BEFORE THE ENVIRONMENT COURT

Decision No. [2016] NZEnvC 191

IN THE MATTER	of the Resource Management Act 1991 ("the Act")
AND	of proposed Plan Change 72 (Rangiuru Business Park) to the Western Bay of Plenty District Plan
AND	of two appeals pursuant to Clause 14(1) of Schedule 1 to the Act
BETWEEN	BLUEHAVEN MANAGEMENT LIMITED (ENV-2016-AKL-000153)
	ROTORUA DISTRICT COUNCIL (ENV-2016-AKL-000154)
	Appellants
AND	WESTERN BAY OF PLENTY DISTRICT COUNCIL
	Respondent

Court:	Environment Judge JA Smith Environment Judge DA Kirkpatrick sitting together for the purposes of s 279(1)(e) of the Act
Hearing:	at Tauranga on 12 September 2016
Appearances:	K Barry-Piceno for Bluehaven Management Limited L Muldowney and S Thomas for Rotorua District Council M Hill for Western Bay of Plenty District Council V Hamm and K Jordan for Quayside Properties Limited
Date of Decision:	30 September 2016
Date of Issue:	30 SEP 2016

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

DECISION OF THE ENVIRONMENT COURT ON PRELIMINARY ISSUES AS TO SCOPE OF APPEALS

A: The appeals by Bluehaven Management Limited (ENV-2016-AKL-000153) and Rotorua District Council (ENV-2016-AKL-000154) are within the scope of Plan Change 72 to the Western Bay of Plenty District Plan and may proceed to be heard on their merits.

REASONS

Introduction

[1] This decision deals with the preliminary issue as to whether two appeals are within the scope of a plan change.

Background

[2] Plan Change 72 ("**PC72**") to the operative Western Bay of Plenty District Plan relates to the Rangiuru Business Park. The Business Park contains approximately 150 hectares of land and is located to the east of Te Puke and the Kaituna River on Young Road, generally bounded by Pah Road to the west, the East Coast Main Trunk Railway and Te Puke Highway to the south, and the Tauranga Eastern Link (State Highway 2) to the northeast.

[3] The appellants, Bluehaven Management Limited ("**Bluehaven**") and Rotorua District Council ("**RDC**"), both seek to challenge the decisions on their submissions relating to the proposed plan provisions for one or more Community Service Areas ("**CSA**s") in the Business Park.

[4] In response, the Western Bay of Plenty District Council ("**WBoPDC**") and Quayside Properties Limited (the owner of most of the land which is subject to the plan change and a wholly owned subsidiary of Quayside Holdings Limited which is a Council-controlled organisation of the Bay of Plenty Regional Council) ("**Quayside**")

challenged both appeals as being outside the scope of the Court's jurisdiction on the basis, broadly, that the relief sought in the appeals is not within the scope of the submissions made by the appellants and that the submissions made by the appellants are not on the plan change as required under clause 6 of Schedule 1 to the RMA.

[5] More particularly,[1] Quayside and WBoPDC object to the following aspects of the relief sought:

(i) The relief sought in paragraph 12 of RDC's Notice of Appeal which seeks to:

(a) Include a new rule imposing a maximum cumulative gross floor area for all office and retail activities allowed in the CSAs to a total of 1,000m^2 for each CSA, with an associated note explaining that this rule is to ensure the CSA continues to provide a service function principally to the local business community; and

(b) Include a new general subdivision and development rule requiring the location, layout and design of a CSA proposed to be included as part of a subdivision application to be shown in order to demonstrate how it will meet the primary local business community service function.

(ii) The relief sought in paragraph 7 of Bluehaven's Notice of Appeal which seeks to:

(a) Include appropriate objectives and policies that identify the purpose and nature of local commercial activities and CSAs;

(b) Impose rules and locational restrictions to ensure the CSAs are of a small scale and type that will provide only the required convenience services for the RBP workforce; and

(c) Include a specific rule to limit GFA of each individual activity and require a cap for convenience retail and office activities to a maximum of 500m2 for each CSA.

[1] Agreed statement of facts and Issues at paras 4 – 10.

[6] All parties have agreed that these issues should be considered and determined on a preliminary basis ahead of any hearing of the substantive merits of the appeals. This preliminary hearing has proceeded on the basis of an Agreed Statement of Facts and Issues dated 8 September 2016 and with an Agreed Bundle of Documents.

[7] Although not framed as an application to strike out the appeals under s 279(4) of the Act, the issues are essentially the same as they would be in relation to such an application. For that reason we have approached this as if it were an application to strike out the appeals. On that basis we have focussed our attention on the relevant primary documents, being mainly relevant parts of the operative Western Bay of Plenty District Plan (first review 2009),[2] PC 72 to that Plan[3] and the s 32 evaluation report prepared by WBoPDC in respect of it,[4] the submissions of Bluehaven and RDC and the further submission of RDC,[5] and WBoPDC's decisions on those submissions.[6] We have not based our decision on any evidential matters that might be contested at a hearing of these appeals on their substantive merits.

Rangiuru Business Park

[8] The history of PC72 goes back to 2005, when Quayside requested a plan change to establish an industrial business park at Rangiuru. The Council accepted that request and notified Plan Change 33 (Rangiuru Business Park zone) ("**PC33**") as a private plan change on 10 December 2005. The Council's decisions on PC33 were made on or about 10 January 2007,[7] with the only appeal being by Transit NZ in relation to roading matters that are not relevant for present purposes.[8]

[9] PC33 incorporated structure plan provisions and maps. Relevantly, the maps showed a single rectangular CSA in the middle of the main business park, with a frontage of approximately 260m to Young Road and a depth of approximately 100m. One of the objectives for the Business Park zone was to maintain and enhance the viability of the established retail centres elsewhere and those proposed in the adopted

2 Agreed bundle of documents, tabs 4 – 6.
3 Agreed bundle of documents, tabs 10 (as notified) and 13 (decisions version).
4 Agreed bundle of documents, tab 11.
5 Agreed bundle of documents, tabs 14 – 16.
6 Agreed bundle of documents, tab 13.
7 Agreed bundle of documents, tab 2.
8 Agreed statement of facts and issues at paras 11.1 – 11.5.

Smart Growth Strategy.[9] In support of that objective, there was a policy to avoid the establishment of large format retail or large office developments, whether standalone or in conjunction with industry, storage and warehousing. Consequent on these provisions, the permitted activities in the zone restricted offices and retailing to those which would be accessory to permitted industry, storage, warehousing, cool stores and pack houses, except in the CSA, where offices, retailing involving a maximum floor area of 100m^2 and places of assembly were also permitted. Permitted activities not complying with one or more of the permitted activity performance standards could be considered as limited discretionary activities. Retailing and office activities not covered by the activity rules were specifically identified as non-complying activities.[10]

[10] The first review of the District Plan under the Act was notified on 7 February 2009 and the provisions of (now operative) PC33 relating to the CSA and to commercial activities generally were carried over into the proposed review of the Plan. This review was made operative on 16 June 2012. There were no appeals in relation to it other than by the NZ Transport Agency in relation to roading matters and the inclusion of an existing pack house within the business park area, neither of which are relevant for present purposes.[11]

[11] It appears to be generally agreed that anticipated development within the Business Park did not occur as a result of the supervening events of the global financial crisis in 2008. As well, development was delayed pending construction of the Tauranga Eastern Link which has now been completed.[12] A further consequence of the latter development is that changes to the environment made the operative Rangiuru Structure Plan maps out of date, including a number of infrastructure arrangements in relation to the location of culverts constructed under the Tauranga Eastern Link, and the final design of that road's proposed interchange with a road into the business park area have.

Ambit of PC72

[12] In 2015, Quayside made a further request to the Council for a plan change to amend the operative provisions of the District Plan relating to the Business Park. The

9 Agreed bundle of documents, Tab 30 (2013 version). The Smart Growth Strategy, released in different forms since 2004, is a non-statutory joint planning document of the Tauranga City Council, the Bay of Plenty Regional Council and the WBoPDC.
10 Agreed statement of facts and issues at para 11.3.
11 Agreed statement of facts and issues at paras 11.6 – 11.7.
12 Agreed statement of facts and issues, para 11.8.

Council accepted that request on 9 October 2015, and on 7 November 2015 notified PC72 – Rangiuru Business Park.[13] For present purposes, PC72 relevantly proposes the following amendments to the operative plan provisions for the Business Park in relation to the Community Services Area:[14]

(a) Divide the CSA into two distinct parts;

(b) Enable one part of the CSA to be included within a new Stage 1 and one part within Stage 2 (as opposed to the operative provisions which provide for the entire single CSA area within Stage 2);

(c) Locate each CSA at intersection points at either end of Young Road (as opposed to the operative provisions which provide for the single CSA at a central point on Young Road);

(d) Add one new permitted activity within the CSAs, specifically educational facilities (limited to childcare/daycare/preschool facilities);

(e) Specify in the wording of the permitted activity rule that the total net land area for the CSAs is 2.6ha (as opposed to the operative provisions which show a single CSA in the relevant district plan maps and structure plan, which covers an area of 2.6 ha according to the scale shown on those maps);

(f) Specify the requirement for a single contiguous development within each CSA of not less than 6000m2 and not greater than 20,000m2 net land area.

[13] Other changes proposed in PC72 but not related to the CSAs include:

(a) amending the staging regime;

(b) amending the road infrastructure provisions;

(c) amending the stormwater provisions and providing alternative options for water supply and wastewater treatment and disposal;

(d) amending the financial contribution provisions to reflect the revised staging and infrastructure provisions and to update construction cost estimates; and

[13] Agreed statement of facts and issues at paras 11.9 – 11.10.
[14] Agreed statement of facts and issues at para 11.11.

(e) making various amendments to the permitted and discretionary land use activities.

The content of the submissions

[14] In its submission, Bluehaven submitted:

> *...the proposed community service area rules will enable ad hoc commercial office and retails development that is not appropriate at this location.*
>
> *The industrial zone has no objectives and policies that support the proposed amendment. The s 32 report contains insufficient assessment and evaluation of this issue.*
>
> *The proposal is inconsistent with the sub-regional commercial strategy, which promotes a hierarchy of identifiable centres with clearly defined functions as set out in the WBoP District Pan commercial chapter issues, objective and policies.*
>
> *The existing plan provisions have poor alignment with district plan objectives and policies, which needs to be rectified. Any plan changes should await the outcome of the Smart Growth Eastern Corridor study to ensure an integrated approach is taken. This study is likely to lead to changes being made to the plan provisions for commercial activities for both Tauranga and Western Bays.*[15]

[15] Bluehaven sought rejection of the proposed amendments, or the inclusion of appropriate objectives and policies to identify the purpose and nature of local commercial centres at the Business Park and to provide for two identified local centres of a location, scale and type to provide required convenience services to the local work force with a maximum gross floor for convenience retail and office activities not to exceed 500m^2 for each local centre.

[16] RDC's submission was a substantially longer document than Bluehaven's, which we will not set out in full. It opposed PC72 in its entirety on the bases that:

15 Agreed bundle of documents, Tab 14.

(a) it would have an adverse effect on the sustainability, vitality and viability of the industrial and commercial land resources in the Rotorua district and the wider region;

(b) it would lead to transport inefficiencies and adverse effects on the transportation network;

(c) it was inconsistent with the higher order planning instruments, including the purpose of the Act.

[17] In particular, RDC focussed its opposition on:

(a) the inclusion of additional non-industrial land use activities in the industrial rules applying to the Business Park;

(b) the changes to the provision of roading infrastructure and the expansion of stage 1 development from 25 to 45 hectares of gross land area; and

(c) the rule which proposed to enable further development outside stage 1 once a development threshold of 50 per cent within stage 1 had been achieved.

[18] A clear theme running through the whole of this submission is that PC72 would deviate from the original intended purpose of Rangiuru, which was intended to be protected for near-exclusive industrial activity.[16]

The Council's decisions on submissions

[19] In the Agreed Statement of Facts And Issues, the parties set out the following as the relevant reasons for the Council's decisions on the submissions by Bluehaven and RDC, which we have reviewed against the actual decisions and accept as a fair summary:

> *Plan Change 72 is not seeking to increase the developable area but to retain what is in the Operative Plan and to give effect to any minor locational change that may be required. The Operative CSA is in the new stage 2, so the proposal to split the CSA into two is to enable activities that would be established in a CSA to be available to the first stage of development.*

[16] Agreed bundle of documents, Tab 15.

Plan Change 72 seeks to modify the location of the CSA, change the area from gross to nett, and add a new permitted activity for childcare.

The Committee's consideration is limited to these particular amendments. The first two would not have any material effect on the purpose and function of the Business Park. The inclusion of childcare facilities is considered to provide a clear benefit.

Rule 21.3.2 provides that there can only be one development per site, and its size has to be between 6,000m^2 and 2ha. This is to ensure a comprehensive development, rather than piecemeal small ones that may or may not join up.

The location restrictions of 250m is important to ensure that the CSAs and their activities are internal to Rangiuru Business Park, rather than on the edge in order to attract passing traffic.

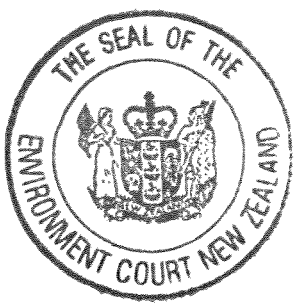
Submissions for a cap on the gross floor area for offices and retail are considered to be outside the scope of what is a very limited plan change. This plan change is not an opportunity to re-visit such matters, as these would have to be addressed by way of a further plan change,

Notwithstanding that this was considered outside the scope of the plan change, there was no evidence (such as economic analysis) other than theoretical planning scenarios given to justify a cap of any size. Nor was there any evidence provided to support submissions claiming the potential for negative effects of the CSAs on nearby town centres such as Rotorua, Te Puke and Wairake. On the contrary, submissions from the Te Puke community were in full support of all aspects of the plan change.[17]

The scope for a submission

[20] A survey of the relevant legislation and case law is set out in *Environmental Defence Society Inc & Ors v Otorohanga District Council.*[18]

[21] For present purposes, the most relevant statutory provisions are:



17 Agreed statement of facts and issues, para 13.
18 [2014] NZEnvC 070 at [7]-[22].

(a) clause 6 of Schedule 1 to the Act, which allows any person to make a submission on a publicly notified proposed plan or plan change in the prescribed form;

(b) clause 14(1) of Schedule 1 to the Act, which sets out the scope of a submitter's appeal rights;

(c) clause 14(2)(a), which limits the right of appeal to provisions that were referred to in the appellant's submission; and

(d) the text of Form 5 in Schedule 1 to the Resource Management Act (Forms, Fees, and Procedure) Regulations 2003, which requires a submitter to give details of the specific provisions of the proposed plan or plan change that the submission relates to, and to give precise details of the decision which the submitter seeks from the local authority.

[22] In this case essentially the same issue arises under clause 14(1) as under clause 6: whether the submission (on which the appeal must be based) is "on" the plan change. No residual issues appear to arise in relation to the requirements of clause 14(1)(a) – (d) relating to the extent of the Council's decisions which are appealed from, as the Council included the proposed plan change provisions which were the subject of the submissions.

[23] In relation to whether the Bluehaven and RDC submissions were "on" PC72, the argument before us was focussed on the analysis undertaken by Kós J in the High Court in *Palmerston North City Council v Motor Machinists Limited*[19] based on the approach set out by William Young J in *Clearwater Resort Ltd v Christchurch City Council*.[20]

[24] The approach in *Clearwater* focuses on the extent to which a plan change or variation alters the relevant parts of the operative or proposed plan, rather than the broader alternative approaches of allowing submissions in terms of either anything which is expressed in the plan change or variation, or anything which is in connection with the contents of the plan change or variation. In pursuit of the adopted approach, *Clearwater* establishes a bipartite test:

19 [2014] NZRMA 519 at [74]-[83].
20 Christchurch AP34/02, 14 March 2003, William Young J at [56]-[69].

(i) a submission can only fairly be regarded as being "on" a plan change or variation if it is addressed to the extent to which the plan change or variation changes the pre-existing status quo; and

(ii) if the effect of regarding a submission as being "on" a plan change or variation would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected, that is a powerful consideration against finding the submission to be "on" the change.

[25] The *Clearwater* test was adopted in *Motor Machinists* and explained with additional analysis. Starting with the purpose of the Act in s 5 and describing the Act as an attempt to provide an integrated system of environmental legislation, Kós J identified two fundamentals inherent in that purpose:

(i) An appropriately thorough analysis of the effects of a proposed plan by means of the s 32 evaluation report which should adequately assess all feasible alternatives or further variations by a comparative evaluation of the efficiency, effectiveness and appropriateness of options.[21]

(ii) Robust, notified and informed public participation in the evaluative and determinative process to ensure that those potentially affected are adequately informed of what is proposed, citing with approval the observation that "*[u]ltimately plans express community consensus about land use planning and development in any given area.*"[22] Kós J added the view that "*[i]t would be a remarkable proposition that a plan change might so morph that a person not directly affected at one stage … might then find themselves directly affected but speechless at a later stage by dint of a third party submission …*"[23]

[26] Noting that the Schedule 1 submission process lacks the procedural and substantial safeguards which exist when promulgating a plan change, Kós J held that the standard submission form (Form 5 in Schedule 1 to the 2003 Regulations) is not designed as a vehicle to make significant changes to the management regime in a plan where those are not already addressed by the plan change. Consequently, permitting

21 Above at fn 19 at [76].
22 *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59 (HC at [54].
23 Above at fn 19 at [77].

the public to enlarge the subject matter of a plan change significantly beyond the ambit of a plan change is not efficient because it transfers the cost of assessing the merits back to the community.[24]

[27] Kós J then expanded on the *Clearwater* test by posing questions that may be asked to determine whether a submission can reasonably be said to fall within the ambit of a plan change:

> In terms of the first limb of the test:
>
> (i) Whether the submission raises matters that should have been addressed in the s 32 evaluation report? If so, the submission is unlikely to be within the ambit of the plan change.
>
> (ii) Whether the management regime in a plan for a particular resource is altered by the plan change? If not, then a submission seeking a new management regime for that resource is unlikely to be on the plan change.[25]
>
> In terms of the second limb:
>
> (iii) Whether there is a real risk that persons directly or potentially affected by the additional changes proposed in the submission have been denied an effective response to those in the plan change process? If so, then the process for further submissions under clause 8 of Schedule 1 to the Act does not avert that risk.[26]

[28] All parties before us presented their cases based on this approach to the *Clearwater* test and we respectfully adopt it as the basis for this decision. However, we also note, in light of the submissions of Mr Muldowney for RDC and by reference to the survey in *Environmental Defence Society Inc & Ors v Otorohanga District Council*,[27] that there are other High Court authorities which are also pertinent to the question of scope which we consider must also be referred to.

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24 Above at fn 19 at [79].
25 Above at fn 19 at [81].
26 Above at fn 19 at [82].
27 Above at fn 18.

[29] In *Power v Whakatane District Council & Ors*[28] the High Court noted that:

> *Care must be exercised on appeal to ensure that the objectives of the legislature in limiting appeal rights to those fairly raised by the reference are not subverted by an unduly narrow approach.*

[30] Allan J went on in that decision to quote with approval the decision in *Westfield (NZ) Limited v Hamilton City Council*[29] where Fisher J said:

> *[73] On the other hand I think it implicit in the legislation that the jurisdiction to change a plan conferred by a reference is not limited to the express words of the reference. In my view it is sufficient if the changes directed by the Environment Court can fairly be said to be foreseeable consequences of any changes directly proposed in the reference.*
>
> *[74] Ultimately, it is a question of procedural fairness. Procedural fairness extends to the public as well as to the submitter and the territorial authority. Adequate notice must be given to those who seek to take an active part in the hearing before the Environment Court if they know or ought to foresee what the Environment Court may do as a result of the reference. This is implicit in sections 292 and 293. The effect of those provisions is to provide an opportunity for others to join the hearing if proposed changes would <u>not</u> have been within the reasonable contemplation of those who saw the scope of the original reference.*
>
> (emphasis in original text)

[31] The same approach was expressed by Wylie J in *General Distributors Limited v Waipa District Council*:[30]

> *[55] One of the underlying purposes of the notification/submission/further submission process is to ensure that all are sufficiently informed about what is proposed. Otherwise the plan could end up in a form which could not reasonably have been anticipated, resulting in potential unfairness.*
>
> *[56] There is of course a practical difficulty. As was noted in* Countdown Properties[31] *at [165], councils customarily face multiple submissions, often*

28 HC Tauranga, CIV-2008-470-456, 30 October 2009, Allan J, at [30].
29 [2004] NZRMA 556, at [574]-[575].
30 (2008) 15ELRNZ 59 (HC)

conflicting, and often prepared by persons without professional help. Both councils and the Environment Court on appeal, need scope to deal with the realities of the situation. To take a legalistic view and hold that a council, or the Environment Court on appeal, can only accept or reject the relief sought in any given submission would be unreal.

[32] As Allan J observed:[32]

In the end, the jurisdiction issue comes down to a question of degree and, perhaps, even of impression.

[33] The issue of consequential changes is also addressed in the *Motor Machinists*[33] decision, where Kós J noted that the *Clearwater*[34] approach does not exclude altogether zoning extension by submission, saying:

Incidental or consequential extensions of zoning changes proposed in a plan change are permissible provided that no substantial further section 32 analysis is required to inform affected persons of the comparative merits of that change.[35]

[34] While accepting the usefulness of an approach which includes an analysis of the relevant resource management issues in the form the Council is required to undertake pursuant to s 32 to comply with clause 5(1)(a) of Schedule 1 to the Act, we respectfully consider that some care needs to be taken in assessing the validity of a submission in those terms. As Kós J expressly recognises,[36] there is no requirement in the legislation for a submitter to undertake any analysis or prepare an evaluation report in terms of s 32 when making a submission. The extent and quality of an evaluation report under s 32 of the Act depends very much on the approach taken by the relevant regional or district council in preparing it. As provided in s 32A, a submission made under clause 6 of Schedule 1 may be based on the ground that no evaluation report has been prepared or regarded or that s 32 or 32AA[37] has not been complied with.

31 *Countdown Properties Ltd v Dunedin City Council* [1994] NZRMA 145 (HC)
32 Above at fn 28 at [43].
33 Above at fn 19 at [81].
34 Above at fn 20.
35 Above at fn 19 at [81].
36 Above at fn 19 at [79].
37 Since the coming into force of the Resource Management Amendment Act 2013 on 4 September 2013, a further evaluation in accordance with the requirements of s 32 may be required pursuant to s 32AA of the Act for any changes made since the first evaluation report was completed.

[35] As held in *Leith v Auckland City Council*,[38] there is no presumption in favour of a planning authority's policies or the planning details of the instrument challenged, or the authority's decisions on submissions. An appeal before the Environment Court is more in the nature of an inquiry into the merits when tested by submissions and the challenge of alternatives or modification.

[36] In that sense, we respectfully understand the questions posed in *Motor Machinists*[39] as needing to be answered in a way that is not unduly narrow, as cautioned in *Power*.[40] In other words, while a consideration of whether the issues have been analysed in a manner that might satisfy the requirements of s 32 of the Act will undoubtedly assist in evaluating the validity of a submission in terms of the *Clearwater* test, it may not always be appropriate to be elevated to a jurisdictional threshold without regard to whether that would subvert the limitations on the scope of appeal rights and reduce the opportunity for robust participation in the plan process.

[37] In that context, we respectfully suggest that one might also ask, in the context of the first limb of the *Clearwater* test, whether the submission under consideration seeks to substantially alter or add to the relevant objective(s) of the plan change, or whether it only proposes an alternative policy or method to achieve any relevant objective in a way that is not radically different from what could be contemplated as resulting from the notified plan change. The principles established by the decisions of the High Court discussed above would suggest that submissions seeking some major alteration to the objectives of a proposed plan change would likely not be "on" that proposal, while alterations to policies and methods within the framework of the objectives may be within the scope of the proposal.

[38] It may be that this issue can be encapsulated by regarding the first test as including an assessment of whether the s 32 evaluation report should have covered the issue raised in the submission. This follows Kós J's wording[41] closely and involves an evaluation of the submission in terms of the issue as it is (or is not) addressed by the proposed plan change and the context in which it arises. In particular, such contextual evaluation should include consideration of whether there are statutory obligations, national or regional policy provisions or other operative plan provisions which bear on

38 [1995] NZRMA 400 at 408-9.
39 Above at fn 19 and set out above in [26].
40 Above at fn 28 and set out above at [30].
41 Above at fn 19 at [81].

the issue raised in the submission. A failure to address the context expressly in the s 32 report may well indicate a failure to consider a relevant matter.

[39] Our understanding of the assessment to be made under the first limb of the test is that it is an inquiry as to what matters should have been included in the s 32 evaluation report and whether the issue raised in the submission addresses one of those matters. The inquiry cannot simply be whether the s 32 evaluation report did or did not address the issue raised in the submission. Such an approach would enable a planning authority to ignore a relevant matter and thus avoid the fundamentals of an appropriately thorough analysis of the effects of a proposal with robust, notified and informed public participation.

[40] We also respectfully note that the discussion in *Motor Machinists*, as in most of the cases on the issue of the scope for submissions made under clause 6 of Schedule 1 to the Act, arises in the context of a proposed change to an operative plan. The context of a review of an entire planning instrument is likely to mean that not only the methods but even the objectives could be open to challenge by way of submissions, because the review would not be considered within any existing framework of operative plan provisions.[42] This aspect is discussed in more detail in our decision in *Motihi Rohe Moana Trust v Bay of Plenty Regional Council*.[43]

The arguments presented

[41] For Quayside, Ms Hamm emphasised the history and nature of the Industrial Park, noting the issues it had faced in relation to staging, infrastructure and take-up. Within that context she submitted that the CSAs were of much lesser significance, amounting to less than 2% of the total area covered by PC72. She noted that no changes were proposed to the objectives and policies that relate to the Business Park. She referred us to the s 42A report of the WBoPDC planning officer, Mr Martelli, and the manner in which he addressed the issues relating to the CSAs.[44]

[42] In relation to the submission by RDC, she noted it sought rejection of the entire plan change but only made express reference to the proposed addition of daycare facilities.

42 In terms of the principles set out in *Leith v Auckland CC* referred to above at [31].
43 ENV-2015-AKL-134, [2016] NZEnvC 190, which is delivered contemporaneously with this decision.
44 Agreed bundle of documents at Tab 12, esp. pp 14-18.

[43] In relation to the submission by Bluehaven, she acknowledged that it was more specific but noted that it only sought rules requiring an overall cap on retail and office gross floor area within the CSAs, so was not a sufficient for the relief which seeks specific limits for each activity.

[44] On the basis that neither RDC nor Bluehaven had made any specific reference to the matters identified as the changes proposed to the CSAs, she submitted that neither submission address the degree to which PC72 changes the status quo, in terms of the first limb of the *Clearwater* test. She did not accept the argument that, taken overall, the proposed changes could be described as sweeping and submitted that essentially the submitters were advancing cases based on their submissions being "in connection with" PC72, which both *Clearwater* and *Motor Machinists* have held is not a sufficient basis to be "on" a plan change.

[45] For WBoPDC, Ms Hill noted that the Council, in the s 42A report, had identified scope as being an issue from the outset. She emphasised that PC72 was limited in its scope, with no changes proposed to the objectives and policies and clear identification of the land use activities in the s 32 evaluation report.

[46] She described the scheme of PC72 as being enabling, so as to get a stalled business park going within appropriate limits so that the CSAs would have no distributional impact.

[47] In relation to the deletion of a single mapped CSA and the change to a net area which was connected to two intersections, she submitted that this was not intended to enable the area to increase but to better provide for the establishment of a commercial area to support the industrial activities. She described this as an updating exercise.

[48] For RDC, Mr Muldowney presented his argument in five main points:

(i) As to context, he submitted that there was little controversy about the intended limited function of the CSA to support an industrial park rather than create a new centre. He referred to the centres approach in the Smart Growth Strategy, to Policy UG10B in the Regional Policy Statement relating to the sustainability of rezoning and development of urban land and to District Plan Objective 21.2.1.4 requiring commercial activities that do not have a functional need to locate in an industrial area be consolidated.

(ii) As to the scope of PC72, he argued that it was not so limited as contended and that the issues identified in the s 32 evaluation report showed an over-specified structure plan that required various changes, of which the potential increase in size and range of activities unrelated to industrial uses was an issue that was open to submission.

(iii) He developed the submission that in the context of PC72 and the broad submission that it be declined in its entirety, it was open to RDC to advance submissions which challenged the greater permissiveness of PC72 and to seek amendments which would maintain the status quo, while enabling updating to meet the requirements for infrastructure, including adjustments to the financial contribution rules.

(iv) He argued that within RDC's broad relief was scope to seek to manage the effects of commercial activity in the CSAs by such means as a cap on gross floor areas, referring to the scope for such detail to be considered within the ambit of a plan change and submissions on it as identified in a number of cases referred to above in our discussion of the relevant case law. He was, however, careful to add that RDC's further submission to Bluehaven's submission ought not to be regarded as a limit on RDC's primary submission.

(v) He submitted that RDC's submission was a direct response to a change in the management regime for Rangiuru as proposed in PC72, and that it did not seek to expand either the area involved or the range of activities.

[49] For Bluehaven, Ms Barry-Piceno emphasised that the operative objectives and policies relating to the Business Park do not support non-industrial uses. She submitted that the s 32 evaluation report was insufficient in its consideration of potential effects and its limited identification and assessment of alternative options. She confirmed that Bluehaven had no opposition to the updating of the District Plan to deal with infrastructure and funding issues.

[50] In reply, Ms Hamm reminded us that Quayside is not the only affected landowner and that others may be affected by the changes sought by the submitters. She repeated that the area of the CSAs would not increase so there was no basis for introducing caps on gross floor area. Ms Hill identified support for PC72 from the Bay of Plenty Regional Council and the Smart Growth alliance. She repeated that PC72

should be characterised as "minor tweaks" to the management regime, with no scope for caps on gross floor area.

Are the submissions "on" the plan change?

[51] As the parties all agree,[45] PC72 as notified proposed to alter the status quo in relation to the CSA at Rangiuru Business Park in a number of different ways. In our view, it is feasible (without determining the likelihood of any possible outcome) that the changes proposed could have some degree of effect on the nature and scale of non-industrial development at Rangiuru, including:

(a) by dividing it to create two such areas rather than limiting it to a single area;

(b) by enabling it to extend along road frontages at the two main intersections within the Business Park, rather than being concentrated in a single area;

(c) by potentially expanding its footprint from an identified 2.6ha rectangle shown on the structure planning maps to an undefined footprint, the area of which may be assessed net of roads and other public places; and

(d) by increasing the range of non-industrial activities permitted in the area.

[52] In terms of the status quo, these changes should be considered in light of the existing planning regime. This is based on the approach taken by the Council in PC33, and in particular the issue statement, objective and policy which highlighted the potential adverse distributional effects on existing and proposed retail centres of locating non-accessory retail and office activities in the Business Park.[46] In the operative District Plan these matters remain important, as evidenced by both the commercial provisions (Issue 19.1.2, objective 19.2.1.1 and policy 19.2.2.3)[47] and the industrial provisions (Issue 21.1.5, objective 21.2.1.4 and policy 21.2.2.6).[48] None of these provisions are proposed to be deleted or amended by PC72.

[53] The s 32 evaluation report for PC72[49] addresses this issue in section 4.0 - Issues and Options Review and in particular in section 4.4 - Issue 4 - Land Use Activities. This section identifies the status quo and the proposed amendments as the

45 Agreed statement of facts and issues at 11.11.
46 Agreed Statement of facts and issues at 11.3.
47 Agreed bundle of documents, Tab 5.
48 Agreed bundle of documents, Tab 6.
49 Agreed bundle of documents, Tab 11.

two options. There is no identification or analysis of any possible variations of or alternatives to the proposed changes. The commentary identifies Objective 21.2.1.4 and Policy 21.2.2.6 as being relevant. The discussion there appears to emphasise a balance between "efficient and optimum use and development of industrial resources" and limiting non-industrial activities. The most appropriate option is identified as being to seek minor changes to the permitted activities while replicating the overall size of the CSA and relocating it to "more logical and central locations." The discussion concludes with the statement that none of the changes generate redistribution effects as there is no increase in size or significant change in land uses. Our reading of these portions of the document leads us to a preliminary view (without determining any of the issues that may be raised on appeal) that the evaluation of the proposed changes to the CSAs is underlain by a number of unstated assumptions about the reasons for making these changes and the likely effects of them which may or may not be valid in this particular case.

[54] The submissions of Bluehaven and RDC substantively challenge the proposed changes in relation to the CSAs and seek approaches which are different, but (on a preliminary basis) not radically so in the context of the operative provisions.

[55] RDC's primary submission sought that the plan change be declined in its entirety. Even if that were the result of the appeal, that would leave the status quo in place. The relief now sought by RDC in its notice of appeal, as summarised in the Agreed Statement of Facts and Issues, is less than such complete rejection of the CSAs. While not specifically identified in RDC's original submission, it appears to us that the amendments sought to the rules to impose a cap on retail and office gross floor area and to require evidence of some functioning demonstrably in support of the industrial park do arise out of the specific references in the submission to RDC's concerns about the sustainability of other industrial and commercial resources including existing centres, the greater scope for non-industrial activities at Rangiuru and the tension with existing objectives and policies.

[56] Bluehaven's relief is both briefer and more specific than RDC's, to the extent of seeking:

(a) appropriate objectives and policies to identify the purpose of the CSAs;

(b) imposing rules and locational restrictions to ensure that the CSAs were of a small scale and of a type to provide only required convenience services; and

(c) a rule to limit the gross floor area of each individual activity and require a cap for both convenience retail and office activities.

[57] That relief appears to us to be within the scope of Bluehaven's original submission which clearly referred to these elements, even if in slightly different terms. This relief is therefore is also within the scope of RDC's further submission in support of the Bluehaven submission.

[58] We note that counsel for Quayside laid great stress on the extent to which both RDC and Bluehaven had raised concerns about matters that were not proposed to be changed by PC72, being the permitted activity status of non-accessory offices and retailing as permitted activities within the CSAs. She submitted that these matters should not be allowed to be re-opened for debate when they had been settled in the PC 33 process and then in the first review of the District Plan. Had PC72 left the provisions relating to the CSA completely unchanged and dealt only with the provisions for infrastructure and financial contributions, that argument would have great force in terms of the test in *Clearwater*. But that is not what happened in PC72. The Council has changed a number of aspects relating to the CSAs (as acknowledged by all parties) at least to the extent that we do not think that RDC and Bluehaven can be prohibited from raising issues that should form part of an integrated regime for the CSAs.

[59] Various submissions were made to us in argument at the hearing in relation to the relative size and significance of aspects of the plan change, the areas of land involved and the extent to which activities might be enabled. We do not consider it appropriate to venture into any consideration of those arguments, which plainly enter into the merits of the plan change and can only be considered and assessed after relevant evidence is presented and tested.

[60] Leaving to one side the extent to which the content of the s 32 evaluation report might be contested on its merits, there can be no real doubt that it addresses matters that are the concern of the submissions lodged by Bluehaven and RDC. On that basis and in terms of the first limb of the *Clearwater* test (whether the submission is addressed to the extent to which the proposal changes the pre-existing status quo) and the first question posed in *Motor Machinists*, the submissions raise matters that should

have been (and, at least to some extent, were) addressed in the s 32 evaluation report. In terms of the second question posed in *Motor Machinists*, it appears at least arguable that PC 72 did involve changes to the management regime for commercial activity which is not accessory to permitted industrial uses in the Business Park, so that it is open to Bluehaven and RDC to lodge submissions seeking a new management regime.

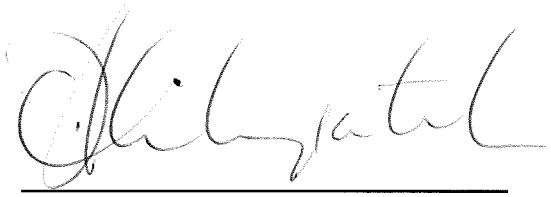
[61] In terms of the second limb of the *Clearwater* test (whether the submission would permit the planning instrument to be appreciably amended without real opportunity for participation by those potentially affected), it seems clear that there is little risk where, as here, the submitters seek relief which would restrict the extent of the change rather than increase it. The issue of potential distributional effects having been raised in the s 32 evaluation report, any potentially interested persons (including all landowners at Rangiuru) were effectively on notice that the location and extent of the CSA, and the range of activities that might occur within it, might be the subject of submissions. They could therefore make their own decisions about whether to become involved in the process by lodging submissions, or by reviewing the notified summary of submissions and then deciding whether to join the process by lodging further submissions.

Conclusion

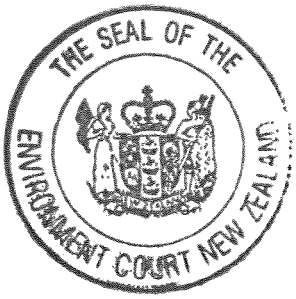
[62] For the foregoing reasons we determine that both these appeals are within the scope of PC72 and direct that they may proceed to hearings on their merits.

[63] Costs are reserved. If any party considers there is reason to depart from the usual practice set out in clause 6.6(b) of the Practice Note 2014 and cannot reach agreement about that with the other parties, then any application must be made within 20 working days of the date of this decision.

For the Court:



DA Kirkpatrick
Environment Judge



IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

AP 214/93

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of Appeals pursuant to that Act from Decision No W53/93, and Decision ENF 210/92 of the Planning Tribunal

BETWEEN COUNTDOWN PROPERTIES (NORTHLANDS) LIMITED and COUNTDOWN FOODMARKETS NEW ZEALAND LIMITED

Appellant

AND THE DUNEDIN CITY COUNCIL

Respondent

AND M L INVESTMENT COMPANY LIMITED and WOOLWORTHS (NZ) LIMITED

Second Respondent

AP 215/93

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of An Appeal thereunder from Decision No W53/93 of the Planning Tribunal

BETWEEN FOODSTUFFS (OTAGO/SOUTHLAND) PROPERTIES LIMITED

Appellant

AND THE DUNEDIN CITY COUNCIL

Respondent

AND M L INVESTMENT COMPANY LIMITED and WOOLWORTHS (NZ) LIMITED

Second Respondent

AP 216/93

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of An Appeals pursuant to that Act from Decision No W53/93 and Decision ENF 210/92 of the Planning Tribunal

BETWEEN TRANSIT NEW ZEALAND

Appellant

AND THE DUNEDIN CITY COUNCIL

Respondent

AND M L INVESTMENT COMPANY LIMITED and WOOLWORTHS (NZ) LIMITED

Second Respondent

Coram: Barker J (presiding)
Williamson J
Fraser J

Hearing: 1,2,3,4,7,8 February 1994 (in Christchurch)

Counsel: R J Somerville and R J M Sim for Foodstuffs
T C Gould and D G Bigio for Woolworths
E D Wylie for Countdown
A J P More for Transit New Zealand
N S Marquet for Dunedin City Council

Date of Judgment: 7 March 1994

JUDGMENT OF THE COURT

Introduction:

These appeals from a decision of the Planning Tribunal ('the Tribunal') given on 4 August 1993 have significance beyond their particular facts. They involve the first consideration by this Court of various provisions of the Resource Management Act 1991 ('the RMA') - a statute which made material alterations to the way in which land use and natural resources are managed. A number of statutes, notably the Town & Country Planning Act 1977 ('the TCPA') were repealed by the RMA and the regimes which they imposed were altered significantly, both in form and in substance. Although the RMA was amended extensively last year, counsel assured the Court that its decision is likely nevertheless to offer long-term guidance to local authorities and to professionals concerned with planning. Counsel were agreed that transitional provisions in the 1993 amendment required these appeals to be determined under the provisions of the 1991 Act without reference to the 1993 amendment.

All three appeals were heard together by a Court of three Judges which was assembled because of the importance of the issues raised and the need for guidance in the early

stages of the RMA's regime. At the commencement of the hearing, the Court was advised by counsel for the appellant, Transit NZ Limited ('Transit') that his client had reached a settlement with the first respondent, the Dunedin City Council ('the Council') and the second respondents, M L Investment Company Limited and Woolworths (NZ) Ltd, (called collectively 'Woolworths'). This settlement was on the basis that, if the other two appeals were substantially to fail, agreement had been reached on the appropriate rules for parking, access and traffic control which should be incorporated in the relevant section of the Council's District Plan.

Counsel for Transit was given leave to be absent for the bulk of the hearing but appeared for the hearing of submissions by the other appellants who claimed that the proposed settlement was incapable of implementation. Those other appellants were -

(a) Countdown Properties (Northlands) Limited and Countdown Foodmarkets New Zealand Limited (collectively called 'Countdown'); and

(b) Foodstuffs (Otago/Southland) Limited ('Foodstuffs').

Like most local bodies in New Zealand, the Dunedin City Council underwent major territorial changes in 1991 as a result of local body re-organisation. Instead of being just one of several territorial authorities in the

greater Dunedin region, the Council now exercises jurisdiction over a greatly enlarged area which includes all the former Dunedin municipalities plus areas of rural land formerly located in several counties. Allowing a certain straining of the imagination in the interests of municipal efficiency, the 'city', as now defined, penetrates into Central Otago, past Hyde, and up the northern coast, including within its boundaries a number of seaside townships such as Waikouaiti.

In consequence, the Council inherited a pot-pourri of District Schemes under the 1977 Act, some urban, some rural. These schemes became the Council's transitional district plan under the RMA. The task imposed by the RMA on the Council of preparing a comprehensive plan for this new and varied territorial district is a daunting one, particularly in view of the wide consultation required by the RMA. It was estimated at the hearing before the Tribunal that the section of the new district plan covering urban Dunedin will not be published until late 1994 at the earliest.

We note that the RMA has introduced a whole new vocabulary which has supplanted the well-known terms used by the TCPA. For example, "scheme" becomes "plan"; "ordinance" becomes "rule". Presumably, the drafters of the RMA wanted to emphasise that Act's new approach; it was not to be seen as a mere refurbishment of the TCPA.

One of the many ways in which the RMA differs from the TCPA, lies in the ability of persons other than public bodies, to request a Council to initiate changes to a district plan. The cost is met by the person proposing the plan change. Under the TCPA, only public authorities of various sorts could request a scheme change. The process by which this kind of request is made and implemented is an important feature of these appeals and will be discussed in some detail later.

Essentially, these appeals are concerned with a request by Woolworths to the Council, seeking a plan change to rezone a central city block from an existing Industrial B zone to a new Commercial F zone. On about 40% of the area of this block (which is bounded by Cumberland, Hanover, Castle and St Andrew Streets and has a total land area of some 2 hectares), stands a large building, formerly used as a printing works. Woolworths wishes to develop a "Big Fresh" supermarket within this building; all parking as well as the retail outlet would be under the one roof. Had Woolworths sought an ad hoc resource management consent under the RMA to use the land in this way (cf the 'specified departure' procedure under the TCPA) Countdown and Foodstuffs would not have been able to object. When a plan change is advertised, however, there is no limit to those who may object.

Both appellants operate supermarkets within the same general area in or near the Dunedin central business

district. They lodged submissions in opposition to the plan change with the Council and appeared at a hearing of submissions before a Committee of the Council. Dissatisfied with the Council's decision in favour of the plan change, they initiated references to the Tribunal under clause 14 of the First Schedule to the RMA ('the First Schedule'). The concept of a 'reference' of a proposed plan change to the Tribunal instead of an appeal to the Tribunal is part of the new approach found in the RMA. The appellants subsequently appealed to this Court alleging errors of law in the Tribunal's decision. Appeal rights to this Court are governed by S.299 of the RMA but are similar in scope to those conferred by the TCPA.

Amongst numerous parties, other than Countdown and Foodstuffs, making submissions to the Council were two who subsequently sought references of the proposed plan change to the Tribunal; i.e. Transit and the NZ Fire Service. Transit's concern was with the efficiency of the State Highway network and with parking and access;, two of the streets bounding the proposed new Commercial F zone constitute the north and southbound lanes respectively of State Highway 1. The Fire Service was concerned with the effect of the traffic generated by various vehicle-orientated retail outlets on the efficient egress of fire appliances from the nearby central fire station. NZ Fire Service did not appeal to this Court.

In addition to the references, there was a related application to the Tribunal by Countdown seeking the following declarations under S.311 of the RMA -

(a) whether the Council could change its transitional district plan; and

(b) whether the Council could lawfully complete the evaluation and assessments required by S.32 of the RMA subsequent to the public hearing of submissions on the plan change.

The first question was considered by Planning Judge Skelton sitting alone; on 1 February 1993, he determined that it was permissible for Woolworths to request the Council to change its transitional district plan at the request of Woolworths and to promote the change in the manner set out in the First Schedule. There was no appeal against that decision. The second question was subsumed with other matters raised in the references, and was left for argument in the course of the substantive hearing before the Tribunal.

That hearing before the Tribunal chaired by Principal Planning Judge Sheppard, lasted 16 sitting days; its reserved decision occupies some 130 pages. The decision is notable for its clarity and comprehensiveness; we have been greatly assisted in our consideration of the complex issues by the way in which the Tribunal has both

expressed its findings and discussed the statutory provisions which are at times difficult to interpret.

Because the decision of the Tribunal contains all the necessary detail, we do not need to repeat many matters of fact and history adequately summarised in that decision. Nor do we feel obliged to refer to all the Tribunal's reasons particularly where we agree with them. Aspects of the essential chronology need to be mentioned.

Chronology:

Woolworths' request, made pursuant to S.73(2) of the RMA, was received by the Council on 19 December 1991. In addition to asking for the change of zoning of the relevant land from Industrial to Commercial, Woolworths provided the Council with an environmental analysis of the request and some suggested rules for a new zone. On 20 January 1992, the Planning and Environmental Services Committee of the Council, acting under delegated authority, resolved to "agree to the request" in terms of Clause 24(a) of the First Schedule of the Act ('the First Schedule'). This resolution was made within 20 working days of receiving the request as required by Clause 24. The Council also resolved to delegate to the District Planner authority to prepare the plan change, undertake all necessary consultations and to request and commission all additional information as required by the RMA. There was consultation by the Council with Woolworths as

envisaged by the legislation, which requires private individuals seeking plan changes to underwrite the Council's expenses in undertaking the exercise.

Early in February 1992, the Council informed the owners of land in the block and some statutory authorities of the proposal. Public notice of the proposed plan change was given on 21 March 1992. It advised the purpose of the proposed change as "to provide for vehicle-orientated large scale commercial activity on the selected area of land on the fringe of the Central Business District." The proposed changes to policy statements and rules in the District Plan were opened to public inspection and submission.

Some 15 submissions on the plan change were received by the Council and a summary prepared. A further 66 notices of opposition or support were then generated; a public hearing was convened at which submissions were made by the parties involved in this present appeal plus many others who had either made submissions or who had supported or opposed the submissions of others. After the public hearing, a draft report purporting to address matters contained in S.32 of the RMA, was presented to the Council Planning Hearings Committee by a Mr K. Hovell, a consultant engaged by the Council to advise it on the proposed change. It was found by the Tribunal as fact, that the analysis required by S.32 (to be discussed in some detail later) was not prepared by the Council

until after the hearing of submissions. Obviously therefore, no draft S.32 report was available for comment at the public hearing of the submissions.

After the hearing of submissions, amendments were made by the Committee to a draft S.32 analysis prepared by Mr Hovell; a final version was prepared by him at the Committee's direction on 31 July 1992. The Tribunal found that Mr Hovell acted as a secretary and did not advise the Committee at this stage of its deliberations. On 11 August 1992, the Committee acting under delegated powers, decided that the change be approved. It had amended both the policy statements and the rules from those which had originally been advertised. The extent to which these amendments could or should have been made will be discussed later. All those who had made submissions were supplied with the Council's decision, a legal opinion from the Council's solicitors and a revised report from Mr Hovell headed "Section 32 Summary".

The extensive hearing before the Tribunal ensued as a result of the references made by the present appellants and NZ Fire Service. In broad terms, the effect of the Tribunal's decision was to direct the Council to modify the proposed plan change in a number of respects; however, it approved the change of zoning of the block in question from Industrial to Commercial.

Foodstuffs, Countdown and Transit exercised their limited right of appeal to this Court. A number of conferences with counsel and one defended hearing in Wellington refined the issues of law. Counsel co-operated so as to avoid unnecessary duplication of submissions. We record our gratitude to all counsel for their careful and full arguments.

Approach to Appeal:

We now deal with the various issues raised before us. Before doing so, we note that this Court will interfere with decisions of the Tribunal only if it considers that the Tribunal -

(a) Applied a wrong legal test; or

(b) Came to a conclusion without evidence or one to which on evidence, it could not reasonably have come; or

(c) Took into account matters which it should not have taken into account; or

(d) Failed to take into account matters which it should have taken into account.

See Manukau City v Trustees of Mangere Lawn Cemetery (1991), 15 NZTPA 58, 60.

Moreover, the Tribunal should be given some latitude in reaching findings of fact within its areas of expertise.

See **Environmental Defence Society v Mangonui County Council** (1988), 12 NZTPA 349, 353.

Any error of law must materially affect the result of the Tribunal's decision before this Court should grant relief. **Royal Forest & Bird Protection Society Inc v W.A. Habgood Ltd** (1987), 12 NZTPA 76, 81-2.

In dealing with reformist new legislation such as the RMA, we adopt the approach of Cooke, P in **Northern Milk Vendors' Association Inc v Northern Milk Ltd** [1988] 1 NZLR 530, 537. The responsibility of the Courts, where problems have not been provided for especially in the Act, is to work out a practical interpretation appearing to accord best with the intention of Parliament.

In dealing with the individual grounds of appeal, we adhere to counsel's numbering. Some of the grounds became otiose when Transit withdrew from the hearing and one ground was dismissed at a preliminary hearing.

Grounds 1, 2 and 3:

1. **The Tribunal misconstrued the provisions of S.32(1) when it held that the first respondent adopted the objectives, policies, and rules contained in Plan Change No 6 at the time when it made its decision that the plan change be approved in its revised form;**

2. **The Tribunal applied the wrong legal tests and misconstrued the Act when it concluded that the first respondent performed the various legal duties imposed on it by S.32;**

3. **The Tribunal misconstrued S.32 and S.39(10(a) of the Act and failed to apply the principles of natural justice by holding that the report of the first respondent's S.32 analysis did not need to be publicly disclosed before the first respondent held a hearing on proposed plan change 6.**

These grounds are concerned with the Council's duty under S.32 of the RMA and can be dealt with together by a consideration of the following topics -

(a) Was the Council correct in not fulfilling its duties under S.32(1) of the RMA before it publicly notified the plan change and called for submissions? Put in another way, was the Council right to carry out the S.32 analysis after the public hearing of submissions but before it published its decision?

(b) Should the Council have made a S.32 report available to persons making submissions on the plan change?

(c) Was the Council's actual S.32 report an adequate response to its statutory responsibility?

(d) If the Council was in error in its timing of the S.32 report or in the adequacy of the report as eventually submitted, was the error cured by the extensive hearing before the Tribunal an independent judicial body before which all relevant matters were canvassed?

S.32 of the Act at material times read as follows

> "32 **Duties to consider alternatives, assess benefits and costs, etc** - (1) In achieving the purpose of this Act, before adopting any objective, policy, rule or other method in relation to any function described in

subsection (2), any person described in that subsection shall -

(a) Have regard to -
  (i) the extent (if any) to which any such objective policy, rule, or other method is necessary in achieving the purpose of this Act; and
  (ii) other means in addition to or in place of such objective, policy rule, or other method which, under this Act or any other enactment, may be used in achieving the purpose of this Act, including the provision of information, services, or incentives, and the levying of charges (including rates); and
  (iii) the reasons for and against adopting the proposed objective, policy, rule, or other method and the principal alternative means available, or of taking no action where this Act does not require otherwise, and

(b) Carry out an evaluation, which that person is satisfied is appropriate to the circumstances, of the likely benefits and costs of the principal alternative means including, in the case of any rule or other method, the extent to which it is likely to be effective in achieving the objective or policy and the likely implementation and compliance costs; and

(c) Be satisfied that any such objective, policy, rule, or other method (or any combination thereof) -
  (i) is necessary in achieving the purpose of this Act; and
  (ii) is the most appropriate means of exercising the function, having regard to its efficiency and effectiveness relative to other means.

(2) Subsection (1) applies to -

(a) The Minister, in relation to -
  (i) the recommendation of the issue, change, or revocation of any national policy statement under sections 52 and 53;
  (ii) the recommendation of the making of any regulations under section 43.

(b) The Minister of Conservation, in relation to -
  (i) the preparation and recommendation of New Zealand coastal policy statements under section 57'

(ii) the approval of regional coastal plans in accordance with the First Schedule.

(c) Every local authority, in relation to the setting of objectives, policies, and rules under Part V.

(3) No person shall challenge any objective, policy, or rule in any plan or proposed plan on the grounds that subsection (1) has not been complied with, except -

(a) in a submission made under clause 6 of the First Schedule in respect of a proposed plan or change to a plan; or

(b) In an application or request to change a plan made under section 64(4) or section 65(4) or section 73(2) or clause 23 of the First Schedule."

Consideration must first be given to the method ordained by the RMA for implementing a plan change initiated by persons other than public bodies. S.73(2) provides -

"Any person may request a local authority to change its district plan and the plan may be changed in the manner set out in the First Schedule."

Clause 2 of the First Schedule requires -

"A written request to the local authority defining the proposed change with sufficient clarity for it to be readily understood and to describe the environmental results anticipated from the implementation of the change".

An applicant is not required to provide any other assessments or evaluations, although Woolworths did so.

Under clause 24 of the First Schedule, the local authority is required to consider the request for a plan change. Within 20 working days it must either "agree to the request" or "refuse to consider" it. The words

"agree to the request" are unfortunate; on one reading, the local authority might be seen as being required to assent to the plan change (i.e. agree to the request for a plan change) within 20 working days. We accept counsel's submissions that the only sensible meaning to be given to the phrase "agree to the request" is "agree to process or consider the request". This interpretation is consistent with the remainder of the First Schedule. The local authority may refuse to consider the request on one of the narrow grounds specified in clause 24(b) or defer preparation or notification on the grounds stated in clause 25. The Council's decision to refuse or defer a request for a plan change may be the subject of an appeal (not a 'reference') to the Tribunal (clause 26).

Clause 28 requires the local authority to prepare the change in consultation with the applicant and to notify the change publicly within 3 months of the decision to agree to the request; (copies of the request must be served on persons considered to be affected). 'Any person' is entitled to make submissions in writing; clause 6 details the matters which submissions should cover. In particular, a submitter must specify what it is he, she or it wants the Council to do. There is no statutory restriction on who can make a submission.

It is doubtful whether the local authority can make a submission to itself under the RMA in its original form.

The Court of Appeal in **Wellington City Council v Cowie** [1971] NZLR 1089 held that a local authority could not object to its own proposed scheme. The TCPA was changed to permit this. A similar provision was not found in the RMA; we were told by counsel that the 1993 amendment now permits the practice. In this case, the Council's development planner lodged a submission which the Tribunal found was lodged in his personal capacity.

The local authority must prepare a summary of all submissions and then advertise the summary seeking further submissions in support or opposition. The applicant for the plan change is entitled to receive a copy of all submissions and has a right to appear at the hearing as if the applicant had made a submission and had requested to be heard. The local authority must fix a hearing date, notifying all persons who made a submission and hold a public hearing; the procedure at the hearing is outlined in S.39 of the RMA; notably, no cross-examination is allowed.

After hearing all submissions, the local authority must give its decision "regarding the submissions" and state its reasons for accepting or rejecting the submissions. Any person who made a submission, dissatisfied with the decision of the local authority, has the right to seek a reference to the Tribunal.

As noted earlier, the words "refer" or "reference", refer to the way in which the jurisdiction of the Tribunal is invoked on plan changes by those unhappy with the Council's decision on the submissions. We shall discuss the Tribunal's powers on a reference later in this judgment. The Tribunal, after holding a hearing, can confirm the plan change or direct the local authority to modify, delete or insert any provision or direct that no further action be taken on the proposed change (clause 27 of the First Schedule). The Council may make amendments, of a minor updating and/or 'slip' variety before resolving to approve the plan change (as amended as a result of the hearing of submissions or any reference to the Tribunal).

The Act does not define the phrase used in S.32(1) "before adopting". The word "adopting" is not used in the First Schedule, which in reference to plan changes uses the words "proposed" (clause 21), "prepared" (clause 28), "publicly notified" (clause 5), "considered" (clauses 10 and 15), "amended" (clause 16), and "approved" (clauses 17 and 20). Section 32 also uses "to set" which implies a sense of finality.

Accepted dictionary meanings of the word "adopt" are "to take up from another and use as one's own" or "to make one's own (an idea, belief, custom etc) that belongs to or comes from someone else". The Tribunal held that the meaning of the word adopting is "the act of the

functionary accepting that the instrument being considered is worthy of the action that is appropriate to its nature".

The Tribunal's findings on the local authority's S.32 duties can be summarised thus.

(a) Read in the context of S.32(2) the word "adopting" as used in S.32(1) refers to the action of a local authority which, having heard and considered the submissions received in support of or in opposition to proposed objectives policies and rules, decides to change the measure from a proposal to an effective planning instrument.

(b) The duties imposed by S.32 are to be performed before adopting", that is, before the change is made into an effective planning instrument.

(c) All that the RMA requires is that the duties be performed at some time before the act of adoption.

(d) If Parliament had intended that in every case S.32 duties were to be performed before public notification of a proposed measure, and that people would have been entitled to make submissions about the performance of them, then there would have been words to express that intention directly.

(e) A separate document of the local authority's conclusions on the various matters raised in S.32(1) is not required to be prepared, let alone published for representations or comments, before the decision is made.

(f) In relation to change 6, the Council adopted the objectives, policies and rules of the change at the time when, having heard and deliberated on the submissions received, it made its decision than the planned change be approved in the revised form.

The essential argument for Foodstuffs and Countdown is that the Tribunal was wrong in law and that S.32 requires the Council to prepare the report before advertising the plan change or at the latest before the hearing of submissions regarding a plan change; it cannot fulfil its obligations under S.32 after that point.

Interpreting the provisions of S.32 of the RMA must commence with an examination of the words used in the section having regard not only to their context, but also to the purposes of the Act. S.32(2) describes the persons to whom the duties it imposes shall apply. They are the Minister for the Environment, the Minister of Conservation and every local authority.

So far as the Ministers are concerned, the description relates only to "recommendations" or the "preparation and recommendation" of policy statements or approvals. A

local authority is limited to "the setting" of objectives, policies and rules under Part V which applies to regional policy statements, regional plans and district plans. A distinction has thus been made in the section between Ministers and local authorities. In relation to Ministers, the section expressly refers to recommendation or preparation and recommendation whereas with local authorities, the section refers to the **setting** of objectives, policies and rules.

Under S.32(1) the local authority involved in the setting of objectives, policies and rules must complete certain duties before adopting such objectives, policies or rules. We see no reason to read the phrase "before adopting" other than in its plain and ordinary meaning. Adopting involves the local authority making an objective, policy or rule its own. The Appellants submitted that the phrase requires the duties to be carried out prior to public notification of change. They argued that the local authority adopts a privately requested change prior to public notification because it had, by then, set or settled the substance of the requested change.

We do not accept this submission because the procedure in Clauses 21 to 28 (inclusive) of the First Schedule does not envisage the local authority making the changes its own until after public notification, submissions, and decisions on submissions. It is inconsistent with that

procedure to conclude that the local authority adopted (or made its own) the proposed change prior to the decision on submissions.

A local authority's obligation under Clause 28 of the First Schedule is to prepare a requested change of plan in consultation with an applicant. The process relates to the form rather than the merits of the change. Even after public notification, the local authority has a discretion, on the application of an applicant, to convert the application to one for a resource consent rather than for a change to a plan (Clause 28(5)(a)). To decide that a local authority is adopting a requested change to an objective, policy or rule prior to its decision on submissions requires a conclusion which limits the meaning of "adopting" to encompassing prescribed procedural steps. No decision or positive act of will by the local authority would be required.

Lord Esher, MR in **Kirkham v Attenborough**, [1897] 1 QB 201, 203 held that, with a contract for sale of goods, there must be some act which showed that a transaction was adopted, an act which was consistent only with the person being a purchaser. In this case, there is no act of the Council which shows anything other than an initial acknowledgment that: (a) the proposed change has more than a little planning merit; and (b) a performance of prescribed duties to invest the proposed plan change with a form whereby its merits can be assessed by the public

submission process. There can be no act or decision, inconsistent with the performance of the obligations of the local authority until it has reached its decision upon the submissions.

During argument, two obstacles to this view were signposted. They concerned, first, S.32(3) and, second, S.19. It was submitted that S.32(3) clearly indicated that "before adopting" must mean "prior to public notification"; otherwise, the public would not have the right to challenge an objective policy or rule on the grounds of non-compliance with S.32. This conclusion followed, it was argued, from the necessity for the challenge to be in a submission under Clause 6 in respect to a proposed plan or change to a plan.

The Tribunal accepted that S.32(3) was capable of giving that indication but concluded that, if Parliament had intended the S.32 duties to be performed before public notification, then there would have been express words to that effect.

The first point to consider is whether S.32(3) applies to a privately requested plan change. In the definition section of the RMA, "proposed plan" means "a proposed plan or change to a plan that has been notified under clause 5 of the First Schedule but has not become operative in terms of clause 20 of the First Schedule; but does not include a proposed plan or change originally

requested by a person other than the local authority or a Minister of the Crown".

The Tribunal held: (a) there was no exlusion of privately requested changes in the words "change to a plan" in S.32(3)(a); (b) the use of the term "proposed plan" in the first phrase of S.32(3) does not preclude a challenge to the Council's performance of its S.32 duties in a submission under clause 16 of the First Schedule.

With respect we do not agree. There is no reason to read down the second part of the definition of "proposed plan" which clearly indicates that the definition of proposed plan does not apply to privately requested plan changes; accordingly, there can be no restriction as to the time when persons making submissions on a privately requested plan change may raise non-compliance with S.32 by the Council. They do not have to do so in their submission.

This approach to S.32(3) supports our view on the timing of the "adopting" of the plan change by the local authority. The Tribunal held, in this case, that the plan was not 'adopted' for the purposes of S.32 until it had heard and considered the submissions on the plan change. It was enough for it to provide the S.32 report at the time when it gave its decision on the submissions which it had heard and considered.

We agree with the Tribunal's decision in the result, although differing on the interpretation of S.32(3). We hold that the "adopting" by the local authority under S.32(1) takes place at a different time with a privately requested plan change than it does when the plan change is initiated by the local authority itself or at the request of another local authority or a Minister. This view follows from our interpretation of S.32(3). A person making a submission on a plan change instituted by a Minister or local authority can challenge the sufficiency of the S.32 report only in his or her submission on the plan change. We give this interpretation in the hope this important Act will prove workable for those who must administer it but at the same time, preserve the rights of persons affected by a plan change.

When a private individual requests a scheme change, the local authority's options are fairly limited. It can only reject the application out of hand if a plan change is 3 months away or if the request is frivolous,vexatious or shows little or no planning merit or is unclear or inconsistent or affects a policy statement or plan which has been operative for less than two years. At the stage of the initial request, the local authority could not possibly have carried out a potentially onerous S.32 investigation. It may not have time to do so even within the 3 months required under clause 28 of the First Schedule before notifying publicly the plan change.

Whilst a privately-inspired plan change may pass the threshold test, as the investigative process unrolls, the local authority may come to the view that the requested change is not a good idea; it may wish to await the hearing and consideration of the submissions before deciding whether to 'adopt' it. It will have to consider the wider implications of a proposed plan change during a period limited by clause 28 to 3 months. These considerations would often be canvassed at the hearing of submissions, as they were in this case, without a S.32 report being prepared. A local authority might not be therefore in a position to 'adopt' the plan change until it had the S.32 report; it could need the public hearing and consideration of submissions to flesh out that report to its own satisfaction.

In response to the argument that those making submissions should have access to a S.32 report because the Act in S.32(3) clearly envisages their having the right to comment on a S.32 report, the answer lies in the interpretation we have given to S.32(3). There is no restriction on the time in which a S.32 report can be challenged on a privately requested plan change; therefore, persons wishing to refer the Council's decisions or submissions to the Tribunal can criticise the S.32 report by means of a reference to the Tribunal.

However, the situation is different for those plan changes to which S.32(3) applies; i.e. plan changes

initiated by the local authority itself or requested by a regional authority or another territorial authority or by a Minister. In those situations, the S.32 report would have to be available at the time the plan change is advertised because of the limitation contained in S.32(3) on the right to comment on the adequacy or otherwise of a S.32 report. For scheme changes requested by a Minister or a local authority, such comment may only be made in a submission on the plan change.

It is no answer to say that a person making a submission in advance of knowing the contents of a S.32 report should include as a precaution a statement that the S.32 report was inadequate; this was suggested in argument by counsel for the Council. Such a course would make a mockery of the process and would imply little cause for confidence in the competence of the local authority.

In this scenario, the difference between 'adopt' and 'approval' is quite wide. The approval, which is the act of making a formal resolution about and affixing the seal to the text of the change may never happen; the result of the submissions to the Council or of a Tribunal direction on a reference may cause the local authority to find that its 'adopting' of the change was erroneous. However, with the plan change initiated privately, adopting comes at the time when the Council decides after hearing all the submissions that it should adopt the

change. Formal approval may follow later, depending on whether there are references to the Tribunal.

When the local authority itself initiates the plan change, the situation is simple; it should not do so unless it is then in a position to 'adopt' a plan change.

In the case of a plan change requested by another authority or by the Minister to which S.32(3) applies, a Council receiving the request will have to 'adopt' the change prior to advertising the change and therefore complete its S.32 report by that stage. Again, the Council may not ultimately 'approve' the change because it may come to a different view on the wisdom of doing so after hearing the submissions or after a Tribunal direction.

As to the argument that time is needed for a S.32 report, one imagines that other local authorities or a Minister in requesting the change should be in a position to supply the territorial authority with most of the information needed for its S.32 evaluation of the proposal. If there were not time available within the 3 months, then there is power for the local authority under S.38(2) to increase the time to a maximum of double. One would not envisage, however, a regional council or a Minister requesting a change without providing sufficient prima facie information justifying the request which would make the adopting process simple.

