts (said to be more likely than two-storey development for the centres in the western suburbs) involve a forecast land area increase for Dinsdale from 2.4ha[101] to 4.6ha, Nawton 1.2ha to 2ha and Frankton 1.5ha to 3ha.[102]

[99] In closing, Mr Lang submitted that the Suburban Centres Review does not address the question of supply to meet the additional demand, only the predicted future demand. He highlighted Mr Speer's evidence where he said that he had recommended to the Council (in a report prepared for the Council in 2009) that further work needed to be done in relation to suburban commercial locations to address future demand. He submitted that although the review considered likely future demand, it was not specific about how that would be met through expanding existing commercial zones, new commercial zones or other methods. However, we had no evidence about this.

[100] Mr Speer's evidence was that the new commercial centre proposed for the overlay area made sense because it filled what he considered to be a "gap" in the

[98] Transcript p 481, lines 19-23.
[99] Transcript, p 435, lines 1-8.
[100] Transcript, p 435, lines 9-12.
[101] Given the 2011 current retail and commercial estimates, it seems unlikely that the Countdown expansion in Dinsdale of 900m^2 has been factored in.
[102] Suburban Centres Review, August 2011. Table 8 at [19].

centres hierarchy and complemented and helped the hierarchy to be implemented in a full way.[103] There was, however, a lack of thorough analysis by Mr Speer and other witnesses as to the basis for this proposition and no/little systematic identification and review of other potential locations for such a new centre with an analysis of their respective costs and benefits.

[101] Even if there proved to be a shortage of zoned retail capacity (and we did not have evidence to make a finding to that effect), the appellant did not adequately consider the options for meeting that demand. The appellant relied on the existence of the supermarket consent (a matter we have already discussed) and the immediate availability of the Trust's land in one ownership to provide the basis for justifying this location for a new commercial centre.

[102] In our view land could be acquired or otherwise arranged to accommodate such a purpose elsewhere to meet any need.

[103] We conclude that we should not lightly set aside the new approach to the allocation of business/commercial centres and industrial land in the proposed district plan, as this approach has been the subject of considerable focus through Future Proof, the RPS and now the proposed plan. This process has sought to address the issues facing Hamilton about the unplanned dispersal of retail and office development and has developed strategy and policy to deal with them.

Traffic and transportation

General background

[104] The key traffic and transportation issues to be considered are the effects on the road hierarchy, the need to integrate land use and infrastructure planning, including by ensuring that development of the built environment does not compromise the safe, efficient and effective operation of infrastructure corridors, and consistency with the relevant objectives and policies.

[105] Evidence was provided by the following transport experts: Mr Mark Apeldoorn for the appellant, Mr Alistair Black for the respondent and Mr Robert Swears for the

[103] Transcript p 424, lines 23-30.

Agency. Mr Andrew McKillop from the Agency and Mr Dylan Gardiner (a planner) also gave evidence for the Agency.

[106] The Agency has the sole power to control and manage all state highways for all purposes. This includes the Greenwood Street section of SH1. In addition, the Agency funds 51% of the cost of maintenance and operations, renewals and capital works associated with the Council's local road network. Mr McKillop advised that the Agency has:[104]

> ...a significant interest in seeing that land use planning for the City is integrated with the transport network" and "an interest in present and future land use decision-making to ensure that the public receive value for money transport outcomes from our investment.

[107] The Council is responsible for the local road network, which includes Killarney Road and a number of other local roads in the vicinity of the site.

[108] As we have noted, the site is located on the corner of SH1 at Greenwood Street and Killarney Road. The average current traffic volume on Greenwood Street south of Killarney Road is approximately 25,000 vehicles per day (**vpd**) and this is projected to increase to just over 30,000 vpd in round terms by 2041, with the new Southern Links project (assuming it is built) in place. Average current traffic volume on Killarney Road on the western side of Greenwood Street is 15,400 vpd and this is projected to increase to around 18,600 vpd by 2041 with the new Southern Links project in place.[105]

[109] Much of the evidence presented to us addressed the effects of traffic on the road network and was more aligned to evidence that would be presented at a resource consent appeal hearing than at a plan review appeal hearing.

Overall strategic transport planning framework

[110] It is clear to us from the evidence and from our reviews of the relevant planning documents that comprehensive transport planning in Hamilton has been undertaken in a manner very closely linked to land use planning over a number of years, with input from the Council, the Waikato Regional Council, the Agency and other councils and

[104] Mr McKillop, evidence-in-chief, paragraphs [4.2] and [4.3].
[105] Transport Assessment Report dated July prepared by Traffic Design Group, Mark Apeldoorn, evidence-in-chief, Appendix E.

road controlling authorities in the general locality. This planning has included a progression of inter-related and cascading processes starting with the Future Proof Growth Strategy, the Hamilton Urban Growth Strategy, the Access Hamilton Integrated Land Transport Strategy, the Waikato Regional Land Transport Strategy, the RPS and the proposed plan.

[111] The evidence,[106] particularly that of the Agency, emphasised the importance of the road hierarchy and the significance of SH1 in that hierarchy. The Upper North Island Freight Story:[107]

> ...highlighted the **constraint** to inter-regional freight traffic caused by delays along sections of SH1 through Hamilton, including the western corridor [which includes Greenwood Street], and recognised that the effects of this constraint are felt at an upper North Island scale.

Mr McKillop stated that SH1 is already under significant pressure which will not be relieved by the completion of the Waikato Expressway alone.[108]

[112] The Regional Council is responsible for regional transport planning, and the relevant objectives and policies set out in the RPS place a strong emphasis on the integration of land use and infrastructure and the road hierarchy's role in achieving that outcome.[109] For example, Objective 3.12 states:

> Development of the built environment (including transport and other infrastructure) and associated land use occurs when an integrated, sustainable and planned manner which enables positive environmental, social, cultural and economic outcomes, including by
>
> ...
>
> c) integrating land use and infrastructure planning, including by ensuring that development of the built environment does not compromise the safe, efficient and effective operation of infrastructure corridors;
>
> ...
>
> e) recognising and protecting the value and long-term benefits of regionally significant infrastructure.

106 Mr McKillop, evidence-in-chief, at [5.4].
107 "Upper North Island Freight Story", 2013, Upper North Island Strategic Alliance.
108 Mr McKillop, evidence-in-chief, at [5.6].
109 Mr Gardiner, evidence-in-chief, paragraphs [22] and [24].

[113] Along with objectives and policies, the RPS also contains implementation methods directing specific action in district plans. As outlined above, we are required to *give effect to* an RPS or *have regard to* the provisions in a proposed RPS when considering the options for the zoning of this site.

[114] We are also required under s 74 (2) (b) (i) of the Act to have regard to any management plans and strategies prepared under other Acts. The proposed plan identified the need to have regard to the following Waikato region strategies and plans relating to transport:[110]

(a) The Regional Land Transport Strategy (**RLTS**);

(b) The Regional Public Transport Plan;

(c) The Regional Road Safety Strategy; and

(d) The Regional Walking and Cycling Strategy.

[115] We have considered the relevant provisions of the RLTS, as well as the relevant provisions of the RPS and the proposed plan, which we analyse in more detail later in this section, but the remaining documents listed in (b) to (d) above are not material to our decision.

Evaluation

[116] We now evaluate the potential traffic and transportation effects arising from both proposals in light of the strategic transport planning framework we have outlined above.

Existing traffic environment

[117] The existing traffic environment is described in the Transport Assessment Report (**TAR**) dated July 2015, which was prepared by the Traffic Design Group and included as Appendix E to the evidence-in-chief of Mr Apeldoorn.

[118] Table 2 of the TAR shows that the existing activities on the site are generating an estimated 259 to 266 vpd. To provide some context, this represents less than 1% of the existing daily traffic volumes on Greenwood Street and Killarney Road.

[110] Hamilton City Council Proposed District Plan dated 13 November 2012, section 1.1.2.2 f)

[119] The road safety history in the locality of the site was considered in the TAR for the period 2009 to 2013 inclusive. In broad terms, the study area included the Greenwood Street/Killarney Road intersection and both road frontages of the site including the intersections of Killarney Road with Higgins Road and Killarney Lane.

[120] In paragraph 3.1 of the TAR it is noted "...that the Greenwood Street/Killarney Road intersection has a typical crash rate of 1.1 injury crashes per annum and is therefore performing marginally better than typically expected." No other information is provided in the TAR on the relative safety performance of the road network in the locality compared to other localities, other than a note stating "Mitigating the risk of these sorts of crashes has been considered in the access designs that are proposed in the following section."

Future traffic environment

[121] The TAR also considered possible future traffic environments, analysing three possible future scenarios which were described as;

(a) Scenario 1 – the permitted baseline under industrial zoning in the proposed plan;

(b) Scenario 2 – the consented baseline with the consented supermarket in place and the remaining parts of the overall site taking the permitted baseline; and

(c) Scenario 3 – the proposed Business 5 zone, assumed to have a maximum of 7,000m^2 GFA.[111]

[122] The transport experts agreed the likely range of trip generation associated with each scenario at expert conferencing prior to preparation of the TAR, and these were used as the basis of preparing the TAR. In response to questions from the Court, Mr Swears confirmed that the other traffic experts agreed with the basic predictions of future traffic volumes contained in the TAR.[112]

[111] Traffic Expert Joint Witness Statement dated 23 November 2015, paragraph [16], included as Appendix H to Mr Apeldoorn's evidence-in-chief.

[112] Transcript, p 336.

[123] The projected future traffic growth on Greenwood Street was set out in Table 3 of the TAR. The traffic flows from Greenwood Street and Killarney Road are summarised above.

[124] Extra trips arising from five different development scenarios at the site were set out in Tables 1 and 2 of Mr Apeldoorn's supplementary evidence dated 15 July 2016. We have summarised these below by referring to the scenario's listed in paragraph [122] and two overlay options:

Scenario 1	2,417;
Scenario 2	4,043;
Scenario 3	4, 969;
The proposed overlay	4,004;[113]
Proposed overlay and consented supermarket area only, plus permitted baseline elsewhere	5,028.[114]

[125] The TAR used Scenario 3 with a GFA of 7,000m^2 as the basis to assess traffic effects on the road network. The appellant now proposes that the total GFA on the site with the proposed overlay and remaining areas of the site permitted under the Industrial Zone rules be capped at 7,000m^2 before non-complying activity status would apply. In our view, the bases are broadly similar and the TAR traffic generation figures are indicative of the overlay figures within the current bounds of estimating accuracy. Accordingly, we consider that the TAR provides an appropriate basis for us to assess the overlay proposal.

Traffic effects considered in our evaluation of the proposed overlay in terms of the relevant objectives and policies

[126] While we do not give the existing supermarket consent any particular weight when assessing which plan proposals are the most appropriate, it is useful to consider associated traffic volumes given the proposed overlay provides for a supermarket up to a cap of 3,600m^2 GFA to be assessed as a restricted discretionary activity.

[113] Provides for overlay but does not include traffic from remaining areas of the site permitted under the Industrial rules.

[114] Provides an assessment of the maximum number of vehicles that could be generated with the overlay and from remaining areas of the site permitted under the Industrial rules.

[127] We record the following findings in the TAR and related evidence that we consider to be particularly relevant to our assessment under this topic:

(a) The full overlay development of the proposed site is projected to increase existing traffic volumes by more than the normal average level of variation (set at 4% in terms of existing traffic volumes) between Kahikatea Drive and Massey Street on Greenmount Street and between near Campbell Street and Lake Rotoroa on Killarney Road;[115]

(b) The potential for reductions in access crossings from seven to three on Greenwood Street and from two to one on Killarney Road are agreed as positive by all traffic experts if the traffic volumes are the same;

(c) Traffic growth without either the consented supermarket or the overlay, will result in levels of service at the Greenwood Street/ Massey Road Intersection in 2041 being typically F (lowest level of service) in the evening peak.[116]

(d) Addition of either the consented supermarket or the overlay will increase evening peak delays and 95th percentile queue lengths by 25% (circa 20 seconds and 80 metres respectively) for the southern leg in 2015.[117] By 2041 the total evening peak delays on the same leg will increase by 48 to 63 seconds (to almost four minutes) and by 93 to 117 metres (to almost 800 metres) for the consented supermarket and overlay respectively.[118]

(e) We also took into account paragraph 41 of the joint witness statement by the experts dated 23 November 2015, in which they agreed that "...where a transport network (or portions of a transport network) is operating at a poor level of service, a small increase in traffic volumes can create very significant adverse effects." This was confirmed by Mr Apeldoorn in response to our questions, when he stated that "...when the system, for example the intersection gets close to its operating capacity then very small increments and additional traffic do very quickly ramp up the level of the delay."

[115] TAR paragraph 7.1 and Figures 7, 10 and 12.
[116] TAR Table 13.
[117] TAR Table 15.
[118] TAR Table 17.

[128] There was no evidence to enable us to compare road safety with the reduced number of access crossings and the increased traffic numbers from either the consented supermarket or the proposed overlay. While Mr Apeldoorn considered that design options exist to address safety concerns, Mr Black and Mr Swears identified a number of safety issues that concerned them. We did not get the impression that they considered these concerns to be insurmountable but, in the absence of a firm proposal put to them, they did not feel able to form a view on safety issues.

[129] We infer from Mr Apeldoorn's evidence that a range of options exist to address safety concerns in the vicinity of the Greenwood Street/ Killarney Road intersection and also to ensure levels of service can be maintained or improved at that intersection. However, that is only one of a number of issues we must consider, for example the effects on evening peaks at the Greenwood Street/ Massey Road Intersection.

[130] The appellant advanced the proposition that if a proposal is put forward when the first application restricted discretionary activity consent is made and it fails to address traffic/transportation issues to the satisfaction of the Council (and the Agency in relation to SH1), then appropriate modifications to the proposal could be required or the consent declined by the Council, however there is no certainty that this would be the case. We do not consider that we could or should rely on this submission as providing a solution to the potential problem, particularly in view of the matters we refer to in paragraph [157].

Significance of Greenwood Street and Killarney Road in terms of the road hierarchy

[131] Considerable emphasis was placed on the implications of the various options on the Greenwood Street section of the network (in particular) and also on Killarney Road.

[132] There were references in the evidence to the various descriptions of where Greenwood Street fits within the road hierarchy. It was described as being part of SH1, a major arterial transport corridor; a national road corridor, a significant transport corridor, regionally significant infrastructure and a regionally significant corridor.

[133] Killarney Road was described variously in different planning documents as a minor arterial transport corridor, an arterial road corridor, a significant transport corridor and regionally significant infrastructure.

[134] It is evident to us from the various descriptions and definitions set out in the different planning documents that both Greenwood Street and Killarney Road have considerable importance in the road hierarchy, particularly Greenwood Street with its function as a state highway that extends both within and beyond Hamilton. It is also evident to us from the various planning documents that there is a requirement to manage land use to take into account the road hierarchy.

