BEFORE THE HEARINGS PANEL
FOR THE QUEENSTOWN LAKES PROPOSED DISTRICT PLAN

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of Hearing Stream 15

OPENING REPRESENTATIONS / LEGAL SUBMISSIONS FOR QUEENSTOWN LAKES DISTRICT COUNCIL

STREAM 15

PART A: GENERAL, VISITOR ACCOMMODATION AND OPEN SPACE AND RECREATION

PART B: TRANSPORT, EARTHWORKS AND SIGNS

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MAY IT PLEASE THE PANEL:

1. INTRODUCTION

1.1 These submissions are made on behalf of Queenstown Lakes District Council (**Council**) in respect of the following chapters, and the submissions made on them, which have been notified in Stage 2 of the Proposed District Plan (**PDP**):

(a) **Part A**: visitor accommodation, and Open Space and Recreation[1]; and

(b) **Part B**: Transport[2], Earthworks[3] and Signs[4].

1.2 The intention is for Council's case (including these legal submissions) to be presented in two parts. The Council's case will open on Tuesday, 4 September with Ms Scott addressing general matters, the Open Space and Recreation, and Visitor Accommodation topics (**Part A**), with Mr Wakefield appearing for the Council in relation to the Transport, Earthworks and Signs topics (**Part B**).

1.3 These submissions generally advise of the key outstanding matters of disagreement between the Council and submitters who have filed evidence for each of the five topics, address some discrete matters that raise legal issues, which we have been asked to address in opening, and introduce the witnesses that will be called in support of the Council's position.

1.4 As has been the practice in previous hearings, it is anticipated that additional legal issues may arise during the course of the hearing that may require counsel's input, including through the right of reply.

1.5 Attached to these legal submissions are:

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1 Chapter 38.
2 Chapter 29.
3 Chapter 25.
4 Chapter 31.

(a) **Appendix 1**: A table summarising the updated requirements set out in *Colonial Vineyard Ltd v Marlborough District Council* [2014] NZEnvC; and

(b) **Appendix 2**: the cases referred to in these submissions.

PART A – GENERAL, OPEN SPACE AND RECREATION, AND VISITOR ACCOMMODATION

2. LEGAL TEST FOR PANEL'S DECISION MAKING

2.1 The mandatory requirements for the preparation of district plans were comprehensively set out in the *Colonial Vineyards* decision. Since that decision was released, section 32 has been materially amended by the Resource Management Amendment Act 2013, and to a minor extent by the Resource Legislation Amendment Act 2017.

2.2 Included as **Appendix 1** is a document which summarises the requirements set out in *Colonial Vineyards*, as amended to capture the changes brought about by both the 2013 and 2017 amendments.

2.3 Together, the *Colonial Vineyards* requirements and those recent amendments provide the legal tests the Panel is to apply in determining the submissions on the notified Stage 2 provisions. These tests are consistent with the summary included in the Panel's first recommendation report.[5]

3. STATUS OF PROPOSED OTAGO REGIONAL POLICY STATEMENT

3.1 Council filed a memorandum,[6] alongside its Rebuttal evidence advising the Panel and submitters on the current status of the proposed Otago Regional Policy Statement (**pORPS**).

3.2 By way of a further update, the Regional Council has not yet made the pORPS operative in part. Following the filing of the 22 August

5 Report 1: Introduction dated 28 March 2018, at paragraphs 31 - 48.
6 https://www.qldc.govt.nz/assets/Uploads/S2239-QLDC-15-Memorandum-advising-Panel-and-submitters-of-PORPS-status-31037154-v-1.PDF

2018 memorandum, the Regional Council has advised counsel that it intends to make the pORPS operative in part at its September or October meetings. It is understood the Regional Council is trying for the September meeting.

3.3 Consequently, the correct legal test as at the date of filing these legal submissions, is still that the version of the pORPS that is *to be had regard to*, is the pORPS as updated by the issued consent orders. However, it is anticipated that this will have changed (at least in part), by the time the Panel issues its recommendation reports, and therefore the availability of the consent orders, and also the consent memoranda sitting with the Environment Court, is important to allow Council and submitters a full opportunity to give evidence and/or submissions on the regional policy statement.

3.4 For ease of reference, the relevant part of the extract from the Council's legal right of reply for Hearing Stream 14, which sets out the correct legal test, is copied below:[7]

> *3.4 A consent order issued by the Environment Court updates the proposed RPS without any formal process. When relevant parts of the pORPS are beyond challenge, significant weight can be given to it. However, a consent order does not and cannot deem the proposed RPS to be approved and operative ….. There is no equivalent to Subpart 7 of the RMA for policy statements. Instead the Regional Council still needs to work through clauses 17(2) and (3) (approval) and clause 20 (notification of operative date) of Schedule 1 of the RMA. Until that actually happens, the correct legal test is that this Panel in its recommendations (and the Council in its decisions), must "have regard to" the PORPS (as amended by consent order) and "give effect to" the operative RPS.*
>
> *3.5 As discussed with the Panel during the course of the hearing, a lot of weight can be given to the PORPS as amended by consent orders, and little weight should be given to the*

7 https://www.qldc.govt.nz/assets/Uploads/Planning/District-Plan/PDP-Stage-2/Stream-14-Council-Right-of-Reply/S2239-QLDC-T14-Scott-S-Reply-Legal-Submissions.pdf

equivalent parts of the operative RPS. Care must be given to using the correct legal test, as until the PORPS is made operative in part, the equivalent parts of the operative RPS must still be given effect to (albeit deserving little weight). In any event, Council's evidence is that its position does give effect to the operative RPS.

3.5 No further consent orders have been issued by the Environment Court, at the time of filing these submissions.

4. CHAPTER 38 OPEN SPACE AND RECREATION

Key issues in dispute

4.1 The more substantial matters of disagreement remaining between the Council and those submitters who have filed evidence, are:

(a) the appropriateness of applying the Open Space and Recreation zones to privately-owned land;
(b) the extent to which new development and increases in existing activities should be enabled in the Ben Lomond Sub-Zone;
(c) whether reverse-sensitivity effects in the Open Space and Recreation zones should be avoided or managed within the Queenstown Airport noise boundaries; and
(d) the zoning of the Council-administered land at Millbrook Park, Jack Tewa Park, Wanaka Marina, and those floodplains north of the Kawarau River and west of the Shotover River.

Additional submission point requiring strike out

4.2 Ms Edgley's section 42A report identifies an additional submission point that it is submitted should be struck out.[8] That is Queenstown Park Limited's submission point 2462.19, which is identical to the points by Remarkables Park Limited that were struck out by the

8 Ms Edgley's section 42A report, at paragraph 9.5.

Chair's Second Decision of 2 August.[9] The QPL submission point is marked in the s42A report as out of scope.

4.3 For the same reasons as set out in the Chair's Second Decision, Council respectfully requests that submission point 2462.19 be struck out under section 41D of the RMA as not being on the PDP. Mr Young acts for both RPL and QPL in this PDP process. RPL was given an opportunity to give submissions on the strike out application, which was taken up by Mr Young.[10] As the submission point is identical, it is submitted that there will be no prejudice to striking out the submission at this stage.

Scope for relief sought in Mr White's evidence for #2407.2

4.4 Consideration of the Stage 2 submission of Glen Dene and Burton (2407.2) leading up to the hearing has been somewhat complex. The Council, in taking a principled and consistent approach to scope, sought that the stage 2 submission seeking to change the *underlying zoning* of Lot 1, (that is 'white' on the Stage 2 plan maps), be struck out. The Chair in his Second Decision of 2 August did not formally strike out the submission seeking to change the underlying zone, but concluded there the stage 2 submission "provides scope for some form of visitor accommodation sub zone" over Lot 1.

4.5 In response to this Decision from the Chair, Ms Devlin on behalf of the Council filed evidence that recommended against the application of a VASZ over Lot 1. Mr White has subsequently filed evidence agreeing with that conclusion. However, he then goes on to consider and give evidence on the underlying zoning of Lot 1, by considering the appropriateness of the Community Purpose (Camping Camp) Zone.

4.6 Council's position, on the (lack of) scope to consider the underlying zone type, has not changed. In addition, an appeal on the underlying zone for Lot 1 has been lodged in the Environment

9 https://www.qldc.govt.nz/assets/Uploads/Procedure-2nd-Decision-Striking-Out-Submissions-2-8-18.pdf
10 https://www.qldc.govt.nz/assets/Uploads/S2468-RPL-T15-YoungJD-Submissions.pdf

Court, and has been agreed to remain on-hold until the decisions on Stage 2 catch up. It is noted that the appeal point before the Environment Court creates scope to apply a zone type that sits anywhere between the decisions version (Rural Zone) and a form of Rural Visitor Zone, requested in relief. Council's position is that the scope available for this Panel, is as set out in the Second Decision of 2 August 2018 (ie. limited to some form of visitor accommodation sub zone), and the question of the underlying zone is now for the Environment Court.

4.7 If this position is not accepted by the Panel, Council reserves its ability to provide a full reply to Mr White's evidence on the Community Purpose (Camping Camp) Zone.

Council witnesses

4.8 The Council will call the following evidence in support of its recommendations on submissions:

(a) Ms Christine Edgley (section 42A author – text); and
(b) Ms Jeannie Galavazi (mapping).

5. VISITOR ACCOMMODATION

5.1 The Council's proposed Visitor Accommodation (**VA**) provisions seek to manage the various forms of short-term visitor accommodation available across the Queenstown Lakes District, in order to promote the social, economic and cultural well-being of people and communities, while recognising and balancing their needs.[11] They serve to clearly distinguish VA activities occurring in residential units, from residential activities.

5.2 The Council's witnesses address both the proposed text for the VA provisions and the mapping of Visitor Accommodation Sub Zones (**VASZ**) in their evidence, with the latter evidence responding to requests by submitters for new VASZs over both urban and rural zones, and requests for extensions / amendments to the notified

11 RMA, s5(2); Ms Bowbyes section 42A report, at paragraph 5.41.

VASZs. The recommended framework is summarised in Ms Bowbyes' evidence summary.