The time for 'adopting' the plan change therefore in terms of S.32, is a 'moveable feast' depending on whether or not the plan change is initiated by a private individual.

S. 19 of the RMA is as follows -

> "19. **Change to plans which will allow activities - Where -**
>
> (a) A new rule, or a change to a rule, has been publicly notified and will allow an activity that would otherwise not be allowed unless a resource consent was obtained; and
>
> (b) The time for making or lodging submissions or appeals against the new rule or change was expired and -
>
> (i) No such submissions or appeal have been made or lodged; or
> (ii) All such submissions have been withdrawn and all such appeals have been withdrawn or dismissed -
>
> then, notwithstanding any other provision of this Act, the activity may be undertaken in accordance with the new rule or change as if the new rule or change had become operative and the previous rule were inoperative."

This section allows activities to be undertaken in accordance with a new rule as if it had become operative, provided that the new rule has been publicly notified and the time for making submissions or appeals against the new rule has expired and no submissions or appeals have been made. The appellants argued that this section implies that consideration under S.32 must take place before the time for making or lodging submissions or

appeals against the new rule have expired; otherwise, activity could be undertaken which was contrary to S.32.

The Tribunal did not place any weight on the argument under S.19. We have carefully considered the submissions and conclude that, while S.19 may appear to produce the possibility of an anomalous situation, it does not affect the powers of a local authority in setting objectives, policies or rules. In particular, it does not reflect upon the time at which the local authority adopts such an objective, policy or rule. Section 19 is concerned with activities which may be undertaken. It is not concerned, as S.32 is, with the rule-making process. Even if a person takes the risk of commencing activity before approval of a change, that activity does not affect the policy, objective or rule itself. Whatever the position about such activity, a local authority is still required to be satisfied of the matters arising under S.32(1)(a), (b) and (c). Certainly there are no words within S.19 which purport to affect the duty under S.32.

Our general approach is supported, we think, by the difference between officially promoted and privately requested changes in their interim effect. S.9(1) of the RMA provides as follows-

> "No person may use any land in a manner that contravenes a rule in a district plan or proposed district plan unless the activity is -

(a) Expressly allowed by a resource consent granted by the territorial authority responsible for the plan; or
(b) An existing use allowed by S.10 (certain existing uses protected).
..."

As noted, 'proposed district plan' includes a proposed change initiated by a local authority or Minister but not a privately requested change. Consequently an officially promoted plan has general planning effect from the date of public notification, whereas a privately requested plan has no general planning effect until approval. S.19 bears to some extent on the question of effect before approval but it is limited to activities allowed by the new rule where there is no opposition to it; in our opinion, as previously discussed, it does not support the appellants' case.

In the result, we believe that the Tribunal came to the correct decision about the timing of the S.32 report; in the circumstances of this case, the report was properly 'adopted' at the time when the Council gave its decision on the submissions.

In Ground 3 of the appeal it was argued that the principles of natural justice required persons making submissions to a local authority to have a S.32 report available to them prior to the hearing of submissions. Reference was made to S.39(1)(a) of the RMA requiring an appropriate and fair procedure at a hearing.

We did not consider that there is any merit in this submission. S.39 requires a public hearing with appropriate and fair procedures. Such a hearing took place on this occasion. There was no report or analysis under S.32 available since the local authority had been under no duty to carry it out prior to that time. The applicant and those making submissions were able to call evidence. When the report did come into existence, it was circulated to the parties. Later, during the reference to the Tribunal, there was ample opportunity to criticise the content of the report and to make submissions and call evidence concerning all aspects of it. We reject Ground 3.

The adequacy of the report prepared by the First Respondent is challenged in Ground 2. It was claimed that the Council (a) had taken into account irrelevant considerations, namely, Sections 6, 7 and 8 of the RMA; (b) had failed to take into account the matters; and had (c) applied the wrong test.

These same criticisms were considered by the Tribunal which concluded that, while the Council's S.32 analysis report did not scrupulously follow the language of S.32(1), it was not substantially deficient in any respect. After weighing the appellant's detailed criticisms, we are of the view that the Tribunal was correct in the robust and practical view that it took. It was suggested in submissions that the Tribunal

incorrectly permitted an inadequate compliance by the Council with its S.32 duties upon the basis that local authorities were still learning the extent of their responsibilities under the Act. We do not share that view. We note that the Tribunal stated -

> "In our opinion failures to perform the S.32 duties in substance which are material to the outcome should not be excused. However deficiencies of form that are not material to the outcome, may properly be tolerated, at least in the introductory period when functionaries are still learning the extent of their responsibilities under the Act."

Earlier it stated -

> "Although functionaries are not to be encouraged in expecting that failure to comply with duties imposed by S.32 can be condoned compliance needs to be considered in terms of a reasonable comparison of the material substance of what is done with what is required if any deficiency that may be discovered from a punctilious scrutiny of a S.32 assessment results in a requirement to return to the starting point as in some board games, the Act will not provide a practical process of resource management addressing substance not form."

We agree with those views.

Since our conclusions are that the Tribunal was not in error in relation to either the timing of the S.32 exercise or the adequacy of the First Respondent's S.32 analysis, there is no need to consider in depth the matter raised in the fourth question under this heading.

It is sufficient to note that the references to the Tribunal took place by way of a complete re-hearing. Any defect of substance in the Council's decision and

S.32 analysis was capable of exploration and resolution by the Tribunal. Even if there had been an error, we believe that it would have been corrected by the detailed, careful and extensive hearing by the Tribunal over a period of 16 days when detailed evidence was given by 19 witnesses and thorough submissions made by experienced Counsel. We are conscious of the approach described in Calvin v Carr, (1980) AC 574, A J Burr Limited v Blenheim Borough, [1982] NZLR 1 and Love v Porirua City Council, [1984] 2 NZLR 308.

We consider that this was one of those instances where any defects at the Council stage of hearing were cured by the thorough and professional hearing accorded to all parties by the Tribunal. Accordingly, grounds of appeal 1, 2 and 3 are dismissed.

Ground 4. **"That the Tribunal applied the wrong legal tests and misconstrued the Act when it held that the first respondent did not exceed its lawful authority in making the amendments to the proposed plan change that were incorporated in the revised version of the change appended to its decision."**

A revised and expanded version of the plan change as advertised emerged when the Council's decision was issued after hearing submissions. The appellants submitted that because many of the changes had not been specifically sought in the submissions lodged with and notified by the Council, that the Council's action in making many of the changes was ultra vires. Mr Wylie for Countdown presented detailed submissions comparing

relevant segments of the change as advertised with the counterparts in the Council's finished product.

Mr Marquet for the Council helpfully provided a compilation which, in each case, demonstrated: (a) the provision as advertised; (b) the provision in the form settled by the Council after the hearing of submissions; (c) the appellants' criticism of the alteration or addition; (d) (where applicable) the submission on which the alteration or addition was said by the Tribunal to have been based; (e) the Tribunal's decision in respect of each alteration or addition; and (f) other relevant references. We have found this compilation extremely helpful; we do not think it necessary to embark on the same detailed analysis of Counsel's submissions which occupied some 20 pages of the Tribunal's judgment, because we agree generally with the Tribunal's approach and its decision in respect of each individual challenge.

The Tribunal categorised the challenged variants into five groups:(a) Those sought in written submissions; (b) Those that corresponded to grounds stated in submissions; (c) Those that addressed cases presented at the hearing of submissions; (d) Amendments to wording not altering meaning or fact; (e) Other amendments not in groups (a) to (d).

Clause 6 of the First Schedule refers to the making of submissions in writing on any proposed plan change. A

person making a submission is required by clause 6 to state whether he/she wishes to be heard in respect of the submissions and to state the decision which the person wishes the local authority to make. A prescribed form requires the statement of grounds for the submission.

A summary of the submissions is advertised by the Council under clause 7(a) and submissions for or against existing submissions are then called for by way of public advertisement. A summary of submissions can only be just that; persons interested in the content of submissions are entitled to inspect the text of the submissions at the Council offices so that an informed decision on whether to support or object can be made. In this case, criticism was made of the adequacy of the summary but we see no merit in such a contention.

Many of the submissions did not specify the detailed relief or result sought. Many (such as Countdown's) pointed up deficiencies or omissions in the proposed plan. These alleged deficiencies or omissions were found in the body of the submissions. Countdown sought no relief other than rejection of the plan change. The Council in its decision accepted many of the criticisms made by Countdown and others and reflected these criticisms in the amendments found in the decision.

Clause 10 of the First Schedule states that, after hearing the submissions "the local authority concerned

shall give its decision regarding the submissions and state its reasons for accepting or rejecting them". This is to be compared with Regulation 31 of the Town and Country Planning Regulations 1978 which stated that "the Council shall allow or disallow each objection either wholly or in part..." (Emphasis added)

Counsel for the appellants submitted that clause 10 was narrower in its scope than the TCP Regulations and did not permit the Council to do other than accept or reject a submission.

Like the Tribunal, we cannot accept this submission. We agree with the Tribunal that the word "regarding" conveys no restriction on the kind of decision that could be given. We accept the Tribunal's remark that "in our experience a great variety of possible submissions would make it impracticable to confine a Council to either accepting a submission in its entirety or rejecting it".

Councils customarily face multiple submissions, often conflicting, often prepared by persons without professional help. We agree with the Tribunal that Councils need scope to deal with the realities of the situation. To take a legalistic view that a Council can only accept or reject the relief sought in any given submission is unreal. As was the case here, many submissions traversed a wide variety of topics; many of

these topics were addressed at the hearing and all fell for consideration by the Council in its decision.

Counsel relied on **Meade v Wellington City Council** (1978), 6 NZTPA 400 and **Morrow v Tauranga City Council** (A.6/80 Planning Tribunal, 13 December 1979) which emphasised that a Council's role under a scheme change was to allow or disallow an objection.

The Tribunal held that a test formulated by Holland J in **Nelson Pine Forest Limited v Waimea County Council** (1988), 13 NZTPA 69, 73 applied. In that case the Tribunal on appeal had added conditions to ordinances which made certain uses "conditional uses". The Tribunal had dismissed the appellant's appeal from the Council scheme change whereby the logging of native forests on private land became a conditional rather than a predominant use. The Judge held that this extension of ordinances articulating conditions for the conditional use, was within the jurisdiction of the Council and accordingly of the Tribunal, although no objector had expressly sought it. He said -

> "...that an informed and reasonable owner of land on which there was native forest should have appreciated that, if NFAC's objection was allowed and the logging or clearing of any areas of native forest became a conditional use, then either conditions would need to be introduced into the ordinance relating to conditional use applications, or at some stage or other the Council would adopt a practice of requiring certain information to be supplied prior to considering such applications. Had the Council adopted the conditions to the ordinances that it presented to the Tribunal at the

> time of the hearing of the objection, I am quite satisfied that no one could reasonably have been heard to complain that they had been prejudiced by lack of notice. Such a decision would accordingly have been lawful."

The Tribunal noted and applied this test in **Noel Leeming Limited v North Shore City (No 2)**, (1993), 2 NZRMA 243, 249.

Counsel for Countdown submitted that Holland J's observations were obiter and made in the context of the TCPA rather than of clauses 10 and 16 of the First Schedule. Counsel contended that Holland J's decision meant no more than that the Judge would have been prepared to find that the amendments ultimately made would have been within the parameters of and (by implication envisaged by) the objection as lodged.

There is some force in this submission. Indeed, a close reading of the decision in the **Nelson Pine Forest v Waimea County** case, the Tribunal's decision in **Noel Leeming v North Shore City (No 2)** and the Tribunal's decision in this case confirms that the paramount test applied was whether or not the amendments are ones which are raised by and within the ambit of the submissions. Holland J's reference to what an informed and reasonable owner of land should have appreciated was included within the context of his previous statement (p.73) -

> "...it is important to observe that the whole scheme of the Act contemplates notice before changes are made by a local authority to the scheme statement nd ordinances in its plan. It follows that when an

> authority is considering objections to its plan or a review of its plan it should not amend the provisions of the plan or the review beyond what is specifically raised in the objections to the plan which have been previously advertised."

The same point was made by the Tribunal in **Noel Leeming v Northshore City (No 2)** at p.249 and the Tribunal in this case at p.59 of the decision.

Adopting the standpoint of the informed and reasonable owner is only one test of deciding whether the amendment lies fairly and reasonably within the submissions filed. In our view, it would neither be correct nor helpful to elevate the "reasonable appreciation" test to an independent or isolated test. The local authority or Tribunal must consider whether any amendment made to the plan change as notified goes beyond what is reasonably and fairly raised in submissions on the plan change. In effect, that is what the Tribunal did on this occasion. It will usually be a question of degree to be judged by the terms of the proposed change and of the content of the submissions.

The danger of substituting a test which relies solely upon the Court endeavouring to ascertain the mind or appreciation of a hypothetical person is illustrated by the argument recorded in a decision of the Tribunal in **Meadow Mushrooms Ltd v Selwyn District Council & Canterbury Regional Council** (C.A.71/93, 1 October 1993). The Tribunal was asked to decide whether it was either "plausible" or "certain" that a person would have

appreciated the ambit of submissions and consequently the need to lodge a submission in support or opposition. We believe such articulations are unhelpful and that the local authority or Tribunal must make a decision based upon its own view of the extent of the submissions and whether the amendments come fairly and reasonably within them.

The view propounded by the appellants is unreal in practical terms. Persons making submissions in many instances are unlikely to fill in the forms exactly as required by the First Schedule and the Regulations, even when the forms are provided to them by the local authority. The Act encourages public participation in the resource management process; the ways whereby citizens participate in that process should not be bound by formality.

In the present case, we find it difficult to see how anyone was prejudiced by the alterations in the Council's finished version. The appellants did not (nor could they) assert that they had not received a fair hearing from either the Council or the Tribunal. They expressed a touching concern that a wider public had been disadvantaged by the unheralded additions to the plan. We find it difficult to see exactly who could have been affected significantly other than those 81 who made submissions to the Council. More importantly, it is hard to envisage that any person who had not participated

in the Council hearing and the Tribunal hearing could have offered any fresh insight into the wisdom of the proposed plan change. We make this observation considering the exhaustive scrutiny given to the proposal by a range of professionals.

We have considered the detailed arguments addressed to us concerning each of the changes in the policy statement and rules. On the whole we agree with the classifications of the Tribunal into the categories which it created itself. Mr Marquet pointed out a few instances where the Tribunal may have wrongly categorised a particular variation. Even if he were correct, that does not alter our overall view. We broadly agree with the Tribunal's assessment of each variation, many of which were cosmetic.

There is only one variation which requires specific mention. That is the change to Rule 4. After the hearing of objections, the Council added a Rule to the effect that "any activity not specified in the preceding rules or permitted by the Act is not permitted within the zone unless consent is obtained by way of resource consent".

We find that there was no submission which could have justified that insertion. Nor is the fact that the omission may have been mentioned in evidence appropriate;

because the jurisdiction to amend must have some foundation in the submissions.

We do not see this omission as fatal. The Tribunal held, correctly, that there there is power to excise offending variations without imperilling the scheme change as a whole. If Rule 4 can be excised, then S.373(3) of the RMA would apply; that subsection provides as follows -

> "Where a plan is deemed to be constituted under subsection (1), or where a proposed plan or change is deemed to be constituted under subsection (2), the plan shall be deemed to include a rule to the effect that every activity not specifically referred to in the plan is a non-complying activity."

We say generally that no-one seems to have been disadvantaged by the amendments. Even where the relationship to the submissions was somewhat tenuous, it seems quite clear that at the extensive hearing before the Council, most of the matters were discussed. If they were not discussed before the Council, they were certainly discussed before the Tribunal at great length.

In fact the whole of the appellant's case can hardly be based on any lack of due process. Their objections to the plan were considered at great length and fairness by the Tribunal. Any complaints now (such as those under this ground) are of the most technical nature. We see nothing in this ground of appeal which is also rejected.

Ground 5. **"The Tribunal erred in law when it determined the status of the written submission on plan change No. 6 made by an employee of the first respondent Mr J. Chandra, and its decision thereon was so unreasonable that no reasonable Tribunal properly directing itself in law and considering the evidence could have reached such a decision."**

This ground was struck out by Barker ACJ at a preliminary hearing.

Ground 6. **"The Tribunal applied the wrong legal test and misconstrued the Act when it declined to defer a decision on the merits of proposed plan change No 6 pending review by the first respondent of its transitional district plan.**

Ground 7. **The Tribunal misdirected itself when it determined that the Act restricts the authority of a territorial authority to decline to approve a plan change where it raises issues that have implications beyond the area encompassed by the plan change and which, in the instant case, should more appropriately be dealt with at a review of the transitional district plan.**

Although these two grounds relate to discrete findings by the Tribunal, they cover similar ground and will be considered together. The appellants claimed that significant resource management issues involving the whole Dunedin City area arise when a Council is addressing a plan change involving only part of the district; consequently, any change to the district plan must have implications for other parts of the district. The appellants asserted that the Tribunal should have referred the proposed plan change back to the Council with the direction that it should be cancelled because the forthcoming review of the whole district plan was a more appropriate way of managing the resource management issues involved.

The Tribunal heard evidence from witnesses giving reasons why it was preferable to pursue integrated management for all parts of the district and that the best time to do that was at the time of the review. The Tribunal rejected this evidence. Its decision is succinctly stated thus -

> "Although we accept that issues raised by plan change 6 would have implications for a wider area than the subject block, these proceedings are not inappropriate for addressing those issues. The proposed plan change was publicly notified; a number of submissions were received, and they were publicly notified; further submissions were received; the respondent's committee held a public hearing at which evidence was given; it made a full decision which was given to the parties; five parties exercised their rights to refer the change to the Tribunal; the Tribunal conducted a three week hearing in public at which public and private interests were represented, evidence was given by 19 witnesses, and full submissions were made. No one could be prejudiced by the Tribunal making decisions on matters in issue in the proceedings on the merits. On the contrary, the applicants would be prejudiced, and would be deprived of what they were entitled to expect, if the Tribunal were to withhold decisions on the merits on questions properly at issue before it. If we have a discretion in the matter, we decline to exercise it for those reasons."

The Tribunal went on to point out that clause 25 of the First Schedule provides that a local authority may defer preparation or notification of a privately requested change only where a plan review is due within 3 months; the review was due to be publicly notified at the end of 1994 at the earliest; it was not likely to be operative before 1997. The Tribunal further held that this was not the unusual case where a change should be deferred

and that the express provision for deferment in the First Schedule shows an intent by the Legislature that deferment is not intended for reviews that are more remote.

We entirely agree with the approach of the Tribunal. Clearly, the legislature was indicating that plan changes which had more than minimal planning worth should be considered on their merits, even although sponsored by private individuals, unless they were sought within a limited period before a review. We see no reason to differ from the view of the experienced Tribunal. This ground of appeal is also rejected.

Ground 8. "The Tribunal wrongly construed the ambit of the first respondent's lawful functions under Part V of the Act and in particular, misconstrued Ss.5(2), 9, 31(a), 31(b) and 76 by allowing the first respondent to direct and control the use and development of natural and physical resources within the subject block.

Under this ground, the appellants mounted a challenge to the way in which the Council used zoning in the proposed plan change. The appellants acknowledged that zoning was an appropriate resource management technique under the RMA. They did not accept that the RMA provides for zoning to restrict activities according to type or category unless it can be shown that the effects associated with a particular category breach "effects-based" standards. According to this argument, if any use is able to meet the environmental standards relating

to that zone, it is not lawful for rules under a plan to prevent any such use on the basis of type or description.

Counsel submitted that the plan change should have created a framework intended to enable people in communities to provide for their own social, economic and cultural wellbeing (the words of S.5 of the RMA). Much was made of the difference between the RMA and the TCPA. S.5 was said to be either or both 'anthropocentric' and 'ecocentric'.

Consideration of S.76 is required -

> "S.76.
>
> (1) A territorial authority may, for the purpose of -
>
> (a) Carrying out its functions under this Act; and
> (b) Achieving the objectives and policies of the plan,- include in its district plan rules which prohibit, regulate, or allow activities.
>
> (2) Every such rule shall have the force and effect of a regulation in force under this Act but, to the extent that any such rule is inconsistent with any such regulation, the regulation shall prevail.
>
> (3) In making a rule, the territorial authority shall have regard to the actual or potential effect on the environment of activities including, in particular, any adverse effect; and rules may accordingly specify permitted activities, controlled activities, discretionary activities, non-complying activities, and prohibited activities.
>
> (4) A rule may -
>
> (a) Apply throughout a district or a part of a district;
> (b) Make different provision for -
> (i) Different parts of the district; or
> (ii) Different classes of effects arising from an activity:

(c) Apply all the time or for stated periods or seasons;
(d) Be specific or general in its application;
(e) Require a resource consent to be obtained for any activity not specifically referred to in the plan."

The Tribunal considered that the plan change represented a reasonable and practical accommodation of the new plan with the old scheme which was acceptable for the remainder of the life of the transitional plan. It rejected the various contentions that the change was inconsistent with the transitional district plan and saw no legal obstacle to approval of the change. It characterised the Council's method of managing possible effects by requiring resource consent as a "rather unsophisticated response" to the new philosophies of the RMA but it held the response was only a temporary expedient, capable of being responsive in the circumstances.

We think that the Tribunal's approach was entirely correct. S.76(3) enables a local authority to provide for permitted activities, controlled activies, discretionary activities, non-complying activities and prohibited activities. The scheme change has done exactly this.

Similar submissions about S.5, the new philosophies of the RMA and the need to abandon the mindset of TCPA procedures were given to the Full Court in **Batchelor v Tauranga District Council (No 2)** [1992] 2 NZLR 84; that

was an appeal against a refusal by the Tribunal to grant consent to a non-complying activity. The Court said at 89 -

> "Our conclusion on the competing submissions about the application of S.5 to this case is that the section does not in general disclose a preference for or against zoning as such; or a preference for or against councils making provision for people; or a preference for or against allowing people to make provision for theselves. Depending on the circumstances, any measures of those kinds may be capable of serving the purpose of promoting sustainable management of natural and physical resources."

As in **Batchelor's** case, reference was made in the appellants' submissions to the speech in Hansard of the Minister in charge introducing the RMA as a bill. We find no occasion here to resort to our rather limited ability to use statements in parliamentary debates in aid of statutory interpretation. **Wellington International Airport Ltd v Air New Zealand Ltd**, [1993] 1 NZLR 671, 675 sets limits for resort to such debates.

To similar effect to **Batchelor's** case is a decision of Thorp J in **K.B. Furniture Ltd v Tauranga District Council** [1993] 3 NZLR 197. He too noted that the aims and objects of the RMA represent a major change in policy in that the RMA moved away from the concept of protection and control of development towards a more permissive system of management of resource focused on control and the adverse effects of activities on the environment.

We find the **Batchelor** and **K.B. Furniture** cases of great relevance when considering this ground of appeal; they looked at the underlying philosophy between the two Acts and, in particular, the application of S.5 of the RMA. In **Batchelor's** case, the Tribunal had taken a similar pragmatic view to that taken by the Tribunal in this case. The Full Court held that there was no general error in an approach which recognised the difficulty of operating with a transitional plan, conceived as a scheme under the TCPA, yet deemed to be a plan under the RMA. Zoning is a method of resource management, albeit a rather blunt instrument in an RMA context; under a transitional plan, activities may still be regulated by that means.

In the **K.B. Furniture** case, Thorp J characterised **Batchelor's** case as pointing to -

> "...the need to construe transitional plans in a pragmatic way during the transitional period, and in that consideration to have regard to the "integrity" of such plans, must have at least persuasive authority in this Court; and with respect must be right. It would be an extraordinary position if a clear statement of legislative policy as to the regulation of land use by territorial local authorities were to have no significance in the interpretation of "transitional plans". At the same time, it would in my view be equally difficult to support the contention that such plans must now be re-interpreted in such a fashion as to ensure that they accord fully with, and promote only, the new and very different purposes of the 1991 Act. That endeavour would be a recipe for discontinuity and chaos in the planning process".

We agree with this statement entirely. This ground of appeal is also dismissed.

Ground 9. **"That the Tribunal applied the wrong legal tests and misconstrued the Act when it concluded that the incorporation of Rule 4 in plan change No 6 is intra vires the Act, and in particular by concluding that Rule 4 is within the bounds of S.76 of the Act and by determining that Rule 4 is necessary with reference to the transitional plan rather than the provisions and purposes of the Act."**

This ground is rather similar to Ground 4.

Rule 4 of plan change 6 provides: "Any activity not specified in rules 1-3 above or permitted by the Act is not permitted within the zone unless consent is obtained by way of a resource consent". The contention of the appellants is that this rule purports to require persons undertaking a number of activities expressly referred to in the district plan to acquire a resource consent before they can proceed. It was submitted that this rule was ultra vires the rule-making power of S.76 (cited above).

Counsel for the appellants drew on the well-known principles that a Court is reluctant to interpret a statute as restricting the rights of landowners to utilise their property unless that interpretation is necessary to give effect to the express words of the RMA Act; in a planning context, this principle is demonstrated by such authorities as **Ashburton Borough v Clifford** [1969] NZLR 921, 943. Counsel submitted that S.9 introduced a permissive regime and that the ability of the local authority to reverse that presumption is prescribed by S.74(4)(e); that normal principles of

statutory interpretation should properly have applied to the construction of S.76.

The Tribunal held that there must be one coherent planning instrument in the context of a hybrid transitional district plan and for the purposes of marrying provisions prepared under one Act which are to change a plan prepared under another Act. "We infer that the need in such circumstances for a rule requiring resource consent to be obtained for activities in one zone that are specifically referred to elsewhere in the plan has on balance more probably been overlooked from the list in S.76(4) than deliberately excluded. The rule is clearly within the general scope of S.76(1) and we do not consider that it was ultra vires respondent's powers".

The Tribunal did not find helpful (and neither do we) various maxims of statutory interpretation advanced by the appellants. The Tribunal could not believe that the Legislature intended, by providing expressly for such rules in the circumstances referred to in S.76(4)(e), to preclude similar rules in other cases where they are needed. We think the Tribunal's reasoning sound and find no reason to depart from it.

Mr Marquet referred to a decision of the Tribunal in **Auckland City Council v Auckland Heritage Trust** (1993), 1 NZRMA 69 where Judge Sheppard held that a reference

anywhere in a plan to a particular activity was sufficient to preclude the application of S.373 to a zone which did not permit that activity. We agree with the criticisms of Mr Marquet of this decision in that no reference was made in it to the ability of a Council to make different provisions for different parts of a district.

In that case, there had been a provision protecting buildings specified in the schedule from alteration or destruction. As alteration or destruction was referred to in the plan, the Judge held that other buildings were not constrained by the rule that demolition and construction can only take place with a resource consent because that requirement was limited only to the scheduled buildings. Such a view could have the effect of taking away control formerly had under the district scheme. However, we are not concerned with the correctness of the **Auckland Heritage Trust** decision.

Even if the Tribunal were wrong in that decision, then our view, already discussed under Ground 4, is that S.373(3) applies; a transitional district plan must be deemed to include a rule to the effect that every activity not specifically referred to in the plan is a non-complying activity.

We reject this ground of appeal.

Ground 10. **"The Tribunal incorrectly applied the law relating to uncertainty and vagueness, and came to a decision which was so unreasonable in the circumstances, that no reasonable tribunal could reach the same, by holding that certain phrases in the rules in change No 6 are valid and have the requisite measure of certainty."**

At the hearing before the Tribunal it was argued by the appellants that the rules contained a number of phrases which were vague and uncertain. The Tribunal listed a number of expressions so attacked, discussed relevant authorities and ruled on the matters listed. In some cases, it upheld the submission and either severed and deleted the phrase objected to or held the whole provision invalid. In other cases it rejected the submission made and upheld the validity of the phrase concerned.

In its decision, the Tribunal dealt with this aspect of the case as part of a wider group of matters under the heading "Whether rules 4 and 6 are ultra vires".

Countdown's notice of appeal para 7, under the same heading, specified a number of respects (including the present point) in which the Tribunal is alleged to be in error in that section of the decision.

As a result of pre-trial conferences and argument before Barker ACJ, the grounds of appeal were re-stated by the appellants jointly in 24 propositions or grounds and these were the bases on which (with some excisions and amalgamations) the appeal came before us.

In submissions for the appellant, Mr Wylie covered a number of matters raised in para 7 of the notice of appeal which are outside the ambit of ground 10. We confine ourselves to the specific issue raised by the ground as framed; i.e. whether in respect of the phrases upheld as valid by the Tribunal, it incorrectly applied the law and came to a decision which was so unreasonable in the circumstances that no reasonable tribunal could reach it.

As to the law, the Tribunal cited and quoted passages from the judgments of Davison CJ in **Bitumix Ltd v Mt Wellington Borough**, [1979] 2 NZLR 57, and McGechan J in **McLeod Holdings v Countdown Properties** (1990), 14 NZTPA 362. The Tribunal then said (p.81) -

> "With those judgments to guide us and bearing in mind that unlike the former legislation the Resource Management Act does not stipulate that conditions for permitted use be 'specified', we return to consider the phrases challenged ..."

My Wylie questioned the validity of the distinction that the RMA, unlike the former legislation, does not stipulate that conditions for permitted uses be "specified". No submissions were made by other counsel in this respect and we are unclear about this step in the Tribunal's reasoning. We consider, however, that the correct approach was as indicated by the judgments cited; in our opinion the Tribunal would have reached the same result even if it had applied them alone and had not

borne in mind the further factor derived from the absence of the word "specified".

The Tribunal held, for example, that the phrase "appropriate design" and the limitation of signs to those "of a size related to the scale of the building..." were too vague and could not stand. On the other hand it determined that whether an existing sign is "of historic or architectural merit" and whether an odour is "objectionable", although matters on which opinions may differ, are questions of fact and degree which are capable of judgment and were upheld.

We do not consider that the Tribunal incorrectly applied the law or came to a decision that was so unreasonable that it could no stand. This ground of appeal is also dismissed.

Ground 11. **That the Tribunal's conclusion that the land in the block the subject of Plan Change No 6 is in general an appropriate location for large scale vehicle orientated retailing is a conclusion which on the evidence it could not reasonably come to."**

This ground was withdrawn at the hearing and is therefore dismissed.

Ground 12.. **"That the Tribunal's decision accepting the evidence adduced by the second respondent about the economic effects of proposed change No 6 were so unreasonable, that no reasonable Tribunal, properly considering the evidence, and directing itself in law, could have made such a decision."**

This ground relates to the evidence of a statistical retail consultant, Mr M.G. Tansley, who generally supported the plan change. No witness was called to contradict his evidence. The appellants made detailed and sustained criticisms of his evidence before the Tribunal and claimed that Mr Tansley did not have the relevant expertise to predict economic effects of the proposed change. The Tribunal held that an economist's analysis would not have assisted it any more than did Mr Tansley's.

In a close analysis of Mr Tansley's evidence, counsel for Countdown examined the witness's qualifications and his approach to a cost and benefit consideration of the proposed plan change; they alleged deficiencies in his predictions about the economic effects of the change. These matters were before the Tribunal when they made their assessment of the evidence. Its decision (p.34) records the Tribunal's appreciation of such criticisms.

The Court is dealing with the decision of an specialist Tribunal, well used to assessing evidence of the sort given by Mr Tansley, who was accepted by the Tribunal as an expert. We see no reason for holding that the Tribunal should not have accepted his evidence. Although it is possible for this Court to hold in an appropriate case that there was no evidence to justify a finding of fact, it should be very loath to do so after the Tribunal's exhaustive hearing. The Tribunal is not

bound by the strict rules of evidence. Even if it were, the acceptance or rejection of Mr Tansley's evidence is a question of fact. We see this ground of appeal as an attempt to mount an appeal to this Court against a finding of fact by the Tribunal - which is not permitted by the RMA. We therefore reject this ground of appeal.

Ground 24. **"The Tribunal erred in law and acted unreasonably by failing to consider either in whole or in part the evidence of the appellants and by reaching a decision regarding the merits of the plan change that no reasonable Tribunal considering that evidence before it and directing itself properly in law could reasonably have reached. In particular the Tribunal failed to consider the evidence of the following -**

> **Anderson, Page, Nieper, Cosgrove, Hawthorne, Bryce, Chandrakumaran, Constantine, Edmonds,**

This ground is similar to ground 12, so we consider it next. The appellants complaint here is that the Tribunal took considerable time to analyse the Council's and Woolworths' witnesses' views on the appropriateness of the location for the commercial zone and on the economic and social effects of allowing the proposed change. They claim, in contrast, that the witnesses called by the appellants on the same topics were not considered at all or not given the same degree of attention. The Tribunal heard full submissions by the appellants as to reliability of opposing witnesses, but, the appellants submitted before us, it failed to place any weight at all on the evidence given by the appellants' witnesses. The Tribunal was said to have been unfairly selective and that, therefore, its decision was against the weight of

evidence and one which no reasonable Tribunal could have reached.

Again, this submission must be considered in the light of the Tribunal's expertise. Even a cursory consideration of the extensive record shows that the hearing was extremely thorough; every facet and implication of the proposed scheme change appears to have been debated at length. The Tribunal conducted a site visit and a tour of suburban shopping centres. An analysis presented by Mr Gould shows that the witnesses whom the appellants claim were ignored in the decision were questioned by the presiding Judge. In the course of its decision (p.86), the Tribunal expressly confirmed that it was reaching a conclusion after "hearing the witnesses for the respondent and applicant cross-examined and hearing the witnesses for Foodstuffs and Countdown..." The Tribunal was not required in its judgment to refer to the evidence of each witness.

Once again, we are totally unable to hold that the Tribunal erred in law just because its thorough decision omitted to mention these witnesses by name. It is impossible for us to say that their evidence was not considered. Again, this ground comes close to be an appeal on fact masquerading as an appeal on a point of law. There is nothing to this ground of appeal which is accordingly dismissed.

Ground 13. **"That the Tribunal applied the wrong legal tests and misconstrued the Act when it held that Change No 6 assisted the first respondent in carrying out its functions in order to achieve the statutory purpose contained in Part II of promoting sustainable management of natural and physical resources and that the change is in accordance with the function of S.31."**

Ground 14. **"The Tribunal misdirected itself in law by concluding that the content and provisions of Plan Change 6 promulgated under Part V of the Act are subject to the framework and legal premises of the first respondent's transitional district plan created under the Town and Country Planning Act 1977."**

These grounds were included in the arguments on Grounds 8 and 9 and do not need to be considered separately.

Grounds 15, 16, 17 and 18:

15. **"That the Tribunal erred in law by holding that S.290 of the Act did not apply to the references in Plan Change No 6."**

16. **"That the Tribunal misconstrued the statute when it held that it did not have the same duty as the first respondent to carry out the duties listed in S.32(1)."**

17. **"That the Tribunal misconstrued the Act when it held that it has the powers conferred by S.293, when considering a reference pursuant to clause 14."**

18. **"That the Tribunal misdirected itself by failing to apply the correct legal test when it purported to confirm Plan Change 6, namely by deciding that it was satisfied on balance that implementing the proposal would more fully serve the statutory purpose than would cancelling it."**

The first step in the appellant's argument to the Tribunal on this part of the hearing was that S.290 of the RMA applied to the proceedings. That section reads -

> **"Powers of Tribunal in regard to appeals and inquiries -**

> (1) The Planning Tribunal has the same power, duty, and disecretion in respect of a decision appealed against, or to which an inquiry relates, as the person against whose decision the appeal or inquiry is brought.
>
> (2) The Planning Tribunal may confirm, amend, or cancel a decision to which an appeal relates.
>
> (3) The Planning Tribunal may recommend the confirmation, amendment or cancellation of a decision to which an inquiry relates.
>
> (4) Nothing in this section affects any specific power or duty the Planning Tribunal has under this Act or under any other Act or regulation."

The second step in the argument was that pursuant to S.290(1) the Tribunal had a duty to carry out a S.32(1) analysis in the same way as the Council had.

The Tribunal held that S.290 did not apply because the proceedings were not an appeal against the Council's decision as such and that the Tribunal was not under the same duty as the Council to carry out the duties listed in S.32(1). It went on to say -

> "However the Tribunal's function is to decide whether the plan change should be confirmed, modified, amended, or deleted. To perform that function, the matters listed in S.32(1) are relevant. We therefore address those matters as a useful method to assist us to perform the Tribunal's functions on these references."

The Tribunal then considered those matters in detail.

The appellant's submission to this Court is that the Tribunal was wrong as a matter of law in holding that S.290 did not apply and in determining that it was not itself required to discharge the S.32 duties.

The Tribunal also held that S.293 of the RMA, unlike S.290, was applicable and that it had the powers conferred thereby. S.293 (in part) is as follows -

> "Tribunal may order change to policy statements and plans
>
> (1) On the hearing of any appeal against, or inquiry into, the provisions of any policy statement or plan, the Planning Tribunal may direct that changes be made to the policy statement or plan.
>
> (2) If on the hearing of any such appeal or inquiry, the Tribunal considers that a reasonable case has been presented for changing or revoking any provision of a policy statement or plan, and that some opportunity should be given to interested parties to consider the proposed change or revocation, it may adjourn the hearing until such time as interested parties can be heard."

Although S.293 refers to "plan" which (by the relevant definition) means the operative district plan and changes thereto, the Tribunal considered that, because there is no mechanism by which there could be an appeal to the Tribunal against the provisions of an operative plan, for S.293 to have any application to plans, therefore, it must apply to appeals against provisions of proposed plans and proposed changes to plans. It accordingly held that the context requires that the defined meanings do not apply and that it has the powers conferred by S.293 in respect of a proposed change as well as those conferred by clause 15(2) of the First Schedule. That clause is as follows -

> "(2) Where the Tribunal holds a hearing into any provision of a proposed policy statement or plan (other than a regional coastal plan) that reference

> is an appeal, and the Tribunal may confirm, or direct the local authority to modify, delete, or insert, any provision which is referred to it."

The appellants submit that the Tribunal was wrong as a matter of law in holding that it had the powers conferred by S.293 in the present case.

Mr Marquet accepted (as he had before the Tribunal) that Ss.290 and 293 both applied and that the Tribunal had the powers set out in those provisions but contended, for reasons amplified in his submissions, that there had been no error of law.

Mr Gould supported the Tribunal's findings. He argued, however, that on a careful reading of the decision the Tribunal did not rely upon the powers contained in S.293 but instead on its jurisdiction under clause 15(2) of the First Schedule. It had correctly defined its function, he contended, and in the performance of that function, had reviewed all the elements of S.32. He submitted that even if the Tribunal had the duties under S.32 of the Council (but in a manner relevant to an appeal process), the steps it would have taken in its deliberation and judgment would have been no different. No material effect would arise, he submitted, if the Tribunal were found to be technically in error in its views as to Ss. 290 and 293.

We consider that, for the reasons given by the Planning Tribunal, it correctly determined that it had the powers

conferred by S.293 although we accept Mr Gould's submission that, in the end, the Tribunal did not exercise those powers and acted only pursuant to clause 15(2) of the First Schedule.

We differ from the Tribunal's conclusion as to S.290. In our view, the nature of the process before the Tribunal, although called a reference, is also, in effect an appeal, from the decision of the Council. In addition, the provisions in clause 15(2) that a reference of the sort involved here is an 'appeal' and a reference into a regional coastal plan pursuant to clause 15(3) is an 'inquiry' link, by the terminology used, clause 15 in the First Schedule with S.290.

The general approach that the Tribunal has the same duties, powers and discretions as the Council is not novel. S.150(1) and (2) of the TCPA conferred upon the Tribunal substantially the same powers as S.290(1) and (2) of the RMA; in particular, S.150(1) provided that the Tribunal has the same "powers duties functions and discretions" as the body at first instance. Under that legislation, the Tribunal's approach to plan changes was that the Tribunal is an appellate authority and not involved in the planning process as such. This principle was discussed in this Court in **Waimea Residents Association Incorporated v Chelsea Investments Limited** (Davison CJ, Wellington, M.616/81, 16 December 1981).

There was no provision in the TCPA corresponding to S.32 of the RMA but the judgment of Davison CJ is relevant as confirming the judicial and appellate elements of the Tribunal's function even although it had the same powers and duties as the Council.

We accept Mr Gould's submission that even if the Tribunal had decided that S.290 applied and it had the same duties as the Council (in a manner relevant to its appellate jurisdiction) the steps it would have taken in its deliberation and judgment would have been no different from those set out in detail in pages 121 to 125 of the decision.

The appellants argue next, in respect of ground 18, that the test required is not simply to decide whether on balance the provisions achieve the purpose of the RMA but whether they are in fact necessary. Alternatively, it is submitted that its construction of the word 'necessary' was not stringent enough in the context.

We deal with the alternative point first. The Tribunal in its decision discussed the submissions made by counsel and the judgments of the Court of Appeal in **Environmental Defence Society Inc and Tai Tokerau District Maori Council v Mangonui County Council** [1989] 13 NZTPA 197 and of Greig J in **Wainuiomata District Council v Local Government Commission** (Wellington, 20 September 1989, C.P.546/89).

The Tribunal considered that in S.32(1), 'necessary' requires to be considered in relation to achieving the purpose of the Act and the range of functions of Ministers and local authorities listed in S.32(2). In this context, it held that the word has a meaning similar to expedient or desirable rather than essential.

We agree with that view and do not consider that the Tribunal was in error in law.

We return now to the appellants' primary submission.

It is true that the Tribunal said (at p.128) -

> "On balance we are satisfied that implementing the proposal would more fully serve the statutory purpose than would cancelling it, and that the respondent should be free to approve the plan change."

But we do not think it is correct that the Tribunal adopted this test in place of the more rigorous requirement that it be satisfied that the provisions are necessary. S.32 is part only of the statutory framework; by S.74, a territorial authority is to prepare and change its district plan in accordance with its functions under S.31, the provisions of Part II, its duty under S.32 and any regulations. This was fully apprehended by and dealt with appropriately by the Tribunal. It said at p.127 -

> "We have found that the content of proposed Plan Change 6 would, if implemented, serve the statutory

> purpose of promoting sustainable management of natural and physical resources in several respects; and that the proposal would reasonably serve that purpose; and would serve the aims of efficient use and development of natural and physical resources, the maintenance and enhancement of amenity values, the recognition and protection of the heritage values of building and ares; and the maintenance and enhancement of the quality of the environment.
>
> We have also found that the measure is capable of assisting the respondent to carry out its functions in order to achiege that purpose, and is in accordance with those functions under S.31; that its objectives, policies and rules are necessary, in the sense of expedient, for achieving the purpose of the Act; that the proposed rules are as likely to be effective as such rules are able to be; and that the objectives, policies and rules of the plan change are in general the most appropriate means of exercising the respondent's function."

The Tribunal went on to deal with possible alternative locations, the road system, pedestrian safety, the obstruction of fire appliances leaving the fire station, non-customers' use of carparking, and adverse economic and social effects. It then concluded with the passage which, the appellants contend, shows that the Tribunal adopted the wrong test by saying that on balance it was satisfied that implementing the proposal would more fully serve the statutory purpose than cancelling it.

In our view, the Tribunal applied the correct test when considering the relevant part of S.32; it asked itself whether it was satisfied that the change was necessary and held, after a full examination, that it was. On the basis of that and numerous other findings, it then proceeded to the broader and ultimate issue of whether it should confirm the change or direct the Council to modify, delete or insert any provision which had been

referred to it. It determined that, on balance, implementing the proposal would more fully serve the statutory purpose than would cancelling it and that the Council should accordingly be free to approve the plan change. Reading the relevant part of the Tribunal's decision as a whole we consider that its approach was correct and that it did not err in law as the appellants contend. This ground of appeal is dismissed.

Ground 19. **"That the Tribunal misdirected itself when it determined that the onus of proof rested with the appellant Transit to establish a case that approving Plan Change No 6 would rresult in adverse effects on the traffic environment."**

Ground 20. **"In considering Plan Change No 6 in terms of S.5 of the Act the Tribunal erred in failing to consider the effects of the Plan Change on the sustainable management of the State Highway, on the reasonably foreseeable transportation needs of future generations, and on the needs of the people of the district, pedestrians, and road users, as to their health and safety, and on the need to avoid, remedy or mitigate adverse effects of the plan change on the transportation environment of the Dunedin district."**

Ground 21. **"The Tribunal erred in determining that the Plan Change would create no adverse effects on the State Highway and on persons using and crossing the State Highway."**

Ground 22. **"In considering the effectiveness of the rules contained in the plan change the Tribunal erred in failing to take account of the fact that in respect of permitted and controlled activities allowed by the plan change the general ordinances of the transitional district plan as to vehicle access are ultra vires and of no effect."**

Ground 23. **"The Tribunal erred in considering the effectiveness of the rules contained in the Plan Change, and in particular wrongly determined that the issue of what are appropriate rules for vehicle access should be resolved by the appellant and the first respondent through the process of proposed draft plan change 7 or some informal process."**

These grounds were not argued because of the settlement reached by Transit with the Council and Woolworths. However, because all the other appellants' grounds of appeal have been dismissed, we have now to consider submissions from those appellants as to why the settlement should not be implemented in the manner suggested.

The settlement arrived at amongst Transit, the Council and Woolworths provided for certain rules as to access to the site to be incorporated in the plan change. Details of these rules were annexed to the parties' agreement and submitted to the Court. Counsel for Transit sought an order that the now agreed rules be referred back to the Tribunal where the parties would seek appropriate orders by consent incorporating the new rules. Such a procedure was only to be necessary if the appeals by Countdown and Foodstuffs alleging the invalidity of the planning change were unsuccessful. We have ruled that they are. We therefore consider the viability of implementing the Transit settlement.

Counsel for Countdown who submitted that the new rules contained within the settlement agreement required public notification before the local authority or Tribunal could proceed to include them in the plan change. Further, it was contended that the Tribunal had refused such proposed amendments sought by Transit upon the basis that Transit's submission to the Council had not specifically

stated the amendments sought and that that was final because it had not been appealed. Reference was made to S.295 of the RMA viz -

> "that a decision of the Planning Tribunal ... is final unless it is re-heard under S.294 or appealed under S.299."

It was further agreed that Transit's grounds of appeal did not embrace the new rules but rather dealt with the procedure adopted by the Tribunal in advising both Transit and the Council actively to consider the issues raised by Transit's proposed amendments.

All parties accepted that the Tribunal had power under clause 15(2) of the First Schedule to confirm or to direct the local authority to modify, delete or insert any provision which had been referred to it; as well, it had powers to direct changes under S.293 of the RMA. The latter power includes a specific power to adjourn a hearing if it considers that some opportunity should be given to interested parties to be notified of and to consider the proposed change. The detailed procedure is contained in S.293(3).

On the penultimate page of its decision the Tribunal stated -

> "The other two amendments sought by Transit would replace general provisions about the design of vehicle accesses to car parking and service and loading areas with detailed rules containing specific standards. However, although Transit's submission to the respondent on the plan change

> referred to pedestrians crossing Cumberland Street mid-block, and to the design and location of accesses and exits, it did not state that the submitter wished the respondent specifically to make the amendments that were sought in Transit's reference to the Tribunal. Further, those amendments were not put to the respondent's traffic engineering witness, Mr N.S. Read, in cross-examination by Transit's counsel.
>
> The applicants' traffic engineering witness, Mr Tuohey, proposed a different rule about design and location of vehicle accesses, and that is also a topic currently being considered within the Council administration, focusing on a draft Plan Change 7. In all those circumstances, we do not feel confident that the specific provisions sought by Transit would necessarily be the most appropriate means of addressing the concern raised by it. We are content to know that both Transit and the respondent are actively considering the issues which the amendments sought by Transit are intended to address."

We do not read those paragraphs, in the context of the Tribunal's decision as a whole, as a concluded finding upon Transit's reference to the Tribunal. We accept that these amendments, now settled upon, may be within the Tribunal's jurisdiction under S.293 or clause 15(2) of the First Schedule.

In **Port Otago Limited v Dunedin City Council** (Dunedin, A.P.112/93, 15 November 1993, Tipping J expressed the view that it would be a rare case in an appeal on a point of law where this Court could substitute its own conclusions on the factual matters underlying the point of law for that of the Tribunal. He considered, and we agree, that unless the correctly legal approach could lead to only one substitute result, the proper course is to remit the matter to the Tribunal as R.718A(2) of the High Court Rules empowers.

Accordingly, we allow Transit's appeal by consent and remit to the Tribunal for its further consideration and determination the possible exercise of its powers under S.293 or Clause 15(2) of the First Schedule in relation to the rules forming part of the settlement.

Since this judgment may have interest beyond the facts of this case and because we have mentioned R.718A of the High Court Rules, we make some comments about the scheme of the Act relating to appeals to this Court.

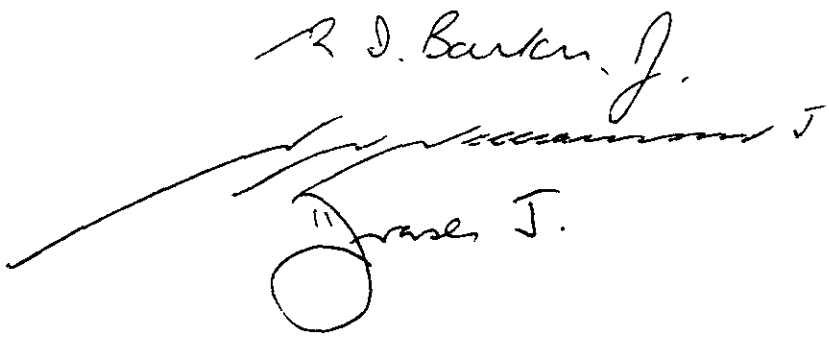
Section 300-307 of the RMA provide detailed procedure for the institution of appeals to this Court under S.299 and for the procedure up to the date of hearing. In our view, it is unfortunate that such detailed matters of procedure are fixed by statute. Our reasons are: (a) statutes are far more difficult to alter than Rules of Court should some procedural amendment be considered desirable; (b) most statutes are content to leave procedural aspects to the Rules once the statute has conferred the right of appeal; (c) the High Court Rules in Part X aim for a uniform procedure for all appeals to this Court other than appeals from the District Court. There is much to be said for having the same rules for similar kinds of appeals.

Although the RMA goes into considerable detail on procedure, it is silent on the powers of the Court upon hearing an appeal from the Tribunal. One might have

thought that the power of the Court on hearing an appeal might have been a better candidate for legislative precision than detailed provisions which are similar to but not identical to well-understood and commonly used rules of Court. We hope that, at the next revision of the Act, consideration be given to reducing the procedural detail in Ss.300-307 and that the same measure of confidence be reposed in the Rules of Court as can be found in other legislation granting appeal rights from various tribunals or administrative bodies.

Result:

The appeals of Countdown and Foodtown are dismissed. The appeal of Transit is allowed by consent in the manner indicated. Woolworths and the Council are both entitled to costs. We shall receive memoranda from counsel if agreement cannot be reached.



Solicitors: Gallaway Haggitt Sinclair, Dunedin, for Foodstuffs
Duncan Cotterill, Christchurch, for Countdown
Timpany Walton, Timaru, for Transit
Chapman Tripp Sheffield Young, Auckland, for Woolworths
Ross Dowling Marquet & Griffin, Dunedin, for Dunedin City Council

IN THE SUPREME COURT OF NEW ZEALAND

SC 82/2013
[2014] NZSC 38

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

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

JUDGMENT OF THE COURT

A The appeal is allowed.

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

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

C Costs are reserved.

REASONS

ELIAS CJ, MCGRATH, GLAZEBROOK AND ARNOLD JJ

(Given by Arnold J)

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Introduction

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

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

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

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

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

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

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

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

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

7 At [1341].

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

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

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

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8 RMA, s 149V.

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

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

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

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

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

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

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

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

The RMA: a (very) brief overview

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

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14 *King Salmon* (Board), above n 6, at [1235]–[1236].
15 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*, above n 11.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Questions for decision

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

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

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40 See s 87A.

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

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

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

We will focus initially on question (a).

First question: proper approach

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

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

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

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

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

Statutory background – Pt 2 of the RMA

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(vii) the protection of protected customary rights.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

New Zealand Coastal Policy Statement

(i) General observations

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

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

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

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

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

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

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

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

61 Section 46A.

62 NZCPS, above n 13, at 5.

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

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

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

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

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

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

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

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

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

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

In *Campbell v Southland District Council*, the Tribunal said:[70]

> Section 5 is not about achieving a balance between benefits occurring from an activity and its adverse effects. … [T]he definition in s 5(2) requires adverse effects to be avoided, remedied or mitigated, irrespective of the benefits which may accrue … .

[39] The "overall judgment" approach seems to have its origin in the judgment of Grieg J in *New Zealand Rail Ltd v Marlborough District Council*, in the context of an appeal relating to a number of resource consents for the development of a port at

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65 At [1180], adopting the language of Ms Sarah Dawson, a planning consultant for King Salmon. This paragraph of the Board's determination, along with others, is quoted at [81] below.

66 At [1180].

67 See Jim Milne "Sustainable Management" in *DSL Environmental Handbook* (Brookers, Wellington, 2004) vol 1.

68 *Shell Oil New Zealand Ltd v Auckland City Council* W8/94, 2 February 1994 (PT); *Foxley Engineering Ltd v Wellington City Council* W12/94, 16 March 1994 (PT); *Plastic and Leathergoods Co Ltd v The Horowhenua District Council* W26/94, 19 April 1994 (PT); and *Campbell v Southland District Council* W114/94, 14 December 1994 (PT).

69 *Shell Oil New Zealand Ltd v Auckland City Council*, above n 68, at 10.

70 *Campbell v Southland District Council*, above n 68, at 66.

Shakespeare Bay.[71] The Judge rejected the contention that the requirement in s 6(a) to preserve the natural character of a particular environment was absolute.[72] Rather, Grieg J considered that the preservation of natural character was subordinate to s 5's primary purpose, to promote sustainable management. The Judge described the protection of natural character as "not an end or an objective on its own" but an "accessory to the principal purpose" of sustainable management.[73]

[40] Greig J pointed to the fact that under previous legislation there was protection of natural character against "unnecessary" subdivision and development. This, the Judge said, was stronger than the protection in s 6(a) against "inappropriate" subdivision, use and development:[74] the word "inappropriate" had a wider connotation than "unnecessary".[75] The question of inappropriateness had to be determined on a case-by-case basis in the particular circumstances. The Judge said:[76]

> It is "inappropriate" from the point of view of the preservation of natural character in order to achieve the promotion of sustainable management as a matter of national importance. It is, however, only one of the matters of national importance, and indeed other matters have to be taken into account. It is certainly not the case that preservation of the natural character is to be achieved at all costs. The achievement which is to be promoted is sustainable management and questions of national importance, national value and benefit, and national needs, must all play their part in the overall consideration and decision.
>
> This Part of the [RMA] expresses in ordinary words of wide meaning the overall purpose and principles of the [RMA]. It is not, I think, a part of the [RMA] which should be subjected to strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used. There is a deliberate openness about the language, its meaning and its connotations which I think is intended to allow the application of policy in a general and broad way. Indeed, it is for that purpose that the Planning Tribunal, with special expertise and skills, is established and appointed to oversee and to promote the objectives and the policies and the principles under the [RMA].
>
> In the end I believe the tenor of the appellant's submissions was to restrict the application of this principle of national importance, to put the absolute preservation of the natural character of a particular environment at the forefront and, if necessary, at the expense of everything except where it was

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71 *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC).
72 At 86.
73 At 85.
74 Town and Country Planning Act 1977, s 3(1).
75 *New Zealand Rail Ltd*, above n 71, at 85.
76 At 85–86.

> necessary or essential to depart from it. That is not the wording of the [RMA] or its intention. I do not think that the Tribunal erred as a matter of law. In the end it correctly applied the principles of the [RMA] and had regard to the various matters to which it was directed. It is the Tribunal which is entrusted to construe and apply those principles, giving the weight that it thinks appropriate. It did so in this case and its decision is not subject to appeal as a point of law.

[41] In *North Shore City Council v Auckland Regional Council*, the Environment Court discussed *New Zealand Rail* and said that none of the ss 5(2)(a), (b) or (c) considerations necessarily trumped the others – decision makers were required to balance all relevant considerations in the particular case.[77] The Court said:[78]

> We have considered in light of those remarks [in *New Zealand Rail*] the method to be used in applying s 5 to a case where on some issues a proposal is found to promote one or more of the aspects of sustainable management, and on others is found not to attain, or fully attain, one or more of the aspects described in paragraphs (a), (b) and (c). To conclude that the latter necessarily overrides the former, with no judgment of scale or proportion, would be to subject s 5(2) to the strict rules and proposal of statutory construction which are not applicable to the broad description of the statutory purpose. To do so would not allow room for exercise of the kind of judgment by decision-makers (including this Court — formerly the Planning Tribunal) alluded to in the [*New Zealand Rail*] case.
>
> …
>
> *The method of applying s 5 then involves an overall broad judgment of whether a proposal would promote the sustainable management of natural and physical resources. That recognises that the [RMA] has a single purpose. Such a judgment allows for comparison of conflicting considerations and the scale or degree of them, and their relative significance or proportion in the final outcome.*

[42] The Environment Court has said that the NZCPS is to be approached in the same way.[79] The NZCPS "is an attempt to more explicitly state the tensions which are inherent within Part 2 of the [RMA]".[80] Particular policies in the NZCPS may be

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77 *North Shore City Council v Auckland Regional Council* (1996) 2 ELRNZ 305 (EnvC) at 345–347; aff'd *Green & McCahill Properties Ltd v Auckland Regional Council* [1997] NZRMA 519 (HC).

78 *North Shore City Council v Auckland Regional Council*, above n 77, at 347 (emphasis added). One commentator expresses the view that the effect of the overall judgment approach in relation to s 5(2) is "to render the concept of sustainable management virtually meaningless outside the facts, circumstances and nuances of a particular case": see IH Williams "The Resource Management Act 1991: Well Meant But Hardly Done" (2000) 9 Otago L R 673 at 682.

79 See, for example, *Te Runanga O Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council* [2011] NZEnvC 402 and *Man O'War Station*, above n 46.

80 *Ngai Te Rangi Iwi Trust*, above n 79, at [257].

irreconcilable in the context of a particular case.[81] No individual objective or policy from the NZCPS should be interpreted as imposing a veto.[82] Rather, where relevant provisions from the NZCPS are in conflict, the court's role is to reach an "overall judgment" having considered all relevant factors.[83]

[43] The fundamental issue raised by the EDS appeal is whether the "overall judgment" approach as the Board applied it is consistent with the legislative framework generally and the NZCPS in particular. In essence, the position of EDS is that, once the Board had determined that the proposed salmon farm at Papatua would have high adverse effects on the outstanding natural character of the area and its outstanding natural landscape, so that policies 13(1)(a) and 15(a) of the NZCPS would not be given effect to, it should have refused the application. EDS argued, then, that there is an "environmental bottom line" in this case, as a result of the language of policies 13(1)(a) and 15(a).

[44] The EDS appeal raises a number of particular issues – the nature of the obligation to "give effect to" the NZCPS, the meaning of "avoid" and the meaning of "inappropriate". As will become apparent, all are affected by the resolution of the fundamental issue just identified.

(ii) Objectives and policies in the NZCPS

[45] Section 57(1) of the RMA requires that there must "at all times" be at least one New Zealand coastal policy statement prepared and recommended by the Minister of Conservation following a statutorily-mandated consultative process. The first New Zealand coastal policy statement was issued in May 1994.[84] In 2003 a lengthy review process was initiated. The process involved: an independent review of the policy statement, which was provided to the Minster in 2004; the release of an issues and options paper in 2006; the preparation of the proposed new policy statement in 2007; public submissions and board of inquiry hearings on the proposed

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81 At [258].
82 *Man O'War Station*, above n 46, at [41]–[43].
83 *Ngai Te Rangi Iwi Trust*, above n 79, at [258].
84 "Notice of the Issue of the New Zealand Coastal Policy Statement" (5 May 1994) 42 *New Zealand Gazette* 1563.

statement in 2008; and a report from the board of inquiry to the Minister in 2009. All this culminated in the NZCPS, which came into effect in December 2010.

[46] Under s 58, a New Zealand coastal policy statement may state objectives and policies about any one or more of certain specified matters. Because they are not mentioned in s 58, it appears that such a statement was not intended to include "methods", nor can it contain "rules" (given the special statutory definition of "rules").[85]

[47] As we discuss in more detail later in this judgment, Mr Kirkpatrick for EDS argued that s 58(a) is significant in the present context because it contemplates that a New Zealand coastal policy statement may contain "national priorities for the preservation of the natural character of the coastal environment of New Zealand, including protection from inappropriate subdivision, use and development". While counsel were agreed that the current NZCPS does not contain national priorities in terms of s 58(a),[86] this provision may be important because the use of the words "priorities", "preservation" and "protection" (together with "inappropriate") suggests that the RMA contemplates what might be described as "environmental bottom lines". As in s 6, the word "inappropriate" appears to relate back to the preservation of the natural character of the coastal environment: it is preservation of natural character that provides the standard for assessing whether particular subdivisions, uses or developments are "inappropriate".

[48] The NZCPS contains seven objectives and 29 policies. The policies support the objectives. Two objectives are of particular importance in the present context, namely objectives 2 and 6.[87]

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85 In contrast, s 62(e) of the RMA provides that a regional policy statement must state "the methods (excluding rules) used, or to be used, to implement the policies". Sections 67(1)(a) to (c) and 75(1)(a) to (c) provide that regional and district plans must state the objectives for the region/district, the policies to implement the objectives and the rules (if any) to implement the policies. Section 43AA provides that rule means "a district or regional rule" Section 43AAB defines regional rule as meaning "a rule made as part of a regional plan or proposed regional plan in accordance with section 68".

86 The 1994 version of the New Zealand coastal policy statement did contain a number of national priorities.

87 It should be noted that the NZCPS provides that the numbering of objectives and policies is for convenience and is not to be interpreted as an indication of relative importance: see NZCPS, above n 13, at 8.

[49] Objective 2 provides:

> **Objective 2**
>
> To preserve the natural character of the coastal environment and protect natural features and landscape values through:
>
> - recognising the characteristics and qualities that contribute to natural character, natural features and landscape values and their location and distribution;
>
> - identifying those areas where various forms of subdivision, use, and development would be inappropriate and protecting them from such activities; and
>
> - encouraging restoration of the coastal environment.

Three aspects of objective 2 are significant. First, it is concerned with preservation and protection of natural character, features and landscapes. Second, it contemplates that this will be achieved by articulating the elements of natural character and features and identifying areas which possess such character or features. Third, it contemplates that some of the areas identified may require protection from "inappropriate" subdivision, use and development.

[50] Objective 6 provides:

> **Objective 6**
>
> To enable people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through subdivision, use, and development, recognising that:
>
> - the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits;
>
> - some uses and developments which depend upon the use of natural and physical resources in the coastal environment are important to the social, economic and cultural wellbeing of people and communities;
>
> - functionally some uses and developments can only be located on the coast or in the coastal marine area;
>
> - the coastal environment contains renewable energy resources of significant value;

- the protection of habitats of living marine resources contributes to the social, economic and cultural wellbeing of people and communities;

- the potential to protect, use, and develop natural and physical resources in the coastal marine area should not be compromised by activities on land;

- the proportion of the coastal marine area under any formal protection is small and therefore management under the [RMA] is an important means by which the natural resources of the coastal marine area can be protected; and

- historic heritage in the coastal environment is extensive but not fully known, and vulnerable to loss or damage from inappropriate subdivision, use, and development.

[51] Objective 6 is noteworthy for three reasons:

(a) First, it recognises that some developments which are important to people's social, economic and cultural well-being can only occur in coastal environments.

(b) Second, it refers to use and development not being precluded "in appropriate places and forms" and "within appropriate limits". Accordingly, it is envisaged that there will be places that are "appropriate" for development and others that are not.

(c) Third, it emphasises management under the RMA as an important means by which the natural resources of the coastal marine area can be protected. This reinforces the point previously made, that one of the components of sustainable management is the protection and/or preservation of deserving areas.

[52] As we have said, in the NZCPS there are 29 policies that support the seven objectives. Four policies are particularly relevant to the issues in the EDS appeal: policy 7, which deals with strategic planning; policy 8, which deals with aquaculture; policy 13, which deals with preservation of natural character; and policy 15, which deals with natural features and natural landscapes.

[53] Policy 7 provides:

> **Strategic planning**
>
> (1) In preparing regional policy statements, and plans:
>
> (a) consider where, how and when to provide for future residential, rural residential, settlement, urban development and other activities in the coastal environment at a regional and district level; and
>
> (b) identify areas of the coastal environment where particular activities and forms of subdivision, use and development:
>
> (i) are inappropriate; and
>
> (ii) may be inappropriate without the consideration of effects through a resource consent application, notice of requirement for designation or Schedule 1 of the [RMA] process;
>
> and provide protection from inappropriate subdivision, use, and development in these areas through objectives, policies and rules.
>
> (2) Identify in regional policy statements, and plans, coastal processes, resources or values that are under threat or at significant risk from adverse cumulative effects. Include provisions in plans to manage these effects. Where practicable, in plans, set thresholds (including zones, standards or targets), or specify acceptable limits to change, to assist in determining when activities causing adverse cumulative effects are to be avoided.

[54] Policy 7 is important because of its focus on strategic planning. It requires the relevant regional authority to look at its region as a whole in formulating a regional policy statement or plan. As part of that overall assessment, the regional authority must identify areas where particular forms of subdivision, use or development "are" inappropriate, or "may be" inappropriate without consideration of effects through resource consents or other processes, and must protect them from inappropriate activities through objectives, policies and rules. Policy 7 also requires the regional authority to consider adverse cumulative effects.

[55] There are two points to be made about the use of "inappropriate" in policy 7. First, if "inappropriate", development is not permitted, although this does not necessarily rule out any development. Second, what is "inappropriate" is to be

assessed against the nature of the particular area under consideration in the context of the region as a whole.

[56] Policy 8 provides:

> **Aquaculture**
>
> Recognise the significant existing and potential contribution of aquaculture to the social, economic and cultural well-being of people and communities by:
>
> (a) including in regional policy statements and regional coastal plans provision for aquaculture activities in appropriate places in the coastal environment, recognising that relevant considerations may include:
>
> (i) the need for high water quality for aquaculture activities; and
>
> (ii) the need for land-based facilities associated with marine farming;
>
> (b) taking account of the social and economic benefits of aquaculture, including any available assessments of national and regional economic benefits; and
>
> (c) ensuring that development in the coastal environment does not make water quality unfit for aquaculture activities in areas approved for that purpose.