[135] While we have reviewed carefully all of the definitions for the different road categories referred to above as well as the evidence of different witnesses, we consider the following matters relating to Greenwood Street to be particularly relevant to our decision:

(a) The traffic experts agreed that the principal function of Greenwood Street:[119]

> ...is the movement of significant levels of goods and people between parts of the City and beyond. ....Property access is either non-existent or heavily controlled.

(b) Mr McKillop stated that SH1, of which Greenwood Street forms part, is a transport corridor of national and regional strategic importance.[120]

(c) National road ... corridors are those roads ... that make a significant contribution to the social and economic wellbeing of New Zealand by connecting major population centres, major ports or international airports.[121]

(d) Desired RLTS investment outcomes for Greenwood Street for years 1 to 10 and 11 to 30 of the strategy are, respectively:

(i) Access, travel time reliability, safety and maintenance to improve safety and support economic growth.

and

(ii) Access, travel time reliability, safety and maintenance.[122]

[119] Traffic Joint Witness Statement dated 23 November 2015, at [9].
[120] Mr McKillop, evidence-in-chief, at [4.5].
[121] One Network Road Classification system developed by Local Government New Zealand and the Agency defines Greenwood Street as a National Road Corridor.
[122] Waikato RLTP, Function and desired investment outcome for Auckland and inter-regional corridors, referenced in EIC of Mark Apeldoorn, paragraph 35

(e) Greenwood Street is the sole arterial route carrying traffic through this section of the city and there are no alternatives on the planning horizon.[123]

(f) No physical intervention measures are proposed in Greenwood Street or Killarney Road within the 30 year planning period of the Waikato Regional Land Transport Plan 2015 to 2045.[124]

(g) Mr Swears considered that SH1 in the vicinity of the site is the most vulnerable of any portion of the state highway through Hamilton.[125]

[136] We accept, therefore, that the section of Greenwood Street/SH1 past the Trust's site is a road of both national and regional significance that sits near or at the top of the roading hierarchy. The RPS and proposed plan contain objectives and policies (and in the case of the RPS implementation methods) that require us to recognise this.

Constraints on access to SH1

[137] While the majority of SH1 through Hamilton is a Limited Access Road **(LAR)**, the joint witness statement by the traffic experts confirms there is no LAR control on Greenwood Street.[126] Similarly, there is no LAR on Killarney Road. Therefore, a permitted activity on any of the existing sites within the Trust site can access Greenwood Street under the proposed plan provisions without the need for a resource consent if the land use and traffic generation is within/below the trigger thresholds specified in Rule 25.14.4.3.[127]

[138] Mr Swears placed considerable emphasis in his various briefs of evidence on avoiding or minimising access to SH1 from the site. For example, in paragraph 6.34 of his evidence-in-chief, he stated:

> Although existing properties with direct access to SH1 are entitled to their accesses, I consider it preferable for accesses along the SH1 frontage of the King Appeal site to be minimised and, if possible, eliminated altogether; regardless of the zoning (or Overlay as appropriate) for the Site.

[123] Mr Gardiner, evidence-in-chief, at 56 (a).
[124] Mr Apeldoorn, evidence-in-chief, at 33.
[125] Transport, p 26, (last part of hearing).
[126] At 11.
[127] Mr Apeldoorn, evidence-in-chief, at [26].

[139] Mr Apeldoorn noted that the desired investment outcomes for the Western Corridor (Greenwood Street) in the WRLT are "access, travel time reliability, safety and maintenance to improve safety and support economic growth." He considered it significant that access features as an outcome for Greenwood Street, but no other such nationally significant corridor.[128]

[140] As a result of historical factors, it would seem that Greenwood Street's ability to function as a nationally significant corridor is partly compromised by the inability to fully control access points to and from it. This is not something that can be remedied by us, but it is a relevant factor that we consider should be taken into account when assessing the two options before us. We consider a cautious approach is required given the importance of Greenwood Street (SH1) in the roading hierarchy.

[141] In closing submissions, counsel for the appellant proposed a new rule 9.5.12 b) to address the number of access crossings onto Greenwood Street. The rule proposes that such accesses would be limited to three (from the current seven) once the level of development reached 3,500m^2 GFA. Whilst we acknowledge that this accords with the traffic experts' opinions that the site should be developed comprehensively so that the number of vehicle crossings on each road frontage is minimised,[129] some important questions remain unanswered particularly with regard to traffic safety and what happens until the 3,500m^2 GFA threshold has been reached.

Requirement to undertake an Integrated Transport Assessment (ITA) at the time of assessment of a proposed plan review

[142] Ms Dickey and Mr Bartlett QC submitted that Implementation Method 6.3.8 in the RPS required the Trust to prepare an Integrated Transport Assessment (**ITA**) to support of the proposed overlay, and that the TAR was no substitute for it. An "integrated transport assessment" is defined in the glossary to the RPS as "a comprehensive review of all the potential transport impacts of a development proposal".

[143] As outlined earlier in our decision, Policy 6.3 of the RPS relates to co-ordinating growth and infrastructure. Section 6.3.8 of the RPS is an Implementation Method, not a policy, and states:

[128] Mr Apeldoorn, evidence-in-chief, at [35].
[129] Traffic Joint Witness Statement dated 23 November 2015, at [30].

> Territorial authorities should ensure an **Integrated Transport Assessment**[130] is prepared to support a structure plan, plan change or resource consent application where the development may result in additional major trip-generating activities.
>
> (underline emphasis added)

[144] It is clear that some of the implementation methods attached to Policy 6.3 are mandatory (evidenced by the use of the word *shall*); for example Implementation Method 6.3.1 which we have outlined in paragraph [113] above. However, some of the other implementation methods outlined in relation to Policy 6.3 and some district plan transportation provisions are not mandatory, as evidenced by the use of the word "*should*" and not "*shall*".

[145] Despite the above, Policy 25.14.2.1f of the proposed plan requires an ITA to be undertaken "for new subdivision, use or development of a nature, scale or location that has the potential to generate significant adverse transportation effects".

[146] It is unclear to us if the intent of Implementation Method 6.3.8 is that an ITA *should* be undertaken at the time of a plan change, or as an alternative *could* be undertaken at the time of a resource consent application. Either way, we are satisfied that it was not necessary for the appellant to prepare an ITA in this instance otherwise taken to its logical conclusion, this would mean that an ITA would have had to be prepared for every site or area to support the zoning attached to it in the proposed plan if major trip-generating activities would be the result. There was no evidence to suggest that this was required of either the Council or any other appellant in a similar situation to the Trust.

[147] We are satisfied that the TAR provides sufficient information for us to gain an appropriate understanding of the traffic implications arising from the overlay proposal. Accordingly, we do not see the absence of an ITA at this time as fatal to the Trust's case.

Extent to which the proposed overlay could affect ability to meet relevant transport objectives and policies

The Regional Land Transport Strategy

[148] We have reviewed the RLTS, but consider that most of the objectives and policies in it are not sufficiently specific to assist us. Objectives and policies, which are consistent with and inform our reading of the documents that follow, are:

Policy P8 - Develop, maintain and protect key strategic corridors as defined in section 4 of the plan in a manner consistent with their functions and desired investment outcomes outlined in this section.

Policy P40 - Protect and promote SH1/29 as the preferred strategic road freight corridor for investment between Auckland, Waikato and the Bay of Plenty regions.

The RPS and proposed plan

[149] There are a number of common themes throughout the RPS and proposed plan that are relevant to transport and traffic issues. These can be summarised in broad terms as:[130]

(a) The need to integrate land use and transport planning;

(b) The management of effects on the function of transport infrastructure and the transport hierarchy;

(c) The importance of the safe, efficient and effective operation of infrastructure corridors and regionally significant infrastructure.

[150] The new objective, policy and rules included in the overlay would increase traffic volumes on nationally or regionally transport corridors, which in our view would result in less appropriate outcomes in terms of the overall transportation framework than those that would occur under the proposed plan.

[151] We consider the proposed overlay could have some benefits in terms of Policy 2.2.1b I of the proposed plan which relates to development being designed and located to minimise energy use and carbon dioxide production by minimising the need for private motor vehicle use (reflecting such matters expressed in the RPS). In an overall context, we consider these benefits would be small and not material to our decision.

[130] In particular see Waikato RPS Objective 3.12 c and e and Policies 6.1 b and d and 6.6 a and Implementation Method 6.6.1 a – c; District Plan Objectives 2.1.12, 2.2.2, 2.2.13, 18.2.1, and 25.1.2.1 relating to development suitability and Policies 2.2.1bi, 2.2.13a, 2.2.13c, 18.2.1a, and 25.1.2.2aiii relating to development suitability. In the Transport Chapter 25: City-wide Transportation Objective 25.14.2.1 and Policies 25.14.2.1e, Policy 25.14.2.1f relating to Integrated Transport Assessments, and the transportation Appendix (15) such as under the heading function in section 15.5 and the plan showing the sensitive transportation network in 15.9.

[152] The principal issue of concern from a transport and traffic perspective is the inability of the overlay to pass the "avoid" threshold in Policy 6.16 of the RPS which states:

> **New centres will avoid adverse** effects, both cumulatively and individually, on
>
> ....
>
> iii) the efficiency, safety and function of the transportation network."
>
> (emphasis added)

And Implementation Method 6.16.1 entitled "District plan provisions" requires that:

> Hamilton City Council, Waipa District Council and Waikato District Council district plans shall manage new commercial development in accordance with Policy 6.16."
>
> (underline emphasis added)

[153] The overlay clearly provides for new commercial development by proposing a new commercial centre, but its provisions do not *avoid* adverse effects on the efficiency, safety and function of the transportation network. This is because:

(a) the proposed overlay would adversely affect the efficiency of operation of the Greenwood Street/Massey Road Intersection and possibly other intersections to lesser extents;

(b) any additional local traffic generated from the overlay area would not avoid adverse effects on the principal function of Greenwood Street which the traffic experts agree *"...is the movement of significant levels of goods and people between parts of the City and beyond.* Similarly, any additional local traffic generated from the overlay area does not avoid adverse effects on the function of Killarney Road; and,

(c) effects on safety of the transportation network, while potentially minor, are unlikely to meet the "avoid" test with increased traffic numbers over a number of intersections.

[154] Regardless of the uncertainty relating to safety, there is a real risk that the provisions contained in the overlay would result in development outcomes that are unlikely, in our view, to meet the "avoid" test contained in Policy 6.16 of the RPS. That is an additional reason for concern when contemplating a proposal for a new

commercial centre that does not neatly fit within the commercial centres hierarchy established under the proposed plan.

Overlay policy and rule framework

[155] We now consider the overlay policy and rule framework and its implications, including its workability.

[156] Aside from the additional activities that are restricted discretionary activities (**RD**), the only difference from the Industrial Zone is that all new buildings and activities, or changes to the existing ones, require RD consent at minimum (which means that there are no permitted/controlled activities). That RD consent is in addition to any RD consent that may be required under the Industrial Zone framework or under the City-wide provisions of the proposed plan.

[157] Any RD consenting process would need to consider the objective and policies for the overlay area. It is likely to take the caps provided for supermarket, retail and office activity as indicating that these activities are suitable, given that the overlay applies to a confined area and considering the objective and policies (particularly Policy 9.2.9d referring to the caps). It is unclear as to what the basis for declining consent would be, even for transportation effects.

[158] We accept the Council's submission that the only way to provide certainty that an integrated approach to the development of the site occurs, is to apply for resource consent for the whole area once. That is not required by the rules contained within the proposed overlay. There is nothing to prevent the appellant applying successively for resource consent for different proposals at different stages on the site. If the supermarket is developed, however, and it comprises 3,600m^2 GFA, it would occupy approx 75% - 80% of the overlay area. Even a smaller supermarket than this would mean the possibilities for integration may be limited.

[159] We conclude that the title amalgamation threshold requirement or condition, as presented in the closing stages of the hearing, is uncertain. The Agency questioned whether it was intended to be in perpetuity or until the land is fully developed and also asked what the subdivision rules require. Would the decision-maker be in a position to decline or grant consent to subdivision and for what reasons? We did not have any evidence on these points.

[160] We now consider the additional discretion/assessment criteria offered by the appellant as part of the overlay. We accept the Council's arguments that there are no material benefits gained by the additional discretion/assessment criteria offered.

(a) In the current Industrial Zone the Council can already exercise discretion over transportation matters in terms of trip generating thresholds and RD status that would trigger an ITA and require consideration against the same transport discretion/assessment criterion G. While we accept that there would be benefits in confining the number of vehicle crossings in a new threshold requirement or condition, we also accept the Council's point that it is unlikely that there would be the worst case scenario portrayed by the appellant would arise, because the conditions attached to the consented supermarket require the number of vehicle crossings to be reduced in any event.

(b) The Industrial Zone has design and layout as a controlled activity for new buildings, alterations and additions, light industrial, service industrial and ancillary residential unit as controlled activities. Policy 9.2.3 provides the policy basis and Rule 9.6 constrains the matters of control – assessment criterion B. Mr O'Dwyer gave evidence that there was a deliberate choice by the Council to accept a lower threshold of amenity in the Industrial Zone.[131]

For these reasons we agree that the additional RD discretion/assessment matters proposed are not necessary.

[161] For these reasons, too, we do not find the overlay proposal the most appropriate approach.

Does the proposed overlay give effect to the RPS?

[162] A lot was made of this during the hearing and we have already covered some of the arguments in preceding paragraphs. Mr Lang submitted that we must consider the RPS is a high level document that does not assist in addressing the matters we must consider. We agree with this submission up to a point, particularly given that the centres hierarchy policy (Policy 6.16) is largely directed at protecting the CBD and sub-

[131] Transcript, p 299, lines 1-3.

regional centres as we have identified. However, there is more to the policy in the RPS than that.

[163] We accept that Policy 6.16 does not confine new centres to existing commercial centres or greenfield centres, however there is some support for protecting existing centres in Policy 6.16b). As well, Policy 6.16f) provides that commercial development is to be managed to maintain industrially zoned land for industrial activities unless it is ancillary, whilst also recognising that specific types of commercial development may be appropriately located in industrially zoned land, even though it does not specify what these types of commercial development might be. The most telling provision is Policy 6.16g), which anticipates the prospect of new commercial centres if certain things can be met, but it does not specify where these new commercial centres are to be located. The problem with the appellant's proposed overlay is that it will not "avoid" adverse effects on "the efficiency, safety and function of the transportation network".

[164] When it comes to the question of whether the appellant's proposed overlay gives effect to Policy 6.16 for the future proof area, we simply conclude that it does not. We do not accept there is any certainty in Mr Lang's propositions that the proposed overlay would involve minor or transitory effects on the efficiency, safety and function of the transportation network, or be an enhancement.[132] Neither do we consider that the district plan provisions are sufficient and should be relied on to allow this fundamental matter to be dealt with at a later stage.

