ORIGINAL

Decision No. C 060 /2005

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of an appeal under s 120 of the Act
BETWEEN	JOHN SCURR (RMA 781/03)
	Appellant
AND	THE QUEENSTOWN LAKES DISTRICT COUNCIL
	Respondent
AND	UPPER CLUTHA ENVIRONMENTAL SOCIETY INCORPORATED
	Section 271A party

BEFORE THE ENVIRONMENT COURT

Alternate Environment Judge FWM McElrea (presiding)
Environment Commissioner OM Borlase
Environment Commissioner CE Manning

Hearing: 16 and 17 December 2004 at Wanaka

Appearances: Mr WP Goldsmith for Mr Scurr
Mr GM Todd for the Council
Mr JR Haworth for the Upper Clutha Environmental Society

DECISION

Introduction

[1] The appellant (" Mr Scurr") has a farm in the Cardrona Valley, which lies on the northern side of the Crown Range between Queenstown and Wanaka. He applied to the Queenstown Lakes District Council ("the Council") for a resource consent to a subdivision of part of his land in Harvey's Gully adjoining Cardrona

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

Valley Road which runs the full length of the Valley. The application was opposed by four submitters, including the Upper Clutha Environmental Society ("the objector"). The application was declined and this appeal has followed.

[2] The central issue in this case relates to the potential effects of a small, "rural lifestyle" subdivision on the landscape and amenity values of the Cardrona Valley, which is an Outstanding Natural Landscape. It requires a determination as to whether the proposed development is consistent with the provisions of the District Plan and would constitute the sustainable management of natural and physical resources having regard to a matter of national importance, namely the protection of outstanding natural landscapes from inappropriate subdivision, use and development.

[3] Mr Goldsmith accepts the need to avoid inappropriate subdivision but says that this development will be appropriate as it will have the appearance of a group of farm buildings, including a homestead. Part of the evidence and argument we have heard relates to whether development controls can ensure such an outcome, and if they can, whether such "facadism" should be approved.

The original application and Council decision

[4] The original application sought to subdivide from Mr Scurr's farm of 3,317 ha, five rural living allotments of between 0.6 ha and 1.3 ha, each with an identified residential building platform. At the hearing before the Council, the application was amended by deleting one of the new allotments and making certain changes to the proposed landscaping in order to address objectors' concerns.

[5] The Council refused consent on the basis that the adverse effects of the proposed subdivision would be more than minor.

The current proposal

[6] By the time of the appeal hearing the proposal had been further amended so that it related to only two new residential allotments -- Lot 1 (0.55 ha) and Lot 2 (0.44 ha) -- each with a defined building platform. In addition there would be a common lot (Lot 3) of 3.2 ha. This reduction of the proposal occurred prior to the preparation of primary evidence for the appeal. Mr Scurr also proposed more specific and more restrictive design controls with the intention that the two proposed dwellings will appear as a single rural group of buildings, one dwelling being designed to look like a primary dwelling or homestead, and the second to look like a barn. Yet further restrictions were suggested by Mr Goldsmith during his reply at the close of the appeal hearing.

[7] It is accepted that the further amended proposal is within the scope of the original application and can properly be considered by this Court. It is essentially a smaller version of the original proposal, raising no new issues.

Witnesses in the appeal hearing

[8] It may be helpful at this stage to list the witnesses appearing for each party, in the order in which the evidence was heard.

Witnesses for Mr Scurr:	
Patrick John Baxter	*landscape architect*
Jeffrey Andrew Brown	resource management planner
Witnesses for the Council:	
Diane Jean Lucas	*landscape planner*
Andrew Philip Henderson	resource management planner
Witness for the objector:	
Julian Robert Haworth	*President of the Upper Clutha Environmental Society*

The status of the activities and the relevant policies and objectives

[9] There was no debate as to the status of the activities for which consent is sought, or the comparative weight to be attributed to the Council's plans. In essence the position is as follows:

(a) In the Transitional District Plan ("TDP") Mr Scurr's property is within the Rural B zone where the proposal is a non-complying activity. The general purpose of this zone is to recognise the contribution of both *farming and tourism as the main components* of the District's economy.[1]

(b) In the Partly Operative District Plan ("PODP") the property is located in the Rural-General Zone where subdivision is a discretionary activity. A consent, if granted, would enable a dwelling (and potentially other structures) within each building platform, as controlled activities.

(c) The Rural General zoning of the land enables farming (agriculture and horticulture) and amenity tree planting (provided it does not create a line of trees longer than 10m in length within 50m of the road) as permitted activities. There are few other permitted activities. All structures are either controlled or discretionary activities.[2]

(d) The subdivision provisions of the PODP are not yet operative, so we must have regard to the TDP as well. The Council has recently announced decisions on Variation 18 to the PODP, but these are still subject to appeal so we cannot give them full weight. Nevertheless, they represent the judgment of the Council after a process of public submission.

(e) Predominant weight should be given to the PODP as it has been prepared in accordance with the purpose and principles of the Act and is well on the road towards becoming fully operative. (For this

[1] Evidence-in-chief of Mr Henderson, para 9.1
[2] Evidence-in-chief of Mr Brown, para 2.7

reason, all later references in this decision to the District Plan relate to the PODP unless otherwise stated.)

[10] The application for resource consent was made to the Council prior to the Resource Management Amendment Act 2003 coming into force on 1 August of that year, but the appeal was filed subsequently. We acknowledge the differing judicial opinions as to the effect of the transitional provisions contained in s 112 of the Amendment Act but the only practical effect in this case relates to the permitted baseline test, upon which Mr Goldsmith placed little reliance, although we return to it below. For present purposes we accept the view of both counsel in this case, namely that the applicable law is that which prevailed prior to 1 August 2003.

The location of the proposed development

[11] A traveller proceeding by motor vehicle from Queenstown to Wanaka can take the longer and more open route via Cromwell, or the shorter but more rugged route over the Crown Range and down the Cardrona Valley, following beside the Cardrona River until the valley opens out at its mouth onto the arable plains lying to the south and east of Wanaka.

[12] The Cardrona Valley itself is a distinct landscape. It is a narrow valley, enclosed and confined by steep mountains.[3] From the headwaters of the Cardrona River in the Crown Range, down to the Cardrona township at the turnoff to the Cardrona ski field, the river follows a very narrow valley floor, at times only a few metres wide. Harvey's Gully, on the western side of the river, is located 10 km below the Cardrona township and approximately 7 km above the mouth of the valley.[4] In this stretch of about 17 km of valley floor the Cardrona River is a more confined braided system than on the open basin below the narrow mouth of the Valley. In the vicinity of Harvey's Gully the main valley floor is about 200m wide.[5]

An alternative location?

[13] The lower portion of Harvey's Gully, where the proposed development is located, is visible in part from the State Highway. A short distance beyond the two building platforms the gully turns first to the left and then to the right, so that the road is no longer visible.[6] Mr Scurr did not give evidence at the appeal but Mr Haworth's evidence was that at the Council hearing Mr Scurr had declined a suggestion from the hearing panel that the development be located in this more western position (out of sight from the road), because of its effects on a commercial, horse trekking safari operation he operates on his station. In response to a question from Mr Goldsmith, Mr Haworth accepted that what Mr Scurr had referred to may have been a "commercial hunting safari operation". We proceed on that basis.

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[3] Evidence-in-chief of Ms Lucas, para 11

[4] These distances are apparent from the topographical map used by witnesses on both sides.

[5] Evidence-in-chief of Ms Lucas, para 28

[6] Mr Baxter (page 49 of transcript of evidence) estimated that this would be about 250m further up the valley from the subject site.

[14] The question whether a subdivision is appropriate in a significant landscape usually depends in part on its location, which affects, eg, the extent to which it might be seen from public places. Thus if this development had been proposed for the position further up Harvey's Gully it would be easier to defend.[7] Mr Scurr will have been aware of that and, as Mr Goldsmith indicated in his closing submissions, has had to balance that advantage against the effect on other uses of his property. Presumably there were competing commercial considerations.

[15] Nevertheless, we accept Mr Goldsmith's submission that Mr Scurr is entitled to have his choice of site properly considered on its own merits, and there is no obligation on an applicant to choose the "best or most appropriate location" on his property – although, in practical terms, evidence of that nature may sometimes assist an applicant's cause. Mr Goldsmith supported this submission by referring to policy 4.2.5.1(b) of the district wide landscape policies, which draws a distinction between areas of the District with greater (or lesser) potential to absorb change, this being a comparative rather than an absolute judgment.

Effects on infrastructural services, roading and traffic

[16] There was no dispute concerning Mr Brown's evidence that the effects of the development in relation to roading, traffic and services (water and electricity supply, effluent and stormwater disposal, and telecommunications) would be minor and acceptable.

Riparian regeneration

[17] Lot 3 is an area of approximately 3 .2 ha, most of which lies to the north of the proposed right-of-way (existing farm track) and includes the area where the Harvey's Gully stream meanders down the lower portion of the Gully towards the road.[8] This area, to the north of the access road, "will be fenced off and maintained, without stock, to allow for riparian regeneration to occur within that area".[9] The intention is to prevent stock from trampling in the stream area.[10]

[18] Ms Lucas pointed out[11] that no restoration management plan was proposed, and with little indigenous seed source to compete with the abundant exotic invaders in the vicinity, indigenous regeneration is unlikely in the next decades, perhaps for 50 years. Indeed the exotic invaders could provide a pest source to invade and degrade other areas beyond, and this could negatively effect natural landscape values. We agree with these concerns, but feel that

[7] Mr Brown accepted that there were some better sites in this area – page 78 of transcript of evidence.
[8] The position of the stream is shown on the earlier plans which Mr Goldsmith annexed to his opening submissions.
[9] Mr Baxter's evidence-in-chief para 19
[10] Mr Baxter in cross-examination, page 27 of transcript
[11] Evidence-in-chief para 91

they could be dealt with, as Mr Goldsmith suggested in cross-examination of Ms Lucas[12], by making a suitable management plan a condition of consent.

[19] With this proviso, the destocking of this portion of the stream, and encouragement of some native revegetation of this area, will have ecological benefits that are not disputed.

[20] The remainder of Lot 3 is on the southern side of the proposed right-of-way and from the plans appears to be an area of about 0.5 or 0.6 ha divided into two "amenity paddocks" which are to be fenced off and grazed. However a covenant is offered for the whole of Lot 3 (including these amenity paddocks) to prevent further subdivision or development. This offers a limited, further positive effect, as will be discussed later.

Outstanding natural landscape, and the idea of a continuum

[21] Mr Haworth described the Cardrona Valley as

> *something of a gem; the valley is unique in that it is a narrow valley that is easily accessible by vehicle. The valley's importance is reflected in the fact that Council itself has named and signposted the valley for tourists [as] the "Alpine scenic Route" ...[It is] the only one of its type, narrow and rugged, that could be driven down in the entire District.*[13]

[22] As a result of the decision in ***Robertson v Queenstown Lakes District Council***[14] Mr Goldsmith accepted that the appropriate landscape category is Outstanding Natural Landscape – District Wide (ONL-DW), so that the proposed subdivision should be assessed against the relevant ONL-DW assessment matters, objectives and policies. Nevertheless, it was his submission that the Cardrona Valley comprised two distinct parts -- a flat valley floor providing a pastoral landscape, and the slopes of the valley which are "natural and wild" -- and that Mr Scurr's site is on part of the flat valley floor.

[23] Mr Goldsmith drew attention to the decision in ***Fordyce Farms Ltd v Queenstown Lakes District Council*** [15] where Judge Jackson at para 11 referred to the land there in question as being "towards the lower end of the continuum" of the visual amenity landscape in the Wakatipu Basin. Applying the concept of a continuum to the present case, Mr Goldsmith referred to the evidence of his witness Mr Baxter that the "valley floor must be considered at the lower end of the scale of the ONL of which it forms part".[16] He submitted that the valley floor part of the landscape is closer in character to a visual amenity landscape than the mountain slope part.

[24] In fact, Harvey's Gully is one of a number of smaller, tributary valleys running down to the main valley floor, some of which contain a limited amount

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12 Transcript of evidence page 143
13 Evidence-in-chief para 109
14 C147/2003
15 C39/2002
16 Mr Baxter's evidence-in-chief para 29

of pastoral development. The proposed site is located in the floor of this particular side valley (Harvey's Gully) which itself is elevated slightly above the main valley floor and at present contains no buildings. From the road one looks up the valley to the mountains beyond. In arguing that the proposed structures will not obscure a "view corridor", Mr Brown describes the lower part of Harvey's Gully as "very narrow and ... enclosed by steep contours and existing vegetation particularly in the vicinity of Lot 1. The site is not located in an 'open' valley."[17]

[25] Our view is that the site is at the junction of the two parts described by Mr Goldsmith and has elements of each. While the site is part of a pastoral landscape, in the sense that it is within the greener fringes of the Cardrona Valley floor, nevertheless it is part of a view (from the road) of the "natural and wild" slopes to which Mr Goldsmith refers. The very fact that it is within a side valley means that the eye is drawn up that valley, past the subject site to the more distant mountain view. In any event, we consider that the Cardrona Valley, being quite narrow, tends to be viewed as a whole, with both sides and the short, connecting valley floor visible in one view. It is the *whole* landscape which is outstanding and natural, not just the steeper slopes. The lower part, with its braided river and intersecting side valleys, is an integral part of that landscape. In this context the concept of a continuum can be of little assistance to the appellant, although it undoubtedly may be relevant in other situations.

The Little Criffel Track

[26] Part of the case for the objector was that, as well as being visible from the Cardrona Valley Road, the two building sites are also visible from the Little Criffel walking track. This track, administered by the Department of Conservation, allows public access up the eastern slopes of the Cardrona Valley to the top of the Criffel Range and the Pisa Conservation Area.[18] It was described by Mr Haworth as "a beautiful walk ... [which is] expected to become part of the track network around here in time".[19]

[27] There is a parking area which serves this track on the opposite side of Cardrona Valley Road from the subject site. Mr Goldsmith established to our satisfaction (and our site visit confirmed) that the parking area, being below road level, does not provide a view of the building platforms at ground level on the subject site, although it appeared from Mr Baxter's evidence in re-examination[20] that the structural planting (of exotics) on Lot 2 would be visible from the car park. Also, members of the public travelling to or leaving that parking area will obtain a view of the building platforms[21], and they will do so more directly and for a longer period than passengers in vehicles going past at speed.

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[17] Evidence-in-chief para 3.11

[18] See attachment A to the evidence-in-chief of Mr Haworth.

[19] Transcript of evidence page 188.

[20] Transcript of evidence page 48

[21] Mr Goldsmith's questions to Ms Lucas (page 130 of the transcript of evidence) suggested a view from the roadway of the upper part of one or both buildings.

[28] In addition, the subject site in its entirety will be visible from the Little Criffel track over its full length except for the first 300m or so (where the track drops down from road level, crosses the river and then climbs the bank on the eastern side). Mr Haworth estimated that a fit person would walk to the top of the ridge in three hours or just over that.[22] The track crosses open country, so that for most of the return journey the subject site would be in full view of those coming down the track.

[29] Mr Haworth noted that this Court (differently constituted) has already given weight to the effects on views from the track in ***Upper Clutha Environmental Society v Queenstown Lakes District Council***[23] **(Robertson)**. At the time of that decision, just over one year before this hearing, there was no direct evidence of anyone using the track apart from Mr Haworth himself and the members of that Court on their site visit, but it was noted that the track had only been recently opened by DOC and it was anticipated that when it became better known -

> *those locals and visitors who enjoy energetic recreation will use it to gain a closer acquaintance with the Criffel landscape. In the total assessment of effects, those on users of the Little Criffel track cannot be regarded as negligible.*[24]

We agree with this assessment. At the time of our hearing there was evidence of greater use of the track, Mr Haworth and Ms Lucas having more recently passed 11 other people on the track one day, and Mr Howarth being aware of increasing numbers of vehicles parked at the entrance to the track.[25] We accept the evidence that the subject site is fully visible from most of the track, and of course is more evident from its lower reaches -- see the photographs which are (in enlarged form) attachment 5 (and part of the composite photograph in attachment 4) to the evidence of Ms Lucas - and (without enlargement but with the mountain tops cropped off) attachment G to the evidence of Mr Baxter. [26]

Views of Cardrona Valley from the air

[30] Attachment 3 to the evidence of Ms Lucas is an outstanding photograph taken by her through the window of an Air New Zealand 737 flying Christchurch-Queenstown over the Cardrona Valley, with the subject site in the centre the of photograph and the snow-capped mountains beyond.[27] The cover sheet to her attachments is a different aerial photograph, also showing the subject site, but it

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[22] Transcript of evidence page 172
[23] C147/03
[24] Para 28
[25] Transcript of evidence, page 189
[26] The Court has had cause to reconsider the conclusions it reached after its site visit (transcript of evidence page 127) that relate to Ms Lucas's photographs. After reviewing the transcript of evidence (pages 112 -117) we are unable to say with certainty whether or not a zoom lens was used in one or other of Ms Lucas's photographs attachments 4 and 5. It might be helpful in the future if witnesses producing photographs were to state in their evidence-in-chief the actual degree of enlargement, if any, and whether a zoom lens has been used.
[27] Transcript of evidence page 163

was not taken by Ms Lucas. Although we raised with Mr Goldsmith the possibility of our considering the effect of this proposal on aerial views of the valley by tourists and other members of the public, we accepted his submission that there was insufficient evidence on the point[28] and we have considered it no further.

Other developments in the Cardrona Valley

[31] The only significant group of buildings at present in the Valley is about 10 km to the south, where the Cardrona township (including the well-known Cardrona Pub) serves passing tourists and outdoor sports, particularly the Cardrona ski field. As indicated, the Court undertook a site visit and inspection of the surrounding area. We were invited by counsel to count the number of dwellings we could see on either side of the road between the township and the mouth of the valley - as noted, a distance of approximately 17 km. Mr Baxter in cross-examination had estimated there were five to eight dwellings over this distance.[29] The road is on the western side of the river. We counted eight dwellings on the other (or eastern) side of the river, and three dwellings on the western side, one of which was Mr Scurr's homestead which is at Spotts Creek, about 3 km north of the subject site.

[32] Of course, there could have been some dwellings we did not see, but the general impression is one of a sparsely populated area. In cross-examination, Mr Baxter agreed with Mr Todd that there was a "minimal number of dwellings", adding that it was "reasonably sparse", and that "on the whole" they were associated with rural activity.[30] As Ms Lucas put it, "There is a paucity of apparent homestead nodes throughout the Cardrona valley and this is part of the natural character."[31] And later: "It is not a domesticated valley. This provides a relief from the domestication of the basins at either end of the mountain corridor - of Wanaka and Wakatipu".[32]

[33] Mr Haworth, for the objector, invited us to take into account for the purposes of cumulative degradation, the proposed development at Hillend. This is a large site on the western side of the river at the lower end of the valley and, further north, towards Wanaka. In ***Wilson v Selwyn District Council***[33] the High Court held that the Environment Court should have taken into account future potential development on an adjoining site which was either permitted or controlled. Both Mr Goldsmith and Mr Todd submitted that the decision in ***Wilson*** does not apply to discretionary or non-complying future development,

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[28] The Court raised the issue, quite late in the hearing, with Ms Lucas. Her evidence (at page 163, 164 of the transcript of evidence) was this: " ... many of the residential developments that have occurred in ... the Wakatipu Basin might be quite well screened from roads but you get above and you see these patterns of drives and curtilage and things that add a clutter that you don't observe from the ground, and I think they are cumulatively affecting the naturalness. So I definitely think with such a regularly overviewed place [as the Cardrona Valley] in such a dramatic country with such high naturalness, that it is a dimension to be considered."

[29] Transcript of evidence page 29

[30] Transcript of evidence page 35

[31] Evidence-in-chief of Ms Lucas, para 39

[32] Evidence-in-chief of Ms Lucas, para 106

[33] [2005] NZRMA 76

which would be the status of land use activities assuming the Hillend subdivision is approved.[34] We agree that this distinction is relevant, and do not consider that the Hillend proposal needs to be taken into account in this decision.

[34] Leaving aside the question of Hillend and referring to the area between the Valley mouth and Cardrona township, Mr Haworth[35] referred to a consent granted on 11 July 2000 for G and U Trust to subdivide a 20 ha site into five lots down near the mouth of the valley. Spotts Creek already contains Mr Scurr's homestead, and would have considerable scope for further development if the present application is granted. About 1.5 kilometres south of the "Robertson" site is the "Smith" block already granted subdivision consent for four lots with one new residential complex already visible. About two kilometres further south is the "Rob Rosa" block where two lots have gained consent. Branch Creek and Boundary Creek, both south of the subject site and on the same side of the Valley have no proposed development Mr Haworth was aware of, although there is a brand new house at Branch Creek which he mentioned, and he considered that both of these side valleys could become the subject of future development applications.

Whether the decision in *Robertson* can be distinguished

[35] We have already referred to the decision in ***Robertson*** in the context of the ONL classification of the landscape, and its reference to the Little Criffel walking track. Mr Haworth accepted that the ***Robertson*** decision (where approval to subdivide was refused) could be distinguished in three respects - the applicant Robertson relied on the screening effect of trees outside his control[36], and the site was on a "perched terrace", with landscape attributes that were somewhat more valuable than the subject site.[37] However, offsetting these (he said) is the fact that the subject site is much closer to the road, and the proposed development will detract from the views of mountains to the west when viewed through Harvey's Gully.[38]

[36] We consider that there is a further distinction between the two sites, namely that the Robertson site is visible from the State Highway in both directions, ie whether travelling up or down the valley, while the Scurr site would not normally be noticed by a passenger in a vehicle heading north (towards Wanaka). The Scurr proposal is also (now) a smaller development than was the Robertson proposal.

[37] Mr Baxter drew attention to yet further points of similarity and difference between the two proposals.[39] Overall, we consider that there are too many differences between the sites to be able to draw useful comparisons.

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[34] Since the hearing of this appeal, the Hillend subdivision is reported to have been allowed by the Council but appealed to this Court.
[35] Evidence-in-chief paras 40 to 53 and cross-examination at page 179 of the transcript of evidence
[36] Transcript of evidence page 181 (cross-examination)
[37] Evidence-in-chief para 25
[38] Ibid
[39] Evidence-in-chief paras 58 to 60

Precedent effect

[38] Mr Haworth expressed concern about the precedent effect which an approval of this application would have elsewhere in the Cardrona Valley, which the objector considers is under "development pressure".[40] He drew attention[41] to attachment C of the original application to the Council, which described this proposal as "stage 1 of a multi-staged development proposal", with "subsequent proposals ... pending for the Home block above the Spott (sic) Creek station homestead, within Spotts Creek, and further east along the Cardrona Road." Mr Haworth was also concerned about other side valleys that might be exploited in a similar way. Mr Henderson referred to "many small gullies similar to Harvey's Gully that are not developed and provide visual interest, adding to the overall appreciation of the landscape of the Cardrona Valley".[42] Mr Brown acknowledged that a precedent could be created by an approval of this application. "In a collective sense, there is potential for other tributary valleys is to absorb appropriate development in this way, and of course each proposal would be assessed on its merits."[43] He considered this would be a "positive precedent".

[39] There can be no doubt that an approval of Mr Scurr's proposal would create a precedent for similar developments in many other parts of the Cardrona Valley. We are entitled to take this into account, and do so, in respect of both the TDP and the PODP

[40] Such issues commonly arise in relation to non-complying activities, and are dealt with applying the guidance offered by the Court of Appeal in ***Dye v Auckland Regional Council***:[44]

> *The precedent effect of granting a resource consent (in the sense of like cases being treated alike) is a relevant factor for a consent authority to take into account when considering an application for consent to a non-complying activity. The issue falls for consideration under s 105(2A)(b) and 104(1)(d).*

[41] Precedent effects focus on the possible influence of the instant case on future (like) cases. In the case of non-complying activities, the closely related issue of the integrity or coherence of the District Plan will also arise, if there is no evident unusual quality in an activity that receives consent.[45] This does not require a looking forward, but rather a consideration of the impact on the present state of the District Plan of a decision to allow an application.

[42] Precedent issues are not often raised in relation to discretionary activities. Nevertheless, there is both case law and reason based on this particular District

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40 Transcript of evidence page 166
41 Supplementary evidence-in-chief, transcript of evidence page 169
42 Evidence-in-chief para 8.12
43 Evidence in chief para 3.30
44 [2002] 1 NZLR 337 at para 49
45 See eg ***Batchelor v Tauranga District Council*** (A64/92) per Sheppard PPJ at p 15.

Plan, to support the relevance of precedent to discretionary activities. In the High Court, Blanchard J ***Manos v Waitakere City Council***[46] held:

> *... the consent authority is in terms of s 104(4)*[47] *required to have regard to the rules, policies and objectives of district and regional plans and is fully entitled to consider the precedent effect of granting an application for a discretionary activity when doing so.*

This view was subsequently stated (obiter) to be correct by the Court of Appeal when refusing leave to appeal to that Court.[48]

[43] As we see the matter, a grant of consent to a discretionary activity can be a precedent in the sense of creating an expectation that a like application will be treated in a like manner. In general this may not be as important as in the case of a non-complying activity, because most District Plans assume that a discretionary activity will be acceptable on a variety of sites within the zone, and each must be assessed on a case-by-case basis.

[44] In terms of this particular District Plan, there is even greater reason to consider issues of precedent for discretionary activities. In a section on the classification of activities[49] it is stated that discretionary activities have been awarded such status ... "because in or on outstanding landscapes or features the relevant activities are inappropriate in almost all locations ...", and "in visual amenity landscapes the relevant activities are inappropriate in many locations ..." Such explanation works against any assumption that this plan envisages discretionary activities will occur on most sites in either type of landscape – an assumption that would leave little room for precedent arguments.

The status of the evidence of Mr Haworth

[45] Mr Haworth is in an unusual situation. He professes no formal qualifications as an expert witness and yet he has extensive experience of the matters canvassed in this and other appeals (including the relevant provisions of the District Plan), and a considerable knowledge of the applicable case law. As may be expected, this knowledge and experience is limited to the Upper Clutha region.

[46] Mr Haworth commenced his evidence-in-chief by recording that he has been on the committee of the Upper Clutha Environmental Society since its inception nine years ago, and is currently its President. He has a degree in Business Studies, is a qualified accountant, and has lived and worked in Wanaka for 14 years as owner/operator of a backpacker lodge business. This has made him familiar with many aspects of the visitor industry in the Upper Clutha. He claims nine years' practical knowledge of the implementation of policies, objectives, rules and assessment matters in the District Plan. This includes experience of variations to the District Plan, and "a large number of

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46 [1994] NZRMA 353 at 356
47 for this case, s 104(1) as it was before the 2003 amendments
48 ***Manos v Waitakere City Council*** [1996] NZRMA 145 at 148, per Gault J
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subdivision and land use resource consent applications" where he has represented his Society at hearings of the Council's resource consent hearings committee. Further, he has six years experience with Environment Court hearings relating to the rural and district-wide sections of the District Plan and is familiar with the Court's decisions following from those hearings.

[47] On this basis Mr Haworth claimed to have "some expert knowledge on planning and resource management issues in relation to the Upper Clutha, this being based on a combination of extensive local and background knowledge and familiarity with the revised Partly Operative District Plan and its relationship with the RMA."[50] This claim was not disputed by any party but nevertheless merits consideration as to its implications. Mr Haworth was described by this Court in the ***Robertson*** decision as being "now a witness of some experience in Environment Court proceedings".[51] Can he be regarded, however, as an expert witness?

[48] The essential privilege of an expert witness as compared to a lay witness is to be allowed to express opinions.[52] There is clear New Zealand authority that to qualify as an expert witness one need not necessarily have formal, professional qualifications. The cases providing this authority can be found in para 15.11 of *Cross on Evidence New Zealand edition* and para 7.245 of Freckleton & Selby *Expert Evidence*. In the latter, in reference to New Zealand law, the following is to be found:

> *The judge or magistrate must determine whether the witness (a) has undergone such a course of special study and/or (b) is so experienced in a particular field as to render that person expert in a particular subject (R v Hallwood , unreported, Court of Appeal, 22 February 1990, 305/80).*

It is to be noted that expertise may be limited to a particular "subject" within a particular "field". The essential issue is always whether the witness is sufficiently qualified, either by a special course of study and/or by experience, to assist the Court on the subject matter in issue. This is to be is decided on a case-by-case basis and is a question of fact.[53]

[49] As is well known, the Environment Court is not bound by the rules of law about evidence that apply to judicial proceedings, and may receive anything in evidence that it considers appropriate to receive.[54] This means that there could be no formal objection to opinion evidence being given by someone such as Mr Haworth, or indeed by any lay witness, but the distinction drawn by the cases is still important in terms of the weight to be attached to evidence by the Court.

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[50] Evidence-in-chief para 4

[51] ***Upper Clutha Environmental Society v Queenstown Lakes District Council*** **(Robertson)** C147/03, at para 17

[52] The restricted categories of evidence on which lay persons can express opinions -- such as the apparent age of someone, or estimates of speed and distance -- are out in para 7.10 of Freckleton & Selby *Expert Evidence.*

[53] Ibid para 7.20

[54] Section 276(1) RMA

[50] A witness seeking to give expert evidence is obliged to undertake the obligations of such a witness, which include impartiality and objectivity: see ***Hillpark Residents Association Incorporated v Auckland Regional Council***[55] and (to similar effect, but since the hearing of this appeal) the *Code of Conduct for Expert Witnesses* contained in the Practice Note of this Court dated 31 March 2005:

> 1. *An expert witness has an overriding duty to assist the Court impartially on relevant matters within the expert's area of expertise.*
> 2. *An expert witness is not an advocate for the party who engages the witness.*

[51] Mr Haworth is of course in the position of being closely, indeed intimately, connected with the Society he represents. Despite this fact we found him to be well able to admit points that did not support the objector, and generally to exhibit a degree of intellectual honesty that inspired some confidence in his opinions.

[52] Our conclusion is that Mr Haworth can properly be regarded as an expert witness on some resource management subjects concerning the Upper Clutha area, but the Court must take into account his lack of formal independence when assessing the weight to be attached to his evidence. We also remind ourselves that he could not (and indeed, did not) profess expertise in all matters we have to consider.

Assessment of landscapes

[53] The criteria for assessing a landscape, referred to by Mr Brown as "the (modified) ***Pigeon Bay*** criteria", are helpfully set out by Judge Jackson at para 80 of ***WESI v Queenstown Lakes District Council***[56] as follows:

> *(a) the natural science factors -- the geological, topographical, ecological and the dynamic components of the landscape;*
> *(b) the aesthetic values including memorability and naturalness;*
> *(c) its expressiveness (legibility): how obviously the landscape demonstrates the formative processes leading to it;*
> *(d) transient values: occasional presence of wildlife; or its values at certain times of the day or of the year;*
> *(e) whether the values are shared and recognised;*
> *(f) the value to tangata whenua;*
> *(g) its historical associations.*

[54] Based largely on the evidence of Ms Lucas and Mr Haworth we find that this landscape is one to be highly valued. It is the mouth of a side valley where the proposed subdivision would occupy the terrace tread which connects the foothills and mountains behind with the wider floor of the Cardrona Valley and its river. It is both memorable and natural, for itself and in its wider context. It is fully legible, has no transient values stated to us, but expresses shared, eternal

[55] A30/2003 at paras 96-98
[56] C80/99

values of natural beauty, peace and re-creation. We were not told of its value to tangata whenua, but noted its historical associations with the gold mining of the 19th century, evidenced by old gold diggings shown nearby and around the Cardrona Valley on the topographical map.[57]

ASSESSMENT MATTERS IN RURAL ZONES

[55] Rule 5.4 of the PODP contains assessment matters which are included in order to enable the Council (and the Court) to implement the policies of the District Plan and fulfil its functions and duties under the Act.[58] The assessment matters relevant to outstanding natural landscapes (district wide) are contained in rule 5.4.4.2(2), and we deal with them in the order there found. Four of the five witnesses addressed these matters in some detail. For his part the fifth witness, Mr Henderson, simply agreed with and adopted the views of Ms Lucas.

(a) Potential of the landscape to absorb development

> *In considering the potential of the landscape to absorb development both visually and ecologically, the following matters shall be taken into account consistent with retaining openness and natural character:*
>
> ***(i) whether, and to what extent, the proposed development is visible from public places;***
> ***(ii) whether the proposed development is likely to be visually prominent to the extent that it dominates or detracts from views otherwise characterised by natural landscapes;***

[56] These two criteria can conveniently be considered together.

[57] It is not disputed that the building platforms will be visible from a section of the public road approximately 130m in length. The two platforms are 210m and 260m from that road. As already noted, the visibility is limited largely to persons travelling away from Wanaka.[59] People driving past at speed will obtain only a fleeting glimpse[60] of the site, while those proceeding more slowly (e.g., so as to turn into the parking area for the Littlel Criffel track, or cyclists) will have a more considered view.

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[57] These gold diggings had been the subject of a submission to the Council by the NZ Historic Places Trust. Somewhat surprisingly, Mr Brown had not seen or read this submission (p 70 of transcript of evidence), and nor had he read the synopsis of objections which Mr Henderson had attached to his brief of evidence (p 77 of transcript of evidence).

[58] Rule 5.4.1 (i). As noted, the Council has recently announced decisions on Variation 18 to the PODP which are still subject to appeal so we cannot give them full weight. In terms of the assessment criteria, the variation affected criteria (a)(i), and (b)(i) and (iii).

[59] Mr Baxter's evidence-in-chief, para 32

[60] Approximately 5 seconds if travelling at 100 kph, according to Mr Baxter: page 12 of transcript of evidence

[58] The road has been recently sealed, and the evidence suggested that since then the average number of vehicles using the road has gone from 1,000 to 4,000 per day.[61]

[59] As already noted, the site is visible from most of the Littlel Criffel track, which is a public place. People walking up the track will only notice it if they stop and look back across the river, while those coming down the track will have it in full view for most of the time.

[60] Mr Scurr's witnesses considered that the proposed development will be partially although not completely screened by new exotic planting, that it would be viewed as one group of buildings through specific design controls, that the extent of visibility of curtilage areas would be minor, and that a "homestead" group of buildings would not detract from views otherwise characterised by natural landscapes as the development will be characteristic of this particular part of the landscape which is part of the pastoral valley floor.[62]

[61] We have already said why we do not accept the simple division of this landscape into "valley floor" and "mountain slopes". However, on the question of "visual prominence" Mr Goldsmith submitted that Ms Lucas did not address this at all, and that here, and elsewhere in her evidence, her general conclusion that the development was inappropriate "coloured the process" of addressing the different assessment matters.

[62] There is some merit in this criticism made by Mr Goldsmith and we have taken it into account when considering Ms Lucas's evidence, which in places does not appear to relate to the heading under which it is written. Nevertheless, there is no requirement that a witness use the actual words of the District Plan -- or, for that matter, a statute -- so long as it is clear that the witness has addressed the relevant provision of the plan (or the statute) if expressing an opinion concerning its application to the facts. Further, it is the responsibility of the Council and, on appeal, this Court, to draw conclusions based on the evidence provided. The conclusions do not have to be expressed by witnesses: rather, the witnesses provide evidence upon which the Council or the Court must draw its own conclusions. The evidence which a tribunal accepts supporting those conclusions may come from a variety of witnesses, and may not always be found under the appropriate headings in their evidence.

[63] In relation to criterion (ii), Ms Lucas sets out the relevant terms of the District Plan and then immediately states a conclusion, "I find that the development will detract from the natural landscape" (para 81). Although she does not expressly refer to visual prominence, we think that is implicit in paras 81 to 86 of her evidence read as a whole. Her view is supported by Mr Haworth who also does not use the term "visually prominent" but who considered that the residential complexes --

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[61] At least, Mr Brown did not dispute this when it was put to him by Mr Haworth (page 68 of transcript of evidence).

[62] See, eg., Mr Baxter's evidence-in-chief at para 36a and Mr Brown's evidence-in-chief at para 3.12

will be reasonably obvious in the landscape from the road and the walking track. I consider that the development proposed conflicts with the undeveloped nature of the site and the wider landscape around the site. The site is currently devoid of buildings. Superimposing 2 residential complexes on the site will detract from the landscape and especially the views through to the mountains to the west of the site. [63]

Based on the evidence as a whole, and noting Mr Henderson's support for the views of Ms Lucas, we find that the proposed development is likely to be visually prominent to the extent that it detracts from views otherwise characterised by natural landscapes.

[64] This conclusion is reached notwithstanding that stringent conditions, of the type outlined by Mr Goldsmith in his reply, might be devised to ensure that the development as a whole has the appearance of a "homestead node", with one dwelling as the farm "homestead" and the other as a barn. Mr Goldsmith suggested that, although not so far proffered, a specific design could be called for to ensure such appearance, and that there could be a restriction on the number of household units in each dwelling, and on the number of tennis courts, swimming pools, trampolines or other signs of domestication (or that some of them could even be prohibited altogether).[64]

[65] Even assuming that such restrictions could be devised[65], and further that they would be honoured by future owners[66], we do not consider that this overcomes the proper concerns of Ms Lucas and Mr Haworth. We say this for four reasons:

(1) A group of buildings which is not actually used for farming could not entirely appear to be part of a farm. While the fencing would be of a traditional farming type there would be none of the usual "clutter" of farm activity associated with such buildings in the minds of the travelling public, such as tractors and farm implements, working dogs and their kennels, cattle yards or sheep dips, hay bales and sundry farm equipment -- what Ms Lucas calls "evident farm-associated activity".[67] Although farmers use their homesteads for residential activities, the proposed development is likely to have an altogether more tidy and different appearance, simply because it is being put to a different use. The design and appearance of the buildings is only part of the impression that is given.

(2) It cannot be assumed that a fleeting glance of the group of buildings will be only a single glance. The existence of new dwellings will be obvious from the new driveway and mailboxes that traditionally indicate a residential

[63] Evidence-in-chief para 81

[64] See e.g. Mr Goldsmith's questions at page 183 of the transcript of evidence.

[65] Mr Henderson readily (perhaps too readily) conceded this in cross-examination by Mr Goldsmith.

[66] Mr Henderson noted in cross-examination (page 151 of transcript of evidence) that "quite often with very prescriptive conditions, a subsequent owner will come along and immediately seek to change them."

[67] Evidence-in-chief of Ms Lucas at para 88. See also para 73, as well as page 118 of transcript of evidence (cross-examination) and pages 211, 212 (discussion between Bench and Mr Goldsmith).

presence.[68] Those who travel this road frequently – residents of the area as well as skiers and other holidaymakers -- might obtain frequent views of the development over a period of time[69], so that they are aware of the reality of a "lifestyle" block rather than the intended appearance of a working farm. This impression is likely to be reinforced by seeing the "lifestyle" owners come and go on recreational activities, such as boating, even if the evidence of such activities (such as boats) is hidden on site, as was suggested could be done.

(3) The openness and natural beauty of an outstanding natural landscape may be said to be compromised even by farm buildings, but they are acceptable precisely because they are part of a farming operation. That is the justification for their existence, especially in an outstanding natural landscape. This is an area of large pastoral holdings. There is no evidence before us that the residents of this district, or its visitors, would like to see *more* farm buildings about the place, or that they are desired for their own sake. (Instead, the case for Mr Scurr seems to be that people will not object to new buildings at this location because they will think it is a farming operation.) Even the owner could not put a new dwelling in this location for farming purposes as a permitted activity: the Council is able to control the location of farm buildings. Adding unnecessary buildings to the landscape can only detract from its outstanding natural characteristics.

(4) Finally, one must question the wisdom of an approach that could undermine the integrity of the New Zealand landscape. This is what Ms Lucas referred to as "facadism".

> *If a pseudo-barn/woolshed is achieved, it is doubtful this assists landscape naturalness or legibility. Honesty in reading landscapes is desired. Facadism and developments for one activity pretending to be another, is undesirable for maintaining aesthetic coherence, natural landscape values and historic associations.*[70]

We share her concerns. Do we want to be deceived by appearances, or not to know whether it is the "real thing"? What would this do for New Zealand's image of itself, or in the eyes of others? The conversion of an existing building to another use raises different issues which do not arise in this case.[71]

> ***(iii) whether any mitigation or earthworks and/or planting associated with the proposed development will detract from existing natural patterns and processes within the site and surrounding landscape or otherwise adversely effect the natural landscape character;***

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[68] See Ms Lucas in cross-examination, page 109 of transcript of evidence.

[69] Mr Henderson agreed that one's perception is likely to change because you are alerted to the development and able to take a closer look next time you go by, although he added that over time you would come to accept that as part of the area, depending on one's point of view: pages 158, 159 of the transcript of evidence.

[70] Evidence-in-chief of Ms Lucas para 89

[71] Importantly, by definition the building is already part of the landscape, and the new use may be one means of preserving its structure. See also cross-examination of Ms Lucas at page 139 of transcript of evidence.

[66] Earthworks did not really feature in the evidence at all. Some mitigating planting is proposed and other forms of mitigation relate to the colour and design of the buildings, as well as other possible restrictions (already dealt with) to maintain a "homestead node" appearance. We assume that these different forms of mitigation are likely to succeed in their intended objective, but only to the extent already noted. They will not, of themselves, adversely effect the natural landscape character -- it is what they are mitigating (the residential development) which does that.

[67] As for the proposed planting – "groups of exotic trees planted primarily for shelter" -- Mr Baxter states[72] that this will change "the existing patterns of grey shrubland and pastoral grass/tussock within the actual building platforms and curtilages ... [but not] in the immediate surrounding landscape." Because this is consistent with usual homestead planting, it will be consistent with what is seen elsewhere on the valley floor.

[68] Given that we do not regard the site as simply "valley floor" landscape, we do not agree that adding further exotic planting to the area can be justified on that basis. Ms Lucas states[73] that the planting in Lots 1 and 2 will read as domestic tree clumps. While Mr Haworth complains[74] that the trees proposed for screening the development from sight "create potentially worse effects, for instance the views afforded [up] Harvey's Gully towards the mountains to the west will be hidden", he agreed in cross-examination[75] that such trees were likely to obscure only a view of the foothills, rather than the mountains themselves. The foothills, however, are attractive in their own right,[76] and part of the natural landscape.

[69] The proposed planting will in one way assist the landscape to absorb the development (by partially screening it from views from the road, though not from the track) but the planting itself will in our view adversely effect the natural landscape character to some degree, precisely because it is exotic planting that is intended to be seen (in order to act as a screen) in the middle of a view which is predominantly natural.

> ***(iv) whether, with respect to subdivision, any new boundaries are likely to give rise to planting, fencing or other land use patterns which appear unrelated to the natural line and form of the landscape; wherever possible with allowance for practical considerations, boundaries should reflect underlying natural patterns such as topographical boundaries;***

[70] It was Mr Haworth's view[77] that "the proposed subdivision will result in artificial boundaries being imposed on this area inconsistent with the existing natural character of the gully". This is true insofar as part of the mouth of this

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[72] Evidence-in-chief paras 20 and 37
[73] Evidence-in-chief para 96
[74] Evidence-in-chief paras 88-89 and page 184 of transcript of evidence
[75] Transcript of evidence page 186
[76] Mr Haworth, ibid
[77] Evidence-in-chief para 90

tributary valley will be cut off from its surrounding area. However, the emphasis in this criterion is on the location of new boundaries. On the lower side of Lot 3 the boundary follows roughly around the contours of the land to the north of the stream. The northern sides of Lots 1 and 2 follow an existing farm access track which in turn seems to follow the contours of the land. On the southern side of those lots the boundary again approximates the contour lines of Mr Baxter's attachment A, so as to create two reasonably level (but slightly east-sloping) lots. The boundaries created by the subdivision therefore appear to reflect to a reasonable degree the topographical features of the location. In our view, it is not the choice of boundaries, so much as the subdivision itself, which interferes with the existing natural character of the gully.

(v) whether the site includes any indigenous ecosystems, wildlife habitats, wetlands, significant geological or geomorphologic features or is otherwise an integral part of the same;
(vi) whether and to what extent the proposed activity will have an adverse effect on any of the ecosystems or features identified in (v);

[71] No witness claimed that the site included any indigenous ecosystems, wildlife habitat or wetlands. (The fencing off of the lower part of the stream and some adjoining land is dealt with separately below under "positive effects".)

[72] While Ms Lucas[78] referred to a significant geomorphologic feature of the Cardrona Valley in the vicinity of the site, namely the Harris-Cardrona mountain suite, to which the site is "the base landform", she does not express an opinion on the extent to which the proposed development will have an adverse effect on that feature. One might infer that she regards the development as breaching the integrity of the terrace tread (the flat portion of a terrace, as distinct from the riser), which she describes as "sculpted deposition lands" or "small terrace units ... [which are] all displayed as a micro-suite of simple, smooth surfaces", but she does not say whether the site is an "integral part" of such a feature. In this instance Mr Goldsmith's criticism already noted is apposite.

[73] We consider the evidence in relation to these criteria to be neutral.

(vii) whether the proposed activity introduces exotic species with the potential to spread and naturalise

[74] Ms Lucas considered that the chosen trees include exotic species which could easily spread across the ungrazed lands, such as birch and maple.[79] Mr Baxter, to the contrary, claimed that none of the proposed species were of the spreading type.[80] If the proposal were to be allowed, this could become a condition of consent.

[78] Evidence-in-chief paras 98, 99
[79] Evidence-in-chief para 96
[80] Evidence-in-chief para 42

Conclusion as to the potential of the landscape to absorb development

[75] It must be remembered that each of the criteria quoted above is simply one factor to be taken into account in assessing such potential, but only so far as it is "consistent with retaining openness and natural character". We consider that the openness and natural character of the landscape in the vicinity of Harvey's Gully would be significantly compromised by the proposed development. Overall our view is that the landscape in question, taking into account the criteria of the District Plan, has very limited ability to absorb development visually, although there is no evidence of any problem in its absorbing this development ecologically.

(b) effects on openness of landscape

In considering the adverse effects of the proposed development on the openness of the landscape, the following matters shall be taken into account:

(i) whether and the extent to which the proposed development will be within a broadly visible expanse of open landscape when viewed from any public road or public place;

[76] As would be expected there was a large degree of overlap between the evidence on openness of landscape and the evidence on the potential of the landscape to absorb development.

[77] We consider that Mr Baxter summarised the position fairly in saying[81] that the development is not within a "broadly visible expanse of open landscape", as viewed from the Cardrona Valley Road, but it is when viewed from the public walking track.

(ii) whether, and the extent to which, the proposed development is likely to adversely affect open space values with respect to the site and surrounding landscape:

[78] Open space values lie at the heart of what has already been described as special about the Cardrona Valley. We prefer the evidence of Ms Lucas and Mr Haworth on this topic[82] and consider that there will be an adverse effect on those values. The site is not, as Mr Baxter states[83], in an "enclosed gully" but rather at the mouth of a gully where it flows out into the main valley floor. The site is currently open in nature and the proposed development will place a residential node into a length of that valley where little or none is currently visible.

(iii) whether the proposed development is defined by natural elements such as topography and/or vegetation which may contain any adverse effects associated with the development;

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[81] Evidence-in-chief para 43
[82] Evidence-in-chief of Ms Lucas paras 105 to 107 and Mr Haworth paras 96 to 97
[83] Evidence-in-chief para 44

[79] The site is partially contained by landform, insofar as it is not visible from the main road except for a short distance (approximately 130m). However, because of the visibility of the development from public places (already discussed) and the lack of any significant existing vegetation that might contain adverse visual effects[84], the effects on the openness of landscape are not significantly diminished by natural elements defining or containing the development.

Conclusion regarding effects on openness of landscape

[80] We find that the proposed development, having regard to the criteria listed, will have a significant adverse effect on the present openness of the landscape.

(c) Cumulative Effects on Landscape Values

In considering whether there are likely to be any adverse cumulative effects as a result of the proposed development, the following matters shall be taken into account:

(i) whether, and to what extent, the proposed development will result in the introduction of elements which are inconsistent with the natural character of the site and surrounding landscape

[81] The proposal will introduce two residential complexes, which are unlikely to be perceived as farm activities, into an area where farm buildings themselves are few and far between. As Ms Lucas puts it, such residential elements are inconsistent with the natural character of the Cardrona Valley.[85] The evidence to the contrary on behalf of Mr Scurr[86] presupposes the success of the deception involved in the rural façade. It also assumes that this is simply a "rural" landscape, such as a visual amenity landscape, in which farm buildings are appropriate, when it must be assessed in terms of its natural character.

[82] As the Environment Court has previously explained:[87]

> *88. It is wrong to equate 'natural' with 'endemic'. In the context of section 6(a) the Planning Tribunal stated, in* ***Harrison v Tasman District Council***[88]*:*
>
> > *"The word 'natural' does not necessarily equate with the word 'pristine' except insofar as landscape in a pristine state is probably rarer and of more value than landscape in a natural state. The word 'natural' is a word indicating a product of nature and can include such things as pasture, exotic tree species (pine), wildlife ... and many*

[84] The willows and poplar at present near the farm gate will, when in leaf, provide some screening effect.
[85] Evidence-in-chief para 113
[86] Evidence-in-chief of Mr Baxter at para 46 and Mr Brown at para 3.23 -- 3 .26.
[87] ***WESI v Queenstown Lakes District Council***, C180/99 at para 89
[88] [1994] NZRMA 193 at 197

other things of that ilk as opposed to man-made structures, roads, machinery."

We respectfully agree with that passage.

89. We consider that the criteria of naturalness under the RMA include:

- *the physical landform and relief*
- *the landscape being uncluttered by structures and/or obvious human influence*
- *the presence of water (lakes, rivers, sea)*
- *the vegetation (especially native vegetation) and other ecological patterns.*

[83] Judged against these elements, the proposal does introduce elements that are inconsistent with the natural character of the site and surrounding landscape.

(ii) whether the elements identified in (i) above will further compromise the existing natural character of the landscape either visually or ecologically by exacerbating existing and potential adverse effects

[84] We believe the matter is fairly put by Mr Haworth[89] in stating that the application does not exacerbate existing effects on the subject site as it is currently in a largely natural state. We accept also Mr Baxter's view that the proposed structural planting with exotic vegetation does not exacerbate an existing adverse effect.[90]

[85] Mr Haworth relies however on the existing and potential adverse effects of other developments in the Valley (already noted above) which this proposal would exacerbate, leaving the danger that no part of the Valley would be left without glimpses of residential development if the side gullies are allowed to be developed in the manner proposed here.[91] We consider this a more realistic assessment than that of Mr Baxter, who regards "dwellings and landscape of an appropriate scale ... [as] anticipated and expected within the Cardrona Valley",[92] or Mr Brown, who acknowledges that there are some other sites that could possibly accommodate new development in a similar way but seems to consider that is appropriate provided "overall the character is rural".[93] We accept the view of Ms Lucas[94] that the existing homestead nodes are discreet, have historic associations and are part of the character of the Valley", and that the potential for this proposal to be a precedent is a concern. If the number of dwellings experienced in the Valley exceeds that which is expected for the

[89] Evidence-in-chief paras 103,104
[90] Evidence-in-chief para 47
[91] Evidence-in-chief para 104
[92] Evidence-in-chief para 47
[93] Evidence-in-chief para 3.24
[94] Evidence-in-chief paras 115, 116

farming of such land, then in our view the existing natural character of the landscape is likely to be compromised.

(iii) whether existing development and/or land use represents a threshold with respect to the site's ability to absorb further change;

[86] The present use of the site is for grazing, and existing development is limited to a farm track, fencing and a few exotic trees. Ms Lucas appears to treat this subparagraph as referring to existing development and/or land use of "the site", as she says that the existing development is "a track and no buildings".[95] Mr Baxter takes a similar approach when he says that the only "change" currently within or near the site comprises existing exotic vegetation.[96] We consider that this is the correct approach, given that the question of a threshold within the wider landscape has already been addressed in the previous subparagraph, in terms of "exacerbating existing ... adverse effects". Further, rule 5.4.2.2(2) as a whole appears to draw a distinction between "the site" (or "the subject land" or "the development") on the one hand, and "the surrounding landscape" on the other hand: see for example paras (a)(iii), (v) and (vi); (b) (ii) and (iii); (c) (i), (ii) and (iii); and (d) (iii).

[87] On the other hand Mr Haworth, under the current heading, says that there is little built development apparent in this part of the Cardrona Valley, which is part of its beauty; so that it "has a very low threshold to absorb further development".[97] Mr Brown approaches the question of a threshold both from a narrow perspective[98] and beyond the site.[99] In the former case, he suggests that there would be no possibility of further development of the site beyond the current proposal (which is not actually the question posed), and in the latter case he considers that the threshold for development in the Cardrona Valley is not crossed by this proposal.

[88] Whichever way the matter is approached, this criterion does not in our view support the proposal. The site itself, if treated as the mouth of Harvey's Gully, has a natural and undeveloped character with a correspondingly low threshold if its landscape values are to be maintained. On the other hand, if the ability to absorb further change relates to the Cardrona Valley, or "this part of the valley" – to use Mr Haworth's term -- we again prefer his evidence, which is supported by that of Ms Lucas.[100]

(iv) where development has occurred or there is potential for development to occur (ie. existing resource consent or zoning), whether further development is likely to lead to further degradation of natural values or inappropriate domestication of the landscape or feature.

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[95] Evidence-in-chief para 117
[96] Evidence-in-chief para 48
[97] Evidence-in-chief para 105
[98] Evidence-in-chief para 3.27
[99] Evidence-in-chief para 3.29
[100] For example at para 39 to 44 of her evidence-in-chief. "With such sparse and discreet built development belonging along the length of this highly accessible mountain enclosed valley, the naturalness is assessed as both highly valued and highly vulnerable." (para 44)

[89] Mr Baxter correctly notes that the response to this assessment matter depends upon the extent of the "landscape or feature" being considered.[101] If it is limited to Harvey's Gully and its close vicinity, there is no existing development nor any resource consent or zoning which would allow development -- so the criterion is not applicable. On the other hand, the wider Cardrona Valley landscape raises different issues. From his evidence Mr Baxter seems to be unaware of two existing resource consents referred to above -- those for the "Smith" block (four lots) and the "Rob Rosa" block where two lots have gained consent.[102] In respect of existing development he considers the Scurr proposal will simply be part of a "pastoral landscape which [already] contains discrete and well separated elements of domestication"[103] Mr Brown has a similar view.[104]

[90] Ms Lucas does not address this criterion but instead states that, "with just two houses, they will not ... appear 'urban' in intensity".[105] Mr Haworth's evidence is more to the point.[106] Based on his account of existing development in Cardrona Valley and consents already granted for future development, and the findings we have already made concerning landscape values in the Valley, we consider that further development is likely to lead to further degradation of natural values through inappropriate domestication of the landscape.

Conclusion concerning cumulative effects on landscape values

[91] Looking at these criteria as a group, we consider that there are likely to be adverse cumulative effects on this natural open landscape as a result of the proposed development. There are already the beginnings of "lifestyle" intrusions into the natural character of Cardrona Valley and these can only increase as the two existing consents are implemented. The Scurr proposal will exacerbate the adverse effects of such development, and lead to a further degradation of natural values and inappropriate domestication. On a cumulative basis the problem is even greater than when considering Harvey's Gully on its own.

(d) Positive effects

In considering whether there are any positive effects associated with the proposed development the following matters shall be taken into account:

(i) whether the proposed activity will protect, maintain or enhance any of the ecosystems or features identified in (a) – (v) above;

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[101] Evidence-in-chief para 49

[102] Mr Goldsmith in cross-examination of Mr Haworth (at page 179 of the transcript) did not challenge his evidence concerning these two properties. However Mr Baxter at para 50 of his evidence-in-chief said he was "unaware of any existing potential for further development through existing unimplemented resource consents".

[103] Evidence-in-chief para 50

[104] Evidence-in-chief para 3.22

[105] Evidence-in-chief para 119

[106] Evidence-in-chief paras 40-44, 46-47, and 107-110

(ii) whether the proposed activity provides for the retention and/or re-establishment of native vegetation and their appropriate management;

[92] These two criteria are appropriately dealt with together. It will be recalled that "(a) – (v)" *above* refers to *indigenous ecosystems, wildlife habitats, wetlands, significant geological or geomorphologic features*, and that there was no evidence at that stage except on the last aspect, which we regarded as neutral.

[93] Nevertheless, this is a convenient point at which to note the proposal to fence off the lower part of the creek and a surrounding area for "riparian regeneration." As already noted above under that heading, the removal of stock from this portion of the stream, and encouragement of some native revegetation of this area under a suitable management plan, would have ecological benefits, and these undoubtedly count as "positive effects". Mr Goldsmith in his submission in reply[107] did not put this higher than a minor benefit, but it would nevertheless be a real benefit.

[94] Mr Haworth points out[108] that these measures could be undertaken whether the application succeeds or not, but we think that is unlikely to happen.

(iii) whether the proposed development provides an opportunity to protect open space from further development which is inconsistent with preserving a natural open landscape;

...

(vi) the use of restrictive covenants, easements, consent notices or other legal instruments otherwise necessary to realise those positive effects referred to in (i) -- (v) above and/or to ensure that the potential for future effects, particularly cumulative effects, are avoided.

[95] Although out of sequence, these two criteria are best considered together. As already noted, the covenant offered for the whole of Lot 3 (including the amenity paddocks) as well as Lots 1 and 2 -- to prevent further subdivision and development -- is a further positive effect, although limited to 4.2 ha. There was some discussion between the Bench and Counsel as to how this might this be achieved. It was the submission of Mr Goldsmith[109], who has some expertise in this area, that while a consent notice could be varied by the Council (we presume, on the application of the owner), assurances of this type can be put beyond the reach even of a future Council by means of a Deed of Covenant in gross for the benefit of the objector Society, backed by a Memorandum of Encumbrance. Such an arrangement was offered by Mr Goldsmith on behalf of Mr Scurr.

(iv) whether the proposed development provides an opportunity to remedy or mitigate existing and potential ... adverse effects by

[107] Page 196 of transcript
[108] Evidence-in-chief paras 112 and 113
[109] Pages 199-203 of transcript

modifying ... or removing existing structures or developments; and/or surrendering any existing resource consents;

[96] There are no existing structures, developments or consents on the subject site, so there are no potential benefits of this type.

(v) the ability to take esplanade reserves to protect the natural character and nature conservation values around the margins of in the lake, river, wetland or stream within the subject site;

[97] There are no reserves proposed for this development, but as Mr Baxter notes[110] a similar positive effect is achievable by a combination of the destocking, fencing and replanting of the area surrounding the stream, reinforced by the covenant procedure already discussed.

[98] This completes our consideration of the listed "positive effects". There is however a further positive benefit of the development acknowledged by Mr Haworth,[111] namely the financial gains to Mr Scurr, and the benefit to the purchasers of Lots 1 and 2 from being permitted residences in this outstanding landscape.

Conclusion concerning positive effects associated with the proposed development

[99] There would be a definite although minor ecological benefit in the protection of the stream where it runs through Lot 3, and the regeneration of the surrounding land in appropriate native species.

[100] There would also be a benefit in limiting development to two dwellings, if there is to be any residential development, but the prospects of there being more than two dwellings on the subject land seem so remote that this positive effect does not carry much weight. We note also that the covenant was offered only in respect of the subject land (Lots 1, 2 and 3)[112], which has an area of 4.2 ha only, and would not prevent a subdivision application for other land in Harvey's Gully.

[101] There is also the benefit to those few individuals who would gain from the development.

[102] Overall the positive effects are real but of no great moment.

THE STATUTORY FRAMEWORK

[103] Under the terms of the RMA as it was prior to the 2003 amendments, the application falls to be considered under ss 104 and 105, as well s 406 relating to subdivisions. Section 104 sets out the relevant matters to be addressed,

[110] Evidence-in-chief para 55
[111] evidence-in-chief para 111
[112] Closing submissions of Mr Goldsmith, para 7f

subject to Part II of the Act, when considering a resource consent application. Those applicable in this case were as follows:

> *(a) Any actual and potential effects on the environment of allowing the activity; ...*
> *(d) Any relevant objectives, policies, rules, or other provisions of a plan or proposed plan; ...*
> *(i) Any other matters the consent authority considers relevant and reasonably necessary to determine the application.*

[104] Because the activity is a non-complying use under the TDP the application must be able to pass through one of the two gateways provided by s 105(2A) if it is to obtain approval. In terms of this case, the various effects on the environment must be no more than minor, or the activity must not be contrary to the objectives and policies of either the TDP or the PODP.

[104] We note at this point that the landscape and the environment against which the proposal must be assessed requires consideration of the permitted baseline. However we accept Mr Goldsmith's analysis of the position, namely that in this case the permitted baseline is of limited relevance. Apart from agricultural activities and tree planting (subject to some restrictions), there are few other permitted activities - certainly none upon which Mr Goldsmith relies. Contrary to Mr Brown's evidence,[113] there are, as already noted, two unimplemented resource consents in Cardrona Valley, which we take into account. For reasons already given, we will ignore the Hillend proposal.

Whether the activity is contrary to the objectives and policies of the District Plan

A The TDP

[105] To start with the second gateway test, given our analysis of the evidence so far, we find that the proposal is contrary to the objectives and policies of the TDP. In particular we refer to the following provisions identified by Mr Henderson:[114]

Objective 1.4.03 (land use relationships) -- avoiding development which would detract from the landscape qualities of scenically significant areas.

Objective 3.1.02 (rural objectives), as supported by policy 3.1.03 -- maintaining land suitable for farming in active production; ensuring that areas of particular interest to tourists and visitors are protected; encouraging the development of non-farming uses appropriate to the amenities of the rural zones in appropriate locations.

[106] Taking these two objectives together, the proposal would remove from active production only a small area of land suitable for farming, but it would in a very direct way detract from the open and natural landscape qualities of an area

[113] para 2.7 of evidence-in-chief
[114] paras 9.1 to 9.5 of evidence-in-chief

of marked scenic significance for tourists and visitors. This non-farming use is neither appropriate to the amenities of the rural zone, nor in an appropriate location.

[107] In his evidence-in-chief[115] Mr Henderson concluded that the objectives, policies and rules of the TDP "do not support the application". The reference here to "rules" is erroneous, as s 105(2)(b) refers only to "objectives and policies". Further, the provisions of a District Plan may not support an application, but may still not be "contrary to" a grant of consent. We were not satisfied that Mr Henderson had appreciated this distinction in drafting his evidence, although he appeared to after discussion with the Bench.[116] For our part, the proposal is at odds with or "contrary to" the objectives and policies of the TDP, in the strong sense of the term used in *New Zealand Rail v Marlborough District Council*[117] -- namely as being opposed to in nature, different or opposite.

B The PODP

[108] Turning to the PODP, the relevant objectives and policies are contained in Parts 4 (District Wide Issues), 5 (Rural Areas) and 15 (Subdivision, etc). Our findings in respect of each are now set out.

Objectives and policies from Part 4 -- District-wide

Nature conservation values

[109] An outstanding natural landscape, and the natural character of the District's environment, is significantly compromised by the proposal. There is no indigenous ecosystem affected, nor any evidence of the value of Lot 3 to indigenous flora and fauna. No other conservation value listed in Objective 1 arises.

Landscape and visual amenities

[110] These objectives and policies underline the importance of the quality of the landscape to the District's economy. They refer to the "romantic landscapes" of mountains and lakes, and the need to protect them from inappropriate subdivision, particularly where activity may threaten the openness and naturalness of the landscape.[118]

[111] More specifically, Objective 4.2.5 requires subdivision and development throughout the District in a manner which avoids, remedies or mitigates adverse effects on landscape and visual amenity values. The policies in support of this objective seek to discourage subdivision where the values are vulnerable to degradation, and to encourage it in areas with greater potential to absorb change, and in harmony with local topography. Within outstanding natural landscapes the policies seek to maintain their open character and to protect naturalness and enhance amenity values of views from public places.

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115 para 9.5
116 pages 155 - 158 of the transcript of evidence
117 [1994] NZRMA 70 at p 80.
118 4.2.4

Avoiding cumulative degradation

[112] This policy[119] expressly recognises the danger of "over domestication" of the landscape. Each proposal must be considered therefore in the context of what has gone before.

Structures[120]

[113] The intention is to preserve the visual coherence of outstanding natural landscapes by a variety of means, some of which are met in this case (e.g. protection of skyline, ridges, prominent slopes and hilltops) while others are not (placement of structures in locations where they are in harmony with the landscape).

Land use[121]

[114] The objective is to encourage land use in a manner that minimises the adverse effects on the open character and visual coherence of the landscape. One method is to require those effects to be considered at the time of subdivision. Another is to control the height, external appearance and general location of buildings.

[115] We have considered all these Part 4 issues in the course of discussing the landscape values and the District Plan's assessment criteria. Now, in this more general context, we reaffirm without repetition those conclusions concerning the landscape values involved here (para 54 above), the potential of the landscape to absorb development (para 75), the effects on the openness of landscape (para 80) and cumulative effects on landscape values (para 91). To this we will add only one observation. The sparse nature of existing development, given the particular landscape values of the Cardrona Valley, cannot be seen as an encouragement to provide more domestication, but rather as a statement of identity deserving of protection.

[116] Overall, we regard the proposal as being at odds with -- contrary to -- the relevant objectives and policies of Part 4.

Objectives and policies from Part 5 – Rural Areas

[117] Perhaps significantly, the first stated objective[122] is to protect the character and landscape value of the rural area. This is to be done by promoting sustainable development of resources and controlling adverse effects caused through inappropriate activities.

[118] Mr Brown and Mr Henderson each set out the different policies supporting that objective. These are largely repetitive of policies already examined relating to landscape protection, location of development and buildings, utilisation of different soil resources, and preservation of visual coherence.

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[119] 4.2.5(8)
[120] 4.2.5(9)
[121] 4.2.5(17)
[122] 5.2 Objective 1

[119] We agree that the small area of land proposed for residential use (0.99 ha) would have no significant effect on the productive capacity of Mr Scurr's farm, though it is land of relatively high quality compared to the steeper slopes further back. However the emphasis upon landscape values demonstrates that this land has an economic (and cultural) value to the District -- and, for that matter, to the nation -- over and beyond its use for farming.

[120] The second objective is the retention of the life-supporting capacity of the soils and/or vegetation in the rural area. Land management techniques, as well as controls on subdivision and development, are the chosen policies in this regard.

[121] The third objective is to avoid, remedy or mitigate adverse effects of activities on rural amenity. Rural amenity, in relation to effects on the environment, include privacy, rural outlook, spaciousness, ease of access, clean air, and quietness. As there are no immediate neighbours, most of these aspects of amenity are not impacted by the proposal. However, visitors arriving at or leaving from the parking area for the walking track are also entitled to enjoy rural amenities, and these may be compromised in some degree.

[122] We consider that the proposal is also contrary to some of these objectives and policies, and inconsistent, in varying degrees, with others.

Objectives and policies from Part of 15 – Subdivision

[123] Objectives and policies concerning the provision of services to subdivided lots are met in this case. Objective 4 includes the recognition and protection of outstanding natural landscapes and has been addressed elsewhere and is not met.

Conclusion regarding objectives and policies

[124] Looking at the objectives and policies of the PODP as a whole, we consider that, on the evidence previously traversed, the proposal is not just "not supported by" those objectives and policies, but is contrary to them. We have already expressed a similar conclusion concerning the TDP, although that is of less importance. The proposal therefore fails the second gateway test.

Are the adverse effects on the environment more than minor?

[125] In the light of the analysis already undertaken it will be abundantly clear that there is only one answer to this question. The environment in question is an outstanding natural landscape, and in this location it will not be able to adequately absorb the proposed development (its open character and naturalness being compromised by the intrusion of non-farming domestication), the proposal will give rise to a cumulative effect when considered in conjunction with existing development and two as-yet unimplemented resource consents in the Cardrona Valley, and its positive effects are of no great moment. Looked at

overall, the adverse effects on the environment cannot be characterised as minor. To the contrary, they would be quite significant.

Exercising the wider discretion

[126] Accordingly, the proposal fails both of the gateway tests. However, if we are wrong about that, the application falls to be considered under the discretion given by s 105(1) paras (b) and (c), and applying s 104(1).

[127] We have already set out the three relevant paragraphs of s 104(1) as they were prior the 2003 amendments, and we now give our findings in respect of each. (Our consideration of these matters is subject to Part II of the Act.)

> ***(a) Any actual and potential effects on the environment of allowing the activity; and ...***

[128] The principal effects on the environment in this case are twofold, both visual in nature -- a loss of naturalness and openness of the landscape as perceived from the Cardrona Valley Road and the Little Criffel Track (which is a specific view to the west near Harvey's Gully), and a resulting adverse impact on the very distinctive landscape which is the Cardrona Valley as a whole, as perceived by those travelling up and down the valley.

> ***(d) Any relevant objectives, policies, rules, or other provisions of a plan or proposed plan; and ...***

[129] The relevant objectives and policies, and the rules supporting those objectives and policies (principally the assessment criteria), have already been considered. They operate against granting this resource consent.

[130] Precedent concerns are also relevant here, as has already been noted. Given the importance which the TDP attaches to the landscape qualities of scenically significant areas, which we find this to be, we consider that the integrity or coherence of that plan would be rendered suspect by the granting of Mr Scurr's application -- quite apart from the precedent effect it would have for later applications, which would be considerable.

[131] The comments made earlier relating to precedent[123] lead to the clear conclusion that as a discretionary activity in an outstanding natural landscape the precedent implications of allowing this activity would again be considerable, and they would be negative, not positive, implications.

> ***(i) Any other matters the consent authority considers relevant and reasonably necessary to determine the application.***

[132] Relevant matters may include concerns about precedent, but these have already been dealt with in relation to "objectives and policies".

[123] paras 38-44 above

Section 406 of the Act

[133] In its pre-2003 form, s 406 provided that, until a proposed District Plan becomes operative, a territorial authority "shall not grant" a subdivision consent if the land in question "is not suitable" or the proposed subdivision would not be in the public interest. We do not regard this land as being suitable for subdivision, as it will give rise to adverse effects on the natural character of the landscape and visual amenity values of the site and surrounding area that would be more than minor. We do not think any separate question of "the public interest"arises.

Part II issues

[134] Relevant provisions of Part II of the Act are:

- promoting the sustainable management of natural and physical resources, as defined in s 5;
- the protection of outstanding natural landscapes from inappropriate subdivision, use and development, as a matter of national importance under s 6;
- the maintenance and enhancement of amenity values and of the quality of the environment, pursuant to paragraphs (c) and (f) of s 7.

Given the agreed classification of the Cardrona Valley as an outstanding natural landscape, the granting of resource consent for this proposed subdivision would, in our view, be in conflict with s 6 by failing to protect a place of great beauty -- something of national importance. Further, rather than maintaining and enhancing amenity values and the quality of the environment, this development would compromise those values. Finally, to manage natural and physical resources in this way would not be sustainable; it threatens to kill the goose that lays the golden egg.

CONCLUSION

[135] It was the essence of Mr Scurr's case, as outlined by Mr Goldsmith in his opening address,[124] that while inappropriate subdivision was not permissible in an outstanding natural landscape, the specific design controls now proposed would ensure that the reduced, two-dwelling development would appear in all relevant viewpoints as typical rural development appropriate in its rural landscape context.

[136] The conclusion we have reached is that design controls, however good, will not hide for long the true nature of the "lifestyle" activities involved, and in any event the Cardrona Valley is much more than a "rural landscape" into which a rural façade can be placed. It is an unusually accessible but outstanding and timeless landscape, the inheritance of all New Zealanders, that is easily devalued and degraded by domestication for short term gain. The Council has

[124] para 31

correctly applied the provisions of both the Act and its own District Plan in refusing consent to Mr Scurr's application.

[137] The appeal is dismissed. Costs are reserved.

DATED AT AUCKLAND this 29th day of April 2005.

For the Court:

.....

FWM McElrea
Alternate Environment Judge

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

Issued:

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ORIGINAL

Decision No. W 8/94

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an appeal pursuant to s.120 of the Act

BETWEEN **SHELL OIL NEW ZEALAND LIMITED**

(RMA 54/93)

Appellant

AND **AUCKLAND CITY COUNCIL**

Respondent

BEFORE THE PLANNING TRIBUNAL

Her Honour Judge S E Kenderdine (presiding)
Mr P A Catchpole
Mr F Easdale

HEARING at AUCKLAND on the 1st, 2nd and 3rd days of September and the 1st day of October 1993

COUNSEL

Mr G Harrison for the appellant
Mr J M Savage for the respondent
Miss S J Simons for BP Oil (NZ) and the Pagani Clothing Company
Mr M D Gifkins for the Carrick Place Residents' Group
Mr P Lange on his family's behalf and behalf of the residents of Carrick House

DECISION

This is an appeal brought under s.120 of the Resource Management Act 1991 ("The Act") by Shell Oil NZ Limited ("Shell") against refusal by the respondent of consent to establish a service station and other facilities at 184 to 196 Dominion Road, at the corner of Carrick Place, Mt Eden, Auckland ("the site").

The council gave the following reasons for its decision:

"1. *Granting the consent to the application would be contrary to the objectives policies and the rules of the district plan.*

2. *The actual potential effects of light spill from the proposed activity would have a more than minor adverse effect on the surrounding residential environment.*

3. *The character and visual effect of the proposed development is inconsistent with the adjoining commercial and residential development and would have a more than minor adverse effect of the amenities of the neighbourhood.*

4. *The proposed service station development is a non-complying activity in the Commercial 1 Zone and in the absence of any special or unusual circumstances, consenting to the application would have adverse potential effects in public confidence in the consistent administration of the District Plan and the maintenance of the essential interrelationships between provisions.*"

This appeal has followed.

The land the subject of the appeal comprises an area of 1915 square metres comprising Lots 1, 2 and 3 DP 182 and is zoned Commercial 1 in the Auckland Transitional District Plan.

The Site And Locality

This site is rectangular in shape with a frontage of 50.3 metres, a depth of 38.0 metres. It is presently a vacant lot, previous buildings on the site having been demolished sometime ago. The site has one frontage only, the end of Carrick Place having been stopped to exclude both legal and physical access to the site.

It is located on the south corner of the former Carrick Place intersection with 184 - 196 Dominion Road, Mt Eden, a short distance north east of the Dominion Road intersection with Valley Road, and slightly to the north of the Valley Road commercial area which is characterised by commercial business premises. The somewhat bulky building immediately to the south of the subject site is occupied by the Pagani Clothing Company and consisting of a shop frontage and an attached industrial workshop set back to the rear of the site. It has no verandah on its street frontage.

At the rear of the site situated at a lower ground level is a recent retirement unit development (Carrick Grove Retirement Village) comprising of 10 individually owned units. There is a driveway of approximately 3.5 metres wide running down the boundary of the site from a crossing on Carrick Place which provides access to garaging and manoeuvring space for the residents. The garages abut the service station boundary with a 6 metres boundary wall. Beyond this point there are four units set between 14 and 7 metres back from the boundary, with their outdoor living spaces facing towards the site. Approximately 16 metres of the common boundary of the service station adjoins the outdoor living courts which are partially screened by trees. Six of the units are distributed along the boundary

SEK.

of the site. The remainder of Carrick Place contains residential buildings and a small reserve.