[57] The importance of policy 8 will be obvious. Local authorities are to recognise aquaculture's potential by including in regional policy statements and regional plans provision for aquaculture "in appropriate places" in the coastal environment. Obviously, there is an issue as to the meaning of "appropriate" in this context.

[58] Finally, there are policies 13 and 15. Their most relevant feature is that, in order to advance the specified overall policies, they state policies of avoiding adverse effects of activities on natural character in areas of outstanding natural character and on outstanding natural features and outstanding natural landscapes in the coastal environment.

[59] Policy 13 provides:

Preservation of natural character

(1) To preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development:

(a) avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character; and

(b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on natural character in all other areas of the coastal environment;

including by:

(c) assessing the natural character of the coastal environment of the region or district, by mapping or otherwise identifying at least areas of high natural character; and

(d) ensuring that regional policy statements, and plans, identify areas where preserving natural character requires objectives, policies and rules, and include those provisions.

(2) Recognise that natural character is not the same as natural features and landscapes or amenity values and may include matters such as:

(a) natural elements, processes and patterns;

(b) biophysical, ecological, geological and geomorphological aspects;

(c) natural landforms such as headlands, peninsulas, cliffs, dunes, wetlands, reefs, freshwater springs and surf breaks;

(d) the natural movement of water and sediment;

(e) the natural darkness of the night sky;

(f) places or areas that are wild or scenic;

(g) a range of natural character from pristine to modified; and

(h) experiential attributes, including the sounds and smell of the sea; and their context or setting.

[60] Policy 15 provides:

Natural features and natural landscapes

To protect the natural features and natural landscapes (including seascapes) of the coastal environment from inappropriate subdivision, use, and development:

(a) avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment; and

(b) avoid significant adverse effects and avoid, remedy, or mitigate other adverse effects of activities on other natural features and natural landscapes in the coastal environment;

including by:

(c) identifying and assessing the natural features and natural landscapes of the coastal environment of the region or district, at minimum by land typing, soil characterisation and landscape characterisation and having regard to:

(i) natural science factors, including geological, topographical, ecological and dynamic components;

(ii) the presence of water including in seas, lakes, rivers and streams;

(iii) legibility or expressiveness – how obviously the feature or landscape demonstrates its formative processes;

(iv) aesthetic values including memorability and naturalness;

(v) vegetation (native and exotic);

(vi) transient values, including presence of wildlife or other values at certain times of the day or year;

(v) whether the values are shared and recognised;

(vi) cultural and spiritual values for tangata whenua, identified by working, as far as practicable, in accordance with tikanga Māori; including their expression as cultural landscapes and features;

(vii) historical and heritage associations; and

(viii) wild or scenic values;

(d) ensuring that regional policy statements, and plans, map or otherwise identify areas where the protection of natural features and natural landscapes requires objectives, policies and rules; and

(e) including the objectives, policies and rules required by (d) in plans.

[61] As can be seen, policies 13(1)(a) and (b) and 15(a) and (b) are to similar effect. Local authorities are directed to avoid adverse effects of activities on natural character in areas of outstanding natural character (policy 13(1)(a)), or on outstanding natural features and outstanding natural landscapes (policy 15(a)). In

other contexts, they are to avoid "significant" adverse effects and to "avoid, remedy or mitigate" other adverse effects of activities (policies 13(1)(b) and 15(b)).

[62] The overall purpose of these directions is to preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use and development (policy 13) or to protect the natural features and natural landscapes (including seascapes) from inappropriate subdivision, use and development (policy 15). Accordingly, then, the local authority's obligations vary depending on the nature of the area at issue. Areas which are "outstanding" receive the greatest protection: the requirement is to "avoid adverse effects". Areas that are not "outstanding" receive less protection: the requirement is to avoid significant adverse effects and avoid, remedy or mitigate other adverse effects.[88] In this context, "avoid" appears to mean "not allow" or "prevent the occurrence of", but that is an issue to which we return at [92] below.

[63] Further, policies 13 and 15 reinforce the strategic and comprehensive approach required by policy 7. Policy 13(1)(c) and (d) require local authorities to assess the natural character of the relevant region by identifying "at least areas of high natural character" and to ensure that regional policy statements and plans include objectives, policies and rules where they are required to preserve the natural character of particular areas. Policy 15(d) and (e) have similar requirements in respect of natural features and natural landscapes requiring protection.

Regional policy statement

[64] As we have said, regional policy statements are intended to achieve the purpose of the RMA "by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the

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[88] The Department of Conservation explains that the reason for the distinction between "outstanding" character/features/landscapes and character/features/landscapes more generally is to "provide the greatest protection for areas of the coastal environment with the highest natural character": Department of Conservation *NZCPS 2010 Guidance Note – Policy 13: Preservation of Natural Character* (September 2013) at 14; and Department of Conservation *NZCPS 2010 Guidance Note – Policy 15: Natural Features and Natural Landscapes* (September 2013) at 15.

natural and physical resources of the whole region".[89] They must address a range of issues[90] and must "give effect to" the NZCPS.[91]

[65] The Marlborough Regional Policy Statement became operative on 28 August 1995, when the 1994 version of the New Zealand coastal policy statement was in effect. We understand that it is undergoing revision in light of the NZCPS. Accordingly, it is of limited value in the present context. That said, the Marlborough Regional Policy Statement does form part of the relevant context in relation to the development and protection of areas of natural character in the Marlborough Sounds.

[66] The Marlborough Regional Policy Statement contains a section on subdivision, use and development of the coastal environment and another on visual character, which includes a policy on outstanding landscapes. The policy dealing with subdivision, use and development of the coastal environment is framed around the concepts of "appropriate" and "inappropriate" subdivision, use and development. It reads:[92]

> **7.2.8 POLICY - COASTAL ENVIRONMENT**
>
> Ensure the appropriate subdivision, use and development of the coastal environment.
>
> *Subdivision, use and development will be encouraged in areas where the natural character of the coastal environment has already been compromised. Inappropriate subdivision, use and development will be avoided. The cumulative adverse effects of subdivision, use or development will also be avoided, remedied or mitigated.*
>
> *Appropriate subdivision, use and development of the coastal environment enables the community to provide for its social, economic and cultural wellbeing.*

[67] The methods to implement this policy are then addressed, as follows:

> **7.2.9 METHODS**
>
> (a) Resource management plans will identify criteria to indicate where subdivision, use and development will be appropriate.

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89 RMA, s 59.
90 Section 62(1).
91 Section 62(3).
92 Italics in original.

The [RMA] requires as a matter of national importance that the coastal environment be protected from inappropriate subdivision, use and development. Criteria to indicate where subdivision, use or development is inappropriate may include water quality; landscape features; special habitat; natural character; and risk of natural hazards, including areas threatened by erosion, inundation or sea level rise.

(b) Resource management plans will contain controls to manage subdivision, use and development of the coastal environment to avoid, remedy or mitigate any adverse environmental effects.

Controls which allow the subdivision, use and development of the coastal environment enable the community to provide for their social, economic and cultural wellbeing. These controls may include financial contributions to assist remediation or mitigation of adverse environmental effects.

Such development may be allowed where there will be no adverse effects on the natural character of the coastal environment, and in areas where the natural character has already been compromised. Cumulative effects of subdivision, use and development will also be avoided, remedied or mitigated.

[68] As to the outstanding landscapes policy, and the method to achieve it, the commentary indicates that the effect of any proposed development will be assessed against the criteria that make the relevant landscape outstanding; that is, the standard of "appropriateness". Policy 8.1.3 reads in full:[93]

8.1.3 POLICY — OUTSTANDING LANDSCAPES

Avoid, remedy or mitigate the damage of identified outstanding landscape features arising from the effects of excavation, disturbance of vegetation, or erection of structures.

The Resource Management Act requires the protection of outstanding landscape features as a matter of national importance. Further, the New Zealand Coastal Policy Statement [1994] requires this protection for the coastal environment. Features which satisfy the criteria for recognition as having national and international status will be identified in the resource management plans for protection. Any activities or proposals within these areas will be considered on the basis of their effects on the criteria which were used to identify the landscape features.

The wellbeing of the Marlborough community is linked to the quality of our landscape. Outstanding landscape features need to be retained without degradation from the effects of land and water based activities, for the enjoyment of the community and visitors.

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93 Italics in original.

Regional and district plans

[69] Section 64 of the RMA requires that there be a regional coastal plan for the Marlborough Sounds. One of the things that a regional council must do in developing a regional coastal plan is act in accordance with its duty under s 32 (which, among other things, required an evaluation of the risks of acting or not acting in circumstances of uncertainty or insufficient information).[94] A regional coastal plan must state the objectives for the region, policies to implement the objectives and rules (if any) to implement the policies[95] and must "give effect to" the NZCPS and to any regional policy statement.[96] It is important to emphasise that the plan is a *regional* one, which raises the question of how spot zoning applications such as that relating to Papatua are to be considered. It is obviously important that the regional integrity of a regional coastal plan not be undermined.

[70] We have observed that policies 7, 13 and 15 in the NZCPS require a strategic and comprehensive approach to regional planning documents. To reiterate, policy 7(1)(b) requires that, in developing regional plans, entities such as the Marlborough District Council:

> identify areas of the coastal environment where particular activities and forms of subdivision, use, and development:
>
> (i) are inappropriate; and
>
> (ii) may be inappropriate without the consideration of effects through a resource consent application, notice of requirement for designation or Schedule 1 of the [RMA] process;
>
> and provide protection from inappropriate subdivision, use, and development in these areas through objectives, policies and rules.

Policies 13(1)(d) and 15(d) require that regional plans identify areas where preserving natural character or protecting natural features and natural landscapes require objectives, policies and rules. Besides highlighting the need for a region-wide approach, these provisions again raise the issue of the meaning of "inappropriate".

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94 RMA, s 32(4)(b) as it was at the relevant time (see above n 60 for the legislative history).
95 Section 67(1).
96 Section 67(3)(b).

[71] The Marlborough District Council is a unitary authority with the powers, functions and responsibilities of both a regional and district council.[97] It is responsible for the Sounds Plan, which is a combined regional, regional coastal and district plan for the Marlborough Sounds. The current version of the Sounds Plan became operative on 25 August 2011. It comprises three volumes, the first containing objectives, policies and methods, the second containing rules and the third maps. The Sounds Plan identifies certain areas within the coastal marine area of the Marlborough Sounds as Coastal Marine Zone One (CMZ1), where aquaculture is a prohibited activity, and others as Coastal Marine Zone Two (CMZ2), where aquaculture is either a controlled or a discretionary activity. It describes areas designated CMZ1 as areas "where marine farming will have a significant adverse effect on navigational safety, recreational opportunities, natural character, ecological systems, or cultural, residential or amenity values".[98] The Board created a new zoning classification, Coastal Marine Zone Three (CMZ3), to apply to the four areas (previously zoned CMZ1) in respect of which it granted plan changes to permit salmon farming.

[72] In developing the Sounds Plan the Council classified and mapped the Marlborough Sounds into management areas known as Natural Character Areas. These classifications were based on a range of factors which went to the distinctiveness of the natural character within each area.[99] The Council described the purpose of this as follows:[100]

> *This natural character information is a relevant tool for management in helping to identify and protect those values that contribute to people's experience of the Sounds area. Preserving natural character in the Marlborough Sounds as a whole depends both on the overall pattern of use, development and protection, as well as maintaining the natural character of particular areas. The Plan therefore recognises that preservation of the natural character of the constituent natural character areas is important in achieving preservation of the natural character of the Marlborough Sounds as a whole.*
>
> The Plan requires that plan change and resource consent applications be assessed with regard to the natural character of the Sounds as a whole as well as each natural character area, or areas where appropriate. …

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97 Sounds Plan, above n 1, at [1.0].
98 At [9.2.2].
99 At Appendix 2.
100 At [2.1.6]. Italics in original.

[73] In addition, the Council assessed the landscapes in the Marlborough Sounds for the purpose of identifying those that could be described as outstanding. It noted that, as a whole, the Marlborough Sounds has outstanding visual values and identified the factors that contribute to that. Within the overall Marlborough Sounds landscape, however, the Council identified particular landscapes as "outstanding". The Sounds Plan describes the criteria against which the Council made the assessment[101] and contains maps that identify the areas of outstanding landscape value, which are relatively modest given the size of the region.[102] It seems clear from the Sounds Plan that the exercise was a thoroughgoing one.

[74] In 2009, the Council completed a landscape and natural character review of the Marlborough Sounds, which confirmed the outstanding natural character and outstanding natural landscape of the Port Gore area.[103]

Requirement to "give effect to" the NZCPS

[75] For the purpose of this discussion, it is important to bear two statutory provisions in mind. The first is s 66(1), which provides that a regional council shall prepare and change any regional plan[104] in accordance with its functions under s 30, the provisions of Part 2, a direction given under section 25A(1), its duty under s 32, and any regulations. The second is s 67(3), which provides that a regional plan must "give effect to" any national policy statement, any New Zealand coastal policy statement and any regional policy statement. There is a question as to the interrelationship of these provisions.

[76] As we have seen, the RMA requires an extensive process prior to the issuance of a New Zealand coastal policy statement – an evaluation under s 32, then a board of inquiry or similar process with the opportunity for public input. This is one indication of such a policy statement's importance in the statutory scheme. A further indication is found in the requirement that the NZCPS must be given effect to in subordinate planning documents, including regional policy statements and

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101 At ch 5 and Appendix 1.
102 At vol 3.
103 *King Salmon* (Board), above n 6, at [555] and following.
104 The term "regional plan" includes a regional coastal plan: see RMA, s 43AA.

regional and district plans.[105] We are concerned with a regional coastal plan, the Sounds Plan. Up until August 2003, s 67 provided that such a regional plan should "not be inconsistent with" any New Zealand coastal policy statement. Since then, s 67 has stated the regional council's obligation as being to "give effect to" any New Zealand coastal policy statement. We consider that this change in language has, as the Board acknowledged,[106] resulted in a strengthening of the regional council's obligation.

[77] The Board was required to "give effect to" the NZCPS in considering King Salmon's plan change applications. "Give effect to" simply means "implement". On the face of it, it is a strong directive, creating a firm obligation on the part of those subject to it. As the Environment Court said in *Clevedon Cares Inc v Manukau City Council*:[107]

> [51] The phrase "*give effect to*" is a strong direction. This is understandably so for two reasons:
>
> [a] The hierarchy of plans makes it important that objectives and policies at the regional level are given effect to at the district level; and
>
> [b] The Regional Policy Statement, having passed through the [RMA] process, is deemed to give effect to Part 2 matters.

[78] Further, the RMA provides mechanisms whereby the implementation of the NZCPS by regional authorities can be monitored. One of the functions of the Minister of Conservation under s 28 of the RMA is to monitor the effect and implementation of the NZCPS. In addition, s 293 empowers the Environment Court to monitor whether a proposed policy statement or plan gives effect to the NZCPS; it may allow departures from the NZCPS only if they are of minor significance and do not affect the general intent and purpose of the proposed policy statement or plan.[108] The existence of such mechanisms underscores the strength of the "give effect to" direction.

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105 See [31] above.
106 *King Salmon* (Board), above n 6, at [1179].
107 *Clevedon Cares Inc v Manukau City Council* [2010] NZEnvC 211.
108 RMA, ss 293(3)–(5).

[79] The requirement to "give effect to" the NZCPS gives the Minister a measure of control over what regional authorities do: the Minister sets objectives and policies in the NZPCS and relevant authorities are obliged to implement those objectives and policies in their regional coastal plans, developing methods and rules to give effect to them. To that extent, the authorities fill in the details in their particular localities.

[80] We have said that the "give effect to" requirement is a strong directive, particularly when viewed against the background that it replaced the previous "not inconsistent with" requirement. There is a caveat, however. The implementation of such a directive will be affected by what it relates to, that is, what must be given effect to. A requirement to give effect to a policy which is framed in a specific and unqualified way may, in a practical sense, be more prescriptive than a requirement to give effect to a policy which is worded at a higher level of abstraction.

[81] The Board developed this point in its discussion of the requirement that it give effect to the NZCPS and the Marlborough Regional Policy Statement (in the course of which it also affirmed the primacy of s 5 over the NZCPS and the perceived need for the "overall judgment" approach). It said:[109]

> [1180] It [that is, the requirement to give effect to the NZCPS] is a strong direction and requires positive implementation of the instrument. However, both the instruments contain higher order overarching objectives and policies, that create tension between them or, as [counsel] says, "pull in different directions", and thus a judgment has to be made as to whether the instrument as a whole is generally given effect to.
>
> [1181] Planning instruments, particularly of a higher order, nearly always contain a wide range of provisions. Provisions which are sometimes in conflict. The direction "to give effect to" does not enjoin that every policy be met. It is not a simple check-box exercise. Requiring that every single policy must be given full effect to would otherwise set an impossibly high threshold for any type of activity to occur within the coastal marine area.
>
> [1182] Moreover, there is no "hierarchy" or ranking of provisions in the [NZCPS]. The objective seeking ecological integrity has the same standing as that enabling subdivision, use and development within the coastal environment. Where there are competing values in a proposal, one does not automatically prevail over the other. It is a matter of judgement on the facts of a particular proposal and no one factor is afforded the right to veto all other considerations. It comes down to a matter of weight in the particular circumstances.

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109 *King Salmon* (Board), above n 6 (citations omitted).

> [1183] In any case, the directions in both policy statements are subservient to the Section 5 purpose of sustainable management, as Section 66 of the RMA requires a council to change its plan in accordance, among other things, the provisions of Part II. Section 68(1) of the RMA requires that rules in a regional plan may be included for the purpose of carrying out the functions of the regional council and achieving the objectives and policies of the Plan.
>
> [1184] Thus, we are required [to] "give effect to" the provisions of the [NZCPS] and the Regional Policy Statement having regard to the provisions of those documents as a whole. We are also required to ensure that the rules assist the Regional Council in carrying out its functions under the RMA and achieve the objective and policies of the Regional Plan.

[82] Mr Kirkpatrick argued that there were two errors in this extract:

(a) It asserted that there was a state of tension or conflict in the policies of the NZCPS without analysing the relevant provisions to see whether such a state actually existed; and

(b) It assumed that "generally" giving effect to the NZCPS "as a whole" was compliant with s 67(3)(b).

[83] On the Board's approach, whether the NZCPS has been given effect to in determining a regional plan change application depends on an "overall judgment" reached after consideration of all relevant circumstances. The direction to "give effect to" the NZCPS is, then, essentially a requirement that the decision-maker consider the factors that are relevant in the particular case (given the objectives and policies stated in the NZCPS) before making a decision. While the weight given to particular factors may vary, no one factor has the capacity to create a veto – there is no bottom line, environmental or otherwise. The effect of the Board's view is that the NZCPS is essentially a listing of potentially relevant considerations, which will have varying weight in different fact situations. We discuss at [106] to [148] below whether this approach is correct.

[84] Moreover, as we indicated at [34] to [36] above, and as [1183] in the extract just quoted demonstrates, the Board ultimately determined King Salmon's applications not by reference to the NZCPS but by reference to pt 2 of the RMA. It did so because it considered that the language of s 66(1) required that approach. Ms Gwyn for the Minister supported the Board's approach. We do not accept that it is correct.

[85] First, while we acknowledge that a regional council is directed by s 66(1) to prepare and change any regional plan "in accordance with" (among other things) pt 2, it is also directed by s 67(3) to "give effect to" the NZCPS. As we have said, the purpose of the NZCPS is to state policies in order to achieve the RMA's purpose in relation to New Zealand's coastal environment. That is, the NZCPS gives substance to pt 2's provisions in relation to the coastal environment. In principle, by giving effect to the NZCPS, a regional council is necessarily acting "in accordance with" pt 2 and there is no need to refer back to the part when determining a plan change. There are several caveats to this, however, which we will mention shortly.

[86] Second, there are contextual considerations supporting this interpretation:

(a) As will be apparent from what we have said above, there is a reasonably elaborate process to be gone through before the Minister is able to issue a New Zealand coastal policy statement, involving an evaluation under s 32 and a board of inquiry or similar process with opportunity for public input. Given that process, we think it implausible that Parliament intended that the ultimate determinant of an application such as the present would be pt 2 and not the NZCPS. The more plausible view is that Parliament considered that pt 2 would be implemented if effect was given to the NZCPS.

(b) National policy statements such as the NZCPS allow Ministers a measure of control over decisions by regional and district councils. Accordingly, it is difficult to see why the RMA would require regional councils, as a matter of course, to go beyond the NZCPS, and back to pt 2, when formulating or changing a regional coastal plan which must give effect to the NZCPS. The danger of such an approach is that pt 2 may be seen as "trumping" the NZCPS rather than the NZCPS being the mechanism by which pt 2 is given effect in relation to the coastal environment.[110]

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[110] Indeed, counsel in at least one case has submitted that pt 2 "trumps" the NZCPS: see *Port Gore Marine Farms v Marlborough District Council* [2012] NZEnvC 72 at [197].

[87] Mr Nolan for King Salmon advanced a related argument as to the relevance of pt 2. He submitted that the purpose of the RMA as expressed in pt 2 had a role in the interpretation of the NZCPS and its policies because the NZCPS was drafted solely to achieve the purpose of the RMA; so, the NZCPS and its policies could not be interpreted in a way that would fail to achieve the purpose of the RMA.

[88] Before addressing this submission, we should identify three caveats to the "in principle" answer we have just given. First, no party challenged the validity of the NZCPS or any part of it. Obviously, if there was an allegation going to the lawfulness of the NZCPS, that would have to be resolved before it could be determined whether a decision-maker who gave effect to the NZCPS as it stood was necessarily acting in accordance with pt 2. Second, there may be instances where the NZCPS does not "cover the field" and a decision-maker will have to consider whether pt 2 provides assistance in dealing with the matter(s) not covered. Moreover, the obligation in s 8 to have regard to the principles of the Treaty of Waitangi will have procedural as well as substantive implications, which decision-makers must always have in mind, including when giving effect to the NZCPS. Third, if there is uncertainty as to the meaning of particular policies in the NZCPS, reference to pt 2 may well be justified to assist in a purposive interpretation. However, this is against the background that the policies in the NZCPS are intended to implement the six objectives it sets out, so that reference to one or more of those objectives may well be sufficient to enable a purposive interpretation of particular policies.

[89] We do not see Mr Nolan's argument as falling within the third of these caveats. Rather, his argument is broader in its effect, as it seeks to justify reference back to pt 2 as a matter of course when a decision-maker is required to give effect to the NZCPS.

[90] The difficulty with the argument is that, as we have said, the NZCPS was intended to give substance to the principles in pt 2 in respect of the coastal environment by stating objectives and policies which apply those principles to that environment: the NZCPS translates the general principles to more specific or focussed objectives and policies. The NZCPS is a carefully expressed document

whose contents are the result of a rigorous process of formulation and evaluation. It is a document which reflects particular choices. To illustrate, s 5(2)(c) of the RMA talks about "avoiding, remedying or mitigating any adverse effects of activities on the environment" and s 6(a) identifies "the preservation of the natural character of the coastal environment (including the coastal marine area) … and the protection of [it] from inappropriate subdivision, use and development" as a matter of national importance to be recognised and provided for. The NZCPS builds on those principles, particularly in policies 13 and 15. Those two policies provide a graduated scheme of protection and preservation based on the features of particular coastal localities, requiring avoidance of adverse effects in outstanding areas but allowing for avoidance, mitigation or remedying in others. For these reasons, it is difficult to see that resort to pt 2 is either necessary or helpful in order to interpret the policies, or the NZCPS more generally, absent any allegation of invalidity, incomplete coverage or uncertainty of meaning. The notion that decision-makers are entitled to decline to implement aspects of the NZCPS if they consider that appropriate in the circumstances does not fit readily into the hierarchical scheme of the RMA.

[91] We acknowledge that the scheme of the RMA does give subordinate decision-makers considerable flexibility and scope for choice. This is reflected in the NZCPS, which is formulated in a way that allows regional councils flexibility in implementing its objectives and policies in their regional coastal policy statements and plans. Many of the policies are framed in terms that provide flexibility and, apart from that, the specific methods and rules to implement the objectives and policies of the NZCPS in particular regions must be determined by regional councils. But the fact that the RMA and the NZCPS allow regional and district councils scope for choice does not mean, of course, that the scope is infinite. The requirement to "give effect to" the NZCPS is intended to constrain decision-makers.

Meaning of "avoid"

[92] The word "avoid" occurs in a number of relevant contexts. In particular:

(a) Section 5(c) refers to "avoiding, remedying, or mitigating any adverse effects of activities on the environment".

(b) Policy 13(1)(a) provides that decision-makers should "avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character"; policy 15 contains the same language in relation to outstanding natural features and outstanding natural landscapes in the coastal environment.

(c) Policies 13(1)(b) and 15(b) refer to avoiding significant adverse effects, and to avoiding, remedying or mitigating other adverse effects, in particular areas.

[93] What does "avoid" mean in these contexts? As we have said, given the juxtaposition of "mitigate" and remedy", the most obvious meaning is "not allow" or "prevent the occurrence of". But the meaning of "avoid" must be considered against the background that:

(a) the word "effect" is defined broadly in s 3;

(b) objective 6 recognises that the protection of the values of the coastal environment does not preclude use and development "in appropriate places and forms and within appropriate limits"; and

(c) both policies 13(1)(a) and (b) and 15(a) and (b) are means for achieving particular goals – in the case of policy 13(1)(a) and (b), preserving the natural character of the coastal environment and protecting it from "inappropriate" subdivision, use and development and, in the case of policy 15(a) and (b), protecting the natural features and natural landscapes of the coastal environment from "inappropriate" subdivision, use and development.

[94] In *Man O'War Station*, the Environment Court said that the word "avoid" in policy 15(a) did not mean "prohibit",[111] expressing its agreement with the view of the Court in *Wairoa River Canal Partnership v Auckland Regional Council*.[112] The Court accepted that policy 15 should not be interpreted as imposing a blanket

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111 *Man O'War Station*, above n 46, at [48].
112 *Wairoa River Canal Partnership*, above n 46.

prohibition on development in any area of the coastal environment that comprises an outstanding natural landscape as that would undermine the purpose of the RMA, including consideration of factors such as social and economic wellbeing.[113]

[95] In the *Wairoa River Canal Partnership* case, an issue arose concerning a policy (referred to as policy 3) proposed to be included in the Auckland Regional Policy Statement. It provided that countryside living (ie, low density residential development on rural land) "avoids development in those areas … identified … as having significant, ecological, heritage or landscape value or high natural character" and possessing certain characteristics. The question was whether the word "inappropriate" should be inserted between "avoids" and "development", as sought by Wairoa River Canal Partnership. In the course of addressing that, the Environment Court said that policy 3 did "not attempt to impose a prohibition on development – to avoid is a step short of to prohibit".[114] The Court went on to say that the use of "avoid" "sets a presumption (or a direction to an outcome) that development in those areas will be inappropriate …".[115]

[96] We express no view on the merits of the Court's analysis in the *Wairoa River Canal Partnership* case, which was focussed on the meaning of "avoid", standing alone, in a particular policy proposed for the Auckland Regional Policy Statement. Our concern is with the interpretation of "avoid" as it is used in s 5(2)(c) and in relevant provisions of the NZCPS. In that context, we consider that "avoid" has its ordinary meaning of "not allow" or "prevent the occurrence of". In the sequence "avoiding, remedying, or mitigating any adverse effects of activities on the environment" in s 5(2)(c), for example, it is difficult to see that "avoid" could sensibly bear any other meaning. Similarly in relation to policies 13(1)(a) and (b) and 15(a) and (b), which also juxtapose the words "avoid", "remedy" and "mitigate". This interpretation is consistent with objective 2 of the NZCPS, which is, in part, "[t]o preserve the natural character of the coastal environment and protect natural features and landscape values through … identifying those areas where various forms of subdivision, use, and development would be inappropriate and protecting

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113 *Man O'War Station*, above n 46, at [43].
114 *Wairoa River Canal Partnership*, above n 46, at [15].
115 At [16].

them from such activities". It is also consistent with objective 6's recognition that protection of the values of the coastal environment does not preclude use and development "in appropriate places and forms, and within appropriate limits". The "does not preclude" formulation emphasises protection by allowing use or development only where appropriate, as opposed to allowing use or development unless protection is required.

[97] However, taking that meaning may not advance matters greatly: whether "avoid" (in the sense of "not allow" or "prevent the occurrence of") bites depends upon whether the "overall judgment" approach or the "environmental bottom line" approach is adopted. Under the "overall judgment" approach, a policy direction to "avoid" adverse effects is simply one of a number of relevant factors to be considered by the decision maker, albeit that it may be entitled to great weight; under the "environmental bottom line" approach, it has greater force.

Meaning of "inappropriate"

[98] Both pt 2 of the RMA and provisions in the NZCPS refer to protecting areas such as outstanding natural landscapes from "inappropriate" development – they do not refer to protecting them from *any* development.[116] This suggests that the framers contemplated that there might be "appropriate" developments in such areas, and raises the question of the standard against which "inappropriateness" is to be assessed.

[99] Moreover, objective 6 and policies 6 and 8 of the NZCPS invoke the standard of "appropriateness". To reiterate, objective 6 provides in part:

> To enable people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through subdivision, use, and development, recognising that:
>
> - the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits;

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116 RMA, s 6(a) and (b); NZCPS, above n 13, objective 6 and policies 13(1)(a) and 15(a).

This is echoed in policy 6 which deals with activities in the coastal environment. Policy 6(2)(c) reads: "recognise that there are activities that have a functional need to be located in the coastal marine area, and provide for those activities in appropriate places". Policy 8 indicates that regional policy statements and plans should make provision for aquaculture activities:

> … in appropriate places in the coastal environment, recognising that relevant considerations may include:
>
> (i) the need for high water quality for aquaculture activities; and
>
> (ii) the need for land-based facilities associated with marine farming;

[100] The scope of the words "appropriate" and "inappropriate" is, of course, heavily affected by context. For example, where policy 8 refers to making provision for aquaculture activities "in appropriate places in the coastal environment", the context suggests that "appropriate" is referring to suitability for the needs of aquaculture (for example, water quality) rather than to some broader notion. That is, it is referring to suitability in a technical sense. By contrast, where objective 6 says that the protection of the values of the coastal environment does not preclude use and development "in appropriate places and forms, and within appropriate limits", the context suggests that "appropriate" is not concerned simply with technical suitability for the particular activity but with a broader concept that encompasses other considerations, including environmental ones.

[101] We consider that where the term "inappropriate" is used in the context of protecting areas from inappropriate subdivision, use or development, the natural meaning is that "inappropriateness" should be assessed by reference to what it is that is sought to be protected. It will be recalled that s 6(b) of the RMA provides:

> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
>
> …
>
> (b) the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:
>
> …

A planning instrument which provides that any subdivision, use or development that adversely affects an area of outstanding natural attributes is inappropriate is consistent with this provision.

[102] The meaning of "inappropriate" in the NZCPS emerges from the way in which particular objectives and policies are expressed. Objective 2 deals with preserving the natural character of the coastal environment and protecting natural features and landscape values through, among other things, "identifying those areas where various forms of subdivision, use, and development would be inappropriate and protecting them from such activities". This requirement to identify particular areas, in the context of an overall objective of preservation and protection, makes it clear that the standard for inappropriateness relates back to the natural character and other attributes that are to be preserved or protected, and also emphasises that the NZCPS requires a strategic, region-wide approach. The word "inappropriate" in policies 13(1)(a) and (b) and 15(a) and (b) of the NZCPS bears the same meaning. To illustrate, the effect of policy 13(1)(a) is that there is a policy to preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development *by avoiding the adverse effects on natural character in areas of the coastal environment with outstanding natural character*. The italicised words indicate the meaning to be given to "inappropriate" in the context of policy 13.

[103] If "inappropriate" is interpreted in the way just described, it might be thought to provide something in the nature of an "environmental bottom line". However, that will not necessarily be so if policies 13 and 15 and similarly worded provisions are regarded simply as relevant considerations which may be outweighed in particular situations by other considerations favouring development, as the "overall judgment" approach contemplates.

[104] An alternative approach is to treat "inappropriate" (and "appropriate" in objective 6 and policies 6(2)(c) and 8) as the mechanism by which an overall judgment is to be made about a particular development proposal. On that approach, a decision-maker must reach an evaluation of whether a particular development proposal is, in all the circumstances, "appropriate" or "inappropriate". So, an

aquaculture development that will have serious adverse effects on an area of outstanding natural character may nevertheless be deemed not to be "inappropriate" if other considerations (such as suitability for aquaculture and economic benefits) are considered to outweigh those adverse effects: the particular site will be seen as an "appropriate" place for aquaculture in terms of policy 8 despite the adverse effects.

[105] We consider that "inappropriate" should be interpreted in s 6(a), (b) and (f) against the backdrop of what is sought to be protected or preserved. That is, in our view, the natural meaning. The same applies to objective 2 and policies 13 and 15 in the NZCPS. Again, however, that does not resolve the fundamental issue in the case, namely whether the "overall judgment" approach adopted by the Board is the correct approach. We now turn to that.

Was the Board correct to utilise the "overall judgment" approach?

[106] In the extracts from its decision which we have quoted at [34] to [35] and [81] above, the Board emphasised that in determining whether or not it should grant the plan changes, it had to make an "overall judgment" on the facts of the particular proposal and in light of pt 2 of the RMA.

[107] We noted at [38] above that several early decisions of the Planning Tribunal adopted what has been described as the "environmental bottom line" approach to s 5. That approach finds some support in the speeches of responsible Ministers in the House. In the debate on the second reading of the Resource Management Bill, the Rt Hon Geoffrey Palmer said:[117]

> The Bill as reported back does not reflect a wish list of any one set of views. Instead, it continues to reflect the balancing of the range of views that society holds about the use of land, air, water and minerals, while recognising that there is an ecological bottom line to all of those questions.

In introducing the Bill for its third reading, the Hon Simon Upton said:[118]

> The Bill provides us with a framework to establish objectives by a physical bottom line that must not be compromised. Provided that those objectives are met, what people get up to is their affair. As such, the Bill provides a

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117 (28 August 1990) 510 NZPD 3950.
118 (4 July 1991) 516 NZPD 3019.

> more liberal regime for developers. On the other hand, activities will have to be compatible with hard environmental standards, and society will set those standards. Clause 4 [now s 5] sets out the biophysical bottom line. Clauses 5 and 6 [now ss 6 and 7] set out further specific matters that expand on the issue. The Bill has a clear and rigorous procedure for the setting of environmental standards – and the debate will be concentrating on just where we set those standards. They are established by public process.

[108] In the plan change context under consideration, the "overall judgment" approach does not recognise any such bottom lines, as Dobson J accepted. The Judge rejected the view that some coastal environments could be excluded from marine farming activities absolutely as a result of their natural attributes. That approach, he said, "would be inconsistent with the evaluative tenor of the NZCPS, when assessed in the round".[119] Later, the Judge said:[120]

> The essence of EDS's concern is to question the rationale, in resource management terms, for designating coastal areas as having outstanding natural character or features, if that designation does not protect the area from an economic use that will have adverse effects. An answer to that valid concern is that such designations do not afford absolute protection. Rather, they require a materially higher level of justification for relegating that outstanding natural character or feature, when authorising an economic use of that coastal area, than would be needed in other coastal areas.

Accordingly, Dobson J upheld the "overall judgment" approach as the approach to be adopted.

[109] One noteworthy feature of the extract just quoted is the requirement for "a materially higher level of justification" where an area of outstanding natural character will be adversely affected by a proposed development. The Board made an observation to similar effect when it said:[121]

> [1240] The placement of any salmon farm into this dramatic landscape with its distinctive landforms, vegetation and seascape, would be an abrupt incursion. This together with the Policy directions of the Sounds Plan as indicated by its CMZ1 classification of Port Gore, weighs heavily against the Proposed Plan Change.

We consider these to be significant acknowledgements and will return to them shortly.

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119 *King Salmon* (HC), above n 2, at [149].
120 At [151].
121 *King Salmon* (Board), above n 6.

[110] Mr Kirkpatrick argued that the Board and the Judge were wrong to adopt the "overall judgment" approach, submitting in particular that it:

(a) is inconsistent with the Minister's statutory power to set national priorities "for the preservation of the natural character of the coastal environment of New Zealand, including protection from inappropriate subdivision, use, and development";[122] and

(b) does not reflect the language of the relevant policies of the NZCPS, in particular policies 8, 13 and 15.

[111] In response, Ms Gwyn emphasised that the policies in the NZCPS were policies, not standards or rules. She argued that the NZCPS provides direction for decision-makers (including boards of inquiry) but leaves them with discretion as to how to give effect to the NZCPS. Although she acknowledged that policies 13 and 15 give a strong direction, Ms Gwyn submitted that they cannot and do not prohibit activities that adversely affect coastal areas with outstanding features. Where particular policies are in conflict, the decision-maker is required to exercise its own judgment, as required by pt 2. Mr Nolan's submissions were to similar effect. While he accepted that some objectives or policies provided more guidance than others, they were not "standards or vetos". Mr Nolan submitted that this was "the only tenable, workable approach that would achieve the RMA's purpose". The approach urged by EDS would, he submitted, undermine the RMA's purpose by allowing particular considerations to trump others whatever the consequences.

(i) The NZCPS: policies and rules

[112] We begin with Ms Gwyn's point that the NZCPS contains objectives and policies rather than methods or rules. As Ms Gwyn noted, the Full Court of the Court of Appeal dealt with a similar issue in *Auckland Regional Council v North Shore City Council*.[123] The Auckland Regional Council was in the process of hearing and determining submissions in respect of its proposed regional policy statement. That proposed policy statement included provisions which were designed

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122 RMA, s 58(a).

123 *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18 (CA).

to limit urban development to particular areas (including demarking areas by lines on maps). These provisions were to have a restrictive effect on the power of the relevant territorial authorities to permit further urbanisation in particular areas; the urban limits were to be absolutely restrictive.[124]

[113] The Council's power to impose such restrictions was challenged. The contentions of those challenging these limits were summarised by Cooke P, delivering the judgment of the Court, as follows:[125]

> The defendants contend that the challenged provisions would give the proposed regional policy statement a master plan role, interfering with the proper exercise of the responsibilities of territorial authorities; that it would be "coercive" and that "The drawing of a line on a map is the ultimate rule. There is no scope for further debate or discretion. No further provision can be made in a regional plan or a district plan".

The defendants' essential point was that the Council was proposing to go beyond a policy-making role to a rule-making role, which it was not empowered to do under the RMA.

[114] The Court considered, however, that the defendants' contention placed too limited a meaning on the scope of the words "policy" and "policies" in ss 59 and 62 of the RMA (which deal with, respectively, the purpose and content of regional policy statements). The Court held that "policy" should be given its ordinary and natural meaning and that a definition such as "course of action" was apposite. The Court said:[126]

> It is obvious that in ordinary present-day speech a policy may be either flexible or inflexible, either broad or narrow. Honesty is said to be the best policy. Most people would prefer to take some discretion in implementing it, but if applied remorselessly it would not cease to be a policy. Counsel for the defendants are on unsound ground in suggesting that, in everyday New Zealand speech or in parliamentary drafting or in etymology, policy cannot include something highly specific. …

[115] As to the argument that a regional policy statement could not contain what were in effect rules, Cooke P said:[127]

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124 At 19.
125 At 22.
126 At 23.
127 At 23.

> A well-meant sophistry was advanced to bolster the argument. It was said that the [RMA] in s 2(1) defines "rule" as a district rule or a regional rule, and that the scheme of the [RMA] is that "rules" may be included in regional plans (s 68) or district plans (s 76) but not in regional policy statements. That is true. But it cannot limit the scope of a regional policy statement. The scheme of the [RMA] does not include direct enforcement of regional policy statements against members of the public. As far as now relevant, the authorised contravention procedures relate to breaches of the rules in district plans or proposed district plans (s 9 and Part XII generally). Regional policy statements may contain rules in the ordinary sense of that term, but they are not rules within the special statutory definition directly binding on individual citizens. Mainly they derive their impact from the stipulation of Parliament that district plans may not be inconsistent with them.

[116] In short, then, although a policy in a New Zealand coastal policy statement cannot be a "rule" within the special definition in the RMA, it may nevertheless have the effect of what in ordinary speech would be a rule. Policy 29 in the NZCPS is an obvious example.

(ii) Section 58 and other statutory indicators

[117] We turn next to s 58. It contains provisions which are, in our view, inconsistent with the notion that the NZCPS is, properly interpreted, no more than a statement of relevant considerations, to which a decision-maker is entitled to give greater or lesser weight in the context of determining particular matters. Rather, these provisions indicate that it was intended that a New Zealand coastal policy statement might contain policies that were not discretionary but would have to be implemented if relevant. The relevant provisions provide for a New Zealand coastal policy statement to contain objectives and policies concerning:

(a) national priorities for specified matters (ss 58(a) and (ga));

(b) the Crown's interests in the coastal marine area (s 58(d));

(c) matters to be included in regional coastal plans in regard to the preservation of the natural character of the coastal environment (s 58(e));

(d) the implementation of New Zealand's international obligations affecting the coastal environment (s 58(f));

(e) the procedures and methods to be used to review the policies and monitor their effectiveness (s 58(g)); and

(f) the protection of protected customary rights (s 58 (gb)).

[118] We begin with s 58(a), the language of which is set out at [110](a) above. It deals with the Minister's ability (by means of the NZCPS) to set national priorities in relation to the preservation of the natural character of the coastal environment. This provision contemplates the possibility of objectives and policies the effect of which is to provide absolute protection from the adverse effects of development in relation to particular areas of the coastal environment. The power of the Minister to set objectives and policies containing national priorities for the preservation of natural character is not consistent with the "overall judgment" approach. This is because, on the "overall judgment" approach, the Minister's assessment of national priorities as reflected in a New Zealand coastal policy statement would not be binding on decision-makers but would simply be a relevant consideration, albeit (presumably) a weighty one. If the Minister did include objectives or policies which had the effect of protecting areas of the coastal environment against the adverse effects of development as national priorities, it is inconceivable that regional councils would be free to act inconsistently with those priorities on the basis that, although entitled to great weight, they were ultimately no more than relevant considerations. The same is true of s 58(ga), which relates to national priorities for maintaining and enhancing public access to and along the coastal marine area (that is, below the line of mean high water springs).

[119] A similar analysis applies in respect of ss 58(d), (f) and (gb). These enable the Minister to include in a New Zealand coastal policy statement objectives and policies concerning first, the Crown's interests in the coastal marine area, second, the implementation of New Zealand's international obligations affecting the coastal environment and third, the protection of protected rights. We consider that the Minister is entitled to include in such a statement relevant objectives and policies that are intended, where relevant, to be binding on decision-makers. If policies concerning the Crown's interests, New Zealand's international obligations or the protection of protected rights were to be stated in binding terms, it is difficult to see

what justification there could be for interpreting them simply as relevant considerations which a decision-maker would be free to apply or not as it saw appropriate in particular circumstances. The Crown's interests in the coastal marine area, New Zealand's relevant international obligations and the protection of protected rights are all matters about which it is to be expected that the Minister would have authority to make policies that are binding if he or she considered such policies were necessary.

[120] Next we come to s 58(g), which permits objectives and policies concerning "the procedures and methods to be used to review the policies and to monitor their effectiveness". It will be recalled that one of the responsibilities of the Minister under s 28(d) of the RMA is to monitor the effect and implementation of New Zealand coastal policy statements. The Minister would be entitled, in our view, to set out policies in a New Zealand coastal policy statement that were designed to impose obligations on local authorities so as to facilitate that review and monitoring function. It is improbable that any such policies were intended to be discretionary as far as local authorities were concerned.

[121] Finally, there is s 58(e). It provides that a New Zealand coastal policy statement may state objectives or policies about:

> the matters to be included in 1 or more regional coastal plans in regard to the preservation of the natural character of the coastal environment, including the activities that are required to be specified as restricted coastal activities because the activities—
>
> (i) have or are likely to have significant or irreversible adverse effects on the coastal marine area; or
>
> (ii) relate to areas in the coastal marine area that have significant conservation value: …

The term "restricted coastal activity" is defined in s 2 to mean "any discretionary activity or non-complying activity that, in accordance with section 68, is stated by a regional coastal plan to be a restricted coastal activity". Section 68 allows a regional council to include rules in regional plans. Section 68(4) provides that a rule may specify an activity as a restricted coastal activity only if the rule is in a regional coastal plan and the Minister of Conservation has required the activity to be so

specified on one of the two grounds contained in s 58(e). The obvious mechanism by which the Minister may require the activity to be specified as a restricted coastal activity is a New Zealand coastal policy statement. Accordingly, although the matters covered by s 58(e) are to be stated as objectives or policies in a New Zealand coastal policy statement, the intention must be that any such requirement will be binding on the relevant regional councils. Given the language and the statutory context, a policy under s 58(e) cannot simply be a factor that a regional council must consider or about which it has discretion.

[122] This view is confirmed by policy 29 in the NZCPS, which states that the Minister does not require any activity to be specified as a restricted coastal activity in a regional coastal plan and directs local authorities that they must amend documents in the ways specified to give effect to this policy as soon as practicable. Policy 29 is highly prescriptive and illustrates that a policy in a New Zealand coastal policy statement may have the effect of what, in ordinary speech, might be described as a rule (because it must be observed), even though it would not be a "rule" under the RMA definition.

[123] In addition to these provisions in s 58, we consider that s 58A offers assistance. It provides that a New Zealand coastal policy statement may incorporate material by reference under sch 1AA of the RMA. Clause 1 of sch 1AA relevantly provides:

> **1 Incorporation of documents by reference**
>
> (1) The following written material may be incorporated by reference in a national environmental standard, national policy statement, or New Zealand coastal policy statement:
>
> (a) standards, requirements, or recommended practices of international or national organisations:
>
> (b) standards, requirements, or recommended practices prescribed in any country or jurisdiction:
>
> …
>
> (3) Material incorporated by reference in a national environmental standard, national policy statement, or New Zealand coastal policy statement has legal effect as part of the standard or statement.

[124] As can be seen, cl 1 envisages that a New Zealand coastal statement may contain objectives or policies that refer to standards, requirements or recommended practices of international and national organisations. This also suggests that Parliament contemplated that the Minister might include in a New Zealand coastal policy statement policies that, in effect, require adherence to standards or impose requirements, that is, policies that are prescriptive and are expected to be followed. If this is so, a New Zealand coastal policy statement cannot properly be viewed as simply a document which identifies a range of potentially relevant policies, to be given effect in subordinate planning documents as decision-makers consider appropriate in particular circumstances.

[125] Finally in this context, we mention ss 55 and 57. Section 55(2) relevantly provides that, if a national policy statement so directs, a regional council[128] must amend a regional policy statement or regional plan to include specific objectives or policies or so that objectives or policies in the regional policy statement or regional plan "give effect to objectives and policies specified in the [national policy] statement". Section 55(3) provides that a regional council "must also take any other action that is specified in the national policy statement". Under s 57(2), s 55 applies to a New Zealand coastal policy statement as if it were a national policy statement "with all necessary modifications". Under s 43AA the term "regional plan" includes a regional coastal plan. These provisions underscore the significance of the regional council's (and therefore the Board's) obligation to "give effect to" the NZCPS and the role of the NZCPS as an mechanism for Ministerial control. They contemplate that a New Zealand coastal policy statement may be directive in nature.

(iii) Interpreting the NZCPS

[126] We agree with Mr Kirkpatrick that the language of the relevant policies in the NZCPS is significant and that the various policies are not inevitably in conflict or pulling in different directions. Beginning with language, we have said that "avoid" in policies 13(1)(a) and 15(a) is a strong word, meaning "not allow" or "prevent the occurrence of", and that what is "inappropriate" is to be assessed against the

[128] Section 55 of the RMA uses the term "local authority", which is defined in s 2 to include a regional council.

characteristics of the environment that policies 13 and 15 seek to preserve. While we acknowledge that the most likely meaning of "appropriate" in policy 8(a) is that it relates to suitability for salmon farming, the policy does not suggest that provision must be made for salmon farming in *all* places that might be appropriate for it in a particular coastal region.

[127] Moreover, when other provisions in the NZCPS are considered, it is apparent that the various objectives and policies are expressed in deliberately different ways. Some policies give decision-makers more flexibility or are less prescriptive than others. They identify matters that councils should "take account of" or "take into account",[129] "have (particular) regard to",[130] "consider",[131] "recognise",[132] "promote"[133] or "encourage";[134] use expressions such as "as far as practicable",[135] "where practicable",[136] and "where practicable and reasonable";[137] refer to taking "all practicable steps"[138] or to there being "no practicable alternative methods".[139] Policy 3 requires councils to adopt the precautionary approach, but naturally enough the implementation of that approach is addressed only generally; policy 27 suggests a range of strategies. Obviously policies formulated along these lines leave councils with considerable flexibility and scope for choice. By contrast, other policies are expressed in more specific and directive terms, such as policies 13, 15, 23 (dealing with the discharge of contaminants) and 29. These differences matter. One of the dangers of the "overall judgment" approach is that it is likely to minimise their significance.

[128] Both the Board and Dobson J acknowledged that the language in which particular policies were expressed did matter: the Board said that the concern underpinning policies 13 and 15 "weighs heavily against" granting the plan change and the Judge said that departing from those policies required "a materially higher

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129 NZCPS, above n 13, policies 2(e) and 6(g).
130 Policy 10; see also policy 5(2).
131 Policies 6(1) and 7(1)(a).
132 Policies 1, 6, 9, 12(2) and 26(2).
133 Policies 6(2)(e) and 14.
134 Policies 6(c) and 25(c) and (d).
135 Policies 2(c) and (g) and 12(1).
136 Policies 14 (c), 17(h), 19(4), 21(c) and 23(4)(a).
137 Policy 6(1)(i).
138 Policy 23(5)(a).
139 Policy 10(1)(c).

level of justification".[140] This view that policies 13 and 15 should not be applied in the terms in which they are drafted but simply as very important considerations was based on the perception that to apply them in accordance with their terms would be contrary to the purpose of the RMA and unworkable. Both Ms Gwyn and Mr Nolan supported this position in argument; they accepted that policies such as policies 13 and 15 provided "more guidance" than other policies or constituted "starting points", but argued that they were not standards, nor did they operate as vetoes. Although this view of the NZCPS as a document containing guidance or relevant considerations of differing weight has significant support in the authorities, it is not one with which we agree.

[129] When dealing with a plan change application, the decision-maker must first identify those policies that are relevant, paying careful attention to the way in which they are expressed. Those expressed in more directive terms will carry greater weight than those expressed in less directive terms. Moreover, it may be that a policy is stated in such directive terms that the decision-maker has no option but to implement it. So, "avoid" is a stronger direction than "take account of ". That said however, we accept that there may be instances where particular policies in the NZCPS "pull in different directions". But we consider that this is likely to occur infrequently, given the way that the various policies are expressed and the conclusions that can be drawn from those differences in wording. It may be that an apparent conflict between particular policies will dissolve if close attention is paid to the way in which the policies are expressed.

[130] Only if the conflict remains after this analysis has been undertaken is there any justification for reaching a determination which has one policy prevailing over another. The area of conflict should be kept as narrow as possible. The necessary analysis should be undertaken on the basis of the NZCPS, albeit informed by s 5. As we have said, s 5 should not be treated as the primary operative decision-making provision.

[131] A danger of the "overall judgment" approach is that decision-makers may conclude too readily that there is a conflict between particular policies and prefer one

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[140] *King Salmon* (Board), above n 6, at [1240]; and *King Salmon* (HC), above n 2, at [151].

over another, rather than making a thoroughgoing attempt to find a way to reconcile them. In the present case, we do not see any insurmountable conflict between policy 8 on the one hand and policies 13(1)(a) and 15(a) on the other. Policies 13(1)(a) and 15(a) provide protections against adverse effects of development in particular limited areas of the coastal region – areas of *outstanding* natural character, of *outstanding* natural features and of *outstanding* natural landscapes (which, as the use of the word "outstanding" indicates, will not be the norm). Policy 8 recognises the need for sufficient provision for salmon farming in areas suitable for salmon farming, but this is against the background that salmon farming cannot occur in one of the outstanding areas if it will have an adverse effect on the outstanding qualities of the area. So interpreted, the policies do not conflict.

[132] Policies 13(1)(a) and (b) and 15(a) and (b) do, in our view, provide something in the nature of a bottom line. We consider that this is consistent with the definition of sustainable management in s 5(2), which, as we have said, contemplates protection as well as use and development. It is also consistent with classification of activities set out in s 87A of the RMA, the last of which is activities that are prohibited.[141] The RMA contemplates that district plans may prohibit particular activities, either absolutely or in particular localities. If that is so, there is no obvious reason why a planning document which is higher in the hierarchy of planning documents should not contain policies which contemplate the prohibition of particular activities in certain localities.

[133] The contrast between the 1994 New Zealand Coastal Policy Statement (the 1994 Statement) and the NZCPS supports the interpretation set out above. Chapter 1 of the 1994 Statement sets out national priorities for the preservation of the natural character of the coastal environment. Policy 1.1.3 provides that it is a national priority to protect (among other things) "landscapes, seascapes and landforms" which either alone or in combination are essential or important elements of the natural character of the coastal environment. Chapter 3 deals with activities involving subdivision, use or development of areas of the coastal environment. Policy 3.2.1 provides that policy statements and plans "should define what form of

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[141] See [16] above.

subdivision, use or development would be appropriate in the coastal environment, and where it would be appropriate". Policy 3.2.2 provides:

> Adverse effects of subdivision, use or development in the coastal environment should as far as practicable be avoided. Where complete avoidance is not practicable, the adverse effects should be mitigated and provision made for remedying those effects, to the extent practicable.

[134] Overall, the language of the 1994 Statement is, in relevant respects, less directive and allows greater flexibility for decision-makers than the language of the NZCPS. The greater direction given by the NZCPS was a feature emphasised by Minister of Conservation, Hon Kate Wilkinson, when she released the NZCPS. The Minister described the NZCPS as giving councils "clearer direction on protecting and managing New Zealand's coastal environment" and as reflecting the Government's commitment "to deliver more national guidance on the implementation of the [RMA]".[142] The Minister said that the NZCPS was more specific than the 1994 Statement "about how some matters of national importance under the RMA should be protected from inappropriate use and development". Among the key differences the Minister identified was the direction on protection of natural character and outstanding landscapes. The emphasis was "on local councils to produce plans that more clearly identify where development will need to be constrained to protect special areas of the coast". The Minister also noted that the NZCPS made provision for aquaculture "in appropriate places".

[135] The RMA does, of course, provide for applications for private plan changes. However, we do not see this as requiring or even supporting the adoption of the "overall judgment" approach (or undermining the approach which we consider is required). We make two points:

(a) First, where there is an application for a private plan change to a regional coastal plan, we accept that the focus will be on the relevant locality and that the decision-maker may grant the application on a basis which means the decision has little or no significance beyond that locality. But the decision-maker must nevertheless always have

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[142] Office of the Minister of Conservation "New Coastal Policy Statement Released" (28 October 2010).

regard to the region-wide perspective that the NZCPS requires to be taken. It will be necessary to put the application in its overall context.

(b) Second, Papatua at Port Gore was identified as an area of outstanding natural attributes by the Marlborough District Council. An applicant for a private plan change in relation to such an area is, of course, entitled to challenge that designation. If the decision-maker is persuaded that the area is not properly characterised as outstanding, policies 13 and 15 allow for adverse effects to be remedied or mitigated rather than simply avoided, provided those adverse effects are not "significant". But if the coastal area deserves the description "outstanding", giving effect to the NZCPS requires that it be protected from development that will adversely affect its outstanding natural attributes.

[136] There are additional factors that support rejection of the "overall judgment" approach in relation to the implementation of the NZCPS. First, it seems inconsistent with the elaborate process required before a national coastal policy statement can be issued. It is difficult to understand why the RMA requires such an elaborate process if the NZCPS is essentially simply a list of relevant factors. The requirement for an evaluation to be prepared, the requirement for public consultation and the requirement for a board of inquiry process or an equivalent all suggest that a New Zealand coastal policy statement has a greater purpose than merely identifying relevant considerations.

[137] Second, the "overall judgment" approach creates uncertainty. The notion of giving effect to the NZCPS "in the round" or "as a whole" is not one that is easy either to understand or to apply. If there is no bottom line and development is possible in any coastal area no matter how outstanding, there is no certainty of outcome, one result being complex and protracted decision-making processes in relation to plan change applications that affect coastal areas with outstanding natural attributes. In this context, we note that historically there have been three mussel farms at Port Gore, despite its CMZ1 classification. The relevant permits came up

for renewal.[143] On various appeals from the decisions of the Marlborough District Council on the renewal applications, the Environment Court determined, in a decision issued on 26 April 2012, that renewals for all three should be declined. The Court said:[144]

> [238] In the end, after weighing all the evidence in respect of each mussel farm individually in the light of the relevant policy directions in the various statutory instruments and the RMA itself, we consider that achieving the purpose of the [RMA] requires that each application for a mussel farm should be declined.

[138] While the Court conducted an overall analysis, it was heavily influenced by the directives in policies 13 and 15 of the NZCPS, as given effect in this locality by the Marlborough District Council's CMZ1 zoning. This was despite the fact that the applicants had suggested mechanisms whereby the visual impact of the mussel farms could be reduced. There is no necessary inconsistency between the Board's decision in the present case and that of the Environment Court,[145] given that different considerations may arise on a salmon farm application than on a mussel farm application. But a comparison of the outcomes of the two cases does illustrate the uncertainty that arises from the "overall judgment" approach: although the mussel farms would have had an effect on the natural character and landscape attributes of the area that was less adverse than that arising from a salmon farm, the mussel farm applications were declined whereas the salmon farm application was granted.

[139] Further, the "overall judgment" approach has the potential, at least in the case of spot zoning plan change applications relating to coastal areas with outstanding natural attributes, to undermine the strategic, region-wide approach that the NZCPS requires regional councils to take to planning. We refer here to policies 7, 13(1)(c) and (d) and 15(d) and (e).[146] Also significant in this context is objective 6, which provides in part that "the proportion of the coastal marine area under any formal protection is small and therefore management under the [RMA] is an important

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143 Although the farms were in a CMZ1 zone, mussel farming at the three locations was treated as a discretionary activity.

144 *Port Gore Marine Farms v Marlborough District Council*, above n 110.

145 The Board was aware of the Court's decision because it cited it for a particular proposition: see *King Salmon* (Board), above n 6, at [595].

146 See [63] above.

means by which the natural resources of the coastal marine area can be protected". This also requires a "whole of region" perspective.

[140] We think it significant that the Board did not discuss policy 7 (although it did refer to it in its overview of the NZCPS), nor did it discuss the implications of policies 13(1)(c) and (d) and 15(d) and (e). As applied, the "overall judgment" approach allows the possibility that developments having adverse effects on outstanding coastal landscapes will be permitted on a piecemeal basis, without a full assessment of the overall effect of the various developments on the outstanding areas within the region as a whole. At its most extreme, such an approach could result in there being few outstanding areas of the coastal environment left, at least in some regions.

[141] A number of objections have been raised to the interpretation of the NZCPS that we have accepted, which we now address. First, we acknowledge that the opening section of the NZCPS contains the following:

> [N]umbering of objectives and policies is solely for convenience and is not to be interpreted as an indication of relative importance.

But the statement is limited to the impact of numbering; it does not suggest that the differences in wording as between various objectives and policies are immaterial to the question of relative importance in particular contexts. Indeed, both the Board and the Judge effectively accepted that policies 13 and 15 did carry additional weight. Ms Gwyn and Mr Nolan each accepted that this was appropriate. The contested issue is, then, not whether policies 13 and 15 have greater weight than other policies in relevant contexts, but rather how much additional weight.

[142] Second, in the *New Zealand Rail* case, Grieg J expressed the view that pt 2 of the RMA should not be subjected to "strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used".[147] He went on to say that there is "a deliberate openness about the language, its meanings and its connotations which … is intended to allow the application of

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147 *New Zealand Rail Ltd*, above n 71, at 86.

policy in a general and broad way."[148] The same might be said of the NZCPS. The NZCPS is, of course, a statement of objectives and policies and, to that extent at least, does differ from an enactment. But the NZCPS is an important part of a carefully structured legislative scheme: Parliament required that there be such a policy statement, required that regional councils "give effect to" it in the regional coastal plans they were required to promulgate, and established processes for review of its implementation. The NZCPS underwent a thoroughgoing process of development; the language it uses does not have the same "openness" as the language of pt 2 and must be treated as having been carefully chosen. The interpretation of the NZCPS must be approached against this background. For example, if the intention was that the NZCPS would be essentially a statement of potentially relevant considerations, to be given varying weight in particular contexts based on the decision-maker's assessment, it is difficult to see how the statutory review mechanisms could sensibly work.

[143] The Minister might, of course, have said in the NZCPS that the objectives and policies contained in it are simply factors that regional councils and others must consider in appropriate contexts and give such weight as they think necessary. That is not, however, how the NZCPS is framed.

[144] Third, it is suggested that this approach to policies 13(1)(a) and 15(a) will make their reach over-broad. The argument is that, because the word "effect" is widely defined in s 3 of the RMA and that definition carries over to the NZCPS, any activity which has an adverse effect, no matter how minor or transitory, will have to be avoided in an outstanding area falling within policies 13 or 15. This, it is said, would be unworkable. We do not accept this.

[145] The definition of "effect" in s 3 is broad. It applies "unless the context otherwise requires". So the question becomes, what is meant by the words "avoid adverse effects" in policies 13(1)(a) and 15(a)? This must be assessed against the opening words of each policy. Taking policy 13 by way of example, its opening words are: "To preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development". Policy 13(1)(a)

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148 At 86.

("avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character") relates back to the overall policy stated in the opening words. It is improbable that it would be necessary to prohibit an activity that has a minor or transitory adverse effect in order to preserve the natural character of the coastal environment, even where that natural character is outstanding. Moreover, some uses or developments may enhance the natural character of an area.

[146] Finally, Ms Gwyn and Mr Nolan both submitted, in support of the views of the Board and the High Court, that to give effect to policies 13(1)(a) and 15(a) in accordance with their terms would be inconsistent with the purpose of the RMA. We do not accept that submission. As we have emphasised, s 5(2) of the RMA contemplates environmental preservation and protection as an element of sustainable management of natural and physical resources. This is reinforced by the terms of s 6(a) and (b). It is further reinforced by the provision of a "prohibited activity" classification in s 87A, albeit that it applies to documents lower in the hierarchy of planning documents than the NZCPS. It seems to us plain that the NZCPS contains policies that are intended to, and do, have binding effect, policy 29 being the most obvious example. Policies 13(1)(a) and 15(a) are clear in their terms: they seek to protect areas of the coastal environment with outstanding natural features from the adverse effects of development. As we see it, that falls squarely within the concept of sustainable management and there is no justification for reading down or otherwise undermining the clear terms in which those two policies have been expressed.

[147] We should make explicit a point that is implicit in what we have just said. In *New Zealand Rail*, Grieg J said:[149]

> The recognition and provision for the preservation of the natural character of the coastal environment in the words of s 6(a) is to achieve the purpose of the [RMA], that is to say to promote the sustainable management of natural and physical resources. That means that the preservation of natural character is subordinate to the primary purpose of the promotion of sustainable management. It is not an end or an objective on its own but is accessory to the principle purpose.

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149 At 85.

This passage may be interpreted in a way that does not accurately reflect the proper relationship between s 6, in particular ss 6(a) and (b), and s 5.

[148] At the risk of repetition, s 5(2) defines sustainable management in a way that makes it clear that protecting the environment from the adverse effects of use or development is an aspect of sustainable management – not the only aspect, of course, but an aspect. Through ss 6(a) and (b), those implementing the RMA are directed, "in relation to managing the use, development, and protection of natural and physical resources", to provide for the preservation of the natural character of the coastal environment and its protection, as well as the protection of outstanding natural features and landscapes, from inappropriate development, these being two of seven matters of national importance. They are directed to make such provision in the context of "achieving the purpose of [the RMA]". We see this language as underscoring the point that preservation and protection of the environment is an element of sustainable management of natural and physical resources. Sections 6(a) and (b) are intended to make it clear that those implementing the RMA must take steps to implement that protective element of sustainable management.

[149] Section 6 does not, we agree, give primacy to preservation or protection; it simply means that provision must be made for preservation and protection as part of the concept of sustainable management. The fact that ss 6(a) and (b) do not give primacy to preservation or protection within the concept of sustainable management does not mean, however, that a particular planning document may not give primacy to preservation or protection in particular circumstances. This is what policies 13(1)(a) and 15(a) in the NZCPS do. Those policies are, as we have interpreted them, entirely consistent with the principle of sustainable management as expressed in s 5(2) and elaborated in s 6.

Conclusion on first question

[150] To summarise, both the Board and Dobson J expressed the view that the "overall judgment" approach was necessary to make the RMA workable and to give effect to its purpose of sustainable management. Underlying this is the perception, emphasised by Grieg J in *New Zealand Rail*, that the Environment Court, a specialist

body, has been entrusted by Parliament to construe and apply the principles contained in pt 2 of the RMA, giving whatever weight to relevant principles that it considers appropriate in the particular case.[150] We agree that the definition of sustainable management in s 5(2) is general in nature, and that, standing alone, its application in particular contexts will often, perhaps generally, be uncertain and difficult. What is clear about the definition, however, is that environmental protection by way of avoiding the adverse effects of use or development falls within the concept of sustainable management and is a response legitimately available to those performing functions under the RMA in terms of pt 2.

[151] Section 5 was not intended to be an operative provision, in the sense that it is not a section under which particular planning decisions are made; rather, it sets out the RMA's overall objective. Reflecting the open-textured nature of pt 2, Parliament has provided for a hierarchy of planning documents the purpose of which is to flesh out the principles in s 5 and the remainder of pt 2 in a manner that is increasingly detailed both as to content and location. It is these documents that provide the basis for decision-making, even though pt 2 remains relevant. It does not follow from the statutory scheme that because pt 2 is open-textured, all or some of the planning documents that sit under it must be interpreted as being open-textured.