[165] As to other provisions of the RPS, our attention was drawn to:

> **Policy 6.1 Planned and co-ordinated subdivision, use and development**
> Subdivision, use and development of the **built environment**, including transport, occurs in a planned and co-ordinated manner which:
>
> a) has regard to the principles in section 6A;
>
> b) recognises and addresses potential cumulative effects of subdivision, use and development;

[132] Mr Lang drew on *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* NZSC38 [17 April 2014] at [145] in his closing: "It is improbable that it would be necessary to prohibit an activity that has a minor or transitory adverse effect in order to preserve the natural character of the coastal environment, even where that natural character is outstanding. Moreover, some uses or developments may enhance the natural character of an area."

c) is based on sufficient information to allow assessment of the potential long-term effects of subdivision, use and development; and

d) has regard to the existing built environment.

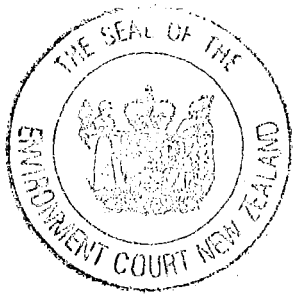
[166] Implementation methods (6.1.1) include local authorities having regard to the principles in section 6A when preparing, reviewing or changing district plans and development planning mechanisms such as structure plans, town plans and growth strategies. We considered the "General Development Principles" set out in section 6A, particularly with reference to transport, but nothing hinges on this policy.

[167] Overall, for the reasons we have expressed, we cannot be satisfied that the proposed overlay gives effect to the RPS. Even if the version of the RPS we were required to consider was the proposed RPS and we had to have regard to it, we could not be satisfied that the overlay provisions, particularly as they relate to transportation effects, would be preferable to those which appear in the Industrial Zone.

Is the proposed overlay the most appropriate approach?

[168] We also conclude that the proposed overlay does not achieve the strategic objectives and policies in the proposed plan. In summary our reasons are:

- It does not achieve Objective 2.2.5 and the associated policies and in particular does not safeguard Industrial Zoned land for industrial purposes and may result in other similar approaches elsewhere in the city;
- It cuts across Objective 2.2.4 and supporting Policy 2.2.4 and the hierarchy of business centres, and has the potential to encourage other such development to adopt similar approaches elsewhere in the city;
- It does not adequately integrate land use and development with the provision of infrastructure under Objective 2.2.12 and has the potential to allow development that compromises the safe, efficient and effective operation and use of existing and planned infrastructure under Policy 2.2.13a, and results in incompatible adjacent land uses under Policy 2.2.13d.



[169] We have also found there are deficiencies in the objective, policies and rules associated with the proposed overlay, including the integrated development proposition. Those would also militate against the proposed overlay achieving efficient use and

development of natural and physical resources, especially land, buildings and infrastructure under Objective 2.2.12 and Policy 2.2.12d on development enabling and encouraging the efficient use of resources.

[170] The Council submitted that the new policy direction contained in the proposed plan should be given a chance on its "first road test". In opening Mr Bartlett QC submitted:[133]

> To summarise, each zone in the PDP has a purpose and a function which is designed to mutually support other centres and implement the centres hierarchy. In turn, the hierarchy seeks to ensure an integrated approach to giving effect to the WRPS and achieving the purpose of the RMA. Undermining the hierarchy at this point in the PDP's development and implementation will not only fail the test in section 32, it will conflict with the function of the Council with respect to its responsibility under section 31 of the RMA.

[171] We take the Council's point. We are mindful that the planning framework of the proposed plan review has been designed to ensure that the poor outcomes resulting from the operative plan, particularly the effects arising from ad hoc commercial development, are not repeated.

[172] As we have said, the overlay does not provide for a suburban centre or neighbourhood centre but creates a new kind of commercial centre. The overlay proposal is not similar in nature to those contained in the Industrial Zone – either the Te Rapa Corridor or the Greenwood Street Corridor which in our view are confined to limited commercial activities largely reflecting the existing commercial activities established within these corridors for some time. While the proposed relief of the 2,000m^2 GFA retail might be characterised as a "drop in the bucket", the potential cumulative effects of the proposal and new type of centre proposed in light of the proposed plan policy present in our view a significant risk to the new centres hierarchy policy approach.

[173] We do not agree with Mr Lang that the history of and (presumably exceptional) reasons for applying the mixed use overlay to the site would be clear. We agree with the Council that there is potential for the proposed overlay to encourage other non-standard approaches to development in the Industrial Zone (and perhaps even a business centre-based approach to something between a suburban and neighbourhood

[133] Council opening, at [35].

centre). The undesirability of that outcome is also based on our consideration of the deficiencies of the proposed mixed use overlay proposition advanced by the appellant.

Outcome

[174] For the reasons expressed above, we have decided that the appellant's proposal for the site, a spot-zoned commercial centre within the Industrial Zone, is not the most appropriate planning method to achieve the objectives of the proposed plan. In particular, the overlay and what is proposed within it do not meet the strategic objectives of the proposed plan. The new objective and policies were introduced late in the piece to fill the gap created by the rule framework provided by the appellant as part of its initial overlay proposal. Whilst we determined that the new objective and policies were within scope of the appeal, they do little to address the wider strategic framework of the plan which we have addressed in this decision in considerable detail. This strategic framework has not been something that has been simply developed by the Council in a vacuum. The genesis for the approach was developed some years ago with input from other significant regional players, who it would seem for a variety of very good reasons recognised the need to collaborate to try and address concerns about the lack of integrated land use and infrastructure planning, ad hoc commercial and industrial development, and the difficulties that are caused as a result. This collaborative approach was led politically, but also included the Regional Council, the Agency and tangata whenua. The strategic approach was publicly consulted upon and was implemented through the RPS. The RPS was also a publicly consulted document.

[175] The reason we have felt the need to mention this is because the strategic direction implemented through the district plan (as directed by the RPS) has been one which has been developed over a lengthy period of time with considerable involvement from others.

[176] We mention the above because the Trust's proposal cannot, in our view, simply be seen as a site-specific proposal, even at a proposed plan review stage. It must be seen within the wider context.

[177] We have decided that the fact of the supermarket consent should not be given any particular weight when considering the most appropriate planning response for this site, and we acknowledge that there is already existing office activity on the site and that the retail component within the scheme of things is not significant. We have found

that the other overlay provisions that have been applied to sites within the Industrial Zone (the Greenwood corridor, Te Rapa corridor and Porters Mixed Use Overlay) are all distinguishable and more limited than that which is proposed for this site.

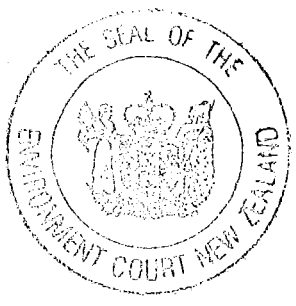
[178] We have also found that, whilst there might be a shortfall of commercial supply in the western suburbs, there is no evidence to support the proposition that there is insufficient zoned land available to meet this need. Furthermore, the strategic policy direction signals any unmet need occurring around existing centres, and we are not satisfied on the evidence before us that this would not be a possibility.

[179] There is also the question of whether this site would be the best option for a new commercial centre. The fact that the site fronts onto SH1 is problematic for the Trust given Policy 6.16 g) of the RPS. Whilst the evidence establishes that a supermarket is likely to be the largest generator of traffic, and despite the fact that there is likely to be some solution to matters of access and design to mitigate adverse traffic effects, this begs the question about whether or not, at this stage, it is appropriate that a new commercial centre that does not neatly fit within the commercial centres hierarchy established under the proposed plan, should be included in the proposed plan. The evidence provided to us was not compelling enough for this to be, in our view, an appropriate outcome.

[180] When considering the law that applies for plan review, we therefore find that the Council-proposed zoning and provisions for the site are the most appropriate way to achieve the objectives of the proposed plan. We are not persuaded that the proposed overlay provisions would be effective or, indeed, efficient. Whilst we can see that there would be benefits to the Trust, and perhaps to local residents, we do not agree that these overall benefits outweigh the strategic objectives of the proposed plan. We do not consider there will be any costs or risks associated with not accepting the overlay that would outweigh the above benefits either.

[181] In conclusion we record that we have had regard to the Council's decision under s 290A of the RMA. That regard has been fleeting given that the proposal before us has significantly changed since the hearing held in respect of the proposed plan.

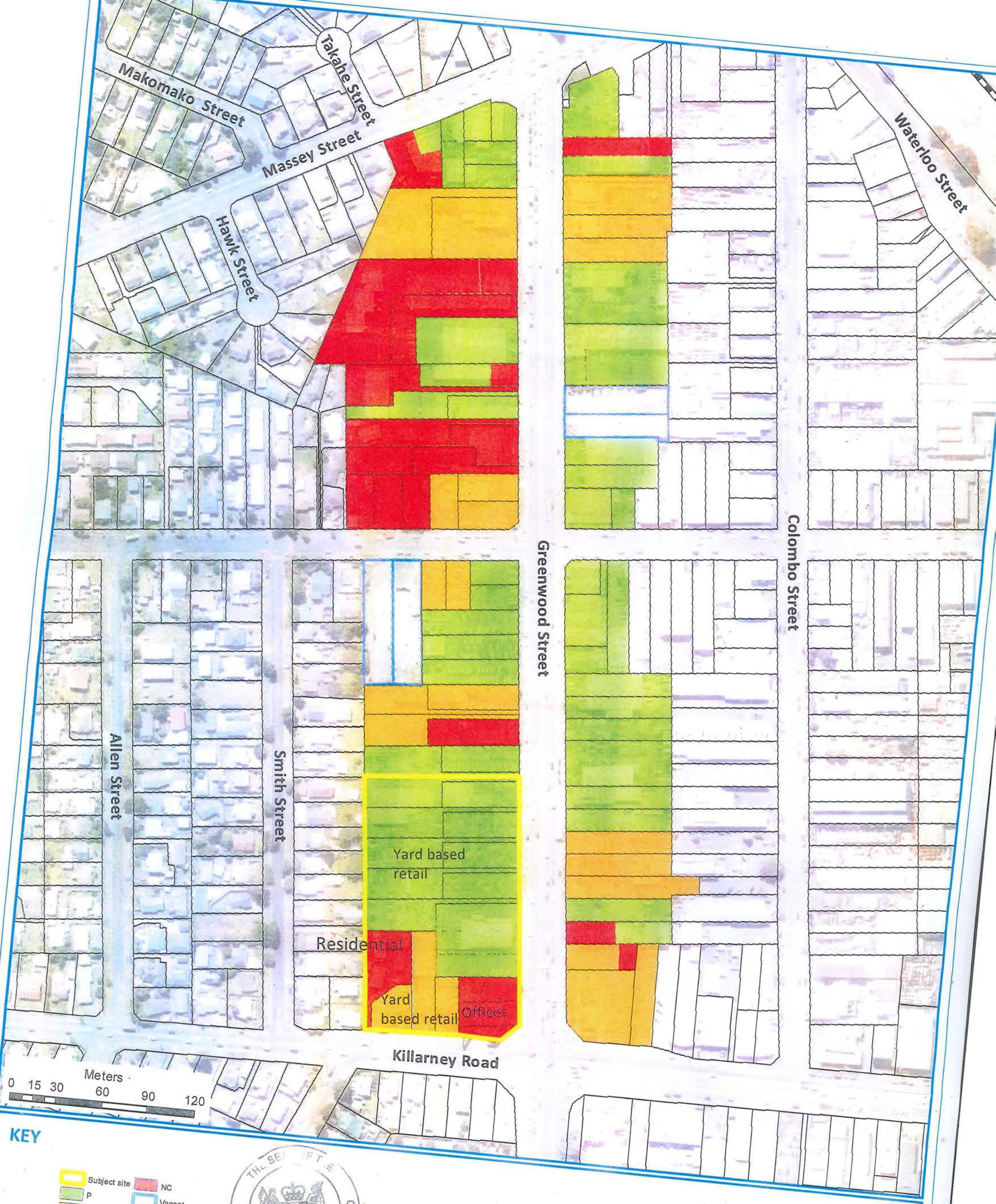
[182] The appeal is dismissed and the Council's decision in relation to the land now subject to this appeal is confirmed.



[183] We do not encourage any application for costs. If costs are sought, any application is to be filed within **10 working days** of the date of this decision, with any reply to be filed **10 working days** thereafter.

For the court:

M Harland
Environment Judge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IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

CIV-2013-425-95
[2013] NZHC 1712

BETWEEN	SHOTOVER PARK LIMITED AND REMARKABLES PARK LIMITED Appellant
AND	QUEENSTOWN LAKES DISTRICT COUNCIL Respondent

CIV-2013-425-94

BETWEEN	FOODSTUFFS (SOUTH ISLAND) LIMITED Appellant
AND	QUEENSTOWN LAKES DISTRICT COUNCIL Respondent

Hearing:	24, 25 and 26 June 2013
Appearances:	R Somerville QC and S Schaepfer for Shotover Park Limited I Gordon and J B Orpin for Queenstown Central Limited N H Soper and A C Ritchie for Foodstuffs (South Island) Limited R S Cunliffe and J E MacDonald for Queenstown Lakes District Council
Judgment:	5 July 2013

JUDGMENT OF FOGARTY J

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Summary of judgment

[1] The appellants allege that one Environment Court failed to consider reasoning of another Environment Court on the same, or sufficiently similar, facts and issues. Justice requires that like cases should be decided the same way. That this was an error of justice and law, so that the Court who failed to consider the other should have its decision set aside.

[2] At the heart of these appeals is criticism of Judge Borthwick's division's decision to disregard the fact and merit of Judge Jackson's division's grant of resource consents to the Pak'nSave and Mitre 10 Mega proposals.

[3] The Court could have considered the reasoning of the other Court, allowing for the differences in the issues. The questions each Court were examining, however, were materially different. So different that in this case there was no duty of one to consider the reasoning of the other.

[4] The Court was not obliged to assume that the environment within PC19 contained the Pak'nSave supermarket and Mitre 10 Mega. This is because when deciding the content of a plan for the future, as distinct from the grant of a particular resource consent, the Court is not obliged to confine "environment" to the "existing environment", as defined in [84] of *Hawthorn*.[1]

[5] The appeals are dismissed.

Introduction

The objective of the operative plan

[6] The Queenstown Lakes District Council plan became fully operative in 2009. Approximately 69 hectares of rural land, zoned rural general, on the Frankton Flats adjacent to the airport is the last remaining greenfields site within the urban growth boundary of Queenstown. The operative plan has an objective:

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1 *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA).