5.3 The more substantial matters of dispute remaining between the Council and those submitters who have filed evidence, include:

(a) whether the effects of RVA and Homestay activities differ from the effects of residential activities, and subsequently, whether a regime to manage the effects of these activities is required (Ms McLeod for Airbnb);

(b) whether a more permissive approach should be provided which increases the permitted threshold from 42 nights per year for RVA activities (Mr Farrell for MajorDomo et al); and in conjunction with this, whether a 'residential sub-zone' approach should be applied as an alternative method (Mr Chrisp for Bookabach & BachCare);

(c) whether the adverse effects of RVA and Homestay activities located in rural areas require management (Mr Ferguson for Darby Planning et al) and whether more flexibility should be provided for Homestay activities in rural areas (Ms Reilly for Federated Farmers);

(d) concerns associated with compliance, monitoring and the enforcement of the VA provisions;

(e) the relevance of the National Policy Statement on Urban Development Capacity 2016 (**NPS-UDC**); and

(f) the application of additional VASZs in both urban and rural zones.

5.4 In relation to the addition of VASZs over rural zones, important matters for the Panel's consideration are, in the Council's view:

(a) the appropriateness of the use of VASZ in rural zones, evaluated against the relevant RMA tests as summarised in *Colonial Vineyard* tests (in particular requirements 8, 9 and 10 as set out in Appendix 1), and then

(b) whether they should be applied in the specific areas requested by submitters.

5.5 It is submitted that question (a) needs to be resolved in advance of (b). It is an issue that the Panel has already, to a degree, grappled with in Stage 1 and in the Wakatipu Basin hearing, where a submitter has proposed a framework that differs from the notified proposal, is bespoke or site specific, and/or is not at all justified by the Council (and often also the submitters) through the section 32 analysis or evidence.

5.6 Council submits that no submitter has provided evidence that justifies the inclusion of a VASZ over one of the rural zones (or outside of the Urban Growth Boundary), including that no submitter has provided the necessary analysis or justified the inclusion of a VASZ in these rural areas, against section 32AA of the RMA.

5.7 Where submitters are seeking a new discrete VASZ over an underlying zone that already includes a VASZ in the provisions, the question to be resolved is the appropriateness of applying the VASZ over additional specific areas of land.

Evidence of Teece Irrevocable Trust No. 2 (2599)

5.8 The Council notes that Ms Devlin has identified a potential conflict in relation to the submissions and evidence lodged by Teece Irrevocable Trust No. 2 (**Teece**), that has arisen since evidence in chief was filed. Although counsel anticipates that no conflict exists, to avoid any issues as to a perceived conflict, Ms Bowbyes has confirmed that she accepts and adopts Ms Devlin's evidence in chief in relation to Teece.[12] Any questions relating to that submitter should be directed to Ms Bowbyes.

5.9 As directed by the Panel, the evidence in chief for Teece was filed on 24 August 2018. The Panel confirmed in its Second Decision relating to submissions not "on" the PDP, dated 2 August 2018, that the Council can present any rebuttal evidence at the hearing. Counsel has therefore asked Ms Bowbyes to provide her rebuttal evidence, as an addendum to her evidence summary.

12 Section 42A Report of Rosalind Devlin: Visitor Accommodation Sub Zones - Mapping dated 23 July 2018 at section 6; and Supplementary Statement of Evidence of Rosalind Devlin: Visitor Accommodation Sub Zones - Mapping dated 10 August 2018 at section 3.

Compliance, Monitoring and Enforcement

5.10 In response to evidence by Ms McLeod, Ms Bowbyes accepts that the enforcement of certain of the proposed VA provisions may pose a challenge to the Council.[13] Ms Bowbyes proposes two options that may assist the council with compliance, being:

(a) amending the VA provisions so that there was a consent trigger for all RVA and Homestay activities; and

(b) including a permitted activity standard that would require registration with the Council, along with a standard requiring the recording of dates / durations by the RVA or Homestay operator.

5.11 Section 87A(1) provides that when an activity is categorised as a permitted activity, "*a resource consent is not required for the activity if it complies with the requirements, conditions, and permissions*" specified in a plan. It is clearly anticipated by the RMA that there may be certain requirements or standards that must be met before an activity is permitted.

5.12 The Council's view is that a permitted activity standard of the type contemplated by Ms Bowbyes' option (b) would be just that, a requirement to provide information about the activity permitted by the district plan. The ODP includes a registration requirement, which is embedded within the ODP definition of visitor accommodation.

National Policy Statement on Urban Development Capacity 2016

5.13 Ms McLeod raises concern, at paragraphs 6.1 to 6.20, with the Council's suggestion that the VA provisions, and restrictions for RVA and Homestays, give effect to the NPS-UDC.

5.14 It is appreciated that Ms Bowbyes' section 42A report uses language to the effect that the VA provisions are 'necessary' (and

13 Ms Bowbyes' rebuttal evidence at section 7.11.

also appropriate) to give effect to the NPS-UDC. This 'necessary' language may have been too strong in that the Council's position has been that its PDP Stage 1 decision, already gives effect to the NPS-UDC.

5.15 However, Ms Bowbyes' evidence goes on to explain that the NPS requirements include the concept of the *demands for different types and locations of development capacity* as well as ensuring that planning decisions are made that provide for *choices that will meet the needs of people and communities and future generations for a range of dwelling types*. In relation to this latter point, Ms Bowbyes notes that Policy PA3 engages the concept of wellbeing which includes providing *available and affordable dwellings in suitable locations*.

5.16 For the Council, the proposed VA provisions are seeking to achieve something other than only providing sufficient development capacity for dwellings (which is of course a valid matter to consider under the NPS-UDC). It is aiming to satisfy the purpose of the RMA in section 5, by addressing housing affordability and also demand for long-term rental, and seeking to strike an appropriate balance between *providing flexibility for the provision of visitor accommodation* and *adversely affecting the supply of residential housing types* for a range of residents of the District.[14]

5.17 Ms Ainsley notes, in her paragraph 6.9, that the Council's Housing Development Capacity Report contemplates demand for activities that would be captured by the definition of RVA and that capacity for housing (including for RVA) is in excess of demand. It is on this basis that she suggests that the proposed restrictions are *not appropriate or necessary* to give effect to the NPS-UDC.[15]

5.18 In response, the Council submits that it is not enough to only rely, or focus, on the availability of "*housing capacity*", as the definition of "*demand*" in the NPS-UDC engages with other relevant

14 Ms Bowbyes' section 42 report, at section 5.29.
15 Ms McLeod, at 6.11.

concepts such as location, types and price points (based on personal preferences). In responding to *demand* as a broader concept, it is relevant to consider the increasing unaffordability of housing in the District, for both permanent residence and long-term rental.

5.19 It is submitted by placing a limited focus on the "*capacity of land for urban development"*[16] and "*housing supply"*[17], there is the potential to lose sight of the other relevant matters that need to be considered and balanced under the RMA, to the detriment of the people, communities and future generations of the District.

5.20 In summary, in the Council's submission the VA provisions do not land or fall only on the NPS-UDC, but in fact, do give effect to / implement the NPS-UDC.

Council witnesses

5.21 The Council will call the following evidence in support of its recommendations on submissions:

(a) Robert Heyes (Economics);
(b) Amy Bowbyes (section 42A report - text); and
(c) Rosalind Devlin (section 42A report – mapping).

PART B – TRANSPORT, EARTHWORKS AND SIGNS

6. CHAPTER 29 TRANSPORT

6.1 Providing a safe and efficient transport network is a key element associated with enabling people and communities to provide for their social, economic and cultural well-being and health and safety.[18]

6.2 Chapter 29 manages transport related activities so that they are undertaken in a manner that maintains the safety and efficiency of

16 Ms McLeod, at 6.11(e).
17 Ms McLeod, at 6.18(b).
18 RMA, s5(2).

the transport network and positively contributes to improving the public and active transport networks.

6.3 The more substantial matters of dispute remaining between the Council and those submitters who have filed evidence, are:

(a) whether the High Traffic Generating Activity (**HTGA)** rule should remain (as amended in Ms Jones' rebuttal evidence) and in particular, should continue to apply in the Jacks Point Zone and Airport Zone;

(b) whether the HTGA threshold for residential units should remain at 50 units and not be raised to 100 units;

(c) the application of the rental vehicle activity rules in the Airport Zone; and

(d) the minimum parking requirements (**MPRs**) for guest room type visitor accommodation. More specifically, whether they should be reduced for zones other than the High Density Residential, Medium Density Residential (between Suburb and Park streets, Queenstown), and Business Mixed Use zones.

The definition of "public water ferry services"

6.4 Mr Farrell, in his evidence for Real Journeys Group,[19] considers that the distinction made in Chapter 29 between public transport and private transport, and the exclusion of privately owned tourism transport operators from the definition of "public water ferry services" (even if they are also available to the public generally), is inconsistent with the definition of "public transport service" appearing in section 5 of the Land Transport Management Act 2003 (**LTMA**).

6.5 For ease of reference, the definition in the LTMA is:

19 Real Journeys Ltd (2466/2760), Go Orange Ltd (2581/2752), Queenstown Water Taxis (2594/2753), Te Anau Developments Ltd (2494), Cardrona Alpine Resort Ltd (2492/2800).