The northern limit to the Dominion Road commercial centre is defined by Carrick Place to the east and Onslow Road to the west. Some of the commercial buildings are in the neo-Edwardian architectural style. Others are of more recent design. The closed end of Carrick Place is now zoned Recreation 3 and contains six car-parks. The land to the north is zoned Residential. Opposite the site to the north of the closed road the corner property, a former residential home is used for offices. The remaining residential properties on the north side are elevated above the service station site and overlook Carrick Place and the site itself. Some of these are being restored. Further north again, on Dominion Road is the Bellevue Reserve containing a number of large trees on the street frontage. Further to the east on Carrick Place are further residential properties which have their outlook towards Dominion Road. East of the site, towards the Carrick Place Reserve, the dwelling houses are characterised by their old villa-type architecture. In the commercial area on the western side of Dominion Road, opposite the site, the shop frontages are characterised by rounded verandah frontages with a small landscaped strip set back on western side of Onslow Road. Behind this group of shops is situated a large car-park. Residential dwellings on the west side of Dominion and Onslow Roads are characterised by buffer planting to the road edges.

The Proposal

Shell previously operated a service station on the western side of Dominion Road, 400 metres north of the intersection of Balmoral Road and we had evidence that options for development other than on this site are extremely limited elsewhere in the area.

This proposal will face Dominion Road with a six lane toll style gate forecourt serviced by two crossings 9 metres wide. The partial white concrete block building will be covered by a T-shaped canopy some 26.0 metres in length and 10.5 metres in width and comprises some 200 square metres consisting of a store room, staff offices, toilets and a Circle K Convenience Store of 120 square metres. This will be situated 10-12 metres back from the rear boundary. The service station building and convenience store is also located on the southern boundary approximate to the Pagani Clothing Company. A butt glazed building located on the boundary parallel to Carrick Place will house a fully automatic car wash machine. There will be associated car-parking and ancillary storage facilities; adjacent to the building is an enclosed rubbish bin compound. It is proposed to operate the service station 24 hours a day.

The site has a crossfall from Dominion Road to its south eastern boundary and any development of the property will therefore require levelling filling and retention of approximately 3 metres is proposed in the south eastern corner contained by constructing a landscaped batter over a width of 6 metres with a portion of crib walling situated opposite the existing retirement village carport. The height of the fill will reduce towards Carrick Place with the landscape strip reducing from 6 metres to a minimum width of 3 metres. It is proposed to fully landscape all the

boundaries of the site including that adjoining the car wash building with large specimen trees. Across the front of the service station the landscaping on the corner and along the frontage is ground cover to protect sight lines into the crossings from Dominion Road. A two metre high fence is proposed along the boundary of the retirement village and during the hearing it was proposed that screen planting would also be provided on the village side of this fence. The forecourt under the canopy plus the remainder of the surface materials will be cobblestone. The layout of the service station described by Mr G Lane, Shell's Retail Development Manager, Northern Region, is virtually identical to that of 20 other sites constructed in the Auckland region since 1988 some of which are familiar to the Tribunal. However, Mr Lane gave evidence that Shell has introduced a new signage regime for service stations known as R.V.I, (Retail Visual Imaging). This requires a single prime sign with a height of 7.0 metres replacing a pole sign of 9.0 metres and a price board at 3.0 metres. Its location has been shifted from the Carrick Place boundary to a position in the landscaping strip directly opposite the main building next to the Pagani Clothing Company. Two poster boards are to be installed on the landscape strip along Dominion Road and an illuminated entry/exit sign will identify the locations of the vehicle crossings. On the service station canopy, the red band is eliminated and the strip lighting consequently becomes more yellow dominant. The word "Shell" remains as previously, whilst the Circle K colour banding along the shopfront is also eliminated and replaced with an illuminated K logo installed above the shop entrance.

It is not proposed that LPG and CNG facilities will be offered at the site.
Mr Burton gave evidence also that Shell is in the process of having the service lane designation uplifted, the council having resiled from its earlier position that it is unwilling to do so in the light of possible future commercial development taking place on the site. Mr Harrison in his opening submission advised that the council had confirmed that in the event of this appeal being allowed the designation will be uplifted.

The Resident Objectors

The appeal was challenged by a number of residents and their representatives. Mrs J Ayres a resident of one of the retirement units and who suffers from a heart disorder stated she would be "in fear of her life" on her daily trip to the shops or the bus stop. The witness explained that there is only one route to the shopping centre from where she and the other residents live and with a service station on that site they would need to pass two large vehicle crossings interrupting their passage. Mrs Ayres explained that because Dominion Road is exceedingly busy and at times there is large traffic build up at the lights, vehicles exiting the site will have to move rapidly alarming pedestrians. Her plea was for the safety of the old, children by themselves, and a group of ex-psychiatric patients located in Carrick House in Carrick Place. Mrs June Head who owns the western-most unit fronting Carrick Place objected because her kitchen, living and bedroom windows look out over the site. She considered the impact of the service station to be unreasonable, that the noise and visual impact would ruin her lifestyle, that she would not have privacy as the service station would operate 24 hours a day, seven days a week.

The witness was fearful that the illuminated canopy would throw indirect light into her property and be a visual intrusion. She also considered the location of the car wash on the northern section of the site meant it would be located immediately above her property and be visible from her living area window and front yard, causing noise, and glare from headlights.

Evidence was given by a Mr Peter Lange who lives at 16 Carrick Place. He spoke not only on his own and his family's behalf but also those who lived at the psychiatric half-way house "Carrick House" situated at 18 Carrick Place as a Trustee Elect of the Eden Trust Board which runs the facility. Mr Lange spoke of the time when the residential environment of the street was protected acoustically by the row of two storey shops on the site, the three residences and the block of flats and mature trees and which ensured the residents seclusion. He described the Shell proposal as "*a banal, rectilinear, bunker-like complex glowing forever red and yellow to sit next to an interesting and complicated collection of architectural shapes*". He considered that no other building could be less sympathetic to the surrounding architectural character of the area and considered the car wash as a building "*of arrogant and careless design*". He spoke also of recent renovations to the surrounding Edwardian villas particularly to one of the grand two-storey houses characterised by fine architecture which lend a dignity and graciousness to the area. He saw the service station activity almost as industrial than commercial activity which would operated all night and during the day, in close proximity to the residential units, with attendant noise factors. The witness spoke also of the 12 patients at Carrick House who require fulltime supervisors and consistent medication and whose favourite past-time he described as walking - some days all day, just up and down to the Valley Road shops. He described the patients as less nimble and slower in reacting than most and the possibilities of having to negotiate past the vehicle accessways to the site. He spoke also of the 11 children under 10 years of age in Carrick Place who visited the shops. He was of the opinion that the members of Carrick House, the retired people and the children made up an "*unusually high component*" of the residential mix in the area and that they would be disadvantaged by the vehicular activity on and off the site. He spoke also of a recreation centre for the psychiatrically disabled eight houses further up Dominion Road and that there was a lot of pedestrian movement from that source, also to the Valley Road shops.

Mrs S M Newlands a resident who lives opposite the site with her family, spoke similarly and gave evidence of her involvement in effecting the closure of Carrick Place which she saw as creating a barrier to activity and as reinforcing what she saw to be the quiet and self-contained nature of the street. She too, did not see a service station as giving any protection at all to the residents from the traffic activity on Dominion Road. Nor did she consider that the landscaping proposed would afford protection from the 24 hours per day site activities because of the way the houses opposite were elevated with views over the site.

Mr M Gifkins, convenor of the Carrick Place Residents' Group gave a history of the street, the social cohesion and sense of community that exists in the area and that is centred in Carrick Place. He spoke also of the large number of residents who work from home and the adverse community response to some previous

commercial proposals which would have resulted in intrusion on residential amenities. He gave evidence also that the Group is equally critical of the service station development seeing it as intrusive - due to its hours of operation, lighting, and glare, placement of buildings, noise and traffic. He was critical also of any further need for a service station on Dominion Road.

Generally the residents wished for a development on the site which would act as a buffer to the effects of Dominion Road.

DISTRICT PLAN PROVISIONS

Under this heading and before examining the district plan provisions it is pertinent to briefly examine the zoning history of the site. Mr R J Burton, planning consultant for Shell explained that prior to Shell's ownership there has been a proposal by the previous landowner to construct a major commercial building on the site. This did not proceed because of the sharemarket crash. Subsequent discussions between Shell and the Mt Eden Borough Council resulted in the council advertising Proposed Change 53 which sought to zone the site Commercial F (service station) as part of a major upgrade of the borough's commercial zoning strategy. The zoning would have recognised the suitability of the site for a service station. The change was withdrawn at the time of council amalgamation in 1989. Shell subsequently lodged a s.60 objection to the Mt Eden District Scheme considering it was well overdue for review (by three years). They allowed the objection to lapse however, due to the implementation of the Resource Management Act 1991. Meanwhile the Auckland City Council refused to propose a change to the transitional district plan on the grounds that the new plan was about to be advertised and that the previous council had withdrawn Proposed Change 53 and clause 25(4)(b) First Schedule to the Act could apply despite the fact that no hearing was ever held on Change 53. Shell considered therefore that it had no other option but to apply for a non-complying consent on the grounds that there are unusual circumstances pertaining to the site and to the pattern and development along Dominion Road. Meanwhile the closure of Carrick Place was provided in Scheme Change No. 41 which recognised that any development of 184 - 196 Dominion for commercial purposes would have the potential to increase traffic flows on Carrick Place. It states that this is not desirable, given the residential character of the street. It states that the purpose of the road closure is to limit the impact of non-local traffic in the area.

Turning now to this appeal the relevant planning document is the Mt Eden District Scheme operative in February 1985 now part of the Auckland City Transitional District Plan. There is also now the Auckland City Proposed District Plan 1993 for which submissions closed recently.

The site is zoned Commercial 1 in the Transitional Operative District Plan which requires this proposal for the site to be dealt with as a non-complying activity. There is a 2.15 metres designation across the Dominion Road frontage for proposed road widening and a further designation for a proposed 6 metres service lane across the eastern side of the site and 5 metres from the boundary.

It is an objective of the plan that Mt Eden commercial areas comprise three shopping centres serving the local residents and those passing through the district. The objectives for the Commercial Zone include: the facilitation of the operation and development of a balance of retail activities, service industries ... and employment opportunities for the benefit of the residents: the promotion of a better and more attractive commercial environment: assurance that any adverse environmental impact of the commercial areas on the residential areas is reduced to a socially acceptable level: promotion of the provision of community facilities and a community focus within each centre.

Relevant policies include the reinforcement and support of commercial centres by encouraging the renovation and renewal of existing properties and facilities to make them attractive to a wide range of shoppers: support for commercial renovation and renewal which provides for pedestrian requirements such as pedestrian shelters (particularly to parking facilities), sitting or resting places, pedestrian malls, shopping arcades, plazas and open spaces around buildings: to control commercial activity close to residential zones in a manner such as to ensure any detrimental effects that may occur are kept to a socially acceptable level.

The final policy indicates that the objectives and policies of the district plan for service stations only make provision for new service stations where that involves the relocation of those existing. The policy states:

> *"To facilitate the relocation of an existing service station, should such relocation be necessary or desirable, the council will upon request promulgate a Scheme Change, rezoning as C2, land zoned C1 and fronting Dominion Road, Balmoral Road or Mt Eden Road, in order that the owner's proposal to relocate his service station might be tested in the appropriate manner."*

In the Commercial 1 Zone service stations are conditional uses only where it is necessary to increase frontage.

The Commercial 2 Zone is specifically for service stations and provides for them to be either expanded on existing sites or relocated in terms of the above policy.

Several objectives and policies relating to the amenities of the Mt Eden are also relevant to this proposal such as that relating to "signs" where the objective is to control (and where necessary) prohibit signs, advertising displays or visual devices of any kind to protect the amenities. "Lighting" has as an objective the prevention of disturbance to the community caused by glare from floodlighting illumination of signs and buildings. "Noise" also has an objective the prevention of disturbance to the community.

The district plan relates specific standards for bulk and location and activity requirements, noise levels, street verandahs, proposed service lane, signage. It is not our intention to examine these in any depth and then briefly here.

The bulk and location controls require a rear yard of 6 metres. There is also a provision for daylight admission to the adjacent residentially zoned land. A landscape plan is also required which includes trees and contributes to the amenities of the street frontage. The noise standard requires the corrected noise level (L10) as measured on the boundary of the site do not exceed the 50 dBA on Monday to Friday between 7.00 am to 8.00 pm and on Saturday from 7.00 am to midday 50 dBA and at other times 45 dBA. It is a requirement of the plan also for a street verandah on any building with frontage to Dominion Road (except for one portion where the existing situation is except) which shall:

"(i) *Be so designed as to achieve continuity with verandahs on neighbouring sites to provide continuous cover for pedestrians; and*

(ii) Not overhang less than three quarters the width of the footpath; and

(iii) Be built and maintained to provide shelter an attractive appearance to the street."

With respect to signage the council is to be "satisfied" that the display of signs in (commercial) zones will not be obtrusively visual from land zoned for recreational, and residential uses. Identification signs for service stations are an exception to the above requirement.

THE PROPOSED PLAN

The proposed plan notified on 1 July 1993 was open for submissions until 30 September 1993. We were advised the main parties to this appeal had presented submissions on the proposed plan. At this stage in its processing however, it merely indicates the manner in which the council seeks to proceed, and it is accepted it will be amended before being finalised.

In the proposed plan the land use zoning approach of the previous plan is retained.

The site is now zoned Business Activity 2. The Business Activity Zones cover areas which were traditionally included in commercial and industrial areas such as suburban retail centres. The residential areas which lie adjacent to this site, are zoned Residential 1 which recognises the heritage and amenity character of these areas. The adjacent retirement units are zoned Residential 6A to recognise the medium density of development achieved on the site. The site is affected by the same road widening and service lane proposals as in the operative transitional plan and the adjacent closed road is zoned as Open Space.

The proposed plan includes a number of objectives and policies relating to business activities and to the Business Activity 2 Zone. These generally are to ensure that any adverse effect of business activity on the environment is to be avoided or reduced to an acceptable level - they seek to protect and enhance environmental values, public safety and amenity values. They attempt, as Mr A R

Watson consultant planner for the council stated, to "*build on*" those in the operative plan. It is an objective to recognise the importance of the main retail frontage in maintaining the pedestrian amenities of the area and it is policy to identify the main retail frontage of centres and apply measures which seek to reinforce it by requiring the provision of verandahs and providing bonuses in floor areas for new development where specified pedestrian facilities are provided. It is an objective of this zoning to acknowledge the role of suburban centres as a focal point of the community interests and activities. It is a policy to adopt controls which limits the intensity and scale of development to a level appropriate to the zone's proximity to residential zone properties and open space areas. It is policy to seek controls which make noise levels acceptable in the interface between residential zones and business zones to adopt controls to seek to protect residential zones, privacy and amenity. Policies also adopt parking and traffic measures which seek to avoid congestion and parking problems.

Mr Watson stated that it is relevant to the context of this appeal to note the principal objectives of the proposed plan being directed at achieving the sustainable management of the resources of the Isthmus as including those to protect and enhance residential amenities.

Service stations are listed as a discretionary activity and various criteria apply to avoid, mitigate or reduce any significant adverse effects. Matters to be addressed are traffic generation, parking, access, buildings, noise, development controls, the residential zone interface, the natural environment, infrastructure constraints, outdoor activities and public safety. Additional criteria included for the assessment of service stations and which recognise their important service to the community, state that depending on their location and scale they may have adverse affect on traffic generation, noise and visual amenity. In particular the criteria is stated as follows:

> "*The site must be landscaped and adequately fenced and screened from adjacent properties, particularly where the adjacent land is zoned residential.*
>
> *All signs and lighting must be approved as part of any application. They must be in keeping with the intent of the zone and the existing development of the area.*
>
> *Restrictions may be imposed on the hours of operation of service stations adjoining residential zones where noise is likely to be a problem.*
>
> *Any compressor or machinery must have adequate sound insulation, in particular, any development must comply with the noise standards set out in Clause 8.8.1.4.*
>
> *Demonstrate that where the proposal is to be located in an established commercial centre it will not break up or isolate parts of the retail frontage.*"

EVALUATION

PART II OF THE ACT

As the notice of appeal was lodged before the provisions of the 1993 Amendment Act applied, we are required to assess it under the 1991 provision. Accordingly s.104(4)(g) requires us to have regard to matters set out in Part II of the Act. Whilst these do not have primacy they contain numerous issues which we are required to consider as part of our overall assessment of the proposal.

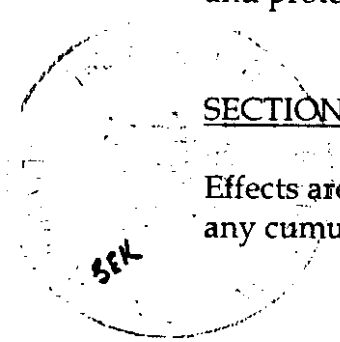
Section 5(1) states that the purpose of the Act is to promote sustainable management of natural and physical resources. Sustainable management is further defined at s.5(2) as:

> "*Managing the use, development and protection of natural and physical resources in a way, or at a rate which enables people in communities to provide for their social, economic and cultural wellbeing and for their health and safety while -*
>
> *(a) Sustaining the potential of natural and physical resources ... to meet the reasonably foreseeable needs of future generations; and*
>
> *(b) Safe guarding the life supporting capacity of ...; and*
>
> *(c) Avoiding, remedying, or mitigating any adverse effects of the activities on the environment.*"

Section 5(2)(a), (b), (c) provisions may be considered cumulative safeguards which enure (or exist at the same time) whilst the resource, in this case the land 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 Act 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 Act is not achieved.

Section 7 is of special relevance in this case and requires particular regard to be had for a development such as this to the efficient use and development of the land resource (s.7(b)), to the maintenance and enhancement of amenity values (s.7(c)), and the maintenance and enhancement of the qualities of the environment (s.7(f)). "*Amenity*" imputes pleasantness and the quality of the environment relating to its intrinsic character or nature. Section 7(e) requires the recognition and protection of the heritage values of .... areas.



SECTION 105(2)(b)(i) PROVISIONS: THE EFFECTS ON THE ENVIRONMENT

Effects are defined as positive, adverse, temporary, permanent, past or future and any cumulative effect which arises over time or in combination with other effects

regardless of scale, intensity, duration or frequency and includes any effect of high or low probability (s.3).

"Environment" includes in s.2(c) amenity values, and at s.2(d) the social, economic aesthetic and cultural conditions which affect people, their communities and their amenity values.

Noise

Mr N Hegley, acoustic consultant for Shell identified the four main noise sources associated with the proposal as the air compressor, fuel dispensers and associated movements on the forecourt, the car wash and on-site parking. The City of Auckland Proposed Plan 1993 Isthmus Section, sets out an average maximum noise level L10 of 50 dBA during the day and 40 dBA at night at the residential boundaries. The night time noise level will therefore control the night time use in this proposal if the plan as stated is implemented, as it is a 24 hour operation.

Mr Hegley undertook measurements on other service station sites on arterial roads. The resulting single event noise levels (L max) measured up to 52 dBA for car doors closing, the opening and closing of car bonnets from less than 47 dBA to 51 dBA. The background noise levels in the area were measured in fine, clear conditions at 53 dBA (daytime) and 28 to 30 dBA in the early hours of the morning.

We listened intently to the cross-examination of Mr Hegley when he was asked about average ambient levels about and after midnight. Generally they range about 40 dBA till 11 pm 30 dBA until midnight, then 23-30 dBA until 5 am. The witness acknowledged that the latter measurement indicated a very quiet noise environment and that a westerly wind would exacerbate any noise intrusion. He gave evidence that after midnight there had never been complaints of noise from vehicles on service stations. His information also was that on Great South Road (which could be compared with Dominion Road and of which he had direct experience) there were likely to be only three cars an hour after midnight possibly on site.

Mr Hegley considered the car wash only to be intrusive of the night time noise levels. However, it is now proposed to avoid this adverse effect, by not operating the facility during night time hours. Mr Hegley also considered that vehicles parking close to the residential boundary might have an adverse impact and recommended a suitable acoustical fence be built to mitigate any problems. This too is now part of the proposal.

Overall we do not consider that noise in general and single event noise is going to have an adverse effect on the residential environment. Paragraph 4.2.2 of New Zealand Noise Standard NZS 6892:9991 suggests that if the night time single event noise level does not exceed the lower of 75 dBA or the existing background level plus 30, then noise should not be a problem. The odd car door closing will not be intrusive and the car wash will not be operating at a time when it could have an

adverse effect. We consider also the acoustical fence will assist in mitigating any possible noise adverse effect on the residents of the retirement village.

Traffic

Dominion Road is one of the major north south arterial roads serving the Auckland area. The only expert traffic evidence was given by Mr J M Burgess, Traffic Consultant for Shell. He was of the opinion that traffic safety was not an issue on this site.

Traffic volumes on Dominion Road to the north of Valley Road recorded in 1991 showed 24,000 vehicles per day and 2,250 vehicles in peak hours. Valley Road itself has a single controlled intersection, being some 160 metres south of Carrick Place. The witness stated that the movements at the intersection are affected during the evening peak, by the queue that forms back from the Valley Road signals past the subject site and through the Onslow Road intersection. A clearway operates however at peak period on the eastern side when it is likely to be congested, and ensures a relatively non-obstructed traffic flow. Meanwhile Carrick Place was recently closed some 30 metres from Dominion Road forming a cul-de-sac providing six car parking spaces arranged at 90 degrees to the kerbline. There are therefore very few traffic flows within this portion of the former Carrick Place.

The accident records for the area do not indicate any particular problem in the vicinity of the site which Mr Burgess stated must be considered to be reasonably good having regard to the relatively high traffic volumes in the general traffic environment. He acknowledged to Mr Savage however, that currently there is limited use by vehicles of the one accessway to the Pagani site and that lack of accessways generally contributes to the lack of accidents (implying that two further accessways might enhance the accident factor). Nevertheless the evidence established that most of the cars would fuel on their way home, so a left turn in and left turn out are the most likely vehicle movements. Whilst any right turning vehicle heading north may well increase the likelihood of accidents so would putting a building on the site if it had vehicle access available from Dominion Road. Further, it was Mr Burgess' evidence that the council is likely to provide a median strip eventually to allow for right turning movements if the service station went ahead. This was not challenged by the council.

The witness considered however, that the vehicles currently parking at the kerbside would restrict motorists visibility leaving the site. It is proposed therefore that parking along the site frontage should be removed to ensure adequate sight distances. We note also that the proposed district plan provides a 2.15 metres set back along this length of road which will provide an additional carriageway width and consequently more opportunity for cars entering and exiting the site to stack safely in the peak periods.

It is Mr Burgess' opinion that say an office building containing 2,390 square metres of floor space and containing parking for 53 cars would generate traffic at a rate similar to, or higher than the service station. In addition it would generate turning movement more evenly less split between north and south in comparison to the service station which would have predominantly southbound left hand turns because of the proximity of a BP station servicing northbound traffic further north of the site. We make no comment on this aspect other than we note the proposed plan provides for a service lane across the rear of the site which would allow vehicle access, an aspect pointed out by Mr H Bhana, planning consultant for BP and Pagani Clothing. The commitment by the council to removing the service lane designation was, at the time of hearing, to be conducted if the service station proposal went ahead. Otherwise, it is part of submissions in the review process.

Overall we concluded on these aspects of the proposal there is likely to be no adverse traffic effects from a service station on the site. The pedestrian issue is one however we address further below.

Lighting

One of the chief concerns of the residents was light spill and glare at night. Mr Gifkins for example saw glare as principal nuisance in this respect both from the illuminated edge to the service station canopy on all but its eastern side and from reflection from the illuminative forecourt area. He put in evidence photographs taken of the Royal Oak Shell Station forecourt at 7.00 pm in winter showing reflection on the windows of the house opposite.

Controls on lighting relate to glare. Expert evidence was given by Mr P H Mason, a consultant lighting engineer for Shell that the luminairs selected for the canopy for placement 2½ metres inside the canopy are designed to cut-off almost all light above an angle of 70° from the vertical, and direct the bulk of the light downwards. Mr Mason cited the Auckland City Consolidated Bylaw 13.3 for spilled light and glare. His assessment of the lighting effects of this proposal (roughly the intensity of a 40 watt lamp) was that it would be less than 20% of that allowed under that bylaw. This would be further reduced by the 2 metre boundary fence proposed between the service station and residential flats which would itself provide a light baffle wider from the ground. He considered from the ground these combined, would shield any light from falling on the nearest flat. The witness considered that this lighting effect should be placed in context with the adjacent street lights on Dominion Road which have a 250 to 100 watt rating and residential security lights with the 150 watt rating. Evidence was given too of the curved yellow fascia of the Shell sign illuminated by the lighting tube in part directly and in part by light bouncing off the reflection on the back of the red line. This apparently creates "*a fade*" over the whole face of the fascia.

Proposed Plan Provision 8.8.1.7 requires that for a proposal such as this, that 20 lux light levels have to be met at the nearest boundary. According to Mr Mason's estimate this development will produce 4 lux only. This could be compared with a car coming up Onslow Road with car lights shining at 20 Lux

and the 10 lux lighting bollard on the nearest side of the residential boundary put there for the residents.

We do not anticipate on this evidence, which was not effectively challenged, that the lighting will cause an adverse effect through light spill or glare. However unscreened lighted surfaces will be clearly visible from many of the surrounding residential properties at night.

Diminution of Amenity

Diminution of amenity may be considered as an effect under 105(2)(b)(i) and it is also a requirement that amenity be maintained and enhanced under s.7(c). We will consider both together. We hold that "*the maintenance and enhancement of amenity*" is a conjunctive phrase so that it is not sufficient if a proposal simply maintains amenity. It must also enhance the amenity.

In terms of amenity the evidence presented is of a cohesive locality with a strong sense of community consisting of a residential mixture from older style housing to a more modern retirement cluster plus a shopping and business centre again with a range of building types and ages located on a busy main road. For the residents there exists a high degree of amenity and the district planning controls recognise this amenity and the importance of maintaining and protecting it.

The site is on the northern interface of the merging uses and the zoning intends commercial use though it could be developed for residential use or could become an extension of the Carrick Place reserve without diminishing the current amenities. The site is also on the topographical interface between elevated residences and the lower Valley Road shops, Dominion Road and the lower lying retirement cluster. Mr Lane for Shell advised us his company has employed a landscape architect on this site because it was fully accepted that it was in a sensitive location.

The proposal, a 24 hour service station in the current image devoted to product promotion and dispensing is a very well-known form of development. It would be ranked by the residents as amongst the least desired of commercial uses in a shopping centre/residential setting particularly as a neighbour. It became clear to us that while the main road carriageway corridors of vehicle movement are accepted as facts of life, the residents did not want that activity overflowing into their residential/commercial amenity zone by the siting of a use primarily devoted to servicing vehicles with what they clearly saw to be an anti-amenity result.

We need to examine the aspects of the proposal which give rise to such a reaction and assess its validity.

Our concerns in this proposal are not with those of the motoring public so much, as those of the residential and business community and the wider public attracted to the business or commercial centre. Currently this vacant site provides a fine

view across the residential area to the west and to Mt Eden from the Dominion Road frontage and we have therefore taken account of Mr Burton's evidence that the service station buildings being of somewhat lesser form than that permitted for a commercial building, would allow both pedestrians and motorists to enjoy this view of Mt Eden. This can be considered a positive effect and an enhancement of amenity.

1. Pedestrian Amenity

Mr Burgess stated that a service station of this kind can typically expect some 500 to 600 customers per day with some 40 to 60 vehicles visiting in the peak period. South bound traffic will make a left turn manoeuvre into the site followed by a left turn exit. Figures from Mr Burgess taken on a showery Friday afternoon showed that at midday 53 (adult) pedestrians passed the site, 11 elderly and two children whilst 46-32 adults, 7-1 elderly persons, 14 -7 children passed by between 3.00 pm and 5.00 pm. Peak hour figures supported six cars on the site at any one time. Figures from the Ministry of Transport show a site is unsuitable if there are 1,000 per hour which is certainly not the case here.

When the traffic queues bank up from the lights and when vehicles leave the service station and try to enter the queue, the evidence given was that one will wait on the footpath and one should be clear of the footpath. Accident statistics, Mr Burgess demonstrated, illustrate that there is no danger to pedestrians crossing accessways to the service station. He stated however, there will certainly be some delay experienced by vehicles leaving the site during the afternoon period when the queue extends back from the Valley Road signalised intersection.

Ms de Lambert, consultant landscape architect for the council although she did not do a specific pedestrian count as did Mr Burgess, stated that there was a lot of pedestrian activity on the Saturday of her site visit, past the site to the residential areas or the bus-stop. In her opinion with such a vehicle-orientated activity on the site there would be little to attract pedestrians. It was her evidence that the two nine metre entry/exit vehicle crossings to Dominion Road represent four vehicle movements for pedestrians to negotiate along the 50 metre road frontage. We note that the 18 metres of total crossings proposed represent 36% of the site's frontage subject to vehicle pedestrian interaction. By comparison most commercial uses in a traditional strip shopping centre gain service access from the rear and do not provide for vehicle crossings to the footpath. This is an adverse effect.

Whilst we respect Mr Burgess' count of less than 1 pedestrian a minute on a showery Friday at midday, we note that the Part II provisions of the Act require us to avoid any adverse effects on the environment whilst any assessment of amenity imputes a quality of pleasantness to the pedestrian environment related to its intrinsic character. This environment is essentially residential/commercial in its character with a strong emphasis on the maintenance of pedestrian amenity. We are conscious of the evidence of the various residents who spoke of the unusually high proportion of elderly, mentally disabled and children in this community, centred on Carrick Place and Dominion Road and the effect of the vehicle

crossings and the vehicle activity on the site on the pedestrian convenience. We are of the opinion that a service station use on this particular site will not maintain nor enhance those amenity values which are currently free of apprehension or anxiety about negotiating vehicular across-ways and the activity of cars on the site. We hold that people are entitled to have their social well-being protected. We adopt Ms de Lambert's evidence that the proposal denies the opportunity for an appropriate uninterrupted pedestrian linkage between the commercial and residential environments - appropriate that is, in the particular circumstances of this case.

2. Parking

Eight parking spaces will be lost to the area causing a certain loss of amenity, countered perhaps by the convenience of a service station in the immediate vicinity of the business area providing a service identified in the district and proposed plan.

The problem with the removal of car-parking spaces as part of the proposal is that if the current parking facility is removed, and it has a frontage of approximately 50 metres, with it goes one of the chances for eight shoppers to park and shop on the eastern side of the road. Mr Burgess' oral evidence was that the western side only provides 2 or 3 parking spaces along Dominion Road, although there were 50 spaces behind the shops on the western area. He acknowledged kerbside parking does "*serve*" shoppers.

We note the transitional district plan currently records that currently Mt Eden is a convenient place for its senior citizens because of its variety of shops. "*Convenience*" in this context implies easily available parking.

On this aspect of convenience shopping, we have concluded however that the provision of six car-parks in Carrick Place and the 50 spaces behind the commercial development on the western side of the road mitigates against the adverse effect of the removal of 8 car-parking spaces on Dominion Road.

3. Signage, Lighting, Vehicular Movements and Residential Amenity

The proposal meets most of the identification requirements in the plans which require that there shall be no more than one identification sign to each service station in terms of the identification of signs for the service station rules. Mr Burton explained that the signage re-imaging referred to earlier is largely cosmetic and there are no fundamental changes to the nature of visual imaging. Nevertheless, his view was that the re-imaging would be unlikely to increase the effects on adjoining properties. It was his evidence that the aggregate of the area of signage on the site exceeds council rules but is in keeping with the size and design of the service station and in keeping with the general locality.

Mr Stephen Brown consultant landscape architect for the appellant went to considerable lengths to provide comprehensive landscape plans to mitigate against the utilitarian character of the service station. He gave evidence that all

that most of residents will see, is the forecourt of the service station rather than the canopy, (apart from its edge) with the forecourt itself partly screened due to the car wash. He anticipated dense planting of native species and possibly camellias at 5-6 metres high and what he termed the significant amount of corner planting would largely obscure the proposal in eight to ten years time, whilst the melia bushes would provide screening in 3-4 years with a spread of 5-6 metres on both boundaries. He anticipated that in 8-10 years time the planting would provide a buffer for the residents and onlookers from the site. It was his opinion that it was a majority of the paving which the residents would see in the short-term. The witness then went on to acknowledge however that some of trees (like the melias) are deciduous - chosen because of their use in adjoining streets and because they would minimise some light loss for the Carrick Place residents in winter. He established lighting is confined to under canopy lighting of the forecourt, to backlit perimeter lighting around the canopy and the illumination of service station signs. He acknowledged however that the canopy was a high one which meant the lighting was visible too.

Mr Bhana's concern about landscaping related partly to the depth that could be provided on a small site, but also the function of the topographical relationship between the site and its residential neighbours. He had concerns for the amenity of the retirement residents looking upwards towards the underside of the light source and to a lesser extent those who overlook the lighted forecourt.

Shell is in a difficult position. On the one hand it has attempted, very properly, to provide a landscaping plan which in time with obscure the utilitarian edges of the proposal, but also has tried to prevent shading of the retirement village by providing deciduous trees. This effectively means that for approximately half the year a greater part of the site will be exposed to the residents opposite looking over the site and to the residents of the retirement village looking upwards to the site (although their view will be partially obscured by the two metre high fence in any event). Even then it is going to take the landscaping nearly a generation to mature. The canopy rises to around 5.5 metres above the station forecourt level and the 7 metre pole sign sits on the south-western corner of the site. While in the main lighting is confined to under-canopy lighting of the forecourt and backlit perimeter lighting around the canopy and the illumination of service station signs they will all contribute visible lighted surfaces if unscreened. In addition the service station itself is decorated in primary colours of red and yellow which will impact visually in a marked way until the landscaping has matured. As to signage, we acknowledge that looking south along Dominion Road several buildings carry two signs but those buildings are linear to Dominion Road. What Shell proposes however is an exposed site which because of its sheer openness attracts the eye to the signage because that is the objective of the signage and the nature of the site.

We can do no better than reproduce here the observations of another Tribunal about the impact service stations can sometimes have on residential amenity (recognising of course that different provisions of the district plan applied to that proposal.) In this case the proposal is in the commercial zone but it has a strong residential interface. As Mr Watson's evidence established, as the proposal faces

northward rather than to the west on Dominion Road it "opens" the service station development to the residential area rather than turning its back on it. And as Mr Watson said also, the 24 hour operation of the site means it will operate in a different manner to other activities which may be permitted if the site was developed as a commercial building shutting down outside of normal business hours are.

In Shell Oil New Zealand Limited v Wellington City Council Decision No: W57/92 at 4,5 discussing a situation where the resident objectors overlooked a site over a main road the Tribunal stated:

> *"... We observe that the RM Act and in particular the provisions of Part II of that Act give a strong caution to commercial enterprises wishing to establish utilitarian brightly coloured and eye-catching structures of standard design in areas where they are not permitted merely for the purpose of attracting attention and custom. If operators such as the present appellant wish to bring their enterprise into zones of residential character and of harmonious design, then they must tailor their structure to fit the amenities there at present.*
>
> *The definition of 'amenity values' places strong emphasis on present neighbourhood character. It would not be exaggerating to state that the design of most modern service stations is effectively a complete advertisement for the product. An advertisement in one sense of the work is something which causes the observer to take note of and consider. The whole colour scheme, layout, lighting and signage of a modern service station is one large attention attracting complex with motifs designed to indicate from a distance the brand of fuel which is sold."*

Mr Burton in his evidence-in-chief acknowledged the land use as generating a relatively high level of activity on the site but stated whilst a service station has long business hours as the volume of traffic diminishes so does the activity. He also acknowledged that at night a pool of light and a strip of light on the red Shell stripe could be seen but considered the overall lighting effects "*lesser than before*".

We hold that the obvious signage, the vehicular activity and the generally lit environment of the service station at night will be obtrusively visible for some of the time, despite the appellant's best endeavours. In terms of residential amenity which may be considered in terms of pleasantness and the coherence of built forms we hold it is more than a minor adverse effect on the environment and the community of people in its vicinity (see the definition of "community" in I W & G P Lefeber v Franklin District Council & Auckland Regional Council Decision No. C 21/93, 1 5,6). On our assessment, it is the intensity of the use, the character of the use and the scale of the use that when contrasted with the adjoining uses forces us to conclude that the proposal is unacceptable on this site.

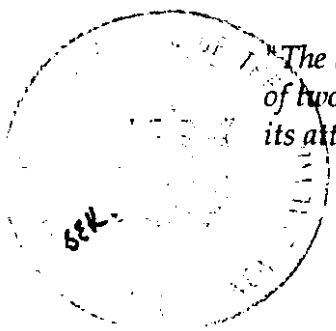
Landscape/Architectural Amenity

Mr Brown laid emphasis on the character of the locality as diverse and less than coherent, characterised by advertising "*clutter*". He pointed out that the 1980's

and 1990's development opposite the site on the corner of Onslow Road, reflected in a mixture of rolled corrugated iron roofing connected to a barrel vault matching curved perspex verandah and for the most part continuous floor to ceiling glazing of 1½ storeys high as being in conflict between the character found in both old and new forms of commercial development. He saw wooden villas interspersed with art deco brick and plaster and the plastered concrete block with tiles found in the retirement village. Mr Brown added that the buildings closest to the Shell site containing the Pagani Fashions and Sasson "*are a more recent addition to the block redolent of the 1950's and 60's - their concrete slab walls, narrow horizontal windows and corrugated iron conveying a far more utilitarian, semi-industrial image*". Mr Brown saw there is little in the way of urban forms and elements in the vicinity of the Shell site, other than the continuation of the verandah as a vernacular form which responds positively and harmoniously to the more historic character and "*artefacts*" of the main parts of the shopping centre. Consequently he was of the opinion that it is difficult to foresee the proposed station either instigating or greatly compounding a discontinuity already so obvious. Instead he saw the Shell proposal as a transitional element of limited vertical scale, interposed between high density and larger scale commercial premises. He was of the opinion also, that there were some similarity both in scale and form and boundary planting with the small scale commercial development across Dominion Road, with its central parking area framed by Smiths Shoes and the adjoining commercial premises. He concluded that it would be unlikely that the service station would substantially change or further degrade the amenity value of its locality. Mr Brown saw, for example, the traffic on Dominion Road as importing a strong sense of activity and dynamism being at odds with the more sedate residential precincts on the other side, creating dysfunction on the amenity of the interface between commerce and residents. The witness emphasised the slender frames of the service station's component. He also stated the service station allows a considerable degree of visual penetration into its confines beneath and beyond the forecourt. He said consequently a station may well be judged almost as much by what is seen through and beyond it as much by its own physical character. He added also that in his view the Shell development would have less effect, and offend less, the residential coherence and amenity than any future commercial development which could well be pushed to the edge of the boundaries of the site. Mr Burton shared generally similar views but in a planning context.

Evidence was given by the residents about the special nature of the housing in Carrick Place emanating from approximately 1883, the distinction being identified in the proposed district plan. Ms Moira Elliott saw the expected outcome of the proposed Residential 1 zoning as creating a climate of stability and certainty for the community and "*creating a safe and supportive environment where the elderly, children and the disabled are not marginalised*".

Ms de Lambert for her part said this:



"*The heart of this traditional strip shopping district benefits from a good collection of two storey commercial buildings in the neo Edwardian architectural style with its attendant detailing. The Valley Road intersection which forms the opposite end*

to the block with includes the proposed site, is a typical collection of buildings in this gracious style ...

Whilst the commercial buildings on the adjacent southern boundary and those across Dominion Road from the site are of more recent design and do not draw from the historical neo Edwardian architectural style, they retain certain characteristics, which continue the pedestrian scale and interest of the traditional strip shopping centre. These characteristics include building right up to the pavement, the frequent incorporation of verandahs and shop front windows for display. As a statement of entry to, or departure from, the Dominion Road shopping centre, they are relatively benign buildings, of little architectural strength, but allowing the strong neo Edwardian character to exist unchallenged. These more recent commercial premises are also of significant shopping interest and generate pedestrian traffic to their respective uses."

Ms de Lambert and the residents considered that even a commercial building on the site, although causing shading and overshadowing on some of the retirement units, was preferable to have because it fronted and continued the form of the street and consequently the "*built*" environment. Ms de Lambert also saw Carrick Place and Onslow Road as "*defining*" the northern limit to the Dominion Road commercial centre. She placed some emphasis too, as did Mr Gifkins, on the area between View Road and Carrick Place, characterised by two blocks of mature vegetation situated on residential properties and the trees of the Bellevue Reserve. When travelling from the south she saw these trees as providing a strong enclosure to the road edge and creating a special vegetated quality to Dominion Road not downgraded by the use of the corner dwelling on Carrick Place as a real estate office. In contradistinction to Mr Brown, Ms de Lambert described the service station as resulting in a visually permeable built use providing no retail frontage, no containment to the street, introducing low level planting at the footpath frontage and generating a predominantly vehicular instead of pedestrian use. She criticised the proposal as providing an abrupt "*fullstop*" to the commercial strip, both visually and commercially, denying the opportunity for appropriate pedestrian linkage between the commercial residential environment. She highlighted the fact that the two 9 metre entry/exit vehicle crossings onto Dominion Road represent a potential for vehicle movements for pedestrians to "*negotiate*" and contrasted this with the traditional strip shopping centre with service access from the rear. Ms de Lambert stated that the service station would deny the commercial centre "*a strong entry statement*" in keeping with the identity and character of the locality.

Whilst we have sympathy with Mr Brown's view that some aspects of the form of the opposite corner of Dominion and Onslow Road is not too dissimilar to what is proposed by Shell (low set buildings set back from the road frontage), and whilst we are conscious too that there is not a verandah on the Pagani building, and that the area is one in transition, we prefer Ms de Lambert's opinion of this proposal.

The Carrick Place corner is a significant focal point in the urban/commercial fabric of Dominion Road. The corner needs a physical built presence to highlight its commercial nature, to separate it from the residential area behind and to make the

corner work as a commercial statement of the zoning's intent. We think this is what the residents were expressing when they were talking about creating a climate that was stable, certain and supportive of their community. The hard edges of the Pagani building however unattractive, are more related to a commercial building on this site. It is a matter either of compounding and confusing further the architectural styles in transition by adding in the bleak clinical (utilitarian) lines of the service station, or allowing for a future opportunity to marry the built environment with a further solid building. We prefer the latter. This hopefully will provide an urban edge which would be more supportive to the amenity of the residential/commercial interface than would be a service station. It could provide a pedestrian precinct uninterrupted by vehicle crossings which we see as disruptive of the commercial form and pedestrian amenity. We do not see the proposed development demonstrating any sensitivity towards this special area other than through increased landscaping, setting the canopy back 12 metres from the boundary (which is greater than normal), non-illumination of the east boundary of the proposed canopy, relocation of the Shell emblem (and stopping the carwash at night). It provides no visual harmony or coherence or aesthetic consistency with the nearby housing or the commercial area being not one thing nor another. Mr Brown conceded to Ms Simons for example, that the area had a notable Edwardian and strong architectural character. We do not consider "*the fragmented collection of building elements*" of the Shell proposal as adding to either (see Mobil Oil v Dunedin City Council Decision No. C 19/93, 1, 7).

All the residents complained of their properties being opened up to the visual and noise pollution and Dominion Road when the site was originally cleared. To some extent that problem would disappear with the imposition of a solid building, though the residents in the retirement units may have to accept a service lane if it is retained and resultant shading on their boundary. It would negate, however, the considerable visual penetration of the forecourt and vehicles which Mr Brown identified and which we do not see as being ameliorated by the landscaping and fencing on the back boundary for many years to come. Mr Burton's evidence on the design of the service station was that it was somewhat utilitarian and functional. Most of the other witnesses saw it as utilitarian. We consider the policies and objectives and rules relating to permitted activities both in the transitional and proposed plans as being able to provide for something less than merely utilitarian in future developments and that this opportunity should remain available.

In terms of the commercial community which we must also consider, the proposal does not add to the retail frontage and consequently does not add to the amenities afforded by a commercial continuum. As Mr Bhana also stated and we agree, the lack of verandah coverage for example highlights the negative contribution made by the service station to the amenity of the Valley Road Shopping Centre.

Overall, in terms of amenities we consider the cumulative or sum of the effects of this proposal outweigh in negative terms, any positive effects. It fails the tests of s.105(2)(b)(i).

SECTION 105(2)(b)(ii): THE OBJECTIVES POLICIES AND RULES OF THE DISTRICT PLAN AND THE PROPOSED PLAN

The first matters to consider are the policies and the objectives and rules in the transitional operative plan in respect of the facilitation of the relocation of an existing service station should it be necessary or desirable as a specific policy, or an extension to the frontage of an existing service station where necessary or desirable. Prima facie, the existing proposal clearly does not comply with these provisions.

It was the appellant's argument that the Commercial 1 Zone provisions provide for objectives and policies relating to building form which differ considerably from the building "*form*" permitted by the rules. It was its argument that the greatest impact on the built environment comes through buildings built in compliance with the rules governing the form of buildings and the objectives and policies only have a real effect on building form where a specific development requires a resource consent which is required to be assessed against the objectives and policies. It was Mr Burton's evidence that the rules governing development in the Commercial 1 zone permit developments as of right which bear no resemblance to the form promoted by the objectives and policies of the zone. In support he cited the requirements for permitted activities and those for service stations.

To evidence this perceived dysfunction between the objectives and policies of the district plan and the rules, the appellant obtained from the council two certificates of compliance pursuant to s.139 of the Act one in respect of a two storey commercial building of a permitted size and one relating to a building virtually identical to the proposed service station building, but limited to use as a convenience store which is a permitted use in the zone. They were relied upon by the appellant to demonstrate a comparison between the effect of permitted forms and the present proposal. These, it was put to us, would have a greater effect on the environment than the service station as it was held they would have greater visual impact, a lack of landscaping and cause a lack of privacy. It was Shell's submission that unfortunate consequences would flow regarding sunlight admission on the southern and western boundaries and particularly on the retirement village, if in the first form a permitted activity was established on the site.

With respect to the certificates of compliance the validity of which was challenged, Mr Harrison submitted that due to the operation of s.139(6) of the Act a certificate of compliance shall be deemed an appropriate resource consent and the Tribunal cannot go behind the wording of the certificate to nullify the consent even if it has been wrongly issued. (see Culpan v Vose and Auckland City 2 NZRMA 380). It was his submission that Shell as owner of the site could as of right build either of the two buildings identified in the two certificates.

Mr Burton also saw the rules allowing for service station development through relocation of an existing service station only as a form of licensing which is at odds with the philosophy of the Resource Management Act 1991. We were referred to Bachelor v Tauranga District Council 1 NZRMA 266 and 2 NZRMA 137, [1993] 2

NZLR 777 and Noel Leeming Appliances Limited v North Shore City Council 2 NZRMA 243 as authorities for considering the district plan provisions, sufficiently unusual and unrelated as to objectives policies and building form to provide an exception to the philosophy of preserving the integrity of the district plan as required in Bachelor. Mr Burton listed the following unusual circumstance: the plan being overdue for review: the proposed scheme change being withdrawn by council: deregulation as bringing about a major change in service station planning not recognised in the district plan: no zone opportunities for a new service station serving south bound traffic on Dominion Road: the proposed district plan providing for a service station on the site as a discretionary activity: the site having unusual characteristics as the only vacant site with sufficient area for a service station which directly adjoins an existing commercial centre, (Planning Tribunal decisions being supportive of sites adjoining a commercial or industrial zone). It was also the appellant's argument that this could be considered to be a special case because the rules of the District Plan appeared to allow a larger development than contemplated by its policies and objectives which was the fifth circumstance to be supplied in the Noel Leeming case. Because the rules are not integrated and as such could not be given much weight with a coherent plan of interrelated objectives and rules then applying the legal principle of construction *generalia specialibus non derogant,* Mr Harrison submitted that the rules should be given precedence over the objectives and policies because they are specific whilst the policies and objectives are general in their application only.

It was BP's submission that the holder of a certificate of compliance cannot use it to effectively change the plan, nor can the certificates release a local authority from its obligations to enforce the provisions of the plan. Otherwise, it was submitted, compliance certificates would become ad hoc planning tools. Mr Bhana's evidence was that s.374(4)(b) of the Act indicates that any rule that requires an activity to be subject to the council's consent is deemed to be a discretionary activity. In this case rule 51.6(c) of the plan requires council's consent for any excavation or deposition of material on any site where that exceeds 25 cubic metres. The purpose of the rule is to protect adjoining sites from the overpowering, dominating effects of large scale land filling. It was submitted that both the convenience store and the office development for which the certificates were issued are in breach of the filling requirements and the office development is in breach of the excavation requirements. Mr Bhana stated and Miss Simons submitted, that clearly a certificate of compliance cannot be issued for discretionary activities and clearly these were issued by the council in error. It was also contended by Mr Bhana that the two proposed developments were in breach of the daylight admission (height to boundary) rules in the plan.

As to the height in relation to the boundary argument, the council, supported by BP and Pagani Clothing referred to the dicta in Lawton v Auckland City Council Decision No. A 54/86 as authority for saying that the height in relation to boundary control requires daylight admission on all four boundaries of the site thus drastically reducing the floor space of the hypothetical office building and the location of the convenience shop buildings. This, it was submitted, makes the appellant's argument in respect of shading the retirement village specious and inaccurate. Mr Harrison countered this argument by drawing our attention to the

fact that Lawton referred to three adjoining residential boundaries and the precedent cannot apply because in this case there is only one.

In regard to these matters we hold that the fact that there was a proposed scheme change which the public knew about, but which was withdrawn because of council amalgamation is of no avail, because as Mr Harrison himself submitted, there is no guarantee the scheme change would have come into effect. The fact that the district plan is overdue for renewal is of no avail either as the new one has been advertised and submissions have been closed and thus far, it appears to endorse the thrust of the provisions of the transitional plan. We adopt both Mr Savage and Miss Simons' submission that because the operative plan is overdue for renewal and because the proposed plan is yet to become operative they cannot be seen to have "diminished value". The Tribunal has a statutory obligation to consider both although we wish all parties to note that we place far less weight on the proposed plan. As for no zoning opportunities as the only service stations provided for in the Commercial Zones are existing ones, Mr Burton himself stated that in applying for a non-complying activity Shell had "*taken an appropriate course of action*" because there are unusual circumstances pertaining to this site. As to the fact that the proposed plan provides for a service station on the site as a discretionary activity the council is still required to evaluate the proposal in light of the provisions in the General Criteria for Assessing Discretionary Activities and Additional Criteria for Specified Activities and these indicate (to give but two examples) special concern for residential amenity at the zone interface, and a demonstration where the proposal is to be located in an established commercial centre, that it will not break up or isolate parts of the retail frontage. There is no guarantee therefore that consent would be given. Further, we do not consider the site has unusual characteristics merely because it is vacant and has sufficient area for a service station directly adjoining a commercial centre. Finally, we can pay no attention to the previous Tribunal decisions which allow service stations directly adjoining commercial/residential areas because we do not know of the particular circumstances surrounding the consents - they may have considered circumstances which do not exist here. We concluded on all these aspects also, that the circumstances were not sufficiently unusual for us to approve the application without upsetting the integrity and coherence of the district plan.

As to the argument about certificates of compliance we have come to a view different from that of Shell.

Section 139(6) states as follows:

> "*A certificate of compliance shall be deemed to be either a land use consent or a subdivision consent, whichever is appropriate, granted subject to any conditions specified in the plan, and the provisions of this Act shall apply accordingly, except that, with the exceptions of sections 120, 121, 122, 125, and 134, this Part does not apply.*"

Our focus is on the words "*a certificate of compliance shall be deemed to be either a land use consent, .., whichever is appropriate, granted subject to any conditions specified in the plan ...*". The use of the adjective "any" indicates there may, or may not be,

conditions. In this case there are conditions emanating from the provisions of the plan to be applied. Even though the certificate of compliance may not be expressed as being granted subject to compliance with these conditions, it could not qualify to be a deemed land use consent unless any applicable conditions specified in the plan are complied with.

In this case there are applicable conditions specified in the plan. Rule 51.5 contains a condition that notice is to be given of any substantial alteration to natural features. On the evidence we are not able to find that the requirement has been complied with. The district plan rules referred to us by Mr Bhana stated as follows:

> "*51.4 Every application made to the Council for the issue of a building permit, or approval of a scheme plan of subdivision or for consent to any other work under any Act may be deemed for the purpose of this ordinance to be also an application for a consent in terms of this ordinance. In such cases consent may be given subject to conditions imposed under this ordinance in addition to any other conditions that the Council may elsewhere be empowered to impose.*
>
> *51.5. No substantial alteration to such natural features shall be made until:*
>
> *(a) Notice shall be given to the Council in order to avoid opportunity to examine and obtain advice about the feature:*
>
> *(b) Written consent has been given by the Council.*
>
> *51.6 For the purposes of ordinances 51.3, 51.4 and 51.5 the following shall be deemed to be substantial alterations:*
>
> *(a) ...*
> *(b) ...*
> *(c) Any change in the natural land contours extending over an area of more than 500m² or involving the excavation and/or depositing of more than 25m³ of soil or other material:*"

We are not aware of notice being given to the council of the change in the natural land contours in order to afford it the opportunity to examine and obtain advice. We understand also that there was no written consent about the landfill.

We therefore find that applicable conditions are not complied with, and hold that the certificates of compliance are therefore not deemed to be land use consents.

Further, because the alteration to natural features involved in the landfill requires the council's consent, the proposal is by section 374(3)(b) a discretionary activity. As such, we do not understand how the council could have considered that the proposal complied with the district plan without that required consent having been obtained. We hold that in that respect too the proposal does not comply with the plan.

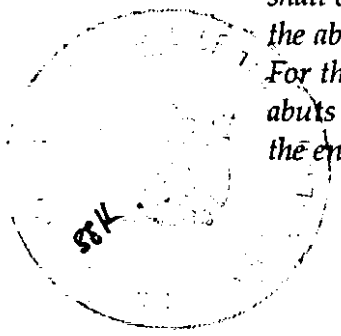
This case illustrates one of the difficulties with the provision for certificates of compliance. If we are wrong in this, we adopt Ms Simon's submission that viability of other possible developments cannot be usefully assessed in this forum. The Act does not provide for such an assessment as a criteria for determining the outcome of an application such as this.

Turning now to some specific rules of the transitional plan. It is a requirement of the transitional plan for a verandah on any building with frontage to Dominion Road. Its lack is also directly contrary to the provision in the proposed plan and planning maps where Dominion Road is shown as requiring pedestrian verandahs. We do not consider the current lack of verandah on the Pagani Clothing Company is persuasive enough to consider the provision irrelevant in respect of the Shell site. The Pagani site may well have one in the future if redeveloped. The plan observes that verandahs are a feature of the New Zealand retail/commercial pedestrian environment and that they contribute to the streetscape in commercial areas. In this case a verandah on the Shell site would not only provide an amenity to shoppers and residents alike but it would link the proposal more visually with that on the western side of Dominion Road.

In respect of the signage provisions the council must be satisfied that signs will not be obtrusively visible from land zoned recreational or residential. This site has land zoned reserve on its immediate northern side and residential on its eastern side and residential on the northern side overlooking the site. The pole sign has been reduced from 9 metres to 7 metres but the total area of signs is greater than 2.5 square metres and instead of one of the identification signs there are six. The signage includes the face of the shop and the carwash and some or all will be visible from the surrounding land. Mr Watson stated both the area and number of signs both still exceeded the rules although both had been reduced. Mr Bhana an experienced witness considered these aspects to be intrusive after being specifically questioned about them by Mr Harrison. As an expert's answer we gave it particular attention and accorded it particular weight due to the sensitivity of the site.

As to the provision requiring daylight admission, that states as follows:

> *"85.33 Daylight Admission to Adjacent Residential Land*
>
> *In order to ensure that adequate daylight is admitted to residentially zoned land within 30 metres of the site on which a proposed building is to be erected the proposed building shall comply with the following equation:*
> *No part of the building shall exceed a height equal to 3 metres plus .75 of the shortest horizontal distance between that part of the building and the nearest site boundary, provided that heights for that purpose of the foregoing height limitation shall be measured from the ground level at the point on the site boundary to which the above measurement is taken.*
> *For that purpose of 'daylight admission to adjacent land' where a site boundary abuts an entrance strip, the boundary shall be taken as the furtherest boundary of the entrance strip."*



The provision is exactly the same as applying in the Employment Zone. In Recreation Zones where the site has a common boundary with land zoned Commercial or Employment, the height in relation to boundary shall not apply to the common boundary.

In our analysis of this provision we agree in part with the appellant's opinion of the matter. We see the rule as applying to residentially zoned land only. Adopting a purposive approach to an interpretation of the phrase "the nearest site boundary" we hold to mean the nearest residential site boundary and it may be usefully contrasted with the phrasing in the Recreation Zone which relates to "its site" and in the Residential Zone as relating to the size and rear boundaries of "the site". Lawton's case does not apply in that it has three residential boundaries and this has only one. We hold there may be restrictive sunlight available to the retirement village but the rule relates to daylight which is protected by it. We note also that as Mr Bhana pointed out, that in the proposed plan there are additional controls for specified activities which adjoin Residential or Open Space Zones which this site would do. This limits the height of buildings on the subject site to no greater than 2 metres plus the shortest horizontal distance between that part of building and the common boundary with the Residential or Open Space Zone. This proposal appears to allow the top of the carwash to intrude upon that control.

The objective and related policy of the transitional plan most applicable to this proposal seeks to ensure that any detrimental effects of the proposal are to be kept to a socially acceptable level. Our findings on the effects of the proposal on residential amenities demonstrates that in this aspect the service station is not at a level of community social acceptability. Further, because of the intrinsic nature of a service station we have also given weight to Mr Watson's evidence that the proposal will not relate in a functional way to the existing commercial area or promote any features which would contribute to a "*better and more attractive commercial environment*" for shoppers or pedestrians which is a general objective for commercial zones. Finally a service station on this site precludes its use for a commercial development which would ensure the site is used efficiently for its zoned purpose. The Noel Leeming case also talks about a "*combination of circumstances*". It is not to be inferred that consent to a non-complying activity will necessarily be granted whenever a rule in the district plan does not comply and lacks the support of an integrated set of objectives and policies. It is the combination of circumstances not the least that allowing the activity will not offend the objectives and policies. We find that the combination of circumstances in this case does not warrant our intervention. We acknowledge there has been a loss of opportunity for relocation for Shell due to changing circumstances but we do not consider this to be unique in the overall context of council amalgamations and changing legislation which have national implications for all developers. We had no evidence that Shell sold on the guarantee of a scheme change (nor could the council legally promise this) merely that it relied on the business opportunity provided in the district plan to pursue a provision which included all the policies, objectives and rules currently before us.

As to the objectives and policies of the proposed plan which we are required to consider, these, as Mr Watson pointed out, place emphasis on supporting the

existing retail area with provisions for verandahs and retail frontages and protection of the amenities of the residential zones which lie in proximity. The Shell proposal gives no credence to these due to our findings above except in respect of noise intrusion and traffic and some minor aspects. We note however, that with service stations allowed as discretionary activities there are substantial differences between the provisions of the transitional and proposed plans but this particular site imposes its own limitations over and above those.

Conclusion

For all these reasons and in exercising our discretion in terms of s.105(1)(b) to grant or refuse consent, we have concluded that whilst some of the effects on the environment would be minor, the effect on amenities would be an major adverse effect. In terms of the objectives and policies for a commercial site with a residential interface, granting consent in this case would be contrary to the objectives and policies not only of the transitional plan but the proposed plan, (as much as we can give it weight at this stage of the planning process).

The appeal is consequently disallowed and the council's decision confirmed.

The question of costs did not arise during the hearing. However, we are of the opinion whilst reserving the question that we should indicate to the parties at this stage how we view this matter. We have been impressed by the planning, and landscaping and legal submissions that have gone into this proposal. It has required very careful and close attention. Some of the provisions of the Resource Management Act 1991 have not been altogether straightforward and in addition the proposed plan was still at the time of hearing, in the process of submission. We hold that the appellant had good reason, in spite of our findings, to test the provisions of the transitional plan in the way it did. Accordingly we are of the opinion at this point not to make an award of costs. As we have stated however, we reserve this question for further submission should the parties consider it necessary to do so.

DATED at WELLINGTON this 2nd day of February 1994

S E Kenderdine
Planning Judge

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BEFORE THE ENVIRONMENT COURT

ORIGINAL

Decision No: W 075 /2009

ENV-2009-WLG-000013

IN THE MATTER of an appeal under s120 of the Resource Management Act 1991

BETWEEN G M BEACHAM
Appellant

AND THE HASTINGS DISTRICT COUNCIL
Respondent

Court: Principal Environment Judge C J Thompson
Environment Commissioner M P Oliver
Environment Commissioner S J Watson

Heard at: Hastings on 9 September 2009. Site visit 9 September 2009

Counsel/Appearances:

M B Lawson for G M Beacham

G W Richardson – s274 party

B W Gilmour for the Hastings District Council

DECISION OF THE COURT

Decision issued: 05 OCT 2009

A. The appeal is allowed

B. Costs are reserved

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

Introduction

[1] In a decision dated 19 December 2008 the Hastings District Council declined an application made by Dr Gregory Beacham for resource consent to operate a car restoration activity on his property at 1424 Maraekakaho Road, Hastings. This is an appeal against that decision. Dr Beacham's business has an international reputation for the expert restoration and refitting of classic motor cars, particularly Jaguars. The proposal is to operate the business within three recently constructed buildings, with an attached amenities block. Together the buildings occupy about 1096m^2 and form three sides of a rectangle, semi-enclosing a sealed courtyard onto which they open. The proposal would consolidate the car restoration business onto the one site at Maraekakaho Road.

[2] The property is 9.3457ha in area and the majority of it is operated as an orchard on which Dr Beacham and his family also live. Dr Beacham has recently leased out the orchard, to be operated in conjunction with others, so he no longer requires to store as much orchard-related material and machinery on site for his own use. The site is set among other similar activities and is immediately adjacent to the Mangaroa Prison, on the outskirts of Hastings City.

The present arrangements

[3] In 1988 Dr Beacham obtained a *specified departure* under the then planning legislation from the Hawkes Bay County Council for the operation of the (then much smaller) car restoration business from the generous but still residential scale garaging existing on the site. However, as the business grew, relocation of part of it was required and part of the property at 96 Algernon Road, also in orchard country south of Hastings, was taken on lease. The building on that site was originally a packhouse for the orchard on that property. Presently, the restoration business itself is conducted at Algernon Road and some vehicles awaiting restoration, and parts, are stored in the buildings at Maraekakaho Road.

[4] A *non-complying* resource consent for use of the Algernon Road property was granted in 2004 and enables the consent holder to operate the restoration business employing 15 staff within a 905m^2 building between the hours of 7.30 am and 6 pm Monday to Thursday. The site is within the *Plains* zone of the Hastings District. This consent would be surrendered if the appeal succeeds.

Zoning and Planning Status

[5] The Maraekakaho Road property is situated within the *Plains* zone of the Hastings District Plan, operative since 2003. There are no identified sites of significance or designations affecting the property.

[6] It is common ground that the application falls within the definition of *industrial activities* contained in Chapter 18 of the Plan as: *The use of land and buildings for the manufacturing, fabricating, processing, packing or storage of substances, into new products and the servicing and repair of goods and vehicles, whether by machinery or hand and includes transport depots and the production of energy but excludes helicopter depots.* It is also common ground that Rule 6.9.5(1) contains the specific performance standards applicable to industrial activities. Industrial activities other than the processing storage and packaging of crops are confined to a maximum gross floor area per site of $100m^2$ and require that no more than three non-resident employees may be employed on site. Plainly the proposal would fail to comply with those performance standards and under Rule 6.7.5 the proposed activity becomes a *non-complying* activity.

[7] Plan Change 46, relating to the *Plains* zone, was notified on 26 June 2008, almost exactly one month before Dr Beacham's application was lodged. The Council notified its decisions on submissions on 23 May 2009. There is only one appeal, and it is not relevant to this proposal. The Plan Change, although not altering the wording of the objectives and policies, sought to limit all *permitted* industrial activities to buildings of not more than $100m^2$ GFA and to clarify that only rural crop/produce-related industrial buildings larger than $100m^2$ GFA are provided for (as a *restricted discretionary* activity). The Plan Change did not relevantly affect the performance standards, nor the status of the activity relevant to this proposal, which therefore remains *non-complying*.

[8] That being so, the application must pass one or other of the two thresholds contained in s104D before it can be considered for a resource consent under s104. That is, its adverse effects on the environment must be no more than minor, or it must be shown to be not contrary to the relevant objectives and policies of the District Plan, when read as a whole. In this case the expert planning witnesses agree that the adverse effects of the proposal are not

more than minor - so we may pass directly to a consideration of the application under s104 and leave a consideration of the Plans objectives and policies until a later point.

Section 104(1)(a)- effects on the environment

[9] We have mentioned that the expert planning witnesses agree that any adverse effects on the environment would not be more than minor. This is not surprising given that the buildings already exist – they are part of the existing environment. That is not to say that the issue of effects on the environment can be ignored. Mr Richardson, a s274 party who lives opposite the Maraekakaho Road property, raised issues about traffic generation and the use of chemicals on the site as possible adverse effects in his original submission to the Council. There was no evidence about those issues, and in the apparent absence of any issues arising from them in the 20 plus year history of this enterprise, we cannot sensibly give such vaguely expressed concerns any real weight now.

[10] Nor, of course, is it to be overlooked that this activity has positive effects. In terms of the purpose of the Act, as expressed in s5, it contributes towards enabling people and communities to provide for at least their social and economic wellbeing and, depending on one's degree of enthusiasm for classic cars, perhaps their cultural wellbeing as well. It does so by providing employment for highly skilled staff, and business for suppliers. According to Dr Beacham's unchallenged evidence, the business has over its lifetime contributed of the order of $50M to the general economy in export earnings.

Permitted baseline

[11] It may seem a little pointless to discuss the concept of the *permitted baseline* in a situation where it is agreed that the adverse effects will not be more than minor, but the concept has a resonance when it comes to considering issues such as Plan integrity. Section 104(2) gives a consent authority the discretion to disregard an adverse effect created by the proposal...*if the plan permits an activity with that effect.* The adverse effect of the proposal which is argued to be so inimical to the thrust of the *Plains* zone provisions as to threaten the integrity of the Plan is the loss of the productive capacity of the zone's soils by erecting buildings over them.

[12] The operative provisions of the *Plains* zone do permit the erection of buildings, quite apart from houses and ancillary buildings. Mr Macdonald confirmed that there are no size or building coverage limits on accessory buildings associated with residential activities permitted on a site of this size. Industrial buildings for the ...*Processing, storage and packaging of crops, produce and agricultural materials*... with a GFA of up to 2500m^2 per site are permitted on any site (no matter what size) in the zone under Rule 6.9.5. The justification for that is that such a rural industry activity is directly related to the production of primary produce on the land, and that is valid and understandable. But the *permitted* activities underline the point that *Plains* zone land is not absolutely inviolable. These were the very provisions which enabled Dr Beacham to construct the existing buildings as *permitted* activities. That seems to us to be a relevant point to consider. We hasten to add that we have not overlooked the subsequent *tightening* of the provisions under proposed Plan Change 46.

Affected person approvals

[13] Section 104(3)(b) provides that a consent authority (in this case, the Court) shall not have regard to any effect on a person who has given written approval to the application. There are four such persons; Mr Brian Clearkin, the owner and occupier of an orchard property on the corner of Maraekakaho and Stock Roads, Mr Grant Taylor (on behalf of the Luton Trust) the owner and occupier of a property to the east of the subject site, Mr T and Mrs M M Hyland, the owners and occupiers of a property immediately opposite the site on Maraekakaho Road, and the Department of Corrections in respect of the Mangaroa Prison, which surrounds the site on three of its boundaries. We have mentioned that Mr Richardson, also a neighbouring owner, opposes the application so the local support is certainly not unanimous. Nevertheless, the fact that its closest neighbours give it their consent is a reasonable indication that its effects, albeit at a reduced scale, have not proved problematic in the past.

Section 104(1)(b) – planning documents

[14] There are no relevant national statements, nor is the Coastal Policy Statement relevant. Brief mentions were made of the Hawkes Bay Regional Resource Management Plan by Mr Alan Matheson, the Council's Consultant Planner, who referred to Objective 38 – *The sustainable management of the land resource so as to avoid compromising future use and water quality*... and to its accompanying Policies 67 and 68; and by Mr Matthew Holder, the Appellant's consultant planner. He referred to Objective 16 – *for future activities, the*

avoidance or mitigation of nuisance effects arising from the location of conflicting land use activities. We agree with Mr Holder's view that Objective 16 is not a live issue here. Mr Matheson says that the Regional Plan supports the District Plan provisions about the *Plains* zone soil resource. We agree with that view also.

[15] The District Plan was the focus of attention. Many of its provisions were mentioned, but particularly relevant objectives include:

RO1 To promote the maintenance of the life-supporting capacity of the Hastings District's rural resources at sustainable levels.

RO2 To enable the efficient, and innovative use and development of rural resources while ensuring that adverse effects associated with activities are avoided, remedied or mitigated.

RO4 To ensure that the natural, physical and cultural resources of the rural area that are of significance to the Hastings District are protected and maintained.

PLO1 To maintain the life-supporting capacity of the unique resource balance of the Heretaunga Plains.

PLO2 To avoid, remedy or mitigate potential adverse effects of land use activities on the rural community, adjoining activities, marae, and the economy.

PLO3 To provide for the establishment of landholdings on the Plains which can accommodate a wider range of activities that can retain the life-supporting capacity of the Plains resources.

The principal supporting policies are:

RP3 Provide for a wide range of activities to establish which complement the resources of the rural area, provided that the sustainability of the natural and physical resources of the area is safeguarded.

PLP1 Enable the establishment of a wide range of activities provided they maintain the life-supporting capacity of the soil resource of the Heretaunga Plains for future use.

PLP4 Control the adverse effects of activities on the community, adjoining activities, and the environment.

PLP5 Activities locating in the Plains Zone will need to accept existing amenity levels associated with well established land use management practices involved with the sustainable use of the soil resource.

PLP6 Limit the scale and intensity of the effects of Commercial Activities in the Plains Zone in order to ensure the sustainable management of the soil resource and to mitigate adverse effects.

PLP7 Provide for the establishment and development of Industrial Activities on the Plains Zone, in a manner that complements the sustainable management of the soil resource, adjacent activities and protects the amenity of the zone.

[16] In summary, we accept that those provisions aim to promote the sustainable management of the Heretaunga Plains land resource, finite in nature and with a productive and life-supporting capacity, not just for the present but also for future generations. Also, as Mr Matheson put it *...commercial and industrial activities are limited in relation to the type and size of those activities, particularly those that do not support the sustainable use of the versatile soils resource.*

[17] This is an issue thoroughly traversed in a number of relatively recent decisions of the Court. For instance, in *McKenna v Hastings DC* (W16/2008) and *Ngatarawa Development Trust Ltd v Hastings DC* (W17/2008), the Court found that the proposals then before it were so contrary to the thrust of the Plan provisions that they should not be given resource consents. The scenario in *H B Land Protection Society Inc v Hastings DC* (W57/2009) was different, in that what was before the Court was a Council-initiated Plan Change to enable the establishment of a regional sports park. Nevertheless, what was at stake was some 30ha of *Plains* zone land, the productive capacity of much of which would, for all real purposes, be lost if the park was built. In that instance, the Court found that while the productive capacity of the soil was undoubtedly important, countervailing values prevailed. The point to be made here is that the protection of the capacity of the *Plains* soils is not an absolute, and other activities are not *prohibited.*

[18] In each case, it is a question of assessing effects and of considering the Plan provisions. If the adverse effects significantly outweigh the positives, and/or the proposal is in irreconcilable conflict with the Plan provisions, then a negative answer is plainly indicated. If things are not that bleak, then it may be that a proposal can still be regarded as promoting the purpose of the Act – the sustainable management of resources.

Section 104(1)(c) – plan integrity

[19] The real issue in this appeal is whether allowing this application would be so contrary to the relevant objectives, policies and other provisions of the District Plan that it would harm its

integrity and effectiveness as an instrument enabling the Council to avoid, rather than to remedy or mitigate, the adverse effects the Plan formation process has identified.

[20] This was at the core of the dispute between the parties, and the fundamental reason why the Council declined the application. The decision of 19 December 2008 records:

> ... the application would have the potential to create an adverse precedent effect. It was felt that the qualities of the proposal could be readily replicated on other sites in the Plains Zone and were not sufficiently unique to this site. Therefore the Council, being consistent in its approach, would find it difficult to refuse consent to similar applications.

[21] We need to begin a consideration of this issue by recalling that the original Maraekakaho Road operation was sanctioned by a *specified departure* granted by the then County Council in 1988. A *specified departure* was, loosely, the equivalent of a *non-complying* consent under the current legislation. We have mentioned also that the Algernon Road operation received a *non-complying* consent from this Council in 2004.

[22] Mr Ian Macdonald, the Council's Environmental Manager, expressed the view that the earlier consents were materially different from the present application because they both utilised existing buildings on the two properties, and thus did not involve taking more land out of production. We see the same circumstances here. Dr Beacham made no secret of his real intent in constructing these buildings, but they were built as storage sheds, and thus were *permitted* in the zone. Now, as has happened twice before, an application has been made to convert them to some other use.

[23] We accept of course the administrative law principle that like applications should be treated alike, but that principle applies both ways. Given that this operation has twice before been regarded as sufficiently outside the run of foreseeable non-complying proposals that it could be examined, and approved, on its merits we must ask why it should be differently regarded now. We heard no suggestion at all that the grant of either of those consents had led to any, let alone a deluge of, applications for similar consents in respect of other properties. The enterprise's own history has discounted the *floodgates* hypothesis, and makes it difficult, if not impossible, for the Council to mount a credible argument that the integrity of the Plan will be imperilled if this consent is granted.

[24] We have said before, and must say again, that the *floodgates* argument does tend to be somewhat overused, and needs to be treated with some reserve. The short and inescapable point is that each proposal has to be considered on its own merits. If a proposal can pass one or other of the s104D thresholds, then its proponent should be able to have it considered against the s104 range of factors. If it does not match up, it will not be granted. If it does, then the legislation specifically provides for it as a true exception to what the District Plan generally provides for. Decision-makers need to be conscious of the views expressed in cases such as *Dye v Auckland RC* [2001] NZRMA 513 that there is no true concept of precedent in this area of the law. Cases such as *Rodney DC* v *Gould* [2006] NZRMA 217 also make it clear that it is not necessary for a site being considered for a *non-complying* activity to be truly *unique* before Plan integrity ceases to be a potentially important factor. Nevertheless, as the Judgment goes on to say, a decision maker in such an application would look to see whether there might be factors which take the particular proposal outside the generality of cases.

[25] Only in the clearest of cases, involving an irreconcilable clash with the important provisions, when read overall, of the District Plan and a clear proposition that there will be materially indistinguishable and equally clashing further applications to follow, will it be that Plan integrity will be imperilled to the point of dictating that the instant application should be declined.