[152] The NZCPS is an instrument at the top of the hierarchy. It contains objectives and policies that, while necessarily generally worded, are intended to give substance to the principles in pt 2 in relation to the coastal environment. Those objectives and policies reflect considered choices that have been made on a variety of topics. As their wording indicates, particular policies leave those who must give effect to them greater or lesser flexibility or scope for choice. Given that environmental protection is an element of the concept of sustainable management, we consider that the Minister was fully entitled to require in the NZCPS that particular parts of the coastal environment be protected from the adverse effects of development. That is what she did in policies 13(1)(a) and 15(a), in relation to coastal areas with features designated as "outstanding". As we have said, no party challenged the validity of the NZCPS.

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150 At 86.

[153] The Board accepted that the proposed plan change in relation to Papatua at Port Gore would have significant adverse effects on an area of outstanding natural character and landscape, so that the directions in policies 13(1)(a) and 15(a) of the NZCPS would not be given effect to if the plan change were to be granted. Despite this, the Board granted the plan change. It considered that it was entitled, by reference to the principles in pt 2, to carry out a balancing of all relevant interests in order to reach a decision. We consider, however, that the Board was obliged to deal with the application in terms of the NZCPS. We accept the submission on behalf of EDS that, given the Board's findings in relation to policies 13(1)(a) and 15(a), the plan change should not have been granted. These are strongly worded directives in policies that have been carefully crafted and which have undergone an intensive process of evaluation and public consultation. The NZCPS requires a "whole of region" approach and recognises that, because the proportion of the coastal marine area under formal protection is small, management under the RMA is an important means by which the natural resources of the coastal marine area can be protected. The policies give effect to the protective element of sustainable management.

[154] Accordingly, we find that the plan change in relation to Papatua at Port Gore did not comply with s 67(3)(b) of the RMA in that it did not give effect to the NZCPS.

Second question: consideration of alternatives

[155] The second question on which leave was granted raises the question of alternatives. This Court's leave judgment identified the question as:[151]

> Was the Board obliged to consider alternative sites or methods when determining a private plan change that is located in, or results in significant adverse effects on, an outstanding natural landscape or feature or outstanding natural character area within the coastal environment?

The Court went on to say:[152]

> This question raises the correctness of the approach taken by the High Court in *Brown v Dunedin City Council* [2003] NZRMA 420 and whether, if sound, the present case should properly have been treated as an exception to

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151 *King Salmon* (Leave), above n 10, at [1].
152 At [1].

> the general approach. Whether any error in approach was material to the decision made will need to be addressed if necessary.

[156] At the hearing of the appeal, Mr Kirkpatrick suggested modifications to the question, so that it read:

> Was the Board obliged to consider alternative sites when determining a site specific plan change that is located in, or does not avoid significant adverse effects on, an outstanding natural landscape or feature or outstanding natural character area within the coastal environment?

We will address the question in that form.

[157] We should make a preliminary point. We have concluded that the Board, having found that the proposed salmon farm at Papatua would have had significant adverse effects on the area's outstanding natural attributes, should have declined King Salmon's application in accordance with policies 13(1)(a) and 15(a) of the NZCPS. Accordingly, no consideration of alternatives would have been necessary. Moreover, although it did not consider that it was legally obliged to do so, the Board did in fact consider alternatives in some detail.[153] For these reasons, the second question is of reduced significance in the present case. Nevertheless, because it was fully argued, we will address it, albeit briefly.

[158] Section 32 is important in this context. Although we have referred to it previously, we set out the relevant portions of it for ease of reference:

> **32 Consideration of alternatives, benefits, and costs**
>
> (1) In achieving the purpose of this Act, before a proposed plan, proposed policy statement, change, or variation is publicly notified, a national policy statement or New Zealand coastal policy statement is notified under section 48, or a regulation is made, an evaluation must be carried out by—
>
> …
>
> (b) the Minister of Conservation, for the New Zealand coastal policy statement; or
>
> …
>
> (2) A further evaluation must also be made by—

[153] *King Salmon* (Board), above n 6, at [121]–[172].

(a) a local authority before making a decision under clause 10 or clause 29(4) of Schedule 1; and

(b) the relevant Minister before issuing a national policy statement or New Zealand coastal policy statement.

(3) An evaluation must examine—

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

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

…

(4) For the purposes of the examinations referred to in subsections (3) and (3A), an evaluation must take into account—

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

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

…

[159] A number of those who made submissions to the Board on King Salmon's plan change application raised the issue of alternatives to the plan changes sought, for example, conversion of mussel farms to salmon farms and expansion of King Salmon's existing farms. As we have said, despite its view that it was not legally obliged to do so, the Board did consider the various alternatives raised and concluded that none was suitable.

[160] The Board noted that it has been held consistently that there is no requirement for consideration of alternatives when dealing with a site specific plan change application.[154] The Board cited, as the principal authority for this proposition, the decision of the High Court in *Brown v Dunedin City Council*.[155] Mr Brown owned some land on the outskirts of Mosgiel that was zoned as "rural". He sought to have the zoning changed to residential. The matter came before the Environment Court on a reference. Mr Brown was unsuccessful in his application

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154 At [124].

155 *Brown v Dunedin City Council* [2003] NZRMA 420 (HC).

and appealed to the High Court, on the basis that the Environment Court had committed a number of errors of law, one of which was that it had allowed itself to be influenced by the potential of alternative sites to accommodate residential expansion. Chisholm J upheld this ground of appeal. Having discussed several decisions of the Environment Court, the Judge said:

> [16] I am satisfied that the theme running through the Environment Court decisions is legally correct: s 32(1) does not contemplate that determination of a site-specific proposed plan change will involve a comparison with alternative sites. As indicated in *Hodge*,[156] when the wording of s 32(1)(a)(ii) (and, it might be added, the expression "principal alternative means" in s 32(1)(b)) is compared with the wording of s 171(1)(a) and clause 1(b) of the Fourth Schedule it appears that such a comparison was not contemplated by Parliament. It is also logical that the assessment should be confined to the subject site. Other sites would not be before the Court and the Court would not have the ability to control the zoning of those sites. Under those circumstances it would be unrealistic and unfair to expect those supporting a site-specific plan change to undertake the mammoth task of eliminating all other potential alternative sites within the district. In this respect a site specific plan change can be contrasted with a full district-wide review of a plan pursuant to s 79(2) of the [RMA]. It might be added that in a situation where for some reason a comparison with alternative sites is unavoidable the Court might have to utilise the powers conferred by s 293 of the [RMA] so that other interested parties have an opportunity to be heard. However, it is unnecessary to determine that point.
>
> [17] It should not be implied from the foregoing that the Court is constrained in its ability to assess the effects of a proposed plan change on other properties, or on the district as a whole, in terms of the [RMA]. Such an assessment involves consideration of effects radiating from the existing or proposed zoning (or something in between) of the subject site. This is, of course, well removed from a comparison of alternative sites.

(Chisholm J's observations were directed at s 32 as it was prior to its repeal and replacement by the version at issue in this appeal, which has, in turn, been repealed and replaced.)

[161] The Board also noted the observation of the Environment Court in *Director-General of Conservation (Nelson-Marlborough Conservancy) v Marlborough District Council*:[157]

> It seems to us that whether alternatives should be considered depends firstly on a finding of fact as to whether or not there are significant adverse effects on the environment. If there are significant adverse effects on the

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156 *Hodge v Christchurch City Council* [1996] NZRMA 127 (PT) (citation added).

157 *Director-General of Conservation (Nelson-Marlborough Conservancy) v Marlborough District Council* [2010] NZEnvC 403 at [690] (quoted in *King Salmon* (Board), above n 6, at [126]).

> environment, particularly if they involve matters of national importance, it is a question of fact in each case as to whether or not an applicant should be required to look at alternatives, and the extent to which such an enquiry, including the undertaking of a cost/benefit analysis, should be carried out.

[162] In the High Court Dobson J held that the Board did not commit an error of law in rejecting a requirement to consider alternative locations.[158] The Judge adopted the approach taken by the Full Court of the High Court in *Meridian Energy Ltd v Central Otago District Council*.[159] There, in a resource consent context, the Court contrasted the absence of a specific requirement to consider alternatives with express requirements for such consideration elsewhere in the RMA.[160] The Court accepted that alternatives could be looked at, but rejected the proposition that they must be looked at.[161] Referring to *Brown*, Dobson J said:[162]

> Although the context is relevantly different from that in *Brown*, the same practical concerns arise in imposing an obligation on an applicant for a plan change to canvass all alternative locations. If, in the course of contested consideration of a request for a plan change, a more appropriate means of achieving the objectives is raised, then there is nothing in s 32 or elsewhere in the RMA that would preclude the consenting authority having regard to that as part of its evaluation. That is distinctly different, however, from treating such an assessment as mandatory under s 32.

[163] For EDS, Mr Kirkpatrick's essential point was that, in a case such as the present, it is mandatory to consider alternatives. He submitted that the terms of policies 13(1)(a) and 15(a) required consideration of alternatives in circumstances where the proposed development will have an adverse effect on an area of the coastal environment with outstanding natural attributes. Given that these policies appear alongside policy 8, the Board's obligation was to consider alternative sites in order to determine whether, if it granted the plan change sought, it would "give effect to" the NZCPS. Further, Mr Kirkpatrick argued that *Brown* had been interpreted too widely. He noted in particular the different context – *Brown* concerned a landowner seeking a zoning change in respect of his own land; the present case involves an application for a plan change that will result in the exclusive use of a resource that is in the public domain. Mr Kirkpatrick emphasised that, in considering the plan change, the

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158 *King Salmon* (HC), above n 2, at [174].
159 *Meridian Energy Ltd v Central Otago District Council* [2011] 1 NZLR 482 (HC).
160 At [77]–[81].
161 At [86]–[87].
162 *King Salmon* (HC), above n 2, at [171].

Board had to comply with s 32. That, he argued, required that the Board consider the "efficiency and effectiveness" of the proposed plan change, its benefits and costs and the risk of acting or not acting in conditions of uncertainty. He emphasised that, although this was an application in relation to a particular locality, it engaged the Sounds Plan as a whole.

[164] In response, Mr Nolan argued that s 32 should not be read as requiring consideration of alternative sites. He supported the findings of the Board and the High Court that there was no mandatory requirement to consider alternative *sites*, as opposed to alternative *methods*, which were the focus of s 32: that is, whether the proposed provisions were the most appropriate way to achieve the RMA's purpose. He relied on the *Meridian Energy* case. Mr Nolan accepted that there is nothing to preclude consideration of an alternative raised in the context of an application for a private plan change but said it was not a mandatory requirement. He noted that the decision in *Brown* has been widely adopted and applied and submitted that the distinction drawn by Mr Kirkpatrick between the use of private land and the use of public space for private purposes was unsustainable: s 32 applied equally in both situations. Mr Nolan submitted that to require applicants for a plan change such as that at issue to canvass all possible alternatives would impose too high a burden on them. In an application for a site-specific plan change, the focus should be on the merits of the proposed planning provisions for that site and whether they satisfy s 32 and achieve the RMA's purpose. Mr Nolan noted that there was nothing in policies 13 or 15 which required the consideration of alternative sites.

[165] We do not propose to address these arguments in detail, given the issue of alternatives has reduced significance in this case. Rather, we will make three points.

[166] First, as we have said, Mr Nolan submitted that consideration of alternative sites on a plan change application was not required but neither was it precluded. As he neatly put it, consideration of alternative sites was permissible but not mandatory. But that raises the question, when is consideration of alternative sites permissible? The answer cannot depend simply on the inclination of the decision-maker: such an approach would be unprincipled and would undermine rational decision-making. If consideration of alternatives is permissible, there must surely be something about the

circumstances of particular cases that make it so. Indeed, those circumstances may make consideration of alternatives not simply permissible but necessary. Mr Kirkpatrick submitted that what made consideration of alternatives necessary in this case was the Board's conclusion that the proposed salmon farm would have significant adverse effects on an area of outstanding natural character and landscape.

[167] Second, *Brown* concerned an application for a zoning change in relation to the applicant's own land. We agree with Chisholm J that the RMA does not *require* consideration of alternative sites as a matter of course in that context, and accept also that the practical difficulties which the Judge identified are real. However, we note that the Judge accepted that there may be instances where a consideration of alternative sites was required and suggested a way in which that might be dealt with.[163]

[168] We agree with Chisholm J that there may be instances where a decision-maker must consider the possibility of alternative sites when determining a plan change application in relation to the applicant's own land. We note that where a person requests a change to a district or regional plan, the relevant local authority may (if the request warrants it) require the applicant to provide "further information necessary to enable the local authority to better understand … the benefits and costs, the efficiency and effectiveness, and *any possible alternatives to the request*".[164] The words "alternatives to the request" refer to alternatives to the plan change sought, which must bring into play the issue of alternative sites. The ability to seek further information on alternatives to the requested change is understandable, given the requirement for a "whole of region" perspective in plans. At the very least, the ability of a local authority to require provision of this information supports the view that consideration of alternative sites may be relevant to the determination of a plan change application.

[169] Third, we agree with Mr Kirkpatrick that the question of alternative sites may have even greater relevance where an application for a plan change involves not the use of the applicant's own land, but the use of part of the public domain for a private

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163 *Brown v Dunedin City Council*, above n 155, at [16].
164 RMA, sch 1 cl 23(1)(c) (emphasis added).

commercial purpose, as here. It is true, as Mr Nolan argued, that the focus of s 32 is on the appropriateness of policies, methods or rules – the section does not mention individual sites. That said, an evaluation under s 32(3)(b) must address whether the policies, methods or rules proposed are the "most appropriate" way of achieving the relevant objectives, which requires consideration of alternative policies, methods or rules in relation to the particular site. Further, the fact that a local authority receiving an application for a plan change may require the applicant to provide further information concerning "any possible alternatives to the request" indicates that Parliament considered that alternative sites may be relevant to the local authority's determination of the application. We do not accept that the phrase "any possible alternatives to the request" refers simply to alternative outcomes of the application, that is, granting it, granting it on terms or refusing it.

[170] This brings us back to the question when consideration of alternative sites may be necessary. This will be determined by the nature and circumstances of the particular site-specific plan change application. For example, an applicant may claim that that a particular activity needs to occur in part of the coastal environment. If that activity would adversely affect the preservation of natural character in the coastal environment, the decision-maker ought to consider whether the activity does in fact need to occur in the coastal environment. Almost inevitably, this will involve the consideration of alternative localities. Similarly, even where it is clear that an activity must occur in the coastal environment, if the applicant claims that a particular site has features that make it uniquely, or even especially, suitable for the activity, the decision-maker will be obliged to test that claim; that may well involve consideration of alternative sites, particularly where the decision-maker considers that the activity will have significant adverse effects on the natural attributes of the proposed site. In short, the need to consider alternatives will be determined by the nature and circumstances of the particular application relating to the coastal environment, and the justifications advanced in support of it, as Mr Nolan went some way to accepting in oral argument.

[171] Also relevant in the context of a site specific plan change application such as the present is the requirement of the NZCPS that regional councils take a regional approach to planning. While, as Mr Nolan submitted, a site-specific application

focuses on the suitability of the planning provisions for the proposed site, the site will sit within a region, in respect of which there must be a regional coastal plan. Because that regional coastal plan must reflect a regional perspective, the decision-maker must have regard to that regional perspective when determining a site-specific plan change application. That may, at least in some instances, require some consideration of alternative sites.

[172] We see the obligation to consider alternative sites in these situations as arising at least as much from the requirements of the NZCPS and of sound decision-making as from s 32.

[173] Dobson J considered that imposing an obligation on all site-specific plan change applicants to canvass all alternative locations raised the same practical concerns as were canvassed by Chisholm J in *Brown*.[165] We accept that. But given that the need to consider alternative sites is not an invariable requirement but rather a contextual one, we do not consider that this will create an undue burden for applicants. The need for consideration of alternatives will arise from the nature and circumstances of the application and the reasons advanced in support of it. Particularly where the applicant for the plan change is seeking exclusive use of a public resource for private gain and the proposed use will have significant adverse effects on the natural attributes of the relevant coastal area, this does not seem an unfairly onerous requirement.

Decision

[174] The appeal is allowed. The plan change in relation to Papatua at Port Gore did not comply with s 67(3)(b) of the Resource Management Act 1991 as it did not give effect to policies 13(1)(a) and 15(a) of the New Zealand Coastal Policy Statement. If the parties are unable to agree as to costs, they may file memoranda on or before 2 June 2014.

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[165] *King Salmon* (HC), above n 2, at [171].

WILLIAM YOUNG J

A preliminary comment

[175] The plan change to permit the Papatua salmon farm in Port Gore would permit activities with adverse effects on (a) "areas of the coastal environment with outstanding natural character" and (b) "outstanding natural features and outstanding natural landscapes in the coastal environment" (to which, for ease of discussion, I will refer collectively as "areas of outstanding natural character"). The majority conclude that the protection of areas of outstanding natural character from adverse effects is an "environmental bottom line" by reason of the New Zealand Coastal Policy Statement (NZCPS)[166] to which the Board of Inquiry was required to give effect under s 67(3)(b) of the Resource Management Act 1991. For this reason, the majority is of the view that the plan change should have been refused.

[176] I do not agree with this approach and for this reason disagree with the conclusion of the majority on the first of the two issues identified in their reasons.[167] As to the second issue, I agree with the approach of the majority[168] to *Brown v Dunedin City Council*[169] but, as I am in dissent, see no point in further analysis of the Board's decision as to what consideration was given to alternative sites. I will, however, explain, as briefly as possible, why I differ from the majority on the first issue.

The majority's approach on the first issue – in summary

[177] Section 6(a) and (b) of the Resource Management Act 1991 provide:

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

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

167 At [17] of the majority's reasons.

168 At [165]–[173] of the majority's reasons.

169 *Brown v Dunedin City Council* [2003] NZRMA 420 (HC).

> (a) the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate … use, and development:
>
> (b) the protection of outstanding natural features and landscapes from inappropriate … use, and development:
>
> …

The majority consider that these subsections, and particularly s 6(b), contemplate planning on the basis that a "use" or "development" which has adverse effects on areas of outstanding natural character is, for that reason alone, "inappropriate". They are also of the view that this is the effect of the NZCPS given policies 13 and 15 which provide:

> **13 Preservation of natural character**
>
> (1) To preserve the natural character of the coastal environment and to protect it from inappropriate … use, and development:
>
> (a) avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character; and
>
> (b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on natural character in all other areas of the coastal environment;
>
> …
>
> **15 Natural features and natural landscapes**
>
> To protect the natural features and natural landscapes (including seascapes) of the coastal environment from inappropriate … use, and development:
>
> (a) avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment; and
>
> (b) avoid significant adverse effects and avoid, remedy, or mitigate other adverse effects of activities on other natural features and natural landscapes in the coastal environment;
>
> …

[178] The majority interpret policies 13 and 15 as requiring regional and territorial authorities to prevent, by specifying as prohibited, any activities which will have adverse effects on areas of outstanding natural character. Section 67(3)(b) of the

RMA thus requires salmon farming to be a prohibited activity in Port Gore with the result that the requested plan change ought to have been refused.

Section 6(a) and (b)

[179] As a matter of logic, areas of outstanding natural character do not require protection from activities which will have no adverse effects. To put this in a different way, the drafting of ss 6(a) and (b) seems to me to leave open the possibility that a use or development might be appropriate despite having adverse effects on areas of outstanding natural character.

[180] Whether a particular use is "inappropriate" or, alternatively, "appropriate" for the purposes of ss 6(a) and (b) may be considered in light of the purpose of the RMA. and thus in terms of s 5. It thus follows that the NZCPS must have been prepared so as to be consistent with, and give effect to, s 5. For this reason, I consider that those charged with the interpretation or application of the NZCPS are entitled to have regard to s 5.

The meaning of the NZCPS

Section 58 of the Resource Management Act

[181] Section 58 of the RMA provides for the contents of New Zealand coastal policy statements:

> **58 Contents of New Zealand coastal policy statements**
>
> A New Zealand coastal policy statement may state objectives and policies about any 1 or more of the following matters:
>
> (a) national priorities for the preservation of the natural character of the coastal environment of New Zealand, including protection from inappropriate … use, and development:
>
> …
>
> (c) activities involving the … use, or development of areas of the coastal environment:
>
> …
>
> (e) the matters to be included in 1 or more regional coastal plans in regard to the preservation of the natural character of the coastal

> environment, including the activities that are required to be specified as restricted coastal activities because the activities—
>
> (i) have or are likely to have significant or irreversible adverse effects on the coastal marine area; or
>
> (ii) relate to areas in the coastal marine area that have significant conservation value:
>
> …

[182] I acknowledge that a "policy" may be narrow and inflexible (as the Court of Appeal held in *Auckland Regional Council v North Shore City Council*[170]) and I thus agree with the conclusion of the majority that a policy may have such a controlling effect on the content of regional plans as to make it a rule "in ordinary speech".[171] Most particularly, I accept that policies stipulated under s 58(e) may have the character of rules.

[183] Under s 58(e), the NZCPS might have stipulated what was required to be included in a regional coastal plan to preserve the natural character of the coastal environment. The example given in the subsection is confined to the specification of activities as restricted coastal activities. This leaves me with at least a doubt as to whether s 58, read as a whole, contemplates policies which require particular activities to be specified as prohibited. I am, however, prepared to assume for present purposes that s 58, and in particular s 58(e), might authorise a policy which required that activities with adverse effects on areas of outstanding natural character be specified as prohibited.

[184] As it happens, the Minister of Conservation made use of s 58(e) but only in a negative sense, as policy 29(1) of the NZCPS provides that the Minister:

> … does not require any activity to be specified as a restricted coastal activity in a regional coastal plan.

[185] Given this explicit statement, it seems plausible to assume that if the Minister's purpose was that some activities (namely those with adverse effects on areas of outstanding natural character) were to be specified as prohibited, this would

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170 *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18 (CA).
171 At [116] of the majority's reasons.

have been "specified" in a similarly explicit way. At the very least, policy 29 makes it clear that the Minister was not relying on s 58(e) to impose such a requirement. I see this as important. Putting myself in the shoes of a Minister who wished to ensure that some activities were to be specified in regional plans as prohibited, I would have attempted to do so under the s 58(e) requiring power rather than in the form of generally stated policies.

The scheme of the NZCPS

[186] Objective 2 of the NZCPS is material to the preservation of the coastal environment. It is relevantly in these terms:

> To preserve the natural character of the coastal environment and protect natural features and landscape values through:
>
> …
>
> - identifying those areas where various forms of … use, and development would be inappropriate and protecting them from such activities; and
>
> …

[187] It is implicit in this language that the identification of the areas in question is for regional councils. I think it is also implicit, but still very clear, that the identification of the "forms of … use, and development" which are inappropriate is also for regional councils.

[188] To the same effect is policy 7:

> **7 Strategic planning**
>
> (1) In preparing regional policy statements, and plans:
>
> …
>
> (b) identify areas of the coastal environment where particular activities and forms of … use, and development:
>
> (i) are inappropriate; and
>
> (ii) may be inappropriate without the consideration of effects through a resource consent application, notice of requirement for designation or Schedule 1 of the [RMA] process;

> and provide protection from inappropriate … use, and development in these areas through objectives, policies and rules.
>
> …

It is again clear – but this time as a result of explicit language – that it is for regional councils to decide as to both (a) the relevant areas of the coastal environment and (b) what "forms of … use, and development" are inappropriate in such areas. There is no suggestion in this language that such determinations have in any way been pre-determined by the NZCPS.

[189] The majority consider that all activities with adverse effects on areas of outstanding natural character must be prevented. Since there is no reason for concern about activities with no adverse effects, the NZCPS, on the majority approach, has pre-empted the exercise of the function which it, by policy 7, has required regional councils to perform. Decisions as to areas of the coastal environment which require protection should be made by the same body as determines the particular "forms of … use, and development" which are inappropriate in such areas. On the majority approach, decisions in the first category are made by regional councils whereas decisions as to the latter have already been made in the NZCPS. This result is too incoherent to be plausibly within the purpose of the NZCPS.

[190] The point I have just made is reinforced by a consideration of the NZCPS's development-focused objectives and policies.

[191] Objective 6 of the NZCPS provides:

> **Objective 6**
>
> To enable people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through … use, and development, recognising that:
>
> - the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits;
>
> - some uses and developments which depend upon the use of natural and physical resources in the coastal environment are important to

the social, economic and cultural wellbeing of people and communities;

- functionally some uses and developments can only be located on the coast or in the coastal marine area;

…

- the protection of habitats of living marine resources contributes to the social, economic and cultural wellbeing of people and communities;

…

- the proportion of the coastal marine area under any formal protection is small and therefore management under the [RMA] is an important means by which the natural resources of the coastal marine area can be protected; and

…

[192] Policy 8 provides:

Aquaculture

Recognise the significant existing and potential contribution of aquaculture to the social, economic and cultural well-being of people and communities by:

(a) including in regional policy statements and regional coastal plans provision for aquaculture activities in appropriate places in the coastal environment, recognising that relevant considerations may include:

(i) the need for high water quality for aquaculture activities; and

(ii) the need for land-based facilities associated with marine farming;

(b) taking account of the social and economic benefits of aquaculture, including any available assessments of national and regional economic benefits; and

(c) ensuring that development in the coastal environment does not make water quality unfit for aquaculture activities in areas approved for that purpose.

[193] Policy 8 gives effect to objective 6, just as policies 13 and 15 give effect to objective 2. There is no suggestion in the NZCPS that objective 2 is to take precedence over objective 6, and there is likewise no indication that policies 13 and 15 take precedence over policy 8. Viewed solely through the lens of policy 8

and on the findings of the Board, Port Gore is an appropriate location for a salmon farm. On the other hand, viewed solely through the lens of policies 13 and 15, it is inappropriate. On the approach of the majority, the standards for determining what is "appropriate" under policy 8 are not the same as those applicable to determining what is "inappropriate" in policies 13 and 15.[172]

[194] I disagree with this approach. The concept of "inappropriate … use [or] development" in the NZCPS is taken directly from ss 6(a) and (b) of the RMA. The concept of a "use" or "development" which is or may be "appropriate" is necessarily implicit in those subsections. There was no point in the NZCPS providing that certain uses or developments would be "appropriate" other than to signify that such developments might therefore not be "inappropriate" for the purposes of other policies. So I simply do not accept that there is one standard for determining whether aquaculture is "appropriate" for the purposes of policy 8 and another standard for determining whether it is "inappropriate" for the purposes of policies 13 and 15. Rather, I prefer to resolve the apparent tension between policy 8 and policies 13 and 15 on the basis of a single concept – informed by the NZCPS as a whole and construed generally in light of ss 6(a) and (b) and also s 5 – of what is appropriate and inappropriate. On the basis of this approach, the approval of the salmon farm turned on whether it was appropriate (or not inappropriate) having regard to policies 8, 13 and 15 of the NZCPS, with ss 5 and 6(a) and (b) of the RMA being material to the interpretation and application of those policies.

[195] I accept that this approach requires policies 13 and 15 to be construed by reading into the first two bullets points of each policy the word "such" to make it clear that the polices are directed to the adverse effects of "inappropriate … use, and development". By way of illustration, I consider that policy 13 should be construed as if it provided:

> **13 Preservation of natural character**
>
> (1) To preserve the natural character of the coastal environment and to protect it from inappropriate … use, and development:

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172 At [98]–[105] of the majority's reasons.

> (a) avoid adverse effects of *such* activities on natural character in areas of the coastal environment with outstanding natural character; and
>
> (b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of *such* activities on natural character in all other areas of the coastal environment; …

[196] The necessity to add words in this way shows that my interpretation of the policies is not literal. That said, I do not think it is difficult to construe these policies on the basis that given the stated purpose – protection from "inappropriate … use, and development" – what follows should read as confined to activities which are associated with "inappropriate … use, and development". Otherwise, the policies would go beyond their purpose.

[197] The majority avoid the problem of the policies going beyond their purpose by concluding that any use or development which would produce adverse effects on areas of outstanding natural character is, for this reason, "inappropriate". That, however, is not spelt out explicitly in the policies. As I have noted, if it was the purpose of the Minister to require that activities with such effects be specified as prohibited, that would have been provided for directly and pursuant to s 58(e). So I do not see their approach as entirely literal either (because it assumes a determination that adverse effects equates to "inappropriate", which is not explicit). It is also inconsistent with the scheme of the NZCPS under which decisions as to what is "appropriate" or "inappropriate" in particular cases (that is, by reference to specific locations and activities) is left to regional councils. The approach taken throughout the relevant objectives and policies of the NZCPS is one of shaping regional coastal plans but not dictating their content.

[198] We are dealing with a policy statement and not an ordinary legislative instrument. There seems to me to be flexibility given that (a) the requirement is to "give effect" to the NZCPS rather than individual policies, (b) the language of the policies, which require certain effects to be avoided and not prohibited,[173] and (c) the context provided by policy 8. Against this background, I think it is wrong to

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[173] Compare the discussion and cases cited in [92]–[97] of the majority's reasons.

construe the NZCPS and, more particularly, certain of its policies, with the rigour customary in respect of statutory interpretation.

Overbroad consequences

[199] I think it is useful to consider the consequences of the majority's approach, which I see as overbroad.

[200] "Adverse effects" and "effects" are not defined in the NZCPS save by general reference to the RMA definitions.[174] This plainly incorporates into the NZCPS the definition in s 3 of the RMA:

> **3 Meaning of effect**
>
> In this Act, unless the context otherwise requires, the term **effect** includes—
>
> (a) any positive or adverse effect; and
>
> (b) any temporary or permanent effect; and
>
> (c) any past, present, or future effect; and
>
> (d) any cumulative effect which arises over time or in combination with other effects—
>
> regardless of the scale, intensity, duration, or frequency of the effect, and also includes—
>
> (e) any potential effect of high probability; and
>
> (f) any potential effect of low probability which has a high potential impact.

[201] On the basis that the s 3 definition applies, I consider that a corollary of the approach of the majority is that regional councils must promulgate rules which specify as prohibited any activities having any perceptible adverse effect, even temporary, on areas of outstanding natural character. I think that this would preclude some navigation aids and it would impose severe restrictions on privately-owned land in areas of outstanding natural character. It would also have the potential generally to be entirely disproportionate in its operation as any perceptible adverse effect would be controlling irrespective of whatever benefits, public or private, there

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[174] The NZCPS, above n 166, at 8 records that "[d]efinitions contained in the Act are not repeated in the Glossary".

might be if an activity were permitted. I see these consequences as being so broad as to render implausible the construction of policies 13 and 15 proposed by the majority.

[202] The majority suggest that such consequences can be avoided.[175] They point out that the s 3 definition of "effect" does not apply if the context otherwise requires. They also, rather as I have done, suggest that the literal words in which the policies are expressed can be read down in light of the purposes stated in each policy (in essence to the protection of areas of outstanding natural character). There is the suggestion of a de minimis approach. They also point out that a development might enhance an area of outstanding character (presumably contemplating that beneficial effects might outweigh any adverse effects).

[203] I would like to think that a sensible approach will be taken to the future application of the NZCPS in light of the conclusions of the majority as to the meaning of policies 13 and 15 and I accept that for reasons of pragmatism, such an approach might be founded on reasoning of the kind provided by the majority. But I confess to finding it not very convincing. In particular:

(a) I think it clear that the NZCPS uses "effects" in its s 3 sense.

(b) While I agree that the policies should be read down so as not to go beyond their purposes,[176] I think it important to recognise that those purposes are confined to protection only from "inappropriate" uses or developments.

(c) Finally, given the breadth of the s 3 definition and the distinction it draws between "positive" and "adverse" effects, I do not see much scope for either a de minimis approach or a balancing of positive and adverse effects.

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175 At [144] of the majority's reasons.
176 See above at [195].

My conclusion as to the first issue

[204] On my approach, policies 13 and 15 on the one hand and policy 8 on the other are not inconsistent. Rather, they required an assessment as to whether a salmon farm at Papatua was appropriate. Such assessment required the Board to take into account and balance the conflicting considerations – in other words, to form a broad judgment. A decision that the salmon farm at Papatua was appropriate was not inconsistent with policies 13 and 15 as I construe them and, on this basis, the s 67(3)(b) requirement to give effect to the NZCPS was not infringed.

[205] This approach is not precisely the same as that adopted by the Board. It is, however, sufficiently close for me to be content with the overall judgment of the Board on this issue.

Solicitors:
DLA Phillips Fox, Auckland for Appellant
Russell McVeagh, Wellington for First Respondent
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DLA Phillips Fox, Wellington for Third Respondent
Crown Law Office, Wellington for Fourth Respondents
Buddle Findlay, Wellington for Board of Inquiry

BEFORE THE ENVIRONMENT COURT

Decision No. [2016] NZEnvC 190

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of an appeal pursuant to Clause 14 of Schedule 1 to the Act
BETWEEN	MOTITI ROHE MOANA TRUST
	(ENV-2015-AKL-000134)
	Appellant
AND	BAY OF PLENTY REGIONAL COUNCIL
	Respondent

Court:	Environment Judge JA Smith (chair) Environment Judge DA Kirkpatrick
Hearing:	at Rotorua on 13 September 2016
Appearances:	RB Enright for the Motiti Rohe Moana Trust PH Cooney and RB Boyte for the Bay of Plenty Regional Council JM Pou and AM Neems for Ngāti Makino Heritage Trust (s 274 party) S Ryan for Lowndes (s 274 party) VJ Hamm and AG Godinet for Motiti Avocados Limited (s 274 party)
Date of Decision:	30 SEP 2016
Date of Issue:	30 SEP 2016

Opening Karakia by Mr Hoete

DECISION OF THE ENVIRONMENT COURT ON AN APPLICATION FOR STRIKEOUT UNDER SECTION 279(4) OF THE ACT

A: The Court refuses to strike out the appeal at this stage.

Some aspects of the appeal may be beyond jurisdiction, particularly potential incorporation of a prohibition of activities within the entire management area. However, any issues as to appropriate provisions can be addressed both in the evidence at the hearing and in any decision by the Court.

The Court is satisfied that the usual methods of control of the scope of hearing, through the hearing and decision process, are adequate in the circumstances and a strikeout is not appropriate.

B: Costs are reserved and may be pursued independently of the outcome of the hearing. The Court does not require any submissions on this issue until the substantive hearing is resolved.

REASONS

Introduction

[1] The Motiti Rohe Moana Trust ("**the Trust**") filed a wide-ranging appeal in respect of the Regional Coastal Environment Plan particularly relating to the rohe of the Trust and the Motiti natural environment.

[2] The area affected was described by a diagram in the Trust's original submission and is annexed hereto as **A** for clarity. It can be seen that it includes not only the immediate environs of Motiti Island but also the offshore Tokau Reefs and other features, including, importantly, the Astrolabe Reef/Otaiti.

[3] Subsequently the parties attended mediation and there were several discussions relating to the scope of the remedies sought by the Appellant.

[4] Given that the Application relates to the scope of the original submission and the appeal as filed, it is necessary to annex hereto both the original submission (marked **B**) and the second amended appeal (marked **C**). Although there was a first amended appeal, its production here is not critical for the purpose of determining the scope of the appeal.

The application for strikeout

[5] The Regional Council has taken the unusual step of applying to strikeout the entire appeal on the basis that:

> *...the relief the Trusts seek which is an integrated spatial planning management area around Motiti with specific provisions applying to it, was not within the foreseeable contemplation of those who are likely to be directly or potentially affected by those outcomes.*
>
> *That relief was not fairly and reasonably raised in the submission. The relief raised in the submission and that now raised in the appeal is also not on the Coastal Plan.*

[6] In closing, Mr Cooney confirmed that the Council's submission was that the Trust had never filed a valid submission; accordingly there could be no valid appeal and therefore the proceedings needed to be struck out as an abuse of process under s 279(4) of the Act. Mr Cooney readily admitted that the Council had received the submission, progressed it through the hearing stage, and issued a decision in respect of it. He also acknowledged that the submission seeking a marine spatial plan was one reflected in a number of other submissions, all of which were accepted and dealt with by the hearings process. Nevertheless, we accept that the question of whether a submission is valid or not is a question of law and the Council's acceptance of it and dealing with the matter as a submission does not make it lawful.

The Court's approach

[7] We consider that we first need to determine whether or not there was a valid submission. If there was a valid submission, the question then is whether this was reduced in any of the notice of appeal documents that have subsequently been filed. To the extent it has been so reduced those submission points and any relief based on them are no longer available to the appellants.

[8] For practical purposes we can regard the submissions and the original notice of appeal as having the same content. The notice of appeal itself simply refers to the original submission. It was acknowledged by all parties that there had been no reduction in the scope of the submission in the original notice of appeal (**Original Appeal**).

Expansion of an appeal

[9] Mr Enright for the Trust submitted that he had not attempted to extend the appeal in either the second or third notices of appeal, but rather to clarify the outcome sought in response to requests of the parties, particularly the Regional Council.

[10] No party argued before us that it was possible to extend a submission on appeal, or extend the scope of the remedies that might be sought.[1] This position was elaborated by the High Court in *General Distributors Ltd v Waipa District Council*:[2]

> *[54] … To this end the Act requires that public notice be given by a local authority where it promulgates or makes any changes to its plan. There is the submission/further submission process to be worked through. A degree of specificity is required in a submission – cl 6 of the First Schedule and Form 5 of the Regulations. … There is a right of appeal to the Environment Court, but only if the prospective appellant referred to the provision or the matter in the submission – cl 14(2) of the First Schedule.*
>
> *[55] One of the underlying purposes of the notification/submission/further submission process is to ensure that all are sufficiently informed about what is proposed. Otherwise the plan could end up in a form which could not reasonably have been anticipated, resulting in potential unfairness.*
>
> *[56] There is of course a practical difficulty. As was noted in* Countdown Properties *at 165, councils customarily face multiple submissions, often conflicting, and often prepared by persons without professional help. Both councils, and the Environment Court on appeal, need scope to deal with the realities of the situation. To take a legalistic review and hold that a Council, or the Environment Court on appeal, can only accept or reject the relief sought in any given submission would be unreal.*

[11] This is expounded further by the High Court in *Royal Forest and Bird v Southland District Council*:[3]

> *…It is important that the assessment of whether any amendment was reasonably and fairly raised in the course of submissions, should be*

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1 *Countdown Properties Northland Limited v Dunedin City Council* [1994] 1ELRNZ 150 at 171, HC.
2 (2008) 15 ELRNZ 59 (HC).
3 [1997] NZRMA 408 (HC) at 413.

approached in a realistic workable fashion rather than from the perspective of legal nicety.

[12] Finally, the Court holds no particular powers to broaden the scope of an appeal (see s 278 of the Act and Rule 1.12 of the District Court Rules, 2014).[4]

[13] Accordingly, it is the argument of the applicant Council here, supported by Motiti Avocados Ltd (a s 274 party), that in the second amended notice of appeal the appellant has gone beyond the scope of any submission it made. It is thus submitted that the entire submission (and appeal) is therefore to be struck out as an abuse of process.

[14] There appears to be an inherent difficulty with this argument, which is that if the appellant has gone too far in the remedies it seeks, it is difficult to see the basis on which it precludes the remedies which are in scope. Given the very broad powers of the Court to decide outcomes between those stated in the plan and those sought by the appellant, such issues of scope are particularly difficult to determine at this stage. It is on this basis that Mr Cooney eventually reverted to an argument that the submission made was invalid and was never "on" the proposed plan.

The Trust's submission

[15] The Trust's submission to the Council started from the proposition that it supported parts of the proposed plan and sought amendments to others to reflect the principles of the Treaty of Waitangi and the status and role of the Trust as kaitiaki of the islands of Motiti and the surrounding waters, islands and reefs. It noted in particular its whakapapa to the island, and before this Court it was acknowledged that they represented a party with a proper interest in this matter.

[16] The format of the submission has adopted the approach of the plan rather sought to dictate its own approach. That is helpful in that it enables us to understand better the particular parts of the plan that are being addressed. It can be seen under general themes that there was concern about active protection of taonga and failure to give effect to Part 2 of the Act and NZCPS and the objectives and policies of the Regional Policy Statement.

[4] *Transit NZ v Pearson* [2002] NZRMA 318 (HC) at [48].

[17] Under "relief sought" the Trust seeks:

(a) to be proactive in respect of active protection and redress, the implementation of Treaty principles in settlement outcomes for Motiti:

(b) amendment of implementation methods to include cultural dimensions;

(c) memoranda of understanding;

(d) policies to partner with the Trust to maintain and enhance coastal values in this area;

(e) implementation methods to advocate for Mataiti and Taiapure reserves; and

(f) clarification of policies for greater certainty of sustaining kai moana and eco systems, avoiding degradation of natural character and biodiversity, measuring baselines and, in particular, provide an expanded network of restored island and marine protected areas where ecological health and indigenous biodiversity will be protected and enhanced.

[18] Under implementation it added:

(a) for cultural advisors to assist with applications;

(b) to add content to objectives and policies, amending or refining as required to integrate matauranga Māori into the plan and to provide the Māori worldview of their existence; and

(c) management and decision-making to take into account various historic cultural and spiritual relationships.

[19] Under the second heading of Matauranga Māori they supported that process, but sought in particular:

(a) a marine spatial plan for Motiti rohe moana and whenua incorporating matauranga Māori in collaboration with the Trust; and

(b) the application of Māori attributes of mana, mauri and tapu to assist with natural character.

[20] Under the third heading of Integrated management they sought integrated management of fisheries resources and, in particular, to give effect to Objective 1 of the NZCPS.

[21] Under the fourth heading of Marae based aquaculture, they sought to expand Issue 35 to include Motiti rohe moana and to provide for non-commercial Marae-based aquaculture.

[22] In relation to Part C, under "Integrated Management" they sought an integrated methodology for the marine environment similar to the use of structure planning, spatial planning or integrated whole of catchment management. They sought that the fishery resources and marine management be integrated, in particular in collaboration with tangata whenua

[23] Under "Natural Heritage" they sought greater involvement and participation in decision-making. They identified that the restoration of biodiversity is an issue of significance to mana whenua.

[24] In respect of "Iwi Resource Management" they noted the need to reframe the issues and objectives and policies to provide for the protection of biodiversity and natural heritage.

[25] Under "Activities in the coastal marine area" they sought to add objectives and policies to provide for marine spatial planning over the Motiti Rohe Moana.

Evaluation of submissions

[26] We have cited these provisions at some length because it is clear to us that they do specifically include matters of marine spatial planning, integrated management including fisheries, flora and fauna, and the protection of at least various areas within the Rohe area as well as restoration of other areas.

[27] In simple parlance, Mr Cooney's proposition that spatial planning management around Motiti was not within contemplation is not borne out by reference to the submission. We have concluded that any reasonable person reading these provisions would immediately ascertain that the Trust had an interest in the waters, reefs, toka, and islands and other features around and including Motiti, and that it sought to

maintain various forms of control – particularly to protect the fisheries, flora and fauna of that area and cultural matters including Taonga. Exact places where various controls were sought is not set out, but it is intended to reflect a spatial planning regime.

Is such a submission on the plan?

[28] There was a great deal of submission made to this Court about the case law applying to whether various submissions or appeals were "on" variations or plan changes. The distinction between a plan change/variation and a full plan review has not been addressed in any of the cases which were put to this Court. We think it is important to analyse the distinction between a full plan review and a plan change or variation to understand how the issues discussed in the cases concerning a provision being "on" plan change and variation come to the fore.

A full plan review

[29] Schedule 1 provides essentially for the preparation, change and review of policy statements and plans (see clause 1 and 2). Clauses 1-15 deal with the preparation of proposed policy statements or plans. Clauses 16 and 16(a) deal with amendment to a policy statement or plan or a variation to the same. It is clear that the words of Clause 16 provide for amendments to a plan which can be made without utilising the process in the First schedule.

[30] Clause 1(4) specifically refers to a request for a plan change and Clause 16(a) deals with variation of a proposed policy statement or plan. We conclude it must be assumed that the word "proposed" applies to both the policy statement and the plan, as well as a change.

[31] The wording of Schedule 1 is such that the distinctions between a variation, a change and a review are not as clear as they might be. However, we conclude that the intention of these phrases is well-established both through practice and through case law. A review in relation to a regional plan consists of a new plan intended to replace the operative plan, and substitute provisions in full. In short, when the plan review becomes operative the existing plan ceases to operate.

[32] In respect of a change, this anticipates that there may be changes to an operative plan, which are less than replacing the whole plan. There appears to be no

particular limit to such a change, but in practice these have tended to replace *parts of* an operative plan only. We conclude that it would be inconsistent if a change could replace an entire plan, as this would be classified as a review.

[33] A variation consists of changes that can occur while the Schedule 1 process is under way. Although the word "proposed" precedes only the words "policy statements", it must by interpretation apply also to the word "plan", ie "proposed plan". Accordingly, it is intended that the variations provision allow alterations to occur during the Schedule 1 process of either a review or a change.

[34] The distinctions between these types of alteration to a plan represent significant differences in approach to the application of Schedule 1, particularly the submission process. For current purposes it is clear the proposed Regional Coastal Environment Plan is intended to replace the operative Coastal Environment Plan in due course. There is little doubt that it constitutes a review of the entire plan, and is intended to provide a comprehensive framework to meet the Council's obligations in respect of the coastal environment.

[35] There have been, from time to time, variations and/or changes to regional plans – including in the Bay of Plenty. These are clearly noted as such both in notification and during processing. The issue in respect of a change or variation is that it may deal with a substantially narrower range of issues and not meet all of the obligations of the authority under the Resource Management Act.

The plan process

[36] The obligations for a regional council are set out not only in section 30, but also in sections 67-70 of the RMA. The first issue is that the Regional Council has the power to provide more than one plan covering all of its obligations under s 30. In this case there is no dispute that the Regional Council has elected to deal with the regional coastal environment in a separate plan.

[37] This is not unusual, but it is clear that there is going to be a question of whether a particular issue is within the subject matter that the Regional Council may address in such a regional coastal plan. For example, the extent of land-based activities that might be controlled in such a plan, or discharges to air. In this particular case, however, there is no doubt that the proposed Regional Coastal Plan (reflecting

ss 67-70), and the Regional Policy Statement, are intended to address the coastal marine area including the waters of the Bay of Plenty within territorial limits.

[38] For current purposes there is no doubt that the Regional Policy Statement acknowledged and addressed Motiti Island, the toka, reefs and sea waters as having particular values. Those were the subject of disputes before and decisions of the Court.

[39] Section 66 requires the Regional Council to prepare regional plans in accordance with the provisions of ss 66 (1) and (2) and it is clear under subsection (2) that it must have regard to the Regional Policy Statement in preparing that plan.

[40] Section 66(2)(a) requires the Regional Council to take into account:

any relevant planning document recognised by an iwi authority; and

any planning document prepared by a Customary Marine Title Group under s 85 of the Marine and Coastal Area Takutai Moana Act 2011.

[41] In preparing the Plan, there are also requirements under s 67 to give effect to any national policy statement (including the NZ Coastal Policy Statement) and the regional policy document.

[42] In relation to a full plan, we have concluded that the parameters of the obligations of the Regional Council in preparing the plan also constitute generally the parameters of the submissions that may be made on the plan.

Scope on a review

[43] We accept that *Motor Machinists*[5] represents a clear statement of an analysis which must occur where there is a plan change or variation dealing with a narrower range of issues in respect of the Council's obligations. Nevertheless, where the Council is fulfilling its statutory functions under s 30 and ss 66 and 67 of the Act, it must be open to a party to argue that the Council has failed to meet any of those obligations, or that these could be better met by altering the provisions of the plan.

5 *Palmerston North City Council v Motor Machinists Limited* [2013] NZHC 1290, HC.

[44] It is well established that on appeals about proposed planning instruments there is no presumption in favour of the planning authority's policies or the planning details of the instrument challenged or the authority's decisions on submissions: each aspect stands or falls on its own merits when tested by submissions and the challenge of alternatives or modification.[6]

[45] In this particular case, we conclude that the submission made by the Trust was well within the framework of the Regional Coastal Plan dealing with issues raised in both the Regional Policy Statement and the NZ Coastal Policy Statement, as well as addressing matters under Part 2 of the Act. This is explicit within the submission, and forms the basis of the submission for a marine spatial plan. In short, the submission is clearly within the scope of the Plan review.

Can a lack of precision defeat a submission "on" the plan review?

[46] The significant submission of Mr Cooney was that there had been a failure to properly identify the changes that were sought to the proposed Regional Coastal Plan. The level of precision required during a plan review process is a matter of some complexity. Not unnaturally, parties are concerned that if they suggest outcomes with too much precision at an early stage they are not able to adapt that submission if Council decides to adopt an alternative approach. On the other hand, Councils are concerned to properly identify the range of outcomes that are sought so that the public notice provisions adequately inform the public of the issues that are raised. We note the discussion in *Motor Machinists*[7] as to amendments made to the Resource Management Act in relation to submissions and further submissions. Although in the context of a plan change a similar approach applies in respect of reviews.

[47] In respect of plan reviews, it must follow that there can be a wide range of potential submissions, and the notification only of a summary of those issues reflects a limited intent for public participation. Nevertheless, in this case we are advised, and accept, that a number of parties made submissions seeking marine spatial plans, and that several further submissions were made to the Trust's submission in relation to the marine spatial planning issue (among other things).

6 *Leith v Auckland City Council* [1995] NZRMA 400 at [408]-[409]
7 *Motor Machinists*, above fn 5 at [43].

[48] Given the clear reference to protection, management of fisheries and marine spatial planning, we are in no doubt that any party reading the submission as a whole (rather than just a summary provided by the Council) would be in no doubt of the potential ramifications of the provisions sought. Moreover, this needs to be understood in the context that the Trust had already raised similar issues in respect of the Regional Policy Statement and that other parties, including Ngāti Makino before this Court, had raised issues relating to co-management of waterways.

[49] We acknowledge that this submission is also in the context of the sensitivity of the population to issues surrounding Motiti Island and the wreck of the MV Rena that occurred in 2011 and its aftermath. This includes the processing of the application for resource consent and the comprehensive hearing of that application which was required by Commissioners. Given that the submission raised, specifically, issues under ss 30, 66 and 67 of the Act – particularly relating to Regional Policy Statement, the New Zealand Coastal Policy Statements and Part 2 of the Act – we conclude that there was clear notice of the concerns of the parties in relation to the coastal plan as it affected the Motiti rohe area.

[50] As to the degree of specificity, we are satisfied that it was sufficiently specific to identify that there could potentially be:

(a) aquaculture areas

areas of restriction for cultural and natural environment reasons;

areas of control including over spatial areas and fishery areas; and

issues of co-management and cultural constraints, including upon land-based coastal areas.

[51] However, there is nothing in the submission as filed that would suggest that the area of effect of the plan was to be wider than that notified. In other words, any landward areas not included within the regional plan were not raised as specific issues in the Trust's submission.

[52] Overall, we have concluded that not only was the submission dealing with issues required to be dealt with under the Act in the review of the Regional Coastal Plan, but was sufficiently specific to alert members of the public to the potential

outcomes sought – including potentially controlling coastal parts of Motiti Island and the area around it for protection, management and aquaculture activities. However there was nothing in the submission which sought to affect the area inland of the coastline of Motiti Island itself.

Alternative analysis as to whether a submission is on the review

[53] In case we are wrong in looking at this matter on a broader basis for a full Plan review, and accepting that the approach in *Motor Machinists* may also be appropriate for reviews, we ask ourselves the following key questions, based on the analysis in that case:

- Should the s 32 report have dealt with the issues raised in the submission?
- Are there third parties who would be affected, who did not have an opportunity to participate?

[54] As to the s 32 report, most of the matters raised by the Trust relating to the application of the Regional Policy Statement and Coastal Policy Statement as well as Part 2, are matters required to be assessed as part of any s 32 Report. It would seem unreal to suggest that the obligations under s 30 and ss 66-70 were not part of an evaluation of the most appropriate way to achieve the purpose of the Act.

[55] To that extent the NZ Coastal Policy Statement is referred to in the latter sections, as is the Regional Coastal Policy Statement. For our part, we cannot see how a s 32 report could not address issues of marine spatial management, even if these were eventually discounted; nor, for example, issues under s 66(2) and (2a).

[56] We acknowledge, as Mr Cooney says, that the Council may properly, after evaluation of all those matters, elect to adopt another management method. However, in our view, two issues arise:

(i) Clearly, the question of whether there should be marine spatial management is a matter which arises under various provisions of the Act and should be addressed in the s 32 report;

(ii) as discussed above, it is well established that it is open to a party to submit that another approach is more appropriate in the Plan.

[57] We note in this case that the Trust essentially has agreed with the Council's general approach save for the submission of including the marine spatial plan for this rohe. Mr Cooney's argument in this regard was that the Council had not provided one, and had dealt with most of the marine area by overall controls. He however then acknowledged that there were several areas where specific controls had been adopted and a more spatial approach had been utilised, such as the Port of Tauranga.

[58] In other words, we have not been advised of anything that would be entirely inconsistent with adopting a marine spatial plan for this area if the rest of the Regional Coastal Environment Plan was to be adopted. Given that this argument was at a high level, it may be that there are such provisions, and these could be properly considered at a full hearing.

Has the submission been narrowed?

[59] Ms Hamm's primary submission to this Court on behalf of Motiti Avocados Limited was that the appeal as filed had subsequently been changed by the two further notices to such an extent that there was no proper matter for consideration by the Court. In that regard she acknowledged that the notice of appeal essentially repeated the matters of submission (in fact attached the submission as its grounds) and, accordingly, that there was no narrowing of the appeal at that point.

The first amended statement of claim

[60] All parties agree that the first amended notice of appeal simply narrowed some of the specific grounds of appeal. In the first amended notice of appeal, the changes were relatively minor, but made certain deletions, one clarification, and also confirmed that the appeal did not seek any relief which opposes (directly or indirectly) the leaving of the Rena wreck, its equipment cargo and associated debris on Otaiti/Astrolabe reef. In particular no relief was sought in relation to maritime incidents in the proposed plan 3.3, or recognition of the wreck in ONFL 44 (see paragraph [32] of the first amended notice of appeal).

The second amended notice of appeal

[61] Ms Hamm submitted that the second amended appeal considerably expanded the remedies sought in the notice of appeal. Mr Cooney took the same view. Both

were of the opinion that the expansion sought was so significant that the appeal should be struck out as a whole. Two issues arise:

- Was there an expansion of the appeal in the second amended notice of appeal?
- If there was, does this vitiate the remedies sought encapsulated within the original appeal and first amended appeal?

Was there an expansion of the appeal?

[62] Mr Enright's primary position was that, with one exception and one clarification, the second amended appeal merely sought to respond to a mediation agreement to provide greater clarity, and was not intended to expand the appeal. He acknowledged that the landing point at Te Hurihuri was a matter beyond the scope of the original submissions or appeal, and therefore asked for that to be removed. We do so.

[63] The Trust also had reached agreement with Lowndes (a s 274 party) that the consent for the wreck of the MV Rena was independent of any changes sought to the proposed Regional Coastal Plan. The Court has issued a memorandum in respect of this issue that can be referred to for greater clarification.

The changes in the second amended notice of appeal

[64] As can be seen from attachment **C**, many of the provisions are essentially insertions of an explanatory nature, or expanding grounds for the marine spatial control sought. It is difficult to see that any of those would expand the original submission, particularly given the subsequent agreement which is included within the annexures (marked **D**), and particularly given the discussion in relation to the Rena and Issue 55 is removed, as is the discussion at 12.1.1(1)(a) in relation to Hurihuri Point landing.

[65] Even the objectives at 2.11, 50, 51 and 52 are clearly an attempt to put in clearer wording the original submissions made by the Trust in relation to the Motiti Natural Environment Area.

[66] Part 4 is clearly intended to create a new management area through new provisions to be inserted as Section 12. This, in our view, is consistent with the marine

spatial planning issue. It then goes on to deal with the content of that. Some wording, such as policy MNEMA1:

(a) discusses rahui conservation management area; and

(b) discusses preventing removal, damage or destruction of indigenous flora or fauna, including taonga species.

[67] Proposed section 12.2 discusses aquaculture as a controlled activity and MNEMA2, under that, discusses the rahui.

[68] Ms Hamm strongly makes the point that there was no discussion in the original submission of rahui, and Mr Enright concedes this. On the other hand, he says that the question of management and protection are both explicitly discussed, including management of fisheries and flora and fauna through marine spatial planning.

Evaluation of second amended notice

[69] The difficulty for this Court in assessing these type of provisions at this stage is that it has not heard the evidence supporting them. A form of restriction or rahui is a significant outcome, and generally there would have to be clear reasons and both objectives and policies to support it. It may or may not amount to a prohibition under the Act, depending on the context. Questions then arise as to the spatial extent of any such rahui, any periods for which it might apply, and any conditions that might then apply.

[70] In short, it is difficult for this Court to conclude that these outcomes are beyond the scope of the originally worded submission and appeal until it has heard evidence. Clearly, any form of blanket prohibition is beyond the appeal and submission, and unlikely to be supported by the proposed Regional Coastal Plan provisions that are not under appeal.

[71] In fact the Trust's own submission sought that "areas" might be subject to various controls. This indicates to us that the intent was that there would be a marine spatial plan with various provisions applying in different places. This appears entirely consistent with the discussion about high value areas and areas of particular cultural value.

[72] I acknowledge Mr Cooney's and Ms Hamm's concerns that the wording as currently sought goes too far. However, a court assessment would need to be made in the context of the evidence and with a close consideration as to the actual remedy sought in relation to each of the grounds of appeal and submission. Mr Enright himself accepts that the wording in the second amended appeal is the Trust's optimum outcome, and issues as to the scope of that wording (and refinement thereof) and the spatial extent of it are matters that will be subject to further refinement through the evidence and hearing process.

Is strikeout an appropriate remedy for amendment that goes beyond the submission?

[73] We have concluded that there are clearly remedies within the scope of the submissions that can be addressed in the appeal if a marine spatial plan is sought. This might impose some form of constraint or restriction, such as requiring resource consents for certain activities. It might include other methods, objectives or policies which are sought to implement a marine spatial plan or conditions sought in the submission and appeal. In practical terms, it is far too early in the case to say whether any of the remedies sought in the second amended statement of claim would be appropriate or better in the circumstances of this case.

[74] The parties will be aware that the general practice of the Court in such complex cases is to issue an interim decision and then give the parties an opportunity to consider the appropriate approach that should be adopted if it considers that there is some merit to the appeal.

[75] Inevitably in the course of a hearing parties refine the remedies sought and the Council and parties offer iterations of the plan which each considers might address the particular concerns of the appeal. This is why the Court refers to the hearing process as an iterative one, and it is one of constant refinement from the time of the original submission until the time when the matter is finally disposed of by the Court. Once evidence is circulated the parties will have further opportunities to refine remedies on the basis of the evidence available, and in consideration of the evidence for the remaining parties. Often this position is further elucidated through cross-examination, where alternatives are explored with witnesses. It is not uncommon for an appropriate approach or even a resolution to appear during the course of a hearing. This is in the nature of the public and participatory planning context in which this matter is being heard.

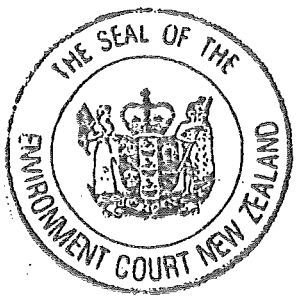
Conclusion

[76] For the reasons we have given in detail, we consider it is premature to conclude that the potential outcomes under the plan are an abuse of process. Clearly, any remedy sought must be within the scope of the submissions filed and must relate to matters which the proposed Regional Coastal Plan addresses under the Act, Coastal Policy Statement and New Zealand Coastal Policy Statement. Given that many of the objectives and policies of the plan are also not in dispute, it would need to be consistent with the settled elements of the plan. However it is not possible for the Court at this stage to say that the particular remedies sought may not be available to any degree at all.

[77] Some remedy between that currently contained within the plan and that sought by the appellant might be considered to be appropriate after a full hearing. In such an event there are a range of possibilities open to the Court, including the potential to require either a plan change or to direct notification of any new provisions. A more common approach adopted by the Court would require the parties to see if they can resolve the issues in light of the Court decision and agree on wording to be incorporated into the plan. Such an evaluation can only be undertaken after hearing full evidence.

[78] It is clear that under s 279(4) of the Act that there is a high threshold to establish an application to strike out.[8] The issues in this case are ones well known to the Regional Council (and other authorities) through the RPS process, the Rena consent and other matters (including resource consents and a district plan). The Court can see no basis to say that the Trust has no valid interest in the matters which are the subject of this plan or that they did not properly raise issues of concern to them within the scope of the plan review being undertaken. Certainly no wrongful actions or process are alleged. After all, the second amended notice of appeal is an attempt to clarify the issues for the parties. If it does not help then it is difficult to see why the appeal should be struck out. Evidence in relation to the concerns and the appropriate response to achieve the purposes of the Act are matters that can only take place on a full evaluation of the evidence and submissions.

[79] Accordingly the application for strikeout is declined.



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8 *Hurunui Water Project v Canterbury RC* [2016] NZRMA 71 at [84]-[86].

[80] Costs are reserved and may be pursued independently of the outcome of the hearing. The Court should not require any submissions on this issue until the substantive hearing is resolved.

For the court:

JA Smith
Environment Judge

MOTITI ROHE MOANA TRUST

Nga Hapu o Te Moutere o Motiti

Rohemoana@gmail.com

MOTITI
ROHE MOANA

21 August 2014

The Chief Executive
Bay of Plenty Regional Council
PO Box 364
Whakatāne 3158
email: coastal.plan@boprc.govt.nz

Tena koutou

MOTITI ROHE MOANA TRUST SUBMISSION TO THE PROPOSED BAY OF PLENTY COASTAL ENVIRONMENT PLAN

A INTRODUCTION

1. This is the submission of Motiti Rohe Moana Trust (the Trust) to the Proposed Bay of Plenty Coastal Environment Plan (the Plan). The submissions seeks retention of those parts of the Plan that support the Trust's aspirations and outcomes and seeks consultation in accordance with the principles of Te Tiriti o Waitangi and the status and role of the Trust as kaitiaki of the island of Motiti and surrounding waters, islands and reefs in respect to all matters relating to Motiti Rohe and seeks amendments or removals to other parts of the Plan to address our concerns with the Plan.

2. The submitter is the Motiti Rohe Moana Trust established in 2009. Trustees are kaumatua born and raised on Motiti Island. Among other things the Trust's purpose set out in the Trust deed is to act on behalf of Nga Hapu o Te Moutere o Motiti for the purposes of resource management, fisheries, aquaculture and other matters within the Motiti Rohe Moana. The rohe is shown in the map in attachment 1.

3. The Trust advocates for ahi ka Maori on Motiti Island and all who whakapapa to Motiti island and surrounding reefs, islets and waters.

4. Te Moutere o Motiti is a taonga. Te Tau o Taiti is a taonga and so too are Te Porotiti, Te Papa, Okarapu, Motuhaku , Motunau, Tokeroa and the coastal waters in which they are located.

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5. This submission is in three parts. Part A is the introduction. Part B sets out the general themes of the submission; challenges the process by which the plan has been prepared and opposes the Plan in general terms as it has not been prepared in accordance with the principles of the Treaty, does not apply matauranga Maori, and has not engaged with Motiti ahi ka or those who whakapapa to Motiti and its waters. The general themes of the submission pick matters that were not addressed in the Proposed Regional Policy Statement or its Variation 1. Part C identifies more specific submissions and the relief sought.

6. The Trust signals at this stage its position set out in its original submissions to the proposal by the Council to prepare a variation to the proposed regional policy statement and a proposed regional coastal environment plan. It reiterates the need for the Regional council to engage in consultation with the Trust and encourages the use of collaborative approach to developing appropriate plan provisions for the coastal environment within the rohe of the Motiti Rohe Moana.

7. The Trust is mindful of the recent Supreme Court Decision

> "*Moreover, the obligation in s 8 to have regard to the principles of the Treaty of Waitangi will have procedural as well as substantive implications, which decision-makers must always have in mind, including in giving effect to the NZCPS.*"
> (SC 82/2013 [2014] NZSC 38 *EDS v King Salmon*, para [88]).

B. SUBMISSIONS & RELIEF SOUGHT

General themes issues & relief sought to the Plan as a Whole

1. Provide active protection of taonga within the costal environment of Motiti Island and coastal waters in partnership with the Trust.

Issue:
Failure to give effect to Part II Resource Management Act 1991 (RMA), New Zealand Coastal Policy statement (NZCPS) Objective 3 and Policy 2 in particular, and relevant provisions of the Proposed Bay of Plenty Regional Policy Statement provide for exercise of

- tino rangitiratanga
- kaitiakitanga
- customary values
- application of matauranga maori
- tikanga
- active protection of taonga

in respect to Motiti Rohe Moana

Relief sought:

a. Engage with the Trust to ensure Treaty of Waitangi are observed; to be proactive in respect of active protection and redress; and to recognise and to ensure RMA Part II & PRPS framework is implemented so that Treaty principles and settlement outcomes are delivered in the for Motiti Island and Motiti rohe moana
b. Amend to provide implementation methods directed at providing reports mandated by the Trust and including cultural dimensions applying matauranga Maori.
c. Enter into memoranda of understanding with the Trust.
d. Add policies for regional council to partner with the Trust to maintain and enhance coastal values of Motiti Rohe Moana and Whenua.
e. Provide implementation methods to advocate for Mataiti and Taiapure reserves in partnership with the Trust
f. Add, refine or clarify policies to Work with tangata whenua to establish ecological bottom line or agreed target for managing the natural (character and biodiversity)and cultural resources of Motiti Rohe Moana and Whenua which will:
    - provide greater certainty in sustaining *kai moana* and ecosystem services
    - avoid degradation of natural character and biodiversity
    - better measure success of protection and enhancement measures implemented
    - establish a baseline for monitoring changes
    - provide an expanded network of restored island and marine protected areas where ecological health and indigenous biodiversity will be protected and enhanced
    - Add Implementation Methods for Plans:

g. Add implementation Methods for all applications for resource consent policy or plan changes or variations are to be reported on by cultural adviser(s) mandated by tangata whenua of Motiti with costs to be borne by proponents.

h. Add content to Objectives and Polices amending or refining as required to integrate matauranga Maori into the Plan to provide the Maori world view of their existence and why they live their lives in the way they do including *Ngakau Maumaharatanga mo ake ake* as it applies to Motiti rohe moana and whenua.

i. Management and decision making to take into account historic, cultural and spiritual relationships of Tangata Whenua with the island and waters of Motiti and the ongoing capacity to sustain these relationships.