***public transport service*—**

(a) means, subject to paragraph (b), a service for the carriage of passengers for hire or reward by means of—

(i) a large passenger service vehicle; or

(ii) a small passenger service vehicle; or

(iii) a ferry; or

(iv) a hovercraft; or

(v) a rail vehicle; or

(vi) any other mode of transport (other than air transport) that is available to the public generally; but

(b) in relation to Part 5, does not include—

(i) an excluded passenger service; or

(ii) a shuttle service

6.6 And the proposed definition of "public water ferry services" in Chapter 29 is:

> *Means a ferry service for the carriage of passengers for hire or reward, which is available to the public generally and is operated to a regular schedule, but does not include any such service that:*
>
> - *is contracted or funded by the Ministry of Education for the sole or primary purpose of transporting school children to and from school; or*
> - *is operated for the sole or primary purpose of transporting passengers to or from a predetermined event; or*
> - *is operated for the sole or primary purpose of tourism.*
>
> *The definition is limited to that part of the ferry service that occurs on the surface of the water and excludes any associated activity that occurs on land or on a structure attached to land, including the lake bed.*

6.7 The Council's proposed definition of "public water ferry services" differs from the definition of "public transport service" in the LTMA, in that the PDP definition excludes any service that is operated for the "sole or primary purpose of tourism", while the LTMA definition does not.[20]

6.8 The two definitions do not relate to the same type of service, with the PDP definition being more specific than that used in the LTMA. The PDP definition relates to "public water ferry services" as opposed to the more general "public transport service".

20 Ms Jones' rebuttal evidence, at section 15.2.

6.9 Ms Jones outlines in her rebuttal evidence why reliance on the LTMA definition would not be appropriate in the PDP context,[21] with certain rules potentially being made redundant. In addition, it is submitted that incorporating the LTMA definition into the PDP could result in unintended consequences for relevant provisions[22] that use the proposed PDP definition.

6.10 What definition should be used in the PDP context, is a question of appropriateness. It is submitted that when preparing a District Plan there is no express requirement to adopt, or rely on, a definition that is used in the RMA or elsewhere (Counsel notes that the Interpretation Act 1999[23] provides a definition of certain general terms that are used in enactments, but that there is also no requirement for a District Plan to use those defined terms).

6.11 While consistency with definitions used in the RMA and other relevant legislation is a sound objective, there may be situations where a modified definition is appropriate. In this scenario, the issue of consistency does not clearly arise, as although the services share similar characteristics, the defined phrases are different. Further, Ms Jones has provided a clear resource management rationale for the use of a separate definition. It is submitted that this is an example where a bespoke definition is appropriate in order to satisfy Part 5 of the RMA, and to give proper meaning to the objective and policy framework of Chapter 29.

Request to put Stage 2 on hold

6.12 Willowridge Developments Ltd (2408.3, 2408.4) has sought that the Council place Stage 2 on hold pending notification and a submission process for the remaining zone provisions, or alternatively, confirming that submitters can re-submit on the Transport (and other) provisions as part of submitting on Stages 3 and 4 of the PDP.

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21 Ms Jones' rebuttal evidence, at section 15.3.
22 29.2.1.2, 29.8.3.1(d), 21.5.43A and 12.4.17.
23 Which includes, at section 29, certain standardised definitions.

6.13 Putting Stage 2 on hold is unnecessary and is a process request that is not being entertained by the Council. The provisions that have been notified that apply to 'roads', as defined, are to apply across the District. This was made clear in the public notice. In terms of any additional zones that are to be notified, Council will, if necessary/appropriate, notify zone or site-specific provisions into Chapter 29 (and for example into the subdivision chapter), in later Stages of the PDP for relevant zones/sites, which will enable an opportunity to submit on those zone or site-specific provisions. For example, if any zone specific provisions that would apply to the Industrial zones are considered necessary for Chapter 29, they will be notified alongside the Industrial zone chapter.

6.14 Consistent with previous advice to the Panel, if a submitter considers that additional zone/site-specific provisions relating to transport matters are required, they would be considered alongside a submission on the zone that has been notified in that later stage. That position does not extend to re-litigating the strategic direction chapters, or the other objectives/policies/provisions of the transport chapter (unless of course they were subject to a variation).

Council witnesses

6.1 The Council will call the following evidence in support of its recommendations on submissions:

(a) Mr Stuart Crosswell - Transport Strategy / Planning;
(b) Mr Michael Smith - Technical Standards; and
(c) Ms Vicki Jones – Planning, author of the Council's section 42A report.

7. CHAPTER 25 EARTHWORKS

7.1 The more substantial matters of dispute remaining between the Council and those submitters who have filed evidence, are:

(a) the exemptions for earthworks with the Ski Area Sub Zones;

(b) the management of sediment from earthworks in the Proposed District Plan and duplication of controls with Otago Regional Council; and

(c) setbacks to waterbodies (Standard 25.5.20).

Conflict with Otago Regional Council / Department of Conservation functions - Sediment controls / management

7.2 Through their evidence, NZSki Ltd (2454) and Skyline Enterprises' (2493) position is that (in relation to Standard 25.5.21) the effects of earthworks on groundwater are already effectively and efficiently managed through the Department of Conservation approval process and by the Otago Regional Council (**ORC**), through Section 12 of the Otago Regional Plan: Water, such that including similar standards in the PDP is unnecessary duplication. These submitters seek that earthworks within Ski Area Sub Zones on Public Conservation Land be exempt from Standard 25.5.21. Mr Wyeth for the Council recommends that this submission be rejected.

7.3 The Council recognises that the management of effects on water quality (ie. sedimentation) is a function that primarily rests with regional councils under section 30 of the RMA. However, the management of earthworks, and effects associated with earthworks (ie. arising from land use activities), are a function of both the Council and ORC, and as a result there may be examples of overlap between the PDP provisions and those in the ORPS / pORPS.

7.4 The Environment Court, in *Telecom New Zealand Ltd v Environmental Protection for Children Trust*,[24] has previously considered the matter of overlapping functions between regional and district councils, finding that:[25]

24 Environment Court, Christchurch, C36/2003, 28 March 2003.
25 At [15].

Subsequent to the decision of the Court of Appeal in Canterbury Regional Council v Banks Peninsula District Council it is clear that there might be an overlapping of the functions of a district and regional council provided each authority is acting within the terms of its respective legal functions under sections 30 and 31.

7.5 The Court went on to note "…*provided the City Council is controlling the effects or potential effects of a land use activity, then it may include controls in its plan*",[26] finding that there is the potential for overlapping jurisdiction between the two councils (including, as an example, the matter of odour effects[27]).

7.6 In this case, the Council is proposing sediment controls which relate to adverse effects associated with land use activities, such that the overlap is submitted to be appropriate.

7.7 Council further submits that the overlap is appropriate in light of both the requirements of the National Policy Statement for Freshwater Management 2014 (**NPSFM**) and the regional policy framework. The Council notes, relevantly, that:

(a) while the NPSFM does not require/direct provisions to be included in district plans to give effect to it, section 75 of the RMA requires district plans to give effect to national policy statements, and the NPSFM is therefore a relevant consideration for earthworks provisions included to manage the effects of sedimentation on waterbodies (resulting from earthworks);[28]

(b) the NPSFM recognises the division of responsibility, by providing a National Objectives Framework to assist "regional councils" and communities;

(c) section 75(3) of the RMA requires that a district plan must give effect to any regional policy statement. While the pORPS is not yet operative, and the PDP is currently only

26 At [16].
27 At [18].
28 As noted in the Section 42A Report of Jerome Wyeth: Earthworks dated 23 July 2018 at section 4.9; and in section 6 of the Council's Reply Legal Submissions for Hearing Stream 14 Wakatipu Basin: https://www.qldc.govt.nz/assets/Uploads/Planning/District-Plan/PDP-Stage-2/Stream-14-Council-Right-of-Reply/S2239-QLDC-T14-Scott-S-Reply-Legal-Submissions.pdf.

required to "have regard to" its provisions under section 74(2) of the RMA, it is relevant to note that there are no appeals against the provisions referred to below and significant weight can be given to them (noting also that they are likely to be 'operative', by the time a decision is made on this chapter); and

(d) the pORPS requires that the Council manage the potential effects of erosion and sedimentation from land use activities through its district plan, by including Policies 3.1.7 (Soil Values) and 3.1.8 (Soil Erosion) and requiring that they be given effect to by Method 4.1.4 (District and City Plans), which provides:

> *4.1* ***City and district plans will set objectives, policies and methods to implement policies*** *in the RPS as they relate to the City or District Council areas of responsibility.*
>
> *Objectives, policies and methods to implement the following policies:*
> *…*
> *4.1.4 Policies 3.1.7, 3.1.8 and 5.4.1: by including* ***provisions to manage the discharge of dust, and silt and sediment*** *associated with earthworks and land use;*

(e) As noted by Mr Wyeth,[29] ORC does not currently have a dedicated regional earthworks or soil conservation plan, and so the methods in the pORPS indicate that sediment associated with land use is to be managed primarily by district plans.

7.8 The Council submits that in synthesising the relevant higher order planning documents and statutory requirements, it is reasonable and appropriate that there is overlap between the management functions of ORC and the Council in relation to earthworks and its associated effects, with a comprehensive response required from all relevant local authorities to address the matter.[30]

7.9 The Council also notes that the PDP places significant importance on protecting amenity values associated with the District's lakes

29 Mr Wyeth's section 42A report, at section 4.27.
30 Mr Wyeth's section 42A report, at section 7.9

and river resources, which is a matter clearly articulated in the Strategic Directions chapters of the PDP. Putting aside the suggestion of unnecessary duplication, the management of such effects is a matter that clearly engages higher order provisions in the District Plan, such that the proposed management approach in Chapter 25 is submitted to be entirely appropriate.

7.10 In relation to the concessions process under the Conservation Act 1987, Mr Wyeth's evidence is that it is a separate process with different requirements and considerations from those in Chapter 25, and as a result there should be little concern about apparent duplication.