[26] That was the position the Court found to exist in its decision in *McKenna v Hastings DC* (W16/2008). There too the adverse effects of the application itself were found to be not more than minor, but there was a direct clash with the provisions relating to the *Plains* zone and the avoidance of the fragmentation of its landholdings and the productive capacity of its soils. A somewhat similar, if less crisply defined, position was found to exist in *Ngatarawa Development Trust Ltd v Hastings DC* (W17/2008).

[27] It is not just the history of this operation that leads us to discount the Plan integrity argument in this instance. This proposal has current features that, individually and collectively, make it unlikely that a materially indistinguishable proposal would come over the horizon. We have in mind factors such as: that it can be conducted in existing buildings; that the soils in this front part of the Beacham orchard are, according to Mr William Wilton, a horticultural consultant engaged by Dr Beacham, poor and of inferior productive capacity; that

the proposal will not fragment the ownership of the land, as a residential subdivision would; that it is a reorganisation and continuance of a longstanding local business; that the two existing resource consents will be surrendered, thus bringing about a close to neutral net *non-complying* position for the operation, and that Dr Beacham is prepared to offer a restrictive condition that there be no further development on the property, even though that could be permitted by the Plan.

Section 104(1) – Part 2

[28] There are no issues relevant to Mäori under s8 or s6(e), nor are there matters of national importance under the other paragraphs of s6. Of the matters to be given particular regard under s7 we can list as relevant:

(b) The efficient use and development of natural and physical resources:

(c) The maintenance and enhancement of amenity values:

(f) Maintenance and enhancement of the quality of the environment:

(g) Any finite characteristics of natural and physical resources:

[29] Arguably, it is more efficient to use the area of poorer soils on the property for a purpose other than for a second rate productive purpose. That has been tried and produced an inferior product. We do not though put any particular weight on that issue. The issues of amenity values and the quality of the environment do not arise on the evidence we heard. The *Plains* zone soils are a finite resource and that, as will be apparent, has been the focus of the hearing and our considerations.

Section 290A – the Council's decision

[30] Section 290A requires the Court to have regard to the Council's decision. That does not create a presumption that it is correct but it does, implicitly at least, call for an explanation if we should come to disagree with it. We have already quoted the central reason from the Council's decision declining the application – see para [20]. It is apparent that the issue of Plan integrity was critical in its thinking and, for the reasons we have outlined – see paras [19] to [27] – we do not regard that issue in the same light.

Result

[31] The effective, and likely permanent, loss of the life-supporting capacity of *Plains* zone soils, even of such a small area as this, to a non-rural industry is not to be accepted lightly – we must have accumulative effects in mind. For many proposals that factor alone would likely be decisive. But for the reasons we have outlined, we do not see this proposal as being in such conflict with the Plan provisions as to create a Plan integrity issue if it is granted. Further, the factors we have listed in para [27] put it in a category which, while not unique, is sufficiently outside the likely mainstream of proposals that it can fairly be considered as a *non-complying* proposition. We conclude that, in the overall weighing process under s5 of the Act, the positive factors of the proposal outweigh its negatives and that the resource consent can be granted.

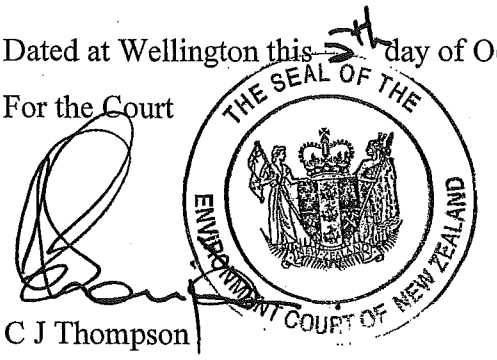
[32] For those reasons, the decision of the Council is not upheld and the resource consent should be granted. The conditions of the consent require thought – for instance to give effect to Dr Beacham's offer of a restriction on further development, as mentioned in para [27]. We ask that Counsel confer and present a set of conditions for approval by 23 October 2009.

Costs

[33] In the circumstances we do not encourage an application for costs, but as a matter of formality they are reserved. Any application should be lodged by 23 October 2009, and any response lodged by 6 November 2009.

Dated at Wellington this 5th day of October 2009

For the Court



C J Thompson

Principal Environment Judge

Decision No. W 067 /2005

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an appeal under section 120 of the Act

BETWEEN **J V & C M CAMPBELL**

(RMA 853/03)

Appellants

AND **NAPIER CITY COUNCIL**

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge L J Newhook (presiding)
Environment Commissioner R M Dunlop
Environment Commissioner W R Howie

HEARING at **Napier** on 3, 4 and 5 May 2005

APPEARANCES

J P Matthews and A McEwan for appellants
M B Lawson and H Kyle for respondent
J H Turnbull for T Claudatos (3 May 2005) and subsequently Mr Claudatos for himself

INTERIM DECISION

Introduction

[1] This was an appeal by Mr and Mrs Campbell against a decision of the respondent refusing resource consent to subdivide their 2.3821 ha property at 37 Jervois Road, into 6 lots. The property adjoins the longstanding township of JervoisTown, and is under consideration by the respondent, in a way we shall describe, for urban zoning in the future.

[2] The status of the activity being agreed as non-complying under the transitional district plan and restricted discretionary under the proposed district plan, the appellants set out to prove service capability, potential and cumulative adverse effects no more than minor, no unacceptable loss of versatile soils, proposal not contrary to the objectives and policies of the plans, and compliance with Part II of the Act.

[3] The respondent contended that adverse effects on the environment would be more than minor, difficulties with servicing for wastewater and stormwater, adverse effect on the low density rural settlement amenity of the JervoisTown area, lack of consistency with the objectives, policies and rules of both plans, and adverse roading issues.

[4] The appeal is of some age, and this is partly because considerable time has been spent in mediation. The last mediation session succeeded in narrowing the **issues** to the point where the parties agreed as follows:

(a) Stormwater to be disposed of to the Upper Pirimu Stream either in terms of the plan lodged with the application or by a new easement and pipe for this development only; subject to the upgrading of the existing pipe capacity to the satisfaction of the NCC Engineering Department.

Financial contributions for creation of the new lots to be based on urban infill as at the date of the application.

(b) A potable water supply must be provided to each lot in terms of the NCC Code of Practice.

(c) Other financial contributions to be in terms of NCC District Plan as at the time of application.

(d) That the wastewater from the proposed subdivision be treated and discharged on each individual lot in accordance with either Rule 37 of the Proposed Regional Plan (as amended by decisions in June 2001) or by way of resource consent.

(e) Issues for the Court therefore are confined to the issues raised in paras 5.2, 5.3, and 5.5 of the Reply to Appeal, and roading.

[5] We raised with the parties the question of whether resolution of the appeal should await the seeking of regional consents in relation to wastewater and stormwater. We were assured that the regional council had been represented at the mediation, and that no problems were foreseen in this regard by any of the parties.

[6] Despite the agreement about provision of services, the respondent called the evidence of its staff engineer Mr P W Scott. While purporting to focus on roading issues in his short evidence, Mr Scott extended his commentary to include mention of servicing problems for stormwater and sewage. We were surprised about this, but ultimately the whole of the evidence on these subjects confirmed the appropriateness, in our view, of the agreement reached by the parties concerning servicing, and also established for us that roading and road traffic safety were not going to be problems if consent was granted.

Applicable law – pre or post 2003 Amendment?

[7] We heard competing submissions from counsel as to whether the status of the proposal was governed by the transitional plan, or the proposed plan (in respect of which all relevant provisions are beyond challenge). They perceived differences of approach arising out of the application of s88A of the Act depending on whether the relevant wording was pre-Amendment or post-Amendment. They also perceived differences in assessment of jurisdictional "gateway" as between s105(2A) pre-Amendment, and s104D post-Amendment, if the status of the activity was held to be non-complying overall, deriving from the transitional plan.

[8] It is regrettable that difficulties of interpretation of s112 of the 2003 Amendment Act, are still consuming Court time. Nevertheless, counsel for the two principal parties insisted on addressing the Court on the two conflicting jurisprudential views of recent times, and sought to offer their own additional views.

[9] As to the current jurisprudential situation, we can do no better than quote from a recent decision of another division of the Court ***Munro v Christchurch City Council***[1], before then examining the gloss that counsel here sought to bring to the issue. In ***Munro***, Judge Bollard's division recorded the following in a circumstance

[1] Decision C71/2005 (Judge Bollard).

similar to the present, where an application had been brought well before 1 August 2003 (the operative date of the 2003 Amendment), and the appeal brought after that date:

> Under a line of this Court's decisions stemming from ***Omokoroa Ratepayers Association Inc v Western Bay of Plenty District Council*** (Decision A17/2004, 13 February 2004), the implication has been drawn that an appeal lodged after 1 August 2003 is to be determined under the RMA as amended. To interpret the position otherwise would effectively mean that s.112(2) is otiose. Subsection (1) recognises that persons with a right of appeal under the principal Act (in its unamended form) retain that right to bring an appeal. But in the light of the implication that emerges on reading subs.(1) and subs.(2) together, an appeal such as the present, while lodged in accordance with the ambit of opportunity available under the pre-amending legislation, is determinable following such lodgement under the legislation as amended.
>
> That implication can be said to be reinforced by the way s.112(5) is expressed. Here again, the subsection does not expressly refer to the position applicable to appeals lodged after 1 August 2003. The clear implication, however, is that where a notice of appeal has been lodged after that date, a person wishing to become a party to the appeal must qualify and apply in accordance with the new s 274 as introduced by the amending Act in substitution of the former ss.271A and 274.
>
> We do not overlook that conflict exists in the case law stemming from a contrary interpretative approach in ***New Zealand Nut Producers Ltd v Otago Regional Council*** (C99/04, 19 July, 2004). Respectful though we are of the views there stated, we adopt the reasoning advanced in the ***Omokoroa Ratepayers*** case, supported by other decisions that have followed that case, including ***North Canterbury Estates Ltd v Waimakariri District Council*** (C26/04, 18 March 2004), ***Environmental Defence Society v Far North District Council*** (A112/04, 25 August 2004), and ***Carter Holt Harvey Ltd and ors v Bay of Plenty Regional Council*** (A160/04, 16 December 2004).

[10] Counsel for the appellants essentially supported the reasoning in the decisions underpinning the Court's decision in ***Munro***. Mr Lawson, for the respondent, however, supported the reasoning of another division of the Court in ***NZ Nut Producers Limited*** to the effect that a pre-August 2003 application and its subsequent post 1 August 2003 appeal would be determined under the Act pre-2003 Amendment. Mr Lawson went on to offer an argument that he considered had not been put in the decided cases, deriving from the provisions of s290 RMA, which provides as follows:

> 290. Powers of Court in Regard to Appeals and Inquiries
>
> (1) The Environment Court has the same power, duty, and discretion in respect of a decision appealed against, or of which an inquiry relates, as the person against whose decision the appeal or inquiry is brought.

(2) The Environment Court may confirm, amend, or cancel a decision to which an appeal relates.

(3) The Environment Court 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 Environment Court has under this Act or under any other Act or Regulation.

Mr Lawson submitted that it would be contrary to s290(1) for the Environment Court to have a different power, duty or discretion from those of the council.

[11] We do not think that s290 assists the view espoused by Mr Lawson. Subsection (4) expressly records that nothing in the section affects any specific power or duty the Court has under legislation. We consider that the correct interpretation of the **duty** of the Court set out in s112 of the Amendment Act, is to apply the amended Act to determination of the appeal. The apparent general obligations of the Court under subsection (1) and (2) of s290 are overlain by the particular duties concerning determination of appeals lodged post-Amendment, described in s112 of the Amendment.

Status of the proposal

[12] As already noted, it was agreed that the proposal is effectively a non-complying activity under the transitional plan and a restricted discretionary activity under the proposed plan.

[13] On this subject Mr Lawson submitted on behalf of the respondent that if we were to hold against his argument that ***NZ Nut Producers*** correctly stated the law, then we would employ the provisions of s88A, post-2003 Amendment. That section provides:

88A Description of type of activity to remain the same

(1) Subsection (1A) applies if-

(a) an application for a resource consent has been made under s88; and

(b) the type of activity (being controlled, restricted, discretionary, or non-complying) for which the application was made under s88, or for which the activity is treated under s77C, is altered after the application was first lodged as a result of-

(i) a proposed plan being notified; or

(ii) a decision being made under clause 10(3) of Schedule 1; or

(iii) otherwise.

(1A) The application continues to be processed, considered, and decided as an application for the type of activity that it was for, or was treated as being for, at the time the application was first lodged.

(2) Notwithstanding subsection (1), any plan or proposed plan which exists when the application is considered must be had regard to in accordance with s104(1)(b).

(3) This section applies subject to s150D.

[14] This, Mr Lawson submitted, "puts the question of status beyond doubt", because by subsection (1A) the proposal must be judged as an application for non-complying activity consent. Mr Lawson went on however to refer to the apparently conflicting provisions of s19 of the Act, which effectively provides that **rules** in a proposed plan will have operative effect as soon as they are beyond challenge from submissions or appeals. Section 19 provides as follows:

19. **Certain rules in proposed plans to be operative**-(1) A rule in a proposed plan is to be treated as if it is operative and any previous rule is inoperative if the time for making submissions or lodging appeals on the rule has expired and-

(a) no submissions in opposition have been made or appeals have been lodged; or

(b) all submissions in opposition and appeals have been determined; or

(c) all submissions in opposition have been withdrawn and all appeals withdrawn or dismissed.

(2) Every reference in this Act or in regulations to a plan or an operative plan is to be treated as including a rule in a proposed plan that is operative in accordance with subsection (1).

[15] Mr Lawson raised s19 in order to make the point that if we were to be judging the application against the Act as amended in 2003, s104D provided in respect of the gateway concerning objectives and policies of district plans, that the proposal not be contrary to **all** of them. In contrast, he said, s19 gave only **rules** an operative effect.

[16] In contrast, Mr Matthews for the appellants submitted that *"it would be nonsense for the rules in the plan to be operative without the objectives and policies in which those rules are based being also operative"*. Nevertheless, the plain wording of s19 is that it applies only to rules, so we are bound to hold that the gateway test in s104D requires us to consider objectives and policies of a transitional plan, even if the rules they support have been overtaken by operation of s19.

[17] So far as concerns the apparent tension between s88A and s19 (both post-2003 Amendment), we hold that s88A(1A) is impliedly subject to s19 in the sense that the former proceeds upon an assumption that any rules setting the status of an activity have not yet been overtaken by new rules attaining operative effect and replacing them. Here, that situation has come about, and the transitional rule establishing non-complying activity for the proposal has been overtaken by the proposed plan rule becoming of operative effect and according restricted discretionary status.

[18] We note that the difficulties created by ambiguities in s88A (pre-2003 Amendment) were addressed in a careful and scholarly way by the Court in ***Canterbury Regional Council v Christchurch City Council***[2]. The changes made by Parliament to the section in 2003 not being material in our view for present purposes, the declaration then made by the Court remains apposite[3]:

> (1) That after submissions and references on provisions of the proposed plan relevant to an application for resource consent have been decided and those provisions are beyond challenge, then on any application for a resource consent lodged and processed before those provisions became beyond challenge, the consent authority (or on appeal, the Environment Court) when considering matters under sections 104 and 105 of the Act must:
>
> (a) Prior to the proposed plan becoming operative by public notification under clause 20, have regard to the proposed plan as amended by decisions on submissions or references; or
>
> (b) After the plan becomes operative, have regard to the newly operative plan-
>
> Both as to classification of the type of activity and as to the merits of granting or refusing resource consent.

[2] Decision C25/2001 followed by Decision C78/2001 (reported at (2001) 7 ELRNZ 113).
[3] At para [6] of C78/2001

(2) That, the consent authority or Environment Court must not apply the classification(s) of the activity under the transitional plan or proposed plan as at the date of application because they are irrelevant (unless they have not been altered).

Those declarations were recorded after lengthy consideration of such principles of interpretation as avoidance of retrospectivity, and use of extraneous material to aid interpretation (such as Hansard).

[19] Counsel were agreed about one thing, namely that very little weight should be accorded to the provisions of the transitional plan. Although they did not say so, we apprehend that the submission and their agreement related to the analysis required under s104.

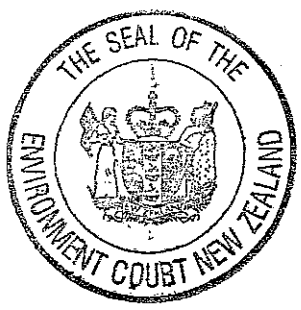
[20] Our summary of the position regarding these none-too-easy statutory provisions is that:

- the proposal is to be tested against the provisions of the 2003 Amendment Act;

- s88A(1A) makes sense and operates in relation to **rules** in previous district plans that have not yet ceased to have operative effect by reason of s19; the corollary is that subsection (1A) will cease to set the status of a proposal once replacement rules have attained operative effect by reason of s19 or at the very least are beyond challenge;

- s104D requires that the proposal, when viewed against the "district plan" gateway be not contrary to the provisions of the **objectives and policies** of all extant district plans, whether or not the **rules** that are supported by those objectives and policies have ceased to have operative effect;

- this proposal must be regarded as a **restricted discretionary activity**, because that is its status pursuant to the rules now deemed operative.



Effects on the environment

Infrastructure

[21] In paragraph [4] of this decision we set out an agreement reached between the parties after extensive mediation. Stormwater, wastewater, and potable water issues were said to have been settled. Financial contributions relating to other matters, in terms of the district plan, were agreed to be available.

[22] In paragraph [6] we described the unusual tack taken by the respondent in calling a staff engineer to express concerns about matters of infrastructure as well as the roading issues. Nothing arose out of the written or oral evidence from Mr Scott that left us with any cause for concern at all about effects on the environment of this sort. Stormwater matters, it seemed, on Mr Scott's evidence under cross-examination, arose out of the need for provision of footpaths. That is a separate matter that we shall address under "effects on roading".

[23] In some rather unsatisfactory way Mr Scott seemed to be expressing a concern on behalf of the council about the long-term planning that it would need to do for infrastructure in this rural settlement. Those are matters for the council to consider over time under separate legislation. So far as concerns this case, Mr Scott raised no matters that would cause us to consider that there would be infrastructure effects on the environment from this proposal, whether potential or cumulative, that would be anything other than minuscule. The evidence in its totality, supported in any event by the sensible agreement reached between the parties, was to the effect that the new lots created by the appellant could be serviced in the same way that existing lots within the Jervois Town settlement have been self servicing for over a hundred years. We heard no evidence to cause us to think that there had been any health problems, water shortages, or anything else.

Effects on roading

[24] In his two-page statement of evidence, Mr Scott, who holds a NZ Certificate of Engineering (Civil), but is not a specialist traffic engineer, asserted that additional residential use in the area would place pressure on roads which are not designed or intended to take additional traffic or cater for additional pedestrian use. Under cross-examination, this boiled down to a concern about additional pedestrian use.

[25] Mr Scott (and indeed no one else on behalf of the council) had taken any traffic counts on the semi-urban unkerbed streets with their attractive mown grass berms. No evidence was given of safety concern having arisen, and our own inspection of the area after schools had finished for the day, gave us a level of comfort in the evidence of the appellant's witnesses, not controverted by Mr Scott or any other council witness, that the existing configuration is entirely satisfactory and this position would not be altered by the proposal.

[26] Indeed, a neighbour Mr T M Claudatos, a party opposing grant of consent, gave answers in cross-examination that confirmed these views. Mr Claudatos's wife conducts a beauty therapy business on their adjoining lifestyle block, and it is clear that there are a number of traffic movements to and from their property on Thursday, Friday and Saturday afternoons, with no evidence of problems occurring. Indeed, the evidence of the appellant Mr Campbell about a former roadside fruit selling operation, tended to indicate that traffic movements on his street, Jervois Road, had been considerably greater during that time than they would be if the subdivision proceeded, again without anyone having reported safety issues of any kind. We feel no surprise about that.

[27] There were a number of aspects of Mr Scott's evidence that we found unsatisfactory, not the least of which included that there had been no traffic counts or other studies to support his assertions, his lack of familiarity with detailed provisions of the district plan that we would have expected from him to know when making his assertions, and his unsubstantiated view that the adding of a few more pedestrians onto these streets would somehow create a need for footpaths in Jervois Town. Even more unusual was Mr Scott's suggestion that the "pedestrian issue" was something that would create a need for full development of the road, because, he asserted, "roadside drains would have to be piped and in order to do that the road crown would have to be lowered, at which point economics would dictate that a full residential standard of roading would have to be developed".

Amenity effects

[28] No issue about any outstanding landscape emerged, whether on account of the provisions of the district plan or otherwise.

[29] Bearing in mind that the subject property is "tucked into" the existing minor settlement of Jervois Town, we listened with interest to evidence about amenity, that being a notable plank of opposition from the respondent. It was clear from the evidence of Mr M P Holder, a planning consultant called by the appellant, that residential densities in Jervois Town vary, with lot sizes tending to be in a band from 1000m^2 to 5000m^2.

[30] Mr Holder gave evidence that each of the proposed lots would be larger than the minimum site area required by that plan for the Rural Settlement zone (1500m^2 site area). (The appellant is proposing one lot of 1.0590 hectares, and 5 lots each of 2645m$^{2)}$. Mr Claudatos' lot immediately to the west of the appellant, is a relatively small lifestyle block described by Mr Claudatos as being of 5 acres.

[31] There is quite some history to the origins of Jervois Town. It was established about 100 years ago, essentially as an area to house agricultural and horticultural workers. Mr Holder described the scene more than adequately when he said:

> Jervois Town's amenity values are characterised by wide open drains, relatively narrow sealed roads, wide grass berms, established housing, and a mixture of small rural land holdings.

[32] He was of the opinion that any new dwellings would create visual effects that would be no more than minor, that is they would fit into the "scene" as we have called it. Mr Holder brought a "permitted baseline" aspect into this analysis, and while not compulsory for us to take account of it, especially on a restricted discretionary activity application, we found his evidence helpful. It appeared that permitted activities could include commercial forestry; rural processing activities (industrial activities processing agricultural, horticultural or viticultural produce) in buildings of up to 2500m^2 in total gross floor area or 10% of net site area whichever is the lesser; a landfill processing up to 100m^3 of fill in any 12 month period; travellers' accommodation for up to 5 persons (excluding staff); educational facilities; and residential care and day care facilities. We consider none of these to be fanciful in Jervois Town situation, except perhaps commercial forestry and small landfills. The effects from such activities would in our view have a far greater impact on the amenity of the locality, than the appellant's subdivision and its attendant buildings.

[33] The proposal would fit well into the rural village atmosphere.

[34] There would be no reverse sensitivity effects from establishment of the subdivision and its associated housing. (In contrast, horticultural activities, to which the respondent asserted the land was better suited, could well do so. We shall discuss that issue in more detail when we deal with the district plan provisions).

[35] As to effect on amenity from a few more cars being attracted to the immediate neighbourhood, the evidence under cross-examination of Mr Claudatos was interesting. He said that the impact of the additional traffic movements to his wife's beauty therapy business had only changed the rural feeling of Jervois Town *"perhaps ever so slightly"*.

Protection of productive and versatile soil resources

[36] This is substantially a matter driven by the district plan, but as with so many district plan provisions, it is also concerned with effects on the environment. We will address it here, because a significant part of the evidence called on behalf of each of the main parties, focussed on this issue.

[37] Mr Campbell gave evidence about previously having conducted flower growing and orcharding (plums) on the land, and gate sales of the latter. Each, he said, had become uneconomic because of vagaries of the respective markets, and the small size of the land.

[38] The appellant called Mr W J W Wilton, an experienced horticultural consultant, who essentially confirmed that Mr Campbell's feelings about the economics of rural use of the land, were reasonably held. He said that after deducting land area covered by buildings, shelterbelts and accessways, there would be only about 1.6 hectares of cropable area. He described the soil as "Heretaunga Silt Loam on Sandy Loam", from the local soils map, having less than 30cm of silt loam over sandy loam with imperfect drainage and water table as high as 30-60cm after wet periods. He also described the soils as slightly saline, which still have adverse effects on intensive protected cropping, and build up of soluble salts from intensive fertiliser use. On a scale of 1:6 versatility classification from a 1996 report prepared for Napier City Council (1 being the classification of least limitations and 6 being very limited), the present soils were class 4. Mr Wilton said that there were more valuable and versatile soils elsewhere on the Heretaunga Plains. He also said that the small size of the property was a severe limitation, noting by comparison some sensible guidelines from the transitional district plan indicating the sizes of

viable economic units for market gardening and orchards as 8 hectares, vineyards 10 hectares, process cropping 30 hectares, and dairy and pastoral farming 40 hectares. Mr Wilton indicated that factory farming could be conducted, involving such activities as mushrooms or chicken farming, however the close proximity of residential housing would rule those out.

[39] The respondent called Mr R S Mills, a horticultural management consultant with experience as an orchard manager. He endeavoured to persuade us that the property could be used productively, particularly if it had some drainage carried out. He suggested the establishment of process crops such as corn, peas and other cannery crops, a standalone or a run-off orchard, and in particular suggested a boysenberry operation. Information that he had been given by a cannery production company suggested that there was a shortage of boysenberry crops, and that there would be a demand.

[40] Each of these witnesses was extensively cross-examined. Improvement of the land through drainage so as to increase its versatility rating, was the subject of some focus. This would apparently have particular benefit for a glass house operation, and we agree that that would theoretically be possible. However, after listening to quite considerable evidence on the subject, we believe that we must take note of the small size of the property, and the relatively high costs of carrying out drainage and doing things like building glasshouses. While this might increase the versatility of the **soil**, it fails to take account of the point that the soil has to be used for something worthwhile and sustainable. We accept from the moderately detailed evidence on the point that the economics would be likely to be quite questionable.

[41] Of more importance, is that there is urban development on three of the four sides of the property, and any intensive cropping or similar activity is likely to create problems of spray drift, noise from bird scaring devices, and the like. The suggestion by the respondent that to let the land go for residential activity would simply be to shift the problem sideways, ignores the fact that the new interface would involve only one property boundary, not three, and be only $^1/_3$ or ½ as extensive as the present interface.

[42] As regards the returns available from horticulture conducted on soils of average to better than average versatility, the evidence indicated wild seasonal fluctuations. The sorts of figures offered (which we need not dwell on in detail) indicated potential returns in good years of considerably less than an average or even

minimum liveable wage. This does not of itself answer the question of whether there are versatile soils here worth protecting, but it does indicate that the property is already reduced to a size, where the usefulness of even versatile soil has been marginalised.

[43] There were a number of other more minor skirmishes on this issue, including the cost of removing the existing internal shelterbelts that cause excessive shading (not a high cost), and whether or not there would be adequate labour available for seasonal picking and the like (questionable in some years, but certainly not a factor supporting an abandonment of rural activity on the land).

[44] Overall, our assessment on this issue is that effects will be no more than minor, and reverse sensitivity problems of intensive horticultural use of a property surrounded by urban development on three sides, militate against the taking of steps to ensure that the property continues to be available for rural activities.

The provisions of the district plans

[45] Mr Holder, and the respondent's planning manager Mr A L B Thompson, both gave detailed evidence.

[46] We have already covered the issue of rules governing the status of the proposed activity.

[47] It was common ground that the status of the proposed activity is restricted discretionary, although reading the extensive list of matters to which the council says it has "restricted" its discretion, one is left wondering exactly what is meant by the term "restricted"!

[48] Both witnesses referred us to the following objective and policies from the transitional district plan:

> Objective 5.2
>
> To ensure that the most fertile land of the County will be available for primary production and to encourage intensive farming and horticultural usage by every available means.
>
> Policy 5.3.2
>
> 'To encourage the best use of the resource by permitting as of right only the most intensive farming and horticultural uses.

Policy 5.3. and 4

To ensure that dwelling houses and other accessory buildings are erected only where they are essential to the proper management of the property.

Policy 5.3.6

To encourage the productive use of non-conforming (small) lots for intensive farming or horticultural uses or for residential and/or storage purposes by rural workers or contractors.

[49] Mr Thompson considered that the proposal was contrary to that objective and its policies. At first reading of them, that appears to be so, but we are troubled about the rather extravagant phrase in the objective: *"by every available means"*, because by implication it seems to suggest a requirement for people to do things that might be unsustainable. That would fly in the face of Part II of the Act. We have also indicated that the statements of the sort found in these provisions are unrealistic in respect of the subject land, so while the proposal is contrary to them on their faces, that is not regarded by us to a matter of importance when we come to weigh the many factors that we have to in this case. In any event the provisions come from the transitional plan (Hawkes Bay County Section) and were proposed under the repealed Town and Country Planning Act 1977.

The proposed district plan

[50] The provisions of the proposed district plan that the witnesses said were relevant for our consideration, are quite extensive. We have considered them in detail, but will simply summarise them here.

[51] The objectives and policies relate to protection, maintenance, enhancement, encouragement, and enablement (variously) of such things as outstanding natural features, significant landscapes, productive and versatile soil resources, character and amenity values of the rural environment, capacity of infrastructure, and restriction of residential development.

[52] Also in summary, because we have dealt with the issues extensively under the heading "effects on the environment", we find that the proposal is not contrary to the objectives and policies. This includes the objective about ensuring that the cumulative adverse effects of subdivision, use and development of land on rural resources are recognised, and avoided, remedied or mitigated, because we have

addressed effects on both a potential and a cumulative basis, and also dealt with rural resources on a broader basis than just soils.

[53] We are driven to comment on a rather unusual *"anticipated environmental result"*, which reads as follows:

> (3.) To maintain a level of amenity in the rural environment that is consistent with the expectations of residents in Napier City, as measured by a "satisfaction" survey completed every 5 years.

That provision cannot be valid, because it anticipates, at least by implication, new provisions (results of surveyed expectations) being included in the district plan without following the formalities of the First Schedule to the Act.

[54] We have already commented that the assessment criteria for restricted discretionary activities relating to subdivision in the main rural zone of the PDP, are extensive. Again, we describe them here in summary form. They are, from clause 39.3(3) of the district plan, criteria (a), (b), (c), (d), (i), (k), (o), (p), (q) (u), (v), and (aa). Consideration of alternative sites, locations or zones seems to us to be of limited relevance in relation to a fixed activity like subdivision of a given piece of land, and also seems to suffer from the criticism that it purports to elevate what is usually a non-complying activity consideration, to one concerning (restricted) discretionary activities.

[55] As to whether the "land use" would contribute to the efficient use and/or development of natural and physical resources within the City, we have effectively dealt with the issue and found no difficulty, in relation to rural, visual, infrastructural, and roading resources. The same may be said of assessment of "positive effects to the surrounding environment and wider community", and "enhancement of amenity values", which in any event are somewhat vague. We have found that the proposal will be compatible with surrounding land uses, and will not have an effect on the outstanding natural features, significant landscapes, rural character and local amenity. The proposal likewise passes criteria concerning volumes and safety of traffic and people, efficient circulation of vehicles, the volume of congestion, disposal of waste and effluent, avoidance of adverse effects on infrastructural services, and avoidance of adverse cumulative effects on the surrounding area. The proposal is either neutral or may not contribute to social and economic wellbeing of the community including for the purposes of diversifying land uses complementing primary production such as agricultural, horticultural and/or viticultural activities. If it registers against that criterion in a slightly negative

way, that would not be such as would result in our view in consent being refused to the proposal.

Napier urban growth strategies

[56] In 1992 and 1999, the respondent published urban growth strategy documents in consultation with the community, in which the Jervois Town area was identified as an area of potential urban consolidation but which should remain subject to the status quo in the short term because of "servicing issues".

[57] We can place little weight on these documents for two reasons. First, they cannot be a substitute for statutory documents produced under the processes of Schedule 1 of the Act by which the public are entitled to comment through formal processes of submission and appeal. We make reference to the recent decision of the Environment Court in ***Infinity Group Limited v Queenstown Lakes District Council***[4], in particular paragraphs [80] to [87] of that decision where for detailed reasons recorded (with which we agree) the Court considered that the results of an informal process, something called the Wanaka 2020 Workshop, should have little weight placed upon them. Secondly, matters of infrastructure are agreed between the parties not to be an impediment to consent on this standalone proposal.

Precedent

[58] Counsel for the respondent, and Mr Thompson, advised that in their view there were a number of other properties in the area which would be "indistinguishable from the applicant's property and which would be difficult to decline consent if the present proposal were consented to".

[59] We struggle with the introduction of the concept of precedent to cases involving applications for (restricted) discretionary activity consents. That concept, together with other concepts that are occasionally described as related, namely integrity of planning instruments, coherence, and public confidence in the administration of plans, have caused enough difficulty in relation to non-complying activity applications. It is salutary to quote from a recent decision of the High Court ***Rodney District Council v Gould***[5]:

[4] Decision No. C10/2005.
[5] (2005) 11 ELRNZ 165, at para 99.

> The Resource Management Act itself makes no reference to the integrity of planning instruments. Neither does it refer to coherence, public confidence in the administration of the district plan or precedent. Those are all concepts which have been supplied by Court decisions endeavouring to articulate a principled approach to the consideration of district plan objectives and policies whether under s104(1)(d) or s105(2A)(b) and their predecessors. No doubt the concepts are useful for that purpose but their absence from the Statutes strongly suggests that their application in any given case is not mandatory.

[60] The issue of whether the concept of precedent has relevance in connection with discretionary activities, has arisen occasionally in past cases. The most recent discussion of that we are aware of is in the decision of the Environment Court ***Scurr v Queenstown Lakes District Council***[6]. There, the Court was concerned about potential development pressures in the iconic Cardrona Valley near Wanaka. The case concerned a small residential development and subdivision proposal. The Court discussed certain findings of the Court of Appeal and the High Court, which it is also relevant for us to record. The Court of Appeal in ***Dye v Auckland Regional Council***[7] said:

> The precedent effect of granting resource consent (in the sense of like cases being treated alike) is a relevant factor for a consent authority to take into account when considering an application for consent to a non-complying activity. The issue falls for consideration under s105(2A)(b) and s104(1)(d).

The Environment Court in ***Scurr*** recorded its understanding of the law concerning precedent in non-complying situations, that lack of evident unusual quality in an activity receiving consent risks impact on the present state of a district plan.

[61] More expressly concerning the issue in relation to discretionary activities, the Court cited decisions of the High Court and the Court of Appeal in ***Manos v Waitakere City Council***[8]. In the High Court, Blanchard J said:

> ...the consent authority is in terms of s104(4) required to have regard to the rules, policies and objectives of district and regional plans and is fully entitled to consider the precedent effect of granting an application for a discretionary activity when doing so.

The Court of Appeal, by way of obiter, held that statement to be correct when refusing leave to appeal to that Court.

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[6] Decision No C60/2005 (Judge McElrea's division).
[2002] 1 NZLR 337 at para [49].
[1994] NZRMA 353 at 356 (HC); [1996] NZRMA 145 at 148, per Gault J (CA).

[62] The Court in ***Scurr*** records[9] that a grant of consent to a discretionary activity as a precedent in the sense of creating an expectation that a like application will be treated in a like manner, may not be as important as in the case of a non-complying activity, because most district plans assume that a discretionary activity will be acceptable on a variety of sites within a zone, and each must be assessed on a case by case basis. The Court proceeded to analyse certain provisions of the district plan there relevant, in particular a provision recording that discretionary activity status had been applied to certain activities *"because in or on outstanding landscapes or features the relevant activities are inappropriate in almost all locations...."* and *"in visual amenity landscapes the relevant activities are inappropriate in many locations...."*. The Court recorded its view that such explanation worked against any assumption that the plan envisaged that discretionary activities will occur on most sites in either type of landscape – an assumption that would leave little room for precedent arguments.

[63] Our own considered view of the statement of the High Court in ***Manos*** and the statements of this Court in ***Scurr***, is that we generally do not disagree with them, but we think it appropriate to record our own understanding of what Blanchard J was saying. We consider that the answer is that essentially it is all about having due regard to any relevant provisions of a plan or a proposed plan pursuant to s104(1)(b)(iv). Therefore, it is probably not now good law as it was under previous legislation, that discretionary activity is "presumed to be appropriate in a zone subject to being approved for a particular site". Instead, it is about what the objectives, policies, and other relevant provisions of the district plan provide. In the ***Scurr*** case, the relevant provisions of the district plan made it clear that particular kinds of activities were inappropriate in almost all locations, so it could be said that something approaching the treatment of precedent in non-complying activity cases, might be at play.

[64] An examination of the relevant provisions of the district plans in the present case, reveals a rather different picture. The closest that any of them appear to us to come to raising the issue of precedent, is assessment criterion (a) in clause 39.3(3), previously mentioned, which we record in full here:

> (a) Whether the land use will contribute to the efficient use and/or development of natural and physical resources within the City and whether any alternative sites, locations or zones have been considered.

[9] At para [43].

The last few words concerning alternatives are the ones we identify in this connection. However, we consider that they do no more than faintly raise the issue of precedent, a quite different situation from that found in ***Scurr.*** The situation might have been similar to ***Scurr*** if something more might have been required to be described by an applicant, for instance, that alternative sites, locations or zones were **available**, but that is not the approach taken by the provision.

[65] Our finding is that "precedent" or "district plan integrity" or "consistent administration of the district plans" are not raised by the relevant provisions of the district plans.

Decision

[66] We have decided that consent should be granted, subject to suitable conditions being imposed. Mr Matthews provided us with a draft towards the end of the hearing, and some comment is called for on aspects of the draft.

[67] The conditions agree that mediation are largely appropriate. The first of them should be slightly amended to make it clear that it relates to stormwater, to avoid possible ambiguity with condition (c).

[68] We comment in turn on various parts of the draft conditions, and make some other comments:

Number 1: We doubt that a "no complaints' covenant is appropriate. The provisions of the Act and the district plans should simply be relied upon.

Number 2: We do not think it appropriate to limit future owners in this way. If a future district plan allow further subdivision, why should that be denied? People should then be able to bring an application, and there should be no pre-emption of that right.

Number 3: Again, we do not think it appropriate to limit the consent in the manner suggested.

Further suggestions

(a) The matter covered by paragraph 4(c) of this decision above, should be addressed if it needs to be.

(b) There should be provision for screen planting on the applicant's land along the Claudatos boundary to the satisfaction of the appropriate council officer.

[69] The issue of costs is reserved. If any application is to be made, it must be filed and served within 15 working days of the date of this decision.

DATED at **AUCKLAND** this 8th day of August 2005.

For the Court:

L J Newhook
Environment Judge

24 DEC 1996

ORIGINAL

Decision No. W189/96

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an appeal pursuant to s.120 of the Act

BETWEEN **MICHAEL DUMBAR**

(Appeal: RMA 747/96)

Appellant

AND **GORE DISTRICT COUNCIL**

Respondent

AND **TRANSPOWER NEW ZEALAND LIMITED**

Applicant

BEFORE THE ENVIRONMENT COURT

His Honour Judge Treadwell presiding
Mr R G Bishop
Ms J D Rowan

HEARING at INVERCARGILL on the 4th, 5th and 6th days of December 1996

COUNSEL

Mr C Withnall QC for appellant
Mr J Bannerman for respondent
Mr D J S Laing for applicant

RECORD OF ORAL DECISION DELIVERED ON 6 DECEMBER 1996

This is an appeal pursuant to s.120 of the Resource Management Act 1991 (RMA) against a decision of the respondent Council granting to Trans Power New Zealand Ltd (Transpower) a resource consent to enable the construction of a 110 kv transmission line along Craig Road.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

The appellant, Mr M Dumbar, is a resident of Craig Road and in his appeal cites as grounds:

(a) The Council gave insufficient consideration to alternative route options for the 110 kv transmission line; and

(b) The Council did not sufficiently investigate, nor give adequate consideration to, putting the transmission line underground.

Background

In December 1994 Rayonier New Zealand Limited (Rayonier) made application to the Gore District Council and the Southland Regional Council under the RMA for a consent to construct a wood processing plant at a cost in excess of $160m a short distance south of Mataura on State Highway 1. Plant commissioning will commence on 7 February 1997 at which date the availability of power would be essential. The consent was considered by the joint Councils in terms of the Regional and Transitional District Plans and a decision favourable to Rayonier issued 12 October 1995. On 3 October 1995 the Proposed District Plan for Gore was publicly notified. Up till that date the provisions of s.375 of the RMA governed the supply of power to Rayonier. Reticulation equipment (poles, lines etc) up to and inclusive of 110 kv was a permitted activity. Above 110 kv the activity was discretionary.

We understand the difference in s.375 above 110 kv was intended to cover the larger lattice type pylons normally associated with kv lines in excess of 110 kv. Rayonier in its initial application was envisaging 33 kv supply which would be possible from the Edendale substation some 7 km away on SH 1.

Transpower tendered for the supply of power. After investigation of the needs of Rayonier it concluded that a 33 kv supply would be inadequate to start the large motors used in the plant and that a 110 kv supply would be needed. This could be supplied in various ways from the 110 kv transmission line connecting Invercargill and Gore. The shortest route to Rayonier was via Craig Road by 20 metre high poles carrying 6 conductors which form a loopline. The main line crosses that road to the west of the Mataura golf club. 2.8 kilometres to the east Craig Road intersects with SH 1 and to the south-east of that intersection is the Rayonier plant. As an alternative the supply could be a loop line carried by 10 m high poles carrying 3 conductors connecting with the main line. The loop could follow Craig Road, State Highway 1 and Pakura Road. A substation would be constructed on the Rayonier site for both alternatives. For the Craig Road alone the loop poles are twice the height of the other by reason of the number of arms and the separation distances required between the six conductors. The base of the pole is 700 mm and the diameter tapers. Less poles would be required than for the 10 m pole option.

A third option is to bring power from the 110 kv line where it enters the Edendale substation. The line would traverse SH 1 to the Rayonier substation.

Transpower has opted for 20 m high poles. On the northern side of Craig Road the owners (including the golf club) have approved. The Court therefore cannot consider the effect on those persons. We record that the Falconer property to the north is being used as an open cast lignite coal mine. Owners to the south have not voiced any opposition with the exception of the appellant. The property of the appellant fronts Craig Road. His parents occupy the house on the property which is some 325 m from the road and extensively landscaped.

The proposed course of the poles and conductors traverses some stands of trees which are to be felled. Council consent has been given to this discretionary activity. Consent was necessary because of a rule in the Proposed Plan relating to the size of the trees. In respect of this aspect of the case the value of these trees was summed up by Mr Buddingh, an experienced horticulturalist when he said:

> *"In effect all the trees can be coined as 'glorified fine wood'. All the trees represent a liability to the community."*

Lastly in respect of general background it was suggested that the lines should go underground. this was dealt with by Mr Stewart, a qualified Electrical Engineer employed by Transpower. He told us the additional cost would be in the order of 14.5 times overhead lines. In monetary terms $495,000 as against $7,000,000. However the main concern with underground high voltage lines was an inability to guarantee supply. Outages on underground cables are generally mechanical (farm machinery etc). It may take days or weeks to repair as opposed to the short time required for overhead repairs. He also disputed evidence given by Mr Kruger for the appellant as to the proportion of underground cabling in Germany. Mr Kruger, who is not an engineer, told us that the percentage of overhead to underground was 54.50% to 45.50%. The true figure for higher voltage lines (110 to 220 kv) was only 3.91% underground of which 5.90 represented 100 kv and 0.23 220 kv. It was therefore not common practice to underground 110 kv lines in Germany.

Preliminary Determination

We have concluded that Transpower has considered other options but on cost and reliability has opted for the present proposal before us. It was entitled to make that choice and we must consider the application as filed. Also the 10 m pole loop option would traverse at least three roads and the views of those living on SH 1 and Pakura Road are not known although they would not be able to object, because 10 m high poles are a permitted activity.

Legal Issues

There is no particular obligation on an applicant for a resource consent (as opposed to the Requirement provisions of the Act, s.166 et seq), to provide the consent authority with alternatives. Under the 4th Schedule, 1(b) there is an indication that the assessment of effects should include a description of alternative locations or methods where it is likely that the activity will result in a significant adverse effect on the environment. As will be seen later we do not consider the effect significant. It is not for the Council or this Court to say that any such alternative should be followed because to do so would be to deprive potential opponents of that alternative of a right to be heard. In any event we have no jurisdiction in the absence of an application or appeal relating to that alternative.

Our function here is to consider the application before us in terms of the RMA and the plans of the territorial and regional authorities.

The second matter is the weight to be accorded the plans. There are three aspects to this:

(a) Initial submissions have been lodged but a summary has not yet been made public. There are therefore no cross submissions. We understand that submissions address some of the matters concerning network utilities which have been raised in the course of the present case.

(b) A $160 m plant is nearing completion relying on the Transitional Plan as modified by s.375 whereby transformers and lines up to 110 kv were a permitted activity. Power is required by 7 February 1997 and 105 jobs for the community hang in the balance.

(c) The appellant until 3 October 1995 would have had no reason to believe that the power source available from the 110 kv Gore/Invercargill line might not be used despite original indications as to use of the Edendale substation.

For these reasons whilst having regard to the Proposed Plan as required by s.104, we still propose to give weight to the Transitional Plan.

The status of the proposed activity we find to be a controlled activity. The provisions particularly relating to electricity supply up to 110 kv are contained in Rule DWR 17.11. Ancillary structures are governed by DWR 17.12. The structures with which we are presently concerned are over 10 m and are a notified controlled activity by reason of Rule 17.13 which specifically recognises over-height structures erected by requiring authorities. Transpower is such an authority by virtue of s.167. The fact that the route requires removal of trees (a discretionary activity) does not taint the

transmission line with a discretionary label. It remains controlled, but the Council would be able in exercise of that control to require that the route be realigned around the trees. In the event this has not happened because consent to remove the trees has been granted. Other parts of the Proposed Plan contain general provisions as to the height of structures and constitute these discretionary activities. However applying generally accepted law the special provision would override the general non-specific provisions hence the activity is controlled.

Lastly there was argument about utility corridors. The Proposed Plan suggests that utilities such as power lines etc be in defined corridors so that amenity effects are confined. No corridors are shown on either the Transitional or Proposed Plan. There was some difference amongst planners as to whether Craig Road was a corridor. For our part we do not think it is. It is a very minor road along the side of which it is intended to construct a small power branch line connected to but not forming part of the more regional power corridor. It is the placement of the plant which necessitates a power lead to it. The corridor principle is of little relevance. We do not intend to place great weight on this provision because it is also subject to submissions.

Consideration under Section 104

By virtue of s.105(1)(a) we have no option but to grant consent subject to conditions. Section 104 is relevant in assessing conditions which would include lowering of the height of the structures (which would result in the loop line of 10 m we previously recorded) or possibly the question of undergrounding but we doubt if our s.108 powers would extend to that because such a condition would effectively be a refusal of consent and a condition cannot be used for that purpose.

Assuming for argument that we have power to lower the height by reference to s.104, we will now consider those issues.

Section 104 is subject to Part II. Section 5 protects natural and physical resources subject to avoiding, remedying or mitigating adverse effects. The protection of the environment and visual amenities are relevant considerations under Part II as is the managing of the use and development of resources in such a way as to enable people and communities to provide for their social and economic wellbeing. The Rayonier project combined with the energy to be provided by the national grid is very much of benefit to the community of Gore and indeed the region. However adverse effects must be carefully considered with a view to remedying or mitigating such effects. In the present case the visual effect of the line is the main point in issue.

In terms of the relevant parts of s.6 there are no outstanding natural features. The landscape is a working rural area including an open cast mine, a straight tar sealed road, a State Highway, and a large industry. In terms of s.7 the

amenities of the appellant is a matter to which we must have particular regard as is the quality of the environment.

Therefore in terms of Part II we consider that it supports the present proposal in forming part of a beneficial community package. We will come to mitigation later but at this stage record that we discount undergrounding and any shifting about of the power poles to different areas. That merely shifts the problem, if there be a problem, elsewhere. It is indeed surprising that over a 2.8 ha stretch of road only one property owner objects and that is in relation to views from a house some 325 metres from Craig Road.

Moving now to the visual issue. We heard extensive evidence on this. In support of the proposal were Mr C M Keogh - a planner specialising in landscape assessment and management and Mr Frank D Boffa - a landscape architect of 25 years experience.

Against the proposal was Mr Ralf F W Kruger, a landscape architect and horticulturalist.

Graphics were produced to show us the effects of the proposal. The most dramatic views were looking straight down the road where the single standards with three cross-arms appeared in linear form. There are already some 11 kv (smaller) poles on Craig Road. The poles certainly accentuated the road line but the landscape was already compromised from that viewpoint. Viewed side-on from the appellant's property the graphics prepared by Messrs Boffa and Keogh showed a greatly different view. The pylons were well apart and the lines would be barely visible. Mr Boffa told us of other graphics he has done where he has been able to compare the graphic with the finished work. He told us of the methods used to prepare the montage and graphics. We accept that the representations shown to us by witnesses for the applicant show a true and correct picture.

On the other hand those produced by Mr Kruger were exaggerated by portraying the poles and lines in heavy black lines not to scale. They were photographed in part from positions where people would be unlikely to tarry, i.e. the Dumbar driveway and the pole positions were in part inaccurate.

We have concluded:

(a) That the change to the general landscape would be perceptible to those using Craig Road;

(b) That the effect when viewed from the Dumbar house is minimal.

Turning to the latter conclusion we further record that Mr D R Anderson, Planning Consultant called by the appellant, in reply to a question from the Court was of the opinion that if the visible poles could be planted out by judiciously placed trees then only the lines would be visible and at 325 metres would not be as major a visual impact as the poles. Messrs Boffa and Keogh were of the same opinion but did not consider the poles much of an intrusion either.

Mr Kruger felt they were an intrusion as shown on his graphics but the heavy black lines indicating lines and poles as prepared by him did not give a true picture.

The crux of the matter is mitigation which would be achieved by a few trees. Transpower have offered to plant trees but this has been rejected by the appellant. This minimal planting will provide all the mitigation required.

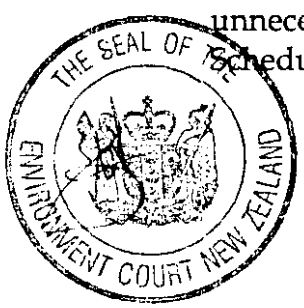
Lastly on the question of view the appellant has no rights beyond their boundary except as provided by the plan. Trees could be planted to block their views or farm buildings erected.

Therefore actual and potential adverse effects are minimal but positive community benefits are considerable.

We have considered the matters in s.104(c) and (d), namely Regional Statement and Transitional and Proposed District Plans. In the unusual circumstances in which Transpower and Rayonier now find themselves coupled with the uncertainty as to the final format of the Proposed Plan, we prefer to follow the Transitional Plan except to the extent that we have recognised the activity as a controlled use. We must however record that having regard to the whole history of this matter with the construction of a massive plant dependant upon power with the applicant Rayonier at all times following the law and the Transitional Plan the project should not at this stage be defeated by strict application of a recently notified Proposed Plan. In that regard we consider the history relevant and important in terms of s.104(1)(i).

<u>Planning Evidence</u>

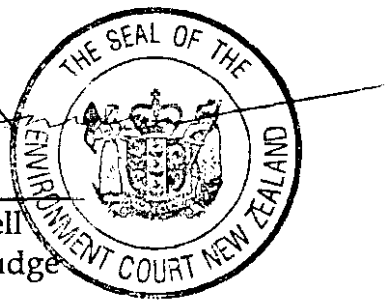
The matter essentially is one of effect of the activity which we have previously discussed. We record that had the proposal been a discretionary activity as opposed to controlled our conclusion would have been the same. We also record that our finding of fact as to the effect of this activity renders it unnecessary for the applicant to have complied with the clause in the 4th Schedule requiring alternatives to be listed.



All the planners called were agreed that the effect upon the landscape generally was an effect normally to be expected in rural areas and that the appeal should not be allowed on that general amenity ground. All were agreed that the effect to be considered was the effect on Mr Dumbar's property and by implication on other property owners who had not formally approved. The disagreement arose mainly from the subjective viewpoints of the planners as to the perceived effects of the transmission line upon the appeal site. We record that if the matter was of such importance to the appellant then we would have expected evidence from the appellant and/or his parents who live on the property. The only evidence we heard was hearsay comment from Mr Kruger.

Conclusion

For the foregoing reasons the appeal is dismissed and the question of costs reserved.



W J M Treadwell
Environment Judge

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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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Para No

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

[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.
>
> …
>
> [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

[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;

[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:

[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
Dyhrberg Drayton, Wellington for Second Respondent
DLA Phillips Fox, Wellington for Third Respondent
Crown Law Office, Wellington for Fourth Respondents
Buddle Findlay, Wellington for Board of Inquiry

IN THE HIGH COURT OF NEW ZEALAND
GISBORNE REGISTRY

CIV-2005-485-001241

IN THE MATTER OF	an appeal pursuant to s.299 Resource Management Act 1991
BETWEEN	GISBORNE DISTRICT COUNCIL Appellant
AND	ELDAMOS INVESTMENTS LTD First Respondent
AND	GLADIATOR INVESTMENTS (GISBORNE) LTD Second Respondent

Hearing: 4 October 2005

Appearances: Nicholas Wright for Appellant
Trevor Gould and Angela Hurst for Respondents

Judgment: 26 October 2005

JUDGMENT OF HARRISON J

In accordance with R540(4) I direct that the Registrar endorse this judgment with the delivery time of 2.45 p.m. on 26 October 2005

SOLICITORS
Brookfields (Auckland) for Appellant
Chapman Tripp (Auckland) for Respondents

Introduction

[1] The Gisborne District Council (GDC or Council) appeals against a decision of the Environment Court, allowing a zoning appeal by Eldamos Investments Ltd. Council had zoned amenity commercial 4.7 hectares of land known as the Heinz Wattie block but the Court directed a change to fringe commercial.

[2] GDC has abandoned its appeal against the Environment Court's decision allowing a separate appeal by Gladiator Investments (Gisborne) Ltd against a refusal to grant a resource consent to construct a Warehouse store on a 2.37 hectares site within the block.

[3] The genesis of this appeal is most unusual. A commercial building, an hotel, and residential apartments have already been constructed within the block. Construction of the Warehouse store, occupying the balance of the land, will proceed shortly. On that event the whole block will be developed as a fringe commercial zone, just as the Court directed. GDC's counsel, Mr Nicholas Wright, accepted that, in the context of this appeal, the block's actual development is, in the short to medium term, "a lost cause".

[4] Nevertheless, Mr Wright justified GDC's appeal upon its long-term desire to resume what he called its "planning vision" for the block once the Warehouse decides to vacate, if and when that ever occurs. He also advised that the Court's decision will have a far reaching, adverse precedential effect on GDC's planning policy direction, even though Council views it as flawed in many respects. I must say that Mr Wright's advice is not easily reconcilable with his later concession that Council's zoning decision was without intrinsic merit. His acknowledgement was inevitable, given the Court's unassailable finding that GDC's decision was not dictated by legitimate planning considerations, but by the expedient of preventing bulk retailing activity on the land.

Background

[5] The Heinz Wattie block is a prominent area immediately to the south east of Gisborne city. Heinz Wattie used the property for many years as a food processing plant. GDC purchased it in 1997 when the company ceased its operations there. The land was then zoned Industrial 2 for light and medium industry, excluding residential, retailing and visitor accommodation activities. The plant was later demolished.

[6] In November 1997, shortly after purchasing the site, Council notified its proposed regional and district plan. It intended to zone the Heinz Wattie block outer commercial which allows retailing as a permitted activity. Three years later Council agreed to sell the land to Gladiator, knowing of the company's proposals to develop it for bulk retailing.

[7] In September 2001 Gladiator applied to Council for a resource consent to subdivide the land for a range of residential and commercial purposes. Among them was development of a large format retail store for Harvey Norman. A number of parties opposed. In March 2002 hearing commissioners heard Gladiator's application.

[8] In April 2002, before the Commissioners had delivered a decision, some of the parties opposed to Gladiator's application issued judicial review proceedings in this Court. They challenged the proposed district plan alleging GDC's failure to consult adequately in breach of s 32 Resource Management Act 1991. On 8 May 2002 the parties settled the proceeding. Council agreed to withdraw the permitted activity status of retailing activities within outer commercial zones in its proposed district plan. It passed a contemporaneous formal resolution to this effect pursuant to Clause D, First Schedule, Resource Management Act. In consideration Gladiator undertook to withdraw its application for resource consent so far as it related to retail, and not to take any steps to appeal or challenge Council's zoning change.

[9] Within weeks GDC granted Gladiator's application to subdivide the block into nine lots and to develop apartments and the Portside Hotel. As noted, they have since been completed along with an office building. Together they constitute a ribbon or boundary to the block parallel to the side of the Turanganui River and the start of Waikanae beach.

[10] In August 2002 Council gave public notice of withdrawal of retailing as a permitted activity within the outer commercial zone. Later that year Eldamos agreed to purchase from Gladiator the site originally designated for a Harvey Norman store, conditional upon the vendor obtaining consent to construct a Warehouse store. At the same time GDC notified variations to its proposed scheme introducing new fringe commercial and amenity commercial zones. The latter was to apply to the Heinz Wattie block, permitting retail activities provided they are ancillary to other permitted activities. Small retail activities (where premises are less than 1500 square metres gross floor area) were allowed as discretionary activities but all other retailing was non-complying.

[11] In June 2003 Gladiator applied to Council for a resource consent to construct a Warehouse store on the designated site. In October GDC confirmed the permitted activities within the amenity commercial zone applying to the block. In November the hearing commissioners heard Gladiator's application for resource consent, which they refused the following month.

[12] Eldamos appealed against GDC's zoning change for the Heinz Wattie block from outer commercial to amenity commercial zone. Gladiator appealed against the hearing commissioners' decision to dismiss its application for a resource consent for the Warehouse site. The hearings of these appeals in the Environment Court occupied 14 days in October 2004 and February 2005. The Court delivered its decision, totalling 69 pages, on 22 May 2005.

Environment Court decision

[13] The Court's decision on the zoning part of the appeal considered a range of legal issues and totalled 53 pages. In summary, the Court held that:

(1) Council's withdrawal of its original plan provisions was legally ineffective (even though none of the parties had raised this issue in pleadings on appeal) (paras 66-106);

(2) Amendments to s 32 Resource Management Act in 2003 materially altered the test for determining the evaluation exercise undertaken by local authorities in deciding whether to adopt a certain zoning objective (paras 112-131); and

(3) The variation proposed by Council failed to meet the test of achieving the purpose of the Resource Management Act in that, instead of managing or controlling effects of activity, it directed a particular outcome (precluding bulk retailing) (paras 132-159).

[14] The Court undertook an inquiry into the purpose of the zoning change, which GDC had described as (para 147):

> … managing effects of buildings and other development by discouraging types that do not contribute to amenity through built form, and enhancing positive characteristics of natural and physical resources.

[15] The Court found that these were not in fact Council's purposes for introducing the zone. Furthermore, even if they were, they would not qualify as assisting GDC to discharge its statutory functions (paras 147-153). The Court was satisfied Council's true objective was to prevent bulk retailing on the site (para 253).

[16] The Court considered the weight to be placed on consultation and community attitudes to the future of the land (paras 160-182) and, after reviewing the relevant evidence and undertaking its own site visit, concluded that the Heinz Wattie block possessed no significant visual, landscape, heritage or cultural amenity value (paras 183-216). This was the primary issue for determination on the appeal. The Court allowed Eldamos' appeal. It directed Council to zone the Heinz Wattie block fringe commercial, and amend the zoning rules for that block only by providing that retail activity having a gross floor area greater than 5000 square metres be provided for as a restricted discretionary activity.

Decision

(a) Jurisdiction

[17] It is appropriate to refer briefly to the nature of the High Court's jurisdiction to consider an appeal before considering each of the seven questions of law said to arise. S299(1) Resource Management Act provides:

> A party to a proceeding before the Environment Court under this Act or any other enactment may appeal on a point of law to the High Court **against any decision**, report, or recommendation of the Environment Court made in the proceeding.
>
> [Emphasis added]

[18] A right of appeal lies "against any decision". The jurisdictional prerequisite is the existence of a point of law. Without it, an appeal cannot be brought. An appellant must establish a decision is wrong because the Court has erred in law. The right of appeal is against a decision, not a legal finding of itself. It follows that the point of law on which the Environment Court has erred must have materially affected the result (*Royal Forest and Bird Protection Society (Inc.) v WA Habgood Ltd* [1987] 12 NZTPA 76, 81-82, Holland J). This nexus is essential.

[19] This statutory requirement accords with a well settled principle of common law. As the Court of Appeal has observed (*Port Nelson Ltd v Commerce Commission* [1996] 3 NZLR 554 at 579 per Gault J):

> To the extent to which these findings are not material to orders made and appealed against they are not appealable: *Lake v Lake* [1955] 2 All ER 538, *Meridian Global Funds Management Asia Ltd v Securities Commission* (Court of Appeal, Wellington, CA 4/92, 14 September 1992).

[20] The same principle applies where a case is stated under s 78 Summary Proceedings Act 1957. A case should not be stated unless the point of law which arises is "(a) clearly necessary for the decision and (b) likely to be decisive one way or the other" (*Police v O'Neill* [1991] 3 NZLR 594, Tipping J at 598).

[21] In *Lake* (supra) a wife sought to appeal against an adverse finding of fact made by the Judge when dismissing her husband's divorce petition; he held that she

had committed adultery but her husband was guilty of condonation. The wife wished to challenge that finding even though she was successful. In dismissing her appeal Sir Raymond Evershed MR said (541F):

> In other words, I think that there is no warrant for the view that there has by statute been conferred any right on an unsuccessful party, even if the wife can be so described, to appeal from some finding or statement – I suppose it would include some expression of the view about the law – which you may find in the reasons given by the Judge for the conclusion at which he eventually arrives, disposing of the proceeding. If that is right … there is no part of the [decision] against which any appeal … could be made on the part of the wife.

[22] In *Lyttleton Port Co Ltd v Canterbury Regional Council* (Wellington Registry, AP10/01, 20 June 2001) John Hansen J applied this reasoning directly in the Resource Management Act context. The Judge dismissed an appeal brought by a company which accepted the Environment Court's decision but sought to challenge some findings made in its course. John Hansen J concluded that the High Court had no jurisdiction to quash part of a decision said to be clearly wrong in law and substitute its own corrected view. He was satisfied that obiter dicta or intermediary findings cannot be subject to appeal (para 43).

[23] The same principle applies where an unsuccessful appellant's challenge is directed at legal findings which are not germane to the Environment Court's decision. An immaterial error is plainly obiter; that is, it does not form part of the ratio of the decision. There is no appealable issue. Furthermore, an obiter finding has no binding or precedential value (although its effect may be persuasive if the reasoning is compelling), and an appellate decision upon it would fall into the same category. This is the reason why the High Court does not exercise its jurisdiction under the Declaratory Judgments Act 1908 where the result would be of academic value only. I add that this principle goes to jurisdiction, not merely relief.

(b) First Three Questions

[24] Council's notice of appeal alleged that the Court's decision "gives rise to [seven] distinct questions of law". Mr Wright placed them in three separate categories. I will deal with them in the same order. The first three related to the

Court's findings on GDC's decision to withdraw part of its proposed district plan without notification. Mr Wright identified these questions as whether the Court erred in (1) finding that it had jurisdiction to consider the validity of GDC's purported withdrawal in 2002 of part of the proposed district plan; (2) finding that the purported withdrawal was invalid, as it was made without "prior public notice and opportunities to make submissions and appeal"; and (3) by taking into account the proposed district plan as it existed prior to the purported withdrawal.

[25] The Court held that Council's resolution on 8 May 2002 to withdraw the retailing provisions from the outer commercial zone of its proposed plan for the Heinz Wattie block was ineffective because it breached Clause 8D, First Schedule. Accordingly the plan must be taken still to have included those provisions when the variations were notified (para 106).

[26] The Court acknowledged that the question was not raised by the scope of the pleadings. Nevertheless, it went on to consider whether or not the resolution to withdraw was legally effective, before reaching an adverse conclusion. The difficulty I have in understanding the purpose of the Court's approach is compounded by this statement (para 81):

> … If, in the course of making a finding about the contents of the proposed plan, the Environment Court were to form an opinion that the withdrawal was not effective at law, that would not be assuming the authority of judicial review. Forming the opinion would not be declaring the withdrawal invalid, nor quashing or cancelling it. **It would simply be a necessary step in making a finding of fact that is essential to decide the appeals within their scope.**
>
> [Emphasis added]

[27] With respect, a finding that Council's withdrawal was ineffective at law is solely legal in character. It was unnecessary for the Court to go further. In the ordinary course of events its finding must be determinative because it means, despite the Court's protestation to the contrary, that the withdrawal was legally invalid or of no effect, thereby reinstating the outer commercial zone in effect until 8 May 2002. It cannot be characterised as simply 'a necessary step in making [an essential] finding of fact …' for deciding the appeal.

[28] However, despite this conclusion, the Court never referred again to the question of the legal ineffectiveness of Council's May 2002 withdrawal again. It fell into an obiter void. It played no part in the Court's substantive decision to allow the appeal and thus does not require further consideration.

(c) Fourth, Fifth and Sixth Questions

[29] The second category of questions, said to relate 'to questions of statutory interpretation as to the Court's role in the context of district plan appeals', was whether the Court erred in (4) finding that the hearing on the variations ought to be fully de novo and that it was entitled, within that context, to 'supplant the Council's decision making role' (para 127); (5)(a) in the manner in which it characterised 'the revised legal test' for the assessment of district plan appeals (para 129); and (b) in concluding that it is the Court's role, in the context of a district plan appeal, to determine and apply what is in its view the 'optimum planning solution' (para 129); and (6) in the definition it adopted of the concept of 'amenity values' and in failing to address in that context (a) evidence concerning the content of submissions made by members of the Gisborne community at first instance; and (b) the expert views of Council's witnesses concerning the expectations and values of the local community.

[30] The apparent purpose of the fourth and fifth questions is to constitute a challenge on the Court's conclusion about the effect of the 2003 amendment to s 32. In its introduction to the variation appeals section of its decision the Court recorded as follows (para 109):

> **The parties agreed that the issues in the variation appeals** can be confined to whether the application of the amenity commercial zone to the Heinz Wattie land is **the most appropriate way to achieve the purpose of the Act**, with regard to:
>
> (a) The visual, landscape, heritage and social amenity values of the land in the zone and the surrounding or connected environs;
> (b) The overall form and function of Gisborne's central commercial area, including social and economic effects on its shape and urban form; and
> (c) Transportation planning and transportation efficiencies and related effects.
>
> [Emphasis added]

[31] The phrase "the most appropriate way to achieve the purpose of the Act" is the test prescribed by s 32(3) as amended in 2003 for evaluating whether an objective in a zone change achieves the purpose of the Act. The Court recited the parties' agreement that it should determine the issues accordingly. It was entitled, when hearing an appeal on a proposed plan or variation, to take account of the same matters considered by the local authority (s 32(5)). However, the Court then stated that before addressing the issues it would '… identify the basis on which challenges to plan provisions are to be considered' (para 110). I am at a loss to follow why this exercise was necessary when, in the preceding paragraph, the Court had succinctly identified the agreed basis for determining the zoning appeal; that is, according to the criterion imposed by the plain words of s 32(3).

[32] I cannot discern GDC's objective in advancing an elaborate argument before the Court about whether the 2003 amendment to s 32 changed the basis for deciding planning appeals. The exercise was pointless because, as just noted, its counsel had agreed that the test to be applied was the unambiguous one now mandated by the amended s 32 in terms materially different from its predecessor. I accept Mr Trevor Gould's observation that the Court was probably motivated to respond out of courtesy for GDC's arguments (paras 111-131), not because they had any relevance to the issues for determination. Ultimately Mr Wright accepted that the Court's conclusions in this part of the decision do not feature in its later reasoning on the primary issue falling for appeal. They are also obiter and, accordingly, do not require further consideration.

[33] I should add that there is no magic in this area of the law. It is simply a question of statutory interpretation. It does not require the superimposition of an artificial jurisprudence upon plain words which mean what they say. As Mr Gould and Ms Hurst emphasised, the purpose of a district plan is to assist the territorial authority to carry out its functions 'to achieve the purpose of the Act' (s 72). Its primary function is (s 31(a)):

> (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; … [Emphasis added]

[34] The evaluation required when considering a change to a district plan is one, which as I repeat GDC accepted before the Court, of the extent to which each objective is 'the most appropriate way to achieve the purpose of the Act' (s 32(3)). That 'purpose' is promotion of 'the sustainable management of natural and physical resources' (s 5(1)). Previously the criterion was one of necessity (s 32(1)(a)). I accept Mr Gould's advice that the necessity test was unsatisfactory because very little is actually 'necessary' in Resource Management Act terms. The amendment makes it easier for a local authority to initiate a scheme change, and assume a more proactive than reactive role.

[35] I reject Mr Wright's submission that the 2003 amendment introduced a fundamental change in character to the evaluation required for changing a district plan, to allow local authorities to advance plan changes or variations which are not the optimum planning solution or to give them a policy making function when initiating variations with which the Court cannot interfere. I also reject his submission that the terms of the 2003 amendment constitute a legislative recognition that, while the Court as a judicial body is well equipped to determine matters of law and also objectively determine matters of contested fact, it is poorly equipped, compared to a local authority, to make sound judgments on the needs and aspirations of the local community, and thus how those needs are best addressed and met in a policy sense. In short, that is not what the Resource Management Act provides, and the circumstances of this appeal do not remotely justify Mr Wright's submissions.

[36] Although characterised as in the same category as the fourth and fifth questions, the sixth question was of a different nature. Its essence was that the Court erred in its approach to the term 'amenity values'. The Act defines 'amenity values' as meaning (s 2(1)):

> … 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.

[37] Without advancing an analytical argument in support, Mr Wright simply suggested that the definition is subjective rather than objective in nature, and that the Court erred in adopting an objective approach. He submitted that whether or not an area possesses amenity values is not defined by reference to the determination of an

objective statutory body, but on the basis of the local community values; that it is "self-evident" that the Court, as a judicial body, is not equipped to make that type of subjective judgment; that the Court placed no weight whatsoever on views from members of the local community or the expert evidence of a Ms O'Shaughnessy; and that views of this nature are inherently local, policy issues to be determined by the community's elected representatives.

[38] I do not accept Mr Wright's attempt to challenge two distinctly separate parts of the Court's decision under the umbrella of one point of law straddling both. First, the Court considered what weight should be placed on consultation and community attitudes to the future of the site (paras 160-182). It considered in detail Ms O'Shaughnessy's evidence, and concluded (para 182):

> In summary, for the purpose of these proceedings the sources of Ms Shaughnessy's opinion about the views of the community do not establish that those views were representative of the public, and we place no weight on them. Rather we will make our findings on the evidence given at the appeal hearing.

[39] Mr Wright challenged this finding in written submissions. However, it does not raise a point of law. The Court was not satisfied, as a matter of fact, that Ms O'Shaughnessy's opinions were representative of the views of the community. It rejected her evidence accordingly. Mr Wright did not suggest that the Court's finding was without an evidential basis.

[40] Second, in logical sequence, the Court considered whether or not the land possessed visual, landscape, heritage and cultural amenity values (paras 183-185). After considering the statutory meaning of 'amenity values' (paras 187-188), it followed a logical, two-step process of considering visual and landscape values in one category (paras 189-205) and heritage and cultural values in another (paras 206-216). Mr Wright's submission is confined to a challenge to the Court's findings on visual and landscape values (paras 202-205). The Court recited its assistance from having viewed the land, at the parties' request, from various vantage points, and concluded (205):

> We find unpersuasive the opinions of Ms Dick and Ms Buckland ascribing visual and landscape values to the site as specialness of place, and as holistic dealing. Although other parts of the former Heinz Wattie land possess visual

> and landscape amenity values (especially along the riverside recently developed for multi-storey buildings), we find that the site possesses no significant visual or landscape amenity values.

[41] It is regrettably necessary to recite what has been frequently said before. When determining an appeal from a local authority, the Court has 'the same power, duty and discretion in respect of a decision appealed against …' (s 290(1)). This is the statutory source of its de novo jurisdiction. It follows, as Mr Gould and Ms Hurst submitted, that the Court has the same role as the territorial authority in achieving the integrated management of effects, and must evaluate for itself the extent to which the objectives, policies and rules are the most appropriate way to achieve the purpose of the Act.

[42] In performing these functions, the Court must apply the law objectively. It is a specialist body; its members are appointed because of their expert knowledge of and experience in planning and are uniquely placed to exercise a collective judgment on the issue of whether or not a block of land possesses a significant visual or landscape amenity value. This power is central to the Court's judicial function. It is not bound by the opinions of landscape architects, or what the local community thinks or values. And, as Mr Gould and Ms Hurst noted, to suggest that the Court is unable to make an assessment of amenity values would result in its inability to make any assessment in terms of effects on the environment, with a consequent inability to perform its statutory function.

(c) Seventh Question

[43] Council's final question is whether the Court erred in its findings that a consent authority is not limited, in preparing a district plan, to introduce provisions designed to 'enhance positive characteristics of existing natural and physical resources' or that 'promote appropriate outcomes to most efficiently and effectively manage resources in a sustainable manner for future generations'.

[44] This question is apparently directed to the Court's identification of this issue for decision (para 132), namely:

> … whether the variations fail to meet the test of achieving the purpose of the Resource Management Act in that, instead of managing or controlling effects of activities, they are directive of a particular outcome (precluding bulk retailing) as was the purpose of district schemes under previous planning legislation.

[45] The Court then identified what GDC said were the two purposes of its variations (para 136). The Court found as a matter of fact that Council's purpose was not designed 'to enhance the positive characteristics of existing natural and physical resources' (paras 136-153) but to preclude bulk retailing from the Heinz Wattie block and prefer other classes of activity there (para 151). The Court recorded it was common ground that (para 145):

> … the purpose of a district plan is to assist the local authority to carry out its functions under the Act to achieve the purpose of the Act; and not in effect to allocate resources, or prescribe what the local authority considers the wise use of them.

[46] Accordingly, there are two short and alternative answers to this last ground of appeal. First, Council is attempting to challenge a finding of fact for which there was a proper evidential foundation; namely, that Council's purposes in initiating the zone change were not as predicated by its seventh question on appeal, 'to enhance positive characteristics of existing natural and physical resources'. Second, the Court did not find that the local authority was not entitled to 'promote appropriate outcomes to most efficiently and effectively manage resources in a sustainable manner for future generations'. Instead the Court found that GDC must carry out its functions under the Act to achieve its statutory purpose rather than, in effect, to allocate resources (para 154). Again, as Mr Gould and Ms Hurst pointed out, this proposition was not even in contest between counsel as representing the proper approach (para 145).

Conclusion

[47] The ratio of the Court's decision, as I pointed out earlier, was its conclusion that the Heinz Wattie block possessed no significant visual, landscape, heritage or cultural amenity values (paras 189-214). An inquiry into this question was the

function it was required to perform in determining Eldamos' appeal. In oral argument Mr Wright accepted that the Court's findings of fact were unchallengeable.