Objective 6 – Frankton

> ***Integrated and attractive development of the Frankton Flats locality providing for airport operations, in association with residential, recreation, retail and industrial activity while retaining and enhancing the natural landscape approach to Frankton along State Highway No. 6.***

[7] By Plan Change 19 (PC19), the Council proposes that this last remaining area of rural zoned land on the Frankton Flats yet to be rezoned for urban zoning be rezoned for urban development.

A brief chronology

YEAR	EVENT
2007	PC19 was first notified by the Council.
2009	In October 2009, hearing commissioners appointed by the Council released a decision recommending that PC19 be approved. In the same year, appeals were lodged, including by Foodstuffs.
2010	Foodstuffs also applied to the Council for resource consent for a Pak'nSave supermarket within the area of PC19.
2011	Foodstuffs' application for resource consent was declined. Cross Roads applied for resource consent for a Mitre 10 Mega adjacent to the proposed Pak'nSave supermarket.
2012	February - a division of the Environment Court, chaired by Judge Borthwick, began hearing the appeal against PC19. March – A month later, Cross Roads applied for direct referral of its resource consent to the Environment Court. 3 May - (After four sittings over four separate weeks, 19 days in all), Judge Borthwick's division reserved its decision on PC19. Later in May, another division of the Environment Court, chaired by Judge Jackson, began hearing the Foodstuffs 2010 appeal against the refusal of resource consent for the Pak'nSave supermarket, and Cross Roads' 2011 direct referral to the Environment Court for consent to a Mitre 10 Mega.

	July - Judge Jackson's division granted resource consent for the Pak'nSave supermarket,[2] and in August for the Mitre 10 Mega.[3] November - Judge Borthwick's division resumed hearing the PC19 appeal in order to hear oral argument on the relevance, if any, of Judge Jackson's division's decisions on Foodstuffs and Cross Roads. By this time both of those decisions were themselves the subject of appeal to the High Court.
2013	February - Judge Borthwick's division issued its judgment on PC19.[4] In this judgment, Judge Borthwick's division placed no weight on these consents. (This judgment is called the *PC19* decision.) On the same day that Judge Borthwick's division delivered its judgment on PC19 this High Court began hearing the appeals against the grant of the Pak'nSave and Mitre 10 Mega resource consents by Judge Jackson's division. Those appeals were successful. March - Foodstuffs, Shotover Park Limited and Remarkables Park Limited appeal Judge Borthwick's division's decision in PC19. In PC19, and so in this decision, both parties are referred to as SPL. April – The High Court allows the appeals against Judge Jackson's division's decisions, and remits the resource consent applications back to the Court, to be reconsidered against the current state of PC19.[5] June - This Court grants leave to Foodstuffs and Cross Roads to appeal the decision of this Court on the resource consents to the Court of Appeal.[6] On the same day, this Court starts hearing the appeals against Judge Borthwick's division's decision.

The allegations of error of law

[8] As already noted, there are two appeals; one by Shotover Park Limited and Remarkables Park Limited, together referred to as SPL, and the other by Foodstuffs. They take different, but complementary grounds of appeal.

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2 *Foodstuffs (South Island) Limited v Queenstown Lakes District Council* [2012] NZEnvC 135 (*Foodstuffs).*

3 *Cross Roads Properties Limited v Queenstown Lakes District Council* [2012] NZEnvC 177 (*Cross Roads*).

4 *Queenstown Airport Corporation v Queenstown Lakes District Council* [2013] NZEnvC 14 (*PC19*).

5 *Queenstown Central Limited v Queenstown Lakes District Council* [2013] NZHC 815; *Queenstown Central Limited v Queenstown Lakes District Council* [2013] NZHC 817.

6 *Foodstuffs (South Island) Limited & Anor v Queenstown Central Limited* [2013] NZHC 1552.

SPL's contention of error of law

[9] SPL contends that Judge Borthwick's division erred in concluding that the considerations in ss 31 and 32 of the Resource Management Act 1991 (the RMA) do not support significant weight being given to Judge Jackson's division's findings in the *Foodstuffs*[7] and *Cross Roads*[8] decisions. SPL relies on the following particular grounds:

(a) Judge Borthwick's division failed to act consistently with Judge Jackson's division in terms of relevant findings of fact and law concerning the proposed activities in activity areas E1, E2 and E3.

(b) It acted on the basis that before doing so the above decisions needed to be determinative of the PC19 proceedings (not pursued in oral argument).

(c) It failed to place weight on the findings of fact and law in terms of ss 5, 7, 31, 32 and 74 of the RMA (as found in Judge Jackson's division's decisions).

(d) It failed to put weight on Judge Jackson's division's decisions in *Foodstuffs* and *Cross Roads* in respect of the decisions version of PC19 (PC19 (DV)). This being the version of PC19 as it was when the Queenstown Lakes District Council adopted the commissioners' decision on the submissions to PC19.

(e) Judge Borthwick's division failed to consider the planning implications of the area of land being used by the activities covered by the Environment Court's decisions in *Foodstuffs* and *Cross Roads* when proposing objectives for that land.

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7 *Foodstuffs (South Island) Limited v Queenstown Lakes District Council* [2012] NZEnvC 135 (*Foodstuffs).*

8 *Cross Roads Properties Limited v Queenstown Lakes District Council* [2012] NZEnvC 177 (*Cross Roads*).

(f) Judge Borthwick's decision made factual findings that conflict with factual findings in the *Foodstuffs* and *Cross Roads* decisions, but did not explain the reasons for these conflicting findings.

(g) Judge Borthwick's division relied on the fact that some of the experts that appeared in *Foodstuffs* and *Cross Roads* did not appear before the Court, but did not acknowledge that there were many common witnesses, particularly in relation to matters of urban design and amenity.

(h) Judge Borthwick's decision failed to consider the implications of the Mitre 10 Mega and Pak'nSave decisions to its assessment under ss 31 and 32.

[10] SPL posed the question of law to be answered as:

> Did Judge Borthwick's division err in concluding that the considerations in ss 31 and 32 of the Act did not support significant weight being given to Judge Jackson's division's finding in the *Foodstuffs* and the *Cross Roads* decisions?

Activity areas E1, E2 and E3, the Eastern Access Road (EAR) and Road 2

[11] To understand the alleged error of law it is essential to explain at this point the above terms, as part of an explanation of the factual setting of this dispute within the 69 hectares of PC19.

[12] This dispute is over an area of approximately 10 hectares. This 10 hectare site is located at the intersection of two to be built roads. One is called the Eastern Access Road (EAR), which will run off State Highway 6 (SH6). In time the EAR will give access to the land south of the airport via this area.[9] SH6 is the main highway into Queenstown from Cromwell. Of its nature that state highway has few intersections in order to maintain its high level of traffic service. The EAR will itself have arterial road status. That means that the traffic engineers will have high expectations as to the quality of traffic flow along this road, and so will be inclined

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9 *PC19* at [26](d).

to take steps to minimise right hand turning on the road and the number of intersections on the road, and maybe, parking on the side(s) of the road.

[13] One planned intersection of the EAR is with Road 2. Road 2 is an important road. It is the proposed main road from the western end of PC19 to the east, to link up with the Glenda Drive industrial area to the east. It is expected to have significant traffic. Road 2 is the first intersection on the EAR after you leave SH6. As you come down the EAR you will come to the intersection with Road 2 and EAR. At that intersection, on your left and on the south side of Road 2, would be a large development containing a Pak'nSave, a Mitre 10 Mega and a significant car park in front of the two retail and trade retail businesses.

[14] From a commercial point of view, this site is an ideal location for a large supermarket and a very large hardware, outdoor supplies and garden centre business. Easily found, straight off main roads. The site is also proximate to the intended residential development immediately to the east, on the other side of the EAR. It is readily reached by the main roads from other parts of Frankton Flats and from Queenstown. It is quite understandable, to this Court, why the landowner (SPL), Foodstuffs and Cross Roads (the developer of Mitre 10 Mega) are vigorously litigating in support of this project.

[15] The location of this project does not fit the content of PC19 as released by the Council (PC19 (DV)). The Pak'nSave part of the project straddles two zones, E2 and E1. E2 is a zone which itself straddles the EAR. E2 is intended to be a "sleeve" on either side of the road. It would contain two-storey buildings, the ground floor being showroom trade related type retail, for example, a plumber merchant, with the upper floor available for residential use. Remember that to the west (closer to Queenstown) is an intended residential and commercial area. The E1 zone is a zone more dedicated to industrial activities. That is deliberately a vague sentence because the planning has not yet reached the state where the activities allowed within the zone can be set out with any great certainty. The Mitre 10 Mega is in the E1 zone, but abutting the Pak'nSave. The car parks, which customers of both businesses would share, straddle both the E1 and E2 zones.

[16] An immediate consequence of the Pak'nSave proposal is that it would eliminate part of the E2 sleeve, as the Pak'nSave operation will go right up to the boundary of the EAR. So it is, in part at least, a direct challenge to the E2 zone. This is partly because it is of a size (approximately 6,000 m^2 ground floor area (gfa)) much greater than the range of 500 to 1,000 m^2 ground floor area gfa preferred by Judge Borthwick's division.

[17] The Mitre 10 Mega, functioning as a major retail activity, presents a challenge to the notion of the E1 zone having a dominance of industrial activity. Before Judge Borthwick's division, Shotover Park Limited was recommending a new zone, E3. E3 was a zone containing the whole of the SPL property of about 40 hectares or so. In other words, four times the size of the Foodstuffs' and Mitre 10 Mega projects. This block includes those two, but is generally running on the east side of the EAR, being the side away from the direction of Queenstown and towards the Glenda Drive industrial area.

Refinement of SPL's error of law

[18] Mr Somerville QC for SPL argued that the effects on the environment of the future development of the urban form, amenity and function of the EAR and Road 2 (the proposed main road to the Glenda Drive industrial area) were critical issues for both divisions of the Environment Court, and that both divisions heard from some of the same witnesses on those issues.

[19] In this context, he argued that the deliberations of Judge Jackson's division, as revealed in its two decisions granting the resource consents for the Pak'nSave and Mitre 10 Mega, ought to have been considered by Judge Borthwick's division when it reconvened to hear argument after delivery of Judge Jackson's division's decisions, and particularly in the reasoning of its decision. I heard his contended error of law to break out into three propositions:

(1) That the reasoning and views of Judge Jackson's division on the merit of the Pak'nSave and Mitre 10 Mega projects and their associated impact/qualification of the E2 zone sleeve and the functioning of the EAR were relevant considerations which Judge Borthwick's division

was obliged by law to have regard to before it reached its decision on PC19.

(2) Either as an aspect of the first proposition or as a separate ground, the common law principle that like cases should be treated alike, required Judge Borthwick's division to consider with some care the reasoning of Judge Jackson's division, and only differ from it for good reasons.

(3) That Judge Borthwick's division failed to do this.

The response by Queenstown Lakes District Council and Queenstown Central Limited to SPL's error of law

[20] Queenstown Central Limited (QCL) is the other major property owner in the PC19 area. Its land is on the other side of the EAR, where a mix of residential and commercial uses are proposed to be located. It can be readily appreciated (the motivations are not part of the evidence) that QCL views the development of another retail centre on the other side of the road to the east as inimicable to its commercial interests to the west.

[21] Counsel for QCL and QLDC's essential response to the contended error of law by SPL was that:

(1) Judge Borthwick's division had a different function under the RMA from Judge Jackson's division. It was applying different sections of the Act, particularly ss 31, 32 and 33, so that it was asking different questions and applying different criteria than those being examined by Judge Jackson's division, which was applying ss 104 and 104D. This is notwithstanding that, as a common element to both statutory functions, Part 2 of the RMA (ss 5, 6 and 7) applied.

(2) That by the time Judge Jackson's division gave its decision the hearing on PC19 had been completed. The decision was reserved. Many of the witnesses were different. The task of Judge Borthwick's division was to resolve the conflicting evidence of the witnesses it

heard, and that it could not do this in natural justice to the parties before it by taking into account and giving weight to a different contest that took place before Judge Jackson's division, albeit over similar merit considerations of the Pak'nSave and Mitre 10 Mega proposals.

(3) While as a matter of law like for like considerations are desirable, in this case, for reasons (1) and (2) combined, Judge Borthwick's division's refusal to undertake a like for like analysis was not an error of law.

Foodstuffs' contended error of law

[22] Foodstuffs supports SPL's argument, but adds a separate point. This point relies on [84] of the Court of Appeal's decision in *Queenstown Lakes District Council v Hawthorn Estate Ltd*,[10] which provides:

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

[23] Counsel for Foodstuffs argued that Judge Borthwick's division erred by declining to consider the Foodstuffs resource consent as forming part of the environment, being (with the Mitre 10 Mega) resource consents which are likely to be implemented. Foodstuffs' counsel argued that [84] applies equally to consideration of applications for resource consents and consideration as to the future content of plans in an environment.

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[10] *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA).

[24] Mr Soper for Foodstuffs argued that the fact that the resource consents were under appeal was irrelevant to the application of [84] of *Hawthorn*. As at the time Judge Borthwick's division reached its decision the appeals were pending only before the High Court, the resource consents were still afoot, they had not been stayed, they were likely to be implemented. Therefore, according to law, Judge Borthwick's division had no alternative but to face the reality of these consents as altering the future environment and thus being facts that had to be taken into account in the analysis of the future content of PC19. They were not, and so that is error of law.

[25] The submissions in reply from QLDC and QCL were predictably that, as a matter of fact, the appeals against those decisions had rendered it impossible to make a finding that the resource consents were likely to be implemented, and that that judgment (which was the judgment by Judge Borthwick's division) was vindicated by the appeals being allowed and the applications being sent back to Judge Jackson's division for reconsideration.

The reasoning of Judge Borthwick's division

[26] Judge Borthwick's division's decision addresses the two decisions of Judge Jackson's division under the heading:[11]

> **Part 3 Weighting to be given to recent Environment Court decisions**

[27] The reasoning opens by recording that, given the grant of the two resource consents and the fact that both decisions had been appealed, the Court had released a minute expressing the tentative view that, while the decisions were relevant and a matter to which the Court could have regard, as they were under appeal little or no weight should be attached to them.[12]

[28] Judge Borthwick's division's decision went on to note that apart from the appeal the consents could not be exercised until a third consent was available to subdivide SPL's land, and that a subdivision application had been lodged with the

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[11] *Queenstown Airport Corporation v Queenstown Lakes District Council* [2013] NZEnvC 14 (*PC19*).

[12] At [103].

Council in 2009. The Court did not regard this aspect and other consents contingent upon the upgrading of QLDC's potable water supply, storm and wastewater systems as a serious barrier to the likelihood of the consents being implemented.