7.11 The issue of duplication between the concession regime and the consenting requirements under the RMA has previously arisen in relation to the clearance of indigenous vegetation within Ski Area Sub Zones.[31] In that hearing, the Panel considered the approval process under the Conservation Act 1987 and the consent requirements created by the proposed PDP provisions, finding that there was no evidence presented to the Panel that gave it confidence that any approval required would amount to duplication of RMA processes. The Panel recommended that if reliance is to be placed on an approval granted by the Department of Conservation (**DoC**), the application to DoC must be provided to the Council in full, with a rule recommended to the Council on that basis.[32]

7.12 The Council acknowledges that the recent amendments to the RMA have introduced a regulation-making power that can require the removal of rules or types of rules from planning documents which "*duplicate, overlap with, or deal with the same subject matter that it included in other legislation*".[33]

7.13 In this instance, the he relevant standards seek to address effects associated with earthworks, which directly engage with the Council's functions under section 31. There is also an important

31 Report 4A: Stream 2 Rural dated 30 March 2018, at paragraphs 1637 - 1648.
32 At paragraph 1646.
33 RMA, s360D(1).

distinction to be made between the effects associated with the clearance of indigenous vegetation and sediment discharge, with sediment discharges to waterbodies, stormwater networks or cross boundary discharges potentially resulting in effects off-site that will require oversight by Council.

7.14 Mr Wyeth, in his rebuttal evidence, points to an absence of evidence from submitters that the DoC concession process will adequately assess the risks of sediment discharge from earthworks within the SASZs. As a result, he recommends rejection of the submission points seeking exemptions for these areas.

7.15 The Council submits that, in this instance, the proposed provisions are the most appropriate in terms of section 32 of the RMA and are justified in light of the purpose of the RMA. This is not a clear case where there is clear and unnecessary duplication of processes in other legislation, such that an exemption for SASZs ought to be granted.

Council witnesses

7.1 The Council will call the following evidence in support of its recommendations on submissions:

(a) Trent Sunich (Environmental management); and
(b) Jerome Wyeth (section 42A report).

8. CHAPTER 31 SIGNS

8.1 The more substantial matter of dispute remaining between the Council and those submitters who have filed evidence are:

(a) the prohibited activity status for billboard signs;
(b) the exclusion of posters within shopfront displays from being classified as signage; and
(c) the permitted number of event signs visible from the State Highway

Plan Change 48

8.2 QMS Media Ltd (2557) and Go Media Ltd (2516) oppose the proposed prohibited activity status for billboard signs in Rebuttal Rule 31.5.14.

8.3 Spark et al (2195) state in their submissions that Chapter 31 is attempting to re-insert the prohibited activity status. The comment by Spark et al stems from the fact that a (relatively) recent Council plan change to the ODP, Plan Change 48,[34] introduced provisions that made 'hoardings' (now referred to as 'billboards' in rebuttal Chapter 31) a prohibited activity under the ODP. Plan Change 48 was appealed, with a consent order issued on 5 June 2015 that altered the activity status of hoardings to non-complying[35].

8.4 In earlier hearings before this Panel it was submitted for the Council that, in general terms, it would be permissible for the Panel to place some reliance on the Environment Court's consideration of very similar issues in the context of a plan change appeal process.[36] However, that submission was balanced against the requirement to consider the proposed PDP approach against the requirements of section 32 and 32AA of the RMA.

8.5 The earlier legal submissions for the Council identified a number of factors which would make it reasonable to have regard to and place some weight on a decision issued by the Court (in that case, relating to appeals against Plan Change 35), including:

(a) the relatively recent consideration by the Environment Court of very similar issues;

(b) the very high level of scrutiny by the Environment Court in relation to the provisions and alternatives; and

(c) the Council's intention to effectively integrate the plan change approach into the structure and style of the PDP.

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34 Dated 11 November 2014.

35 https://www.qldc.govt.nz/assets/Uploads/Planning/District-Plan-Changes/48/2015-06-05-Consent-Order.pdf

36 Reply legal submissions for the Council, Hearing Streams 1A and 1B, 7 April 2016, at 4.1 to 4.5.

8.6 There are several reasons why placing reliance on the Court's consent order for Plan Change 48 should be approached with caution:

(a) the order does not evince any detailed consideration or scrutiny of the evidence relating to the relevant provisions;

(b) the order expressly acknowledges that it has been made by consent, rather than representing a "decision or determination on the merits"[37];

(c) the Council has notified and now recommends a different planning approach for billboards, which it has justified for the purposes of section 32 of the RMA; and

(d) the consent order was issued before there was a requirement to do a section 32AA evaluation for any change made by the Environment Court, including as part of a consent order.

8.7 While acknowledging that the Council was a party to the consent order issued in June 2015, on the basis of the above it is submitted that because the Environment Court was not asked, or required, to interrogate the evidence for the proposed prohibited activity status at that stage, the Panel should consider the evidence before it in this hearing, and determine the activity status based on that evidence, not the earlier consent order.

8.8 Ms Leith has provided extensive evidence as to why a prohibited status is appropriate in her section 42A report[38] and rebuttal evidence[39] and Council considers that this position should be preferred to that of the Plan Change consent order.

Prohibited activity status for billboards

8.9 The leading authority in terms of the appropriateness of a prohibited activity status is the Court of Appeal decision in

37 At [5].
38 Ms Leith's section 42A report, at paragraphs 7.17 to 17.26.
39 Ms Leith's section 42A report, at 5.1 to 5.3.

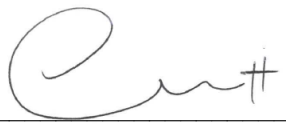
Coromandel Watchdog[40], where the Court accepted that adopting a prohibited activity status could be the most appropriate option in terms of the RMA in a number of situations.[41] This includes situations where, relevantly, the Council may decide (after undertaking the requisite analysis) to take a precautionary approach in relation to a particular activity.[42]

8.10 Ms Leith's evidence is that because of the considerable growth pressures within the District, if signage is not properly controlled (including billboards), there may be a proliferation of such signage and resulting adverse effects.[43] While it is correct to note that there have been no consent applications for hoardings / billboards since the consent order was issued by the Environment Court, that does not mean to say that a non-complying activity status is the most appropriate in terms of the RMA, particularly in light of the recast objectives and policies included in Stage 1 of the PDP and Chapter 31, which place a greater emphasis on protecting the District's landscapes.[44]

Council witnesses

8.1 The Council will call the evidence of Amanda Leith (section 42A author) in support of its recommendations on submissions.

DATED this 31st day of August 2018



S J Scott / M G Wakefield
Counsel for Queenstown Lakes District Council

40 *Coromandel Watchdog of Hauraki Inc v Chief Executive of the Ministry of Economic Development* [2007] NZCA 473.
41 At [37].
42 *Coromandel Watchdog*, at [34].
43 Ms Leith's section 42A report, at 7.25.
44 Ms Leith's section 42A report, at 7.2.

APPENDIX 1

***Colonial Vineyard Ltd v Marlborough District Council* [2014] NZEnvC 55 with updates to capture amendments made by the Resource Management Amendment Act 2013 and Resource Legislation Amendment Act 2017 underlined.**

General Requirements	Additional Discussion
1. A district plan (change) should be designed to accord with – and assist the territorial authority to carry out – its functions so as to achieve the purpose of the Act.	Requirements 1 and 2 need to be read subject to the amended section 74(1) of the RMA which states (<u>underline</u> showing the 2017 amendments): A territorial authority must prepare and change its District Plan in accordance with – a. Its functions under section 31[45]; and b. The provisions of Part 2; and c. A direction given under section 25A(2); and d. Its obligation (if any) to prepare an evaluation report in accordance with section 32; and e. Its obligation to have particular regard to an evaluation report prepared in accordance with section 32; and <u>(ea) A national policy statement, a New Zealand coastal policy statement, and a national planning standard; and</u> f. Any regulations
2. The district plan (change) must also be prepared in accordance with any regulation (there are none at present) and any direction given by the Minister for the Environment.	
3. When preparing its district plan (change) the territorial authority must give effect to any national policy statement or New Zealand Coastal Policy Statement.	The national policy statements currently in place include: • National Policy Statement on Urban Development Capacity; • National Policy Statement for Freshwater Management; • National Policy Statement for Renewable Electricity Generation; • National Policy Statement on Electricity Transmission; and • New Zealand Coastal Policy Statement.

45 Which now includes, at section 31(1)(aa), a function to ensure that there is sufficient development capacity in respect of housing and business land to meet the expected demands of the district.

4. When preparing its district plan (change) the territorial authority shall: a. Have regard to any proposed regional policy statement; b. Give effect to any operative regional policy statement.	The PDP needs to give effect to the Operative Otago Regional Policy Statement, and needs to have regard to the pORPS. See legal submissions above for further guidance.
5. In relation to regional plans: a. The district plan (change) must not be inconsistent with an operative regional plan for any matter specified in section 30(1) or a water conservation order; and b. Must have regard to any proposed regional plan on any matter of regional significance, etc.	
6. When preparing its district plan (change) the territorial authority must also: • Have regard to any relevant management plans and strategies under other Acts, and to any relevant entry in the Historic Places Register and to various fisheries regulations to the extent that their context has a bearing on resource management issues of the district; and to consistency with plans and proposed plans of adjacent territorial authorities; • Take into account any relevant planning document recognised by an iwi authority; and • Not have regard to trade competition or the effects of trade competition;	Reserve Management Plans prepared under the Reserves Act are of particular relevance, to the Open Space and Recreation Zones, chapter.
7. The formal requirement that a district plan (change) must also state its objectives, policies and the rules (if any) and may state other matters.	
Objectives [the section 32 test for objectives]	
8. Each proposed objective in a district plan (change) is to be evaluated by the extent to which it is the most appropriate way to achieve the purpose of the Act.	The updated section 32 requirements, relevant to all of requirements 8, 9 and 10, are as follows: (1) An evaluation report required under this Act must - …

	a. Examine whether the provisions in the proposal are the most appropriate way to achieve the objectives by – i. Identifying other reasonably practicable options for achieving the objectives; and ii. Assessing the efficiency and effectiveness of the provisions in achieving the objectives; and iii. Summarising the reasons for deciding on the provisions; and … (2) An assessment under subsection (1)(b)(ii) must – a. identify and assess the benefits and costs of the environmental, economic, social and cultural effects that are anticipated from the implementation of the provisions, including the opportunities for – i. Economic growth that are anticipated to be provided or reduced; and ii. Employment that are anticipated to be provided or reduced; and b. If practicable, quantify the benefits and costs referred to in paragraph (a); and c. Assess the risk of acting or not acting if there is uncertainty or insufficient information about the subject matter of the provisions. … (4) If the proposal will impose a greater or lesser prohibition or restriction on an activity to which a national environmental standard applies than the existing prohibitions or restrictions in that standard, the evaluation report must examine whether the prohibition or restriction is justified the circumstances of each region or district in which the prohibition or restriction would have effect.