[48] However, Mr Wright argued that the Court, by confining its consideration to existing 'natural or physical qualities and characteristics of' the Heinz Wattie block, erred in failing to inquire into its potential. This proposition did not feature anywhere in his written synopsis. He admitted that it faced a real difficulty – in my judgment, it met a number of insurmountable difficulties. One is that by definition natural or physical qualities and characteristics are existing; describing them as having a potential component is contradictory. Another is that, once the Warehouse site is constructed, the whole Heinz Wattie block will be fully developed and comprise a mixture of bulk retailing, commercial and residential activities including a hotel; its potential will be exhausted. In any event, as Mr Gould pointed out, the Court specifically considered the impact of current and future development (para 204). This ground of appeal, like the others, must also fail.

[49] Even though its path to consideration of the true issue arising on this appeal was diverted by a range of irrelevant arguments advanced by Council, the Court conventionally exercised its specialist role of drawing upon its collective expertise in determining whether GDC's proposed zone change conformed with Part II. The terms of its decision on this question provide unequivocal confirmation of the Court's reliance upon its own judgment, and its rejection of so-called expert evidence which, contrary to the purpose underlying the admissibility of opinion evidence in any forum, frequently amounted to no more than advocacy or submission. In my judgment none of the points of law raised by GDC on this appeal materially affected the Environment Court's decision, which was based upon an unchallenged factual determination that the Heinz Wattie block did not possess significant visual, landscape, heritage or cultural amenity values sufficient to justify an amenity commercial zoning.

[50] Accordingly, I dismiss Council's appeal against the Environment Court's decision dated 22 May 2005 allowing Eldamos' appeal against its zoning change to the Heinz Wattie land.

Costs

[51] Costs must follow the event. Eldamos and Gladiator were represented by one set of counsel; collectively they are entitled to one award of costs against GDC. I certify for two counsel. I invite counsel to confer on the level of costs. If they cannot agree, I will determine them according to memoranda to be filed first by Gladiator and Eldamos.

[52] It may assist counsel if I record my provisional view that Eldamos is entitled to costs on an indemnity or reasonable solicitor/client basis. A figure in the range of $15,000-$20,000 plus disbursements seems appropriate. This appeal was hopelessly misconceived. An objective evaluation by Council of the questions of law raised would have established that its appeal had no prospect of success; its points were diffuse and immaterial to the Court's decision. In this respect I record that my minute dated 8 August 2005 specifically drew counsel's attention to GDC's obligation to prove that a legal error 'caused or substantially contributed towards a wrong decision' if its appeal was to succeed.

[53] Also, as I have already noted, the entire Heinz Wattie block will soon be developed with a mixture of bulk retailing, commercial and residential activities. GDC's decision to pursue a zoning appeal is irreconcilable with abandonment of its appeal against the Warehouse resource consent. I am satisfied there is nothing in the Court's decision which might adversely interfere with or influence future zoning changes made by Council in accordance with its statutory functions and obligations for any land within its territorial boundaries, including the area to the north of Customhouse Street and the disused railway yards to the west. The relevance of the Court's decision is limited to the unusual circumstances of Council's 2002 zoning change to the Heinz Wattie block.

[54] I trust that counsel will be able to resolve the question of costs between them.

_____

Rhys Harrison J

IN THE ENVIRONMENT COURT
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKAURAU

Decision [2021] NZEnvC 079

IN THE MATTER OF	an appeal under s 120 of the Resource Management Act 1991
BETWEEN	EJL GUTHRIE
	RM and LK NEWMAN
	BANCO TRUSTEES LIMITED
	McCULLOCH TRUSTEES 2004 LIMITED & ORS
	(ENV-2019-CHC-000015)
	Appellants
AND	QUEENSTOWN LAKES DISTRICT COUNCIL
	Respondent

Court:	Environment Judge MJL Dickey Environment Commissioner M Mabin Environment Commissioner A Gysberts
Hearing:	14-16 September 2020
Later case events:	Submissions 7 October 2020 Memoranda of counsel for the appellants dated 19 February and 2 March 2021 Memorandum of counsel for the respondent dated 25 February 2021
Appearances:	G Todd for the appellants M Doesburg for the Council D Hanan for himself and certain s 274 parties (ED Hanan, J Hanan, JM Hanan and A Barrowclough) J Ryan on behalf of certain Arrowtown residents K Swain for certain residents

Date of Decision: 10 June 2021

Date of Issue: 10 June 2021

DECISION OF THE ENVIRONMENT COURT

A: The appeal is declined.

B: Costs are reserved. Any application for costs is to be filed within 10 working days and any responses within five working days of receipt of any application.

Contents

Annexures

REASONS

A Appeal and Proposal

[1] This appeal concerns a proposed 14-lot subdivision located in the rural area adjacent to the southern part of Arrowtown in the Wakatipu Basin, east of Queenstown. The site is located at 112 McDonnell Road, Arrowtown. It comprises 6.5458ha.

[2] The site is described as:[1]

> 2.1 The site comprises an area of 6.55ha of land south-west of Arrowtown. It is a rural site containing one residential dwelling and associated ancillary structures, a mature garden of mostly mature exotic trees, an apple orchard, boundary and avenue plantings. A spring surfaces near the site's northern corner, flows to the boundary then continues to the south in the road reserve. The more easterly portions of the site are moderately flat and covered in pasture grass. A hummock feature appears near the centre of the site, and most of the existing development and planting is on the upper portions of this feature. The more westerly (rear) portion of the site is covered in pasture grass, which extends up a slope towards a ridge which visibly separates the Hills Golf Club from the subject site.
>
> 2.2 The Hills Golf Club shares the site's western boundary. The northern boundary is shared with another rural property (the Hanan site) and a small site containing an electrical substation. To the south of the site is another rural property (the Page site). The site's eastern boundary abuts McDonnell Road. On the opposite side of the road the land is held in two separate uses. The more southerly land is currently open, but is part of the recently consented Arrowfields development, which allows for 20 residential lots. The more northern lands on the opposite side of McDonnell Road are part of the Low Density Residential (LDR) zone of Arrowtown.

[3] The application was first lodged with the Queenstown-Lakes District Council on 30 April 2018. It comprised a proposed 14-lot subdivision of the site, which provided for one allotment around the existing dwelling, 12 allotments each containing a new Residential Building Platform and one access lot to vest as public road. Further, land use consent was also sought to breach internal boundary setbacks which, at the time of notification, included breaches of the road boundary and internal boundary setback rules. Finally, the proposal included the provision of infrastructure to service the

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[1] Evidence-in-chief (**EIC**) of SR Skelton. Attachment B "Landscape Assessment Report, 24 April 2018".

development, landscaping and earthworks.

[4] Key features of the proposal include generous building setbacks from McDonnell Road (minimum of 20m), a minimum separation between buildings of 10m, maximum coverage of 70% on each building platform and a maximum building height of 8m; significant tree planting and landscaping to take place, and an existing orchard to be retained. The proposed lots range in net size from 3,845m^2 to 8,714m^2, averaging out at 4,568m^2.

[5] Both before and during the Council hearing, the applicant made several changes to the proposal. These included changes to the location of some of the residential building platforms in order to achieve compliance with road boundary and internal boundary setbacks. Additionally, proposed Lot 1 was no longer to be vested as road but, rather, ownership divided equally across Lots 2-14.

[6] At the appeal hearing, the Court was advised that the proposal had been further amended so as to provide for a maximum building height of 6m rather than 8m as originally proposed. Finally, conditions are proposed that address, among others, engineering matters and covenants preventing further subdivision. Following the hearing, a set of amended draft conditions was filed addressing maintenance of internal roadside planting and avoiding the use of complex hip and valley roofs.

B The issues to be resolved

[7] The primary issue between the parties required us to assess the extent of any adverse effects of the proposal on landscape character and visual amenity in the Wakatipu Basin. We also needed to determine the extent to which the Proposed Plan and Schedule 24.8 should inform that assessment.

C Statutory matters

[8] Sections 104 and 104B, and Part 2 of the Act are relevant to our assessment of the proposal.

[9] Section 104(1) sets out the matters we must consider. They are as follows:

> 104 Consideration of applications
>
> (1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to–
>
> (a) any actual and potential effects on the environment of allowing the activity; and
>
> (ab) any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity; and
>
> (b) any relevant provisions of—
>
> (i) a national environmental standard:
>
> (ii) other regulations:
>
> (iii) a national policy statement:
>
> (iv) a New Zealand coastal policy statement:
>
> (v) a regional policy statement or proposed regional policy statement:
>
> (vi) a plan or proposed plan; and
>
> (c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

[10] Section 104(2) states that we may, when forming an opinion on effects, disregard an adverse effect of the activity on the environment if a plan permits an activity with that effect.

[11] We are also obliged, in terms of s 290A, to have regard to the Council's decision.

[12] Finally, s 88A is relevant. It relates to the activity status of the proposal.

D Relevant planning documents

[13] Section 104(1)(b) of the RMA lists the statutory planning documents to which regard must be had.

[14] In determining the relevant planning provisions and their application to this proposal, we were assisted by evidence from Ms Sarah Gathercole (called by the Council) and Mr Nicholas Geddes (called by the appellants). In addition to their

evidence, the witnesses conferred and prepared a Joint Witness Statement (**JWS**).[2] They largely agreed on the relevant planning documents and provisions.

National Policy Statements

[15] Two National Policy Statements were referenced by the parties:

- NPS: Urban Development;
- NES: Contaminated Land.

[16] The planning witnesses agreed that the NES: Contaminated Land was not relevant to this proposal. They agreed that the NPS: Urban Development is relevant. However, Mr Doesburg for the Council submitted that, as the Wakatipu Basin is not an urban environment, the NPS: Urban Development does not apply and is not a determining factor. We heard no argument on the point. We agree with counsel, and put that document to one side when making our assessment.

Regional Policy Statements

[17] The parties were agreed that the Regional Policy Statement (**RPS**) for Otago 1998 and the Partially Operative Otago Regional Policy Statement 2019 are relevant, but, in the event of conflict, greater weight should be given to the 2019 document.

[18] From the RPS 2019, they agreed that Objectives 1.1 (sustainable management of resources), 1.2 (integrated management of resources) and related policies are relevant, but could not agree on the extent to which the proposal complies with them. Reference was also made by Ms Gathercole to Objectives 3.1 (values of ecosystems), 3.2 (significant and highly valued resources) and 4.5 (urban growth). Again, the extent to which the proposal is consistent with those provisions was disputed.

[19] However, and as might be expected, the provisions are set at a high level and the relevant guidance that could be drawn from the statements is adequately expressed in the district planning documents to which we have regard.

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[2] Planners' JWS dated 12 December 2019.

District Planning Documents

Zoning

[20] The matter of zoning and relevant plan provisions occupied some time at the hearing. That is because the Council has been undertaking a rolling review of its Operative Plan[3] for some years. That review has also resulted in, relevant to this appeal, a variation to the Proposed Plan[4] relating to the Wakatipu Basin.

[21] Under the Operative Plan the site is zoned Rural General.

[22] Under the notified version of the Proposed Plan (2015) it was zoned Rural.

[23] Stage 2 of the Proposed Plan zoned the site Wakatipu Basin Rural Amenity Zone, but decisions on Stage 2 rezoned it to Wakatipu Basin Lifestyle Precinct (South Arrowtown Landscape Character Unit). Appeals have been filed against that zoning. Chapter 24 of the Plan is relevant. Many of its provisions are challenged by appeals.

Consents required

[24] The planners agreed on the various consents required for the proposal.

[25] Under the Operative Plan, discretionary activity resource consent is required for the proposed subdivision and identification of building platforms;[5] and other consents are required for earthworks and breach of a site standard. Overall, the activity is discretionary.

[26] Under the Proposed Plan, the proposed subdivision is non-complying, as it proposes lots with a minimum net site area less than 4,000m^2, and the average area of the proposed lots is less than 1ha per lot. The land use is non-complying for the same reason.[6] Other elements of the proposal, being setbacks variously from internal boundaries, roads and rivers and the removal of and works within the root protection

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3 Queenstown-Lakes District Council District Plan.
4 Queenstown-Lakes District Council - Proposed District Plan, Decisions Version (December 2020).
5 Rule 15.2.3.3(vi).
6 Rule 27.5.21 and Rule 24.5.1.2.

zone of exotic vegetation are classified as restricted discretionary activities.

[27] The planners also agreed that, as the application was lodged in May 2018, after the notification of Stage 2 of the Plan (which includes Chapter 24)[7] and prior to the decisions version of the Proposed Plan being notified, the activity status remains discretionary in accordance with s 88A of the Act. Given that agreement, we do not consider the matter further.

Operative Plan

[28] The following parts from the Operative Plan are relevant: Part 4 (District wide); Part 5 (Rural Areas); Part 14 (Transport); Part 15 (Subdivision and Development); Part 22 (Earthworks).

[29] Guided by the planners and our own assessment, we set out in Annexure **A** the detailed provisions relevant to this proposal.

[30] There is no doubt that the Plan focuses on the value of the District's visual resource, landscapes and indigenous character, and their importance to the community's wellbeing and living environments, among others.[8] The District is described as a series of landscapes distinctive in their formation. The Plan recognises that buildings, tree plantings and roading can all change the character of the area and provide for social, recreation and economic activity.[9]

[31] The Plan describes activities occurring in the District, including settlements, noting a demand for new settlement areas and pressures for growth on existing settlements. There is a need to manage new development so as to respect the character of the landscape and avoid any adverse effects on the visual qualities of the landscape.[10]

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[7] Their JWS recorded, at [12], that at the time the application was made, none of the provisions within Stage 2 of the Proposed Plan had immediate legal effect, and the application was assessed as discretionary under the Operative Plan.

[8] Section 4.1 Natural Environment.

[9] Section 4.2 Landscape and Visual Amenity, Introduction at 4.2.1.

[10] Section 4.2.3 and 4.2.3(i).

[32] The landscape is described as falling into three separate categories – outstanding natural landscapes (**ONL**) and features (**ONF**), visual amenity landscapes (**VAL**) and other landscapes.[11] In describing the landscapes, the Plan plainly records its focus on visual effects – the form and colour of structures contrasting with the surroundings, and the views from roads as these give visual access to the mountains, lakes and landscape.[12]

[33] The Plan describes the ONL as "the romantic landscapes – the mountains and the lakes – landscapes to which Section 6 of the Act applies".[13]

[34] VAL are also described. Given that the expert landscape witnesses agreed that the site sits within such a landscape, we address these in more detail. The Plan describes VAL:

> 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
> - landscapes which include ridges, hills, downlands or terraces; or
> - a combination of the above.
>
> The key resource management issues for the visual amenity landscapes are managing adverse effects of subdivision and development (particularly from public places including public roads) to enhance natural character and enable alternative forms of development where there are direct environmental benefits.

[35] District wide Objective 4.2.5 provides that subdivision, use and development be undertaken in a manner which avoids, remedies or mitigates adverse effects on landscape and visual amenity values. Policies that follow focus on achieving that objective where the landscape and visual amenity values are vulnerable to

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[11] Section 4.2.4.

[12] Section 4.2.4(1).

[13] Section 4.2.4(2).

degradation;[14] and on encouraging development and/or subdivision in areas with greater potential to absorb change without detraction from those values.[15]

[36] A policy that implements the objective for VAL is to avoid, remedy or mitigate the adverse effects of subdivision and development on visual amenity landscapes that are highly visible from public and other places frequented by members of the public and visible from public roads; mitigate loss of or enhance natural character by appropriate planting and landscaping; and discourage linear tree planting along roads as a means of achieving the previous two policies.[16]

[37] The Plan also focusses on avoiding new urban development in the outstanding natural landscapes of the Wakatipu Basin and discouraging such subdivision and development in the VAL of the district.[17] Further, it emphasises the clear identification of the edges of existing urban areas, and controls extensions to them and any new urban areas.[18]

[38] There is particular reference to limiting the urban growth of Arrowtown[19] and to recognising the importance of the open space pattern that is created by the inter-connectedness between the golf courses and other Rural General land.[20]

[39] In the Rural General Zone issues include protecting rural amenity values. The objectives include protecting the character and landscape value of the rural area, supported by policies that require consideration of the district-wide landscape objectives and policies, avoiding, remedying or mitigating adverse effects of development on the landscape values and preserving the visual coherence of the landscape.[21]

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[14] Policy 4.2.5.1(a).
[15] Policy 4.2.5.1(b).
[16] Policy 4.2.5.4.
[17] Policy 4.2.5.6.
[18] Policy 4.2.5.7.
[19] Policy 9.9.1 and 9.9.2; 9.10.
[20] Policy 9.11.
[21] Part 5 Objective 1, Policies 1.1, 1.6, 1.7 among others.

[40] In the Rural General Zone, all subdivision and the location of residential building platforms is a discretionary activity.[22] There are no minimum lot sizes.

[41] In Part 15 – Subdivision, there are assessment criteria for subdivisions. Under the subdivision assessment criteria, regard is to be had, among others, to the extent to which the proposed development maintains and enhances rural character, landscape values and visual amenity.[23]

[42] In considering consent applications, the Council is obliged to follow a certain process, and shall apply Rules 5.4.1 and 5.4.2.1, and have regard to, but not be limited to, the relevant assessment matters in Rules 5.4.2.2 and 5.4.2.3.

[43] Rule 5.4.2 sets out landscape assessment criteria provisions which require, first, a determination of the landscape and category and, secondly, the consideration of assessment matters.[24]

[44] There are assessment matters for each of the ONL (Wakatipu Basin) and ONF – District-wide; ONL (District-wide); and VAL.[25]

[45] The assessment matters for VAL are relevant:

(a) effects on natural and pastoral character;

(b) visibility of development;

(c) form and density of development;

(d) cumulative effects on the landscape; and

(e) rural amenities.

[46] There are fulsome criteria under each of the headings, but for present purposes we note references to whether the proposal will compromise or lead to the loss of the

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[22] Rule 15.2.3.3(vi).
[23] Rule 15.2.3.6(b)(i)(a),(b) and (d).
[24] Rules 5.4.1, 5.4.2.1; and Rules 5.4.2.2 and 5.4.2.3.
[25] Rule 5.4.2.2.

"natural or arcadian pastoral character of the surrounding Visual Amenity Landscape"; to "over-domestication"; whether the development is highly visible from any public place or public road; visual prominence; further, in considering cumulative effects there is a need to consider existing development; whether the development will lead to "further degradation or domestication", or visually compromise the existing "natural and arcadian pastoral character".[26]

Proposed Plan

[47] The following parts from the Proposed Plan are relevant:[27] Chapter 3 (Strategic Direction); Chapter 24 (Wakatipu Basin); Chapter 25 (Earthworks); Chapter 27 (Subdivision and Development); Chapter 28 (Natural Hazards); and Chapter 29 (Transport).

[48] Certain of the provisions are subject to appeal. We set out in Annexure **B** the advice we received from counsel on this point.[28] We return to this matter later in our decision when we consider the matter of weighting.

[49] The Proposed Plan's Strategic Direction focusses on protection of the district's distinctive visual environment and retention of its distinctive landscapes. Rural living opportunities will be provided in areas identified as appropriate for rural living environments. Further, the Plan will identify the district's Rural Character Landscapes and only allow further land use changes in such areas where they can absorb that change.[29]

[50] Chapter 24 of the Plan contains provisions relating only to the Wakatipu Basin Rural Amenity Zone (**Amenity Zone**) and its sub-zone, the Wakatipu Basin Lifestyle Precinct (**Precinct**). The purpose of the zone is to "maintain and enhance the character and amenity of the Wakatipu Basin".[30]

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[26] Rule 5.4.2.2.3

[27] Planners' JWS at [19].

[28] Mr Doesburg's Opening Submissions; a compendium of relevant chapters from the Proposed Plan – annotated to show what provisions are affected by appeals; memorandum dated 1 October 2020 and prepared with input from Mr Todd and Mr Hanan.

[29] Chapter 3 Proposed Plan.

[30] Chapter 24, 24.1 Zone Purpose, Regional Plan.

[51] The purpose of defining the Precinct is to identify areas within the broader Amenity Zone: "… that have the potential to absorb rural living and other development, while still achieving the overall purpose of the Rural Amenity Zone".

[52] The Plan states that the "balance of the Rural Amenity Zone is less enabling of development while still providing for a range of activities suitable for a rural environment".[31]

[53] The Amenity Zone is described as:[32]

> a distinctive and high amenity value landscape located adjacent to, or nearby to, Outstanding Natural Features and Landscapes.

[54] Schedule 24.8 divides the Basin into 24 Landscape Character Units. The relevant provisions of Schedule 24.8 are attached as Annexure **C**.

[55] The Units are described as:[33]

> … a tool to assist identification of the particular landscape character and amenity values sought to be maintained and enhanced. Controls on the location, nature and visual effects of buildings are used to provide a flexible and design-led response to those values.

[56] Chapter 24 objectives and policies focus on the maintenance and enhancement of landscape character and amenity values in and associated with the Amenity Zone (which includes the Precinct).[34] Subdivision and development is to:[35] maintain or enhance the landscape character and amenity values identified in Schedule 24.8 – Landscape Character Units; maintain or enhance landscape character and visual amenity values associated with the Amenity Zone and Precinct and surrounding landscape.[36] Activities are provided for whose built form is subservient to natural landscape elements and that, in areas Schedule 24.8 identifies as having a sense of openness and spaciousness, maintain those qualities.[37]

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[31] Chapter 24, Zone Purpose.
[32] Chapter 24, Zone Purpose
[33] Chapter 24.1, Zone Purpose.
[34] Objective 24.2.1 and following policies.
[35] Policy 24.2.1.3.
[36] Policy 24.2.1.4.
[37] Policy 24.2.1.11.

[57] Rural living opportunities are constrained, and the minimum lot size for subdivision in the Amenity Zone is 80ha.

[58] For the Precinct only, Objective 24.2.5 provides that rural living opportunities are enabled provided landscape character and visual amenity values are maintained or enhanced.

[59] The following policy, again relating to the Precinct only, makes it clear that the landscape character and values are those identified in Schedule 24.8 – LCU:

> 24.2.5.1 Provide for rural living, subdivision, development and use of land where it maintains or enhances the landscape character and visual amenity values identified in s 24.8. – Landscape Character Units.

[60] The Precinct policies also make it clear that the Plan will implement minimum and average lot sizes in conjunction with standards controlling building size and location among others, so as to not compromise the landscape character and visual amenity values of the Precinct as identified in Schedule 24.8 – LCU,[38] and maintain a defensible edge between areas of rural living in the Precinct and the balance of the zone.[39]

[61] For all intents and purposes, the objectives and policies in Chapter 24 inform the way in which subdivision and development in the Basin will be assessed. While Chapter 27 Subdivision contains its own objective and policy framework, the objectives and policies have a district-wide focus, save for suites of location-specific provisions. There are no objectives and policies in this chapter specifically relating to the Wakatipu Basin.

[62] If the proposal complied with the minimum lot sizes in the Proposed Plan, it would likely be assessed as a restricted discretionary activity. The assessment criteria for developments and subdivisions are largely similar. For developments, the criteria include whether the location, form and design adequately responds to the identified landscape character and visual amenity qualities of the LCU in Schedule 24.8; the

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[38] Policy 24.2.5.4.
[39] Policy 24.2.5.5.

extent to which those elements complement existing landscape character and amenity values and the extent to which the development maintains visual amenity, particularly from public places.[40]

[63] Subdivision criteria refer to relevant objectives and policies, to existing landscape character, visual amenity values of the Amenity Zone or Precinct, the possibility of better outcomes from clustering, and the extent to which there is an opportunity to use covenants.[41]

[64] While all of the descriptions in Schedule 24.8 – LCU 24 are relevant, the following assist with establishing context, and determining subdivision/development constraints and opportunities.

Settlement patterns	The [area] anticipates a reasonably spacious patterning of rural residential development, together with extensive riparian and escarpment restoration, pastoral areas and a landscape framework throughout the south western edges of Arrowtown to create an attractive edge to the settlement in conjunction with the adjacent golf courses and roads. The Arrowtown Lifestyle Retirement Village SHA anticipates an urban patterning of buildings… Typical lot sizes • Predominantly 4-10ha • Some larger lots 10-20ha.
…	
Naturalness	The unit displays a low level of naturalness as a consequence of the level of existing and anticipated built development together with the golf course patterning. The relatively wild and unkempt character of the escarpment counters this to a limited degree.
Sense of Place	Generally, the unit reads as part of the swathe of golf courses and rural residential development that frame the western and southern edges of Arrowtown and effectively functions as a 'greenbelt' to the

[40] Rule 24.7.5.
[41] Rule 27.9.3.3.

	village. However, this 'greenbelt' effect, together with the legibility of the escarpment as a robust defensible edge to Arrowtown has been significantly compromised by the Arrowtown Lifestyle Retirement Village SHA, which confers a distinctly urban character in a prominent and sizable part of the unit.
Potential landscape issues and constraints associated with additional development	Extent to which the unit can continue to operate as a 'greenbelt' to Arrowtown. Role of the escarpment as an edge to the village. Ensuring urban residential development is constrained within defensible boundaries and does not sprawl westwards and southwards in an uncontrolled manner into the existing, 'more rural' areas. Public golf course facility.
	…
Environmental characteristics and visual amenity values to be maintained and enhanced	Views from McDonnell Road and Centennial Avenue to the surrounding mountain/river context. Reinforcing/re-establishing a robust and defensible edge to Arrowtown.

Weighting of plans

[65] The weighting to be accorded to the Proposed Plan assumed some prominence in the hearing. While the expert planners had agreed in the JWS that the Operative Plan should be awarded greater weight, that position had changed by the time of the hearing.

[66] In cross-examination,[42] Mr Geddes agreed that the Proposed Plan's Amenity Zone and the Lifestyle Precinct is a shift from the Operative Plan's rural zone, and that it is a shift towards greater prescription. He also acknowledged that "limited weight" had to be given to the Precinct Zone,[43] and to the Zone Purpose in Chapter 24.[44] Finally, he opined that, in terms of the objective and policy or the planning framework, the Operative Plan would still contain the predominant provision set for

[42] Transcript, page 101.
[43] Transcript, page 108.
[44] Transcript, page 112.

the assessment of the proposal.[45] He then qualified that by reference to Part 4 of the Operative Plan still having strategic relevance but that the Part 5 Rural provisions would be the "lower order" in favour of Chapter 24 of the Proposed Plan.[46]

[67] Ms Gathercole agreed that the Proposed Plan represents a change in direction and provides a clear and more prescriptive management regime for subdivision and development in the Basin.[47]

[68] The leading case on the weight to be applied to operative and proposed plans is *Keystone Ridge Ltd v Auckland City Council*.[48] The extent to which the provisions of a proposed plan are relevant should be considered on a case by case basis, and might include: the extent to which a provision has been exposed to independent decision-making; circumstances of injustice; and the extent to which the new measure, or absence of one, might implement a coherent pattern of objectives and policies in a plan. In assessing weight, each case should be considered on its merits. Where there had been significant change in Council policy, and the new provisions are in accord with Part 2, the Court may give more weight to the proposed plan.

[69] The Council acknowledged that the Proposed Plan represents a change in direction and provides clearer and more prescriptive management of development in the Wakatipu Basin. In light of that, counsel submitted that it may be appropriate to attribute weight to the Proposed Plan, despite it continuing to work its way through the appeal process.

[70] The appellants agreed with that view. Mr Todd submitted that it is important in assessing the development to consider the provisions of LCU 24, particularly given the landscape characteristics in the LCU (with the exception of an appeal point by Roger Monk) are beyond appeal.

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[45] Transcript, page 129.
[46] Transcript, page 130.
[47] Transcript, page 228.
[48] *Keystone Ridge Ltd v Auckland City Council* HC Auckland AP24/01, 3 April 2001 at [16] and [36].

[71] We find that the Proposed Plan continues the Operative Plan's approach of controlling subdivision and development in the rural areas of the Wakatipu Basin, so as to protect the landscape values of the area but applies a more nuanced approach. The appeals could result in changes to Chapter 24 – Zone Purpose, objectives and policies, standards – including changes to minimum lot sizes; or changes to the zoning of the site. However it is appropriate, even given the uncertainty of the outcome of plan appeals, to have regard to the provisions of both documents in determining this appeal. We give significant weight to the shift in policy reflected in Chapter 24, in the sense that it provides a more prescriptive regime to subdivision and development than does the Operative Plan in the Wakatipu Basin.

E Other matters

[72] The Wakatipu Basin Land Use Planning Study[49] (**Study**) was drawn to our attention in the hearing. We were encouraged to give weight to it by the appellants in assessing the proposal, relying on s 104(1)(c) of the RMA.

[73] We were advised that the Proposed Plan as notified zoned the majority of the land on the western side of McDonnell Road as a Rural zone.

[74] That zoning was superseded by a variation made to the Proposed Plan under Stage 2, following a request by a panel of independent commissioners who heard submissions on Stage 1, for a further assessment to be carried out of the landscape character of the Wakatipu Basin and its capabilities of absorbing further development. Mr Doesburg provided us with an excerpt from the Commissioners' Direction as follows:[50]

> In the course of the hearing, based on the evidence from the Council and submitters, we came to the preliminary conclusion that continuation of the fully discretionary development regime of the Rural General zone of the ODP, as proposed by the PDP, was unlikely to achieve the strategic direction of the PDP in the Wakatipu Basin over the life of the PDP. We are concerned that, without careful assessment, further development within the Wakatipu Basin has the potential to cumulatively and irreversibly damage the character and amenity values which attracts residents and other activities to the area.

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[49] Wakatipu Basin Land Use Planning Study, Final Report March 2017 (**Study**).

[50] Memorandum concerning PDP provisions affecting Wakatipu Basin, 1 July 2016, at [8] and referred to by counsel for the Council in his legal submissions at [9].

[75] The Panel encouraged the Council to undertake a detailed study of the Basin to:

(a) identify the environmental characteristics and amenity values of the area that should be maintained and enhanced;

(b) identify the areas able to absorb development without adversely affecting the identified values or the values associated with surrounding ONLs and ONFs;

(c) identify areas unable to absorb such development; and

(d) determine whether (given development already consented) there is capacity for further development in the Wakatipu Basin and (if so) where it should occur and the form it should take.

[76] That request led to the development of the Study that in turn, we are advised, informed the Variation to the Proposed Plan.

[77] The Study identified 25 landscape character units in the Basin. It identified the "Absorption Capability" of each unit qualifying that identification as follows:[51]

> Note: An absorption capability classification of 'low', 'moderate', 'high' does not indicate the relative scale, density or volume of additional dwellings that could potentially be accommodated in the LCU. Capacity depends on the spatial character of the LCU and the zoning controls, especially minimum lot size.

[78] The Study found for South Arrowtown LCU land a "high" absorption capability. It said:[52]

> 1.19 For those parts of the WB with a rating of Moderate-High or higher, the landscape sensitivity of the majority of units suggests a Rural Lifestyle type planning strategy (via a precinct) is appropriate.

[79] The Study also made observations about the impact of the Special Housing Area development that had been approved (the Retirement Village), among others. It made recommendations about the expansion and reduction of rural lifestyle living in certain

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[51] Study, footnote on page 4.
[52] Study, page 5.

areas, zoning strategy and policy, and rules/standards.

[80] There was a disagreement between the planners on the relevance of this document to our assessment. Mr Geddes considered that it is the only comprehensive landscape assessment that has been completed, and includes the entire Wakatipu Basin. In this regard, it underpins the s 32 analysis of Chapter 24 of the Proposed Plan, and provides character unit descriptions in Schedule 24.8 that are written into the Proposed Plan's planning framework to provide guidance for plan users as to the features and attributes of each character unit.

[81] Mr Geddes also considered that it is a stand-alone landscape assessment that can be applied in isolation from its Chapter 24 application and, due to its comprehensive nature, should be afforded a high level of weighting for assessment of the current application under s 104(1)(c).

[82] Ms Gathercole considered that the Study is a document that informs the Proposed Plan, but that it should not be read in isolation from the provisions of Chapter 24.

[83] For the appellants, Mr Todd submitted that the Study is of substantial importance; that its findings have been incorporated into the Proposed Plan by way of Schedule 24.8 and the identified landscape characteristics of LCU 24 are critical to our assessment of the proposal under the Proposed Plan. He submitted that the Study's findings have been directly incorporated into the Proposed Plan, which demonstrates its importance to our assessment.

[84] Mr Doesburg accepted that elements of the Study have been incorporated into the Proposed Plan, but submitted that its status is no different to any other report that informs a s 32 assessment – and that its status should not be elevated beyond that.

[85] We find that the Study is a document to which we may have regard under s 104(1)(c). We do not apply a weighting to it because it is not a statutory planning document, prepared in accordance with Schedule 1 to the Act. It has not been incorporated into the Plan under Part 3 of Schedule 1 to the Act, and therefore has

no status as a tool to aid assessment. The Proposed Plan makes no particular reference to it in the objectives, policies and rules for the Wakatipu Basin. We find, therefore, that it is not appropriate to elevate it to an assessment tool – it is useful background analysis and information only.

F Effects on the environment

[86] The planners agreed there are no outstanding issues relating to engineering matters, and that the primary areas of contention as between themselves relate to character, landscape and visual amenity effects.

[87] We record that any other potential effects have been addressed through the proposed conditions of resource consent, which were submitted to us. We note in particular conditions relating to the engineering design of foundations for most of the lots so as to address potential stability issues; and a condition ensuring that the lots cannot be further subdivided.

Permitted baseline

[88] The matter of an applicable permitted baseline was explored by both Ms Gathercole and Mr Geddes in their evidence.[53] Their views were recorded in the JWS.[54]

[89] The planners agreed that the following activities are permitted within the Rural General zone under the Operative Plan, and within the Wakatipu Basin Lifestyle Precinct under the Proposed Plan:[55]

(a) Earthworks up to 1,000m^3 within any consecutive 12-month period;

(b) Fences less than 2m in height;

(c) Farming activities.

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[53] Planners' JWS at [33]-[34].
[54] Planners' JWS at [33].
[55] Planners' JWS at [15].

[90] Further, they agreed that all residential development and subdivision requires resource consent within those two zones.[56]

[91] Mr Geddes expressed the view that the establishment of shelter belts is a permitted activity in the locality and, as such, should be counted as a relevant element of the permitted baseline.[57] Simply put, Mr Geddes considered there is a baseline to be relied on insofar as the planting of shelter belts is a common horticultural practice.[58]

[92] Ms Gathercole considered that there is no relevant or helpful permitted baseline given the range of activities proposed which require resource consent.[59] She said that shelter belts are typically planted around the boundary of a site. The application proposed hedges and planting around each individual lot, which will contribute to a loss of openness. In Ms Gathercole's opinion, it is fanciful to rely on shelter belts as a permitted baseline, as it is unlikely that shelter belt planting for horticulture purposes would take that form. In addition, the proposed planting relies on subdivision to occur first, which requires resource consent.[60]

[93] We note that much of the proposed planting largely follows along the proposed accessways, although some hedging is proposed to provide privacy between building platforms, and these are to be no more than 2.5m tall. We consider that the form and location of shelter belt planting is quite dissimilar to what is proposed for landscaping on this site. That difference means that it is not possible to draw a reasonable comparison of adverse effects. We therefore do not apply any permitted baseline. The nature of the proposal is such as to require an assessment of all its elements.

[94] We turn to consider the effects of the Proposal in contention.

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[56] Planners' JWS at [15].

[57] NK Geddes EIC at [9].

[58] He also referred to earthworks, but as the effects of earthworks were not in contention we do not address this element.

[59] SK Gathercole EIC at [21].

[60] SK Gathercole EIC at [22].

Landscape character and visual amenity effects

[95] We were assisted by the evidence of three landscape architects: Mr Stephen Skelton (called by the appellants), Ms Helen Mellsop (called by the Council); and Mr Hugh Forsyth (called by a number of the s 274 parties opposing the proposal).

[96] In addition to their evidence, the witnesses conferred and produced a JWS. They recorded their agreement on certain facts and assumptions.

Methodology

[97] The experts agreed with the suggested Queenstown-Lakes District Council Guidelines for the Assessment of Landscape and Visual Effects prepared by Bridget Gilbert in Proposed Plan mapping hearings under the direction of the Court. They agreed with the 7-point scale for describing the magnitude of visual and landscape effects contained in that document. They also agreed that landscape effects are not just experienced from a particular viewpoint; that it is important to identify the key viewpoints and visual amenity attributes and then assess effects on the visual amenity in relation to these viewpoints.[61] We note that the Assessment is a tool used to identify and assess the likely significance of the effects of change resulting from use and development on the landscape and visual amenity.[62]

[98] At the top of the scale,[63] the effect rating is described as Very High: Total loss of key elements/features/characteristics, i.e. amounts to a very significant negative change in visual amenity/landscape character and/or landscape values; in the middle of the scale is Moderate: Partial loss of or modification to key elements/features/characteristics, i.e. the pre-development visual amenity remains evident but is changed and in the case of landscape character and/or landscape values, remains evident but is changed…; at the bottom of the scale is Very Low: Negligible loss of or modification to key elements/features/characteristics [landscape values] of the baseline, i.e. visual influence of new elements is barely discernible, influence of

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[61] Landscape JWS at [13]-[16].

[62] Guidelines for the Assessment of Landscape and Visual Effects, Attachment B to HJ Mellsop EIC at page 1.

[63] Noting there is a scale for each of Visual Effects and Landscape Effects.

new elements on landscape character and/or landscape values is barely discernible. Given there was no disagreement about the use of the methodology, we accept its use in this proceeding.

[99] All the experts agreed on the description of the site, which we have set out at paragraph [2] of this decision.

Environment

[100] We have already described the environment in which the site sits. We take note of the consents that have been issued and/or implemented as follows:

(a) Arrowtown Lifestyle Retirement Village on McDonnell Road;

(b) Arrowsouth – a 24 allotment subdivision comprising 20 residential freehold titles;

(c) five rural living allotments with 4 residential building platforms on McDonnell Road;

(d) six rural living allotments with four residential building platforms on the corner of Hogan's Gully and McDonnell Roads.

[101] We have also noted the consents to the proposal provided by a number of landowners in the vicinity of the site.

Receiving landscape

[102] The experts agreed on the extent of the receiving landscape, while noting that there are finer scale Landscape Character Units (**LCU**) within the landscape. The receiving landscape is the rural landscape that extends south and west of urban Arrowtown. It is bounded by the Cotter Avenue escarpment and the Arrowtown River to the east, Feehly Hill and Brow Peak to the north, Mill Creek to the west and a schist ridge to the south.[64] We attach as Annexure **D** a document showing the extent of the receiving environment as agreed by the landscape experts.

[64] HJ Mellsop EIC at [3.2] and Attachment C.

[103] Notably, the landscape experts used a combination of the visual catchment for the proposal and landscape character boundaries as the context for assessment. It was considered to be the full area of the wider landscape that could be affected by the development.[65]

[104] The smaller LCUs are those identified in Chapter 24 of the Proposed Plan. The receiving landscape takes in all of the LCU 24, all of LCU 22 (the Hills), half of LCU 23 (Millbrook) and a small portion of LCU 15 (Hogans Gully).[66]

Attributes

[105] The experts agreed that the landscape had the following attributes:[67]

(a) the Cotter Avenue escarpment is a strong natural legible landform;

(b) the hummocky glacial topography is an important component of the landscape;

(c) the exotic tree patterns are a strong component of the landscape;

(d) there is still significant open space in the form of grassland and golf courses;

(e) there are clusters of urban-style development within the landscape such as Millbrook, the Arrowtown Retirement Village and Arrowfields;

(f) there is a strong presence of rural living development;

(g) the golf courses form part of the landscape character;

(h) there is a dominance of open grassland, whilst the landscape still retains some functional farming component.

[106] The experts also agreed that the level of naturalness of the landscape is low-moderate.[68]

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[65] HJ Mellsop EIC at [2.2].
[66] SR Skelton EIC at [7]; Landscape JWS at [12].
[67] Landscape JWS at [17].
[68] Landscape JWS at [18].

[107] Both Ms Mellsop and Mr Forsyth attribute to the landscape a "pastoral" character that includes elements of open grassland, clusters of exotic trees, scattered dwellings that are often surrounded by trees and a predominant area of greenspace land used as a golf course.

[108] Ms Mellsop described the landscape as having a "dominant arcadian pastoral character".[69] She described it as having a high level of visual amenity and a predominance of rural living and recreational uses rather than productive working farmland. She described the Retirement Village and (to a lesser extent) the Millbrook cluster housing as anomalous elements within the landscape.

[109] Ms Mellsop acknowledged that, while the area is highly managed and modified, it is dominated by the natural elements of pasture, lawn and trees and is perceived to be moderately natural, particularly in contrast to the urban form of Arrowtown.

[110] Mr Forsyth considered that the receiving landscape fell into three separate character areas, albeit he acknowledged that it was mostly part of the large terrace area that lies west of Arrowtown.[70] That position is in contrast to his agreement recorded in the JWS as to the extent of receiving landscapes. As set out in the JWS, he considered that the landscape is characterised by large, rural lifestyle landholdings (1-2ha).

[111] Mr Skelton considered that the landscape displayed a "parkland character" – derived from the presence of and increasingly prevalent urban type development, maintained appearance of the golf course areas, lack of truly productive areas and the presence of more natural elements such as landform and vegetation patterns. While some of the landscape displays an open character and there are pockets which are more rural living in character, urban character elements are ubiquitous in the landscape. He considered that the landscape serves as a gateway to urban Arrowtown.

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[69] HJ Mellsop EIC at [3.13].
[70] HD Forsyth EIC at [6.6].

[112] Having said that, all witnesses agreed on the elements within the landscape – what they disagreed on is the extent to which those elements defined the landscape.

[113] There was disagreement between Mr Skelton and Ms Mellsop as to the meaning of pastoral. Ms Mellsop referred to it in an aesthetic sense (including the golf course in that description) whereas Mr Skelton referred to it in a functional sense.

[114] We agree with the experts on the extent of the receiving environment and agree with their identification of its attributes. We find that the environment, while containing a pastoral character, the Retirement Village (a work in progress) and rural-residential developments, displays a pastoral (in both an aesthetic and functional sense) character and openness that is in stark contrast to urban Arrowtown located on the other side of McDonnell Road to the east; and while not an overtly working rural landscape, still contains elements that are associated more closely with the rural environment than the urban one.

Anticipated physical changes to the landscape as a result of proposed development

[115] The experts agreed that the following changes to the landscape will occur:[71]

(a) the development will have a rural-residential character;

(b) the addition of twelve 1,000m^2 building platforms and a potential 700m^2 floor area per platform;

(c) there will be a number of trees planted, which will increase the vegetative character of the site;

(d) there will be more lineal planting in the form of screening hedges;

(e) the planting adjoining the road is low level and will not fully screen the development;

(f) curtilage activity will be confined to within 15m of dwellings;

[71] Landscape JWS at [19].

(g) the development could contain substantial buildings of possibly two storeys along with possibly accessory buildings such as swimming pools;[72]

(h) removal of some of the existing trees onsite, for example from Lots 6 and 7, to make room for the building platforms;

(i) earthworks associated with construction of houses;

(j) increased domestic activity on the site (and associated effects such as noise);

(k) visible lighting at night;

(l) the watercourse will have planting around it;

(m) there will be some loss of pastoral character.

[116] We agree with that assessment, and note that it is the effects of those changes on visual amenity and landscape character that are at the core of the dispute in this hearing.

[117] In determining the environmental effects of those matters, we record that the experts (and the s 274 parties) disagreed on the following:

(a) whether the proposal is rural or urban in character;

(b) effects on visual amenity;

(c) effects on landscape character, considering the impact of the Retirement Village, absorption capacity of the landscape and the relevance of the Study to that matter, and the effects of the proposal;

(d) effects of mitigation measures - mounding and planting;

(e) degree of domestication and cumulative effects on the landscape.

We address each of the areas of disagreement.

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[72] The proposed height of buildings was changed in the hearing from 8m to 6m. The landscape experts advised that the change may make it less desirable/less likely that 2-storey buildings will be constructed.

Is the Proposal rural or urban in character?

[118] A difference between the parties lay in the interpretation of the future character of the proposed development. The Council's witnesses and the s 274 parties considered the proposal is "suburban or urban" in nature, whereas the appellants' witnesses considered it is closer to rural-residential living.

[119] Ms Mellsop's view was that the proposed subdivision represents a large-lot suburban extension of Arrowtown into the VAL. She considered that densities introduced by the proposal would be characteristic of large-lot suburban development, and would be perceived as urban sprawl rather than differentiated as rural living development.[73] She noted that the proposal would result in lots of around 4,000m^2 in size, but that the four lots proposed in the western part of the site are slightly larger at 5,096-8,714m^2; and that the residential density proposed is similar to that anticipated in the Operative Plan's Rural Residential Zone and in the Proposed Plan's Large Lot Residential B Zone.[74] She also said that the proposal would allow for substantial two-storey dwellings on each lot and potential curtilage activities, including carparking, clotheslines, pergolas, play equipment, walls, gardens and lawns, extending up to 15m from each dwelling. She considered that lineal planting of hedges and exotic tree avenues along boundaries and access roads would compartmentalise the site and largely remove its open pastoral characteristics.[75] Finally, she considered that the development would compromise the legibility of the urban edge in this location.[76]

[120] In contrast, Mr Skelton considered the proposal would present a dissipating, rural living edge to an existing urban area.[77] He considered the proposal will be rural living in character, using the term to describe development which is not urban, but instead has a density of not more than 1 household/4,000m^2, displays rural elements such as generous road setbacks, spaciousness between buildings, generous areas of

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[73] HJ Mellsop EIC at [8.3] and [8.10].
[74] HJ Mellsop EIC at [7.2]-[7.3].
[75] HJ Mellsop EIC at [7.4].
[76] HJ Mellsop EIC at [7.6].
[77] SR Skelton rebuttal evidence (**Rebuttal**) at [18].

landscaping, lacks urban infrastructure and is void of solid boundary fencing.[78]

[121] Mr Skelton considered the proposal reflects the characteristics of the Rural Residential Zone in the Operative Plan, being a minimum lot size of 4,000m^2. He noted the following from the Operative Plan:[79]

> The purpose of Rural-Lifestyle and Rural-Residential zones is to provide for low density residential opportunities as an alternative to the suburban living areas of the District.

[122] He then referred to the definition of urban development from the Proposed Plan, which provides:[80]

> Means development which is not of a rural character and is differentiated from rural development by its scale, intensity, visual character and the dominance of built structures. Urban development may also be characterised by reliance on reticulated services such as water supply, wastewater and stormwater, and by its cumulative generation of traffic. For the avoidance of doubt, a resort development in an otherwise rural area does not constitute urban development, nor does the provision of regionally significant infrastructure within rural areas

[123] Mr Skelton considered the proposal will be rural living, not suburban large-lot or urban in character, for the following reasons:[81]

(a) the boundary vegetation, existing and proposed, is rural in character and will be retained;

(b) building platforms (**BPs**) will be set back a minimum of 20m (Lot 12) from the legal road boundary, which will be approximately (and in excess of) 27m from the edge of the sealed road;

(c) the minimum distance between BPs is 25m, which allows for generous areas of open space between buildings (but it is anticipated future building design would increase this space between dwellings. In contrast, in urban areas one would expect a minimum of 5m between buildings);

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[78] SR Skelton Rebuttal at [20].
[79] Operative Plan, 8.2.
[80] Proposed Plan, Chapter 2.
[81] SR Skelton Rebuttal at [24].

(d) significant rural character tree planting (234 trees) will be undertaken in the site and the existing orchard will be retained;

(e) design controls are imposed that will direct building and landscape design to reflect rural elements and avoid/mitigate adverse visual effects with regard to colour;

(f) the development will be adjacent to Arrowtown's urban areas, and will not reflect the scale, intensity, setbacks, visual character or dominance of built form in the existing urban environment;

(g) buildings will not be dominant within wider open and vegetated areas.

[124] Mr Geddes addressed the issue of whether the proposal is "urban" or "rural" development in some detail, concluding that the average lot size of the proposed subdivision, being 4,568m^2, is akin to what is anticipated in the Rural Residential zone of the Operative Plan and Large Lot Residential B of the Proposed Plan.[82] He also noted that the Proposed Plan introduced the Wakatipu Basin Lifestyle Precinct with a minimum lot size of 6,000m^2, while achieving an average of 1ha.[83] He concluded that the minimum lot size of 4,000m^2 remains an appropriate threshold between residential densities and rural living densities.

[125] Ms Gathercole did not ascribe primacy to this issue, noting that the relevance of the reference to "urban" mainly relates to the location of the site in relation to the defined urban growth boundary and whether the objectives and policies in Chapter 4 of the Proposed Plan referring to urban development are relevant.

[126] Having said that, and relying on Ms Mellsop, she was of the view that the proposal is not of a rural living character, and is differentiated from rural development by its scale, intensity, visual character and the dominance of built structures. She considered it constitutes urban development, thereby engaging Chapter 4 of the Proposed Plan. However, under cross-examination, Ms Gathercole agreed that the

[82] Operative Plan: Rural Residential Zone – 4,000m^2 minimum; Proposed Plan: Large Lot Residential B – minimum density of 4,000m^2.

[83] Subdivision at this level would require a restricted discretionary activity consent.

proposal is of an "urban type" and "suburb"[84] and "more on the urban side but it is very – it is not a clear cut black and white answer".[85]

[127] Mr Doesburg submitted that the proposal is right on the line between rural and urban development, noting that some lots are smaller than 4,000m^2, and that the development appears to intend to connect to the reticulated water and wastewater system (despite providing some private infrastructure on site). Mr Todd submitted that the proposal constitutes rural living development and is not urban development. He acknowledged that the nature of the site would inevitably change from a rural character to a rural lifestyle character.

[128] We find that the proposal is arguably more rural-residential in nature than urban, largely because of the average lot sizes, which accord more closely with rural residential opportunities provided in the Operative and Proposed Plans than they do urban opportunities. Having said that, the proposed lot sizes are considerably smaller than those contemplated in the Precinct for rural living opportunities, and the proposal does not achieve the average lot size of 1ha. While located in a rural environment, the proposal in terms of scale, design, density and visual character calls to mind elements that are more suburban than rural. While there is a contrast between Arrowtown's residences and this proposal in terms of building set backs and minimum distances between buildings, it presents as an 'urban style' development in a rural landscape. Finally, we note that the reliance of the development on the public water and wastewater system is a characteristic that the Proposed Plan refers to in its definition of "urban development".

[129] We make no final finding on the point as we agree with the Council that the essential question is whether the proposal maintains and enhances landscape character and visual amenity given that is the focus of both planning documents.

Effects on visual amenity

[130] The Landscape JWS usefully set out the experts' opinions on the effects of the

[84] Transcript, page 210, line 23.
[85] Transcript, page 219, lines 15-18.

proposal from various agreed viewpoints, which they described as "Public viewpoints" and "Private viewpoints".

Public viewpoints

Walking tracks

[131] The Landscape JWS recorded that Mr Forsyth and Ms Mellsop considered the adverse effects on visual amenity from the public walking tracks on the escarpment to be moderate or moderate-high, depending on the elevation. Mr Skelton considered the effects to be moderate.[86]

[132] In her evidence, Ms Mellsop noted that walking tracks on the Cotter Avenue escarpment provide elevated views to the west over rural farmland and golf courses to the distant mountains surrounding the Wakatipu Basin. Urban development is visible in the foreground east of McDonnell Road, but views are otherwise dominated by vegetation, pasture and mountainous topography and have a high degree of visual amenity.[87]

[133] From higher parts of the walkways, Ms Mellsop considered that the proposed development on the eastern part of the site would be partially visible when deciduous trees are not in leaf. The development would be prominent in the mid-ground of the views – moderate or moderate-high adverse visual amenity effects depending on elevation and distance from the site. Development would be perceived as a spread of urban-style development beyond McDonnell Road and would detract from the perceived naturalness and rural character of the views.[88]

[134] Mr Skelton accepted that from the mid track are occasional views towards the site through breaks in the built form; that from more elevated portions of the track there are views above the site's existing high stature boundary planting to the internal parts of the site. He acknowledged that from the elevated parts of the tracks, parts of

[86] Landscape JWS at [36].
[87] HJ Mellsop EIC at [6.6].
[88] HJ Mellsop EIC at [6.7].

the proposed development may be visible.[89]

[135] Mr Forsyth recorded that he had not assessed the McDonnell Road/Cotter Avenue walking track.

[136] We find that the proposed development will be seen from certain parts of the walkways, appearing as domestic elements in an area that is still largely rural in character, comprised of vegetation, pasture and the mountains in the distance.

From public roads and private viewpoints

[137] For views from public roads, there was considerable disagreement between the landscape experts on the extent to which the proposal would affect views from McDonnell Road.

McDonnell Road

[138] The JWS recorded that Mr Skelton considered that the development cannot be seen from McDonnell Road other than if you are right in front of it (a 270m stretch of the road) and that the adverse effects on visual amenity were low. Ms Mellsop and Mr Forsyth considered adverse effects on views from McDonnell Road to be moderate in extent; from the part of McDonnell Road immediately adjoining the site – moderate to high adverse effects, while Mr Skelton considered the effect to be moderate and existing visual amenity from this location to be low.[90]

[139] Mr Skelton acknowledged some adverse effects on the visual amenity from McDonnell Road as visual access across the open character of the site's eastern extents will be reduced.[91]

[140] Mr Skelton considered the view across the site from the road is not memorable in the context of any wider ONLs, and the adverse visual effects will be very low in extent. In fact, Mr Skelton maintained that Ms Mellsop and Mr Forsyth were guilty

[89] SR Skelton EIC at [18]-[19].
[90] Landscape JWS at [37].
[91] SR Skelton EIC at [32].

of applying a tunnel vision approach to this matter, in effect ignoring a wider range of views available to the surrounding ONL and ONFs and landscape from just those available when viewed in front of the site and from McDonnell Road.

[141] Ms Mellsop's assessment in her evidence was that from various viewpoints on McDonnell Road:

(a) views of distant mountains currently available adjacent to the site would be obscured by houses and planting amounting to a moderate adverse effect;

(b) views to the west along the road, being one of the few remaining open views, would be obscured by the development;

(c) the concentration of visible houses would be perceived as another instance of urban style development spreading into the rural surrounds of the Arrowtown township;

[142] Immediately adjacent to the site, there would be adverse visual effects for pedestrians and cyclists, which Ms Mellsop described as moderate to high.[92]

[143] Mr Forsyth considered the proposed development will remove long views that are presently available from the site frontage; he assessed that once the proposed foreground planting is mature – at five years – the loss of visual amenity will be moderate-high.[93]

[144] We note that, in cross-examination, Ms Mellsop accepted that there are many places along McDonnell Road where you get the views of the surrounding mountains. Mr Forsyth accepted that from the elevated views you would not lose the views of the surrounding mountains across the site.[94]

[145] We find that the views across the site from McDonnell Road will be somewhat compromised by the development, but note the availability of other views to the surrounding ONL, ONFs and landscape.

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[92] HJ Mellsop EIC at [6.3] and [6.4].
[93] HD Forsyth EIC at Appendix C at [12.4]-[12.9].
[94] Transcript page 169, lines 1-15, page 262, line 6.

Hanan property

[146] The JWS recorded that, while there is some visibility of the site from the Hanans' property, Mr Skelton considered that views from the Hanans' property to the development will be partially mitigated through screening vegetation. Mr Forsyth disagreed.[95]

[147] Mr Forsyth particularly focussed on the effects on the Hanan property, assessing visual effects (from two houses) as high from their north/west boundary, and expressing scepticism that subsequent planting will succeed as indicated. From the Hanans' boundary – the rear driveway gate, he opined that a 2-level dwelling is likely to screen the view to the foreground hills, assessing the visual effects as high. And from the Hanans' site frontage, he noted that trees provide intermittent screening along the road boundary. He considered that the development will screen the majority of the present McDonnell Road boundary and open fields, and distant foreground views – assessing the adverse visual effects as high.[96] In answer to questions, he qualified his original opinion as to the effects of the proposal on rural views from the property (which he said would be completely removed), acknowledging that rural views would be removed from the main viewing threshold of McDonnell Road.[97]

[148] Ms Mellsop acknowledged that she had not visited any private properties in the vicinity to assess adverse visual effects.[98] She considered, however, that new dwellings and domestication would be clearly visible from parts of the Hanan property to the north. These include views from the access driveway and the building in the south-west corner of this property. The proposal would substantially alter the currently available rural views to open pasture and vegetation. Adverse effects on visual amenity are likely to be high initially but would be reduced to moderate over a period of 7-10 years as proposed screen planting matures.[99]

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[95] Landscape JWS at [38(a)].
[96] HD Forsyth EIC, Appendix C, [12.10]-[12.31].
[97] Transcript, page 259, lines 13-17 and page 262, lines 15-17.
[98] HJ Mellsop EIC at [6.12].
[99] HJ Mellsop EIC at [6.14].

Cotter Avenue and Advance Terrace

[149] Mr Skelton noted that Cotter Avenue and Advance Terrace are two public roads that traverse the upper edge of the Terrace. He noted that extensive residential development exists adjacent to those roads, and that views are occasionally available from these roads through gaps in built form and landscaping.[100]

[150] Mr Skelton considered the adverse effect from the Cotter Avenue and Advance Terrace properties to be low-very low; Ms Mellsop considered it to be moderate to moderate-high, depending on location. Mr Forsyth considered it to be moderate.[101]

[151] Ms Mellsop noted that dwellings on the western side of Cotter Avenue/Advance Terrace and on the escarpment face (accessed from McDonnell Road) are oriented to take advantage of the panoramic views over the Basin, which include the subject site. In her opinion, residents are likely to place a high value on these views and be sensitive to changes that reduce naturalness and visual amenity.[102]

Arrowtown

[152] Ms Mellsop considered that moderate-high adverse visual effects would be experienced by residents of urban dwellings across the road in Arrowtown and future houses adjoining the road in Arrowfields, as the proposed dwellings would be visually prominent within the view and would completely change the current open pastoral character to a large lot residential character.

[153] Mr Forsyth considered the adverse visual effect from the lower part of the Arrowfields development and the adjacent dwellings to the north of McDonnell Road to be moderate-high. Mr Skelton considered the effect to be moderate.[103]

[154] Ms Mellsop observed that the existing vegetation on the application site and the Hills golf course and the rising topography in the western part of the site would screen

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[100] SR Skelton EIC at [20].
[101] Landscape JWS at [38(c)].
[102] HJ Mellsop EIC at [6.12].
[103] Landscape JWS at [38(b)].

the proposed development from adjoining properties to the south and west.[104]

[155] In his rebuttal evidence, Mr Skelton provided a "Visibility Analysis" to support his assessment that the site is visually contained by landform, and the proposal's visual effects are highly limited. As described earlier, he concluded that Mr Forsyth and Ms Mellsop often viewed the site and proposal through "tunnel vision", concentrating only on the site and the effects the development may have on what is now a relatively open site. He stated that there was very little consideration of the wider visual amenity experienced from the site's visual catchment. He concluded that the site has a role as part of a much wider visual amenity or as part of wider expansive views, which also include golf courses, large areas of undeveloped VAL, ONL and ONF.[105]

[156] He gave an example of his assessment that the proposal will have low adverse visual effects on elevated public and private terrace views from east of the site. He assessed that the view to the wider ONL mountains will be completely maintained and the introduction of a rural living component to an urban and vegetated foreground will result in very little modification of the view. As against that, Ms Mellsop had assessed the visual effects as moderate-high and Mr Forsyth as high.[106]

[157] Mr Skelton referred to the scale of assessment by all experts and noted that, to achieve a moderate-high adverse effect, the bulk of the foreground to views of the ONL and across the Basin would need to be changed by either residential development, forestry or other modification, with significant loss of vegetation and visual access across open space. To achieve a high adverse visual effect, the above may occur in tandem with structures or vegetation which would partially screen views of the wider ONLs and Wakatipu Basin.[107]

[158] We find that there will inevitably be a change in the views to and across the site

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[104] HJ Mellsop EIC at [6.14].

[105] SR Skelton Rebuttal at 3-6. We record also Mr Todd's submission that some of Ms Mellsop's photographs were not as widely framed as they could have been, and Ms Mellsop's response that they were an aid to her assessment. We conducted our own inspection of the area and did not rely only on the photographs provided with the written evidence.

[106] SR Skelton Rebuttal at [7].

[107] SR Skelton Rebuttal at [8].

from various viewing points along Cotter Avenue and Advance Terrace, but note that the roads (save for one vacant site) are occupied by dwellings, so the opportunity for public viewing is limited to glimpses between houses. We find that there will be a measure of adverse visual effect experienced by residents across the road in Arrowtown and the future Arrowfields development. We agree with Ms Mellsop that it is likely that the proposed development will be screened from view of the Hanans' property once the planting has matured. We note, however, that the views the Hanans presently enjoy across the site will be largely lost.

[159] We also agree with Mr Skelton that the site's role as part of a wider visual amenity of golf courses and distant mountains is relevant. We find that the wider visual amenity will, however, be affected by the proposed development because it will sit in the foreground of those views and be a noticeable element to the viewer.

More distant viewpoints

[160] Feehly Hill is a small roche moutonnee near the western edge of Arrowtown. Mr Skelton acknowledged that the site is visible to the south from the summit of the Hill from a distance of approximately 1.11km.[108] Tobin's Track is a dirt road that ascends the Crown Terrace, where there are occasional breaks in vegetation on the lower portions from which views are available to the site. As the track ascends further south up the Crown Terrace, there are limited opportunities to see the site but at the top there are extensive views of Wakatipu Basin. The site is visible from this view.[109]

[161] Ms Mellsop acknowledged that the site would be seen from more distant elevated public places around Arrowtown. She accepted that the development would only form a small part of the expansive view from elevated surrounding vantage points but as with the Retirement Village and more recent development within Millbrook Resort, it would appear as an anomalous area of urban-style development within the rural landscape of the Basin floor. The subdivision would be inconsistent with the patterns of scattered rural living and golf course within the view and would be an obvious isolated extension of Arrowtown's urban form into the rural buffer. She

[108] SR Skelton EIC at [21].
[109] SR Skelton EIC at [22].

assessed the adverse effects on visual amenity as moderate to low from Tobin's Track and Feehly Hill.[110]

[162] Ms Mellsop noted that there would be partial views towards the site from parts of the public lookout at the top of Crown Range Road, and from some sections of the zigzag road leading to the public lookout. She assessed the adverse visual effects as very low.[111]

[163] Mr Forsyth assessed the effects from elevated public viewpoints as moderate-high to moderate. He noted that while the views were 1.1-1.95km distant the pattern and details of the landscape surrounding Arrowtown remains legible. He considered any change to be very noticeable.[112]

[164] Mr Skelton considered that, from all public views, the proposal will be seen in the context of other urban type development; that views from more elevated public and private spaces will still be available across the site to parts of the Wakatipu Basin and the ONL mountain landscape. He did not consider that the proposal's residential components will be visually prominent, or detract from views of the wider landscape, or from more distant views of the wider ONL mountains.

[165] While we acknowledge that distance will soften the impact on any views, we find that the proposed development is of sufficient size and intensity as to be noticeable in the landscape, and to add a domestic element to it. It will intrude into the open character of the landscape in this location.

Summary of visual effects

[166] In his closing submissions, Mr Todd submitted that Ms Mellsop and Mr Forsyth failed to properly consider the impact of the Retirement Village on the receiving environment, and that Mr Skelton's evidence should be preferred. Further, that the assessment of visual effects by Ms Mellsop and Mr Forsyth did not consider the

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110 HJ Mellsop EIC at [6.9] and [6.10].
111 HJ Mellsop EIC at [6.11].
112 HD Forsyth EIC at [8.5].

context of the overall views experienced from the various identified viewpoints – that their photographs represented merely an aid to their assessment; and gave a cropped impression of the views shown. Mr Todd submitted that Mr Skelton's visual evidence showed a much wider panoramic view as opposed to the cropped images of Ms Mellsop and Mr Forsyth. Finally, Mr Todd submitted that the Council witnesses did not properly assess the effects of the proposal in the context of the Proposed Plan, particularly LCU 24 and the characteristics and values that, he submitted, must be considered.

[167] Mr Doesburg relied on Ms Mellsop's evidence, which he said identified that the site is clearly visible from nearby views, including from McDonnell Road, some walkways in Arrowtown and areas along Cotter Avenue and Advance Terrace; also, that it is visible from elevated public areas like Tobin's Track and Feehly Hill. He also noted that Ms Mellsop did consider the impacts of the Retirement Village; that she simply has a different opinion to Mr Skelton.

[168] We had the benefit of detailed evidence from the three landscape witnesses on the effects of the proposal on visual amenity. While we have not determined that the level of adverse effects are as high as Ms Mellsop considered they are from some of the viewpoints, we find that, overall, the proposal will have moderate adverse effects on visual amenity.[113] We find that Ms Mellsop did, in assessing the visual context, consider not only the impact of the Retirement Village but also the wider landscape in which the site sits.

[169] While there is some opportunity for screening the proposed development, we consider that it will be visible in the landscape when viewed from most of the viewpoints to which our attention was drawn. We have identified the landscape's various qualities as including openness and a pastoral character, and find that the proposed development will result in some loss of those qualities.

[113] With reference to the Assessment Methodology used by the landscape witnesses and referred to earlier.

Effects on landscape character

Impact of Retirement Village on landscape character

[170] All landscape experts agreed that the Retirement Village is in the same landscape as the site and surrounds.

[171] Mr Skelton considered that it will be clear from McDonnell Road that within the village site is an urban character area; that urban character has critically undermined the urban edge of Arrowtown, and the break in rural patterning created by the village has stuttered the entry experience to Arrowtown experienced from McDonnell Road. He considered that, especially when viewed through the lens of a visitor, the more open land between the Retirement Village and Arrowtown appears unfinished and incomplete "as if it was a pastoral remnant destined for future change". He also noted that these open lands have several existing consents and submissions to the Proposed Plan seeking development rights – which will reduce the existing open character of this in-between land.[114]

[172] Ms Mellsop is of the view that, with the notable exception of the Retirement Village, the landscape is perceived as being relatively coherent in its patterns of golf course, rural pastoral land, exotic vegetation and rural dwellings surrounded by trees.[115] She described the Retirement Village, and to a lesser extent the clusters of dense housing within Millbrook, as an anomalous element within the landscape.[116]

[173] Ms Mellsop acknowledged that while the urban form of the village is partially visible from McDonnell Road behind an existing hawthorn hedge, it is not visible from Centennial Road, Arrowtown Lake Hayes Road or Malaghans Road. She described these as the main approaches to Arrowtown from the south-east, south and west respectively, and noted that they carry more traffic than McDonnell Road. As a result, she does not agree that the village has eroded the entry experience to

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[114] SR Skelton EIC at [33]-[37]. (In that regard we note there are areas of proposed development on the Hills Golf Course: At the time of hearing these had not been approved. They are sought for inclusion in an appeal against the Proposed Plan.)

[115] HJ Mellsop EIC at [3.8].

[116] HJ Mellsop EIC at [3.13].

Arrowtown. For people approaching along McDonnell Road, it appears as an unexpected, isolated and anomalous instance of urban form, separated from Arrowtown by golf course parkland, pastoral and rural living land uses. She did not agree that it has undermined the urban edge as claimed by Mr Skelton. She considered that the rural greenbelt remains clearly legible, and the village takes up only a small percentage of land within the greenbelt.[117]

[174] Mr Forsyth considered that the form of the village is urban. He does not agree with Mr Skelton's assessment that the village has adversely affected and diminished the landscape values of the remaining land. That is because the village is in an elevated land area largely screened from local road views, and does not fall within the primary views of the main residential areas; its roadside boundaries are screened by a hedge and the road drops away from the terrace to the north. He observed that the majority of the southern entry on McDonnell Road contains landscape areas on its borders that reflect rural activity.[118]

[175] The experts agreed in large part on the attributes of the landscape, but disagreed on the extent to which the Retirement Village impacts the landscape's character. We find that the Retirement Village does impact the landscape in this area, and agree with Ms Mellsop's description that it is an anomalous element. We are aware that the Retirement Village is not finished and that only a small number of units have been built. It is inevitable therefore that it will assume more prominence in the landscape than it does at present. We do not, however, consider that the village has diminished the values of the remaining landscape to the point where those values are not worthy of protection. We consider there is still a sizable area in this part of the Basin that contains qualities that should be protected, as recognised in the Operative and Proposed Plans.

Absorption capacity

[176] There was disagreement between the experts as to the extent to which the

[117] HJ Mellsop EIC at [10.4]-[10.5].
[118] HD Forsyth EIC at [6.13]-[6.16].

landscape can absorb development. The Landscape JWS[119] recorded that Ms Mellsop considered there is a low to moderate-low capacity and that some development can be absorbed provided the distinction between urban and rural character is retained. Mr Skelton considered some development can be absorbed depending on the location and design, and Mr Forsyth considered the capacity varies depending on specific locations. Mr Skelton considers the wider receiving environment has a moderate to moderate-low capacity to absorb development.

[177] Contrary to his statement in the Landscape JWS, in his written evidence Mr Skelton stated that the landscape has a high capacity to absorb change.[120] He referred to the Proposed Plan and the Study, stating that they recognise that LCU 24 has a high capacity to absorb additional development. He said that the rating is predicated by the Study's assessment that the Retirement Village has compromised the urban edge of Arrowtown and added a distinct urban element in the LCU, and degraded the "greenbelt" effect of the LCU such that it has less tolerance for sensitive urban development. He agreed with that assessment.[121] He noted that the site is between the urban areas of Arrowtown and the Retirement Village – he considered that this confinement checks the spill of effects and contains them within the LCU.

[178] When considered in combination with existing and consented rural living and urban-style development within the landscape, Ms Mellsop's view was that the proposal would exceed the absorption capacity of the landscape.[122] She considered that the proposed development would take the landscape beyond the tipping point where its value as a rural edge to Arrowtown township is significantly undermined. She considered that, beyond McDonnell Road, which has become the de facto urban edge in this location due to the Urban Growth Boundary, there is no defensible landscape boundary that would contain further spread of large lot suburban-type development to the west.[123]

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[119] Landscape JWS at [33]-[35].
[120] SR Skelton EIC at [39]-[41].
[121] SR Skelton EIC at [39].
[122] HJ Mellsop EIC at [7.8].
[123] HJ Mellsop EIC at [7.9].

[179] Ms Mellsop stated that the effects on the landscape she identified could be avoided by substantially reducing the proposed number of dwellings and maintaining the open character of the area adjoining McDonnell Road; she suggested that part of the site west of the existing dwelling could absorb two appropriately designed residential lots without compromising the natural and pastoral character of the VAL.[124]

[180] Ms Mellsop disagreed with Mr Skelton's reliance on the Study's assessment of the landscape's absorption capability; she considered that reliance on that part of the Study was inappropriate; and that the Study identified absorption capacity to assist the Council in preparing a variation to the Proposed Plan for Wakatipu Basin. She said that the capacities did not necessarily translate into the notified or decisions version of the Proposed Plan.[125]

[181] Mr Forsyth considered that the development will have a domestic/suburban character, and did not think that the proposal meets an Operative Plan policy of being located in an area capable of absorbing development; the issue is one of extent and scale.[126]

[182] The Proposed Plan, in enabling a level of rural living in the Precinct, recognises that that part of the landscape does have capacity to absorb additional rural living without the loss of the characteristics that are valued by the community. As against that, in the Amenity Zone (of which the Precinct is a sub-zone) no additional subdivision of lots under 80ha is permitted.

[183] We note Ms Mellsop's evidence to the effect that the landscape could absorb two appropriately designed residential lots without compromising the natural and pastoral character of the VAL.

[184] We note also that the Study's rationale for the reference to the landscape having a high capacity to absorb change was not carried into the Proposed Plan, and as we have previously found we do not consider the Study should be used as an assessment

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[124] HJ Mellsop EIC at [8.3]-[8.4].
[125] HJ Mellsop EIC at [10.6]-[10.7].
[126] HD Forsyth EIC at [10.11]-[10.13].

tool under the Proposed Plan. As it presently stands, the Proposed Plan for the Precinct imposes limits on density (1 unit per hectare on average) and lot sizes (6,000m^2 with a 1ha average), and in that way provides guidance on what might be considered to be the acceptable absorption capacity of the landscape.

[185] The appellants urged us, in assessing the proposal, to pay close attention to LCU 24. They said that its substance is beyond challenge by appeal, and that it, in effect, provides the best and latest statement of character and visual amenity values in Arrowtown South; further, that it states that the capability of the unit to absorb development is high. The Council disagreed, and argued that LCU 24 may still change as a result of appeals and should be considered in that light.

[186] We determine that LCU 24 is relevant to our assessment, but note that our assessment is not limited to only the character and values identified but should extend to character and visual amenity values associated with the Amenity Zone more generally. The objectives, policies and assessment criteria to which we have already made reference make that clear. Finally, while the provisions of LCU 24 state that the capability of the unit to absorb development is high, we observe that the provisions of Chapters 24 and 27 are the response to that statement; they set minimum density and subdivision controls for the Precinct.

[187] We find that the landscape has a very limited capacity to absorb further development. The Proposed Plan articulates the extent of that capacity in terms of its minimum and average lot size requirements – it is for note that resource consent is required even if the minimum requirements are met. In any event, we prefer Ms Mellsop's opinion that the proposed development would take the landscape beyond the tipping point where its value as a rural edge to Arrowtown is significantly undermined.

The proposal's effects on landscape character

[188] The experts disagreed on the extent to which the proposal would affect landscape character. The Landscape JWS summarised their views.

[189] Ms Mellsop considered the adverse effect on the open pastoral character and remaining naturalness of the landscape would be moderate, as it would represent suburban sprawl across McDonnell Road.[127]

[190] Mr Skelton considered there will still be rural character remaining, and effects on natural character will be very low to negligible. The only adverse effect will be the loss of the pastoral portion from the eastern part of the site. The landscape character as a whole will not be adversely affected.[128]

[191] Mr Forsyth considered that, as a whole, the effect will be moderate as McDonnell Road forms the green edge to the urban development to the east, and this development will affect the legibility of this edge. The effects on the narrower landscape will be moderate-high.[129]

[192] In his evidence, Mr Skelton said that the site is part of "in-between land" along the McDonnell Road corridor; it is part of a remnant pastoral landscape, bookended by the urban areas of the Retirement Village and, with particular regard to visitors, appears unfinished and destined for future change.[130] He considered that the proposal will result in very little change to the landscape character. He acknowledged that the proposal will intensify the rural living character elements, but will not diminish the existing parkland character of the landscape, and will retain an appropriate level of open, rural character.[131]

[193] Ms Mellsop acknowledged that the receiving landscape does have capacity to absorb additional rural living without the loss of the characteristics that are valued by the community. However, she considered that there is little capacity to absorb change that: extends additional urban-style development into the greenbelt surrounding Arrowtown, or undermines the rural character of the approaches to Arrowtown; compromises remaining open character of land adjoining public roads; reduces

[127] Landscape JWS at [40].
[128] Landscape JWS at [41].
[129] Landscape JWS at [42].
[130] SR Skelton EIC at [44].
[131] SR Skelton EIC at [45].

legibility and naturalness; degrades the availability of views from public roads and elevated private and public viewpoints among others.[132]

[194] For reasons that we have already outlined, Ms Mellsop considered that the subdivision would represent suburban sprawl across McDonnell Road and would compromise the legibility of the urban edge in this location - although the site is a relatively small part of the receiving landscape, its location immediately west of the current urban edge (McDonnell Road) means it is a significant component of the rural buffer to Arrowtown. The development would also adversely affect the open space character of the receiving landscape and the availability of open views to rural land and to more distant landscapes.[133]

[195] Overall, it is Ms Mellsop's view that the proposal will have moderate adverse effects on the character and values of the remaining landscapes.