[29] Judge Borthwick's division recorded Foodstuffs' submission that there was a commonality of issues, and that for this reason Judge Borthwick's division should give significant weight to the factual findings, particularly in *Foodstuffs*, concerning (a) landscape, (b) industrial land supply, (c) the amenity of the neighbourhood – particularly on the EAR and Road 2, and (d) urban structure. It recorded the submission by Foodstuffs that these same issues are to be considered by this Court under ss 5, 7, 31 and 74 of the RMA.

[30] It is then appropriate to set out a number of paragraphs of Judge Borthwick's division's Part 3 reasoning in full:

> [114] Further, SPL and Foodstuffs submit decisions made on the following topics should be accorded significant weight:
>
> (a) the court's findings in *Foodstuffs v QLDC* at [193, 194, 224, 254 and 283] in relation to AA-C2, assuming this Activity Area were to extend to the EAR as proposed by SPL in the PC19 proceedings and opposed by QLDC/QCL;
>
> (b) the court's findings in *Foodstuffs v QLDC* at [192] concerning the sleeving of retail activity along the EAR if car-parking is not allowed as proposed by SPL in the PC19 proceedings and opposed by QLDC/QCL; and.
>
> (c) the court's findings in *Cross Roads Properties Ltd v QLDC* at [176] in relation to a "trade retail centre" south of Road 2.
>
> [115] SPL, citing a line of case authority, submits that while this court is not bound by decisions of other Environment Court divisions, and is free to consider each case on its own facts and merits, the court is entitled to take into account decisions made in *Foodstuffs v QLDC* and *Cross Roads Properties Ltd v QLDC* on similar facts. When deciding whether to consider the decision of another division, and the weight to be given to the findings made therein, this court must act reasonably and rationally. Failure to do so may be regarded as giving rise or contributing to irrationality in the result of the process. If this court were to come to contrary findings of fact or law than *Foodstuffs v QLDC* and *Cross Roads Properties Ltd v QLDC* then we should give reasons for our contrary decisions.
>
> [116] Disputing the District Council's submission that an appeal or direct referral of a resource consent application is more narrowly focused than these plan change proceedings, SPL submits the Environment Court in

Foodstuffs v QLDC and *Cross Roads Properties Ltd v QLDC* addressed the "very issues" to be determined on the plan change appeals including sections 31(l)(a), 32(3) and (4), 74(2) and Part 2 of the Act; there are no gaps in the analysis or evaluation of the relevant evidence; the Environment Court's decisions address the relevant potential adverse effects of land and the objectives and policies of the operative District Plan and PC19(DV).

[117] Foodstuffs submits that this court has two options, either:

> (a) give "adequate" weight to [the] Environment Court's decision to grant consent to Foodstuffs; or
>
> (b) await the outcome of the High Court proceedings.

...

The issues

[121] While submitting that the decisions of *Foodstuffs v QLDC* and *Cross Roads Properties Ltd v QLDC* are relevant (and we agree that they are), SPL and Foodstuffs gave scant regard to the *relevance* of the decisions to these proceedings. In the end two themes emerged:

> (a) whether the grants of consent are relevant to an assessment of the environment?
>
> (b) is the implementation of the consents relevant to an evaluation under section 31(1)(a) and section 32(3) generally and in particular, the efficiency and effectiveness of policies, rules and other methods which may anticipate a different environmental outcome?

Issue: Whether the grants of consent are relevant to an assessment of the environment?

[122] In a plan change proceeding, a grant of consent may be relevant to an assessment of the environment, which we find would include the future environment as it may be modified by the implementation of resource consents held at the time the plan change request is determined and in circumstances where those consents are likely to be implemented. Unlike *Hawthorn Estate Ltd* (cited to us by SPL and Foodstuffs) this court is not concerned with how the environment may be modified by the utilisation of rights to carry out permitted activities under the District Plan. Indeed the proposed modification of the existing environment is the subject matter of these plan change proceedings. *Hawthorn Estate Ltd* is therefore distinguishable on its facts.

[123] The likelihood of the consents being implemented is a question of fact and this is difficult to determine, but not because these particular consents are contingent upon the gaining of other consents and approvals. (While this will take time we were told of no compelling reason why these would not ultimately be forthcoming).

[124] Rather, the question is difficult because it involves speculation as to the outcome of the High Court appeals. Subject to the High Court's

decisions, it may be open to the other division of the Environment Court to confirm the grants of consent with or without modification or (possibly) to reject the applications. Given this, we are not in a position to determine the likelihood that these consents will be implemented.

[125] But even if we are wrong in finding this, any consent granted to the Foodstuffs and Cross Roads Properties Ltd may be exercised. This is so notwithstanding that the underlying zoning does not permit the activities authorised (and after all it was on this basis that they were granted). While Foodstuffs (South Island) Ltd and Cross Roads Properties Ltd may consider it preferable that the underlying zoning is enabling of the consents held, this would not preclude the exercise of their consents (see section 9 of the Act).

Issue: Is the implementation of the consents relevant to an evaluation under section 31(l)(a) and section 32(3) generally, and in particular the efficiency and effectiveness of policies, rules and other methods which may anticipate a different environmental outcome?

[126] The consideration of unimplemented resource consents as forming part of the future environment is important when we come to consider the integrated management of the effects of use, development or protection of land. Section 31(l)(a) provides:

> Every territorial authority shall have the following functions for the purpose of giving effect to this Act in its district:
>
> (a) The establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district.

The resource consents are also relevant under section 32 (which we summarised earlier).

[127] However, for the following reasons we reject Foodstuffs and SPL submission that the Environment Court findings (and obiter) are either relevant to issues for determination before this court and secondly, are matters to which significant weight attaches:

(a) the court in *Foodstuffs v QLDC* and *Cross Roads Properties Ltd v QLDC* does not purport to determine any issue in these proceedings;

(b) the "factual findings" relied upon by SPL and Foodstuffs are conclusions given in their own policy context; namely PC19(DV);

(c) in contrast with *Foodstuffs v QLDC* and *Cross Roads Properties Ltd v QLDC*, the evidence before this court, from largely different witnesses, sought different policy outcomes from PC19(DV);

(d) the issues considered and factual findings made in *Foodstuffs v QLDC* and *Cross Roads Properties Ltd v QLDC* are not the same as in these proceedings albeit that they may

be grouped under the same topic headings with reference to sections 5, 7, 31 and 74; and

(e) to the extent that the matters at [114] above address relief sought by the parties in these proceedings, and are not provisions in PC19(DV), the comments are obiter.

[128] We find that there is nothing *inevitable* (as suggested) about the grant of consents to Foodstuffs and Cross Road Properties Ltd and the consequential approval of AA-E3 in these proceedings. The AA-E3 zone is enabling of a wide range of activities, including a supermarket and trade retailing. The Environment Court in *Foodstuffs v QLDC* and *Cross Roads Properties Ltd v QLDC* did not consider SPL's proposed AA-E3 zone.

[129] We have concluded that sections 31 and 32 considerations, in particular the efficiency and effectiveness of policies, rules and methods, do not (in this case) support a submission that significant weight should be given to the Environment Court's findings. Firstly, and for reasons that we give later, we have determined that the land east and west of the EAR should be subject to its own ODP process. Secondly, while there are differences in the range of activities provided for within the different sub-zones supported by QCL/QLDC and by SPL, and differences also in the road frontage controls proposed by these parties, not dissimilar outcomes in terms of achieving an acceptable urban design response would potentially arise on the balance of the AA-E2 (being the land not subject to Foodstuffs' consent application).

[130] The artifice in the SPL and Foodstuffs submission is this; in *Cross Roads Properties Ltd v QLDC* the court also found, for urban design and landscape reasons, large format trade related retail should be confined to the south of Road 2, whereas SPL in these proceedings sought a zoning enabling of these activities both north and south of the Road. We are not prepared to alter the weight given to different findings (obiter) of the Environment Court in *Foodstuffs v QLDC* and *Cross Roads Properties Ltd v QLDC* to suit SPL and Foodstuffs. If we are to give significant weight to the factual findings made in *Cross Roads Properties Ltd v QLDC* then we would partially reject AA-E3 (and reject AA-E4) as they provide for these activities north of Road 2. That is not an outcome SPL or Foodstuffs would support.

Outcome

[131] While we find that the Environment Court decisions *Foodstuffs (South Island) Ltd v QLDC* and *Cross Roads Properties Ltd v QLDC* are relevant, we are unable to assess whether the consents (if upheld) will be implemented and therefore decline to consider the consents as forming part of the environment.

[132] We decline to defer our Interim Decision pending the release of the High Court's decisions on the consent appeals as the High Court decisions are not, in our view, determinative of PC 19.

SPL's criticism of Judge Borthwick's division's reasoning

[31] Mr Somerville QC noted that Judge Borthwick's division's summary of his client's argument, at [115], is accurate. He then went on to argue that the Court did not identify any findings in either the *Foodstuffs* or the *Cross Roads* decisions as being of relevance. Despite having listed the topics in [114]. Rather, Mr Somerville QC submitted that Chapter 3 of the decision focuses almost exclusively on the *Hawthorn* [84] considerations, not on the decision-making process, the findings or the reasoning in the *Foodstuffs* and *Cross Roads* decisions.

[32] Judge Borthwick's division heard from five expert witnesses who had also given evidence in the Foodstuffs and Cross Roads proceedings. Mr Barrett-Boyes gave urban design evidence in both the Foodstuffs and Cross Roads hearings. Mr Brewer gave urban design evidence in the Cross Roads hearing. Mr Heath gave retail evidence in the Cross Roads hearing. Mr Penny gave transport evidence in the Foodstuffs hearing; and Mr Dewe gave planning evidence in the Foodstuffs hearing. All of these witnesses gave evidence at the PC19 hearing.

[33] Mr Somerville QC submitted that notwithstanding the observation of Judge Borthwick's division, that the witnesses were largely different,[13] in terms of urban design issues and traffic evidence there were issues common to both the PC19 decision and the *Foodstuffs* and *Cross Roads* decisions. During the Foodstuffs and Cross Roads hearings, Judge Jackson's division heard from two urban design witnesses who gave evidence at the PC19 hearing (Messrs Barrett-Boyes and Brewer) and two who did not (Messrs Teesdale and Williams). In terms of traffic experts, the Court in the Foodstuffs and Cross Roads hearings had evidence from Mr Penny and comments from Dr Turner, both of whom gave evidence at the PC19 hearing.

[34] In the *Foodstuffs* decision the issue of street frontage controls along the EAR was considered by the Court, which found that the proposed Pak'nSave development

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13 *PC19* at [127].

was "complementary and sympathetic to Road 2 to the north, the EAR to the west, and the proposed Mega Mitre 10 to the east".[14]

[35] Mr Cunliffe for QLDC pointed out immediately that this finding was under the heading "Conclusions as to effects on landscape".

[36] Under the heading of "*Street frontage, presence and amenity*", after detailed consideration of evidence of Mr Teesdale and Mr Barrett-Boyes, and having noted that the location of the EAR is not settled, Judge Jackson's division commented with apparent approval of Mr Teesdale's opinion:[15]

> ... it is likely that the carparking and main entrances to these commercial buildings [in the sleeves alongside each side of the EAR] will either be behind or at the side because of the nature of the road.

The Court went on:[16]

> ... That is important evidence because it means that the "sleeve" concept behind the E2 activity area is unlikely to work in practice – the road is the wrong design for the concept and the activity in it is mainly vehicular, as Mr Barrett-Boyes agreed when the court put that to him. The EAR is, after all, proposed to be an arterial road.

[37] Mr Somerville QC argued that this was a very important piece of evidence and conclusion, both of which should have been taken into account by Judge Borthwick's division when they reconvened.

[38] Mr Somerville QC also relied upon findings by the Court in the *Foodstuffs* judgment that the proposed land use achieved integration and met the purpose of the Act. He relied on three paragraphs from the *Foodstuffs* decision:

> **4.5 Integrated management/comprehensive development**
>
> <u>Integration with surrounding land uses and zones</u>
>
> [239] The first important aspect of integrated management is identified by objective 12. It is to ensure that the Frankton Flats B zone is integrated with the surrounding uses and other Queenstown urban areas. There was little or no evidence to suggest that was not being achieved, as the joint statement of

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14 *Foodstuffs* at [91].
15 At [192].
16 At [192].

the traffic engineers/transportation managers (already referred to) establishes.

[240] Greater emphasis was placed by QCL and the council on an alleged failure to "comprehensively" develop Lot 20 in conjunction with surrounding land. However, analysis of the evidence of Foodstuffs' witnesses does not bear that out. For example, the joint statement of the transportation engineers records their agreement:

- ... that the Glenda Drive driveway upgrade project including the Eastern Access Road and Road 2, will be able to proceed as programmed during the 2012-13 construction season without requiring a decision on Plan Change 19.

- ... that the pedestrian facilities provided for access into and within the proposed sites will provide a good level of service. It is agreed that the pedestrian crossings of the right-of-way are adequate and do not provide the "dead end" suggested by Mr Denney.

- it does not interfere with the location and layout of the EAR and Road 2, thus connecting streets efficiently;

- it enables mixed uses within the Frankton Flats B zone while providing for travel demand management;

- it ensures that land use and public access and transport is integrated

...

5. Outcome

5.1 Under the operative district plan

[280] We have no difficulty with granting a resource consent under the operative district plan. Despite the fact that the area is zoned Rural General, we have found that it is surrounded by urban activities and falls into the third (lowest) of the district's landscape categories. Further, the rural objectives in Chapter 5 of the operative district plan are replaced by a specific urban growth objective in Chapter 4. The site is in an area (Frankton Flats) which is clearly marked for urban development under objective (4.9.3)6 of that plan. All potential adverse effects have been sufficiently mitigated so that the important district-wide objectives as to landscape and protection of airport functioning (by avoiding reverse sensitivity effects) are met. In regard to the latter, we note that the Queenstown Airport Corporation was not even a party to the proceedings. The proposal is integrated into the roading network (specifically the EAR and Road 2) as required by the first policy. Space for industrial activities in any expansion of the Glenda Drive zone is left to the east and south of the site and the proposal will help buffer those activities from the residential area also aimed for in the Frankton Flats objective. There would be a greater benefit under section 5 of the Act by granting consent, than there would from refusing it.

[39] In the *Cross Roads* judgment, Judge Jackson's division found large format retail (LFR) (known more colloquially as "big box retail") south of Road 2 is probably desirable in urban design terms and for landscape reasons.[17] As to integration, the same Court found:[18]

> [77] The residential growth objective seeks residential growth sufficient to meet the district's needs. The first implementing policy is to enable "... urban consolidation ... where appropriate", and the second is to encourage new commercial development (*inter alia*) which " ... is imaginative ... urban design and ... integrat[es] different activities". The first is met because, as we shall see shortly, the later objective 6 expressly contemplates urban development of the Frankton Flats. As for the second policy, while nobody could claim that the trade retail store building is particularly imaginative, the policy is merely encouraging, not directive. Further, the proposal does integrate different activities in several ways: it contains several different types of activities (as defined in the district plan and discussed earlier) on the site itself; as a trade retail operation it will supply to local industry; and it would integrate car parking with the proposed Pak 'N Save on the adjacent land to the west; and finally (but importantly) it fits into the now nearly fixed road network (the EAR and Road 2) in this corner of the Frankton Flats...