2. Matauranga Maori

Issue:

We strongly support the inclusion of matauranga Maori in integrated management process. However, we consider there needs to be specific provisions for its implementation

Relief sought

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a. Marine spatial plan for Motiti rohe moana and whenua incorporating matauranga Maori in collaboration with the Trust.
b. Apply Maori attributes of mana, mauri and tapu to assessment of natural character in particular to the island reefs and waters of Motiti rohe moana and whenua.

3. Integrated management – coastal marine area

Issue:

The purpose of the RMA and PRPS is to achieve integrated management. Methods need to be implemented to achieve integrated management for the marine environment. The integrated management of fisheries resources in terms of an ecological management approach has been developed in the international context and must be applied to the Motiti rohe moana to give effect to Objective 1 of the NZCPS.

Relief sought:

Integrated marine management implemented through integrated management of fisheries resources.

4. Marae based aquaculture

Issue: More specific provision is needed for non commercial marae based aquaculture. Objective 34 is supported as far as it goes.

Relief Sought:

a. Expand issue 36 to include Motiti rohe moana. Recognise that water quality is not an issue in this location and that Oceanic aquaculture carried out by Motiti marae within customary waters is worthy of investigation and implementation if proven feasible.
b. Expand Objective 35 to also provide for non commercial marae based aquaculture.

PART C SUBMISSIONS & RELIEF SOUGHT

Specific

1. Integrated management issue objectives and policies are supported as far as they go. There is a need to provide integrated methodologies for the marine environment similar to the use of structure planning, spatial planning or integrated whole of catchment management applied on land.

Relief sought:
Add Issues, Objectives Policies and Methods that implement Objectives 1 and 3 of NZCPS.
Add
Issue: Fisheries resources to be a management focus so that marine management can be integrated in a manner similar to integrated catchment management for land. Objective:

As

Develop methodologies for management of fisheries resources in collaboration with tangata whenua and management agencies.
Policy: A methodology for integrated management of fisheries resources will be developed for the Motiti Rohe moana and whenua through collaboration with the Trust and stakeholder groups.
Policy: Methodologies developed will be implemented by plan change or variation

2. Natural Heritage issue objectives and policies do not go far enough in recognising issues of significant to Mana Whenua and Mana moana participation and decision making in regard to natural heritage and biodiversity or in identifying locations which require restoration and the linkage between natural and cultural heritage.

   Relief Sought:
   Add Issues Objectives Policies and Methods to give effect to Objective 2, 3 and 7 and Policies 2, 13 and 15.
   Reword issues and objectives to include recognition that natural heritage and restoration of biodiversity is an issue of significance to Mana Whenua and Mana Moana and their participation and decision making is provided for in regard to indigenous biodiversity and natural heritage.

3. **Iwi Resource Management** issues objectives and policies are supported as far as they go and need to be reworded and extended.

   Relief sought: Reword issues objectives and policies:
   a. to provide for Mana Whenua and Mana Moana rather than "iwi";
   b. to extend issue 20 for example to recognise and provide for Mana Whenua and Mana Moana to be able to develop ad utilise their land and waters,
   c. reframe the issues objectives and policies to provide for protection of biodiversity and natural heritage as a focus for achieving appropriate fisheries management.

4. **Activities in Coastal Marine Area** is supported in part and opposed to the extent it does not provide for matters of significance to Mana whenua and Mana moana.

   Relief sought:

   a. Add Objectives and policies to provide for marine spatial planning over the Motiti Rohe Moana

We wish to be heard in oral submission.

Umuhuri Matehaere
CHAIRMAN
MOTITI ROHE MOANA TRUST

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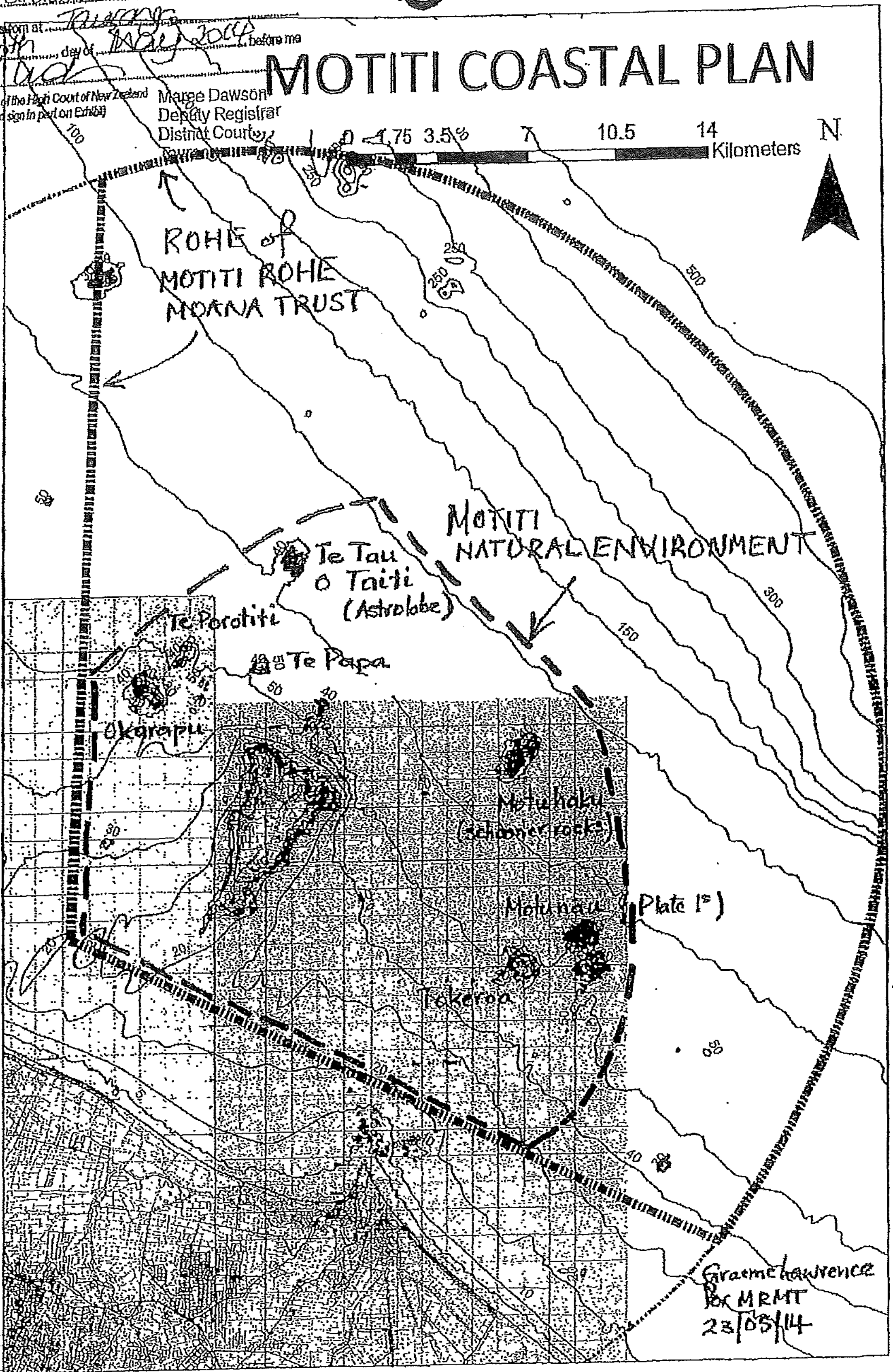
This is the annexure marked B referred to in the annexed affidavit of Graeme James Lawrence which was sworn at Tauranga this 26th day of May 2014 before me

Signature

A Solicitor of the High Court of New Zealand (Solicitor to sign in part on Exhibit)

"B"



BEFORE THE ENVIRONMENT COURT
AUCKLAND REGISTRY

UNDER	the Resource Management Act 1991
BETWEEN	**UMUHURI MATEHAERE, GRAHAM HOETE AND KATARAINA KEEPA AS TRUSTEES OF THE MOTITI ROHE MOANA TRUST**, with its registered office at 20 Matapihi Station Road, RD5, Tauranga
	Appellant
AND	**BAY OF PLENTY REGIONAL COUNCIL** a consent authority under the Act with its principal offices at 5 Quay Street, Whakatane
	Respondent

FIRST AMENDED NOTICE OF APPEAL BY THE TRUSTEES OF MOTITI ROHE MOANA TRUST IN RELATION TO THE PROPOSED BAY OF PLENTY REGIONAL COASTAL ENVIRONMENT PLAN

Dated this 23rd day of November 2015

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To the Registrar
Environment Court
Auckland

1 The Trustees of the Motiti Rohe Moana Trust (**MRMT**) appeal against the decision of Bay of Plenty Regional Council on the following Plan Change:

- The Proposed Bay of Plenty Regional Coastal Environment Plan **(Proposed Plan)**

2 MRMT made a submission on the Proposed Plan. MRMT was a primary and further submitter. It was assigned primary submission number 083 and further submitter FS12.

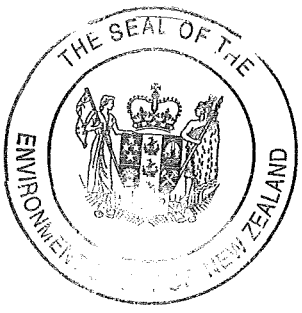
3 MRMT is not a trade competitor for the purposes of section 308D of the Resource Management Act 1991 (**RMA**).

4 MRMT was established in 2009. Trustees are kaumatua born and raised on Motiti Island. The Trust's purpose stated in the Trust Deed is to act on behalf of Nga Hapu o te Moutere o Motiti for environmental and other kaitiaki roles. This includes ahi ka Maori on Motiti Island and those who whakapapa to Motiti Island and surrounding reefs, islets and waters. MRMT is directly affected by an effect of the subject of the appeal that— (a) adversely affects the environment; and (b) does not relate to trade competition or the effects of trade competition.

5 MRMT received notice of the decision on or about 01 September 2015. The decision was made by Bay of Plenty Regional Council (**Council**). The decision that MRMT is appealing is described below.

6 Reasons for the decision are stated in the Commissioners Report; with Appendix B providing responses to submission points where Hearing Commissioners disagreed with Council Officer recommendations. Appendix D provides revised wording, adopted by Council as the Decisions Version of the Proposed Plan ("**Decision**"). At Appendix B, the Decision states:

> "**Appendix B: Recommendations on Submission Points**
>
> This Appendix sets out the Hearing Committee's recommendations on submission points where those recommendations differ from the officer's written recommendations that were contained in the following two section 42A reports:
>
> - Proposed Regional Coastal Environment Plan Staff Recommendations on Provisions with Submissions and Further Submissions, 6 March 2014 (otherwise referred to as the "**1193 page S42A Report**"); and
>
> - Proposed Regional Coastal Environment Plan 2014, Supplementary Report on Submissions to the Proposed Regional Coastal Environment Plan 2014, **Jo Noble, 11 May 2015**, File Reference 7.00399).
>
> **If a submission point is not listed in this Appendix then the Hearing Committee**



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has adopted the officer's recommendations and reasons contained in the above section 42A reports without further change." [Emphasis Added]

7 MRMT's primary and further submission points are not listed in Appendix B and not addressed in the Jo Noble Report dated 11 May 2015. Accordingly Council's decision on MRMT's submission points is as stated in the **1193 page S42A Report.**

8 The 1193 pages s42A Report has not listed submission points by submitter and these are not listed sequentially.[1] Subject to [11] below, this Appeal relates to the following decisions and recommendations made in relation to MRMT's primary submission (083) and further submission FS12:

Pages 2-3 of 1194
Pages 18-22 of 1194
Page 54 of 1194
Page 140 of 1194
Page 176 of 1194
Page 300 of 1194
Page 429 of 1194
Page 686 of 1194

9 This Appeal is limited to creation of a marine spatial planning framework for the Motiti Natural Environment Area. Scope of relief is identified by the following submission points made by MRMT in its primary submission:

Submission Point 083-2:

"a. Marine spatial plan for Motiti rohe moana and whenua incorporating matauranga Maori ~~in collaboration with the Trust~~. [delete words in strikethrough]

b. Apply Maori attributes of mana, mauri and tapu to assessment of natural character in particular to the island reefs and waters of Motiti rohe moana and whenua."

Submission Point 083-6:

"1. Integrated management issue objectives and policies are supported as far as they go [*sic*]. There is a need to provide integrated methodologies for the marine environment similar to the use of structure planning, spatial planning or integrated whole of catchment management applied on land.

Relief Sought:

Add Issues, Objectives, Policies and Methods that implement Objectives 1 and 3 of NZCPS."

Submission Point 083-10:

"Add objectives and policies to provide for marine spatial planning over the Motiti Rohe

[1] MRMT notes that the 1194 page Officer Report is not user-friendly meaning that it is difficult to ensure that all relevant page numbers and cross-references are correctly recorded.

Moana."

10 This Appeal relies upon all submission points in 083 and further submission FS12 but only to the extent that these submission points support the relief for marine spatial planning for the Motiti Natural Environment Area as stated in [9] above.

11 This Appeal expressly excludes the matters arising from the submission and further submission of Lowndes (submitter # 113, and FS30) as it relates to management of maritime incidents including the wreck of the MV Rena (and its equipment and cargo and associated debris field) on Otaiti/Astrolabe Reef and any associated debris or discharge.

12 Council was wrong to reject or reject in part MRMT's submission 083 and further submission FS12 seeking introduction of marine spatial planning for Motiti Natural Environment area. To the extent that Council accepted some of MRMT's primary and further submission points, MRMT does not challenge "acceptance" but appeals against the wording adopted in the Proposed Plan [2] to convey "acceptance" of these submission and further submission points. The decisions identified at [8] are therefore appealed for the following reasons:

12.1 Relief sought by MRMT was within jurisdiction of the RMA and within scope ("remit") of the Proposed Plan. Part 2 RMA, and higher order policy instruments, such as the NZCPS and Regional Policy Statement, require or envisage use of marine spatial planning as a method to implement Objectives and Policies for nationally important outcomes. On *King Salmon* principles s8 RMA is relevant, even if the NZCPS otherwise covers the field, to coastal methods that address Te Tiriti and partnership obligations.

12.2 Marine spatial planning is required to implement a Customary and Biodiversity effects management area within the footprint of the Motiti Natural Environment Area. Cultural effects include s6(e), s6(f), s7(a) and s8 RMA values; mana whenua / mana moana considerations; matauranga Maori principles; and the interrelationship of the biophysical and metaphysical world. Relief sought by MRMT expressly sought marine spatial planning outcomes for Motiti Rohe Moana. It was wrong for Council to reject these outcomes on the basis that *"..a successful marine spatial planning exercise needs collaboration from a broad spectrum of parties, and would require political support and the allocation of resources."* (pp3 of 1194).

12.3 The Proposed Plan process is a fully notified public process involving input from a broad spectrum of stakeholders. It is irrelevant consideration to require a separate extra process on the basis that it requires "political support" and "allocation of resources". Council had regard to irrelevant matters and fell into error by its determination that marine spatial planning cannot be undertaken within the Proposed Plan itself. It is the correct process and Council should not defer consideration of an essential issue that involves nationally important values in relation to Motiti Rohe Moana.[3]

12.4 The decisions do not give effect to Part 2 RMA including s5 cultural and social wellbeing,

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[2] Whether by way of Issues, Objectives, Policies or Methods.

[3] The Decision at [90] identified that "..in response to other submitters we have amended the issues and objectives to refer to possible future maritime spatial planning.."

Bs

nationally important values in s6(a), s6(b), s6(d), s6(e), s6(f), matters for particular regard including s7(a), s7(c), s7(d), s7(f), s7(g) and Te Tiriti principles in s8 RMA.

12.5 The decisions do not give effect to relevant provisions in the NZ Coastal Policy Statement and Regional Policy Statement; do not address relevant statutory functions and tests in ss30, 32, 32A, 32AA, requirements for Regional Plans in ss63-70 and 1st Schedule RMA; and fails to adopt Objectives, Policies, Methods to introduce marine spatial planning and related relief sought by MRMT in its primary and further submissions within the Motiti Natural Environment Area (Motiti Rohe Moana).

12.6 The decisions do not give reasons for rejecting a number of MRMT's submission points. The decisions do not address the issues and reasons stated in MRMT's primary submission and further submission. Relief sought by MRMT falls within jurisdiction and is effects based.

13 I seek the following relief:

13.1 The relief stated in [9] above.

13.2 For clarity, this appeal does not seek any relief which opposes either directly or indirectly the leaving of the wreck of MV Rena (and its equipment and cargo and associated debris field) on Otaiti/Astrolabe Reef and any associated debris or discharge. In particular no relief is sought in relation to:

a. maritime incidents in the proposed plan (3.3), or

b. recognition of the wreck of MV Rena in ONFL 44.

14 The following documents were attached to the Notice of Appeal dated 13 October 2015:

a. MRMT Submission #083
b. MRMT Further submission #FS12
c. Final Decisions Committee Report September 2015

Dated this 23rd day of November 2015

Umuhuri Matehaere
Trustee & Chairman, Motiti Rohe Moana Trust

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

ATTACHMENT ONE: AMENDED RELIEF TO APPEAL

Part One Purpose, content, planning framework

Amend 5.Plan Mechanisms at 5.2 to provide for "Management Areas" as a plan mechanism by amending the heading and adding a new paragraph follows:

"5.2 Zoning, ~~and~~ Overlays and Management Areas

The Motiti Management Area adopts a spatial planning approach to the Motiti Natural Environment Management Area, identified in the Regional Policy Statement. The Management Area has multiple values and requires an integrated approach to protect and enhance these values.

Part Two Issues and objectives for the coastal environment

Add a new item 12 to the list of topic headings to provide for the Motiti Natural environment Management Area as follows:

12. Motiti Natural Environment Management Area (MNEMA)

Under 1. Issues

Add a new set of issues to address an additional discrete spatial area within the coastal environment, namely the Motiti Natural Environment Area, following on from 1.10 Harbour Zone and 1.11 Port Zone, by inserting a new 1.12 Motiti Natural Environment Management Area and issues as follows:

1.12 Motiti Natural Environment Management Area

Issue 53 Motiti Island is the only continuously occupied offshore island in the region. It is the most developed of all offshore islands. Tangata whenua have a lengthy history of traditional and continuing cultural relationships with the coastal environment of the Motiti Natural Environment Management Area where tangata whenua have lived and fished for generations. Motiti is physically and spiritually linked to Otaiti as well as toka, reefs and other features identified in the Motiti Natural Environment Management Area. Otaiti is both anchor (haika) and umbilical cord (pito) for Motiti Island (Topito o te Ao).

Issue 54 For tangata whenua of Motiti, Te Moutere o Motiti is a taonga. Te Tau o Taiti (Astrolabe reef) is a taonga, and so too are identified features and named toka (rocks) including Te Porotiti, Te Papa, Okarapu, Motukau, Motunau, Tokeroa and the coastal waters in which they are located.

Issue 55 *He Aitua*

The *MV Rena* grounding on Te Tau o Taiti (Otaiti) Astrolabe reef on 5 October 2011 was a significant maritime incident with profound impacts on the marine environment and customary fisheries of the Motiti Rohemoana.

Rahui

Tangata whenua of Motiti issued a rahui under customary authority, kaitiakitanga and tikanga to manage, maintain and protect Otaiti for the duration that the MV Rena wreck remains in situ. The rahui seeks to restore the mauri of Otaiti as a

taonga. For restoration to occur, an integrated approach is required to address tangible and intangible values including natural heritage, natural character, biodiversity, cultural and taonga species. The rahui expresses the matauranga Maori of Motiti tangata whenua for protection of Otaiti and management of the Motiti Natural Environment Management Area.

Under 2 Objectives

Add new objectives for the Motiti Natural Environment Management Area under a new Section 2.11 as follows:

2.11 Motiti Natural Environment Area (see Part Seven Map Series 43 and 44)

Objective 50 Protect, restore and rehabilitate the natural and cultural heritage characteristics that are of special value to the tangata whenua of Motiti including:

(a) Mauri o te wai; and

(b) Kaimoana resources; and

(c) Landforms and features; and

(d) Taonga including Otaiti.

Objective 51 Recognise the ongoing and enduring relationship of the tangata whenua of Motiti with the coastal environment of MNEMA. Recognise and implement the rahui for Otaiti in order to sustainably manage the multiple values that exist within the Rahui Conservation management area.

Objective 52 In taking into account the principles of the Treaty of Waitangi and kaitiakitanga, protect and enhance the Motiti Natural Environment Management Area as taonga.

Part Four Activity Based policies and rules

Add a new item 12 to the list of topic headings to provide for the Motiti Natural environment Management Area activities as follows:

12. Motiti Natural Environment Management Area activities (MNEMA)

Add a new Policies & Rules Section 12 as follows:

12. Motiti Natural Envrionment Management Area (MNEMA)

12.1. Policies

12.1.1 General Policies for the Motiti Natural Environment Management Area

1. Also refer to the following policies in other sections of this Plan where relevant to a proposed activity.

(a) All policies in Part 3 –Natural heritage

With the exception that the reference in NH5(a) (ii) to activities in Schedule 15 being appropriate in certain circumstances does not include activities and structures associated with boat launching,

C3

retrieval and mooring areas identified as Te Huruhi Point Landing Area on Map 4 of the Motiti island Environmental Management Plan Operative May 2016.

(b) All policies in Part 3 - Iwi Resource management

(specific references to be added)

Policy MNEMA 1 Incorporate mātauranga Māori for the Motiti Natural Environment Management Area by:

(a) identifying a Rahui /Conservation Management Area incorporating Otaiti and the waters associated with Otaiti for protection of natural heritage, cultural values and taonga species, for restoration and enhancement of natural character.

(b) Give effect to a customary rahui preventing removal, damage or destruction of any indigenous flora or fauna including taonga species within the Rahui/Conservation Management Area and preventing occupation of space for that purpose, unless for the purpose of scientific, state of the environment or resource consent monitoring.

Policy MNEMA 2 Achieve integrated management of the Motiti Natural Environment Management Area by regular mauri monitoring in collaboration with tangata whenua of Motiti.

12.2 Rules

Rule MNEMA 1 Controlled

Motiti marae based aquaculture that is not located within the Rahui/Conservation Management Area and is subject to Rule AQ 2.

Rule MNEMA 2 Prohibited

Breach of the Rahui by:

a. Removal, damage or destruction of any indigenous flora or fauna including taonga species, unless for the purpose of scientific or resource consent monitoring; or

b. Structures or Occupation (whether temporary or permanent) of the Rahui /Conservation Management Area for the purpose of removal, damage or destruction of any indigenous flora or fauna including taonga species, unless for the purpose of scientific or resource consent monitoring.

Part Five Methods

Add Consequential Amendments

Part Six

Update Schedule 6 ASCV.

Add a new Schedule 6A to identify the attributes values and tangata whenua aspirations to include the following:

A. The cultural landscape extends from the sea floor to the ocean surface and is integrated with land within the Motiti Natural Environment Area.

C4

B. Taonga species include [taken from the RPS Appendix J]:

- Hapuku;
- Tamure (snapper);
- Kahawai;
- Maomao
- Tarakihi;
- Moki
- Araara (trevally)
- Parore;
- Haku (yellow-tail Kingfish)
- Aturere (tuna)
- Kuparu (John Dory)
- Kumukumu (gurnard)
- Patikirori (sole)
- Mango (sharks)
- Wheke (octopus)
- Koura (crayfish)
- Paua (abalone)
- Kuku (mussels)
- Tipa (scallops)
- Tio (oysters)
- Kina (urchins)
- Rori (sea cucumbers)
- Karengo (seaweeds).

C. Schedule 2 – Indigenous Biological Diversity Area:

- IBDA A75 Motiti Island
- IBDA A76 Astrolabe Reef
- IBDA A77 Motunau (land)
- IBDA A78 Motunau (marine area)
- IBDA A79 Motuputa Island
- IBDA B132 Motiti Islets

C. Schedule 3 – Outstanding Natural Features and Landscapes

- ONFL 44 Motiti Island margin and associated islands, reefs and shoals

D. Schedule 5 – Regionally Significant Surf Breaks

- 12 Motiti Island (east side)

E Schedule 6 – Areas of Significant Cultural Value

- ASCV 25 Motiti Island and associated islands, reefs and shoals

C5

The Natural Heritage (NH), Iwi Resource Management (IW) and Recreation, public access and open space (RA) polices contained in Part 3 contain additional policy direction on managing effects on A- E above

Tangata whenua aspirations

Motiti Natural Environment Area

- Marae based aquaculture.
- Restoration of natural heritage and cultural values.
- Protection of biodiversity, particularly indigenous flora and fauna, in order to establish, maintain and enhance the habitat of taonga species.
- Protection and restoration of the mauri and mana
- Use and development of coastal environment of Motiti Island supports the values and attributes of identified natural and cultural heritage values.
- Maori customary activities, public access, educative and experiential opportunities are able to be undertaken.

Otaiti Rahui Conservation Area

- Protection of natural heritage, cultural values and taonga species
- Restoration and enhancement of natural character
- Avoid taking, removal, damage or destruction of any indigenous flora or fauna including taonga species unless for the purpose of scientific or resource consent monitoring

Amend Schedule 15 to remove reference to Te Huruhi Point Landing Area on Map 4 of the Motiti Island Environmental Management Plan Operative May 2016.

Part Seven

Provide additional maps and amendments to the existing suite of maps 43 and 44:

- to identify and provide for the Motiti Natural Environment Management Area based on the RPS Appendix I Map 21a and
- to show the Rahui Conservation Management Area identified in MNEM Policy 1
- to incorporate Motunau Island Rocks and Reefs including Tokeroa within MNEMA
- providing for Motiti Island within MNEMA

AMENDED RELIEF TO APPEAL - ENV-2015-AKL-134

Part One Purpose, content, planning framework

The parts of the Plan relating to the spatial planning approach to the Motiti Natural Environment Management Area and any amendments made to other parts of the Plan as a result of appeal ENV-2015-AKL-000134 (including **[to specify]** [5.2] [spatial planning approach for the Motiti Natural Environment Management Area], Issues 53 – 55, Objectives 50 – 52, Policies MNEMA 1 and 2, and Rules MNEMA 1 and 2) shall not come into effect or become operative until a date after final resolution of the appeals and other challenges (if any) against the grant of consents to The Astrolabe Community Trust relating to the remains of the MV Rena on Otaiti, with the intent that these provisions shall have no effect on the resolution of those resource consents.

Amend 5.Plan Mechanisms at 5.2 to provide for "Management Areas" as a plan mechanism by amending the heading and adding a new paragraph follows:

"5.2 Zoning, ~~and~~ Overlays and Management Areas

The Motiti Management Area adopts a spatial planning approach to the Motiti Natural Environment Management Area, identified in the Regional Policy Statement. The Management Area has multiple values and requires an integrated approach to protect and enhance these values.

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(rocks) including Te Porotiti, Te Papa, Okarapu, Motukau, Motunau, Tokeroa and the coastal waters in which they are located.

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Tangata whenua of Motiti issued a rahui under customary authority, kaitiakitanga and tikanga to manage, maintain and protect Otaiti ~~for the duration that the MV Rena wreck remains in situ~~. The rahui seeks to restore the mauri of Otaiti as a taonga. For restoration to occur, an integrated approach is required to address tangible and intangible values including natural heritage, natural character, biodiversity, cultural and taonga species. The rahui expresses the matauranga Maori of Motiti tangata whenua for protection of Otaiti and management of the Motiti Natural Environment Management Area.

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12.1.1 General Policies for the Motiti Natural Environment Management Area

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~~With the exception that the reference in NH5(a) (ii) to activities in Schedule 15 being appropriate in certain circumstances does not include activities and structures associated with boat launching, retrieval and mooring areas identified as Te Huruhi Point Landing Area on Map 4 of the Motiti island Environmental Management Plan Operative May 2016.~~

Deleted

(b) All policies in Part 3 - Iwi Resource management

(specific references to be added)

Policy MNEMA 1 Incorporate matauranga Maori for the Motiti Natural Environment Management Area by:

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Breach of the Rahui by:

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BEFORE THE ENVIRONMENT COURT

Decision [2015] NZEnvC 50
ENV-2013-WLG-000050

IN THE MATTER	of an appeal under cl 14 of Schedule 1 to the Resource Management Act 1991
BETWEEN	NGATI KAHUNGUNU IWI INC Appellant
AND	THE HAWKES BAY REGIONAL COUNCIL Respondent

Court: Environment Judge C J Thompson
Environment Commissioner A C E Leijnen
Environment Commissioner K Prime
Hearing: at Hastings 3 and 4 December 2014
Counsel and Representatives:
N J R Tiuka for Ngati Kahungunu Iwi Inc
N F Jones for Hawkes Bay District Health Board – s274 party
L J Blomfield for the Hawkes Bay Regional Council

DECISION ON APPEAL

Decision issued: 27 MAR 2015

The appeal is allowed: - see paras [107] and [108]

Costs are reserved

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

Introduction

[1] Proposed Change 5 (Change 5) to the Hawke's Bay Regional Resource Management Plan – Land Use and Freshwater Management (RRMP), notified on 2 October 2012, is, in part, a step towards the Hawkes Bay Regional Council implementing the National Policy Statement for Freshwater Management. The RRMP is a combined regional policy statement and regional plan. Sections 1-4 of the document are intended to meet the requirements of s62 of the RMA in relation to the contents of a Regional Policy Statement (RPS) and sections 5-8 the requirements of s67 relating to the contents of a Regional Plan (RP).

[2] Change 5 is primarily concerned with the RPS and it introduces a new section to Chapter 3 of the RRMP. The decisions version of Change 5, released on 5 June 2013, would delete Objective 21 from the Groundwater Quality section (3.8) in Chapter 3: Regionally Significant Objectives and Policies, and would also amend Objective 22. It would also consequentially amend and delete duplicate Objectives 42 and 43 respectively from section 5.6 of Chapter 5: Regional Plan Objectives and Policies. This is (somewhat obscurely) located under a section in Change 5 entitled *Insertions to other chapters in the Part 3 (RPS) of HB Regional Resource Management Plan.*

[3] Objective 21 presently reads:

> No degradation of existing groundwater quality in the Heretaunga Plains and Ruataniwha Plains aquifer systems.

And Objective 22, again without the Change 5 amendment, reads:

> The maintenance or enhancement of groundwater quality in unconfined or semi-confined productive aquifers in order that it is suitable for human consumption and irrigation without treatment, or after treatment where this is necessary because of the natural water quality.

[4] The decisions version of Change 5 would, as noted, delete Objective 21 and amend Objective 22 to read:

> The groundwater quality in the Heretaunga Plains and Ruataniwha Plains aquifer systems and in unconfined or semi-confined productive aquifers is suitable for human consumption and irrigation without treatment, or after treatment where this is necessary because of the natural water quality.

[5] The significant difference between the notified and decisions versions of Objective 22 is the opening reference to Objective LW1 (OBJ LW1) in the notified version. That objective is part of the new section inserted as Chapter 3.1A (ie of the RPS) and sets the scene, as it were, for the changes proposed for Chapter 3.8. We are informed that, with one exception (see footnote), OBJ LW 1 has now been settled (through other concluded appeals) and is beyond challenge. It now reads:

> OBJ LW1 Integrated management of fresh water and land use and development
>
> Fresh water and the effects of land use and development are managed in an integrated and sustainable manner which includes:
>
> 1. protecting the quality of outstanding freshwater bodies in Hawke's Bay;
> 1A. protecting the significant values of wetlands[1];
> 2. the maintenance of the overall quality of freshwater within the Hawke's Bay region and the improvement of water quality in water bodies that have been degraded to the point that they are over-allocated;
> 2B. establishing where over-allocation exists, avoiding any further over-allocation of freshwater and phasing out existing over-allocation;
> 3. recognising that land uses, freshwater quality and surface water flows can impact on aquifer recharge and the coastal environment;
> 4. safeguarding the life-supporting capacity and ecosystem processes of fresh water, including indigenous species and their associated fresh water ecosystems;
> 5. recognising the regional value of fresh water for human and animal drinking purposes, and for municipal water supply;
> 6. recognising the significant regional and national value of fresh water use for production and processing of beverages, food and fibre;
> 7. recognising the potential national, regional and local benefits arising from the use of water for renewable electricity generation;

[1] This part of the Objective is still subject to an appeal but does not affect the present discussion

8. recognising the benefits of industry good practice to land and water management, including audited self-management programmes;
8A. recognising the role of afforestation in sustainable land use and improving water quality;
9. ensuring efficient allocation and use of water;
...
12. recognising and providing for river management and flood protection activities;
13. recognising and providing for the recreational and conservation values of fresh water bodies; and
14. promoting the preservation of the natural character of the coastal environment, and rivers, lakes and wetlands, and their protection from inappropriate subdivision, use and development.

We pause here to note the use of the term *overall quality* in paragraph 2. This leads to the issue of considering an *overs and unders* approach to region-wide water quality which we anticipate is founded on Objective A2 of the National Policy Statement for Freshwater Management (NPSFM) and which we will come to later.

[6] POL LW1 is entitled *Problem solving approach – Catchment-based integrated management*. Here it is stated that the Council will ... *adopt an integrated management approach to fresh water and the effects of land use and development within each catchment area*, that amongst other things:

b) provides for *matāuranga a hapū* [ie the collective knowledge of a hapu] and local tikanga values and uses of the catchment;
c) provides for the inter-connected nature of natural resources within the catchment area, including the coastal environment;
cA) recognises and provides for the need to protect the integrity of aquifer recharge systems;
d) gives effect to provisions relating to outstanding freshwater bodies arising from the implementation of Policy LW1A;
dA) maintains, and where necessary enhances, the water quality of those outstanding freshwater bodies identified in the catchment, and where appropriate, protects the water quantity of those outstanding freshwater bodies;
e) promotes collaboration and information sharing between relevant management agencies, iwi, landowners and other stakeholders.
f) takes a strategic long term planning outlook of at least 50 years to consider the future state, values and uses of water resources for future generations;

g) aims to meet the differing demand and pressures on, and values and uses of, freshwater resources to the extent possible;

gA) .....

h) ensures the timely use and adaptation of statutory and non-statutory measures to respond to any significant changes in resource use activities or the state of the environment;

iC) .....;

iD) .....

iE) recognises and provides for existing use and investment;

j) ensures efficient allocation and use of fresh water within limits to achieve freshwater objectives; and

k) .....[2]

[7] Part 2 of POL LW1 describes the process for preparation of regional plans, including the identification of the spatial extent of each catchment, the scope of values which must be attributed, and those values that are optional to a water body, and focuses on provisions for outstanding freshwater bodies. Sub clause (e) requires regional plans to:

> ... set out how the groundwater and surface water quality and quantity limits and targets will be implemented through regulatory or non-regulatory methods including specifying timeframes for meeting water quality and allocation targets.

[8] When the Council sets objectives in its Regional Plan aligned to POL LW1.2, Policy POL LW1.3 requires it to ensure:

a) the life-supporting capacity, ecosystem processes and indigenous species including their associated ecosystems of fresh water are safeguarded; and

b) adverse effects on water quantity and water quality that diminish mauri are avoided, remedied or mitigated; and

c) the microbiological water quality in rivers and streams is safe for contact recreation where that has been identified as a value under Policy LW1.2 or Policy LW2 Table 1.

[2] Note: the numbering of the subparagraphs of this policy does not strictly follow in sequence the policy needs to be referred to as following consent order settlement.

[9] When prioritising water values, the *problem solving* approach requires that subject to POL LW1.3, (relevant to this appeal) the Council:

1. Give priority to maintaining, or enhancing where appropriate, the primary values and uses of freshwater bodies shown in Table 1 for the following catchment areas in accordance with Policy LW2.3: (emphasis added)
   a) Greater Heretaunga/Ahuriri Catchment Area;
   b) Mohaka Catchment Area; and
   c) Tukituki Catchment Area.

These provisions also apply both to the preparation of regional plans, and where no catchment-based plan has yet been prepared for the relevant catchment. The default position then, one could say, is POL LW1.3. We set out Table 1 as it relates to the Greater Heretaunga/Ahuriri Catchment area:

Catchment Area	Primary Value(s) and Uses – in no priority order	Secondary Value(s) and Uses – in no priority order
Greater Heretaunga / Ahuriri Catchment Area	• any regionally significant native water bird populations and their habitats • Cultural values and uses for: o mahinga kai o nohoanga o taonga raranga o taonga rongoa • Fish passage • Individual domestic needs and stock drinking needs • Industrial & commercial water supply • Native fish habitat in the Ngaruroro River and Tutaekuri River catchments • Recreational trout angling and trout habitat in: o the Mangaone River o the Mangatutu Stream o the Ngaruroro River and tributaries upstream of Whanawhana cableway o the Ngaruroro River mainstem between the Whanawhana cableway and confluence with the Maraekakaho River o the Tutaekuri River mainstem above the Mangaone River confluence • The high natural character values of the Ngaruroro River and its margins upstream of Whanawhana cableway, including Taruarau River • The high natural character values of the Tutaekuri River and its margins above	• Aggregate supply and extraction in Ngaruroro River downstream of the confluence with the Mangatahi Stream • Amenity for contact recreation (including swimming) in lower Ngaruroro River, Tutaekuri River and Ahuriri Estuary • any locally significant native water bird populations and their habitats • Native fish habitat, notwithstanding native fish habitat as a primary value and use in the Tutaekuri River and Ngaruroro River catchments • Recreational trout angling, where not identified as a primary value and use • Trout habitat, where not identified as a primary value and use

	the confluence of, and including, the Mangatutu Stream • Trout spawning habitat • Urban water supply for cities, townships and settlements and water supply for key social infrastructure facilities • Freshwater use for beverages, food and fibre production and processing and other land-based primary production	

[10] In the absence of a numerical standard compliance relies, in the interim, on an interpretation of the objectives and policies. The setting of a numerical standard (to follow in regional plans) relies on an interpretation of the amended objectives and policies, which as Ngati Kahungunu (whose position we will set out shortly) asserts, sets a bottom line of a quality of water (through the application of OBJ 22 as proposed by the Council), that is *suitable for human consumption and irrigation without treatment, or after treatment where this is necessary because of natural water quality.*

[11] To give more context, we should mention now two further objectives which have been settled. These are:

OBJ LW2 Integrated management of freshwater and land use development

The management of land use and freshwater use that recognises and balances the multiple and competing values and uses of those resources within catchments. Where significant conflict between competing values or uses exists or is foreseeable, the regional policy statement and regional plans provide clear priorities for the protection and use of those freshwater resources.

OBJ LW3 Tangata whenua values in management of land use and development and freshwater

Tangata whenua values are integrated into the management of freshwater and land use and development including:

a) recognising the mana of hapu, whanau and iwi when establishing freshwater values; and

b) recognising the cumulative effects of land use on the coastal environment as recognised through the Ki uta ki Tai (*mountains to the sea*) philosophy; and

c) recognising and providing for wairuatanga and the mauri of fresh water bodies in accordance with the values and principles expressed in Chapter 1.6, Schedule 1 and the objectives and policies in Chapter 3.14 of this Plan; and

d) recognising in particular the significance of indigenous aquatic flora and fauna to tangata whenua.

[12] We record, and shall return to the point later, that Objectives 42 and 43 in the regional plan portion of the RRMP, without the amendments of Change 5, read:

> OBJ 42 No degradation of existing groundwater quality in aquifers and Ruataniwha Plains aquifer systems.
>
> OBJ 43 The maintenance or enhancement of groundwater quality in unconfined or semi-confined productive aquifers in order that it is suitable for human consumption and irrigation without treatment, or after treatment where this is necessary because of the natural water quality.

[13] The Council, quite understandably, was at pains to point out that the amendments proposed through Change 5 were designed to affect the RPS and that the RP changes were still to come. After the Change 5 amendments to the RPS set in place *higher order* objectives and policies, a process would then be followed by the Council to amend its regional plan as it considers each catchment. However, as already noted, Change 5 purports to consequently change Objectives 42 and 43 of the Regional Plan.

[14] While s67(3) RMA requires a regional plan to *give effect* to the RPS, this does not require that the plan simply mimics the RPS. In this case Change 5 clearly sets out that *the* RP is earmarked for future changes. However, by making a change to a fundamental objective of the RP as a *consequential* change, the objective is unable to be considered in the context of the whole of the plan to which it relates. A

consequential change to the RP could change the meaning of that plan in a broader context. We were not provided with any evidence on the significance of that change to the overall drafting/meaning of the RP such as a s32 analysis would deliver.

[15] In the meantime, the *Board of Inquiry into the Tukituki Catchment Proposal* has given a decision on Plan Change 6 (which is specific to the Tukituki catchment) - so that process has, in some respects, *leap-frogged* Change 5. Clearly, some caution is needed in considering the Board decision's relevance to the present issues because it dealt with a regional plan change, rather than being directed at the higher level document (regional policy statement) we have before us. The Board has indicated that the provisions of Chapter 5.6 of the Regional Plan do not apply within the Tukituki River catchment, of which the Ruataniwha Plains aquifer system forms part. It has made an amendment to Objective 42 by removing from it the words … *and Ruataniwha Plains [aquifer system].* On that basis, Objective 42 is now to read:

> No degradation of existing groundwater quality in aquifers in the Heretaunga Plains. [3]

In addition, the Board's decision on PC 6 appears to seek to impose better management practices to reduce contaminant loading. This is the sort of amendment one might expect once the Council takes to implementing the review of its Regional Plan to align with the NPSFM. Again we note that Change 5 relates to Chapter 3 of the combined Plan, which is the Regional Policy Statement, not the Regional Plan.

The hierarchy of planning instruments

[16] Since the Supreme Court judgment in *EDS v NZ King Salmon Co Ltd* [2014] NZRMA 195 there has been an increased awareness of the need to consider the hierarchy of planning documents, and the degree of control those documents have over the required or permissible contents of the documents ranking below them. Plainly, the senior document is the RMA, and immediately below that are the National Policy Statements (NPS). In this case, this is the NPSFM which came into force on 1 August 2014 and, with some transitional provisions, revoked the 2011

[3] see p62, Appendix 5 to the Board's Report

version from that date. In its own terms the NPSFM speaks of being applicable to Regional Plans, and makes no mention of Regional Policy Statements. Why that is so, we do not know, because s62(3) RMA makes it perfectly clear that a Regional Policy Statement must give effect to an NPS.

[17] Also, going up the chain rather than down, a Regional Plan must give effect to both an NPS and to a Regional Policy Statement, so it would make no sense to have a Regional Policy Statement that did not give effect to an NPS.

Ngati Kahungunu Iwi Inc's position

[18] In respect of Objective 21, Ngati Kahungunu Iwi Inc (Ngati Kahungunu) wishes to see the *as notified* version of Change 5 remain as part of the RRMP, and in an approach slightly revised from the relief sought in the original appeal, seeks that Objective 22 should read:

> The maintenance or enhancement of groundwater quality in other aquifers in order that it is suitable for human consumption and irrigation without treatment, or after treatment where this is necessary because of the natural water quality.

We note Ngati Kahungunu's point about the term *productive aquifers*. These are defined in the RRMP as:

> i. Has quantity and flow of water such that it can be used for water supply purposes, and
> ii. Where the benefits of utilisation outweigh the costs (especially where the aquifer has existing contamination).

The NPSFM does not differentiate between *productive* and *non-productive* aquifer systems and Ngati Kahungunu is concerned that, first, the proposed wording would allow for the degradation of non-productive aquifers; and secondly, that classification as *non-productive* or *productive* is a function of use for the time being, rather than of inherent quality or quantity. This position did not appear to be challenged during the hearing although Ms Blomfield, in her reply, thought it unnecessary.

[19] In his opening submissions for Ngati Kahungunu (para 64), Mr Tiuka emphasised the point that:

> The operative RPS Objectives 21 and 22 are reinforced by Policy 17 which directs decision makers to manage effects of activities on groundwater quality so that the environmental guidelines in the RRMP, Policies 75 and 76, are complied with. The guidelines in Policies 75 and 76 reinforce the direction set in the operative Objective 21 and 22, that water quality in the Ruataniwha and Heretaunga should not be degraded, and that elsewhere it should meet human drinking water and irrigation quality standards.

Mr Tiuka went on to emphasise that the operative provisions give clear direction that the existing quality in those aquifers is to be maintained, and that elsewhere it is to be maintained or improved. Further, he noted Policy 17, which reads:

POL 17 Decision-Making Criteria – Activities affecting Groundwater Quality

3.8.15 To manage the effects of activities that may affect the quality of groundwater in accordance with the following approach:

(a) To ensure that all activities, particularly discharges of contaminants onto or into land, comply with the environmental guidelines for groundwater quality, and the associated implementation approach, set out in Policies 75 and 76.

(b) To encourage discharges of contaminants onto or into land where these are likely to have less adverse effect than discharges into water.

(c) To consider the effects of the taking of groundwater on the quality of groundwater, including the potential for salt water intrusion.

(d) To prevent or minimise spills or other breaches of resource consent conditions causing contamination of groundwater, particularly in those areas of high contamination vulnerability for the Heretaunga Plains aquifer system as shown in the DRASTIC map in Schedule V, by requiring the preparation and implementation of site management plans and spill contingency measures for relevant activities.

(e) To disallow any discharge activity which presents a significant risk of groundwater contamination in those areas of high contamination

> vulnerability for the Heretaunga Plains aquifer system as shown in the DRASTIC map in Schedule V.

is not changed by Change 5, so there would be an internal inconsistency between the operative RPS policy and the provisions to be amended by Change 5 – as he puts it … *The objective allows for degradation and the policy requires maintenance.*

[20] Mr Tomoana, who is the Chair of Ngati Kahungunu and who provided cultural evidence for the Iwi, provided some examples of better practice in response to questions from Ms Blomfield. We are also aware that there exists a Settlement Act relating to Tainui and the Waikato River which relies on the potential for maintenance and enhancement of the water of that river and its related waterways. That must have some basis of practicality as it has the effect of a National Policy Statement under the RMA, although in terms of direction-setting, it may do no more than does the direction in s30(1)(c)(ii).

[21] We shall return to Ngati Kahungunu's position in discussing s6 issues.

The District Health Board's position

[22] Dr Jones indicated that the Board was pleased that the Regional Council was setting an objective to protect the safety of water for drinking. Unsurprisingly, the Board's concern was how that might be implemented; its effectiveness, and the issues of possible changes of levels of contamination over time.

[23] He also pointed out that what is regarded as *safe* – for instance in terms of nitrate levels in the water – might change over time. While that change might possibly go either way, the Board's view was that a precautionary approach, keeping acceptable levels noted as low, would provide a buffer and reassurance against problems in the future. Dr Jones also reminded us that in the Tukituki Board's decision on Plan Change 6, the groundwater nitrate-nitrogen (NO_3-N) limit has been set at 10-11.3 mg/L[4] - but that that could be revisited in any subsequent plan change.

[4] See paras [48] –[49] for explanation of this numeric

The Council's position on what it is able to do about water quality in aquifers – and why it has made the disputed changes in Change 5

[24] The reasons the Council advances for deleting Objective 21 are, first, that its wording is absolute – it states that there is to be no degradation of the quality of groundwater, and it believes that to be impossible to achieve. Secondly, there is a time lag between cause and effect upon water in aquifers – ie a contaminant may be released into groundwater at entry point A and then, depending upon the permeability of the land through which it passes, it may not show up as a contaminating effect at measuring point B until years, or decades, later. Even then, it will probably not be possible to connect a particular effect to a particular cause. That means that there will be, because of what may have been introduced to groundwater in the past, an effect or set of effects of groundwater degradation that are unpredictable in kind and/or degree, and impossible to relate to any one cause or event. This is referred to by the Council as *the load to come*. In her closing submissions, Ms Blomfield puts the point this way:

> 42. For the future, implementing the 'no degradation' objective would require regional plans to limit or prevent any activity which might result in contaminants entering groundwater. That would mean a prohibition on all farms, all horticulture, and taken to an extreme level, even native bush because it too leaches nitrogen into the soil and that nitrogen inevitably reaches groundwater. An absolute and blanket requirement for 'no degradation' of groundwater across the whole region is clearly an unworkable proposition.
>
> 43. As noted previously, instead what is required is the setting of appropriate limits on the allowable extent of degradation, such that use and development can occur without compromising life-supporting capacity and the health and well-being of people and communities (amongst other things). Clearly such limits may be tougher in some areas and laxer in others. That is why Appendix 2 to the NPSFM sets a range of numerical attributes for communities to select from.

[25] The Council points out that Objectives 21 and 22 are in the present RRMP, notified in 2000 and effective from 2006, but there has been, over the last 14 years of monitoring, increases of nitrate-nitrogen at 18% of the monitoring sites. Most of

these sites are in the Heretaunga Plains and Ruataniwha gravel aquifers. As Ms Blomfield put it in her opening submissions:

> Even if further land use change is curtailed, it is likely that over time existing groundwater quality will degrade to some extent.

And she then went on to say:

> What is proposed instead is an objective requiring the groundwater quality in the Heretaunga Plains aquifer and the Ruataniwha aquifer systems and confined aquifers or semi-confined productive aquifers to be suitable for human consumption and irrigation without treatment (unless treatment is necessary because of the natural water quality).

[26] The Council also points out that the changes to Objectives 21 and 22 of the RPS are but part of a package; and a high-level part at that. It says, correctly, that when it comes to catchment-specific issues, Regional Plan provisions can be put in place, tailored to the circumstances of those catchments.

[27] We shall return to these themes later in the decision.

A regional council's functions

[28] The functions required of a regional council – and indeed its *raison d'etre* – are those of relatively high-level control of resources having regional, as opposed to immediately local, significance. Section 30 is key to considering what a regional council may do and, more importantly in this context, what it must do. The relevant portions of the section provide:

> 30 Functions of regional councils under this Act
>
> (1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:
>
> (a) The establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the natural and physical resources of the region:
>
> (b) The preparation of objectives and policies in relation to any actual or potential effects of the use, development, or protection of land which are of regional significance:

(c) The control of the use of land for the purpose of—

(i) Soil conservation:

(ii) The maintenance and enhancement of the quality of water in water bodies and coastal water: (emphasis added)

(iii) The maintenance of the quantity of water in water bodies and coastal water: …

(f) The control of discharges of contaminants into or onto land, air, or water and discharges of water into water: …

We interpolate that *water body* is defined in s2 RMA as:

> … fresh water or geothermal water in a river, lake, stream, pond, wetland, or aquifer, or any part thereof, that is not located within the coastal marine area (emphasis added).

[29] So, in summary, it is a function of every regional council to control the use of land to maintain and enhance the quality of water in water bodies – ie including water in aquifers, and to control the discharges of contaminants into *water* (again, including water in aquifers). This function is not optional – it is something a regional council is required to do, whether it be difficult or easy.

[30] A regional council must have a regional policy statement (RPS) in place, prepared in accordance with Schedule 1 to the Act: - see s60(1) - and we turn to consider what such a document must contain.

The requirements of a regional policy statement

[31] An RPS must comply with the provisions of s61 (in this case, the version of that section operative between 1 April 2011 and 27 June 2013) – of which the first requirement (just to emphasise the point) is that it be prepared in accordance with the functions of a regional council under s30. Also, and unsurprisingly, accordance with Part 2 of the Act is required, as it is with duties under s32 and any regulations.

[32] The contents of an RPS must also comply with s62(3):

> A regional policy statement must not be inconsistent with any water conservation order and must give effect to a national policy statement or New Zealand coastal policy statement.

[33] In the relevant parts of Hawkes Bay, there is no water conservation order in place. Obviously the relevant national policy statement to be given effect is the NPSFM, and, to the extent it may be relevant, the New Zealand Coastal Policy Statement.

Section 32 report

[34] It is common ground that the version of s32 to be considered in this appeal, because of the date of notification of the Plan Change (2 October 2012), is that in force at that time. It provides:

> 32 Consideration of alternatives, benefits, and costs
>
> (1) In achieving the purpose of this Act, before a proposed plan, proposed policy statement, change, or variation is publicly notified, a national policy statement or New Zealand coastal policy statement is notified under section 48, or a regulation is made, an evaluation must be carried out by—
>
> (a) the Minister, for a national environmental standard or a national policy statement; or
>
> (b) the Minister of Conservation, for the New Zealand coastal policy statement; or
>
> (ba) the Minister of Aquaculture, for regulations made under section 360A; or
>
> (c) the local authority, for a policy statement or a plan (except for plan changes that have been requested and the request accepted under clause 25(2)(b) … of Schedule 1); or
>
> (d) the person who made the request, for plan changes that have been requested and the request accepted under clause 25(2)(b) … of the Schedule 1.
>
> (2) A further evaluation must also be made by—
>
> (a) a local authority before making a decision under clause 10 or clause 29(4) of the Schedule 1; and
>
> (b) the relevant Minister before issuing a national policy statement or New Zealand coastal policy statement.
>
> (3) An evaluation must examine—

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

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

(3A) This subsection applies to a rule that imposes a greater prohibition or restriction on an activity to which a national environmental standard applies than any prohibition or restriction in the standard. The evaluation of such a rule must examine whether the prohibition or restriction it imposes is justified in the circumstances of the region or district.

(4) For the purposes of the examinations referred to in subsections (3) and (3A), an evaluation must take into account—

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

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

(5) The person required to carry out an evaluation under subsection (1) must prepare a report summarising the evaluation and giving reasons for that evaluation.

(6) The report must be available for public inspection at the same time as the document to which the report relates is publicly notified or the regulation is made.

Our overall view of the inadequacies of Change 5 is summarised later and it follows that the s32 evaluation did not succeed in identifying those inadequacies. Given that overall view, we need not take up space in going through the s32 requirements in detail.

The relevant part of the NPSFM

[35] In passing, we note that Objective D1 and Policy D1 are identical in both the 2011 and 2014 versions of the NPSFM:

D. Tāngata whenua roles and interests

Objective D1

To provide for the involvement of iwi and hapū, and to ensure that tāngata whenua values and interests are identified and reflected in the management of fresh water including associated ecosystems, and decision-making regarding freshwater planning, including on how all other objectives of this national policy statement are given effect to.

Policy D1

Local authorities shall take reasonable steps to:

a) involve iwi and hapū in the management of fresh water and freshwater ecosystems in the region

b) work with iwi and hapū to identify tāngata whenua values and interests in fresh water and freshwater ecosystems in the region and

c) reflect tāngata whenua values and interests in the management of, and decision-making regarding, fresh water and freshwater ecosystems in the region.

Also, both the 2011 and 2014 versions of the NPSFM contain this paragraph in the Preamble:

> Setting enforceable quality and quantity limits is a key purpose of this national policy statement. This is a fundamental step to achieving environmental outcomes and creating the necessary incentives to using fresh water efficiently, while providing certainty for investment. Water quality and quantity limits must reflect local and national values. The process for setting limits should be informed by the best available information and scientific and socio-economic knowledge.

What is meant by "no degradation of existing groundwater"?

[36] Mr Gavin Ide, the Council's Manager Strategy and Policy, expressed the view that the unconditional statement in Objective 21 that there is to be … *no degradation of existing groundwater quality* … while aspirational, is unrealistic and ambiguous. He said that the amended OBJ 22 provides a clearer description of the intended environmental outcome for management of not only the Heretaunga and Ruataniwha aquifer systems, but also the region's other unconfined and semi-confined productive aquifers.[5] His evidence led us to consider two questions in relation to his criticism of the wording of OBJ 21:

a) Are the words *no degradation* too absolute?

b) Is the reference to *existing ground water* ambiguous?

[37] There are two bases for the criticism that *no degradation* is too absolute:

a) The first is premised on the *load to come* phenomenon.

[5] Ide EIC Para [2.3-2.4]

b) The second, on the perceived potential constraint that *no degradation* will have on the drafting of regional plans which, as Ms Blomfield put it in her closing submission, … *would limit or prevent any activity which might result in contaminants entering the groundwater.* As noted at para [24], the result of that, Ms Blomfield submitted, would mean … *a prohibition on all farms, all horticulture, and taken to an extreme level, even native bush because it too leaches nitrogen into the soil and that nitrogen inevitably reaches groundwater.*

We think that this submission, while certainly reflecting the evidence called by the Council, somewhat overstates both the issue and the possible consequences of adopting Ngati Kahungunu's position.

[38] In explaining the concept of *the load to come* Mr Ide referred to contaminants from land uses such as grazing cows, dairy effluent, and septic tank discharges, that can *leak* through the soils and into groundwater. In some aquifers, the presence of contaminants *leaked* by human activities in the past may not be observed until many years later. This *lag legacy* effect or *load to come* can mean that even if, from today, there was no further land use change in the catchment and no additional contaminants *leaked* through soils into groundwater, there would still be unavoidable degradation of groundwater quality observed in the future.

[39] Dr Stephen Swabey, the Council's Science manager, provided a more detailed explanation of this phenomenon in his evidence in chief at paras 3.23 to 3.32. It essentially means that changes in contaminant levels at observation bores may potentially reflect contamination from land use activities, or other sources, that occurred years, decades, or longer, before the observations are made. Therefore, Dr Swabey says, the Council is essentially setting what is sees as a pragmatic and practical objective based on a water quality thought to be achievable.

[40] We understand the point that this *load to come* cannot be practicably quantified, but several things come to mind in considering the Council's proposed course:

a) We don't know what the *load to come* will present as, so how do we know the objective is unrealistic?

b) There can be no doubt that better land use practice can result in a reduction in the release of contaminants to land and to groundwater. This can address both existing and future uses.

c) We were told that ground water does have the ability to attenuate the contaminants that enter it, and that groundwater is generally purer than surface water, but that near-surface ground water may be closer to the quality of the surface water it enters/mixes with. Mr Swabey told us that:

> High levels of nitrate in groundwater can lead to nutrient enrichment of surface water where groundwater contributes to the baseflow of rivers, or discharges to wetlands, estuaries or lakes. High levels of nitrate in surface water can be toxic to aquatic life[6]

d) When we look at the NPSFM later we note the surface water value for nitrate-nitrogen sits at 11.3mg/L. If ground water were to have the same standard applied, would this have a potential adverse impact on the maintenance of the surface water standard?

[41] The use of the term *existing* is not unusual in RMA practice. It denotes the point in time when a decision is to be made. In terms of OBJ 21, the terminology *existing ground water quality* must incorporate *the load to come*. There is no ambiguity in that, other than the difficulty in measuring its duration or quantum. However, the adoption of a water quality standard that is essentially just suitable for human consumption, as an objective, carries with it a risk that there is acceptance of a general degradation of the water quality potentially below what *the load to come* might bring.

[42] This brings in to play the role of an *objective* in RMA terms. We are not aware of any decision of this Court in which the term is defined – probably because the meaning is so apparent that judicial pronouncement has been thought unnecessary. The Concise Oxford is simple and direct: – an *objective* is … *a goal or aim*. That

[6] EIC S E J Swabey Para [6.11]

simplicity sits perfectly well here – an *objective* in a planning document sets out an end state of affairs to which the drafters of the document aspire, and is the overarching purpose that the policies and rules of the document ought to serve. In this planning document, the objective must be governed by the function imposed on a regional council by s30(1)(ii):

> The maintenance and enhancement of the quality of water in water bodies and coastal water

and that, we think must be plain, was the intention behind Objective 21 as drafted and notified.

Suitable for human consumption?

[43] We were told by the Council that the words *suitable for human consumption* did not relate to any numerical standard, and that a numerical standard would be set when catchment specific regional plans are prepared in accordance with the policy. However, we note that the AER sets out a Table of what can be indicators of achievement of that standard as:

- Nitrate-nitrogen levels
- Organic and inorganic determinands of significance in NZ Drinking Water Standards
- E.coli levels
- Pesticides and herbicides

[44] Dr Swabey told us that, in general, groundwater in the Heretaunga Plains meets the NZ Drinking Water Standard (NZDWS) values for parameters measured.[7] Dr Swabey has a strong background in hydrology and hydrogeology and has assisted ecologists in their studies of stygofauna and troglofauna, but he did not claim expertise in ecological matters.

[45] It is accepted that the NZDWS is referenced as an indicator in terms of organic and inorganic determinants in the AER table, but it is also noted that a key water quality parameter used to indicate the *State of the Environment* for groundwater

[7] EIC S E J Swabey Para [7.2]

quality is nitrate-nitrogen.[8] Dr Swabey explained that nitrate is a naturally occurring nutrient for plant growth. However, at higher concentrations, nitrate in groundwater can be detrimental to human health and to aquatic ecosystems. High levels of nitrate in groundwater can lead to nutrient enrichment of surface water where groundwater contributes to the base flow of rivers, or discharges to wetlands, estuaries or lakes. High levels of nitrate in surface water can be toxic to aquatic fauna.[9]

[46] The Ministry of Health (MoH) has set a limit of 11.3 mg/L nitrate-nitrogen (NO_3-N) as the maximum acceptable level in drinking water.[10] In the absence of anything else then, this must be a determinant bottom line. What was termed the *trigger value* for NZDWS is 5.65 mg/L[11] (i.e. half the MoH acceptable level drinking water limit) although the evidence is not clear about the significance to be attributed to this value.

[47] While there is an exception in one site in the western part of the Heretaunga aquifer where the trigger point has been observed, the water in the Heretaunga aquifer is of a much higher quality than required by the NZDWS. Dr Swabey said there was no trend from most sites (2009-2013) but concentrations increased during this period at two sites. We note from the exhibits provided by Dr Swabey that most sampling sites (14 of 17) in the Heretaunga aquifer tested indicate levels less than 1.00mg/L NO_3-N. A couple of sites measured in what he described as the *moderate* range (1.0 to 5.65mg/L) and there was one site above this - but no site recorded an exceedance of the NZDWS.

[48] Dr Swabey also described the groundwater quality of the Ruataniwha plains. The sampling period is reliable from 1999 onwards. Again, this aquifer seems to measure up relatively well and Dr Swabey found concentrations of parameters measured generally compliant with, or in most cases well above, the NZDWS.

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[8] EIC S E J Swabey Para [6.9]
[9] EIC S E J Swabey Para [6.9 to 6.11]
[10] EIC S E J Swabey Para [6.10]
[11] EIC S E J Swabey Para [7.3]

[49] Dr Swabey set out in detail the nature of an aquifer (both confined and unconfined) and aquifer processes. He noted:

> In most locations in the Hawkes Bay, local surface water is of a lower quality than local groundwater (particularly the groundwater located deeper than 10m below the ground), so in most cases the addition of deeper groundwater to surface water is most likely to improve surface water quality.[12]

He also explained that:

> The physical links between rivers and ground water occur where rivers recharge aquifers and where aquifers discharge to rivers as springs. The two classes of freshwater body should not be considered as a continuum from the point of view of physical processes. There is adequate rationale to manage surface water and ground water separately in policy, while considering the impact of each upon the other.[13]
>
> (Emphasis added)

[50] Dr Swabey partly relied on evidence from Dr Christopher Hickey, a Principal Scientist with NIWA, presented to the Plan Change 6 Board of Inquiry. Dr Hickey examined the susceptibility of groundwater invertebrates to nitrate. Apparently Dr Hickey employed mayfly and water fleas as surrogates to establish guideline concentrations for protecting groundwater invertebrates. His evidence was that compliance with the NZDWS (11.3mg/L NO_3-N) will mean protection of stygofauna because the chronic guideline for the surrogates based on his research was 17mg/L NO_3-N.

[51] In the hearing before this Court, that evidence could not be tested. Neither Dr Swabey nor Mr Black (for Ngati Kahungunu – and who we shall introduce shortly) claimed expertise in this area. The conclusion Dr Swabey drew was that adopting the NZDWS at 11.3mg/L is more conservative than Dr Hickey's findings, and will protect the animal life in groundwater. On this basis the Council was comfortable that the life-supporting capacity, ecosystem processes and indigenous species - including their associated ecosystems of fresh water - would be safeguarded. This would be consistent with OBJ LW1.4 of Change 5.

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[12] EIC S E J Swabey Para [9.6]
[13] EIC S E J Swabey Para [9.28]

[52] Ngati Kahungunu essentially see that this objective would result in the quality of the groundwater (compared to its measured quality today) being permitted to deteriorate to the cusp of chronic decline.

[53] Dr Swabey referenced PC 6 in terms of Dr Hickey's evidence and the standard which has been set at 11.3mg/L, but we were not provided with any analysis of the decision-making which has resulted in the adopted plan change. PC 6 of course affects the Regional Plan, rather than a Policy Statement, and relates to the Tukituki Catchment.

[54] Mr Ide explained that water is allocated in terms of the quantity that may be taken from the water source and also in terms of the measureable quality of the water based on the permissive quality standard after assimilation. Thus, based on Change 5, the reference to *suitable for human consumption* in the disputed OBJ 22 provides the measure for quality allocation purposes. It could be described as representing the cusp of over-allocation.

Conclusion – what does "suitable for human consumption mean?

[55] Reading Change 5 as a whole, the AER indicates that the NZDWS defines the term *suitable for human consumption* and that this defines the (current) acceptable limit of NO_3-N at 11.3mg/L. This measure was clearly relied upon in the Council's evidence. If this level of degradation were to occur it would be well below the current environmental level, and at the cusp of being detrimental to, and therefore unable to sustain, the life supporting capacity, ecosystem processes and indigenous species including their associated ecosystems, of fresh water.

The term "overall quality" and the concept of "overs and unders"

[56] A significant matter in Change 5 is that it requires maintenance of the *overall quality* of freshwater within the whole of the Hawkes Bay region – cf Objective A2 of the NPSFM. This is said by the Council to allow for (indeed to mandate) an *unders and overs* approach. Questions of Mr Ide confirmed that an *unders and overs* approach was the intent of the new objective and that it means that deterioration of

the quality of water in one area or waterbody could be tolerated, so long as there is a matching (at least) improvement in quality somewhere else. We have difficulty in seeing how such an approach can be consistent with the unqualified function imposed on regional councils by s30(1)(c)(ii) of … *the maintenance and enhancement of the quality of water in water bodies* … .