[196] Mr Forsyth considered that implementation of the proposal will have a high effect on existing landscape character because it will: remove land from future rural productive capacity; change the use from rural to domestic; introduce large structures close to the road frontage; lead to noise, light and vehicle effects; and remove the views into the site.[134]

[197] On this issue we prefer the evidence of Ms Mellsop, and predict that the proposal will have moderate adverse effects on the character and values of the landscape. Notwithstanding the Retirement Village and the denser housing within Millbrook, we find that there remains a clear edge between the urban development on the eastern side of McDonnell Road and the open space and rural character of the western side of the road. The road provides a clear line boundary between the two areas, and remains a defensible edge between urban and rural. We find that development at the density proposed will impact that openness and rural character and erode the "edge" by blurring the distinction. Mr Skelton considered that the development would provide a dissipating rural living edge to an existing urban area,

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132 HJ Mellsop EIC at [7.1]-[7.2].
133 HJ Mellsop EIC at [7.6].
134 HD Forsyth EIC at [9.14]-[9.17].

and in answer to questions acknowledged that it performs a remedial function given his view that the landscape in which it sits is a remnant pastoral landscape. However, that is not what the planning documents envisage or require.

[198] The Operative Plan requires the clear identification of the edges of existing urban areas while the Proposed Plan requires the maintenance of a defensible edge between areas of rural living in the Precinct and the rest of the Zone; and reinforcing/re-establishing a robust and defensible edge to Arrowtown.[135]

Effects of mitigation measures –planting

[199] From the Landscape JWS, Mr Skelton considered that planting along McDonnell Road will provide some low level visual mitigation, but acknowledged that is not its primary purpose. Ms Mellsop considered that mitigation measures do not reduce the adverse effects to an acceptable level and the planting will have some adverse effects as it will compartmentalise the landscape and restrict views to open pastoral land. Mr Forsyth considered that the planting will create a good environment for the inhabitants of the site, but agreed it will compartmentalise the landscape when viewed from elevated locations. Overall, he does not consider the planting has an adverse or positive effect.[136]

[200] We find that there will be some visual screening provided by the proposed planting, but that is not sufficient to ameliorate the effects of the proposed development. Further, the introduction of such planned planting will create a "formality" in the landscape that otherwise does not exist, and contributes to adverse effects on the rural character of the area.

Degree of domestication and cumulative effects on the landscape

[201] The Landscape JWS recorded that Mr Skelton considered that the landscape is rural living to urban parkland as shown by the golf courses, rural living and existing urban environment. It has crossed the threshold of being predominantly rural in

[135] Operative Plan Policy 4.2.5.7; Proposed Plan Policy 24.2.5.5 and Section 24.8, LCU 24.
[136] Landscape JWS at [43]-[45].

character, and accordingly the proposal would not change that character. Ms Mellsop agreed that it is predominantly rural living, but considered it is vulnerable to additional development and has not yet crossed the threshold into urban character. The proposal would cross the threshold, as it would be perceived as suburban rather than rural living, and would breach the current boundary (the road) between the rural and urban areas. Mr Forsyth considered the landscape as a whole would be moderately affected in terms of domestication. The effects on the western side of McDonnell Road would be high.

[202] We find that the landscape has not "crossed the threshold" from being predominantly rural in character to a point where it will be unchanged by the proposed development. The question is whether the proposal will further change the landscape and push it over the threshold. We find that, at the densities proposed, it is likely that this development will add yet another discordant element into the landscape, impacting the landscape qualities we have already identified and views to the Basin and across it to the mountains beyond from various viewpoints.

Residents' evidence

[203] For their part, those opposing the proposal had three concerns:

(a) effects on the Hanan property, which neighbours the site;

(b) effects on landscape character and amenity; and

(c) effects of allowing the proposal on Arrowtown's urban edge.

[204] Mr Jim Ryan, on behalf of various Arrowtown residents, presented evidence. Mr Ryan's family have been Arrowtown ratepayers for nearly 50 years, and have (as he described it) been passionately involved in their community. He described Arrowtown's reaction to local government reform over 30 years ago, which reform led to the establishment of the Arrowtown Planning and Advisory Group. He advised that the Group has greatly helped the Arrowtown village retain the character that it has today, enjoyed by locals and visitors alike. He likened Arrowtown to English villages, and noted that such villages are entirely constrained within their original

boundaries, and do not have any ad hoc developments adjoining them. He recorded that there are eight supporters to the proposal but not one person is from the village. He was concerned at what could potentially happen on the boundaries of Arrowtown if consent to this development was given.

[205] Mr Ken Swain gave evidence on behalf of 28 persons, advising that his group is separate from Mr Hanan's group. He said that he was there really representing the common person of Arrowtown. He stated that he believed that Arrowtown is a unique village; there are no hotels, there are no large buildings and his group would like to think it somewhat similar to a lot of the villages in Europe and England that people travel the world to see. He spoke of the Urban Growth Boundary around Arrowtown, confirmed in the case of *Monk v Queenstown-Lakes District Council* in 2013.[137] He said that the Urban Growth Boundary was widely acclaimed by almost all of Arrowtown's residents. He spoke of the huge panorama that is the mountains and the valleys, and that the residents' contention is that having housing in the foreground greatly detracts from the values and desirability of living along the Terraces. He noted that the Arrowtown Retirement Village is quite visible from along the Terrace, but acknowledged it has been approved, and that the residents of Arrowtown had very little, if any, input into the development as it was approved under the Special Housing Area laws. He believed that the Proposed Plan is subject to many appeals, and therefore is quite a long way from being approved. He does not believe that McDonnell Road is an entranceway to Arrowtown as the Council is promoting it as a bypass to Queenstown. He believed that people entering Arrowtown would stay on the higher part of Arrowtown and enjoy the views from there.

[206] Dame Elizabeth Hanan, the owner of 82 McDonnell Road, also gave evidence. She provided some history about her involvement in Arrowtown and the family's involvement with various plan changes over the years. She spoke of a plan change leading to the depiction of the urban/rural boundary of Arrowtown, keeping the rural zone on one side of McDonnell Road with the urban developments on the other side. She spoke also of the Study, observing that in her opinion there had been no input from the community to that document. She referred to her appeal against decisions

137 *Monk v Queenstown-Lakes District Council* [2013] NZEnvC 12.

on the Proposed Plan. She also described the purpose of the buildings on 82 McDonnell Road.

[207] Mr David Hanan made a brief opening on his own behalf and for the residents who were providing evidence under the Hanan umbrella. He stated that the Hanans were not aware of the zoning of the Guthrie land as Lifestyle Precinct. He advised that if they had known, they would have made a submission to the Proposed Plan. He criticised the Proposed Plan process, raising concerns about transparency and consultation. He stated that the residents are very concerned that the development sets a precedent for what is proposed in the Wakatipu Basin Lifestyle Precinct not just here but in all other precincts across the district. He said that the proposal clearly does not fit in with the rules of the proposed Lifestyle Precinct. He argued that the proposal devalues and degrades the environment, and that the proposal should be rejected.

[208] Mr David Hanan advised that his family intended to live at 82 McDonnell Road permanently in the near future. He said that the proposal will have a detrimental effect on the rural general landscape that the Operative Plan seeks to protect; and on rural amenity values. He raised concerns about noise, air quality, light pollution, among others.

[209] Statements from Ms Barraclough, Ms Judith Hanan and Mr John Hanan were taken as read.

Conclusion on visual and landscape effects

[210] We find that the proposal will have adverse effects on the landscape character and visual amenity of the area. In reaching those conclusions we were assisted by the agreement of all the landscape witnesses on the extent of the receiving landscape, the nature of the environment in which the site sits – relevant developments and consents, the attributes of the landscape and the anticipated changes to the landscape that would occur as a result of the proposed development. We have found that the proposal will have moderate adverse effects on visual amenity. Further, we find that the landscape has very limited ability to absorb further development without tipping it from rural to

a more rural-residential landscape. We acknowledge that the Retirement Village has impacted the landscape, but not to the point where it has diminished the values of the surrounding landscape.

G Planning

[211] As we have previously outlined, the planners conferenced and produced a JWS for this proceeding. They agreed on a number of matters: permitted activities within the relevant zones; the resource consents that have been issued within the vicinity of the subject site, and by and large they agreed on the relevant policy and plan provisions.

[212] What they did not agree on was issues relating to the permitted baseline, the weighting of the Study and whether the development could be characterised as urban or rural (and whether or not plan provisions relating to urban development applied to the assessment). We have already addressed these matters in our decision.

[213] The planners relied on the opinions of the respective landscape experts as the foundation for their different opinions on the extent to which the proposal meets the objectives and policies. They agreed that character, landscape and visual amenity are the primary areas of contention with the proposal. Given their reliance on the landscape experts, it is therefore unnecessary for us to traverse their analysis of the Plans' provisions and their related conclusions, save for addressing some remaining areas of disagreement.

[214] While the relevant objectives and policies were generally agreed by the planners, there were some key areas of disagreement as to the extent to which certain of them should influence our assessment.

[215] Mr Geddes and Ms Gathercole spent some time on the urban versus rural characterisation of the development. We have already addressed that matter. We consider, however, that it is relevant to have regard to the fact that both plans ascribe importance to urban growth boundaries and their maintenance.

[216] In terms of cumulative effects, and the Operative Plan's reference to domestication and over-domestication of the landscape, Mr Geddes agreed with Ms Gathercole insofar as those terms are not defined and represent a threshold at which the character of the landscape is diminished by a density of development that the land cannot absorb. However, he noted that the Plan does not provide any guidance as to where the threshold has been set in terms of domestication, nor does it provide instruction as to what to do if or when this threshold is exceeded. He also noted that those terms are not referenced in the assessment framework of the Proposed Plan.[138]

[217] There was disagreement with regard to whether the proposal is contrary to Policy 24.2.5.5 in the Proposed Plan, which directs the maintenance of a defensible edge between areas of rural living in the Precinct and the balance of the Zone. Ms Gathercole considered that, given the location of the building platforms and no obvious separation from the remainder of the Amenity Zone, the proposal will erode this edge and is contrary to the policy.

[218] Mr Geddes noted that outside that policy there is no other reference to "defensible edge" in Chapter 24, and there are no controls within the Proposed Plan framework that pertain to the specific maintenance of such edges. He noted that the proposal meets the required setback for buildings in relation to internal boundaries and that there is no plan or RMA definition as to what constitutes a defensible edge. He referred to Schedule 24.8 – LCU 24 and the reference to "a robust and defensible edge to Arrowtown" as having been "significantly compromised by the Arrowtown Lifestyle Retirement Village SHA, which confers a distinctly urban character in a prominent and sizable part of the unit". On his reading, the defensible edge included the greenbelt, which could include rural residential development. He concluded that the development is akin to a rural residential-type development, and it is therefore an acceptable element within the greenbelt and would not frustrate any current defensible edge or any future edge.

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[138] NK Geddes Rebuttal at [45], [46].

[219] We have addressed whether or not the proposal affects the maintenance of a 'defensible edge' in our findings on the effects of the proposal on landscape character. We have found that the proposal will erode that edge.

H The Commissioners' Decision

[220] Under s 290A, we are obliged to have regard to the Commissioners' Decision. Our findings on effects generally accord with those made in that decision. We note, however, that the Proposed Plan has now moved further through the process and has, therefore, been more fully considered in our decision.

I Evaluation

[221] We now have to exercise our discretion in the light of our findings. In doing so, we are to have regard to such matters listed in s 104 of the Act as are relevant. The exercise of our discretion requires us to make a judgement in terms of s 104B of the Act to grant or refuse consent. That judgement has to be made to achieve the purpose and principles of the Act set out in Part 2.

[222] In this case the effects of the proposal on visual amenity and landscape character were to the forefront of our consideration, as were the objectives and policies contained in each Plan. Both planning documents focus on the value of the district's landscapes.

[223] In the Operative Plan, the key resource management issue for the VAL is managing adverse effects of subdivision and development (particularly from public places, including public roads) to enhance natural character and enable alternative forms of development where there are direct environmental benefits.

[224] Importantly, VAL are described as wearing "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".[139]

[139] Chapter 4, Issue 4.2.4(3) Operative Plan.

[225] The Operative Plan's objectives and policies address landscape and visual amenity values, focussing on the avoidance, remedying or mitigation of adverse effects; particularly development that is highly visible from public areas and visible from public roads.

[226] In the Operative Plan, detailed assessment criteria to guide the assessment of subdivision and development proposals are focussed on effects on natural and pastoral character, including whether the development will compromise the natural or arcadian pastoral character of the surrounding visual amenity landscape, result in over-domestication; the extent of visibility of development – when viewed from any public place or if it is visually prominent such that it detracts from public or private views; form and density of development; cumulative effects of development on landscape, including whether the development is likely to lead to further degradation or domestication of the landscape, which represents a threshold with respect to the vicinity's ability to absorb further change, among others.

[227] The Proposed Plan, in the Amenity Zone and its sub-zone the Precinct, has as its purpose to "maintain and enhance the character and amenity of the Wakatipu Basin". The Amenity Zone is described as a "distinctive and high amenity value landscape located adjacent to, or nearby to, Outstanding Natural Features and Landscapes".[140]

[228] The Proposed Plan articulates the values and characteristics of the Wakatipu Basin. It has divided the Basin into 24 Landscape Character Units, which are a tool to assist the identification of the particular landscape character and amenity values sought to be maintained and enhanced. Objectives and policies require that subdivision and development has to maintain or enhance the landscape amenity values identified in Schedule 24.8 – Landscape Character Units, maintain or enhance landscape character and visual amenity values associated with the Amenity Zone and Precinct and surrounding landscape; and in areas which Schedule 24.8 identifies as having a sense of openness and spaciousness, maintain those qualities. For the Precinct, the objective is to provide that rural living opportunities are enabled,

[140] Chapter 24.1 Zone Purpose, Proposed Plan.

provided landscape character and visual amenity values are maintained or enhanced.

[229] We have been guided by the assessment criteria in both Plans, but note that the Proposed Plan's criteria relate to restricted discretionary activities.

[230] The proposal is a non-complying activity under the Proposed Plan[141] because it does not meet the minimum and average lot sizes. It is important to note that the Precinct seeks to avoid adverse effects by implementing minimum and average lot size standards along with other controls. We refer particularly to Policy 24.2.5.4, which provides that minimum and average lot size standards will be implemented "so that the landscape character and visual amenity values of the Precinct, as identified in Schedule 24.8 – Landscape Character Units, are not compromised by cumulative adverse effects of the development".

[231] The criteria for developments that are restricted discretionary activities in the Proposed Plan include whether the proposal's form, scale and design and finished materials adequately respond to the identified landscape character and visual amenity qualities of the Landscape Character Units set out in Schedule 24.8; the extent to which development maintains visual amenity in the landscape, particularly from public places, among others. For subdivision, there is reference to objectives and policies and the extent to which the location of buildings complements the existing landscape character, visual amenity values and wider amenity values of the Wakatipu Basin Amenity Zone and Precinct.

[232] We have therefore considered maintenance or enhancement of the landscape character or amenity values identified in LCU 24; whether the proposal will compromise the landscape and amenity values of the area: taking into account the attributes of the landscape that we have already discussed and the descriptions of the Unit, including "Sense of Place", "Potential landscape issues and constraints…" and "Environmental characteristics and visual amenity values to be maintained and enhanced".

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[141] However, for the purposes of our overall assessment, the proposal is 'discretionary' in terms of s 88A of the Act.

[233] We have previously set out the particular parts of LCU 24 that we consider are relevant to this proposal. We note the reference to the Unit displaying "a low level of naturalness as a consequence of the level of existing and anticipated built development together with the golf course patterning" and we also note that "the unit reads as part of the swathe of golf courses and rural residential development that frame the western and southern edges of Arrowtown and effectively function as a "greenbelt" to the village. However, this "'greenbelt' effect… has been significantly compromised by the Arrowtown Lifestyle Retirement Village SHA which confers a distinctly urban character in a prominent and sizable part of the unit".

[234] Finally, the environmental characteristics and visual amenity values to be maintained and enhanced have been described as "views from McDonnell Road and Centennial Avenue to the surrounding mountain/river context. Reinforcing/re-establishing a robust and defensible edge to Arrowtown".

[235] While compromised, it is clear to us that the Unit is still viewed as providing a role as a "greenbelt" to the Arrowtown village.

[236] Having said that, we note that the site, given its Precinct zone, is presently considered as being suitable for rural living opportunities. Two issues arise in that regard. The first is that the Precinct zoning of the site is under challenge by way of appeal, and the second is that the proposal does not comply with the Precinct's minimum and average lot sizes for subdivision and development. The proposal does not meet those requirements by quite some margin.

[237] In considering the effects of the proposal, we record first our finding that the landscape displays a pastoral character and openness that is in stark contrast to urban Arrowtown. We consider the proposal is more residential-suburban than urban, but have made no final finding on this point given that it is the effects of this proposal on the landscape rather than how it is characterised that are at issue.

[238] The extent to which the landscape will change as a result of the proposed development was agreed by the experts and outlined earlier in our decision.

[239] We have previously set out our findings on the effects of the proposal on visual amenity and landscape character.

[240] We find that the scale and nature of the proposal will adversely impact and compromise the visual amenity values and landscape character of the area. We consider that development of this scale will be a discordant element in the landscape in this location and will blur what is presently a clear urban edge to Arrowtown provided by McDonnell Road.

[241] We find that the proposal is, therefore, contrary to those objectives and policies in both plans that address landscape character and visual amenity values.

[242] We acknowledge the appellants' efforts to mitigate the effects of the proposal with lot design, building platform location, landscape and planting initiatives. However, we consider that the proposal is at a scale which does not sit comfortably in this landscape. We note that the Proposed Plan may change so as to potentially alter the zoning of this site, or the permitted minimum lot sizes in a way that either enables further development or constrains that development. At this time, however, we cannot predict the outcome of the Proposed Plan appeals process.

Plan integrity

[243] The Council argued that granting consent to the proposal has the potential for undesirable precedent effects or impacts on plan integrity; it potentially would provide an indication that the expectations of the Proposed Plan can be challenged. Mr Doesburg submitted that granting consent to a development that breaches minimum and average lot sizes is likely to result in an expectation that similar proposals in the Precinct would be approved. He pointed to other sites on McDonnell Road and adjacent to the Retirement Village.

[244] Mr Todd did not accept that as a likely result, noting that while the proposed density is non-complying, there is a pathway for developments that breach lot sizes to be approved; each must be considered on its merits. He submitted that, unlike the Amenity Zone, there is no clear direction in the objectives and policies of the Precinct

for lot sizes to adhere to the 6,000m^2 minimum/1ha average. Mr Todd also submitted that it is relevant to note that the proposal is assessed as a discretionary activity, given the timing of its lodgement. Finally, he noted that the appellants have an outstanding appeal challenging minimum lot sizes in the Precinct.

[245] The Proposed Plan has a chapter dedicated to the Wakatipu Basin. Its purpose is supported by objectives and policies. Those provisions focus on landscape character and amenity values, and for the Precinct also address rural living opportunities with reference to those values. It is clear that the Precinct's rules put in place minimum and average lot size standards, among others, to ensure that the landscape character values and visual amenity identified in the LCU are not compromised. There is, therefore, a clear direction in the objectives and policies. Having found that the proposal will adversely affect landscape character values and visual amenity, we find that granting consent would impact the integrity of the Proposed Plan and have the potential to create expectations that similarly framed proposals would gain consent.

Part 2

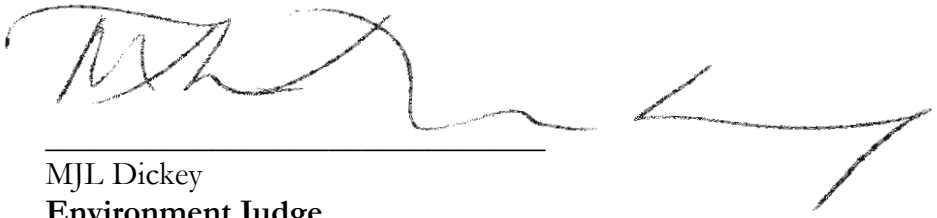
[246] Counsel agreed that reference may be had to Part 2, given the age of the Operative Plan and the stage of the Proposed Plan. Mr Todd submitted that the proposal accords with Part 2 as it will enable land to be used for a productive purpose; is an efficient use of resources; it maintains and enhances amenity values and the quality of the environment and the finite characteristics of natural and physical resources – as all are informed by reference to the LCU. We disagree for the reasons we have outlined.

[247] Having considered the provisions of Part 2, and the effects of the proposal, informed by reference to both planning documents, we find that the proposal does not accord with Part 2 of the Act.

J Conclusion

[248] Having considered the effects of the proposal and the relevant provisions of the Operative and Proposed Plans, consent should be refused. The appeal is therefore declined. Costs are reserved. Any application for costs is to be filed within 10 working days and responses within five working days of receipt of any application.

For the Court:



MJL Dickey
Environment Judge

Summary of Operative Plan and Proposed Plan issues, objectives, policies and assessment matters

Operative District Plan

Provisions	Description
Part 4 – District wide	
Section 4.2.4(3) Visual Amenity Landscapes	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 • landscapes which include ridges, hills, downlands or terraces; or • a combination of the above. The key resource management issues for the visual amenity landscapes are managing adverse effects of subdivision and development (particularly from public places including public roads) to enhance natural character and enable alternative forms of development where there are direct environmental benefits.
Objective 4.2.5	Subdivision, use and development being undertaken in the District in a manner which avoids, remedies or mitigates adverse effects on landscape and visual amenity values.
Implementing Policies	
Policy 1 Future development	directs to avoid, remedy or mitigate the adverse effects of development and/or subdivision in areas where landscape and visual amenity values are vulnerable to degradation, and to encourage development/subdivision in areas that have greater potential to absorb change; seeks to ensure subdivision/development harmonises with local topography and other values.
Policy 4 Visual Amenity Landscapes	directs that the adverse effects of subdivision and development are avoided, remedied or mitigated in VALs that are highly visible from public areas and visible from public roads. It also requires the mitigation of loss of or enhancement of natural character by appropriate planting and landscaping.
Policy 6 Urban Development	directs that the adverse effects of urban subdivision and development in VAL are avoided, remedied or mitigated by avoiding such development along roads.
Policy 7 Urban Edges	to identify clearly the edges of existing urban areas; any extensions to them and any new urban areas.
Policy 8 Avoiding cumulative degradation	directs that in applying (inter alia) policies 1 and 4 the density of subdivision does not lead to over-domestication of the landscape.
Policy 9 Structures	directed at preserving the visual coherence of landscapes. For VALs, by screening structures from roads and other public places by vegetation.

Provisions	Description
Policy 17 Land use	is directed at encouraging land use in a manner that minimises adverse effects on the open character and visual coherence of the landscape.
Part 4.9 **Urban Growth**	outlines identified issues arising from urban growth. It states that the District Plan identifies that most of the growth will occur within the existing and proposed residential zoned areas.
Objective 1	requires that growth and development is consistent with the maintenance of the quality of the natural environment and landscape values.
Objective 9	requires that the scale and distribution of urban development is effectively managed.
Policies 9-11	to limit the growth of Arrowtown, to ensure that the development within the Arrowtown Urban Growth boundary provides for certain matters; to recognise the importance of the Open Space pattern that is created by the inter-connections between the golf courses and the other Rural General land.
Explanation and Principal Reasons for Adoption	The Arrowtown boundary has been defined to manage the scale and location of urban growth in and around the settlement, and to assist in giving effect to the Arrowtown Plan 2003. This recognises the need to efficiently utilise existing development capacity to provide for identified local needs. Facilitating a designed urban edge with landscaped gateways will enhance the element of surprise when entering the town. The character and identity of Arrowtown and the surrounding landscape is important to the area's economy. It is therefore important to preserve or enhance the setting of the settlement. It is also important to recognise the significant inter-relationship between the rural reserves around the fringe of town and the urban environment, particularly the contribution that they make to the amenity value of the area and the wellbeing of locals and visitors. These measures will enable development proposals outside the boundary to be assessed for the impact that they would have on the effectiveness of the boundary and maintaining a separation of urban and rural environments.
Part 5 – Rural Areas	
Objective 5.2.1 Character and Landscape Value	to protect the character and landscape value of the rural area by promoting sustainable management and controlling adverse effects of inappropriate activities.
Implementing Policies	
Policies 1.1, 1.4, 1.6, 1.7, 1.8.	consider fully the District-wide landscape objectives and policies when considering subdivision, use and development in the Rural General zone; seek to ensure activities occur only where the character of the rural area will not be adversely impacted; adverse effects on the District's landscape values are avoided, remedied or mitigated; the visual coherence of the landscape is preserved; avoid, remedy or mitigate adverse effects of the location of structures
Objective 3 Rural Amenity	to avoid, remedy or mitigate adverse effects of activities on rural amenity.
Implementing policies	
Policy 3.5	to ensure residential dwellings are set back from property boundaries, so as to avoid or mitigate adverse effects of activities on neighbouring properties.

Assessment matters	
R 5.4.2	direct assessment as to: (d) effects on natural and pastoral character; (e) visibility of development; (f) form and density of development; (g) cumulative effects on the landscape; and (e) rural amenities.
R 5.4.2.2(3)	Assessment criteria include: (a) Effects on natural and pastoral character. Take into account: … (ii) whether … the development will compromise the natural or arcadian pastoral character of the surrounding Visual Amenity Landscape; (iii) … degrade any natural or arcadian pastoral character … by causing over-domestication of the landscape; (iv) whether any adverse effects identified in (i) – (iii) above are or can be avoided or mitigated by appropriate subdivision design and landscaping, and/or appropriate conditions of consent… (b) Visibility of Development Whether the development will result in a loss of the natural or arcadian pastoral character of the landscape, having regard to whether and the extent to which: (i) the proposed development is highly visible when viewed from any public places, or is visible from any public road …; and (ii) the proposed development is likely to be visually prominent such that it detracts from public or private views otherwise characterised by natural or arcadian pastoral landscapes; (iii) there is opportunity for screening or other mitigation… which does not detract from or obstruct views of the existing natural topography…; (iv) the subject site and the wider Visual Amenity Landscape of which it forms part is enclosed by any confining elements of topography and/or vegetation; … (vi) any proposed roads, earthworks and landscaping will change the line of the landscape or affect the naturalness of the landscape…; (c) Form and Density of Development. Take into account whether: (i) there is the opportunity to utilise existing natural topography to ensure that development is located where it is not highly visible when viewed from public places; … (iii) development is concentrated in areas with a higher potential to absorb development while retaining areas which are more sensitive in their natural or arcadian pastoral state; (iv) the proposed development, if it is visible, does not introduce densities which reflect those characteristic of urban areas; … (d) Cumulative effects of development on the landscape. Take into account: (i) the assessment matters detailed in (a) to (d) above; (ii) the nature and extent of existing development within the vicinity or locality;

Assessment matters	
	(iii) whether the proposed development is likely to lead to further degradation or domestication of the landscape such that the existing development and/or land use represents a threshold with respect to the vicinity's ability to absorb further change; (iv) whether further development as proposed will visually compromise the existing natural and arcadian pasture character of the landscape by exacerbating existing and potential adverse effects; (v) the ability to contain development within discrete landscape units as defined by topographical features such as ridges, terraces or basins, or other visually significant natural elements,… ; … (vii) whether the potential for the development to cause cumulative adverse effects may be avoided, remedied or mitigated by way of covenant, consent notice…. Note: For the purposes of this assessment matter the term "vicinity" generally means an area of land containing the site subject to the application plus adjoining or surrounding land (whether or not in the same ownership) contained within the same view or vista as viewed from: … (e) Rural Amenities. Take into account whether: (i) the proposed development maintains adequate and appropriate visual access to open space and views across arcadian pastoral landscapes from public roads and other public places; and from adjacent land where views are sought to be maintained; … (iv) landscaping, including fencing and entrance ways are consistent with traditional rural elements, particularly where they front public roads. …
Rule 5.4.2.3	General Assessment Matters, particularly subparagraph (iv) (All Buildings) and subparagraph (xxvi) Residential Units – Discretionary and Non-Complying Activities
Rules 15.2.6.4 and 15.2.7.3	Lot sizes and Dimensions Criteria

Proposed Plan

Provisions	Description
Part Two: Strategy	***Strategic Direction***
Strategic Objectives	
Objective 3.2.4	the distinctive natural environments and ecosystems of the District are protected.
Objective 3.2.5	the retention of the District's distinctive landscapes.

Strategic policies	
Urban Development	
Policy 3.3.13	apply Urban Growth Boundaries (**UGBs**) around the urban areas in the Wakatipu Basin …
Policy 3.3.14	apply provisions that enable urban development within UGBs and avoid urban development outside of the UGBs…
Rural Activities	
Policy 3.3.22	provides for rural living opportunities in areas identified on the District Plan maps as appropriate for rural living developments…
Policy 3.3.23	seeks to identify areas on the District Plan maps that are not within ONL or ONF that cannot absorb further change, and avoid residential development there.
Policy 3.3.24	seeks to ensure that cumulative effects of subdivision and development do not result in the areas losing their rural character.
Wakatipu Basin	***Chapter 24***
	Zone Purpose The chapter applies to the Wakatipu Basin Rural Amenity Zone and its sub-zone the Wakatipu Basin Lifestyle Precinct. Its purpose is "to maintain and enhance the character and amenity of the Wakatipu Basin". The Landscape Character Units are "a tool to assist identification of the particular landscape character and amenity values sought to be maintained and enhanced. Controls on the location, nature and visual effects of buildings are used to provide a flexible and design-led response to those values". The purpose of defining the Precinct "is to identify areas within the broader Rural Amenity Zone that have the potential to absorb rural living and other development, while still achieving the overall purpose of the Rural Amenity Zone. The balance of the Rural Amenity Zone is less enabling of development, while still providing for a range of activities suitable for a rural environment…" The Zone Purpose also addresses controls on buildings and consenting requirements.
Objective 24.2.1	landscape character and visual amenity values in the Wakatipu Basin Rural Amenity zone are maintained or enhanced.
Policies	
Policy 24.2.1.1	requires a minimum net site area of 80ha be maintained within the Wakatipu Basin Rural Activity Zone outside of the Precinct.
Policy 24.2.1.2	seeks to ensure subdivision and development is designed to minimise inappropriate modification to the natural landform.
Policy 24.2.1.3	seeks to ensure that subdivision and development maintains or enhances the landscape character and visual amenity values identified in Schedule 24.8 – Landscape Character Units.

Policy 24.2.1.4	seeks to maintain or enhance landscape character and visual amenity values associated with the Rural Amenity Zone including the Precinct and surrounding landscape context (inter alia) by control of the colour, scale, form, coverage, location (including setbacks from boundaries) and height of buildings and associated infrastructure, vegetation and landscape elements.
Policy 24.2.1.5	requires all buildings to be located and designed so that they do not compromise the landscape and amenity values and the natural character of an ONF or ONL that are adjacent, or where the building is in the foreground of views from a public road or reserve of the ONF or ONL.
Policy 24.2.1.11	provides for activities whose built form is subservient to natural landscape elements and that, in areas Schedule 24.8 identifies as having a sense of openness and spaciousness, maintain those qualities.
Objective 24.2.5	enables rural living opportunities in the Precinct, provided landscape character and visual amenity values are maintained or enhanced. This objective and policies 24.2.5.1-24.2.5.6 apply to the Precinct only. In the event of a conflict between this objective and policies 24.2.1-24.2.4, this objective prevails.
Policies	
Policy 24.2.5.1	provides for rural living, subdivision, development and use of land where it maintains or enhances the landscape, character and visual amenity values identified in Schedule 24.8 – Landscape character units.
Policy 24.2.5.2	promotes design-led and innovative patterns of subdivision and development that maintain or enhance the landscape, character and visual amenity values of the Wakatipu Basin overall.
Policy 24.2.5.4	implements minimum and average lot size standards in conjunction with standards controlling building size, location and external appearance, so that the landscape, character and visual amenity values of the Precinct, as identified in Schedule 24.8 – Landscape Character Units, are not compromised by cumulative adverse effects of development.
Policy 24.2.5.5	maintains a defensible edge between areas of rural living in the Precinct and the balance of the Zone.
Restricted Discretionary Activity Assessment Criteria include:	
Rule 24.7.5	(a) response to the identified landscape character and visual amenity qualities of the landscape character units set out in Schedule 24.8 – Landscape Character Units and the criteria set out below (b) the extent to which the development complements the existing landscape character and visual amenity values, including consideration of … (d) the extent to which the development maintains visual amenity in the landscape, particularly from public places … (g) the extent to which the development avoids, remedies or mitigates adverse effects on the features, elements and patterns that contribute to the value of the adjacent or nearby ONLs and ONFs.

Subdivision and Development - Chapter 27	
Objectives and Policies	
Objective 27.2.1	subdivision that will enable quality environments to ensure the District is a desirable place to live, work and play, together with policies 27.2.1.3, 27.2.1.4, 27.2.1.5.
Objective 27.2.2	subdivision design achieves benefits for the subdivider, future residents and the community together with policies 27.2.2.1 and 27.2.2.6.
Objective 27.2.4	natural features, indigenous biodiversity and heritage values are identified, incorporated and enhanced within subdivision design, together with Policies 27.2.4.1 and 27.2.4.4.
Restricted Discretionary Activity Assessment Criteria include:	
Rule 27.5.9 (a) and (b)	Matters for discretion include location of building platforms and accessways, subdivision design and lot layout.
Rule 27.9.3.3	Assessment matters include: General a. the extent to which the proposal is consistent with the objectives and policies relevant to the matter of discretion… Subdivision Design c. the extent to which the location of future buildings, ancillary elements and the landscape treatment complements the existing landscape character, visual amenity values and wider amenity values of the Wakatipu Basin Rural Amenity Zone or Wakatipu Basin Lifestyle Precinct … e. the extent to which the development maintains visual amenity from public places and neighbouring properties. f. whether clustering of future buildings or varied allotment sizes … would offer a better solution for maintaining a sense of openness and spaciousness k. whether the proposed subdivision provides an opportunity to maintain landscape character and visual amenity through the registration of covenants.

Status of Proposed Plan appeals

[1] We requested advice from the Council as o the state of appeals against the Proposed Plan and relevant to this appeal. We were advised that provisions from Stage 1 and Stage 2 of the Proposed Plan are relevant. Many provisions have been appealed, some withdrawn, some settled by consent and some addressed in interim Environment Court decisions.

[2] The Environment Court has heard and issued decisions on some parts of Stage 1 – particularly "Topic 2 – Rural Landscapes". Decision 2.2 addresses the objectives and policies in Chapters 3 and 6 of the Proposed Plan. Decision 2.2 is an interim decision and provides a range of directions.[142]

[3] Chapter 3 provides the over-arching strategic direction of the Proposed Plan, and contains objectives and policies relating to urban growth and urban development, as well as policies relating to activities in the rural environment. A key issue addressed is whether Chapter 3 should "carve out" certain zones, such that Chapters 3 and 6 do not apply to those zones (**Exception Zones**) – the rationale being that some zones have been tailored to address the matters in ss 6(b) and 7(c) of the RMA such that the more general provisions in Chapters 3 and 6 need not apply.

[4] A recent decision of the Court, Decision 2.6,[143] confirms that the Wakatipu Basin Rural Amenity Zone could not be made an Exception Zone, at least at this time, which means that Chapter 3 continues to apply.

[5] Chapter 6, which addresses the management of landscapes "carves" out the Wakatipu Basin Rural Amenity Zone (Policy 6.3.3.A). That chapter does not, therefore, apply to our consideration of this proposal.

[6] Chapters 3, 24 and 27 are relevant to this appeal. Appeals most relevant to this appeal are:

- Policy 3.3.23 and Policy 3.3.24 have been appealed;

[142] *Upper Clutha Environmental Society Inc v Queenstown-Lakes District Council* [2019] NZEnvC 205.
[143] *Upper Clutha Environmental Society Inc v Queenstown-Lakes District Council* [2020] NZEnvC 159, 21 September 2020.

- an appeal by the Hanans against the decision to zone the site Wakatipu Basin Lifestyle Precinct (and another site similarly zoned);

- appeals seek to remove the 80ha minimum site area for the Wakatipu Basin Rural Amenity Zone;

- appeals by the appellants and others seeking to amend the Wakatipu Basin Lifestyle Precinct standards, including reducing the restricted discretionary minimum lot size from 6,000m^2 to 4,000m^2 and removing the average lot size of 1ha^2;

- various other provisions have been appealed, including from Chapter 24 – Wakatipu Basin:

    - Objective 24.2.1;

    - Policies 24.2.1.1 – 24.2.1.4 and 24.2.1.9 and 24.2.1.11-12;

    - Objective 24.2.5;

    - Policies 24.2.5.1 – 24.2.5.2, 24.2.5.4;

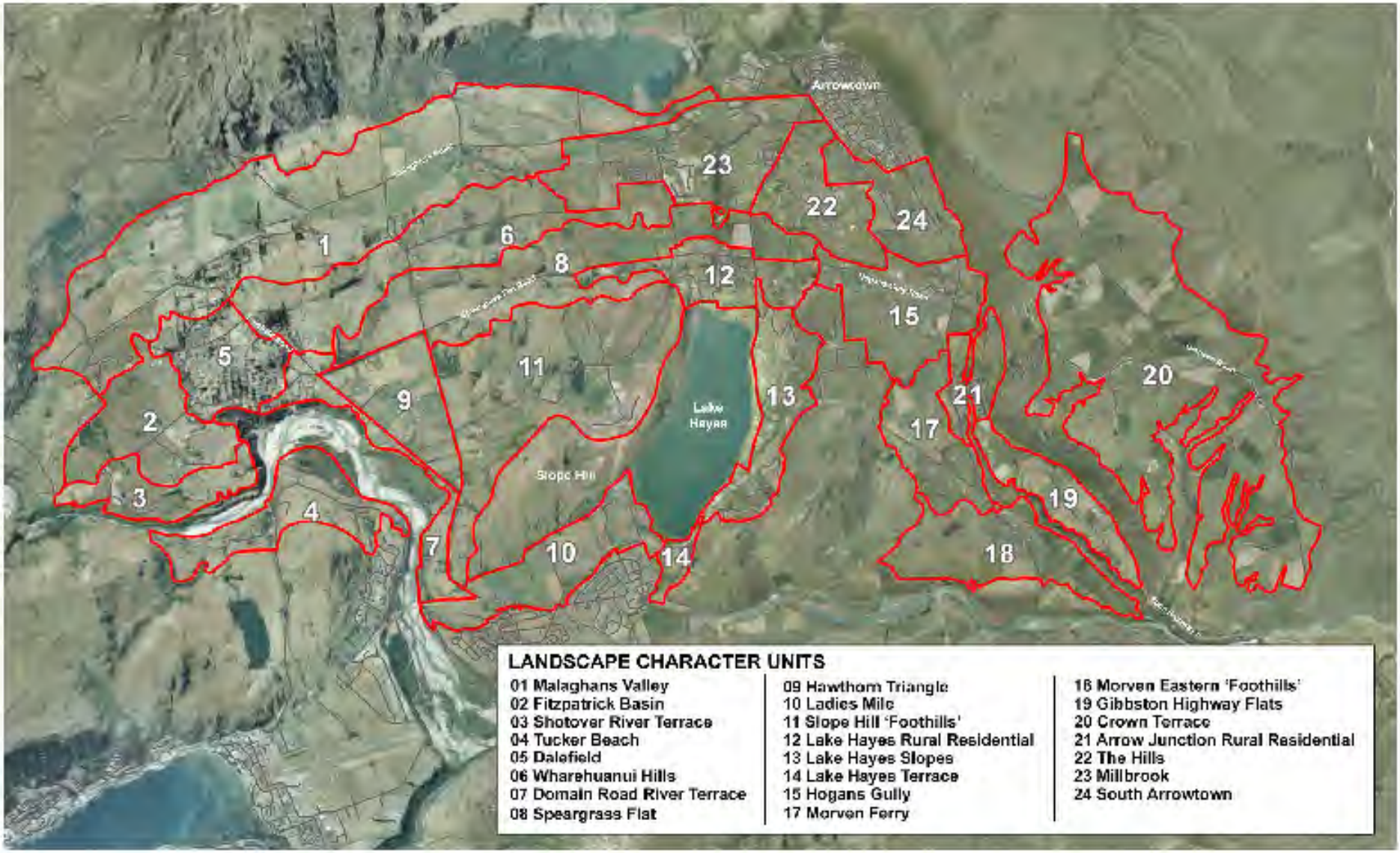
    - Policies 24.2.5.4 – 24.2.5.6;

    - Chapter 24 – Wakatipu Basin – Schedule 24.8 Landscape Character Units, LCU 24: Arrowtown South – under appeal in part – against the rows relating to "Sense of Place" and "Potential landscape opportunities and benefits associated with additional development".

[7] On 19 February 2021 the Court was advised that the appeal against a part of the LCU-24 Arrowtown South had been withdrawn. It related to "Sense of Place". One appeal remains in respect of that unit – relating to "Potential landscape opportunities and benefits associated with additional development".

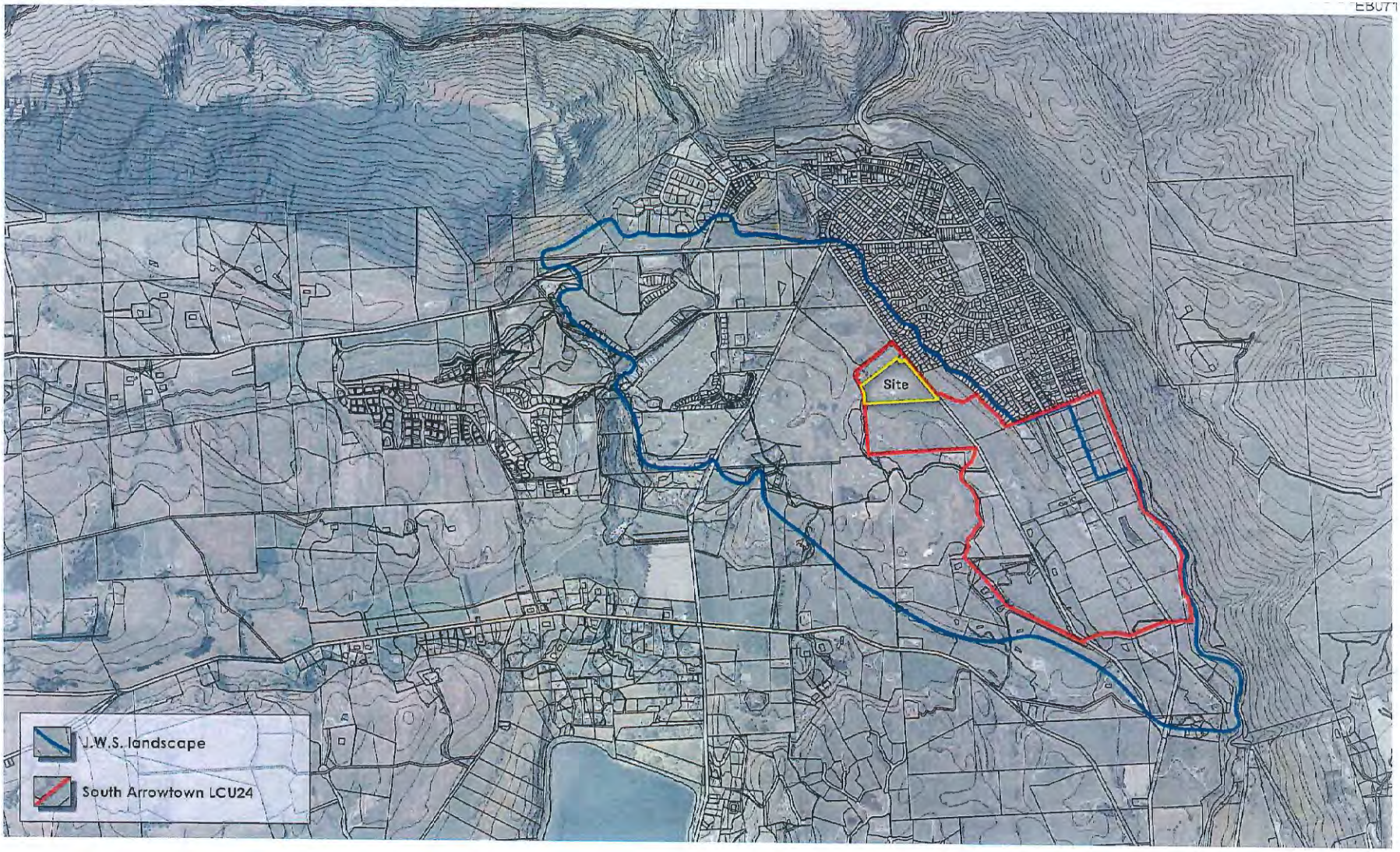
24.8 Schedule 24.8 Landscape Character Units

Extracts of Map showing all LCUs and Table for LCU 24: Arrowtown South



Landscape Character Unit	24: Arrowtown South
Landform patterns	The unit encompasses the flat to gently rolling land on the south side of Arrowtown and includes the steep escarpment that currently defines the south western edge of the village.
Vegetation patterns	Extensive exotic amenity planting around buildings and throughout the public golf course. A mix of native and weeds species along watercourses. Native and amenity pond edge plantings (in golf course) Scrub and weeds throughout escarpment. Extensive amenity plantings anticipated throughout the Arrowtown Lifestyle Retirement Village SHA (unbuilt).
Hydrology	A watercourse (running roughly parallel with McDonnell Road) and amenity ponds.
Proximity to ONL/ONF	Unit adjoins ONL (WB) along east boundary. Mid to long-range views to surrounding ONL mountain context.
Character Unit boundaries	North: Arrowtown Urban Growth Limit. East: ONL/study area boundary. South: cadastral boundaries. West: McDonnell Road, toe of hummocky hill landform pattern.
Land use	Golf course, rural residential (Arrowtown South Structure Plan) and retirement village (Arrowtown Lifestyle Retirement Village SHA) uses dominate. Open grazing land is required along the McDonnell Road frontage of the Arrowtown South Structure Plan area.
Settlement patterns	The Arrowtown South Special Zone anticipates a reasonably spacious patterning of rural residential development together with extensive riparian and escarpment restoration, pastoral areas and a landscape framework throughout the south western edges of Arrowtown to create an attractive edge to the settlement in conjunction with the adjacent golf courses and roads. The Arrowtown Lifestyle Retirement Village SHA anticipates an urban patterning of buildings ranging from one storey units along the McDonnell Road edge to three storey buildings in the central western margins of the area. Typical lot sizes: • Predominantly 4-10ha. • Some larger lots 10-20ha. The Arrowtown Lifestyle Retirement Village will have implications for future settlement patterns for the land around it south and west of McDonnell Road.
Proximity to key route	Located on Centennial Avenue and Mc Donnell Road, both of which comprise a popular routes between Arrowtown and SH6 / Arrow Junction.
Heritage features	Four heritage buildings/features identified in PDP.
Recreation features	No Council walkways/cycleways through the unit.
Infrastructure features	Reticulated sewer in part. No reticulated water and stormwater although it is expected that the Arrowtown Lifestyle Retirement Village SHA will be fully serviced.
Visibility/prominence	The area is visible from the elevated streets along the western edge of Arrowtown. The relatively close proximity means that the unit is prominent in the outlook. The unit is also visible from McDonnell Road and Centennial Avenue. Like The Hills, the unit is also visible from the western edges of the Crown Terrace, the tracks throughout the ONL to the east (Mt Beetham environs) and the zigzag lookout. The diminishing influences of distance and relative elevation in conjunction with the relative unimportance (visually) of the unit within the wider panorama reduces the unit's prominence.

Landscape Character Unit	24: Arrowtown South
Views	Key views relate to the view out over the area from the tracks throughout the ONL to the east (Mt Beetham environs) and the zig zag lookout. In these views the area reads as a part of the swathe of relatively low lying, undulating rural/rural residential land flanking Arrowtown. The outlooks from McDonnell Road, Centennial Avenue and the western margins of Arrowtown comprise a golf course and rural residential landscape on the edge of Arrowtown. The relatively wild and unkempt escarpment forms a prominent element in views from McDonnell Road. The recently approved Arrowtown Lifestyle Retirement Village SHA comprising a distinctly urban one - three storey high density retirement village development will also be visible in each of these outlooks (albeit to a varying degree depending on location). From within the unit, key views are expected to relate to the attractive long-range views to the surrounding ONL mountain setting.
Enclosure/openness	A variable sense of enclosure and openness deriving primarily from localised landform and vegetation patterns. The escarpment to the north east of the unit and the hummocky landform of The Hills to the south west provide containment to the McDonnell Road portion of the unit.
Complexity	Generally, a relatively complex unit as a consequence of the landform and vegetation patterns (golf course area), together with the dense arrangement of buildings (SHA area).
Coherence	A limited perception of coherence as a consequence of the varying landform and vegetation patterns and the somewhat anomalous urban character of development associated with the approved SHA located at some distance from the legible village edge (i.e. the escarpment).
Naturalness	The unit displays a low level of naturalness as a consequence of the level of existing and anticipated built development together with the golf course patterning. The relatively wild and unkempt character of the escarpment counters this to a limited degree.
Sense of Place	Generally, the unit reads as part of the swathe of golf courses and rural residential development that frame the western and southern edges of Arrowtown and effectively function as a 'greenbelt' to the village. However, this 'greenbelt' effect, together with the legibility of the escarpment as a robust defensible edge to Arrowtown has been significantly compromised by the Arrowtown Lifestyle Retirement Village SHA which confers a distinctly urban character in a prominent and sizeable part of the unit.
Potential landscape issues and constraints associated with additional development	Extent to which the unit can continue to operate as a 'greenbelt' to Arrowtown. Role of the escarpment as an edge to the village. Ensuring urban residential development is constrained within defensible boundaries and does not sprawl westwards and southwards in an uncontrolled manner into the existing, 'more rural' areas. Public golf course facility. Golf course landscape potentially suited to accommodating a reasonably high level of development (e.g. Millbrook). Close proximity to Arrowtown. Close proximity to urban infrastructure. Large-scaled lots suggest potential for subdivision. Urbanising effects of the approved Queenstown Country Club SHA suggest a tolerance for (sensitive) urban development. Potential for integration of walkways/cycleways. Riparian restoration potential. Easy topography.
Environmental characteristics and visual amenity values to be maintained and enhanced	Views from McDonnell Road and Centennial Avenue to the surrounding mountain/river context. Reinforcing/ re-establishing a robust and defensible edge to Arrowtown.
Capability to absorb additional development	High



patch

Landscape - Reference : PA18168 ISC7

0 100 200 300 500m
SCALE = 1:10,000 AT A1

Evidence of
Stephen Skelton

112 - 116 McDonnell Road
Context Plan - 11 March 2020

Annexure D

Summary ✓ 50pp 1/3/99

Decision No **A 10/94**

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an appeal under section 120 of the Act

BETWEEN **J J HANTON and others**

(Appeal RMA 280/93)

Appellants

AND **THE AUCKLAND CITY COUNCIL**

Respondent

AND **B P OIL NEW ZEALAND LIMITED**

Applicant

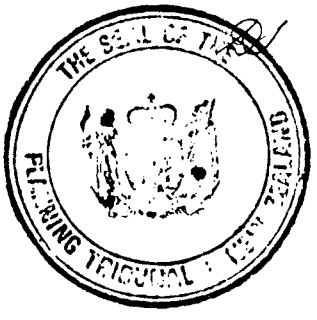
BEFORE THE PLANNING TRIBUNAL

Planning Judge DFG Sheppard (presiding)
Mr J R Dart
Mr F Easdale

HEARING at AUCKLAND on 13, 14, 15, 16, 17 and 20 December 1993

APPEARANCES

Dr K A Palmer for the appellants
Mr D A Kirkpatrick for the respondent
Mr R E Bartlett and Mr D A Allan for the applicant
Mr J B Childs for Waitemata Health Limited (leave to withdraw)



DECISION

INTRODUCTION

This is an appeal under section 120 of the Resource Management Act 1991 against a decision granting land-use consent (subject to conditions) for a new service station on a site at 1380 Great North Road, Waterview, Auckland City. By an amended notice of appeal the appellants sought that the respondent's decision be reversed and the application declined. It was common ground among the parties that by section 230 of the Resource Management Amendment Act 1993 the appeal is to be considered and decided as if that Act had not been passed. We accept the correctness of that.

The appellants are nine residents of the Waterview suburb. Waitemata Health Limited, which has premises in the vicinity of the site, appeared at the commencement of the appeal hearing and announced that it did not wish to take part in the hearing.

The applicant had previously applied unsuccessfully for planning consent under the former Town and Country Planning Act 1977 for a service station on the same site, the Planning Tribunal's decision disallowing its appeal being Decision A46/91 given in June 1991. There was no challenge to the applicant being free to make the present application despite the fate of the previous application.

Since the previous decision the installation of traffic signals at the intersection of Herdman Street and Great North Road, and proposals by the respondent for improvements to Great North Road (especially proposals for a raised or painted median, redesign of a deceleration lane leading to the service station, a separate lane for traffic turning right from Great North Road into Herdman Street, a splitter island to the south of the intersection on Great North Road, and a recessed bus stop) have altered circumstances that were material reasons for the Tribunal's earlier decision to disallow that appeal.

The Site and its Environs

The site fronts the eastern side of Great North Road about 500 metres south of the Waterview interchange with the North-Western Motorway. The site is owned by

the applicant, which purchased it from the former Auckland Area Health Board in 1989. The legal description of the land is Lot 1 on Deposited Plan 139519 being part Allotment 61 Parish of Titirangi and being the land comprised and described in Certificate of Title 82 D/616 North Auckland Registry.

The site has an area of 1.6250 hectares (reduced to 1.3540 hectares after proposed road widening) and is currently undeveloped. It has a frontage to the eastern side of Great North Road of 338 metres, and a maximum depth of about 70 metres. The eastern boundary runs more or less parallel to, and about 20 metres east of, the western bank of the Oakley Creek. The southern boundary runs at right angles to Great North Road, some 60 metres south of the intersection with Herdman Street, to meet the boundary of an esplanade reserve adjoining Oakley Creek.

The site is presently in pasture, and some small trees have been planted on it near the road frontage. The northern two-thirds of the frontage is marked by a row of trees, being acmenas between 6 and 10 metres high and eucalypts and poplars reaching about 20 metres in height. The remainder of the road frontage is open, except for a small acmena tree in the road reserve.

Great North Road is elevated about 5 metres above the Oakley Creek at the northern end of the site. The south-western portion of the site contains a generally flat area of some 20 metres by 70 metres, from which the land falls about 15 metres to the Oakley Creek. There is a walking path through the reserve near the creek from the northern part of which the site is screened from view by trees and shrubs between the path and the creek. The southern end of the site is more open, and views of the site can be gained from that part of the walking path.

To the east of the site beyond the esplanade reserve there are institutional buildings formerly Carrington Hospital and associated health-care facilities and to the south-east there is Carrington Technical Institute. To the west of the site, on the other side of Great North Road, is the residential suburb of Waterview, which comprises mainly single-storey detached houses, 40 to 50 years old, with some infilling development of sites, particularly those fronting Great North Road.

Great North Road is a busy arterial road carrying on average more than 45,000 vehicles per day with a peak two-way flow of up to 4,100 vehicles per hour (in the evening peak); and has a sealed carriageway width of 13 metres marked in two

lanes in each direction. Herdman Street carries about 1,600 vehicles per day. The 85th percentile of the speed of traffic on Great North Road between Herdman and Cowley Streets is in the vicinity of 64 kilometres per hour.

Although there have been injury accidents on the stretch of Great North Road in the vicinity of the site, the marking of four traffic lanes, the provision of a central refuge for pedestrians using the crossing just south of Herdman Street, and the installation of traffic signals at the Herdman Street intersection are likely to be leading to a substantial reduction in accidents there.

The Proposal

The main features of the proposal are an office and shop building about 3.5 metres high with a floor area of 150 square metres (containing retail space of about 70 square metres for retailing convenience goods - limited by condition to 30 square metres - and motor vehicle accessories); an 8-lane vehicle service forecourt with dispensers for petrol, diesel and LPG; a canopy over the forecourt 5.7 metres high measuring 29 metres by 9.5 metres with a cover for access to the shop measuring 9 metres by 6.1 metres; and a separate automatic car wash approximately 7 metres by 11 metres and 3.9 metres high. LPG would be stocked in a 4-tonne (7,500-litre water capacity) vessel in the usual fenced compound beyond the public area of the forecourt and driveways, about 40 metres from the front boundary and about 55 metres from the nearest residential boundary, at a level 3.5 metres below the forecourt level where it would not be visible from the road or from the service station forecourt. Except for the LPG, the stocks of fuel would be underground. Although it was not mentioned, we expect that motor oils would also be sold. No workshop, lubrication or tyre bays are proposed, and no servicing or repairs to motor vehicles is proposed to be carried out on the site. It is intended that the service station would be open for business 24 hours a day, 7 days a week; but it was acknowledged that in practice the noise level condition imposed by the respondent would have the effect that the car wash would not be open for business after 9 o'clock at night.

The service station has been designed for one-way flow of traffic through it, from the north to the south. The entry would be from a 90-metre deceleration lane from Great North Road leading into the forecourt; and the exit would be to Great North

Road from the south of the site at a point 24 metres south of the Herdman Street intersection. Nine parking spaces would be provided on the site.

The respondent has current proposals for widening Great North Road in the vicinity of the site, providing a slot for traffic waiting to turn right out of Great North Road into Herdman Street, and a bus-stop bay recessed off the moving traffic lanes, south of the Herdman Street intersection. Funds have been allocated for that work in the 1993/94 financial year, and the work is expected to be completed in the following year. At the time of the appeal hearing, the respondent had not decided whether those works would include provision of a raised median in the centre of the road or merely a painted median. However, even if the median in Great North Road generally is not to be a raised structure but merely painted on the road surface, there is to be a raised "splitter island" median in Great North Road extending south from the Herdman Street intersection past the exit driveway from the service station. The applicant's proposal had been designed to fit with the respondent's improvement proposals for Great North Road.

There would need to be earthworks for preparing the platform for the service station itself, for the driveways and for the LPG compound. To support the filling required for the service station there would be a timber crib wall up to 5 metres high around the eastern edge of the forecourt.

The service station itself (including all paved areas) would occupy about 3,000 square metres, which is about 20 per cent of the total site area; and would have a frontage of about 100 metres. The proposal the subject of the current application was that of the rest of the site about 11,000 square metres be planted in trees and the balance in low shrubs, to the intent that it would appear an addition to the adjoining public reserve, being land owned by the respondent and zoned Open Space Activity. There would be a raised garden with trees and shrubs along the road frontage. Landscape designers have been engaged to provide a landscaping plan and a plan for the ongoing maintenance of the planting.

Lighting would be focused and of low intensity to minimise light spill outside the canopy area and shop front. There would be a BP sign 7.5 metres high located in the road frontage planting strip north of the forecourt. Illumination of signs would be by back-lit plastic facings to ensure that no light spill occurred. No flashing illuminated signs are proposed. A condition imposed by the respondent would

prohibit signs visible to motorists travelling north on Great North Road, so as not to encourage right turns across southbound traffic lanes into the service station.

The underground fuel storage would conform to the national code of practice, and the installation of the storage and dispensing equipment would be supervised by qualified engineers. The proposal is to store 100,000 litres of petrol. The tanks and pipework would be double-skinned and the entire system pressurised with automatic shutdown on loss of pressure and monitoring wells to detect escape of hydrocarbons. Vent pipes for the main storage tanks would be designed to entrain air to dilute and help disperse vapour discharged on refilling. Valves and overspill chambers would preclude spillage of excess fuel, and the management system would require daily reconciliation of stocks to identify any losses.

A stormwater management plan would involve separation of stormwater catchments within the site to enable disposal of contaminants and avoid any significant discharge of pollutants into receiving waters. There would be a three-stage oil interceptor trap and a sediment detention pond.

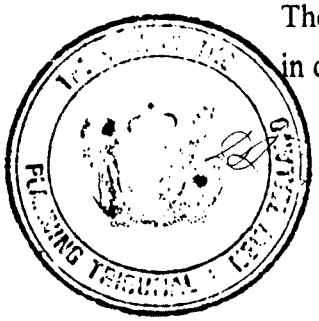
PLANNING INSTRUMENTS

It was not suggested that any regional planning instrument contains provisions applicable to the appeal. The relevant planning instruments are the transitional district plan and a proposed new district plan.

Transitional District Plan

The relevant transitional district plan is the former Auckland City district scheme. By that plan the land is in the Residential 5 zone, in which service stations on arterial roads are conditional uses. Great North Road at Waterview is classified as an arterial road. It was common ground that under the Resource Management Act and in terms of the operative transitional district plan, the proposal is a discretionary activity. We therefore hold that the application requires land-use consent in terms of the transitional district plan.

The plan contains some general criteria for consideration of conditional uses, and in clause 3.5:2.4 there are specific criteria for consideration of service stations.



In Residential 5 zones a range of activities are permitted as of right including (as well as dwelling units) homes for the aged, pensioner housing, private hospitals for up to 21 patients, and private schools; and conditional uses (now discretionary activities) include (as well as service stations) buildings for arts and recreation, community welfare services, educational institutions, and private hospitals for 21 patients or more patients.

Proposed District Plan

The respondent has prepared a proposed district plan under the Resource Management Act for the section of its district that includes the subject site, that is, the Auckland isthmus excluding the central area. The plan was publicly notified on 1 July 1993, and numerous submissions were received within the period prescribed (which elapsed on 30 September 1993); but at the time of the appeal hearing the respondent had not published a summary of the submissions to allow further submissions in support or opposition in the way provided for by clause 7 of Part I of the First Schedule to the Act. Indeed, although the period for lodging submissions had closed on 30 September 1993, by the time of the appeal hearing in mid-December the respondent informed us that it was unable to state whether it had received any submissions challenging any of the provisions of the proposed district plan that might bear on the applicant's proposals or on the proposed zoning of its land.

At the time it granted consent, in June 1993, the respondent had not yet notified its proposed district plan, so the service station application had been considered by it solely in terms of the transitional district plan. However, we accept the respondent's submissions that on this appeal, now that the proposed plan has been notified, the application needs to be considered in terms of that plan as well: see the reasoning in *Ireland v Auckland City Council* (1981) 8 NZTPA 96 and the reference in section 9(1) to a use of land that contravenes a proposed plan.

By the proposed district plan as originally published, the site would be in the Residential 6a zone (which would also apply to the existing residential development on the western side of Great North Road. The proposed plan does not provide for service stations as permitted or discretionary activities in the Residential 6a zone or in any other residential zone. No reason for omitting provision for them in those zones is stated. Service stations are provided for as

discretionary activities in the Business Activity zones. The provisions of the proposed plan about performance standards for hazardous facilities would also effectively prevent service stations in residential zones.

Although the respondent was unable to inform us of any relevant submissions received by it on the proposed plan, the applicant's planning witness was able to depose that submissions had been lodged seeking that service stations be provided for in residential zones; and a consultant planner called for the respondent deposed to his understanding that there had also been submissions from the public seeking rezoning of the subject site as Open Space.

The principal objectives for achieving sustainable management of the resources of the isthmus area are stated in section 2.3 of the proposed plan. They include conserving, protecting and enhancing the district's natural environment; conserving the district's resources to meet the needs of the community; protecting the district's resources from significant effects of activities and development; protecting, preserving and enhancing significant habitats; achieving a healthy and safe living environment; protecting and enhancing residential amenities; giving recognition to the status of the tangata whenua and providing for their interest; providing for economic growth and development which does not unduly compromise environmental values; and allowing for new service provision where it does not compromise environmental protection and enhancement.

In the chapter on residential activity, objectives are stated of identifying, maintaining and enhancing the recognised character and amenity of residential environments; recognising the need for supporting activities to be located in residential areas to promote the economic and general welfare and convenience of residents (paragraph 7.3.4); and specifically in respect of the Residential 6 zones there are policies of imposing controls on developments which protect the external environment of the site, and of permitting a wider range of activities than permitted in the lower intensity residential zones, while maintaining the appreciated amenity (paragraph 7.6.6.1), and under the title "Strategy" an explanation that provision is made for a range of activities to operate within the zone; that in general the activities provided for would be expected to include a residential component or to be of benefit to the community; that activities which attract significantly more people to a site than would be anticipated from the density permitted in the zone would be discouraged as they can cause increased traffic generation, noise and

other adverse environmental impacts; and that conditions may be imposed on activities seeking resource consent to ensure that generated effects do not extend beyond the boundaries of a site and that measures are undertaken to mitigate any adverse impact on personal privacy and on the visual amenity of the vicinity (paragraph 7.6.6.2).

In the chapter on transportation there is an objective of improving access, ease and safety of movement within the city (paragraph 12.3.2) and a policy of improving the capacity and safety of existing facilities through the use of appropriate traffic management techniques.

It was common ground that the proposed service station, while not provided for in the relevant zone under the proposed plan, is not a prohibited activity as defined; and even if it were, by section 105(2)(c) the proscription against granting resource consent for a prohibited activity in a proposed plan would not take effect until the relevant part of the plan is beyond challenge. It was common ground therefore that the proposal must be considered as a non-complying activity in respect of the proposed district plan, and we so hold.

Other Resource Consents Required

Discharge of stormwater

The applicant had applied to the Auckland Regional Council for a permit for the discharge to the Oakley Creek of stormwater from the service station premises, and on 16 December 1993 the regional council granted the discharge permit accordingly. The applicant informed us that it accepted the conditions and did not intend to appeal against any part of the decision. Because the application had not been notified, no third parties were entitled to lodge submissions or to appeal against that decision.

Discharge into air

At the start of the appeal hearing the applicant advised that the Auckland Regional Council had considered (apparently on advice from the Ministry for the Environment) that no resource consent was required for discharge into air of vapour from the fuel tanks when being refilled (apparently understanding that to be

the effect of section 392), so no application had been made. However after considering questions from ourselves, the applicant subsequently applied to the Auckland Regional Council and on 16 December 1993 was granted a permit to discharge contaminants (hydrocarbons and related substances in quantities less than 5 kilograms per hour) into air. The applicant informed us that it had accepted the conditions and did not intend to appeal against any part of the decision. Because the application had not been notified, no third party was entitled to lodge submissions or to appeal against that decision.

THE APPELLANTS' CASE

The main grounds advanced for the appellants in opposition to the service station were:

1. That concerns expressed in the 1991 appeal decision about traffic safety remain substantially applicable, traffic densities having compounded at least 3 per cent per annum in the intervening period.

2. That service stations are not permitted in residential zones under the proposed district plan, and although decisions on submissions may affect the final content of the plan, it is unlikely that service stations will be added back in any residential zone; that neither of the threshold tests for grant of non-complying activity consent can be satisfied and that granting consent for a service station in a residential zone would compromise the objectives and policies of the proposed plan, bring its integrity into question, and affect public confidence in its administration.

3. That the proposal would have adverse effects on the amenities of the area by the impact of a large corporate service station on the residential environment, the loss of a significant area of "green belt", and detraction from the amenity of the Oakley Creek walkway; and the site has come to be regarded as part of the public estate to be used for public purposes.

4. That there would be discharges of contaminants in the stormwater runoff to the Oakley Creek, and venting of fumes during the refilling of fuel tanks.

5. — That the proposal does not (in terms of section 5(2)(c)) adequately avoid, remedy, or mitigate the adverse effects of the activity on the environment.

6. That the proposal conflicts with principles in Part II in that the scale of the development abutting the Oakley Creek, which has a natural habitat function, could raise matters of national importance, in particular: preservation of the natural character of wetlands and rivers and their margins (section 6(a)); protection of areas of significant habitats of indigenous fauna (section 6(c)); and the relationship of Maori and their culture and traditions with their ancestral lands (section 6(e)); and matters under section 7 which are relevant to the achievement of sustainable management, namely maintenance and enhancement of amenity values (section 7(c)); recognition of the heritage value of the site, its original purchase from Ngati Whatua and continued public purpose and use (section 7(e)); and maintenance and enhancement of the quality of the environment in that as a large structure, the service station would not maintain and enhance amenity values, nor enhance the quality of the environment (section 7(f)).

7. That duties under section 8 which apply to the territorial authority in the first instance, which may have a responsibility to alert an applicant of the duty of serious consultation with iwi and local hapu where a proposal could affect Maori interests in ancestral land, have not been complied with.

8. That storage of 100,000 litres of petrol would substantially exceed the maximum safe volume for the locality.

9. That the applicant's agreement for purchase of the site had originally been conditional on obtaining approval for a service station, but without obtaining that approval the applicant had waived the condition, so it must be taken to have assumed the risk that consent might not be granted.

10. That the Tribunal having refused the previous application, the council's subsequent grant of a similar application affects public confidence in the resource management decision system.

11. — That an isolated small area should not be spot zoned, and although the current proposal is not formally a zoning, the issue is not dissimilar in that the emphasis of the Resource Management Act is on the effects of activities.

On ground 2, counsel for the appellants accepted that it would not be proper for the Tribunal to speculate about the outcome of submissions on the proposed plan.

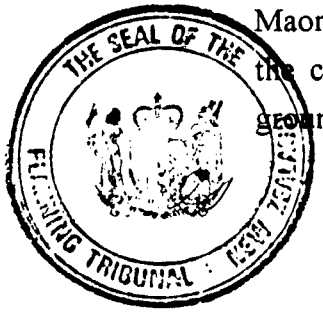
On ground 4, counsel for the appellants acknowledged that because the discharges had been the subject of separate applications which had not been notified, and no appeals arising from them were before the Tribunal, the Tribunal could not address those claims in these proceedings. We accept that because the requisite discharge permits have been granted, we should consider the proposal on the footing that any discharges of contaminants to the waters of the creek, and into the atmosphere, would be insignificant.

The appellants offered no direct evidence to support ground 8, which was based on the amount of petrol to be stored exceeding the limits prescribed in the proposed district plan. In that respect, Mr Palmer accepted that the limit on the quantity of petrol that may be stored is not particularly reliable pending decision on submissions on the plan.

In support of their case, the appellants called no fewer than 16 witnesses. Regrettably, much of the testimony of many of those witnesses was not properly evidence but assertions of aspects of their case which had been fully presented by their counsel in his address to the Tribunal, and did little to provide a basis for judicial findings or otherwise advance their case.

THE APPLICANT'S PURCHASE OF THE SITE

The circumstances in which the applicant came to be the owner of the site are relevant to several references in the appellants' grounds of appeal, namely the claim that the site has come to be regarded as part of the public estate to be used for public purposes (see ground 3); the claimed applicability of the relationship of Maori with their ancestral lands, and the heritage value of the site (see ground 6); the claim that the proposal would affect Maori interests in ancestral land (see ground 7); and the reference to the applicant having waived a condition of



purchase of the site (see ground 9). Despite those claims, there was not any conflict of primary fact on those topics, and we set out our findings on them.

Carrington Hospital land (which included the subject site) was formerly owned by the Auckland Area Health Board, successor to the former Auckland Hospital Board, being part of a 13,000 acre block (covering a large part of the Auckland isthmus) that had been acquired by the Crown from Ngati Whatua for valuable consideration in 1841, and most of which was purchased for public health purposes from various intervening owners.

The subject site had originally been set aside for school purposes in 1878 and was transferred to the Crown for health purposes in 1892. It was transferred to the Auckland Hospital Board in about 1980, and its successor, the Auckland Area Health Board sold it to the applicant by conditional agreement for sale and purchase that was made in 1989, made unconditional in November 1990, and completed in December 1990; and the transfer to the applicant was registered in 1991.

The land is subject of a general Waitangi Tribunal claim (WAI 121) by W and E Manukau made in January 1990 (after the agreement for sale of the subject land to the applicant had been entered into) which relates to all land from Otahuhu to the Bay of Islands. Claim WAI 388 by the Ngati Whatua o Orakei Trust Board was made to the Waitangi Tribunal on 17 August 1993 and related to the land in the Tamaki isthmus generally.

Neither of those claims under the Treaty of Waitangi Act 1975 has been reported on or heard by the Waitangi Tribunal, and there is no evidence that the land is excluded from the effect of section 6(4A) of that Act (as inserted by section 3 of the Treaty of Waitangi Amendment Act 1993) by which that Tribunal is precluded from recommending return to Maori ownership of any private land. We consider that the existence of those broad claims should not therefore influence this Tribunal's decision on this appeal.

A witness for the appellants who is deputy chairman of the Ngati Whatua o Orakei Trust Board, Mr G P Hawke, deposed that the Auckland Area Health Board had not informed or consulted with Ngati Whatua o Orakei about the Health Board's intention to sell land in the vicinity; and that the Trust Board would have expressed

opposition on the grounds that the land was designated for health and educational purposes, not for development by a multi-national oil company.

A local resident who gave evidence for the appellants, Ms S C Abernethy, deposed that the land "should not be derogated from in any way by grants to commercial interests".

The respondent council has formally resolved not to purchase the site to add it to the adjoining reserve at this time.

By their counsel the appellants accepted that for the purposes of this appeal it should be assumed that the applicant has a valid and lawful title to the property. We accept that, and add that there was no evidence before us to suggest otherwise.

There is no basis for treating the land as part of the public estate to be used for public purposes; or for holding that its sale to commercial interests was a derogation from any special legal status precluding such a transaction. There is no evidence of probative value before us to suggest any particular relationship by Maori with the service station site, or that the site has any heritage value; and there is nothing to support the claim that the proposal would affect Maori interests in their ancestral land.

We accept that the applicant waived the condition of its purchase agreement and completed the purchase without having obtained approval for a service station on it, and thereby assumed the risk that consent might not be obtained. That was a commercial judgment, and we do not consider that it diminishes the applicant's case nor advances the appellants' case.

CONSULTATION WITH THE TANGATA WHENUA

One of the issues raised for the appellants was that there had been no, or no adequate, consultation with the tangata whenua. In that regard, their counsel submitted that under section 8, a duty of serious consultation with iwi and local hapu may be applicable where a proposal could affect Maori interests in ancestral land; and that the duty may apply to the territorial authority in the first instance, who may have a responsibility to alert an applicant.

In support of that submission, Mr Palmer relied on two Planning Tribunal decisions, *Gill v Rotorua District Council* (1993) 2 NZRMA 604 and *Haddon v Auckland Regional Council* (Report A77/93); and contended that section 8 overrides narrower obligations under the regulations and that the omission from the regulations of provision for consultation on a resource application with iwi may be overridden by the general obligation under section 8. Counsel also argued that the reference in section 8 extends the duty of consultation of the type referred to in *NZ Maori Council v Attorney-General* [1989] 2 NZLR 142 (CA) to the consent authority, relying on section 5(j) of the Acts Interpretation Act 1924 for construction of section 8 to achieve the purpose and spirit of the provision. Mr Palmer observed that under section 93(1)(f) there is a discretion to require service of a resource consent application on an iwi authority.