[40] Judge Jackson's division was comfortable about inserting trade retail uses over the E2 and E1 zones, because it knew that the QLDC then appeared to support (though QCL opposed) the introduction of a "trade related retail overlay" diametrically opposite from the proposed Pak'nSave and Mitre 10 Mega, on land enclosed by the EAR, SH6 and Road 2.[19]

[41] So Judge Jackson's division in *Cross Roads* saw themselves as resolving an issue as to whether trade related retail should be placed north or south of Road 2, and concluded:

> [175] ...This decision would determine that large format trade retail is south of Road 2 rather than north. As it happens, we have cogent evidence that is probably desirable in urban design terms, and for landscape reasons.
>
> [176] However, in the bigger picture for Frankton Flats (or at least the "B" zone) introduction of a trade retail centre either side of Road 2 (if that occurs) will not relevantly interfere with the development of a village/town centre further west. That is because "Town Centres are pedestrian orientated, and it is necessary to ensure these attractive environments are not degraded by retail activities that are incompatible with their amenities."

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17 *Cross Roads* at [175].
18 At [77].
19 *Cross Roads* at [175].

[42] As I will discuss further, one of the criticisms of this reasoning is that Judge Jackson's Court was embarking on planning, rather than resolving a resource consent application.

[43] Earlier in the *Foodstuffs'* decision the Court appeared to remind itself that it was not engaged in planning:

> [45] We remind ourselves here that while we heard some evidence about possible outcomes of the hearing on PC19(DV) we must strictly apply the objectives, policies and rules in the decisions version itself. We must not speculate on any witness' (in this proceeding) improvements on PC19(DV) and/or with one possible exception - when predicting the reasonably foreseeable future environment - whether this is likely to be accepted by the (other division of) the Environment Court. We were also advised by the parties that, apart from the location of the EAR, all issues about PC19(DV) are still open for the court that heard the appeals on it to decide. Obviously that will affect the weight to be given to PC19(DV) if the proposal passes the gateway tests and we get to consider the substantive merits of the proposal (and if questions of weight arise).

[44] In *Cross Roads*, it is apparent that Judge Jackson's division was aware that its rulings in [175] and [176] were intruding into planning issues as to the content of PC19, because in the next paragraph they explain why they are doing this:[20]

> [177] A further factor, which did not apply in the Foodstuffs case, is that this is a direct referral to the Environment Court. One of the principal points of the procedure is to have a speedy determination of the matter brought before the court. That would not be achieved if we adjourned this matter until 2013 while the appeals on PC19 are resolved. Further, we bear in mind that if the council had not agreed to the referral of CRPL' s application to the Environment Court, it would have had strict time limits within which to hear and notify the decision. Given that the direct referral was introduced in 2009 to streamline processes, it would be unusual if Parliament intended applicants or the Environment Court to wait until a plan change is resolved, when the consent authority would have been obliged to proceed. We consider this is a strong indicator that we should decide now rather than wait.

[45] Mr Somerville QC submitted that Judge Borthwick's division's decision, rejecting the location of the Pak'nSave and Mitre 10 Mega, was directly contrary to the findings in Judge Jackson's division's *Foodstuffs* decision that the proposed development was:[21]

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[20] At [177].

[21] *Foodstuffs* at [91].

> ... complementary and sympathetic to Road 2 to the north, the EAR to the west, and the proposed Mega Mitre 10 to the east.

Further, that the finding in the *PC19* decision, Judge Borthwick's division, that larger retail units are unlikely to give rise to a high quality landscape was contrary to the findings in the *Foodstuffs* and *Cross Roads* decisions, that the proposals achieve integration and meet the purpose of the RMA. The *PC19* decision is also inconsistent with the findings in the *Cross Roads* decision, that large format retail south of Road 2 is probably desirable in urban terms and for landscape reasons.

[46] I agree. The *PC19* decision favoured leaving the EAR in place. That finding is directly contrary to the finding in *Foodstuffs,* that the sleeving concept would not work in practice. Judge Borthwick's division found the activity area E2 (the sleeve) was:[22]

> ... the most appropriate way to achieve the purpose of the Act.

[47] It might also be noted that Judge Borthwick's division had at least two other reasons why it did not favour the Pak'nSave and the Mitre 10 Mega. They were: first, that they did not want to have another "town centre" in the PC19 area:

> [555] We conclude that AA-E3 would most likely develop as a fourth commercial centre and that its policies are strongly enabling of this result. However, there is nothing in its provisions that would ensure a mix of uses eventuates. At this location the Activity Area would be inconsistent with the District Council's policies which seek to keep the urban area compact (Section: District Wide Issues, clause 4.5.3, objective 1 and policies 1.1 and 1.2). We also find that the unmet growth demand in retail activities (such that there is) should be located in AA-E2 and in a manner that complements and (reinforces the form and function of AA-Cl and that this would be the most appropriate way to. achieve the purpose of the Act.
>
> [556] And we find the QLDC's Trade Retail Overlay would have the same result.

[48] The context needs to be kept in mind. On the west side of the EAR there was proposed to be a village with a mix of residence, retail and commercial uses. Judge Borthwick's division did not want a fourth commercial centre. Nearby, already established, is the Remarkables Park town centre. A second town centre was planned in PC19, west of the EAR. This Court is not sure what counts as the fourth – it could

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[22] *PC19* at [524].

be the existing commercial activities at Frankton, at the major intersection on SH6, accessing the airport and the Frankton suburb, the extension of the Remarkables centre in PC35, or the main town centre, downtown. It appears to this Court that Judge Borthwick's division was taking judicial notice that a large supermarket and a Mitre 10 Mega, east of the EAR, whether north or south of Road 2, would inevitably attract a very large number of shoppers, which fact would in turn attract efforts by other retail businesses to locate in the same area, and thus put pressure to create by way of a series of resource consents another town centre of retail activity.

[49] Second, that the QLDC plan already provides for large format retail, and specifically provides for it nearby in the Remarkables Park Scheme enabled by Plan Change 34:[23]

> [26] By way of further context it is relevant to note the following, additional features in the wider environment:
>
> ...
>
> (e) the approximately 150 hectares Remarkables Park Special Zone (RPZ)located on the southern side of Queenstown Airport adjoining the Kawarau River. RPZ is being developed progressively for a mix of urban activities including residential, visitor accommodation, recreational, community, education, commercial and retail activities in accordance with a structure plan. The RPZ contains the largest shopping centre outside the Queenstown central business district (CBD) with a further 30,000m2 retail development enabled by the recently operative PC34.

How Judge Borthwick's division could have responded

[50] In addition to the reasoning of Judge Borthwick's division's decision in Part 3, I agree that Judge Borthwick's division could have more directly engaged upon the reasoning of Judge Jackson's division. But it did not. In this respect it did decline the opportunity to directly consider whether or not to adopt the analysis and the conclusions of Judge Jackson's division as to the practicality of "sleeving", and the suitability of the proposed Pak'nSave and Mitre 10 Mega to the road network, to resolve the introduction of trade related retail east of the EAR, in the PC19, and either north or south of Road 2.

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[23] At [26](e).

[51] Before turning to a closer examination as to whether this failure was an error of law, it is important to note, before we leave the findings of the respective Courts, some of the phrasing of the conclusions of the Courts.

[52] The finding in [91] of *Foodstuffs* is that:

> ...the proposed development is complementary and sympathetic to Road 2 to the north, the EAR to the west, and the proposed Mega Mitre 10 to the east. (Emphasis added)

The finding as to the sleeve is that:[24]

> The "sleeve" concept behind the E2 activity area is unlikely to work in practice... (Emphasis added)

The finding as to amenities was:[25]

> ...there is not much in it aesthetically.

And:[26]

> ...the effects on the amenities of the likely future environment in general and street amenities in particular will not be adverse.

As to urban design, it was:[27]

> We are satisfied that overall a high standard of urban design has been achieved...

[53] This can be contrasted with the phrasing in the *PC19* decision, where Judge Borthwick's division's reasoning found that the E2 zone was:[28]

> ... the most appropriate way to achieve the purpose of the Act.
>
> (Emphasis added)

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24 *Foodstuffs* at [192].
25 At [194].
26 At [195].
27 At [202].
28 *PC19* at [524].

Resolution of the SPL appeal issues

Judge Borthwick's division's statutory task

[54] Judge Borthwick's division was exercising functions given to territorial authorities under the Act in ss 31 and 32, particularly ss 31(1)(a) and 32(3) which provide:

> **31 Functions of territorial authorities under this Act**
>
> (1) Every territorial authority shall have the following functions for the purpose of giving effect to this Act in its district:
>
> (a) the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district:
>
> **32 Consideration of alternatives, benefits, and costs**
>
> ...
>
> (3) An evaluation must examine—
>
> (a) the extent to which each objective is the most appropriate way to achieve the purpose of this Act; and
>
> (b) whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives.
>
> (Emphasis added)

[55] Judge Borthwick's division was addressing the content of a scheme change in respect of the Frankton Flats, which change itself had to be fitted into the goal of achieving integrated management of the natural and physical resources of the QLDC's district. See s 31(a). This means that this division of the Environment Court was obliged by law to have a district-wide perspective addressing the function of PC19 in meeting the needs of the whole of the district, as well as a narrower focus of a good utilisation of the land within the bounds of PC19, undeveloped rural land to be urbanised.

[56] The RMA provisions do not provide only one right answer as to how to do that. Any number of solutions might achieve appropriate integrated management.

[57] The RMA objective is "the most appropriate way" to achieve the purposes of this Act. See above, ss 32(3)(a) and (b). The phrase "the most appropriate" acknowledges that there can be more than one appropriate way to achieve the purpose of the Act. The task of the territorial authority is to select the most appropriate way, the one it considers to be the best. That is inherently a decision, upon which reasonable persons can differ, known to lawyers as a question of degree. That task passed to Judge Borthwick's division on appeal. That task was never within the jurisdiction of Judge Jackson's division.

[58] This task of the territorial authority is taken on by the Environment Court because the statute gives a right of appeal to the Environment Court from judgments by the territorial authorities as to this matter. The Environment Court is not given the power to initiate any new plan change.

[59] That is why we read Judge Borthwick's division applying the standard "the most appropriate way" in its deliberations. It is also why we do not see Judge Jackson's division applying that standard.

Judge Jackson's division's statutory task

[60] Judge Jackson's division was applying two different sections of the RMA, ss 104D and 104. It is part of the scheme of the RMA that resource consents are not required if activities are permitted. They are only required for activities which are not permitted. This distinction between permitted activities and then a range of activities which have varying difficulties of being approved is a policy which dates back to the predecessor Act, the Town and Country Planning Act 1977, and before that to the Town and Country Planning Act 1953. Under the 1977 Act, one had permitted uses, controlled uses, conditional uses and specified departures.

[61] Under the RMA there is a broader range: permitted activities, controlled activities, restricted discretionary activities, discretionary activities and non-complying activities and prohibited activities.[29]

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[29] Section 77A(2).

[62] In common with all of the statutes, and particularly under the RMA, different tests apply depending on the classification of the activity under the operative and any proposed applicable plans.[30]

[63] All applications for resource consent have to be examined against the state of the plans as they are at the time the application is being considered. As Judge Jackson's division reminded itself in [45] of the *Foodstuffs* decision, set out above.

[64] But as we have seen, in the exigencies of the long delays in the *Cross Roads* decision, at [177], Judge Jackson's division consciously went beyond the normal bounds of restraint into resolving what were really planning issues as to whether there should be any trade related retail activity east of the EAR, and, if so, where? These being live issues before another division of the Environment Court, as Judge Jackson's division knew at the time they were considering the resource consent.

[65] In this regard, counsel for QLDC submitted that Judge Jackson's division was taking into account irrelevant considerations under s 104 when it took into account submissions to amend proposed plan PC19 (DV), which were a matter for evaluation and judgment by the territorial authority under ss 31 and 32, and on appeal to the Environment Court, but which were completely outside the jurisdiction given to a consent authority under s 104, or on appeal therefrom to the Environment Court.

[66] This context is not directly relevant to the question of whether there is any error of law on the part of Judge Borthwick's division. But is, in my view, a partial explanation of the reaction of Judge Borthwick's division to Judge Jackson's division's evaluations of planning issues that were placed before Judge Borthwick's division, where it called those views "obiter".[31]

The law - like for like – a relevant/mandatory consideration

[67] The critical issue in this appeal is whether or not Judge Borthwick's division was obliged by law to take into account Judge Jackson's division's examination of these common issues.

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30 Sections 104, 104A-D.

31 See *PC19* at [127] and [130].

[68] Whether or not Judge Borthwick's division had to take into account these common issues is a novel question. Counsel before me agreed that nothing like this set of circumstances has arisen before in New Zealand in any of the authorities. Counsel were not able to find authorities from any other jurisdiction which might assist the Court. The problem appears to be a consequence of two different divisions of the one Court addressing the same subject matter contemporaneously.

[69] It is necessary then to go back to first principles to place Mr Somerville QC's argument, that Judge Borthwick's division was obliged to consider the analysis and conclusions of Judge Jackson's division.

[70] Judge Borthwick's division was exercising a statutory discretion, given in ss 31 and 32, as to the content of PC19, albeit on appeal from the territorial authority's exercise of a statutory discretion. Its decision is now on appeal, limited to error of law. The principles guiding the exercise of statutory discretion do not differ depending on whether the exercise is being judicially reviewed, or heard on appeal.[32]

[71] The classic statement as to what considerations are relevant and mandatory is in the judgment of Lord Greene, Master of the Rolls, in *Wednesbury*[33] as set out by the Privy Council in the case of *Mercury Energy Limited v Electricity Corporation of New Zealand Ltd*.[34] Lord Greene MR in the *Wednesbury* case said at 228-230 that the Courts:

> ... can only interfere with an act of executive authority if it be shown that the authority has contravened the law. It is for those who assert that the local authority has contravened the law to establish that proposition. .. It is not to be assumed prima facie that responsible bodies like the local authority in this case will exceed their powers; but the court, whenever it is alleged that the local authority have contravened the law, must not substitute itself for that authority. It is only concerned with seeing whether or not the proposition is made good. When an executive discretion is entrusted by Parliament to a body such as the local authority in this case, what appears to be an exercise of that discretion can only be challenged

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32 *Peters v Davison* [1999] 2 NZLR 164 (CA) at [181].