[57] Nor do we see it as compatible with the requirements of s69, which provides:

> Rules relating to water quality
>
> (1) Where a regional council—
>
> (a) Provides in a plan that certain waters are to be managed for any purpose described in respect of any of the classes specified in Schedule 3; and
>
> (b) Includes rules in the plan about the quality of water in those waters,—
>
> the rules shall require the observance of the standards specified in that Schedule in respect of the appropriate class or classes unless, in the council's opinion, those standards are not adequate or appropriate in respect of those waters in which case the rules may state standards that are more stringent or specific.
>
> (2) Where a regional council provides in a plan that certain waters are to be managed for any purpose for which the classes specified in Schedule 3 are not adequate or appropriate, the council may state in the plan new classes and standards about the quality of water in those waters.
>
> (3) Subject to the need to allow for reasonable mixing of a discharged contaminant or water, a regional council shall not set standards in a plan which result, or may result, in a reduction of the quality of the water in any waters at the time of the public notification of the proposed plan unless it is consistent with the purpose of this Act to do so. (emphasis added)

[58] There could also be issues with s107, the relevant parts of which provide:

> Restriction on grant of certain discharge permits
>
> (1) Except as provided in subsection (2), a consent authority shall not grant a discharge permit … allowing—
>
> (a) The discharge of a contaminant or water into water; or

(b) A discharge of a contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water; …

if, after reasonable mixing, the contaminant or water discharged (either by itself or in combination with the same, similar, or other contaminants or water), is likely to give rise to all or any of the following effects in the receiving waters:

(c) The production of any conspicuous oil or grease films, scums or foams, or floatable or suspended materials:

(d) Any conspicuous change in the colour or visual clarity:

(e) Any emission of objectionable odour:

(f) The rendering of fresh water unsuitable for consumption by farm animals:

(g) Any significant adverse effects on aquatic life.

[59] Moving down the chain of planning documents, Objective A1 of the NPSFM is unequivocal. It reads:

To safeguard:

a) The life-supporting capacity, ecosystem processes and indigenous species including their associated ecosystems, of fresh water; and

b) The health of people and communities, at least as affected by secondary contact with fresh water …

Objective A2 then somewhat clouds the issue by requiring that:

The overall quality of fresh water within a region is maintained or improved while …

without defining what *overall* should be taken to mean.

[60] It might, perhaps, be appropriate for a Council to regard *overall quality* as permitting some increase in a type of contaminant (nitrate-nitrogen, for instance) in a particular water body, so long as that was matched or exceeded in its adverse effects by, say, a reduction in some other contaminant, so that the … *quality of the water* … taken overall, was at least no worse.

[61] But as a matter of practical implementation, and for monitoring and enforcement, tangled issues can readily be imagined if the Council's view of the term *overall quality* is adopted. Insofar as aquifer water is concerned, the practical issues could be acute. If it is impossible to know and anticipate the location, extent, or exact cause, of water quality decline over time through *the load to come*, how could anyone possibly plan for, or put into effect, compensatory improvements in other water bodies in other parts of the region?

[62] Further, who would set the average (or perhaps, it would better be called a median) and what kinds of contaminant in one water body could be offset against others, in a different water body – ie what sort of beneficial effect would counterbalance an adverse effect when those effects are in different water bodies perhaps scores of kilometres apart?

[63] We recognise what we say elsewhere about the absence of legal consequences in failing to achieve an objective, but that is not the same thing as having an objective interpreted in such a way that it would be impossible to know whether it had been achieved at all.

[64] In saying all of that, we recognise that we are dealing with an Objective rather than a Rule, so direct enforceability might not be such an acute issue. However, an Objective is a goal which rules (to follow in the planning document) will be focused towards achieving. We conclude that this approach to the interpretation of *overall quality* is fundamentally flawed, and that drafting and/or interpreting the Change 5 objectives in that way could result in a more degraded and unacceptable water outcome.

[65] The distinction the Heretaunga aquifer holds in the operative RP recognises the very high quality of groundwater in this aquifer.[14] We share the concerns held by

[14] PC6 Tukituki Catchment Proposed Board of Enquiry Plan Change – Determined by the Board of Inquiry June 2014 – amended 29 August 2014, page 54 POL 75 Table 10 and Explanation and reasons 5.6.2.

Ngati Kahungunu that the overall thesis of Change 5 is the acceptance of a lower water quality than that which can be measured today. It is working *down* rather than *up*.

Summary of responses to the Council's position

Response 1 – "overall quality and "no degradation"

[66] The core of the Council's argument is that because many factors or agents which may affect groundwater quality are already existent within the system(s), and are beyond the control of the current generation, it is futile to have objectives which seek the maintenance of, let alone the enhancement of, the quality of that groundwater.

[67] That is because, they say, the results of what was done on the land or in the water 10 years, or decades ago, for instance by way of the introduction of nitrates or other pollutants, may still be working its way through the systems, and there is nothing to be done to prevent their eventual emergence. So, they say, the quality of the groundwater is pre-ordained, for better or for worse, and the success or failure of any Objective seeking to maintain or enhance it cannot be measured.

[68] What happened in 1965, or in 1915 for that matter, in upstream catchments by way of the application of fertilizers, or by way of extreme weather events causing sediment and nutrient loading of water may, we accept, be having effects now, and into the future, on water in aquifers. Whether that is so, or not, and the degree of any effect, is unknown and, on the present state of science, probably unknowable. However that situation is known to exist and must therefore form part of the existing environment, and is therefore to be addressed in Plan objectives and other provisions.

[69] This lack of precise knowledge is not a reason to refrain from taking any step to try to maintain, and indeed improve, the quality of the water in any aquifer. We can start with the definition of *existing water quality* in the NPSFM – the quality of the fresh water at the time the regional council commences the process of setting or reviewing freshwater objectives and limits in accordance with Policy A1, Policy B1,

and Policies CA1 – CA4. The Objective therefore should be to, at the least, maintain that level of quality. While maintaining water quality may be something of a moving target, the requirement is to strive for management practices that will prevent degradation, and to strive to ensure that quality is, at a minimum, maintained. That is the plain requirement of s30: - see particularly s30(1)(c)(ii) and s30(1)(f):

> (c) The control of the use of land for the purpose of: - …
>
> (ii) the maintenance and enhancement of the quality of water in waterbodies and coastal water …
>
> (f) The control of discharges of contaminants into or onto land, air, or water and discharges of water into water … (emphasis added).

[70] If historical causes of water quality lead to decline later, and are causes which cannot be foreseen or controlled, then that will have to be dealt with at the time the quality decline is identified and its extent becomes known. To say *we can do nothing* because there may be a *load to come* is as illogical as saying … *we can do nothing because next week there might be another Cyclone Bola which may cause massive sediment and nutrient runoff into the region's waterbodies.*

[71] The frequent use in the hierarchy of planning documents of terms such as *enhancement* – see eg s7 RMA, or *improve* – see eg Objective A2 of the NPSFM, inherently recognise that there will be situations where, from whatever cause, water or other aspects of the environment (eg, air, or land) may be degraded to some degree from their pristine states.

[72] It is self-evident that we can only plan for what is reasonably predictable, and if we cannot predict the effect, if any, of whatever might or might not have happened decades ago, we cannot plan for it. But that is not, we repeat, a logical basis for saying that we should not plan for what we can predict. If it was, the same would hold good for every aquifer system in the country. As to that, we need to point out that, so far as we can establish, none of the other 10 Regional Councils (and 6 Unitary Councils) in the country have adopted the view espoused here – that aquifers are *too hard* and that there is no point in making them the subject of positive

objectives and policies in regional planning documents so a default minimum standard should be adopted.

[73] What we can predict, and can, and should, be planning for, by way of objectives and policies, is the effects of current anthropogenic activities affecting waterbodies.

[74] If the *load to come* argument has any superficial appeal, it cannot succeed against the truth that we know what makes the quality of groundwater worse – ie putting pollutants into it. So, if we appropriately manage potential pollutants entering it now, its quality at least will not get worse (ie it will be *maintained*) and, as the inherited pollutants slowly work their way out of it, it will get better (ie it will be *improved*). Having a sub-optimal present is not an excuse for failing to strive for an optimal (or, at least, closer to optimal) future.

[75] There may have been increases of nitrate-nitrogen at 18% of groundwater monitoring sites. While undoubtedly that is an issue, the fact that at 82% of the monitoring sites nitrate-nitrogen has either remained stable, or decreased, over those 14 years is evidence that for the great majority of sites, whatever controls and practices relating to groundwater contamination have been in place for at least the last 14 years have worked well, and it makes no sense to abandon the policies that govern those controls and practices now.

[76] Further, we must be able to know, within broad bounds at least, what activities have been undertaken on the headwaters land of these catchments over the last c120 years, and to derive from that knowledge at least a broad expectation, by way of known properties of other aquifers in the country, of likely effects upon the water to be found in the aquifers, now and into the future.

[77] Even putting that possibility aside, not being able to remedy the poor practices of the past (assuming, which is certainly not proven, that remedy is actually required) is not a good reason to allow the same errors to be made in the future. We must be

able to say that, even if what has been done in the past is irreversible, it would be irresponsible to use that as an excuse not try to apply better standards from this point on. In saying that, we have in mind the analogy of air discharges. Policy Statement and Plan objectives over years have encouraged improvement, and this has led to best-practice improvements as knowledge has increased and technology has improved. The objectives for clean air assist in driving technology development, and this becomes very important when we are intensifying activity which is associated with farming in the region, or more urban based activities such as sewage treatment and disposal. Whatever intensification leads to higher potential pollutants, technology and best practice needs to be developed to maintain and, where degraded, enhance the environment to ensure that the sustainability principles of RMA are fulfilled.

Response 2 – what are the consequences of having an RPS Objective that is not achieved?

[78] Next, we have to ask what the legal or other consequences would be if, in a particular aquifer or part of one, an objective aspiring to maintenance or enhancement of water quality was not met? The answer seems clearly to be - *None*. If, in support of such an objective, the Plan's Rules are written to govern inputs – the sort of LUC and nutrient budget rules to be found in the Manawatu-Wanganui Regional Council's One Plan for example – then the expected outcome would be known, within broad limits at least. If the actual outcome shows higher rates of nutrient pollution than predicted, that may be at least a lead to identifying what the *load to come* actually might be. If the objective is that the quality of all water is to be maintained, and in one part of a catchment it actually deteriorates, then the *load to come* might well be the culprit. Again, the possibility of an objective of maintenance or enhancement being partly unfulfilled is not an excuse for not trying at all. The objective, even if unachieved because of *the load to come*, will still have value as a demonstration that the aspiration, from now on, is to at least maintain quality and that, from now on, the planning documents will be designed to give effect to that aspiration.

[79] Insofar as catchment-specific Plan provisions are concerned, it is quite correct to say that they can be tailored to match what is required or desired in a catchment. But what also needs to be present is consistency down through the hierarchy of planning documents – so the Plan provisions will need to *give effect to* the RPS provisions, which in turn give effect to the NPSFM. If the contents of the RPS are inadequate, there could be no confidence that the Plan provisions will not suffer from the same deficiencies.

Part 2 RMA – s6

[80] For completeness we will set out the whole of s6 – the matters declared to be of national significance and which all decision- makers under the Act are required to recognise and provide for. Of particular relevance here is s6(e):

> 6 Matters of national importance
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
>
> (a) The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:
>
> (b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:
>
> (c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:
>
> (d) The maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers:
>
> (e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.
>
> (f) the protection of historic heritage from inappropriate subdivision, use, and development.
>
> (g) the protection of protected customary rights.

[81] The evidence principally relevant to s6(e) came, unsurprisingly, from the witnesses called for Ngati Kahungunu.

[82] Mr Marei Boston Apatu is of Ngati Hori, Ngati Hawea, Ngati Hinemanu, Ngati Marau and Ngai Te Upokoiri hapu, which are of Ngati Kahungunu. Through these hapu he has ancestral connections to the Heretaunga Aquifer, the Ngaruroro River, the Rua Taniwha aquifer system and the Tukituki River.

[83] In this *pepeha* Mr Apatu summarises the cultural connections of Ngati Kahungunu and their hapu to their *maunga* (mountains), *awa* (rivers), *whenua* (lands) and, in particular, the Ngaruroro River:

> Ko Ruahine, Owhaoko, Puketapu nga maunga
> Ko Ngaruroro, Taruarau, Ikawatea nga awa
> Ko Kuripapango nga korero nehera
> Ko Owhaoko, Timahanga, Omahaki, Kohurau, Otamauri, Matapiro, Maraekakaho, Ohiti-waitio, Ngatarawa, Heretaunga nga whenua
> Ko Ngati Hinemanu, Ngai Te Upokoiri nga hapu
> Ko Heretaunga Haukunui, Ararau, Haro Te Kaahu, Takotonoa, Ringahora
> Ko Ngati Kahungunu te iwi

[84] His description of the Maori perception of the environment is succinct:

> … the physical embodiment of *atua* (celestial beings) and the topography of the whenua often being explained as the result of actions of our ancestors. The physical and metaphorical aspects making p the environment are inseparable and give rise to their status as *taonga*.
>
> i. This understanding, or world view, gave rise to *protocols* governing how Maori treat the land, water, and other natural resources;
> ii. The protocols were relayed from birth through through teaching tools, such as parables, storytelling, whakatauki, wananga and allegorical or symbolic names and descriptions expressing personification to demonstrate applied practices for kaitiaki;
> iii. The kaitiakitanga guidelines were for everyone. For example, to guard against abuse of the environment, Maori Rangatira applied non-

negotiable restrictions such as Tapu, Rahui (ban, restriction)to protect people and environmental resources from natural mishap, human misuse and sometimes potential to abuse; and,

iv. There is a rich inheritance and whakapapa connecting Maori to their own matauranga and the source of this cultural knowledge.

[85] He continued to describe in detail many of the cultural, spiritual and historic connections of Ngati Kahungunu to their environment. Of significance were the exploits of their eponymous explorer ancestor Tamatea Pokaiwhenua, Kahungunu's father in the 15th century. (para 17. ii.) Te Awa a Tamateanui and Tuna a Tamatea are two of the many examples of the historic culture of their Ngati Kahungunu ancestor's name being embedded into the landscape (para 17. v.)

[86] Mr Apatu described the past abundance of good quality water, eels, kakahi, pukeko, and weka prior to the swamps being drained; adding that titi (mutton birds) were plentiful on the ranges of the Timahanga district. Fibres like flax and raupo for clothing, roofing and binding grew abundantly around the wetlands as did plants used for medicinal purposes. Another interesting cultural aspect mentioned by Mr Apatu was how the Ngaruroro River was named by an ancestor Mahu Tapoanui, who witnessed schools of Upokororo (grayling) creating a wave-like action on the water (*Ngaru* - wave, *roro* - an abbreviated form of *Upokororo*, which were abundant at that time).

[87] Mr Apatu also gave his connections through other maunga, awa, taniwha, the Karamu lands and the links of other hapu, namely Ngati Hori, Ngati Hawea and Ngati Ngarara to Kahungunu. This further illustrates the diversity of whakapapa connections individual iwi may have to a number of different land blocks within Ngati Kahungunu.

[88] In his upbringing by his kuia and koroua he was very much influenced by their teachings of the cultural knowledge and practices of their hapu. He mentioned being taught of springs that had … *spiritual and healing powers* … and many other springs

that had some cultural significance to their hapu. He particularly mentioned that as children he and his siblings were always taught by their mother, a rongoa Maori practitioner, to ...*respect water as precious*... and ...*never to waste water*... .

[89] In his view there is now a *wider understanding* and *partial alignment* between western science and cultural imperatives where there is cooperation. He summarised this portion of his evidence by stating:

> Ngati Hori ki Hawea is not averse to any action it deems necessary to protect our taonga, our whenua and our wai, and it is our duty as Maori and kaitiaki to do whatever it takes to hold true to our values, beliefs and rituals in order that we pass these taonga on in good condition for the next generation to come.

[90] Later in his evidence in chief Mr Apatu recited further connections through maunga (mountains), tupuna (ancestors), hapu and iwi to their awa tupuna (ancestral river) the Tukituki river. This river was traditionally the *highway* that connected whanau to other whanau, to their gardens, to trade links, to their pa sites, to their waahi tapu and waahi tupuna.

[91] Mr Apatu closed his evidence by giving detail of the collective Treaty of Waitangi claim WAI 595 on behalf of Ngati Kahungunu, which highlights their concerns for the Heretaunga aquifers and freshwater management as far back as 1995, when the claim was lodged. In his view the changes to the Objectives will have effects on the cultural relationships of tangata whenua to these aquifers.

[92] Mr Morris Wayne Black is a self employed resource management consultant and researcher. He is of Ngati Hawea, Ngati Kahungungu, Nga Rauru, and Ngati Porou, and he gave planning evidence on behalf of Ngati Kahungungu Iwi Incorporated. While Mr Black did comment on some iwi issues, he defers to Mr Apatu and Mr Tomoana for more detailed explanation on cultural matters.

[93] In his view the connectivity between aquifer systems and surface water will cause adverse affects on the relationships that Maori have with the rivers and the streams connected to these systems if water quality is not maintained. He considers that the respondent Council has a duty to maintain or enhance groundwater quality within the region's two main aquifer systems.

[94] He sees the Tukituki and Ngaruroro rivers as *iconic* to tangata whenua as kaitiaki, whose duty involves protecting and upholding the mauri within the river systems, including their associated ground water sources. Like Mr Tomoana, he sees rivers, including their water, their beds, their banks, tributaries, springs and ground water systems, as taonga in the Maori world view and points out that matauranga Maori and whakapapa are founded in wairuatanga (Maori spirituality) which links Maori to both the spiritual and physical. Maori knowledge systems, he says, recognise the nurturing nature of Papatuanuku and the benefits derived from the waters she produces, that originate from Ranginui as the water passes through the natural cycle of evaporation, precipitation over Papatuanuku to replenish mauri released via the springs. He states that … *any decline in water quality that adversely affects mauri is seen by tangata whenua is an adverse affect on their health and wellbeing* …

He concludes with the statement that:

> … groundwater quality in the Heretaunga Plains and Ruataniwha Plains should be maintained or enhanced and Objective 21 retained with consequential amendments to Objectives 22, 42 and 43 …

[95] Mr Ngahiwi Tomoana is the current chair of Ngati Kahungunu Incorporated. He has been involved in hapu and iwi development issues for most of his life. He currently holds many governance roles in local, regional and national organisations.

[96] In his evidence in chief he briefly summarised the Maori cosmology from Ranginui (Sky father) and Papatuanuku (Earth mother) through to their 70 children, naming some of those better known. He drew comparisons between the whenua (placenta) of a pregnant woman that nurtures an unborn child and the whenua (land)

which nurtures mankind; this whenua (placenta) being buried at a significant site to the child recognising another aspect of the connection of birth to the earth inherent in whakapapa.

[97] He explains the significance of the inter-connectedness of the values of *mauri* and *wairuatanga* to Ngati Kahungunu in relation to *kaitiakitanga* and that responsibility to safeguard our natural resources, concluding with the comment that it is their cultural duty as kaitiaki to protect *nga taonga tuku iho* (the treasures handed down).

[98] In a power point presentation to the Court Mr Tomoana described the Ngati Kahungunu connectedness to the universe and the environment through genealogy. The continuity of that connectedness is demonstrated in the proverb:

> ...*hinga atu he tetekura ara mai na he tetekura* (...when one fern frond dies another one takes its place...)

He continued, likening the reproductive capacity of the womb to the reproductive capacity of Papatuanuku, stating that the aquifer is the womb of Papatuanuku - our Earth Mother, and drew similarities between the Maori view of a baby in the womb and mankind in our physical environment. In doing so, he likened degradation of our waters to polluting the waters in which an embryo develops into a baby in a mother's womb:

> ...if we allow the waters of our aquifers to be degraded ... we let the waters of our womb be degraded.

[99] The cultural obligation of offering the best hospitality possible to visitors is paramount to any iwi. In cross-examination from Ms Blomfield, he gave an example of Ngati Kahungunu's reputation being sullied by feeding guests polluted mussels:

> ... They all got sick and we were the laughing stock of the country because we'd sent visitors home with the runs. If the water or any food is degraded, we see that as a slight on our ability to give due respect to any visitors that come here deserving the best hospitality and we, we're fearful that any

> degradation of the aquifer is going to have a, an [inimical] effect on our ability to host visitors in the proper manner ... .

[100] In describing the Heretaunga Muriwaihou (Heretaunga aquifer system) Mr Tomoana quoted from the evidence of Te Hira Huata at the Waitangi Tribunal hearing of WAI 2358:

> The extraordinary clean water from the springs, and from the streams that flowed from them, was the exilir of life for the hapu, feeding and cleansing body, soul and mind, and as important for ritual as it is for bodily needs.

[101] Of great cultural relevance is how Heretaunga Muriwaihou is embedded in their whakatauki (proverb):

> Heretaunga Hauukunui – Heretaunga of the life giving dews or waters
> Heretaunga Ararau – Heretaunga of Arcadian pathways
> Heretaunga Haro Te Kahu – Heretaunga the beauty of which only can be appreciated by the eyes of a hawk in full flight
> Heretaunga Takoto Noa – Heretaunga from whence the Chiefs have departed and only the servants remain

Mr Tomoana says that while Ngati Kahungunu is supportive of economic development in their region they do not want development at the cost of detriment to the natural resources, and closed his evidence with a plea to retain objectives 21 and 22.

Conclusions on s6(e)

[102] When it comes to considering the implications of s6(e):

> The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga …

the unchallenged evidence of those three witnesses is directly relevant, and very powerful. The evidence makes it plain that *culture and traditions* are to the fore, and the relationship of that culture and those traditions with water is clear. That the quality of the water in the whenua should be, at the very least, not further degraded by anthropogenic activities in the future is fundamental. That controlling authorities should at least aspire to the improvement of that quality over time is no less so. We

have the clear view that nothing less than those two objectives – of protection from further degradation, and improvement over time – will suffice to *recognise and provide for* this issue of *national importance*.

[103] As the Court noted (although in the context primarily of land, rather than water) in its decision in *Outstanding Landscape Protection Soc v Hastings DC* [2008] NZRMA 8 what has been described to us in this evidence seems to be just the kind of relationship *…of Maori, their culture and traditions with their ancestral ... water*... that the drafters of the section must have had in mind.

[104] Against that background, it is our view that compliance with the requirement, as a matter of *national importance*, to recognise and provide for the matters in s6(e) cannot possibly be achieved in failing to even aspire to maintain, let alone improve, the quality of the water in these aquifers. For the same reasons it does not meet Objective D1 and Policy D1 of the National Policy Statement for Freshwater Management. – Change 5 and the assessment that supports it must therefore be flawed.

The most appropriate outcome to meet the purpose and principles of the Act

[105] For the reasons we have attempted to set out, we have a very clear view that the deletion and amendment of Objectives 21 and 22 which the Council seeks to effect through Change 5 cannot be supported. The existing provisions, with the amendment sought by NKII, (see para [18]) would be a much better means of attempting to achieve the purpose of the Act – the sustainable management of natural and physical resources – while attempting to achieve the goals set out in s5(2) and of recognising and providing for the issues of s6(e). To not aspire and attempt to at least maintain the quality of water abdicates the functions of a regional council under s30 (see para [29]) and the requirements of a regional policy statement under s62(3) (see paras [32] and [33]) and fails to implement the role of such a document in the hierarchy of planning instruments.

Section 290A – the first-instance decision.

[106] Section 290A requires the Court to ... *have regard to* ... the decision that is the subject of the appeal. Section 290A does not mean that the first-instance decision is presumed to be correct and that an appellant has the onus of demonstrating that it is incorrect. But it does require the Court to give the decision genuine and open-minded consideration in coming to its decision. In this instance we have done that, but have been driven to the conclusion, on the evidence and material we heard, that the operative versions of Objectives 21 and 22 (including the Ngati Kahungunu amendment) are those that best accomplish the purpose and principles of the Act.

Result

[107] For the reasons we have outlined, our decision is that, insofar as relevant to this appeal, the Decisions Version of Change 5 should be set aside, and Objectives 21 and 22 should be reinstated with the amendments sought to Objective 22 in these terms:

> Objective 21:
>
> No degradation of existing groundwater quality in the Heretaunga Plains and Ruataniwha Plains[15] aquifer systems.
>
> And Objective 22:
>
> The maintenance or enhancement of groundwater quality in aquifers in order that it is suitable for human consumption and irrigation without treatment, or after treatment where this is necessary because of the natural water quality.

[108] Further, the consequential changes set out in Change 5 to Part 5 of the RRMP which relate to the regional plan (OBJ 42 and OBJ 43) should be deleted and the regional plan (Chapter 5.6) be left intact until the Council comes to specifically address these provisions in the context of freshwater management in accordance with its obligations under the NPSFM (notably Policy A2 and Policy CA2).

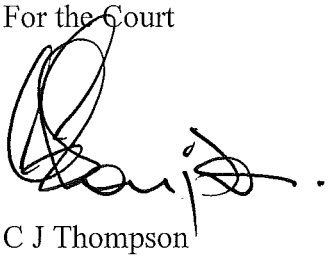
[15] Subject to the Ruataniwha Plains aquifer being removed by Plan Change 6

Costs

[109] It is the usual practice of the Court to not award costs on a plan appeal, and we do not encourage any application in this instance. But as a matter of formality, costs are reserved and any application should be made within 15 working days of the issuing of a final decision, and any response should be lodged within a further 10 working days.

Dated at Wellington this 27th day of March 2015

For the Court



C J Thompson
Environment Judge

IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

CIV-2012-425-000405
[2013] NZHC 815

BETWEEN	QUEENSTOWN CENTRAL LIMITED Appellant
AND	QUEENSTOWN LAKES DISTRICT COUNCIL Respondent
AND	FOODSTUFFS (SOUTH ISLAND) LIMITED Applicant
AND	SHOTOVER PARK LIMITED Associated Respondent

Hearing: 12-14 February 2013
(Heard at Queenstown)

Appearances: J Young for Shotover Park Limited
J Gardner-Hopkins and E Matheson for Queenstown Central Limited
T Ray and J Macdonald for Queenstown Lakes District Council
N Soper and A Ritchie for Foodstuffs (South Island) Limited
G Todd for Cross Roads Properties Limited

Judgment: 19 April 2013

RESERVED JUDGMENT OF FOGARTY J

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Contents

Road map

[1] *There are two resource consent applications at issue: one application by Foodstuffs to build a Pak'nSave at Frankton Flats, and another by Cross Roads Properties to build a Mitre 10 Mega, also at Frankton Flats. Queenstown Lakes District Council (QLDC) declined the Foodstuffs application. The Cross Roads application went directly to the Environment Court. The Environment Court granted both applications. Now the Environment Court's decisions have been appealed to the High Court. The High Court is releasing two separate decisions, one for each application.*[1] *This is necessary as there are separate rights of appeal. Both decisions need to be read together.*

Introduction and summary of both the Foodstuffs and the Cross Roads appeals decision

[2] This summary endeavours to collect in one place the reasoning of both decisions.

[3] The Resource Management Act 1991 requires applications for consent to be processed promptly; even on the eve of a proposed plan for the locality becoming operative; even when the applications are in conflict with what is being proposed.

[4] There is a tension, not resolved by a rule, rather guided by standards, between the consent authority's duty to process the applications and the duty to do so having regard to the proposed plan for the locality.

[5] In 2012, the Environment Court was seized with two applications for consent to establish a Pak'nSave supermarket and a Mitre 10 Mega on the Frankton Flats, being undeveloped land adjacent to the airport at Queenstown. These were significant applications, taking up about 4 hectares of a 42 hectare

[1] This decision and *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 817.

area of undeveloped rural zoned flat land. The land is identified for urban development in objective 6 of the operative district plan. To implement objective 6, including to provide for industrially zoned land, there is a proposed plan, PC19. The Council had heard submissions for and against it, and reached a decision. There have been numerous appeals against that decision, and those appeals were pending before another division of the Environment Court, already part heard. Neither the Pak'nSave nor the Mitre 10 Mega proposals are permitted in the proposed plan change.

[6] The two applications for consent were for two large scale retail developments, Foodstuffs, 2.8 hectares, and Cross Roads, 1.82 hectares, to be located in the proposed E1 and E2 zones, but located significantly in the E2 zone, abutting the eastern access road and partly encroached on the pure industrial zone E1. E2 is for light industrial activities with some provision for retail. As PC19(DV) stood at the time, area E, including E1 and E2, provided for industrial activities with limited retail activities. These applications were not permitted by proposed plan PC19.

[7] The Council, via a Commissioners' decision, had declined the Pak'nSave application. On appeal, the Environment Court, by a majority, held that a Pak'nSave would have only "minor" adverse effects on the environment, and, unanimously, would not on the whole be contrary to the objectives and policies of PC19. Having gone on to consider the merits of the application, having regard to the proposed change, the Environment Court granted the application.[2] Commissioner Fletcher dissented from the finding that the Pak'nSave proposal would have only a "minor" adverse effect. He considered the loss of future supply of industrially zoned land to be an adverse effect that was more than "minor". He otherwise agreed with the decision. The Environment Court similarly split on adverse effect in the Cross Roads

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[2] *Foodstuffs (SI) Ltd v Queenstown Lakes District Council* [2012] NZEnvC 135 (*Foodstuffs*).

application for a Mitre 10 Mega.[3] Here though, Commissioner Fletcher completely dissented. That application was heard directly by the Environment Court.

[8] Both decisions are appealed and were heard by this Court together. The issues in both appeals centre upon whether and how the Environment Court should have considered PC19 providing for the development of Frankton, when considering whether or not the two applications would have adverse effects on the environment. For the purposes of s 104D analysis, there is no material difference between the Foodstuffs and Mitre 10 Mega proposals.

[9] It is the scheme of the RMA that there is always an operative plan, and often a proposed plan. Before any consents are granted, the operative plan has to be applied, and regard must be had to the proposed plan, s 104. The jurisprudence is that the closer the proposed plan comes to its final content, the more regard is had to it. Consent has to be given under both plans.

[10] Within this basic scheme there is a sliding scale of analysis of the merits of applications, depending on the degree of conformity or departure from the operative and proposed plans. Those are ss 104 and 104A-D. This case concerns principally the application of s 104D.

[11] Section 104D provides:

> **104D Particular restrictions for non-complying activities**
>
> (1) Despite any decision made for the purpose of [section 95A(2)(a) in relation to adverse effects], a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either—
>
> (a) the adverse effects of the activity on the environment (other than any effect to which [section 104(3)(a)(ii)] applies) will be minor; or
>
> (b) the application is for an activity that will not be contrary to the objectives and policies of—

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

(i) the relevant plan, if there is a plan but no proposed plan in respect of the activity; or

(ii) the relevant proposed plan, if there is a proposed plan but no relevant plan in respect of the activity; or

(iii) both the relevant plan and the relevant proposed plan, if there is both a plan and a proposed plan in respect of the activity.

(2) To avoid doubt, section 104(2) applies to the determination of an application for a non-complying activity.

(Emphasis added)

[12] In both cases, the Environment Court, by a majority, applying s 104D(1)(a), was satisfied that the adverse effects of the separate proposals on the environment will be "minor". The Court found the proposals will have only a "minor" effect in two different ways:

(i) By ignoring the proposed change PC19 completely, and effectively assuming as a fact that the Frankton Flats area was going to remain undeveloped;

(ii) In case (i) was wrong: By taking the proposed change into account and finding that "minor" could be any loss less than 20%, arguing that using a number scale was "no more arbitrary" than the statutory standard "minor", and finding the loss of industrial land was less than 5%, and so "minor".

[13] The assumption in (i) of a rural undeveloped environment is contrary to objective 6 and policies 6.1 and 6.2 of the operative district plan and to the current contest between property developers for the most valuable commercial development of Frankton Flats which is the remaining undeveloped flat land in Queenstown. There is no prospect of the land remaining undeveloped. While the Environment Court was right not to focus on the specifics of PC19(DV)'s content, it should have recognised:

- that the future environment of Frankton Flats was urban, consistent with objective 6 and its policies;

- the sites of the proposals were located within the last area of Frankton Flats to be rezoned urban;

- There was competition for development of that land and a pending plan change (PC19).

[14] As to (ii), it is not permissible to substitute a numeric test for the statutory test. The application of that test oversimplified the task set by law in subsection (1)(a).

[15] These two errors undermine both judgments of the Environment Court, for they had the consequence that the gatekeeping section, s 104D(1)(a), was not applied correctly. Inasmuch as the Environment Court may have considered its s 104 analysis led to satisfaction of s 104D(1)(b), as an alternative to (1)(a), it was also in error of law.

[16] There is a real prospect that had s 104D been applied correctly, both these applications would have been dismissed at either of the two s 104D thresholds. Therefore the errors are material. It is not the task of the High Court on appeal to apply s 104D.

[17] Accordingly, both appeals have to be allowed. The applications remain on foot, and can be pursued, but will be examined now against the latest decision on the proposed change, which was released by another division of the Environment Court on 12 February 2013.[4]

[18] There were other arguments presented to the Court, contending other errors of law on the part of the Environment Court. Because of the Court's findings on the application of the gateway section 104D, these issues are of

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[4] *Queenstown Airport Corporation Ltd and Anor v Queenstown Lakes District Council* [2013] NZEnvC 14 (*QAC v QLDC*).

lesser importance to this Court. In case, however, this matter goes on to the Court of Appeal, the two judgments identify these other issues of law, and give summary reasons as to the Court's findings, both on error and on materiality.

[19] The first of these arguments is that the Environment Court should not have heard the appeal against the *Foodstuffs* decision or the original application in respect of *Cross Roads Properties Ltd* until the decision of the other division of the Environment Court on PC19(DV). The second argument is that the Court wrongly classified Queenstown Central Limited (QCL) as a trade competitor, with improper motives, with the result that it did not give QCL a fair hearing. The third argument is that the Court misinterpreted objective 10 of PC19(DV).

[20] This Court is releasing separate judgments on each appeal. However, there is significant cross-referencing. Effectively, both decisions have to be read, to collect the complete reasoning. The reason for separate judgments is to allow the parties to each appeal to make separate decisions to seek leave to appeal or not.

Section 104D issues

The context

[21] Queenstown is a resort town with an international appeal. The resort town proper is built right on the edge of the lake, at the head of Frankton Arm. Its centre is a bustling resort town, a mix of retail, restaurants, bars, backed by hotels, motels and apartments.

[22] The area suitable for industrial land is at the head of Frankton Arm, on flat land known as the Frankton Flats. The Frankton Flats are significantly developed. The airport is there. There is also industrially zoned land called Glenda Drive. There is also a large area of undeveloped land, not yet built upon, a good part of which is the subject of this litigation.

[23] The Council notified its district plan under the Act in 1995. It was declared partially operative in 2003 and fully operative in 2009. Frankton Flats was given a Rural General zoning; however, the district plan recognised that eventually it would become urbanised. Under the heading in the section of the operative district plan dealing with "District Wide Issues" "Urban Growth" the following appears:

> ***Objective 6 – Frankton***
>
> > ***Integrated and attractive development of the Frankton Flats locality providing for airport operations, in association with residential, recreation, retail and industrial activity while retaining and enhancing the natural landscape approach to Frankton along State Highway No. 6.***
>
> ***Policies:***
>
> *6.1 To provide for the efficient operation of the Queenstown airport and related activities in the Airport Mixed Use Zone.*
>
> *6.2 To provide for expansion of the Industrial Zone at Frankton, away from State Highway No. 6 so protecting and enhancing the open space and rural landscape approach to Frankton and Queenstown.*

[24] Part of Frankton Flats is developed; another part (FFA) remains undeveloped, but for a large excavation undertaken by a failed developer. The rezoning of the balance of Frankton Flats, known as FFB, is the purpose of plan change 19 (PC19). It was first notified back in July 2007. After hearing submissions, the Council released what is known as PC19 (Decision Version) ("PC19(DV)").

[25] PC19(DV) has as its overall purpose the completion of the rezoning of Frankton Flats for urban activities, implementing objective 6 and policies 6.1 and 6.2 of the operative district plan. The mix of activities includes education, residential, visitor accommodation, commercial, industrial, business and recreation. It covers an area of approximately 69 hectares; 38-42 hectares, variously described, which provide for industrial uses.[5] It provides for a village centre, generally towards the west end of the area, being itself a mix of

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[5] See *Foodstuffs* at [100]. See *QAC v QLDC*, at [28], (numbers are hectares) – D-7.95, E1-20.39, E2-9.37, E4-1.62.

commercial, business, residential, visitor accommodation and retail. Generally to the south and near the airport, it provides for industrial and yard-based activities, with minimum lot sizes and more limited site coverage, with no residential or visitor accommodation and limits on retail. Generally, to the east it provides for industrial activities, with no residential or visitor accommodation and retail prohibited. This land to the east abuts existing industrial zoned land known as Glenda Drive. This proposed plan reflects the usual urban separation of residential activities from unsuitable commercial and industrial activities, made to avoid nuisance, or, in current RMA language, to avoid reverse sensitivities.

[26] The Council's decision on the proposed change, PC19(DV), was the subject of a number of appeals. While these appeals were pending, Foodstuffs applied to the QLDC to construct a supermarket, to be a Pak'nSave, in the area of PC19(DV). Likewise in PC19's area, Cross Roads Properties Limited applied for consent to erect a Mitre 10 Mega alongside the Pak'nSave, both businesses sharing a large car park.

[27] Because the operative zoning of the land for both the Foodstuffs and the Cross Roads applications is Rural General, the proposed uses were non-complying against the operative district plan.

[28] Both the Foodstuffs and the Cross Roads proposals were inconsistent with PC19(DV). Section 87B(1)(c) of the RMA requires that as the rules proposed by PC19 are not yet operative, any application must be treated as an application for a discretionary activity. The Pak'nSave proposal was located mostly within the E2 activity area, where all activities are prohibited unless an outline development plan had been approved. Inasmuch as Pak'nSave was located in area E1, it was a prohibited activity.

[29] In the case of Cross Roads, it was located principally in the E1 industrial zone, and in that regard is a prohibited activity. But for the same reason, it is treated as a discretionary activity by application of s 87.

[30] To obtain consent therefore the two proposals needed to get past the gateway of s 104D and then survive analysis under s 104. The first way that both applications could get to s 104 was if the consent authority (here the Environment Court) would be satisfied that the effects on the environment of the Pak'nSave proposal, and separately, the Mitre 10 Mega proposal, would not be more than "minor".

Preliminary observations

[31] The Environment Court framed the application of s 104D(1)(a) in the following way, in [71] of its *Foodstuffs* decision:

> [71] Similarly, the resources or people against which or on whom possible effects are assessed to ascertain whether they are adverse (and, if so, more than minor) are identified either in principles in Part 2 of the RMA, or in operative objectives and policies, or in proposed objectives and policies in a proposed plan (change) that are beyond challenge. In our view they do not include the objectives and policies of a proposed but challenged plan (or plan change). Where the provisions of a proposed plan (change) are under challenge then they are not reasonably foreseeable as settled in that form for the purposes of section 104D(l)(a) of the RMA. It is worth noting that while permitted activities under a proposed district plan (or plan change) are not relevant to the first gateway test, proposed objectives and policies are still relevant under the second gateway test (and under section 104(1)(b) if we reach that far). In summary:
>
> (1) the first gateway (section 104D(l)(a)) is concerned with the adverse effects of a proposal on the existing and likely (reasonably foreseeable) future environment as explained in *Hawthorn*;
>
> (2) the reasonably foreseeable environment does not include permitted activities in a proposed but challenged plan or plan change;
>
> (3) the second gateway (section 104D(l)(b)) is concerned principally with the adverse effects of a proposal on the future desired environment (even if, in the case of a proposed plan (change) that may be unlikely).

[32] The issues on this appeal principally concern the legality of subparagraphs (1) and (2). I observe, however, that this judgment should not be taken in any way as an endorsement of (3). Because both appeals turn on the application of the first gateway threshold, and because I have not had full

argument on the framing of the second gateway test (3), this judgment does not discuss that framing. It is sufficient to say that I think (3) is inconsistent with s 104D(1)(b). The objectives and policies of plans are not confined to avoiding adverse effects.

[33] As a preliminary to more detailed analysis of the first gateway, I briefly introduce the issue by way of reference to the arguments that I heard. I do not intend, however, to attempt to summarise all the arguments from the five sets of counsel. That would unduly burden the judgment, without assisting the comprehension of it. It is, however, important to signal at the outset that this Court's judgment as to the application of the first gateway test does not coincide with any one of the five arguments received. It also does not wholly reject the approach of the Environment Court. The Environment Court rightly observed that PC19(DV) was under appeal in many respects, and so it was difficult to forecast what its ultimate shape and content would be.

[34] Mostly, counsel before me presumed that the task of applying the standard "will be minor" in the first gateway test involved examining the effects of each proposal on the future environment as provided for in PC19. In that regard, I heard a great deal of detailed argument as to the distinctions between the industrial E1 zone, the mixed industrial commercial and retail E2 zone, and the potential alignments of the Eastern Access Road.

[35] The Environment Court correctly identified, and all counsel agreed, that one of the ultimate issues was whether or not there was an adverse effect of the loss of industrial land. The first gateway test s 104D(1)(a), of being satisfied that the proposed activity's effects on the environment will be "minor", does not refer in any way to the operative or proposed plans. By contrast, the second gateway test s 104D(1)(b) does refer to operative and proposed plans, but only to their objectives and policies. For reasons which I detail hereafter, I am of the view that the first gateway test is a forward looking judgment as to whether or not the proposed activities may cause an adverse effect more than "minor" on the existing and future environment. That judgment can be made, and must be made, with regard to the provisions of the operative plan, existing

resource consents, commercial activity competing for use of the subject and surrounding land, and associated regulatory initiatives by way of proposed change. But the judgment is not made in any static setting, for example, examining PC19(DV) as though it will remain unchanged.

[36] Second, I observe that the cornerstone material fact in the application of the first gateway test is that there is an operative district plan which contains objective 6, which provides for the urbanisation of this area to accommodate residential, commercial and industrial activity. I note that in [71] of the Environment Court's framing, it has correctly included in the consideration of whether effects are adverse and, if so, more than "minor", "operative objectives and policies".[6] However, I go on to reason that in fact it did not do this when applying the first gateway test. This is because, in my respectful view, it got sidetracked by the decision of the Court of Appeal in *Queenstown Lakes District Council v Hawthorn Estate Ltd*.[7]

[37] Overall, the Environment Court was looking at these two applications, in the context of a plan change promulgated by the Council to give effect to the operative district plan objective 6, policies 6.1 and 6.2 and implementation methods, in accordance with the "Explanation and Principal Reasons for Adoption". It was a zone with multiple uses, endeavouring thereby to accommodate a residential village, shopping for the residents and to provide for additional commercial, industrial and yard-based activities.

[38] This is all in a setting where optimal growth of Queenstown makes it desirable to make provision for a low cost residential community and, second, for more industrial activity which, in the nature of things, is easier located on flat land. Flat land was scarce. This is the remaining flat land within the urban boundaries of Queenstown not yet developed. None of these facts are in dispute. All are common knowledge, and the stuff of regular debate in the local community.

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6 See third and fourth lines.

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

[39] At the time that the Environment Court heard both applications for resource consent, in July and August 2012, PC19(DV) was under appeal. As already noted, there were numerous submissions for change, and the different zone boundaries and policies were very much under challenge. There was, however, no suggestion that the area of Frankton Flats B would remain undeveloped as rural general land. On the contrary, there is going to be intensive development, and the setting was one of making planning decisions to accommodate all the proposed activities, including a large area of industrial activity onto this area.

[40] There is very little land zoned industrial in the operative plan which remains undeveloped. It is all at Glenda Drive. In 2006, it amounted to 6.2 hectares.[8] There were competing estimates by the experts as to how much industrial zoned land Queenstown needs. The estimates vary between a low of 60 hectares and a high of 100 hectares. It was common ground that Queenstown is short of industrial land.[9] The Frankton Flats B zone, under PC19(DV), is approximately 69 hectares, of which 38-42 hectares provided for industrial (not exclusively) activities. Hence the important conclusion by the Environment Court, at [100] of the *Foodstuffs* decision:

> [100] ...Indeed, providing a maximum of some 42 hectares within Frankton Flats B is not going to meet all the need identified [for industrial land], no matter which numbers are used.

[41] The next part of this decision summarises the reasoning in the *Foodstuffs* and the *Cross Roads* decisions, before returning to the issue as to whether or not that reasoning was in error of law. Both judgments of the Environment Court are detailed and very long. I am indebted to Mr Todd for his summary of the Environment Court's reasonings in both decisions, when applying s 104D(1)(a).

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8 *Foodstuffs* at [107].
9 *Foodstuffs* at [63], [291], [298].

Foodstuffs decision

[42] The Court noted that a resource consent was required under both the operative plan and under the proposed plan.[10] It noted the extended definition of "effect" in s 3 of the RMA.[11] It set out the wide definition of "environment" in s 2 of the Act.[12] It is appropriate to set out both of those definitions now.

[43] Section 2 contains a broad definition of "environment"; it provides:

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

[44] Section 3(a) of the RMA provides:

> **3 Meaning of "effect"**
>
> In this Act, unless the context otherwise requires, the term effect … includes—
>
> (a) Any positive or adverse effect; and
>
> ...

[45] The Court then went on to find that the meaning of "environment" was explained by the Court of Appeal in *Hawthorn*, setting out [42] of that decision:[13]

> [42] Although there is no express reference in the definition to the future, in a sense that is not surprising. Most of the words used would, in their ordinary usage, connote the future. It would be strange, for example, to construe "ecosystems" in a way which focused on the state of an ecosystem at any one point in time. Apart from any other

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10 At [23].
11 At [66].
12 At [67].
13 *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA).

> consideration, it would be difficult to attempt such a definition. In the natural course of events ecosystems and their constituent parts are in a constant state of change. Equally, it is unlikely that the legislature intended that the inquiry should be limited to a fixed point in time when considering the economic conditions which affect people and communities, a matter referred to in para (d) of the definition. The nature of the concepts involved would make that approach artificial.

[46] The Environment Court then went to apply what it considered the Court of Appeal's conclusion was:

> [84] In summary... in our view, the word "environment" embraces the future state of the environment as it might be modified by the utilisation of rights to carry out permitted activity under a district plan. It also includes the environment as it might be modified by the implementation of resource consents which have been granted at the time a particular application is considered, where it appears likely that those resource consents will be implemented. We think Fogarty J erred when he suggested that the effects of resource consents that might in future be made should be brought to account in considering the likely future state of the environment. We think the legitimate considerations should be limited to those that we have just expressed. In short, we endorse the Environment Court's approach.

[47] Then in [69] of its judgment, the Environment Court recognises that the Frankton Flats was generally undergoing major changes, and these were all about changes "to one of the few as yet un-urbanised areas remaining on the flats". It then observed that just about everything about PC19(DV) had been challenged on appeal. It then moved on to [71], as we have seen.

[48] In the *Foodstuffs* decision, the Environment Court was satisfied that the adverse effects of the activity of a Pak'nSave supermarket on the environment would be "minor". It reached this decision by firstly finding that the landscape in the area had already been modified by the adjoining urbanisation of the Frankton Flats. That part of the decision is not under challenge. Second, and more pertinently, it found:

> [104] ...By analogy with *Hawthorn* where the Court of Appeal held that possible applications for resource consents were not part of the reasonably foreseeable environment, we hold that a possible exclusively industrial zoning for the site under the unresolved (and challenged) PC19(DV) is not part of the reasonably foreseeable environment.

> [105] ...Consequently the potential effect of removing possible exclusively industrial land from use as such within the potential Frankton Flats B zone is not an effect on the "environment" within the meaning of section 104D(1) of the RMA.

[49] By these two findings, the Environment Court removed from the future environment the possibility of industrial zoning. As will become apparent, the qualifier "exclusively" was not relevant; it is not used again in the Court's reasoning. The effect of these two findings is that it did not consider either the subject site or the receiving environment as a place where industrial activity might occur in the future. This is contrary to objective 6, which we have seen expressly provides for industrial activity on the Frankton Flats generally, and specifically in policy 6.2 for expansion of the industrial zone at Frankton. Effectively, the Environment Court used [84] of *Hawthorn* to remove consideration of objective 6 of the operative district plan when examining the future environment of the Frankton Flats.

[50] In case that reasoning was wrong as a matter of law, the Court went on to examine the receiving environment in the context of the planned development of Frankton Flats B for urban activities, including industrial land. In this alternative analysis it substituted the test of "minor" for a test of a 20% or less loss of potentially industrial land. It set "minor" alongside the complementary concept of "major" to arrive at the 20% figure. It then found that the potential loss of industrial land was less than 5%. It used this finding to find that quantitatively and qualitatively the effect would be "minor".

[51] Therefore, on two alternative bases the Court was satisfied that the adverse effects on the environment would be "minor", and so was satisfied that s 104D(1)(a) applied. That enabled the application for a non-complying activity to proceed to s 104 analysis.

[52] I note that in the *Foodstuffs* analysis the Court also considered the question of an adverse effect on the amenities of the future Eastern Access Road and another road, Road 2, and adverse effects on the future of urban structure on the Frankton Flats. It came to the conclusion that both effects were "minor". These aspects of the decision were not the focus of the appeal.

[53] The appeal by QCL against the *Foodstuffs* decision did not contend that the Environment Court also cleared the Foodstuffs application under the second gateway test, subsection (1)(b). However, it is arguable it did. At [119], the Court found:

> [119] Since we have found that any adverse effects of the proposal on the environment are not more than minor, the first gateway under section 104D(1)(a) of the RMA is passed and we do not have to consider the second, that is whether the proposal is contrary to the objectives and policies of either the outline development plan or of the PC19(DV). However, out of an abundance of caution and in the light of Mr Gardner-Hopkins' submission that consent cannot be granted because both gateway tests are failed, we will consider each of the objectives and policies to which the proposal by Foodstuffs is said to be contrary, after we have discussed them below under section 104(1)(b) of the Act.

[54] In its s 104 analysis, the Environment Court did find that the Pak'nSave proposal was consistent with objective 10 of the proposed change, when considered as a whole. In the companion *Cross Roads* decision of the Environment Court, it came to a similar position. The appeal point was taken principally in the *Cross Roads* appeal. In that decision, I find that there were several errors by the Environment Court in the construction of the objectives and policies. For the purposes of this judgment it is sufficient to say that my conclusion in that regard in *Cross Roads* is of equal application to *Foodstuffs*. So that if the Environment Court did clear the *Foodstuffs* application under the second gateway that was an error of law. I also observe that it is important in regulatory statutes to ask the right question at the right time. If the second gateway test of s 104D(1)(b) was going to be examined in *Foodstuffs*, it should have been before considering the criteria under s 104(1)(b). As under s 104, the issue is not "will not be contrary" to the objectives and policies, for even if there is a conflict a proposal may be granted.

Cross Roads decision

[55] The *Cross Roads* decision was released after the *Foodstuffs* decision. It followed the analysis on the law in *Foodstuffs*, particularly as applying to the application of *Hawthorn* and as to the substitution of a numeric test for the

statutory test of "minor". Like *Foodstuffs* it started with a landscape "minor" effect analysis, which does not concern us on this appeal.

[56] On the *Hawthorn* point, the Environment Court said, at [59]:[14]

> [59] The short answer is that, adopting the analysis in *Foodstuffs*, as a matter of law the supply of possible industrially zoned land under proposed PC19(DV) is not part of the (future) environment for the purposes of section 104D. We acknowledge that the *Foodstuffs* analysis was dealing with the E2 area, while this case is about E1. However, we were advised that in the PC19(DV) appeal hearings SPL is seeking that the site be part of a proposed "E3" area, in which a range of other activities including "trade and home improvement retail" would be enabled. Obviously, the future environment under PC19 is very unpredictable. Thus we consider the *Foodstuffs* analysis still applicable.

[57] Then it moved on to the alternative analysis:

> [60] In case we are wrong about that, we proceed to consider whether the removal of 1.8 hectares of industrial land would be only minor or not...

[58] The Environment Court then reached its conclusion:

> [65] ...Taking all those matters into account, we are satisfied that to lose 5% (cumulatively up to 5.6%) of the only land that is proposed by PC19(DV) to be protected for "true" industrial uses would be an effect on the PC19(DV) environment that is only minor.

[59] It then dealt with adverse effects on the Eastern Access Road and Road 2.

[60] It then, again similarly to *Foodstuffs*, appeared to have deferred the second gateway test until after consideration of s 104, as in the last sentence of [71] it said:

> [71] ...We consider the extent to which the proposal implements (or fails to implement) the relevant objectives and policies of PC19(DV) in part 3 of this decision.

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[14] *Cross Roads Properties Ltd v Queenstown Lakes District Council* [2012] NZEnvC 177.

Does Hawthorn apply to the application of s 104D(1)(a), in the context of this case?

[61] The Court in *Foodstuffs* approached s 104D(1)(a) by identifying the range of alleged adverse effects. The alleged adverse effects identified by the evidence were:[15]

(i) effects on the landscape;

(ii) effects on industrial land supply;

(iii) effects on the amenity of the neighbourhood and in particular on the Eastern Access Road and Road 2;

(iv) effects on "urban structure".

[62] The practical consequence of applying [84] in *Hawthorn* literally, however, is that the Court is not allowed to examine the effects of the Foodstuffs and Cross Roads proposals on the future environment. Rather, applying [84] of *Hawthorn* to s 104D(1)(a), requires adopting the unreal prospect that the undeveloped land will continue to be the activity on the receiving environment. Likewise, housing, retail, etc, is excluded from consideration by the application of [84]. Or to use the drier phrasing of the Environment Court, in [71], cited above at [30]:

> [71] ...
>
> *(2) the reasonably foreseeable environment does not include permitted activities in a proposed but challenged plan or plan change;*
>
> ...

[63] The Environment Court found effectively that *Hawthorn* prevented it from taking into account the reality that there was a demand for more industrial land for Queenstown, which had been recognised in the operative district plan as an objective to be provided in the future, and that the only available flat land will be used at least in part for that industrial activity.

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15 *Foodstuffs* at [65].

[64] Paragraph [84] is a summary of paragraphs [34]-[83]. In the core of its analysis, the Court of Appeal endorsed a future orientated assessment of the environment, in [53] and [54],:

> [53] Future potential effects cannot be considered unless there is a genuine attempt, at the same time, to envisage the environment in which such future effects, or effects arising over time, will be operating. The environment inevitably changes, and in many cases future effects will not be effects on the environment as it exists on the day that the council or the Environment Court on appeal makes its decision on the resource consent application.
>
> [54] ...It would be surprising if the Act, and in particular s 104(1)(a), were to be construed as requiring such ongoing change to be left out of account. Indeed, we think such an approach would militate against achievement of the Act's purpose.

[65] *Hawthorn* also recognised that these standards have to be applied in context:

> [61] Difficulties might be encountered in areas that were undergoing significant change, or where such change was planned to occur...

That was not the context of *Hawthorn*.

[66] I think [84] of *Hawthorn* was read literally as applying to any context. I do not think the Court of Appeal intended it to be read this way. To read [84] as a rule applying to this context was an error of law. The context of this case is materially different from the context in *Hawthorn*. The Court of Appeal in *Hawthorn* did embrace a future environment as the consideration in s 104D (s 105(2A) previously) and s 104. For these combinations of reasons, it does not govern the application of these facts. It does, however, support relying upon objective 6 and policies 6.1 and 6.2 as reliably informing the assessment of "minor" effect on the future environment.

[67] In *Hawthorn* the applicant applied for consent to subdivide 33.9 hectares into 32 separate lots, and for consent to erect a residential unit on each lot. The proposal required consent as a non-complying activity under the operative district plan and as a discretionary activity under the proposed district plan, so it did engage the predecessor to s 104D, s 105(2A).

[68] It is very material when comparing the context of *Hawthorn* to this case that the following relevant resource consents already existed in the *Hawthorn* baseline and receiving environment:

(a) An unimplemented consent to subdivide the subject site into 8 blocks of approximately 4 hectares each; (baseline)

(b) Building consents in respect of a 166 hectare triangle, which included the subject site, for 24 houses already erected and a further 28 consented to, but not yet built; (part baseline, part receiving) and

(c) Consents in respect of a further 35 building platforms outside the area of the triangle (receiving).

[69] This large number of existing consents meant that there was no issue, but that the environment would have a rural/residential quality. Furthermore, the applicant developer in *Hawthorn* had proffered as a condition of its application not to intensify the residential quality, by not making any further application for subdivision within the receiving environment. It is not surprising that consent was granted, and not disturbed on two appeals.

[70] None of the baseline or receiving environment cases has ever been deployed before to rule out consideration by a consent authority of the prospect that an application would impede an established objective in the operative plan. Given objective 6 and its policies 6.1 and 6.2, and recognising Queenstown's needs, it is inevitable that the Frankton Flats <u>will be</u> urbanised and used in part for industrial activities. "Will be" is the language used in s 104D(1)(a).

[71] The predecessor of s 104D was s 105(2A). It has been considered by the Court of Appeal in *Arrigato Investments Ltd v Auckland Regional Council*[16] and in *Dye v Auckland Regional Council*.[17] They also are distinguished by

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16 *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323 (CA).
17 *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA).

context. Like *Hawthorn*, they were subdivision applications into relatively stable existing environments.

[72] There is no doubt that a Pak'nSave supermarket and/or a Mitre 10 Mega would have major effects on the future environment. They involve the erection of very large buildings, putting in place a large number of car parks, and will generate tens of thousands of vehicle movements each week. They would enhance the economic wellbeing of the community by delivering the benefits of competition in the marketplace.

[73] The question is not whether the Foodstuffs (or Cross Roads) proposal would affect the environment. But the question is whether it will be an adverse effect, and if so, can the consent authority be satisfied it will be less than minor.

[74] All counsel agreed that utilisation of scarce land for an inappropriate use can be an adverse effect. This is because Part II of the Act, particularly s 5(2), includes consideration of meeting community needs, in the future.

[75] Section 5 provides:

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

[76] The consent authority cannot consider any adverse effect on the community of using land for retail activities, which is suitable for industrial activities, if the s 104D(1)(a) analysis is done without the Court being able to have regard to the future needs of Queenstown for industrial land, and the objective in the operative district plan to provide more industrial land at Frankton Flats.

[77] The sort of issues that had to be confronted in *Foodstuffs* simply were not in play in *Hawthorn*. One cannot say with confidence how the Court of Appeal in *Hawthorn* would have analysed the material facts of this case. For these reasons, I do not consider that the Environment Court or this Court are bound by [84] in *Hawthorn*.

[78] Furthermore, the finding at [84] of *Hawthorn* was a non-binding observation that I erred, when I suggested, obiter, that the effects of resource consents that might in future be granted should be brought into account in considering the likely future state of the environment. The Court of Appeal endorsed the Environment Court's approach, which had taken a more restricted view. But the Court still answered the question in the negative, meaning that they did not think there was a material error in the High Court judgment, and no error in the Environment Court judgment.

[79] When the RMA had its genesis, it was intended by many of the promoters to introduce effects based decision-making. Activities which did not generate adverse effects should not be regulated, was the attractive goal. That idea has never been completely lost. The Act did finally embrace the inevitability of plans, but not the inevitability of rules. Plans were to have objectives, policies to implement them, and those policies might or might not have rules: ss 30(1)(a) and 31(1)(a). But alongside that was the understanding that if an activity was innocuous (had no significant adverse effect on the environment), it did not need to be regulated or controlled by the RMA.

[80] That, in my view, is the natural context of s 104D(1)(a). If the activity is non-complying but has only "minor" (no need to be bothered about) adverse effects, then, even though it is non-complying, consent can be considered under s 104.

[81] There are a number of Environment Court decisions which examine the meaning of "minor" in s 104D(1)(a). They were not cited in argument.

[82] Section 104D(1)(a) is a section intended to impose a further restraint on consents being granted for non-complying activities under either an operative plan or a proposed plan, and activities which are inconsistent with the proposed plans, unless they have only a "minor" effect. It is a very small eye in the needle. It can be contrasted with ss 104A-C. I develop this point later in this judgment, when considering the numeric substituted test for "minor".

[83] There was no dispute to the proposition of fact that each activity, the Pak'nSave and Mitre 10 Mega, considered separately would have the adverse effect of a loss of land for industrial use. There was evidence before the Environment Court of a shortage of industrial land – quite independent of PC19(DV)[18]. That assessment can be made without regard to the operative plan. But, in fact, it is reinforced by objective 6, and its policies of the operative plan.

Conclusion

[84] The context of this case was materially different from *Hawthorn*. That decision recognised the importance of context. Read as a whole, it endorses having regard to objective 6 and its policies as a guide to the future environment. [84] was a summary only, and itself should not be read out of context. It is an observation which does not bind this Court in this case.

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[18] *Foodstuffs* at [63], [291] and [298].

[85] Section 104D, and indeed the RMA as a whole, calls for a "real world" approach to analysis, without artificial assumptions, creating an artificial future environment. Read as a whole, *Hawthorn* endorses having regard to objective 6 and its policies. The current development of the Frankton Flats, of which these applications are only part, was inconsistent with the plain statutory injunction imposed on the consent authority to consider the adverse effects on the future environment, contained in the phrase "will be". To read down s 104D(1)(a) so that the judgment is will be "minor" if established in an undeveloped environment, was contrary to the operative plan and the facts, and so thwarted the intention of Parliament. It was a significant error of law in the *Foodstuffs* decision, and likewise in *Cross Roads.*

Did the Environment Court err in its interpretation and application of "minor" when applying the alternative numeric analysis, which does take into account and recognise the presence of PC19(DV)? Did the Environment Court err in law when defining a 20% threshold for "minor" effects?

[86] In the alternative to applying *Hawthorn*, the Environment Court, in case it was wrong, went on to consider whether the effect of granting consent to the retail use of a Pak'nSave would be more than "minor". The Court considered four possible areas against which the Foodstuffs area could be "measured":[19]

(1) The activity areas proposed to be zoned industrial under PC19(DV) (42 hectares);

(2) All undeveloped industrial land in the Queenstown/Wakatipu area;

(3) The quantity of industrial land demanded in the district;

(4) The total area of industrial zones plus proposed industrial zones within the district.

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[19] *Foodstuffs* at 106.

[87] The Court opened its discussion of the alternative application of the standard "minor" in s l04D(1)(a), as follows:

> [72] Counsel did not refer to authorities on what "minor" means. The dictionary definitions suggest it means comparatively small or unimportant or lesser in number, size or [extent]. Based on normal usage "minor" seems to come between minimal on one side, and more than minor and then major on the other side of a scale of effects. Further, the concepts of size and importance seem to have both quantitative and qualitative dimensions. Accordingly, whether adverse effects are "minor" or "more than minor" depends on the circumstances and context. For example, where a significant habitat of a threatened indigenous species is at risk in a region where the species' population has already reduced to 20% of its former population, even a small (say 1%) reduction in its habitat or population may be more than minor. It depends on the species, the factors on which its population viability depend and the margins of error in the analysis.
>
> [73] We are also acutely conscious of the "One Percent Problem" "... where small contributors account for so much of a ... problem that the social goal cannot be met without regulating many one percent sources".[20] Even very minor effects which may happen have the potential to lead to adverse accumulative effects ...
>
> [74] We return to the assessment of other adverse effects, including any strict cumulative effect - an effect that is at least reasonably likely to happen if a proposal gains consent and if it is implemented. The situation that most often arises with predicting such an effect is that the consent authority (or on appeal the Environment Court) is faced with making an unscientific qualitative prediction on evidence that gives no margin of error or confidence limits. A further complication is that in *Westfield*[21] Blanchard J approved an Environment Court decision in which the court placed "significant" somewhere in the scale, at least where there are possible trade effects (which must be disregarded under (now) section 104(3)(a)(i)). For the purposes of this decision we ignore any complexities introduced by *Westfield* and apply the first gateway test in the standard way. We hold that any adverse effect which changes the quantity or quality of a resource by under 20% may, depending on context, be seen as minor.

[88] It may be noted that no authority is cited for the last sentence. The last sentence has to be read as justified by the preceding analysis. That analysis starts with reference to the "dictionary definitions" and "normal usage". It is not referenced to the function of s l04D in the scheme of the RMA.

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20 Citing an article by K M Stack and M P Vandenberg *The One Percent Problem* (2011) 111 Columbia Law Review 1385 at 1388.

21 *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] 2 NZLR 597 (SC).

[89] When it came to applying the standard against the key issue on appeal, whether the loss of potential industrial land is an effect on the environment, as we have seen, the Court identified a loss of about 5% of the proposed supply of scarce industrial land. It recognised this as a distinct adverse effect, but concluded it was only minor:

> [110] ...However, in these particular circumstances we are satisfied that it is quantitatively and qualitatively only minor (and at the lower end of minor too).

[90] No counsel defended the proposition that any adverse effects which change the quantity or quality of a resource by under 20% may, depending on context, be seen as "minor". Rather, counsel supporting the decision emphasised that the Court was relying on a much lower percentage of 5%.

[91] The context is the unchallenged common assumption by the Environment Court under appeal and all counsel before me that land suitable for industrial activities is a resource and is necessarily limited within the urban area of Queenstown. Moreover, there is competition for land suitable for industrial activities, to be used for other, here retail, activities. In this context, loss of land for industrial activity can be an "adverse effect" on the environment. The definition of environment is engaged under s 2(a), (b) and (d), set out above in [43].

[92] I do not think it is possible to ignore the Court's approach to the application of "minor" by its substitution of a 20% test. This is for two reasons. Firstly, it is a substitution of one standard, a statutory one, by another. Second, by identifying 20% as a demarcator between "minor" and "not minor", the Court is creating an anchoring effect on reasoning. Setting up the break line at 20% facilitates and indeed encourages a judgment that a loss of 5% will be "minor". This is even though there are qualifying passages in the Court's judgment saying that a significant 1 % loss could be "minor".

[93] The legal method deployed by the Environment Court in its analysis is a traditional legal method known as "literal" or "black letter". This is the method of reading a provision in isolation, as a businessman would, giving the words in the provision their usual meaning and then applying them to the facts.

[94] This legal method can apply quite satisfactorily when the provision is a rule. A rule can be applied without the need to understand why the rule is there, and without the need to understand the other body of rules surrounding it. So, for example, we are all familiar with driving to a strange city and immediately becoming familiar with the parking prohibitions around our hotel. It is not necessary to understand the policy or purpose behind why there is a no stopping sign and yellow lines painted in a particular part of a particular street. The signs and the yellow lines send a clear and unmistakeable communication.

[95] This black letter method cannot apply reliably, however, when the statutory provision is not a rule but a standard. When the statutory provision contains a term like "minor", that is a standard, application of which requires resolution of a question of degree. There is no bright line distinction between "minor" and "not minor". There is always room for two persons to honestly disagree in good faith on the application of a standard.