It was established (and not challenged) that Ngati Whatua are the tangata whenua in the vicinity of the site, and it was common ground that they had not been consulted over the service station proposal, and had not been separately served with the application. Their attitude is that land surplus to requirements of public authorities in Auckland should be returned to Maori ownership and not used for activities that the iwi consider unsuitable. It was also established that the applicant had given notice of the resource consent application to everyone on the list supplied to it by the respondent for that purpose, and had also sent copies of the application to everyone who telephoned for them.

Ngati Whatua are not parties to these proceedings. The deputy chairman of the Trust Board, Mr Hawke, stated in evidence that the Trust Board considered that the respondent had been in breach of the Resource Management Act in that as tangata whenua and owner of adjacent land the Trust Board had never been notified of the application. In cross-examination he acknowledged that the adjacent land referred to has access to Carrington Road; and that the Trust Board's objective is retention of the site as open space.

The subject site was held in separate freehold title by a private company at the time when the present application was lodged. The respondent, as consent authority, had no knowledge of the site containing any waahi tapu; and it is not shown in the proposed district plan as containing any archaeological feature or Maori Heritage site. Neither the Department of Conservation nor the Auckland Regional Council

records show the site containing archaeological or historic sites. There is nothing to indicate that the adjacent land vested in the Trust Board would be affected in any way by the proposed service station. In the circumstances, we hold that the respondent had no duty to notify the Ngati Whatua o Orakei Trust Board of the resource consent application.

Mr Palmer accepted that any omission of service can be cured by the appeal hearing, and announced that the appellants were not asking that processing of application be declared invalid.

To the extent that the Planning Tribunal held, in *Gill v Rotorua District Council*, that the Act requires consent authorities actively to consult with tangata whenua on applications for resource consent, counsel for the respondent submitted that that finding was wrong in law, and urged us not to follow it. He contended that while territorial authorities have an obligation under clause 3 of the First Schedule to consult with tangata whenua during the preparation of proposed policy statements and plans, they are not required to consult with anyone when considering applications for resource consents. Counsel observed that applicants for resource consents are obliged by section 88(6) and clause 1(h) of the Fourth Schedule to identify in their assessments of environmental effects those interested in or affected by a proposal, the consultation undertaken and any response to the views of those consulted. He also observed that consultation by a consent authority with tangata whenua would also be inconsistent with its position as the decision-maker in a judicial or quasi-judicial process, resulting in a degree of active participation by consent authorities which would be contrary to the principles of natural justice. Mr Kirkpatrick submitted that if Parliament had intended consent authorities engage in consultation on resource consent applications, it would have explicitly provided for that in the code of procedure for processing those applications. Counsel for the applicant adopted those submissions.

The text of section 8 is:

> "In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)."

In *~~NZ~~ Maori Council v Attorney-General* [1989] 2 NZLR 142 (CA) the learned President, delivering the Judgment of the Court, added some observations (at page 152):

> "In the judgments of 1987 this Court stressed the concept of partnership. We think it right to say that the good faith owed to each other by the parties to the Treaty must extend to consultation on truly major issues. That is really clear beyond argument ... it would be inconsistent with the principles of the Treaty to reach a decision as to whether there should be a general sale [of forestry cutting rights] without consultation."

In *Gill v Rotorua District Council*, the Tribunal said (at page 616):

> "One of the nationally important requirements of the Act under the Part II considerations is that account be taken of principles of the Treaty of Waitangi 1840: Section 8 of the Act. One of these principles is that of consultation with the tangata whenua: see *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 (CA).
>
> The council itself does not appear to have actively consulted with the tribe over the proposal. In its report to council, the Statutory Hearings Committee stated, in the light of allegations that the council had not adequately consulted the Trustees, that: '... the records clearly indicate that the necessary advice was conveyed to the Trust, and from there it was a matter for the Trust to deal with'.
>
> This is not what the legislation requires. The council's actions appear to have been merely passive. The test which the council has to meet under all provisions of s 7 is a high one. It is required to have *particular regard* to the issues listed. We have no evidence that the council gave especial regard to the Maori issues in its investigations into the proposal. The section imposes a duty to be on inquiry. The evidence disclosed that the Maori people of the area had supported the Scenic Reserve designation in 1979. The council, had, until this point, supported the Scenic Reserve designation also. It should have investigated further why the Maori people supported it originally and been on the alert as a consequence."

In its report to the Minister of Conservation in *Haddon*'s case, the Tribunal said (at pages 20-22):

> "...it is clear to us that the parties had not taken into account the principles of being adequately informed, or of consulting sufficiently as to the full implications for the hapu of what exactly was proposed, or of how to give effect to some of the hapu's customary practices, early enough in the decision-making process.
>
> It would appear that the duty 'to take into account' indicates that a decision maker must weigh the matter with other matters being

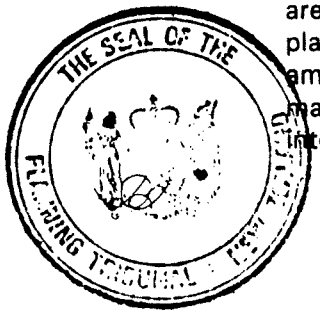
considered, effect a balance between the matter at issue and be able to show he or she has done so. In this case the concerns which seem to have been taken into account are the general social concerns of the community. The cultural concerns of the Maori community and its relationship with traditional resources do not seem to have been weighed and shown to be weighed (apart from in one small aspect).

The Court of Appeal has established that consultation is a principle of the Treaty. *NZ Maori Council v Attorney-General* [1989] 2 NZLR 142, 152 (CA). That principle was not cited by any of the parties before us but as a party exercising a function and power under the Act, we too are required to take into account the principles of the Treaty. We have thus taken judicial notice of the existence of this principle and hold that it was applicable in this case. It is our view after hearing Mr Haddon, that had all the parties entered into a dialogue with him and the hapu even before the formal notification had taken place, such consultation might well have circumvented the inquiry process or at least some of the issues raised before us.

We gained the clear impression that he should have been part of the process which formulated the application instead of, as he put it, being brought in only at the 7th stage in a 9 stage process. Your counsel drew our attention to the Treaty principle of the Crown making informed decisions. To be informed all the parties under the RMA, including the ACC and ARC, must be informed where the interests of a Treaty partner is concerned and demonstrate in their various functions that they have taken those interests into account. To be properly informed therefore the parties must consult at the initial stages in the process."

In its decision in *Ngatiwai Trust Board v Whangarei District Council & ors* (Decision A7/94) the Tribunal (differently composed) addressed the passages quoted above from *Gill*'s case and *Haddon*'s case and said (at page 5):

"We do not think that, by these passages, it was intended to be understood that, in all cases where Maori people are known to reside in the vicinity of a site the subject of a resource consent application, or otherwise where local Maori community interests have registered some viewpoint or concern about the application, the council to whom the application is addressed must first consult with those involved, or their representatives, before proceeding to hear and determine the matter. Rather, the Tribunal appears to have focussed in the cases mentioned upon the local authority parties' failure to follow up the special background of Maori significance present in each instance - both cases being intimately related to apparently long-standing cultural issues of which the councils concerned could not have been unaware. We pause here to emphasise that nothing we are about to say should be construed as suggesting that a council planning officer, in preparing a report for pre-hearing distribution among the parties and for the council's assistance at the hearing, may not be under a duty (depending on the circumstances) to enquire into the views of the tangata whenua by consulting with their

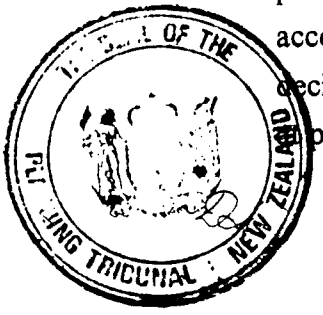


> representatives, so as to ensure that the report is suitably comprehensive as to relevant issues upon which the council needs to be informed. If this point was, in effect, conveyed in the previous cases before the Tribunal, we likewise endorse it."

Then, after referring to the *Maori Council* case and the recent Judgment of the Privy Council in *NZ Maori Council v Attorney-General* delivered 13 December 1993, and quoting the text of section 8, the Tribunal continued (at page 6):

> "...in approaching s 8 the particular function or power requiring to be performed or exercised by a particular person pursuant to a particular section or part of the Act must be considered in its context in order to analyse the nature and extent of the responsibility incumbent on the person under the section. In the process of such consideration, the underlying obligations and responsibilities of the Treaty, collectively explained in the line of well-known cases of high authority, and going to its essence and hence its workability as a living document, need carefully to be borne in mind. If the person's particular function or power requiring to be performed or exercised is perceived as affecting or likely to affect a matter founded upon or arising out of the Treaty, then the person concerned must take into account such Treaty principle or principles as are relevant to ensure that the intent of the Treaty in relation to the matter is maintained, insofar as that is practicable in achieving the Act's purpose under s 5.
>
> In this instance, the respondents proceeded to exercise their functions and powers, in relation to the applications made to them, by requiring the applicants to furnish supporting information and plans, and by requiring that various interested parties be notified, including the appellant. As bodies required to act judicially in hearing and determining the applications in the light of the evidence forthcoming from the applicants and others electing to participate, we do not see that either respondent, having regard to its relevant functions and powers, was under a duty to consult with the appellant (or with others within the appellant's auspices) before proceeding to hear the applicants and representatives of the appellant."

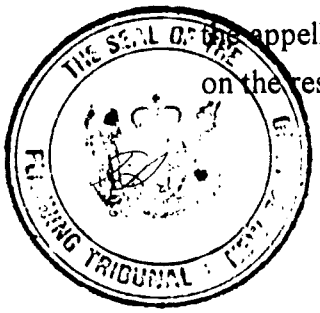
Because of its place in Part II of the Act, and because of its subject matter, section 8 is an important provision, to be given fair, large and liberal construction, and not read down. Yet we would not be entitled to give it effect beyond the scope of the words used. Consent authorities receiving and processing resource consent applications, such as the respondent in this case, are undoubtedly exercising functions and powers under the Act, and are bound to take into account the principles of the Treaty. That duty would include, in appropriate cases, taking into account the Crown's duties of active protection of Maori interests, and of informed decision-making, where relevant: *Re applications by Sea-Tow and others* A129/93 p 23.



Although section 8 requires consent authorities to take into account the principles of the Treaty, we do not find in its language any imposition on consent authorities of the obligations of the Crown under the Treaty or its principles. Where, as in *Haddon*'s case, the consent authority is a Minister of the Crown, then it is to be expected that the Minister's decision would take into account those obligations. But where the consent authority is not a Minister of the Crown, but a local authority or some other person, we do not find authority in section 8 for the proposition that by exercising functions and powers under the Act it is subject to the obligations of the Crown under the Treaty. Rather the consent authority is to take those principles into account in reaching its decision.

The Crown's duty of consultation referred to by the Court of Appeal in the 1989 Judgment was found to exist in a context of sale by the Crown of assets in respect of which the good faith of partners was involved. In our view, the case of a consent authority, not being a Minister of the Crown, receiving and processing a resource consent application is distinguishable in three ways. First, in such a case a consent authority is not disposing of Crown assets in a way that might place them beyond reach of being available to compensate for grievances under the Treaty. Its function is confined to deciding whether a proposed use may be made by whomever of natural and physical resources consistent with their sustainable management. Secondly, the consent authority is following quite a detailed code of procedure which does not overlook the place of the tangata whenua, but which omits any express duty of consultation. Thirdly, the consent authority's function is to act judicially, and consultation with one section of the community prior to a public hearing of those who choose to take part would be inconsistent with that character of its function. With respect, we do not find in the Judgment of the Court of Appeal anything which would support Mr Palmer's submission.

We would adopt, with respect, the discussion in the *Ngatiwai* decision of the earlier Tribunal decisions, and would follow the conclusion that a consent authority is not obliged to consult with the tangata whenua on a resource consent application. We hold that no such duty is to be inferred from section 8 or the *Maori Council* case; and we do not accept the submission made by Mr Palmer for the appellants that the respondent was under a duty to consult with Ngati Whatua on the resource consent application.



We also agree that where it is known that natural or physical resources the subject of a resource consent application are the object of a valued relationship by Maori people, an adviser preparing a report on the application for a consent authority should investigate and report on the extent to which the proposal would affect that relationship. However that was not required on the facts of this case.

Criteria

We now consider the proposal by reference to the criteria set out in section 104 that are applicable.

Actual and potential effects

First we are required by section 104(1) to have regard to any actual and potential effects of allowing the activity.

We accept Mr Bartlett's submissions that consideration may be given to any positive effects as well as to any adverse effects of allowing the activity; and we find that positive effects of allowing it would include not only the service and convenience for customers of the fuel and other goods and services provided by the service station, but also the extensive planting proposed, which would add to amenity values of the area, and the ability for the council to recess the bus bay on the applicant's land, so that stopped buses do not restrict passing traffic.

Planning

We now consider whether there would be any actual or potential planning effects of allowing the activity.

It was the appellants' case that an isolated small area should not be spot-zoned, and although counsel acknowledged that the proposal is not for a zoning as such, he argued that the issue is not dissimilar in that the emphasis of the Resource Management Act is on the effects of activities.

We do not accept that analogy. In terms of the zoning under the operative district plan, a service station may be permitted on the site as a discretionary activity. If a service station is established there, no change to the Residential 5 zoning of the

land would be needed for the plan to retain its integrity. We do not overlook that a service station would not be an activity that the proposed district plan provided for on the site. To avoid prejudging an issue that may yet have to be decided by the Tribunal, our consideration of the planning effects in that respect should proceed on the assumption that the relevant provisions of the proposed plan will remain unchanged when that plan becomes operative. However a service station on the subject site would not be a prohibited activity there. If a service station is established pursuant to resource consent granted on the basis of it being a discretionary activity under the operative (transitional) plan, then even though it may be a non-complying activity in terms of the proposed plan (which had not been published at the time resource consent was applied for), a grant of consent for it would imply that a judgment had been reached that despite being a non-complying activity, land-use consent deserved to be granted in all the circumstances. Any effect on the integrity of the proposed plan would be reduced by the facts that the application had been made (and originally decided) before the proposed plan had been published; that the reasons for omitting provisions allowing service stations in the Residential 6a zone are not stated in the plan; and that the relevant provisions of the plan had been challenged, but those challenges had not been heard let alone decided. In addition, the planning suitability of the site for a service station by its physical characteristics, and in particular its large size, its location on an arterial route, and the lack of immediate neighbours; and the absence from the proposal of workshop and vehicle servicing facilities, would further reduce the planning effect of allowing the activity.

We find that the planning effect of allowing the proposed activity would be minimal.

Traffic

Several witnesses for the appellants asserted that the proposed service station would create a dangerous traffic situation leading to a substantial increase in traffic accidents, and accidents involving children crossing Great North Road to buy confectionery or snack food that may be sold at the service station. Mrs D Persson, Mr J J Hanton, Ms S Abernethy, Mr C R Corsbie, Mr B King, Mrs J A Corsbie, and Mrs S W Morris Upton, all local residents, gave anecdotal evidence of difficulties with the Great North Road carrying heavy flows of traffic and of accidents of which they had knowledge.

Mr Corsbie offered a critique of the evidence of Mr B Harries, a qualified traffic engineer called for the applicant, and although Mr Corsbie acknowledged that he possessed no qualifications in traffic engineering himself, he referred to examples in which, he asserted, the advice of experts has been found deficient, citing the Auckland Harbour Bridge extension welding, the construction of the Newmarket viaduct, the building of the Clyde Dam on fault lines, and allowing use of arsenical and dieldrin sheep dips, DDT, hormone sprays and a particular brand of motor oil. In cross-examination, Mr Corsbie stated that he did not agree with the opinion of Mr F S Green, the qualified traffic engineer called for the appellants, on the entrance to the service station; that he had deliberately not read a report on the proposal that had been prepared by another traffic engineer, Mr R Dickson, at the request of previous counsel for the appellants, because he had wanted to keep his evidence "devoid of conflict", and that study of other reports might have changed his mind; and that he did not accept some of the opinions of the four traffic engineers who did give evidence about the proposed road widening and the proposed traffic management techniques for the service station.

A qualified planner called for the appellants, Mr Brehmer, expressed the view that the proposed service station would impede traffic flows on Great North Road, reported accidents on that stretch of road, and was critical of the design of the entrance and exit to the service station. However in cross-examination that witness accepted that he had no qualifications in traffic engineering (except that his course for his diploma in town planning had covered traffic matters), and that he did not agree with the opinions expressed in evidence by Mr Green.

Mr King, too, stated that he would argue with some of Mr Green's views, although he acknowledged that he would not be in a position to contradict them. Mr King's profession is that of a musician.

In this case where we had the benefit of four witnesses who possess specialist professional qualifications and experience in that field of knowledge, we prefer their opinions to those that were beyond the expertise of the witnesses who offered them.

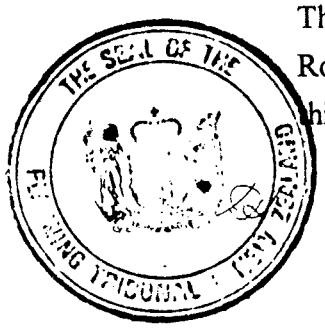
We find that Mr Green is qualified to give opinion evidence on traffic engineering, being a registered engineer with specialist experience in that field. Mr Green stated

that if a kerbed median was constructed on Great North Road it would resolve the major traffic concern he had, and he considered that further design work on the upgrading of the road would ensure that the proposal would not prejudice traffic safety and efficiency. However he acknowledged that a raised median would restrict access into frontage properties from the southbound lanes. In cross-examination he acknowledged that in general signs are effective in controlling traffic; that right-turn entries into the proposed service station would not create undue traffic hazards; that the public is becoming familiar with one-way service stations; and that if found desirable, the proposed splitter island could be lengthened, which, together with appropriate signs and suitable design of the exit, would further discourage vehicles leaving the service station turning right into the northbound lanes.

Consistent with the opinions expressed by Mr B Harries, Mr B L Hall and Mr G J Tuohey, all qualified traffic engineers, we find that the present application differs from the previous one in that the service station layout incorporates traffic management measures associated with the proposed widening of Great North Road, has enhanced access and egress arrangements, is improved by the recent installation of traffic signals at the intersection at Herdman Street, and proposes an enhanced bus stop facility. The service station has been designed to be developed as an integral part of the frontage road and traffic environment; the site is strategically well placed in the road network, and has sufficient frontage length to accommodate particularly high quality access and egress driveways. The relevant standards are capable of being met for ingress, deceleration lane and egress, and the proposal would have the capacity to handle all the associated traffic activity well removed from interaction with passing traffic. The design would not compromise, but be complementary to, the respondent's proposed road widening and improvement plans, and we accept the expert evidence that the service station as proposed could be established without any undesirable impact on traffic safety or traffic flow on Great North Road or Herdman Street.

Children crossing Great North Road to buy confectionery or snack food would have the protection of a pedestrian crossing and traffic signals.

The respondent has authority for traffic management measures on Great North Road itself. Those are within its executive functions, and are not matters on which this Tribunal has jurisdiction. However we find that the respondent is aware of the



advantages and disadvantages of installing a kerbed median in Great North Road instead of a painted median, and is making a decision after consultation with the local community and with the benefit of qualified advice. We are content with that, and are confident that if a raised median, or any other traffic management measure, is found desirable for the safe and efficient use of Great North Road, the respondent will act appropriately. It would be impertinent for us to express any opinion on that subject in this document.

In summary, we find that the proposal would not cause any adverse effects on the safe and efficient flow of traffic.

Visual

The first-named appellant, Mr J J Hanton, asserted in evidence that the proposed service station would be a blot on the countryside. He did not explain his opinion by reference to the drawings of the proposal.

Mr Brehmer claimed that the proposal would have significant visual effects, replacing a pleasant open space with buildings, concrete areas and retaining walls, thereby completely changing it; that the structures of the station could not be concealed by the planting proposed; and referred to the proposed planting of trees as a major unnecessary change of natural resources. However in cross-examination the witness acknowledged that he had not considered the visual effects on a site-by-site basis; that he had been one of the crusaders against the service station, had himself lodged a late objection to it (although he resides 3 kilometres from the site), and was opposed to the zoning of the subject land for housing or for any purpose other than open space.

Local residents called for the appellants, Mr B King, Mrs J A Corsbie, Mrs S W Morris Upton, and Mr C Kiwi, all deposed to the enjoyment that they had experienced in walking along the pathway beside the Oakley Creek, and expressed concern that their future enjoyment would be spoiled by the presence of the service station. Mr King explained that from the walkway no buildings are visible now, and that a view of service station buildings would be an effect. Mrs Morris Upton claimed that the "oil company means to despoil their most prized amenity". Another witness for the appellants, Mr P Tucker, said: "The superimposition of an industrial style complex on this particular site presents such a juxtaposition of opposites in

terms of land use as to appear almost surreal. The psychological effect of this development on hundreds of thousands of passing commuters who have enjoyed this rural window for decades should be taken into account." In cross-examination he acknowledged that he did not have training in psychology or behavioural sciences and did not have data to present to the Tribunal that would enable it to consider the psychological effect.

We were more assisted by the careful and professional analysis of the likely visual effects in the evidence of a qualified landscape architect (called for the applicant) Mr J L Goodwin. He referred to the trees along the Great North Road boundary towards the northern end of the site about 5 metres from the eastern kerb of the road, and deposed that the canopy of the eucalyptus trees hangs over the carriageway; that the trees are reaching maturity; that it is characteristic of eucalyptus trees that they drop branches; and that additional stress caused by the proposed road widening (which is independent of this proposed development) encroaching on their root zones would increase the likelihood that they would have to be removed. He explained that when those trees are removed the view from the houses opposite would be to the mature trees along the Oakley Creek and, in a few years, to the maturing native trees proposed as part of the service station development, in that the existing trees would be replaced with a new line of trees in front of the forecourt.

Mr Goodwin deposed that the properties directly opposite the service station would have their view of the service station largely obscured by the proposed tree planting between the forecourt and the road, around the shop and to the south of the entrance; and that other residents located further north would be able to view the service station canopy through the vehicle entrance and over the low planting required to maintain sight lines, but that the shop and forecourt would be partly obscured by the proposed planting.

The witness gave the opinion that there would be some moderate short-term adverse visual effects associated with the development due to loss of vegetation, and the new structures, but in 3 to 5 years, once the proposed planting had become established, the perceived adverse visual effects would be minimal.

It was Mr Goodwin's evidence that the view of the service station from the Oakley Creek walkway would generally be glimpses through trees or sideways glances,

that it would not be the focus of views from the walkway; that in the short term there would be an adverse effect on the visual amenity of the walkway, but that in 3 to 5 years the planting would screen the retaining wall and substantially screen the building and carwash from that view so that the visual effects would be minor and in the long term would be improved.

In summary, it was Mr Goodwin's professional opinion that there would be no more than minor adverse effect on the residential character in the immediately adjacent Waterview area; that the proposal would maintain a 'green belt', and when the proposed planting has matured, would provide an improvement to the green belt.

Having ourselves visited the site and viewed it from the opposite side of Great North Road and from the parts of the Oakley Creek pathway from which it may be seen, we find the concerns expressed by the appellants' witnesses to be overstated and unsubstantiated; and we accept Mr Goodwin's assessment of the likely visual effects of the proposal. Although the current rural aspect of the land is attractive, the zoning would allow for development as of right; and we accept the applicant's submissions that the attitude of the appellants to the applicant's land as a green belt does not invest it with status by which the private owner of that land is to keep it free from development. We find that the proposed planting would leave an appearance that would not have adverse visual effects and would eventually screen the service station from view from the southern part of the path where the site and the wirescape and traffic on Great North Road are visible now; and that although the proposal would change the visual environment from the western side of Great North Road, the extensive planting proposed would be beneficial and enhance that environment.

Noise

It was the applicant's case that the service station would comply with the noise limits in conditions imposed by the respondent, which are consistent with the provisions of the operative and the proposed district plans; and reminded us that there are no residential neighbours of the service station.

The applicant's case was not accepted by the appellants. Mrs Persson deposed to being annoyed by the noise from cars using another service station near her home late at night and the peculiar noise of the carwash there.

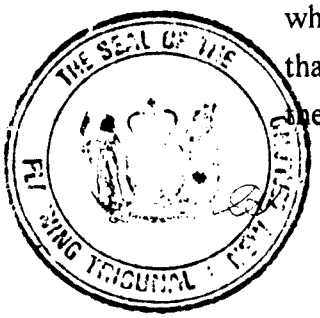
Mr Brehmer acknowledged that he had no expertise in acoustics, and stated that he did not recognise the NZ Standards for the Assessment of Environmental Sound referred to by the applicant's qualified and experienced acoustics engineer, Mr N I Hegley. He had no evidence that the proposed activity would not meet the standards, but considered that if there is no activity on the site then there would be no noise and no need to impose noise restrictions.

However as the site is privately owned and zoned residential, we do not find that witness's evidence realistic or helpful to our assessment of the issue before us.

The transitional district plan prescribes that average maximum noise level (L_{10}) from uses on commercially zoned land at a residential zone boundary is not to exceed 50 dBA on Mondays to Fridays from 7 am to 10 pm and on Saturdays from 7 am to 12 noon; and 40 dBA at all other times. The proposed district plan 1993 would allow the 50 dBA level all day on Saturdays and from 9 am to 6 pm on Sundays and public holidays.

The applicant's case was supported by Mr Hegley. He deposed to measurements of the existing daytime noise environment at the boundary of the residential property closest to the service station site on a Saturday afternoon, being a L_{10} of 72 dBA and a L_{95} of 53 dBA. The witness explained that the noise sources from the proposed service station would be the LPG unit, the carwash, the air compressor, and general forecourt noise. The noise from the carwash when operating would be an L_{10} of 48 dBA at the closest house (which would require doors on the carwash to be able to comply with the night time noise limit), and he deposed that the air compressor, LPG pump, and general forecourt noise would be likely to comply with the noise limits in the district plan, and that the total service station operation would comply with the limits for residential zone.

We prefer Mr Hegley's opinion to those expressed by witnesses for the appellants, who lacked qualifications or relevant expertise in environmental noise; and we find that (subject to the restrictions referred to by Mr Hegley on the use of the carwash) the operation of the proposed service station would not be likely to give rise to any



significant adverse noise effects, assessed by reference to the existing and proposed district plan provisions about noise in residential zones.

Other effects

Other environmental effects relating to emissions to air, emissions to ground, and stormwater control are subject to control under the discharge permits granted by the Auckland Regional Council and the conditions imposed by that council, which are not before the Tribunal in these proceedings. We note that fumes from refilling the main petrol storage tanks would be dispersed through vent pipes specially designed to dilute and disperse the vapour, so there would not be effects on neighbouring properties. We also note that a stormwater management plan would be required, and that a detention pond would be created on the site to allow solids to settle out of the stormwater before discharge. There is nothing before us on which we might suspect that the emissions of petrol vapour or stormwater from the proposed service station would have adverse effects on the environment.

Although not part of the appellants' case as put by their counsel, their planning witness, Mr Brehmer, claimed that in the event of a calamity occurring with hazardous goods on the site, rescue efforts could be hampered by congestion on Great North Road, the only access to the site. The witness did not profess to have expertise in dealing with emergencies, and we prefer the opinion expressed by the Fire Service Technical Liaison Officer, Mr A J Haggerty, that access and water supplies to the site are adequate.

Another matter that was raised by one of the appellants' witnesses, Mr N Boyd, but not by their counsel, was the applicant's allowance for spillage and evaporation of petrol, which he reported as being 0.04%. Mr Boyd described that as completely unacceptable. However in cross-examination he accepted that the design of the fuel storage incorporates the latest practice, that it may well be one of the safest service stations, that the figure quoted was based on experience at other service stations, and that the proposed station should be able to achieve a zero loss. In the light of that we do not find any reason for concern about the subject proposal in that respect.

The appellants' planning witness, Mr Brehmer, described the reference in the application to preventing light spill beyond the site as wishful thinking, posing the

rhetorical question how potential customers would find the service station if it were not visible from beyond the site. In our view that does not address the issue. It is not suggested that when lit at night the service station would not be visible from the road beyond the site. What was claimed (and on the evidence we accept) is that the lighting would not light up any area beyond the site.

We accept the evidence of the applicant's planning witness, Mr H F Bhana, and find that the topography would minimise any difficulty with wash of car headlights over the residential properties on the opposite side of Great North Road; that the only house that might be affected (No 1431) would be screened by the planting in the south-western corner of No 1429 and by a bus shelter in front of No 1429; and that any effects would be further mitigated by adjusting the site levels so that vehicle headlights point downwards as the vehicles leave the site.

Mr Brehmer also referred to the replacement of natural contours by retaining walls and fill as loss of amenity values. We accept that the proposal would involve some alteration to the existing ground contours, although we do not know whether they are natural contours. There have already been alterations to natural contours in the formation of Great North Road and the development of the residential area of Waterview on the western side of that road. By its zoning of the subject land, the district plan contemplates private development that would be likely to require some earthworks to provide building sites, and possible roads. In our judgment, the alteration of the ground contours of part of the applicant's property required for the establishment of the proposed service station would not be disproportionate in the context of the size of the property as a whole or its situation in an established suburb of Auckland City; and we find that it would not be an adverse effect on the environment.

Relative weight of the proposed plan

The criteria set out in section 104(4) include relevant rules, policies or objectives of a plan or proposed plan (paras (a) and (b)). In this case both an operative (transitional) plan, and a proposed plan exist. As mentioned already, those plans are not consistent in a material respect, in that the operative plan provides for a service station on the subject site to be a conditional use (so that by section 374 it is deemed to be a discretionary activity), but the proposed plan does not provide for a service station on the subject site at all, whether as a permitted activity or as a

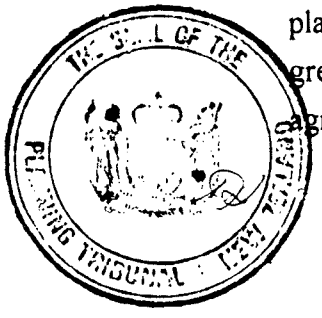
discretionary activity; and does not provide for storage of the quantity of petrol proposed to be stocked on the site, whether as a permitted or discretionary activity.

In the light of that difference, the parties made submissions about the way in which we should perform the duty imposed by section 104(4) of having regard to those provisions of the plan and the proposed plan.

Counsel for the appellants submitted that we could well consider the proposed plan to be the dominant document. He observed that the Resource Management Act does not distinguish between weight to be accorded to an operative district plan and to a proposed plan, and argued that there is a clear inference of an intent to upgrade the importance of the proposed plans and to accord them equal importance. He relied on a Planning Tribunal decision in *Peng Lee Lim v Hutt City Council* W102/93.

Counsel for the respondent observed that the proposed plan is at a very early stage in the planning process, and submitted that it may be regarded as "inchoate" as that term was used in the Tribunal's decisions in *Stevens v Tasman District Council* W43/92 and *Banks v Nelson City Council* W15/93. Mr Kirkpatrick also submitted that the correct approach is to consider which is the dominant plan. He argued that it would be in the interests of justice to regard the operative plan as dominant, given that the provisions of the proposed plan may be altered significantly. Counsel contended that it is also relevant to consider the expectations of the applicant, which had acquired the site at a time when the service station was a conditional use, and has been continuing attempts to obtain consent. He submitted that it would be unfair to deny those expectations, referring to the Tribunal's decisions in *Northern Contractors v Mt Eden Borough Council* 11 TPA 151; *Brewster v Dunedin City Council* C30/87; *Warde v Howick Borough Council* A88/83; and *Clark v Christchurch City Council* C36/83.

That approach was endorsed by an experienced consultant planner called for the respondent, Mr R M Dunlop. That witness deposed that until the new plan can no longer be altered through the submission and appeal processes, it would be good planning practice that the operative should form the dominant document; and that greater weight should be placed on the transitional plan. In cross-examination he agreed that the Act does not differentiate, giving one more or less weight.



Counsel for the applicant announced that he did not ask for a finding that the existing plan is the dominant document, explaining that the use of that term could be an apology for lack of clear thought. He observed that the proposed plan is at an early stage in the process of coming into force; that submissions have been made about absence of provisions for service stations in residential zones; that the applicant takes issue with the appellants' claim that it is unlikely that service stations will be added back as a discretionary activity; and that by contrast the operative plan has been the subject of a lengthy and relatively recent review process. Mr Bartlett submitted that there is no basis for preferring proposed provisions that have not been tested, that cannot be tested in these proceedings, and which are subject to strenuous opposition; and that the present application can proceed as a non-complying activity.

In *Peng Lee Lim*'s case, the Tribunal considered the reference in section 105(2)(b)(ii) to the objectives and policies of the plan or proposed plan, and said (at page 3):

> "We consider that this wording allows flexibility as to what weight the Tribunal would give to a proposed plan as opposed to an operative plan, that weight generally being greater as a proposed plan wends its way further through the notification and hearing processes. There may be occasions when regard must be had to the provisions of both."

In respect of the proposed variation in that case, the Tribunal took note of the fact that the variation was subject to many submissions which had not been heard by the council, and expressed the view that it could not hold that its provisions were sufficiently tested to influence the decision on that appeal.

We agree with the view expressed in that decision that there may be cases when regard is to be had to the provisions of both an operative plan and a proposed plan; and that the weight to be given to a proposed plan would in general be greater the further the relevant provisions have been exposed to testing along the statutory course prescribed by Part I of the First Schedule. We also agree with the proposition that there is a limit to the extent that description of an operative plan as the dominant document is useful in the new regime under the Resource Management Act. That term was used in cases under the Town and Country Planning Act 1977 as a shorthand for indicating that a proposed measure had not

been sufficiently exposed to testing to prevail over the corresponding provisions of the operative scheme. However, the Resource Management Act provides a regime that, although similar in many respects, is different from that of the Town and Country Planning Act. It would avoid merely applying the thinking appropriate to the previous regime if the shorthand term was not applied in the new regime.

We accept Mr Palmer's submission that the Resource Management Act does not distinguish between weight to be accorded to an operative district plan and to a proposed plan, and that it gives provisions of a proposed plan more significance; but we do not accept that the new Act accords proposed plans equal importance with operative plans for the purpose of deciding resource consent applications. Rather, the Act expects that consent authorities are to have regard to any relevant rules, policies and objectives (and, in cases to which the Resource Management Amendment Act 1993 applies, other provisions) of an operative plan or a proposed plan, implying that when there are rules, policies or objectives in any such plan, regard is to be given to them. That is not to say that those contents of plans are necessarily to be given full effect. That cannot be done where the proposal is a non-complying activity; nor can it be done in cases like this, where there has been a deliberate change of policy and the two plans are inconsistent.

We observe that the requirements of section 104 for having regard to various matters are related to the exercise of discretions conferred by section 105(1). That indicates that, rather than have a general rule about the cases where a proposed plan is to prevail over inconsistent provisions of an operative plan, or vice versa, each case is to be decided individually according to its own circumstances. The extent (if any) to which the proposed measure may have been exposed to testing and independent decisionmaking may be relevant; so may circumstances of injustice (though not every case of disappointed aspirations or even expectations would create an injustice); and the extent to which a new measure (or, as in this case, the absence of one) may implement a coherent pattern of objectives and policies in a plan may be relevant too.

We therefore proceed to have regard to all relevant rules, policies and objectives of the operative (transitional) district plan, and of the proposed district plan. After we have had regard to them and to all other relevant considerations, we will then attempt to take into account all relevant matters in reaching a discretionary

judgment whether to grant or refuse land-use consent to the proposed service station.

Rules of Transitional and Proposed Plans

Transitional plan

The relevant rules of the transitional district plan are the rule by which service stations are conditional uses in the Residential 5 zone; and the criteria for assessing service station applications set out in Ordinance 3.5:2.4. We now consider the extent to which the present proposal meets those criteria.

> "(a) The development is capable of satisfying the Dangerous Goods Act and Regulations"

There was no issue on this respect. We find that the proposal has been designed in accordance with the requirements of the Dangerous Goods Act and Regulations; and that the petrol storage tanks are to be constructed in accordance with the Code of Practice for Underground Petrol Storage Systems.

> "(b) The site must be of adequate size and frontage to accommodate the use plus off-street parking and landscaping."

Again there was no contest in this respect. We find that the site has ample size and frontage to accommodate the service station and off-street parking and manoeuvring areas and an unusually large extent of landscaping.

> "(c) The site must be sufficiently remote from intersections and corners to ensure adequate sight distance and to prevent congestion caused by the ingress and egress of vehicles to and from the site."

The service station site itself fronts onto the intersection of Great North Road and Herdman Street. However that is not an impediment to the proposal because the proposal provides for one-way traffic which would not enter the intersection at all; there are no intersections on the subject side of the road within the vicinity of the site; the sight distances are greater than normally required; there would be no restrictions to impede visibility; and there would be no potential for congestion caused by the ingress or egress of vehicles to and from the service station.

"(d) The entry/exit points must be so designed as to permit easy access to the site and to prevent on-street congestion."

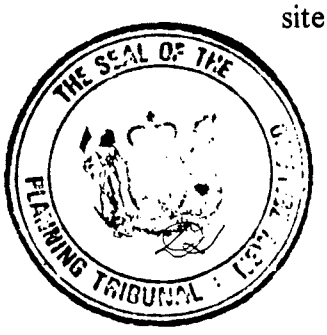
The deceleration lane for entry to the service station is to be lengthened to allow vehicles entering the station to slow down and enter the forecourt at a safe speed. That is required by a condition imposed by the respondent. The location of the exit point is not expected to impede vehicles leaving from the intersection with Herdman Street, and vehicles are not expected to have problems turning left out of the service station site. We find that the entry and exit points have been designed so as to permit easy access to the site and to avoid on-street congestion.

"(e) The development must generally observe underlying principles of the published recommendations of the Ministry of Transport, for both typical and innovative service station layouts with respect to site (sic) distances, minimum depth of forecourt, width of frontage, location and width of footpath crossings and pedestrian refuges."

The only respect in which the recommendations of the Ministry of Transport are not met is that the width of the exit crossing is 8 metres (along the kerb line, 6.3 metres at right angles) which is wider than the 6-metre maximum width recommended for one-way crossings, to avoid them being used as two-way crossings. However the extra width is necessary for tanker movements, and use of the exit as an entrance would be discouraged by signs and by the splitter island or kerbed median. The traffic engineer called for the respondent was satisfied with the design of the service station, as were the traffic engineers called for the applicant.

"(f) The scale of development must have regard to the bulk and location controls for the zone."

The general bulk and scale of the proposed building would comply with the ordinances for the Residential 5 zone; the design would provide ample space for tanker movements without requiring reverse manoeuvres or complex turns; and we find that the scale of the development is acceptable in the context of the size of the site.



"(g) The site must be landscaped and adequately fenced and screened from adjacent properties, particularly where the adjacent land is zoned residential."

The land adjoining the applicant's property is held for reserve purposes, and residential development of it is not expected. The landscaping proposed would provide adequate screening, and fencing would serve no purpose. Views of the service station from dwellings opposite would be broken by trees that are to reach the service station canopy height of 5 metres and would provide significant screening. The eastern and southern boundaries are to be heavily planted to screen the buildings, and the retaining wall is to be planted in trailing plants.

> "(h) All signs and lighting must be approved as part of any application. They must be in keeping with the intent of the zone and the existing development of the area. In residential zones, particularly rigorous standards will apply."

The signs proposed would involve use of yellow lettering on a dark green background which would produce a relatively soft tone while enabling clear identification of the service station. The forecourt lighting would be relatively subdued and there would be no overspill. We accept the opinion of the consultant planner called for the respondent that the proposed signage would not be excessive, but would be appropriate for identifying the proposed use and the range of services available.

> "(i) The site must have adequate off-street parking and adequate manoeuvring space for tankers and service vehicles."

Nine parking spaces would be provided, and there would be ample space for manoeuvring of tankers and other service vehicles. The filling points for the fuel storage tanks are accessible, and it is expected that petrol and LPG tankers would be able to pass through the forecourt without reversing.

> "(j) Restrictions may be imposed on the hours of operation of service stations in residential zones where noise is likely to be a problem."

It is proposed that the service station be operated continuously, 24 hours per day. If the carwash is unable to meet the required night-time noise limits, it would be switched off from 9 pm to 8 am the following day. With the noise limits imposed by the respondent's condition, and the relative isolation of the site from residential properties, there is no need for restrictions on the hours of operation of the service station.

Criterion (k) applies to service stations in shopping centres and is not applicable.

> "(l) Any compressor or machinery must have adequate sound insulation. In particular any development must comply with the noise standards set out in clause 6.5:3 of the statement."

The compressor would be able to comply with the noise standards, and the respondent's condition would ensure that the development would comply with the noise standards.

> "(m) The location of any LPG storage tank must be at an appropriate distance from site boundaries consistent with safety requirements."

The segregation distance from the site of the proposed LPG tank to the nearest residential boundary would be 55 metres, much greater than the separation distance normally considered acceptable. Any LPG reaching the atmosphere would flow downhill from the service station and dissipate. The LPG installation has been designed to meet the requirements of relevant legislation, the New Zealand Code of Practice, and best industry practice.

Proposed plan

The relevant rules of the proposed plan are those by which service stations are not provided for in the Residential 6a zone, and the storing of more than 200 litres of petrol is not permitted in that zone. Both of those rules are subject to challenge by submissions on the proposed district plan.

The isolation of the site from other activities would mean that hazards from the storage of petrol at the service station would be lower than those from service stations on many sites in Business Activity zones; and the risks of possible groundwater contamination and other policies sought to be implemented by the restriction on petrol storage are addressed by the National Code of Practice for Underground Storage of Petrol, with which the proposal is designed to comply.

Policies and Objectives of Transitional and Proposed Plans

Transitional Plan

The transitional district plan contains an objective (at clause 3.1:2.5) of recognising:

> "the need for certain acceptable non-residential uses and activities required to promote the economic and general welfare and convenience of residents"

to be achieved by policies of which the following are relevant:

> "(a) By providing for specified auxiliary uses to service residential areas.".

That explains the limited provision for service stations in residential zones under which the present application is to be considered.

Proposed plan

The proposed plan contains statements of objectives and policies of a general character, but none which directly addresses the omission of provision for service stations in residential zones.

Mr Brehmer referred to objectives of the proposed plan (paragraph 2.3.1) of protecting and enhancing the natural environment, of protecting the district's resources from significant adverse effects of activities and development, and of conserving the district's significant landscape features. He claimed that the proposed planting would be inconsistent with those objectives, because it would completely change the pleasantness of the amenities of the area, and claimed that the site is a significant landscape feature.

Mr Brehmer referred to a further objective in the proposed plan (paragraph 2.3.3) of achieving a healthy and safe living environment for the citizens of the district, and asserted that health and safety would be compromised by the proposal to place a commercial facility on the opposite side of Great North Road from a housing area and a school because people, including children, would be "enticed to cross the dangerous road to buy trivialities, not only a danger to themselves, but also to

motorists [who would be] unnecessarily delayed in their journey". The witness also referred to an objective (in paragraph 2.3.3) to give recognition to the status of the tangata whenua, and asserted that the objective had not been met because there had been no consultation with the tangata whenua.

Mr Brehmer also considered that the proposed development would not meet an objective in paragraph 2.3.4 of providing for economic growth and development which does not unduly compromise environmental values. A further objective referred to by that witness was paragraph 2.3.5: "to allow for new service provision where it does not compromise environmental protection and enhancement". He asserted that changing the pleasant open landscape and filling it with concrete and buildings, propped up by retaining walls, would be "anything but environmental protection and enhancement".

We consider that those objectives, cast in such general language, are to be seen in the context of the plan as a whole. They are not absolute goals, but expressions of the value the community places in them. In relation to the present application we have addressed the substance of the matters raised by Mr Brehmer in previous parts of this decision.

Objectives and policies that are more specific to residential activity are found in part 7 of the proposed district plan. They include an objective (clause 7.3.4):

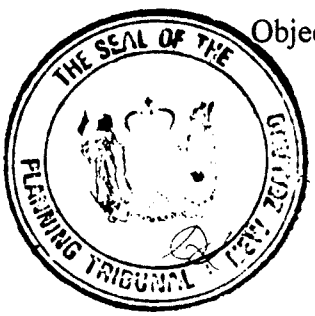
> "To recognise the need for certain supporting activities to be located in residential areas to promote the economic and general welfare and convenience of residents."

The following policies are relevant to achieving that objective:

> "By providing for non-residential activities in certain residential areas where they provide benefit or support for residential activity.
>
> ...
>
> By taking into account the impact of location, scale, and generated effect on neighbouring sites and the local environment when administering development controls in relation to non-residential activities in residential zones."

Objective 7.3.2 is:

> "To identify, maintain and enhance the recognised character and amenity of residential environments."



The policies stated for achieving that objective do not bear on non-residential activities, such as the present proposal, and are therefore not applicable.

Reference was made to a strategy for the Residential 6 zones set out at paragraph 7.6.6.2. However the proposed plan carefully identifies objectives and policies (as expected by section 75(1)(b) and (c)) and it is clear that clause 7.6.6.2 is not intended to fall into either category.

In the section of the proposed plan on transportation there is a relevant objective at paragraph 12.3.2:

> "To improve access, ease and safety of movement within the city, while ensuring that adequate provision is made for the various transport needs of the region."

In the chapter of the proposed plan on hazardous facilities, there are the following expectable objectives:

> "5E.4.1 Objective
> To control any actual or potential adverse effects of hazardous facilities and substances on the natural and physical environment, and the people of the district."

A relevant policy for achieving that objective is:

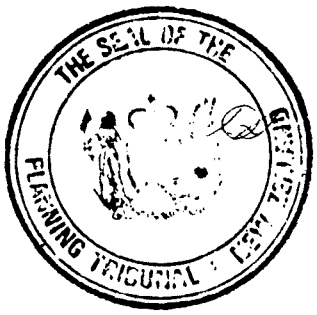
> "By requiring operators of hazardous facilities to manage their activities in such a way as to avoid, remedy or mitigate adverse effects on the adjoining area"

A further relevant objective is:

> "To minimise the adverse effects of site contamination and to prevent future site contamination."

A relevant policy for achieving that objective is:

> "By applying measures which seek to minimise and control the adverse effects of discharges into or on to land."



Part II

The following provisions of Part II are potentially applicable in this case: avoiding, remedying or mitigating any adverse effects of activities on the environment (section 5(2)(c)); the relationship of Maori and their culture and traditions with their ancestral lands etc (section 6(e)); the maintenance and enhancement of amenity values and the quality of the environment (section 7(c) and (f)).

It was the appellants' case that the proposal would not adequately avoid, remedy or mitigate the adverse effects of the activity on the environment in that the proposed service station would be a serious detraction from the visual appearance of an open green-belt area, would compromise the Oakley Walkway and natural habitat, would be a continuing disturbance for residents from 24-hour activities, would create risk of water and air pollution, would cause detrimental effects on traffic flow and safety, and increased interruption of traffic from the Herdman Street intersection, and increasing hazard to young people attracted to convenience goods.

By contrast it was the applicant's case that the proposal would promote the sustainable management of natural and physical resources in that the site is a physical resource with development potential; that it has no significant visual, cultural, social, botanical or other factors that warrant consideration of it as an important open-space resource; that the Tribunal is entitled to take as conclusive the residential zoning under both plans by which the site is zoned for development; and that the proposal would provide efficient and effective means of providing fuel to motorists.

For reasons given in earlier parts of this decision, we do not accept that the proposal would have the adverse effects cited by the appellants. In our judgment, if established and operated in accordance with the conditions imposed by the respondent, the service station would be a management of the resource represented by the applicant's property in a way which would enable people and the community to provide for their economic wellbeing in the refuelling of their vehicles without compromising the values expressed in paragraphs (a) to (c) of section 5(2). We consider that the proposal, established and carried on in that way, would avoid, remedy, or mitigate any adverse effects of the activity on the environment.

We accept that the relationship of Maori and their culture and traditions with their ancestral lands etc is a matter of national importance (section 6(e)). However the evidence did not establish that the service station site is the object of any such relationship, even though we accept that it was once part of a larger area of land possessed by Ngati Whatua.

In our judgment the applicant's proposal, if established and carried on in compliance with the respondent's conditions, would maintain and enhance the amenity values and the quality of the environment.

Threshold Tests

Because the proposed service station activity on the site would be a non-complying activity under the proposed district plan, resource consent may not be granted unless we are satisfied on one or other of the threshold tests set out in section 105(2)(b).

Effects on the environment

The first of those threshold tests is whether any effect on the environment would be minor. In that regard an issue was raised whether the effects of the proposal should be considered against any effects generated by the existing disuse of the land, or in terms of effects that could be generated by an activity permitted on the site as of right.

Counsel for the applicant submitted that when assessing effect on the environment for the purpose of section 105(2)(b)(i), the Tribunal should have regard not to the existing pastoral state of the site, but to the intensity and nature of development that would be permitted on the site as of right pursuant to the district plan. He reminded us that the Residential 5 zoning under the operative plan, and the Residential 6a zoning under the proposed plan, both provide for ranges of activities permitted as of right. Counsel submitted that a zero-based approach would be impractical and potentially inequitable; and contended that it cannot have been the intention that a non-complying activity that would have less effect than a permitted activity could not be considered. Mr Bartlett referred to three Tribunal decisions in which the potential of the site for other development as of right had been considered: *Thomson v Queenstown-Lakes District Council* 2 NZRMA 189;

Design No 4 v Queenstown-Lakes District Council 2 NZRMA 161; *Van Erkel v Queenstown-Lakes District Council* A57/93. He argued that the effect should be seen in context (referring to *Darroch v Whangarei District Council* A18/93) so that we should take into account the nature and intensity of the development that could be permitted on the site as of right, when determining whether the effects of the proposal would be minor.

The passage in the *Darroch*'s case to which Mr Bartlett referred was the following (at page 22):

> "The actual and potential effects of the proposal are to be seen in context. The proposal is to make regular, but intermittent, use of stockyards that already exist for a permitted activity on an ample site in a rural area. We find that in the normal round of farming activities, it is not uncommon for hundreds of cattle to be mustered and yarded for various purposes such as drenching and weighing. That kind of activity could occur in the normal course of farming as frequently as twice a month or more often. It is against the background of that finding that we have regard to the actual and potential effects of the proposal."

It is evident that the passage related to consideration, under section 104(1), of the actual and potential effects of the proposal; and not to consideration of the threshold test under section 105(2)(b)(i) whether any effect on the environment would be minor. The same is true of the Queenstown cases relied on by counsel. The distinction was made by the Tribunal in *Paynter Horticultural v Hastings District Council* W25/93.

We are not persuaded that assessing, for the purposes of section 105(2)(b)(i), whether any effect on the environment of a non-complying activity would be minor is necessarily to be gauged against possible effects of hypothetical activities that according to the rules of the district plan would be permitted on the site. Although by use of the word "minor" section 105(2)(b)(i) implies a comparative judgment of degree, we have found nothing in the section to indicate a comparison with the effect of permitted uses on the environment. We remember that those carrying on authorised activities have duties to avoid unreasonable noise (section 16) and to avoid, remedy or mitigate adverse effects on the environment (section 17). Rather, we consider that the judgment is to be made in the circumstances as they exist. In the present case, those circumstances include the absence of environmental effects from the current disuse of the site, and also its location fronting a busy road,

adjacent to public open space used for informal recreation, and opposite an established residential area.

We make our judgment on the footing that the activity would be established and carried on in compliance with the conditions imposed by the respondent. The establishment works and the service station itself would be visible from certain houses fronting Great North Road, and from the path beside the creek, until the proposed screen planting becomes established. The proposal has been designed so that effects on traffic flow and safety would be minimal. Other effects on the environment, such as emissions of noise, light, and contaminants, would be restricted by the conditions. Considered overall, in its situation and circumstances already described, it is our judgment that the effects on the environment would be no greater than minor.

Objectives and Policies of Plans

By section 105(2)(b)(ii) we have to consider whether we are satisfied that granting the consent would not be contrary to the objectives and policies of the district plan or those of the proposed plan. We have already referred to the relevant objectives and policies of those instruments. The understanding to be given to the word "contrary" has been explained in the Tribunal's decision in *NZ Rail v Marlborough District Council* C36/93 and in the judgment in the High Court in the same case (Wellington AP 169/93 4 November 1993 Greig J).

Despite Mr Brehmer's opinion that the proposal would be contrary to some objectives expressed in very general language, from our own findings about the proposal there is no basis for us to conclude that it would be contrary (in the sense mentioned) to any of the objectives or policies of either plan.

We are therefore satisfied that the proposal meets both the threshold tests in section 105(2)(b), and that consent to the activity could be granted even though it is a non-complying activity in respect of the proposed district plan.

DISCRETION

Having now addressed the various criteria and conditions stipulated by the Act, we now approach the discretionary judgment to grant or refuse consent (section

105(1)(b)). We start by considering various matters raised at the hearing which have not already called for consideration.

Geological Stability

A witness called for the appellants, Mrs Persson, deposed that there is some doubt about the underlying geological structure, that some (unidentified) authorities consider the area unstable, that earthmoving to form a site for the service station would cause quite serious movement of soil strata, and that the site for the proposed building would be below the floodline of the Oakley Creek.

The consultant planner called as a witness for the respondent, Mr Dunlop, deposed that the respondent's Natural Hazards Register, which records areas of known and potential instability, shows an area adjacent to the site between its eastern boundary and Oakley Creek (in common with the banks of all the city's principal streams) as potentially unstable because of the potential for peak flows to trigger erosion along their margins. Mr Dunlop also deposed that here the esplanade reserve contains the flood plain of the Oakley Creek; that the subject site is at a higher elevation; and that a geotechnical report by engineers engaged by the applicant had indicated no geological impediment to the service station development proposed.

In our judgment the doubts raised by Mrs Persson's assertions were adequately addressed by Mr Dunlop's evidence; and there is no basis for a finding that the service station site is unsuitable for the purpose, or that the necessary earthmoving would have any adverse effects.

Reserves in Vicinity

The first-named appellant, Mr J J Hanton, claimed that his lifestyle would be negatively impacted by changing a reserve area to one that is commercial; that to take away the only bit of green belt reserve left in the area, and cutting off access to the Oakley Creek and its amenities was offensive to him, and an insult to Maori people's generosity; and that the service station would be a blot on the countryside and a white elephant.

Ignoring the rhetoric, we record that there was no evidence that the site is or ever was a reserve for public recreation, nor that the proposal would cut off access to the Oakley Creek and its esplanade reserve. In cross-examination Mr Hanton acknowledged that the proposal would not affect his access to the creek, that the city council had acquired the adjacent property for reserve, and that he did not use the pathway by the creek very often. Mr King agreed that the service station would not prevent access to routes on either side of the stream, and acknowledged that there are ample opportunities to introduce further access which would not be foreclosed by the service station.

The Avondale area in general, and Waterview in particular, are not deficient in open space, and are well served by active and passive reserves. In particular the site, on its southern boundary, abuts a public reserve of some 3.9 hectares, and, on its eastern boundary, the esplanade reserve of 2.5 hectares. Both the applicant's property and the surrounding land have traditionally been zoned Residential. The applicant offered to sell to the respondent the residue of its property not required for the service station site, but that offer has not been accepted. However, one of the conditions imposed by the respondent would exclude residential development of the balance of the property, so that it would in effect become a private open space, which would visually appear as an extension of the adjoining reserve.

In Part VIII the Act provides a technique (designation) by which use, subdivision or changing the character, intensity or scale of the use of land that would prevent or hinder a public work is restricted. The procedures in that part provide safeguards for owners of land affected, including rights of appeal (sections 174 and 179), lapsing of designations (section 184), and rights of seeking that the land be taken (section 185). The applicant's property is not subject to such a designation in either the operative plan or the proposed plan. Even if we were persuaded that the applicant's property should be made reserve (which we are not), for us to refuse consent on that ground in the absence of a designation would be to deprive the applicant of safeguards that the legislation provides for such cases. In principle we do not consider that it is a valid ground for opposing resource consent to an activity on undesignated private land that the opponents wish the land to have the status of public reserve. In any event, in this case we are not persuaded that the land should have that status. For those reasons we decline to take the opponents' wish into account in deciding whether the resource consent sought should be granted or refused.

Proposed Planting

Although it was not part of the appellants' case as presented by their counsel, several witnesses for the appellants expressed dissatisfaction about the planting of the remainder of the site proposed by the applicant.

The appellants' planner, Mr Brehmer, described the effect as turning an open sunny glade into a dark gully, a change of pleasant semi-open space to a dark woodland; and claimed that it would detract from the present pleasant environment. Mr King said that the planting proposed would be unacceptable because it was restricting the view of the open sky; but in cross-examination he acknowledged that on that topic some of the appellants agreed with him, and others disagreed. Mrs Corsbie expressed her concern that it would become a dark gulch. Mrs Morris Upton preferred open pasture but agreed that the residents could not come to one mind about how much planting was desirable. Mr Kiwi considered that the planting proposed would be desirable to screen the building from being obvious from the valley, but if the building and associated structures were screened from that view with a continuous row of shrubs around the base of the crib wall, that would be ample planting. He believed that the group could speak with a single voice on the amount of planting that would be desirable. Mr Tucker described the proposed planting as a dense and dark woodlot that would change the character of the walkway irreparably, encouraging street kids and providing cover for thieves or muggers; and that very dense planting would cut the area right off from the rest of the park, creating a hard boundary with the reserve land.

In response, counsel for the applicant proposed that inner and outer planting areas might be distinguished, to separate steps to mitigate adverse effects, from unrelated bonus or compensation planting elsewhere on the site.

Having heard the evidence of the appellants' witnesses we do not share Mr Kiwi's view that the group could speak with a single voice on this topic. We record that neither the original notice of appeal nor the amended notice of appeal sought relief in respect of the extent of the proposed planting. We accept that the planting was part of the proposal the subject of the application for resource consent; and that persons who might otherwise have opposed the application may have refrained from doing so on being satisfied that the proposed planting would adequately

mitigate any adverse effects. We also observe that there is no restriction in any relevant planning instrument on the applicant planting its property as it wishes. In the circumstances we consider that a decision should be made on the proposal which was the subject of the original application and we will refrain from requiring any amendment to the landscaping proposed.

Integrity of proposed plan

Mr Brehmer asserted that granting consent to a service station in the Residential 6a zone under the proposed district plan would seriously impair the integrity of that plan and would set a dangerous precedent for further exceptions to the plan.

In our opinion that overstates the position. It is to be remembered that the present application was made before the proposed plan was published; that the omission of provision for service stations in residential zones and the restrictions on the amount of petrol that may be stored in those zones have been challenged by submissions on the proposed plan; and that the respondent has not yet had the opportunity to consider those submissions and give its primary decision on them. The possibility of a reference on the topic to this Tribunal cannot be excluded.

It is also to be remembered that the applicant was entitled to apply for land-use consent for its proposal; that we have found that the effects of the proposal on the environment would be minor; and that it would not be contrary to the objectives or policies of the operative district plan or those of the proposed district plan.

In those circumstances, although we will take into account that the proposal is a non-complying activity in terms of the proposed district plan, we do not accept that granting consent would seriously impair its integrity, or set a dangerous precedent.

Previous application

We refer to the appellants' claim that the Tribunal having refused the previous application, the subsequent grant of a similar application would affect public confidence in the resource management decision system.

We do not accept that submission. The present proposal, while similar, is not identical with the previous application. In the meanwhile, relevant circumstances have changed, particularly the installation of traffic signals at the Herdman Street intersection and the respondent's proposals for other road works and traffic management measures. The Act does not restrain repeat applications, and it was not suggested that any rule of estoppel precluded the present application. We do not see that granting consent on the subsequent application, if that is in accordance with the law, and is held to be deserved on the merits, should affect public confidence in the resource management decision system. We decline to take into account the fact that a previous application for a similar service station on the same site was refused.

General

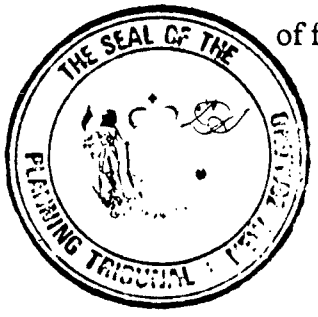
In our judgment, little weight should be placed on the provisions of the proposed district plan in the circumstances mentioned above. As a discretionary activity in terms of the operative district plan the proposal meets with criteria stipulated in that plan; the actual and potential effects of allowing the activity would be minor; the proposal would promote the sustainable management of natural and physical resources; and would not be contrary to the objectives or policies of either of the district plans. In our judgment, resource consent for the proposed service station deserves to be granted.

CONDITIONS

Some minor improvements to the conditions imposed by the respondent arose during the course of the appeal hearing.

References to NAASRA standards are now obsolete, as are references to Ministry of Transport recommendations.

The definition of the convenience goods that may be sold from the service station requires refining to delete motorists' accessories from the schedule (the sale of them being part of the definition of a service station) and to stipulate that the sale of food should be ancillary to the service station activity.



A condition should be added to require that an archaeological survey of that part of the site to be developed for the service station be carried out prior to development.

Counsel are asked to agree on the drafting of an amended set of conditions accordingly. Failing agreement, the Tribunal will receive memoranda from the parties and settle the conditions itself.

DETERMINATIONS

For the foregoing reasons the Tribunal makes the following determinations:

1. The respondent's decision is amended to the extent of substituting a revised set of conditions in accordance with the preceding section of this decision.

2. To that extent only the appeal is allowed; and in all other respects it is disallowed.

3. The question of costs is reserved.

DATED at AUCKLAND this 1st day of March 1994

DFG Sheppard
Planning Judge

BEFORE THE ENVIRONMENT COURT

ORIGINAL

Decision No W 075 /2008

ENV-2008-AKL-000043

IN THE MATTER of an appeal under s120 of the Resource Management Act 1991

BETWEEN PROGRESSIVE ENTERPRISES LIMITED
Appellant

AND THE NORTH SHORE CITY COUNCIL
Respondent

Court: Environment Judge C J Thompson, Environment Commissioner W R Howie, Environment Commissioner H M Beaumont

Hearing: at Auckland on 6 –10 and 15 - 16 October 2008. Site visit 13 October 2008

Counsel: D A Allan and A Bull for The National Trading Company of New Zealand Ltd
C N Whata, J D K Gardner-Hopkins, D Minhinnick for Progressive Enterprises Ltd
W S Loutit and D K Hartley for the North Shore City Council

DECISION OF THE COURT

Decision issued: 3.11.08

A. The appeal is declined

B. Costs are reserved

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

Introduction

[1] In November 2007 the North Shore City Council granted the resource consents necessary to enable The National Trading Company of New Zealand Ltd (NTC) to fitout an existing building at 30-60 Wairau Road, Glenfield and to operate it as a Pak 'N Save supermarket. After a joint hearing, the Auckland Regional Council also granted consents in respect of discharges to air and to ground for the same proposal. Those are not subject to appeal and need not be discussed. There were appeals against the City Council's decision by other parties also but they have all now been resolved, either by withdrawal or by agreement on modifications to conditions. Those have been incorporated into draft Consent Orders which are presently in abeyance, pending the outcome of this appeal. Only this appeal against the grant of consents by the City Council, lodged by Progressive Enterprises Ltd which competes with NTC in the supermarket trade, remains to be dealt with in this hearing.

The proposal

[2] The proposed supermarket is to be one of 4899m^2 gross floor area (gfa) (of which about 2929m^2 will be retail floorspace) and will have some 342 (including 8 mobility spaces) carparking spaces. It is to have *left-turn in, left-turn out,* access onto Wairau Road. Access onto Archers Road will be constructed through a recently acquired property to a four-way, signalised intersection with Archers Road and Poland Road. There will also be access onto and off Porana Road.

Site and area description

[3] The site is one of 2.4169ha with frontage onto the western side of Wairau Road. As mentioned, it also has access onto Archers Road to its north, and to Porana Road to its south. SH 1, in the form of the Northern Motorway, is a block away to the east, running parallel to Wairau Road. The surrounding streets are occupied by light industrial, servicing, and (mostly) bulk or trade retail premises, with a considerable emphasis on matters automotive. The closest residential development to the site is about 150m to the west, on the north side of Archers Road. This appears to be in a state of transition, with a number of the former residential properties now occupied by small enterprises such as an optometrist, accountancy practices, hairdressers and an upholsterer/soft furnisher.

[4] As it passes the site, Wairau Road is a four-lane regional arterial road with a flush median. At that point, it carries about 24,000 vehicles per day (vpd). Archers Road is a secondary arterial linking residential and industrial areas to the west in Glenfield and Birkenhead with Wairau Road and the motorway. It carries about 13,500 vpd past the site. Porana Road is a collector road linking Wairau Road to the western parts of the North Shore via Sunnybrae Road and carries around 9,000vpd. It provides the main access to the North Shore Events Centre, a block to the south of the site[1].

Zoning and planning status

[5] The site is zoned *General 9* (in general terms, a business zoning) in the District Plan and the planning witnesses are agreed that overall the proposal is to be considered as a *Discretionary* activity principally, but not solely, because it is a food retail operation with a gfa greater than 2500m^2. That activity status of course brings into play s104 (subject to Part 2) and it is agreed that all factors (save that there is no relevant National Policy Statement) mentioned in that section are to be considered.

Litigation history

[6] This proposal, in differing sizes and permutations, has produced a good deal of litigation extending back into the early 1990s. It is not necessary to review all of that, save to highlight that on the last occasion when it was before this Court – in 2001 – the proposal was for a supermarket of 6259m^2. There was also to be a Fire Service building on the Wairau Road/Porana Road corner of the block. The then proposed access included a rather problematic right-turn into the site off Wairau Road, and onto and off Archers Road through an access point a little to the east of the existing Archers Road/Poland Road intersection. Because of those issues and the amount of traffic it was projected to generate, the Court regarded the proposal as *too large* for the site and the surrounding road network (as it then existed) to cope with. For that reason the Court upheld the Council's decision to decline the necessary consents and expressly did not embark upon an examination of the proposal's possible effects on the amenity values of other North Shore centres. That decision is *The National Trading Company of New Zealand Ltd v North Shore City Council* (A182/2002).

[1] Wade EiC 3.6 to 3.14

[7] As will already be apparent, the Council has a different stance on the current application, and supports its decision to grant the consents. In brief, it believes that the proposal's (about 22%) smaller size and absence of the Fire Service development, and improvements in the access to the roading network surrounding the site, have avoided or mitigated the adverse effects on traffic and existing centres to the extent that they no longer outweigh the positive effects.

The live issues

[8] There is a large measure of agreement between the parties that there are three central issues to be resolved. First, whether there will be adverse traffic effects, particularly as they might relate to the Wairau Road / Tristram Avenue intersection. Secondly, whether there will be significant social and economic effects on the amenity of the existing North Shore centres as the result of patronage being drawn away from them by the proposed supermarket. Thirdly, whether the proposal so conflicts with, or is contrary to, the provisions of the relevant planning documents that to allow it would seriously harm the integrity of those documents as instruments for managing the effects of activities.

Our approach to drafting this decision

[9] We had evidence from 26 witnesses – their written briefs occupy 5 large folders and the transcript of the 6 & 1/2 days of hearing runs to 570 pages. The bundle of planning documents agreed by the Planner witnesses occupies 2 large folders and a folio of plans. There is a further large folder of annexures to the evidence of Progressive's principal planning witness.

[10] Obviously we cannot hope to mention all of that material in a decision of acceptable length. We make no apology for summarising it, in places quite severely, and for citing only those extracts of the documents that strike us as exemplifying the issues and themes we regard as decisive.

[11] We mention also that we heard *Confidential* evidence from some witnesses. That was evidence about supermarket turnover and performance figures which the parties agreed to share between selected witnesses for each of them but which, for reasons of commercial sensitivity, they did not wish to be made public. We agreed to accept that evidence on that basis and while witnesses were cross-examined about that material the Court was cleared of

persons who were not privy to it. We have not found it necessary to refer to the specifics of that evidence in giving reasons for our conclusions.

[12] In dealing with the live issues, we have attempted to avoid repetition by grouping the points to be discussed with the relevant District Plan provisions and assessment criteria. Although somewhat inconsistent with the order in which topics appear in s104, we have found it convenient to deal with the argued adverse effects and corresponding District Plan provisions first; then with positive effects; then with the Regional planning documents; and then the issue of plan integrity under the catch-all of *other matters*: - s104(1)(c).

Preliminary point 1 - Alternatives

[13] In two respects, one being almost the mirror image of the other, the issue of *alternatives*, was raised by Progressive. While it might be true that NTC had commented in the course of the application process that it had struggled to find another suitable site for a Pak 'N Save in the southern sector of the North Shore, we do not understand it to be advancing the absence of a viable alternative site as a reason why consent should be granted for this proposal.

[14] Progressive called Mr Nigel Dean, a very experienced commercial real estate valuer, who expressed the view that potential alternative sites could be found in the southern sector which, it might be argued, were *better* in terms of effects or issues with the planning documents. His possibilities were rather discounted by NTC's witnesses on grounds of location, size, difficulty of title amalgamation, or any number of other reasons.

[15] Progressive's *mirror image* of that position was the proposition that the Wairau Road site could better be used for some other activity that would be a less intense generator of private car trips and, potentially at least, amenable to a more intense use of public transport. Such a use, the argument was, would be more sympathetic to the increasing emphasis on public transport in the planning documents.

[16] We deal with the relationship (or lack of one) between supermarkets and public transport elsewhere. What needs to be said here is that in the absence of credible evidence that there will likely be ...*any significant adverse effect on the environment*... arising from the proposal – thus bringing into play the requirements of Clause 1(b) of Schedule 4 to the Act to

demonstrate a consideration of alternative locations or methods in the application process - possible alternative sites for the proposal are irrelevant. Unless Clause 1(b) applies, every proposal must be assessed on its own merits without regard to whether there might, or might not, be a *better* site. That has been the clearly held view of the Court over a long period: - see eg *Dumbar v Gore DC* (W189/1996), *Te Kupenga O Ngati Hako Inc v Hauraki DC* (A10/2001) and *All Seasons Properties Ltd v Waitakere CC* (W021/2007).

Preliminary point 2 - Permitted baseline

[17] Activities permitted as of right by the District Plan bear no practical similarity to the proposal in their likely effects on the environment. Food retailing, for instance, would be confined to premises of less than 200m^2 gfa associated with service stations, and to a tiny fraction of the estimated daily traffic generation. A realistic office development would require a resource consent. There is no assistance to be derived from considering the permitted baseline and we exercise our discretion under s104(2) to put it aside.

The District Plan and live issues of effects on the environment

[18] As mentioned, it is common ground that the proposal is to be considered as a *Discretionary* activity – because it is identified as such in Rule 15.6.1.3 and is not listed in the Table of exemptions attached to the Rule. The District Plan contains, as one would expect, assessment criteria to assist in the exercise of that discretion. In citing Plan extracts, we have underlined portions of the quoted provisions to highlight the fundamental points we take from an overall reading of the Plan. We should also add that we have considered Proposed Plan Change 30, notified on 1 May 2008 and on which Further Submissions close on 10 November 2008. It relates to urban design issues – in the context of this appeal to 15.3.3 and 15.3.4 of the Plan. What it proposes does not seem of great relevance to the live issues and, given its early stage of development, we have not given it weight.

General amenity values

[19] Criteria relevant to amenity values are to be found in, first, 15.3.3 which provides:

15.3.3 Retail Activities

Objective

To enable a wide range of retail activities in business centres, and in locations where they meet the needs and preferences of the community; avoid, remedy or mitigate adverse environmental effects; and enhance community accessibility to a range of facilities.

Policies

1. By encouraging retail activities to locate in the existing and proposed business centres in the city, which include:

a) Sub-regional centres at Takapuna and Albany;

b) Suburban centres, ranging from Browns Bay, Glenfield and Highbury, to Devonport, Milford and Northcote, and to Albany Village, Greville Road, Mairangi Bay, Sunnynook and Unsworth Drive;

c) Local centres distributed throughout the city;

and In the General Business zones where appropriate.

2. (omitted)

3. (omitted)

4. By recognising the potential demand for some retail activity to establish in business zones outside the existing and proposed business centres and requiring this development, (in the Sub-regional 6, Business Park 7, Business Special 8, General 9 and General 10 zones) unless otherwise exempted, to be subject to a thorough evaluation, particularly in terms of the effects of the activity on:

- the roading network in which the activity is located; and
- the amenity values of nearby residential areas; and
- the character, heritage, and amenity values of the centres; and
- the overall accessibility to the range of business and community facilities in the city; and
- the pedestrian amenity in the vicinity of the proposed retail activity.

5. (omitted).

6. (omitted).

7. (omitted).

8. (omitted).

Methods

- Policies 1, 2, 3, 4, 6 and 8 will be implemented by rules
- Policy 5 will be implemented by Council initiatives in the form of advice, coordinating initiatives and advocacy
- Policy 7 will be implemented by Council works for service and amenity improvements.

Explanation and Reasons

Retail activity has traditionally congregated in the existing business centres. These centres comprise land and groupings of buildings, services and facilities and street and landscape improvements. In the context of the RMA, they are valuable physical resources which require

sustainable management. In addition to the existing centres, the District Plan identifies new centres in the growth areas of the city, including a second subregional centre at Albany.

The benefits provided by existing centres include:

- *Their value to the social and economic well-being of the surrounding communities, since they serve a wide range of functions*
- *The opportunity they provide for access to a wide range of goods and services by means of multi-purpose trips, rather than single purpose trips to dispersed stores*
- *Their accessibility to local residents with limited mobility*
- *Their ability to adapt to changing needs either incrementally or by comprehensive redevelopment.*

The Council recognises that the retail sector is dynamic and that a District Plan, unless constantly reviewed, will not be able to anticipate the range of new developments which are likely to occur over the life of the plan. So while the existing centres and the proposed new centres are expected to provide for the majority of new development, the Council recognises that some flexibility in retail location may be needed.

Retail activity responds to changes in the mobility of the population, the length of shopping hours, in retailing technology, the availability of discretionary spending power, in markets and demographics, and the needs and preferences of the community.

Convenient access to retail activity is of particular importance. The last decade has seen the emergence of more vehicle orientated shopping environments. The District Plan provides for some flexibility for retail location outside of the existing and proposed centres within other business zones.

Some retail activity, either in a stand-alone or combined format, can include high traffic generating activities that have the potential for adverse effects on the efficient functioning and management of the street network. For this reason, proposals for large developments, and for activities which cumulatively have the effect of a large development, outside the existing and proposed centres, will need to demonstrate that their effects on the traffic and roading environment are avoided or mitigated. The assessment criteria provided in Section 15.7.4.1 *for both Limited Discretionary and Discretionary activities aim to limit these effects. Large developments can also have adverse social and economic effects on existing and proposed centres. In terms of* Section 15.7.3.5, *proposals will also need to demonstrate that significant adverse effects of this type are avoided or reduced by mitigation measures or by positive effects resulting from the new activity. The social and economic benefits being considered here are not those which are excluded by Section 104(8) of the RMA (trade competition).*

While the Council's role is largely to provide a framework within which private investment decisions can be made, there is scope for the Council to intervene to compensate in a positive manner by upgrading public facilities, or by conserving and enhancing heritage buildings. These interventions can act as a catalyst to private investment.