Policies and methods (including rules) [the section 32 test for policies and rules]		
9.	The policies are to implement the objectives, and the rules (if any) are to implement the policies;	As above.
10.	Each proposed policy or method (including each rule) is to be examined, having regard to its efficiency and effectiveness, as to whether it is the most appropriate method for achieving the objectives of the district plan taking into account: i. The benefits and costs of the proposed policies and methods (including rules); and ii. The risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods; and iii. If a national environmental standard applies and the proposed rule imposes a greater prohibition or restriction than that, then whether that greater prohibition or restriction is justified in the circumstances.	
Relevant considerations in relation to district rules		
11.	In making a rule the territorial authority must have regard to the actual or potential effect of activities on the environment.	
12.	Rules have the force of regulations.	
13.	Rules may be made for the protection of property from the effects of surface water, and these may be more restrictive than those under the Building Act 2004.	
14.	There are special provisions for rules about contaminated land.	
15.	There must be no blanket rules about felling of trees in any urban environment.	We note that sections 76(4A) and (4B) of the Resource Management Act 1991 provide further guidance on this matter.

Other statutes	
16. Finally territorial authorities may be required to comply with other statutes.	

APPENDIX 2

Colonial Vineyard Ltd v Marlborough District Council [2014] NZEnvC 55

> at Tab 2, or pages 58 to 112, of the Casebook for Rezoning Hearing Stream 12 – Upper Clutha dated 15 May 2017: https://www.qldc.govt.nz/assets/Uploads/Planning/District-Plan/Hearings-Page/Hearing-Stream-12/Evidence-Presented-at-Hearing/01-Monday-15-May-2017/S0001-QLDC-T12-Casebook-Part1.pdf

Coromandel Watchdog of Hauraki Inc v Chief Executive of the Ministry of Economic Development [2007] NZCA 473

> is attached from the next page.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA285/05
[2007] NZCA 473

BETWEEN	COROMANDEL WATCHDOG OF HAURAKI INCORPORATED Appellant
AND	CHIEF EXECUTIVE OF THE MINISTRY OF ECONOMIC DEVELOPMENT First Respondent
AND	NEW ZEALAND MINERALS INDUSTRY ASSOCIATION Second Respondent
AND	AUCKLAND CITY COUNCIL First Intervener
AND	AUCKAND REGIONAL COUNCIL Second Intervener

Hearing: 31 July 2007

Court: Glazebrook, O'Regan and Arnold JJ

Counsel: R B Enright and B E McDonald for Appellant
H B Rennie QC and R M Macky for First Respondent
R A Fisher and M L van Kampen for Second Respondent
M E Casey QC for First and Second Intervener
Vanessa Evitt for First Intervener
L S Fraser for Second Intervener

Judgment: 31 October 2007 at 11.30 am

JUDGMENT OF THE COURT

A **We answer the question for which leave to appeal was given as follows:**

Did the High Court err in holding that a prohibited activity status can only be used when a planning authority is satisfied that, within the time span of the Plan, the activity in question should in no circumstances ever be allowed in the area under consideration?

Answer: Yes.

B **We remit the matter to the Environment Court for reconsideration in the light of this decision.**

C **We award costs of $6,000, plus usual disbursements, to the appellant. Each respondent must pay half of those costs and disbursements.**

D **Any issues of costs in the High Court or the Environment Court should be resolved in those courts in the light of this decision.**

REASONS OF THE COURT

(Given by O'Regan J)

Prohibited activity status

[1] This is an appeal against a decision of Simon France J dismissing appeals by Coromandel Watchdog and the Thames-Coromandel District Council (TCDC) against a decision of the Environment Court (EC W50/2004 30 July 2004). The High Court decision is reported at [2005] NZRMA 497. It raises for consideration the circumstances in which it is proper for a local authority to classify an activity as a

"prohibited activity" when formulating its plan in accordance with the Resource Management Act 1991 (the Act).

[2] The Environment Court decision dealt with appeals to that Court against decisions made by TCDC in response to submissions made to TCDC on the decisions version of its proposed district plan in respect of mining and related activities. In essence, the complaint of the referrers (now the respondents) was that the proposed district plan provided for mining to be a prohibited activity in a number of zones, covering a substantial portion of the Coromandel Peninsula. The area in which mining was a prohibited activity included part of the Hauraki Goldfields, which are known to have significant deposits of gold and silver. The Environment Court found that TCDC was wrong to categorise mining as a prohibited activity in circumstances where TCDC contemplated the possibility of mining activities occurring, but wished to ensure that such activities could occur only if a plan change was approved.

[3] In short, the Environment Court held that prohibited activity status should not be used unless an activity is actually forbidden. In the words of the Environment Court (at [13]), prohibited activity status "should be used only when the activity in question should not be contemplated in the relevant place, under any circumstances". In particular, the Environment Court held at [12]:

> It is not, we think, legitimate to use the *prohibited* status as a de facto, but more complex, version of a *non-complying* status. In other words, it is not legitimate to say that the term *prohibited* does not really mean *forbidden*, but rather that while the activity could not be undertaken as the Plan stands, a Plan Change to permit it is, if not tacitly invited, certainly something that would be entertained.

[4] At [15], the Environment Court emphasised that:

> [U]nless it can definitively be said that in no circumstances should mining ever be allowed on a given piece of land, a *prohibited* status is an inappropriate planning tool.

[5] The Environment Court decision was essentially upheld by Simon France J.

[6] Simon France J declined Coromandel Watchdog's application for leave to appeal to this Court. TCDC did not seek leave to appeal. Simon France J did,

however, reformulate the question of law which could be put to this Court as follows:

> Did the High Court err in holding that a prohibited activity status can only be used when a planning authority is satisfied that, within the time span of the Plan, the activity in question should in no circumstances ever be allowed in the area under consideration.

[7] The qualification "within the time span of the Plan" was not expressly stated as part of the test adopted by the Environment Court or approved by the High Court. That may well have been because the Judge saw it as an implicit element of the test as expressed earlier. Logically, a plan regulates (or prohibits) activity only for the life of the plan.

[8] Coromandel Watchdog then sought special leave from this Court, and that was granted on the question of law which had been formulated by Simon France J (see [6] above): CA285/05 6 April 2006. In the same judgment, this Court granted leave to the Auckland City Council and the Auckland Regional Council to intervene.

Issues for determination

[9] The principal issue for determination is framed by the question of law on which leave to appeal was granted. However, it became apparent during the hearing that neither of the respondents disputed that prohibited activity status may be justified in a number of circumstances which were identified by the interveners. The most significant of these is where a planning authority has insufficient information about a proposed activity and wishes to take a precautionary approach, even though it does not rule out the possibility of that activity being permitted in the future. This meant that the focus of the appeal was on the extent to which the apparently absolutist position outlined in the decisions of the Courts below prevented the allocation of "prohibited activity" status in such circumstances, and if it did, whether it was therefore shown to be wrong.

[10] A subsidiary issue which also requires determination is whether we should remit the matter to the Environment Court for reconsideration in the light of our decision.

[11] Before commencing our consideration of these issues, we propose to set out the factual context, and the relevant statutory provisions.

The factual history

[12] The decisions version of the proposed district plan provided that mining would be a prohibited activity in the conservation and coastal zones, and in all recreation and open space policy areas. In all other zones and policy areas, it provided that mining was a non-complying activity. The respondents, the Ministry of Economic Development and the New Zealand Minerals Industry Association (NZMIA), were both concerned about this. The Ministry's interest is because of its responsibility for mineral markets and industries, and its management of Crown minerals. It indicated that it wished to see the proposed district plan give appropriate recognition of mineral and aggregate resources, and provision for their use. The NZMIA had a similar interest. It represents mining and quarrying companies, as well as others involved in the minerals sector.

[13] Prior to the Environment Court hearing, TCDC modified its stance and moved towards the respondents' positions, but not to their satisfaction. On the other hand, Coromandel Watchdog, which is an environment group seeking to protect the Coromandel Peninsula from precious metal mining in inappropriate places and of inappropriate scale, sought to uphold the decisions version of the proposed district plan (ie the version prior to TCDC's modified stance).

[14] The Environment Court said at [2] that it had, with the agreement of all parties, dealt with the matter "at a relatively high level of abstraction: ie to resolve the issue of an appropriate planning status for mining related activities in the zones created by the [proposed district plan]". It added: "Once that issue is resolved, attention can then be turned to the detail of the appropriate objectives, policies, rules etc".

[15] It is unnecessary for us to go into the detail of what was proposed by TCDC, and how those proposals were modified by the Environment Court. The Environment Court decision contains a useful tabular summary of the positions of

the various parties at [10], and the Environment Court's decision is also set out in tabular form at [31] (as corrected in a subsequent decision of 28 September 2004). Reference should be made to the Environment Court's decision for the details. In general terms, however, the proposed district plan as amended by the Environment Court provides that underground mining is a discretionary activity in all zones, and surface mining is either a discretionary activity or a non-complying activity in all zones other than the recreation and open space policy areas in the coastal, industrial, housing and town centre zones, where it is a prohibited activity. That is a substantially more liberal regime than the modified position taken by TCDC in the Environment Court, which still classified mining as a prohibited activity in a number of other areas and zones. It is also more liberal than the decisions version of the plan, which classified mining (not subdivided into underground and surface mining as in the modified position) as a prohibited activity in most areas.