[96] It is not possible to apply standards in any way consistently without the persons who are applying them examining and agreeing on the policy or reason why the standard has been imposed, rather than a rule made. Standards are usually imposed when the task is of such complexity that it is simply not possible for it to be regulated by precise rules. In such situations it is necessary to apply the standard against the purpose for which it is applied. This is the classic situation where s 5 of the Interpretation Act 1999 applies. Section 5(1) provides:

> **5 Ascertaining meaning of legislation**
>
> (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.

[97] The operative standard in s 104D(1)(a) is:

> A consent authority may grant a resource consent for a non-complying activity only if it is satisfied that ... the adverse effects of the activity on the environment ... will be minor.

[98] It is not simply an application of a standard of "minor". It requires a positive satisfaction on the part of a consent authority that the adverse effects of the activity on the environment in the future will be "minor".

(Emphasis added.)

[99] Coming to this standard for the first time, the consent authority should ask: "Why is it here?" The reason is not hard to find. It is an amendment to the RMA, introduced to elaborate upon s 104. Section 104 is the cornerstone section which sets out the criteria that a consent authority must have regard to when considering any application for a resource consent. Sections 104A, B, C and D amplify s 104 by distinguishing separate criteria for applications for controlled activities s 104A (which "must" be granted), and discretionary or non-complying activities s 104B, restricted discretionary activities s 104C, and non-complying activities s 104D, (all of which "may" be granted).

[100] It also needs to be appreciated that s 104D(1)(a), treated as a threshold, is plainly intended to be applied without the obligation to have regard to either the operative district plan or proposed district plan. In context, it may be appropriate, and was here, to recognise that there was a plan change in process implementing objective 6 and policies 6.1 and 6.2. That exercise must be done when applying s 104D(1)(b) and, later, s 104(1)(b).

[101] In this context, it becomes clear that the purpose of s 104D(1)(a) is to allow applications for non-complying activities which may or will be contrary to the objectives and policies of an operative district plan or proposed district plan where the adverse effect is so "minor" that that is likely not to matter. It presents a picture where non-complying activities are unlikely to get consent under an operative district plan, let alone under a proposed district plan, but they will be considered if the adverse effects will be "minor".

[102] In that context, it can be understood immediately that "minor" here is very much at the lower end of adverse effect. That it is quite wrong to approach "minor" as indicating something of the order of 20% of loss. So that if something is lost by a proposal, one can tolerate it if it is merely 20%.

[103] Secondly, by a different line of critique, the jurisprudence is full of cases which constantly warn against the dangers of substituting the statutory test with another. In the *Cross Roads* decision, the Environment Court said of the 20% demarcator:

> [39] ...We accept that 20% is an arbitrary figure when compared with the range of figures from 15 to 25%, but it is not unreasonable. All we are trying to do is set an approximate upper limit beyond which we would, in most reasonably foreseeable circumstances, not be able to find that an adverse effect was only minor. Nor do we think such an approximate test is any more arbitrary than the words "minor" used in section 104D of the RMA or "significant", often used in this context.

[104] Embedded in that last sentence is the notion that the very deployment by Parliament of the "minor" standard in s 104D(1)(a) is "arbitrary". That is not intended as a complimentary term. The Courts must take statutes as they are enacted. A test cannot be dropped because it is perceived as arbitrary, and replaced by a Judge made "better" test.

[105] However, regard to the scheme and purpose of the Act, and particularly the functioning of s 5, shows there is nothing arbitrary in the term "minor". It is a sensible standard which, understood for its purpose, is designed to give applications which will have only a "minor" adverse effect on the environment but are for other reasons non-complying an opportunity to be approved. It fits in as part of a statutory policy that otherwise non-complying activities which are contrary to the policies and objectives of plans and proposed plans simply will not be approved, s 104D will stop the application even being considered under s 104. In that regard, non-complying activities are close to but fall short of being prohibited activities. There is nothing "arbitrary" in this graduated scale of the classification of activities from permitted through to prohibited. To be sure, the application of the standard calls for judgment and it is always

possible for decision-makers to disagree on these questions of degree, but, when inculcated into the scheme of analysis and the values to be applied, such disagreement tends to be minimised.

[106] In [74] of the *Foodstuffs* judgment, cited above,[22] the Court distinguished approval by Blanchard J, in *Discount Brands Ltd v Westfield (New Zealand) Ltd,*[23] of the use of the synonym "significant" in the context of applying the test of "minor" as it appeared, a provision dealing with applications not requiring public notification. Section 94A provides:

> **94A Forming opinion as to whether adverse effects are "minor" or more than "minor"**
>
> When forming an opinion, for the purpose of section 93, as to whether the adverse effects of an activity on the environment will be minor or more than minor, a consent authority¬
>
> (a) may disregard an adverse effect of the activity on the environment if the plan permits an activity with that effect; and
>
> (b) for a restricted discretionary activity, must disregard an adverse effect of the activity on the environment that does not relate to a matter specified in the plan or proposed plan as a matter for which discretion is restricted for the activity[; and]
>
> (c) must disregard any effect on a person who has given written approval to the application.

[107] This provision has since been repealed. Blanchard J said:[24]

> [119] An important matter which the council's Regulatory and Hearings Committee needed to inform itself upon was the effect which the activity proposed by Discount Brands might have on the amenity values of the existing centres - on the natural or physical qualities and characteristics of those areas that contributed to people's appreciation of their pleasantness, aesthetic coherence, and cultural and recreational attributes. The committee was required to disregard the effects of trade competition from the Discount Brands centre, since competition effects would have to be disregarded upon the substantive hearing of the resource consent application. But, as Randerson J said, significant economic and social effects did have to be taken into account. Such effects on amenity values would be those which had a greater impact on people and their communities than would be caused simply by

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22 At [99].
23 *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] 2 NZLR 597 (SC).
24 At [119]-[120].

> trade competition. To take a hypothetical example, suppose as a result of trade competition some retailers in an existing centre closed their shops and those premises were then devoted to retailing of a different character. That might lead to a different mix of customers coming to the centre. Those who had been attracted by the shops which closed might choose not to continue to go to the centre. Patronage of the centre might drop, including patronage of facilities such as a library, which in turn might close. People who used to shop locally and use those facilities might find it necessary to travel to other centres, thereby increasing the pressure on the roading system. The character of the centre overall might change for the worse. At an extreme, if the centre became unattractive it might in whole or part cease to be viable.
>
> [120] The Court of Appeal considered that only "major" effects needed to be considered, since only then would the effect on the environment be more than minor, in terms of s 94(2)(a). But in equating major effects with those which were "ruinous" the Court went too far. A better balance would seem to be achieved in the statement of the Environment Court, which Randerson J adopted, that social or economic effects must be "significant" before they can properly be regarded as beyond the effects ordinarily associated with trade competition on trade competitors. It is of course necessary for a consent authority first to consider how trading patterns may be affected by a proposed activity in order that it can make an informed prediction about whether amenity values may consequentially be affected.

[108] The standard of "minor" applies within a particular statutory provision when applied to a particular context. Just as it is wrong to go to the dictionary, so also it is wrong, as I have noted, to take the meaning given to a standard in a statutory provision dedicated to another purpose and assume it has the same reference in a different provision, with a different purpose.

[109] What I do take from the judgment of Blanchard J, approving the judgment of Randerson J in the High Court, is the standard "significant" used as a synonym to "minor" was used as part of a purposive explanation of the appropriate reach and application of s 94(2).

[110] I am satisfied that it was an error of law for the Environment Court to use the standard of 20%, albeit with all its qualifications.

[111] There are additional reasons why it was an error of law, which have some pertinence to the judgments that have to be made. The first is that, as the Environment Court recognised, analysis of adverse effects is both a qualitative

and quantitative exercise. It is impossible to use an arithmetical measure of quality. Land developers and planners are very aware, acutely aware, of the distinction between the quantity of land and the quality of land for particular activities. So are businessmen who understand the market. Take the position that pertains in Queenstown as an example. Most of the industrial land is. located on flat land in the village of Frankton, which is at the end of Frankton Arm. The resort town proper, right on the edge of the lake, at the head of Frankton Arm, is built on the slopes at the head of Frankton area. It is also now filled with a busy town centre, all the accoutrements of a village, and surrounded by hotels and apartment complexes. It is not an industrial area. It is also folded around hills. The northern exit from this village goes almost immediately into very high quality landscape, which is not suitable for an industrial sprawl.

[112] Reducing the adverse effects of the Pak'nSave proposal to 5% or less does not give one the answer as to whether that will be a "minor" non-complying activity. This is for two reasons. Firstly, the Environment Court has already been anchored by the proposition that anything less than 20% may well be "minor". 5%, of course, is much lower than 20%. That was a mental distraction, a legally irrelevant consideration. Second, the percentage does not really tell the consent authority anything about the quality of the land for industrial uses. It might be not only land that is intended to be zoned industrial, but land which the marketplace will find is highly desirable as industrial land, rather than land for some other activity. It may also have other desirable qualities, namely for commercial use. That will pose a difficulty for the decision-makers who will have to decide how tightly to define the range of activities on that piece of land, depending on what goal they are trying to achieve.

[113] The areas suitable for industrial land, within the bounds of the town, are the Frankton Flats, upon which are located the airport and a significant area of operatively industrially zoned land in Glenda Drive. But because of the high demand for flat land for commercial as well as industrial uses, a lot of the Glenda Drive industrial land is in fact occupied by non-industrial uses. As the

Environment Court has had occasion to recognise in its *Foodstuffs* judgment, this is because of market forces which tend to place on land activities which obtain the highest value for the land. To be sure, you can categorise the land as "land zoned industrial", but, if the zoning also allows some commercial or retail activities, everybody knows that the land may be lost to industrial use. A substantial town like Queenstown requires industrial land to meet its needs. Industrial land has to be found. This is why a plan may have to secure land for industrial activity, in order to prevent market forces putting it to more remunerative activities.

[114] It follows that for the development of a town and its ongoing growth, the critical issue is what industrial land is available, or is potentially available, and what is its quality, rather than the total of land zoned industrial in the operative plan. The Court was told from the bar that Remarkables Park retail zone was considered as a site for Mitre 10 Mega, but it is not flat.

[115] For all these reasons, the Environment Court fell into error of law, when treating the statutory test as arbitrary, and when substituting a numerical percentage loss for the "satisfied will be minor" test.

Did the Environment Court err in law in considering all undeveloped industrial land in Queenstown/Wakatipu was the appropriate base against which to measure the loss of industrial land in relation to the Foodstuffs application?

[116] This is a subsidiary ground of appeal. The issue falls out of the four possible areas against which loss of industrial land could be measured, set out above in [98]. The Environment Court had selected option 2 (all undeveloped industrial land in the Queenstown/Wakatipu area). It was alleged by QCL that that was an error of law. That the focus should have been on the Frankton Flats area.

[117] As Mr Soper for Foodstuffs pointed out, however, the framing of the question: of "all undeveloped industrial land in the QueenstownlWakatipu area" was not in fact widening the focus away from the Frankton Flats. For all

undeveloped land suitable for industrial uses was located on the Frankton Flats and was a combination of the land to be developed under PC19(DV) and the undeveloped but currently zoned industrial land in Glenda Drive, which is nearby and on the Frankton Flats. Mr Soper argued the frame of reference of the inquiry by the Environment Court was correctly in the sensitive area, being the land proposed to be zoned industrial under PC19 and the adjacent industrially zoned land in Glenda Drive. This Court agrees.

[118] That frame of reference led to the following analysis in the *Foodstuffs* decision:

> [107] We know that it is proposed there be some 42 hectares on which industrial activities will be permitted under PC19(DV). As of 2006 when the CLNA was prepared, there were 6.2 hectares of land undeveloped in Glenda Drive. We do not know how much remains undeveloped at Glenda Drive, but it must be a maximum of 6.2 hectares. Thus the proposed Pak 'N Save will use for retail purposes between 4.5% and 5.2% of the proposed future supply of industrial/business land under PC19(DV).
>
> [108] We can also test the qualitative (or policy) importance of losing industrial land. Since, on the hypothesis, we are looking at the possible outcomes of PC19 (even though we believe that to be incorrect under *Hawthorn*), we can look at how PC19(DV) rates the importance of losing industrial land. The answer appears to be that it is important but compromise is possible - without needing to have regard to the importance of industrial land supply. That is because PC19(DV) contemplates that within Activity Area E2 as shown on the structure plan, "Showroom Retail with a gross floor area more than 500 m^2 per retail outlet" is a limited discretionary activity and all other retail is discretionary. So PC19(DV) seems to consider that all retail and even large retail will not be an adverse effect on the supply of industrial land anywhere in E2. No reason is put forward either in PC19(DV) or in the evidence in this proceeding as to why other proposed retail (such as the Pak 'N Save) would have an adverse effect on industrial land supply when PC19(DV) implies that showroom retail would not. In fact, the scheme of PC19(DV) shows that the effects on industrial land supply of using it for retail are irrelevant: "Showroom retail" in an area identified as E2 on a structure plan - because it is a limited discretionary activity - goes with a list of matters to which the council has restricted its discretion. None of those matters relates to the effect of the proposal on the supply of industrial land - see proposed rule 12.20.3.3i and iv.
>
> [109] Potentially it is possible for the whole of the E2 subzone under PC19(DV)'s structure plan to be developed for Showroom retail as a series of limited discretionary applications. That is, an area of 10.62 hectares could be removed from the industrial land supply. That can only be justified on the basis that either the adverse effect on industrial

> land supply is minor, or that the land is more valuable for (showroom) retail. Either way, the same justification applies (absent reference to the proposed policies) to other retail such as a supermarket.

[119] I remind myself the issue here is not whether this is a meritorious evaluation, but whether there is any error of law embedded in this evaluation. I have already found that it is an error of law to depart from the "satisfied will be minor test" and going to the 20% loss threshold, and pursuing a numeric evaluation for both quantitative and qualitative analysis. The question now becomes whether there is any additional error of law in the analysis in [107] through to [109].

[120] The appellant, QCL, submitted that the appropriate basis upon which to measure the loss of industrial land supply is the type of industrial land that PC19 intended for the Pak'nSave site. QCL submitted that Area E2 was intended for "light industry" and, as the AAE2 borders the Eastern Access Road, development is to be higher amenity, good quality urban design with activities including higher quality showroom-type uses and other premier businesses who can exploit the passing trade the Eastern Access Road will provide.

[121] One can immediately see that QCL's argument tries to narrow the area of loss to equate in fact the total area of loss. Assessed against the area of land for E2 as it was under PC19(DV), the level of loss for industrial land is in fact a loss of nearly 21 %. Secondly, in evaluating the issue of "minor" or not, in [108] we can see that the Environment Court replied on the retail aspects as to uses available in the E2 zone. This is developed in [109].

[122] Mr Soper for Foodstuffs submitted the Environment Court was entitled to find it was unlikely that the Foodstuffs site would be used for industrial purposes in the near future. Secondly, the decision to adopt all undeveloped industrial land as an appropriate base was a judgment issue, a matter of fact, and not a question of law.

[123] I consider that the QCL argument is too specific for an inquiry under s 104D(1)(a), as to potential loss of industrial land. I heard a lot of argument, getting into the niceties of the distinctions between E1 and E2 industrially zoned land in PC19(DV). But the Environment Court was right not to get bogged down in the detail of these zones, which could change as a result of the appeals, and did. Section 104D(1)(a) analysis is not against the specific content of proposed plans. That is subsection (1)(b), (where it is confined to objectives and policies). The subsection (1)(a) analysis is properly considered in terms of the very preceding words of s 104D, as an inquiry into whether or not the Court can be satisfied that there will be no more than a "minor" effect on the environment in the future. That involves envisaging what the future environment may be. That is a broader lens than focussing on the specifics of the current proposed change, which is under appeal.

[124] I do not agree with Mr Soper's submission that the Environment Court was entitled to find it unlikely that the Foodstuffs site would be used for industrial purposes. That is not the s 104D(1)(a) test. Second, the final content of PC19 could not be predicted at that time.

[125] In the *Cross Roads* decision, I have addressed the arguments that the Environment Court was in error of law when interpreting objective 10 of PCI9(DV). That reasoning is to be read as adopted in this judgment.

[126] Applying s 104D(1)(b), a consent authority could not be satisfied that the Pak'nSave supermarket in the El and E2 zones will not be contrary to objective 10 of PCI9(DV).

[127] If the Environment Court did so find, this was a material error of law. For, had the decision gone the other way, these applications would not have got past s 104D.

General conclusion on error of law in the Foodstuffs application on the evaluation that the Foodstuffs application could be no more than a "minor" adverse effect, and was not contrary to objective 10 of PC19(DV)

[128] For these reasons, I am of the view that it is clear that the *Foodstuffs* analysis was in error of law on the gateway issues. The principal error of law was to ignore the facts: that the Frankton Flats was suitable for industrial activities, was inevitably going to be urbanised, and was intended to be for activities including industrial, by objective 6 of the operative plan. Second, it was to depart from the "minor" test, both in turning to the dictionary meaning and implicitly contrasting it with major; and using a numeric standard as a substitute when it is not. Third, it erred when interpreting objective 10 of PC19(DV). The resultant consequence was that the Environment Court lowered the threshold enabling applicants for non-complying activities to get past the gate, set up to prevent non-complying activities from even being considered for consent unless the effects will be "minor". If it did make a decision on s 104D(1)(b), it was in error to find that it was satisfied that the application would not be contrary to objective 10.

Materiality of error of law

[129] This Court only intervenes where there are material errors of law. In this case, the question divides into two parts.

[130] The first question is whether the judgment on the first gateway might have been different had the Environment Court not applied *Hawthorn* and had not substituted the numeric standard for the "minor" standard. For a number of reasons, I think that it is likely that the judgment would have been different.

[131] On the gateway issues, Commissioner Fletcher dissented in both the *Foodstuffs* and the *Cross Roads* decisions. His reasons can be summed up in *Foodstuffs*, by his two paragraphs [291], [292] and the opening sentence of [293].

> [291] Further, I consider there is evidence of a scarcity of industrial land. The evidence of scarcity in the CLNA is that "the supply of commercial land is likely to be exhausted in the near future" (p. 1) and table 4 showing that as of 2006 out of 120 hectares of commercial land there is only 30 (25%) hectares vacant, and that within this there is 54 hectares of industrial land, of which only seven hectares (13%) is vacant. As well, we have the parties' acceptance of the "fact that there is a shortage of land for these types of activities". The impending shortage is due to the lack of land zoned industrial (and perhaps that that which is so zoned is not exclusively so). Scarcity would normally push up prices (which it has) which would bring more supply into the market, which can only happen if there is land available and it is zoned accordingly. The parties agree that:
>
> > The Frankton Flats is the last remaining greenfields site within the Urban Growth boundary of Queenstown south of the State Highway.
>
> There is no more land available in Queenstown suitable to be zoned industrial.
>
> [292] I consider the loss of around 5% of the future supply of industrially zoned land to a supermarket to be [an] adverse effect that is more than minor.
>
> *Qualitatively*
>
> [293] I disagree with my colleagues about the policy importance of losing industrial land...

[132] I do not set out the rest of the qualitative analysis. It is closely related to a proposed rule in PC19(DV) and an objective. We then come to his conclusion:

> [294] Both quantitatively and qualitatively the effect of losing 2.2 hectares of future industrial land to a supermarket would be more than minor in my judgment.

[133] In the *Cross Roads* decision, Commissioner Fletcher's reasoning was similar:

> [196] As to the first, I consider that the 5.6% loss in proposed industrial land would be a more than minor adverse effect. This would be relevant under section 104D if the industrial protection of area E1 under PC19(DV) was part of the (future) environment, and will be relevant under section 104(1)(a) of the Act.
>
> ...
>
> [201] I agree with the majority that resource consent(s) should be granted to CRPL under the operative district plan. However, in relation to PC19(DV) I disagree with my colleagues on this point. In my view

> not only is the loss of future industrial land an effect in terms of section 104(1)(a) that is more than minor, but there is more to the issue. The proposal not only does not give effect to, but is contrary to objective 10, and specifically policies 10.1 and 10.11 of PC19(DV). I would refuse consent under PC19(DV).

[134] The reasoning of Commissioner Fletcher is close to the reasoning in this judgment.

[135] The second part of the materiality reasoning is the decision of Judge Borthwick's division on the PC19 higher order issues, released on 12 February.[25] This decision was released at the beginning of the oral hearing of this case. But, at my request, it was not examined until the last day, after the appeal had been argued on the facts as they presented to the Environment Court of Judge Jackson. This decision of the Environment Court was written after having a resumed hearing on 7 November 2012, which was after the release of the *Foodstuffs* and *Cross Roads* decision by Judge Jackson's division.

[136] Judge Borthwick's division's decision did not amend PC19 to accommodate the Pak'nSave and Mitre 10 Mega proposals. The zone plan is now little different from PC 19(DV), as it was before the Environment Court on these consent applications. The Pak'nSave site is affected, however, in a significant way, in that the E2 zone on the eastern side of the Eastern Access Road is reduced in width, so that the Pak'nSave site is now located as to one-third in E2 and two-thirds in E1. As to the Mitre 10 Mega site, there is no change; it remains squarely within E1. J udge Borthwick's division endorsed the E1 zone as an area for industrial activities.[26] The Court granted leave to the parties *"to review and propose a revised version of the objectives and policies, but subject to their overall direction being maintained".*[27]

[137] I have not lost sight also of the fact that the Commissioners' decision rejected the Foodstuffs application. The Commissioners decided that the

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[25] *Queenstown Airport Corporation Ltd* v *Queenstown Lakes District Council* [2013] NZEnvC 14.

[26] At [656].

[27] At [662].

proposal failed both gateways under s 104D.[28] They held that the adverse effects on the rural environment would be significant,[29] that the adverse effects in terms of urban design would be significant,[30] and made more general findings that the proposal would have significant adverse effects on the environment.[31] They also found that the Pak'nSave proposal would be contrary to the objectives of PC19(DV) and undermine the integrity of the plan change.

[138] Accordingly, I come to the general conclusion that the errors, when applying s 104D(1)(a), are material.

[139] Inasmuch as there might have been findings in respect of the second gateway issue (1)(b) of lack of material conflict with objective 10, those errors also are material, in both applications. My reasoning in this regard is to be found in the *Cross Roads* decision.

[140] It follows that the two consents must be set aside.

Other issues

Should the Environment Court have adjourned the hearings?

[141] Counsel for QCL argued that, because there was an imminent decision by another division of the Environment Court on PC19(DV), this division of the Environment Court should have deferred its decision on the consent application. The submission was that it was an error of law, because the circumstance meant that Judge Jackson's division could not reasonably have proceeded with either of its decisions, and/or, in doing so, the Environment Court did not appreciate the consequence of doing so, and have regard to relevant considerations.

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28 *Foodstuffs* at [260].
29 At [258].
30 At [259].
31 At [260].

[142] The argument did not rely on provisions of the RMA. Nor could it, because they are the other way. Both appeals had to be heard; ss 87I(1)(c), 101(2), 272.

[143] Rather, the argument went to the inherent power of the Environment Court to schedule its hearings. It is long established that the High Court is loathe to interfere with scheduling decisions of any statutory Court. The decision to proceed with these hearing applications did disrupt the decision-making processes of the other division. It had an additional hearing on 7 November 2012 to consider the consequences of the grants of consents for the Pak'nSave and the Mitre 10 Mega. However, in my view, given the clear scheme of the statute which allows for applications to proceed in the face of plan changes, and indeed requires applications to be dealt with promptly, I do not consider that the decision of Judge Jackson's division to continue was an error of law. Whether or not it was meritorious is a different question. But it is not one within the jurisdiction of this Court limited on appeal to errors of law.

Was the Court prejudiced by an error of law classifying QCL as a trade competitor? Did this materially affect the decision?

[144] I address this issue less summarily, as it may have ongoing relevance to these parties. The RMA is the fourth planning statute in our legislative history. As part of the reforms it allows any person to make submissions or applications, whether or not they own land, and whether or not they are adversely affected by other activities nearby, s 96(2). So a concerned environmental activist in Kaitaia can make a submission against the development of opencast coalmining in Southland. A person can apply for consent for an activity on another person's land, even though the applicant does not even have a conditional agreement to purchase that land. A concerned activist in Kaitaia can take an interest in the amenity values of the suburb of Sydenham in Christchurch, and file a submission in opposition to an application for consent for a retail activity in the Sydenham shopping centre.

[145] Businesses competing in trade, unrelated to competition to purchase land and develop it, began to take an interest in RMA disputes. It became the practice for many years for supermarket operators to take a very keen interest in attempts by rivals to locate in their customer catchment. Typically, the competing supermarket retained lawyers, planners and other experts to run sophisticated planning arguments as to why consent should not be granted for another supermarket within their customer catchment. Of course, the arguments did not say they were worried about trade competition. But it was commonly thought by participants in the process and obviously in the end by Parliament that this participation was motivated by the fact they were in competition in trade.

[146] As a result of amendments to the RMA in 2003, trade competitors are now the only class of person who must have a legitimate RMA reason for participating in an RMA process.

[147] The relevant provisions now are:

> **96 Making submissions**
>
> (1) If an application for a resource consent is publicly notified, a person described in subsection (2) may make a submission about it to the consent authority.
>
> (2) Any person may make a submission, but the person's right to make a submission is limited by section 308B if the person is a person A as defined in section 308A and the applicant is a person B as defined in section 308A.

In Part l1A, ss 308A and 308B provide:

> **308A Identification of trade competitors and surrogates**
>
> In this Part,
>
> (a) person A means a person who is a trade competitor of person B:
>
> (b) person B means the person of whom person A is a trade competitor:
>
> (c) person C means a person who has knowingly received, is knowingly receiving, or may knowingly receive direct or

> indirect help from person A to bring an appeal or be a party to an appeal against a decision under this Act in favour of person B.
>
> **308B Limit on making submissions**
>
> (l) Subsection (2) applies when person A wants to make a submission under section 96 about an application by person B.
>
> (2) Person A may make the submission only if directly affected by an effect of the activity to which the application relates, that
>
> (a) adversely affects the environment; and
>
> (b) does not relate to trade competition or the effects of trade competition.
>
> (3) Failure to comply with the limits on submissions set in section 149E or 149O or clause 6(4) or 29(1B) of Schedule 1 is a contravention of this Part.

[148] Foodstuffs South Island Limited was the applicant for the Pak'nSave supermarket. Queenstown Central Limited owns part of the land in PC19. It does not own land over which the Pak'nSave supermarket would be operated. Shotover Park Limited (SPL) is another property owner, over whose land Foodstuffs' Pak'nSave would operate. Cross Roads Properties Limited is a subsidiary of the leading South Island retailer, H W Smith Limited, who operate Mitre 10s in the South Island. Queenstown Gateway Limited (QGL) owns land adjacent to PC19, which has a consent for the establishment of a Countdown supermarket. QGL and QCL are managed by the same company. But there is no common shareholding.

[149] At [37] of the *Foodstuffs* decision, the Court made five points on what it saw as the trade competition complexities of the case:

> [37] The proceeding is fraught with trade competition complexities:
>
> - Foodstuffs owns the Pak 'N Save and New World supermarket brands. There is a New World at the Remarkables Park shopping centre on the south side of the airport. It is easy to see that Foodstuffs would not want to have their Pak 'N Save in close proximity to its sister brand;

- conversely, Foodstuffs may like to place the Pak 'N Save in close proximity to the Countdown supermarket proposed to be built on land in Frankton Flats A, immediately to the west of the PC19 land. The Countdown brand is owned by Progressive Enterprises, Foodstuffs' main rival in the supermarket trade in New Zealand;

- the Countdown supermarket is proposed to be built on land owned by Queenstown Gateway Limited ("QGL"). It is obvious that QGL may not want a Pak 'N Save in close proximity to the proposed Countdown supermarket. We understand QGL is a sister company of QCL, with related ownership. The management of the QGL land and the QCL land in the C1 area of PC19(DV) is done by the same company, the Redwood Group Limited ("RGL");

- the Remarkables Park shopping centre is on land owned by Remarkables Park Limited ("RPL"), which we understand is a related company to Shotover Park Limited, sharing common ownership.

- RPL and SPL on one side are trade competitors with QCL and QGL on the other side.

[150] The appellant argues that the Environment Court found that QCL was a sister company of Queenstown Gateway Limited (QGL) and a trade competitor, without giving QCL the opportunity to address the issue further, in breach of natural justice. Secondly, having found QCL to be a trade competitor, the Environment Court took that into account when making its substantive assessment. This finding altered the weight it gave to evidence from witnesses from QCL, and its refusal to stay its consideration of the applications and await the higher order decision on PC19 from Judge Borthwick's division.

[151] For Foodstuffs, Mr Soper submitted that the appellant's arguments were misconceived, and misinterpreted the Environment Court's reasoning. That the Court did not find, for the purposes of the Pak'nSave application, that QCL was a trade competitor. Mr Soper argued that QCL has overstated the position when saying that there was prejudice occasioned by error of law as to whether or not QCL was a trade competitor.

[152] As to the Environment Court taking the perception that QCL was a trade competitor, there are two dimensions to the analysis which need to be separated. One is the meaning of trade competitor, and the second is the Court's evaluation of the relationship between QCL and QGL.

[153] Mr Soper, supported by Mr Todd for Cross Roads, denied vigorously that the Court had made a finding that QCL was a trade competitor.

[154] I am quite satisfied that the Court did regard QCL as a trade competitor with QGL, as it states so simply in the last bullet point at [37]. Mr Soper submits that that last phrase is confined to the PC19 proceedings. I agree. As a matter of fact there is no doubt that QCL and SPL are in competition for the best uses of appropriately zoned land in the Frankton area. QCL is the owner of around about 23 hectares of land.

[155] QCL and SPL are disagreeing on the appropriate zoning of their respective parcels of land. Let us allow that to be described as a form of competition or competing with each other. It does not follow they are in trade competition.

[156] In the absence of a statutory definition of "trade competitor", the qualifier "trade" can be understood by taking into account the mischief which was perceived to be afoot, as outlined above.

[157] There is no doubt that the Environment Court was perfectly aware that neither SPL nor QCL were directly active as retailers. It dubbed them as trade competitors by their association with Foodstuffs and with Progressive. SPL and QCL are property developers. Property developers develop property with an eye to the market for that property. That does not make them participants in the trade of the use to which the property is likely to be put. There is nothing in Part 11A of the RMA to suggest such an extended definition.

[158] Keeping in mind the overall policy of the RMA to allow all-comers to participate, there is no justification for extending the phrase "trade competitors" to property developers competing for the best use of land. I am satisfied that the Environment Court was in error of law in categorising SPL and QCL as trade competitors.

[159] Competition between land developers is an inevitable ongoing phenomenon. As the Environment Court had occasion itself to observe, if the market is left unregulated, land will trend towards its most valuable use.[32] It is the purpose of regulation of use of the land to prevent that. This is discussed very clearly in the dissent of Commissioner Fletcher, in *Foodstuffs*. The RMA is a mixture of statutory reform of the common law of nuisance, and providing for national, regional and local regulations of use of natural resources.

[160] Where the total amount of land is a limited resource, choices have to be made. The situation in Queenstown is a classic example of that. There is a very limited amount of flat land available in the Queenstown urban environment. There is a contest for the use of that land. There is a community interest to build a significant amount of low cost housing to enable workers to live in Queenstown and not have to commute all the way from Cromwell. There is a need for retail and commercial activities to support that residential population. But on top of this, there is a recognised and overall shortage in Queenstown of industrial land. If it was entirely left to market forces the local authority could not be sure that all those needs would be catered for on the Frankton Flats. In the long run, that would be to the overall detriment of the economic welfare and growth of the town. Hence, the Council, in its plan, has endeavoured to meet needs for all of those activities. It is in this context that owners of land located in Frankton Flats compete to get their land zoned for the highest valued use. That is not trade competition, as that word is used in the RMA. If it were, numerous planning disputes would be wrongly categorised as trade competition.

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32 *Foodstuffs* at [102].

[161] Rather, trade competition presents as the use of RMA arguments to serve the ulterior purpose of retaining or obtaining market share in unrelated markets. So a supermarket as a trade competitor stops a rival building another supermarket in its customer catchment, and uses every available RMA argument to do so. This is a wholly different game from property owners competing for the best use of their land.

[162] In [263] of the *Foodstuffs* decision, the Court said:

> [263] ...Quite apart from our duty to issue a decision as soon as practicable, the strong flavour of anti-competitive behaviour by QCL suggests a decision should be issued sooner not later.

[163] While it was unfortunate that the Environment Court labelled QCL as a trade competitor, and criticised its behaviour, I do not think it was an error of law which had material consequences. There is no evidence, beyond QCL's genuinely held perception, however, that the characterisation of QCL as a trade competitor influenced the decision, except possibly the decision to hear these applications, notwithstanding the commencement of the proceedings before the other division of the Environment Court in respect of PC19.

Result

[164] The appeal is allowed, for the reason that the decision has material errors of law, summarised at the beginning of this judgment. The case is remitted back to the Environment Court. In case there be any doubt, the application now requires re-evaluation against the current terms of PC19, as they have been amended by the February 2013 decision.

[165] Costs are reserved. If the parties cannot agree costs, I require counsel to circulate draft submissions on costs, not extending beyond five pages each. After that process, file the submissions. I will deal with these submissions on the papers unless there is a request for an oral hearing. Leave to apply in that regard is reserved.

ORIGINAL762

DOUBLE SIDED

Decision No: C86 /99

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an application under section 311 for a declaration by **VIVID HOLDINGS LTD**

ENF : 8/99

BEFORE THE ENVIRONMENT COURT

Environment Judge J R Jackson – (Sitting alone pursuant to section 279 of the Act)

HEARING at QUEENSTOWN on 12 and 13 April 1999

APPEARANCES

Mr G M Todd and Ms J E Macdonald for Vivid Holdings Ltd, D W Andrew, and R W Pringle
Mr W P Goldsmith for Carlin Enterprises, Carolina Developments Ltd, Pisidia Holdings Ltd, Stalker Family Trust, Crosshill Farm Ltd, Allanby Farms Ltd, M L McLellan, J & N Turnbull, R & M Cox – all under section 274
Mr N T McDonald for Design 4 Ltd, Quail Point Properties Ltd, J F Investments Ltd, D Speight, M Clear, M W Pittaway, J Stewart, C Umber, A Jardine, Shotover Properties, G Stalker, K Stalker, W Stalker, Clark Fortune McDonald & Associates, M Hamer, R & P Chilman, R Drayton, C & F Rule, N Beer – all under section 274
Mr N S Marquet for Queenstown Lakes District Council
Mr S Stamers-Smith for Wakatipu Environmental Protection Society Inc

DECISION

Introduction

1. This proceeding is about the validity of a reference by the Wakatipu Environment Protection Society ("the Society") to this Court. The issue is of significance to many rural landowners in the Queenstown Lakes District. The Queenstown Lakes District Council ("the Council") publicly

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

notified its proposed district plan ("the proposed plan") under the Resource Management Act 1991 ("the Act") on 10 October 1995. Part 6 of the proposed plan dealt with urban growth. The explanation for the objective of sustainable growth management stated that a growth management strategy ("GMS") was "seen as essential to the sustainable management of the District's resources and amenities ..."[1]. Part 8 of the proposed plan, called "Rural-Residential Areas", provided for low-density lifestyle residential opportunities in certain rural locations throughout the District. A rural-residential zoning enabled subdivision[2] of the relevant land to a minimum lot size of around 4,000 m^2.

2. The Society lodged a submission ("the Society's submission") relating to part 8 of the proposed plan . The submission states (relevantly):

> *Our submission is that we oppose any new RR zones until the Growth Management Survey/Strategy has shown that there is a need for them and the preferred area(s) for them. The areas in the plan do not appear to be designed in a sustainable pattern as there is no provision for co-ordinated landscape treatment. This will lead to piecemeal development.*
>
> *We seek the following decision from the Council:*
>
> *Refer RR zones for more study as part of the Growth Management Survey/Strategy.*

3. The Council's summary[3] of submissions states in respect of the Society's submission that the Society:

1 Proposed plan p.6/9
2 Under Part 15 of the proposed plan
3 Under Clause 7 of the First Schedule to the Act

opposes any new Rural Residential zones until the Growth Management Survey/Strategy has shown that there is a need for them and the preferred area(s) for them. There is no provision for co-ordinated landscape treatment in the Rural Residential areas in the plan and this will lead to peicemeal [sic] *development.*

It will be seen that this is nearly a copy of the submission. Under the heading 'Decision Requested', the Council summary simply copies the decision sought as stated in the Society's submission (quoted above).

4. The issue of rural subdivision and development attracted many submissions. After months of hearings the Council issued its decision ("the revised plan"). The revised plan:

(1) deletes part 6 of the proposed plan and thus all reference to the GMS; and

(2) retains as Rural Residential the zoning of some of the land zoned Rural Residential in the proposed plan; and

(3) zones as Rural Residential certain other land that had a different zone in the proposed plan; and

(4) introduces a new zone, called the "Rural Lifestyle" zone, applying to:

  (a) some of the land previously zoned Rural Residential in the proposed plan; and

  (b) certain other land previously zoned Rural Downlands;

(5) contains a completely new part 8 called "Rural Living Areas" which contains mainly new objectives, policies and rules in respect of Rural Residential and Rural Lifestyle land.

5. In effect the Council has completely rejected the Society's submission and has gone in the opposite direction. Instead of having no rural-residential

subdivision until a growth management strategy is completed it has, in the revised plan, dropped the idea of a growth management strategy completely and immediately increased the rural living areas. The decision *Issue 6 – Urban Growth* states:

> *... it was inappropriate for* [the Council] *to make any decision with respect to whether a growth management strategy should be conducted* [and] *... the Council has not budgeted for such a strategy and ... there are presently no plans for it to be implemented.*

6. The rules for both the Rural Residential and Rural Lifestyle zones are contained in a single chapter (Part 8 – Rural Living Areas) of the revised plan. The provisions for each zone are almost identical. The only significant difference is in the minimum lot sizes:

   (a) the minimum lot size in the Rural Residential zone is 4,000 m^2;
   (b) the minimum lot size in the Rural Lifestyle zone is 1 hectare provided that the lots to be created by subdivision (including the balance lot) do not average less than 2 hectares.[4]

7. The Society lodged a reference[5] with the Environment Court in respect of the relevant Council decision[6]. Under the heading "Relief Sought" in the reference the Society requests that:

> *The Court make an interim decision referring the entire plan back to council for it to reconsider its decisions to give better effect to the purpose of the Act*

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4 See the table of minimum lot sizes in the revised plan in para 15.2.6.3 [p.15/16]
5 RMA 1394/98.
6 Decision 8/1.1.7.

Alternatively ...

5. Decision 8/1.1.7

5.1 Either reinstate the rural residential zone provisions of the Proposed District Plan (Oct 1995) or

5.2 Delete all rural living zones of the Proposed District Plan (July 1998) and replace with rural general zoning.

The Society's reference also seeks other relief, but that is not challenged in this proceeding.

8. Vivid Holdings Ltd ("Vivid") owns a property near Arrowtown. Vivid lodged a submission on the proposed plan seeking that the Rural Downlands zoning of its property be changed to Rural Residential. This submission was accepted in part by the Council which rezoned the property Rural Lifestyle, and the land therefore falls into one of the categories described above[7].

9. Vivid has now applied to the Court under section 311 of the Resource Management Act 1991 ("the Act") for a declaration that the Court has no jurisdiction to grant some of the relief requested by the Society[8]. Vivid is supported by all other persons who appeared except the Society.

10. None of the parties questioned whether an application for a declaration is the appropriate mechanism in this case. The usual procedure would be an application under section 279(4) for an order striking out all or part of the

7 In paragraph 4(4)(b).
8 Quoted above in para 7

Society's reference. However, I am satisfied that the Court has jurisdiction because section 310 of the Act gives power to declare:

> *(a) The existence or extent of any function, power, right, or duty under the Act.* [my emphasis]

The question in this case involves the extent of the Society's right to refer the Council's decision to this Court.

The Arguments

11. For Vivid, Mr Todd's first submission was that the Society's first relief sought – that the Court refer the entire plan back to the Council for reconsideration – fails to meet the requirement of Form 4 of the Resource Management (Forms) Regulations 1991 ("the regulations") to state the relief sought. A similar issue arose in ***Leith v Auckland City Council***[9]. The appellant there sought *"withdrawal of and/or substantial modification of the plan"*. The Court stated that such a failure could lead the Court to decline jurisdiction. The reasons were that:

> *The present references fail to identify relief that could be granted other than a direction for withdrawal of the proposed district plan. No modification to the plan that would meet the appellants' cases has been specified with any particularity at all. The result is that the respondent had nothing specific to focus its evidence on, and the Tribunal is consequently not able to give adequate consideration to amendments to the proposed district plan that it might direct the respondent to make if any of the appellants' challenges is found to be justified.*

9 [1995] NZRMA 400, 411.

12. Mr Todd's second argument was that the Society's reference fails to meet what he called the accepted test which is:

> *Whether the relief goes beyond what is reasonably and fairly raised in submissions.*[10]

He submitted:

(a) *That the relief sought in the original submission was clearly tied to reconsidering the Rural Residential issue as part of a Growth Management Strategy.*

(b) *That the Wakatipu Environmental Society had clearly filed a submission in relation to the Growth Management issue.*

(c) *That the Queenstown Lakes District Council in releasing its decisions decided to delete all reference to Growth Management and provision for the adoption of a Growth Management Strategy.*

(d) *That the Wakatipu Environmental Society did not appeal the Council's decision deleting all reference to Growth Management and the provision to adopt a Growth Management Strategy.*

(e) *That its failure to file a Reference in respect to such decision is fatal to it now seeking to rely on an original submission where the relief sought in that submission was clearly tied to the provision for a Growth Management Strategy being retained as part of the Plan.*

10 ***Atkinson v Wellington Regional Council*** Decision No: W13/99

13. A third and alternative argument was that the reference filed by the Society now seeks something different to what was sought in the original submission. In particular, relief 5.1 sought by the Society's reference was inconsistent with the original submission which sought no more subdivision in the rural residential zone. Finally in respect of relief 5.2, he noted that the Society did not generally file further submissions in respect of submissions which sought zoning for rural-residential purposes. It only made three such cross-submissions, whereas many specific submissions (about 85) were made to the Council seeking rural-residential zoning for particular pieces of land. A significant number of those submitters are represented in this proceeding and are seeking to have the Society's reference declared invalid.

14. For other parties Mr Goldsmith submitted first that because the Society has not requested reinstatement of the growth management strategy, the relief sought cannot be granted. Alternatively he said that the Society's submission could only refer:

(a) to rural residential land referred to in the proposed plan, not to land which has subsequently been zoned as 'rural living'; or

(b) to land which was covered by a cross-submission by the Society (and there were only 3 such cross-submissions).

15. Mr McDonald adopted the submissions of Messrs Todd and Goldsmith. For the Council Mr Marquet submitted that:

(a) the first relief sought is void for uncertainty;

(b) *... the relief sought in paragraph 5 of the Society's reference is not mandated by the original submission by the Society.*

The role of references in the preparation of district plans

16. The First Schedule to the RMA contains a code for the process of notifying a proposed plan and the making of submissions on it[11]. The relevant clauses for present purposes are those which give power to make submissions, to make a cross-submission on a submission, and to refer a decision to the Environment Court. Clause 6 gives the power to make a primary submission on a proposed plan and the Society's submission was made under Clause 6. The power to make a further or cross submission is contained in clause 8. Vivid and others lodged cross-submissions under this clause against the Society's submission.

17. The primary rule as to the scope of references is clause 14 of the First Schedule to the Act. Rather strangely, almost none of the decisions[12] on the scope of references discuss the wording of clause 14. The submissions of counsel in this case did not even refer to clause 14. That states:

> ***14. Reference of decision on submissions and requirements to the Environment Court***
>
> *(1) Any person who made a submission on a proposed policy statement or plan may refer to the Environment Court*
>
> *(a) Any provision included in the proposed policy statement or plan, or a provision which the decision on submissions proposes to include in the policy statement or plan; or*

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11 Recent decisions on this issue include ***Re An Application by Christchurch City Council*** (Montgomery Spur) C71/99 and ***Christchurch International Airport Ltd et anor v Christchurch City Council*** C77/99 (the Templeton Hospital case)

12 e.g. ***Atkinson v Wellington Regional Council*** (Decision W13/99); ***Telecom NZ Ltd v Manawatu-Regional Council*** Decision W66/97; ***Telecom New Zealand Ltd v Waikato District Council*** Decision A74/97 and ***Hilder v Otago Regional Council*** Decision C122/97 although this decision refers to clause 14. An exception is ***CBD Development Group v Timaru District Council*** Decision C43/99. The leading cases in the High Court ***Countdown Properties (Northlands) Ltd v Dunedin City Council*** [1994] NZRMA 145; ***Royal Forest and Bird Protection Society Inc v Southland District Council*** [1997] NZRMA 408 are of course on the scope of a local authority's decision making powers under clause 10 rather than on clause 14.

(b) Any matter excluded from the proposed policy statement or plan, or a provision which the decision on submissions proposes to exclude from the policy statement or plan,

if that person referred to that provision or matter in that person's submission on the proposed policy statement or plan.

18. Clause 14(1) requires an answer to three questions to establish whether a reference is lawful:

(1) Did the appellant make a submission?

(2) Does the reference relate to either:

(i) a provision included in the proposed plan; or

(ii) a provision the local authority's decision proposes to include; or

(iii) a matter excluded from the proposed plan; or

(iv) a provision which the local authority's decision proposes to exclude?

(3) If the answer to any of (2) is 'yes', then did the appellant refer to that provision or matter in their submission (bearing in mind this can be a primary submission[13] or a cross-submission[14])?

19. It is difficult to see how a submitter can refer[15] directly in their submission to provisions or matters which a decision proposes to include or exclude unless their submission has been accepted by the local authority in which it is unlikely the submitter will be referring the matter to the Court. No one

13 Under clause 6 of the First Schedule
14 Under clause 8 of the First Schedule
15 ***CBD Development Group v Timaru District Council*** Decision C43/99

can reliably anticipate the collective mind of the local authority. I consider that in order to start to establish jurisdiction a submitter must raise a relevant 'resource management issue'[16] in its submission in a general way. Then any decision of the Council, or requested of the Environment Court in a reference, must be:

(a) fairly and reasonably within the general scope of:

(i) an original submission[17]; or

(ii) the proposed plan as notified[18]; or

(iii) somewhere in between[19]

provided that:

(b) the summary of the relevant submissions was fair and accurate and not misleading[20].

20. The leading authorities on the scope of local authority decisions are ***Countdown***[21] and ***Royal Forest & Bird Protection Society Inc v Southland District Council***[22]. In the latter case Panckhurst J adopted ***Countdown*** and stated:

> *... [T]he assessment of whether any amendment was reasonably and fairly raised in the course of submissions, should be approached in a realistic workable fashion rather than from the perspective of legal nicety.*

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16 As the term is used in section 75(1)(a) of the Act

17 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145; *Royal Forest and Bird Protection Society Inc v Southland District Council* [1997] NZRMA 408; *Atkinson v Wellington Regional Council* W13/99 is a recent example referred to by Mr Todd

18 *Telecom NZ Ltd v Waikato District Council* A74/97 at p.4

19 *CBD Development Group v Timaru District Council* C43/99

20 *Re An Application by Christchurch City Council* (Montgomery Spur) C71/99 and *Christchurch International Airport Ltd et anor v Christchurch City Council* C77/99

21 [1994] NZRMA 145

22 [1997] NZRMA 408 at 413

I hold that the same interpretative principle applies to the assessment of the scope of references and whether they raise sufficient matters under clause 14 of the First Schedule to establish jurisdiction.

The requirements of clause 14 in this case

21. The Society filed a submission and it does relate to provisions included in Part 8 of the proposed plan – the objectives, policies and rules for rural-residential activities. In addition, the Council's decision proposes to exclude the growth management strategy and consequent objectives and policies from the proposed plan so the Society could have referred that excluded provision to the Court. The Society has chosen not to do that. In fact the Society has in its reference (paragraphs 5.1 and 5.2) sought different relief which focuses on what the Council decision proposes to include, that is further rural-residential zoning and the creation of a rural lifestyle zone, together grouped in a new Part 8 called "Rural Lifestyle".

22. The Society's primary submission clearly raised the issue of rural-residential subdivision. It opposed any new rural-residential zones. Admittedly that was only until a growth management "survey/strategy" was completed, but that is no longer going to occur. I cannot think it is reasonable to hold (as Vivid and others have requested) that the Council's decision not to proceed with a growth management survey and/or strategy knocks out the Society's submission or right to refer the Council's decision. To the contrary, I consider that, in the absence of such a survey/strategy being completed, the Society has made it clear that it opposes new rural-residential development throughout the district. When the Society's reference seeks as alternative relief, not the deletion of all rural-residential zones, but the deletion of those which were not included in the proposed plan, that relief can be seen as a subset of what it referred to in its submission. The relief is within the scope of the Society's original

submission because the Society referred to *"no more rural-residential zoning"*. That phrase can fairly and reasonably be seen as relating to both provisions included in the proposed plan and to provisions the decision proposes to include (i.e. in the revised plan). Since this is *"a question of degree to be judged by the terms of the proposed [plan] and of the contents of the submission"*[23] I now consider the relevant factors.

23. In ***Westmark Investments Ltd v Auckland City Council***[24] Barker J was considering "so-called grounds for submission … being a statement against planning controls generally" and whether these were sufficient to establish a valid reference to the Planning Tribunal. He compared the primary submission with those in ***Countdown*** and said:

> *I acknowledge, as was done in the* ***Countdown*** *case at 167, that persons making submissions are unlikely to fill in the forms exactly as required by the First Schedule, even when the forms are provided to them by a local authority. The Full Court noted that the Act encourages public participation in the resource management process; that the ways whereby citizens participate in that process should not be bound by formality.*
>
> *The comments were made in the context of assertions to the Court that the wider public had been disadvantaged. In that case, there was no doubt that all parties before the council and before the Tribunal, knew exactly what the issues were; there was no question of a broad general attempt to torpedo a whole plan by a submitter who did not even to* [sic] *attempt to follow the form and made broad assertions unsupported by any substance.*

23 *Countdown* [1994] NZRMA 145 at 166
24 [1995] NZRMA 570 at 572

> *I note that in the* ***Countdown*** *case, there were discussions about possible amendments to the plan presented at the hearing of submissions. That possibility, as discussed by the Tribunal and by the Court in* ***Countdown****, cannot diminish the duty of somebody making a submission to attempt to say exactly what it is in the plan that is objected to and what result is sought. Latitude about the lack of formality surely must be directed to the wording of the relief sought or to the specificity of the parts of the plan to which objection is taken. For example, if the submitter said that he or she did not like the height restrictions in a particular zone or height restrictions in general and asked that these all be removed that would be sufficient probably.*[25]

24. Without elevating Barker J's words into an independent test or checklist for compliance with the First Schedule, it is useful to consider how the Society's submission might measure against the considerations Barker J identified. In this case, I find that:

(1) all persons who read the Council's summary of submissions, and all parties to this case, knew exactly what the Society's issue was – whether or not there should be more rural residential subdivision;

(2) there is no question of an attempt by the Society in its reference to torpedo the whole revised plan;

(3) the Society has generally followed the forms in the regulations in both its submission and in its reference;

(4) the opposition to rural-residential zoning is supported by at least one matter of substance – especially in the Queenstown-Lakes district – and that is the reference in the primary submission to landscape values.

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25 *Westmark* at p.575

I also note that by analogy with Barker J's example with respect to height restrictions, it is probably sufficient if the Society's submission (and thus by extension its reference) stated it did not like rural-residential zonings in general. In fact the Society has gone further, and has now cut down the relief it is seeking.

25. I therefore hold that in this case the Society's reference is jurisdictionally sufficient when it seeks no further rural-residential subdivision or activity beyond what was in the proposed plan. That is so even if the issue is inextricably involved in fact with individuals' submissions and the Council's decision on them. My decision on that point may be conclusive on the jurisdictional issue but the following aspects of the policy and scheme of the Act are also relevant.

The Society's failure to lodge further submissions on rural-residential issues

26. First, I do not overlook that a local authority's decision can neither propose to include a provision nor exclude a matter unless there is a submission to that effect (or it is a consequential alteration)[26]. In this context, a provision is a form of words describing an issue, objective, policy, rule or other method, or reason etc[27]. Thus in this case the Council could only propose to rezone other areas as rural-residential if there were submissions seeking that. If there were such submissions then they had to be summarised and notified. The Society therefore had an opportunity to lodge cross-submission on any such primary submissions. The issue is whether this leads to the conclusion that in general the Society's reference cannot relate to further rural-residential subdivision beyond what was in the proposed plan? In other words: is the failure to lodge cross-submissions on individuals' submissions seeking rural-residential zoning fatal?

[26] Under clause 10(2)
[27] See section 75 (for district plans) and section 67 (for regional plans)

27. Secondly, it is the policy of the RMA to encourage public participation[28]. If I hold that the Society's reference is invalid, then that policy is not being carried out. Of course, in this case, many people will be affected by the Society's reference, and may have to appear and call evidence when they did not expect to because there were no cross-submissions on their primary submissions. Those matters are partly a consequence of the scheme and policy of the RMA, and partly a matter which can be dealt with in the hearing procedure by this Court. For example, the Society can be directed to give particulars as to which specific pieces of land it opposes rural-residential zonings for.

28. Thirdly, as to the scheme of the RMA, the Court has the wide power in section 293 of the Act to change any provision of a plan when hearing a reference to the Court. Certainly this power is exercised cautiously and sparingly,[29] but its existence suggests that if the Court is concerned that other interested persons should be heard then it can remedy that by directing notification under section 293(2). I consider that one of the reasons Parliament has given the Environment Court the powers in section 293, especially in section 293(2) is to cover the situation where the relief the referrer is seeking is not spelt out in adequate detail in the submission and/or the reference. Obviously it is good practice to spell out precisely the relief sought[30], but it is not essential to do so. If it is not and the Court considers a reasonable case for a particular change to a proposed plan is made out but that interested persons have not had adequate notice -

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28 See *Murray v Whakatane District Council* [1997] NZRMA 433 (HC) and ***Bayley v Manukau City Council*** [1998] NZRMA 513; (1998) 4 ELRNZ 461

29 See ***Kaitiaki Tarawera Inc v Rotorua District Council***(1998) 4 ELRNZ 181 at 188; also ***Romily Properties Ltd v Auckland City Council*** A95/96 at p.6

30 ***Leith v Auckland City Council***[1995] NZRMA 400.

because the relief was not stated, or not clearly - then the Court can exercise its powers under section 293(2).

29. That section covers the situation which came before the High Court under the Town and Country Planning Act 1977 ("the TCPA") in ***Nelson Pine Forests Ltd v Waimea County Council.***[31] In that case the Maruia Society had made a submission to the local authority seeking that the activity of clearing native forest and scrub be a conditional use in the district scheme. The Council despite opposition from NPF in an objection, introduced conditional use status for land clearance. Ordinances (rules) concerning conditions to be attached to the activity if consented to, were proposed by the Council to the Planning Tribunal on appeal. Holland J stated:

> *The Court considers that an informed and reasonable owner of land on which there was native forest should have appreciated that, if NFAC's objection was allowed and the logging or clearing of any areas of native forest became a conditional use, then either conditions would need to be introduced into the ordinance relating to conditional use applications, or at some stage or other the council would adopt a practice of requiring certain information to be supplied prior to considering such applications. Had the council adopted the conditions to the ordinances that it presented to the Tribunal at the time of the hearing of the objection, I am quite satisfied that no one could reasonably have been heard to complain that they had been prejudiced by lack of notice. Such a decision would accordingly have been lawful.*[32]

30. Thus, there was the possibility under the TCPA that the Planning Tribunal's decision could go beyond the local authority's decision by way

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31 (1988) 13 NZTPA 69
32 (1988) 13 NZTPA 69 at 73

of amending a plan[33], but it is certain that the Environment Court may do so under the RMA because of its powers under section 293 of the Act. Thus in unusual cases, and at this stage I do not think this case is one, people may be involved at a late stage even though they had not previously been involved in the new plan process or at the reference level. But my point here is that there is a safeguard for them, to ensure they can be given a chance to be heard.

31. In the circumstances I consider the second and third aspects of the scheme and policy of the Act which I have identified outweigh the first. An aim of the Act is to assist and encourage public participation in the plan process. It does not impose two sets of procedural hurdles in front of interested persons which they must jump, or if they fail, be excluded from the process. If, as I have held, the Society's general reference opposing rural-residential zoning beyond that proposed in the proposed plan is valid as fairly and reasonably within the scope of the original submission, then the omissions of the Society:

(a) to oppose many submissions seeking further rural living zones by filing further submissions on those issues;

(b) to refer the proposed exclusion of a growth management strategy from the plan to the Environment Court

- are not fatal to the Society's reference (paragraphs 5.1 and 5.2).

Outcome

32. In the circumstances I hold that the Court does have jurisdiction to grant the relief sought by the Society in paragraphs 5.1 and 5.2 of its reference. The Court is likely however to decline jurisdiction in respect of the first

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[33] See the ***Nelson Pine Forest Ltd*** case at p.74

relief sought in the Society's reference. In the meantime, because the Court has jurisdiction, Vivid's application for a declaration is refused.

33. Costs are reserved, although my initial view is that they should lie where they fall for two reasons: first the Society is the author of all the difficulties because its original submission and reference are both unclear; secondly, while Vivid and the supporting parties have been unsuccessful, there was genuine doubt about the true legal status of parts of the reference.

34. The Society's reference will now be set down for a pre-hearing conference. It may be possible at that time to refine the issues further. The persons who appeared in this proceeding and those who filed submissions seeking rural-residential zoning for their land should consider whether they wish to appear under section 274. In the meantime I prefigure my intention (subject to any submissions on the issue) to direct the Society to serve its reference (minus any attachments) on the persons who made submissions seeking rural-residential zoning of their land.

DATED at CHRISTCHURCH this 17th day of May 1999.

J R Jackson

Environment Judge

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

ORIGINAL

Decision No. C 90 /2005

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of references under clause 14 of the First Schedule of the Act
BETWEEN	WAKATIPU ENVIRONMENTAL SOCIETY INCORPORATED
	(RMA 1165/98)
	Referrer
AND	QUEENSTOWN LAKES DISTRICT COUNCIL
	Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge J R Jackson (presiding)
Environment Commissioner C E Manning
Environment Commissioner R Grigg

Hearing at Queenstown on 23-25 May 2005

Appearances:
Ms N S Marquet for the Queenstown Lakes District Council
Mr R Bartlett and Mr P Page for D S and J F Jardine and G B Boock
Mr A M B Green for Shotover Park Limited and Naturally Best New Zealand
Mr G M Todd for Henley Downs Limited
Mr W P Goldsmith and Ms V Walker for Jacks Point Limited

DECISION

Introduction

[1] The Coneburn Valley runs south from the Kawarau River to the point, just south of Lakeside Estates, where the western face of the Remarkables meets Lake Wakatipu. It is flanked on the east by the Remarkables, on the north-west by Peninsula Hill, and

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

further south on the western side by Jacks Point. These western landforms are roches moutonnées which are linked by the Tablelands, a hummocky, elevated area formed by glaciation. At its southern end the valley descends to Lake Wakatipu in a series of terraces which are most pronounced at the south-eastern end (near Lakeside Estates). State Highway 6 runs along the eastern side of the valley.

[2] Formally the purpose of this case is to determine the final location of a planning line separating the Outstanding Natural Landscape of the Remarkables and Lake Wakatipu from the Coneburn Valley lying between them. The central issue between the parties is whether land ("the Jardine land") in the valley to the east of State Highway 6 owned by D S and J F Jardine is part of the outstanding natural landscape.

[3] The land concerned is on the shores of Homestead Bay on Lake Wakatipu and lies immediately north-westwards of Lakeside Estates and to the south and east of Jacks Point. It is south of land that now has unchallenged zoning as the Jacks Point Resort Zone as a result of Variation 16 to the Queenstown Lakes District Council's Partly Operative District Plan. Part of the Jardine land has also been rezoned Jacks Point Resort Zone, but that zoning has been challenged by a reference to the Environment Court. The zoning reference is to be heard separately, and this decision does not expressly or by implication deal with the question of the appropriate zoning of the land.

The positions of the parties

[4] The Council's proposed line showing the extent of the outstanding natural landscape ("ONL") was agreed by all parties in these proceedings with the exception of Shotover Park Limited and Naturally Best New Zealand Limited. These dissenting parties contended that the Jardine land west of the State Highway was part of an outstanding natural landscape, although they did exclude from the ONL land to the north of it, and did not formally oppose the classification of the land to the north as Visual Amenity Landscape ("VAL"). As a fall-back position, Ms D J Lucas, an experienced landscape architect called by Shotover Park and Naturally Best New Zealand, suggested that only the series of terraces might be included in the ONL, but did not recommend such a division of the landscape classification.

[5] The original referrer, the Wakatipu Environmental Society Incorporated, no longer maintained an interest in these proceedings. Jacks Point Limited and Henley Downs Limited appeared broadly in support of the Council's and the Jardines' position, but particularly to preserve their own position in the event that there was any evidence to suggest that land to the north of the Jardine land should also be included in the ONL.

[6] The central issues in this case appear to be as follows:

- Is there a valley landscape, separate from the ONL of the Remarkables and Lake Wakatipu, and if there is, how should it be classified?
- If there is a separate valley landscape, does the Jardine land belong with it, or with the ONL?
- What difference does the unchallenged zoning to the north make to our conclusions?
- If the primary position of Shotover Park Limited and Naturally Best New Zealand cannot be sustained, is there any merit in Ms Lucas' alternative suggestion?

[7] To assist us in considering what we described in paragraph [6] as the central issues in this case, we received evidence from five landscape architects: Ms E J Kidson, called by the Queenstown Lakes District Council; Ms D N Lucas, called by Shotover Park Limited and Naturally Best New Zealand Limited; and Messrs B Espie, T J King and R F W Kruger, called by D S and J F Jardine.

Legal issues

[8] Before we deal with these issues, we outline the law as it applies to these references and discuss how the Partly Operative District Plan deals with landscapes. We will also outline the Court's previous consideration of land in the Coneburn Valley.

[9] The original reference from which this case derives dates to 1998. We are therefore required to apply the provisions of the Act as they were prior to the 2003 Amendment Act. Under that form of the Act, territorial authorities, in preparing and

changing their district plans, are required to do so in accordance with their functions under section 31, the provisions of Part II, their duties under section 32 and any regulations[1]. The same requirements apply to the Environment Court in dealing with references[2].

[10] The case involves largely a fact-finding exercise to determine which provisions of Part II of the RMA apply to the land in question. The objectives, policies and rules which apply to the various categories of landscape are not at issue in the proceedings, and our duties under section 32 are satisfied by ensuring that the land is accurately categorised and that the provisions of the plan already determined to be necessary for the type of landscape concerned are in consequence applied to it.

[11] Section 31 of the Act specifies that one of the functions of territorial authorities is:

> (a) The establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district:

We accept that to apply different landscape categories and their consequent provisions to part of the same landscape, and where the land displays similar characteristics, would not achieve integrated management. As Mr Bartlett submits, similar factual situations should give rise to similar legal situations.

[12] Section 4 of the Partly Operative District Plan divides the landscapes broadly into three categories, outstanding natural landscapes and features, visual amenity landscapes, and other landscapes[3]. Subsequently the plan talks of outstanding natural landscapes, visual amenity landscapes, and other **rural** landscapes. In addition to adopting different policies for outstanding natural landscapes, visual amenity landscapes, and other areas on a district-wide basis, a rule applying to rural zones makes it mandatory, when assessing resource consent applications in these zones, to determine

1 Section 74(1) RMA.
2 Section 290(1) RMA.
3 Issues 4.2.4.

the landscape category of the site concerned as part of either an outstanding natural landscape (ONL), visual amenity landscape (VAL) or other rural landscape (ORL)[4].

[13] The High Court in *Queenstown Lakes District Council v Trident International Limited*[5] has held that it is an error of law not to assign land zoned Rural-General to one of these three categories of landscape even if the site could be regarded as part of a peri-urban landscape. This is as a result of Rule 5.4.2.1. This rule, of course, only applies when assessing proposals for resource consent.

[14] The consent authority (and on appeal this Court) is not required to classify the landscape in other zones. Neither is it precluded from doing so. We also note that there is no requirement to determine landscape category prior to assessing resource consent proposals, though we consider it good practice to do so, so that all parties are clear at an early stage about what criteria proposals are required to satisfy.

[15] The Partly Operative District Plan describes the various categories of landscape in the following way:

> The outstanding natural landscapes are the romantic landscapes – the mountains and the lakes – landscapes to which Section 6 of the Act applies.
>
> The visual amenity landscapes are the landscapes to which particular regard is to be had under Section 7 of the Act. They are landscapes which wear a cloak of human activity much more obviously – pastoral (in the poetic and picturesque sense rather than the functional sense) or Arcadian landscapes with more houses and trees, greener (introduced) grasses and tend to be on the District's downlands, flats and terraces. The extra quality that these landscapes possess which bring them into the category of 'visual amenity landscape' is their prominence because they are:
>
> - adjacent to outstanding natural features or landscapes; or
> - on ridges or hills; or
> - a combination of the above.

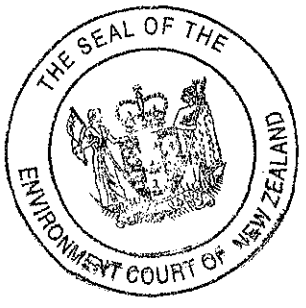
4 Issues 4.2.4(2), (3) and (4). Rules 5.4.2 and 5.4.2.1.
5 CIV 2004-485-002426 paras 25-27.

[16] The Court has considered landscapes in the Coneburn Valley area on two previous occasions. First in *Wakatipu Environmental Society Incorporated v Queenstown Lakes District Council*[6] the Court said:

> ... we hold that the inner edge of the ring – inside which the landscape is not an outstanding natural landscape but is at least in part a visual amenity landscape – is the area inside the black lines marked on the attached Appendix II[96]. The edge runs approximately
>
> ...
>
> - up the Kawarau River to Riverside Road;
> - across and downstream to the 400 m contour;
> - south along the 400 m contour to Remarkables Station homestead;
> - around three sides of the homestead up to the bank and back along the power lines;
> - south along the power lines until due east of Trig B;
> - due west to Lake Wakatipu;
> - inside Trig E (east of Jacks Point) to the two tanks and around the base of Peninsula Hill to SH6;
>
> ...
>
> [96] A copy of part Infomap Series 260 Maps E1 and F41. The dotted lines are: (a) either where the boundary follows a zone boundary in the revised plan; or (b) where we have some uncertainty as to where precisely to draw the line.