A fruitful way to encourage a sense of local identity, an increase in business confidence and an improved streetscape, is to engage the private sector, both property owners and retailers, and the local community, in a partnership with the Council in the preparation of Centre Plans. These Centre Plans need to be agreed by all participants, after which they will be adopted by the Council as action documents for particular centres. The Plans can include a range of proposals which will need to be implemented in a number of ways, including District Plan controls, public works proposals, improved centre management techniques and agreed private sector initiatives. Centre Plans will provide an opportunity to include more specific design controls and assessment criteria for individual centres into the District Plan, based on their essential characteristics and qualities.

Expected Environmental Results

- The majority of new retail developments established largely within the existing and proposed business centres, as measured by a biennial business zones land use survey and annual assessment of the NZ Business Directory.
- Maintenance and enhancement of the vitality and viability of sub-regional and suburban centres, as measured by:
  - Annual analysis of Valuation NZ's commercial property yield data
  - Annual pedestrian flow surveys
  - Five-yearly resident surveys
  - Five-yearly centre vitality surveys based on review of public spaces, activity patterns and quality improvements
  - Biennial business zones land use surveys.
- Developments within suburban and local centres at a scale appropriate to their location and catchments, as measured by biennial business zones land use surveys
- Retailing at Link Drive does not develop into a commercial centre with a full range of merchandise, as measured by biennial business zones land use surveys
- Retailing within the Business Park and General Business zones predominantly small scale shops whose primary function is to serve the local area, or larger shops of low intensity retailing, as measured by biennial business zones land use surveys
- Progressive refinement of District Plan provisions through Centre Plans, so that controls affecting retail centres are differentiated to achieve the reinforcement and

enhancement of the particular qualities of individual centres, as measured by ongoing review of Plan provisions

• Resident satisfaction with the amenities of shopping centres, as measured by five-yearly residential zone land use surveys

• Council assistance in the promotion of individual centres and works undertaken in conformity with Centre Plans, as measured by an assessment of Annual Plan commitments.

[20] As mentioned, the accepted evidence was that more than one half of the projected turnover of the proposed supermarket would be business presently going to the Pak 'N Save at Albany, some 6 km to the north. All but a tiny fraction of the balance would be drawn from existing North Shore supermarkets, with most of those in the southern sector being Progressive *brands*. In terms of 15.3.3, that indicates very strongly that the proposal will *...meet the needs and preferences of the community ... and enhance community accessibility to a range of facilities*. Also, it demonstrates a *...potential demand for some retail activity to establish in business zones...* That would suggest that the accessibility criterion in Policy 4 is well met, and there is agreement that the pedestrian amenity in the vicinity of the proposal is not in issue. Nor are the amenity values of the nearby residential areas. In terms of those criteria, that leaves amenity values for the centres, and roading, both of which we deal with elsewhere.

Traffic and roading

[21] Traffic and roading related criteria are to be found in Section 15.7.4.1, which provides:

15.7.4.1 High Traffic Generating Activities identified as Limited Discretionary or Discretionary Activities in Rule 15.6.1.3

Activities will be assessed against the following criteria:

a) The extent to which any adverse effects of the activity on efficiency, safety and operational aspects of the adjacent and local road network, and in particular, the avoidance of adverse traffic effects on residential amenity, are able to be avoided, remedied or mitigated.

b) The extent to which the activity has adverse effects on private and public transport patterns, and in particular, the extent to which the proposal:

Results in an increase (or reduction) in overall travel distances

Encourages the use or maintains the integrity of the public transportation network.

c) Criteria listed under Clause 12.5.1.3 of the Transportation Section of the Plan.

For brevity's sake, we can say that we understand that the traffic engineers and planners agree that with the exception of one portion, the criteria in 12.5.1.3 are all met. The exception is:

> In relation to congestion and intersection performance, effects on streets and intersections within the area for a distance of one kilometre should be avoided, remedied or mitigated, given both present day conditions, and future traffic volume projections. Possible mitigation measures include feasible network improvements.

[22] The disputed criterion in 12.5.1.3 was in contention as it related to the Wairau Road / Tristram Avenue intersection.

[23] The parties' expert traffic witnesses – Mr Brett Harries (called by Progressive Enterprises), Mr Andrew Foy (called by the City Council), Mr Warrick Wade (called by the City Council), Mr John Burgess (called by NTC) – had conferred and agreed on a number of matters relating to the traffic assessment[2]:

- the parking complies, both in quantity and in layout, with the District Plan requirements
- the number and location of truck loading bays and truck operations are not in contention
- the proposed traffic management measures at Wairau / Porana, Archers / Poland, and Wairau / Archers are not in contention
- the Tristram Avenue / Wairau Road intersection is more or less at capacity at periods during the day
- the data from 2007 traffic counts are to be used for existing traffic flow
- the network effects assessment should focus on the weekday pm peak (5 – 6pm) and the Saturday midday peak (12 – 1pm)
- the trip generation rate is 17.7 trips per $100m^2$ gfa during the weekday evening peak hour (867 vehicle movements) and 19.3 trips per $100m^2$ on Saturdays at midday (946 vehicle movements)
- the pass-by trip proportions are 20% on a weekday evening and 15% on a Saturday midday.

The traffic experts were not agreed on the following matters:

[2] Caucusing meeting minutes May 2008

- the value or otherwise of a supermarket in terms of support for public transport, particularly when compared to offices
- the distribution and assignment of trips onto the road network
- the quantum of traffic through the Tristram Avenue / Wairau Road interchange and Tristram Avenue / Wairau Road / Hillside Road intersection
- the performance of the Tristram / Wairau interchange and intersection

[24] Further traffic and transport experts – Mr Grant Smith (called by Progressive Enterprises), Mr Peter McCoombs (called by Progressive Enterprises), Mr David Glover (called by Progressive Enterprises), Mr John Parlane (called by the City Council) – also provided evidence.

Written approvals - traffic

[25] A considerable number of owners/occupiers of properties in the general area gave written approval to the proposal. Particularly relevant to the issue of traffic effects, NZ Transport Agency (formerly Transit New Zealand) does not consider that there are any significant issues for roads under its control arising from the proposal and it was not represented at the hearing. It gave its written consent to the proposal, in which it expressed itself *...comfortable that any traffic effects of the Application on the State Highway network (including the Wairau/Tristram interchange) can be adequately managed or controlled...* so we cannot have regard to any adverse effect another party considers there might be on the Agency as the operator of the highway network: - see s104(3)(b).

[26] In a similar vein the City Council, as manager of the local roading network, expressed itself satisfied that the effects of traffic generated by the proposal can be adequately managed. While acknowledging that the Wairau / Tristram intersection, particularly the right-turn out of Wairau Road onto Tristram Avenue, is largely at capacity at peak times, it accepts the views of Messrs Foy, Parlane, Wade, and Burgess that the amount of traffic the proposal will add to that intersection will make little or no practical difference.

Traffic – adjacent and local road network

[27] There is no issue about adverse traffic effects on residential amenity, at least in any direct sense. The traffic experts were agreed that the proposed traffic management measures at

intersections immediately adjacent to the site (Wairau / Porana, Archers / Poland, and Wairau / Archers) were not in contention.

[28] Mr Harries reviewed the recent data (1998 – 2007) on crashes on Wairau Road and at the Wairau / Tristram intersection. He noted the steady growth in crashes, especially non-injury crashes, on Wairau Road and related the increase in crashes to the increased traffic volumes and congestion. He noted a small increase in crashes at the Wairau / Tristram intersection[3].

[29] Mr Burgess reviewed the same data and observed that the number of crashes had increased significantly between 2002 and 2005 and then decreased in 2006 and 2007. He considered that there was no significant trend of deterioration and there would always be fluctuations from year to year[4].

[30] Mr Wade also considered the crash records for the road network and the intersections in close proximity to the proposed site. He noted the increase in crashes and that the Wairau / Hillside / Tristram and Wairau / Archers intersections were *blackspots* with more than one injury crash per year. Mr Wade considered the proposed improvements at each of the access points would assist in improving safety for existing users and mitigate the effects of the proposed supermarket.[5]

[31] Mr Parlane considered the crash records and undertook a search of all crashes on the North Shore over the same period. He demonstrated a similar pattern of an increase in the number of non-injury crashes and noted that the increase also occurred outside of peak traffic hours. He considered this trend to be at least partly explained by an increase in the reporting rate for non-injury crashes over the last ten years.

[32] We find that traffic safety is an issue in the Wairau Road corridor. However there is no compelling evidence that the proportionately small increase in traffic volumes as a result of the supermarket will significantly increase the crash rate. We agree with Mr Wade that the

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[3] Harries EiC 60 to 65
[4] Burgess EiC 3.28
[5] Wade EiC 6.15

proposal incorporates effective mitigation of the potential traffic safety effects particularly with respect to the re-alignment of the Archers Road entrance and the prevention of the right turn onto the site from Wairau Road.

Traffic – private and public transport patterns

[33] There was a measure of agreement that both the Regional and the District planning documents have been, and are being, modified to give increasing emphasis to the issue of public transport. Both for the sake of the planet's atmosphere, and the avoidance of still more congestion on the roading network, the use of public transport (in this case, buses) is being promoted. Opponents of this proposal suggested that alternative uses for the site (for instance, office accommodation) could be found which would be amenable to a more intense use of buses, and thus be more in tune with the thrust of the Plans.

[34] Quite apart from the *alternative sites* issue, which we have dealt with elsewhere, the short point is, as the witnesses all agree, that supermarket shopping and public transport simply do not interface in any meaningful way. A bus and a trolleyfull of groceries is not a viable combination for any but the strongest and most resolute shopper. The surveys indicate that about 96% of all supermarket shopping trips are done in a private car, for just that reason. It also appears to be generally accepted that society needs supermarkets as an efficient means of distribution of food and groceries to an intensely settled urban population. Taking as a given that supermarkets in more or less their present form will continue into the foreseeable future, whether a supermarket is in a centre, or out of a centre, will make no difference to its level of contribution to public transport use, which is effectively nil. Put another way, any supermarket, wherever located, could arguably be out of sympathy with, if not actually contrary to, those sorts of Plan provisions.

[35] It is also to be noted that the site is more than the 800m walking distance (suggested as a catchment radius) from the busway stops on the commuter Rapid Transit Network (RTN) [6]. The RTN provides fast, high frequency services unaffected by congestion and is the backbone of the passenger transport system. The Regional Policy Statement, Appendix H, notes that employment densities should be higher closer to a transit stop and graduate to lower densities

[6] Parlane rebuttal par 4.5

at the edge of a centre or corridor. Thus, the proposed supermarket is not occupying a prime site in terms of accessibility from the RTN.

[36] Wairau Road is part of the indicative Quality Transit Network (QTN) intended to provide high frequency and high quality transit services. Mr Wade notes that the proposed supermarket does not remove the potential for future passenger transport improvements in this area[7].

[37] Given that almost all shoppers will travel by private motor vehicle, the evidence we heard about the likely impact on total travel was not conclusive either way. But the stronger indication was that providing a Pak 'N Save in the southern North Shore should result in an overall reduction in travel distances. Those living in the southern part of the city would be able to shop at a brand of choice without having to travel to Albany, as they do now. That would have some beneficial effect on private transport patterns.

[38] We find that the proposal is neutral with respect to the impact on private and public transport patterns.

Traffic – intersection performance

[39] There are a number of intersections in the vicinity of the site and it is the Wairau Road / Tristram Avenue / Hillside Road intersection, to the north, that is the busiest. Mr Burgess acknowledges that this intersection is operating more or less *at capacity* during peak periods and notes that this is typical of many major intersections in the Auckland region[8].

[40] Mr Wade explained that the Wairau / Hillside / Tristram intersection is constrained by proximity to the motorway interchange on Tristram Avenue. He noted that the three intersections (along Tristram Avenue and through the interchange) work in tandem and the lack of storage capacity and conflicts with flows restricted efficiency[9].

[7] Wade EiC 4.10

[8] Burgess EiC 3.21

[9] Wade EiC par 3.8

[41] The performance of the Tristram / Wairau intersection has been modelled and assessed in terms of the Level of Service (LOS), the average delays experienced, the degree of saturation, and the length of the queue for the right turn from Wairau Road into Tristram Avenue. The weekday 5.00pm to 6.00pm period was chosen because supermarket transactions peak during this period and the analysis would demonstrate the likely worst case impact of the proposal on the traffic network[10]. The results were presented for the existing performance, based on the 2007 traffic flows, and the predicted performance after incorporating the additional traffic generated by the proposed supermarket. Despite some differences in the assumptions and the models used the results obtained by the various experts, with the exception of Mr Smith, are surprisingly similar. The results for the weekday 5.00 to 6.00pm peak are summarised in Table 1[11]:

	Burgess		**Foy**		**Harries**	
	Existing	Predicted	Existing	Predicted	Existing	Predicted
Wairau Rd flow (vph)	2,437				2,749	
Intersection flow (vph)	4,451				4,658	
Additional traffic (vph)		185		212		268
LOS intersection	D	E	D	D	D	D
LOS critical movement	F	F	F	F	F	F
Average delay (sec)	55	66	43	49	44	54
Saturation (%)	94	99	140	130	89	99
95 percentile queue (m)	206	255	313	328	278	334

[42] During the weekday 5.00pm to 6.00pm peak the average delay for traffic passing through the Tristram / Wairau intersection is predicted to increase by 6 to 11 seconds or some 20% over existing conditions. Similarly the predicted queue length for the traffic turning right from Wairau Road into Tristram Avenue would increase by some 20%.

[43] Mr Harries noted that the quantum of decrease in performance ...*may not appear great*... but he considered the effect was significant when considered in the context of the

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[10] Wade Eic par 3.16

[11] Key parameters drawn from submission of Mr Whata

strategic importance of the intersection and the objectives and policies of the District Plan[12]. During cross-examination he agreed that predicted effects on intersection performance were similar and the difference between the experts was in determining the significance of those effects[13].

[44] During cross-examination Mr Harries noted that he considered the peak period to be more like 3.00 to 6.00pm. He observed that the traffic flows and the peak queue generation may actually be greater in the 4.00pm to 5.00pm period. He explained that the agreement to focus on the 5.00pm to 6.00pm peak period did not imply that that the effects on the intersection were confined to this one hour peak period[14]. In response to questions from the court Mr Harries further explained that the addition of the supermarket traffic would extend the peak observed from 4.00pm to 5.00pm to the 5.00pm to 6.00pm period[15].

[45] Mr McCoombs regarded the Tristram interchange and the adjoining intersection with Wairau Road as a key gateway between the national state highway network and the adjoining local roading network. He noted that the northern approach is the busiest arterial on the North Shore[16]. He considered that the change in the degree of saturation predicted to occur with the proposed supermarket to be a ...*marked adverse effect on a key intersection*[17].

[46] Mr Parlane, asked to review the traffic position by the Council, and Messrs Burgess and Wade, all agree that the supermarket will be a significant generator of local traffic and there will be some, although minor, local congestion. Overall, they consider that the traffic effects, including effects on the operation of key intersections on the local network will be not be significant.

[12] Harries EiC par 112

[13] Transcript 10 October page 404

[14] Transcript pages 406 to 407 and 428

[15] Transcript page 433

[16] McCoombs EiC par 22

[17] McCoombs EiC par 31

[47] Mr Parlane commented on the nature of the morning and evening weekday peak traffic periods[18]. He observed that the morning peak causes the most delay for motorists due to queues that spill back from most of the North Shore interchanges as a result of the build up of traffic on the motorway heading south. The evening peak carries more traffic but that traffic spreads out onto a number of roads so the delays experienced are generally less.

[48] In response to questions from the court Mr McCoombs also described both the morning and evening peak traffic. He considered that the delays through the intersection and the interchange would be worse in the evening than the morning. He also noted that the delays in the morning *...would just be the beginnings of quite a long trip into the city, the rest of it spent grinding away down the motorway*[19].

[49] The modelling work for the weekday traffic has been undertaken for the 5.00 to 6.00pm peak period, as agreed by the traffic experts. We agree with Mr Harries that this is likely to be indicative of the performance of the intersection through a broader pm peak period. The March 2008 traffic counts for Wairau Road (taken from the updated evidence of Mr Harries[20]) indicate approximately 2600 vph between 4.00pm and 5.00pm and approximately 2400 vph between 5.00pm and 6.00pm. These counts are consistent with the assumptions used in the modelling work by Mr Burgess (2,437 vph) and Mr Harries (2,749 vph).

[50] We are satisfied that the results of the modelling are sufficiently robust to indicate the effects of the increased traffic through an extended 4.00pm to 6.00pm weekday evening peak period. While no specific modelling has been done for the 4.00pm to 5.00pm period it is clear that the base traffic flows are similar, or slightly higher, and that the supermarket generated traffic is likely to be similar or slightly lower. For completeness, we might perhaps add that, given what we understood of the premises underpinning Mr Smiths' modelling, we do not regard it as convincing and give it little weight.

[51] There is no doubt that the Wairau / Tristram intersection and interchange poses a problem, and will continue to do so until some long term solution is found. The traffic

[18] Transcript page 446
[19] Transcript page 368
[20] Harries affidavit dated 15 October 2008

generated by this proposal will have *an* effect on this intersection. We agree with Mr Harries that the significance of the effect should be considered in the context of an already busy intersection and the plan provisions.

[52] We also note that the scale and duration of the traffic effects on intersections are somewhat limited. Only one of the surrounding intersections is considered to be affected. The impacts of the supermarket are most marked in the weekday pm peak and the Saturday midday peak – that is when the supermarket generates the most traffic. At all other times the Wairau / Tristram intersection will operate more or less as it does now even though the traffic volumes will increase slightly.

[53] We find that there is an effect on the operation of the Wairau / Tristram intersection. However this effect is small in magnitude, limited in duration and minor when considered in the context of the traffic situation on the surrounding road network.

Traffic – findings

[54] We turn back to the District Plan provisions with respect to traffic and the assessment criteria listed in 15.7.4.1. We have found that there are no adverse effects on residential amenity and the potential traffic safety effects have been remedied by the proposed changes to the Archers Road and Wairau Road entrances. We have found that the effects on private and public transport patterns are neutral.

[55] The traffic engineers and planners were satisfied that the criteria listed in clause 12.5.1.3 are all satisfied with the exception of the performance of the Wairau / Tristram intersection and interchange. Given the written approval from the NZ Transport Agency we cannot have regard to any potential adverse traffic effect on it as the manager of the Wairau / Tristram interchange. We have found that there is a minor effect on the performance of the Wairau / Tristram / Hillside intersection.

[56] Overall we find that the traffic effects of the proposal are not significant to the extent that they should count against the proposal.

Social and economic effects on Centre amenity

[57] Social and economic effects find a particular place in 15.7.3.5, which provides:

> **15.7.3.5 Discretionary Activities identified in Rule 15.6.1.3**
>
> Without limiting the exercise of the Council's discretion, activities will be assessed to determine the extent of any adverse social and economic effects, including the following effects:
>
> a) The extent to which the new activities would result in a significant adverse effect on the commercial and community services and facilities of any existing or proposed business centre as a whole.
>
> b) The extent to which the overall availability and accessibility of commercial and community services and facilities will be maintained in any existing business centre.
>
> c) The extent to which the new activities would result in a significant adverse effect on the character, heritage and amenity values of any existing or proposed centre.
>
> d) The extent to which the benefits of a new development are able to directly or indirectly mitigate any adverse effects in a), b) or c) above.
>
> e) For activities which require consent under rule 15.6.1.3.1(b), the effects, including traffic and social and economic effects, of all existing activities within Wairau Park, and any cumulative effect associated with the additional activity, on other areas of the city.

[58] The Plan provisions in respect of centre amenity and viability are entirely in accord with the views expressed in the Supreme Court judgments in *Westfield (New Zealand) Ltd v North Shore City Council* [2005] NZRMA 337. In discussing the meaning to be given to the then s104(8) (now renumbered as s104(3)(a)) – the statutory prohibition against taking account of trade competition in making resource consent decisions - Blanchard J said this:

> [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 (s2). 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 (s104(8)). 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 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.

[59] Despite inquiry during the hearing it remains unclear to us whether, by some quirk of the transitional provisions in the 1997 and/or 2003 RM Amendment Acts, the Supreme Court was actually dealing with the original (ie pre-1997) version of s104(8). The use of the phrase *...on trade competitors...* in the third sentence of para [120] rather suggests that it was. If so, the removal of that qualification in the 1997 amendment would suggest that the prohibition on taking account of trade competition should now be interpreted more widely. Given our uncertainty on the point however it is appropriate to, if anything, favour the Progressive position and simply take the *Discount Brands* interpretation as it stands. The end result is that decision-makers are not to take account of effects such as the erosion of patronage or profit margins, or even the enforced closure of competing businesses. Those are caused *...simply by trade competition.* But if the effects of allowing a new business into the arena would be to cause *significant* economic and social effects to an existing centre as a whole – to the point where its *amenity values* are affected in a *significantly* adverse way, then that is to be weighed in coming to an overall decision under s5. The term *significantly adverse* must be taken as meaning more than *minor*, but not necessarily so bad as to be *ruinous.* It is to be noted that even if there are shown to be likely *significantly adverse* effects on the amenity values of a

centre, that will not necessarily be decisive. That would be but one factor to be weighed in the s5 decision-making process.

[60] On this topic, we can quickly cut to the chase. The short point is that no witness asserts that the operation of the proposed Pak 'N Save will bring about the demise of an existing North Shore supermarket. All expert witnesses in the field of retail analysis agree that the biggest loser of custom to the Wairau Pak 'N Save will be the existing Albany Pak 'N Save, which will *contribute* of the order of 52% of the projected Wairau turnover. Other supermarkets in central/southern North Shore are predicted to lose up to 12 – 15% of turnover, with those more distant at places such as Devonport and Birkenhead to the south, and Browns Bay and Albany to the north, losing rather less than that.

[61] In any event, the demise of a competing supermarket would of itself, by definition, simply be the outcome of trade competition. The real point is that still less does any witness suggest that the absorption of some patronage of existing supermarkets by the proposed Pak 'N Save will have such an adverse effect on the amenity values of existing centres on the North Shore that the effects should be regarded as *significant* in the sense discussed by Blanchard J in *Discount Brands.*

[62] The closest any Progressive witness gets to predicting such an outcome is Dr Fairgray, who suggests that there will be some adverse effects on smaller centres. He expects ...*sales by other retail outlets and service outlets close to existing supermarkets, which trade off these customers, would on average reduce directly by around half that amount – in the order of 6% to 8% - depending on the current levels of cross shopping in these centres.*

[63] He goes on to express the view that in smaller centres, small businesses are more dependent on the customer flows generated by a supermarket, and that a drawing-away of custom by the Wairau Pak 'N Save will be felt more in them. However he agrees that overall the market size for such goods and services will not change, and there will be a corresponding increase, and therefore a positive effect, in such trading in the larger centres. For the community, city-wide, the availability of the shopping resource will not reduce but there may be a loss of convenience for those who might not be able to satisfy all of their shopping needs at smaller centres. This, he says, would be an outcome not consistent with the objectives and

policies of the District Plan about the intensification of centres and their promotion as community focal points.

[64] Similarly, Dr Nick Taylor, a social researcher, Dr Stephen Gale, an economic consultant and Mr Anthony Dimasi, an economist and market analyst, all called by Progressive, all express the view that the *...siphoning off...* (as Mr Dimasi puts it) of shopper visits from some centres will be *...at odds with...* what he describes as the centres-based strategy of the District Plan and will be *...sowing the seeds for the potential gradual emasculation of this critical strategy.* Dr Taylor and Dr Gale have somewhat less melodramatically expressed views, but still regard the proposal as likely to have an adverse social and economic impact. It is to be noted clearly though that this feared impact arises not from any significant effect on the relevant amenity values of North Shore centres but from what they argue, from an economist's point of view, is the inconsistency of the location of the proposed supermarket with the terms of the District Plan.

[65] Addressing the real issue of effects on amenity values of centres, at the request of NTC Ms Julie Meade Rose, a social anthropologist, made a study of the two centres with existing supermarkets closest to the Wairau site – Sunnynook and Northcote. Her assessment is that their community facilities such as Plunket centres, kindergartens and schools, clubs, community centres, libraries and the like, are all robust, well-utilised and not dependent on the presence of a nearby supermarket. She considers that the proposal would have minimal, if any, effects on them. Notably, nobody disputed this conclusion.

[66] There is simply no evidence upon which any Court could credibly find that there *might*, let alone *will*, be significant adverse effects, in the *Discount Brands* sense, on the amenity values of any existing North Shore centre. The highest that Progressive can put it is that there may be some loss of shopper convenience, and that is not, we consider, a *significant* adverse effect on *amenity*. It is, we recognise, an issue mentioned in the Plan's criteria in 15.7.3.5 (see para [57]) but the evidence on the point is so faint and speculative that we cannot give it weight. This ground of opposition must be put aside as insubstantial, and Plan integrity issues dealt with under their appropriate head.

Adverse effects generally

[67] The general provision about adverse effects is 15.3.4, which we include simply for completeness:

> **15.3.4 Control of Adverse Effects**
>
> ***Objective***
>
> To ensure that the adverse environmental effects of business activities are avoided, remedied or mitigated.
>
> ***Policies***
>
> 1. By requiring that business activities avoid, remedy or mitigate adverse environmental effects.
> 2. By requiring that activities in business areas provide for an adequate level of vehicular and pedestrian safety and convenience appropriate to the area in which the site is located.
> 3. By ensuring that developments in business areas do not detract from the visual amenity of the area in which they are located.
> 4. By ensuring that potential adverse effects from noise, vibration, illumination, pollution and odour associated with business activities are avoided, remedied or mitigated.
> 5. By ensuring that development does not overshadow public spaces or neighbouring residential areas to such an extent that adverse environmental effects are created.
> 6. (omitted)
> 7. (omitted)
> 8. (omitted)
> 9. By ensuring that development does not create adverse effects on the capacity of existing stormwater infrastructure, or on the ability of those systems to operate effectively.
>
> ***Methods***
>
> • Policies 1 and 4 will be implemented by Rules and by education initiatives, in the form of information provided to Businesses
> • Policies 2, 3, 5, 6, 7 and 8 will be implemented by rules.
>
> ***Explanation and Reasons***
>
> *The Business Section of the Plan relies directly on the use of performance standards to control adverse effects. The zoning is used as a means of setting levels of effects in different areas. It is therefore a means of expressing the outcomes that are anticipated for particular areas, whether that relates to air quality or visual qualities, for example. There are no detailed lists of activities for the business zones. However, to assist in denoting types of activities to which particular controls apply, the business zones make use of the Australian and New Zealand Industrial Classification 1993 (ANZSIC) as a comprehensive listing of commercial/industrial activities. This classification system has the added advantage of being*

a multi-level, four tier system which allows reference to general first tier categories or to sub-sets within those. The ANZSIC 1993 volume will remain a reference volume for the business zones during the life of the District Plan.

The reasons why effects are managed by performance standards, rather than by listing specific activities which require assessment, are:

- The avoidance of current definitional problems arising under activity lists, e.g. what constitutes Home Improvement Centres

- A more transparent basis of control, which clearly identifies potential adverse effects being controlled.

The technique of Controlled and Discretionary activity listing is used, but the listing is generally of particular characteristics of activities, rather than specific activities themselves. The Controlled activity listing is used for activities in a sensitive location, for subdivision, and for the design and appearance of structures in certain circumstances. The Discretionary listing is used for particular processes or characteristics of particular business operations, which require assessment by the Council.

The major determinants of business location within the zones are as follows:

- *the control on high traffic generating activities, the primary purpose of which is explained under Objective 15.3.2 – Transportation Network.*
- *The two controls which apply maximum and minimum floor space controls, which are explained under Objective 15.3.4 – Control of Adverse Effects and under the Objectives for the Albany Centre.*

These three controls differentiate between activities on the basis of intensity of activity to control adverse effects.

...

Expected Environmental Results

- That all development and activities within the local and suburban zones is of a scale which is appropriate to the locality, as measured by five yearly resident surveys and biennial business zone land use surveys.
- ...
- That higher levels of awareness as to means of protecting environmental quality are evident among business operators, as measured by an annual assessment of compliance with the resource consent conditions and an annual assessment of Council's complaints register.

There are no live issues about any of these provisions, and they do not call for any particular comment.

Overall consideration of District Plan provisions

[68] Whether the Plan is described as having a *centres-based* retail strategy, or some other terms is used, really does not much matter. We accept for present purposes that the general position is summed up in 15.3.3, Policy 1: - ie the Plan *encourages* retail activities to locate in existing and proposed business centres *and* in the General Business zones, ...*where appropriate*. Whether location in a General Business zone might be *appropriate* can be judged by whether:

- it is a location that meets the needs and preferences of the community;
- adverse effects are avoided, remedied or mitigated;
- it enhances community accessibility to facilities;

all in terms of the Objective of 15.3.3

- Whether in terms of 15.3.3 Policy 4, it recognises the potential demand for retail activity in such a zone, and the development can meet a thorough evaluation, particularly on the criteria in that Policy.

Some flesh is put on the bones of those Policies by the *Explanation and Reasons*, and again we have highlighted the particularly relevant portions, as we have for the *Expected Outcomes.*

[69] It is arguable, if not certain, that attempting to engraft a proposal of this size onto an existing centre might overwhelm its infrastructure and its character. Unless and until a firm proposal is addressed, that cannot be known. What we think can be presently ascertained is that *this* proposal is *appropriate* in its location, in terms of 15.3.3. It is in a location that meets the community's needs and preferences; it will not impose adverse effects such as noise, illumination, odour etc on its surrounding environment, particularly residential development; the immediately surrounding roading network can cope with it, and the functioning of the Wairau/Tristram intersection will not be made markedly worse, even on the *worst-case* model. Depending on decisions about planning and funding priorities (which are for the Council to make, perhaps in conjunction with the NZTA) improvements could be made to the intersection. In any event, there are a number of possible routes between the site and the surrounding catchments, enhancing its accessibility.

Employment

[70] Some issue was made of the possibility that a *better* use of the site would be in the form of an activity which generated more employment – ie, a greater number of jobs. This was a

subset of the argument that a use of the site could be found which made more use of public transport and, possibly as well, fitted with the strategy of providing local employment and thus keeping down peak hour use of arterial corridors, in particular the Harbour Bridge. The proposed supermarket will generate between 200 and 250 full-time equivalent (FTE) jobs. That is, about 100 jobs per hectare. Certainly, a high-rise office park would be more intensive than that, but we are told that the 100 jobs/ha ratio is typical for general business (ie non-CBD) areas around Auckland. We have discussed the relevance of *better* or *alternative* possible uses elsewhere. There is nothing in this point which has not already been dealt with.

Positive effects

[71] There was a clear consensus among all the economist witnesses that the introduction of a strong competitor into the North Shore supermarket market would be a *good thing* for consumers, even if its competitors would not welcome it. Dr Nick Taylor, a social researcher engaged by Progressive did not share the views of his economist colleagues. His view was that the proposal would not contribute to the social and economic wellbeing of significant groups and communities in the City, largely because of the social and economic impacts on amenity, discussed elsewhere. In our view, the introduction of that competitive element, and the related ability of shoppers from the southern/central section of the City to have convenient and less distant access to a supermarket of choice, are clear benefits in resource management terms, and are far from outweighed by the suggested negatives.

Regional planning documents

[72] As is the statutory scheme, the District Planning documents should, and do, reflect at a detailed level the necessarily broader view of the Regional Policy Statement (RPS) and similar documents. In reflecting on the evidence about the regional documents, we came to think that the approach of Mr Serjeant, the Council's consultant planner, captured the essence of them admirably. That is of course not to say that we in any way disparage the evidence of the other planners on these issues.

[73] The first thing to note is that the Auckland Regional Council did not appear at the hearing. That may be taken as an indication that it does not have concerns that the proposal has adverse implications for the matters dealt with in the RPS or associated documents.

[74] Section 2 of the RPS mentions resources of national and regional importance as including *...roading and utilities infrastructure* and *commercial facilities* as resources to be considered in deciding issues of sustainable management. Issue 2.3.4 recognises the importance of the existing centres for both commercial and community purposes, and their place in furthering the principles and purposes of Part 2 of the Act.

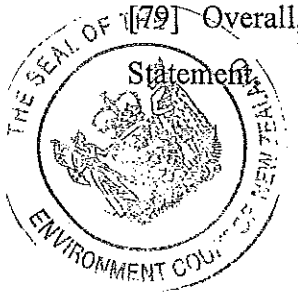
[75] Issue 2.3.5 emphasises the importance of public transport, and the adverse effects that can arise from the congestion of arterial roads. Sections 2.5.1 and 2.5.2 contain objectives and policies which reinforce the importance of the integrated management and efficient use of infrastructure and resources generally. We note, and agree with, Mr Serjeant's view that these provisions do not purport to direct the location of activities, in contrast with the very strong emphasis on containing urban activities within existing metropolitan urban limits.

[76] Similarly, policy 2.6.2.1 deals with urban intensification around nodes and transport corridors, with the explanatory text seeming to make clear that the intention is to encourage facilities to establish in places and combinations which facilitate employment, social and commercial activities in convenient proximity.

[77] The planners agree that of the provisions of Plan Change 6, designed to give effect to the Regional Growth Strategy, sections 2.6.1, 2.6.5 and 2.6.11 are the most relevant, although given its stage in the evolutionary process the Plan Change cannot be given great weight. It does introduce issue 2.4.3, cautioning against *...ad hoc urban development...* as having the potential to undermine the vitality of town centres. To the extent that it is intended to apply to commercial, rather than residential developments, this is the issue dealt with in considering social and economic effects on centres, and the discussion need not be repeated.

[78] In terms of compliance with Policy 2.6.5, we see no reason to disagree with Mr Serjeant's view that the urban intensification provisions support the corresponding District Plan provisions already in place, but do not add anything substantive to them.

[79] Overall, as with the District Plan, we see no conflict with the Regional Policy Statement.



Section 104(1)(c) - Precedent – Plan Integrity

[80] The first thing to be said about so-called *precedent* is that Blanchard J pointed out as long ago as his decision in *Manos v Waitakere CC* [1994] NZRMA 353, that the term *effect* is not directed to impacts on a Plan. Rather, it is concerned with impacts upon natural and physical resources and the environment within which they exist. In a number of decisions, the Courts have found it more helpful to consider the issue as one of Plan integrity, and to deal with it as a relevant *other matter* under s104(1)(c).

[81] In any event, an authoritative line of decisions, not the least of them being the Court of Appeal's judgment in *Dye* v *Auckland RC* [2002] 1 NZLR 337, makes it clear that there is no *precedent*, properly so-called, to be found in decision-making about resource consents. Nevertheless, rather unhelpfully, the term continues to be used. Certainly, unwise or unprincipled resource consent decisions may impair the usefulness of Plan provisions as a means of managing the effects of activities, in the sense that they may raise a legitimate expectation that truly similar applications will have similar outcomes.

[82] But where a Plan gives an activity *Discretionary* status, and provides criteria against which applications for a consent for such an activity are to be measured, such a problem should not arise. If the application, measured against the criteria, can be shown to have its adverse effects avoided, remedied or mitigated, and its positive effects demonstrated, to the point of meeting the Act's purpose of promoting the sustainable management of resources, then, by definition, granting the consent cannot harm the integrity of the Plan. Mr Dimasi, although expressing reservations about the proposal in his evidence-in-chief, had to accept, in the course of cross-examination, that that is so.

[83] Nor can a proposal which has been through such a Plan-based assessment process be deserving of the epithets directed at it by Progressive's planner witnesses. Mr Michael Foster has a clear view that the primary strategy of the Plan is for centres-based retailing, and described the proposal as *out of zone*. But it cannot be that if it merits consent as a *discretionary* activity. In any event, as the Council's consultant planners Mr Steven Dietsch and Mr David Serjeant point out, a supermarket of this size cannot be a *permitted* or *controlled* activity, and thus *in zone*, anywhere in North Shore because of the amount of traffic it would generate. As with Mr Dimasi, Mr Foster readily acknowledged in cross-examination

that the Plan does provide for retailing out of centres, and that if a proposal can meet the criteria it will not compromise the Plan's strategy.

[84] Similarly Mr Serjeant says, and we agree, that the proposal can hardly be described as an *ad hoc* development (at least in any pejorative sense) if it has been through the Plan assessment process and found not to undermine the vitality of existing town centres. We have touched on this point in dealing with the Regional Policy Statement.

[85] So, the end point is that the proposal is to be measured against the criteria set out in the Plan. If it measures up well, it may be granted a consent. If another supermarket proposal for a similar zone should come over the horizon, then it too will have to be measured against those criteria and, if it gains a pass mark, it too may be given a consent. If it does not, it should be refused a consent.

[86] If there is a concern that a supermarket will encourage a proliferation of satellite retail enterprises seeking to co-locate to take advantage of its pulling power, again the Plan has a control mechanism. A retail activity, of whatever size, seeking to locate within a 500m radius of an existing supermarket is classified as a *discretionary* activity and would have to withstand the same assessment scrutiny. We observe too that the issue of cumulative effects would then be very much in focus.

[87] The process is straightforward and, if the Plan's provisions are followed thoroughly and transparently the question of so-called *precedent* does not arise. Whatever the outcome, it will be the Plan's content and process that provides the decision-making tools, and its integrity will have been upheld.

Part 2 issues

[88] There are no Treaty issues arising under s8, nor are there matters of national importance under s6. In terms of s7 – *matters to which we are to have particular regard* – paras …

(b) The efficient use and development of natural and physical resources:

(c) The maintenance and enhancement of amenity values:

(f) Maintenance and enhancement of the quality of the environment: and

(g) Any finite characteristics of natural and physical resources…

are to be considered.

[89] In the context of this proposal it seems to us that paras (b) and (g) are facets of the same general issue. The roading network is a resource that the proposal will take advantage of, enabling a number of route choices and efficient access to and from the site without imposing significant adverse effects. The site itself represents a finite resource – flat, accessible land of sufficient size for such an activity in the southern sector of the City. Those who oppose it say that there could be a higher and better (in economics terms) use of the land. In those terms, possibly that might be so, but we do not have a command economy and individuals and organisations are free to decide for themselves what use they make of their assets so long as they do not impose unreasonable burdens on others. It cannot be said that the proposal is such an *inefficient* use of the resource that it would fall foul of those paragraphs.

[90] Paras (c) and (f) have their place in the consideration of the amenity values of the North Shore centres which has been discussed elsewhere. In other respects of amenity and the general quality of the environment, as affected by the proposal, there are no other issues requiring discussion.

Section 290A – the Council's decision

[91] The Council's decision of 24 January 2008 was made by an independent Commissioner acting under delegated authority, as provided for in the Act. Relevantly, the Commissioner held that the proposal would not have significant adverse effects on the surrounding roading network; that it would decrease trip lengths for shoppers in the southern sector of the City; that it would not undermine the economic health or vitality of existing centres; that it would create positive effects; that it would broadly achieve the strategy of the District Plan, and that overall it would achieve the purpose of the Act. We have had regard to that decision and, as will be apparent, we have independently come to the same conclusions.

Overall evaluation – section 5

[92] We do not need to be able to say that this is the *best* site for another Pak 'N Save on the North Shore. That is largely a commercial judgement which is none of our business. What we can and do hold is that this is a site which, when its positive and (alleged) adverse effects are measured against the provisions and criteria in the planning documents and the relevant

provisions of Part 2 of the Act, would clearly accommodate the proposed supermarket in a way that would promote the purpose of the Act. That is, the sustainable management of natural and physical resources, in a way that allows people and the community to provide for their (at least) economic wellbeing while avoiding, remedying or mitigating adverse effects on the environment.

Result

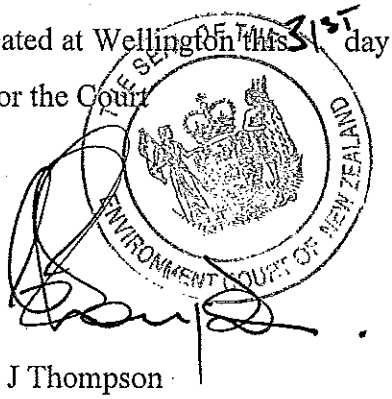
[93] For the reasons we have set out, the appeal is declined and the decision of the Council to grant the necessary resource consents is upheld. A proposed set of Conditions upon which the consents might be granted was presented by Mr Allan with his opening submissions. On the face of it, they appear to us to be satisfactory and we heard no evidence to the contrary. They are approved.

Costs

[94] Costs are reserved. Any applications should be lodged by 21 November 2008, and any responses lodged by 5 December 2008.

Dated at Wellington this 31st day of October 2008

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

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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.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA97/2017
[2018] NZCA 316

BETWEEN	R J DAVIDSON FAMILY TRUST Appellant
AND	MARLBOROUGH DISTRICT COUNCIL Respondent

Hearing:	22 and 23 November 2017
Court:	Cooper, Asher and Brown JJ
Counsel:	J D K Gardner-Hopkins and B S Carruthers for Appellant J W Maassen, N Jessen and M W G Riordan for First Respondent J C Ironside for Kenepuru and Central Sounds Residents Association Inc and Friends of Nelson Haven and Tasman Bay Inc as Interested Parties
Judgment:	21 August 2018 at 1 pm

JUDGMENT OF THE COURT

A The questions of law are answered as follows:

Question:

(a) Did the High Court err in holding that the Environment Court was not able or required to consider pt 2 of the Resource Management Act 1991 directly and was bound by its expression in the relevant planning documents?

Answer:

Yes, but because there were no reasons in this case to depart from pt 2's expression in the relevant planning documents, the error was of no consequence.

Question:

(b) If the first question is answered in the affirmative, should the High Court have remitted the case back to the Environment Court for reconsideration?

Answer:

No.

B The appeal is dismissed.

C Leave is granted for the parties to file submissions on costs, limited in each case to no more than five pages in length, to be filed within 15 working days of delivery of this judgment.

REASONS OF THE COURT

(Given by Cooper J)

Table of Contents

Introduction

[1] This case concerns an important issue about the role of pt 2 of the Resource Management Act 1991 (the Act), in the consideration by consent authorities of applications for resource consent. It raises what is meant by the words "subject to Part 2" in s 104(1) of the Act.

[2] Section 104(1) sets out the matters which a consent authority must have regard to. They include any actual and potential effects on the environment of allowing the

activity, and any relevant provisions of various planning documents which are listed in s 104(1)(b). The consent authority is directed to have regard to these matters "subject to Part 2".

[3] There are four sections in pt 2 of the Act. The first is s 5 which states the purpose of the Act and sets out a definition of "sustainable management". Section 6 sets out matters of national importance which are to be recognised and provided for by all persons exercising functions and powers under the Act. Section 7 sets out another list of matters to which persons exercising functions and powers are to have "particular regard". Finally, s 8 requires functionaries under the Act to take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi). It is clear that pt 2 is of central importance to the scheme of the Act.

[4] It is also necessary to consider the extent to which the reasoning of the Supreme Court in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*, a case involving an application for a plan change, should be applied in the case of applications for resource consent.[1]

[5] In form, the appeal is a second appeal with the leave of this Court against a determination of the High Court.[2] This Court granted leave to pursue two questions on the second appeal.[3] Before setting those questions out it will be appropriate to give some background.

A proposed mussel farm

[6] The appellant applied to the respondent for resource consent to establish and operate a mussel farm adjacent to and surrounding the southern end of an unnamed promontory jutting out into the northern end of Beatrix Bay in Pelorus Sounds. The proposed farm would be in two separate blocks: one, lying to the southeast of the promontory, 5.166 hectares in area, and the other lying to the southwest, comprising 2.206 hectares, having a total area of 7.372 hectares. The farm would

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1 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 [*King Salmon*].

2 *R J Davidson Family Trust v Marlborough District Council* [2017] NZHC 52, [2017] NZRMA 227 [High Court judgment].

3 *R J Davidson Family Trust v Marlborough District Council* [2017] NZCA 194.

consist of a number of lines with an anchor at each end, and a single warp rising to the surface. At the surface would be a "backbone" with dropper lines extending to approximately 12 metres depth (not to the sea floor). Each structure set would be spaced 12 to 20 metres apart. In addition to mussels, the application sought to cultivate scallops, oysters and algae.[4]

Environment Court decision

[7] The application was heard by an independent commissioner, retired Environment Court Judge Kenderdine on 21 May 2014, and in accordance with her decision, the application was declined by the Council on 2 July 2014. The appellant then appealed to the Environment Court. Two incorporated societies, Kenepuru and Central Sounds Residents Association Inc, and Friends of Nelson Haven and Tasman Bay Inc, who had lodged submissions on the application, joined in the Environment Court appeal under s 274 of the Act, in support of the Council's decision.[5]

[8] The site of the proposed farm was within the Coastal Marine Zone 2 in the Marlborough Sounds Resource Management Plan (the Sounds Plan). In that zone, marine farms are provided for (within 50–200 m of the shore) as discretionary activities. Because the proposed farm would extend beyond 200 m from the shore, the activity required consent as a non-complying activity under r 35.5 of the Sounds Plan.

[9] The Sounds Plan, which became operative on 28 February 2003 is a combined district, regional and regional coastal plan. Relevant provisions of the Sounds Plan were reviewed by the Environment Court in its judgment, which confirmed the Council's decision.[6] Those provisions dealt with natural character, indigenous vegetation and habitats of indigenous fauna, landscape and public access. The site of the proposal was within an "Area of Ecological Value" with national significance as a feeding habitat of King Shags. The King Shag is a Nationally Endangered species in

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4 This description of the application is taken from the Environment Court's decision, *R J Davidson Family Trust v Marlborough District Council* [2016] NZEnvC 81 at [5] [Environment Court decision].

5 Those societies appeared as parties in this Court ("the interested parties").

6 Environment Court decision, above n 4, at [137]–[153].

the *New Zealand Threat Classification System* published by the Department of Conservation, with a stable population of between 250–1,000 mature individuals.[7]

[10] The Sounds Plan included objectives that sought to protect significant fauna and their habitats from the adverse effects of use and development, and policies that sought to avoid the adverse effects of land and water use on areas of significant ecological value.

[11] Having reviewed the relevant objectives and policies, the Environment Court expressed doubt that the Sounds Plan could be said to fully implement pt 2 of the Act, identifying in particular the risk of extinction of the King Shag, an event of low probability but high potential impact.[8] The potential adverse effects on King Shags was one of the main factual issues considered by the Environment Court.

[12] The New Zealand Coastal Policy Statement 2010 (NZCPS) was also relevant to the application. It was important, because at the time of the Environment Court decision, the NZCPS had not been implemented in the Sounds Plan.[9] The Environment Court identified as particularly relevant provisions in the NZCPS Policies 6(2) and 8(b) (aquaculture), 11 (indigenous biodiversity), 13 (preservation of natural character), and 15 (natural features and natural landscapes).

[13] Having identified the relevant provisions of the Sounds Plan and the NZCPS, the Environment Court turned to a comprehensive consideration of the effects of the proposal. It found:

(a) The proposal was unlikely to add any adverse cumulative effects to the water in Beatrix Bay that were more than minimal in the context of larger "natural" variations. However, whether there would be changes to the food web in a way that affected the King Shags was unknown.[10]

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7 At [97].
8 At [153].
9 At [155].
10 At [184].

(b) There were unlikely to be adverse effects on the rocky reef system adjacent to the proposed farm.[11]

(c) There would only be very minor (if any) independent or cumulative effects on the intertidal zone.[12]

(d) There would be adverse effects on King Shag habitat, adverse effects on the populations of New Zealand King Shags and their prey and a low probability (very unlikely but possible) that the King Shag would become extinct as a result of the application.[13] The Court however considered it could not assess these effects against the effects of other major environmental "stressors" (pastoral farming, exotic forestry, deforestation, dredging and trawling as well as river flood events and oscillations in weather patterns).[14]

(e) The proposal would compromise the integrity of the adjacent promontory from a visual/aesthetic/natural character perspective: this would be a significant adverse effect.[15]

(f) The cumulative effect, on top of the accumulated effects of the other mussel farms in the area would be significant. This would be contrary to Policy 13(1)(b) of the NZCPS.[16] Policy 13(1)(b) of the NZCPS requires significant adverse effects to be avoided so as to preserve the natural character of the coastal environment and protect it from inappropriate use and development.

(g) There would be no more than minor adverse effects on navigational safety.[17]

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11 At [189].
12 At [190]–[192].
13 At [206].
14 At [207].
15 At [225].
16 At [233].
17 At [239].

(h) Adverse effects on fishing and access were likely to be minor.[18]

(i) While noting it had received "minimal evidence" on the issue of economic effects, the Court accepted there would be a "producer surplus and consumer surplus which would give benefits to society".[19] It was also prepared to take into account social benefits of employment, but it could not make any quantitative comparison of net benefits of the proposed marine farm with the net benefits of the status quo.[20]

[14] As the application required consent for a non-complying activity the Environment Court could only grant consent if either s 104D(1)(a) or (b) applied. These so called "gateway tests" provide respectively that a consent authority may grant a non-complying activity consent only if it is satisfied that either the adverse effects of the activity on the environment will be minor or the application is for an activity that will not be contrary to the objectives and policies of a relevant plan. On the basis of its consideration of the proposal's effects the Court was satisfied that there would be significant adverse effects on the environment. This meant it could only contemplate granting consent if the application could be brought within s 104D(1)(b). On this issue, the Court was satisfied that the application could not be said to be contrary to the objectives and policies of the Sounds Plan as a whole, although that was what it described as a "close-run judgment".[21]

[15] The Court therefore turned to consider the merits of the application having regard to the statutory considerations set out in s 104(1) of the Act. At the outset, the Court addressed the words "subject to Part 2" which precede the list of matters to which the Council must have regard set out in paragraphs (a) to (c) of the subsection. The Court considered that the decision in *King Salmon* had the effect that in the absence of invalidity, incomplete coverage or uncertainty of meaning in the "intervening statutory documents", there is no need to look at pt 2 of the Act.[22] It held:

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18 At [243].
19 At [244].
20 At [244]–[245].
21 At [249].
22 At [259].

> [260] We accept that in this proceeding we are not obliged to give effect to the NZCPS, merely to "have regard to" it, and even that regard is "subject to Part 2" of the RMA. However, logically the *King Salmon* approach should apply when applying for resource consent under a district plan: absent invalidity, incomplete coverage or uncertainty of meaning in that plan or in any later statutory documents which have not been given effect to, there should be usually no need to look at most of Part 2 of the RMA. We note that the majority of the Supreme Court in *King Salmon* was clearly of the view that its reasoning would apply to applications for resource consents.
>
> (Footnotes omitted.)

[16] The last sentence in that extract from the Environment Court's decision had a footnote reference to *King Salmon* at [137]–[138], to which we will refer below.

[17] Turning (as required by s 104(1)(a)) to the actual and potential effects of allowing the activity the Court gave this summary of its findings which took into account other identified "stressors" in the area:[23]

> (1) likely net social (financial and employment) benefits;
>
> (2) a likely significant adverse effect on the natural feature which is the promontory;
>
> (3) likely significant cumulative adverse effects on the natural character of the margins of Beatrix Bay;
>
> (4) likely adverse cumulative effects on the amenity of users of the Bay;
>
> (5) very likely minor adverse impact on King Shag habitat by covering the muddy seafloor under shell and organic sediment, an effect which cannot be avoided (or remedied or mitigated);
>
> (6) very likely a reduction in feeding habitat of New Zealand King Shags;
>
> (7) very likely more than minor (11% plus this proposal) accumulated and accumulative reduction in King Shag habitat within Beatrix Bay and an unknown accumulative effect on the habitat of the Duffer's Reef colony generally; and
>
> (8) as likely as not, no change in the population of King Shags, but with a small probability of extinction.

[18] Considering the proposal in terms of the relevant policies in the Sounds Plan, the Court concluded that "on balance" resource consent should be refused on the basis that the proposal would inappropriately reduce the habitat of King Shags, contrary to

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23 At [269].

a key policy requiring adverse effects to be avoided on areas of significant ecological value.[24]

[19] The Court then turned to the NZCPS, recording its view that the site was not in an appropriate area having regard to adverse effects on King Shag habitat which could not be avoided as directed by Policy 11.[25] The Court also relied on the precautionary approach contained in Policy 3 of the NZCPS. Its discussion of this aspect of the case concluded with the words: "[n]o party argued that the NZCPS was uncertain or incomplete so there is no need to apply the "subject to Part 2" qualification in s 104 RMA."[26]

[20] Weighing the proposal under the Sounds Plan and the NZCPS, the Court judged that the "undoubted benefits" were outweighed by the costs it would impose on the environment. It noted in particular that the proposal did not avoid or sufficiently mitigate:[27]

> (1) the direct minor effect of changing a small volume of the habitat of King Shag;
>
> (2) the accumulative effect — with other existing mussel farms in Beatrix Bay — of an approximate 11% reduction in the surface area of that soft bottom habitat on King Shag, even acknowledging that there are other suitable foraging areas within Pelorus Sounds which have not been quantified;
>
> (3) the more than minor adverse effects on the landscape feature of the northern promontory; and
>
> (4) the addition to the already significant adverse accumulated and accumulative effects on the natural character of Beatrix Bay.

High Court judgment

[21] The appellant's appeal to the High Court raised four questions. For present purposes, we only need to be concerned with the first which asked whether

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24 At [274].

25 Policy 11 of the NZCPS seeks to protect indigenous biological diversity in the coastal environment, including amongst other things by avoiding adverse effects of activities on indigenous taxa that are listed as threatened, and on the habitats of indigenous species.

26 Environment Court decision, above n 4, at [287].

27 At [282].

the Environment Court erred in failing to apply pt 2 of the Act in considering the application for resource consent under s 104.

[22] Cull J noted the Supreme Court's conclusion in *King Salmon* that the NZCPS gave substance to the principles in pt 2 of the Act in relation to New Zealand's coastal environment.[28] She also referred to the discussion of s 5 in *King Salmon*, noting the Supreme Court's observation that it was not intended to be an "operative provision" under which particular planning decisions are made.[29]

[23] The Judge considered that the Supreme Court had rejected the "overall judgment" approach in relation to the "implementation of the NZCPS in particular", as the approach would be "inconsistent with the elaborate process required before a national coastal policy statement can be issued …".[30] The Judge then held that the reasoning in *King Salmon* applied to s 104(1), because the relevant provisions of the planning documents, including the NZCPS had already given substance to the principles in pt 2 of the Act.[31] She considered *King Salmon* applied equally to s 104 considerations as it does to a plan change.[32] She also accepted a broad submission that had been made to her by the respondent that it would be inconsistent with the scheme of the Act and *King Salmon* to allow regional or district plans "to be rendered ineffective by general recourse to Part 2 in deciding resource consent applications".[33]

[24] Dealing with a specific argument that the Environment Court had erred by not applying ss 5(2) and 7(b) of the Act, the Judge pointed out that even if the Environment Court had paid specific attention to pt 2, it was not clear that the enabling provisions of pt 2 would have been given pre-eminent consideration.[34] In any event, the Environment Court had taken into account the likely net social benefits in assessing the effects of the proposal.[35] It had also found that issues under s 7(b), which requires decision makers under the Act to have particular regard to the efficient

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28 High Court judgment, above n 2, at [73].
29 At [74], referring to *King Salmon*, above n 1, at [151].
30 At [75], referring to *King Salmon*, above n 1, at [136] and [137].
31 At [76].
32 At [78].
33 At [77].
34 At [85]. The Judge was contrasting the "enabling" aspects of the definition of sustainable management in s 5(2) with protective provisions in s 5 and elsewhere in pt 2.
35 At [86].

use and development of natural and physical resources, was largely irrelevant because it did not deal with the protection of resources. Finally, the Judge concluded that the appellant had not identified any deficiency in the relevant planning instruments such as would justify resort to pt 2 in accordance with *King Salmon*.[36]

The appeal to this Court

[25] This Court granted leave to appeal on the following questions of law:

(a) Did the High Court err in holding that the Environment Court was not able or required to consider pt 2 of the Resource Management Act 1991 directly and was bound by its expression in the relevant planning documents?

(b) If the first question is answered in the affirmative, should the High Court have remitted the case back to the Environment Court for reconsideration?

[26] The balance of this judgment will address the first question. As will become clear, the terms of the answer we give to the first question effectively dictate the answer to the second.

First question — consideration of Part 2 of the Act

Appellant's submissions

[27] Mr Gardner-Hopkins for the appellant presented a comprehensive argument based on the text and purpose of s 104(1), its legislative history and the wider scheme of the Act. He submitted that the approach taken in *King Salmon* to plan changes should not apply in the case of applications for resource consents. Rather, in considering resource consent applications, pt 2 of the Act must be considered as well as the statutory documents referred to in s 104(1), and in the case of conflict pt 2 will prevail.

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[36] At [88].

[28] Counsel noted that the words "subject to Part 2" have often been construed, in the context of cases involving resource consents, as enabling or requiring reference to the provisions in pt 2 of the Act. Cases where such references have been made include decisions of this Court, including *Queenstown Lakes District Council v Hawthorn Estate Ltd* in which it was said:[37]

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

[29] The words "[s]ubject to Part II" in the statute as it then was were subsequently relocated in subs (1) but that does not detract from the argument. In addition, in *Central Plains Water Trust v Synlait Ltd* this Court said:[38]

> Section 104(1) requires the consent authority inter alia to comply with the overarching provisions of Part 2. Among the matters to which the authority is required by Part 2 to have particular regard is the efficient use of natural and physical resources (s 7(b)). That theme (1) consideration is of very great importance. It is recognised not only by the RMA but increasingly within the general principles of law which provide a context for adjudication.

[30] In addition, Mr Gardner-Hopkins was able to refer to various High Court judgments taking the same approach.[39] Numerous Environment Court decisions could also be quoted for the same proposition.

[31] Counsel noted that the expression "subject to Part 2" also occurs in s 171(1) of the Act in the context of considering notices of requirement. The drafting of s 171(1) follows a similar pattern to that of s 104(1), requiring consideration, "subject to Part 2", of the effects on the environment of allowing the requirement, as well as the

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

38 *Central Plains Water Trust v Synlait Ltd* [2009] NZCA 609, [2010] 2 NZLR 363 at [92(a)].

39 *Wilson v Selwyn District Council* [2005] NZRMA 76 (HC) at [79]; *Unison Networks Ltd v Hastings District Council* [2011] NZRMA 394 at [67] and [72]; and *Auckland City Council v John Woolley Trust* [2008] NZRMA 260.

provisions of any relevant policy statement or plan. Section 171 was considered by the Privy Council in *McGuire v Hastings District Court*.[40] Writing for the Board, Lord Cooke discussed the various provisions in pt 2 of the Act before noting that s 171 is expressly made subject to pt 2, including ss 6, 7 and 8. He wrote: "[t]his means that the directions in the latter sections have to be considered as well as those in s 171 and indeed override them in the event of conflict."[41]

[32] Similar observations were made in *Queenstown Airport Corp Ltd v Queenstown Lakes District Council*.[42] And in another case involving a requirement, Brown J took the same approach, distinguishing *King Salmon* on the basis that the relevant statutory provisions discussed in the latter did not include the phrase "subject to Part 2".[43]

[33] Mr Gardner-Hopkins traced the history of s 104 noting that as originally enacted, pt 2 was listed as one of the matters to which a consent authority was to have regard; it was the seventh in a list that began by referring to any relevant rules of a plan or proposed plan, then mentioned relevant policies or objectives of such plans, then national policy statements, the NZCPS and regional policy statements as well as other matters. That drafting approach led the Full Court of the High Court to observe that although the section directed the consent authority to have regard to pt 2, it was "but one in a list of such matters and is given no special prominence".[44]

[34] It was shortly after that the Act was amended, placing the words "subject to Part 2" near the beginning of the section. The Ministry for the Environment produced a departmental report on the Resource Management Act Amendment Bill, in April 1993. The report was provided for the Chairman of the Planning and Development Select Committee, to assist its consideration of the Bill. At page 62, the observation was made:

> The main change to section 104 was the rewriting of section 104(4). This was done to clarify that Part [2] was not one of a list of matters that had to be had

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40 *McGuire v Hastings District Council* [2000] UKPC 43, [2002] 2 NZLR 577.
41 At [22].
42 *Queenstown Airport Corp Ltd v Queenstown Lakes District Council* [2013] NZHC 2347 at [68].
43 *New Zealand Transport Agency v Architectural Centre Inc* [2015] NZHC 1991, [2015] NZRMA 375 at [117].
44 *Batchelor v Tauranga District Council (No 2)* [1993] 2 NZLR 84 (HC) at 89.

> regard to but was an overriding matter, as it is with the whole Act including the next section, 105, where decisions are made on applications.

[35] Consistent with this, when introducing the Resource Management Act Amendment Bill 1993, the Minister for the Environment said:[45]

> Part [2] of the Resource Management Act sets out its purpose and the key principles of the Act. It is fundamental, and applies to all persons whenever exercising any powers and functions under the Act. The current references in the Act in Part [2] are being interpreted as downgrading the status of Part [2]. Amendments in this Bill restore the purpose and principles to their proper over-arching position.

[36] Mr Gardner-Hopkins supplemented these arguments by reference to the fact that under sch 4 of the Act, every application for resource consent must include an assessment of the activity "against the matters set out in Part 2". This was not a requirement of the legislation as originally enacted, but the result of s 125 of the Resource Management Amendment Act 2013. Once again, it is relevant to note the explanation given in the departmental report on what was then the Resource Management Reform Bill 2012. That document referred to the proposed new sch 4 as requiring applications to consider provisions of the Act and other planning documents relevant at the decision-making stage of the application process. There was a specific reference to pt 2 of the Act as well as any relevant documents listed in s 104(1)(b) including the district or regional plan and any relevant national environmental standards.[46]

[37] Later in that document, it was observed:[47]

> Part 2, which sets out the purpose and principles of the RMA, is the part against which decisions under section 104 are made. Ultimately, all decisions on resource consents must demonstrably contribute towards the purpose of the Act.

[38] This reform found its way into the forms provided in the Resource Management (Forms, Fees, and Procedure) Regulations 2003. A new Form 9, the prescribed form for an application for resource consent states, in paragraph eight: "I

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45 (15 December 1992) 532 NZPD 13179.

46 Ministry for the Environment *Departmental Report on the Resource Management Reform Bill 2012* (April 2013).

47 At 82.

attach an assessment of the proposed activity against the matters set out in Part 2 of the Resource Management Act 1991." This form was required to be used from 3 March 2015.[48] The Supreme Court's decision in *King Salmon* had been delivered over 10 months earlier on 17 April 2014.

[39] In the balance of his submission, Mr Gardner-Hopkins addressed various arguments as to why the Supreme Court's decision in *King Salmon* should be confined to cases involving plan changes, the context in which the decision arose.

[40] Here, he emphasised the different statutory framework, discussed by the Supreme Court, including s 67(3) of the Act, under which a regional plan must "give effect to", amongst other things, any NZCPS.[49] He also referred to the Supreme Court's conclusion that by giving effect to the NZCPS, the Council would necessarily be acting "in accordance with" pt 2, obviating any need for that part to be referred to again. Caveats to this were invalidity, incomplete coverage or uncertainty; in those instances, reference to pt 2 might be justified and provide assistance, as opposed to pt 2 being referred to as a matter of course. Mr Gardner-Hopkins argued that there was nothing in *King Salmon* that suggested the Supreme Court intended its decision would be applied to resource consent applications as well as plan changes. Mr Gardner-Hopkins also endeavoured to confine the Supreme Court's observations about s 5 and the other provisions in pt 2 not being "operative" provisions to the plan and plan change context. He submitted that the language of s 104(1) and its direct reference to pt 2 must give the latter something of an "operative" role and function. On the approach taken in *McGuire*, pt 2 might override the other matters required to be considered in s 104(1) in the case of conflict.

[41] In the present case, Mr Gardner-Hopkins submitted that the Environment Court erred by not having regard to pt 2, wrongly regarding itself as precluded from doing so by *King Salmon*. The High Court had wrongly concluded the reasoning in *King Salmon* precluded resort to pt 2 because the relevant provisions of the

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[48] See Regulation 7 of the Resource Management (Forms, Fees and Procedure) Amendment Regulations 2014.

[49] Section 67(3)(b).

planning documents including the NZCPS had already applied pt 2. Although the Environment Court had referred to s 7(b), it had found it largely irrelevant, and the High Court was not justified in concluding that the Environment Court would have arrived at the same outcome had it applied pt 2 as a whole, including those aspects of it that were enabling. Instead, the Environment Court had regarded the issues as effectively determined by the relevant plan and NZCPS provisions it discussed. This was to elevate the planning documents above pt 2, instead of affording the latter its "overarching" significance.

Respondent's submissions

[42] For the respondent, Mr Maassen submitted that the Environment Court was bound to apply the NZCPS by reason of its correct assessment that the NZCPS was neither uncertain nor incomplete and, consequently, there was no reason to apply the "subject to Part 2" qualification in s 104. The clear outcomes mandated by the NZCPS were faithful expressions with greater particularity of the requirements of pt 2 on indigenous biodiversity, which was the kernel of the case. In advancing this argument, Mr Maassen contended that the Environment Court had not purported to shut out resort to pt 2 in an appropriate case; however, in view of its findings on the NZCPS there was no need to consider pt 2. To the extent that the Environment Court had also implied that pt 2 should not be considered where the provisions of the regional coastal plan were clear, Mr Maassen disagreed. Depending on the circumstances of the case, there could be a valid contention that the provisions were deficient in meeting the objectives in pt 2. That was not the case here, because the outcomes sought to be achieved by the Sounds Plan were harmonious with the relevant policies in the NZCPS.

[43] Mr Maassen argued that the words "subject to Part 2" in s 104(1) did not authorise case-by-case resort to pt 2 in the context of resource consent applications, uninfluenced by clear directions of the planning documents. In this respect, he submitted the Act contemplates "planning" as opposed to "ad hoc" decision-making. The public are entitled to expect that planning strategies will be implemented and to organise their lives and make investment decisions based on those strategies; decisions

made under s 104 should be informed by the policy of the relevant planning documents.

[44] In argument, Mr Maassen's position was clarified to the extent that in accordance with the reasoning in *McGuire*, he accepted pt 2 must be considered, and would override the provisions of planning instruments in the event of a conflict. As he put it, there must be no barriers to a decision-maker's access to pt 2. However, a conclusion that the provisions of a relevant policy statement or plan were comprehensive in achieving the outcomes contemplated by pt 2 would not constitute such a barrier. He placed some weight on observations made by Fogarty J in *Wilson v Selwyn District Council*.[50] Fogarty J said:

> [79] Where a provision in a plan or proposed plan is relevant, the consent authority is obliged, subject to Part [2], to have regard to it, "shall have regard". The qualifier "subject to Part [2]", enables the consent authority to form a reasoned opinion that upon scrutiny the relevant provision does not pursue the purpose of one or more of the provisions in Part [2], in the context of the application for this resource consent.

[45] In accordance with this approach, Mr Maassen submitted that the appropriate starting point is the proposition that the plans fulfil their purpose in achieving pt 2, but the consent authority could form a reasoned opinion upon scrutiny that the relevant provision does not pursue the purpose or one or more of the provisions of pt 2 in the context of the application for the particular resource consent. Mr Maassen argued such an approach was consistent with *King Salmon* because of the starting assumption that plans were fulfilling their intended purpose.

Analysis

[46] Section 104(1) provides:

> **104 Consideration of applications**
>
> (1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to–

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[50] *Wilson v Selwyn District Council*, above n 39. Fogarty J's interpretation of "the environment" in that case was reversed by this Court in *Queenstown Lakes District Council v Hawthorn Estate Ltd*, above n 37, but this Court did not criticise what was said at [79].

(a) any actual and potential effects on the environment of allowing the activity; and

(ab) any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity; and

(b) any relevant provisions of—

(i) a national environmental standard:

(ii) other regulations:

(iii) a national policy statement:

(iv) a New Zealand coastal policy statement:

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

(vi) a plan or proposed plan; and

(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

…

[47] For the reasons addressed by Mr Gardner-Hopkins summarised above[51] we are satisfied that the position of the words "subject to Part 2" near the outset and preceding the list of matters to which the consent authority is required to have regard, clearly show that a consent authority must have regard to the provisions of pt 2 when it is appropriate to do so. As Mr Gardner-Hopkins demonstrated, the change made in 1993 was plainly designed to preserve the preeminent role of pt 2, containing as it does the statement of the Act's purpose and principles. As we understand it, there was in the end no contest between the present parties about the consent authority's ability to refer to pt 2 in an appropriate case.[52]

[48] That conclusion also follows from the provisions in pt 2 itself. Sections 5–8 of the Act provide:

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51 At [27]–[38].

52 Although we did not call on the interested parties orally at the hearing, their written submissions were to the same effect.

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.

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:

(h) the management of significant risks from natural hazards.

7 Other matters

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—

(a) kaitiakitanga:

(aa) the ethic of stewardship:

(b) the efficient use and development of natural and physical resources:

(ba) the efficiency of the end use of energy:

(c) the maintenance and enhancement of amenity values:

(d) intrinsic values of ecosystems:

(e) *[Repealed]*

(f) maintenance and enhancement of the quality of the environment:

(g) any finite characteristics of natural and physical resources:

(h) the protection of the habitat of trout and salmon:

(i) the effects of climate change:

(j) the benefits to be derived from the use and development of renewable energy.

8 Treaty of Waitangi

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

[49] The Supreme Court observed in *King Salmon* that s 5 was not intended to be an "operative provision", in the sense that particular planning decisions are not made under it.[53] It went on to observe that the hierarchy of planning documents in the Act was intended to:[54]

> … 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.

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53 *King Salmon*, above n 1, at [151].
54 At [151].

[50] These statements of the law are of course binding on this Court and, with respect, an accurate description of the relationship between the planning documents and pt 2. In summary, the structure of the Act requires pt 2 to have a direct influence on the content of the planning documents. While other provisions express the machinery by which that process is achieved, they are underpinned by pt 2. Thus, to give just one example, s 63(1) of the Act states that the purpose of the preparation, implementation, and administration of regional plans is to assist a regional Council to carry out any of its functions in order to achieve the purpose of the Act. So there is a direct link to s 5 where the purpose of the Act is set out.[55]

[51] In the case of applications for resource consent however, it cannot be assumed that particular proposals will reflect the outcomes envisaged by pt 2. Such applications are not the consequence of the planning processes envisaged by pt 4 of the Act for the making of planning documents. Further, the planning documents may not furnish a clear answer as to whether consent should be granted or declined. And while s 104, the key machinery provision for dealing with applications for resource consent, requires they be considered having regard to the relevant planning documents, it plainly contemplates reference to pt 2.

[52] In any event, as can be seen from the provisions of pt 2 set out above, each of ss 6, 7 and 8 begins with an instruction, which is to be carried out "[i]n achieving the purpose of this Act", thus giving s 5 a particular role. Further, in each case the instruction is given to "all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources". We consider those instructions must be complied with in an appropriate way in disposing of any application for a resource consent, and indeed it is untenable to suggest to the contrary. That conclusion would apply even without the words "subject to Part 2" in s 104(1); but they underline the conclusion. As the Privy Council said in *McGuire* ss 6, 7 and 8 constitute "strong directions, to be borne in mind at every stage of the planning process".[56] While it is true, as the Supreme Court in *King Salmon* observed, that s 5 is not a provision under which particular planning decisions are

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55 To similar effect is s 59 which enacts that the purpose of a regional policy statement is to "achieve the purpose of the Act" in various stated ways; and s 72 which states the purpose of district plans in the same language that is used for regional plans, thus embracing the purpose of the Act.

56 *McGuire v Hastings District Council*, above n 40, at [21].

made, the reference to pt 2 in s 104(1) enlivens ss 5–8 in the case of applications for resource consent.

[53] The real question is whether the ability to consider pt 2 in the context of resource consents is subject to any limitations of a kind contemplated by *King Salmon* in the case of changes to a regional coastal plan. The answer to that question must begin with an analysis of what was decided in *King Salmon*.

[54] At the outset, it may be noted that *King Salmon* concerns the same plan, the Sounds Plan, with which we are concerned in the current appeal. It should also be noted that the judgment was written on the assumption that because no party had challenged the NZCPS there was acceptance that it conformed with the Act's requirements, and with pt 2 in particular.[57] That assumption remains appropriate.

[55] The second point to note is that what was in issue on the appeal determined by the Supreme Court was a proposed change to the Sounds Plan to accommodate a salmon farm at Papatua in Port Gore. The Board of Inquiry appointed to determine the plan change at first instance determined that the area affected was of "outstanding natural character and landscape value." If implemented, the proposal would have very high adverse visual effects. The directions in Policy 13(1)(a) and Policy 15(1)(a) of the NZCPS would not be given effect to.[58] Those policies are respectively:

> 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 …
> >
> > …
>
> 1. 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 …

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57 *King Salmon*, above n 1, at [33].
58 At [19].

[56] Notwithstanding its conclusions on these issues, in applying s 5, the Board considered that the appropriateness of the area for aquaculture, specifically for salmon farming, weighed heavily in favour of granting consent. Consequently, the proposed zone would be appropriate.[59]

[57] The Supreme Court in *King Salmon* held that the relevant directions in Policies 13 and 15 of the NZCPS had the overall purpose of preserving the natural character of the coastal environment, and protecting it from inappropriate use and development. If an affected area was "outstanding", such adverse effects were required to be avoided. In less sensitive areas, the requirement was to avoid "*significant* adverse effects".[60] "Avoid" was to be interpreted as meaning "not allow" or "prevent the occurrence of".[61]

[58] The Court noted that under s 67(3) of the Act, a regional plan must give effect to any national policy statement, any NZCPS and any regional policy statement. To "give effect" was to implement, and this was a matter of "firm obligation".[62]

[59] It is clear that the Court considered the NZCPS would not be given effect to if the plan were changed as proposed, because of the Board of Inquiry's finding that implementing the change would result in significant adverse effects on areas with outstanding natural character and landscape. And, as this Court observed in *Man O'War Station Ltd v Auckland Council*, the "overall judgment" approach was rejected because of the prescriptive nature of the relevant provisions in Policies 13 and 15 of the NZCPS and the statutory obligation to give effect to them.[63] The policies were specific and clear in what they prohibited. As the Supreme Court in *King Salmon* said:[64]

> [The Board] 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),

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59 At [19].
60 At [62] (emphasis added).
61 At [62].
62 At [77].
63 *Man O'War Station Ltd v Auckland Council* [2017] NZCA 24, [2017] NZRMA 121 at [56]–[57].
64 *King Salmon*, above n 1, at [153].

> 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 policies give effect to the protective element of sustainable management.

And following that:

> [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.

[60] There were other relevant aspects of the statutory context that underpinned the Supreme Court's approach. These included s 58(a) of the Act which empowered the Minister, by means of the NZCPS, to set national priorities in relation to the preservation of the natural character of the coastal environment.[65] This was clearly fundamental to what we consider to be a contextual rejection of the "overall judgment" approach.[66] For example, the Court said:[67]

> 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.