[16] The philosophical debate which arose in the Environment Court proceedings was as to whether prohibited activity was an appropriate status where a planning authority did not necessarily rule out an activity, but wished to ensure that a proponent of the activity would need to initiate a plan change. Plan changes require a different and more consultative process than that for applications for resource consent in relation to a discretionary activity or a non-complying activity. In essence, the proponent of a plan change faces a higher hurdle. There is the potential for greater community involvement.

[17] The Environment Court made an important factual finding in its decision, which led to it criticising TCDC for inconsistency in its treatment of some activities which the Environment Court believed had essentially the same effect as mining. The Court said:

> [21] The exclusion of mining from large tracts of the Peninsula seemed to reflect an attitude towards that industry generally which is, we think, inconsistent with the attitude taken towards other activities which, depending on their nature and scale, have the potential to produce equally adverse effects. Mining was treated differently from, for instance, quarrying and production forestry. Those two activities are provided for throughout the Peninsula, mining was not. But quarrying is a subset of mining, with potentially identical effects. In the case of production forestry the noise, dust, traffic issues, indigenous vegetation issues and general visual effects are, potentially at least, similar to anything likely to be produced by a mining

> undertaking. The Decisions version defines Production Forestry as [in summary] meaning the management of forests planted primarily for logging and timber production, and including extraction for processing, and planting and replanting. Section 5, subsection 550, Table 1 – Activity Status: Rural Activities, gives it a wide gamut of activity status, depending on the zone. For example:
>
> - Rural zone outside all policy areas – *permitted*.
> - Rural zone within Recreation and Open Space policy areas – *controlled*.
> - Coastal zone outside all policy areas – *discretionary*.
> - Coastal zone within Recreation and Open Space policy areas – *controlled*.
> - Conservation zone [all parts] – *controlled*.
>
> The contrast with mining is obvious and marked. In no case is Production Forestry listed as *prohibited*.
>
> [22] To that extent, the [proposed district plan] was both internally inconsistent and not, as it should be, effects based. If it is able to deal with the effects of quarrying and forestry, then it should be able to deal with mining on equal terms. One would expect that of a Plan designed to assist a territorial authority to perform its function of the integrated management of effects under s 31.

[18] Nevertheless, the Environment Court noted (at [14]) that, whatever activity status was given to mining activities, a significant mining proposal would almost certainly require a plan change in any event.

The statutory scheme

[19] The concept of "prohibited activity" is dealt with in s 77B of the Act. Section 77A empowers a local authority to make rules describing activities in terms of s 77B. Section 77B provides for six levels of activity, with a descending degree of permissiveness. These are:

(a) Permitted activity;

(b) Controlled activity;

(c) Restricted discretionary activity;

(d) Discretionary activity;

(e) Non-complying activity; and

(f) Prohibited activity.

[20] A permitted activity may be undertaken without a resource consent. If an activity is controlled, restricted discretionary, discretionary or non-complying, a resource consent is required, with increasing levels of difficulty for the applicant: see ss 104 – 104D of the Act.

[21] The most restrictive is a prohibited activity. Section 77B(7), which deals with prohibited activity status says:

> If an activity is described in this Act, regulations or a plan as a prohibited activity, no application may be made for that activity and a resource consent must not be granted for it.

[22] The effect of s 77B(7) is that the only way that a prohibited activity may be countenanced is through a change in the provisions of the plan. The plan change process outlined in Schedule 1 to the Act is different in character from the resource consent process. Counsel for Coromandel Watchdog and counsel for the interveners pointed out that the plan change process has the following characteristics:

(a) Notification and public consultation is mandatory;

(b) A cost/benefit evaluation under s 32 is required;

(c) A holistic approach is allowed for, rather than a focus on one site as happens with resource consent applications. The "first come, first served" approach which applies to resource consent applications does not apply;

(d) Any person has standing to make submissions, with a chance to make a second submission after public notification of submissions. Any person who makes a submission has a right of appeal; and

(e) The local authority considering a plan change acts as a planning authority, rather as a hearing authority as it does when considering resource consent applications. The latter role is a narrower, quasi-judicial role.

[23] The place of rules in a district plan needs to be oriented in the statutory scheme. Under s 75(1) of the Act, a district plan must state:

(a) The objectives for the district;

(b) The policies to implement the objectives; and

(c) The rules (if any) to implement the policies.

[24] Thus, the Act provides that a plan must start, at the broadest level, with objectives, then specify, in respect of each objective, more narrowly expressed policies which are designed to implement that objective. Such policies can be supplemented by rules designed to give effect to those policies.

[25] Section 75(2) allows a district plan to state a number of other factors, but this does not affect the mandatory nature of s 75(1).

[26] In formulating a plan, and before its public notification, a local authority is required under s 32(1) to undertake an evaluation. Under s 32(3) the evaluation must examine:

(a) The extent to which each objective is the most appropriate way to achieve the purpose of the 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.

[27] The purpose of the Act is set out in s 5. It is "to promote the sustainable management of natural and physical resources". "Sustainable management" is defined extensively in s 5(2).

[28] The important point for present purposes is that the exercise required by s 32, when applied to the allocation of activity statuses in terms of s 77B, requires a council to focus on what is "the most appropriate" status for achieving the objectives of the district plan, which, in turn, must be the most appropriate way of achieving the purpose of sustainable management.

[29] Section 32(3) is amplified by s 32(4) which requires that for the purposes of the examination referred to in s 32(3), an evaluation must take into account:

(a) The benefits and costs of policies, rules or other methods; and

(b) The risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods.

[30] The precautionary approach mandated by s 32(4)(b) is an important element in the argument before us. We will revert to it later.

[31] In addition to the cost/benefit analysis required by s 32, there are a number of other requirements which must be met by a local authority in preparing its district plan. When determining which of the activity types referred to in s 77B should be applied to a particular activity, the local authority must have regard not only to the cost/benefit analysis undertaken pursuant to s 32, but also to its functions under s 31, the purpose and principles set out in Part 2 of the Act, particularly the sustainable management purpose described in s 5, the matters which it is required to consider under s 74, and, in relation to rules, the actual or potential effect on the environment of activities including, in particular, any adverse effects (s 76(3)). The Environment Court has set out a methodology for compliance with these requirements (adapting that set out in *Nugent Consultants Ltd v Auckland City Council* [1996] NZRMA 481 (EC) to take account of amendments made to the Act in 2004) in *Eldamos*

Investments Ltd v Gisborne District Council EC W047/2005 22 May 2005 at [128] and [131].

Is prohibited activity status appropriate only for absolutely forbidden activities?

[32] The case for Coromandel Watchdog is that none of the requirements and criteria referred to at [31] above give any support to the restrictive interpretation given to the term prohibited activity by the courts below. Counsel for Coromandel Watchdog, Mr Enright, went further. He submitted that:

(a) The Environment Court's interpretation ran counter to the express recognition by Parliament in s 32(4)(b) of a precautionary approach;

(b) Both the Courts below had effectively imposed a new test for "prohibited activity" which was inconsistent with the plain words of s 77B(7) and the precautionary approach;

(c) The High Court imposed a new statutory test. This was acknowledged in the leave decision of the High Court, where the effect of the High Court's merits decision was described as "to circumscribe the use of 'prohibited activity' status by setting down a test which the planning authority must be satisfied is met before an activity can be prohibited" (at [14]);

(d) The decisions under appeal had imposed judge-made constraints into the complex statutory framework of the Act, and had imposed a high "under no circumstances" threshold into the test for a prohibited activity in a context where the Act did not, itself, do this; and

(e) Such a restrictive interpretation was inconsistent with the purposes of the Act.

[33] Counsel for the interveners, Mr Casey QC, supported that submission, and illustrated the points by reference to a number of different circumstances in which prohibited activity status may be appropriate, but would not be permitted if the decisions under appeal were upheld.

[34] Mr Casey accepted that the use of prohibited activity status was appropriate when a local authority had determined that an activity would never be allowed or, alternatively, would never be allowed during the currency of the local authority's plan. However, he argued that the decisions under appeal had wrongly confined the use of prohibited activity status to that situation when it may be appropriate in others. He emphasised the process requirements of the Act, and particularly the emphasis in s 32 on the "most appropriate" outcome. He suggested that prohibited activity status may be the most appropriate of the menu of options in s 77B in a number of different situations, particularly:

(a) Where the council takes a precautionary approach. If the local authority has insufficient information about an activity to determine what provision should be made for that activity in the local authority's plan, the most appropriate status for that activity may be prohibited activity. This would allow proper consideration of the likely effects of the activity at a future time during the currency of the plan when a particular proposal makes it necessary to consider the matter, but that can be done in the light of the information then available. He gave an example of a plan in which mining was a prohibited activity, but prospecting was not. The objective of this was to ensure that the decision on whether, and on what terms, mining should be permitted would be made only when the information derived from prospecting about the extent of the mineral resource could be evaluated;

(b) Where the council takes a purposively staged approach. If the local authority wishes to prevent development in one area until another has been developed, prohibited activity status may be appropriate for the undeveloped area. It may be contemplated that development will be

permitted in the undeveloped area, if the pace of development in the other area is fast;

(c) Where the council is ensuring comprehensive development. If the local authority wishes to ensure that new development should occur in a co-ordinated and interdependent manner, it may be appropriate to provide that any development which is premature or incompatible with the comprehensive development is a prohibited activity. In such a case, the particular type of development may become appropriate during the term of the plan, depending on the level and type of development in other areas;

(d) Where it is necessary to allow an expression of social or cultural outcomes or expectations. Prohibited activity status may be appropriate for an activity such as nuclear power generation which is unacceptable given current social, political and cultural attitudes, even if it were possible that those attitudes may change during the term of the plan;

(e) Where it is intended to restrict the allocation of resources, for example where a regional council wishes to restrict aquaculture to a designated area. It was suggested that, if prohibited activity status could not be used in this situation, regional councils would face pressure to allow marine farms outside the allocated area through non-complying activity consent applications. He referred to the Environment Court decision in *Golden Bay Marine Farmers v Tasman District Council* EC W42/2001 27 April 2001. In that case, (at [1216] – [1219]), the Court accepted that prohibited activity status for the areas adjacent to the area designated for marine farming was appropriate; and

(f) Where the council wishes to establish priorities otherwise than on a "first in first served" basis, which is the basis on which resource consent applications are considered.