33 *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223 (the *Wednesbury* case).

34 *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385 at 389. The same passage is cited by Cooke J in *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 181-182. *Countdown Properties (Northlands) Ltd v Dunedin City* [1994] NZRMA 145 (HC) at 153 is to the same effect and draws obviously from *Wednesbury*.

> in the courts in a strictly limited class of case. ... it must always be remembered that the court is not a court of appeal. ... the law recognizes certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion ... is an absolute one and cannot be questioned in any court of law.
>
> What then are those principles? They are well understood. ... The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters. ...

[72] These principles are extended in New Zealand by the judgment of Cooke J, as he was, in *CREEDNZ Inc v Governor-General*.[35] In that decision, Cooke J distinguished between mandatory considerations that have to be taken into account, and a consideration which can be taken into account but which is not mandatory. The context of that case was judicial review of an administrative order, called the National Development Order, applying the National Development Act 1979 to give approval to the construction of the aluminium smelter at Aramoana. One of the arguments before the Court was that the Government was determined to give authority for the go-ahead for the Aramoana smelter, even though the project would have dire effects on the New Zealand economy. When analysing what considerations were taken into account by the Ministers (and there was scant material), Cooke J said:[36]

> A point about the legal principle invoked by the plaintiffs should be underlined. It is a familiar principle, commonly accompanied by citation of a passage in the judgment of Lord Greene MR in [Wednesbury Corporation]: "If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters."

He then also cites in support Lord Diplock in *Secretary of State for Education and Science v Tameside Borough Council*.[37] Then Cooke J goes on:[38]

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35 *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA).

36 At 182.

37 *Secretary of State for Education and Science v Tameside Borough Council* [1977] AC 1014 at 1065.

38 *CREEDNZ Inc v Governor- General* [1981] 1 NZLR 172 (CA) at 182-183.

> What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation that the Court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the Court itself, would have taken into account if they had to make the decision. And when the tests are whether a work is likely to be in the national interest and is essential for one or more of the purposes specified in s 3(3), it is not easy to assert of a particular consideration that the Ministers were legally bound to have regard to it.

[73] It is important in this context that review for error of law is confined to requiring the decision-maker to consider matters which expressly or by implication the decision-maker "ought to have regard to", or conversely "would not be germane".

[74] Refining the point, the issue becomes whether the reluctance of Judge Borthwick's division to engage with the analysis of Judge Jackson's division is a failure to take into account a mandatory relevant consideration?

The authorities on like for like

[75] The High Court has previously held that the Town and Country Planning Appeal Boards are

> ... not bound by its previous decisions, and is free to consider each case on its own facts and merits...[39]

[76] Mr Somerville QC argued that where two divisions of the same Court are examining the same issue, then, in principle, both Courts should strive to agree.

[77] Mr Somerville QC submitted that a failure to act consistently gives rise to a ground of review on these *Wednesbury* administrative law principles. In *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd* Blanchard J said: [40]

> Inconsistency can be regarded as simply an element which may give rise or contribute to irrationality in the result of the process.

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39 *Raceway Motors Ltd and Others v Canterbury Regional Planning Authority* [1976] 1 NZLR 605 at 607.

40 *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd* [1998] NZAR 58 (CA) at 67.

[78] In the same case, Thomas J, in his dissenting decision, agreed with the majority view in this respect, saying:[41]

> ...the notion that like should be treated alike has been an essential tenet in the theory of law.

Thomas J went on to say that he did:[42]

> ... not doubt ... for a moment that it is an established principle of administrative law that a statutory body must act consistently towards those in the same situation unless the unequal or different treatment can be justified on a rational basis.

Thomas J then went on to say:[43]

> ... that the principle in issue derives from the fundamental notion inherent in the rule of law that like is to be treated alike. In essence, a statutory body which fails to carry out its power or exercise its discretion even-handedly where there is no justification for acting otherwise abuses its powers or exercises its discretion wrongly.

[79] Mr Somerville QC cited the Privy Council in *Matadeen v Pointu*,[44] where the Privy Council were discussing the notion of even-handedness as one of the building blocks of democracy, and said:

> ...treating like cases alike and unlike cases differently is a general axiom of rational behaviour. It is, for example, frequently invoked by the courts in proceedings for judicial review as a ground for holding some administrative act to have been irrational.

[80] Mr Somerville QC's argument is also reflected by the practice of common law Courts of "coordinate jurisdiction", not to differ one from the other.[45] In the case of *In re Howard's Will Trusts*,[46] a Mr Howard had devised valuable properties to his trustees, on trust for his wife for life, and after her death, for his daughter, his only child, with remainders over his grandchildren. Mr Howard wanted to retain the surname and arms of Howard over generations. The trust had a complicated clause

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41 At 72.
42 At 92.
43 At 93.
44 *Matadeen v Pointu* [1998] 3 WLR 18 (PC) at 26.
45 *Halsbury's Laws of England* (4th ed, 2001) vol 37 Practice and Procedure at [1244], entitled "Decisions of Co-ordinate Courts".
46 *In re Howard's Will Trusts* [1961] Ch 507. Co-ordinate means at the same level, as the divisions were here.

which essentially required the grandchildren acquiring these estates to change their surname if necessary to Howard. At least one of the grandchildren had refused to do that, and the question was whether or not they had forfeited their entitlement to the property. This raised an argument that it was against public policy, to force a name onto a person, so these provisions were ineffectual. Wilberforce J, sitting at first instance, later to become Lord Wilberforce, said as an observation:[47]

> ...it is evidently undesirable that on a subject so much a matter of appreciation different judges of the same Division should speak with different voices.

[81] Wilberforce J did not have to explain what was "evidently undesirable". It goes to the question of public confidence. Two Courts of equal standing should not speak with different voices.

[82] In *Murphy v Rodney District Council*,[48] one of the issues was whether another resource consent application would be more likely to be granted, out of consistency with a decision consenting to the proposal before the Court – that is to say, the precedent effect. Baragwanath J said:[49]

> [39] It does not follow from the fact that rigid precedent is unattainable that no regard may lawfully be had to broadly similar decisions. To say that is not to import into environmental decision making the rigid doctrine of precedent... that would be impossible and indeed undesirable given the wide variety of facts, the number and range of decision makers, and the cost and delay of marshalling precedents. But "justice involves two factors – things, and the persons to whom the things are assigned – and it considers that persons who are equal should have assigned to them equal things" (Aristotle, *Politics* (1952), p 129). Human experience is that not to treat similar cases alike will give rise to suspicion and a deep sense of injustice which it is the duty of the Courts, as well as others who make decisions on behalf of the public, to avoid.

[83] There is no doubt that in this case Foodstuffs and Cross Roads have, in a broad sense, a right to have a sense of grievance after they have been granted resource consents for their proposals only to see that these proposals are not adopted and provided for in PC19. They are seeing, in a broad sense, one division of the

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47 At 523.
48 *Murphy v Rodney District Council* [2004] 3 NZLR 421 (HC).
49 At [39].

Environment Court supporting their proposals and another division being hostile to them. This does not encourage confidence in the judicial system.

[84] One of the central issues for judgment in this case is whether the distinction between ss 104 and 104D on the one hand (Foodstuffs and Cross Roads), and by ss 31 and 32 on the other (PC19), is sufficient to justify different merit judgments on the Pak'nSave and Mitre 10 Mega proposals.

Resolution of like for like issue

[85] As is apparent from the dicta cited above, like for like is a common law principle. It can be, and is, correctly applicable to the application of statutes. This is because all statutes are enacted into a common law legal system. The Courts bring to the interpretation of statutes the basic principles of justice which lie at the heart of the common law system, and will apply those subject only to directions from the contrary from Parliament.

[86] All Judges are very alive to the importance of maintaining public confidence in adjudication, both of common law and statutory cases. Much of the reasoning of Judges in cases compares previous decisions for their similarity to assist guiding the adjudication to the just solution of the problem.

[87] The issue in this case was to what extent the issues were so common as to make it relevant for Judge Borthwick's division to consider the reasoning and conclusions of Judge Jackson's decision.

[88] There is an aphorism used by practitioners of regulatory law, that *"the answer you get depends on the question you ask"*. It is critical when one applies a regulatory statute to apply the test set in the statute. Regulatory statutes are very carefully drafted with that in mind. They are drafted, of course, on political direction by the relevant Ministers of the Crown, but by professionals who understand the subject matter and choose language which sets very carefully the test to be applied.

[89] The RMA is a very complex statute. Significantly more complex than its predecessors, the Town and Country Planning Act 1977 and the Water and Soil Conservation Act 1967.

[90] The RMA, as enacted and amended, like its predecessors, reveals a compromise between regulating activities according to plans, and allowing departures from plans. As originally enacted, consent authorities were given an obligation to have regard to all planning instruments, whether operative or proposed.[50] As already noted in the RMA, activities are set on a graduating scale for ease of implementation, with or without regulatory consent, from permitted onto controlled activities (the first does not need consent and the second will get consent) and thereafter to a rising scale of restricted discretionary, discretionary, non-complying until prohibited activities.[51] The task of granting resource consents is treated as a separate task under the RMA, via s 104, than the task of determining the content of plans, ss 31 and 32. This distinction is material in this case, for the reasons which follow. Coupled with the particular context of this case, the distinction between these sections means that Judge Borthwick's division was not obliged by law to consider Judge Jackson's division's reasoning.

[91] In some contexts, when large scale proposals are pursued by way of resource consent, granting them consent can have enduring consequences for the content of plans. This is essentially the contextual setting in this case, because the establishment of a Pak'nSave and Mitre 10 Mega complex and associated car parking, east of the EAR, has to be seen in a wider framework, where PC19 is already proposing a town centre to the west of the EAR, and beyond Glenda Drive, on the other side of the airport, there is another town centre, the Remarkables Park. Now, of itself, of course, a Mitre 10 Mega and Pak'nSave would not be of itself a commercial or town centre, but, as already noted in [555], Judge Borthwick's division was concerned that allowing these retail activities to locate at the intersection of the EAR and proposed Road 2 could generate another commercial centre, indeed a "fourth".

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50 Section 104.
51 Sections 104A-D.

[92] Reading Judge Jackson's division's decision, there is no sense that it is deciding whether or not to grant the resource consent in a wider framework, embracing considerations as to the number of commercial centres to be seen as appropriate for Queenstown. Rather, Judge Jackson's division's decision focuses upon the objectives and policies of PC19, but does not address the function of PC19 relative to other parts of the Queenstown district. This is natural enough, as resource consent applications tend to be examined in the context of the immediate environment into which the proposed activity is to be placed.

[93] The sleeve of the EAR, and the associated traffic issues, was a common issue nonetheless that the two divisions had to examine. Integrated design, and particularly the bulk and location of buildings was another common issue. It was probably inevitable that Judge Jackson's division had to comment on the proposal of a Trade Retail Overlay nearby, in the PC19 issues.

[94] Judge Borthwick's division could have discussed Judge Jackson's division's reasoning and conclusions in regard to those two sub-topics of the sleeve and integrated design more expansively than it did.

[95] Paragraph [127] of Judge Borthwick's division does read as essentially dismissive. It includes implicitly a criticism that some of Judge Jackson's findings went beyond the proper scope of an enquiry as to the merit of a resource application. That is how I read the phrase "(and obiter)". But I think [127] should be read with the following paragraphs, [128], [129] and [130], which I think contain more reasons why Judge Borthwick's division did not find anything helpful in Judge Jackson's division's decision. The rejection is further explained by Judge Borthwick's division rejecting the proposal of a trade retail overlay zone, anywhere east of the EAR, that is on the same side of the EAR as the Pak'nSave and Mitre 10 Mega proposals. Judge Borthwick's division's decision was concerned about the proposed activity area E3 (which would absorb both the Pak'nSave and the Mitre 10 Mega and QLDC's proposed area for yard-based retail) as accommodating large format retail (LFR) activities in a non-town centre arrangement.[52] Judge Borthwick's division was satisfied that the growth demand for hardware, building and garden supplies

[52] *PC19* at [536].

could be accommodated within the existing zones or consented development.[53] The Court was concerned that if E3 was intended to accommodate activities of this sort, then it would provide floor space supply which would exceed the unmet growth demand for all sectors of retail activity.[54] That led to important later conclusions, which I have been explaining are relevant ultimately to understanding [127] through to [132]; these conclusions are [557] to [560]:

> **Outcome**
>
> [557] On the evidence provided we are not satisfied that AA-E3 or the proposed Trade Retail Overlay would give effect to the objectives and policies of the operative District Plan, and if a fourth commercial centre node emerges then it is likely to be inconsistent with those provisions. In short, we conclude that the AA-E3 objective is not the most appropriate way to achieve the purpose of the Act.
>
> [558] We may have reached a different view on whether there should be provision for a Trade Retail Overlay had Remarkables Park Ltd (supported by SPL) not successfully applied for a private plan change enabling up to 30,000m^2 additional retail floorspace at the Remarkables Park Zone located near the periphery of its existing centre. PC34 (now operative) is to enable future expansion of the commercial centre, including large format retail activities. In making our determination on all activities areas we have taken into consideration that there is zoned land to accommodate large format retail activities in the Remarkables Park Zone.
>
> [559] It follows from all our findings that we reject SPL's relief to zone its land AA-E3.
>
> [560] And we reject the Trade Retail Overlay.

[96] I think there is no doubt that Judge Borthwick's division was very alive to the reasoning of Judge Jackson's division as to the merits of a Pak'nSave and Mitre 10 Mega, but did not agree, principally because of its reluctance to introduce trade retail activity on SPL's land, the subject of E3, which proposed zone includes the Pak'nSave and Mitre 10 Mega proposal. That judgment was made looking at a bigger picture than the naturally limited focus of Judge Jackson's division.

[97] In this context then, I think the correct classification is that it was permissible, but not mandatory, for Judge Borthwick's division to engage in the reasoning and resolution of Judge Jackson's division when examining these two resource consent applications. The extent of their engagement and the reasons they

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53 At [538].
54 At [539].

gave are a sufficient response, and do not amount to a refusal to take into account mandatory relevant considerations, and so are not an error of law.

[98] As a precaution, I turn to treat the like for like obligation as potentially separate from an identification of relevant considerations. If it is not already clear, the like for like obligation can in some contexts make relevant considerations mandatory. I have found that they are not mandatory. But if I am wrong, and there is a separate and independent like for like obligation, I am now considering that separately. In this context, I am putting *CREEDNZ* to one side, the *Wednesbury* dictum to one side, and focussing solely on the common law principle that a Court should not differ with the views of a peer Court (co-ordinate Court).

[99] For reasons I have already canvassed, the tasks set the two different divisions are, to an RMA lawyer, two quite distinct tasks. I readily acknowledge, however, that to non RMA specialists that has to be explained.