[61] The Court applied a similar analysis to s 58(d), (f) and (gb), which enabled the Minister to include in an NZCPS objectives and policies concerning the Crown's interests in the coastal marine area, the implementation of New Zealand's international obligations affecting the coastal environment and the protection of protected rights.

[62] We note also the Court's discussion of s 58(e) of the Act, which provides that an NZCPS may state objectives or policies about matters to be included in regional coastal plans for the preservation of the natural character of the coastal environment. That may include "the activities that are required to be specified as restricted coastal activities" because of their "significant or irreversible adverse effects" or because they relate to areas with "significant" conservation value. The Court observed:[68]

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65 The discussion of the provisions of s 58 here and in the following paragraphs reflect its form prior to the enactment of the Resource Legislation Amendment Act 2017.

66 At [118]–[121].

67 At [118].

68 At [121].

> 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.

[63] In this context, the Court also mentioned ss 55 and 57. It noted that s 55(2) relevantly provided that if a national policy statement so directs, a regional council must amend a regional policy statement or regional plan to include specific objectives or policies to give effect to matters specified in a national policy statement. Section 55(3), which provides that a regional council must also take "any other action that is specified in the national policy statement" and other related provisions made clear a regional council's obligation to give effect to the NZCPS and the role of the NZCPS as what the Court described as a "mechanism for Ministerial control".[69]

[64] Significantly the Court also addressed applications for private plan changes. The ability to make such applications was held not to support adoption of an "overall judgment" approach, essentially because the decision-maker would always have to take into account the region wide perspective that the NZCPS required.[70]

[65] The Court referred to "additional factors" that supported rejection of the "overall judgment" approach "in relation to the implementation of the NZCPS." This included the general point that it would be inconsistent with the elaborate process required before an NZCPS can be issued, and secondly the uncertainty that would be created by adoption of the "overall judgment" approach.[71]

[66] We see these various passages in the judgment as part of the Court's rejection of the "overall judgment" approach in the context of plan provisions implementing the NZCPS. Given the particular factual and statutory context addressed by the Supreme Court, we do not consider it can properly be said the Court intended to prohibit consideration of pt 2 by a consent authority in the context of resource consent applications. There are a number of additional reasons which support this conclusion.

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69 At [125].
70 At [135].
71 At [136].

[67] First, the Court made no reference to s 104 of the Act nor to the words "subject to Part 2". If what it said was intended to be of general application across the board, affecting not only plan provisions under pt 4 of the Act, but also resource consents under pt 6, we think it inevitable that the Court would have said so. We say that especially because of the frequency with which pt 2 has historically been referred to in decision-making on resource consent applications. The "overall judgment" approach has also frequently been applied in the context of resource consent applications. If the Supreme Court's intention had been to reject that approach it would be very surprising that it did not say so. We think the point is obvious from the preceding discussion, but note in any event that in its discussion of whether the Board had been correct to utilise the "overall judgment" approach the Court's reasoning was expressly tied to the "plan change context under consideration". It was in that context that the Court said the "overall judgment" approach would not recognise environmental bottom lines.[72]

[68] Secondly, we do not consider that what the Supreme Court said at [137]–[138] indicates it intended its reasoning to be generally applicable, including to resource consents, as the Environment Court considered was the case. The Supreme Court's observation at the outset of [137] that the "overall judgment" approach creates uncertainty is certainly of a general nature, but the context is established by what immediately follows:[73]

> 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.

[69] We accept that the Court went on to refer to Environment Court decisions allowing appeals from the District Council with the result that renewal applications for marine farms in the Marlborough Sounds were declined. It contrasted this with the Board's decision in the case before it, as an illustration of the uncertainties that arise. We consider this was simply underlining the possibility of different outcomes

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72 At [108].
73 At [137].

where an overall judgment is applied. This is a long way from establishing that the Court intended to proscribe an "overall judgment" approach in the case of resource consent applications generally.

[70] Thirdly, resource consents fall to be addressed under s 104(1) and, as we have demonstrated, the statutory language plainly contemplates direct consideration of pt 2 matters. The Act's general provisions dealing with resource consents do not respond to the same or similar reasoning to that which led the Supreme Court to reject the "overall judgment" approach in *King Salmon*. There is no equivalent in the resource consent setting to the range of provisions that the Supreme Court was able to refer in the context of the NZCPS, designed to ensure its provisions were implemented: the various matters of obligation discussed above. Nor can there be the same assurance outside the NZCPS setting that plans made by local authorities will inevitably reflect the provisions of pt 2 of the Act. That is of course the outcome desired and anticipated, but it will not necessarily be achieved.

[71] Where the NZCPS is engaged, any resource consent application will necessarily be assessed having regard to its provisions. This follows from s 104(1)(b)(iv). In such cases there will also be consideration under the relevant regional coastal plan. We think it inevitable that *King Salmon* would be applied in such cases. The way in which that would occur would vary. Suppose there were a proposal to carry out an activity which was demonstrably in breach of one of the policies in the NZCPS, the consent authority could justifiably take the view that the NZCPS had been confirmed as complying with the Act's requirements by the Supreme Court. Separate recourse to pt 2 would not be required, because it is already reflected in the NZCPS, and (notionally) by the provisions of the regional coastal plan giving effect to the NZCPS. Putting that another way, even if the consent authority considered pt 2, it would be unlikely to get any guidance for its decision not already provided by the NZCPS. But more than that, resort to pt 2 for the purpose of subverting a clearly relevant restriction in the NZCPS adverse to the applicant would be contrary to *King Salmon* and expose the consent authority to being overturned on appeal.

[72] On the other hand, if a proposal were affected by different policies so that it was unclear from the NZCPS itself as to whether consent should be granted or refused, the consent authority would be in the position where it had to exercise a judgment. It would need to have regard to the regional coastal plan, but in these circumstances, we do not see any reason why the consent authority should not consider pt 2 for such assistance as it might provide. As we see it, *King Salmon* would not prevent that because first, in this example, there is notionally no clear breach of a prescriptive policy in the NZCPS, and second the application under consideration is for a resource consent, not a plan change.

[73] We consider a similar approach should be taken in cases involving applications for resource consent falling for consideration under other kinds of regional plans and district plans. In all such cases the relevant plan provisions should be considered and brought to bear on the application in accordance with s 104(1)(b). A relevant plan provision is not properly had regard to (the statutory obligation) if it is simply considered for the purpose of putting it on one side. Consent authorities are used to the approach that is required in assessing the merits of an application against the relevant objectives and policies in a plan. What is required is what Tipping J referred to as "a fair appraisal of the objectives and policies read as a whole".[74]

[74] It may be, of course, that a fair appraisal of the policies means the appropriate response to an application is obvious, it effectively presents itself. Other cases will be more difficult. If it is clear that a plan has been prepared having regard to pt 2 and with a coherent set of policies designed to achieve clear environmental outcomes, the result of a genuine process that has regard to those policies in accordance with s 104(1) should be to implement those policies in evaluating a resource consent application. Reference to pt 2 in such a case would likely not add anything. It could not justify an outcome contrary to the thrust of the policies. Equally, if it appears the plan has not been prepared in a manner that appropriately reflects the provisions of pt 2, that will be a case where the consent authority will be required to give emphasis to pt 2.

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[74] *Dye v Auckland Regional Council* [2002] 1 NZLR 337 at [25].

[75] If a plan that has been competently prepared under the Act it may be that in many cases the consent authority will feel assured in taking the view that there is no need to refer to pt 2 because doing so would not add anything to the evaluative exercise. Absent such assurance, or if in doubt, it will be appropriate and necessary to do so. That is the implication of the words "subject to Part 2" in s 104(1), the statement of the Act's purpose in s 5, and the mandatory, albeit general, language of ss 6, 7 and 8.

[76] We prefer to put the position as we have in the preceding paragraphs rather than adopting the expression "invalidity, incomplete coverage or uncertainty" which was employed by the Supreme Court in *King Salmon* when defining circumstances in which resort to pt 2 could be either necessary or helpful in order to interpret the NZCPS.[75] While that language was appropriate in the context of the NZCPS, we think more flexibility may be required in the case of other kinds of plan prepared without the need to comply with ministerial directions.

[77] As we have seen, the High Court Judge apparently considered that the reasoning in *King Salmon* applied with equal force to resource consent applications as to plan changes. She appears to have proceeded on the basis that consent authorities will not be permitted to consider the provisions of pt 2 in evaluating resource consent applications, unless the plan is deficient in some respect. For the reasons we have given, we do not consider that is correct, and it is contrary to what was said by the Privy Council in *McGuire* describing ss 6, 7 and 8 as "strong directions, to be borne in mind at every stage of the planning process".[76]

[78] However, in the circumstances of this case the error is not significant and the Judge was clearly correct when she held that it would be inconsistent with the scheme of the Act to allow regional or district plans to be rendered ineffective by general recourse to pt 2 in deciding resource consent applications.

[79] In the present case, as has been seen, the Environment Court based its decision to dismiss the appeal on the impact of the proposal on the habitat of King Shags, adverse effects on landscape and the natural character of Beatrix Bay. In terms of

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75 *King Salmon*, above n 1, at [90].
76 *McGuire v Hastings District Council*, above n 40, at [21].

the NZCPS, the site was inappropriate having regard to the adverse effect on King Shag habitat which could not be avoided, contrary to Policy 11. As has been seen, in terms of the Sounds Plan, the site of the proposal was within an "Area of Ecological Value" with national significance as a feeding habitat of King Shags. Associated policies drew attention to the likely adverse effects of proposals on feeding habitat, the probability of a decrease in numbers of King Shags, the probability of adverse effects occurring and the probability of adverse effects being avoided, remedied or mitigated. The Sounds Plan included objectives that sought to protect significant fauna and their habitats from the adverse effects of use and development, and policies that sought to avoid the adverse effects of land and water use on areas of significant ecological value.

[80] The Environment Court's decision was clearly justified having regard to the NZCPS and the Sounds Plan. It took the approach, justified by *King Salmon*, that there was no need to apply the "subject to Part 2" qualification in s 104(1) because there was no suggestion that the NZCPS was uncertain or incomplete.[77] It also decided "on balance" that the proposal should be rejected if considered solely in terms of the Sounds Plan.[78] Although it had earlier said the Sounds Plan did not fully implement pt 2 of the Act, this was referring in particular to the risk of extinction of King Shags, a matter clearly dealt with in the NZCPS in any event.[79]

[81] We do not discern any error in this approach. If there had been reference to pt 2, it could not have justified a decision that departed from what the NZCPS required. In our view, while the Court might properly have considered pt 2 more extensively than its passing reference to s 7(b), the thrust of the relevant NZCPS policies and the Sounds Plan could not properly have been put on one side calling pt 2 in aid.

[82] Having regard to the foregoing discussion we agree with Cull J's conclusion that it would be inconsistent with the scheme of the Act to allow regional or district plans to be "rendered ineffective" by general recourse to pt 2 in deciding resource consent applications, providing the plans have been properly prepared in

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77 Environment Court decision, above n 4, at [287].
78 At [274].
79 At [153].

accordance with pt 2. We do not consider however that *King Salmon* prevents recourse to pt 2 in the case of applications for resource consent. Its implications in this context are rather that genuine consideration and application of relevant plan considerations may leave little room for pt 2 to influence the outcome. That was so in the present case because of both the NZCPS and the Sounds Plan.

Result

[83] These conclusions lead us to answer the questions posed as follows:

(a) Did the High Court err in holding that the Environment Court was not able or required to consider pt 2 of the Resource Management Act 1991 directly and was bound by its expression in the relevant planning documents?

Answer: Yes, but because there were no reasons in this case to depart from pt 2's expression in the relevant planning documents, the error was of no consequence.[80]

(b) If the first answer is answered in the affirmative, should the High Court have remitted the case back to the Environment Court for reconsideration?

Answer: No.

[84] The appeal is dismissed.

[85] Normally we deal with costs on the basis of submissions made by the parties at the conclusion of the hearing. In this case, although we heard the parties at that stage we consider that it will be appropriate for brief submissions to be filed having regard to the outcome of the appeal. We invite submissions accordingly. They should

[80] We note that the Environment Court could have relied on pt 2 to fill the gap left by the shortcomings it had identified in the provisions of the Sounds Plan dealing with King Shags, but there was no need to do so having regard to the provisions of the NZCPS that it applied.

deal not only with the substantive appeal but also costs on the application for leave to appeal which was opposed by the respondent.

[86] Leave is granted for the parties to file submissions on costs, limited in each case to no more than five pages in length, to be filed within 15 working days of delivery of this judgment.

Solicitors:
Russell McVeagh, Auckland for Appellant
Cooper Rapley Lawyers, Palmerston North for Respondent
Ironside Law Ltd, Nelson for Interested Parties

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV 2023-404-001516
[2024] NZHC 1414

BETWEEN	SHIRLEY WARU Applicant
AND	TŪPUNA MAUNGA O TĀMAKI MAKAURAU AUTHORITY First Respondent
	AUCKLAND COUNCIL Second Respondent

Hearing:	5 December 2023
Appearances:	J W H Little & H P Short for the Applicant P T Beverley & C A Easter for the First Respondent No appearance for the Second Respondent
Judgment:	31 May 2024

JUDGMENT OF TAHANA J

This judgment was delivered by me on 31 May 2024 at 1.00pm
Pursuant to Rule 11.5 of the High Court Rules

……

Registrar/Deputy Registrar

Solicitors/Counsel:
J W H Little, Auckland
Duncan King Law, Auckland
Buddle Findlay, Auckland

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Introduction

[1] At issue in this case is whether the Auckland City Council (the Council) acted lawfully by granting resource consent for the removal and planting of vegetation on Ōtāhuhu / Mount Richmond (Ōtāhuhu) without requiring that the application be notified, or alternatively, without requiring limited notification to users of Ōtāhuhu.

[2] Ōtāhuhu is not the first maunga to be the subject of an application of this nature. In *Norman v Tūpuna Maunga o Tāmaki Makaurau Authority* (the *Ōwairaka* decision), the Court of Appeal determined that the Council should have required public notification of a resource consent application to remove vegetation on Ōwairaka / Mount Albert (Ōwairaka).[1] A key issue in this application is whether the Court of Appeal's findings apply to the circumstances of Ōtāhuhu such that this Court is bound to reach the same outcome. Before considering that issue, I first acknowledge the maunga, Ōtāhuhu.

Ōtāhuhu

[3] Ōtāhuhu has stood in Tāmaki Makaurau / Auckland for thousands of years. Its formation has been described as a "fire-fountain" that then created what is now the maunga which encapsulates a cluster of cones or craters that were once vents.

[4] Since the arrival of Māori, different iwi / hapū[2] have established significant connections to the maunga. It was given the name Ōtāhuhu and became a kāinga (home). It carries the etchings of a pā (fortified settlement) and it has witnessed bloodshed so that its surrounds were once tapu.[3] The maunga is of significant spiritual and cultural importance to those iwi / hapū.

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1 *Norman v Tūpuna Maunga o Tāmaki Makaurau Authority* [2022] NZCA 30, [2022] 3 NZLR 175 [*Ōwairaka*].

2 Ngāi Tai ki Tāmaki, Ngāti Maru, Ngāti Pāoa, Ngāti Tamaoho, Ngāti Tamaterā, Ngāti Te Ata, Ngāti Whanaunga, Ngāti Whātua Ōrakei, Ngāti Whātua o Kaipara, Te Ākitai Waiohua, Te Kawerau ā Maki, Te Patukirikiri and hapū o Ngāti Whātua.

3 Brent Druskovich *Heritage Impact Assessment of Proposed Tree Removals and Re-vegetation Planting Plan for Ōtahuhu/ Mt Richmond* (January 2019) at 6.

[5] By 1835 Ōtāhuhu was no longer a kāinga for hapū and came under private ownership. It was renamed Mount Haslwell[4] and then Mount Richmond.[5] In 1890, Ōtāhuhu was gazetted as a reserve for quarrying and recreation. The scars of that quarrying are etched into its mounds. Over the years trees have been planted so that Ōtāhuhu is now cloaked with trees both indigenous to Aotearoa New Zealand, and from lands across the seas.

[6] In its more recent history, Ōtāhuhu was the subject of a wider settlement under Te Tiriti o Waitangi / the Treaty of Waitangi between the Crown and a collective of iwi / hapū known as Ngā Mana Whenua o Tāmaki Makaurau.[6] That settlement sought to restore ownership of certain maunga, including Ōtāhuhu, to those iwi / hapū so they may exercise mana whenua and kaitiakitanga over the maunga.[7] The Court of Appeal sets out the settlement history in detail in the *Ōwairaka* decision, so I do not repeat it here. The significance of the settlement and Ōtāhuhu to those iwi / hapū is uncontested.

[7] The first respondent, the Tūpuna Maunga o Tāmaki Makaurau Authority (the TMA), is the administering body of the maunga and developed the proposal to remove non-native vegetation and plant native vegetation on Ōtāhuhu (the proposed activity). The applicant, Ms Waru is a resident of Ōtāhuhu and applies to review the Council's decision not to require notification of the resource consent application.

Issues for determination

[8] Ms Waru applies to review three aspects of the Council's decision not to require notification of the resource consent application under the Resource Management Act 1991 (the RMA):

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4 After Edmund Storr Halswell who was the New Zealand Company Commissioner to manage native reserves.

5 After Mathew Richmond, a Lands Commissioner.

6 Ngāi Tai ki Tāmaki, Ngāti Maru, Ngāti Pāoa, Ngāti Tamaoho, Ngāti Tamaterā, Ngāti Te Ata, Ngāti Whanaunga, Ngāti Whatua Orakei, Ngāti Whātua o Kaipara, Te Ākitai Waiohua, Te Kawerau a Maki, Te Patukirikiri and hapū o Ngāti Whātua.

7 Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014, s 3(b) [Redress Act].

(a) first, the decision that the proposed activity will not have, or is not likely to have, adverse effects on the environment that are more than minor;

(b) second, the decision that there were no special circumstances that warrant public notification; and

(c) third, the decision that limited notification was not required.

[9] I outline the grounds for reviewing each of the above decisions after setting out the relevant background.

Background

Parties

[10] Ms Waru is from Te Uri o Tai, a hapū in the Tai Tokerau (the North of Auckland). Ms Waru's evidence is that Ōtāhuhu is named after her tūpuna, Tāhuhu of Te Uri o Tai. Ms Waru has been a resident of the suburb of Ōtāhuhu for over 30 years and is the co-founder and leader of a community group called Respect Mt Richmond / Ōtāhuhu. That group was established to "protect the trees" on Ōtāhuhu.

[11] The TMA was established under Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014 (the Redress Act).[8] The maunga was vested in the Tūpuna Taonga o Tāmaki Makaurau Trust Ltd and declared a reserve.[9] Ōtāhuhu is held for the common benefit of Ngā Mana Whenua o Tāmaki Makaurau and the other people of Auckland.[10]

[12] The membership of the TMA includes six members appointed by iwi rōpū, six members appointed by the Council and one non-voting member.[11]

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8 Redress Act, s 106.
9 Section 41(1).
10 Section 41(2).
11 Section 107.

Context of the proposed activity

[13] The TMA is undertaking a range of projects across the different tūpuna maunga in Tāmaki Makaurau. Ōtāhuhu is part of an ecological restoration programme to restore native vegetation and to remove non-native vegetation.

[14] To understand the context within which the TMA applied for the resource consent, I set out the purposes of the Redress Act, which include to give effect to the settlement by:[12]

> (a) restoring ownership of certain maunga and motu of Tāmaki Makaurau to the iwi and hapū, the maunga and motu being treasured sources of mana to the iwi and hapū; and
>
> (b) providing mechanisms by which the iwi and hapū may exercise mana whenua and kaitiakitanga over the maunga and motu;
>
> …

[15] The evidence of Paul Majurey, the Chair of the TMA and a descendant of Marutūāhu, is that a key principle for the iwi / hapū is to "see the Tūpuna Maunga returned to a state of indigenous vegetation." Mr Majurey's evidence is that the "wellbeing of the Tūpuna Maunga is the fundamental consideration."

[16] Under the Redress Act, the TMA is required to prepare and approve an integrated management plan (IMP) for the tūpuna maunga, including Ōtāhuhu.[13] The TMA prepared and approved an IMP in 2016.[14]

[17] Against that backdrop, an application was filed for resource consent for the proposed activity.[15]

Initial application for resource consent (LUC60344578)

[18] In August 2019, an initial resource consent application (LUC60344578) was lodged for the removal of 443 exotic trees and the planting of 39,600 indigenous plants

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12 Section 3(a) and (b).
13 Section 58.
14 The IMP was subsequently amended after public consultation in 2022.
15 The application lists the Council as the applicant and the TMA as the relevant Department.

(the initial application). The initial application was accompanied by a number of technical reports.

[19] Mr Dales, a senior planner at the Council, processed the application and:

(a) commissioned independent peer reviews of the applicant's technical assessments;

(b) undertook a site visit; and

(c) requested further information, to which the TMA responded.

[20] Mr Dales prepared a report which included his recommendations that the application be processed on a non-notified basis and that it be granted. Mr Dale's report was peer reviewed by Mr Mason, the Council's Principal Project Lead, Resource Consents.

[21] Mr Munro, an independent planning commissioner, was engaged to review and determine the application on behalf of the Council.

[22] On 28 April 2021, the Council informed the TMA that Mr Munro considered that any persons occupying residential zoned land which would experience noise during the tree removal should be notified. The TMA then revised its application to only include those trees that were 100 metres or farther from residentially zoned properties.

Revised application for resource consent (LUC60384274)

[23] In August 2021, an amended application was lodged with the following changes:

(a) removing only 278 exotic trees;

(b) revising the location of the processing areas and the amount of helicopter use; and

(c) not including the planting of 20 native trees on the eastern side of Ōtāhuhu as trees along the Mt Wellington Highway frontage would be retained.

[24] The revised application was accompanied by:

(a) a revised report entitled "Assessment of Effects on the Environment and Statutory Assessment" by Jodie Mitchell and reviewed by Tania Richmond of Richmond Planning Ltd dated 16 August 2021 (the Assessment of Effects on Environment);

(b) a revised report entitled "Ōtāhuhu / Mt Richmond Tree Removal Methodology" by Richard Forward of Treescape Arboriculture Consultants dated May 2021 (the Tree Removal Methodology);

(c) a plan entitled "Ōtāhuhu Planting Plan 2018" by Jessica Le Grice, Anna Mairs and Kelvin Floyd of Te Ngahere dated December 2018 (the Planting Plan);

(d) a revised report entitled "Heritage Impact Assessment of Proposed Tree Removals and Re-vegetation Planting Plan for Ōtāhuhu / Mt Richmond" by Brent Druskovich Consultant Archaeologist dated June 2021 (the Heritage Impact Assessment);

(e) a revised report entitled "Assessment of Noise Effects Ōtāhuhu / Mt Richmond – Vegetation Restoration" by Jon Styles of Styles Group Acoustic & Vibration Consultants dated 21 June 2021 (the Assessment of Noise Effects);

(f) a revised report entitled "Assessment of Ecological Effects – Ōtāhuhu/Mt Richmond Restoration" by Kathryn Longstaff of Tonkin & Taylor Ltd dated June 2021 (the Assessment of Ecological Effects);

(g) a report entitled "Assessment of Environmental Effects of tree removals and habitat restoration activities on Lizards at Ōtāhuhu" by Trent Bell of EcoGecko Consultants dated January 2019; and

(h) a report entitled "Landscape and Visual Assessment for Proposed Tree Removal Ōtāhuhu" by Sally Peake of Peake Design dated 29 April 2019 (the Landscape and Visual Assessment).

[25] Mr Dales processed the revised application, and a peer review report was obtained for a new noise assessment by Mr Runcie. Mr Dales also requested further information from the TMA regarding noise standards, which the TMA provided.

[26] Mr Dales prepared a report which included his analysis and recommendations that the application be processed on a non-notified basis and that it be granted. Mr Dales' report was reviewed by Mr Mason.

Decision to grant resource consent

[27] On 15 September 2021, Mr Munro determined that the revised application (LUC60384274) could proceed on a non-notified basis. He determined that the proposed activity will have or is likely to have adverse effects on the environment that are no more than minor because:

i. in the context of the landscape and visual values of Ōtāhuhu, any adverse landscape and visual effects of the proposal are considered to be short term in nature and in keeping with the natural landform and landscape, so that overall any adverse effects will be less than minor;

ii. any adverse ecological effects arising from the proposal have been proposed to be appropriately managed as part of the works programme to ensure that any adverse effects will be less than minor;

iii. any adverse effects on public access and recreation will be short term in nature and will be less than minor;

iv. the proposed works have been designed to be sympathetic to the heritage values of Ōtāhuhu, and can be managed to ensure they are less than minor;

v. the tree removals methodologies are considered consistent with best arboricultural practice, and any adverse effects associated with this will be less than minor;

vi. any effects associated with land disturbance and stability have [been] proposed to be appropriately managed to ensure they are less than minor; and

vii. noise effects will be localised to adjacent land and users of that land, and in the wider or general environment will be less than minor.

[28] Mr Munro determined that there were no special circumstances warranting public notification because "there is nothing exceptional or unusual about the application." He also determined that the application should proceed without limited notification because there are no adversely affected persons because any adverse effects on any person will be less than minor.

[29] The TMA did not progress the tree removal when the resource consent was issued because by that time, the High Court had issued its decision regarding Ōwairaka and it had been appealed to the Court of Appeal.[16] On 3 March 2022, the Court of Appeal allowed the appeal and set aside the Council's decision not to require notification of the resource consent application for tree felling and removal in relation to Ōwairaka.[17] The Court of Appeal held that the removal of all exotic trees on Ōwairaka, and revegetation with indigenous fauna, was a proposal of such significance that it needed to be provided for in the IMP.[18] That would ensure appropriate, informed, public consultation about the proposal.[19]

[30] After the Court of Appeal decision, the TMA undertook consultation on proposed changes to the IMP.

Consultation on Integrated Management Plan (IMP)

[31] Consultation on the IMP took place from August to November 2022. The revised IMP refers to the removal of "[a] maximum of 443 non-native trees (not all)" and the "[r]etention of selected existing non-native trees." The "[t]ree types to be confirmed for retention include mature, healthy, and significant examples of London Plane, English Oak, She-Oak and Olive trees."

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16 *Norman v Tūpuna Maunga o Tāmaki Makaurau Authority* [2020] NZHC 3425.
17 *Ōwairaka,* above n 1.
18 At [212].
19 At [212].

Removal of trees in July 2023

[32] On 25 July 2023, the TMA began felling 60 exotic trees on Ōtahuhu. Mr Nicholas Turoa, Kaiwhakahaere Te Waka Tairangawhenua, manages co-governance and co-management arrangements between the Council and Ngā Mana Whenua o Tāmaki Makaurau. Mr Turoa deposed that given storm damage on Ōtāhuhu and the large machinery required for the removals, he decided to begin "the vegetation restoration tree removals as part of the works to remove unsafe trees that were damaged in the storm."

[33] Ms Waru applied for interim relief to halt the felling, which was declined.[20] This application for review was then filed and the TMA has agreed to halt felling pending the outcome of this proceeding.

Grounds of review

Determination as to adverse effects

[34] Ms Waru claims that Mr Munro's determination that the proposed activity would neither have, nor be likely to have, adverse effects on the environment that were more than minor was unlawful in relation to his consideration of adverse effects on:

(a) amenity values (including temporary effects);

(b) the heritage value of the trees to be removed; and

(c) the natural environment (including birdlife and the trees).

[35] Ms Waru claims that Mr Munro did not give adequate consideration to, and had inadequate information about, the adverse effects in relation to each of the above at [34(a)–(c)].

[36] Further, Ms Waru claims that no reasonable decision maker would have reached the same findings.

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[20] *Waru v Tūpuna Maunga o Tāmaki Makaurau Authority* [2023] NZHC 1996.

Determination of no special circumstances

[37] Ms Waru claims that Mr Munro's determination that no special circumstances existed was unlawful because:

(a) it was based on a factual error as to the content of the IMP;

(b) it was based on a legal error as to the relevance of consultation; and

(c) no reasonable decision maker could find that there were no special circumstances warranting public notification.

Determination as to limited notification

[38] Ms Waru claims that Mr Munro did not give adequate consideration to, and had inadequate information about, the adverse effects for users and the local community in relation to amenity values (including temporary effects), the heritage value of the trees to be felled and the consequent impact on amenity values.

[39] Ms Waru also claims that Mr Munro's determination was based on an error as to the content of the IMP and that no reasonable decision maker would have reached the same decision.

[40] Before considering whether any of Ms Waru's grounds of review are made out, I set out the statutory requirements under the RMA when determining whether a resource consent application must be publicly notified. I then consider the Court of Appeal's findings in the *Ōwairaka* decision.

When must a resource consent application be publicly notified?

Statutory requirements

[41] Section 95A of the RMA governs the public notification of consent applications, and requires that the consent authority consider and decide various questions, including:

(a) whether the activity will have or is likely to have adverse effects on the environment that are more than minor;[21] and

(b) whether special circumstances exist that warrant the application being publicly notified.[22]

[42] If the consent authority's answer to either of those questions is yes, the application must be publicly notified.

[43] When considering whether there are any adverse effects on the environment, the RMA defines both "effect" and "environment." Effect includes "any temporary or permanent effect" and "regardless of the scale, intensity, duration, or frequency of the effect."[23] Environment is defined to include:[24]

(a) ecosystems and their constituent parts, including people and communities;

(b) all natural and physical resources;

(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.

Adequacy of information before the consent authority

[44] The consent authority "must decide the level of effects based on a sufficiently and relevantly informed understanding of those effects."[25] In *Discount Brands Ltd v*

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21 Resource Management Act 1991, s 95A(8)(b) [RMA].
22 Section 95A(9).
23 Section s 3.
24 Section s 2(1).
25 *Gabler v Queenstown Lakes District Council* [2017] NZHC 2086 at [65].

Westfield (New Zealand) Ltd the Court considered that the information in the possession of the consent authority must be adequate for it:[26]

> (a) to understand the nature and scope of the proposed activity as it relates to the district plan; (b) to assess the magnitude of any adverse effect on the environment; and (c) to identify the persons who may be more directly affected.

[45] The Court was of the view the adequacy of information was statutorily required. The information is not required to be all-embracing, but it must be sufficiently comprehensive to enable the consent authority to consider these matters on an informed basis.[27]

[46] The Court must carefully scrutinise the material on which the decision was based in order to determine whether the authority could reasonably have been satisfied that in the circumstances the information was adequate.[28]

[47] As to the source of the information, the Court observed that:

> [107] The information before the authority can be supplied by the applicant, gathered by the authority itself or derived from the general experience and specialist knowledge of its officers and decision makers concerning the district and the district plan. But in aggregate the information must be adequate both for the decision about notification and, if the application is not to be notified, for the substantive decision which follows to be taken properly – for the decisions to be informed, and therefore of better quality. …

[48] Mr Beverley for the TMA noted that *Discount Brands* was decided prior to the RMA amendments that included:

(a) removal of the express requirement for a consent authority to have adequate information;

(b) removal of the presumption in favour of notification; and

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26 *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597 at [114].
27 At [114].
28 At [116].

(c) replacement of the requirement to be "satisfied" that adverse effects on the environment "will be minor," with the task of "deciding" whether an activity "will have or is likely to have adverse effects on the environment that are more than minor."

[49] Mr Beverley referred to *Coro Mainstreet (Inc) v Thames Coromandel District Council* where the Court of Appeal noted that the continued applicability of *Discount Brands* was not argued but that the substantial amendments to the RMA, which were directed at providing greater non-notification, may have altered the law.[29] As the point was not argued before the Court of Appeal it did not consider the issue, but noted:[30]

> … If the point had affected the outcome of the present case, we would have wanted to consider whether the 2009 amendments gave effect to the apparent intention of Parliament to give consent authorities greater scope to decide not to notify resource consent applications, and to reduce the intensity of review to be applied to non-notification decisions from that mandated in *Discount Brands*.

[50] Despite referring to the above decision, Mr Beverley did not advance any arguments as to why *Discount Brands* should no longer apply or what a lesser standard would require. This may be because the Court of Appeal in the *Ōwairaka* decision considered that a different approach to *Discount Brands* would "be very difficult to sustain."[31]

[51] It is therefore necessary for this Court to be satisfied that there was adequate information on which to assess adverse effects. Before turning to the circumstances of Ōtāhuhu, I outline the relevant findings in the *Ōwairaka* decision.

Court of Appeal's findings in the *Ōwairaka* decision

[52] I only consider the findings that are relevant to notification of the resource consent application for Ōwairaka, as it is those findings on which Ms Waru relies to justify a similar outcome here.

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29 *Coro Mainstreet (Inc) v Thames Coromandel District Council* [2013] NZCA 665, [2014] NZRMA 73 at [41].
30 At [41].
31 *Ōwairaka,* above n 1, at [261].

[53] The Court of Appeal held that the Council had erred and set aside its decision to grant resource consent for the felling and removal of trees. The Court accepted that it was appropriate to consider the overall activities (which included both removal and planting of vegetation) when considering whether there is likely to be adverse effects on the environment. The Council had not erred in this respect. The Court, however, considered that the decision not to require notification was flawed in two respects:[32]

(a) in the Council's consideration of temporary adverse effects; and

(b) in the Council's consideration of the heritage and historical significance of some of the trees.

[54] On the adequacy of information, the Court did not consider the standard set out in *Discount Brands* needed to be revisited despite subsequent amendments to the RMA because "no party sought to argue that a less exacting standard is appropriate."[33] Further, the Court considered that any different approach in the case before it would "be very difficult to sustain."[34] I therefore adopt the *Discount Brands* standard when considering whether the information before the Council was adequate.

[55] The Court then considered the Council's consideration of temporary adverse effects noting that it was clear that there would be a period for which the amenity of Ōwairaka would be adversely affected by the removal of the trees:

> [262] As to temporary adverse effects, it is clear that there would be a period for which the current amenity of Ōwairaka would be adversely affected by the removal of the trees. The maunga clearly operates as a very important public recreation reserve. It seems axiomatic that the process of removing so many trees from it in one process will have an adverse effect for whatever period must elapse before the new planting becomes established.

[56] The Court considered that the Judge should have focused on the statutory test: the consenting authority had to decide whether or not the effects of the activity would be more than minor and that required adequate information.[35]

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32 At [256].
33 At [261].
34 At [261].
35 At [263].

[57] The Court was not satisfied that the information was adequate because the proposal did not give enough detail about what was proposed in key respects. The Court considered that the evidence did not enable the consenting authority to form any proper conclusions as to the "nature and duration of the adverse effects" of tree removal pending the implementation of the planting.[36] The consent conditions did not require any specific timeframes to be met. The Court therefore concluded that the decision was based on inadequate information and the decision to grant resource consent for the felling and removal of exotic trees should be set aside.[37]

[58] Further, the Court was not satisfied that the Council had considered the temporary adverse effects in any meaningful way. Assessment of temporary adverse effects requires consideration of whether those effects are minor without confusing those adverse effects with what may happen in the longer term. This approach is necessary because s 3(b) of the RMA defines "effect" as including any "temporary" effect.[38] The temporary effect could only be assessed if there was adequate information as to its nature and duration.

[59] The Court then referred to this Court's decision in *Trilane Industries Ltd v Queenstown Lakes District Council* where the Court held that the consenting authority could not ignore temporary adverse effects simply by reason of subsequent activities which would address those effects:[39]

> [58] Although the Council repeatedly points to Ms Mellsop's conclusion that effects would be able to be mitigated and would then be low, that is the situation that would be reached over time. A consent authority cannot ignore temporary effects in undertaking its notification assessment. It also cannot average out effects over time to say that a temporary moderate adverse effect which will, in due course, reduce to a low or extremely low effect is therefore a minor or less than minor effect. While the Council says that the assessment must necessarily consider the broad range of effects and how they might change over time, that does not justify ignoring a temporary adverse effect, on the grounds it will be ameliorated in a relatively short timeframe having regard to the life span of the proposed activity. That may, of course, be appropriate in deciding whether to grant the resource consent, but it is not appropriate when making a notification decision, which is intended to allow the public a right

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36 At [268].
37 At [268].
38 At [269].
39 *Trilane Industries Ltd v Queenstown Lakes District Council* [2020] NZHC 1647, (2020) 21 ELRNZ 956.

> of audience if any adverse effects, whether temporary or permanent, will be more than minor.
>
> …
>
> [60] Here, the Council appears to have taken a global view of the effects on landscape and visual amenity, including over time, to reach the view that effects on landscape and amenity are minor. That is not the correct approach. It would be the equivalent of saying that temporary construction noise effects could be ignored, simply because, once built, the noise effects of the activity would be negligible.

[60] The above passage indicates that any temporary adverse effects must therefore be assessed on their own and not globally as part of any proposed mitigation activity to address those adverse effects in the longer term.

[61] The Court of Appeal in the *Ōwairaka* decision also considered that the Council had inadequate information on which to determine whether there was any heritage value in the trees to be removed. It was inappropriate to assume that the trees had no heritage value because this was not reflected in the Auckland Unitary Plan (AUP).[40] The evidence before the Court indicated that these were matters "which should legitimately have been taken into account in relation to the notification issue but were not before the decision maker."[41]

[62] The Court did not need to go on to consider whether there were special circumstances to justify public notification having found that public notification was already required.[42] The Court set aside the Council's decision to grant resource consent for the felling and removal of the trees.[43]

[63] It is appropriate to first consider whether the Court of Appeal's findings in *Ōwairaka* apply to the circumstances of Ōtāhuhu before considering the other grounds of review. I therefore consider:

(a) Whether Mr Munro gave adequate consideration to, and had adequate information about, the temporary adverse effects on amenity values?

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40 *Ōwairaka,* above n 1, at [277].
41 At [277].
42 At [280].
43 At [285].

(b) Whether Mr Munro gave adequate consideration to, and had adequate information about, the heritage value of some of the trees?

[64] If I determine that there was adequate information and adequate consideration of the above issues, it is then necessary to consider the other grounds of review.

Determination as to adverse effects

Adequacy of information regarding temporary adverse effects on amenity values

[65] Mr Little for Ms Waru submitted that there was inadequate information on which to assess the temporary adverse effects on amenity values and in particular amenity value that is not limited to visual amenity.

[66] Mr Munro's decision discloses the following reasons for determining that the proposed activity will have or is likely to have adverse effects on amenity values that are no more than minor:

> i. in the context of the landscape and visual values of Ōtāhuhu, any adverse landscape and visual effects of the proposal are considered to be *short term in nature* and in keeping with the natural landform and landscape, so that overall any adverse effects will be less than minor;
>
> ii. …
>
> iii. any adverse effects on public access and recreation will be *short term in nature* and will be less than minor;
>
> iv. …
>
> <u>Other adverse effects</u>
>
> vii. Although public access to the Maunga will be *temporarily disrupted*, this disruption will be *short term in nature* and will not permanently or unreasonably limit people's use or enjoyment of the Maunga. Also, the Applicant has proposed a communications plan to ensure that users of the reserve are aware of any access restrictions.
>
> viii. Following from the Applicant's expert assessments including the Council's peer reviews, it can be concluded that any landscape and visual effects of the tree removals experienced by people with an outlook to, or using the Maunga, will have limited effects and such effects *will be adequately mitigated by the proposed restoration planting.*

(emphasis added)

[67] In the *Ōwairaka* decision the Court considered that it was clear that there would be a period for which the amenity of Ōwairaka would be adversely affected by the removal of the trees. The application for Ōwairaka proposed the removal of 345 trees. The Court considered that:[44]

> The maunga clearly operates as a very important public recreation reserve. It seems axiomatic that the process of removing so many trees from it in one process will have an adverse effect for whatever period must elapse before the new planting becomes established.

[68] Mr Little argued that the position is the same for Ōtāhuhu.

[69] The TMA argued that Ōtāhuhu is different to Ōwairaka and referred to the fact the TMA reduced the number of trees to be removed to 278, olive trees had previously been removed in 2018, 315 trees would remain (noting 61 trees were removed in 2023) and the project will be implemented in stages over several years. Further, the TMA submitted that there is significantly more native planting on Ōtāhuhu and Ōtāhuhu does not have a significant ecology overlay. Mr Beverley asserted that the critical difference is that the Court of Appeal's findings turned on the fact that the resource consent did not require any particular timescales to be met. The TMA says, here, the Planting Plan clearly discloses timescales.

[70] The relevant passage from the *Ōwairaka* decision states:

> [268] We do not consider that the evidence before Mr Kaye enabled him to form any proper conclusions as to the *nature and duration* of the adverse effects which would be the consequence of the intended tree removal, *pending the implementation and establishment* of the replacement planting. There was of course an ability to control both aspects by the imposition of conditions on the grant of consent, but the application itself did not give the detail about what was proposed in these key respects. *Significantly, the resource consent, when granted, did not require any particular time scale to be met*, simply stating as one of the conditions that timeframes for key stages of the works authorised by the consent and finalised tree protection methodologies were required to be submitted prior to commencement of each stage of the tree removals …
>
> (emphasis added)

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[44] At [262].

[71] The above passage indicates that the Court was concerned with the consequences of the tree removal *pending* the implementation and establishment of the replacement planting. The Court was concerned that there was inadequate information as to the *nature* and *duration* of temporary adverse effects. It follows that it would be necessary for the Council to understand timescales in relation to both tree removal and replacement planting as any temporary adverse effect would exist from the time of removal to the time at which the planting was implemented and established.

[72] There was a planting plan in relation to Ōwairaka,[45] so in that respect, the circumstances are similar.

[73] I consider the information available to Mr Munro as to timescales for removal and replacement planting.

[74] Mr Munro's decision required that the removal and planting take place in accordance with the information provided with the application:

> The removal of exotic vegetation and restoration planting activities shall be carried out in accordance with the plans and all information submitted with the application, detailed below, and all referenced by the Council as consent number LUC 603484274:

[75] The resource consent also required that information must be made available at the pre-commencement meeting that included "[t]imeframes for key stages of the works authorised under this consent."

[76] The processes for removal of the trees were contained within the Tree Removal Methodology report dated May 2021 and the Assessment of Noise Effects dated June 2021. The Tree Removal Methodology included an inventory of all trees to be removed and their respective locations on the maunga. The Assessment of Noise Effects noted that "[t]he overall project will be completed in approximately 40 days (allowing for set up and pack down)." A breakdown was then provided by location and type of removal (helicopter versus other removal methods).

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[45] See *Norman v Tūpuna Maunga o Tāmaki Makaurau Authority* [2020] NZHC 3425 at [195].

[77] The Assessment of Effects on the Environment also set out the expected duration of the removals and the timing as follows:

> 5.21 Expected duration of the works is 40 days including set up and pack down. Helicopter assisted dismantling will be required for potentially a maximum of 18 days. Helicopter use is restricted between the hours of 9am to 5pm, Monday through Friday.
>
> 5.22 The works will occur:
>
> - in the drier summer months to avoid modification to the ground;
> - between the hours of 7.30am and 6.00pm, Monday to Friday; and
> - no works on Saturday, Sunday or public holidays.
>
> (footnote omitted)

[78] The timing of planting was set out in the Planting Plan. Appendix A to the Planting Plan set out a six-year schedule which included a description of the type of plants to be planted in each year and the locations of the plantings. The Planting Plan records that "[p]lanting should ideally take place during the months of May to August as long as soil conditions are suitable." 7,000 plants would be planted each year in years one to three; 7,500 plants would be planted each year for years four and five; and 3,600 plants would be planted in year six (39,600 in total).

[79] Mr Munro therefore had information:

(a) as to the removal of trees:

(i) the number and location of trees to be removed;

(ii) the approximate time it would take to remove the trees (40 days);

(iii) the timing of the removals (drier summer months on Monday to Friday between 7.30 am to 6 pm);

(iv) that the tree removal could happen all at once unless he imposed conditions requiring staged removal; and

(b) as to the planting:

(i) the number and types of plants to be planted;

(ii) the locations of the planting;

(iii) the timing of the planting (ideally between May to August); and

(iv) the number of plants to be planted each year and the overall total by the end of the six-year plan.

[80] I therefore consider that there was sufficient information on which to assess the *duration* of any temporary adverse effects.

[81] Turning to the *nature* of the temporary adverse effects, this Court cannot ignore the Court of Appeal's view that it seems "axiomatic that the process of removing so many trees … in one process will have an adverse effect for whatever period must elapse before the new planting becomes established."[46] Here, at the time the resource consent was granted, 278 trees were to be removed without any conditions as to timing so that they could all be removed at once. It follows that the circumstances are largely the same as Ōwairaka, although there were 278 and not 345 trees that were to be removed, with 315 trees remaining on Ōtāhuhu.

[82] Here, the reasons for Mr Munro determining that the adverse effects on amenity values were less than minor were:

> i. in the context of the landscape and visual values of Ōtāhuhu, any adverse landscape and visual effects of the proposal are considered to be *short term in nature* and in keeping with the natural landform and landscape, so that overall, any adverse effects will be less than minor;
>
> ii. …
>
> iii. any adverse effects on public access and recreation will be short term in nature and will be less than minor;
>
> …
>
> (emphasis added)

[46] *Ōwairaka,* above n 1, at [262].

[83] On Mr Munro's reasoning, the adverse effects on visual amenity would be "short term in nature" and "in keeping with the landform and landscape." The question is whether there was adequate information to assess the magnitude of any adverse effects in the short term.

[84] Amenity values means 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.[47] The issue is whether there was sufficient evidence on which Mr Munro could form conclusions as to the temporary adverse effects on those matters.

[85] Mr Beverley submitted that there was adequate information as to adverse effects on amenity values as contained in Ms Peake's Landscape and Visual Assessment, a peer review of that report by Mr Kensington and the Assessment of Effects on Environment reviewed by Ms Richmond.

[86] Mr Little submitted that there was inadequate information and refers to Ms Waru and Mr Borrell's evidence, which he submits provides information as to amenity values beyond visual amenity. Ms Waru provided evidence:

(a) about the "impressive" beauty of many of the trees;

(b) that the trees provide shelter for users and visitors including in the playground and central walkway and for those having picnics;

(c) that the trees are a habitat and food source for birds, which in turn contributes to amenity;

(d) that the trees block the outlook to the industrial and commercial areas that partly surround the maunga; and

(e) that children climb and play on the trees.

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47 RMA, s 2(1).

[87] Ms Waru also provided evidence of the overall tree canopy cover in the suburb of Ōtāhuhu compared to other suburbs. She referred to the Council's "Urban Forest Canopy Cover" report which provides that canopy cover in Māngere-Ōtāhuhu was eight per cent in 2016/2018 (a net loss of six per cent from 2013), with the minimum threshold being 15 per cent.[48] Ōtāhuhu is therefore not one of the 11 of 16 local boards that meets the minimum canopy cover.

[88] Mr Barrell, an arborist, also provided evidence in support of the application which opines as to the shade and tree cover provided by the trees to be removed:

> There would also be markedly less tree cover and shade in most walkable parts of the reserve in the long term (the intended native planting programme is limited to certain parts of the reserve only, which parts do not include, for the most part, those areas in which exotic trees will be felled … Native planting will take many years to establish and contribute to the reserve's amenity.

[89] I accept that the information before Mr Munro did not include information as to any adverse effects relating to the recreational attributes of the trees to be removed beyond visual amenity whether that be shade, shelter or their use for children's play. Ms Peake and Mr Kensington's respective reports were concerned with the adverse effects on visual amenity.

[90] In this regard, the Landscape and Visual Assessment records the key matters for assessment as: identifying cultural landscape features for protection and enhancement; effects of visual change for user groups/community; and managing visual amenity effects of tree removal. There is no reference to other amenity values such as the recreational attributes of the trees to be removed:

> For those visitors engaged in passive or informal use, the landscape may form an important part of the activity, and as the tracks are located in the area most affected by tree removals, the *visual change* is likely to be more noticeable. In addition, there will be some *initial visual impacts* from retained tree trunks, particularly buttressed roots, although they are expected to be quickly contained and screened by grass and vegetation.
>
> *Visual effects* are expected to vary for different individuals, depending on the purpose of the visit and the nature of the activity and, as for landscape effects, while the project will have *noticeable visual impacts* due to the number and size of trees proposed to be removed, the *final outcome will result in positive*

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[48] Nancy Golubiewski and others *Auckland's Urban Forest Canopy Cover: State and Change (2013-2016/2018)* (Auckland Council, Technical Report 2020/009, July 2020) at 14 and 27.

> *effects on the integrity of the feature* and its landscape through protection and enhancement. This is likely to be appreciated by users sensitive to environmental improvement and is expected to *assist in moderating adverse visual effects*.
>
> Generally, in relation to informal recreation use of the maunga, *the magnitude of visual change* resulting from the vegetation removal will be high due to the location and number of trees proposed to be removed, but effects will vary according to the sensitivity of the receiver (as well as their knowledge/perception about the sensitivity of the environment to change – either positive or negative). Overall, however, the removal of the exotic vegetation will reinstate the natural character of the volcanic feature and mountain, and provides the opportunity to enhance the visitor experience with overall positive effects.
>
> (emphasis added)

[91] The Landscape and Visual Assessment acknowledged that visual amenity is a component of the overall amenity of a place and contributes to people's appreciation of the pleasantness and aesthetic coherence of the environment, but it did not refer to the recreational attributes of the trees beyond their visual amenity. Ms Waru's evidence refers to recreational attributes of the vegetation to be removed which include providing shade, shelter, structures for play and a place to observe birdlife.

[92] Ms Peake provided an affidavit in support of the TMA's opposition. She opined that the amenity values are far broader than the trees alone and that there is a range of other physical and cultural characteristics that are pertinent in the assessment of effects on amenity values. Ms Peake then says those values have been incorporated into the IMP and the AUP and represent shared community values that form the basis for any assessment.

[93] Ms Peake opined that her assessment of effects has fairly evaluated the potential effects on amenity values, and she noted her conclusions for informal recreation users. Ms Peake's evidence suggests that her conclusions as to informal recreation users considers any adverse effect that is not limited to visual amenity. It is therefore helpful to consider Ms Peake's assessment of the adverse effects for those users:

> … For passive or informal users it was identified that the landscape may form an important part of the activity/visit and that *visual change* would likely be more noticeable, including initial *visual impacts from retained tree trunks*. The assessment concluded that:

(a) generally, in relation to informal recreation use of the Maunga, the *magnitude of visual change* (but not necessarily the effect) will be high due to the location and number of trees proposed to be removed; but

(b) the *effect of that visual change* will vary according to the sensitivity of the receiver as well as their knowledge/perception about the sensitivity of the environment to change – whether positive or negative (the section on landscape and natural character effects described how the communications programme is expected to explain the purpose and aims of the restoration); and

(c) overall, the removal of the exotic vegetation will reinstate the natural character of the volcanic feature and mountain, and provides the opportunity to *enhance the visitor experience* with overall positive effects.

(emphasis added)

[94] I do not consider that Ms Peake's assessment includes information as to amenity values that relate to recreational attributes going beyond visual amenity.

[95] The landscape architect appointed by the Council to peer review Ms Peake's report, Mr Peter Kensington, agreed with Ms Peake's conclusions. Mr Kensington referred to his preliminary views as follows:

> As with the application and resource consent at Ōwairaka, this application also proposes the removal of a relatively extensive quantity of mature trees and the *magnitude of visual change* that will occur to this landscape will be significant (it will be a dramatic change). However, from my early review of the application, I can also appreciate that this change will help to 'reveal' the underlying landform of this 'hidden' maunga for the appreciation of the wider community and this will provide for a strong *visual connection* between maunga, particularly those which are visually proximate to Ōtāhuhu, including Māngere, Maungarei and Maungakiekie.
>
> (emphasis added)

[96] The above assessment is also based on visual amenity. Mr Kensington agreed with Ms Peake's assessment of adverse effects:

> 15. In my mind, the above preliminary review comments remain valid, primarily because this application proposes to remove a significant number of exotic trees (similar in number to the Ōwairaka resource consent) with some being relatively large / mature specimens. As such, the relative *magnitude of visual change* is likely to be similar to that at the Ōwairaka site. This change will primarily be experienced by people using the site for active and passive recreation, for people within residential properties that immediately adjoin the

> site and for those people travelling past the site on Great South Road and Mount Wellington Highway.
>
> 16. Having said this, I acknowledge the findings of the applicant's assessment by landscape architect Sally Peake and, following further reflection, I find that I agree with the applicant's reasoning for the proposal and the likely scale of both adverse and positive landscape and *visual effects*.
>
> (emphasis added)

[97] The above passage refers to the adverse effects on visual amenity, the effects on the landscape being positive because the underlying landform of the maunga would be visible.

[98] The Assessment of Effects on Environment also considered amenity values from the perspective of the different viewing audiences (as set out in the Landscape and Visual Assessment) and concluded that any effects on visual amenity would be low to positive:

> Visual amenity effects
>
> 8.10 While the mountain is a distinctive landscape feature, with a relatively low profile (the highest scoria mound being 50m) it is not widely visible within the surrounding business and residential context, noting that no regionally significant viewshafts have been identified in the AUP. Nevertheless from close distances, notably surrounding roads, there are clear views of the maunga and surrounding sports fields. From further afield the maunga is generally screened from view. There are some residential areas immediately adjacent to the reserve with clear views of the project area with overall what is described by Ms Peake as a small visual catchment. The attendant vegetation is also visible to visitors who regularly use the sports facilities and tracks.
>
> 8.11 Three groups of viewing audiences and the corresponding degree of visual changes and therefore effects on each group in relation to the vegetation removal have been identified by Ms Peake. As these relate to effects on persons, they are discussed when assessing section 95B and Section 95E of the RMA. It is noted that Ms Peake has identified the magnitude of change to inform visual effects both positive and adverse and in many instances the visual effects are at worst low adverse initially, with low to positive visual effects at the end of the project.
>
> (footnote omitted)

[99] The Assessment of Effects on Environment also considered the potential adverse effects on different persons including street network users, visitors to the

maunga and residential neighbours. In terms of visitors to the maunga, the report considered the visual change and the impact of temporary closure:

> 8.35 Viewpoints have been identified as having less than minor to nil adverse effects on *visual amenity initially*. As noted by Ms Peake, this conservative rating does not take into account the positive effects of the enhanced cultural and visual integrity on the landscape as a result of the restoration programme. This means that over time, there will be *enhanced vegetative patterns and greater legibility of the maunga*
>
> …
>
> 8.38 It is considered that the purpose of the visitor's trip will influence the effects that the tree removals may have. Two main groups are identified – those engaged in active sports and using the facilities and those engaged in passive or informal use. As the focus of active users is unlikely to be natural landscape, effects at worst will be low. As the landscape is more likely to form part of the activity for passive users, there may be some initial *visual impacts* however, this will vary according to the sensitivity of the receiver. *The final outcome for this group* will result in positive effects on their visitor experience *given the protection and enhancement of the integrity of the feature and its landscape.*
>
> 8.39 Any temporary closure of parts of the park will be communicated in advance. The need to close parts of a park for operational or maintenance works is not an uncommon occurrence. There may be some minor inconvenience to regular park users during the works, in particular those who use the carparking area entrance to access the clubrooms, and users of the Bert Henham sports field. Where health and safety for contractors and public can be assured, public access can be maintained. It is anticipated that any disruption to pedestrians will be low level, minimal and limited to the duration of works.
>
> …
>
> 8.42 There are two small residential enclaves directly adjacent to Bert Henham and McManus Park where closer views are available. All trees within 100m of these properties will be retained. While for some there may be a perceived *adverse visual or amenity impact*, the closest and most visible trees are being retained. This will maintain a vegetated element in the foreground view. As the vegetated slope to the rear of Portage Road properties will be retained, the outlook will be unchanged. Long-term, there will be potentially positive effects through reduced shading and the grass slopes will allow the maunga profile to be better defined and revealed, enabling legibility and appreciation of the volcanic feature.
>
> (footnotes omitted and emphasis added)

[100] The Assessment of Effects on Environment acknowledges the visual impacts of tree removal but also refers to the "final outcome." The final outcome presumably

refers to the final outcome of the restoration planting which will protect and enhance the features of the landscape. While the experts agreed that the visual change was likely to be "noticeable" or "dramatic," both landscape architects acknowledged that whether there was any "adverse" effect was likely to be subjective. It would be positive in so far as it provided more visible viewshafts of parts of the maunga and would be subjective depending on the person's view. In those circumstances they considered that the adverse effect was low.

[101] While the reports disclose consideration of recreational attributes insofar as Ms Peake identified the different types of recreational users (active and passive), there was no information as to the recreational attributes of the trees to be removed (other than their visual amenity) and, whether their removal would have any adverse effects on recreational attributes such as shade, shelter, structures for play and observing birds.

[102] The TMA submitted that the Council specifically considered the adequacy of information and requested further information under s 92 of the RMA. Those further information requests related to noise and landscape effects (including specifically in relation to the temporary adverse effects from tree stumps), and that further information was provided by the TMA.

[103] The TMA also argued that Ms Waru has not provided any expert landscape or planning evidence to challenge or contest the expert views of Ms Peake, Mr Kensington or Ms Richmond or to contest the conclusions of Mr Dales and Mr Munro. The TMA also submitted that the evidence of Mr Barrell invites the Court to assess the merits of the decision, which it is not entitled to do in the context of a judicial review application. Further, the TMA argued that Mr Barrell is not a landscape or amenity expert.

[104] I accept that it is not for the Court to undertake a merits review of the Council's decision or to form its own view as to the merits. The Court of Appeal has provided guidance on how the Court is to approach such an application:[49]

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[49] *Pring v Wanganui District Council* (1999) 5 ELRNZ 464 (CA) at [7].

> It is well established that in judicial review the Court does not substitute its own factual conclusions for that of the consent authority. It merely determines, as a matter of law, whether the proper procedures were followed, whether all relevant, and no irrelevant, considerations were taken into account, and whether the decision was one which, upon the basis of the material available to it, a reasonable decision-maker could have made. Unless the statute otherwise directs, the weight to be given to particular relevant matters is one for the consent authority, not the Court, to determine, but, of course, there must have been *some* material capable of supporting the decision …

[105] The expert views of Ms Peake, Mr Kensington and Ms Richmond do not opine on the recreational attributes of the trees beyond their visual amenity. There is no reference in the expert reports to the definition of "amenity values" in the RMA to indicate that the TMA experts turned their minds to the recreational attributes of the trees to be removed. Ms Waru and Mr Barrell, while not landscape or planning experts, provide evidence that is relevant to determining the recreational attributes of the trees. Had the experts considered those attributes and any adverse effects on them from tree removal then I agree that it would be inappropriate to interfere, but that is not the case here.

[106] I accept that there was adequate information to assess the magnitude of any adverse effects on visual amenity. I also accept that there was adequate information on which to assess the circumstances of the maunga after the tree removal — that is, the extent of tree cover remaining. There was also information as to the impact on birdlife as set out in the Assessment of Ecological Effects, which would be relevant to the adverse effects on amenity value. There was *not* however, any information as to the recreational attributes of the trees for shade, shelter or as play structures. Mr Munro did not therefore have adequate information to determine the magnitude of any temporary adverse effects on amenity values beyond visual amenity.

Assessment of temporary adverse effects

[107] In the *Ōwairaka* decision the Court of Appeal held that the Council had not taken into account temporary effects in any meaningful way:[50]

> … while the temporary effects of the tree removal were identified as adverse, it is difficult to see how they were taken into account in any meaningful way. While Mr Kaye's conclusion that the adverse effects would be effectively

[50] At [269].

> mitigated over time could be a legitimate basis for granting consent to the application in accordance with the approach discussed in *Bayley*, we are not convinced that approach can be justified at the notification stage. It would effectively mean that the adverse effects of cutting down such a substantial number of trees on the maunga could be characterised as minor on the basis that those effects will not continue in the longer term. That is difficult to reconcile with the fact that s 3(b) of the RMA specifically refers to "any temporary … effect".

[108] Here, Mr Munro's decision records that:

> Following from the Applicant's expert assessments including the Council's peer reviews, it can be concluded that any landscape and visual effects of the tree removals experienced by people with an outlook to, or using the Maunga, will have limited effects and such effects will be adequately mitigated by the proposed restoration planting.

[109] The above passage indicates that Mr Munro considered that any effects would be "limited" and the restoration planting would mitigate the visual effects. Mr Munro also had the Landscape and Visual Assessment which explained the potential adverse landscape and visual effects.

[110] The Landscape and Visual Assessment did consider the temporary operational effects and temporary landscape and visual effects as follows:

> Temporary effects
>
> In addition to the impacts of visual change, the location and method of tree removal will also create temporary short term effects, particularly for immediate neighbours. The methodology statement by Treescape sets out the different methods proposed to remove the vegetation, including manual removal, MEWP assisted removal, crane assisted removal, and helicopter assisted removal. Structures such as platforms, cranes, and helicopters will introduce visual features that contrast with the natural character of the maunga. However, their temporary use means their introduction will result in only low adverse visual effects for a limited time frame, while for most viewers their small size relative to the overall scale of the mountain will also minimise effects. For some people, the operation will be of interest and will not have any negative effects.
>
> In addition to temporary operational effects, there could be temporary landscape and visual effects from the retention of tree stumps. Such effects will be minimised as far as possible, and the height of retained stumps will be minimise (max. 1m). It is anticipated that stumps will be quickly contained and screened by grass and vegetation.

[111] Ms Peake provided further information in response to a request regarding the Moreton Bay Fig tree stumps noting that the expert arborists had advised that the

stumps would be cut down to a height where they would be rapidly obscured by grass. The temporary adverse effects arising from the tree stumps was therefore considered in a meaningful way.

[112] Ms Peake explains in her evidence that her assessment of temporary adverse effects was brief because the restoration planting is not intended to replace the removed trees. Rather, it is intended to restore the maunga to reflect its status and character as an outstanding natural feature. The restoration planting appears to be more relevant to the landscape feature and not visual amenity, from the sites at which the trees are to be removed, although Ms Peake notes that the planting will "enhance" the visitor experience.

[113] I accept that there was meaningful consideration of temporary adverse effects on visual amenity but there was no meaningful consideration of temporary adverse effects on amenity values beyond visual amenity.

Adequacy of information regarding heritage value of trees

[114] In achieving the purposes of the RMA, all persons exercising functions and powers under it, in relation to managing the use, development and protection of natural and physical resources must recognise and provide for the protection of historic heritage from inappropriate use and development.[51] Historic heritage means:[52]

> **historic heritage**—
>
> (a) means those natural and physical resources that contribute to an understanding and appreciation of New Zealand's history and cultures, deriving from any of the following qualities:
>
> (i) archaeological:
>
> (ii) architectural:
>
> (iii) cultural:
>
> (iv) historic:
>
> (v) scientific:

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51 RMA, s 6(f).
52 Section 2(1).

(vi) technological; and

(b) includes—

(i) historic sites, structures, places, and areas; and

(ii) archaeological sites; and

(iii) sites of significance to Māori, including wāhi tapu; and

(iv) surroundings associated with the natural and physical resources

[115] Mr Little argued that the Council had inadequate information about the heritage value of the trees to be felled and the *Ōwairaka* decision supports this Court finding that the information was inadequate.

[116] Mr Beverley sought to distinguish *Ōwairaka* by arguing that here, there was no expert evidence that the trees are of heritage value and therefore the Court is entitled to accept the "uncontested views of the heritage experts."

[117] The Court in the *Ōwairaka* decision held that it was inappropriate for the Council to assume that the trees had no heritage value because this was not reflected in the AUP.[53] In the case of Ōtāhuhu, the Assessment on Environmental Effects notes that "none of the vegetation is recorded in the AUP as being of collective or individual significance" so to that extent the Council considered that factor relevant, but that does not, on its own, indicate that this was the basis for reaching the view that the trees to be removed had no heritage value. It is necessary to consider what other information was before the Council.

[118] The evidence in the *Ōwairaka* decision indicated that there was relevant information as to heritage value that should legitimately have been before the Council:

> [277] The approach taken in this case by the proponents of the application and Mr Kaye reflected an assumption, endorsed by the Judge, that if there was any value in the trees to be removed it would have been reflected in the provisions of the Auckland Unitary Plan. But the evidence on which the appellants rely and which we have summarised earlier in this judgment shows that assumption was not able to be made. We do not need to repeat the summary here. For present purposes it is sufficient to mention the summary given by Ms Inomata. These are matters which should legitimately have been

53 At [277].

> taken into account in relation to the notification issue but were not before the decision maker. As a result, in respect of the heritage value of the trees to be removed the material relied on by the Council when making the decision on notification was inadequate in terms of the standard articulated in *Discount Brands.*

[119] It is helpful to set out the evidence the Court was referring to as it indicates the type of evidence the Court considered undermined the assumption as to heritage value:[54]

> Had the society been consulted, Ms Inomata said that information could have been provided on the heritage value of the trees intended to be removed. She gave the following examples:
>
> (a) The olive grove planted with seeds sent home by Jack Turner from Palestine during World War II. Jack's family planted the grove in honour and memory of him, not then knowing whether he lived (he was a prisoner of war).
>
> (b) The so-called "penny trees", being the grove of gum (eucalyptus) trees planted by Mt Albert Borough Council, using seeds purchased for a penny a piece.
>
> (c) The large macrocarpa on the far side of the reserve. It was planted by one of Mt Albert's earliest settlers, William Sadgrove (he appeared on the first electoral roll of 1853 with a Mt Albert address) and is probably the oldest tree on the mountain. Sadgrove Terrace, the road next to the mountain, was named after him.
>
> (d) The cherry trees planted by Ethel Penman in memory of her brother Edgar, who died in the Great War at Gallipoli aged 18.
>
> (e) The woodland grove of mixed native and non-native trees next to the archery field, planted by pupils from Mt Albert Primary School in the 1950s.
>
> [115] Ms Inomata acknowledged that some of the trees to be removed would have little heritage value. Others however were likely to have such value which the society thought should at least be taken into account before the decision was made to remove them.

[120] Here, there is no evidence from any equivalent historic society for Ōtahuhu. There is Ms Waru's evidence that many of the trees to be removed have, or are likely to have, heritage value. Ms Waru's evidence included old Auckland newspaper articles that refer to the efforts of earlier generations to plant trees to "beautify" the

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54 From [114].

reserve and hide the "scars made by man" from quarrying. A 1929 New Zealand Herald article reports:

> A comprehensive scheme of improvements which has served the dual purpose of beautifying a reserve rich in Māori history and providing work for a number of unemployed men, is nearing completion at the Mount Richmond Domain, Ōtāhuhu. The formation of roads and paths and the planting of native and English trees has marked the end of years of effort to save for the people a park that was being destroyed by quarrying operations. … Over 400 trees have been planted, practically every native variety being represented, the exotics including oaks, elms and sycamores… .

[121] Mr Barrell's evidence, refers to Mike Wilcox's book, "Auckland's Remarkable Urban Forest", and its inclusion of a list of individual exotic trees of "outstanding interest" on the reserve. Mr Barrell also gives evidence that "[t]here are many significant individual trees on the reserve that are part of the resource consent," identifies some of them, and says that "[s]ome of them are better specimens than those on the Council's notable trees list."

[122] Neither Ms Waru nor Mr Barrell is a heritage expert, but Mr Barrell is an arborist and has knowledge of trees including the types of trees that are listed as "notable."

[123] Turning to the expert evidence relied on by the TMA. Ms Peake's Landscape and Visual Assessment refers to the same book as Mr Barrell (Auckland's Remarkable Urban Forest) and to the time at which the trees were likely planted:

> Dating back to 1890 when the domain was gazetted, there is a collection of exotic trees across the site, which have been augmented with native trees and smaller vegetation around the buildings and roads. A total of 444 exotic trees have been surveyed and are proposed for removal. There are some 46 different species, with the largest proportion being Olea, which have established across the domain. Other notable trees in higher numbers are Monterey Cypress, Moreton Bay Fig, Monterey Pine, London Plane and Black Poplar.
>
> The author of Auckland's Remarkable Urban Forest states that there is a fine collection of exotic trees on this scoria cone. Of outstanding interest is a very large pagoda tree (Styphnolobium japonicum), a big Chinese fir, a white escallonia (Escallonia bifida), several large European beech, two sweet chestnuts, several magnificent figs and London plane…. There are numerous elms and several enormous eastern cottonwoods…
>
> Not all of these trees are identified in the Treescape survey, however.

(footnote omitted)

[124] The Council requested further information given Ms Peake's reference to the book, "Auckland's Remarkable Urban Forest":

> **5. Discrepancy between the application tree schedule and the Wilcox publication**
>
> The application assessment of landscape and visual effects (at the last paragraph on page 4 and the first sentence on page 5) makes reference to the 2012 publication by Mike Wilcox, Auckland's Remarkable Urban Forest and notes that it mentions the presence of other exotic trees on site in addition to those that have been identified within the application. I request that the applicant clarify this statement and confirm whether the application schedule is correct and can be relied upon, or whether there are additional trees, as identified within the Wilcox publication, to be added.

[125] In her response, Ms Peake stated:

> I have relied on the arboricultural survey to identify the tree species and can only assume that the trees identified in the Wilcox publication have been removed subsequent to 2012.

[126] Ms Peake provided evidence in support of the TMA's opposition to this application that heritage values extend beyond the trees alone and "have been appropriately assessed as a component of landscape and amenity values."

[127] I accept that there is an overlap between the definitions in the RMA of "amenity values" and "historic heritage" but they are not the same. "Historic heritage" includes natural and physical resources that contribute to appreciation of New Zealand's history and cultures, deriving from historic qualities. Amenity values refers to natural or physical qualities and characteristics of an area that contribute to appreciation of its pleasantness, aesthetic coherence, cultural and recreational attributes. The latter does not include appreciation of history, although history may or may not be relevant to pleasantness, aesthetic coherence, cultural and recreational attributes.

[128] The Heritage Impact Assessment also includes information on when the trees would have likely been planted providing photographs at different points in time and noting:

> The 1959 aerial photograph illustrates that many of these quarries have mature vegetation growing in them, thus illustrating that they are not currently in use, the northern slopes near Great South Road slopes appear to be in a state of being rehabilitated and works appear that maybe ongoing on the adjacent lower ground.

[129] The Heritage Impact Assessment notes that the "Heritage Assessment has focused on the archaeological values of this place." That indicates that the heritage value of the trees was not a focus of the report. The report does not opine on the heritage value of the trees which is unsurprising given Mr Druskovich is an archaeologist.

[130] Ms Richmond is a planner and has experience working for councils, central government and in consultancy. Her work has a particular focus on open space and historic heritage places. She has also provided planning advice to the TMA. Ms Richmond provided evidence in support of the TMA's opposition. Ms Richmond's evidence was that the fact trees may have been planted over 100 years ago does not in itself result in heritage value and there was no indication that any of the non-native trees on Ōtāhuhu had any heritage value.

[131] Ms Richmond referred to the Bert Henham Park Management Plan (1977) prepared by the former Tamaki City Council, which is a reference source in the Heritage Impact Assessment, which does not record the trees as having heritage value.

[132] Mr Beverley also referred to Mr Turoa's evidence and submitted that there was an investigation into any notable trees during the individual assessment of each tree for the Tree Removal Methodology and in processing the application. I accept the Council checklist included "Heritage (inc Notable Trees)," and that each tree was identified in the Tree Removal Methodology.

[133] Ms Waru and Mr Barrell's evidence indicates that there is information as to the circumstances in which the trees were planted in 1929 and evidence as to the attributes of the trees to be removed, but much of the historical information regarding the trees was available and expressly referred to in Ms Peake's report. Each tree was also individually identified in the Tree Removal Methodology so their attributes would have been known. Further, the nature of Ms Waru and Mr Barrell's evidence is

different to the evidence regarding Ōwairaka because it does not include the views of a heritage expert (such as evidence from the equivalent Ōtāhuhu historic society) nor does it disclose historical information about particular trees. Rather the evidence refers to the timing of planting, which information was already available and before the Council. The Heritage Impact Assessment included photographs at various stages in the history of the maunga which indicated the trees that had been planted on it at various points in time. Ms Peake's report also referred to that history. Ms Richmond's evidence is that age alone does not establish heritage value.

[134] I am therefore satisfied that there was adequate information on which to determine the heritage value of the trees to be removed, and that such value was adequately considered.

Adverse effects on natural environment

[135] While it is not necessary to consider whether the Council erred in relation to its decision regarding the adverse effects on the natural environment, I do not consider that it did for the reasons outlined below.

[136] In relation to ecological effects, Mr Munro's decision reads as follows:

> the activity will have or is likely to have adverse effects on the environment that are no more than minor because: …
>
> ii. any adverse ecological effects arising from the proposal have been proposed to be appropriately managed as part of the works programme to ensure that any adverse effects will be less than minor…

[137] Mr Little argued that by referring to the works programme, it is unclear whether the adverse effects will be less than minor because of the mitigation steps to be taken when removing the trees, or because of the replanting. Both activities were included in the work programme.

[138] I reject this ground of appeal as the Assessment of Ecological Effects determined the overall ecological effect without regard to mitigation. First, the report considered the magnitude of effects without mitigation and determined the magnitude to be moderate. The report then considered the ecological value of the trees, which

was determined to be low. Together, the report concluded that the *overall ecological effect* was low. After reaching that conclusion, the report then refers to the "residual potential ecological effects" requiring mitigation so that no net loss of biodiversity will result. The planting addresses that residual effect – the loss of biodiversity.

[139] I consider that the Assessment of Ecological Effects assessed overall ecological effects without mitigation as low. The report then identified "residential ecological effects", which would be addressed by planting. This is further supported by the report noting that post mitigation, the effects will be "negligible" indicating that the adverse effects move from "low" to "negligible" because of the planting.

[140] I therefore reject this ground of review.

Overall conclusion

[141] While I accept there was adequate innformation on which to assess the *duration* of any temporary adverse effects, there was inadequate information on which to assess the *nature* of temporary adverse effects. This is because there was an absence of information before Mr Munro as to the temporary adverse effects on amenity values beyond visual amenity. The experts' assessments were limited to the adverse effects on visual amenity only. The definition of amenity values in the RMA is broader than visual amenity alone. Ms Waru and Mr Barrell's evidence indicates that there was relevant information as to amenity values beyond visual amenity, that would have been available had the application for resource consent been notified. Whether there were any adverse effects on amenity values beyond visual amenity (whether temporary or permanent) should have been considered.

[142] It follows that Mr Munro did not consider temporary adverse effects on amenity values beyond visual amenity in any meaningful way.

[143] I otherwise dismiss Ms Waru's grounds for alleging that there was inadequate information to assess the heritage value of the trees or the adverse effects on the natural environment.

[144] For this reason, it follows that the decision of the Council to grant resource consent for the felling and removal of trees must be set aside.

[145] Given my conclusion, it is unnecessary to determine whether limited notification would have been appropriate. It is also unnecessary to determine whether there were special circumstances to justify public notification.

Result

[146] The decision of the Council to grant the resource consent for the felling and removal of trees is set aside.

Costs

[147] If the parties are unable to agree costs, leave is granted to file costs memoranda of no more than five pages with Ms Waru filing a costs memorandum, and the TMA filing any response within 10 working days thereafter.

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Tahana J