[35] Mr Casey noted that the requirements for district plans, to which we have referred above, are similar to those which apply to regional councils such as the Auckland Regional Council in relation to regional plans. So the concerns which have been expressed in relation to district plans arise equally in relation to regional plans.

[36] As noted earlier, both the Ministry and the NZMIA accepted that these situations could call for the use of prohibited activity status. They argued that the decisions under appeal would not prevent the use of prohibited activity status in this way. We disagree. It is clear from the extracts from the Environment Court decision that we have highlighted at [3] – [4] above that the Court postulated a bright line test – ie the local authority must consider that an activity be forbidden outright, with no contemplation of any change or exception, before prohibited activity status is appropriate. We are satisfied that, in at least some of the examples referred to at [34] above, the bright line test would not be met. Yet it can be contemplated that a local authority, having undertaken the processes required by the Act, could rationally conclude that prohibited activity status was the most appropriate status in cases falling within the situations described in that paragraph.

[37] There was also consensus among all parties and interveners as to the process by which a local authority was required to apply prohibited activity status (or any other status under s 77B) to a particular area – (see [23] – [31] above for a description of this process). Coromandel Watchdog and the interveners argued that the question which a local authority had to ask and answer was whether prohibited activity status was the "most appropriate" for the particular area, having regard to the matters evaluated in the course of the process mandated by the Act. They argued that the Environment Court had, by substituting the dictionary definition "forbidden" for the words of s 77B(7), put an unnecessary and incorrect gloss on the words of the Act itself.

[38] Counsel for the NZMIA, Mr Fisher, argued that the test postulated in the Environment Court decision was an orthodox application of previous case law, and had been confirmed in a subsequent decision. He referred to *Bell v Tasman District Council* EC W3/2002 23 January 2002 and *Keep Okura Green Society Inc v North*

Shore City Council EC A095/2003 10 June 2003. Mr Fisher said that both these cases emphasised the limited circumstances in which prohibited activity status was appropriate. He said both were in line with the Environment Court's decision in this case. We disagree. Neither purports to place an overlay on the statutory language. Both simply apply the statutory criteria to the facts of the case. Mr Fisher also referred to *Calder Stewart Industries Ltd v Christchurch City Council* [2007] NZRMA 163 (EC), in which reference was made to the High Court decision in the present proceedings. We do not see that case as adding anything to the High Court's decision in this case.

[39] Mr Fisher also submitted that the approach urged on us by Coromandel Watchdog ignored the public's reliance on district plans as representing development they can expect to see in the district or region. He relied upon the following statement of Elias CJ in *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] 2 NZLR 597 at [10] (SC):

> The district plan is key to the Act's purpose of enabling "people and communities to provide for their social, economic, and cultural well being". It is arrived at through a participatory process, including through appeal to the Environment Court. The district plan has legislative status. People and communities can order their lives under it with some assurance.

[40] We accept there is validity in Mr Fisher's submission where a council which could have assessed the effects of an activity which was likely to occur in its territory simply chose to give it prohibited activity status to defer the consideration of those effects until a specific proposal came before it. But in other cases, those relying on the plan will be on notice that an activity is prohibited for the life of the plan, subject only to the possibility that the plan may be changed. If the plan change process is activated, it will, of course, afford to the public an opportunity to voice its opinion on the impact of the prohibited activity to the council, which is considering the plan change to permit the activity.

[41] We are satisfied that resort to a dictionary definition of the word "prohibit" was unnecessary in this instance. The Act defines prohibited activity in terms which need no elaboration. It simply means an activity for which a resource consent is not available. We agree with Coromandel Watchdog and the interveners that elaboration

has the potential to limit unduly the circumstances in which the allocation of prohibited activity status may be the most appropriate of the options available under s 77B(7). We therefore conclude that the question for which leave to appeal was granted (see [6] above) must be answered "Yes".

Should we remit the matter to the Environment Court?

[42] The respondents argued that, even if we were to answer the question for which leave to appeal was granted affirmatively, there was no need to refer the matter back to the Environment Court. They said that TCDC had adopted the Environment Court's findings and had undertaken considerable work towards finalising its district plan on the basis of the Environment Court's findings. They argued that, even if we found that the Environment Court had been unduly restrictive in its formulation of the test, this did not call into question its findings in this particular case.

[43] The principal concern raised for consideration by the respondents in the Environment Court was the use of prohibited activity status for mining activities over a very large area of the Coromandel Peninsula, which included a large area of the Hauraki Goldfields containing significant gold and silver resources. As Simon France J noted at [49], the concern was that TCDC appeared to be using prohibited activity classification as:

> [A]n ongoing planning tool, not to prohibit absolutely an activity but to dictate a process for identifying the circumstances in which that activity will be followed. What [TCDC] wishes to do, and has done, is defer decisions about a contemplated activity in an area until there is an application to do it.

[44] As noted at [17] above, the Environment Court found that TCDC was in a position to assess the effects of mining, particularly surface mining, because it had undertaken that exercise for activities which the Environment Court considered had similar effects such as production forestry and quarrying. It considered that TCDC had been inconsistent in its treatment of mining activities.

[45] We agree with the Courts below that, if a local authority has sufficient information to undertake the evaluation of an activity which is to be dealt with in its

district plan at the time the plan is being formulated, it is not an appropriate use of the prohibited activity classification to defer the undertaking of the evaluation required by the Act until a particular application to undertake the activity occurs. That can be contrasted with the precautionary approach, where the local authority forms the view that it has insufficient information about an aspect of an activity, but further information may become available during the term of the plan.

[46] Mr Enright argued that the Environment Court's decision was clearly influenced by its absolutist approach to prohibited activity status, and this Court could not conclude that its decision would have been the same if it had applied the statutory test without the additional gloss. He said the change of approach by TCDC before the Environment Court hearing, and its subsequent acceptance of the Environment Court's decision, did not affect the right of Coromandel Watchdog to seek to uphold the decisions version of the proposed district plan, and Coromandel Watchdog wished to do so in the Environment Court with the benefit of this Court's decision.

[47] Mr Enright said that the Environment Court had, at [33], invited the parties to confer and to revisit the proposed district plan provisions to provide a policy framework to provide for mining, giving effect to the broadly stated views in the Environment Court's decision. He said that this involved an inversion of the required statutory process, because the activity status in terms of s 77B had been determined, with the policies left to be formulated consistently with those classifications. This meant that policies had to be formulated to conform with rules, despite the fact that the statutory process requires rules to be formulated to give effect to policies.

[48] Mr Fisher said this misrepresented what the Environment Court had said, and that, at the high level of abstraction at which, with the agreement of all parties, the Court had dealt with the matter, the Court had undertaken the statutory process. However, that does not entirely meet Mr Enright's point, because it is clear that the Environment Court's decision dealt with the appropriate status classifications, but not with policies, leaving these to TCDC to formulate later.

[49] We are unable to conclude that the Environment Court's decision would be unaffected by the outcome of the present appeal. In those circumstances, it is appropriate to remit the matter to the Environment Court for reconsideration in the light of this decision.

Two other matters

[50] Mr Enright and Mr Casey submitted that the Environment Court had wrongly described the Act as having a "permissive, effects-based philosophy" (at [12]). They said this over-simplified the criteria which local authorities were required to consider when formulating plans, and ignored the fact that plans are an important mechanism by which local authorities and their communities can direct, in a strategic way, the sustainable management of resources. Mr Casey accepted that s 9 was expressed in permissive terms (allowing all land uses other than those contravening a rule in a plan) but contrasted that with the restrictive language of ss 11 – 15. We doubt that the Environment Court was seeking to downplay any aspect of the Act, or to promote the control of effects on the environment to an exclusive status. The labels "permissive" and "effects-based" do not comprehensively describe the sustainable management purpose in s 5 of the Act. The use of those labels should not overshadow the numerous matters that are required to be considered by local authorities when undertaking the processes required by the Act.

[51] There was also criticism of the reference at [15] of the Environment Court's decision to "a given piece of land" (see [4] above). This was said to indicate a requirement for a local authority to make an assessment of the potential effects of a particular activity on a site by site basis, rather than with respect to broad areas and zones as is customary. A site by site evaluation is unnecessary, and we think it is clear from the rest of the Environment Court's decision that there was no intention to impose such a requirement. For example, the table at [31] of the Court's decision refers to policy areas within zones, as the decisions version of the proposed district plan had.

Costs

[52] Coromandel Watchdog is entitled to costs. We award costs of $6,000 plus usual disbursements. Each of the respondents is responsible for half of those costs and disbursements. Any issues relating to costs in the High Court and the Environment Court should be resolved by those courts respectively, in the light of this decision.