[100] Quite independently of the common law principle, depending on the context, there can be reasons within the scheme and structure of the RMA which would encourage, where the context makes it possible, and desirable, for common decision-making when a proposal is the subject both for consideration under a proposed plan change and consideration as a resource consent. I have found above that Judge Borthwick's division could have considered Judge Jackson's division's views on the "sleeve" of the EAR, and the reasonableness of a trade retail overlay east of the EAR. The issue is whether that is possible and useful in this context, and unilaterally mandatory.

[101] It is possible to draw a meaningful distinction between the architecture of the RMA and the detail. Like many regulatory statutes, the RMA has had a lot of detail poured into it since its enactment, which has to a degree obscured its architecture. But its architecture does essentially remain via ss 31, 32, 74 and 104.

[102] The hierarchy of the statutory instruments running off the RMA, are set out in sequence in s 104(1)(b):

> **104 Consideration of applications**

> (1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to–
>
> ...
>
> (b) any relevant provisions of—
>
> (i) a national environmental standard:
>
> (ii) other regulations:
>
> (iii) a national policy statement:
>
> (iv) a New Zealand coastal policy statement:
>
> (v) a regional policy statement or proposed regional policy statement:
>
> (vi) a plan or proposed plan; and

[103] Just looking at s 104(1)(b), one can see at a glance that those are all standards, regulations, policies and plans for which there is political accountability.

[104] Political accountability is not only intended by the RMA, it is inevitable. For there is no coherent set of ethics or values which dictates when resources are to be developed, for what purpose, and how, or whether or not they should be left alone. The values collected in Part 2 conflict with each other. For example, there is no necessary or best resolution of the inevitable tension between conservation and development. It is the context which drives the weight given to one value over the other. All communities have to provide for activities which many people do not want in their back yard (NIMBY). The RMA does not leave development to market forces. It is no accident then that the question of granting consents or not is required by s 104 to be judged only after having had regard to the contents of all relevant plans, operative or proposed.

[105] Of course the contents of plans can reflect the origins of plan changes which might be private plan changes. And they can reflect provisions amended or inserted by the Environment Court on appeal. But, as I have already occasioned to mention, the Environment Court's jurisdiction is that of the territorial authority.

[106] It is in this context that there is normally a deference given by the Environment Court to the responsibilities of the territorial authorities, and where appropriate Central Government, to the policy decision reflected in the plans, operative or proposed.[55]

[107] In this case, one of the reasons why Judge Borthwick's division did not engage with Judge Jackson's division's decision is that it considered that Judge Jackson's division had gone too far beyond having regard under s 104, into expressing views on the desirable content of the proposed plan PC19 planning issues. That is the context of the use of the term "obiter". For example, whether or not there should be a sleeve concept on both sides of the EAR is fundamentally a planning issue. It extends well beyond the site of the Pak'nSave, which occupies only part of the proposed sleeve. Judge Borthwick's division regarded that as a concept which is still a work in progress.

[108] I think in the context of this case, Judge Borthwick's division was entitled to be essentially dismissive in [127] of the relevance of the reasoning of Judge Jackson's division, on the sleeve, on trade retail activity east of the EAR, and on the design management of the EAR neighbourhood – all being matters in issue as to the content of PC19. Second, to engage on these issues would be to be bedevilled by the complication of no clear overlap of witnesses, but most importantly by the different question asked by s 32 analysis from s 104 analysis.

Conclusion on SPL's appeal

[109] For these reasons, I find that SPL's appeal fails. There is no error of law by reason of a failure to have regard to a similar decision.

Foodstuffs' appeal

[110] Foodstuffs argue that [84] of *Hawthorn* required Judge Borthwick's decision to include in the environment of PC19 a supermarket and hardware retail activities on the proposed site. This is because resource consent had been granted to them, and the consents were likely to be implemented. Section 104(1)(a) expressly provides

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55 *Canterbury Regional Council v Apple Fields Ltd* [2003] NZRMA 508 (HC) at [45].

that a consent authority must have regard to the environment before allowing any activity.

[111] The purpose of district plans is to assist territorial authorities to carry out their functions in order to achieve the purpose of the Act.[56]

[112] The purpose of a territorial authority's plan is to "establish and implement objectives, policies and methods to achieve integrated management... of the land and associated natural and physical resources of the district."[57] Where some of that land is already the subject of resource consents likely to be implemented, and the plan has not yet been made for that locality, it is natural enough that the territorial authority has to write a plan which accommodates the presence of that activity.

[113] For this reason, it is a very significant decision whether or not Judge Borthwick's division's decision settles the provisions of PC19, accommodating the Pak'nSave and Mitre 10 Mega activities as proposed by SPL and Foodstuffs, or not. Judge Borthwick's division declined to take these resource consents into account at all. It distinguished [84] of *Hawthorn* as having no application to its situation.

[114] There was some difference between counsel as to whether or not Judge Borthwick's division had found as a fact that the two resource consents were not likely to be implemented. Or rather had found that it was not possible to find it a fact whether or not they were not likely to be implemented, by reason of the uncertainty of the appeals.

[115] In my view, the Court of Appeal in *Hawthorn* intended [84] to be a real world analysis in respect of resource consent applications. The setting of the case was of application for resource consents, under s 104, not the application of ss 31 and 32. [58] That is also reflected in [84], "at the time a particular application is considered". The Court of Appeal in *Far North District Council v Te Runanga-O-Iwi O Ngati*

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56 Section 72.

57 Section 31(1).

58 Not so in the case of allowing for permitted uses, for as the Court of Appeal explained, both in the *Hawthorn* and the recent *Carrington* decision, the assumption that permitted uses will be taken advantage of is not a likelihood assumption.

Kahu recently applied *Hawthorn* [84], but again in the context of the application for resource consents, not in the planning context of ss 31 and 32.[59]

[116] When a territorial authority is deciding the plan for the future, there is nothing in the Act intended to constrain a forward-looking thinking. A similar point was made by Judge Borthwick's division, when distinguishing [84]. (See [122] of their reasoning set out above). Within that paragraph they said:

> [122] ...Unlike *Hawthorn Estate Ltd* (cited to us by SPL and Foodstuffs) this court is not concerned with how the environment may be modified by the utilisation of rights to carry out permitted activities under the District Plan. Indeed the proposed modification of the existing environment is the subject matter of these plan change proceedings. *Hawthorn Estate Ltd* is therefore distinguishable on its facts.

[117] In any event, if I am wrong on that point, the likely to be implemented test in [84] was intended to be a real world analysis, as is confirmed by [42] of the *Hawthorn* decision which ends with the word "artificial":

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

[118] Treated as a wholly practical issue, which is what I think Judge Borthwick's division did, the Court was faced with a very uncertain situation. It knew the resource consents were under appeal. As a result, it found that they could not assess likelihood. This is clear from [131], set out above, being the conclusion, because it involves speculation as to the High Court appeals ([124], set out above).

[119] Recognising this, Mr Soper argued that the law requires the fact of the appeal to be ignored. He relied on s 116(1) which provides:

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[59] *Far North District Council v Te Runanga-O-Iwi O Ngati Kahu* [2013] NZCA 221 *(Carrington).*

> **116 When a resource consent commences**
>
> (1) Except as provided in subsections (1A), (2), (4), and (5), or section 116A, every resource consent that has been granted commences—
>
> (a) when the time for lodging appeals against the grant of the consent expires and no appeals have been lodged; or
>
> (b) when the Environment Court determines the appeals or all appellants withdraw their appeals—
>
> unless the resource consent states a later date or a determination of the Environment Court states otherwise.

And on r 20.10(1)(a) of the High Court Rules, which provides:

> **20.10 Stay of proceedings**
>
> (1) An appeal does not operate as a stay—
>
> (a) of the proceedings appealed against; or
>
> (b) of enforcement of any judgment or order appealed against.

[120] He argued that *Hawthorn's* analysis extended to the obligations being met by a territorial authority in relation to district plans, as well as to considering whether to grant resource consents. He relied on [48] and [49] in *Hawthorn*:

> [48] The requirements of ss 5, 6 and 7 must be complied with by all who exercise functions and powers under the Act. Regional authorities must do so, when carrying out their functions in relation to regional policy statements (s 61) and the purpose of the preparation, implementation and administration of regional plans is to assist regional councils to carry out their functions "in order to achieve the purpose of this Act". Further, the functions of regional councils are all conferred for the purpose of giving effect to the Act (s 30(1)). Consistently with this, s 66 obliges regional councils to prepare and change regional plans in accordance with Part II.
>
> [49] The same obligations must be met by territorial authorities, in relation to district plans. The purpose of the preparation, implementation and administration of district plans is, again, to assist territorial authorities to carry out their functions in order to achieve the purpose of the Act. Similarly, the functions of territorial authorities are conferred only for the purpose of giving effect to the Act (s 31) and district plans are to be prepared and changed in accordance with the provisions of Part II. There is then a direct linkage of the powers and duties of regional and territorial authorities to the provisions of Part II with the necessary consequence that those bodies are in fact planning for the future. The same forward-looking stance is required of central government and its delegates when exercising powers in relation to national policy statements (s 45) and New Zealand coastal policy statements (s 56). The drafting shows a consistent pattern.

He also relied upon the decision of *GUS Properties Ltd v Marlborough District Council*,[60] where the High Court held:

> ... unless there is some good basis upon which a stay should be granted then it should be refused as the appeal of the appellant is from a decision of an experienced Tribunal which should be given effect to unless the appellant will lose the benefit of its appeal unless a stay is granted.

[121] For these reasons, Mr Soper submitted that Judge Borthwick's division was required to consider the likelihood of whether consents would be implemented on the basis of the factual evidence before the Court. The Court had already found there was no compelling reason why the other associated resource consents would not be obtained. In the absence of a stay there was no basis for the Environment Court to decline to determine whether consents would be implemented, and therefore exclude them from its consideration as to what constituted the relevant environment for PC19 purposes.

Analysis

[122] There was no suggestion that the holders of the resource consents were seeking to implement them pending the appeals. Judge Borthwick's division was in a very difficult position. If it did treat the environment the subject of the plan change as including a large supermarket and trade retail in that location, on the southeast side of the intersection of the EAR and proposed Road 2, then it would have had to adjust to all the ramifications of that. It would not make particular sense and was likely to be incoherent to have incompatible plan change provisions applicable to the land.

[123] It also took into account that, if the resource consents were upheld on appeal, they could be utilised, notwithstanding that the underlying zoning would not provide for the activity. They did this when considering whether their preferred E1 and E2 zoning rendered the SPL land incapable of reasonable use, an argument addressed to it under s 85 of the Act (not pursued on this appeal). In [864], they said:

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[60] *GUS Properties Ltd v Marlborough District Council* HC Wellington AP 230/94, 12 September 1994 at 5-6.

> [864] ... It is our understanding that, if upheld on appeal, the land use consents granted by the Environment Court may be exercised notwithstanding that the underlying zoning would not provide for this activity.

[124] It was suggested in argument that one of the options of Judge Borthwick's division would have been to delay completing its decisions on PC19 until it knew the outcome of the appeal in the High Court. But discussion on this point rapidly indicated that such an approach would also require allowing time for the Court of Appeal and the prospect that the issue might go through to the Supreme Court. Years could pass. All this has to be set against the context where PC19 started its life in 2007, nearly seven years ago.

[125] There are suggestions in Judge Jackson's division that this delay is already a concern and embarrassment.[61] It must be. Parliament could never have intended that a territorial authority having designed a plan change and publicly notified it would then take seven years to receive submissions and form a judgment as to the most appropriate way to achieve the purpose of this Act. It was not envisaged that appeals would unduly extend the process. On the contrary, there are a number of sections intended to achieve speedy resolution of appeals. Section 121(1)(c) provides:

> **121 Procedure for appeal**
>
> (1) Notice of an appeal under section 120 shall be in the prescribed form and shall—
>
> ...
>
> (c) be lodged with the Environment Court and served on the consent authority whose decision is appealed within 15 working days of notice of the decision being received in accordance with this Act

[126] This means that within three weeks any appeals from the territorial authority's decision should be lodged with the Environment Court. That presupposes efficient analysis of the issues arising by the appellant's advisers.

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[61] *Foodstuffs* at [267]-[269].

[127] Section 269 of the RMA gives the Environment Court the power to regulate proceedings in such manner as it thinks fit, and has a goal of a fair and efficient determination of the proceedings.[62]

[128] Section 272(1) provides:

> **272 Hearing of proceedings**
>
> (1) The Environment Court shall hear and determine all proceedings as soon as practicable after the date on which the proceedings are lodged with it unless, in the circumstances of a particular case, it is not considered appropriate to do so.
>
> (Emphasis added)

[129] Counsel before the Court partially explained the long delay. The Court knows it was significantly affected by airport issues. See *Foodstuffs* at [267]-[269]. Whatever the explanation as to why this PC19 was not resolved soon after October 2009, when the commissioners released a decision recommending PC19 be approved, and why it took until February 2012 before the appeal against the commissioners' decision was heard, the predicament facing both divisions of the Court is manifest come the end of 2012.

[130] It would be very hard for Judge Borthwick to have to justify in the public interest, let alone against the efficient policy of the RMA, abandoning delivering a decision on PC19 while awaiting appeals on the Foodstuffs and Cross Roads resource consents through the appellate Courts. She did not.

[131] On the other hand, if she was going to go ahead and assume that the resource consents were granted, and write a plan change, the provisions of which would adopt the logic and reasons of the grant of the resource consent, this could have nullified the outcome of the appeal process. For if, as a result of the appeal process and the referral back, the resource consents were not granted, the parties favouring that outcome would be thwarted by the adoption of the challenged outcome in PC19.

[132] I consider that Judge Borthwick's division had in fact no choice but to keep going.

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[62] See s 269(1) and (4).

[133] It also needs to be kept in mind that the decision under appeal is an interim "higher order" decision. There is still a lot of work left to be done, and a further hearing.

[134] This next stage may be able to continue consistent with the contingencies that follow upon the now Court of Appeal litigation. If the Court of Appeal reinstates the resource consents, then there may still be time for Judge Borthwick's division to take them into account as likely to be implemented. If the Court of Appeal dismisses the appeals, there may still be time for Judge Jackson's division to reconsider the matter in the light of directions from the High Court. If the Court of Appeal issues the decision between these two options, with further directions to Judge Jackson's Court, there may likewise still be time for an urgent hearing by Judge Jackson's division to accommodate that, before Judge Borthwick's division completes the lower order matters.

Conclusion on Foodstuffs' appeal

[135] There was no error of law on the part of the Environment Court declining to treat the resource consents as likely to be implemented. For these reasons, the *Foodstuffs* appeal fails.

General conclusion

[136] Both appeals are dismissed. Costs reserved.

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