We attach Appendix II to this decision as attachment A. We note from the dotted line that the Court had some uncertainty about the precise line. The dotted line at the bottom of the topographical map joins the north-south running lines some 750 metres south of the northern cadastral boundary of the Jardine land. We agree with the evidence of Ms Kidson that there is no topographical difference between the northern and southern edge of the Court's interim line and that it should be regarded only as a temporary approximation.

[17] Secondly in *Wakatipu Environmental Society Incorporated v Queenstown Lakes District Council*[7] the Court determined that the narrow neck of the valley north of the Hensman shelterbelt which runs between the Remarkables and Peninsula Hill was part of a VAL.



6 [2000] NZRMA 59 at para 111.
7 C203/2004.

[18] In this proceeding no party disputed or called evidence to deny that land in the Coneburn Valley north of the Jardine land was also part of a visual amenity landscape.

Is the Coneburn Valley a separate landscape? and how should it be classified?

[19] For the sake of completeness we record the position of the various witnesses on these questions:

- Ms Lucas considered that the base to the Remarkables could not be assessed as a landscape separate to the Remarkables themselves. In reaching this conclusion Ms Lucas had only considered the Jardine land as her brief had been specifically limited to this.
- Ms Kidson, Mr Espie and Mr King held that the landscape values associated with the Remarkables and those associated with the valley floor were different, and that there were two separate landscapes.
- Mr Kruger considered that the changes to the valley floor enabled by Variation 16 which were already taking place, had disrupted a once cohesive landscape; although prior to variation 16 he had been of the same opinion as Ms Lucas, he now no longer considered that position tenable.

[20] We do not consider it necessary to discuss the evidence and arguments of the expert witnesses on this question in great detail. We find that by accepting the landscape line drawn by the Council north of the Jardine land, Shotover Park Limited and Naturally Best New Zealand Limited have accepted that there is a Coneburn Valley floor landscape separate from the Remarkables and Lake Wakatipu. We find that there is a separate valley floor landscape and that it is appropriately categorised VAL. We go on to consider whether the Jardine land in question is part of that landscape or part of the ONL.

Does the Jardine land belong with the valley or with the Remarkables?

[21] When the Council is considering an application for a resource consent, rule 5.4.2.1 of the Partly Operative Distinct Plan sets out a list of factors that must be included when analysing a site and its surrounding landscape. They are:

> An analysis of the site must include a description of those existing qualities and characteristics (both negative and positive), such as vegetation, topography, aspect, visibility, natural features, relevant ecological systems and land use.
>
> An analysis of the surrounding landscape must include natural science factors (the geological, topographical, ecological and dynamic components in of the landscape), aesthetic values (including memorability and naturalness), expressiveness and legibility (how obviously the landscape demonstrates the formative processes leading to it), transient values (such as the occasional presence of wildlife; or its values at certain times of the day or of the year), value of the landscape to Tangata Whenua and its historical associations.

[22] This proceeding is of course a reference. However, we consider the factors outlined in rule 5.4.2.1 helpful and appropriate in determining to which of the two landscapes the Jardine land belongs, although the Tangata Whenua values and historical associations of the land were not a significant issue between the parties.

[23] Ms Lucas gave evidence that in the ice ages glaciers had dug out the trench between the Remarkables and the roches moutonnées and deposited moraine mounds; however the Remarkables were now eroding and infilling the glacial deposits with material from the crags above. She described the fans formed by the erosional process variously as the great alluvial skirt or apron of the Remarkables. She continued "the alluvial skirt is part of the mountain block". She also considered the Jardine land part of the mountain landscape of the Remarkables.

[24] Mr Kruger considered the geological situation rather more complex. Referring to geological maps produced by himself and Ms Lucas, he said that the area under consideration showed comparatively little evidence of alluvial deposits which were "part of the mountain block", but was made up mainly of glacial deposits, beach deposits, and old beach deposits. He considered the subject area showed a mix of geological formations. We agree with this evidence. We add that on the basis of the geological map produced by Ms Lucas, the only geological feature distinguishing this land from the rest of the valley is the presence of an extensive area of old beach deposit.

[25] While the presence of schist fan debris from the mountains on part of the Jardine land is undeniable, we find that geologically the Jardine land belongs to the valley floor landscape.

[26] In terms of topography the major contrast is between the steep rugged schistose wall of the Remarkables and the gently undulating floor of the broad shallow valley. Even Ms Lucas described the valley floor as "gentle lands". By contrast there is no significance topographically in the cadastral boundary to the north of the Jardine land, a point Ms Lucas accepted in discussion with the Court. Topographically the Jardine land is part of the valley landscape.

[27] Mr Espie referred us to Appendix 5 of the Coneburn Resource Area Study prepared by Boffa Miskell Limited. This map attached to this report shows much of the valley area and parts of the Tablelands as developed farmland. By contrast the upper mountain slopes are comprised either of tussock lands or unvegetated rock and scree while the upper part of the alluvial fans connecting the mountains to the valley floor are generally covered by grey shrubland or bracken fern. It is on the lower part of these fans that a line can be drawn between the native ecology of the mountains, and the improved pasture and exotic vegetation of the valley floor. The Jardine land is covered with the exotic pasture grasses and contains shelterbelts associated with the pastoral development of the land.

[28] Ms Lucas did not attach great significance to this distinction. She considered that farming had "thinly draped a cultural layer over these lands" and that such features as shelterbelts were part of a land management regime which should not be assumed to be permanent. Mr Kruger considered that had been the situation prior to the introduction of Variation 16, since up to that time human modification had been sufficiently limited that natural succession would have been able to return the land to a higher level of ecological authenticity; it was now his opinion that the domestication associated with Variation 16 was irreversible.

[29] We consider that, even without Variation 16, the possibility of the reversion of all the Jardine land to pre-human types of vegetation is remote. We accept that shelter belts may be planted and later cut down as agricultural management techniques change.

But the change is to different types of agricultural landscape and the evidence of human intervention remains. Ecologically the Jardine land is linked to the valley rather than the mountain landscape.

[30] We note that the Jardine land not only has a number of residential and agricultural buildings, but in the northern area there is an airstrip used for the purpose of commercial tandem skydiving.

[31] Once it is accepted that there are two landscapes in the area, we accept the evidence of Ms Kidson and Mr Espie that the distinction is between the aesthetics of wild, rugged mountains, with little evidence of human influence and the pastoral aesthetics of the valley floor and the grazed parts of the tablelands. There is no reason at present to separate the Jardine land from the rest of the valley floor, though as this Court has stated in *Stalker v Queenstown Lakes District Council*[8], it is appropriate to turn our minds to what the unchallenged provisions of the plan envisage on the valley floor, and what effects this might have. This approach has been confirmed by the High Court in *Wilson v Selwyn District Council*[9]. We will discuss this in a separate section of this decision.

[32] Ms Kidson also gave evidence that transient effects differed in kind in the valley from those on the mountain slopes. In the valley the landscape changes often result from seasonal changes in land use patterns, whereas on the mountain slopes changes come sometimes within a matter of minutes or hours from the varied effects created by light and weather patterns. The examples given by Ms Kidson were of the effects of sunsets on the rock face of the Remarkables, or of storm conditions visually separating the various ridges, or of snow lingering in the chutes down the face of the mountains. We accept the evidence of Ms Kidson that the mountains are subject to more rapid and more varied changes in effect than the valley floor where these changes are generally confined to seasonal changes in vegetative cover. The Jardine land is subject to the same transient effects as the rest of the valley floor.

8 C40/2004 at paras [8] – [15].
9 CIV 2004-485-000720.

[33] Once it is accepted that there is a valley floor landscape which can be separated from the Remarkables – and Shotover Park and Naturally Best New Zealand have not challenged that as far as land north of the Jardine land is concerned – a consideration of the geological, topographical, ecological, aesthetic and transient values associated with the landscape leads inexorably to the conclusion that the Jardine land is part of the valley floor landscape, and, as things presently stand, part of a visual amenity landscape.

Is the position changed by the Resort zoning to the north?

[34] Variation 16 rezoned land to the north of the land being considered in this proceeding as Jacks Point Resort zone. That land is owned by Jacks Point Limited and Henley Downs Limited, and the rezoning of it is beyond the point of challenge. The variation also rezoned 134 hectares of Jardine land in the same way, but that is still contested.

[35] The objective[10] for the zone is:

> To enable development of an integrated community, incorporating residential activities, visitor accommodation, small-scale commercial activities and outdoor recreation – with appropriate regard for landscape and visual amenity values, servicing and public access issues.

Development is to be in accordance with a structure plan and includes provision for residential activities clustered at urban densities, two lodges, visitor activity areas, an 18 hole golf course, home sites of a more rural residential character on the tablelands, a farm buildings and crafts activity area, and a boat facilities activity area.

[36] Mr Green for Shotover Park Limited and Naturally Best New Zealand Limited submitted that the effect of this zoning was such that a VAL landscape classification for land to the north of the Jardine land could no longer be maintained. He submitted that for those areas beyond challenge, there are no linkages to sections 4 and 5 of the plan, since they are no longer in the Rural-General zone.

[10] Objective 12.1.4.2.

[37] If Mr Green is correct in asserting that the application of landscape categories to any land except that in the Rural-General zone is redundant, he has some difficulty in maintaining that an ONL classification should apply to that part of the Jardine land zoned Jacks Point Resort zone, despite that zoning still being subject to challenge. Clause 16B(2) of the First Schedule to the Act provides that from the date of public notification of a variation, the proposed plan shall have effect as if it had been so varied. There would thus be no basis to apply a landscape category to the rezoned Jardine land.

[38] Mr Green is correct that the provisions of Section 5 of the Plan do not apply to this land. However the landscape categories outlined at the beginning of the statement of landscape and visual amenity issues in section 4 are very broad. The issues are district-wide and do not appear to preclude the application of one of these categories to other than rural land. Mr Green noted that the Court had excluded from the Wakatipu Basin ONL "all land zoned residential, industrial or commercial in Queenstown, Arthurs Point and Arrowtown". For his argument that exclusion from classification should also apply to the Jacks Point Resort zone he relied on Mr Kruger's reply to a question from the Court that if Variation 16 is implemented the landscape category would become null and void, because the land in question would be an urban landscape, and Ms Lucas' reply that the rezoning of land to the north made it irrelevant to assign it to a landscape category.

[39] We accept that the result of the development of Jacks Point Resort zone may be that landscape classification of the land it occupies becomes redundant. However Mr Goldsmith submitted that this result is not certain. He referred us to those provisions in the structure plan which concentrated residential areas in about 300-350 hectares of a valley landscape of possibly 1,500 hectares, and a provision in the zone rules that in the total zoned area the maximum site coverage (curtilage of residential areas excluded) cannot exceed 5% of the total zone.

[40] We note that the policies which flow from the Jacks Point zone's objective contain a solid basis from which to protect landscape values. They include[11]:

- maintenance and protection of views into the site from the lake, and views across the site to the mountain peaks beyond when viewed from the roadway;
- requiring the external appearance, bulk and location of buildings to have regard to landscape values;
- requiring development in accordance with a structure plan so that the impact on landscape values is mitigated;
- ensuring that subdivision, development and ancillary activities are subservient to the landscape;
- providing for local biodiversity;
- ensuring that residential activity is not readily visible from the highway;
- ensuring that the visual amenity values of Queenstown's southern entrance are not compromised;
- ensuring that development associated with farming and related activities does not produce over-domestication of the landscape.

Amongst the environmental results anticipated are preservation of open space and rural amenity and conserving the key scenic values of the area by recognising the predominant surrounding landforms, particularly the peaks and mountain ranges, and recognising and enhancing important vegetation and the important and dominating natural and visual resources of the site.

[41] Given the concerns for landscape expressed in the zone's provisions and in particular the anticipated environmental outcome of preserving rural amenity, it may be premature on the rather limited nature of the evidence provided to us, to conclude that the application of the section 4 landscape classification to Jacks Point Resort zone land is irrelevant or redundant. In any event, if it is, that applies equally to that part of the Jardine land zoned Jacks Point Resort zone.

[11] Policies 12.1.4.3.1, 12.1.4.3.3, 12.1.4.3.4, 12.1.4.3.7, 12.1.4.3.8, 12.1.4.3.10, 12.1.4.3.11, 12.1.4.3.14.

[42] Paragraphs [34] to [41] of this decision give us a sufficient basis to find that the Jacks Point Resort zone which is unchallenged to the north of the Jardine land does not affect our previous findings that there is a separate valley landscape which can properly be categorised as VAL and that the Jardine land is part of that landscape. However, there is another matter on which we consider the Court's guidance could be helpful, although it is not strictly necessary in deciding this case.

[43] Implicit in Mr Green's submission that landscape classification of the unchallenged Jacks Point zoned land was irrelevant, is the suggestion that the Jardine land on its own is too small to be considered a separate landscape and for that reason should be regarded as part of the neighbouring ONL. This raises the question what is the effect on the rural remnant of a landscape when the other part(s) of that landscape are urbanised? We remind ourselves that, in accordance with the High Court decision in *Queenstown Lakes District Council v Trident International Limited*[12], land in the Rural-General zone must be classified in accordance with Rule 5.4.2.1 of the Partly Operative District Plan before a resource consent can be granted for any activity. This is the first time this Court has considered the question in the light of the High Court's guidance.

[44] In *Wakatipu Environmental Society Incorporated v Queenstown Lakes District Council*[13], the Court outlined in broad terms the area of land necessary to constitute a landscape:

> ... evidence suggests that in most circumstances in the district a flat area that has the following characteristics may begin to be considered a separate landscape:
>
> (a) it must contain at least one (preferably more) rectangle with at least 1.5 x 2 kilometre sides;
> (b) no part of the landscape may be more than 1 kilometre from such a rectangle;
> (c) it must contain a minimum area of 600 hectares;
> (d) internal corners should be rounded.
>
> We do not find that such a quantitative measure of scale is appropriate but introduce it to the parties as an inference from the common stance of the landscape experts in these proceedings in case it is useful in the future.

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12 CIV 2004-485-002426.
13 C73/2002 at para 20.

[45] We note the general terms in which the Court made these remarks. We consider they may have limited applicability to remnant landscapes. The passage cited certainly does not suggest that the guidelines should be applied in a mechanistic way so that when the remnant of a rural landscape that has been part urbanised fails to meet the dimensions suggested, that remnant is automatically joined with the neighbouring rural land to achieve the requisite area and classified with that land. The more appropriate approach is to determine the extent of the landscape of which the land in question is a part, to determine what effect any actual or potential urbanisation has on that landscape, and to determine what the landscape classification of that landscape is in terms of the categories in section 4 of the plan. If the total landscape is not Outstanding Natural Landscape or Visual Amenity Landscape, any rural part of another landscape should be classified as Other Rural Landscape to address the requirements of section 5 of the district plan.

[46] Such an approach is consistent with that adopted by the High Court in *Queenstown Lakes District Council v Trident International Limited* and would produce in this case the same outcome as we reached at paragraph [42].

Ms Lucas' alternative line

[47] As a tailpiece to her evidence-in-chief Ms Lucas offered, but did not recommend, to the Court the option of including the wave cut beaches in the ONL, but without the alluvial lands above. Earlier in her evidence Ms Lucas had described these beaches as "great wide staircases [which] step down from the fans and moraine onto the lakeshore below" and a "stepped pedestal to the great mountain above and its alluvial skirt". She considered that they were highly legible horizontal bands which indicated former higher lake levels. These beaches are found around between Jacks Point and Lakeside Estate. In cross-examination Ms Lucas told us that this would involve the landscape line delineating the ONL being drawn between 300 and 800 metres inshore from Homestead Bay, so that the land between the shore and the line was included in the Outstanding Natural Landscape.

[48] Ms Kidson also described the terraces and the shoreline area. She told us that to the south of Jacks Point the landform around the lake flattens and slopes gradually back in a series of terraces. It was her evidence that the terraces became more marked to the south, along the shoreline of Lakeside Estates. She also told us that terraces were also obvious in the Glenorchy region around Blanket Bay at the Stone Creek and Buckler Burn, and referred us to similar features in the Frankton Arm, and at Collins Bay, Halfway Bay and Drift Bay.

[49] Having viewed the terracing beside Homestead Bay and heard the evidence of more marked features of the landform elsewhere, including not very far south of the subject land, we do not consider these terraces to be particularly legible or outstanding. We find that to draw the landscape line in the alternative location proposed by Ms Lucas would not be warranted.

Overall conclusions

[50] We summarise our findings:

(1) that there is a separate Coneburn Valley landscape classified as VAL;
(2) that the Jardine land the subject of this reference is part of that valley landscape;
(3) that these conclusions are not changed by the existence of an unchallenged zoning of Jacks Point Resort zone on land to the north;
(4) that the inclusion of the beach terraces on the Jardine land within the ONL is not warranted.

[51] We consider that the function of territorial authorities set out in section 31(a) of the Act to establish objectives, policies and methods to achieve integrated management of the effects of the use of land, would not be carried out if a line were drawn which produces different outcomes for largely indistinguishable parts of the same landscape. It should be remembered that the purpose of visual amenity landscapes is to protect landscapes adjacent to outstanding natural landscapes.

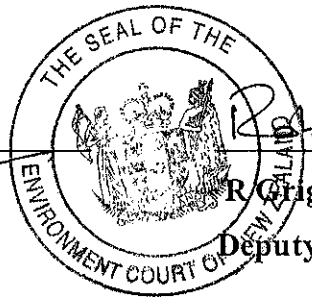
Outcome

[52] The outcome is that the case for Shotover Park Limited and Naturally Best New Zealand Limited fails. The landscape line will be drawn in the position agreed by the other parties, and which, save for the area of land we have considered, is not contested. That line, which was attached as Appendix 1 to the evidence of Ms Kidson, is also attached to our decision as attachment B.

[53] Costs are reserved. Any applications should be made to the Court within fifteen working days of the issue of this decision. Responses should be made within a further ten working days.

DATED at CHRISTCHURCH 28 June 2005

For the Court:



C E Manning
Environment Commissioner

R Grigg
Deputy Environment Commissioner

Issued[14]: 28 JUN 2005

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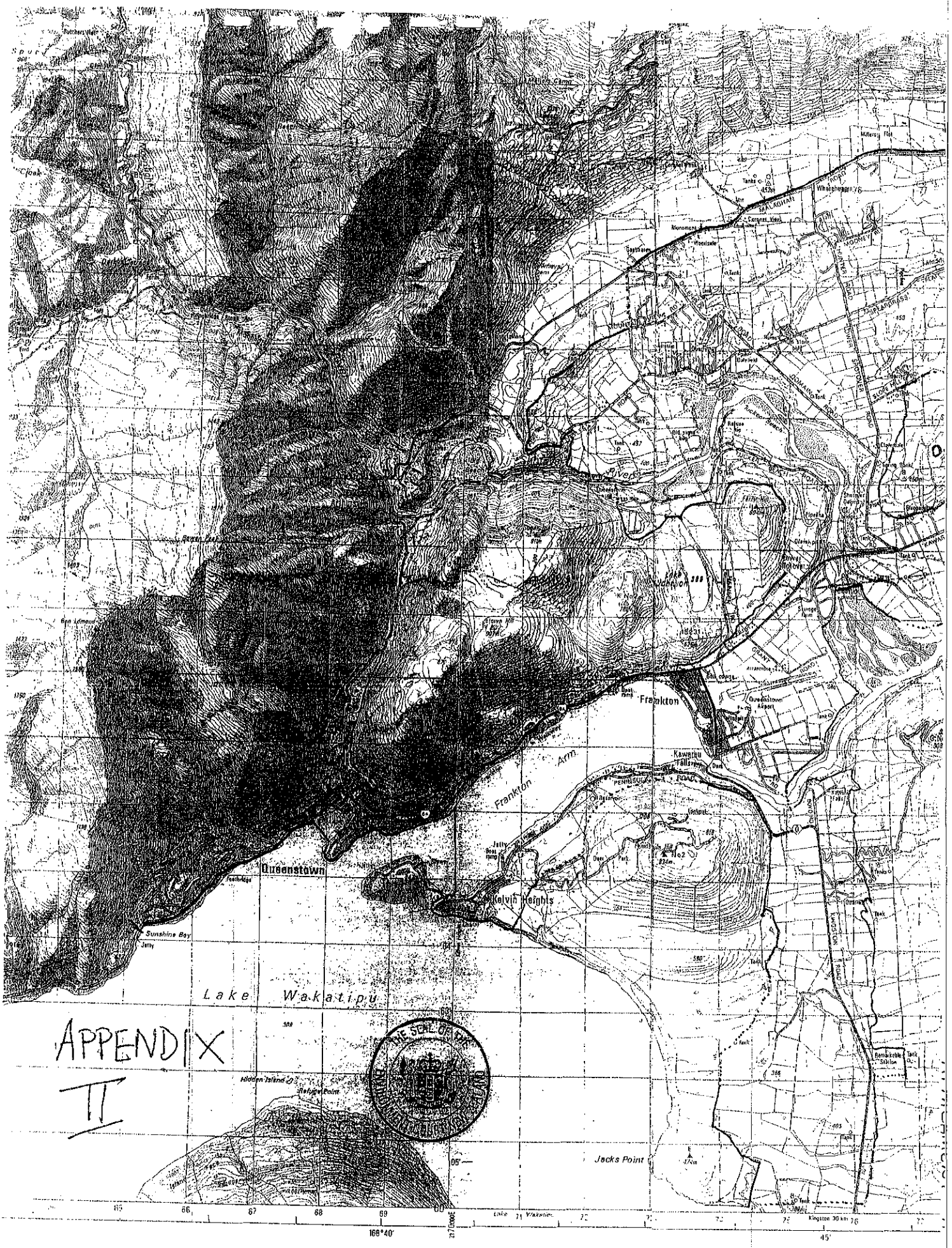
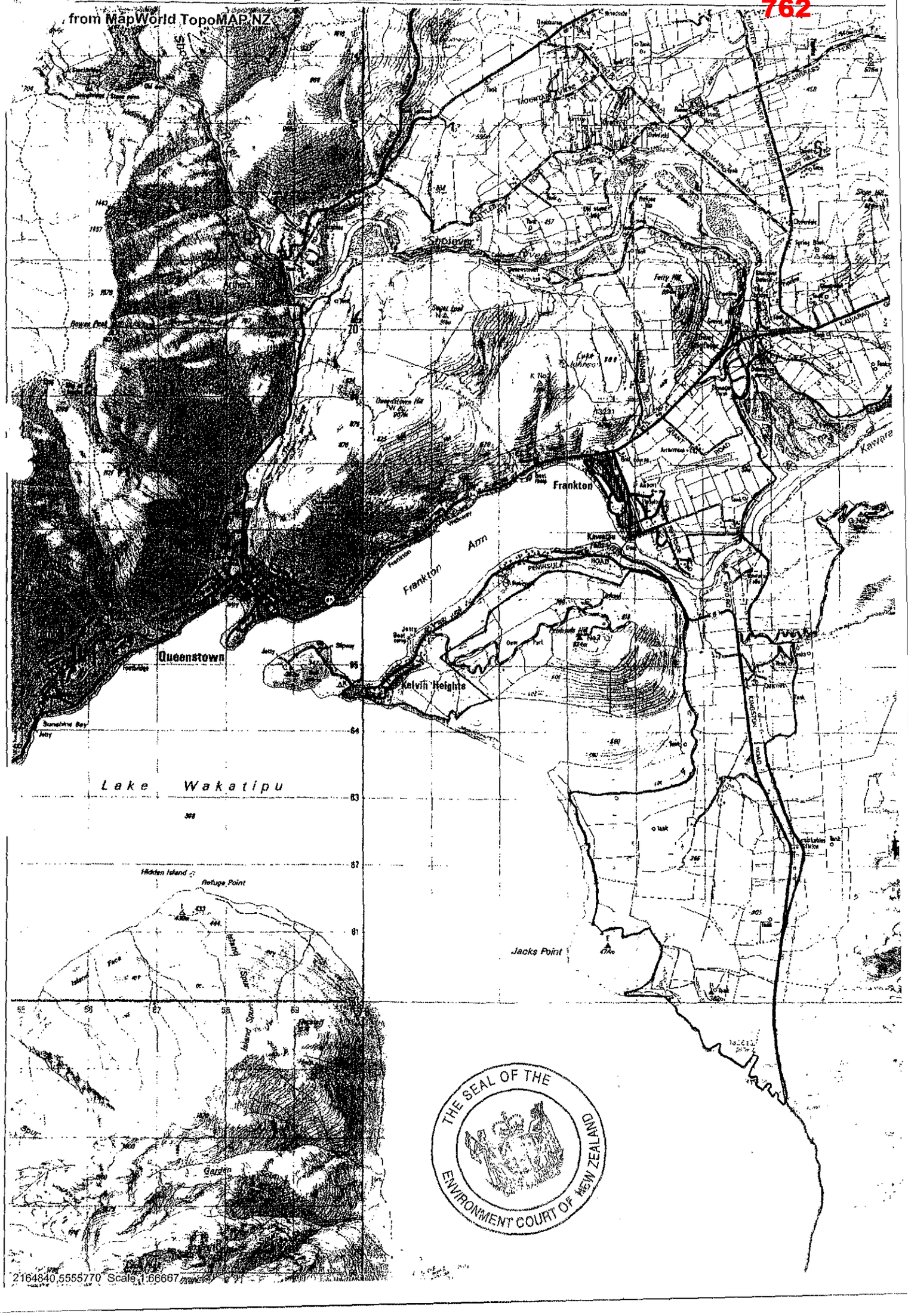


APPENDIX II

1:50 000
Topographic Map 260-E41
QUEENSTOWN

ATTACHMENT D

762



THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

[redacted]

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IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CIV2003 485 000956
CIV2003 485 000954
CIV2003 485 000953

BETWEEN	WESTFIELD (NEW ZEALAND) LIMITED KIWI PROPERTY MANAGEMENT LIMITED WENGATE HOLDINGS LIMITED Appellants
AND	HAMILTON CITY COUNCIL Respondent

Hearing: 6, 7, 8 and 9 October 2003

Appearances: C Whata and M Baskett for Westfield (New Zealand) Ltd
D Allan for Kiwi Property Management Ltd
S Menzies for Wengate Holdings Ltd
P Lane for Hamilton City Council
D R Clay for National Trading Co Ltd
J Milne for Tainui Developments Ltd

Judgment: 17 March 2004

JUDGMENT OF FISHER J

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Counsel:
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Introduction

[1] Most of Hamilton's retail activities are conducted in either the commercial centre or five smaller centres in the suburbs. The Hamilton City Council's proposed district plan provides for additional retail activity in the commercial services and industrial zones. The present appeals are directed to the additional retail activity proposed. The appeals are brought against a decision of the Environment Court of 27 March 2003 upholding those aspects of the proposed plan.

Factual background

[2] Resource management in the city of Hamilton is currently governed by transitional and proposed district plans. The proposed district plan was notified in October 1999 and amended by Council decisions in October 2001. It was then the subject of further Council decisions of 29 January 2002. From the proposed plan as amended, the Appellants took references to the Environment Court. With minor qualifications the Environment Court endorsed the proposed plan as amended. From the Environment Court decision the Appellants have appealed to this Court alleging legal error on the Environment Court's part.

[3] Under the proposed plan, retailing is contemplated in four zones – central city, suburban centre, commercial services and industrial. Retailing is also possible in new growth areas. In contention in the present appeals are the commercial services and industrial zones.

[4] Commercial services zones are found on the fringe of the central city and in several locations elsewhere. Retailing there is intended to involve primarily vehicle-orientated activities including large format shops, traffic orientated services and outdoor retailing. With minor exceptions the zone restricts retailing to a gross leaseable floor area of not less than 400 m^2. Any retail activity with an individual occupancy less than 400 m^2 is a controlled activity where it is part of an integrated development with a gross floor area greater than 5000 m^2 and where any occupancy of less than 400 m^2 faces on to an internal pedestrian or parking area and not on to a

road. Any retail activity that generates traffic over a certain threshold becomes a controlled activity. The significance of designating a retail activity a controlled activity is that it provides the Council with the power to impose conditions upon retail use of the land even though not permitting outright prohibition of such activity.

[5] In an industrial zone retail activities are restricted to a gross leaseable floor area of less than 150 m^2 or greater than 1000 m^2, one retail activity per site, and a minimum net site area of 1000 m^2. As with the commercial services zone, traffic consequences are controlled by making retail activities that generate traffic over a certain threshold controlled activities.

[6] Kiwi and Westfield argue that provision for retail activity in the commercial services and industrial zones ought to be curtailed in order to protect the viability of existing shopping centres in the city centre and Chartwell areas. They further argue that unrestricted retail activity in those zones would have adverse traffic effects. A particular focus was that in those zones, intensive retail shopping malls should be "discretionary activities", not "controlled activities".

Legislative background

[7] Section 74 of the Resource Management Act 1991 required the Hamilton City Council to prepare a district plan in accordance with ss 31 and 32 and Part II of the Act. Section 31 prescribes the Council's functions in giving effect to the Act in the district plan. The functions include two of particular significance (all statutory references as they stood prior to an amendment in 2003):

> (a) The establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district;
>
> (b) The control of any actual or potential effects of the use, development, or protection of land, including for the purpose of the 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.

[8] Of the provisions contained in Part II, s 5 needs to be quoted in full:

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

[9] Finally, s 32 sets out the Council's duty in the following terms:

> 32 Duties to consider alternatives, assess benefits and costs, etc.
>
> (1) In achieving the purpose of this Act, before adopting any objective, policy, rule, or other method in relation to any function described in subsection (2), any person described in that subsection shall—
>
> (a) Have regard to—
>
> (i) The extent (if any) to which any such objective, policy, rule, or other method is necessary in achieving the purpose of this Act; and
>
> (ii) Other means in addition to or in place of such objective, policy, rule, or other method which, under this Act or any other enactment, may be used in achieving the purpose of this Act, including the provision of information, services, or incentives, and the levying of charges (including rates); and
>
> (iii) The reasons for and against adopting the proposed objective, policy, rule, or other method and the principal alternative means available, or of taking no action where this Act does not require otherwise; and
>
> (b) Carry out an evaluation, which that person is satisfied is appropriate to the circumstances, of the likely benefits and costs of the principal alternative means including, in the case of any rule or other method, the extent to which it is likely to be effective in achieving the objective or policy and the likely implementation and compliance costs; and
>
> (c) Be satisfied that any such objective, policy, rule, or other method (or any combination thereof)—

(i) Is necessary in achieving the purpose of this Act; and

(ii) Is the most appropriate means of exercising the function, having regard to its efficiency and effectiveness relative to other means.

Environment Court decision

[10] As mentioned, on appeal from the Hamilton City Council decisions Kiwi and Westfield argued that in commercial services and industrial zones intensive retail shopping malls should be discretionary as opposed to controlled. Two grounds were advanced. One was that such activity would have adverse effects on the transport infrastructure of Hamilton. The other was that there would be consequential re-distribution effects upon existing retail activities elsewhere in the city.

[11] As to the transport infrastructure, a traffic expert called for the Appellants, Mr Tuohey, considered that developments generating traffic movement beyond a certain threshold ought to be a discretionary activity in the commercial services zone. Contrary evidence was given by equivalent experts called by the Council and Tainui. After traversing the merits of this evidence the Environment Court concluded that it preferred the latter witnesses. It considered that the potential for adverse traffic effects could be adequately controlled by making developments of this nature a controlled activity. The Court did not agree that imposing conditions adequate to control the potential for adverse traffic effects would invalidate any consent given.

[12] The second issue concerned consequential redistribution effects. The Court noted that s 74(3) precluded paying regard to trade competition *per se* but accepted that it could have regard to consequential social and economic effects. On the other hand, the Court considered that in the light of s 32(1)(c) a rule or restriction could not be justified unless it was "necessary" in order to achieve the purposes of the Act.

[13] As to consequential effects, there was a similar conflict of evidence. The Court was critical of the evidence of Mr Tansley and Mr Akehurst who predicted major adverse impacts on existing centres if new developments proceeded elsewhere. The Court preferred the contrary evidence of Messrs Donnelly, Speer, Keane and Warren. In particular, the Court found that the retail premises permitted

by the proposed plan "may have some impact on trade at the existing centres but ... the impact will not be sufficient to generate flow-on consequential effects" (para 148). The Court accepted the evidence of Mr Speer that a "Chartwell-type development", i.e. an intensive retail shopping mall, in the commercial services for industrial zones was "more theoretical than real". The Court went on to say:

> Having found that the proposed provisions as now supported by the Council are unlikely to give rise to adverse traffic or adverse consequential effects, it follows that in our view, the changes to the proposed plan as advocated for by Westfield and Kiwi and to a lesser extent Wengate, are not necessary to achieve sustainable management. (para 150)

[14] On a separate issue, the Court noted that when the proposed plan had originally provided for a commercial services zone covering the Wengate site it had required a buffer strip to manage reverse sensitivity. Consequent upon a Council decision to re-zone that area industrial, the special buffer had been deleted. In its 2002 resolutions the Council agreed to support reversion to commercial services zoning for the site but made no overt reference to the buffer. A Council witness before the Environment Court suggested that the buffer be reinstated. The Environment Court agreed with that suggestion and re-imposed the buffer.

[15] From those decisions Kiwi, Westfield and Wengate now appeal.

Appeal principles

[16] Pursuant to s 299 of the Act, a party to proceedings before the Environment Court may appeal to the High Court only "on a point of law". The unsuccessful attempts of appellants to enlarge the jurisdiction has often been commented upon: see, for example, *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145; *NZ Suncern Construction Ltd v Auckland City Council* [1997] NZRMA 419 and *S and D McGregor v Rodney District Council* (High Court, Auckland, CIV-2003-485-1040, 24 February 2004, Harrison J, para 1).

[17] Conventional points of law are relatively easy to identify. More complex is the relationship between law and fact. The only possible challenge to the original Court's finding as to a primary fact is that there had been no evidence to support it before the Court. The only possible challenge with respect to inferences is that on

the primary facts found or accepted by the Court at first instance, the inference urged by the Appellant was the only reasonably possible one. In these matters the Environment Court should be treated with special respect in its approach to matters lying within its particular areas of expertise: see *Environmental Defence Society Inc v Mangonui County Council* (1987) 12 NZTPA 349, 353. As Harrison J recently pointed out in *McGregor v Rodney District Council* (supra), Parliament has circumscribed rights of appeal from the Environment Court for the obvious reason that the Judges of that Court are better equipped to address the merits of their determinations on subjects within their particular sphere of expertise.

Kiwi and Westfield appeals

[18] In this court Kiwi and Westfield allege essentially four errors of law. They submit that the Environment Court:

(a) Over-estimated the legal threshold required before a restrictive rule can be justified;

(b) Failed to conduct its own over-arching inquiry into adverse effects;

(c) Failed to take into account the desirability of public participation; and

(d) Misused the controlled activity status as a means of controlling adverse traffic effects.

[19] In addition Mr Allan argued that the Environment Court "failed to take into consideration when assessing the potential for flow-on consequential effects to arise … the full range of activities provided for under the zoning provisions being promoted by the Council including in particular the potential for a more intensive retail development than large format retail (characterised … as a 'Chartwell type development')". I could not regard this as a question of law, quite apart from the fact that it was open to the Court to express, as it did, agreement with the evidence that "a Chartwell type development is more theoretical than real". Other issues originally flagged by the appellants, such as failure to consider whether controlled activity status was the most appropriate means, were not pursued at the hearing in this Court.

[20] The appeal was opposed by the Hamilton City Council as Respondent along with two interested parties with land potentially affected by any change to the proposed plan, Tainui and National Trading.

[21] It will be convenient to proceed through the four identified legal issues in turn.

(a) Legal threshold required before a restrictive rule is justified

[22] Before the Environment Court Mr Whata submitted that his client merely had to show, on the balance of probabilities, that the retail impacts flowing from the liberal zoning proposed *may* be of such a scale as to adversely affect the function of existing centres, and that it was for the Council and other supporting parties to show that impacts sufficient to generate adverse effects would never occur or were so remote as to be fanciful or so small as to be acceptable. He submitted that it was not sufficient for the Council to simply assert that, on the balance of probabilities, adverse effects were unlikely to occur.

[23] The Environment Court did not accept that submission. It held that in accordance with section 32(1)(c) the Council and the Court had to be satisfied that any rule was *necessary* in order to achieve the purpose of the Act before a restriction would be justified. The Court concluded:

> [83] We are required, among other things, under section 32(1)(a)(i) of the Act to have regard to the extent to which any plan provision is necessary in achieving the purpose of the Act. In our view, therefore, we are required to consider carefully the provisions of section 5 and the relevant provisions of Part II of the Act as they apply to the circumstances of this case. We are then, in accordance with sections 32(1)(c)(i) and (ii) to determine on the evidence whether the restrictive provisions proposed are:
>
> (i) necessary in achieving the purpose of the Act; and
>
> (ii) the most appropriate means, having regard to efficiency and effectiveness relative to other means.
>
> [84] We are required to make a judgment in accordance with the wording of the statute. Whether regulatory control is necessary, will depend on the circumstances of each and every case. To impose on ourselves a rigid prescriptive rule, in addition to the statutory directions, would contain [sic] flexibility in the exercise of our judgment. What is required is a factually

realistic appraisal in accordance with the Act, not to be circumscribed by unnecessary refinements.

[24] The Court described the word "necessary" as used in s 32(1) as "a relatively strong word" defined in the Concise Oxford Dictionary as "requiring to be done, achieved, etc; requisite; essential." It referred to statements from various authorities suggesting that the threshold is a high one:

- ...evidence may show such a large adverse effect on people and communities that they are disabled from providing for themselves. [*Baker Boys v Christchurch City Council* [1998] NZRMA 433]

- we do accept that the decisions cited by counsel for Westfield support a general proposition that potentially high adverse effects on people and communities, or evidence of unacceptable externalities, should be taken into account in settling the provisions of district plans about new retailing activities. [*St Lukes Group Ltd v Auckland City Council* (Environment Court, Auckland, A132/01, 3 December 2001, Judge Sheppard)]

- The proposal would have *"a serious and irreversible detrimental effect on the Upper Hutt* CBD" which would be *"gutted"* with curtain rising on a *"tumble weed street scene"*. [*Westfield (NZ) Ltd v Upper Hutt City Council* (Environment Court, Wellington, W44/01, 23 May 2001, Judge Treadwell)]

[25] In this Court the Appellants submitted that in deciding whether more restrictive controls over retail activity were justified, the Environment Court had set the threshold too high. The first argument in support was that the dictionary definition of "necessary" adopted by the Environment Court set too stringent a standard. The Appellants rightly pointed out by reference to authority that in s 32 "necessary" is not meant to indicate essential in any absolute sense but rather involves a valued judgment. As was said by Cooke P in *Environmental Defence Society v Mangonui County Council* [1989] 3 NZLR 257 (CA) at 260 in this context, "necessary is a fairly strong word falling between expedient or desirable on the one hand and essential on the other".

[26] Clearly there would have been an error of law if the Environment Court had refused to consider more stringent controls over retailing in the affected zones unless unavoidable in an absolute sense. However, I do not read the judgment as indicating that any such approach was taken. As s 5 of the Act makes clear, choosing the regime that will best secure the optimum use of land is inescapably an exercise in

very broad value judgments. These range across such intangible considerations as safety, health, and the social, economic, and cultural welfare of present and future generations. On a full reading of the Environment Court's decision there could be no suggestion that it approached its task in any other way. There is not the slightest suggestion that the Court would have refused more stringent controls unless shown to be necessary in the sense that oxygen is essential for the creation of water.

[27] It is true that at one point the Court referred to the Concise Oxford Dictionary definition "requiring to be done, achieved, etc; requisite; essential" but in my view the matter is not to be approached by dissecting individual words or phrases in isolation from the rest of the judgment. The judgment is replete with other expressions and assessments demonstrating that the necessity for more stringent controls was approached as a matter of broad degree. The Court described the word "necessary" as merely a "relatively" strong word. It also cited passages from authorities clearly pointing to broad value judgments, for example, "a large adverse effect on people", and "potentially high adverse effects". At no point does the Court's evaluation of evidence suggest that the Appellants were required to show that more stringent controls were "necessary" in any absolute sense.

[28] A related submission was that the Court erred legally in its finding that "having found that the proposed provisions now supported by the Council are unlikely to give rise to adverse traffic effects or adverse consequential effects, it follows that the changes to the proposed plan adequately catered by [the Appellant] are not necessary to achieve sustainable management." The Appellants contended that the Court ought to have turned its mind to the possibility that, even though unlikely, the possibility of adverse traffic effects or adverse consequential effects still warranted greater control. Mr Allan pointed out that pursuant to s 75(1), a District Plan is to make provision for certain matters set out in Part II of the Second Schedule to the Act. Clause 1 of Part II requires that provision be made for any matter relating to the use of land including the control of "any actual or potential effects of any use of land ..." (Clause 1(a)).

[29] Clearly Mr Allan was right to say that potential effects are to be taken into account as well as actual effects. That is inherent in the prospective nature of a

District Plan. Furthermore, "effect" is defined in s 3 of the Act to include not only potential effects of high probability but "any potential effect of low probabilities which has a high potential impact". The Environment Court concluded that the proposed provisions were unlikely to give rise to adverse traffic or consequential effects (para 150). Mr Allan argued that it was illogical to proceed from that conclusion to the further conclusion that the changes to the proposed plan advocated by Westfield and Kiwi were unnecessary.

[30] I agree that a conclusion that adverse effects were unlikely did not lead inexorably to the conclusion that more stringent controls were unjustified. There remained an evaluative step between the two. The Court had to decide whether the level of likelihood, necessarily a question of degree, warranted more stringent controls.

[31] Three sentences before referring to the conclusion that adverse effects were "unlikely" the Court had said:

> We therefore find that the retail premises of the plan as now supported by Council may have some impact on trade at the existing centres but that the impact will not be sufficient to generate flow-on consequential effects (para 148).

That in turn must be read in the context of the Court's earlier recognition that pursuant to s 74(3) the Court was not to have regard to trade competition (para 72). Consequential effects were limited to flow-on effects as a result of adverse effects on trade competition.

[32] Reading paras 148 and 150 together, therefore, it becomes clear that the Court regarded the possibility of relevant adverse effects as minimal, if not negligible. Para 148 is expressed as an unqualified negative. Para 150 changes the language to "unlikely". In relation to traffic, the Court had already accepted the conclusion of Mr Bielby that the Hamilton City roading network "will be able to safely and efficiently cope with the volumes and patterns of traffic that will result from additional commercial development in North Te Rapa and in industrial areas" (paras 62 and 63). So it was after expressing unqualified negatives in relation to both traffic and consequential effects that the Court went on to refer to such effects as

"unlikely" and its conclusion that the changes advocated for by the Appellants were unnecessary.

[33] On appeal there is always a temptation to pick upon each word and phrase in the judgment appealed from and subject it to microscopic examination. What really matters is the underlying reasoning. Given the time which the Court devoted to the reasons for its ultimate conclusion that there would not be adverse effects, and the different wording used elsewhere, I can attach no significance to the use of the word "unlikely" in para 150.

[34] A final point is that when predicting future events in an area as complex as urban resource management, ultimate conclusions could never be anything more than opinions. When speaking of the future, the distinction between an absolute negative and the conclusion that something is "unlikely" is somewhat arbitrary. It is difficult to exclude most future events in a theoretical sense, at least events of the kind now under consideration. Of course the Appellants are entitled to argue that provision ought to be made for potential effects, particularly those which have a high potential impact. But the Court was entitled to approach the matter in robust terms by effectively concluding that adverse consequences were so unlikely that further controls were not necessary. In my view that is what it did.

[35] On the same topic the Appellants criticised the way in which the Court had approached the onus of proof. Mr Allan submitted that "the issue before the Environment Court was whether *on the balance of probabilities* implementation of the Council's proposed provisions *could* give rise to consequential effects of significance" (my italics). In my view there are two difficulties in this argument. One is that it is a contradiction in terms to say that the Court was required to determine "on the balance of probabilities" whether provisions "could" give rise to consequential effects. The possibility that something "could" happen is clearly a lower threshold than the probability that it will occur. The tests are mutually exclusive.

[36] But more importantly it involves a confusion between two different concepts. Doogue J referred to this in the different context of applications under s 1 05 in *Ngati*

Maru Iwi Authority v Auckland City Council (HC Auckland, AP18/02, 7 June 2002). In all applications under the Resource Management Act 1991 a distinction is to be drawn between a burden of proof relating to the facts on the one hand and ultimate issues as a matter of evaluation in accordance with the law on the other.

[37] I agree with Mr Whata that in the present context the two questions are "is there a risk" and "does it need to be controlled"? What was required of the appellants was sufficient by way of evidence or argument to make the possibility of an adverse effect a live issue. Once there was a foundation for considering that possibility, it was for the Court to determine the level of likelihood as a question of fact and then, in the light of such conclusions, whether particular provisions were justified in the plan. But I can see no indication that the Environment Court did anything else.

[38] Mr Allan further submitted that it is not a requirement for a rule to be "necessary" for the purposes of s 32(1)(c) if the rule is supportable by reference to other resource management criteria. He pointed out that pursuant to s 25(1)(d) the district plan is to state "the methods to be used to implement the policies, including any rules" which he took to indicate that rules would be required whether or not the "necessary" test is satisfied. In my view the word "any" in this context envisages the possibility that there will be no rules unless the rule is necessary in terms of s 32(1)(c)(i). Similarly, I accept that in making a rule a territorial authority is required by s 76(3) to have regard to actual or potential effects and that rules may provide for permitted activities as well as other forms of activities. But I do not take it from those provisions that all activities are prohibited unless a rule can be found to justify them. In our country citizens are free to do whatever they like so long as there is no law prohibiting it. Rules in district plans are no different in that respect. That is the reason for the principle established in s 32(1)(c)(i) that there is to be no rule unless it is *necessary* in achieving the purpose of the Act. Long may it continue.

(b) Failure to conduct own inquiry

[39] The Appellants submitted that the Environment Court erred in considering only the question whether more restrictive rules were "necessary" for the purposes of s 32(1)(c)(i). In their submission the Court ought to have gone on to have regard to

all the other factors adverted to in s 32(1)(a) and, for this purpose, to carry out the evaluation required under s 32(1)(b).

[40] I agree that in accordance with its duties under ss 32 and 76 the Court was required to conduct a broadly-based survey of considerations relevant to the proposed retailing activities. It is also true that hearings in the Environment Court are rehearings conducted *de novo*. However the Court does not have to ignore the fact that Council officers and the Council had already covered the same ground. The evidence the Council broadly conveyed to the Court regarding the Council's own investigations and conclusions with respect to a proposed plan itself represents fresh evidence before the Environment Court. The Court is entitled to rely upon that evidence in the absence of specific issues to which their attention is drawn. The Court is not expected to conduct the type of broad-ranging inquiry that would have been appropriate if the whole exercise were approached afresh.

(c) **Failure to consider desirability of public participation**

[41] Mr Whata submitted that the ability of competitors to oppose development by means of contesting applications for resource consent was a relevant factor for the purposes of s 32(1)(c)(ii) and that this had been overlooked by the Environment Court. By allowing the extended retail activities as a controlled activity the Council was denying other members of the public the opportunity to participate. Others could have mounted an opposition if such activities had been made discretionary and therefore subject to public notification.

[42] The Environment Court had itself observed (para 152) that the proposed plan would enable retail development unrestrained from the ability of competitors to oppose by contesting applications for resource consent. The Court pointed out that by this means the considerable delay and expense to which parties and the Council would be involved could be avoided. The Court considered that a factor which fell within subs 32(1)(c)(ii).

[43] Mr Whata contrasted this with the view expressed in the High Court in *North Holdings Ltd v Rodney District Council* (HC Auckland, CIV-2002-404-002402,

M1260-PL02, 11 September 2003, Venning J) at paras 25, 35 and 36 that in general the resource management process is to be public and participatory and that at least in the case before Venning J, the public interest in achieving sound resource management decisions was of greater importance than the prompt processing of applications.

[44] I respectfully agree that as a matter of general policy the resource management process is intended to be public and participatory. I see no reason to question the priority which that consideration was given over expedition in the *North Holdings* case. Of course, principles of this nature involve a value judgment to be exercised in relation to the content of each district plan in each case. Otherwise there would never be permitted or controlled activities in district plans.

[45] In the present case the Council and the Environment Court considered that making intensive retail activity a controlled activity in the zones in question strikes the right balance between public participation and other resource management values. That was clearly a judgment for the Council and Environment Court to make. In my view it does not involve any point of law. The Environment Court did not ignore the many competing considerations which impact upon a decision of this nature. In para 152 the Court pointed to:

> Extensive consultation and the commissioning of reports, both from Council officers and consultants. Following that process, the Council considered that to impose restrictions was not necessary for the control of consequential effects. It would have instead had the effect of inhibiting trade competition. The plan provisions as now espoused by Council enable retail development within the city of Hamilton unrestrained from the ability of competitors to oppose development by means of contesting applications for resource consents. A practice, the evidence showed, that in the past caused considerable delays, at expense not only to the parties involved, but also to Council.

[46] Clearly the Environment Court has considered the issue of public opposition. In this case it preferred the equally valid and competing consideration that the rule should be the most appropriate means of exercising the rule-making function having regard to its efficiency and effectiveness relative to other means (s 32(1)(c)(ii)). That was a choice the Court was entitled to make.

(d) Misuse of controlled activity status as the means of controlling adverse traffic effects

[47] The fourth ground of appeal to this Court was that the power to impose conditions pursuant to the classification of retail activities as controlled activities was not a valid means of avoiding adverse traffic effects in that the conditions which would need to be imposed would nullify the consents ostensibly given. The argument rests on the assumptions that the conditions would be either so onerous as to remove the substance of the consent or would be dependent upon the activities of third parties over whom the applicant for consent would have no control.

[48] The performance outcomes for the relevant activities are set out in Rule 4.4.5(c) of the proposed district plan in relation to commercial service zones and Rule 4.5.5(c) in relation to industrial zones. In both cases the Council can impose conditions when consenting to a controlled activity. The conditions can relate to traffic requirements within the applicant's immediate control in that they relate to car parking, access to and from the adjacent road network, access to major arterial roads and internal vehicular layout. But equally the Rules provide for the conditions to relate to the impact upon the external roading network with respect to access, traffic volumes and traffic capacity (see traffic engineering study required under rules 4.4.3(e) or (f) and 4.5.3(f) or (g)).

[49] Rules 4.4.3(f) and 4.5.3(g) also provide that where any activity requires preparation of a traffic impact study the provisions of Rule 6.4.5 relating to roading contributions is to apply. Rule 6.4.5(a)(iii) provides that in exercising any discretion available under Rule 6.1.4(e) (no doubt intending to refer to (d)), the Council may require the provision of new roads, the upgrading of existing roads, or the payment of a levy as a condition. Rule 6.1.4(d)(ii) authorises the imposition of such conditions in a number of circumstances including a commercial development where the value of the work exceeds $250,000.

[50] A distinctive characteristic of a controlled activity is, of course, that the Council may not decline consent to a proposed activity; it can merely impose appropriate conditions. The Appellant's argument is that the control necessary to

avoid unacceptable adverse traffic effects requires that the Council be given powers which extend beyond the mere imposition of conditions upon a consent that must be given.

[51] The Environment Court dealt with this issue in the following way:

> [64] It was suggested by some counsel that consent conditions imposed under controlled activity status may well, from a legal point of view, negate the consent and accordingly be illegal. In particular, counsel for Kiwi and Wengate submitted that some conditions, which might otherwise be thought desirable and necessary, might not be able to be imposed on a controlled activity because to do so, would result in an applicant being required to carry out work of such a scale that the consent could not be realistically exercised.
>
> [65] It is well known that a condition of a resource consent must be such as arises fairly and reasonably out of the subject matter of the consent. However, in our view, a consent is not "negated", or rendered "impracticable" or "frustrated", merely because it requires the carrying out of works which might be expensive. We agree with Mr Cooper's submission that such may be the price which an appellant has to pay for implementing a resource consent in certain circumstances.
>
> [66] It was further argued, that any condition arising out of the controlled activity status on traffic matters, may well require a third party, such as Transit New Zealand, to be involved. This may well be so. However we do not consider a condition precedent to any retail activity commencing, and involving a third party such as Transit New Zealand Limited to be invalid.
>
> [67] Counsel also raised the issue, of the ability of the Council to impose conditions on one developer effectively to take account of cumulative traffic effects arising from a series of developments. However, in our view, this does not give rise to any legal difficulty either. Any developer has to tailor his or her development to the environment as it exists at the time consent for the development is sought. A developer will be required to ensure that the traffic impacts of the proposed development are able to be appropriately accommodated by the roading network. Both Mr Bielby and Mr Winter were satisfied that the roading network, given the provisions in the proposed plan as espoused by the Council's latest position, could adequately cope with future development.
>
> [68] As pointed out by Mr Cooper the concerns raised by Kiwi and Westfield on traffic issues would be met by making retailing activities, restricted discretionary activities, with the matters over which the Council's discretion is reserved being restricted to traffic related matters. However, having regard to the evidence of Mr Bielby, and Mr Winter, which we prefer to the evidence of Mr Tuohey, and where it conflicts, with Mr Harries' testimony, we do not consider it necessary to amend the provisions to restricted discretionary activity status.
>
> (paras 64-68)

[52] As a preliminary point Mr Allan argued that although the rules clearly provided for conditions relating to internal features of the development site, it was not clear that the Council would have the power to impose conditions relating to impact on traffic flows exterior to the Applicant's site. Mr Allan submitted that although the exterior matters were clearly included in the "traffic impact study" required in such circumstances, it did not follow that the Council had the power to impose conditions relating to such matters. I accept the response of Mr Lang and Mr Milne that the rules do contain the power to impose positive conditions arising out of the needs demonstrated in the traffic impact study. By virtue of the power to require "roading contributions" in terms of rule 6.4.5, the Council gains access to the incidental powers to require the provision of new roads, or the upgrading of existing roads, as alternatives to the payment of levies *simpliciter*.

[53] The Appellant's principal argument, however, was that any conditions imposed in that respect would or might be legally invalid since the Applicants would be powerless to bring about the requisite changes in roads on property beyond their own control. This lack of power was said to "negate the consent". The Appellants further pointed out that the approval of the roading authorities, whether the Council or Transit New Zealand, would place compliance with the condition beyond the control of the Applicants.

[54] I agree that the power to impose conditions for resource management consent is not unfettered. The conditions must be for a resource management purpose, relate to the development in question, and not be so unreasonable that Parliament could not have had them within contemplation: see, for example, *Newbury District Council v Secretary of State for the Environment* [1981] AC 578 and *Housing New Zealand Ltd v Waitakere City Council* [2001] NZRMA 202 (CA).

[55] Conditions attached to a consent will usually be regarded as unreasonable if incapable of performance. A classic example was consent to erect additional dwellings subject to a condition requiring access via a 4.8 metre wide strip when access to the Applicant's property was in fact possible only through an existing strip with a width of only 3.7 metres: *Residential Management Ltd v Papatoetoe City Council* (Planning Tribunal A62/86, 29 July 1986, Judge Sheppard); and see further

Ravensdown Growing Media Ltd v Southland Regional Council (Environment Court, C194/2000, 5 December 2000, Judge Smith).

[56] On the other hand, a condition precedent which defers the opportunity for the Applicant to embark upon the activity until a third party carries out some independent activity is not invalid. There is nothing objectionable, for example, in granting planning permission subject to a condition that the development is not to proceed until a particular highway has been closed, even though the closing of the highway may not lie within the powers of the developer: *Grampian Regional Council v City of Aberdeen* [1983] P&CR 633, 636 (HL).

[57] In the present case the Appellants' main argument appears to be that the district plan contains invalid or unacceptable rules in that adverse traffic effects could be addressed only by imposing invalid conditions. Mr Allan submitted that "the Court has conflated the general validity of the content of a resource consent condition and whether or not, in the context of a particular proposal, that condition practically negates the consent, is impractical to fulfil, or frustrates the consent." Mr Whata acknowledged that, as in the case of *Grampian* Regional Council, "it may be appropriate to impose a condition that requires significant works to be undertaken prior to the commencement of the consented activity" but went on to submit that "This is no more than a statement about the validity of conditions precedent to carrying out an activity … it is quite another matter to adopt as a method in a district plan, control of all traffic effects by a way of controlled activity status and the imposition of conditions precedent that may blight an otherwise legitimate development."

[58] Wherever there is power to impose conditions there must be the potential for the territorial authority in question to impose invalid conditions. In the normal course any challenge to the conditions must await the specific case in question. It would normally be premature to challenge the district plan itself on the basis that the imposition of invalid conditions under it can be foreseen as a possibility.

[59] Of course it would be different if it could be postulated that consents could not be given to certain permitted activities without the imposition of invalid

conditions. But I can see no reason for assuming that, faced with the need for changes to roads which lay beyond the immediate ownership and control of the Applicant, it would be impossible for the Hamilton City Council to frame valid conditions in order to meet the need. In principle, for example, it would be possible to impose a condition similar to that imposed in *Grampian,* namely that until a nearby arterial route were increased in size from two lanes to four a proposed retail development could not proceed. Further, pursuant to rule 6.4.5 such condition precedent could be coupled with a levy requiring the Applicant to contribute to the off-site roading development.

[60] Technically, it has been held that there is a critical distinction between two ways in which a condition is framed. One requires an applicant to bring about a result which is not within the applicant's power, for example that the applicant construct a new roundabout on a nearby roadway when the roadway is controlled by Transit New Zealand. The other stipulates that a development should not proceed until an event has occurred, in this example that the roundabout has been constructed – see *Grampian* at 636. While I have no respect for English formalism of this type, it seems clear that at least by wording the condition in appropriate terms the Council will have the power to impose valid conditions of the kind in question in this case.

[61] Mr Allan went on to submit that whether the potential for adverse traffic effects could be met by an appropriate condition, with the associated possibility that the further work or contribution required might make the development too expensive, would be a matter of fact and degree to be determined in each particular case. He submitted:

> It will be in part a function of the relationship between the scale of the work and expense required by a condition and the scale and nature of the activity for which consent has been sought. An activity which is of a relatively modest scale but which involves the generation of additional (cumulative) traffic effects that, given the traffic conditions at the time, require significant works on the roading network, may in practice be rendered uneconomic by those works and effectively be rendered incapable of being carried out.

[62] I would not have thought that the imposition of a condition that would make a development uneconomic could normally qualify as incapable of performance for invalidity purposes. But even if that were so, the invalidity would attach to the

particular condition in question, not to the District Plan itself. It cannot be postulated that merely because a power could be used in an invalid manner, creation of the power itself is invalid.

[63] The last argument was developed by both Mr Allan and Mr Whata in relation to the hapless small developer who finds that, due to large developments which have already used up the remaining capacity of the surrounding roading network, the small developer's proposal requires a roading upgrade which is beyond the economic capacity of the smaller developer. Mr Whata coupled that with the need for opportunity for public opposition to the developments that had preceded it.

[64] I agree with the Environment Court that a developer has to tailor his or her development to the environment as it exists at the time consent for the development is sought. This applies to developments and activities in many contexts other than traffic effects. I can see its relevance as an argument in support of public notification as one of the relevant values. But it could not be elevated to the notion that any condition required at any given time in relation to any particular development might be invalid simply because the developer in question happens to take adverse traffic effects over a threshold beyond which an expensive upgrade is required.

[65] I have already referred to the opportunity for public participation as merely a number of the competing values which impact upon the way in which the district plan was drafted. The choice between those competing values was eminently one for the Environment Court. Similarly the question whether controlled activity status for retail activities of this sort was the best way of addressing the potential for adverse traffic effects is not a question of law. It was a resource management question for the Environment Court alone.

[66] My conclusion is that the fourth and final argument on the appeals by Kiwi and Westfield fails.

The Wengate appeal

[67] The Wengate site was zoned commercial services under the proposed plan as originally notified. In rule 4.4.3(g) the plan provided for a special buffer zone between buildings on the Wengate site and adjacent industrial properties. The buffer was imposed to manage reverse sensitivity which might otherwise have impacted upon the Wengate site.

[68] When the Wengate site was rezoned industrial by the Council decision of October 2001, the special buffer zone relating to the Wengate site was deleted. In its subsequent 2002 decision the Council agreed to support reversion to the original commercial services zoning for the Wengate site but without overt reference to the associated buffer zone. The Environment Court reinstated the buffer zone. It did so on evidence from the Council which the Court described in the following terms:

> [160] Mr Harkness also pointed out that the proposed plan as notified contained rule 4.4.3(g) – Special Buffer – Te Kowhai – to manage reverse sensitivity concerns for the Wengate site. This rule was deleted by Council when the site was to be zoned as Industrial. He suggested it be reinstated – a suggestion we agree with.

[69] On appeal to this Court, Mr Menzies submitted for Wengate that the Environment Court lacked the jurisdiction to reinstate the buffer zone. He submitted that the question of a buffer zone was not the subject of any reference before the Environment Court, and that to rule on an issue not referred to the Environment Court was an error of law.

[70] Mr Menzies pointed to a number of decisions in which the Environment Court accepted that it could not make changes to a plan where those changes were outside the scope of the reference to it and could not fit within the criteria in ss 292 and 293 of the Act. They included *Applefields Ltd v Christchurch City Council* [2003] NZRMA 1; *Williams and Purvis v Dunedin City Council* (Environment Court, CO22/C002, 21 February 2002, Judge Smith); *Re an application by Northland Regional Council* (Environment Court, A12/99, 10 February 1999, Judge Sheppard) and *Re Vivid Holdings Ltd* [1999] NZRMA 467 .

[71] Wengate's challenge to the Environment Court imposition of the buffer zone is based solely upon lack of jurisdiction. Mr Menzies submitted that the Environment Court was limited in its jurisdiction to the specific references before the Environment Court. The only reference before the Environment Court relevantly touching upon the Wengate land was the reference emanating from Wengate itself. Before the Environment Court Wengate merely sought the endorsement of the Council's latest position that the commercial services zone should extend to the Wengate site. It did not ask that in confirming a commercial services zoning for the Wengate site the Environment Court should reinstate the original buffer zone. Mr Menzies submitted that since the Environment Court's jurisdiction was limited to the matters specifically brought before it, the Court had acted beyond its jurisdiction. He submitted that this constituted an appealable error of law.

[72] I agree that the Environment Court cannot make changes to a plan where the changes would fall outside the scope of a relevant reference and cannot fit within the criteria specified in ss 292 and 293 of the Act: see *Applefields*, *Williams and Purvis*, and *Vivid,* supra.

[73] On the other hand I think it implicit in the legislation that the jurisdiction to change a plan conferred by a reference is not limited to the express words of the reference. In my view it is sufficient if the changes directed by the Environment Court can fairly be said to be foreseeable consequences of any changes directly proposed in the reference.

[74] Ultimately, it is a question of procedural fairness. Procedural fairness extends to the public as well as to the submitter and the territorial authority. Adequate notice must be given to those who might seek to take an active part in the hearing before the Environment Court if they know or ought to foresee what the Environment Court may do as a result of the reference. This is implicit in ss 292 and 293. The effect of those provisions is to provide an opportunity for others to join the hearing if proposed changes would *not* have been within the reasonable contemplation of those who saw the scope of the original reference.

[75] In the present case, it is reasonable to infer that the buffer zone was originally introduced to address environmental effects between industrial zone land and commercial services zone land. That was relevant at a time when the Wengate site, with a commercial services zoning, was across the road from industrially zoned land. The concept of a buffer zone to address interactions between industrial and commercial services zones became redundant when the zoning of the Wengate site was changed to industrial. This changed back again, however, when Wengate successfully pursued a reversion to commercial services zoning. It is unsurprising that on accepting the Wengate position that its land should have the commercial services zoning reinstated, the Environment Court would reinstate the buffer zone that had originally been associated with that form of zoning.

[76] I cannot see that it was not reasonably foreseeable that in reinstating the original commercial services zoning the Environment Court would also reinstate the buffer zone that had been associated with it. It would be odd if an appellant could gain the zoning it sought without the restrictions which one would naturally tend to associate with zoning of that nature. As Mr Lang pointed out, Wengate's reference might have sought to omit not only rule 4.4.3(g), which imposed a buffer zone, but other rules governing activities within the commercial services zone. Taken to its logical extreme, if Wengate's argument regarding the jurisdictional limitations stemming from the scope of the reference were correct, the jurisdiction of the Environment Court would have been limited to reinstatement of the zoning without any of those associated rules.

[77] In my view the Environment Court must be taken to have had the jurisdiction to agree to the requested zoning subject to imposition of other rules foreseeably associated with such zoning. A buffer zone was in that category. It follows that the Environment Court had jurisdiction to reinstate the buffer zone.

[78] The point of law brought before this Court by Wengate was limited to the question whether the Environment Court erred in law in its assumption of jurisdiction to reinstate rule 4.4.3(g) relating to the buffer zone. I have already decided that question against Wengate. However, I note in passing that the only evidence before the Environment Court on that subject was that of Mr Harkness. The

dimensions of the buffer zone suggested in his evidence were more modest than those imposed. He suggested that 5 metres may well have been sufficient for the width of the buffer zone as distinct from the 10 metres specified in the original buffer zone and reinstated by the Environment Court. Further discussion between Wengate and the Council may result in some voluntary modification of the dimensions involved but it is clearly outside the scope of this appeal.

Result

[79] All appeals are dismissed.

[80] It was agreed by counsel at the hearing that costs would follow the event on a scale 2B basis. It follows that the three Appellants, Westfield, Kiwi and Wengate, must pay costs to the Respondent, Hamilton City Council according to scale 2B.

[81] No oral submissions were made with respect to the costs liability of the Appellants to Tainui Developments Ltd and National Trading. I would hope that these could be resolved by agreement. If necessary they will need to be the subject of written memoranda and a ruling by another Judge. To deal with that eventuality, and also any disagreement between the Appellants and the Respondent as to costs details, I direct that (a) within three weeks of the delivery of this judgment all parties claiming costs must file and serve memoranda setting out the terms of their claims, (b) the Appellants will have a further two weeks within which to file memoranda in opposition and (c) the claimants will have a further ten days within which to file any memoranda in reply.

Signed at 4.00 pm on 17 March 2004

RL Fisher J