Solicitors:
Kensington Swan, Auckland for Appellant
R M Macky, Auckland for First Respondent
Simpson Grierson, Auckland for Second Respondent
Buddle Findlay, Auckland for First Intervener
Auckland Regional Council, Auckland for Second Intervener

DOUBLE SIDED

Decision No. C 36 12003

IN THE MATTER of the Resource Management Act 1991 (the **Act)**

AND

IN THE MATTER of a reference pursuant to Clause 14 of the First Schedule of the Act

BETWEEN **TELECOM NEW ZEALAND LIMITED**

(RMA 433199)

AND **TELSTRA CLEAR LIMITED**

(RMA 420/99)

AND **VODAFONE NEW ZEALAND LIMITED**

(RMA 443199)

Referrers

AND **ENVIRONMENTAL PROTECTION FOR CHILDREN TRUST**

(Section 271A party in RMA 433199, 443199 and 420199)

AND **THE RADIO NETWORK LIMTIED**

(Section 271A party in RMA 443/99)

AND **CHRISTCHURCH CITY COUNCIL**

Respondent

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

BEFORE THE ENVIRONMENT COURT

Environment Judge J A Smith (presiding)
Environment Commissioner W R Howie

HEARING at **CHRISTCHURCH** on 11 March 2003

APPEARANCES

Ms M Ritchie for Environment Protection for Children Trust (the **Trust)**
Ms A M Douglas for the Canterbury Regional Council **(CRC)**
Mr S F Quinn for the Referrers and for Radio Network Limited (the **Telcos)**
Mr A D Prebble for the Christchurch City Council (the **City Council)**

PRELIMINARY DECISION (No.3)

Introduction

[1] This is a further preliminary decision in relation to a series of references by the Telcos on the provisions relating to cellphone towers within the Proposed Christchurch City Plan **(the plan).** There have already been two preliminary decisions of this Court relating to scope of the reference.

[2] As a result of the earlier decisions, the Court made directions for the parties to prepare a statement of facts and issues, That document was filed on 6 December 2002 and runs to some 370 pages, much of which constitutes background attachments necessary for the hearing. The document is a comprehensive approach to the facts and issues relevant to the substantive hearing in this matter and intends to incorporate the position of each of the parties.

[3] To that extent the Court reached the position in a telephone conference with the parties that the statement of facts and issues gave rise to two remaining issues. The first relates to paragraph 54. The Court made a direction in respect of that requiring Ms Ritchie for the trust to forward a redraft of paragraph 54. Subsequently the Court

understands that the parties have now clarified paragraph 54 which can now be substituted for that in the original document.

[4] However, the Telcos also had significant concerns in respect of paragraph 62 of the document which were not able to be resolved by agreement,

[5] It is essentially the position of the Trust that the issue raised in paragraph 62 is properly put before the Court. The Telcos and the City Council argue that paragraph 62 is beyond the jurisdiction of this Court on reference. The Court then sought to obtain consent of the parties to consider this matter on the papers but Ms Ritchie for the Trust indicated that she wished to be heard by the Court. The parties had already circulated detailed submissions. Ms Ritchie produced further submissions at the hearing but both the Telcos and the City Council spoke to the written submissions already filed with the Court on the issue.

The issues

[6] Paragraph 62 of the facts and issues states:

> *The trust also considers that the following additional matters pertaining to the interpretation of relevant provisions of the RMA* are *relevant:*
>
> *62.1 Whether RF emissions are a contaminant;*
>
> *62.2 Whether the Council has the jurisdiction to assess the effect of RF emissions as being an issue in respect of which it has a function under section 31 of the RMA, or whether this is a matter over which only regional councils have jurisdiction under their functions in section 30. In particular:*
>
> *(a) whether the control or effects of RF emissions is a function of territorial authorities under section* 31 *or of* regional *councils under section 30 of the RMA;*
>
> *(b) Whether the emission of RF (which the Trust claims is a contaminant under the RMA) is a discharge of contaminants over*

which regional councils have the sole jurisdiction under section 15 of the RMA; and

(c) Whether the City Council has jurisdiction under the RMA to include in the Plan rules that deal with the control of discharge of contaminants,

62.3 *Whether the Council has the jurisdiction to grant resource consents regarding RF emissions.*

[7] It is Ms Ritchie's fundamental position that New Zealand Standard 2772 1999 Radio Frequency Fields Part 1 deals with the control of the discharge of a contaminant. The CRC appeared at the call over of this matter to advise that it had an interest in being heard if the Court was going to deal with whether RF emissions were a contaminant. However, CRC did not participate in this preliminary issue hearing.

[8] The position for the Telcos and the Council is:

(1) The Council has power to control the effects of the land use activity including the effects of the use of land for the construction of and operation of cell phone towers; and

(2) That this issue was not raised in the submission of either the Trust or Telco.

It is our intention to deal with issues in this order:

(1) Whether the City plan may control use of a site intended for use as a cell phone tower by application of NZS 2772 part 1 as a matter of jurisdiction rather than merit (which is still to be decided); and

(2) Whether this issue is precluded in any event by virtue of the scope of references before the Court.

Background

[9] We understand the factual position to be clear. The equipment that may be installed by the Telcos for a cell phone site involves equipment mounted on a tower that emits radio frequency (RF). This energy may be focused and directed.

[10] Whether or not the emission constitutes a discharge and whether or not the RF constitutes a contaminant, the emission of RF creates an electromagnetic field in the air. Creation of the electromagnetic field is the effect of the cell phone tower emission and is referred to in NZS 2772:1 as a Radio Frequency Field. The strength of the radio frequency field is a function mainly of the strength of the emission and distance from the point of emission. This is generally measured in terms of micro watts per square centimetre and defined in the standards 2772:1 as Power Flux Density **(PFD).**

[11] There is a disputed potential for radio frequency fields to effect human beings. To avoid a potential adverse effect an upper limit of the PFD is sometimes specified. That limit would usually relate to a position relative to source measured in micro watts *per* square centimetre.

[12] The foreword to NZ5 2772:1 (page 4) states:

> *In setting limits, ICNIRP/IRPA identified radio frequency (RF) field values above which adverse biological affects could be confirmed by independent laboratory studies.*

This exposure can be measured in Watts per kilogram **(Dose approach).** However there are difficulties in accurately measuring the dose outside a laboratory.

[13] Accordingly the standard adopts the PFD approach by correlating the PFD to the dose. This enables prediction of exposure levels. The PFD also takes into account changes in absorption at differing frequencies (see para 103-109 of Statement of Facts and Issues).

Power to control

[14] The Act provides that the City Council may control through a district plan:

> *s31(b) any actual or potential effects of the use, development, or protection of land, including for the purpose of avoidance or mitigation of natural hazards*

and the prevention or mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances.

[15] In order to justify provision in plans in relation to RF (or electromagnetic) fields it is only necessary to establish that there is an actual or potential effect under section 3 of the Act which gives an extended meaning to effect. The Telcos and City Council accept cellphone towers can be subject to control by a district plan, at least on the basis of potential effect. Subsequent to the decision of the Court of Appeal in Canterbury ***Regional Council v Banks Peninsula District Council'*** it is clear that there might be an overlapping of the functions of a district and regional council provided each authority is acting within the terms of its respective legal functions under sections 30 and 3 1.

[16] From this we must conclude that provided the City Council is controlling the effects or potential effects of a land use activity, then it may include controls in its plan. This is irrespective of whether the Regional Council may have the power to control RF on the basis that it is a contaminant. It is not necessary for us to determine that issue to conclude that the City Council clearly has the power to control land use activities which create RF (electromagnetic) fields and have potential adverse effects on people.

[17] It appears to be at the very heart of the Trust's case, on the Telco reference, that the land use activity does produce an effect on the environment (particularly people). On this basis we conclude that the Council must be empowered to control land use activities so as to avoid remedy or mitigate actual or potential effects. As such the provisions relating to cell phone towers within the plan are within the scope of the Council's powers and therefore can be the subject of reference. The merit of the argument as to whether NZS 2772 is the appropriate mechanism in terms of section 32 part II and the other provisions of the Act and Plan is a matter on which the Court has yet heard no evidence.

1 [1995] 3NZLR 189 and 195.

Overlapping functions

[18] We further conclude that there is at least the potential for the regional and district councils to have overlapping jurisdiction in this area. There may be some difficulties for the Regional Council in establishing that RF is a contaminant, namely that it changes or is likely to change the physical, chemical or biological condition of the land or air into which it is discharged, but that matter is not before us at this time. Quite simply in our view if RF is a contaminant then that may merely mean that there are overlapping functions of the Councils. The Regional Council is focused upon the potential to change the physical, chemical or biological condition of the land or air, whereas the District Council is focused upon the adverse effects of the land use activity. Odour is an example where regional and district councils have such overlapping functions already.

[19] It appears to be the Trust's contention that RF can only be controlled by a regional plan and that the District Council cannot have provisions in its plan in relation to Standard NZS 2772.1. To the extent that Ms Ritchie's submission depends on that proposition it must be rejected completely. On the contrary we conclude that ***Canterbury Regional Council v Banks Peninsula District Council*** is clear authority for the proposition that provided the District Council control is related to its obligations under section 31(b), then it may to some extent overlap with functions of regional councils under section 30(1)(f).

Jurisdiction

[20] We also accept the submissions primarily advanced by Mr Prebble but supporting by the Telcos that this issue was not raised in any of the submissions of the Telcos or in the submission of the Trust. No party was able to point any provisions of the original submissions or the references which referred even indirectly to this issue. The High Court has just released the decision ***Clearwater Resort and Ors v Christchurch City Council*** AP3402 and AP3502. That decision has again confirmed the approach of the High Court and Environment Court in the past to the questions of whether a particular argument is on the reference.

[21] In short we agree with the submission of Mr Prebble for the Council that if the Trust argues that the Council has exceeded its jurisdiction that is not remediable on this reference but would need to be subject to separate proceedings.

Outcome

[22] We conclude:

(1) Paragraph 62 raises the matter of whether RF is a contaminant. This is a separate issue, neither relevant nor material to the issues before this court;

(2) Paragraph 62 has not been raised in any submissions or reference and therefore is not within the jurisdiction of this Court.

Costs

[23] This novel proposition has been raised late in the process before this Court and only arose as result of comments on the statement of facts and issues, There have been a number of prehearing conferences and jurisdictional hearings on this matter where this issue could have been raised. The circumstances of this preliminary decision are unusual and may warrant an order of costs. Accordingly the Court directs that if any party seeks an order for costs they are to file such application within 15 working days, any reply within 10 working days and final response, if any, within 5 working days thereafter.

DATED at CHRISTCHURCH this 28th March **2003**

J A Smith
Environment Judge

Issued:[2] - 1 APR 2003

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

[2] Smithje/Jud-rule/d/rma443-99